

Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa

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Abstract

For many years, South African courts have relied on International Labour Organisation conventions to interpret and give meaning to the fundamental social security and labour law rights enshrined in the Constitution, 1996. Social security and labour law has been one of the ILO's major initiatives of promoting decent work agenda since its inception in 1919. Decent work refers to the availability of employment in conditions of freedom, justice, security and human dignity. This is a multidimensional concept introduced by the ILO in 1999. It has four key components, namely, employment conditions, social security, workplace rights and social dialogue. To this end, the preamble to the ILO Constitution sets out several objectives in this regard, including the protection of workers from illness, accidents, the protection of children, women, and the support of the elderly. The ILO pursues these noble values and goals by developing international labour and social security standards, which member states must ratify and incorporate into their national law. The purpose of these ILO standards is to provide a standard framework or regulatory tool to guide member states in establishing, improving and maintaining social security and labour law systems domestically, regionally and internationally. Against this background, this article examines selected themes on the impact of international standards on labour and social security rights enshrined in the Constitution. It looks at some of the relevant international instruments which have influenced the promotion and protection of these rights. Furthermore, it shows how the courts have infused these standards into their judgments in South Africa.

Keywords

International Labour Organisation; international standards; decent work; social justice; social security; labour standards; human rights; South African courts.

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1 Introduction

Since its inception in 1919 the International Labour Organisation (hereafter the ILO) has played an important role in the development of an internationally defined regulatory framework that guides the creation, development and maintenance of social security and labour law systems worldwide and has become a leading global starting point for efforts to this end.¹

The ILO sets international standards in the form of conventions and concomitant recommendations. These international standards are international agreements that can be ratified by the member states.² The ILO standards set out the basic principles to be followed by a ratifying State, whilst the relevant recommendations complement the Convention by providing detailed guidance on its implementation. In this context, ILO labour and social security standards are a unique set of legal instruments that give concrete meaning to the trait of human right to labour and social security contained in the *Universal Declaration on Human Rights*, 1948 and in the *International Covenant of Economic, Social and Cultural Rights*, 1966.

Considering the above, this article has the following three objectives. First, it gives a concise overview of how the ILO sets the international standards. Secondly, it scrutinises the impact of these international standards in the context of social security and labour law, and touches on the human rights framework that has shaped South Africa's labour and social security law. Thirdly, it discusses the application of international standards in domestic courts, and refers to judicial decisions where courts have used universal sources of the ILO's international labour and social security standards.

2 A brief background, motivation and conceptual clarification of the notion social security

South Africa's social security system is comprised of contributory and non-contributory social protection programmes, the former requires contribution from both the employer and the employee while the latter is tax financed, administered by the South African Social Security Agency (SASSA), with

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¹ See Trebilcock "International Labour Standards" 585-613.

² Swepston "International Labour Law" 141-145.

the Department of Social Development playing an oversight and management role. To a certain extent labour law and social security law are intrinsically linked as one field of study. Social security is therefore provided through social insurance and social assistance which requires means testing to determine eligibility. Whereas labour rights are entitlements that relate specifically to the role of being a worker. Some of these rights are exercised individually and others collectively. They can include a right to work in a job freely chosen, a right to fair working conditions, which may encompass issues as diverse as a just wage or protection of privacy; a right to be protected from arbitrary and unjustified dismissal; a right to belong to and be represented by a trade union; a right to strike.

To this end, this article examines the impact of international standards on labour and social security law in South Africa. The evaluation is important in order to determine whether the national legislation is in line with international instruments which allude to social security and labour law as a fundamental human right to which every human being is entitled.

As outlined in section 27(1)(c) of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution), social security is a fundamental right. However, the Constitution is silent on how it is meant to be understood. Consequently, academic discourse, governmental policies and the jurisprudence of courts is used to provide conceptual understanding of social security. Accordingly, social security encompasses a wide array of public and private initiatives that provide cash or in-kind benefits, or both, in response to an individual's earnings capacity ceasing to exist.³ The glossary in the Social Welfare White Paper⁴ defines social security as the policies which ensure that all people have adequate economic and social protection during times of unemployment, ill health, maternity, child rearing, disability and old age, by means of contributory and non-contributory schemes that provide for their basic needs.⁵ In light of the above, South Africa has incorporated some of the principles of the ILO's social security instruments into its domestic law, as will be shown later in this article.

3 A constitutional perspective to international social security and labour standards

In its 2019 Centenary Declaration, the ILO recognised that general and sustainable peace can only be achieved if it is based on social justice, and the need to improve conditions for the rights of workers around the world,

³ Olivier *et al Social Security* 23-24.

⁴ GN 1108 in GG 18166 of 8 August 1997 (White Paper for Social Welfare).

⁵ Chapter 7 of the White Paper for Social Welfare (GN 1108 in GG 18166 of 8 August 1997).

including the right to social security.⁶ The ILO has captured succinctly the motivation behind the international labour and social security standards when it stated that:

An international legal framework on social standards ensures a level playing field in the global economy. It helps governments and employers to avoid the temptation of lowering labour standards in the belief that this could give them a greater comparative advantage in international trade. Because international labour standards are minimum standards adopted by governments and the social partners, it is 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.⁷

These standards comprise of conventions, protocols, and recommendations.⁸ ILO conventions play an important role in creating baseline labour and social security standards. Scholars acknowledge that the ILO conventions hold significant importance in setting decent work standards.⁹ It is through the international standards that conventions, and recommendations are formulated.¹⁰ The ILO crafts these international standards through its annual International Labour Conference, in Geneva. This International Labour Conference involves representatives of governments, trade unions, as well as workers and employers around the world.¹¹ At the conference member states identify the problem, and put the issues on the agenda. Then a report on the laws and practices of member states is prepared by the International Labour Office. Following this, the report is circulated to member states as well as to the ILO for comments. The International Labour Office also prepares a draft instrument for comments, which is then submitted to the Conference in which the draft is amended as necessary and offered for adoption. At the Conference participants can examine the draft instrument for comment during the double discussion. It is important to note that two-thirds of the standard votes are needed for acceptance.¹² Once the two thirds is achieved then the convention is normally adopted. Once adopted, the ILO member states are obliged to submit any convention or protocol to their national competent authority for the enactment of relevant legislation or other actions, including ratification.

⁶ ILO 2021 https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_780953.pdf 9.

⁷ ILO *Rules of the Game* 10-11.

⁸ ILO 2019 <https://www.social-protection.org/gimi/RessourcePDF.action?id=55196> 2.

⁹ Compare Weiss 2013 *IJLLIR* 7-19; Olivier 2013 *IJLLIR* 21-38; Fombad 2013 *AJICL* 7-11; Hodges 2014 *Journal of Industrial Relations* 566-575.

¹⁰ ILO date unknown <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>.

¹¹ ILO date unknown <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>.

¹² ILO *Rules of the Game* 10-11.

In the South African context, the forefathers of the Constitution must be commended for showing an interest in belonging to the family of nations¹³ by ratifying and agreeing to be bound by internationally and regionally recognised instruments in the area of social security and labour law. In this context, international law is viewed as a pillar of South Africa's legal system since it became a member of the international community with the advent of democracy.¹⁴ According to Olivier, South Africa's Constitution of 1993¹⁵ accorded international law recognition for the first time in the country's history, which helped motivate the application of international law in the country. In his view, this step signified to the international community that South Africa would adhere to internationally accepted rules and norms in the wake of the end of the apartheid law system.¹⁶

To put things into perspective, it is important to note that international conventions do not form part of the domestic law of our country and are not enforceable at the instance of private individuals in our courts unless they are legislated in municipal law.¹⁷

Several provisions of the Constitution specifically mention international law and international agreements, supporting these interpretations.¹⁸ Therefore, when interpreting the Bill of Rights, any court, tribunal or forum must consider international law and foreign law.¹⁹ Section 231(3) of the Constitution makes it clear that when Parliament agrees to the ratification of, or accession to, an international agreement such agreement becomes part of the law of the country only if Parliament expressly so provides and the agreement is not inconsistent with the Constitution.

With the aforesaid provision in mind, it becomes apparent that an Act of Parliament can override any contrary rights or obligations under international agreements entered into before the commencement of the

¹³ Smit and Van Eck 2010 *CILSA* 46; see Marshall "Importance of International Labour Standards" 65-70.

¹⁴ Dugard 1997 *EJIL* 77-80; see Barber 1991 *International Affairs* 723; Dugard 1991 *Social Justice* 83-92.

¹⁵ The *Constitution of the Republic of South Africa Act* 200 of 1993 (the Interim Constitution); Devine 1995 *ICLQ* 1-5.

¹⁶ Olivier *et al Introduction to Social Security* 163-164. See Hopkins 2003 *CILSA* 292-298.

¹⁷ *R v Secretary of State for the Home Department, Ex parte Brind* 1991 1 AC 696 (HL) 761G-762D; *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 3 SA 150 (A) 161C; *Maluleke v Minister of Internal Affairs* 1981 1 SA 707 (B) 712G-H; *Binga v Cabinet for South West Africa* 1988 3 SA 155 (A) 184H-185D; *S v Petane* 1988 3 SA 51 (C) 56F-G; Hahlo and Kahn *South African Legal System* 114; Dugard *International Law* 339-446.

¹⁸ See Olivier 2003 *PELJ* 26-42.

¹⁹ See ss 39(1)(b) and (c) of the Constitution.

Constitution. The same provision is evident in section 231(4) of the Constitution which provides that:

any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

South Africa supports the principle that customary international law may be applied directly as part of the common law.²⁰ In *Republic of Angola v Springbok Investments (Pty) Ltd*,²¹ Kirby J held that South Africa has embraced the doctrine of incorporation, which holds that the rules of international law (the *ius gentium*) are considered to be part of the law unless they conflict with statutes or the common law.

In addition, section 35(1) of the Constitution is also perfectly consistent with these conclusions. It reads as follows:

in interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.

With regard to the interpretation of international law, section 35(1) of the 1993 Constitution provided that:

In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law...

This provision was incorporated in section 233 of the final Constitution. In its relevant part 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.²²

In this context, the courts are directed only to "have regard" to public international law if it is applicable to the protection of the rights entrenched in the Constitution. Quite often, judicial interpretation of domestic law in South Africa has been influenced by international law. For example, in the case of *S v Makwanyane*,²³ it was argued on behalf of the accused that the

²⁰ Gericke 2014 *PELJ* 2601-2604.

²¹ *Republic of Angola v Springbok Investments (Pty) Ltd* 2005 2 BLR 159 (HC) 162.

²² *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* 2003 3 SA 513 (CC) para 37, where the Constitutional Court held that an interpretation that takes into account principles contained in relevant ILO Conventions is to be preferred.

²³ *S v Makwanyane* 1995 6 BCLR 665 (CC) (*S v Makwanyane*).

imposition of the death penalty for murder was a cruel, inhuman and degrading punishment that should be declared unconstitutional. Chaskalson used international law extensively and creatively to interpret the constitutional right to life. In doing so, he came to the conclusion that the documents used during the negotiation process (specifically those related to the position of the death penalty), had become part of the context in which the Constitution should be interpreted.²⁴

Furthermore, Chaskalson referred to the European Court of Human Rights and the United Nations Committee on Human Rights, whose deliberations are informed by *travaux préparatoires*, as described in article 32 of the *Vienna Convention on the Law of Treaties*.²⁵ Furthermore, the Constitutional Court in *Government of the Republic of South Africa v Grootboom*,²⁶ remarked that relevant international law can be a guide to interpreting the socio-economic rights in the Constitution but the weight to be attached to any particular principle or rule of international law will vary. However, the Court indicated that where the relevant principle of international law binds South Africa, it may be directly applicable.

International standards as a component of labour and social security are, intrinsically, endowed with a human rights element.²⁷ Consequently, human rights are valued in terms of political ethics²⁸ and their existence does not depend on legal recognition.²⁹ Because they are human rights they are considered to be the highest standard in the world and therefore they have a minimalist character.³⁰

Islam argues that human rights are “inborn and inherent in all human beings by virtue of their birth as human beings and by the nature of their humanity”.³¹ He further asserts that human beings bear these rights wherever they go, and anywhere they are.³² According to him, nationality is immaterial to human rights.³³ Nickel³⁴ provides a comprehensive definition of human rights, which can be summarised as follows:

²⁴ *S v Makwanyane* paras 12-17.

²⁵ *S v Makwanyane* paras 16 and 17.

²⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26.

²⁷ ILO 2011 https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_152819.pdf.

²⁸ Campbell and Miller *Human Rights and the Moral Responsibilities* 1-26.

²⁹ *Social Protection Floors Recommendation* 202 of 2012.

³⁰ Simpson 2021 *CJLJ* 149-169.

³¹ Islam *International Law and Current Concepts* 556.

³² Islam *International Law and Current Concepts* 556.

³³ Islam *International Law and Current Concepts* 556.

³⁴ Nickel *Making Sense of Human Rights* 9-10.

... rights are claims by right-holders against addressees,³⁵ who are usually, though not only States, that are held by all persons, are high priority or urgent norms, with a specific claims (for example, the right to fair trial, and the right to social security) instead of few and highly abstract claims (for example, the right to dignity and equality), are normative claims whose truth is not dependent on legal recognition, and are meant to be *minimum standards* instead of a complete statement of what is just (for example, to say our human rights are satisfied is not to say that some situation is just, any more than that a minimum wage is a just wage).

In view of the above, it is apt to consider human rights as privileges which belong to the individual because of being human, and for no other reason.³⁶ Some scholars argue that this definition of human rights is a significant unique feature of human rights.³⁷ Mpedi³⁸ asserts that the right to have access to social security, is a fundamental right which should be enjoyed by everyone. Other scholars consider social rights as having an aspirational or "manifesto" character.³⁹ It is argued that critics who regard human rights as pure desire have now been persuaded by human rights philosophers that social security rights are an integral part of human rights. This has also been acknowledged by international lawyers and the United Nations.⁴⁰ The *Universal Declaration of Human Rights* states:

Everyone, as a member of society, has the right to social security. Article 25 formulates this provision in a more precise way, and reads ... the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his/her control.⁴¹

The right to social security as a human right is enshrined in major international human rights instruments such as the *Universal Declaration of Human Rights* (UDHR)⁴² and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁴³ As alluded to above, it has also been recognised by the international community as a basic human right.⁴⁴ As such, it is not only individual member states who ought to ensure the correct

³⁵ See Barrientos and Leisering 2013 *International Journal of Social Welfare* 59-61.

³⁶ Mubangizi *Protection of Human Rights in South Africa* 4-13. See also Huber 2013 *Journal of Human Rights* 129; Weiss *et al United Nations and Changing World Politics* 165-166.

³⁷ Nickel *Making Sense of Human Rights* 7-36; Griffin *On Human Rights* 33; see Papisca "Relevance of Human Rights" 91.

³⁸ Mpedi 2005 *Obiter* 174.

³⁹ Davy 2014 *Washington University of Global Studies Law Review* 207-212; see Openshaw and Mansell *International Law* 126-135.

⁴⁰ Sen 2004 *Philosophy and Public Affairs* 345-348; Wellman *Moral Dimensions of Human Rights* 12-13.

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

⁴² Article 22 of the UDHR.

⁴³ Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (1996) (the ICESCR).

⁴⁴ CESCR date unknown <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet16rev.1en.pdf>. See also *CESCR General Comment No 19, The Right to Social Security* UN Doc E/C.12/GC/19 (2008) (art 9).

application of labour and social security law within their national boundaries; but also the global community has the responsibility of ensuring the implementation of the social security and labour law standards across the world.

As discussed above, one of the main objectives of the ILO, as articulated in the *Declaration of Philadelphia*⁴⁵ and further restated at the International Labour Conference of 2001,⁴⁶ is to provide for the establishment of social security systems of a universal nature. In a similar vein, the need for increased international solidarity in order to achieve progress in the development of national social security systems was reaffirmed by the World Commission on the Social Dimension of Globalisation in 2004.⁴⁷

While social security is the basic right of all people, it invokes an interesting question which relates to human rights discourse?⁴⁸ One is dignity,⁴⁹ or natural rights. The link between universal social security and the concepts of human rights, democracy and the rule of law might best be understood by referring to the notions of human dignity and social cohesion.⁵⁰ Mishra agrees that social [security] rights are not about reducing inequality *per se*, but rather about ensuring that a minimum of basic resources and opportunities are available to all, in order to ensure a life of human dignity and social inclusion.⁵¹ The ILO General Conference concluded in 2001 that:

Social security is very important for the well-being of workers, their families and the entire community. It is a basic human right and a fundamental means for creating social cohesion, thereby helping to ensure social peace and social inclusion. It is an indispensable part of government social policy and an important tool to prevent and alleviate poverty. It can, through national solidarity and fair burden sharing, contribute to human dignity, equity and social justice. Finally, it is also important for political inclusion, empowerment and the development of democracy.⁵²

⁴⁵ *Declaration of Philadelphia* (1944), adopted by the International Labour Conference, 26th session, 1944. Art III(f) recognises the "solemn obligation of the ILO to further among the nations of the world programmes which will achieve the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care".

⁴⁶ See ILO *Resolution and Conclusions Concerning Social Security*.

⁴⁷ In this respect, the Commission further stated that basic social security constitutes a recognised human right and a global responsibility.

⁴⁸ See Munro *Risk, Needs and Rights* 30-34.

⁴⁹ The Committee on Economic, Social and Cultural Rights (the CESCR) describes the purpose of the right to social security in General Comment No 19 as follows: "The right to social security is of central importance in guaranteeing human dignity for all persons when they faced with circumstances that deprive them of their capacity to fully realise their Covenant rights". (*CESCR General Comment No 19, The Right to Social Security* UN Doc E/C.12/GC/19 (2008)).

⁵⁰ King *Judging Social Rights* 22-23.

⁵¹ Mishra 2005 *International Social Work* 17-18.

⁵² ILO *Resolution and Conclusions Concerning Social Security*.

The constitutional approach to social security as a human right is a very effective tool for extending its reach to those in need, in particular the precariat (workers excluded by labour and social security law partly because of the nature of their employment, e.g. atypical or non-standard workers and workers engaged in the gig economy).⁵³ This is more likely to happen in a society where legal culture, services, enforcement actions and litigation processes greatly enhance the bargaining power of local communities in terms of state bureaucracy and other power centers. It is argued that a rights-based approach to social security and labour law can empower individuals to protect themselves from social risks.⁵⁴

4 A synopsis of selected ILO's instruments relating to social security and labour law

As previously mentioned, social security and labour law are fundamental human rights recognised by various international conventions, some of which are endorsed in South Africa. In most cases, ILO conventions and recommendations provides a reference against which the South African system can be measured. This benchmark is relevant in respect of, among others, evaluating the general responsibility of the state, and the developmental and integrated approach towards the system of social security and labour law.⁵⁵

International instruments protecting social security rights generally adopt a holistic approach to social security, and provide a minimum core protection for social security. The minimum core approach seeks to establish the minimum legal content for claims related to economic and social rights.⁵⁶ Various international bodies have developed detailed standards on social security and socio-economic rights in general. For example, independent experts and the UN Special Rapporteur on economic, social and cultural rights, as well as bodies such as the UN Committee on Economic, Social and Cultural Rights, have played an important role in protecting, monitoring and defining the content and scope of international law on economic, social and cultural rights, including the right to social security.⁵⁷

The next section provides a synopsis of selected ILO's conventions and recommendations on social security and labour law. These international

⁵³ See Krennerich 2014 *VRÜ* 105-122.

⁵⁴ See Pawar 2012 *Journal of Comparative Social Welfare* 35-38.

⁵⁵ See Samson 2004 http://www.inapng.com/pdf_files/Social%20Cash%20Transfers%20-Concept%20-Samson%20UNICEF-INA-DfCD.pdf.

⁵⁶ Lehmann 2006 *Am U Int'l L Rev* 163-196. See also De Schutter *Economic, Social and Cultural Rights* 293-450.

⁵⁷ See Berdyevev *et al Reporting Human Rights Violations* 3-19.

instruments have had a far-reaching impact on the drafting of legislation and policies relevant to social security and labour law in South Africa.

4.1 ILO Convention 102 of 1952

The *ILO Convention 102* is colloquially referred to as the "ILO mother Convention". This Convention provides a point of reference to the core set of principles and minimum benchmark for building and maintaining progressively comprehensive social security systems. *Convention 102* covers nine (9) classical risks, and provides for the qualifying criteria. The risks covered by the Convention include, *inter alia*, (a) medical care; (b) sickness; (c) unemployment benefit; (d) old-age benefit; (e) employment injury; (f) family allowance; (g) maternity; (h) invalidity; and (i) survivor benefits. To ratify the Convention, a member state must operate three of the nine branches, but there is an additional provision that must be present which is at least one of the following risks, namely unemployment, old age or injury.

It is important to note that all these classical risks have been operationalised and employed in various ILO conventions.⁵⁸ These conventions provide a definition of the contingency/risk, the scope of personal coverage, the amount of the benefit, and the qualifying period. For example, the *Invalidity, Old-Age and Survivors' Benefits Convention* of 1967 provides the "possibility of fixing higher age with due regard to working ability of elderly persons in a country". This provision is important, considering the scourge of unemployment and its impact on the labour market.

In summary, *ILO Convention 102* provides a framework for establishing comprehensive social security systems.⁵⁹ Once ratified and implemented through law and applied in practice, *Convention 102* can contribute greatly to decent work and poverty alleviation, by providing for adequate minimum levels of benefits for the nine main social security contingencies, in order to guarantee the replacement of earnings and access to medical care. Furthermore, the *ILO Convention 102* provides a set of standards that guarantee good governance, financial sustainability, rights of beneficiaries,

⁵⁸ All these risks are covered under the following conventions: (a) *Income Security Recommendation 67* of 1944; (b) *Medical Care Recommendation 69* of 1944; (c) *Equality of Treatment (Social Security) Convention 118* of 1962; (d) *Employment Injury Benefits Convention 121* of 1964; (e) *Invalidity, Old-Age and Survivors' Benefits Convention 128* of 1967; (f) *Medical Care and Sickness Benefit Convention 130* of 1969; (g) *Maintenance of Social Security Rights Convention 157* of 1982; (h) *Employment Promotion and Protection Against Unemployment Convention 168* of 1988; (i) *Maternity Protection Convention 183* of 2000; (j) *Social Protection Floors Recommendation 202* of 2012.

⁵⁹ ILO *Assessment of the South African Legislation*.

respect for the rule of law, equality of treatment, non-discrimination, and policy coherence.

Consequently, it is submitted that South Africa can learn valuable lessons if it can ratify and apply this convention. First, this would afford the country the ability to obtain a wide range of coverage, which among other benefits can also provide guarantees for a health system, which can reduce poverty. In addition, the goal of *Convention 102* is for ratifying states to seek universal social security for all citizens. To this end, the Convention provides ratifying member states with some degree of flexibility in achieving universal social security for all citizens in respect of the nine branches indicated above. This is based on the fact that there is no adequate social security model for all countries, as countries differ in social and cultural values, its unique history, institutions and different economic developments.

Furthermore, this Convention may be ratified by a country, without agreement to abide by it in its entirety. The Convention is composed of two parts: the general social security principles, and agreed upon minimum standards across the nine branches. To ratify the Convention, a country must accept the general social security principles but only the minimum standards for at least three of the social security branches, including at least one of the following: (1) unemployment, (2) old age, (3) employment injury, (4) invalidity or (5) survivors. Furthermore, under the Convention, article 9 expressly provides for three alternatives for countries to provide universal social security under the branches it agrees to. The country can choose to protect 50 per cent of all citizens, or 20 per cent of all citizens of the economically active population and finally 50 per cent of all employees.⁶⁰ Lastly, countries, in committing to provide social security across chosen branches, can opt to administer through public or private means.

The Convention, with respect to the countries who have ratified it, sets minimum social security standards across the branches agreed to with regard to the following. First, the percentage of the country's population to be at least protected in case of occurrence of one of the specified contingencies. Second, a minimum level of benefits to be paid to citizens in case of occurrence of one of the contingencies and third, the conditions for and periods of entitlement to the prescribed benefits.

4.2 United Nations Charter of 1945 (UN Charter)

In its preamble, the *UN Charter* clearly states that:

We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought

⁶⁰ Article 9 of the *Social Security (Minimum Standards) Convention 102* of 1952.

untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life...

With the foregoing statement in mind, it becomes clear that the member states of the *UN Charter* sought to address collectively the issues of human rights protection, promotion of higher standards of living, full employment, conditions of economic and social progress and development, and solutions to global economic, social, health, and related difficulties.⁶¹

In the field of social security and labour law, this meant that nations were committed to achieving international cooperation to resolve global problems of an economic, social, cultural or humanitarian nature, and to promote and encourage respect for human rights, and fundamental freedoms for all, regardless of race, sex, language or religion.⁶² Furthermore, the forefathers of the United Nations sought to:

establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and lastly to employ international machinery for the promotion of the economic and social advancement of all people.⁶³

4.3 Universal Declaration of Human Rights of 1948

The UDHR states that:

everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his/her dignity and the free development of his/her personality.⁶⁴

The Declaration recognises that the ILO, based on the mandate contained in its Constitution, including the 1944 *Declaration of Philadelphia*, has the obligation to develop programmes which will achieve the objectives of full employment, raising standards of living, establishing a minimum living wage, and extending social security measures to provide a basic income to all in need, along with all the other objectives set out in the *Declaration of Philadelphia*.

In recent years, the ILO's work on social security has been conducted within the framework of the global campaign on social security and coverage for

⁶¹ See Art 55(a) of the *Charter of the United Nations* (1945) (the *UN Charter*).

⁶² See Arts 55(b) and (c) of the *UN Charter*.

⁶³ See the Preamble of the *UN Charter*.

⁶⁴ Article 22 of the UDHR.

all, as mandated by the International Labour Conference of 2001.⁶⁵ The Campaign highlights the fact that most people in developing countries are regarded as poor.⁶⁶

The ILO considers that the best strategy for progress is for these countries to put in place a set of basic social security guarantees for all residents,⁶⁷ while planning to move towards higher levels of provision as their economies develop, as envisaged in the *Social Security (Minimum Standards) Convention*. Even though social security is recognised as a human right,⁶⁸ the minority of the world's population actually enjoys this right,⁶⁹ while the majority lacks adequate and comprehensive coverage.⁷⁰

The ILO encourages all member states to develop strategies to enhance their levels of social security, guided by its social security standards, as their economies mature and their fiscal space widens.⁷¹ According to the ILO, social security systems contribute not only to human security, dignity, equity and social justice, but also provide a foundation for political inclusion, empowerment and the development of democracy.⁷² The ILO strategy for the extension of social security includes the following key elements:

establishing and maintaining social protection floor as a fundamental element of national social security systems (horizontal dimension); and pursuing strategies for the extension of social security that progressively ensure higher levels of social security to as many people as possible, guided by ILO social security standards (vertical dimension).⁷³

In April 2009, at one of its joint Crisis Initiatives, the UN System Chief Executives Board for Coordination adopted the social protection floor initiative.⁷⁴ The ILO, together with the World Health Organisation (WHO) and several collaborating agencies, are leading this initiative.⁷⁵ Its core mandate is to support countries in their efforts to plan and implement sustainable social transfer schemes and essential social services.⁷⁶

⁶⁵ ILO *Social Security for All* 1-41. See Kulke 2007 *International Social Security Review* 124-127; Kannan 2007 *International Social Security Review* 19-23.

⁶⁶ Kannan 2007 *International Social Security Review* 19-23.

⁶⁷ ILO *Social Security for All* VI.

⁶⁸ Anon 2003 https://www.ilo.org/global/publications/world-of-work-magazine/articles/WCMS_081319/lang--en/index.htm.

⁶⁹ ILO *World Social Protection Report 2014/15* 2.

⁷⁰ Bailey 2004 <http://www.ilo.int/public/english/protection/socsec/pol/campagne/files/addispaper.pdf> 2-3.

⁷¹ ILO *Social Security for All*.

⁷² ILO 2003 https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_005285/lang--en/index.htm.

⁷³ ILO *Social Security for All*.

⁷⁴ ILO *Social Protection Floor Initiative* 1-4.

⁷⁵ ILO *Social Protection Floor Initiative* 1-4.

⁷⁶ ILO *Social Protection Floor Initiative*.

This concept was endorsed as part of the Global Jobs Pact adopted by the International Labour Conference in June 2009.⁷⁷ This Pact requires countries that do not have extensive social security to build adequate social protection for all, drawing on a basic social protection floor that includes the following: access to health care, income security for the elderly and persons with disabilities, child benefits and income security, as well as public employment guarantee schemes for the unemployed and the working poor. It urges the international community to provide development assistance, including budgetary support, to establish a basic social protection floor on a national basis.⁷⁸

In recent years, the ILO and other agencies have published a number of reports and related documents discussing the need for social security and gathering evidence on its positive economic and social impacts, as well as the costs and affordability of providing the minimum of basic social protection for all in need in the poorest countries.⁷⁹

Wilson⁸⁰ asserts that the UDHR, in particular article 22, is often quoted because of its reference to everyone's "right to social security". However, the substance is contained in article 25's reference to 'the right to a standard of living adequate for the health and wellbeing of everyone'.

In short, it is submitted that the UDHR is a guiding instrument, which sets a benchmark against which member states should gauge their domestic laws, in particular the fulfilment of their citizens' human rights and social security protection.⁸¹ In the words of Hannum,⁸² the UDHR remains the primary source of global human rights standards and is the basis for most human rights instruments.

4.4 International Covenant on Economic, Social and Cultural Rights of 1996

The most important international instrument relating to social security is the ICESCR.⁸³ At the time of writing this article there were approximately 173

⁷⁷ ILO *Summit on the Global Jobs Crisis*. See also Anon 2009 https://www.ilo.org/global/publications/world-of-work-magazine/articles/WCMS_115059/lang--en/index.htm 4-7.

⁷⁸ See also Anon 2009 https://www.ilo.org/global/publications/world-of-work-magazine/articles/WCMS_115059/lang--en/index.htm 4-7.

⁷⁹ García and Gruat 2003 <http://www.ilo.org/public/english/protection/download/lifecycl/lifecycle.pdf> 13-120.

⁸⁰ Veit-Wilson "Some Social Policy Implications of a Right to Social Security" 65.

⁸¹ See also Glendon 1998 *Notre Dame L Rev* 1153-1164; Schwelb 1959 *ASIL Proceedings* 217-229.

⁸² Hannum 1996 *Ga J Int'l & Comp L* 287-290. See also Gruskin 1998 *Health and Human Rights* 3-6.

⁸³ Vierdag "Legal Nature of the Rights Granted by the International Covenant" 3-39.

member states who have ratified this Convention.⁸⁴ South Africa has signed and ratified the ICESCR, together with its Optional Protocol.⁸⁵ The South African Human Rights Commission believes that this ratification will enhance the ability of the government to play a meaningful role as one of the key advocates for social, economic and cultural rights in the international arena.⁸⁶ It will also enable the country to increase and improve the respect and observance of [social security] rights.

The substantive rights that are recognised by the Covenant include the following; the right to work, the right to social security,⁸⁷ the right to special protection for the family,⁸⁸ mothers and children, the right to an adequate standard of living, including food, clothing, and housing, and the right to health care services.⁸⁹ The basic obligation imposed by the Covenant on a member states is to take steps "to the maximum of its available resources, with a view to achieving progressively the full realisation of the right by all appropriate means, including the adoption of legislative measures".⁹⁰ This provision has been described as imposing an obligation to move as expeditiously and effectively as possible towards realising the listed objectives.⁹¹ The primary responsibility for the enforcement of the Covenant lies with the UN Committee on Economic, Social and Cultural Rights. The Committee was established in 1987 to monitor the compliance of member states with their obligations under the Covenant.⁹² The Committee consists of eighteen independent experts, who are elected by the Economic and Social Council of the UN for a four-year term.⁹³

⁸⁴ OHCHR 2021 <https://indicators.ohchr.org/>.

⁸⁵ SAHRC 2015 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/305-sahrc-welcomes-government-s-decision-to-ratify-the-international-covenant-on-economic-social-and-cultural-rights-icescr>.

⁸⁶ SAHRC 2015 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/305-sahrc-welcomes-government-s-decision-to-ratify-the-international-covenant-on-economic-social-and-cultural-rights-icescr>.

⁸⁷ Article 25(1) of the ICESCR.

⁸⁸ Article 10 of the ICESCR.

⁸⁹ Masanque 2012 *Cal W Int'l LJ* 462-487.

⁹⁰ Article 2(1) of the ICESCR; Saul *et al International Covenant on Economic, Social and Cultural Rights* 133-172. See *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM) and *Governing Body of the Juma Masjid Primary School v Essay* 2011 7 BCLR 651 (CC). Citing the decision of *Juma Masjid* case the court in *Madzodzo* highlighted that the "right to basic education provided for in section 29 (1) (a) of the Constitution is an unqualified right which is immediately realizable and is not subject to the limitation of progressive realization". The right to basic education is also "an empowerment right". In order to comply with its obligation to respect the right to basic education, the government is required to "take all reasonable measures to realize" the right with "immediate effect".

⁹¹ See Article 2 of the ICESCR.

⁹² Alston and Simma 1987 *AJIL* 747-749.

⁹³ Alston and Simma 1987 *AJIL* 747-749.

The Committee does not have adjudicative functions. Its principal activities are the adoption of "General Comments" on the content of the ICESCR and the examination of reports submitted by member states.⁹⁴ Since 1991, the Committee has drafted the Optional Protocol to the ICESCR, in order to help reinforce the protection of economic and cultural rights.⁹⁵ In addition, in terms of the ICESCR, member states have to submit periodic reports to the Committee on the measures taken and progress made with respect to their obligations.⁹⁶ A first report is normally due within two years of ratification of the Covenant, and subsequent reports are required within a four-year cycle.⁹⁷

It is important to note that although the General Comments do not bind member states, however, they are generally regarded as a primary source for determining the content of international social security and labour law rights, and have regularly been referred to by the Constitutional Court.⁹⁸ Furthermore, according to the Committee, a state's obligations under the Covenant do not end with the duty to refrain from interference with the enjoyment of these rights. The rights have an additional positive dimension, in that they can only be adequately realised by taking positive steps towards fulfilling them.⁹⁹

In terms of the Covenant, the state is required to adopt "legislative measures in order to realise these rights".¹⁰⁰ This involves the creation of a legal framework that grants individuals the legal status, rights and privileges that will enable them to pursue their rights domestically. Furthermore, the state is required to implement other measures and programmes designed to assist individuals in realising their rights.¹⁰¹

The positive dimension of international social security rights is qualified by the use of the phrase "to the maximum of its available resources", and with a view to achieving "progressively the full realisation of the right". The concepts "to the maximum of its available resources" and "progressive

⁹⁴ Alston and Simma 1987 *AJIL* 747-749.

⁹⁵ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008).

⁹⁶ Article 2 of the ICESCR.

⁹⁷ For further reading on the Human Rights Council and its mechanisms, see UN *Human Rights Council* 5-24.

⁹⁸ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC). See also Chirwa date unknown http://aihr-resourcescenter.org/administrator/upload/documents/Socio-economic_rights_in_Africa.pdf.

⁹⁹ Fombad 2013 *AJICL* 9-10.

¹⁰⁰ Fombad 2013 *AJICL* 9-10.

¹⁰¹ *CESCR General Comment No 3, The Nature of States Parties' Obligations* UN Doc E/1991/23 (1990) para 4.

realisation of the right" are understood to grant the state some degree of discretion in selecting the means of achieving social security rights.¹⁰² Nevertheless, it is argued that this discretion has its own limitations. For example, Currie and De Waal¹⁰³ argue that although the full realisation of [such] rights can only be achieved progressively, this does not change the state's obligation to take those steps that are within its power immediately, and other steps as soon as possible.

According to the authors, the burden is on the state to show that it is making progress towards the full realisation of these rights. They further maintain that the requirement for states to take "appropriate" steps towards the realisation of the rights gives states a considerable amount of discretion, and that they have an obligation to justify the appropriateness of the measures that they adopt.

Currie makes three crucial inferences regarding the enforcement of [social security] rights.¹⁰⁴ First, he states that argument about scarcity of resources does not relieve states of what the Committee on Economic Social and Cultural Rights term 'core minimum obligations'. Secondly, he maintains that:

violations of [social security] rights will occur when the state fails to satisfy obligations to ensure the satisfaction of minimum essential levels of each of the rights, or fails to prioritise its use of its resources so as to meet its core minimum obligations.

These core minimum obligations apply, unless the state can show that its resources are "demonstrably inadequate" to allow it to fulfil its obligations. Thirdly, Currie indicates that because the obligations are to be realised progressively does not mean that states may postpone their obligations to some distant or unspecified time in the future. A state that claims to be unable to carry out its obligations because of resource scarcity must prove that this is the case. For example, in General Comment 3, the Committee affirms that:

... any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.... In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been

¹⁰² Chenwi 2013 *De Jure* 742-769.

¹⁰³ Currie and De Waal *Bill of Rights Handbook* 572.

¹⁰⁴ Currie and De Waal *Bill of Rights Handbook* 572. See Jacob in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 31.

made to use all resources that are at its disposition, in an effort to satisfy, as a matter of priority, those minimum obligations.¹⁰⁵

4.5 ILO's Maternity Protection Convention, 183 of 2000

The ILO's *Maternity Protection Convention*, provides that all employed women, including those in atypical forms of dependent work, must be covered for pregnancy, childbirth and their consequences. In particular, protected persons should be entitled to maternity benefits for a minimum period of 14 weeks (including six weeks of compulsory leave after childbirth) for a minimum of two thirds of their previous income. Medical care provided to protected persons must include antenatal, childbirth and postpartum care. This convention also establishes the right to work breaks for breastfeeding, as well as provisions on health protection, job protection and non-discrimination.

It is unfortunate that South Africa is yet to ratify the *Maternity Protection Convention, 2000* and the *Social Security (Minimum Standards) Convention, 1952*.¹⁰⁶ It is argued that this is a missed opportunity to address the current social security gaps relating to the inclusion of self-employed workers or independent contractors from the framework of most employment legislation, like the *Basic Conditions of Employment Act*.¹⁰⁷

4.6 Equality of Treatment (Social Security) Convention, 118 of 1962

It is important to note that South Africa has not ratified this convention. Be that as it may, this convention examines the issue of social security for migrant workers globally. The convention requires a ratifying state to accord equal treatment to nationals of other ratifying states (and their dependents) with its own nationals (including refugees and stateless persons), if expressly accepted) in its territory. Equally, the convention also establishes the principle of the provision of benefits abroad and the need to make every effort to participate in plans for the maintenance of acquired rights and rights in the process of being acquired according to the legislation of the citizens of the states for which the Convention is in force.

Similarly, the *Equal Treatment Convention* reinforces the principles espoused by *Convention on Discrimination in relation to Employment and Occupation, 1958*. This convention has been ratified by South Africa. The convention requires each member state for which the convention is in force,

¹⁰⁵ CESCRC General Comment No 3, *The Nature of States Parties' Obligations* UN Doc E/1991/23 (1990) paras 9 and 10. See also Constitutional Court judgment of *Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 1 BCLR 1 (CC) para 19.

¹⁰⁶ See Boswell and Boswell 2009 *Agenda* 76-84.

¹⁰⁷ For further reading, see SALRC *Project 143*.

to declare and pursue a national policy designed to promote any methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof. It is important to note that Convention, 1958 was recognised by the courts in South Africa as a point of reference in defining, discrimination. For example, in *SACWU v Sentrachim Ltd*,¹⁰⁸ the Industrial Court, faced with a case of alleged wage discrimination based on race, quoted the Convention as follows:

Discrimination is defined in the convention as including any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. There are, however, limits, [with] art 1 s 1(2) stating: Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination.

4.7 *Employment Promotion and Protection against Unemployment Convention, 168 of 1988*

This convention covers two cardinal issues. In the main, it addresses the protection of the unemployed through the provision of benefits in the form of periodic allowances and the promotion of employment. Furthermore, it also recognises the value of linking social security to broader social and economic policies aimed at the promotion of full, productive and freely chosen employment. In addition to the benefits provided in the event of unemployment, the signatory states are also called upon to take appropriate measures to coordinate their unemployment protection system and their employment policy. Therefore, the unemployment protection system should encourage employers to offer and workers to seek productive employment.

4.8 *Medical Care and Sickness Benefits Convention, 130 of 1969*

Convention 130 incorporates the health care and cash benefits, reflecting the trend towards the establishment of a comprehensive medical insurance system. It provides that all employees, including interns, or at least 75 percent of the population who are fully financially active, or all residents who do not meet certain criteria must be subject to both conditions. *Convention 130* extends the health care required under *Convention 102* for dental care

¹⁰⁸ *SACWU v Sentrachim Ltd* 1988 9 ILJ 410 (IC) 429. For a detailed discussion on post democratic judgments which have infused the requirements of Convention 111 on the interpretation of the constitutional prohibition of unfair discrimination in the workplace. See *Hoffmann v South African Airways* 2000 12 BLLR 1365 (CC); *Harksen v Lane* 1997 11 BCLR 1489 (CC); *Mias v Minister of Justice* 2002 1 BLLR 1 (LAC); *HOSPERSA obo Venter v SA Nursing Council* 2006 6 BLLR 558 (LC); *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1997 11 BLLR 1438 (LC).

and medical rehabilitation, including the provision of care and upgrades to prosthetics and orthotics. It gives the right to random benefits and confines the possibility of limiting the duration of disease benefits. The corresponding limit of 26 weeks will no longer fall into the category of individuals protected by the beneficiary and will only be granted if the beneficiary remains in this category if the disease begins.

4.9 Maintenance of Social Security Rights Convention, 157 of 1982 and Maintenance of Social Security Rights Recommendation, 167 of 1983

Convention 157 and *Joint Recommendation 167* specifically address the issue of supporting the social security rights of migrant workers and supplementing *Convention 118*, which focuses on equality of treatment and export. Unlike *Convention 118*, which allows states parties to select one or more of the nine contingencies, this Convention apply to all sectors, regardless of scheme type: general and special, with and without contributions and with defined employer obligations by law. The purpose of this Convention is to promote flexible and comprehensive coordinated arrangement between national security projects, in particular through the conclusion of bilateral or multilateral agreements on social security. *Convention 157* also establishes a system based on the principles of redemption and the right of redemption. *Recommendation 167* provides a model rule for concluding bilateral or multilateral agreements on social security in all circumstances and provides for respect for social security rights and export benefits. It also provides model agreements on the coordination of bilateral or multilateral instruments of social security.

4.10 Income Security Recommendation, 67 of 1944 and Medical Care Recommendation, 69 of 1944

Recommendations 67 and *69* form the basis for the development of social security in ILO instruments and can be considered as a project of an integrated social security system. Together, they formulate a comprehensive system of income security and health care protection for each of the nine categories of social security in addition to reduction and prevention of poverty. Guidelines 67 and 69 are based on the guiding principles of general governance, and then, by incorporating social insurance and social assistance, income insurance and health care services.

4.11 Social Protection Floors Recommendation, 202 of 2012

Recommendation 202 is the first international instrument to offer guidance to countries to close social security gaps and progressively achieve

universal protection through the establishment and maintenance of comprehensive social security systems. To this aim, the Recommendation calls for the attainment of the following issues. First, the implementation, as a priority, of social protection floors as a fundamental element of national social security systems and as a starting point for countries that do not have a minimum level of social protection; and second, the extension of social security with a view to progressively ensuring higher levels of social security to as many people as possible according to national economic and fiscal capacity and as guided by ILO's other social security standards. This Convention provides that social protection floors should comprise at least four basic social security guarantees including access to essential health care and basic income security for children, benefits for persons of active age who are unable to earn sufficient income, and older persons and should be set at a level that allows people to live in dignity. Through the social protection floors concept, *Recommendation 202* provides the minimum core content of the human right to social security.

The great achievement of *Recommendation 202* is the policy guidelines that offer states to fulfil their common and overall responsibility for the establishment and maintenance of these comprehensive social security systems. This is done through a set of principles that provide guidance for the development and implementation of social security programmes. These guiding principles deliberately reflect both the basic principles of human rights and the basic principles relating to the good governance, provision and financing of the social security system.

4.12 Transition from the Informal to the Formal Economy Recommendation, 204 of 2015

Recommendation 204 identifies the lack of protection for workers in the informal economy and provides advice on improving their protection and facilitating the transition to a formal economy. It also includes guidelines for expanding social security coverage for workers in the informal economy and its role in facilitating the transition to a formal economy.

In summation, it is clear that the ILO conventions play a crucial role of assisting member states to develop and fortify their local legislation on labour and social security law. Be that as it may, the ILO has noted with concern cases of serious failure by member states to respect their reporting with regard to the domestication of ratified Conventions and other standards-related obligations.¹⁰⁹

¹⁰⁹ ILO 2021 https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_804622.pdf 63.

5 Application of international labour and social security standards: A survey of selected courts' jurisprudence in South Africa

As evinced in the discussion above, the ILO has played a major role of shaping the labour law and social security system in South Africa.¹¹⁰ The essence of ratifying ILO Conventions means that the ratifying state confirms its intention to comply with the ILO standards. Consequently, South Africa has become a signatory to several ILO Conventions. In this regard, South African labour and social policy must therefore be aligned with international labour and social security standards and conventions. The alignment of South Africa's labour and social security legislation with international standards is underscored in section 233 of the Constitution, which provides that when a court interprets any legislation, it must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Furthermore, section 233 of the Constitution is given effect in the *Labour Relations Act* (the LRA)¹¹¹ and the *Basic Conditions of Employment Act* (the BCEA).¹¹² For example, in its preamble, the LRA provides that its purpose is, amongst others, to give effect to the public international law¹¹³ obligations of the Republic with regard to labour relations. Specific examples that are provided in the LRA include sections 1 and 3, which clearly state that the purpose of the Act is to give effect to obligations imposed on South Africa as a member state of the ILO, and that the Act must be interpreted in line with the public international law obligations of the Republic.¹¹⁴ In addition, the Code of Good Practice¹¹⁵ requires that in interpreting the presumption of employment or defining the notion of an employee, such provisions must be interpreted in accordance with international labour standards.

As discussed above, sections 1 and 3 of the LRA recognises South Africa's international law obligation as a member state of the ILO. Budeli acknowledges that these objectives seek to, *inter alia*, protect rights in section 27 of the Constitution, provide a framework for collective bargaining

¹¹⁰ Fourie acknowledges that the new forms of work have been recognised by the ILO, and in terms of its standard setting, it covers employees outside the traditional employment relationship. See Fourie 2008 *PELJ* 133-134; Smit and Van Eck 2010 *CILSA* 46-51.

¹¹¹ *Labour Relations Act* 66 of 1995 (the LRA).

¹¹² *Basic Conditions of Employment Act* 75 of 1997 (the BCEA).

¹¹³ See *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* 2003 3 SA 513 (CC) para 27.

¹¹⁴ These legislative provisions have a similar status in the BCEA, *Employment Equity Act* 55 of 1998, and the *Skills Development Act* 97 of 1998.

¹¹⁵ See part 3 of GN 1774 in GG 29445 of 1 December 2006 (Code of Good Practice: Who is an Employee).

between employees, employers, their respective organisation, and to ensure employee participation in decision-making and the effective resolution of labour disputes.¹¹⁶

Before the adoption of the *ILO Recommendation concerning the Employment Relationship* in 2006, South Africa had taken some initiatives to address the new development in the labour market.¹¹⁷ In early 2000 the dominant impression test was modified as focus shifted to the existence of an employment relationship rather than the traditional common law contract of employment.¹¹⁸ Nemusimbori concedes that the dominant impression test has failed to adequately capture the diversity of the modern labour market and the rise of non-standards employment associated with innovative business models.¹¹⁹ In the authors view, it was partly in response to these developments that the rebuttable presumption of employment was incorporated in the amendment to the LRA under section 200A in 2002. South Africa's compliance with the ILO Recommendation was further evinced in NEDLAC's work. NEDLAC has issued a code entitled the "Code of Good Practice: Who is an Employee?" to assist parties in determining the existence of an employment relationship. The presumption applies regardless of the form of the contract, and therefore gives effect to the ILO Recommendation. This was South Africa's initiative to fulfil its international obligation under the ILO and to ensure that vulnerable workers receive legal protection within the ambit of the labour legislation.¹²⁰

Similarly, South Africa has ratified some international human rights legal instruments including those giving effect to freedom of association.¹²¹ Consequently, South Africa has an obligation to ensure that its labour laws and policies are transformed, among others, to conform to ILO Conventions it has ratified.¹²² ILO's *Conventions 87* and *98* remain critical as they relate to the right to freedom of association and collective bargaining and continue to be sources of collective labour law.

The influence of international labour standard and the Constitution gave rise to Chapter II of the LRA. As earlier stated, one of the purposes of section 1 of the LRA is to give effect to obligations incurred by the Republic as a

¹¹⁶ Budeli-Nemakonde 2017 *SAPL* 6-7.

¹¹⁷ See ILO *Employment Relationship* 35-36.

¹¹⁸ Kasuso *Definition of an "Employee"* 29.

¹¹⁹ Nemusimbori *Appraisal of the Status of Uber Drivers* 16.

¹²⁰ Nemusimbori *Appraisal of the Status of Uber Drivers* 16.

¹²¹ For further discussion, see Tshoose and Kruger 2013 *PELJ* 299-306; Budeli 2010 *Obiter* 16-33.

¹²² On the status of the ILO Conventions that South Africa has ratified, see ILO date unknown
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888.

member state of the ILO. The following articles of *Convention 87* discussed below address freedom of association.¹²³ Article 2 of *Convention 87* provides: Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. Article 3(1) of *Convention 87* provides:

Workers' and employers' organisations' shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

Article 5 of *Convention 87* provides:

Workers' and employers' organisations' shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

The above articles point to their similarities to sections 4(1), 4(2) and 4(3) of the LRA. It is submitted that this description above provides telling examples of the influence the ILO had in South Africa's labour legislation.

Furthermore, the ILO provided technical assistance in the drafting of new labour legislation. In July 1994, a Ministerial Legal Task Team was appointed to draft a new LRA. The Task Team headed by Thompson Cheadle was commissioned to draft a Bill that align labour legislation in line with various International Labour Organisation Conventions and the Constitution.¹²⁴

Likewise, the BCEA stipulates that one of its objectives is to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution, by establishing and making provision for the regulation of basic conditions of employment, thereby complying with its obligation as a member state of the ILO.

As discussed above, international labour standards are important for two reasons. First, they represent an international endorsement of a minimum of best practices, whether in labour law related matters in general or in social security matters in particular. Secondly, when ratified by member states, these standards constitute a binding legal obligation under national and international law and can be incorporated into national law. At the international level, labour and social security standards are often set by laws and regulations. Others can also be found in bilateral agreements. Often it

¹²³ *Freedom of Association and Protection of the Right to Organise Convention 87 of 1948.*

¹²⁴ Bhoola 2002 https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm.

only binds parties, unions and employers, but if they are adopted in some countries, they gain the force of law.

The courts have constantly referred to international labour and social security standards, conventions and recommendations for guidance in their interpretation of the fundamental constitutional rights.¹²⁵ In *S v Makwanyane*,¹²⁶ Chief Justice Chaskalson (as he was then) described the role of international law as follows:

(P)ublic international law would include non-binding as well as binding law. They may both be used ... as tools of interpretation. International agreements and customary international law accordingly provide a [interpretative] framework. [The Constitution] can be evaluated and understood [juxtapose international law], and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the ILO, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].¹²⁷

In *Government of the Republic of South Africa v Grootboom*,¹²⁸ the Constitutional Court per Justice Yacoob held that the relevant international law can be a guide to interpretation, but the weight attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.¹²⁹ In *SA National Defence Union v Minister of Justice*,¹³⁰ the court held that:

Section 39 of the Constitution provides that, when a court is interpreting chapter 2 of the Constitution, it must consider international law. [In the courts view], the conventions and recommendations of the ILO ... are important resources [that can be used in employment law] for consider[ing] the meaning and scope of 'worker' as used in s 23 of the Constitution.¹³¹

In *Discovery Health Ltd v Commission for Conciliation, Mediation and Arbitration*,¹³² the Labour Court emphasised that the Constitution accords

¹²⁵ *National Education Health and Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) paras 34, 41 and 47-51.

¹²⁶ *S v Makwanyane*.

¹²⁷ *S v Makwanyane* para 35.

¹²⁸ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

¹²⁹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26.

¹³⁰ *SA National Defence Union v Minister of Justice* 1999 20 ILJ 2265 (CC).

¹³¹ *SA National Defence Union v Minister of Justice* 1999 20 ILJ 2265 (CC) para 35. See also *Murray v Minister of Defence* 2006 11 BCLR 1357 (C) 1358.

¹³² *Discovery Health Ltd v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 1480 (LC) para 38 and 42.

international law a particular status and requires the application of international law when interpreting South African legislation.

In *National Education Health and Allied Workers Union v University of Cape Town*,¹³³ the court had to determine the scope and meaning of section 23(1) of the Constitution, which provides that: "everyone has the right to fair labour practices".¹³⁴ In this context, Ngcobo J held that in giving content to this concept, courts and tribunals will have to seek guidance from domestic and international experience.¹³⁵ He further held that:

international experience is reflected in the conventions and recommendations of the ILO. Additionally, Ngcobo held that other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance.¹³⁶

Similarly, in *Rural Maintenance (Pty) Ltd v Maluti-A-Phofung Local Municipality*,¹³⁷ which dealt with section 197 of the LRA (transfer of a business as a going concern), the court acknowledged that international developments in relation to so-called 'service provision changes', as opposed to standard transfer of businesses, necessitated the reformulation or development of South African law.¹³⁸

In other cases, such as *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration*,¹³⁹ the court recognised that "the nature and extent of the fair procedure requirements established by the LRA and the Code is supported by international labour standards". The court further held that *ILO Convention 158* requires procedures to promote compliance with the obligation to ensure that dismissals are based on valid reasons.¹⁴⁰ Lastly, in the courts' view, the ILO convention[s] provides an important point of reference in the interpretation and application of the LRA.¹⁴¹

In summation, it is clear that the ILO's international standards played and continue to play a crucial role in the development and interpretation of

¹³³ *National Education Health and Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) (*National Education Health & AWU*).

¹³⁴ *National Education Health & AWU* para 34.

¹³⁵ *National Education Health & AWU* para 34.

¹³⁶ *National Education Health & AWU* para 34.

¹³⁷ *Rural Maintenance (Pty) Ltd v Maluti-A-Phofung Local Municipality* 2017 38 ILJ 295 (CC) (*Rural Maintenance (Pty) Ltd* case).

¹³⁸ *Rural Maintenance (Pty) Ltd* case para 21.

¹³⁹ *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration* 2006 27 ILJ 1644 (LC) (*Avril Elizabeth Home* case).

¹⁴⁰ *Avril Elizabeth Home* case. The security of employment provision is buttressed by the *Termination of Employment Convention 158* of 1982, which provides that a worker's employment shall not be terminated unless there is a valid reason.

¹⁴¹ *Avril Elizabeth Home* case.

labour and social security law in South Africa. These international standards established through the conventions and recommendations ensures that the fundamental human rights and freedoms of all persons are respected, fulfilled and protected. It is unfortunate that the links between social security and labour institutions are not fully developed in South Africa. Consequently, labour and social policies ought to be complementary and contribute to an integrated strategy for improving livelihoods and establishing an inclusive society. In essence, labour and social security policies must be developed and implemented in unison, requiring an all-encompassing strategy linking the two.

6 Conclusion

This article, exploring selected themes on the impact of international standards on labour and social security law in South Africa, has aimed to revisit and challenge certain preconceptions about the role of international labour organisation in the setting of labour and social security standard in South Africa and across the world. It has attempted to showcase how selected international law instruments on labour and social security law has shaped South Africa's jurisprudence and legislation on labour and social security law.

After exploring several pathways to using international law in labour and social security interpretation, all of which rigorously adhere to the tenets of international standard setting and benchmarking. It can be deduced that the ILO through its rich history and work ought to be commended for the milestones it has achieved over the years. Certainly, it has extraordinarily developed conventions and recommendations which have not only shaped the labour and social security systems of the majority of member states, but provided the baseline standard framework within which their domestic laws can be measured. Furthermore, these conventions extend the conceptualisation of social security, and also contribute to the development of a more comprehensive social security policy for South Africa.

The role of the ILO in standard setting has been expanded upon over the years by the courts, and academic discourse in South Africa. Finally, over and above the complementary role played by the courts, there is a need for the ILO to respond to the current needs, realities and emergence of new risks which have the potential of affecting the social security systems and the precariat in the world of work.¹⁴² To conclude, in its standard setting role the ILO ought to also grapple with the emerging labour and social security challenges associated with, *inter alia*, atypical employment, emergence of gig economy in light of the 4th industrial revolution, the impact of long-

¹⁴² See ILO *Democratisation and the ILO* 28.

covid19 in the livelihoods of employees and the effectiveness of member states in enforcing their international obligations.¹⁴³

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¹⁴³ See Waas "How to Improve Monitoring and Enforcement" 79-94.

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List of Abbreviations

AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
Am U Int'l L Rev	American University International Law Review
ASIL Proceedings	Proceedings of the American Society of International Law at its Annual Meeting
BCEA	Basic Conditions of Employment Act 75 of 1997
Cal W Int'l LJ	California Western International Law Journal
CESCR	Committee on Economic, Social and Cultural Rights
CILSA	Comparative and International Law Journal of Southern Africa
CJLJ	Canadian Journal of Law and Jurisprudence
EJIL	European Journal of International Law

Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
IJERPH	International Journal of Environmental Research and Public Health
ILO	International Labour Organisation
LRA	Labour Relations Act 66 of 1995
NEDLAC	National Economic Development and Labour Council
Notre Dame L Rev	Notre Dame Law Review
OHCHR	United Nations Office of the High Commissioner for Human Rights
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission
SAPL	Southern African Public Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
VRÜ	Verfassung und Recht in Übersee