

**RATIFYING THE ILO CONVENTION NO. 102 (SOCIAL SECURITY
MINIMUM STANDARDS CONVENTION, 1952) BY SOUTH AFRICA**

by

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PLAGIARISM DECLARATION

I, Xoliswa Xakaxa student number 205023649, hereby declare that the treatise submitted in partial fulfilment of the degree LLM (Labour Law) to be awarded is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

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SUMMARY

Twenty-three (23) years have elapsed since South Africa parted ways with the apartheid system. Nevertheless, poverty, inequality, and unemployment pose the greatest threat to human dignity and social cohesion. Section 27 (1) (c) of the Constitution obligates the state to develop a comprehensive social security system. It affirms the universal right to access social security, including appropriate social assistance for those unable to support themselves and their dependants. It orders the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

The underlying normative commitment of social security is the improvement of the quality of life of the population by promoting economic or material equality. The study provides a general overview of the system of Social Security in South Africa as a Member State of the ILO. In particular, the study underscores that South Africa has not ratified ILO Convention No. 102 Social Security (Minimum Standards) Convention, 1952 and other Conventions relevant to Social Security. The study examines the need to ratify the said Convention in order to receive extensive coverage that would, among other benefits receive guarantees for a well-established system and thereby potentially reduce poverty. The Constitution is the supreme law of the country, it clearly stipulates that when interpreting, and applying the statutes international law must be considered. The study illuminates the significant benefits the country would receive from ratifying Convention No. 102.

CHAPTER 1: BACKGROUND OF THE STUDY

1.1 Introduction

Social security has a powerful impact on all levels of society. It provides older people with income security in their retirement years. Children benefit from social security programmes designed to help their families cope with the cost of education. For employers and enterprises, social security helps maintain stable labour. Starting by defining the concept of social security is instructive. Determining the ambit of the concept of social security is extremely important not only for the purpose of understanding the Constitutional right of access to social security, but also for the purpose of obtaining a broader understanding of what social security system in the South African context entails, as well as under the international arena.

The International Labour Organisation (ILO) Conventions play a significant role in establishing uniform standards in the world of work.¹ Olivier opines that international norms and standards play a significant role in the regulation of labour markets and, to a certain extent, the social security framework in developing countries. He argues that regional instruments and country statutory frameworks in the developing world, covering these areas were developed often with the international standards framework in mind, and invariably show similarities with international and regional instruments. He acknowledges that the relevance of international law is further supported by the recognition of the role of international law in regional instruments, Constitutions and court judgements. Under the ILO, social security is defined to mean:

‘the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of

¹ Weiss “International labour standards: A complex public-private policy mix” (2013) 29 *International Journal of Comparative Labour and Industrial Relations* 7-19 and Olivier “International labour and social security standards: A developing country Critique” (2013) 29 *International Journal of Comparative Labour and Industrial Relations* 21-38. See also Smit P and Van Eck “International perspectives on South Africa’s unfair dismissal law” (2010) 43 *The comparative and International Law Journal of Southern Africa* 46. See also Hodges “The role of the International Labour Organisation in balancing work and family in the 21st C” (2014) 56 *Journal of Industrial Relations* 566-575, Baccaro and Mele “Pathology of path dependency? The ILO and the challenge of new governance” (2012) 65 *Industrial and Labour Relations Review* 196-200, Lerner and Milman-Sivan “Global justice, labour standards and responsibility” (2011) 12 *Theoretical Inquiries in Law* 440-464.

old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner.²

The glossary in the Social Welfare White Paper³ defines social security as the policies, which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, disability and old age, by means of contributory and non-contributory schemes providing for their basic needs.⁴ Olivier opines that social security is not a fixed concept that is well accepted.⁵

As will be seen in chapter 2, the ILO is the oldest specialised agency within the United Nations framework and setting international social security standards has been one of the core activities of the ILO since its establishment in 1919. The preamble of the ILO Constitution sets forth a number of goals in this respect, including, the protection of workers against sickness, disease, and injury arising out of employment, the protection of children, young persons, women and the provision for old age and injury.⁶ One of the main objectives of the ILO is to obtain social justice worldwide through the promotion of decent work for all by the setting of international labour standards.⁷ Most of the standards envisaged social insurance as the means for their application.⁸ Their objective is the establishment of compulsory insurance schemes for a specific branch of social security (unemployment, industrial accidents, occupational diseases, sickness, old age, invalidity and death) as defined in the Convention No. 102 of 1952.⁹ The ILO establishes norms and standards of social security to which countries including South Africa must comply with. The Organisation is devoted to promoting

²The International Labour Organisation Convention, Social Security 102 of 1952. See also ILO 'Facts on Social Security' available at <http://www.ilo.org/public/english/protection/socsec/pol/campagne/files/africafactsheet.pdf>. (Accessed on 2-8-2017).

³ White Paper for Social Welfare GN 1108 in Government Gazette 18166 August 1997 available at www.gov.za (Accessed on 26 June 2017).

⁴ ILO, "International Labour Standards on Social security" available at <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm> (Accessed on 2-8-2017).

⁵ Olivier *et al* *Social security: A legal analysis* (2003) 24.

⁶ Kulke and Lopez "Social security – International standards and the right to social security", in Riedel E (ed) *Social security as a human right*; Drafting a General Comment on Art 9 ICESR- Some challenges (Berlin-Heidelberg, Springer Verlag, 2007) 91-124.

⁷ Swepston 'The future of ILO standards' (1944) Vol.117 (9) *Monthly Labour Review* 16-23.

⁸ Korda and Pennings "The legal character of international social security standards" (2008) 10 *European Journal of Social Security* 133.

⁹ *Ibid.* (Herein after referred to as Convention).

social justice and internationally recognised human and labour rights, pursuing its founding mission that labour peace is essential to prosperity. Studies show that only 20 percent of the world's population has adequate social security coverage, while more than half lacks any kind of social security protection at all.¹⁰ Lack of social security coverage is largely concentrated in the informal economies of the developing world, which are generally a larger source of employment for women than for men. This is an alarming statistic. The most vulnerable groups outside the labour force are people with disabilities and old people who cannot count on family support, and who have not been able to arrange provisions for their own pensions.

In fact, the Preamble to the Constitution of the ILO, in the amended version of 1946, includes in the programme of the Organisation “the protection of the worker against sickness, disease and injury.” The Declaration of Philadelphia on 10 May 1944 and its Income Security Recommendation 67 of 1944 makes the latter “a solemn obligation” by introducing social security. This right is further upheld in the Universal Declaration of Human Rights, 1948, and the International Covenant on Economic, Social and Cultural Rights, 1966.¹¹ In the context of social security law, there are varieties of international legal instruments making provision for social security including:

- The Social Security (Minimum Standards) Convention No. 102 of 1952;
- The Equality of Treatment (Social Security) Convention 118 of 1962;

¹⁰ ILO “International Labour Standards on Social security” available at <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm>. (Accessed on 2-8-2017).

ILO ‘Facts on Social Security’ available at <http://www.ilo.org/public/english/protection/socsec/pol/campagne/files/africafactsheet.pdf>. (Accessed on 2-8-2017).

¹¹ Universal Declaration of Human Rights and the International Covenant on Economic and Social and Cultural Rights furthered the major highlights of the Philadelphia Declaration and outlined the steps towards ensuring Social Justice. See also the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, Article 22 and 25; International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly Resolution 2200 A (XXI) of 16 December 1966, Articles 9, 10 (2) and 10 (3); Convention on the Elimination of All Forms of Discrimination Against Women, adopted by UN General Assembly Resolution 34/180 of 18 December 1979, see Articles 11(1)(e), 11(2)(b) and 14(2); International Convention on the Protection of the Rights of All Migrant Workers and their Families, adopted by UN General Assembly Resolution 45/158 of 18 December 1990, Articles 27 and 54; the Convention on the Rights of the Child, adopted by UN General Assembly Resolution 44/25 of 20 November 1989, Articles 26, 27(1), 27(2) and 27(4). Finally the Convention on the Rights of Persons with Disabilities, adopted by UN General Assembly Resolution A/RES/61/106 of 13 December 2006.

- The Employment Injury Benefits Convention 121 of 1964;
- Invalidity, Old-Age and Survivors' Benefits Convention 128 of 1967;
- The Medical Care and Sickness Benefits Convention 130 of 1969;
- The Maintenance of Social Security Rights Convention 157 of 1982;
- The Employment Promotion and Protection against Unemployment Convention 168 of 1988; and
- Maternity Protection Convention 183 of 2000.

Having briefly looked at the ILO framework, it is vital to turn the focus to the South African context. The Constitution of the Republic of South Africa¹² guarantees everyone the right to have access to social security, including the right to social assistance, if they are unable to support themselves and their dependents.¹³ Social security refers to measures that are put in place to curtail the effects of risks such as unemployment, injuries at work, illness or old age.¹⁴ Primarily, social security consists of social assistance and social insurance.¹⁵ Social assistance is financed from general revenue while individual contributions finance social insurance.¹⁶ Social assistance can function as a redistributive mechanism when properly designed; however, a thriving economy is equally important for financing redistributive measures, creating jobs and bringing people out of poverty.¹⁷ It is normally given to the vulnerable group in society, which includes children, old people and people with disabilities.¹⁸ It was noted in the case of *Khosa and others v Minister of Social Development and Others*

¹² The Constitution of the Republic of South Africa, 1996 (Hereinafter referred to as the Constitution).

¹³ s27(1) of the Constitution: Everyone has the right to have access to-

- (a) Healthcare services, including reproductive health care;
- (b) Sufficient food and water; and
- (c) Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

¹⁴ Van der Walt, le Roux and Govindjee *Labour Law in Context* (2012) 277. See also White Paper for Social Welfare GN 1108 in Government Gazette 18166 August 1997 available at www.gov.za (Accessed on 26 June 2017).

¹⁵ Kaseke 'The Role of Social Security in South Africa' 2010 53 *International Social Work* 159 168.

¹⁶ Van der Walt, le Roux and Govindjee *Labour Law in Context* (2012) 277.

¹⁷ Brockerhoff "Setting the scene – the Right to Social Security and its importance for addressing Poverty and Inequality" *A Review of the Development of Social Security Policy in South Africa* (2013) 10.

¹⁸ The Social Assistance Act 13 of 2004

that in order for a society to be that in which dignity, freedom and equality reigned, it had to ensure that basic amenities of life were available to all.¹⁹

Social insurance also acts as a safety net that helps alleviate poverty and protect people against economic shocks.²⁰ However, it is largely based on the existence of a formal employment relationship in South Africa, which as will be seen later, is a problem because many people are either unemployed or work in the informal sector.²¹ The country is mainly involved in informal sector operations due to lack of education, resources, opportunities and unfortunate circumstances that lead to the exclusion of formal sector employment.

This reality is often not catered for in order to enjoy social insurance in comparison to the minority found in the formal employment sector.²² The eventualities create an impression of lack of unity and uniformity in the use and enjoyment of state benefits.²³ On the other hand, the same informal employment sector group becomes eligible to certain insurance assistance benefits that participants in the formal employment sector do not enjoy.²⁴

That is why effective international labour standards, which are in the form of Conventions, are important. Conventions are agreements that countries consent to be bound by.²⁵ International labour standards result in employee cooperation and increases productivity without fear of losing the job, trade competitiveness, and growth, stable relationship between the employer and employee, which motivates the employer to invest in training the employee.²⁶ The role of Conventions and Recommendations will be discussed in detail in the previous chapter.

Specifically, this study seeks to discuss the importance of Convention No. 102, its importance and why South Africa should ratify it.

¹⁹ *Khosa and others v Minister of Social Development and others* (2004) 6 SA 505 (CC).

²⁰ *Ibid.*

²¹ Van der Walt, le Roux and Govindjee *Labour Law in Context* (2012) 277.

²² Rycroft and Jordaan *A Guide to South African Labour Law* (1992).

²³ Kaseke 'The Role of Social Security in South Africa' 2010 53 *International Social Work* 159 168.

²⁴ *Ibid.*

²⁵ Manfred "International Labour Standards: A Complex Public-Private Policy Mix" (2013) 29 *The International Journal of Comparative Labour Law and Industrial Relations* 8.

²⁶ *Ibid.*

1.2 Problem Statement

The review of the South African Social Security schemes still reveals many knowledge gaps. Post-1994 South Africa inherited not only a fragmented but also an unequal social security system that mostly benefited the white community.²⁷ The Constitution is the supreme law of the country and declares that all other laws must be tested against it to make sure that they are not invalid.²⁸ Key among the provisions of the Constitution is the entrenched Bill of Rights. The Bill of Rights is significant as it entrenches key labour rights, including the right to social security, right to social assistance as well as the right to socio-economic rights (i.e. the right to access adequate housing, the right to education, the right to social welfare, the right to healthcare and emergency medical treatment).²⁹ To achieve the progressive realisation of these rights, the State has to be increasingly sensitive to the role of international law in labour law and social security matters.³⁰ Legislation such as the South African Social Security Agency³¹ and the Labour Relations Act,³² were enacted to give effect to some of the above-mentioned rights.³³

Further, aligning the above laws with international standards is imperative for South Africa since it is required by the Constitutional confirmation that ratified international instruments that bind South Africa.³⁴ Importantly, the Constitution entrenches prescripts to consider international law when interpreting the Bill of Rights and to accord a reasonable interpretation to social security legislation, which is consistent with international law.³⁵

Several international standards including regional instruments, inform the unemployment provisions and therefore serve as benchmarks against which to measure the social security legislation in South Africa. Key among these instruments includes the core ILO social security Convention that is the ILO Social Security

²⁷ Brand *Introduction to socio-economic rights in the South African Constitution* (1998) 43.

²⁸ S 2 of the Constitution.

²⁹ S 26, s27 and s29 of Constitution.

³⁰ The purpose of Social Security in South Africa.

³¹ Act 9 of 2004.

³² Act 66 of 1995.

³³ Van der Walt, le Roux and Govindjee *Labour Law in Context* (2012).

³⁴ S 231(2) of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*).

³⁵ S 39(1) (b), 233 of the *Constitution*. See also Olivier and Govindjee "a Critique of the Unemployment Insurance Amendment Bill" 2015 *PER* 5.

(Minimum Standards) Convention.³⁶ The Convention can be ratified by compliance with three of the nine branches.³⁷ Both SADC Protocol on Employment³⁸ and Labour and the Code on Social Security in the SADC³⁹ require of SADC Member States to align their social security system with the standards embedded in ILO Convention No. 102.⁴⁰ Similarly, the Universal Declaration of Human Rights of 1948, grants everyone the right to social security⁴¹ and the "right to security in the event of unemployment." Further, the United Nation's International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically provides that "The State Parties to the present Covenant recognise the right of everyone to social security, including social insurance" as being of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their Covenant rights."⁴²

In the South African context, the current economic downturn and the sharp increase in social assistance expenditure in recent years have shown the importance of the social security system of South Africa in attempts to alleviate poverty and to prevent people from falling into poverty. At present, South Africa has a high rate of unemployment,⁴³ poverty and social security challenges that the government progressively addresses, through social assistance agencies.⁴⁴ Social grants or cash transfers target vulnerable parts of the population, such as foster children, and provide relief from hardship.⁴⁵ This form of compensation, although plausible as a struggle to ease the hardship of poverty, fails to address the root cause effectively, which is

³⁶ Olivier and Govindjee "a Critique of the Unemployment Insurance Amendment Bill" 2015 *PER* 5.

³⁷ Art 2(a) (ii) of Convention No. 102.

³⁸ Art 11(2).

³⁹ Art 4.3 of the Code.

⁴⁰ Olivier and Govindjee "a Critique of the Unemployment Insurance Amendment Bill" 2015 *PER* 5.

⁴¹ Article 22 of the *Universal Declaration of Human Rights* (1948).

⁴² *CESCR General Comment No 19: The Right to Social Security* UN Doc E/C.12/GC/19 (2008) (*General Comment No 19*) par 1.

⁴³ Govindjee "Assisting the unemployed in the absence of a legal framework: The next frontier for the Eastern Cape bench" (2011) 1 *Speculum Juris* 86-91, argues that unemployment is viewed as constituting one of the greatest threats to the social security system.

⁴⁴ Brockerhoff "Setting the scene – the Right to Social Security and its importance for addressing Poverty and Inequality" 2013 *A Review of the Development of Social Security Policy in South Africa* 10.

⁴⁵ *Ibid.*

unemployment and marginalisation.⁴⁶ Furthermore, major challenges and problems are evident in the current system. Unemployed adults for instance, who are able to work can only access such grants through members of their household who are beneficiaries⁴⁷.

A further problem exists in terms of the current exclusionary nature of social security system in South Africa. Notably, the current social insurance system is employment-based, as they do not only exclude persons without employment, but also those who work in the so-called informal sector. The system is purely a contributory scheme that only attempts to prevent members from sliding into poverty and is not properly aligned with social assistance.⁴⁸

Similarly, the right to access social assistance is determined by the means-test. The latter only focusses on the immediate family structure, but does not extend to extended family. The categorical nature of the means-test effectively marginalises orphans who are in most cases parented by their extended families.

Similarly, a problem exists in the current Compensation Fund for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) regulation in the following regard. If a deceased employee is killed in a motor vehicle accident by virtue of the employer's negligence, section 35(1) of COIDA as well as section 19(a) of the Road Accident Fund Act 56 of 1996 (RAF) precludes the deceased's dependents from making a claim. This study seeks to explore the provisions of Convention No. 102 in order to establish where South Africa is lacking in this respect.

In relation to refugee workers, a pressing concern is that refugee workers only receive coverage provided a dedicated bilateral agreement exists subject to a verification process to enable the refugee worker to access the benefits in their own state. The study reflects upon a refugee who is unable to access the benefits, which he or she has contributed towards by virtue of not being in a country that is part of a dedicated

⁴⁶ *Ibid.*

⁴⁷ Stephanie "Setting the scene – the Right to Social Security and its importance for addressing Poverty and Inequality" 2013 *A Review of the Development of Social Security Policy in South Africa* 10.

⁴⁸ Tshoose "Social Assistance: Legal Reforms to Improve Coverage and Quality of life for the poor people in South Africa" (Unpublished Doctoral Thesis) University of South Africa (2016) 14.

bilateral agreement, which means that they would be disadvantaged in terms of receiving a benefit. The study evaluates the requirements in terms of Convention No. 102 in order to find out whether South Africa is compliant with international standards.

The implementation of effective social security remains under strain in the country. Corruption, lack of availability of funds and distribution of services remains the major challenges.⁴⁹ The courts cannot always grant orders for social security to be given effect since not everyone has access and resources for litigation.⁵⁰ A large body of socio-economic rights case law based on administrative law principles has developed, particularly in the field of social assistance.⁵¹ In the case of *Mashava v President of the Republic of South Africa*, the Court sought to address the inability of provincial governments to administer the social grant system properly. This frustrated people like the complainant's access to social assistance, such that the case was quite directly about the right of everyone to have access to social assistance.⁵²

The progressive realisation of rights should be monitored and implemented effectively by chapter 9 institutions as per the 1996 Constitution.⁵³ It is also stated that the effective provision of social security services requires uniform norms and standards, standardised delivery mechanisms and a national policy for the efficient, economic and effective use of the limited resources available to the State for social security.⁵⁴ However, effective implementation is lacking due to administrative structures and monitoring mechanisms are limited.⁵⁵ In addition, it becomes chaotic and violent when such rights are inaccessible due to budgetary constraints, a shift in power or lack of available resources.⁵⁶

⁴⁹ *Ibid.*

⁵⁰ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC)

⁵¹ Danie Brand "One / Introduction to socio-economic rights in South African Constitution" *Impact of International instruments with reference to Social Security and Socio-Economic Rights* 2015 5.

⁵² *Mashava v President of the Republic of South Africa* (2004) 12 BCLR 1243 (CC).

⁵³ s 217 of the Constitution of 1996.

⁵⁴ Kaseke 'The Role of Social Security in South Africa' 2010 53 *International Social Work* 159 168.

⁵⁵ Manfred "International Labour Standards: A Complex Public-Private Policy Mix" 2013 29 *The International Journal of Comparative Labour Law and Industrial Relations* 9.

⁵⁶ *Ibid.*

In the *Government of the Republic of South Africa and Others v Grootboom*,⁵⁷ the Constitutional Court held that Constitution utilizing coordinated programmes requires the state to fulfil its obligations in terms of section 25, 26 and 27 of the Constitution, subject to availability of funds.⁵⁸ A reasonable programme must be balanced, flexible and make appropriate provision for short, medium, and long-term needs.⁵⁹ It should respond to the needs of those most desperate to pass the test of reasonableness.⁶⁰

In terms of the White Paper for Social Welfare⁶¹, social security covers a wider variety of public and private measures that provide cash or in kind benefits or both. Such coverage may include instances where a person is unemployed, experiencing interference with his or her ability to earn a living, experiencing a lack of development or an inability to exit impoverishing conditions and provide child maintenance. What is of interest is that the White Paper defines the domains of social security as relating to positive measures such as poverty prevention, poverty alleviation, social compensation, and income distribution.⁶²

Furthermore, efficiency and reality are emphasized in so far as to request a national social security economic policy that is required to prevent the proliferation of laws and policies relating to social security from prejudicing the beneficiaries of social security, prejudicing the economic interests of the Republic or its provinces or impeding the implementation of such national social security economic policies.⁶³ Section 217 of the Constitution makes provision for the procurement of goods or services by organs of state.⁶⁴ However, the lack of service delivery or quality thereof arises within such a process, which contributes to the challenges South Africa currently experiences.

1.3 Research Methodology

In order to illuminate the benefits of ratifying Conventions for South Africa, this study adopts a desktop research methodology. This methodology, therefore, involves the

⁵⁷ (2000) 11 BCLR 1169 (CC).

⁵⁸ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ "The White Paper for Social Welfare: *Principles, guidelines, Recommendations, proposed policies and programmes for developmental social welfare in South Africa*" August 1997

⁶² *Ibid.*

⁶³ Olivier, Dupper and Govindjee "Role of Standards in Labour and Social Security Law" *International: International, Regional and National Perspectives* (2013).

⁶⁴ S 217 of Constitution of 1996.

reading and analysis of primary sources, including the International Conventions and Recommendations relevant to social security, Conventions that govern labour standards, official reports of relevant international organisations and national laws. The secondary resources will range from books, journal Articles, conference papers, case laws, legislation, law treatises, as well as relevant internet sources.

1.4 Research Questions

1. What is the current Social Security framework in South Africa?
2. Does South Africa have a Constitutional duty to follow the international standards with regard to social security and in particular ILO Convention No. 102 (Social Security Minimum Standards Convention)?
3. What process is followed in order to ratify an ILO Convention?
4. How has the establishment of the ILO played a role in setting up labour standards in the form of Conventions?
5. To what extent did policymakers and courts expand the concept of social security?

1.5 Underlying theme of the study

The underlying theme of this study is that the Constitution⁶⁵ of the Republic of South Africa guarantees everyone the right to have access to social security, including, appropriate social assistance for those who are unable to support themselves and their dependants.⁶⁶ The State has a further obligation to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right.⁶⁷ Section 39(1) (b) of the Constitution compels a court, tribunal or forum, when interpreting the Bill of Rights, to consider international law. In *S v Makwanyane and another*,⁶⁸ the Constitutional Court held that, in the context of section 39(1) (b), the phrase 'public international law' refers both to international law that is binding on South Africa and to international law, to which South Africa is not

⁶⁵ The Constitution of the Republic of South Africa, 1996 (the Constitution).

⁶⁶ S 27(1)(c) of the Constitution.

⁶⁷ S 27(2) of the Constitution.

⁶⁸ (1995) 3 SA 391 (CC).

bound. In addition, the Court emphasised that both 'hard' and 'soft' international law must be considered by courts in their interpretation of the Bill of Rights.⁶⁹

1.6 Aims and Objectives of the study

The primary aims and objectives of the study are:

- To investigate whether South Africa is compliant with the international standards as set by the ILO regarding Social Security. In order to achieve the latter, considering the establishment of the ILO, its structure and function in setting labour standards are imperative for the study.
- To analyse the existing social security legal framework in South Africa.
- To understand the ratification process of the ILO Conventions.

While the Recommendations of this study are not aimed at replacing the existing framework of social security, the researcher rather recommends that South Africa, as a Member State of the ILO, should consider ratifying Social Security (Minimum standards) Convention, 1952. In doing so, the study dedicates chapter three of this study to analyse the provisions of Social Security (Minimum Standards) Convention, 1952 and how South Africa can benefit by ratifying this Convention this ILO Convention's principle on social security.

Also, the ethos of democratic governance and fundamental rights guides the Recommendations. In other words, this study places good governance, respect of fundamental rights and democracy as central to the design of any policy framework and the effective implementation of social security measures.

1.7 Outline of the Research

This study consists of five chapters.

⁶⁹ 'Soft' international law consists of imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but which lack the status of 'law'. Dugard *International law. A South African perspective* (2000) 36.

Chapter one

Provides a brief outline of the topic and the issues dealt within this research as well as the background and history. In addition, it provides the problem statement, research methodology, aims, and objectives of the study, the scope and limitations and the Recommendations.

Chapter two

Chapter 2 explores the formation of the International Labour Organization and the ratification process of ILO Conventions. The chapter also provides a discussion of the supervisory monitoring of the ILO Conventions ratified by Member States. The ILO's structure and all its activities as marked by three tripartism organs comprising of the Governing Body, the International Labour Conference, and the International Labour Office are also considered in chapter 2.

Chapter three

Chapter 3 evaluates the ILO Convention No. 102 Social Security (Minimum Standards) Convention, 1952 and other relevant Conventions that deal with social security in an International context.

Chapter four

In chapter 4, the legislative framework and the role of Social Security in South Africa are discussed. In particular, the chapter explores the two main branches of social security system in South Africa. These are Social Assistance as well as Social Insurance.

Chapter five

Finally, chapter 5 concludes this study. The chapter provides some valuable lessons and Recommendations as to why it is important for South Africa to ratify ILO Convention No. 102.

CHAPTER 2: ESTABLISHMENT OF THE INTERNATIONAL LABOUR ORGANIZATION (ILO), AIMS AND OBJECTIVE OF THE ILO AND RATIFICATION PROCESS OF ILO CONVENTIONS

2.1 Introduction

In chapter one, a general introduction and framework for this study was discussed. The problem leading up to this study was clearly highlighted. The aims and objectives of the study as well as the research questions were highlighted.

In this chapter, the establishment of ILO, aims and objective of the ILO and the ratification process of ILO Conventions and the role of the ILO are presented. The chapter also considers the three major organs of the ILO, that is, the International Labour Office functioning under the Director-General, International Labour Conference also known as the World Industrial Parliament and the Governing body.

The ILO's work in the field of social security has been pioneering. From the date of its inception 1919⁷⁰, the ILO has been constantly engaged in formulating standards with a view to extend social security benefits to a larger section of people in a greater number of contingencies.⁷¹ It is a tripartite body consisting of representatives of the government, employers and workers. It functions in a democratic way by taking interest for the protection of the working class throughout the world. In 1944, the ILO Conference meeting in Philadelphia adopted an important Declaration concerning the aims and purposes of the International Organisation which later became known as the 'Declaration of Philadelphia' reshaping the aims and the future role of the ILO in the post-war period. The Declaration of Philadelphia that was subsequently incorporated into the ILO Constitution affirmed that 'all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their

⁷⁰ It was a part of the Treaty of Versailles, which ended the World War I, and was one of the main specialised agencies of the United Nations. Servais *International Labour Law* (2009) 21. The ILO's Constitution laid down the rationale of the Organisation, spelled out its aims and purposes as well as its detailed design and also identified certain "*methods and principles for regulating labour conditions, which all industrial communities should endeavour to apply, so far as their special circumstances will permit*" that are of "*special and urgent importance*". See also Blanpain *Comparative Labour Law and Industrial Relations in industrialized market Economics* (2007) 137. See also ILO <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>. (Accessed on 14-7-2017).

⁷¹ Servais *International Labour Law* (2009) 21. See also ILO <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>. (Accessed on 14-7-2017).

spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'. In 1946, the ILO became the first Specialized Agency of the United Nations.

The original membership of 45 countries in 1919 grew to 121 in 1971; two years earlier, on the occasion of the 50th anniversary of its founding in April 1969, the ILO was awarded the Nobel Peace Prize.⁷² This achievement demonstrated a strong current world opinion that has still recognised the link between social justice and consolidation of world peace.⁷³ Notably, the ILO became known worldwide in 1999 with its Decent Work Agenda, the contemporary credo of the organisation. Despite this great milestone, unfortunately, working conditions in many countries have not always improved or developed for the better. It is recorded that to date, about 215 million children are still working, a situation that has been termed as scandalous.⁷⁴ South Africa became a member of the ILO in the year 1995, which is from its inception.

2.2 Aims and Objectives of the ILO

The primary aim of the ILO is the welfare of labour as reaffirmed by the Philadelphia Conference of 1944 under the Philadelphia Declaration, on which the ILO is based. These include among others that poverty anywhere constitutes danger to prosperity everywhere, the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care.⁷⁵ The objectives of the ILO are clearly articulated in the preamble to its Constitution, supplemented by Article 427 of the Peace Treaty of Versailles, which was drawn up in 1919. These include improvements in the regulation of the hours of work, including the establishment of a maximum working day and week, regulation of the labour supply, prevention of unemployment; provision of an adequate living wage, protection of the worker against sickness, disease, and injury arising out of his or her employment, protection of

⁷² Doumbia-Henry *Rules of the Game-A Brief Introduction to the International Labour Standards* (1999)13. See also Musukubili footnote 33.

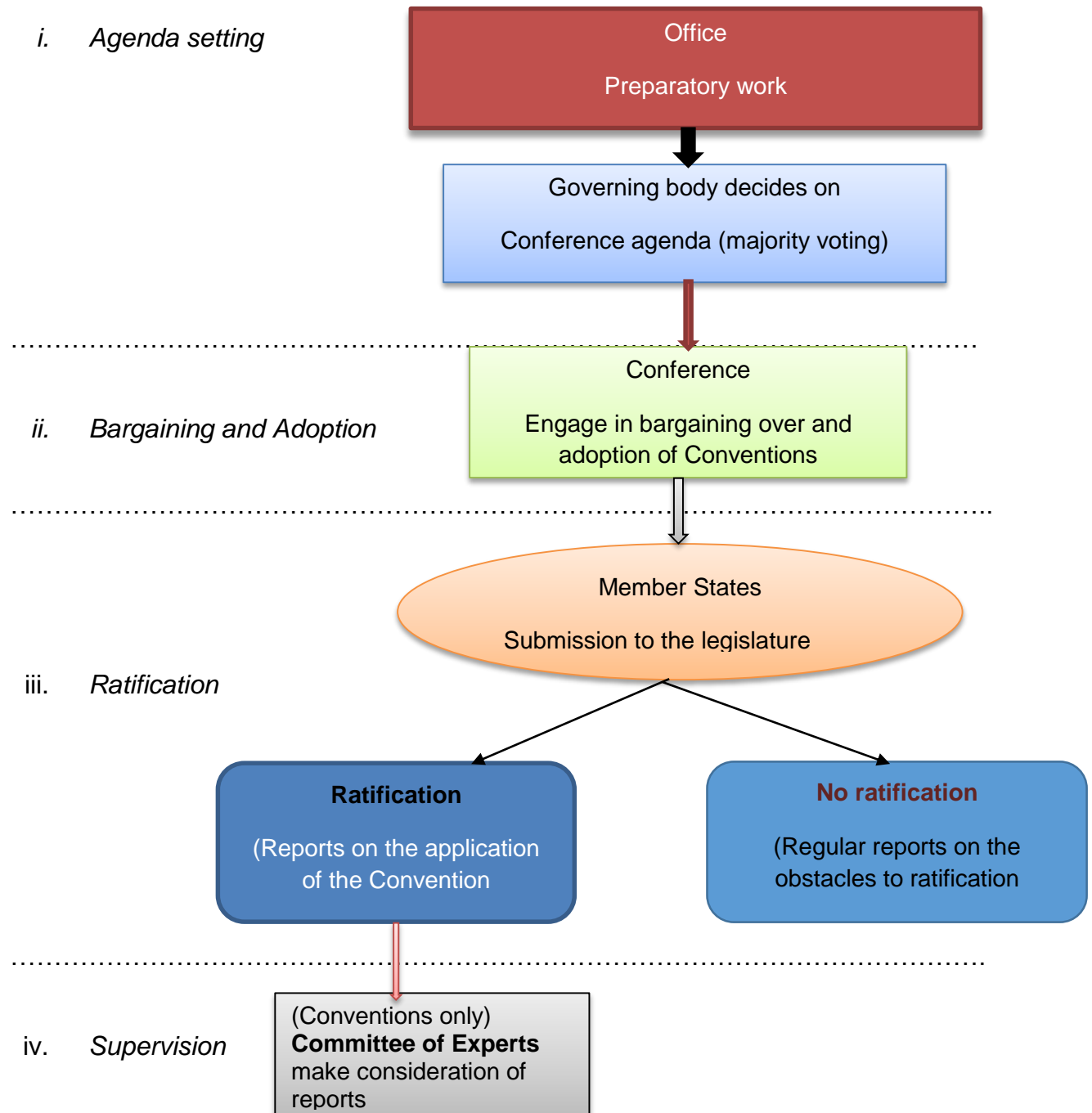
⁷³ Valticos *International Labour Law* (1979) 23.

⁷⁴ Available at: <http://library.fes.de/pdf-files/iez/10279.pdf>. (Accessed on 12 September 2017).

⁷⁵ Maheswara *Impact of I.L.O standards on Indian Labour* (2007) 28.

children, young persons, and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own.⁷⁶

2.3 Overview of the ILO's Decision Procedure



⁷⁶ Available at: http://www.encyclopedia.com/topic/International_Labor_Organization.aspx. (Accessed on 12 September 2017). See also ILO: *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* Geneva (1998) 23 24. See also <http://www.nationsencyclopedia.com/United-Nations-Related-Agencies/The-International-Labour-Organization-ILO-PURPOSES.html>. (Accessed on 23 September 2017).

The principal bodies of the ILO are the International Labour Conference, the Governing Body, and the International Labour Office.⁷⁷

2.4 The International Labour Conference

The International Labour Conference is the supreme organ of the ILO. It convenes once a year in June. It is ultimately responsible for the adoption, by qualified majority voting, of labour standards. Further, the Conference is also responsible for the supervision of the application of ratified Conventions. The Conference adopts the programme and budget of the ILO as proposed by the Governing Body as mandated in terms of Article 1 (4), Article 7 (2) of the ILO Constitution. It decides over amendments to the ILO Constitution and elects the Governing Body after three years. Most specific issues, such as the legal texts of international labour standards, are discussed within Conference committees. The Conference also regulates its own procedure, including the set up and the composition of committees for issues on the Conference's agenda.⁷⁸

2.5 The Governing Body

The most important function of the Governing Body is to set up the Conference agenda. The Governing Body also establishes the programme and the budget, it elects the Director-General, and it supervises the work of the International Labour Office. The Governing Body meets three times a year.⁷⁹ Like the Conference, the composition of the Governing Body is tripartite. It consists of 28 government members, 14 employer members and 14 worker members.⁸⁰ Representatives of other member countries are elected at the Conference every three years, taking into account their geographical provenance.

2.6 The International Labour Office

The International Labour Office is the permanent secretariat of the ILO. In the context of international labour standards, its main task is to provide documentation and studies on the issues before the Conference and the Governing Body. The International

⁷⁷ Art 2 of the ILO Constitution.

⁷⁸ Art 17.1 of the ILO Constitution.

⁷⁹ Van Niekerk and Smit *Law@work* (2015) 21.

⁸⁰ Art 7 (7) of the ILO Constitution.

Labour Office serves as the secretariat of the International Social Security Association (ISSA), which groups together government services as well as central institutions and national unions for social security of different countries.⁸¹ The Office administers the ILO's technical cooperation programme. Furthermore, it publishes a wide range of statistical documents as well as specialised studies, reports and periodicals.⁸² The Director-General heads the International Labour Office, who is elected for a five-year renewable term.⁸³

2.7 The International Labour Standards

Although the tasks of the organisation have undergone several changes over time, its main instrument has always been the setting of international labour standards. The most important of these are Conventions, Member States which can ratify and thus become legally binding on them, and Recommendations, which often contain more detailed provisions but do not create legal obligations. The International Labour Conference adopts labour standards, a tripartite body, which comprises government delegates as well as delegates representing employers and workers.⁸⁴ Remarkably, since becoming a member of the ILO, South Africa greatly benefited from the standards set by the ILO for the welfare of the workers.

Before the study explores the ratification process of the ILO Conventions, it is important to highlight that the Director-General of International Labour Office is obliged by Article 19 (4) of the ILO Constitution to send a certified copy of the proposed Convention to each of the members. After the receipt of the certified copy the government circulates the same to all the ministries of the Government of South Africa and also to the employers' organisations and employees' organisations inviting their observations, and suggestions with regard to the desirability or otherwise of giving effect to those Conventions. After taking into consideration the views expressed, the government prepares a statement on action proposal, which is placed before the

⁸¹ It was founded in 1927. It is "a privileged forum for social security institutions throughout the world and an acknowledged partner with everyone interested in the appropriate development of social protection adapted to the genuine needs of populations.

⁸² Article 10 (1), (2) of the ILO Constitution.

⁸³ Art 8 of the ILO Constitution

⁸⁴ Boockmann *Decision-Making on ILO Conventions and Recommendations: Legal Framework and Application* (2012) 4.

parliament where the statement will be discussed and considered. The copies of the statements are thereafter forwarded to the ILO and to the state governments, and employers and workers organisations. It is therefore important to mention that in the process of any ratification the tripartite consultation is very essential.

2.8 Ratification Process and Implementation of ILO Conventions

The decision to ratify ILO Conventions is made by the Member States. Conventions become legally binding on Member States if they are ratified,⁸⁵ provided that they have legally entered into force.⁸⁶ This distinguishes Conventions from Recommendations, which are not ratified.

2.8.1 Submission to the competent national authorities

As soon as an ILO Convention has been adopted by the International Labour Conference, the instrument is sent to all Member States for consideration. The ILO Constitution requires that the instrument be sent to the representatives of the national organisations of employers and of workers as well as to the governments.

The ILO Constitution requires that Member States (in consultation with representatives of employers' and workers' organisations, and in some cases other relevant government institutions) submit the instruments to the "competent national authorities" for the enactment of legislation or other actions, including possible ratification. Normally and depending on specific setting in a country, the competent authority would be the national parliament, Legislative Assembly, or Congress in the Member State. Subsequently, the government may indicate that the instrument is already fully implemented in national law and practice, and therefore it can be ratified. It may also recommend the enactment of legislation to give effect to the provisions of the instrument, that ratification is postponed to give more time for consultations or studies or that the Convention should not be ratified. Within 12 months of the adoption of the instruments (or at the latest within 18 months), Member States are required to complete this submission and report back to the Director-General of the ILO in extensive detail, explaining what they have done and the actions taken by the

⁸⁵ Art. 19.5 Of the ILO Constitution.

⁸⁶ ILO *Handbook of Procedures* (2011) 26.

competent national authorities.⁸⁷ The outline of the report to the ILO must be stated in a Memorandum of Understanding. The government must also indicate which employers and workers' organisations have been given copies of the report.

2.8.2 Member State decides to ratify

Ratification itself is voluntary, although ILO officials sometimes stress a moral obligation to ensure the ratification of Conventions, at least for those governments that have voted in favour of them.⁸⁸ So, why do states ratify the ILO Conventions? When a Member State ratifies the Convention, it agrees to two important things. Firstly, it agrees to implement the Convention.⁸⁹ Thus, the national legislation must be reviewed in relation to the provisions of the Convention.⁹⁰ A country that ratifies is not allowed to pick and choose parts of the Convention as it wishes. In the long-term, all of the provisions must be applied in national law and practice.

Secondly, the Member State also agrees to report at regular intervals to the supervisory mechanisms of the ILO. This is elaborated further below. The regulatory, supervisory machinery of the ILO comes into force twelve (12) months after the Director-General of the ILO has been notified of the ratification. In other words, a ratified Convention becomes subject to the ILO's supervisory system for ensuring that the Convention is actually implemented and applied. The CEACR is responsible for supervision. Governments may request information, clarification or any other assistance from the International Labour Secretariat in the procedures related to the ratification process.

In the Member States where national laws go beyond the provisions of the new Convention, there may be a concern that national laws will be watered down to conform to the new provisions. ILO standards are minimum standards and as stated

⁸⁷ Available at: <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang-en/index.htm>. (Accessed 17 September 2017).

⁸⁸ Report of the Director-General, 1997.

⁸⁹ Art. 19.5 Of the ILO Constitution.

⁹⁰ The implementation of a standard need not necessarily be in the form of a law. Many Conventions stipulate that they can also be applied by collective agreements or arbitration awards. Although this creates problems if coverage by collective bargaining is not universal. Some Conventions do not require legislation but rather administrative acts to be implemented.

in Article 19 of the ILO Constitution, under no circumstances can a Member State whose legislation goes beyond a Convention's provisions weaken its national laws once it has ratified the Convention.⁹¹ After ratification, the Convention will remain valid in that Member State for a period of at least ten (10) years. After this period, the State may denounce the Convention if it wishes. This is an extremely rare practice.

At regular intervals, States that have ratified Conventions must report on their application in law and in practice. They have a Constitutional obligation to present reports on the measures they have taken to put those Conventions into effect. The reports are examined by the Committee of Experts on the Application of Conventions and Recommendations, a body independent of the Organisation, whose own report is then discussed each year by a tripartite committee of the International Labour Conference. Representation and any grievance procedure may be brought against a Member State for a violation of a Convention they have ratified. The International Labour Standards minimum standards adopted by governments and the social partners, are in everyone's interest to see these rules applied across the board, so that those who do not put them into practice do not undermine the efforts of those who do.⁹² Employers' organisations and workers' organisations may present the Organisation with their comments on the application of Conventions ratified by their countries.

2.8.3 If a Member State takes no action

If a Member State takes no action, the Committee of Experts will remind the Member State of its obligation to submit the ILO instrument to the competent authorities. A first

⁹¹ Art. 19.8 of the ILO Constitution states that "In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement that ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation."

⁹² Simmons and Beth *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge (2009) 56. See also Baccini and Mathias Koenig-Archibugi Why do states commit to international labour standards? The importance of "rivalry" and "friendship" (17 November 2011).

reminder is sent out twelve (12) months after the closing of the ILO Conference session. A second reminder is sent out after eighteen (18) months have elapsed.⁹³

2.8.4 If a Member State chooses not to ratify the Convention

After the state has submitted the instrument to its competent national authorities, the Governing Body of the ILO may request the state to report at appropriate interval, showing the impediments to ratification that exist at the level of national law and practice.⁹⁴

2.9 The Supervision of the ILO Standards

Among international organisations, the ILO has a unique supervisory system. Countries are obliged to report, at regular intervals, on the application of the Conventions they have ratified. At the ILO, a committee of independent experts evaluates these reports. If a country does not fulfil its obligations, the committee may issue an observation.⁹⁵ There are four types of procedures for supervision:

2.9.1 Regular supervision

The regular supervisory machinery is based on Articles 19 and 22 of the ILO Constitution. The Committee of Experts on the Application of Conventions and Recommendations is composed of twenty (20) jurists appointed by the Governing Body for a three (3) year term.⁹⁶ They come from different geographical regions and legal systems, and their role is to provide an impartial and technical evaluation of the state of application of Conventions in the Member States.⁹⁷ This helps to ensure that countries implement the Conventions. Once a country has ratified an ILO Convention, it is obliged to report regularly (every two (2) years for fundamental and priority

⁹³ Available at: <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm>. (Accessed 17 September 2017).

⁹⁴ ILO Ratification Process (2014) 2.

⁹⁵ Art 22 of the ILO Constitution.

⁹⁶ Doumbia-Henry *Rules of the Game* 80. See also Alaupain "The Settlement of Disputes within the International Labour Office" 1999 5 *Journal of International Economic Law* 273-293. See also International Labour Organisation <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (Accessed on 19 September 2017).

⁹⁷ Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4A), International Labour Conference, 73rd Session, 1987 para 24. See also *ILO Handbook on Procedure Relating to International Labour Conventions and Recommendations* (2006) 35.

Conventions, every five (5) years for all other Conventions) on the measures it has taken to implement the Convention. The reports are sent to the Committee of Experts, detailing the steps the government has taken in law and practice to apply the Conventions.⁹⁸ Governments are required to submit copies of their reports to employers and workers' organisations, whose comments are of great importance because they help to give a complete picture of the situation in a given country. If the Committee of Experts finds that the Government is not complying fully with the Convention, it can formulate a direct request (for minor failures) or an observation (for serious failures). The Committee publishes a yearly report on the application of Conventions and Recommendations, which is examined at the ILC.⁹⁹ Another stage of the reporting process is a general survey on a specific topic decided by the Governing Body and describing the situation in all the countries whether they have ratified the Convention in question or not. The survey is based on information received from members according to Articles 19 (5) (e) and 19 (6) (d) of the ILO Constitution.

2.9.2 Specific allegations through representation

If trade unions or employers' associations claim that a Member State has violated a ratified Convention, they can make a representation to the ILO Governing Body, in writing, and with proof in support of the allegations.¹⁰⁰ The Government concerned must reply, and if the Governing Body is not satisfied with its response, it publishes the representation and the Government response, as well as its own conclusions concerning further action.¹⁰¹

2.9.3 Specific allegations through complaints

A procedure could be undertaken by a Member State against another Member State, by the Governing Body or by another delegate to the ILC.¹⁰² The complaint is sent to the Governing Body, which may appoint a commission of inquiry that can call for

⁹⁸ *ILO Handbook of Procedures Relating to International Labour Conventions and Recommendations* 35 para 60 (iii). See also Elliot "The ILO and Enforcement of Core Labour Standards" 2000 6 *Institute for International Economics* 2.

⁹⁹ Elliot *The ILO and Enforcement of Core Labour Standards* 2000 6 *Institute for International Economics* 3.

¹⁰⁰ Art 24 of the ILO Constitution.

¹⁰¹ *ILO Handbook on Procedures Relating to International Labour Conventions and Recommendations* 77.

¹⁰² Art 24 of the ILO Constitution.

information and documents from the States and hear witnesses. The commission of inquiry provides a report of its findings with Recommendations to the Governing Body and the States concerned, for public exposure. A State can refuse to comply with the Recommendations but the complaint may be referred to the International Court of Justice although this is rare. However, challenges such as inconclusive information based on a lack of proper, accurate reports and ill monitoring procedures based on naming and shaming do not yield good solutions.¹⁰³

2.9.4 Special procedure on Freedom of Association

The preamble to the ILO Constitution, Convention No. 87 on the Freedom of Association and Protection of the Right to Organise and the Declaration of fundamental principles and rights at work 2.4.4 provides for the special procedure on Freedom of Association. The Governing Body's Committee on the Freedom of Association reviews complaints alleging that a Member State has infringed the basic principle of Freedom of Association, whether or not the Member State has ratified the relevant Convention.

2.10 Conclusion

This chapter has noted that before 1919, international coordination of welfare policy occurred only through bilateral treaties seeking to stem labour migration between bordering countries by equivalent working conditions for foreign nationals in each country. The ILO as a specialised agency of the United Nations has, since its inception a bestowed responsibility of ensuring social security and an environment conducive to the working class across countries. Established post the Treaty of Versailles, the organisation touched a milestone by the Declaration of Philadelphia in 1944. Alongside providing for a descriptive and normative framework, social security was for the first instance recognised by the organisation in 1944 through its Declaration in Philadelphia, which was elaborated and deliberated upon by the Recommendations and Conventions.

This organisation is often considered to be the source for the new branch of international law for International Social Security Law. It has to its credit flagship

¹⁰³ Marius Olivier *et al* *The Role of Standards in Labour and Social Security Law International, Regional and National Perspectives* (2013) 5.

Conventions and Declarations that have not only defined social security and its minimum standards but also explained through its organs the responsibility on individual countries to promote and protect the rights of the human beings as social beings entitled to basic minimum security for their existence. The Conventions and Recommendations of the organisation maintain the working of the organisation in multitude. While the Recommendations pave way for structural developments, the Conventions provide a concrete structure to the working of the organisation and also govern its major working organs, International Labour Office, International Labour Conference and the Governing Body.

What follows is an overview of the body of international law that is most relevant to the interpretation of the right to social security and assistance in the South African Constitution. In particular, the provisions of the Social Security (Minimum Standards) Convention, 1952 (No. 102) are explored. The history of all social security Conventions adopted by the ILO shows a constant tension between Member States of the organisation and the Bureau of the ILO in respect of the definition of protected classes of persons. In the process of drafting a Convention, the Bureau has always tried to expand the categories of persons covered in order to reach the ultimate goal of social security Conventions, which is universal coverage. Member States for their part always succeeded in limiting the prescribed categories to a percentage of waged workers or residents.¹⁰⁴ Since 1919, the ILO has adopted 31 Conventions and 23 Recommendations in this area, which have greatly contributed to the development of social security as a universal human right - notably by laying down specific obligations and guidelines for the Member States.

¹⁰⁴ *Extending social security: Policies for developing countries*, ESS Paper No 13, ILO Social Policy and Development Branch. See also Van Ginneken *social security: A new consensus* (2003).

CHAPTER 3: ILO CONVENTION NO. 102 SOCIAL SECURITY (MINIMUM STANDARDS) CONVENTION, 1952 AND OTHER CONVENTIONS RELEVANT TO SOCIAL SECURITY

3.1 Introduction

In chapter two (2), the formation of the ILO and ratification process of ILO Conventions was discussed. The chapter highlighted that for nearly hundred (100) years, the ILO has been at the forefront advocating for social justice in the working world as well as internationally recognised human and labour rights. This quest remains significant to the ILO founding mission that labour peace is essential to prosperity. This chapter seeks to provide a detailed discussion of the ILO Convention No. 102.¹⁰⁵ The chapter also considers other Conventions relevant to social security and well as Recommendations.

Worth noting is that since its inception in 1919, the ILO has done pioneering work in the field of social security. This organisation has adopted a number of Conventions and Recommendations in the area of social security. These ILO standards have greatly contributed to the development of social security as a universal human right by laying down specific obligations and guidelines for the Member States. One of the most important Conventions developed by the ILO in the field of Social Security is Convention No. 102, which was adopted on 28 June 1952 and came into force on 27 April 1955.¹⁰⁶

3.2 The Evaluation of the ILO Convention No. 102

Convention No. 102 is deemed to be a staunch current social security Convention given its internationally respected definition of social security.¹⁰⁷ Convention No. 102

¹⁰⁵ Hereinafter referred to as Convention.

¹⁰⁶ ILO 'Social Security (Minimum Standards) Convention, 1952 (No. 102)' available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C102. (Accessed on 12 September 2017).

¹⁰⁷ Available at <http://socialprotection-humanrights.org/instru/social-security-minimum-standards-convention-no-102-1952/>. (Accessed on 01 October 2017).

expresses great freedom in respect of Member States that have undergone the ratification process since an allowance is given for full coverage.¹⁰⁸

Convention No. 102 establishes, as its title suggests, a general system whose scope is gradually extending to all sectors of activity and to the entire population including the self-employed and non-working population. The Convention introduces the principle of a minimum general level compatible with human dignity that the States must attain in the light of their socio-economic development.¹⁰⁹ Vonk regards Convention No. 102 as the most important instrument for the development and expansion of social security as the ILO proudly refers to Convention No. 102 as the flagship of social security Conventions.¹¹⁰ However, it does not provide a single definition of social security; the definition can be construed from various parts of the Convention each addressing one of the nine social risks that it covers. Notably, the term “social security” first found its way into the Universal Declaration of Human Rights in 1948,¹¹¹ which states in a short Article 22:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.

Important is to remember that not only does Convention No. 102 insist on the periodicity and regularity of available cash benefits,¹¹² it also provides for minimum standards in the nine distinct branches of social security, setting minimum standards for each of these branches and laying down principles for the sustainability and good

¹⁰⁸ Available at: <http://socialprotection-humanrights.org/instru/social-security-minimum-standards-Convention-no-102-1952/ par 2>. (Accessed on 01 October 2017).

¹⁰⁹ Available at: <http://socialprotection-humanrights.org/instru/social-security-minimum-standards-Convention-no-102-1952/ par 1>. (Accessed on 01 October 2017).

¹¹⁰ Vonk ‘The Social Protection Floors Recommendation 2012 (No 202): The Human Rights Approach to Social Security in ILO Wrapping Paper’ in Olivier, Dupper and Govindjee *The Role of Standards in Labour and Social Security Law* (2013) 30.

¹¹¹ UN Doc A/810 (1948) *Universal Declaration of Human Rights*, UNGA Resolution 2200A (XXI).

¹¹² S 1(2) of the Convention No. 102 defines the term benefit in arts 10, 34 & 49 as either direct benefit in the form of care or indirect benefit consisting of a reimbursement of the expenses borne by the person concerned.

governance of those schemes. These branches are medical care,¹¹³ sickness,¹¹⁴ unemployment,¹¹⁵ old age,¹¹⁶ employment injury,¹¹⁷ family,¹¹⁸ maternity,¹¹⁹ invalidity,¹²⁰ and survivors' benefits.¹²¹ At least three (3) schemes from the above categories need to be established by Member States to the Convention. One of these three (3) schemes must be an unemployment benefit, old age benefit, employment injury benefit or invalidity, or survivors' benefit. The minimum standard defines the scope of protection and benefits, including the amount thereof, provided by the Convention.

In all cases, a ratifying member must comply with some general parts of the Convention, including Part XI, which provides for periodic payments of social security. These are considered below.

a) Medical care

The provisions of medical care cover pregnancy, confinement, and its consequences and any disease that may lead to a morbid condition. The need for pre-natal and post-natal care, in addition to hospitalisation, was emphasized. A morbid condition may require general practitioner care, provision of essential pharmaceuticals and hospitalisation.¹²²

b) Sickness benefit

Generally, the sickness benefit would include incapacity to work following a morbid condition resulting in loss of earnings. This calls for periodical payments based on the Convention specifications. However, the worker need not be paid for the first three (3)

¹¹³ Part II arts 7-12.

¹¹⁴ Part III arts 13-18.

¹¹⁵ Part IV arts 19-24.

¹¹⁶ Part V arts 25-30.

¹¹⁷ Part VI arts 31-38.

¹¹⁸ Part VII arts 39-45.

¹¹⁹ Part VIII arts 46-52.

¹²⁰ Part IX arts 53-58.

¹²¹ Part X arts 59-64. See also ILO 'International Labour Standards on Social security' available at <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm> (accessed 12 September 2017).

¹²² Up-to-date ILO Social Security Standards and their status of ratifications (Classified Guide, 18 May 2009). Available at: www.socialsecurityextension.org/.../RessourceDownload.action? (Accessed on 12 September 2017).

days of suspension of earnings and the payment of benefit may be limited to twenty six (26) weeks in a year.¹²³

c) Unemployment benefit

Unemployment benefit covers the loss of earnings during a worker's unemployment period. When he is capable and available for work but remains unemployed because of lack of suitable employment. This benefit may be limited to thirteen (13) weeks payment in a year, excluding the first seven (7) days of the waiting period.¹²⁴

d) Old-age benefit

This benefit provides for the quantum payment of an individual's working capacity a certain amount beyond a prescribed age and continues until death.¹²⁵

e) Employment injury benefit

Employment injury benefit covers the following contingencies resulting from an accident or disease during employment:

- 1) Inability to work following a morbid condition, leading to suspension of earnings;
- 2) Total or partial loss of the earning capacity, which may become permanent; and
- 3) Death of the breadwinner in the family, as a result of which the family is deprived of financial support. Medical care and the periodical payment corresponding to an individual's needs should be available.¹²⁶

f) Family benefit

The nature of this benefit refers to the responsibility for the maintenance of children during an entire period of contingency. Periodical payment, provision of food, housing, clothing, holidays or domestic help in respect of children should be provided to a needy family.¹²⁷

g) Maternity benefit

This benefit includes pregnancy, confinement and their consequences resulting in the suspension of earnings. Provision should be for medical care, including pre-natal

¹²³ *Ibid* at Article 13-18.

¹²⁴ *Ibid* at Art 19 to 24.

¹²⁵ *Ibid* at Art 25 to 30.

¹²⁶ *Ibid* at Art 31 to 38.

¹²⁷ *Ibid* at Art 45 to 39.

confinement, post-natal care, and hospitalisation if necessary. Periodical payment limited to twelve (12) weeks should be made during the period of suspension of earnings.¹²⁸

3.3 Why is It Important for South Africa to Ratify Convention No. 102?

As noted above, Convention No. 102 is of great importance to any Member State of the ILO. Ratification will signify a clear message to the international community that South Africa is ready to promote cooperation and build esteem with other states across the world in providing strong social security laws. Should South Africa ratify the foregoing Convention, it would receive certain benefits that come with it including benefits flowing from the ILO experience and technical assistance (policy advice and actuarial studies).¹²⁹ Further, it would receive guarantees for a well-established Social Security system. Ratifying Convention No. 102 would enhance confidence in the current Social Security system in the country. Besides that, it would prevent the South Africa from slipping back from the international arena. Similarly, ratifying Convention No. 102 would contribute significantly to the extension of coverage and poverty reduction. Like Convention No. 102, Article 25 of the Universal Declaration of Human Rights also provides a further obligation and declares that:

- 1) Everyone has the right to a standard of living that is adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control; and
- 2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

This international recognition of the right to social security, reflects the growth of social welfare measures universally.

¹²⁸ *Ibid* at Art 46 to 52.

¹²⁹ Available at: www.ilo.org/documents/worms-172072. (Accessed on 4 September 2017).

3.4 Other Conventions Relevant to Social Security

Convention No. 102 paved the way for adoption of several specific Conventions that subsequently gave effect to its provisions. This study explores some of them.

3.4.1 Equality of Treatment (Social Security) Convention 118 of 1962¹³⁰

This Convention is designed to secure equal treatment of nationals and non-nationals, including refugees and stateless persons, in case of social security except in special schemes for public servants, war victims and public assistance by ratifying states. However, equality is assured to non-nationals of another ratifying state in case of medical care, sickness, maternity, invalidity, old age, and survivor's employment or family benefits. Equal treatment is guaranteed regardless of residence, on condition of reciprocity. States accepting obligation are bound to make payment based on invalidity, old age, and survivor's employment and family benefits. However, the states can prescribe a minimum period of residence for granting benefits of maternity, unemployment survivors and old age benefits. So far, thirty seven (37) countries have ratified the Convention.

3.4.2 Employment Injury Benefits Convention 121 of 1964¹³¹

This Convention applies to employment injury benefits for the workers. This Convention provides for payment of cash and medical benefits in cases of employment injury and at least seventy five percent (75%) of expenses involved for all employees. The General Conference of the ILO, convened in Geneva, Switzerland by the Governing Body of the International Labour Office,¹³² had decided upon the adoption of certain proposals with regard to benefits in the case of industrial accidents and occupational diseases, so far, twenty four (24) countries have ratified this Convention. A Member State whose economic and medical facilities are insufficiently developed may avail itself by a declaration accompanying its ratification of the temporary exceptions provided for in the Articles.¹³³ Any Member State, which ratifies this Convention, may by a declaration accompanying its ratification, exclude from the application of the Convention seafarers, including sea fishermen and public servants.

¹³⁰ Convention No.118 of ILO.

¹³¹ Convention No.121 of ILO. This Convention has not been ratified by South Africa.

¹³² Forty-eighth session on June 17th 1964.

¹³³ The Employment Injury Benefits Convention, 1964 at Article 2.

These categories are protected by special schemes that provide in the aggregate benefits at least equivalent to those required by this Convention.¹³⁴ National legislation concerning employment injury benefits shall protect all employees, including apprentices, in the public and private sectors, including co-operatives.

The application of national legislation concerning employment injury benefits may be limited to prescribed categories of employees and prescribed categories of beneficiaries.¹³⁵ The contingencies covered will also include where due to an employment injury, a morbid condition, incapacity for work resulting from such a condition and involving suspension of earnings as defined by national legislation, total loss of earning capacity or partial loss thereof in excess of a prescribed degree likely to be permanent, or corresponding loss of faculty and the loss of support suffered as the result of the death of the breadwinner by prescribed categories of beneficiaries.¹³⁶

Each Member State shall prescribe a definition of "industrial accident", including the conditions under which a commuting accident is considered an industrial accident, and shall specify the terms of such definition in its reports upon the application of this Convention submitted under Article 22 of the Constitution of the ILO.¹³⁷

Under this Convention, each Member State is obliged to secure the persons protected, subject to prescribed conditions. These include the provisions of benefits such as; medical care, allied benefits in respect of a morbid condition, cash benefits in respect of the contingencies specified in the Article 6 as well as clauses (b), (c) and (d) of the Convention.¹³⁸ The Convention states categorically that medical care and allied benefits in respect of a morbid condition shall comprise of a general practitioner and a specialist in-patient and out-patient care. These include domiciliary visiting, dental care, nursing care at home or in hospital or other medical institutions. Also included are maintenance in hospitals, convalescent homes, sanatoria or other medical institutions, dental, pharmaceutical and other medical or surgical supplies. The Convention requires prosthetic appliances be kept, repaired and renewed as

¹³⁴ Seafarer is the general term for men (and occasionally women also) who work on ships at sea.

¹³⁵ *Ibid* at Article 5.

¹³⁶ *Ibid* at Article 6.

¹³⁷ *Ibid* at Article 7.

¹³⁸ *Ibid* at Article 9.

necessary. Further, eyeglasses, the care furnished by members of such other professions as may at any time be legally recognised as allied to the medical profession, wherever possible must be accessible at all times.¹³⁹

The Convention emphasises further that any State that provides medical care and allied benefits by means of a general health scheme or a medical care scheme for employed persons may specify in its legislation that such care shall be made available to persons who have sustained employment injuries on the same terms as other persons entitled thereto, on condition that the rules on the subject are so designed as to avoid hardship.¹⁴⁰ Cash benefits in respect of loss of earning capacity likely to be a permanent or corresponding loss of faculty will remain payable in all cases in which such loss, in excess of a prescribed degree, remains at the expiration of the period during which benefits are payable.¹⁴¹ In addition, increments in periodical payments or other supplementary or special benefits, as prescribed, shall be provided for disabled persons requiring the constant help or attendance of another person.¹⁴² The cash benefit in respect of the death of the breadwinner shall be a periodical payment to a widow as prescribed, a disabled and dependent widower, dependent children of the deceased and other persons as may be prescribed.¹⁴³

The Convention states that a person employed in the major group of economic activities with the largest number of economically active male persons enjoys protection in the contingency in question, or of the breadwinners of the persons protected, as the case may be, in the division comprising the largest number of such persons or breadwinners, for this purpose. The Convention requires that the wages of the skilled manual male employee be determined on the basis of the rates of wages for normal hours of work fixed by collective agreements, by or in pursuance of national laws or regulations, where applicable, or by custom, including cost of living allowances, if any; where such rates differ by region but paragraph 8 of this Article is not applied, the median rate shall be taken.¹⁴⁴ Notably, no periodical payment shall be less than a prescribed minimum amount. Every claimant has a right of appeal in the

¹³⁹ *Ibid* at Article 10.

¹⁴⁰ *Ibid* at Article 11.

¹⁴¹ *Ibid* at Article 14.

¹⁴² *Ibid* at Article 16.

¹⁴³ *Ibid* at Article 18.

¹⁴⁴ *Ibid* at Article 19.

case of refusal of the benefit or complaint as to its quality or quantity. Each Member State shall accept general responsibility for the due provision of the benefits provided in compliance with this Convention and shall take all measures required for this purpose. Each Member shall, under prescribed conditions, take measures to prevent industrial accidents and occupational diseases and each Member State shall, within its territory, assure to non-nationals, equality of treatment with its own nationals as regards employment injury benefits.¹⁴⁵

3.4.3 Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128)¹⁴⁶

Convention 128 covers old-age benefit, invalidity benefit and survivor's benefit. The coverage for payment of compensation in case of invalidity, death, or old age is fifty percent (50%) for industrial employees, twenty five percent (25%) for all employees including agriculture. This Convention is divided into several parts, namely; General provisions, invalidity benefit, old-age benefit, survivors benefit, standards to be complied with by periodical payments, common provisions, miscellaneous and final provisions. It has total of 54 Articles. Each Member, which has ratified this Convention, may subsequently notify the Director-General of the International Labour Office that it accepts the obligations of the Convention in respect of one or more of Parts II to IV not already specified in its ratification.

The following are provisions specifically relating to social security of employees:

Article 14

- This Article requires each Member to which this Part of Convention applies, to provide social security to the persons protected under the provision of old-age benefit.

Article 15

- Article 15 is crucially important as it covers the survival beyond a prescribed age of not more than sixty five (65) years or such higher age as may be fixed by the competent authority.

Article 22

¹⁴⁵ *Ibid* at Articles 23, 25, 26, 27, 28.

¹⁴⁶ This Convention has not been ratified by South Africa.

- The persons protected under Article 22 include the wives, children and as may be prescribed, other dependants of all breadwinners who were employees or apprentices or the complete economically active population.

Article 29

- In terms of Article 29, each Member shall include the findings of such reviews in its reports upon the application of this Convention submitted under Article 22 of the Constitution of the ILO and shall also specify any action taken.

3.4.4 Medical Care and Sickness Benefits Convention, 1969 (No. 130)¹⁴⁷

Fourteen (14) Member States have so far ratified the Medical Care and Sickness Benefits Convention. This Convention addresses matters concerning medical care and sickness benefit. The Convention repealed two earlier Conventions relating to sickness insurance industry and agricultural Conventions that had been promulgated in 1927. This document contains 45 Articles. This Convention regulates the protection of workers in respect of entitlement to medical care of a curative and preventive nature, and compensation for loss of earnings through sickness. Ratifying states are responsible for securing the provision of medical care and sickness benefit to employees or prescribed classes of persons. Medical care can also be extended to wives and children of persons covered and must include, in particular hospitalisation, pharmaceutical and surgical supplies and dental treatment. Benefits must be available equally to nationals and non-nationals. The rate of cash benefits payable to the standard beneficiary should not be less than sixty percent (60%) of the earnings of the class of employees, to which the beneficiary belongs. Part IV deals with the common provision, and specific conditions under which a protected person is not entitled to benefit.

3.4.5 Maintenance of Social Security Rights Convention, 1982 (No. 157)

Convention 157 calls for the reinforced protection of migrant workers. It provides rules for the adoption of national legislation implementing the principles of the maintenance of rights in course of acquisition and of acquired rights for migrant workers, in respect of all branches of social security covered by Convention No. 102.

¹⁴⁷ This Convention has not been ratified by South Africa.

3.4.6 Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168)

The Employment Promotion and Protection against Unemployment Convention relates to the unemployment benefit. It is a revision of the Unemployment Provision Convention of 1934. It provides standards in the field of employment and unemployment protection, notably in the promotion of full, productive, and freely chosen employment, the principles of equality of treatment, non-discrimination and the methods of providing unemployment benefits.

3.4.7 Maternity Protection Convention, 2000 (No. 183)¹⁴⁸

This Convention revised the 1952 ILO Convention (C103), which in turn was a revision of the original 1919 ILO Convention (C3). The revision was aimed at gaining more ratification by easing the requirements of the 1952 Convention. It covers maternity benefit to women workers. This Convention provides comprehensive protection to pregnant working women in the case where unemployment is due to childbirth. Specifically, it provides for fourteen (14) weeks of maternity benefit to women to whom the instrument applies. Women who are absent from work on maternity leave shall be entitled to a cash benefit, which ensures that they can maintain themselves and their child in proper conditions of health and with a suitable standard of living, which shall be no less than two-thirds of her previous earnings or a comparable amount. The Convention also requires ratifying States to take measures to ensure that a pregnant woman or nursing mother is not obliged to perform work, which has been determined to be harmful to her health or that of her child, and provides for protection from discrimination based on maternity. The standard also prohibits employers to terminate the employment of a woman during pregnancy or absence on maternity leave, or during a period following her return to work, except on grounds unrelated to pregnancy, childbirth and its consequences, or nursing. Women returning to work must be returned to the same position or an equivalent position paid at the same rate. The Maternity Protection Convention provides a woman with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child.

¹⁴⁸ This Convention has not been ratified by South Africa.

3.4.8 Social Security Recommendations

As noted in the previous chapter, the ILO Recommendations are international instruments that lay down detailed standards, which are desirable or which should be achieved. In other words, they are non-binding guidelines that are not subject to formal ratification but which may orient national policy and practice, often on subjects for which a Convention was not considered adequate. Recommendations have a persuasive effect upon Member States and have had a marked influence on the shaping of social security programmes throughout the world in setting norms and standards and by providing guidance.

It is not the intention of this study to discuss all the Recommendations relevant to social security. This is because Recommendations are normally not binding in nature. However, some of the main Recommendations include:¹⁴⁹

3.4.8.1 Income Security Recommendation, 1944 (No.67)

This Recommendation aims at formulating general principles to be followed by states in making income security schemes for employed persons and their dependents. It recommends that such schemes should be funded on compulsory social insurance, supplemented by assistance measures. The risks covered under this Recommendation are sickness, maternity, invalidity, old age, the death of the wage earner, unemployment, emergency expenses and employment injuries. Suggestions for application of guiding principles detailed in other provision are also given in the annexure to the Recommendation.

3.4.8.2 Social Protection Floors Recommendation, 2012 (No. 202)

These Recommendations, together with the Philadelphia Declaration (1944), opened the way for the elaboration and the adoption of Convention No. 102.

¹⁴⁹ Others include: Employment Injury Benefits Recommendation, 1964 (No.121), Invalidity, Old-age and Survivors' Benefits Recommendation, 1967(No.131), Medical Care and Sickness Benefits Recommendation, 1969 (No.134), Maintenance of Social Security Rights Recommendation, 1983 (No.167), Employment Promotion and Protection against Unemployment Recommendation, 1988 (No.176), Maternity Protection Recommendation, 2000 (No.191)as well as the List of Occupational Diseases Recommendation, 2002 (No.194)

The Declaration of Philadelphia and its Income Security Recommendation that was subsequently upheld by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights recognised Social Security as a basic human right.¹⁵⁰ Social assistance broadly described as '*Social Security*' has its own safeguards due to its extensive scope of application and, therefore, the organisations ensured minimum and immediate content of the right¹⁵¹ to social security with a useful framework being made available to financial institutions, donors, human rights agencies and NGO's (working in the field) as a guiding principle.

These guiding principles include the following:

- a) The model: Social Security as a human right and not as a commodity relies on collective funding. This can be of different types: public, professional or community. In all these cases, it is a basic and minimal requirement of the right that an independent, participatory, and regulatory body supervise it.
- b) Contributions and Benefits: The benefits must be defined in advance, along with contributions that do not exceed a reasonable percentage of available income (whatever its source) how small or minimal the benefit is.
- c) Risks: As per the principle of interdependence of all human rights, implementation of the right to social security and ensuring the right to an adequate standard of living in Article II of ICESCR has its related risks such as those in connection with health care, sickness benefits, survivor's benefits and maternity benefits. These risks and sensitive issues must be given priority.
- d) Coverage: States are to undertake negotiations with civil society aimed at guaranteeing social security for all, including the self-employed, rural workers and workers in the informal sector. Provision must be made for periods of time when the insured person, family, or group is not able to contribute to the system. In all cases, social security programmes should be subject by law to such requirements.

¹⁵⁰ Universal Declaration of Human Rights and the International Covenant on Economic and Social and Cultural Rights furthered the major highlights of the Philadelphia Declaration and outlined the steps towards ensuring Social Justice.

¹⁵¹ The Conference concluded that the essentials of social security to be provided to all are: provision of benefits to households and individuals; through public or collective arrangements; aimed at protecting against low or declining living standard and that arises from basic risks and needs.

It was largely believed that labour issues overwhelmingly fall within the domestic field of law,¹⁵² characterised by a unique blend of particular rules negotiated by the parties to an employment relationship and general legislative imperatives enacted for the protection of workers.¹⁵³

3.5 Conclusion

The approach of South Africa with regard to international labour standards has always remained positive. Importantly, the ILO instruments have provided guidelines and useful frameworks for the evolution of legislative and administrative measures for the protection and advancement of the interest of the workforce. Although this may be true, the response to the ratification of the ILO Conventions relating to social security has been poor.

Although South Africa has not ratified even the flagship ILO Convention on Social Security, i.e. Convention No. 102, all the nine areas identified in the Convention and other related Conventions are somehow made part of a social security framework in South African labour legislation and administrative actions. It is reasonable to conclude that South Africa has incorporated the obligation contemplated in the ratified and unratified Conventions through the Constitution and legislation. However, as statistics will reveal in chapter 4, many employees are out of social security coverage in South Africa. To try to address this pandemic, South Africa needs to ratify ILO Convention No. 102, which would provide guidance as, listed above.

The next chapter explores South Africa's social security framework and its fundamental role in providing social security of labour in detail.

¹⁵² Patrick Macklem, "Labour Law Beyond Borders" 5 (3) *JIEL* 1 (2002).

¹⁵³ *Ibid.*

CHAPTER 4: SOUTH AFRICAN SOCIAL SECURITY SYSTEM

4.1 Introduction

In the previous chapter, an international perspective of social security was explored. In particular, the chapter provided a detailed discussion of the provisions of the ILO Convention No. 102 Social Security (Minimum Standards) Convention, 1952 as well as other Conventions and Recommendations relevant to social security. The chapter noted that South Africa has not yet ratified Convention No. 102 even though this study believes that it is in a position to do so.

This chapter seeks to explore South Africa's social security system and its fundamental role in providing social security of labour. It is worth noting that the system of social security is the critical intervention that assists the South African government to eradicate poverty, promote social inclusion, and ensure social cohesion.¹⁵⁴ Remarkably, the rising levels of inequality and high levels of poverty are undoubtedly two of the major challenges facing the South African society and democracy today.¹⁵⁵ In one of unequal countries in the world, it is not sufficient to merely focus on economic growth alone, as there is no guarantee that everyone will benefit from it. Social security is an important safety net that helps to relieve poverty and protects people against economic shocks. Furthermore, social security has been found to be developmental, both socially and economically.¹⁵⁶

4.2 Nature of Social Security in South Africa

Social security in South Africa is made up of funding from national income tax and payments into insurance-based funds, overseen by the Ministry of Social Development. The system is primarily based on four fundamental and inter-related elements, namely; private savings, social insurance, social assistance and social relief. Against this background, this chapter revisits the Constitutional provisions

¹⁵⁴ Tshoose Social Assistance: Legal Reforms to Improve Coverage and Quality of life for the poor people in South Africa (Unpublished Doctoral Thesis) University of South Africa (2016) 9.

¹⁵⁵ Moller "Satisfied and dissatisfied South Africans: Results from the general household survey in international comparison" 2007 81 *Social Indicators Research* 391-393.

¹⁵⁶ Brouckhoff *A Review of the Development of Social Security Policy in South Africa* (2013) 10.

providing for social security protection. Thereafter, the study explores other legislation giving effect to the Constitutional protection in South Africa. Special reference is given to legislation that deals with social insurance as well as social assistance. This will be done with the intention of determining whether South Africa is complying with the ILO standards that cover this topic but in particular the ILO Convention No. 102. The ILO standards that make provision for the employer to finance employment injury benefits.

Compensation must generally be in the form of a periodic payment that should last throughout the contingency as opposed to a lump sum benefit. The appropriate scheme's scope of application must extend to at least half of the national workforce or twenty percent (20%) of residents, minimum compensation levels should be set at fifty percent (50%) of lost wages and that migrant workers should be treated equal to the local workforce.

These principles will be used as benchmarks to evaluate whether or not South Africa complies with the relevant international standards. A cursory glance of the South African social security system reveals that there is an influence of international standards set by the ILO as a result of the South African Constitution, which states that international law should be taken into consideration when social security rights are interpreted.¹⁵⁷ International treaties that cover social security also bind South Africa.¹⁵⁸ The Constitution provides that a Court, tribunal or forum may, but is not obliged to; consider international law when interpreting the Bill of Rights.¹⁵⁹

4.3 Social Security Framework Under the Constitution

It is important to realise that a Constitutional imperative regarding social security exists in South Africa. These relate, *inter alia*, to health care, food and water.¹⁶⁰ The Constitution of South Africa is the supreme law of the country, any law or conduct, which is invalid, and the obligations imposed by it must be fulfilled.¹⁶¹ Since 1996,

¹⁵⁷ S 39 (1) of the Constitution.

¹⁵⁸ These treaties include the SADC Treaty (1992), the Charter of Fundamental Social Rights in SADC (Social Charter) (2003), the 2007 Code on Social Security in the SADC Code and the 2006 Draft Protocol on the facilitation of Movement of Persons.

¹⁵⁹ S 39 (1) (b) of the Constitution.

¹⁶⁰ S 27 (1) (a) (b) of the Constitution.

¹⁶¹ S 2 of the Constitution.

social security has been transformed from a welfare system predominantly aimed at the white population to a more encompassing social security system.

The Constitution provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.¹⁶² In fact, this was emphasised in *Khosa and others v Minister of Social Development and others*¹⁶³ and *Mahlaule and others v Minister of Social Development and others*¹⁶⁴ where the Constitutional Court held that the right of access to social security, including social assistance, for those unable to support themselves and their dependents, was entrenched because the society in South Africa valued human beings and wanted to ensure that people were afforded their basic needs. The reason for this, as Liebenberg opines, is that the new democratic government inherited a social security system that was fragmented, inequitable, and administratively inefficient. In addition, the apartheid social security system was premised on high levels of coverage, with social assistance forming a residual “safety net” function for targeted categories of vulnerable groups living in poverty, primarily, persons with disabilities, children and the aged.¹⁶⁵

Importantly, children, like adults, have the right of access to social security. This right is entrenched in a cluster of other child economics and social rights found in section 28(1) (c) of the Constitution. This section provides that, every child has the right to basic nutrition, basic health care services and social services. However, the Constitutional Court emphasized in *Grootboom and Others v Government of the Republic of South Africa and Others*¹⁶⁶ that section 28 (1) (c) must be read in conjunction with section 28 (1) (b) of the Constitution. These sections imply that parents have the primary responsibility to provide economic and social rights of their children. The State intervenes only where the guardians or parents fail or are unable to provide for children. The primary responsibility to take care of children, thus lies with

¹⁶² S 27 (1) (c) of the Constitution.

¹⁶³ (2004) 6 SA 505 (CC).

¹⁶⁴ (2004) 6 BCLR 569 (CC).

¹⁶⁵ Liebenberg and Sandra ‘The Judicial Enforcement of Social Security Rights in South Africa’, in Riedel, Eibe, (ed.), *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges*, Springer-Verlag, Berlin, Heidelberg (2007) 70. Sandra Liebenberg was also part of the drafting process of the Constitution.

¹⁶⁶ [2000] ZACC 14.

their parents. Children's growth, development, and well-being depend largely on the ability of their parents or guardians' ability to provide for them. In terms of section 27 (2) of the Constitution, the government is required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. In *Grootboom and Others v Government of the Republic of South Africa and Others*,¹⁶⁷ the Constitutional Court held that progressive realisation entails that while the state might be unable to realise a right immediately due to limited resources, it is nonetheless obliged to improve accessibility both in terms of numbers of people accessing the right progressively, as well as the range of people covered. In addition, progressive realisation can also be seen as referring to improving the quality of the right being realised, rather than merely increasing the scope.

Furthermore, the Constitution provides everyone with a right of access to social security; this means that the right of access is not just limited to South African citizens but also includes foreigners who are permanent residents of South Africa. In *Khosa and others v Minister of Social Development and others*, the Constitutional Court found that the exclusion of permanent residents from COIDA was an infringement of the permanent residents' rights to dignity and equality and of their right of access to social security.¹⁶⁸

This study will focus on social security in the form of social insurance and social assistance.

4.4 Social Insurance

Social insurance is defined as a mandatory, contributory system of one kind or another, regulated by private sector provisions, concerned with the spreading of income over the life cycle or the pooling of risks.¹⁶⁹ To put it differently, social

¹⁶⁷ [2000] ZACC 14. See also *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 SA 721 (CC).

¹⁶⁸ *Khosa and others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (2004) 6 BCLR 569 (CC) para 46.

¹⁶⁹ The report of the Committee of Inquiry into a Comprehensive System of Social Security (Taylor Committee Report) provides a comprehensive attempt to bring the different elements of a fragmented social security to address, in a coherent and phased way, the Constitutional and economic challenges facing South Africa. To address this, the Committee took into consideration the case of *Government of the Republic of South Africa v Grootboom* (2001) 1 SA 46 (CC) and recommended that social security policies and programmes must be reasonable both in their conception and their implementation.

insurance is a form of social security designed to protect income earners and their families against a reduction or loss of income because of exposure to risks. The contributions to social insurance are made by employers, employees, self-employed persons, and sometimes by the state.¹⁷⁰ For the most part, the contributions are wage-related and the employees and employers agree upon a percentage deduction aimed at achieving a reasonable level of income maintenance.¹⁷¹

Notably, social insurance covers contingencies such as pensions or provident funds, medical benefits, maternity benefits, illness, disability, unemployment, employment injury benefits, family benefits and survivor's benefits. Notwithstanding the fact that South Africa lacks a statutory pension and insurance arrangement,¹⁷² it has a set of social insurance funds that provide benefits under specific circumstances, including the Unemployment Insurance Fund (UIF), the RAF and the funds established under the COIDA and the ODMWA. However, a notable problem with social insurance is that it is based on full employment, which implies that people who are unemployed cannot benefit under such schemes.¹⁷³

4.5 Unemployment Insurance Fund

This section considers the unemployment insurance aspect of the UIF. The UIF system plays a key role in South Africa's social security architecture, particularly since it is the only arm of South Africa's social security that caters for the unemployed, more specifically, the portion of the unemployed that were previously employed. Presently, two sets of laws regulate unemployment insurance in the country. The Unemployment Insurance Act¹⁷⁴ and the Unemployment Insurance Contributions Act.¹⁷⁵ The purpose of the Unemployment Insurance Act is to provide for short-term unemployment insurance to qualifying workers. In particular, it provides for the payment from the Fund of unemployment benefits to certain employees and for the payment of illness, adoption, maternity and dependant's benefits related to the unemployment of such an

¹⁷⁰ Van Der Walt and Govindjee *Labour Law in Context* (2017) 277.

¹⁷¹ Development Policy Research Unit (DPRU) (2011) An overview of the South African labour market from Quarter 3 of 2010 to Quarter 3 of 2011.

¹⁷² Available at:

https://www.gov.za/sites/www.gov.za/files/Comprehensive_Social_Security_in_South_Africa_a.pdf. (Accessed on 24 October 2017).

¹⁷³ Van Der Walt and Govindjee *Labour Law in Context* (2017) 277.

¹⁷⁴ Act 63 of 2001.

¹⁷⁵ Act 4 of 2002.

employee.¹⁷⁶ The Unemployment Insurance Contributions Act¹⁷⁷ provides for the imposition and collection of contributions for the benefit of the UIF.

Astonishingly, the South African economy suffers from the debilitating effects of very high unemployment rates in the world, with African employees, women, youth and those with incomplete schooling being disproportionately affected.¹⁷⁸ Not only are official unemployment rates astoundingly high standing at twenty seven point seven percent (27.7%) but also many of the unemployed in the South African economy have also never worked before.¹⁷⁹ In order to address this problem, the Employment Services Act,¹⁸⁰ (ESA) was promulgated and took effect on 9 August 2015. The ESA is a genuine attempt by the legislature to address unemployment levels.¹⁸¹

Similarly, the unemployment insurance system was introduced as a system offering subsistence income to eligible recipients to alleviate the harmful economic and social effects of income loss due to unemployment shocks. This kind of systematic arrangement is prevalent in many industrialised economies in the world but much less so in developing countries. As regards to administration, the UIF collects unemployment insurance in South Africa, which falls under the auspices of the Department of Labour. As mentioned above, both employers and employees contribute to the UIF through SARS if the employer is registered with SARS or through the Unemployment Insurance Commissioner if not.¹⁸² Employers and employees to whom the Act applies are obliged to contribute, on a monthly basis, an amount equal to one percent (1%) of the employee's remuneration each. The benefit amount for claimants is dependent on the wage level of the contributor prior to applying for

¹⁷⁶ Van Der Walt and Govindjee *Labour Law in Context* (2017) 281.

¹⁷⁷ Unemployment Insurance Contributions Act 4 of 2002.

¹⁷⁸ Van Der Walt and Govindjee *Labour Law in Context* (2017) 280. Development Policy Research Unit (DPRU). (2011) An overview of the South African labour market from Quarter 3 of 2010 to Quarter 3 of 2011.

¹⁷⁹ Available at: <http://www.statssa.gov.za/?cat=31>. Media Release 28 September 2017 (Accessed on 15 October 2017).

¹⁸⁰ Act 4 of 2014.

¹⁸¹ The ESA repeals the Employment Services provisions contained in the Skills Development Act, No 97 of 1998 (SDA). The purpose of ESA is to establish productivity within South Africa, decrease levels of unemployment, and provide for the training of unskilled workers. Therefore, going forward, the Public Employment Service will register job seekers and placement opportunities. The aim is then to match job seekers with services and placement opportunities. The Public Employment Service will also provide training for unskilled job seekers and give the unemployed access to career information.

¹⁸² Van Der Walt and Govindjee *Labour Law in Context* (2017) 280.

unemployment insurance.¹⁸³ Subsequently, the funds collected are then used to provide income replacement benefits including unemployment, illness, maternity, adoption, and dependent's benefits. A point of concern is that it does not apply to government employees.

4.6 Compensation for Occupational Injuries and Diseases Act¹⁸⁴ (COIDA)

Before looking at the significance of COIDA, it is important to reiterate that the ILO's primary goal is to promote opportunities for women and men to obtain decent and productive work that is characterised by conditions of freedom, equity, security and dignity. In this formulation of decent work, the protection of workers against work-related sickness, disease and injury, as embodied in the Preamble to the Constitution of the ILO, is an essential element of security and continues to be a high priority for the ILO.¹⁸⁵ According to the ILO estimates, each year two million men and women die from work-related diseases and accidents, a death toll averaging some 5,000 workers a day.¹⁸⁶ When the COIDA was enacted in 1993 and took effect on 1 March 1994, it significantly improved the common law position.¹⁸⁷ COIDA replaced the Workman's Compensation Act¹⁸⁸ (WCA) and has a wider scope than the previous WCA. Currently, COIDA is the primary legislation governing the occupational injuries and diseases at the workplace.

The COIDA benefits provide for medical examination and treatment, disability certification and compensation. Similarly, when an employee has died as a result of injuries sustained in the workplace or an occupational disease, the dependents of the deceased employee may qualify for benefits.¹⁸⁹ Primarily, the COIDA prevents employees covered by the Act from suing their employers for damages in terms of

¹⁸³ *Ibid.*

¹⁸⁴ Act 130 of 1993.

¹⁸⁵ *Moloi* Compensation for Occupational Injuries and Diseases Act 130 of 1993: Provided by the Commission for Conciliation, Mediation and Arbitration (CCMA). Available at: <http://www.labourguide.co.za/health-and-safety/544-perspectives-on-compensation-for-occupational-injuries>. (Accessed on 22 October 2017).

¹⁸⁶ *Ibid.*

¹⁸⁷ Smit "Employment Injuries and Diseases" in Olivier MP, Smit & Kalula (eds) *Social Security: A Legal Analysis* (2003) 459 (hereafter Smit *Employment Injuries and Diseases* (2003)).

¹⁸⁸ Act of 1941.

¹⁸⁹ Smit *Employment Injuries and Diseases* (2003) 466.

common law.¹⁹⁰ In the case of *Free State Consolidated Gold Mines (Operations) Bpk h/a Western Holdings Goudmyn v Labuschagne*,¹⁹¹ the Court held that in a case of total permanent disablement of an employee, there is no obligation on the employer to retain the services of an employee or to find alternative employment for an employee. However, an employer who dismisses a partially disabled worker must, before the dismissal, consult with the employee concerning the disablement and investigate whether the employee can be accommodated elsewhere in the employer's business.

In the case of *Jooste v Score Supermarket Trading (Pty) Ltd*,¹⁹² the Constitutional Court was asked by the applicant to confirm a decision of the Eastern Cape High Court, which declared section 35 of COIDA unconstitutional. The applicant fell and was injured at her workplace. She claimed that her injuries were caused by the negligence of one or more of her fellow workers during the course of their employment. She brought a common law claim for damages against the employer, who argued that section 35 of COIDA prevented an employee from making such a claim against an employer. The applicant responded by stating that the provision was unconstitutional in that it violated her rights to equality, fair labour practice, and access to courts. Her equality challenge was based on the fact that the provision denies employees their common law right to claim damages from their employers. This, she maintained, placed employees at a disadvantage in relation to people who are not employees and who retain such a right. The High Court found that the provision violated an employee's right to equal protection and benefit of the law. The Constitutional Court accepted that the challenged provision differentiated between employees and non-employees and found that there was no evidence in support of the proposition that the differentiation in issue amounted to unfair discrimination and in fact held that, the applicant advanced no contention in that regard. The Court found that the challenged provision was not arbitrary or irrational. Nor did it favour employers only. In other words, it was rationally connected to the legitimate purpose of the Act. The Court conceded that whether an employee ought to have retained the common law right to claim damages, either over

¹⁹⁰ S 35(1) of COIDA.

¹⁹¹ (1999) 20 ILJ 2823 (LAC).

¹⁹² (1999) 20 ILJ 525 (CC).

and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy.

Having said that, it is important to remember that anyone who employs one or more workers must register with the Compensation Fund and pay the annual assessment fee. Claims for employees employed in the mining and building industries must be referred to the relevant mutual associations. Claims by employees working for individually liable employers (the state, parliament, the provincial authorities and local authorities that have been exempted from making payments to the Compensation Fund) must be referred to the employer. However, it is beyond the scope of this study to discuss the steps that should be followed when reporting to and claiming from the Compensation Fund. Like the UIF, COIDA does not apply to government employees. This remains a key concern, particularly given the provisions of section 9 (equality clause) and 23 (labour relations) of the Constitution.

4.7 Occupational Diseases in Mines and Works Act, 1973 (OMDWA)

The Occupational Diseases in Mines and Works Act is over 100 years old and was last amended in 1994. This important legislation covers only the mining and mining-related sector of the industry. It contains a list of diseases for which those employed in specified job categories in a mine or works may be compensated. Importantly, OMDWA provides compensation for occupational lung diseases in miners and ex-miners only. Currently, it is administered by the Medical Bureau of Occupational Disease (MBOD), which falls under the Department of Health Chief Directorate: Non-Communicable Diseases. The MBOD is responsible for benefit medical examination of miners and ex-miners. OMDWA provides for post-mortem benefits (through the National Institute for Occupational Health's Pathology Section) for miners if an occupational disease is found, even if it was not the cause of death. OMDWA pays lump sum benefits based on the level of impairment and does not make any further pension provision. The low-fence for lung function loss is thirty five percent (35%) for compensation to be paid out. All medical expenses including follow-up related expenses to the treatment of the lung disease are paid by the mine owner(s) when mining diseases are not covered under the OMDWA. COIDA is applicable.

Notably, in *Mankayi v AngloGold Ashanti Ltd*,¹⁹³ the issue was whether section 35 (1) of the COIDA extinguishes the common law right of mineworkers to recover damages for occupational injury or disease from negligent mine owners notwithstanding that they are not entitled to claim compensation under COIDA but only under the ODMWA. AngloGold employed Mr Mankayi as an underground mineworker. In the course of his employment, he contracted diseases in the form of tuberculosis and chronic obstructive airways, which rendered him unable to work. Mr Mankayi received some compensation under ODMWA but claimed that he was entitled to sue the mine directly at common law.

Both the South Gauteng High Court and the Supreme Court of Appeal interpreted section 35 (1) of COIDA as extinguishing the mineworkers' common law claim and extending the protection against common law liability to the mine owners. In the Constitutional Court, Mr Thembekile Mankayi attacked these findings on the basis that, because he is precluded by section 100 (2) of ODMWA from claiming compensation under COIDA, section 35 (1) of COIDA does not apply to him. The Constitutional Court held that section 35 (1) of COIDA does not affect the common law right of an employee to claim damages for the compensable disease under ODMWA. This means a mineworker who claims damages for the compensable disease under ODMWA retains the right to recover supplementary damages for an injury or disease from a negligent mine owner.

4.8 The Road Accident Fund (RAF)

The RAF is a government-run insurance scheme that operates in terms of the Road Accident Fund Act.¹⁹⁴ The Fund was primarily established in order to pay compensation to road accident victims injured or to the dependents of those killed as a result of the negligence of the driver or owner of a motor vehicle at any place within South Africa. The Road Accident Fund Amendment¹⁹⁵ came into effect on 1 August 2008. The Amendment Act limits the RAF's liability for compensation in respect of claims for non-pecuniary loss or what is commonly referred to as general damages, specifically to instances where a 'serious injury' has been sustained. The Amended

¹⁹³ [2011] ZACC 3.

¹⁹⁴ Act 56 of 1996 (as amended).

¹⁹⁵ Act 19 of 2005.

Act also limits the amount of compensation that the RAF is obliged to pay for claims for loss of income or a dependent's loss of support arising from the bodily injury or death of a victim of a motor vehicle accident.

In order to have a successful claim from the RAF, certain conditions or requirements must be fulfilled. Key among the requirements is that one can claim from RAF only if the accident was not the claimants' fault. This means drivers, passengers, pedestrians, cyclists and motorcyclists can all claim from the Road Accident Fund, as long as they were not entirely responsible for the accident.¹⁹⁶ The fund provides cover for both South Africans and foreigners involved in accidents on South African roads. In terms of the RAF, a claimant may submit a claim from the RAF if such claimant(s):

- were injured in an accident and were not the driver solely responsible for the accident;
- was the driver responsible for the accident but not the owner of the vehicle, and the accident was a result of the owner's negligence (for example, because the owner failed to replace worn brake pads on the vehicle);
- was a child, spouse or another person who was dependent on the income of a person killed in an accident; and
- was a close relative of the deceased and paid for this person's funeral.

However, one cannot claim from the RAF if:

- the person was the driver and is the owner of the vehicle solely responsible for the accident; and
- the person was the only person involved in the accident (for example, you were injured because you crashed your vehicle into a tree or another obstacle, and nothing else, such as badly maintained roads, contributed to the accident).

Importantly, before the RAF can process any claim, a medical practitioner must assess the injury in terms of the American Medical Association's Guide to the evaluation of permanent impairment (the AMA Guide). If the injury is found to have resulted in thirty percent (30%) or more impairment of the whole person, according to the methods stipulated in the AMA Guide, the injury should be assessed as serious. The final step of the report will follow only where the injury is not listed on the 'non-serious injuries'

¹⁹⁶ Available at: <https://www.raf.co.za/Pages/default.aspx>. (Accessed on 12 October 2017).

list, and where the injury is considered to have resulted in less than thirty percent (30%) of the whole person's impairment. In this case, the medical practitioner should apply what has come to be known as the 'narrative test'. According to this test, the medical practitioner should consider if the injury has resulted in any one, more or all of the following consequences:

- Serious long-term impairment or loss of a body function;
- Permanent serious disfigurement, severe long-term mental or severe long-term behavioural disturbance or disorder; and
- The loss of a foetus.

The Road Accident Fund requires that you submit a claim within three years of the motor vehicle accident if you know who was responsible.

4.9 Other Insurance Legislation

In South Africa, there are a number of other important statutes relevant to the subject matter of occupational health and safety. The Occupational Health and Safety Act¹⁹⁷ (OHSA) and the Mines Health and Safety Act¹⁹⁸ are particularly important. OHSA encourages employers and employees to make sure that their own workplaces are safe to prevent the occurrence of occupational injuries and diseases.¹⁹⁹ In fact, OHSA reprimands those employers who fail to comply with its regulations by imposing penalties on them or by referring cases to the criminal justice system for adjudicating contravention.²⁰⁰

As regards to the Mines Health and Safety Act, the Act requires the owner of every mine in operation to ensure, as far as reasonably practicable, that the mine is designed, constructed, equipped and operated in such a way that employees can perform their work without being endangered.²⁰¹ The employers and employees are required to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines.²⁰²

¹⁹⁷ Act 85 of 1993.

¹⁹⁸ Act 29 of 1996.

¹⁹⁹ S 38 (1) of OHSA.

²⁰⁰ *Ibid.*

²⁰¹ S 2 (1) of the Mines Health and Safety Act 29 of 1996.

²⁰² S 2 (11) of the Mines Health and Safety Act 29 of 1996.

In 1998, the Medical Schemes Act²⁰³ was promulgated. This Act seeks to consolidate the laws relating to registered medical schemes. It provides for the establishment and appointment of the Registrar of the Council for Medical Schemes. Further, it makes provision for the registration and control of certain activities of the Medical Schemes. The Act also seeks to protect the interests of members of medical schemes and makes provision for the coordination of medical schemes and incidental matters. The fulfilment of this promise is an attempt to remove a fundamental difference between the poor and rich people of South Africa.

In addition, it is well understood that a healthier population translates into a productive and effective workforce. Accordingly, the National Health Insurance (NHI) is established as a financing system that will make sure that all citizens of South Africa, as well as foreign nationals with South African residents, are provided with essential healthcare, regardless of their employment status and ability to make a direct monetary contribution to the NHI Fund. In fact, the Health Minister Aaron Motsoaledi has emphasized that the NHI will be compulsory for all South African citizens.²⁰⁴ However, the Minister observed that all state medical aids would be made redundant, even though the question of private medical aids' future would still need to be answered. Overall, the implementation of the NHI in South Africa is a noble attempt to address the inequities and scarcities of healthcare resources in the country. However, South Africa's status, as a developing country, does not preclude the success of universal healthcare, as evidenced by certain international models.

4.10 The National Social Security Fund (NSSF)

The government has made proposals for an integrated social insurance scheme, referred to as the NSSF. The NSSF will fill a significant gap in South Africa's social security arrangements, and it will complement social assistance programmes, social insurance funds, and private arrangements. The NSSF will provide pensions to employees who reach retirement, disability benefits to those who are physically unable to work and survivor benefits to their dependents should they not live until

²⁰³ Act 131 of 1998.

²⁰⁴ Available at: <http://www.health.gov.za/index.php/nhi> (Accessed on 21-10-2017). See also: <https://www.businesslive.co.za/bd/national/health/2017-08-31-aaron-motsoaledi-takes-flak-over-national-health-insurance/> (Accessed on 21-10-2017). Also <https://mg.co.za/Article/2011-08-12-national-health-insurance-a-dummys-guide>.

retirement.²⁰⁵ Contributions to the pension and risk-benefit components of the NSSF will be pooled, sharing risk across all contributors. The Social security payroll contributions worth twelve percent (12%) of earnings are proposed to be met by employees and employers. This includes unemployment insurance, which will continue to be paid at the rate of two percent (2%). There will be both a floor and a ceiling on contributions. It is proposed that workers earning less than R13 000 per year should not be obliged to contribute to the NSSF, though they will continue to contribute to the UIF. Those earning in excess of the UIF threshold will not contribute to income above that level.

As regards to the pension, the NSSF provides that at retirement, an employee who contributed to the NSSF will receive a pension calculated according to a straightforward formula based on lifetime wages, length of service, and an accrual rate to determine what proportion of average earnings the employee would receive for every year worked. This is a defined-benefit pension plan, though its design is intended to yield an income in retirement similar to the average expected outcome of defined-contribution plans. This means that employees with equivalent contribution records will receive the same pension because the investment risk is carried by the system. An employee's pension should represent a fair return on contributions during his or her career, taking into account that the risk benefits are also a claim on these contributions. The NSSF has been designed to enable employees who have worked a full career to achieve an income in retirement of at least forty percent (40%) of their earnings over the course of their career. However, workers will not achieve this replacement income through the NSSF alone: for lower-income workers, the old age grant will continue to contribute to income in retirement, while higher-income earners will need to make supplementary contributions during their careers if they are to achieve an adequate retirement pension.

The next discussion focuses on the second arm of Social Security in South Africa.

²⁰⁵ Inter-Departmental Task Team On Social Security And Retirement Reform: *Towards Integrated And Comprehensive Social Security In South Africa* (2012)

4.11 Social Assistance Framework in South Africa

Although this study's main focus is on social security in the form of social insurance, it is imperative to consider briefly the social assistance framework in South Africa. The primary aim of social assistance is to provide a safety net of minimum income protection for people who are unable to contribute and to provide for social security protection through contributing to, for example, a pension scheme.²⁰⁶ The Code on Social Security in SADC defines Social assistance as "a form of social security that provides assistance in cash or in kind to persons who lack the means to support themselves and their dependents."²⁰⁷ South Africa's social assistance system originated as a result of the state's response to poverty among white citizens in the 1920s and 1930s. The system first launched non-contributory old-age pensions, followed by programmes for disabled and poor parents, followed by the introduction of a limited system of contributory unemployment insurance. In part, this system was de-racialised in the 1940s, but it was not until the end of apartheid that the racialisation of social assistance was completely abolished with respect to old-age pensions, and access to social assistance as a whole was de-racialised.²⁰⁸

Notably, the White Paper for Social Welfare of 1997 is an important policy document that was developed to move from the previous era of fragmented social welfare to a new developmental paradigm. The main focus was, therefore, to change a fragmented system with different provincial systems into one system, and to change from a system of entitlement and receiving of handouts to a developmental stage where people take ownership and are part of their own development. The White Paper commits itself to provide social grants for eligible people. In 1997 the White Paper for Social Welfare was the first policy mechanism in which developmental aspects of social security were evoked and it paved the way for widespread legislative reforms. However, a paradigm shift towards a developmental direction calls for an integrated and coordinated service delivery approach where resources from different role players are pulled together. The White Paper laid out a new direction towards development-orientated work, but it

²⁰⁶ Van Der Walt and Govindjee *Labour Law in Context* (2017) 278.

²⁰⁷ *Ibid.*

²⁰⁸ Seekings and Jeremy "Inequality in South Africa" Lecture presented at University of Cape Town, Cape Town, South Africa, May 25, 2011.

committed also to the continuation of social assistance as one route to poverty alleviation.

Since the end of apartheid in 1994 and the implementation of extensive social welfare policy in South Africa, there has been an ongoing dialogue and debate surrounding the expansion of social assistance. Divergent themes and direction have characterised social welfare in the past two decades following the end of apartheid.²⁰⁹ The first decade, following the end of apartheid involved the political debate which is centred on poverty alleviation and redistribution. In the current decade, the debates have transitioned to issues of rising expenditure, handouts and the language of welfare dependency.²¹⁰ While the South African government has a Constitutional commitment to ensure income security for its citizens, there is widespread concern that social assistance has stretched to a point of un-sustainability. Furthermore, there is a persistent concern that the expansion of social assistance has resulted in beneficiaries' dependence on cash transfers from the state.

The South African Social Security Agency (SASSA) grants are administered alongside insurance-based schemes that cover areas such as unemployment and child benefits. Social assistance in South Africa is mainly concerned with the payment of grants and is regulated by the Social Assistance Act,²¹¹ which is administered by SASSA. The Social Assistance Act provides general requirements applicable to most of the social grants listed below.²¹² SASSA grants cover the following areas:

- Older persons;²¹³
- War Veteran's Grant;
- Grants In Aid;
- Disability Grant;²¹⁴
- Child Support Grant;²¹⁵

²⁰⁹ Available at: https://psujia.files.wordpress.com/2012/04/social_welfare_final.pdf. (Accessed on 15 June 2017).

²¹⁰ Surender and Rebecca "Social Assistance and Dependency in South Africa: An Analysis of Attitudes to Paid Work and Social Grants" 2010 39 *Journal of Social Policy* 203-21.

²¹¹ Act 13 of 2004.

²¹² S5 of the Social Assistance Act.

²¹³ S11 of the Social Assistance Act.

²¹⁴ S9 of the Social Assistance Act.

²¹⁵ S6 (a) of the Social Assistance Act.

- Care Dependency Grant;²¹⁶
- Foster Child Grant; and ²¹⁷
- Social Relief in Distress.²¹⁸

Today, South Africa's social assistance system is accessible to more beneficiaries. The government has significantly increased its spending on social grants. Today, more South African citizens are recipients of social assistance. Approximately, about sixteen (16) million people receive grants in South Africa, with over eleven (11) million persons in receipt of the Child Support Grant²¹⁹ from the allocated DSD budget of R137 billion.²²⁰ The number of grants available and the scope of assistance offered to South Africans have expanded from offering grants to just children and seniors, to the introduction of three coverage areas: childhood, working age, and old age. The assistance system currently comprises of the following grants, namely:

- Child Support Grant;
- Care Dependency Grants;
- Foster Care Grants;
- Unemployment Insurance Fund;
- Compensation Fund;
- State Disability Grant; and
- Old Age Pension Grant

4.12 Ubuntu

Within the social protection context, *Ubuntu*²²¹ as a Constitutional value plays a crucial role in supporting the existence of social assistance in South Africa by preserving the

²¹⁶ S9 of the Social Assistance Act.

²¹⁷ S8 of the Social Assistance Act.

²¹⁸ S11 of the Social Assistance Act.

²¹⁹ Van Der Walt and Govindjee *Labour Law in Context* (2017) 279.

²²⁰ Govindjee Social Security In South Africa: Implications of South Africa's Ratification of The ICESCR and Recent Developments, 28th Annual Labour Law Conference 4 -6 August 2015.

²²¹ Ubuntu is a Zulu word, which in its simplest form is defined as the art of being human and a way of life associated with many African societies.

dignity of South Africans.²²² *Ubuntu* is an all-encompassing view of humaneness, caring, sharing, respect, and compassion.²²³

4.13 Conclusion

South Africa has made good progress in broadening social assistance and expanding health care and social insurance since 1994. However, there is still more to be done if the social security system is to fully meet its Constitutional requirements. Important is to remember that all South Africans have, in terms of section 27 (c), a Constitutional right to social security. For this reason, a well-designed social security system reduces the risks associated with economic change or loss of work and contributes to household income security and social cohesion. Whether funded by the fiscus, or mandatory contributions, it shares the risk between the vulnerable and the not so vulnerable, offering the greatest protection to those that need it most and thereby promoting social solidarity. It also supports and complements employment objectives, labour market institutions and collective bargaining arrangements.

This chapter has observed that the social security system in South Africa has a long history of fragmentation due to the discriminatory practices of apartheid. The consequences of the said discriminatory practices of apartheid led to inconsistencies in the levels of benefits and quality of service delivery among the different 'race' groups, with the black population suffering the greatest discrimination as beneficiaries of social security. To this end, the study has established that South Africa has two primary pillars of social security. The first pillar is a social insurance system, which consists of the UIF, COIDA, and the RAF. The UIF and COIDA are occupational insurances and play the role of a safety net for those beneficiaries currently in the

²²² Whitworth and Wilkinson "Tackling child poverty in South Africa: Implications of *Ubuntu* for the system of social grants" (2013) 30 *Development Southern Africa* 125-126.

²²³ Matolino and Kwindigwi "The end of *Ubuntu*" (2013) 32 *South African Journal of Philosophy* 199; See also Letseka "In defence of *Ubuntu*" (2012) 31 *Studies in Philosophy and Education* 47-57. For further reading in this regard, see *S v Makwanyane* 1995 3 SA 391 (CC), *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 3 SA 238 (SCA) para 38, *Koyabe and Others v Minister for Home Affairs and Others* (Lawyers for Human Rights as Amicus Curiae) 2010 4 SA 327 (CC), Gade "What is *Ubuntu*? Different interpretations among South Africans of African descent" (2012) 31 *South African Journal of Philosophy* 484-493, Keevy "*Ubuntu* versus the core values of the South African Constitution" 2009 34 2 *Journal of Juridical Science* 20-22 and Bennett "*Ubuntu*: An Africa equity" 14 2011 *PER* 30-53.

formal labour market. Specifically, they relate to formal sector workers but there are exclusions, as indicated above. Therefore, while social insurance fills a major welfare hole for millions of beneficiaries in the workplace, most employees are found in informal sectors and a few employees are in the formal sectors.

The second pillar is social assistance. The majority of people in South Africa are unemployed and are left out in the cold without any social insurance. For example, while the UIF plays an important role of providing occupation insurance during the unemployment period, this measure can only make provision to a certain extent. Notably, RAF remains the only fund that has a universal coverage in the South African context.

The chapter also considered the social assistance framework in South Africa. It was highlighted that South Africa's social assistance system is built on a solid framework with noble principles that aim to stop the social and economic marginalisation of the poor. The system attempts to achieve this through a series of primarily non-contributory, means-tested grants that intend to provide the poor with opportunities they would not have access to in the absence of social assistance. These grants offer cash transfers that are envisioned to remove barriers preventing the poor from accessing education, healthcare, and employment, with the ultimate goal of significantly decreasing the number of citizens living in poverty.

Similarly, the study highlighted that South Africa suffers from an extraordinary unemployment problem, displaying an official unemployment rate of around twenty seven point seven percent (27.7%) in 2017.²²⁴ Many South Africans cannot afford voluntary contributions to medical schemes and/or retirement funds, especially at the lower end of the income distribution, which results in an incomplete coverage. This has resulted in, social cash transfers, both conditional as well as unconditional, to become an important strategy for reducing poverty and promoting social development. In this context, the current unemployment insurance system was introduced in an attempt to provide a much-needed relief to those who find themselves out of work.

²²⁴ Available at: <https://tradingeconomics.com/south-africa/unemployment-rate>. (Accessed on 21-10-2017).

This chapter has observed, however, that social insurance does not serve the most vulnerable among the unemployed, namely those who have never worked before and those in the informal sector. Govindjee and Van Der Walt have echoed these sentiments, in so far as to observe that in South Africa, with some exceptions, social insurance is purely based on formal employment, which means that coverage by the schemes is dependent upon the existence of a formal employment relationship.²²⁵

Additionally, the system is designed in a way that the benefit amount and the potential days of benefit are dependent on the claimants' previous employment. The system appears to favour claimants in more stable previous employment positions as opposed to their counterparts with shorter previous work histories, since the days of benefits are determined by the amount of time worked within the four years prior to the claim. The current social security system remains highly fragmented. The establishment of a single department responsible for social security will unify policymaking. The shared administration and services will improve efficiency and service delivery across the agencies and significantly reduce costs. In mitigation though, poorer claimants are able to claim a larger proportion of their benefits as replacement income, thus rendering the system progressive with regard to income.

Similarly, the government is moving ahead with efforts to compel all workers to contribute towards a national social security fund to provide for retirement, death, and disability benefits. The implementation of such efforts remains a challenge and requires further research. In particular, this study highly recommends for the establishment of a single department with oversight for social security. Such a department will serve as the point of policy coordination for the social security system. It will be responsible for ensuring that all aspects of the system work efficiently and coherently to achieve the goals of social security and that the system complements labour market initiatives as well as broader government projects and priorities

Having looked at the social security framework in South Africa, the next chapter concludes this study. In doing so, the chapter provides general proposals and Recommendations reflected in the problem statement and the research questions.

²²⁵ Van Der Walt and Govindjee *Labour Law in Context* (2017) 277.

CHAPTER 5: RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

Chapter one of the study discussed the proposed plan of the study by way of introduction of the background of the study, the role of Social Security in South Africa, problem statement, the research methodology, aims and objects of the study. Chapter two of the study discussed the establishment of the ILO, aims and objective of the ILO and the ratification process of the ILO Conventions. The chapter also considers the supervision of the ILO Conventions. Chapter three provided a detailed discussion of the ILO Convention No. 102 Social Security (Minimum Standards) Convention, 1952. The chapter also considered other Conventions relevant to social security and well as Recommendations. Chapter four of the study provided an evaluation of the South African social security framework. In particular, the chapter explored the two pillars of social security i.e. social insurance and social assistance framework and the manner in which each element works in terms of the benefits and the grant system.

This chapter presents the conclusion of this study. It further highlights Recommendations based on this study in particular the need and benefits of ratifying Convention No. 102.

With the advent of democracy, South Africa became a member of the international community. International law is now viewed as one of the pillars of the new democracy. In considering the rationale of applying international law in South Africa, Olivier argues that the 1993 Constitution, for the first time in South African history, accorded Constitutional recognition to international law, thereby ending the debate on the status of international law in South African domestic law.²²⁶ The need to take into account of international developments in the design of social security institutions and norms in South Africa has been recognised before.²²⁷

²²⁶ Olivier "Interpretation of the Constitutional provisions relating to international law" (2003) 6 *PER* 26-27.

²²⁷ Goosen *et al* "Industrial and comparative social security standards" in Olivier *et al* (eds) *social security law: General principles* (1999) 527. See also Fombad "An overview of the Constitutional framework of the right to social security with special reference to South Africa" 2013 21 *African Journal of International and Comparative Law* 7-11. Berry and Smit "Social assistance needs of children with chronic health conditions: A Comparative study of international and South African eligibility assessment instruments" 2011 26 *Social Work in Public Health* 635-649.

When comparing the South African practice and the ILO standard, the South African government evidently has, to some extent taken proactive measures to promote social security. According to Article 2 of the 1952 ILO Convention, each Member State shall comply with at least three out of nine social security aspects listed therein. Internationally, countries have embarked on major reform initiatives in an attempt to overhaul their social security systems comprehensively in order to align their social security system with the ILO Convention No. 102.²²⁸ This study recommends that South Africa should follow suit. These reforms have largely been informed by international norms and the involvement of international agencies, such as the ILO and the World Bank. Despite this important development, South Africa has not ratified some of the key Conventions on social security. These include, *inter alia*, Social Security (Minimum Standards) Convention, 1952, Equality of Treatment Convention, 1962, Employment Injury Benefits Convention, 1964, Invalidity, Old-Age and Survivors' Benefits Convention, 1967, Medical Care and Sickness Benefits Convention, 1969; Maintenance of Social Security Rights Convention, 1982 as well as Employment Promotion and Protection against Unemployment Convention, 1988.

This study established that South Africa has indicated its intention to become a party to, and to be legally bound by, the obligations imposed by the relevant international labour Conventions. For instance, the Constitution compels any court, tribunal or forum, when interpreting the Bill of Rights, to consider international law and foreign law. Additionally, section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. However, this study observes that what remains to be done is to strive to embrace international social security norms more fully by consolidating and giving further effect to the provisions of the Constitution, in particular, the social security rights entrenched in section 27 (1) (c) of the Constitution. This could be affirmed by the ratification of Convention No. 102 by South Africa.

This study has shown that the need and benefits incorporated under Article 102 will be of great benefit for South Africa should it choose to ratify the Convention. Its

²²⁸ Olivier "Regional overview of social protection for non-citizens in the Southern African Development Community (SADC) (2009) 46.

ratification would see most of the shortfalls and gaps experienced in the current fragmented system of social security addressed. In particular, Convention No. 102 sets out protection for not only formal workers but for informal workers as well. Citizens of the Republic of South Africa and non-citizens are afforded protection but subject to an agreement with the Republic of South Africa and the concerned country that gives permission for the application of the Social Assistance Act to its citizen.

Similarly, South Africa is in need of the benefits that are offered by the ILO in order to stretch coverage of the overall benefits to everyone instead of the fragmented system of benefits in South Africa. For example, not everyone can benefit sufficiently in social security since the majority of South Africans consist of informal workers who receive social assistance in most cases and without which cannot sustain themselves.

Further, the study has observed that the purpose of social assistance is to prevent poverty and unemployment. The social assistance system in South Africa is primarily advanced by taxpayer's contributions through a grant system that is administered by SASSA. This study recommends that perhaps a better approach should be adopted in line with Convention No. 102 to empower more individuals to be part of social insurance and reduce the social assistance reliance.

The study has shown that South Africa is a developing country that is impoverished and deeply rooted with the inheritance of inequalities. Therefore, corrective measures are still in great demand for the socially dependent individuals to be assisted with service delivery. More importantly, the socially dependent people should be uplifted and empowered in order to be socially independent from social assistance. To address this problem, this study's Recommendation is to call on government to be proactive in creating more jobs. In doing so, more people will migrate from social assistance to social insurance to avoid being social assistance reliant. In other words, more people would be employed and thereby contribute towards social insurance. According, the statistical summary of social grants in South Africa, the total number of social grants for the period 30th September 2017 to the 28 February 2018 is currently R104, 545,456.²²⁹ Consequently, the study recommends that South Africa needs to attract more social insurance contributors and reduce social assistance dependents.

²²⁹ Available at: www.sassa.gov.za/index.php/knowledge.../statistical-reports?...761...february-2018. (Accessed on 12 July 2018).

Therefore, a more comprehensive social security structure is needed in South Africa, which can be found if South Africa is to ratify Convention No. 102.

This study has also identified some shortfalls in the social insurance systems in South Africa that is evidently not aligned to Convention No. 102. In particular, this study has shown that the exclusionary nature of the system of Social Security in South Africa is an issue that needs to be tackled immediately. It also addressed the challenges posed by the fact that a very few number of South Africans are adequately equipped to participate effectively in the labour market to secure their social needs. It is important for the study to emphasize that in terms of Article 22 Universal Declaration of Human Rights of 1948 that everyone has the right to social security and to receive protection in the case of unemployment.

The study found that the social insurance system in South Africa comprises of the RAF, COIDA and UIF, to name a few which exclude, certain citizens and non-citizens, which are against the concerned Convention. The study has identified that the current UIF system in South Africa excludes certain state employees such as cabinet ministers, deputy ministers, and municipal councillors which is not in line with Convention No. 102. The study highly recommends that South Africa should ratify Convention No. 102 in order to bring the current UIF system in line with international laws, which does not exclude certain categories of employees.

In relation to refugee workers, the study reveals that refugee workers only receive coverage if a dedicated bilateral agreement exists subject to a verification process to enable the refugee worker to access the benefits in their own state. The study reflects upon a refugee who is unable to access the benefits that he or she has contributed towards by virtue of not being in a country that is part of a dedicated bilateral agreement, which means that they would be disadvantaged in terms of receiving a benefit. This kind of practice may be construed to be an infringement of section 9 of the Constitution of South Africa, which states that no one may be unfairly discriminated against directly or indirectly based on origins.

A further problem exists in terms of the current COIDA regulation in the following regard. If a deceased employee is killed in a motor vehicle accident by virtue of the employer's negligence, section 35 (1) of COIDA as well as section 19 (a) of the RAF Act precludes the deceased's dependents from making a claim. Convention No. 102

does not make provision for the exclusion of benefits for the deceased employee's dependents which South Africa may benefit from upon ratifying the Convention. This is not in line with Convention No. 102 since it stipulates that the dependents of a deceased employee are entitled to receive compensation. In addition, the study found a great concern in the COIDA system in the fact that there is a yield towards burdening employees with medical costs should there be a delay with compiling the required documentation and submit reports timeously in the event of those employees who have medical aid when the need arises to access medical care. Convention No.102 prohibits this practice. Moreover, the COIDA system is grounded in the alienation of relinquishing employee rights in terms of common law relief by undertaking the insurance system, which is not based on a fault on the side of the employer. By ratifying this Convention, South Africa would not waive its common law rights against the employer for common law remedies instead the injured employee would receive support in terms of the benefit subject to the requirements and periodical terms.

The study recommends that South Africa ratify Convention No. 102 since Convention No. 102 does not frustrate the process of looking after injured employees in the above sense under its Articles. Therefore, the best interests of employees are advanced in order to restore the health care position of the concerned employee to its original or better form and provide the required financial benefit up until the employee is capacitated to earn a living. The study observed that in South Africa medical care is divided into two kinds of services, namely: Private health care and State health care. Typically, for private health care, a medical aid is required and the majority of users consist of formal sector employees, despite a small margin of informal workers who have access to it. On the other hand, in public hospitals, medical aid is predominantly not required since it consists mainly of informal workers with the exception of formal workers who cannot afford private healthcare. The medical care for maternity benefits caters for pre-natal care to post-natal care and hospitalisation, including the services of a midwife where necessary. In terms of the concerned Convention, medical care is provided for but it is not clear whether it refers to state or private hospitals.

The ILO does not differentiate between national and non-nationals for medical care. In terms of the national health Act, access to its health care benefits is subject to the expenses of medical care. It is divided into three components, namely: free service, a subsidized service, or a fully paid service. The South African Constitution does not

look at nationality when considering emergency medical treatment, which is in line with the ILO.

Convention No. 102, prescribes a minimum period for maternity benefits, sickness benefits and unemployment benefits, which are far flexible in approach in order to provide more benefits. For instance, when in relation to maternity benefits and sickness benefits, the minimum period is thirteen weeks. Whereas for sickness benefits, the minimum period is 12 weeks. It is evident that the concerned Convention is able to provide more minimum benefits when considering the qualifying minimum periods, more importantly, the said Convention is able to switch over to social assistance when the maternity benefits are inadequate.

Although the study acknowledges that South Africa has compatibility with some of the provisions of the ILO Convention No. 102, in ratifying the Convention South Africa would greatly enhance its social security system. In fact, this would not prove to be difficult when ratification is undertaken.

Despite the Recommendation for ratification of Convention No. 102, there is a particular gap in the provisions of Article 60 that emphasises support in relation to a widow or child who has lost a breadwinner. This provision does not accommodate same-sex marriages. However, in South Africa, we have same-sex marriages/unions, which means that an element of discrimination based on sexual orientation may be construed under Article 60 of Convention No. 102. The South African system under the Unemployment Insurance Act extends coverage to a surviving spouse, dependent child or life partner. More importantly, the Unemployment Insurance Act does not require the beneficiary of the breadwinner to lack the ability to provide self-support. Be that as it may, the majority of benefits of Convention No. 102 outweigh the minor shortfall of the concerned Convention. This study highly recommends that South Africa should strive to ratify Convention No. 102 to keep up with its obligation as a Member State of the ILO.

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