UNIVERSITY OF KWAZULU-NATAL

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EXTENSION OF SOCIAL SECURITY BENEFITS TO WOMEN IN THE INFORMAL ECONOMY: A CASE FOR MATERNITY PROTECTION

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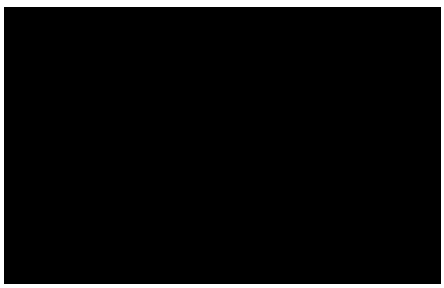
Signed: 

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ABSTRACT

This study addresses the central issue that only workers recognised as 'employees' by South Africa's labour law framework qualify for social security benefits. It highlights that, as a result, self-employed and atypical workers have no access to maternity benefits in the form of paid maternity leave, resulting in financial hardship – particularly for those in informal employment. The study finds that this exclusion constitutes a violation of core constitutional rights to equality, dignity, life, health, social security, and those of children, and a failure on the part of the state to give effect to its legal obligations in terms of international law. It argues further that the state's differential treatment of self-employed workers, and the resulting impact on their constitutional rights to equality and dignity, constitutes unfair discrimination, which would not be permitted in terms of the limitations clause.

Equally, the study considers the policy advocacy strategies utilised by self-employed women in the informal economy, to mobilise and lobby for law reform to address the violation of their rights. It examines whether state institutions supporting democracy, such as the Commission for Gender Equality (CGE), can play a role in initiating law reform processes to leverage state accountability on its gender equality obligations and commitments. It concludes that current weaknesses within the National Gender Machinery (NGM) undermine this potential, and that the measures required for the CGE to take up and act on an individual complaint and escalate this to the national policy level, are unsustainable and indicate failed institutionalism.

The study examines best practice in countries of similar socio-economic status to South Africa, finding that such countries have successfully extended maternity benefits to self-employed workers through affordable, administratively efficient mechanisms that give effect to key components of International Labour Organisation Maternity Convention 183. The study draws out practical design and implementation considerations that would need to be addressed by the state, to ensure that the most vulnerable category of self-employed workers – predominantly in the informal economy – would be able to access maternity benefits, making recommendations for the South African Law Reform Commission process currently underway.

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Final appreciation goes to Professor Managay Reddi, my Dean in the School of Law and Promotor of my thesis, for her guidance, counsel and encouragement.

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CHAPTER 1
INTRODUCTION

I. INTRODUCTION

Currently, only workers recognised as 'employees' by South Africa's labour law framework,[2] qualify for social security benefits such as unemployment employment insurance, maternity benefits and workers' compensation.[3] As a result, self-employed or own account workers, independent contractors and other informal sector workers have no access to these and other forms of social protection, resulting in financial hardship – particularly for those in informal employment. 'Less than 10% of workers in Sub-Saharan Africa and Asia have access to social security, while in other developing countries between 10% to 50% of workers are able to access social security.'[4]

As will be outlined below, women's economic and social status within a context of patriarchy and the feminisation of poverty, aggravate the impact of the exclusion from social security protections, particularly upon the birth of a child. Testimonies from self-employed women speak to hardships and tough choices in relation to their sexual and reproductive health rights, and the consequences of the lack of paid maternity leave in relation to their financial security and economic participation.[5] Furthermore, global studies indicate that the development status of emerging nations and their economic progress in relation to their Gross Domestic Product are inextricably linked to the status and well-being of women in their societies, and the opportunities available to them.[6] There is 'theory and mounting evidence that empowering women means a more efficient use of a nation's human capital endowment and that reducing

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[2] The Unemployment Insurance Act 63 of 2001 (UIA), the Unemployment Insurance Contributions Act 4 of 2002 (UICA), and the Labour Relations Act 66 of 1995 (LRA).

[3] '"[E]mployee" means — (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee"' as defined in Section 213 of the Labour Relations Act.'

[4] Paper presented at the 8th Ordinary Session of the Labour and Social Affairs Commission of the African Union, Yaounde, Cameroon (11–15 April 2011), as part of the *Social protection plan for the informal economy and rural workers 2011–2015 (SPIREWORK)* at 3.

[5] Commission for Gender Equality 'Accessing Maternity Benefits for Working Women Consultative: workshops concept note and report, Johannesburg', 2009.

[6] World Economic Forum 'Global Gender Gap Report' 2015, available at *https://reports.weforum.org/global-gender-gap-report-2015/the-case-for-gender-equality/?doing_wp_cron=1601475646.2081570625305175781250*, accessed on 30 September 2020.

gender inequality enhances productivity and economic growth.'[7] In addition, having more women participate in the workforce contributes to a country's economic performance in several ways. According to one study:

> '… greater female participation in the U.S. workforce since 1970 accounts for a quarter of current GDP. Another study indicates that the reduction in the male-female employment gap has been an important driver of European economic growth in the last decade. Closing this gap would have massive economic implications for developed economies, boosting US GDP by as much as 9% and euro zone GDP by as much as 13%. Conversely, limiting women's access to labour markets is costly. For example, Asia and the Pacific reportedly lose US$42 billion to US$47 billion annually as a region because of women's limited access to employment opportunities.'[8]

The focus of this study, accordingly, is on the extension of maternity benefits to self-employed workers, predominantly women in the informal economy, and the impact their exclusion from this aspect of South Africa's social security regime has on their rights and livelihoods.

Following a complaint received to this effect, the Commission for Gender Equality (CGE),[9] one of South Africa's constitutional institutions supporting democracy[10], undertook legal and consultative research among members of the South African Self-Employed Women's Association (SASEWA). It examined the impact of the lack of an enabling mechanism for self-employed workers to access maternity benefits, on their sexual and reproductive health rights, labour rights, and constitutional right to social security. Prompted by its research findings, the CGE formed a strategic alliance with the Congress of South African Trade Unions (COSATU), through its national gender structure, to strengthen its call on the state to enact necessary law reform to bring self-employed workers into the maternity benefit regime. This alliance resulted in the adoption of a recommendation at COSATU's National Gender Policy Conference, calling for South Africa's ratification of the International Labour Organisation Maternity

[7] Ibid.
[8] Ibid 36–38.
[9] A complaint was lodged by Gina Barbieri and Associates in 2009, buttressed by research undertaken by the Legal Resources Centre (LRC). The complainant, a self-employed attorney, was unable to make contributions towards any state or private insurance fund to ensure she had access to paid maternity leave, and alleged that working women in her position were being discriminated against
[10] The Commission for Gender Equality is one of the State Institutions Supporting Constitutional Democracy, as provided for in s 181(1)(*d*) and further governed by s 187 of Chapter 9 of the Constitution of the Republic of South Africa, 1996, and by the Commission on Gender Equality Act 39 of 1996 (CGE Act).

Convention 183 and Recommendation 191 on Maternity Protection, and enacting labour law reform to accommodate self-employed women workers.[11]

Buttressed by the oversight mandate and policy advocacy interventions of the CGE, and the political weight of COSATU's policy recommendations as a member of the ruling party's tripartite alliance, campaign partners on this issue could secure the Department of Justice and Constitutional Development's support for such reform. The result was the creation of the South African Law Reform Commission (SALRC) Project Committee 143: Investigation into Maternity and Paternity Benefits for Self-Employed Workers.[12] Through the SALRC, further research was conducted with women informal traders, through the support network Women in Informal Employment: Globalising and Organising (WIEGO), and other informal trader networks.

This study references the researcher's role as the then lead Commissioner within the CGE in driving the institution's response to the complaint received. It undertakes first to analyse critically the role of feminist mobilisation and institutions supporting democracy such as the CGE, in terms of initiating legislative reform to respond to gender discrimination and inequality, while profiling the agency of individual commissioners within such institutions to champion such processes. Supplemented by additional research into relevant constitutional and legislative provisions, and informed by South Africa's obligations in terms of international and regional conventions, the study seeks further to undertake an analysis of international and constitutional obligations on the state to enact an enabling mechanism to bring self-employed workers into the maternity benefits framework. Finally, through comparative research into international best practice in the extension of maternity benefits to the informal economy and self-employed workers, the study explores potential models and approaches for the state to consider in the law reform process currently underway, and sets out appropriate recommendations.

The study's findings and recommendations run parallel to and intersect with the SALRC process and deliberations in this regard. The study is nonetheless distinctly a scholarly analysis of this complex set of issues. Its unique contribution to existing knowledge in this sector is to examine: (i) the core issue of whether there has been a failure by the state to regulate and enable

[11] COSATU 'Draft discussion document: Maternity Protection' National Gender Conference (March 2012).
[12] SALRC 'Briefing Document, Project 143: Maternity and Paternity Benefits for Self-Employed Workers', 2017.

access to the constitutional right to social security, as envisaged by s 27 of the Constitution; (ii) if so, whether this constitutes a derogation of the state's responsibility to enact 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of this right;[13] and (iii) whether the differential treatment between women workers, on the basis of their occupation, constitutes unfair discrimination in terms of s 9 of the Constitution.[14]

II. CONCEPTUAL FRAMEWORK

(a) Theoretical considerations

The theoretical framework of this study is primarily constitutional. The existing legal framework that governs the maternity benefits mechanism in South Africa is analysed from a constitutional perspective to assess whether it gives effect to the rights guaranteed therein, or whether the state's differential treatment of this category of workers constitutes unfair discrimination. In addition, a feminist lens is brought to bear, in order to interrogate the lived realities of self-employed women, and the impact the denial of access to maternity benefits has on their sexual and reproductive health rights and their ability to participate in the economy. Feminism has been described as: 'The range of committed inquiry and activity dedicated first, to describing women's subordination – exploring its nature and extent; dedicated second, to asking both how – through what mechanisms, and why – for what complex and interwoven reasons – women continue to occupy that position; and dedicated third to change.'[15]

The lived realities of predominantly poor women are not unique to South Africa. Studies indicate that the disadvantages of the neo-liberal slate in terms of policies adopted in pursuit of globalisation are mostly borne by women in developing countries.[16] Although women have increasingly come into employment, unemployment statistics indicate that more women are unemployed than men are, and that even when employed, women typically occupy lower status positions, at lower wages, and with greater job insecurity.[17] This scenario points to what has

[13] Constitution of the Republic of South Africa Act 108 of 1996, s 27(2).
[14] Ibid s 9(1).
[15] Clare Dalton 'Where we stand: observations on the situation of feminist legal thought' (1987) 3 *Berkeley Women's LJ* 1 at 2.
[16] This is evident particularly during the Covid-19 pandemic, where research indicates that women have suffered greater economic hardship and job losses than men have. 'Emerging evidence on the impact of COVID-19 suggests that women's economic and productive lives will be affected disproportionately and differently from men. Across the globe, women earn less, save less, hold less secure jobs, are more likely to be employed in the informal sector', United Nations 'Policy Brief: The Impact of COVID-19 on Women' 2020, accessed on 23 April 2021.
[17] Elsje Bonthuys and Catherine Albertyn (eds) *Gender, Law and Justice* (2007) at 9.

been termed as the feminisation of poverty, where women are 'disproportionately represented among the world's poor compared to men'.[18]

Studies indicate that 'women and children continue to be more likely than men to live below the poverty line.'[19] Contributing factors in this regard range from access to education and participation in the paid labour force, to structural barriers such as income inequality in the form of the gender wage gap, occupational sex segregation, and the over-concentration of women in certain categories and sectors of employment.[20] Such realities typically exemplify the system of patriarchy, which has been defined as the gendered social structures that accord superior power to men, and allow them to dominate women.[21] Such a system is institutionalised in nature, with the result that even men who do not actively oppress women, benefit from the inferior social status imposed on women, described as the 'patriarchal dividend.'[22]

These economic and patriarchal contexts result in most self-employed women working in the informal economy, with little or no social security to buttress their harsh realities.[23] Studies indicate that '[p]regnancy and childbearing further marginalise vulnerable women and children by reducing income-generating potential and introducing a host of new financial needs. Only 14% of pregnant women in the poorest quartile are employed, either in the informal or the formal sector.'[24] Upon pregnancy and childbirth, ironically, the most vulnerable categories of working women are then further denied access to protection in the form of maternity benefits, to help them cope with loss of income and the additional burden on household budgets. 'Laws providing maternity protection for working women are usually restricted to the formal sector, which in many countries represents but a small proportion of overall economic activity. Such laws do not apply to the majority of women working in unregistered activities in the informal sector.'[25] Working conditions in the informal economy are precarious, unsafe, and poor – both

[18] MacKenzie Christensen 'Feminization of Poverty: Causes and Implications' in W. Leal Filho et al. (eds) *Gender Equality, Encyclopedia of the UN Sustainable Development Goals* (2019) *at 1,* available at *https://doi.org/10.1007/978-3-319-70060-1_6-1,* accessed on 28 September 2020.
[19] Ibid.
[20] Ibid at 4.
[21] Raewyn Connell *Gender and power: Society, the Person and Sexual Politics* (2013).
[22] Ibid at 79.
[23] Catherine Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court.' (2011) 22(3) *Stellenbosch LR* 591.
[24] Matthew Chersich et al. 'Safeguarding maternal and child health in South Africa by starting the Child Support Grant before birth: Design lessons from pregnancy support programmes in 27 countries' (2016) 106 (12) *SAMJ* 1192.
[25] Ockie Dupper et al. 'The case for increased reform of South African family and maternity benefits' (2000) 4 (1) *Law, Democracy & Development* 27 at 33.

in terms of remuneration and occupational health and safety.[26] This study examines the context of self-employed women, a category of workers predominantly found in the informal economy, the impact of their exclusion from the maternity benefits regime, and the interventions necessary to bring about change.

In recognising the domestic responsibilities typically imposed on women in a patriarchal society, the importance of recognising and including men in care work cannot be denied. This is essential to overcome such work being stereotyped as 'women's work', and preventing this gendered division of labour being perpetuated – thus enabling women to participate more freely in other sectors of society. There is increasing acceptance of the fact that 'there are links between women's unpaid responsibilities in the domestic sphere and their ability to engage in income-earning employment'.[27] Arguments for shifting this traditional patriarchal burden on women were made in the minority judgement in *President of RSA v Hugo*.[28] In this case, the court held that the Presidential pardon releasing female prisoners who were mothers to minor children below the age of twelve, and not men who were fathers to such children, was deemed fair discrimination. The court recognised the burden on and vulnerability of mothers who had been victims of previous gender discrimination in a way that fathers had not been. While this judgment was deemed favourable to women, in that it recognised the societal disadvantages experienced by women as mothers, and accommodated this, it was criticised by many in that it failed to take advantage of the opportunity to transform such gendered norms and shift the underlying gender stereotype of women as primary care-givers.[29]

On the face of it, it could therefore be argued that an interrogation of parental leave is required, or at least an extension of the concept of paternity leave, rather than focusing on maternity leave. Nonetheless, such an inquiry would not address the particular challenges that women encounter in relation to their ability to participate in the economy and to exercise their sexual and reproductive health rights, nor would it address the overwhelming impact the denial of this form of social security has on the most marginalised:

[26] Op cit note 4.
[27] Laura Alfers *WIEGO Child Care Initiative: Literature Review* (2015) at 5.
[28] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).
[29] Catherine Albertyn 'Feminism and the Law' in Christopher Roederer & Darrel Moellendorf *Jurisprudence* (2004) 291.

> 'Most people in South Africa are poor, and most of the poor are women. It is no surprise that the achievement of equality, human dignity and freedom under South Africa's Constitution is closely tied to the eradication of poverty and inequality. These goals are an essential part of South Africa's transformative constitutional project, and part of the wider constitutional commitment to improve the quality of life and free the potential of all persons. Central to this transformative project, although often not recognised as such, is the need to address the distinctive forms of poverty and inequality experienced by women.'[30]

Before engaging with these issues, however, it is necessary to begin with an examination of definitions of key concepts relating to the informal economy, employees and maternity benefits. This includes the distinction between maternity, paternity and parental benefits, and the constitutional implications thereof.

(b) Concepts and definitions

(i) Formal vs informal economy and implications for access to benefits

The informal sector was defined by the ILO as 'enterprises characterised by seven traits, including low barriers to entry, small-scale operations, being labour intensive, family owned, reliant on skills acquired outside of formal schooling and operating in unregulated and competitive markets'.[31] The formal sector can be viewed as all economic activities by workers and economic units that are, in law or in practice, covered by formal arrangements, excluding illicit activities.[32] The International Conference of Labour Statisticians (ICLS) adopted a definition of the informal sector, as part of its Resolution adopted in 1993, noting that this includes informal own-account enterprises, and enterprises of informal employers, irrespective of the workplace, the extent of fixed capital assets used, and the duration of the operation of the enterprise.[33]

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[30] Catherine Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court' in Sandra Liebenberg & Geo Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) chap 9 149–71 at 149.

[31] Recommendation 204 Task Team *Concept Note on Legal Reforms required to align South African laws with ILO Recommendation 204 on the Transition from the Informal to Formal Economy*, 2015 at 3.

[32] Definition adapted from the International Labour Conference 'Recommendation 204 Concerning the Transition from the Informal to the Formal Economy', adopted by the Conference at its One Hundred and Fourth Session (12 June 2015).

[33] Resolution concerning statistics of employment in the informal sector, adopted by the Fifteenth International Conference of Labour Statisticians (January 1993) para 6, available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_087484.pdf*, accessed on 8 October 2020.

Stats SA defines the informal economy sector in terms of whether or not entities are registered, and the size of the business in terms of number of employees. The informal (and formal) sector excludes domestic and agricultural work, which are captured separately – in line with international guidelines. Employers, self-employed workers and people who work unpaid in their household businesses, whose businesses are not registered for income tax or VAT, fall into the informal sector. In addition, informal sector employment includes employees from whom income tax is not deducted by their employers and who work in businesses with fewer than five employees.[34] This definition of the informal economy sector and informal sector employment is distinct from the concept of 'informal employment', which is understood as being unprotected work both inside and outside of the informal sector. Such work is characterised by the absence of a written contract, and medical or social benefits such as the contribution to a pension.[35]

The ILO defines the informal economy as 'all economic activities by workers and economic units that are, in law or in practice, not covered or insufficiently covered by formal arrangements', excluding illicit activities.[36] This definition shifts the focus from the nature of the economic enterprise, whether or not this is legally regulated, to the nature of the employment relationship with workers and whether or not these are legally regulated or protected.[37] Analysts in the sector argue that the common criterion shared by enterprises in the informal economy is that their 'informal economic activities are small in scale and elude government regulatory requirements such as registration, tax and security obligations and health and safety regulations.'[38] Furthermore, that 'a definition based on work characteristics, rather than an enterprise based definition, may be a more appropriate method for classifying workers.'[39]

[34] Stats SA 'Survey of Employers and the Self-employed' (2017) at 11.
[35] Michael Rogan & Caroline Skinner *The nature of the South African informal sector as reflected in the quarterly labour force survey, 2008-2014* (2017) at 7.
[36] International Labour Conference Recommendation 204 op cit note 32 at 4.
[37] Miriam Altman *Formal-Informal Economy Linkages* (2008) (Commissioned by the Department of Trade and Industry and the Department of Science and Technology, March) at 6.
[38] Richard Devey, Caroline Skinner & Imraan Valodia 'The Informal Economy' (2003) *Human Resources Development Review* 142 at 144.
[39] Richard Devey, Caroline Skinner & Imraan Valodia 'Informal Economy Employment Data In South Africa: A Critical Analysis' (2003) Report prepared for the Employment Data Research Group, Human Sciences Research Council – Paper presented at the TIPS AND DPRU FORUM 2003, The Challenge of Growth and Poverty: The South African Economy Since Democracy, 8–10 September 2003, Indaba Hotel, Johannesburg at 1.

The implications of the distinction between formal and informal economy workers become apparent upon analysis of the category of workers designated as 'employee'. Such categorisation results in the concomitant access to benefits enjoyed by these workers, and the exclusion from such benefits, including from contributing towards and benefiting from unemployment insurance, of others.

(ii) Categories of workers and implications for access to benefits

At the heart of the issue of extension of social security benefits to categories of workers, is the definition of the term 'employee'. The Basic Conditions of Employment Act No 75 of 1997 (BCEA) and the Labour Relations Act No 66 of 1995 (LRA), define an employee as: 'Any person, excluding an independent contractor, who works for another person or the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer'.[40] An employee, therefore, is anyone who is in paid employment – regardless of whether this is in the formal or informal sector.

The Unemployment Insurance Act No 63 of 2001 (UIA), which governs the payment of benefits to formal sector employees who have contributed to the Unemployment Insurance Fund (UIF), defines an employee as 'any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor.'[41] The UIA defines a contributor to the UIF as 'a natural person (a) who is or was employed; … and (c) who can satisfy the Commissioner that he or she has made contributions for the purposes of this Act.'[42]

The Code of Good Practice: Who is an Employee (The Code)[43] must be taken into account in determining whether a particular person is an employee in terms of key labour legislation – such as the LRA, the BCEA and the Employment Equity Act. Equally, the Code should be taken into account in making the same determination for the application of the UIF.[44] The Code

[40] BCEA op cit note 40 s 1.
[41] UIA op cit Chapter 1 note 2, as amended by the Unemployment Insurance Amendment Act 10 of 2016.
[42] Ibid.
[43] 'Code of Good Practice: Who is an Employee' (GN 1774 of GG 29445, 01/12/2006), issued in terms of s 200A(4) read with s 203 of the LRA.
[44] Ibid s 4.

notes that the 2002 amendments to the LRA[45] and the BCEA[46] introduce a provision into each Act creating a rebuttable presumption as to whether a person is deemed an employee, and is therefore covered by the Act. These sections only apply to employees who earn less than a threshold amount determined from time to time by the Minister of Labour.[47]

For a person to be presumed to be an employee, they must demonstrate that they work for or render services to the person or entity cited in the proceedings as their employer, and that any one of seven listed factors is present in their relationship with that person or entity,[48] regardless of the form of the contract of employment:

(i) the manner in which the person works is subject to the control or direction of another person;
(ii) a person's hours of work are subject to the control or direction of another person;
(iii) in the case of a person who works for an organisation, the person forms part of that organisation;
(iv) the person has worked for that other person for an average of at least 40 hours per month over the last 3 months;
(v) the person is economically dependent on the other person for whom he or she works or renders services;
(vi) the person is provided with tools of trade or work equipment by the other person;
(vii) the person only works for or renders services to one person.

Furthermore, the BCEA and the UIA distinguish 'employee' from 'independent contractor'. The latter is deemed to be a worker who is a registered provisional taxpayer, determines his or her own working hours, runs his or her own business or trades in his or her own name, is free to carry out work for more than one employer at the same time, invoices the employer for each project and is paid accordingly, is not subject to the deduction of Pay As You Earn or Unemployment Insurance Fund contributions from his or her invoice, does not receive any allowances, medical aid or bonus, and is also not eligible for any kind of leave.[49] What this means is that all waged workers, whether in the formal or informal sector, are covered by the

[45] LRA s 200A.
[46] BCEA s 83A.
[47] Ibid s 6(3).
[48] Code of Good Practice sections 15 & 18.
[49] South African Guild of Editors *Employees vs Independent Contractors* (2016) at 2.

protections envisaged in these laws. That many waged workers or employees in both the formal and informal sector are denied access to the protections and benefits outlined in this slate of labour legislation is not a matter of legal exclusion by these laws, but rather one of non-compliance by their employers, and poor enforcement by the state.[50]

Conversely, a 'self-employed worker' means a person who is the sole owner or joint owner of the unincorporated enterprise in which he or she works, excluding those unincorporated enterprises that are classified as quasi-corporations.[51] An 'own-account worker' means a worker who, working on his or her own account or with one or more partners, holds what may be defined as a 'self-employment job', and has not engaged on a continuous basis any 'employees' to work for him or her during the period in question.[52] Such categories of workers, being excluded from the definition of 'employee' in terms of the BCEA, LRA and UIA, would not be entitled to contribute to the UIF, and, accordingly would not be entitled to access benefits outlined in this legislation, such as maternity and parental benefits and the paid leave these accord.

(iii) Categories of benefits

Maternity benefits refers to at least four consecutive months' maternity leave (seventeen weeks),[53] payable to a contributor who is pregnant, at a rate of 66 per cent of the beneficiary's earnings as at the date of application, but subject to the applicable maximum income thresholds.[54] This includes instances where a contributor has a miscarriage in the third trimester, or gives birth to a stillborn child.[55] The contributor must, however, have been in employment for at least 13 weeks prior to the date of claiming maternity benefits, whether as a contributor or not.[56]

The formally referred to concept of 'paternity leave' has been replaced by the gender-neutral concept of parental benefits, which came into effect on 1 January 2020.[57] This provides for at

[50] Recommendation 204 Task Team op cit note 31.
[51] Organisation for Economic Co-operation and Development *Glossary of Statistical Terms* (2007) at 709.
[52] Ibid at 568.
[53] BCEA s 25(1).
[54] UIA s 12(3)(c).
[55] Unemployment Insurance Amendment Act op cit s 9(a).
[56] UIA s 24(6).
[57] Labour Laws Amendment Act 10 of 2018.

least ten consecutive days parental leave[58] commencing when the employee's child is born, or the date that the adoption of an employee's child is granted, or the date that a child is placed in the care of a prospective adoptive parent by a competent court, pending finalisation of an adoption order, whichever date occurs first. Parental benefits are payable at a rate of 66 per cent of the beneficiary's earnings as at the date of application – subject to the applicable maximum income thresholds.[59] These provisions do not apply to mothers who give birth, as they are already entitled to maternity leave, as outlined above.

Adoption benefits refers to at least ten consecutive weeks' adoption leave,[60] commencing on the date the adoption order is granted, or the date that the child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first. Adoption benefits are payable at a rate of 66 per cent of the beneficiary's earnings as at the date of application, subject to the applicable maximum income thresholds.[61]

Commissioning parental benefits refers to at least ten consecutive weeks' leave commencing on the date that a child is born as a result of a surrogate motherhood agreement,[62] or at least ten consecutive days parental leave,[63] commencing on the date when a child is born as a result of a surrogate motherhood agreement. Commissioning parental benefits are payable at a rate of 66 per cent of the beneficiary's earnings at the date of application, subject to the applicable maximum income thresholds.[64]

Family responsibility leave refers to three days' paid leave an employee may take when his or her child is sick or in the event of the death of an employee's child, adopted child, grandchild, sibling, spouse, life partner, parent, adoptive parent, or grandparent. In terms of s 27(3) of the BCEA, an employer must pay an employee per day, the wage the employee would ordinarily have received for work for that day, and on the employee's usual payday.

[58] BCEA s 25A.
[59] UIA s12(3)(cA).
[60] BCEA s 25(B).
[61] UIA s 12(3)(cA).
[62] BCEA s 25(C).
[63] Ibid s 25A.
[64] UIA s 12(3)(cA).

All of the benefits outlined in this section are governed by the BCEA and the UIA, as indicated, and are applicable to 'employees' as defined in these Acts and outlined above. All workers who have an employer are covered by the provisions of the LRA and BCEA, regardless of whether they work in the formal or informal sector. However, self-employed, own-account workers and independent contractors, all of whom are excluded from the definition of 'employee', are excluded from the provision of maternal and parental benefits outlined here.

This chapter next considers whether such exclusion is permissible in the context of South Africa's legal obligations in light of its international and regional commitments to human rights, including labour rights, and to gender equality, or whether it constitutes a violation of international law.

(c) Literature overview

Globally, studies reveal that women assume primary responsibility for child and family care in the home, at 2.5 times the rate of men.[65] Despite being essential to the functioning of families and the economy, such care work is typically not recognised as work, and is unpaid.[66] The burden of unpaid care work on women's economic participation has a significant impact on their career and sexual and reproductive health choices and outcomes, resulting in women's prevalence in informal, insecure, low-status and part-time positions.[67] Pregnancy further exacerbates women's vulnerability, in that it poses 'considerable financial pressures on households, through: maternal inability to work; increased volume and variety of food required to support pregnancy and breastfeeding; travel costs for additional health visits; and costs of a new child and childcare.'[68] Often, because of their economic pressures and inadequate income security, women cannot reduce their workload and take significant time off from their businesses, either directly before or soon after the birth of a child. As a result, through working far too late into pregnancy, or too soon after the birth of their child, women are forced to

[65] UN Women *Progress of the World's Women 2015–2016, Transforming Economies, Realising Rights* (2015) at 11.
[66] Laura Alfers 'Our children do not get the attention they deserve: A synthesis of research findings on women informal workers and child care from six membership-based organizations' (2016) *WIEGO Child Care Initiative Research Report*; Diane Elson 'Progress of the World's Women' (2000) *UNIFEM.*
[67] Sarah Cook & Xiao-yuan Dong 'Harsh Choices: Chinese Women's Paid Work and Unpaid Care Responsibilities under Economic Reform' (2011) 42 (4) *Development and Change* 947–965; Francie Lund 'Hierarchies of care work in South Africa: Nurses, social workers and home-based care workers' (2010) 149 (4) *International Labour Review* 495–509; Shahra Razavi 'Rethinking Care in a Development Context: An introduction' (2011) 42 (4) *Development and Change* 873–903.
[68] The DSD/Centre for Health Policy *Investigating the potential impact of maternity and early child support in South Africa: An options assessment* (2012) at 1.

compromise on their health, valuable bonding time with the infant child, and, in instances where they have no option but to take an infant back to their workplace, the health and development of the child.[69]

Research indicates that there is a direct correlation between child-care and the income of informal economy workers. This relates first to changes in the choice of employment, with women choosing more flexible working patterns when they have small children to care for, meaning that working hours are often irregular and incomes lower.[70] Studies also indicate that while poor women may indeed take on employment when their children are young, they are often 'forced to trade off stable and better paid employment for employment that offers greater flexibility. This allows them time to care for their children, but it is also informal, insecure, and poorly paid'.[71]

Secondly, women are obliged to change their work schedules to correlate with their children's needs, so impacting on the efficacy and functioning of their businesses. Street traders note that early mornings and later afternoons are the best time to access wholesale markets, trade and to cater to foot traffic. Ironically, these are the times when small children are most in need of parental care, and lifting to and from crèches or schools.[72] Thirdly, when women are obliged to keep small children with them while they work, this affects their productivity and output – further impacting on their business profitability and family income. Frequent instances of inadequate infrastructure pose health and safety hazards for young children in the workplace, with women reporting having to stay home from street trading when the weather is bad, because of the lack of shelter for their children.[73] Informal economy workers are more vulnerable to income insecurity and poor health because of unsafe and insecure working conditions, often poorly paid and fluctuating income, and work spaces with limited and poor public infrastructure and services such as shelter and sanitation services.[74]

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[69] International Labour Organisation, 'Maternity cash benefits for workers in the informal economy' (2016) *Social Protection for All Issue Brief* at 1.
[70] Alfers op cit note 66.
[71] Alfers op cit note 27 at 12.
[72] Ibid.
[73] Ibid.
[74] Francie Lund, 'Work-related social protection for informal workers' (2012) 65 *International Social Security Review* 9–30. Stats SA, in 'Quarterly Labour Force Survey' identifies 10 sectors and related occupations typical of the informal economy, including subsistence farmer, beach/public market trader, street and seasonal trader, tuck shop operator, waste picker, car guard, hairdressing, sewer, informal child-care worker. *http://www.statssa.gov.za/?page_id=1856&PPN=P0211&SCH=72661*, accessed on 11 November 2020. Stats SA further reports that "informal employment grew from 4.2 million informal jobs in 2013 to 5 million informal jobs in 2019. Males had the highest share of those employed in all types of employment compared to females. In informal employment, a decline from 47.7% in 2013 to 43.8% in 2019 was observed for participating females,

Studies indicate that measures to reduce financial stress, for instance through income protection during childbirth, would not only have a direct positive impact on vulnerable women's health and well-being, but would also enhance their ability to cover pregnancy-related expenses. Such measures would strengthen women's agency in managing their choices and decision-making, support their nurturing of their new-borns, and through their improved economic status enhance the prospects of their children.[75] Although the South African Unemployment Insurance Fund (UIF) framework provides for paid maternity leave for formally designated employees, self-employed women are not covered by the system.[76] In addition, some categories of vulnerable women workers in the domestic and farm work sectors, as well as casual, part-time, volunteer and sub-contracted workers, are excluded from the benefits of maternity protection provided by the UIF.[77] As a result, these benefits provide income security to a minority of women, with studies indicating that globally only 28 per cent of those employed, primarily salaried workers in the formal economy, are protected by cash benefits.[78] Where women run their own businesses, whether in the formal or informal economy, an assumption has been that they are able to make their own financial arrangements to take time off from work upon the birth of a child. Research indicates that the opposite is true, and that the majority of such women are forced to make difficult choices between business demands, family financial needs, their own health, and reproductive planning.[79]

There is clearly a blindness to women and their contribution to the economy, and the lack of an enabling legislative framework to provide for maternity protection in the workplace undermines their economic participation. This discrimination flies in the face of South Africa's constitutional guarantees of equality, and the international obligations flowing from treaties and conventions to which the state is a signatory.

(d) International law

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while males recorded an increase from 52.3% in 2013 to 56.2% in 2019." Stats SA 'Gender Series Volume VII: Informal Economy, 2013–2019' (2020) at 8. Finally, while inequality experienced by workers in the informal economy is generally acknowledged, little attention is paid to inequalities based on sex within the informal economy itself. WIEGO's studies indicate that employers in the informal economy are mostly men, and have the highest earnings, followed by own-account workers, employees, and domestic workers, where women are overrepresented. WIEGO 'Hierarchies of Earnings and Poverty', https://www.wiego.org/hierarchies-earnings-and-poverty, accessed on 19 September 2021.

[75] The DSD/Centre for Health Policy op cit note 68 at 1.
[76] The UIA op cit note 2.
[77] Ibid.
[78] ILO op cit note 69 at 1.
[79] Alfers op cit note 66; COSATU op cit note 11.

The ILO has recognised the need for the extension of forms of social protection to workers, and has called for the gradual extension of maternity protection to women in all sectors of activity, as a matter of priority. Its 1999 study revealed that very few countries provided paid maternity leave for agricultural, casual, home and domestic workers, with only marginally more countries extending these benefits to self-employed workers.[80]

These results are startling, considering the existence of sector-specific ILO conventions imposing obligations on states to extend such benefits, as well as its Maternity Protection Convention 183 – calling for such coverage for workers in atypical forms of work. South Africa has yet to ratify these conventions, and yet coupled with other relevant treaties to which South Africa is a signatory, these constitute a persuasive body of international law and evidence of the need to extend paid maternity benefits coverage.

Key measures at the United Nations level include the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 9 declares that '[t]he State Parties to the present Covenant recognize the right of everyone to social security, including social insurance'. Article 10(2) goes on to specifically state that maternity leave should be covered, and that '[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.'

The UN reporting body on this Covenant, the Committee on Economic, Social and Cultural Rights, emphasised the need for such coverage, stating that maternity leave is one of the nine principal areas of social security and that coverage should be extended to all women – including those in atypical work. Countries are urged to prioritise marginalised and vulnerable categories of working women, including those who are self-employed. State parties are exhorted to take the necessary steps, and legislative measures in particular, to ensure access for all and as soon as possible – to the right to social security.[81] The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), to which South Africa is a signatory, declares that 'to prevent discrimination against women on the grounds of marriage or maternity leave and to ensure their effective right to work, States Parties shall take appropriate measures . . .

[80] International Labour Organisation 'Social Security: A New Consensus' (2001) Geneva.
[81] United Nations Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 19: The right to social security (Art. 9 of the Covenant*')* (2008).

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances'.[82]

Most regional human rights instruments include the issue of women's right to maternity benefits, without any restriction imposed relating to their category of employment. The African Charter on Human and People's Rights declares, in Article, 18 that 'the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.' In addition, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provides that: 'States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall . . . guarantee adequate and paid pre and post-natal maternity leave.'[83] South Africa is a signatory to both these continental treaties, and is obliged to enact appropriate policy, legislative and other measures to ensure it complies with these commitments. Therefore, this study will involve a critical analysis of the extent to which the South African state has fulfilled its international law obligations in this regard.

(e) Constitutional and legislated obligations

Section 27 of the South Africa Constitution provides that everyone has the right to equal access to social security, and requires the state to take 'reasonable legislative and other measures . . . to achieve the progressive realization of . . . these rights.'[84] Furthermore, the right to equality captured in s 9 of the Constitution declares that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law,'[85] and enjoins the state to promote the achievement of equality by taking 'legislative and other measures designed to protect or advance persons, or categories of person, disadvantaged by unfair discrimination.'[86] Finally, s 9(3) prohibits the state from discriminating against anyone on the basis of numerous grounds – including gender, sex or pregnancy. With the impact on a person's constitutional right to dignity forming the basis of any constitutional enquiry into unfair discrimination, the

[82] United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Article 11(2)(b).
[83] African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), Article 13.
[84] Constitution s 27(2).
[85] Ibid s 9(1).
[86] Ibid s 9(2).

undermining of a women's right to dignity by preventing her from accessing maternity protection, simply because of her category of employment, is key to this inquiry.[87]

Read together, these provisions outline a compelling obligation on the state to ensure that working women, regardless of the sector or nature of their occupation, have access to social security in the form of maternity protection. Arguably, there is a direct obligation on the state in terms of s 27 at least to regulate the provision of social security benefits to all categories of workers. Nonetheless, it would seem that South Africa has failed to enact a policy mechanism to extend maternity benefits to these categories of working women. This study therefore involves an in-depth critical examination of whether the state's failure to address the current exclusion of self-employed women and women in the informal economy, constitutes unfair discrimination.

The Basic Conditions of Employment Act (BCEA) provides for at least four consecutive months' maternity leave for pregnant women, enabling them to draw maternity benefits from the UIF – in accordance with the provisions of the Unemployment Insurance Act (UIA) and the Unemployment Insurance Contributions Act. Only designated employees who have contributed towards the UIF may draw maternity benefits from the Fund during maternity leave. Consequently, self-employed and informal economy workers are precluded from contributing towards and drawing benefits from this fund, and are without cover during maternity leave.

Furthermore, workplace protections against unfair labour practices in the provision of benefits to employees, as provided for by the Labour Relations Act (LRA), do not extend to these categories of vulnerable workers, as they do not fit the definition of 'employee' under the Act. Equally, being own account workers, they do not have an identifiable 'employer' committing the unfair practice. Evidently, South Africa is failing to meet its constitutional and international obligations towards working women, and its prevailing labour legislative framework perpetuates discrimination against a vulnerable category of workers, which is contrary to obligations to prioritise their access to rights and eliminate unfair discrimination.

The correlation between maternal and child health has been firmly established.[88] It can therefore be further argued that the derogation of a woman's rights to maternity protection and

[87] Ibid s 10.
[88] Zohra S. Lassi, Amara Majeed & Shafia Rashid et al. 'The interconnections between maternal and new-born health – evidence and implications for policy' (2013) 26 (S1) *The Journal of Maternal-Fetal & Neonatal Medicine* 3-53.

resulting impact on her sexual and reproductive health rights, undermines and constitutes a violation of the s 28 guaranteed right of every child to basic nutrition and health care.[89] This study argues that the state is obliged to enable all women workers to take maternity leave, regardless of their category of employment. Concomitantly, it could again be further argued that this is necessary in order to promote the best interests of the child, deemed 'of paramount importance in every matter concerning the child'.[90]

III. RESEARCH QUESTIONS

The study seeks to address the following key research questions:

(a) How does the lack of access to maternity benefits impact on the rights to social security,[91[1]] equality,[92[2]] and human dignity,[93[3]] and on the economic participation of self-employed women – and women in the informal economy in particular?

(b) Is the state's failure to grant access to maternity benefits to self-employed women a violation of its international commitments and constitutional obligations?

(c) Does the impact of the lack of access to maternity benefits on the right to equality amount to unfair discrimination?

(d) What international best practices are available for South Africa to draw on in terms of maternity protection models and mechanisms, and what would be the law reform implications to enact these?

(e) Can institutions supporting democracy such as the Commission for Gender Equality play a role in initiating law reform processes to leverage state accountability on its gender equality obligations and commitments?

(f) What policy advocacy strategies would be effective for vulnerable categories of workers, such as self-employed women in the informal economy, to mobilise and lobby for law reform to address the violation of their rights?

IV. RESEARCH METHODOLOGY

[89] Constitution s 28(1)(c).
[90] Ibid s 28(2).
[91[1]] Ibid s 27.
[92[2]] Ibid s 9.
[93[3]] Ibid s 10.

This is a socio-legal study, in that it not only engages with the relevant legal framework and necessary law reform processes pertaining to the study's focus, but equally engages with the relationship between the law and its impact on a particular segment of society. Socio-legal studies have been defined as embracing 'disciplines and subjects concerned with law as a social institution, with the social effects of law, legal processes, institutions and services and with the influence of social, political and economic factors on the law and legal institutions'.[94]

In addition, it is important to declare the position of the researcher in relation to this study, as partial participant-observer. Participant observation is understood as 'the process enabling researchers to learn about the activities of the people under study in the natural setting through observing and participating in those activities.'[95] In participant observation, the researcher learns and gathers data by being located in or exposed through 'day-to-day or routine activities of participants.'[96] The study draws on research work the researcher had undertaken during her role as a Commissioner with the CGE, over the period 2009–2016, and as an Advisory Committee member and Project Leader on the SALRC Project Committee 143, from 2017 to date. The study presents primary source data gleaned from consultative workshops facilitated with street traders, self-employed women and other categories of informal economy workers, by these two entities, from 2009 to date, as well as the researcher's experience and insight gained into the operation of an institution supporting democracy, from the perspective of a commissioner.

This thesis is not based on an empirical study, but rather on a desktop review of relevant legal materials and secondary sources. It includes a comparative component, drawing on appropriate legal frameworks and maternity protection models applied in countries comparable to South Africa's socio-economic context. This component demonstrates how developing countries embodying a constitutional framework, with large-scale population bases reflecting the prevalence of women's participation in their informal economy, can enact and regulate an affordable maternity protection mechanism that gives effect to socio-economic rights and obligations.

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[94] Socio-Legal Studies Association *Statement of Principles of Ethical Research Practice* (2009) at para. 1.2.1., available at *https://slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf*, accessed on 28 September 2020.

[95] Barbara Kawulich 'Participant Observation as a Data Collection Method' (2005) 6 (2) *Forum: Qualitative Research* at 1.

[96] Ibid.

Ethical clearance considerations in drawing on work that comprises the intellectual property of institutions such as the CGE and SALRC have been addressed by obtaining permission from these bodies to do so.

V. STRUCTURE OF THE THESIS

(a) Overview

This study comprises the following six chapters, which capture particular dimensions to the investigation, consultation and policy advocacy recommendations towards envisaged law reform securing the extension of maternity benefits to self-employed women:

(b) Campaigning for social security rights: Self-employed women in the informal economy and maternity benefits

Chapter two captures and analyses how women in organised labour structures in South Africa mobilised around the need for a legislative response to a critical gender justice issue – access to maternity benefits for self-employed women – predominantly in the informal economy. The chapter captures the rights' considerations and aspirations relating to women in the informal economy, gleaned through consultative workshops conducted by the CGE and the SALRC, and how such workers successfully navigated and generated the law reform initiative currently underway.

(c) Feminist institutionalism and the Commission for Gender Equality: Leveraging state accountability for gender equality through institutions supporting democracy

Chapter three explores how the vehicle of the CGE serves as a platform to leverage state accountability on gender equality obligations and commitments, and those relating to access to social security and maternity protection for self-employed women, in particular. It examines the political constraints and opportunities navigated by the CGE in this regard, within the context of the national gender machinery. This analysis is situated amid criticism that South Africa has undermined the feminist transformative potential of gender equality through its technical and depoliticised approach to women's empowerment, and the creation of inefficient and unwieldy bureaucratic structures and processes. It explores, in particular, the strategic alliances formed with trade union and representative structures of women informal economy workers, and how pressure was brought to bear upon the state to accede to the demands for law reform to extend maternity protection to all classes of working women. Equally, it examines

the agency of individual commissioners within such institutions, to navigate internal mechanisms and constraints to drive a policy advocacy process.

(d) International legal framework pertaining to maternity protection and the rights of self-employed women

Chapter four comprises a comprehensive, critical analysis of relevant international conventions and treaties relating to social security, maternity protections and vulnerable categories of workers, such as women in the informal economy. This examination includes scrutiny of whether the state's exclusion of self-employed workers from existing maternity protections constitutes a violation of the state's obligations under international law.

(e) Constitutional and legislative provisions

Chapter five comprises a comprehensive, critical analysis of the constitutional and legislative framework relating to social security, maternity protections and vulnerable categories of workers, such as women in the informal economy. Using a constitutional lens of analysis, and drawing on relevant court judgments, this chapter examines obligations on the state to enact measures to ensure access to social security to all categories of working class women, and the obligations to prioritise vulnerable categories of women, who are victim to previous discrimination in particular. This examination includes scrutiny of whether the state's exclusion of self-employed workers from existing maternity protections constitutes a violation of these workers' rights, is deemed unfair discrimination in particular, and constitutes a violation of the paramountcy of the best interests of the child.

(f) Comparative approaches: Extension of maternity protection to self-employed workers

Chapter six examines comparative legal systems and best-practice approaches globally, in the extension of social security benefits to self-employed workers. This chapter interrogates the forms of maternity protection that have been taken up in comparable countries' legislative and policy frameworks, and the benefits and entitlements that are included. The chapter also considers the relevant categories of workers likely to be affected, and the challenge of funding maternity protections through state and employer liability in an informal economy context. Critical issues such as voluntary as opposed to compulsory registration, worker contributions in contexts of unstable income levels, and models suggesting special schemes for self-employed workers as opposed to their inclusion in existing legislation, are analysed and considered.

(g) Conclusion and recommendations

The final chapter seven presents an analysis of the findings of the study, and proposes a slate of recommendations for consideration in the ongoing law reform process.

VI. CONCLUSION

An analysis of the existing maternity benefits' mechanism reveals that South Africa has not enacted an enabling policy or legislative framework to extend maternity benefits to self-employed workers. Despite constitutional commitments to equality and non-discrimination, and access to social security benefits, in addition to obligations incurred through ratification of international conventions relating to non-discrimination, gender equality and the attainment of socio-economic rights – the current unemployment insurance mechanism prevents self-employed women from contributing to a maternity fund and drawing maternity benefits during pregnancy and after childbirth. The next chapter explores the impact this has on self-employed women, particularly those in the informal sector, and how they mobilised to bring about the resulting law reform process currently underway.

CHAPTER 2

CAMPAIGNING FOR SOCIAL SECURITY RIGHTS: SELF-EMPLOYED WOMEN IN THE INFORMAL ECONOMY AND MATERNITY BENEFITS[97]

I. INTRODUCTION

This chapter analyses how self-employed women in South Africa, in organised labour structures predominantly in the informal economy, mobilised around the need for a legislative response to a critical gender justice issue – their access to maternity benefits. It draws on these workers' engagement with the Commission for Gender Equality (CGE) and the South African Law Reform Commission (SALRC), and their experiences of navigating their pregnancy and confinement during birth, while trying to sustain their own small businesses. The chapter details the impact these experiences have on self-employed workers' reproductive health rights and choices, their participation in the economy, and ultimately, their dignity.[98] It describes how, through strategic engagement with institutions such as the CGE and Congress of South African Trade Unions (COSATU), this vulnerable category of workers could successfully initiate a call for law reform that, if successful, will ultimately extend maternity benefits to self-employed women.

II. LODGING A COMPLAINT AND CONSULTATION WITH THE CGE

The CGE is mandated by its governing Act to receive and investigate complaints of gender discrimination.[99] A complaint was duly lodged by Gina Barbieri and Associates in 2009, buttressed by research undertaken by the Legal Resources Centre (hereafter LRC). The complainant was self-employed, and therefore not recognised as an 'employee' in terms of the Unemployment Insurance Contributions Act, and not permitted to contribute to the state's UIF. Equally, she had undertaken research among private insurance policies, and found that no equivalent private insurance fund existed to which she could contribute and draw down benefits upon the birth of a child – in the form of paid maternity leave. She alleged that working women

[97] This chapter first appeared in Janine Hicks 'Women's Movements and Feminist Activism' (2019) 33 (2) *Agenda Feminist Media* 32 - 41, and is used with permission.
[98] As noted in chapter one of this thesis, the impact on a person's constitutional right to dignity forms the basis of any constitutional inquiry into unfair discrimination. This chapter considers whether preventing women's access to maternity benefits because of her category of employment constitutes unfair discrimination.
[99] CGE Act s 11(e).

in her position were being discriminated against, in that no mechanism existed to afford them paid maternity leave.

The CGE took up this complaint, and together with the complainant and the LRC, consulted with key stakeholders in the sector in the form of the South African Self Employed Women's Association (SASEWA) and the Businesswomen's Association (BWA), to assess the extent of the impact of the apparent gap in South Africa's labour and social security protection mechanisms. These stakeholders emerged as campaign partners on this issue, and worked together to devise a strategy of consultation, and to further research as well as advocacy engagements to develop and leverage policy recommendations in line with the CGE's mandate.

Consultative workshops during 2009 brought together a diverse group of working women, to discuss the issues with the campaign team and to deliberate on the policy gap and the practical impact it has on working women. Two pilot workshops were initially held in Stanger and in Durban, in August 2009, and these were then rolled out in each of the nine provinces through the CGE's provincial offices in each province. The objectives of the workshops included obtaining a broader understanding of the social issues impacting on working women in relation to maternity benefits, establishing awareness among affected stakeholders of the discrimination inherent in current policy approaches, establishing a clear need for an advocacy campaign in response, and creating the requisite buy in from a broad stakeholder group.[100] Workshop participants came from a range of sectors, including women members of cooperatives, women street traders, and women who had their own registered companies. Workshop numbers varied between 35 and 50 participants per workshop, and in the main comprised South African nationals, although participants were not requested to identify their nationality.

Women were asked in what way they were affected by not being able to access maternity benefits, and what response they would like to see from the state. Participants spoke bitterly of the difficulties they experienced, often as sole breadwinners, in that during maternity leave, there was no income for their families. This particularly impacted on those women who had to be hospitalised during childbirth, and were unable to arrange for a replacement to run their business for them. Participants from the eThekwini and KwaDukuza Municipalities reported that their situation was particularly aggravated by municipal informal trade permit requirements that resulted in their losing their assigned trading spaces if they were away from

[100] CGE op cit note 5.

their stalls for too long. Women reported that if they were unable to pay their permit fees for three consecutive months, they would lose their trading permit.

Furthermore, the lack of affordable and accessible child-care facilities resulted in a complete lack of support for women needing to return to their businesses. Those women financially obliged to return to work immediately after birth, with no such child-care, found themselves obliged to bring their newborn infants to their workplace. Street traders, in particular, spoke in anguish of the conditions to which their infants were exposed, due to poor working conditions, non-existent sanitation facilities and inadequate shelter from the weather. Women spoke of the financial and psychological stress they confronted in such circumstances.

Other categories of working women running their own small listed companies shared their challenges, with many stating that they were obliged to shut down their consultancies and businesses temporarily during childbirth, due to the nature of their businesses. This negatively impacted their family incomes and respective business growth. Many women reported how resulting financial constraints limited their family planning decision-making.

Participants called for their inclusion in state social security and maternity benefit mechanisms, as well as for the provision of subsidised childcare facilities close to their places of work so that they could breastfeed their children while they are working. Participants across provinces were unified in their call for a review of municipal informal economy policy, trade permit systems, health and safety standards, and mechanisms to enable women's participation in the informal economy. Participants were united in their commitment to contribute voluntarily financially towards a state-subsidised maternity benefits scheme, such as the current UIF. Trader network organisations resolved to form organised communication structures among their stakeholder groups to raise awareness of these issues, roll out a campaign calling for law reform in response, and to support submissions by the CGE in this regard to Parliament and the state.[101] The CGE was requested to convene consultative workshops across the provinces, and to draw on the political weight of COSATU to help leverage its policy proposals.

III. POLICY ADVOCACY STRATEGIES: DRAWING ON ORGANISED LABOUR

The CGE engaged with the office of the General Secretary of COSATU in November 2009, bringing to his attention the gap in South Africa's social security framework relating to access

[101] Ibid.

to maternity benefits for the informal economy and self-employed workers.[102] After presentations on this issue to COSATU's national gender office, collaboration between the CGE and COSATU began in earnest, to frame this as a critical issue effecting all classes of working women, and to develop a policy position in this regard. The outcome was the development of a discussion document detailing the inadequate provision for maternity benefits and its impact on working women – which was tabled at COSATU's gender conference in 2012. The intention was to secure a resolution at this forum, calling for the ratification of the ILO Maternity Protection Convention and necessary reform to South Africa's maternity benefits mechanism. Thereafter, the resolution would be taken forward to COSATU's national conference, and if adopted there, would effectively secure this position as official policy of the Tripartite Alliance.

The Discussion Document: Maternity Protection, was effectively tabled at COSATU's National Gender Conference in March 2012.[103] The emerging conference resolution called for South Africa's ratification of the ILO Maternity Convention, and the necessary reform to the labour legislative framework to ensure access to maternity benefits for all classes of working women, including self-employed women and those in the informal economy.

IV. ENGAGING WITH THE DEPARTMENT OF LABOUR

The CGE made formal submissions to the Minister of Labour in November 2009, bringing to the Minister's attention discrimination in law and practice against informal economy workers and its impact on women in particular.[104] The CGE emphasised that this situation exacerbates the socio-economic impact of poverty and inequality between women and men, as it prevents women from participating fully in the economy – often impacting on their reproductive health and family planning choices. Eventually, the South African Law Reform Commission received the mandate from the Minister to investigate the feasibility of extending maternity and paternity benefits to self-employed workers.

In November 2016, the SALRC established Advisory Committee Project 143: Maternity and Paternity Benefits for Self-Employed Workers, appointed Advisory Committee members to lead this process. In June 2017, the Committee developed and issued a research proposal paper

[102] Commission for Gender Equality, correspondence addressed to Office of Secretary-General, COSATU, 10 November 2009.
[103] COSATU op cit note 11.
[104] Commission for Gender Equality, correspondence addressed to Office of the Director-General, Department of Labour, 10 November 2009.

for public comment,[105] followed in November 2017 by a briefing document for public comment.[106] An Ad Hoc Committee of key governmental stakeholders was established to advise the Committee on related developments. These included the review of South Africa's social welfare mechanisms currently underway in the social development sector, the development of the National Health Insurance scheme in the health sector, and developments relating to South Africa's ratification of ILO Recommendation 204 (on the transition from the informal to formal economy).[107] The Women's Ministry in the Presidency, and the CGE were also invited to nominate representatives to serve on the Ad Hoc Committee and advise the law reform process.

The SALRC ascertained and acknowledged that there is currently no legislation on this subject matter and no government department working on it.[108] The Advisory Committee conceptualised a two-phase approach to a study, to determine which categories of workers should be included and what the nature and extent of benefits to be offered should be. The study would also examine South Africa's obligation relating to maternity and paternity benefits, as informed by the Constitution and international obligations and commitments. The SALRC also sought to undertake a social needs study, using quantitative and qualitative methodologies, to generate information pertaining to the types, numbers and needs of workers affected by the issue, as well as perceptions, experiences and roles in relation to child care. The study would culminate in a report to be tabled before the Minister of Justice and Correctional Services, advising on necessary law reform.

V. SALRC CONSULTATION IN THE SECTOR: DEMANDS AND RECOMMENDATIONS

Committee members engaged with stakeholders in the informal economy sector, convening two consultative workshops with informal economy and own account workers in Durban in December 2017. The first workshop comprised approximately 30 participants, organised through Women in Informal Employment: Globalizing and Organizing (WIEGO) network partners, and a local non-governmental organisation, Children in Distress Network (CINDI). Women represented a broad range of organised groupings, from the South African Waste

[105] South African Law Reform Commission (SALRC) 'Research Proposal Paper, Project 143: Maternity and Paternity Benefits for Self-Employed Workers', 2017.
[106] SALRC op cit note 12.
[107] ILC Recommendation 204 op cit note 32.
[108] SALRC op cit note 105.

Pickers' Association, SASEWA,[109] Markets of Warwick, Traders Against Crime, and other local networks operating in Durban and Pietermaritzburg. The intention was to elicit from this initial consultative process, a clearer perspective on which categories of workers were affected by this gap in the legislative framework, and what impact this had on their access to sexual and reproductive health and social security, and on their economic participation. Stakeholders' input was also sought on the forms of maternity benefits and social assistance that would be most beneficial, and what contribution affected workers could make toward any participatory scheme set up to provide such benefits. These consultations generated a rich set of data for the SALRC.[110]

Working women cited an extensive range of challenges experienced prior to birth, during birth, and caring for newborn children because of their inability to take paid maternity leave during this period. These included loss of a day's income for each clinic visit, occasioned by long queues, and working long hours right up to the ninth month – resulting in giving birth early, miscarriages and sometimes giving birth at the place of work. Women cited financial pressures occasioned by being unable to earn income during the period of childbirth, and losing their trading sites through not being able to secure an assistant to look after their business, due to trading permit restrictions in this regard. Women reported the stress of being faced with the decision of taking their children to work with them, to ensure continued income, resulting in them not being able to pay attention to their business and their customers, losing customers due to breastfeeding and changing nappies in public, and placing their children in unsafe and unhealthy environments. Referring to harassment from officials policing compliance with permit requirements, one participant stated that 'women traders must hide their babies from metro police in containers, because if they see the baby, the mother will be arrested'.[111]

Partners of working women cited challenges they experience supporting their families during the period of childbirth, without these women having access to adequate social security support systems. These challenges included losing working days, increased family household expenses relating to childcare, and in some instances, financial losses occasioned by long absences from working where complications resulting from birth arose.[112] Participants were asked what forms of social security support would help address the challenges they had raised, whether they

[109] South African Self-Employed Women's Association.
[110] SALRC 'SALRC WIEGO & CINDI Consultation Workshop: Project 143: Maternity and Paternity Benefits for Self-Employed Workers', 6 December 2017.
[111] Ibid at 7.
[112] Ibid at 9.

would be able to contribute to such support through monthly contributions, and how the state could best enable men to play an equal role in childcare and rearing. Participants unequivocally called for paid maternity leave, three months before birth and three months post birth, with access to clinics and child-care facilities, and free public child care facilities in particular (close to their trading spaces), to support them during this period. The issue of maternal health and early development were also raised, with participants citing concerns regarding their nutrition during pregnancy and breastfeeding, and that of their newborn children, and suggesting that cash benefits in this regard would assist greatly.

Participants also stated clearly that all workers should be able to contribute to a fund such as the UIF, although they acknowledged that variances in their monthly earnings, and the fact that in some months they made no profit at all, posed a challenge to determining such contribution. There was a general call for education and awareness measures for men on their role in childcare, and support for their attendance with their partners at antenatal clinics. The issue of paternity leave was raised by participants, with a view to enabling men to take on greater care roles in raising children. However, this view was somewhat contested. Participants agreed that paternity leave should be increased, but expressed doubt at whether fathers would use this time to assist partners in taking care of the newborn child.[113]

The second workshop was convened with the assistance of the eThekwini Municipal Informal Economic Forum (EMIEF) and the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs (EDTEA). These structures brought together a small dialogue of representatives from their networks to elicit their views on challenges experienced during pregnancy and birth of children to informal economy workers.[114] Worker representatives spoke of challenges experienced during the period of childbirth for informal traders who are the breadwinners and heads of households. Often, women return to the streets to trade, within days of giving birth, stating that 'the family has got nothing to eat during the three days of absence from work'.[115]

A representative stated that there is no support for workers from the state, despite the EMIEF having lodged a request with the eThekwini Municipality to establish a fund from their permit contributions, to enable traders to use funds to pay for food and other necessities required by

[113] Ibid at 14.
[114] SALRC 'SALRC EDTEA Workshop, Project 143: Maternity and Paternity Benefits for Self-Employed Workers', 7 December 2017.
[115] Ibid at 4.

mothers and their families. She reiterated the challenge relating to permit conditions cited in the WIEGO and CINDI workshop, namely that workers are only permitted to bring a helper to run their stall if those names have been disclosed and displayed on their permit. Regardless of whether those helpers are family members, workers are viewed as being employers of their helpers, and, ironically, are required to make UIF contributions on their behalf – even though they are not registered as formal businesses, resulting in financial hardship for self-employed workers.[116] Workers ruefully cited that they are required to pay rentals for their stalls for six to twelve months in advance, with the benefit from the interest gained on these contributions accruing to the municipality, and not the workers.

Particularly vulnerable categories of workers, such as home-based workers and waste pickers were identified, as these do not hold any permits with the municipality, and would effectively be excluded from social security protection.[117] Participants expressed great dissatisfaction at their exclusion from consultative policy processes in relation to the informal economy.

The SALRC Project 143 Advisory Committee is in the process of finalising its legal and comparative study relating to an appropriate policy response and legal framework to enable maternity and paternity benefits for informal economy and self-employed workers. The Advisory Committee is working to releasing a discussion document to form the basis of national consultation on proposed models emerging from this process.

VI. FURTHER POLICY ADVOCACY AND CONSULTATION: CREATING LINKAGES WITH LABOUR

The National Economic Development and Labour Council (NEDLAC) has established a R204 National Task Team to guide South Africa in its implementation of ILO Recommendation 204, on the Transition from the Informal to Formal Economy. The SALRC Advisory Committee has engaged with the task team and participated in the convening of a national dialogue on this process.[118] The dialogue brought together a diverse range of informal economy worker representative structures, organised labour, business and state departments to formulate a roadmap to facilitate the transition from the informal to formal economy. Debates focused on a necessary enabling regulatory and policy environment and capacity of state structures to

[116] Ibid at 5.
[117] Ibid at 6.
[118] Department of Labour 'National Dialogue on the Transition from the Informal to Formal Economy in South Africa, in partnership with NEDLAC R204 National Task Team and partners', 26–28 March 2018.

support this process, mechanisms to strengthen worker participation, and necessary monitoring and compliance mechanisms. Key to the debate at this dialogue was the issue of extending social security to informal economy workers – with maternity benefits and protections for working women central to this issue.

VII. CONCLUSION

Testimony of denial of rights, social exclusion and hardships provided by informal economy and self-employed workers during the consultative workshops convened by the CGE and the SALRC, reiterate findings in this regard in the literature referenced in this study. These testimonies point to the numerous and significant violations of gender equality, human rights and children's rights experienced by women and their children.

What makes the discrimination and denial of rights egregious, is that it is predominantly particularly vulnerable and marginalised categories of working-class women who are most affected by this gap in the legislative framework. Despite the overwhelming evidence of state obligations to prioritise and redress previous discrimination, the state continues to perpetuate women's marginalisation in the economy, contributing to the feminisation of poverty referred to in chapter one of this thesis.

The next chapter examines the role of the CGE as an institution supporting democracy, and its potential ability to give effect to its constitutional mandate and obligations to address such forms of systemic gender inequality.

CHAPTER 3

FEMINIST INSTITUTIONALISM AND THE COMMISSION FOR GENDER EQUALITY: LEVERAGING STATE ACCOUNTABILITY FOR GENDER EQUALITY THROUGH INSTITUTIONS SUPPORTING DEMOCRACY[119]

I. INTRODUCTION

This chapter shares the success of the South African Commission for Gender Equality (CGE) in leveraging state accountability in terms of international and constitutional gender equality obligations and commitments, to bring about policy reform in the social security sector. The chapter critically analyses the CGE's policy advocacy campaign on access to maternity protection benefits for informal economy women workers, which resulted in the state's take up of law reform on this issue through the South African Law Reform Commission (SALRC). It further examines the political constraints and opportunities navigated by the CGE, within the context of its location within the National Gender Machinery (NGM). This analysis is situated amid criticism that South Africa has undermined the feminist transformative potential of gender equality through its technical and depoliticised approach to women's empowerment, and the creation of inefficient and unwieldy bureaucratic structures and processes. It demonstrates one critical area where the CGE could give effect to its mandate, and bring about a policy response with the potential to positively impact on the quality of lives of millions of working class women in the informal economy sector.

With this chapter, the researcher explores the question of whether the institutionalism of gender equality within the construct of a NGM, and the creation of an independent gender equality entity in particular, is effective. There is an examination of whether using the formal rules and procedures works – the legal mandate of the CGE and its obligations to monitor and advise the state on gender equality issues. The chapter reveals that this is a story of failed institutionalism, and that while the design and framework for this legal mandate should have yielded the policy reform necessary to give effect to gender equality, what worked in this instance was civil society activism and policy advocacy, which was leveraged by individual commissioner's

[119] This chapter forms part of Amanda Gouws (ed) *Feminist Institutionalism in South Africa: Designing for Gender Equality*, forthcoming, and is used with permission.

agency and networks. Unless effectively embedded within institutional design, such measures are not sustainable, leading to unequal and unpredictable delivery on the CGE's mandate.

This chapter accordingly examines the following three aspects in seeking to address this question. First, it describes how the CGE, as an institution supporting democracy, and mandated to engage with civil society on gender equality matters, can be used by civil society to bring issues of concern to the attention of policy makers, so amplifying the significance of the CGE's position and powers in relation to the state, compared to that of civil society. The chapter details the origination of the initial complaint received by the CGE, and how the CGE worked with an alliance of civil society organisations to consult with affected informal economy and own account workers to research and develop recommendations on appropriate policy reform – thereby establishing the credibility and legitimacy of its recommendations.

Secondly, this chapter explores the power and agency of commissioners within the formal rules processes of internal institutional decision-making, to direct and shape the interventions undertaken by the institution. The requires navigating bureaucratic and political procedures to log the maternity benefits project in the CGE's approved and adopted annual Programme of Action (POA) and budget, and have this researched and implemented by the institution's secretariat. This narrative is told from the researcher's perspective as a CGE Commissioner, serving two terms between 2007 and 2016, and as lead Commissioner on the maternity benefits initiative.

Finally, the researcher details the importance of using formal and informal rules to give effect to the CGE's mandate, and to influence state policy-making. A description is given of the formal processes followed in logging the maternity benefits issue and advising the state on the need for policy reform. More significantly, however, the researcher documents the informal, strategic advocacy interventions that were adopted to augment this formal process and contribute towards the uptake of this issue by the SALRC. In this regard, the chapter describes how the CGE was able to get the maternity benefits issues onto the state agenda, using not only the formal powers assigned to the CGE, but also advocacy strategies, so mobilising affected stakeholders and strategic alliances. The researcher concludes that while the CGE is tasked with advising the state on gender equality matters, securing the state's take up of a particular policy issue, particularly within a contested arena amid competing demands, requires strategic, political intervention.

The chapter accordingly details how the strategic alliance created with the Congress of South African Trade Unions (COSATU), as a key stakeholder within the ruling party's tripartite alliance, the framing of maternity benefits as a working class women's issue, and securing a COSATU national conference resolution on the need for policy reform, influenced the positive outcome of this campaign. The researcher argues that these political advocacy measures effectively resulted in the policy reform currently underway and that without these, the design of South Africa's NGM and the CGE in particular, would not have yielded this positive outcome. The chapter concludes with some thoughts in relation to institutional design in this regard.

II. CONTEXTUAL LOCATION: THE CGE AS AN INSTITUTION SUPPORTING DEMOCRACY, AND COMPONENT OF THE NATIONAL GENDER MACHINERY

South Africa's Constitution recognises the inequalities and injustices occasioned by South Africa's colonial and apartheid past, and guarantees, in principle, access to equality and freedom from discrimination.[120] Legislative provisions have been developed to address and promote gender and racial equality and non-discrimination (in *inter alia,* the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000). However, access to rights and protection from discrimination remain a pipe dream for most South Africa women – as gender inequality, discrimination and oppression continue to shape our society. Feminist activists and academics have long made the point that it is critical to distinguish between notions of formal and substantive gender equality, between liberal notions of equality as articulated in the various political rights and freedoms guaranteed in our Constitution, and lived experiences of equality, in access to socio-economic rights – such as economic participation and social security benefits.[121]

As part of its recognition of the need to address inequality, South Africa created a particular set of state institutions to ensure that despite an unequal society marked by discrimination, citizens could access and leverage the political, civil and socio-economic rights outlined in the Constitution. The authors of the Constitution realised that 'though guaranteed by the Constitution, such rights would not necessarily translate into a lived reality. Six independent,

[120] Constitution s 9(1) & 9(3).
[121] Amanda Gouws 'Beyond Equality and Difference: The Politics of Women's Citizenship' (1999) 40 *Agenda Feminist Media* 54–58.

statutory bodies[122] were provided for in Chapters 9 and 10 of the Constitution 'as safeguards for South Africa's new democracy, with the specific role to ensure that these rights are realised, especially by vulnerable groups in society.'[123] Referred to as Institutions Supporting Democracy (ISDs), their role broadly is to fulfil a monitoring, reporting, research and activism function, in order to protect and promote human rights and thereby advance democratic practice.[124] Overall, they are responsible for holding the state accountable 'by ensuring the consistent adherence by public institutions to the rule of law, as well as inculcating a culture of respect for human rights by both the State and all members of civil society'.[125]

The Constitution stipulates that these institutions shall be independent, reporting directly to the National Assembly in Parliament, and 'subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.'[126] It requires that all other organs of state 'through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.'[127]

The constitutional guarantees, backed up by the ISD, lay the groundwork for improving government accountability for delivering on constitutional rights, as well as the significant commitments outlined in regional and international treaties and conventions. As a result, South Africa, like several African countries, has witnessed substantive legislative reform advancing gender equality and women's rights. These have included the removal of discriminatory provisions in legislation, common law and traditional law in areas pertaining to family, employment, property ownership and inheritance, and the incorporation of new gender equality provisions into national constitutions. There have also been significant successes in efforts to integrate gender equality goals into national development plans and strategies – including poverty reduction strategies.[128]

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[122] These institutions are identified in s 181(1) of the Constitution, and are the following: The Public Protector; The South African Human Rights Commission; The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; The Commission for Gender Equality; The Auditor-General; and The Electoral Commission.
[123] Mcebisi Ndletyana et al. 'Assessment of the Relationship between Chapter 9 Institutions and Civil Society, Final Report', 2007 (Commissioned by the Foundation for Human Rights, January).
[124] Kristina Bentley 'The Role of the Chapter 9 Institutions in the Promotion and Protection of Gender Equality in South Africa', Gender Mainstreaming Seminar, University of Cape Town, 2006.
[125] Ndletyana op cit note 123 at 28–29.
[126] Constitution s 181(2).
[127] Ibid s 181(3).
[128] Ines Alberdi 'Legislative Reform Lays Foundation for Advancing Gender Equality and Women's Rights', Third Meeting of the Africa-Spain Women's Network, UNIFEM, 12 May 2008.

Yet, despite these gains

> '… a profound concern remains about the slow pace of implementation ... Legislative frameworks still include gender-discriminatory provisions, and have serious gaps in their protection of women's rights. Where new laws have been adopted, they often provide little or no enforcement measures and include no provisions for redress. This is often the case, for example with laws prohibiting violence against women.'[129]

The CGE has a vital role in the state architecture, to leverage and ensure state accountability and delivery on international, constitutional and legislative commitments to promote gender equality and to enhance the status of women. The Constitution tasks the CGE to 'promote respect for gender equality and the protection, development and attainment of gender equality'.[130] Its mandate and set of specific responsibilities are outlined in s 11(1) of the CGE's founding legislation, the Commission on Gender Equality Act, No 39 of 1996 (as amended). The CGE is specifically obliged to 'monitor and evaluate policies and practices of organs of state at any level;[131] to evaluate any Act of Parliament 'affecting or likely to affect gender equality or the status of women and make recommendations to Parliament or such other legislature with regard thereto;'[132] and to 'monitor the compliance with international conventions, international covenants and international charters, acceded to or ratified by the Republic, relating to the object of the Commission'.[133]

In addition to its function as an ISD, however, the CGE was conceptualised and designed as a core component of South Africa's national gender machinery (NGM). The context, role and functioning of the actors in the NGM are outlined in South Africa's National Policy Framework for Women's Empowerment and Gender Equality, developed by the Office on the Status of Women, and adopted by Cabinet in 2002.[134] The NGM was designed as a coalition between the executive and legislative spheres of government, the CGE as an ISD, and civil society, as architecture necessary to transform collectively South African society, address gender inequality, and, as key to this – drive gender mainstreaming. Principle structures within the NGM included the then Office on the Status of Women (OSW) located within the Presidency,

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[129] People Opposing Women Abuse (POWA) 'Review of State Institutions Supporting Constitutional Democracy', 2007 at 27–28.
[130] Constitution s 187(1).
[131] CGE Act s 11(1)(*a*)(i).
[132] Ibid s 11(1)(*c*)(iv).
[133] Ibid s 11(1)(*h*).
[134] The Office on the Status of the Woman 'South Africa's National Policy Framework for Women's Empowerment and Gender Equality', 2002.

and a slate of Gender Focal Points (GFPs) within the executive sphere of government, in national and provincial government departments, and within local municipalities, the CGE, Parliamentary select and portfolio committees, including the then Joint Monitoring Committee on the Quality of Life and Status of Women, and various organs of civil society.[135]

Noting the gendered disadvantages experienced by South African women, further compounded by 'variables such as race, class, disability, sexual orientation, religion and geographic location', the National Policy Framework concurs that gender inequality is 'systemic and entrenched in the structures, norms, values and perspectives of the state and civil society'.[136] It therefore tasks these principle structures to collaborate in advancing the empowerment of women and gender equality and monitoring the effectiveness of departmental policies on gender equality'.[137] In theory, therefore, these structures should work in cohort to detect and remedy any shortcomings in South Africa's legislative framework and implementation – such as the exclusion of women workers in the informal economy from social security benefits guaranteed under the Constitution. The National Policy Framework notes particularly that 'national machinery alone cannot shift public policy agendas for women without the participation of organisations of civil society', that women's organisations comprise an important component of effective national machineries, and accordingly calls on institutions within the NGM to 'have structures and mechanisms to facilitate close and effective relationships with organisations in civil society'.[138]

Accordingly, the CGE should be able to draw on the support of its NGM stakeholders in advancing its mandate, and advising Parliament on the need for any legislative reform, or implementation shortcoming to be addressed through Parliament's oversight of the executive, to hold the state to account in delivering on its gender equality commitments. The National Policy Framework envisages an annual national reporting mechanism in the form of an annual meeting, to be convened jointly by the OSW and the CGE, to ensure 'regular follow-up and review of progress in the implementation of the National Gender Policy'.[139] Such a meeting did not take place during the nine years of the researcher's tenure as Commissioner, nor, to her knowledge, since her term ended in 2016. The annual review envisaged would serve to assess state progress on the basis of gender equality indicators – the CGE is specifically tasked with

[135] Ibid at viii.
[136] Ibid at 25.
[137] Ibid at ix.
[138] Ibid ch 4.4.5.1 at 32.
[139] Ibid ch 6.5.1 at 48.

undertaking 'a review of the comprehensiveness of the indicators', a task the CGE, to the researcher's knowledge, has not undertaken.

A further critical role, particularly for the CGE, is to monitor and assess if the state is complying with its international obligations, including exercising due diligence to prevent violence against women.[140] It is this unique location and its legislated set of powers that positions the CGE as a powerful actor to track state implementation of policies, programmes and commitments, to gather evidence of shortcomings and make recommendations to Parliament. With substantive powers of subpoena and litigation, this creates a significant ally for civil society and communities to act against abuse of rights and to call for an appropriate state response to address failures to deliver on political, civil and socio-economic rights.

Nonetheless, the CGE's challenges in delivering on its constitutional and legal mandate have been well documented and publicly scrutinised. Some of these were highlighted in a review undertaken by Parliament in 2007, the so-called 'Asmal review', which aimed to measure the extent to which the ISD have transformed society and entrenched human rights.[141] This followed criticism by politicians and the media, and several additional reviews by civil society and donor institutions.[142] A key critique that was raised included the assertion that there was insufficient collaboration with, and awareness measures among, civil society organisations (CSOs).

A key role of the ISD is to form a 'bridge' between the state and civil society. The CGE Act calls upon the CGE to liaise and interact with organisations promoting gender equality, and other sectors of civil society, to further the object of the Commission.[143] Civil society has been described as the 'third sector', following the public sector (government) and the private sector (business). However, this does not describe the relationships of power between these three stakeholders. While we have seen close collaboration between government and business, and a significantly increased influence of business on the policy formulation process, through structures such as the National Economic Development and Labour Council (NEDLAC), the converse has happened with the civil society sector's relationship with government.

[140] POWA op cit note 129.
[141] Parliament of the RSA 'Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions' 2007.
[142] Human Rights Institute of South Africa 'The effectiveness and impact of three constitution building institutions in South Africa: South African Human Rights Commission, Commission for Gender Equality, The Public Protector', 2007.
[143] CGE Act s 11.

State policy-making is a contested arena, with diverse competing interests and actors. It has been argued that this space has been taken up by a powerful private sector and political elite, and that civil society enjoys very little power to influence policy in this realm.[144] It has been noted that 'elements within the ANC government have often frowned upon civil society organisations and activists' actions to hold government and leaders accountable, demanding they be proscribed, and alleging they are fronts either for apartheid-era groups or foreign enemies'.[145] Civil society organisations are, as a result, largely unable to attract the attention of policy makers, impacting on their ability to lobby and advocate for policy response on critical issues. This amplifies the significance of the role of the CGE as an ISD, tasked by the Constitution to 'liaise and interact with any organisation which actively promotes gender equality and other sectors of civil society to further the object of the Commission.'[146] The CGE occupies a strategic position to engage with civil society, take up gender equality issues impacting on communities, and leverage its legal mandate and constitutional powers to bring these to the attention of policy makers.

The challenge, however, arises when the CGE is disregarded by the state in its endeavours to bring about policy change, and is unsupported by its counterparts in the NGM in its attempts in this regard. As evidenced in the CGE Act and cited above, the CGE merely has powers to make recommendations to Parliament. This means that the CGE is largely restricted to making use of the formal rules' processes at its disposal, to bring to the attention of Parliament, policy and legislative deficiencies impacting on gender equality. These include noting such issues in its annual reports to Parliament, making regular presentations before its designated oversight portfolio committee, and its interactions with the Minister assigned responsibility for women's empowerment and gender equality.

This by no means guarantees that Parliament or the Executive will take up and act upon these recommendations, as will be evidenced in the researcher's recount of the CGE's journey in raising the issue of accessing maternity benefits for informal economy workers. When the efficiency of the NGM, and the effectiveness of various Women's Ministers is in question,[147]

[144] William Gumede 'How civil society has strengthened South Africa's Democracy' (2018) *Corruption Watch*, available at htt*ps://www.corruptionwatch.org.za/civil-society-strengthened-democracy-south-africa/*, accessed on 1 June 2019.
[145] Ibid.
[146] Constitution s 11(1)(*g*).
[147] Joy Watson 'Policy and Praxis: Promises and Disappointments of the Department of Women', paper presented at a conference on Feminist Institutionalism, Stellenbosch Institute for Advanced Studies, 26–27 July 2019.

the ability of the CGE to bring about single-handedly the policy reform envisaged by the Constitution, the CGE Act, and the National Policy Framework, is severely compromised. This is particularly exacerbated by the competition for funding for gender equality, and confusion regarding the mandate between the Women's Ministry and the CGE.[148] It is submitted that the importance of having a Women's Minister at the level of Cabinet, without a functioning relationship between the CGE and the Women's Minister, buttressed by a functioning NGM, is significantly undermined, so impacting on the ability of the CGE to feed issues into high-level policy debates and trade-offs. Without this functioning NGM, as a portal into the Executive, and as an effective, responsive portfolio committee in Parliament to pick up oversight of the Executive's implementation of legislation or to respond to gaps in the legislative framework, it may be argued that the CGE cannot discharge its mandate. The CGE cannot single-handedly promote, protect and ensure the attainment of gender equality, as it was conceptualised within the context of the NGM.

In addition, the relative power of the CGE as an ISD, compared to its counterparts, needs to be examined. Historically, since its establishment, the CGE has been assigned a lower Treasury grading, than, for instance, its sister organisation, the South African Human Rights Commission, so resulting in a smaller funding allocation. Throughout the researcher's tenure as Commissioner, the CGE regularly raised with Parliament the challenges faced because of its underfunding. The legal weight of its advisory recommendations to state entities, compared to, for instance, the binding nature of the remedial measures of fellow ISD, the Public Protector South Africa, as clarified in the *Inkandla* Constitutional Court decision,[149] further diminishes the ability of the CGE to press the state to take up its findings and recommendations.

What the above elements point to, therefore, is the relatively weak power of the CGE as an ISD to compel the state to take on its recommendations, and the unsupported context within which it seeks to do this work – as a key stakeholder within what has been typified as a largely dysfunctional NGM.[150] This demonstrates a vital space and opportunity for CGE interaction and engagement with civil society, to amplify its policy advocacy work and bring pressure to bear on the state through building political momentum around the issues it seeks to take up. By virtue of the legal mandate and very clear powers allocated by the CGE Act, the CGE can elevate civil society campaigns and advocacy interventions to ensure that they receive the

[148] Ibid.
[149] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).
[150] CGE *National Gender Summit: Summit Report*, 2014.

attention of policy makers, and that they are adequately responded to. While the CGE cannot force government to take on many of its recommendations, it does have legal clout to draw upon, in the form of subpoenas in support of legal investigations, and ultimately, litigation, when government action contravenes its obligations with regard to gender equality. This chapter will speak to such strategies in more detail.

From the reviews emerge a consistent call for the CGE to work more effectively with its sister ISDs and CSOs to take up issues through advocacy and to apply pressure on government to respond to its obligations. The overall finding of the various reviews was that such collaboration is inadequate and *ad hoc* in nature, and in breach of the CGE's legislated obligations. It is apparent that the effective use of constitutional institutions such as the CGE depends on building working relationships between the institution and CSOs, founded on broader public education on rights. Within this context, the CGE's successes in collaborating with CSOs to bring about law reform in response to a critical issue impacting on women's substantive equality – that of maternity benefits for self-employed women – demonstrates the potential it presents, as an institution, to bring about meaningful transformation.

III. CAMPAIGNING FOR MATERNITY BENEFITS FOR SELF-EMPLOYED WOMEN: IN AND OUT OF SYSTEMS

The complaint regarding the exclusion of self-employed workers from the maternity benefits regime was lodged with the KwaZulu-Natal (KZN) provincial office of the CGE in 2009. As the then Commissioner assigned to lend support to CGE activities in the province, the researcher used the internal decision-making mechanisms of the CGE to table this complaint in 2009 before a formal meeting of the CGE's decision-making structure, the plenary of Commissioners and the CGE Secretariat. The researcher took the initial research undertaken by the LRC, developed a concept note, and tabled this issue before one of the CGE's Standing Committees, the Legal Complaints Committee, of which she was a member, as well as the thematic committee, namely the Democracy & Good Governance Committee, of which she was Chairperson.

Chaired by Commissioners and comprising relevant heads of department with the CGE, these committees serve as engine rooms to undertake the necessary research and develop recommendations on gender equality issues, as well as exercise oversight by monitoring the implementation of the relevant components of the CGE's POA. Chairpersons of these

committees, supported by the Secretariat, develop quarterly reports for their committee, inclusive of recommendations to table at plenary, which are shared with Committee members for adoption. At the Commissioners' quarterly plenaries, committee reports and plenary recommendations are tabled, and lead Commissioners present their overview reports, tabling any proposed recommendations for plenary deliberation and resolution.

The complaint pertaining to self-employed women buttressed by legal research was accordingly put before these structures and a resolution was secured at the CGE plenary of 1921 May 2009, to take up this issue within the CGE POA. At this plenary meeting, a campaign on the take-up of the issue of maternity benefits for self-employed women was adopted as a formal campaign of the CGE, and this issue was incorporated into the CGE's strategic planning and reporting mechanisms. The Democracy and Good Governance Committee was mandated by the plenary to oversee consultative workshops and research to be undertaken by various provincial offices of the CGE, and to develop recommendations to bring back to the Commissioners' plenary.

With the plenary having adopted this issue, the researcher then worked with the CGE provincial team in KZN to initiate this campaign. The team established a working group comprising the complainant, the LRC Durban office, and representatives of the South African Self Employed Women's Association (SASEWA) and the Businesswomen's Association South Africa (BWASA) – to guide the process and secure participation of affected women in the informal economy and own-account workers. The working group met and planned for the convening of consultative workshops with membership of these associations and additional key stakeholders in the sector, to assess the extent of the impact of the apparent gap in South Africa's labour and social security protection mechanisms.

Consultative workshops during 2009 and 2010 brought together a diverse group of working women, to discuss and debate the issues with the campaign team and to deliberate on the policy gap and the practical impact it has on working women. These included business women who owned their own enterprises, women entrepreneurs, street traders and own account workers operating from home or the local markets. The objectives of the workshops included obtaining a broader understanding of the social issues impacting on working women in relation to maternity benefits, establishing awareness among affected stakeholders of the discrimination inherent in current policy approaches, establishing a clear need for an advocacy campaign in

response, and creating the requisite buy-in from a broad stakeholder group.[151] Reporting regularly to the CGE plenary on progress, through the Democracy and Good Governance Committee and the Commissioner's progress reports, the researcher worked with campaign partners to devise a strategy of consultation, further research, and advocacy engagements to develop concrete policy recommendations, in line with the CGE's mandate.

The CGE office staff in the other provinces conducted consultative meetings with their civil society networks, to generate additional feedback on the impact of the lack of access to maternity benefits on self-employed women, and their aspirations in relation to access and contribution to maternity benefit funds. The CGE's resulting analysis outlined the impact of this gap on their sexual and reproductive health rights, labour rights and other constitutional rights to social security. This analysis revealed the need for comprehensive law reform to address state failures to deliver on constitutional rights to equality, and access to social security – in accordance with international conventions to which South Africa is a signatory. The consultative process and the generation of substantive data on this impact provided substance to the motivation and submissions developed by the CGE, both internally, to build support for this campaign, and to Parliament, and informed the drafting of a subsequent policy brief for a COSATU national policy conference. It also provided the campaign the political credibility it needed to attract the attention of policy makers.

Accordingly, in line with its mandate, the CGE reported regularly on this issue to Parliament, in the form of its annual reporting process, as well as regular interaction with its designated oversight Portfolio Committee. It became evident, however, that in the face of competing policy interests and a general lack of urgency on the part of Parliament to tackle this issue, a more political approach was required. Upon reflection on why it took such a long time from the reception of the complaint to the state's eventual take up of this issue, despite a sympathetic response received from the Portfolio Committee, it is clear there were nuanced factors at play. These include political complexities related to an ANC-dominated Parliament exercising oversight over fellow Ministers. This was given that Parliament did not once within the duration of the researcher's term as Commissioner, call any member of the Executive before it to account for this policy shortcoming. Neither the Portfolio Committee nor any individual Member of Parliament appeared to have taken up this issue brought to them by the CGE, and

[151] CGE op cit note 5.

for instance, table a motion calling upon the relevant Ministry to develop proposed recommendations for legislative reform. It became clear that additional strategies were required to escalate this issue, and to bring it to the attention of policy makers and to call for a response.

As noted, as part of its strategic interventions outlined in its envisaged campaign on this issue, in November 2009 the CGE engaged with the office of the General Secretary of COSATU, as a key stakeholder in the tripartite alliance. The CGE brought to his attention the gap in South Africa's social security framework relating to access to maternity benefits for the informal economy and self-employed workers. The CGE began developing good working relationships with COSATU's national Gender Coordinator, appearing before the gender structure of COSATU to flag gender employment and labour discrimination issues of concern. These included the lack of gender equality policy provisions in the workplace, the slow pace of gender transformation in the workplace, sexual harassment in the workplace, inadequate childcare, the gender wage gap, and the exclusion of informal economy women workers from the maternity benefits regime. The intention of engaging with COSATU was to escalate the necessary political response and recognition for law reform – framing access to maternity benefits as a labour issue impacting predominantly on working class women.

This resonated with COSATU, and the CGE received a favourable response. After presentations on the maternity benefits study to COSATU's national gender office, collaboration between the CGE and COSATU began in earnest, to frame this as a critical issue impacting all classes of working women, and to develop a policy position in this regard. Over two years, supported by the Chairperson and the CEO, the researcher worked closely with COSATU's National Gender Coordinator to feed this issue into COSATU's policy agenda, developing a discussion document on access to maternity benefits to table at COSATU's gender conference in 2012.

The timing of this process was fortunate, in that COSATU was planning for its National Gender Conference, the resolutions of which would be put before COSATU's own national Policy Conference, which in turn fed into the tripartite alliance. This ultimately influenced ANC and government policy priorities. The intention was to secure a resolution at this forum, to bring to COSATU's national conference thereafter, and to secure this position effectively as the official policy of the Tripartite Alliance. The Discussion Document: Maternity Protection was

effectively tabled at COSATU's national Gender Conference in March 2012.[152] The emerging conference resolution called for South Africa's ratification of the ILO Maternity Convention, and for necessary reform to the labour legislative framework to ensure access to maternity benefits for all classes of working women – including self-employed women and those in the informal economy.

In addition, as noted, from the outset of the campaign, the CGE made formal submissions to the Minister of Labour, bringing to the Minister's attention discrimination in law and practice against informal economy workers and its impact on women in particular. The CGE emphasised that this situation exacerbates the socio-economic impact of poverty and inequality between women and men, as it prevents women from participating fully in the economy – often impacting on their reproductive health and family planning choices. The CGE continued to raise the issue of the need for law reform on this issue in its engagements with its Parliamentary oversight committee. It is submitted that it is as a result of a combination of these measures, supported by the influential policy agenda-setting deliberations within the Tripartite Alliance, that the CGE was finally advised by the South African Law Reform Commission that it had received the mandate from the Minister of Justice and Constitutional Development to investigate the feasibility of extending maternity and paternity benefits to self-employed workers. The CGE was invited to make a submission to the SALRC on the proposed scope of the investigation, which it duly did – informed by its legal research and consultative workshop findings. As noted, this investigation is currently underway.

IV. INSTITUTIONALISM INSIGHTS

The rationale and design of the institution of the CGE, as an ISD, embedded within a functioning NGM, make sound and theoretical sense. The potential value of an independent, empowered mechanism such as a gender commission, to hold a state to account for delivery on gender equality commitments and obligations, equipped with necessary powers and located in a strategic web of inter-connecting gender equality components in all aspects of state and civil society, is compelling. Such an institution can play a critical role in collaborating with civil society organisations to inform policy deliberations on gender equality issues.

Reverting to the three aspects examined in this chapter, in relation to the CGE's campaign on maternity benefits, it is clear that the institutional design of a gender equality entity that ensures

[152] COSATU op cit note 11.

the inclusion and participation of civil society in holding the state to account is significant. Structuring that institution as an independent body, such as one of South Africa's ISDs, with appropriate powers of monitoring and oversight, albeit in an advisory role, is core to this. Requiring that institution to engage with civil society, to enable civil society to leverage strategic, systemic issues of discrimination, inequality and state policy shortcomings, to an institution that has legislated access to Parliament and the support (in theory) of the Executive, is key to ensuring these substantive gender equality issues find their way into policy deliberations.

What is apparent is the need for extensive public awareness and outreach strategies by feminist institutions, to accelerate communities' understanding of their rights, and how an institution such as the CGE can be used to address the non-delivery or abuse of these rights. Institutions such as the CGE rely implicitly on civil society organisations to identify systemic failures in the state delivery on legislated and constitutional rights, and particularly to enable them to reach into marginalised communities. In a context of extreme poverty, rurality and limited access to information, institutions need to strategically devise measures to regularly connect with civil society and be apprised of substantive inequality and rights abuses, and create tangible, accessible mechanisms for CSOs to feed such issues into the research, consultative, or complaints processes of the institution.

The interventions and achievements highlighted above reveal the potential and real impact that strategic collaboration between the CGE and civil society organisations can bring about. The joint campaign and advocacy interventions outlined, supplemented by effective use of the CGE's legal powers, can ensure that the state responds to gaps in its policy frameworks and implementation, and service delivery shortcomings impacting on women's realisation of substantive gender equality – in relation to socio-economic rights in particular. A functioning NGM would facilitate such interface through organised interaction with diverse civil society structures and networks. The earlier critiques of the CGE revealed the need for such focussed and targeted interventions to strengthen linkages between civil society organisations and institutions supporting democracy, to ensure that potential leverage of state accountability – and thereby citizen access to rights – is realised. In the context of resource constraints, culminating in one outreach officer assigned per provincial office of the CGE, located primarily in capital cities within those provinces, such collaboration with civil society in outreach and mobilisation is essential, as is envisaged by the National Policy Framework.

In relation to the CGE's internal decision-making process and the strategic role played by commissioners, several insights can be gleaned from the campaign experience outlined in this chapter. First, it is important to consider the strategic agency of individual commissioners, within the body of the collective, noting the context of opportunities and challenges they confront. Commissioners deployed to support provincial offices, and through their own research and activism, play a vital role in identifying critical gender equality shortcomings and systemic state failures in this regard, and in bringing these into the strategic planning framework of the institution. The CGE's internal decision-making mechanism and process require further analysis in this regard, as not all gender equality issues make it through into the CGE's slate of formally adopted campaigns.

Upon considering the effectiveness of the CGE as an institutionalised gender equality instrument, it is critical to observe that different commissioners have varying degrees of success and track records in implementing significant campaigns and having the CGE take on particular gender equality issues. This points to varying degrees of power, agency and effectiveness of individual commissioners. It might be perceived by some as being difficult for commissioners to influence the CGE, regardless of whether one is a recognised feminist or gender equality expert, or is supported and informed by gender equality networks in civil society. The path of identifying a critical gender equality issue and ensuring its take up by the institution, is a complex and challenging one.

The starting point is obtaining consensus that the issue falls within the CGE's mandate. Thereafter, comes mobilising limited CGE resources to research this further and develop appropriate recommendations on what interventions are required in line with the CGE's mandate, whether to litigate, implement a formal legal investigation, formulate outreach and awareness measures, or develop policy recommendations for Parliament. Regardless of the logic of the issue or strength of research supporting this, commissioners need to build consensus within a diverse body of colleagues, to secure the adoption of these measures for inclusion in the CGE's annual POA and budget, against competing proposals. Ultimately, commissioners need to oversee the secretariat's development and implementation of activities and budget to deliver on this issue.

This requires a commissioner to operate within prescribed boundaries between the executive and secretariat components of the CGE relating to the role of commissioners within the institution, and yet simultaneously navigate political alliances and allegiances among

commissioners – and even petty factions and point scoring among individual commissioners. In addition, skill-sets and capacity within departments and provincial offices of the CGE vary, and commissioners have to attune their support for the implementation of interventions accordingly, including stepping in to bolster capacity shortcomings as needed, without undermining the function of the secretariat in this regard.

Effectively, this results in the need for individual commissioners to champion particular issues. Nonetheless, a commissioner working in a silo developing an issue and set of recommendations on her or his own, would not be successful in anchoring this within the institutional machinery of the CGE. To achieve this requires building the necessary consensus among colleagues to support a motion to adopt formally this project as an institutional initiative – rather than a personal project of a commissioner. The researcher's experience has been that this usually goes beyond the merits of the argument of the matter before the Commission, and requires political and diplomatic negotiation skills to secure the necessary support for the project. As observed by the researcher, nuanced issues such as the race and perceived or actual political ideological alignment of the Commissioner, professional jealousies, prejudice and alliances, all come into play in the relative weighting of projects and final decision-making.

Further institutional shortcomings to be considered, include resource constraints confronting the CGE, impacting on the sustainability and outcome of the commissioners' interventions. During the researcher's tenure as a commissioner, there was limited research and legal advocacy capacity in the secretariat to undertake the work required to buttress this campaign. There was heavy reliance on the commissioners to undertake this work to augment such capacity shortcomings – both in terms of research and drafting policy recommendations, but equally, the critical experience Commissioners bring to bear, drawing on their experience in gender equality and policy sectors. The researcher was privileged to have served fifteen years in civil society organisations, working on social justice campaigns and policy advocacy issues, which generated a wealth of networks on which to draw in undertaking this campaign, as well as a set of hard skills relating to strategic advocacy interventions.

The take up of the maternity benefits issue required the researcher to develop the founding concept note and the proposed set of interventions, designing and facilitating participatory processes to engage with stakeholder groups, and drawing on established networks in the province to access those groups. Escalating the issue to a national policy level attracting the

interest of labour stakeholders required participating in strategic conferences and working groups related to the issue, and taking up the strategic opportunity to participate in the team tasked with drafting conference resolutions pertaining to maternity benefits. Noting the institutionalised constraints outlined above, facing the CGE as an ISD, this is where the critical role of commissioners and the powerful force of civil society mobilisation and policy advocacy comes to the fore. This is a political role as much as one requiring gender equality expertise. The insight gained by the researcher in working on this campaign is that its success requires building strategic alliances – both within the institution, to secure its adoption, and externally, in this case with alliances of working class women, and ultimately, COSATU, to provide the political weight and credibility needed.

The final aspect for consideration pertains to the take-up by the state of the gender equality issues raised by the CGE. The insight gained from this campaign was the need to use both formal and informal procedures. The formal component encompassed the inclusion of the maternity benefits' issue in the CGE's annual POA and presentations to its oversight parliamentary Portfolio Committee. Nonetheless, the researcher's experience from the policy advocacy sector is that the successful take-up of a policy issue requires a diverse slate of advocacy interventions, which includes considering who has influence over decision-makers, and how best to deliver a message in a manner that convinces them they should take this up. In this case, it involved the formation of a strategic alliance with COSATU.

Related to this is the value of working in coalitions and strategic interaction between commissioners, activists and politicians to impact on a policy agenda and bring about transformation. Ideally, a functioning NGM would provide the platform for such collaboration in the form of regular, effective strategic planning and consultative processes. Formulating an issue such as maternity benefits as a working class, labour issue, was seminal in building movement on this issue and ensuring it received the necessary political support, both within the CGE and thereafter – in Parliament and the Department of Justice & Constitutional Development. The process of incrementally building the campaign through the creation of the project working group in KwaZulu-Natal was fundamental to the success of this campaign. By working with membership-based networks, the CGE could directly access affected self-employed women and women street traders, who were mobilised and organised to attend consultative workshops and speak frankly about their experience of exclusion from this social security support mechanism.

The critical partnership with COSATU ensured that the campaign could escalate from being one of numerous civil society social justice campaigns, into a policy advocacy initiative with the power to tilt the legislative framework of the state. COSATU's National Gender Coordinator and her research partners and alliances proved influential in securing a spot on the agenda of COSATU's National Gender Policy conference, feeding into COSATU's own policy-setting process in turn. Equally, the importance of working with actors within the state is apparent. The powerful voice of COSATU as a critical ally augmented the CGE's mandated role to advise Parliament on matters of gender equality, and secured the necessary attention and response of the CGE's oversight committee in Parliament, and the Department of Justice & Constitutional Development. By working deliberately through this coalition of partners, the CGE successfully navigated the "bridge" between civil society and state structures and processes, attracting the attention and, ultimately, support, of policy makers on this issue.

Nonetheless, the outstanding issue here is the dysfunctionality of the NGM, which should have served to assist the CGE in having this issue taken up by the legislative and executive spheres of the state, both of which are represented in the NGM – but were silent on this issue. Shortcomings in this mechanism, the lack of accountability of leadership, and the lack of effective monitoring and evaluation mechanisms, contrary to what is outlined in the National Policy Framework cited above, have resulted in substantive gender equality issues such as access to maternity benefits being neglected. The CGE is a critical actor in promoting the attainment of gender equality in South Africa, but it cannot do this on its own.

Ultimately, however, what this chapter indicates, is the need for feminist institutions to make full use of their powers, and engage with Parliament and policy makers in the exercise of their mandate and to push for policy reform. Unless an institution such as the CGE has the appetite to exercise its legislated powers and mandate to hold the state to account, it is unlikely to achieve its full potential. A passive mechanism of routine reporting through formal parliamentary and planning processes is insufficient to generate the heat necessary to galvanise the state machinery to respond to individual gender equality shortcomings. The optimal functioning of the CGE requires the optimal functioning of the NGM, as conceptualised in the National Policy Framework.

V. CONCLUSION

The South African Parliament has crafted a unique set of institutions to support, enhance and ensure the attainment of democracy in South Africa. These provide citizens and organised

structures with a platform to obtain critical information in relation to their constitutional rights, to lodge complaints, have instances of the abuse of constitutional rights investigated, and to hold the state to account for the delivery on these rights. Equally, in the design of the NGM, theoretically, South Africa has an integrated, interdependent slate of institutions to design, develop, implement and monitor the attainment of gender equality.

As demonstrated, the current conceptual and structural limitations of the institutions of the state to take up and deliver on the NGM, as originally conceptualised, has severely undermined the ability of South Africa to attain gender equality. The structure, interaction and engagement between the primary stakeholders, the Women's Ministry, Parliament's corresponding Portfolio Committee, the CGE and civil society organisations in the sector, need to be interrogated and repurposed to strategically disrupt and address the structural causes of gender inequality. It is proposed that the CGE and Parliament initiate a consultative process with NGM stakeholders to review the National Policy Framework. This should include an updated analysis of the manifestations of gender inequality, clarify issues of distinct roles, involve the interaction and accountability between NGM stakeholders, and develop gender indicators to measure the efficacy of the NGM to deliver on its purpose and drive gender mainstreaming and transformation in South Africa.

For women in South Africa, the role of the CGE as a core institution within the NGM is critical to ensure the attainment not only of *formal* gender equality, but also of *substantive* gender equality. This moves beyond issues such as parity in women's representation, or the recognition and protection of women's rights through formal legal frameworks, to addressing issues vital to women's equal status as citizens, and their quality of life, witnessed through delivery on their socio-economic rights.

The CGE is informed and buttressed by civil society organisations in the exercise of its mandate of promoting, protecting and ensuring the attainment of gender equality. This it undertakes through asserting its independence and powers in leveraging state response, delivery and accountability in relation to the numerous constitutional guarantees that are fundamental for women's development, empowerment and, often, their very survival. Reflection of gains in and persistent obstacles to gender equality, twenty years post democracy, have revealed that South Africa has much to be proud of in its recognition and promotion of women's formal equality. However, much vigilance and work is required of the state, the CGE and civil society

to address systemic shortcomings and challenges impeding the attainment of women's substantive equality.[153]

The following chapter analyses the relevant international legal framework in relation to this study, to assess whether the denial of maternity benefits to self-employed workers constitutes a violation of South Africa's obligations in terms of international conventions.

[153] CGE op cit note 141.

CHAPTER 4

INTERNATIONAL LEGAL FRAMEWORK PERTAINING TO MATERNITY PROTECTION AND THE RIGHTS OF SELF-EMPLOYED WOMEN

I. INTRODUCTION

This chapter presents a critical analysis of relevant international conventions and treaties relating to social security, maternity protection and self-employed workers, predominantly women in the informal economy.

The chapter first interrogates South Africa's obligations to comply with this body of international law, and the persuasive or binding nature of the obligations set out in the treaties and conventions ratified by South Africa. This analysis includes a consideration of the applicable provisions in this regard, and how these have been interpreted by our courts in the application of such international law. The chapter then investigates whether the state's exclusion of self-employed workers from the existing maternity benefits mechanism constitutes a violation of South Africa's obligations under international law, and the implications thereof.

II. APPLICATION OF INTERNATIONAL LAW

South Africa has ratified several conventions, protocols and treaties at the United Nations (UN), African Union (AU) and Southern African Development Community (SADC) regional levels. As a member state of such bodies, and signatory to such conventions, South Africa is obliged to enact measures to ensure the implementation of commitments expressed in these instruments. Such instruments enjoy the protected status of customary international law, recognised by the Constitution to form part of South African law, unless found to be inconsistent with the Constitution or an act of Parliament.[154] International instruments that have been approved and ratified by Parliament are legally binding on the Republic in terms of s 231(2) of the Constitution, which provides as follows:[155]

> '(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

[154] Constitution s 232.
[155] Ibid s 231(2).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) An 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.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

The Constitution further stipulates that every court, when interpreting legislation, 'must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'[156] It is clear that such an approach by the courts is mandatory if such interpretation is reasonably possible.[157] This section also gives constitutional standing to the interpretive presumption that legislation intends to comply with international law.[158]

Furthermore, the Constitution empowers our courts to consider international or foreign law when interpreting the Bill of Rights. It holds that when interpreting the Bill of Rights, courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.[159] This was underscored in *Kaunda v President of the Republic of South Africa*[160] where the court found that all legislation, including the Bill of Rights and the Constitution as a whole, must be interpreted according to this provision.[161] It can be argued therefore, that international law is not only relevant when courts interpret the Bill of Rights, as mandated by s 39(1)(b), but also when courts interpret legislation.[162]

[156] Constitution s 233.
[157] Constitution s 233.
[158] Raylene Keightley 'Public International Law and the Final Constitution' (1996) 12 *SAJHR* 405-418 at 415.
[159] Constitution s 39(1).
[160] 2005 (4) SA 235 (CC).
[161] Supra at para 33.
[162] Raylene Keightley op cit at note 159.

In *S v Makwanyane,*[163] in considering s 35(1) of the 1993 Constitution,[164] the court concluded that the term "international law" includes both binding and non-binding international law. It demonstrated the potential significance of comparable international instruments, even if these are not binding on South Africa in terms of the provisions of s 231 highlighted above, as long as they are relevant to the subject matter under consideration by the court.[165] This signifies the importance of a court considering international law to guide it on issues that have already been debated and decided on at that level.[166] The court in this instance concluded, however, that although the South African courts may rely on international law to guide them in their deliberations, the supreme law of the Republic remains the Constitution.[167] Thus although in this case the court considered international and comparable foreign law, it found the death penalty to be invalid because it contravened the Constitution.

Equally, in *Grootboom*, the court held that relevant international law can serve as a guide to a court's interpretation, noting that the weight to be attached to any particular principle or rule of international law will vary. It confirmed, however, that if such principle or rule of international law is binding on South Africa, the court might apply it directly.[168] In this instance, the court considered the application of the International Covenant on Economic Social and Cultural Rights in a bid to understand better the content of the social economic rights of relevance in *Grootboom.* It also relied on this instrument's supervising committee's General Comment 3.[169] Ultimately, however, despite such consideration, the court found that it did not have enough comparable information to develop an interpretation of the concept of the 'minimum core content' of socio-economic rights in the South African context.[170]

In *Glenister,*[171] as in *Makwanyane,* while the court considered international law, it ultimately reverted to the Constitution to root its finding that to create an anti-corruption entity that lacked independence would be contrary to the Constitution.[172] While in these judgments the courts

[163] *S v Makwanyane and Another* 1995 (3) SA 391 (CC).
[164] Constitution of the Republic of South Africa Act 200 of 1993.
[165] *S v Makwanyane* supra at para 35.
[166] Supra at para 34.
[167] Supra at para 9.

[168] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 26.

[169] United Nations Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment 3', (1990).
[170] *Grootboom* supra note 169 at para 32.
[171] *Glenister v The President of the Republic of South Africa and Others* [2011] ZACC 6, 2011 (3) SA 347 (CC)
[172] Supra at para 189 -197.

used international law to interpret the Bill of Rights, they failed to recognise that the binding nature of the relevant international law could, on its own weight, sustained their findings, thereby missing an opportunity to accord international law the weight envisaged by the Constitution.[173]

When states ratify international agreements, they are primarily bound by these in relation to other states. This may appear irrelevant when considering that human rights treaties are enforced, not by other states, but by individuals in domestic courts. While this may have been the case historically, it is argued that international law has evolved into a system that now also binds the state in relation to individuals at the domestic level.[174] As a result, South African courts may have to adopt a more robust approach to international human rights law and its incorporation into our domestic legislation.[175] According to the International Law Commission Articles on State Responsibility, a delinquent state may be responsible to one or more states or to the international community as a whole, for failing to honour its obligations in terms of international law. However, this is 'without prejudice to any right, arising from the international responsibility of a state, which may accrue directly to any person or entity other than a State.'[176]

It may therefore be held that where a state's international obligation is owed to its citizens, those citizens may invoke the principle of state responsibility to compel the state to remedy its breach of the duties in question.[177] This was the finding in *Andrea Francovich and Danila Bonifaci v Italian Republic*, where the European Court of Justice held that based on the broad principles of state responsibility, individuals may be entitled to redress, stating that:

> '…the possibility of obtaining redress from the Member State is particularly indispensable … where the full effectiveness of Community rules is subject to prior action on the part of the State … It follows that the principle whereby a State must be liable for loss and damage caused

[173] Bonita Meyersfeld 'Domesticating International Standards: The Direction of International Human Rights Law in South Africa' *CCR* (2013) 5, 399–416, at 408.
[174] Ibid at 409.
[175] Ibid.

[176] International Law Commission Articles on State Responsibility, 'International Law Commission Report', A/56/10 August 2001 at Article 33 (1), available at https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility, accessed on 24 April 2021.

[177] Bonita Meyersfeld op cit note 174 at 411.

> to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty'[178],

The implications are clear. South Africa has a legal obligation to implement provisions contained in the conventions and treaties to which it is signatory and has formally ratified. An analysis of the relevant international, continental and regional treaties in this regard now follows.

III. UNITED NATIONS INSTRUMENTS

(a) The Universal Declaration of Human Rights (UDHR)

Ratified by South Africa in 1994, the UDHR states in Article 22 as follows:

> '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 organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.

The framing of this right makes clear the linkages between every individual's right to social security, regardless of category of work or employment, the obligations undertaken by the state to enact appropriate measures to realise everyone's right to economic, social and cultural rights, and their significance for the attainment of dignity. With human dignity forming one of the cornerstones of the founding provisions of the Constitution,[179] the significance of the right to social security could not be more underscored.

Article 25 of the UDHR further requires states to enact measures to provide for the health and well-being of all – and mothers and children in particular. Such measures include social services and the right to security in the event of unemployment or other lack of livelihood.

(b) The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

South Africa was signatory to the Convention in 1993, and ratified it in 1995, and is legally bound to implement the state commitments contained therein. CEDAW contains several

[178] *Andrea Francovich and Danila Bonifaci v Italian Republic* 1991 Case C-6/90 ECR I-5357, at 31.
[179] Constitution s 1(a).

specific provisions designed to ensure the protection and non-discrimination of women on the grounds of pregnancy. As a starting point, as a means to ensure the elimination of discrimination against women in the workplace, Article 11(1) speaks particularly to the right to job security and all the benefits and conditions of service,[180] as well as the right to social security and the protection of health.[181]

CEDAW specifically addresses the right to maternity leave, as a concrete measure to prevent discrimination against women on the grounds of childbearing and to ensure their right to work, by calling on state parties to 'introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.'[182] CEDAW also encourages states to 'enable parents to combine family obligations with work responsibilities and to participate in public life, in particular through promoting the establishment and development of a network of child-care facilities'.[183] Article 12 details additional obligations on state parties to enact measures 'to eliminate discrimination against women in the field of health care,'[184] including access to family planning, 'and ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.'[185]

States have been held accountable for failing to enact measures to deliver on their commitments in terms of such international conventions, and this provision in CEDAW in particular. In *Elisabeth de Blok et al v Netherlands*,[186] The Netherlands was accused of violating its obligations in terms of article 11(2)(b) of CEDAW by not enacting measures to provide paid maternity leave to self-employed women. The CEDAW Committee, the international body tasked with monitoring state compliance with CEDAW obligations, held that the right to maternity leave should be extended to self-employed women,[187] and stated that the failure to provide maternity benefits constituted a direct form of discrimination on the basis, and therefore a violation of CEDAW.[188] The implications of this ruling for South Africa are self-evident, in that any similar challenge would in all likelihood be successful. Equally, this ruling

[180] CEDAW, article 11(1)(*c*).
[181] Ibid 11(1)(*e*) & (*f*).
[182] Ibid 11(2)(*a*) & (*b*).
[183] Ibid 11(2)(d).
[184] Ibid 12(1).
[185] Ibid 12(2).
[186] CEDAW/C/57/D/36/2012.
[187] Ibid para 8.4.
[188] Ibid para 8.9.

would constitute persuasive authority in a South African court tasked with interpreting South Africa's responsibilities in terms of international law.

(c) Beijing Platform for Action

The Beijing Declaration and Platform of Action was adopted at the United Nations Fourth World Conference on Women, in 1995. South Africa participated in this World Conference and signed the Declaration in the same year. Comprising 12 critical areas of concern in relation to gender equality and the status of women, the Platform for Action is a powerful tool for transformation. It comprises obligations on governments, multilateral and international institutions, the private sector and civil society, to take forward action addressing each strategic objective.[189] The Platform of Action includes numerous provisions relevant to promoting women's economic participation by enabling access to social security provisions, including maternity benefits, requiring governments to take up the following action:

Strategic objective F.1. Promote women's economic rights and independence, including access to employment, appropriate working conditions and control over economic resources:

> Article 165 (b) 'Adopt and implement laws against discrimination based on sex in the labour market, especially considering older women workers, hiring and promotion, the extension of employment benefits and social security, and working conditions;'
>
> Article 165 (c) 'Eliminate discriminatory practices by employers and take appropriate measures in consideration of women's reproductive role and functions, such as the denial of employment and dismissal due to pregnancy or breast-feeding, or requiring proof of contraceptive use, and take effective measures to ensure that pregnant women, women on maternity leave or women re-entering the labour market after childbearing are not discriminated against;'

Strategic objective F.2. Facilitate women's equal access to resources, employment, markets and trade:

[189] The UN Beijing Declaration and Platform for Action (1995), available at *https://beijing20.unwomen.org/~/media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf*, accessed on 28 November 2020.

> Article 166 (d) 'Promote and strengthen micro-enterprises, new small businesses, cooperative enterprises, expanded markets and other employment opportunities and, where appropriate, facilitate the transition from the informal to the formal sector;'

Strategic objective F.5. Eliminate occupational segregation and all forms of employment discrimination:

> Article 178 (c) 'Enact and enforce laws and develop workplace policies against gender discrimination in the labour market, especially considering older women workers, in hiring and promotion, and in the extension of employment benefits and social security;'

Strategic objective F.6. Promote harmonisation of work and family responsibilities for women and men:

> Article 179 (b) '... consider appropriate protection for atypical workers in terms of access to employment, working conditions and social security;'

> Article 179 (f) 'Examine a range of policies and programmes, including social security legislation and taxation systems, in accordance with national priorities and policies, to determine how to promote gender equality and flexibility in the way people divide their time between and derive benefits from education and training, paid employment, family responsibilities, volunteer activity and other socially useful forms of work, rest and leisure.'

There is solid evidence of significant obligations on the state to enact measures to eradicate gender discrimination in the labour force and ensure the extension of social security benefits to women, and atypical workers in particular.

(d) The Convention on the Rights of the Child (CRC)

Ratified by South Africa in 1995, this Convention enacts significant measures to address the best interests of the child. By extension, many of these provisions impose an obligation on the state to promote maternal health. These include the provision of child-care services,[190] appropriate pre-natal and post-natal health care for mothers,[191] and access to social security.[192]

[190] UN Convention on the Rights of the Child (CRC), article 18.
[191] Ibid article 24(2).
[192] Ibid article 26.

The UN Committee on the Rights of the Child (CRC Committee) notes that the right to health includes access to 'conditions that provide equality of opportunity for every child to enjoy the highest attainable standard of health.'[193] Additionally the right to health as enshrined in article 24(1) 'imposes a strong duty of action by State parties to ensure that health and other relevant services are available and accessible to all children, with special attention to under-served areas and populations. It requires a comprehensive… and adequate legal framework and sustained attention to the underlying determinants of children's health.'[194]

The CRC Committee observes further: 'Among the key determinants of children's health, nutrition and development are the realization of the mother's right to health … A significant number of infant deaths occur during the neonatal period, related to the poor health of the mother prior to, and during, the pregnancy and the immediate post-partum period.'[195] It calls on states to enact measures to ensure access to nutritionally adequate food, including 'direct nutrition interventions for pregnant women'.[196] It also specifically calls on states to adopt measures to ensure compliance with International Labour Organisation (ILO) Maternity Protection Convention 2000 (No 183), including 'community and workplace support for mothers in relation to pregnancy and breastfeeding and feasible and affordable child care services'.[197] In recognising the right of the child to the enjoyment of the highest attainable standard of health,[198] member states are obliged to take appropriate measures to 'ensure appropriate pre-natal and post-natal health care for mothers'.[199] In this regard, the Committee recommends, in particular, that 'social protection interventions include ensuring universal coverage or financial access to care, paid parental leave and other social security benefits'.[200]

The CRC Committee went further to establish article 3 as one of four general principles of the instrument as a whole.[201] Article 3(1) expressly states: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

[193] UN Committee on the Rights of the Child (CRC) 'General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health' CRC/C/GC/15 at para 23.
[194] CRC ibid at para 28.
[195] Ibid at para 18.
[196] Ibid at para 43.
[197] Ibid at para 44.
[198] UN CRC op cit 193 article 24(1).
[199] Ibid article 24(2)(d).
[200] CRC op cit note 196 at para 55.
[201] CRC Committee 'General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by State Parties under Article 44, Paragraph 1(a), of the Convention' (1991) CRC/C/5 at para 13.

administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'[202]

It would appear that in international law, the standard of the best interests of the child has been interpreted to be of broad application, extending beyond traditional areas of law, and to matters concerning children indirectly, and not only directly.[203] The CRC Committee found that article 3 'contains a principle, a rule of procedure and an independent right,'[204] calling for:

> '[t]he right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.'[205]

Importantly for the considerations of this study, the CRC Committee held that the legal duty imposed by article 3 applies:

> '… to all decisions and actions that directly or indirectly affect children. Thus, the term "concerning" refers first of all, to measures and decisions directly concerning a child, children as a group or children in general, and secondly, to other measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure.'[206]

The CRC Committee did, however, recognise that since almost all state action will invariably have an effect on children, states need not always perform a full and formal inquiry into the best interests of the child. The Committee held that such an inquiry would always be necessary where a decision would have a major impact on a child or children.[207] The present study makes the case that failure by the state to enact a maternity benefits regime for self-employed women has an impact on the children of such workers. Accordingly, in line with the requirements of international law, the best interests of such children should be taken into consideration, even although they are not the 'direct targets' of this social security measure.

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[202] UN CRC op cit 193 article 3(1).
[203] Meda Couzens 'The Best Interests of the Child and the Constitutional Court', *CCR* (2019) 9, 363–386, at 365.
[204] CRC Committee 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration art. 3, para. 1' CRC/C/GC/14 at para 6.
[205] Ibid at part 1 A.
[206] Ibid at para 19.
[207] Ibid at para 20.

(e) The International Covenant on Economic, Social and Cultural Rights (ICESCR)

Ratified by South Africa only in 2015, the ICESCR provides the most comprehensive article on the right to health in international human rights law. It declares that state parties recognise 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,'[208] while its monitoring committee, the UN Committee on Economic, Social and Cultural Rights (CESCR) details steps that states should adopt to achieve the full realisation of this right.[209] The CESCR notes further that the right to health is closely related to and dependent upon the realisation of other human rights, as contained in the international Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.[210]

The ICESCR reference to 'the highest attainable standard of physical and mental health' is not confined to the right to health care. The particular wording of the ensuing articles acknowledges that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life. This extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.[211]

Furthermore, the CESCR stipulates that the right to health is not to be understood purely as a right to be healthy, but rather that it includes both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. The entitlements referred to include the right to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable level of health.[212]

The notion of 'the highest attainable standard of health' referred to in article 12(1) of the ICESCR requires consideration of both the individual's biological and socio-economic preconditions and the relevant state's available resources.[213] The CESCR notes that since the

[208] ICESCR article 12(1).
[209] UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 14: The Right to the Highest Attainable Standard of Health' (2000), E/C.12/2000/4 at para 2.
[210] Ibid.
[211] CESCR 'General Comment 14' op cit note 212 at para 4.
[212] Ibid at para 8.
[213] Ibid at para 9.

adoption of this instrument, the notion of health has widened in scope in that more determinants of health are being taken into consideration, such as resource distribution and gender differences.[214]

The ICESCR further imposes significant obligations on the state to ensure the right to social security, and the provision to working mothers of paid maternity leave, or leave with 'adequate social security benefits.'[215] Article 7 provides for the right to 'just and favourable conditions of work', while Article 9 declares 'the right of everyone to social security, including social insurance'. In several provisions, this Convention identifies the family unit as a fundamental unit of society, and contains measures to protect and assist families. Article 10 requires state parties to provide paid leave or adequate social security to mothers before and after childbirth – an obligation that overlaps with that of Article 9.

The CESCR observes that often women are not entitled to social security benefits simply because they are in the informal economy, or do not meet the eligibility criteria.[216] It accordingly reminds state parties of their obligation to ensure the 'progressive realisation of the right to social security as indicated in General Comment 19'.[217] It observes that the right to social security encompasses 'the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from: (a) lack of work-related income caused by sickness, disability, maternity, employment injury, [and] unemployment, ...'[218]

The CESCR further notes that social security, 'through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion'.[219] It observes that state parties to the Convention are obliged to 'take effective measures, and periodically revise them when necessary, within their maximum available resources, to fully realize the right of all persons without any discrimination to social security, including social insurance.'[220] In referring to the wording of article 9 of the Covenant, the

[214] Ibid at para 12(b).
[215] ICESCR article 2.
[216] Committee on Economic, Social and Cultural Rights 'Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals', 54th session, 23 February–6 March 2015, at para 9.
[217] Ibid, at para 10.
[218] Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Thirty-ninth session, 5–23 November 2007, at para 2.
[219] Ibid, at para 3.
[220] Ibid, at para 4.

CESCR notes that 'the measures that are to be used to provide social security benefits cannot be defined narrowly and, in any event, must guarantee all peoples a minimum enjoyment of this human right.'[221] It specifically observes that '[p]aid maternity leave should be granted to all women, including those involved in atypical work, and benefits should be provided for an adequate period.'[222] State parties are particularly exhorted to address the needs of categories of workers who typically experience difficulties in accessing the right to social security, and to ensure that social security systems include in their protections workers that are inadequately protected by social security, such as part-time, casual and self-employed workers, and those working in the informal economy.[223]

(f) International Labour Organisation (ILO) Conventions

South Africa is not signatory to key ILO conventions pertaining to maternity protection, and accordingly, while these may be considered persuasive by the courts when adjudicating cases, South Africa is not obliged to enforce them. In instances where South Africa has not ratified an international instrument, s 233 of the Constitution requires courts to take international law into consideration when interpreting domestic legislation:

> '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.'

ILO Maternity Protection Convention 2000 (No 183) is the leading instrument in this regard. Convention 183 makes it clear that maternity protections should be extended to all categories of workers, including those in 'atypical' forms of work, such as self-employed women.[224] The Preamble states:

> '… in order to further promote equality of all women in the workforce and the health and safety of the mother and child, and in order to recognize the diversity in economic and social development of Members, as well as the diversity of enterprises, and the development of the protection of maternity in national law and practice …'

[221] Ibid.
[222] Ibid, at para 19.
[223] Ibid, at para 31–34.
[224] ILO Convention 183, Maternity Protection Convention (2000), article 2(1).

Convention 183 states unequivocally that 'a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than 14 weeks,'[225] and that 'maternity leave shall include a period of six weeks' compulsory leave after childbirth'.[226] Article 6 provides for the payment of maternity benefits in the form of cash benefits, comprising two-thirds of the woman's previous earnings, and 'at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living'.[227]

Articles 5 and 6 are key to the extension of such benefits to women in atypical forms of work, and in instances where large numbers of women are affected:

> '(5) Each Member shall ensure that the conditions to qualify for cash benefits can be satisfied by a large majority of the women to whom this Convention applies.
>
> (6) Where a woman does not meet the conditions to qualify for cash benefits under national laws and regulations or in any other manner consistent with national practice, she shall be entitled to adequate benefits out of social assistance funds, subject to the means test required for such assistance.'

In reviewing country compliance with Convention 183, the ILO notes that all but two of the 185 countries surveyed pay cash benefits during a woman's maternity leave. Over 80 per cent of the 155 countries which had available information have made provision in law for an express prohibition against discrimination, with 43 of these expressly listing pregnancy or maternity as a prohibited ground. Nonetheless, the study notes that the persistent lack of coverage and legal protection for certain categories of workers, and therefore the effective implementation of Convention 183, remains a critical challenge.[228]

Convention 183 is accompanied by its Maternity Recommendation No. 191,[229] which in many instances proposes higher standards of maternity protection than those outlined in Convention 183. For instance, Recommendation 191 proposes more detail on types of maternity leave and longer periods of leave, increased levels of cash benefits and measures to finance these, and more detailed suggestions on improved health protection.[230] As an example, Convention 183

[225] Ibid article 4(1).
[226] Ibid article 4(4).
[227] Ibid article 6(2).
[228] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69, at 2.
[229] ILO 'Recommendation 191 on Maternity Protection' (2000).
[230] ILO 'Maternity at Work. A review of national legislation' (2010) at 2.

stipulates that '… a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than 14 weeks',[231] while Recommendation 191 proposes that states should 'endeavour to extend the period of maternity leave referred to in Article 4 of the Convention to at least 18 weeks.'[232]

In addition, the ILO Social Security (Minimum Standards) Convention 1952 (No 102), also not ratified by the South Africa government, ensures access to a minimum slate of social security measures for workers, including medical care,[233] and specifies benefits applicable 'in case of pregnancy and confinement and their consequences.'[234] This Convention specifically requires member states to 'secure to the persons protected the provision of maternity benefit,'[235] including such contingencies as 'pregnancy and confinement and their consequences, and suspension of earnings … resulting therefrom'.[236]

ILO Recommendation 202 on National Social Protection Floors recognises that social security 'is an important tool to prevent and reduce poverty, inequality, social exclusion and social insecurity, to promote equal opportunity and gender and racial equality, and to so support the transition from informal to formal employment'.[237] It envisages and provides a framework for the creation of nationally defined, comprehensive social protection systems, and extending existing social security coverage. It calls for the creation of national minimum standards or 'floors' of social protection, prioritising access to those most in need such as people living in situations of poverty, those unprotected by existing social protection mechanisms, including workers in the informal economy and their families.[238] The proposed social security guarantees should include 'access to essential health care including maternity care, as well as basic income security at a nationally defined minimum level for all resident women in case of maternity'. The guarantees should be established in law and reviewed regularly to provide for 'adequate, sustainable and universal protection'.[239]

[231] ILO Convention 183 op cit note 227, article 4(1).
[232] ILO Recommendation 191 op cit note 232, para 1(1).
[233] ILO Convention 102, Convention on Social Security (Minimum Standards) (1952), articles 7 & 8.
[234] Ibid article 10(b).
[235] Ibid article 46.
[236] Ibid article 47.
[237] ILO 'Recommendation 202, National Social Protection Floors' (2012), Preamble.
[238] Ibid.
[239] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 2.

In giving effect to Recommendation 202, member states should apply the following principles:[240]

'(a) universality of protection, based on social solidarity;

(b) entitlement to benefits prescribed by national law;

(c) adequacy and predictability of benefits;

(d) non-discrimination, gender equality and responsiveness to special needs;

(e) social inclusion, including of persons in the informal economy;

(f) respect for the rights and dignity of people covered by the social security guarantees;

(g) progressive realization, including by setting targets and time frames.'

Recommendation 202 particularly calls for basic income security, at least at a nationally defined minimum level, for people who cannot earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability.[241]

ILO Employment Relationship Recommendation 198 of 2006 recognises instances where employment relationships may be disguised to deny workers labour protections. Article 5 calls on member states to address this vulnerability through national policy, in order to safeguard protection for workers. It exhorts states to address the needs of workers in instances where the employment relationship is uncertain – particularly for women workers.[242]

ILO Recommendation 204 concerning the transition from the informal to the formal economy (2015) introduced the first international labour standard relating to the informal economy.[243] It applies to all workers in this sector, including self-employed and own account workers, subcontracted workers and members of cooperatives.[244] This standard provides guidance to member states on extending rights and protections to informal economy workers – including social protections in the form of social insurance coverage. Article 18 of the ILO's R204 provides that member states should progressively transition to the formal economy, and implement legislative and other measures to extend to all workers social security, maternity protection, decent working conditions, and a minimum wage. It specifically addresses the

[240] Ibid at 27 s 3(a) – (g).
[241] Ibid s 5(c).
[242] ILO 'Recommendation 198, Employment Relationships Recommendation' (2006).
[243] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 2.
[244] ILO op cit note 31.

exclusion from maternity benefits of informal economy workers, by recommending that states should 'progressively extend, in law and in practice, to all workers in the informal economy, social security [and] maternity protection'.[245] It further specifies that states should encourage access to childcare and other forms of care services to promote gender equality and support the transition to the formal economy.[246] Equally, it calls for states to enact measures to ensure gender equality and the elimination of all forms of discrimination against informal workers.[247]

South Africa, as a signatory to this recommendation, has tasked the Decent Work Country Programme Steering Committee to oversee the implementation of the ILO's Decent Work Agenda. With social protection constituting one of the four priority areas agreed to, the programme of action includes developing measures to '[f]acilitate the extension of social protections that currently exist for wage employed workers to own account workers.'[248]

South Africa has confirmed in its Decent Work Country Programme (DWCP) Report that its social insurance system excludes workers outside of the formal wage economy, as well as those engaged in atypical and precarious work situations – such as in the informal sector.[249] The Report outlines South Africa's DWCP, which includes the following priorities: 'Strengthening fundamental principles and rights at work through the ratification and implementation of International Labour Standards;' and '[s]trengthening and broadening social protection coverage through better managed and more equitable access to social security and health benefits, ...'.[250]

South Africa's DWCP Steering Committee has been tasked with responsibility to oversee the implementation of this programme, and has established a R204 Task Team to address country obligations set out in this instrument.[251] The Task Team has identified the need for legal reform to '[f]acilitate the extension of social protections that currently exist for wage employed workers to own account workers',[252] and includes the Unemployment Insurance Act as one of the body of laws requiring amendment.[253] South Africa clearly does not have adequate systems

[245] ILO Recommendation 204 op cit note 31, article 18.
[246] Ibid, article 21.
[247] Ibid.
[248] Ibid at 2.
[249] NEDLAC 'Draft South Africa Decent Work Country Programme' (18 March 2010), available at *http://new.nedlac.org.za/wp-content/uploads/2014/10/decent_work_country_programme_sa.pdf*, accessed on 1 October 2020 at 30.
[250] Ibid at 23.
[251] ILO Recommendation 204 op cit note 31.
[252] Ibid at 2.
[253] Ibid at 13.

and measures in place to live up to the standards and requirements outlined in these Conventions. This significant gap would have to be addressed through law reform should South Africa accede to public pressure and ratify, in particular, the Maternity Protection Convention 183. The implications of such ratification will be addressed later in this study.

IV. AFRICAN UNION INSTRUMENTS

Foremost in the slate of human rights standards adopted by the African Union, is the African Charter on Human and People's Rights (the Banjul Charter). Adopted by the then Organisation of African Unity in 1981, this international human rights instrument is intended to promote and protect human rights and basic freedoms in Africa, and was ratified by South Africa in 1996. As with similar wording in all other international rights instruments, member states are obliged to 'recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them'.[254]

While not specifically addressing the question of social security or maternity benefits, the Charter declares that everyone 'shall have the right to enjoy the best attainable state of physical and mental health,'[255] obliges the state to protect and take care of the family, as the 'natural unit and basis of society,'[256] and 'ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions'.[257] This latter article provides a substantive argument for the adoption by the state of maternity protection measures for all categories of working women, on a non-discriminatory basis.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) further develops the continental commitment to attaining gender equality and eradicating discrimination against women as articulated in the Banjul Charter – by affirming rights and protections accorded to women in existing international instruments.[258] Ratified by South Africa in 2004, the state is expressly bound to 'enact and effectively implement appropriate legislative or regulatory measures,'[259] 'take corrective and

[254] African Charter on Human and People's Rights, article 1.
[255] Ibid article 16(1).
[256] Ibid article 18(1).
[257] Ibid article 18(3).
[258] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Preamble.
[259] Ibid article 2(1)(*b*).

positive action in those areas where discrimination against women in law and in fact continues to exist,'[260] and 'support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women'.[261]

In addressing the economic and social rights of working women, the Maputo Protocol sets out clear obligations on state parties to enact legislative and other measures to ensure equal opportunities for and non-discrimination against women in the workplace,[262] and their equal access to benefits. Compellingly, the Protocol identifies, in particular, the vulnerability of women in the informal sector, and imposes on states the obligation to 'create conditions to promote and support the occupations and economic activities of women, in particular, with the informal sector,'[263] 'establish a system of protection and social insurance for women working in the informal sector,'[264] and 'guarantee adequate and paid pre and post-natal maternity leave in both the private and public sectors'.[265] The sexual and reproductive health rights of women are affirmed, including decisions in relation to family planning and the spacing of children,[266] as well as access to pre- and post-natal health and nutritional services.[267]

The African Charter on the Rights and Welfare of the Child, ratified by South Africa in 2000, again establishes the critical linkages between the rights of the child and those of its parent or caregiver. For instance, the Charter calls for measures to reduce infant and child mortality,[268] and to ensure 'appropriate health care for expectant and nursing mothers'.[269]

The AU Social Protection Plan for the Informal Economy and Rural Workers (2011–2015) was adopted to extend social protection benefits to vulnerable categories of workers largely denied protection by formal labour frameworks. The Social Protection Plan envisages a Minimum Social Protection Package, in terms of which member states are urged to '[d]efine and implement a Minimum Protection Substantive Package for informal and rural workers and members of their families, encompassing measures on access to market and land for stable

[260] Ibid article 2(1)(*d*).
[261] Ibid article 2(1)(*e*).
[262] Ibid article 13(1).
[263] Ibid article 13(1)(*e*).
[264] Ibid article 13(1)(*f*).
[265] Ibid article 13(1)(*i*).
[266] Ibid article 14(1).
[267] Ibid article 14(2).
[268] African Charter on the Rights and Welfare of the Child, article 14(1)(*a*).
[269] Ibid article 14(1)(*b*).

workplace, health, maternity, death, retirement.'[270] As part of this process, states should '[r]eview their laws and regulations, policies, strategies and programmes as they relate to access of the informal and rural workers to social protection measures, and undertake reform measures for more inclusive social protection systems.'[271] Member states are particularly urged to enact 'a range of policies to enhance women's economic security, such as the revision of labour laws to eliminate gender discrimination and ensure equal protection'.[272]

V. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) INSTRUMENTS

South Africa joined the SADC in 1994. It is signatory to a slate of instruments concerning non-discrimination against women, and the provision of social security rights and benefits – including those relating to maternity benefits. The Charter on Fundamental Social Rights in the SADC calls on member states to 'create an enabling environment consistent with ILO Conventions on discrimination and equality and other relevant instruments,'[273] so that gender equality and equal opportunities for men and women are created, including 'access to employment, remuneration, working conditions, [and] social protection…'.[274] The Charter goes further to declare that member states are obliged to create an enabling environment 'so that every worker in the Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits'.[275]

The provisions outlined above articulate the legal obligation of member states such as South Africa, to extend social security protection measures such as maternity benefits to all categories of workers – in both the formal and informal economy. The Code on Social Security in the SADC (2008) (Minimum Standards) anchors this more substantively. Making reference to ILO Conventions 102 and 183, it obliges member states to establish and progressively raise their systems of social security, 'at least equal to that required for ratification of International Labour Organisation (ILO) Convention Concerning Minimum Standards of Social Security No. 102 of 1952'.[276] Of particular significance, the Code calls on member states to expand progressively

[270] African Union Social Protection Plan for the Informal Economy and Rural Workers (2011 – 2015), s B(27)(*a*).
[271] Ibid s B(27)(*d*).
[272] Ibid s C(31)(*f*).
[273] Charter on Fundamental Social Rights in the SADC (2003), article 6(1).
[274] Ibid article 6(1)(*b*).
[275] Ibid article 10(1).
[276] Code on Social Security in the SADC (2008), article 4(3).

the coverage and impact of their social insurance schemes to the entire working population,[277] and that they 'should provide and regulate social insurance mechanisms for the informal sector.'[278] With specific reference to ILO Convention 183, the Code obliges member states to 'ensure that women are not discriminated against or dismissed on grounds of maternity and that they enjoy the protection provided for in the ILO Maternity Protection (Revised) Convention No. 183 of 2000,'[279] and 'progressively provide for paid maternity leave of at least 14 weeks and cash benefits of not less than 66% of income'.[280]

The SADC Protocol on Gender and Development of 2008, again ratified by South Africa, and colloquially referred to as SADC CEDAW, aims to provide for gender mainstreaming and the empowerment of women, to eliminate discrimination on the basis of gender, and to achieve gender equality.[281] In addition to the usual exhortation on states to enact measures to implement the Protocol, state parties are specifically empowered to implement affirmative action measures 'to eliminate all barriers that prevent them from participating meaningfully in all spheres of life and create a conducive environment for such participation'.[282]

In relation to the rights of working women, the Protocol calls on state parties to enact policies and legislation to ensure equal access, benefits and opportunities for women in trade and entrepreneurship, 'taking into account the contribution of women in the formal and informal sectors'[283] – ensuring that policies in these sectors are gender responsive.[284] To promote equal access to employment and benefits, state parties are obliged to 'provide protection and benefits for women and men during maternity and paternity leave.'[285]

VI. CONCLUSION

It is apparent from the above analysis and application of relevant international law that there is a significant and detailed obligation on South Africa to enact a mechanism that would enable self-employed, informal economy workers to access maternity benefits. To fail to do so would constitute a dereliction of South Africa's obligations in international law to both its fellow

[277] Ibid article 6(4).
[278] Ibid article 6(5).
[279] Ibid article 8(1).
[280] Ibid article 8(3).
[281] SADC Protocol on Gender and Development (2008), article 3(a).
[282] Ibid article 5.
[283] Ibid article 17 (1).
[284] Ibid article 17(2).
[285] Ibid article 19(4).

member states, and to its citizenry. The following chapter will present an analysis of how these commitments have been domesticated into South Africa's legislative framework, to assess whether the state has adopted the necessary measures to give effect to these, or, as is argued in this study, whether it has failed in this regard. Equally critical to establish, is whether any such failure is tantamount to a prohibited form of unfair discrimination against women, and a violation of state obligations in relation to the best interests of the child principle. The following chapter will, therefore, primarily assess whether the denial of maternity benefits to self-employed workers constitutes a violation of their constitutional rights to equality, dignity and social security, and of the rights of the child.

CHAPTER 5

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

I. INTRODUCTION

This chapter sets out the relevant constitutional and legislative provisions pertaining to self-employed workers' access to social security provisions, and maternity benefits in particular. Using a constitutional lens of analysis, and drawing on relevant court judgments, the study examines the obligations on the state to enact measures to ensure access to social security for all categories of working class women – not just those employed in the formal sector. The state's obligation to prioritise access to maternity benefits for this category of women will be examined critically. Equally, the chapter examines the state's obligations in relation to the paramountcy of the best interests of the rights of the child, and how these are impacted by the state's current exclusion of self-employed women from the social security system.

A question requiring interrogation is whether the exclusion of self-employed women from the state's existing maternity benefits policy and legislative framework constitutes unfair discrimination. Another pivotal question is whether there is a constitutional imperative, buttressed by case law, requiring the state to develop a social security system that accommodates self-employed workers. A critique will be undertaken of the *lacuna* in our current labour and social security legislative framework and the case for law reform in response.

II. CONSTITUTIONAL PROVISIONS

(a) Founding provisions

The founding provisions in the South African Constitution state that South Africa is a democratic state founded on the values of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'.[286] In *S v Makwanyane*, the court held that the Constitution articulates a 'vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos'.[287] Accordingly, the Constitution has been described not only as descriptive, in detailing the exercise of power by state institutions, but as prescriptive, in that it prescribes how state power is to be exercised legitimately in line

[286] Constitution, Preamble.
[287] *S v Makwanyane and Another* supra note 164 at para 261.

with democratic standards.[288] In addition, the Constitution is normative, in that it stipulates the principles and values which must be adhered to by the state in its exercise of power.[289] Dignity, as a founding value, is arguably one of the cornerstones of the Constitution,[290] thereby informing the interpretation of the rights enshrined in the Constitution.[291]

These fundamental principles go to the heart of ascertaining whether differential treatment, acts or omissions by the state constitute unfair discrimination. Several rights detailed in the Bill of Rights of the Constitution, lend a compelling legislative framework and argument for the inclusion of informal economy workers in South Africa's social security mechanism, and the extension of maternity benefits in particular, to informal economy workers.

(b) Implementation, interpretation and application of the Bill of Rights

Regarding the state's obligations to implement the different categories of rights contained in the Bill of Rights, including socio-economic rights such as the right to social security, the Constitution makes it clear that this is a legal obligation, and not an aspiration. It does so by stating: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights,'[292] while acknowledging that these are subject to the limitations referred to in s 36.[293] The seminal judgment in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*[294] determined that the justiciability of socio-economic rights cannot be construed to exist on paper only and courts are, accordingly, constitutionally bound to ensure that they are protected and fulfilled.[295]

The term 'respect' has been interpreted by the South African courts as meaning to not arbitrarily remove or make it difficult for a person to access the right or service in question.[296] 'Protect' requires the state to enact and enforce necessary legislation that prevents the violation of such rights by others, while 'promote' requires the necessary education and outreach to inform people of the nature of such rights and services and how to access these.[297] The most

[288] Pierre De Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2014) at 40.
[289] Ibid.
[290] *Makwanyane* supra note 164 at para 329.
[291] *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 35.
[292] Constitution s 7(2).
[293] Ibid s 7(3).
[294] 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) at para 78.
[295] Grootboom supra note 169 at para 20
[296] Iain Currie & Johan De Waal *The Bill of Rights Handbook* 6 ed (2013).
[297] Ibid.

contested of this phrasing, namely the obligation on the state to 'fulfil' the rights in the Bill of Rights, is specified in relation to particular rights, which compel the state to take reasonable legislative and other measures within its available resources to achieve the realisation of these rights.[298]

The Constitution makes it unequivocally clear that the Bill of Rights is binding on all spheres of the state, stating that it 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'[299] In interpreting the rights contained in the Bill of Rights, the Constitution exhorts courts when 'interpreting any legislation, and when developing the common law or customary law', to 'promote the spirit, purport and objects of the Bill of Rights'.[300] The values of dignity and equality, and the principles of non-discrimination are inherent in such interpretation.

Interpretation, as it pertains to the Bill of Rights, involves ascertaining the meaning of a provision in the Bill of Rights, to establish whether the impugned law or conduct in question is inconsistent with that provision.[301] In some of its early judgments, the Constitutional Court, in particular, drew a distinction between ordinary statutory interpretation and a rights interpretation, emphasising that a rights interpretation called for a less restrictive and more generous form of interpretation in favour of those whose rights enjoyed constitutional protection.[302] An example of this "more generous" approach can be evidenced in *Attorney General v Moagi*, where the court held that 'Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.'[303]

The Constitutional Court further drew on international law, citing dicta from foreign cases to support its approach to constitutional interpretation. For instance, in *S v Zuma*,[304] the Constitutional Court referenced the decision in *Minister of Home Affairs (Bermuda) v Fisher*[305] stating that '[a] supreme constitution requires a generous interpretation ... suitable to give to

[298] Constitution s 26(2) & s 27(2); see *Government of RSA and Others v Grootboom and Others* supra note 169, which is discussed later in this chapter.
[299] Constitution s 8(1).
[300] Ibid s 39(2).
[301] Iain Currie and Johan de Waal op cit at 133–149
[302] Lourens du Plessis 'Interpretation' in S Woolman and M Bishop (eds) *Constitutional Law of South Africa*. 2 ed (2013) at 32-38.
[303] 1982(2) Botswana LR 124, at para 184.
[304] 1995 (2) SA 642 (CC)
[305] [1980] AC 319 (PC)

individuals the full measure of the fundamental rights and freedoms referred to ....'[306] In *R v Big M Drug Mart Ltd*, Dickson J held, with reference to the Canadian Charter of Rights and Freedoms that:

> 'The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee. It was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection.'[307]

What these judgments reveal is that rights interpretation is essentially distinct from conventional statutory interpretation because it is overtly value laden.[308] It is of necessity generous in that its intention is to prevent interference with constitutionally entrenched rights. This requires courts 'to pass value judgments on a text couched in inclusive and open ended language. From a common law point of view, this means investing the judiciary with law-making authority that departs from systems committed to parliamentary sovereignty.[309]

In *S v Makwanyane*[310] the court held that '[w]hilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] generous and purposive and give ... expression to the underlying values of the Constitution'.[311] It is evident that the Constitutional Court prefers the generous and purposive approach adopted in *Makwanyane* to a more literal interpretation of a provision, as seen in *Sanderson v Attorney General, Eastern Cape*.[312] In this instance, even although s 25(3)(a)–(j) of the interim Constitution articulated the factors that constituted the right to a fair trial, without making reference to any non-trial related interests of the accused, the court held that the right to be tried within a reasonable time included both the trial and non-trial related interests of the accused.[313]

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[306] Supra at paras 14 -15.
[307] (1985) 18 DLR (4th) 321, 3956, 18 CCC (3d) 385.
[308] Lourens du Plessis op cit note 307 at 32.
[309] Ibid.
[310] Supra at note 164.
[311] Supra at para 9.
[312] 1998 (2) SA 38 (CC).
[313] *Sanderson* supra at paras 22 – 4.

Conversely, courts have ruled that although they are required to give effect to the object and purpose of a provision, they may not unduly burden a provision by imposing a meaning of which the state is not reasonably capable.'[314] One of the more controversial examples of the court's approach of generous interpretation was witnessed in *S v Mhlungu*[315] where a majority of the Constitutional Court held that:

> 'An interpretation which withholds the rights guaranteed by Chapter 3 of the [interim] Constitution from those involved in proceedings which fortuitously commenced before the operation of the Constitution would not give to that chapter a construction which is "most beneficial to the widest amplitude" and should therefore be avoided if the language and context of the relevant sections reasonably permits such a course.'[316]

In this instance, the court adopted a generous approach to support an interpretation of s 241 (8)[317] of the interim Constitution, permitting persons involved in cases pending at the commencement of the Constitution to rely on the rights in the interim Bill of Rights. This interpretation was applied, even although the relevant constitutional provision made it clear that those involved in cases prior to the commencement of the interim Constitution would have their matters dealt with as though the Constitution had not come into effect.[318]

The minority judgment in this case favoured a more literal interpretation of the constitutional provision, holding as follows:

> 'There are limits to the principle that a Constitution should be construed generously so as to allow to all persons the full benefit of the rights conferred on them, and those limits are to be found in the language of the Constitution itself ... . Section 241(8) of the interim Constitution provides expressly that pending cases shall be dealt with as if the Constitution had not been passed. When the language is clear it must be given effect.... With all respect to the judges who have taken a different view I find it difficult to see what meaning other than that which I have suggested can reasonably be given to the language used.'[319]

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[314] *South African Airways (Pty) Ltd v Aviation Union of South Africa* 2011 (3) SA 148 (SCA) at para 29.
[315] 1995 (3) SA 867 (CC).
[316] *Mhlungu* supra at para 9.
[317] Section 241(8) reads as follows: 'All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution.'
[318] Iain Currie and Johan de Waal op cit note 301 at 138.
[319] *Mhlungu* supra note 320 at para 78.

This majority judgment reveals that 'where the text reasonably permits, a broad interpretation (generous) should be preferred over a narrow interpretation, if the result of the latter would be to deny persons the benefits of the Bill of Rights.'[320]

A purposive interpretation is one that seeks to elicit the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom, and then to prefer the interpretation of a provision that best supports and protects those values.[321] Equally, as held in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council,*[322] a contextual interpretation requires the provisions of the Constitution to be read in context, to ascertain their purpose. This requires taking cognisance of South Africa's political history, and moving beyond a narrow, textual interpretation of a provision.[323] This can be seen in *Shabalala v Attorney General of the Transvaal*[324] where the Constitutional Court held:

> '[T]he Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment.'[325]

Equally, the courts have held that a contextual interpretation requires examining the Constitution in its entirety, and not considering provisions in isolation.[326] This is evident in several Constitutional Court decisions. For instance, in *S v Makwanyane*, the Constitutional Court regarded the rights to life, equality and dignity as together providing meaning to the prohibition of cruel, inhumane or degrading treatment or punishment in s 11(2) of the interim

[320] Iain Currie and Johan de Waal op cit note 301 at 139.
[321] Ibid at 136.
[322] 1999 (1) SA 374 (CC).
[323] Iain Currie and Johan de Waal op cit note 301 at 141.
[324] 1996 (1) SA 725 (CC).
[325] *Shabalala* supra note 329 at para 26.
[326] *Grootboom* supra note 169 at para 24.

Constitution.[327] In *Soobramoney v Minister of Health (KwaZulu-Natal),*[328] the Constitutional Court held that it could not interpret the right to life as captured in s 11 to impose additional positive obligations on the state, inconsistent with the right to medical treatment. It therefore could not order the state to provide life-saving treatment to a critically ill patient.[329]

Constitutional interpretation is, however, not unrestrained. In S *v Zuma*[330] the court expressed caution, noting:

> 'While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective meaning.' Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean… even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination .... I would say that a constitution 'embodying fundamental principles should *as far as its language permits* be given a broad construction '[331]

Similarly, in *S v Gumede & Others,* the court held that while s 39(1)(a) of the Constitution requires a liberal interpretation of the Bill of Rights this 'does not permit or encourage courts to ignore the actual language used in the Constitution. If it were felt that the rights of detained persons should be extended, this should be achieved by means of legislative action and not by means of judicial activism, or by interpretation which reads words into provisions which were not there or excised words which were.'[332]

In interpreting socio-economic rights, the Constitutional Court has consistently emphasised that, in addition to their textual setting, such rights need to be interpreted in their social and historical context, as is evidenced in *Grootboom*.[333] Equally, in *Soobramoney v Minister of Health (KwaZulu-Natal),* Chaskalson J commenced his judgment by recognising the economic disparity in South Africa, and stated:

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[327] *Makwanyane* supra note 164 at para 10.
[328] 1998 (1) SA 765 (CC).
[329] Supra at para 15.
[330] Supra note 309.
[331] Supra at para 17 – 18.
[332] 1998 (5) BCLR 530, 542AC (D).
[333] *Grootboom* supra note 169 at paras 22 and 25; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para 24.

> 'We live in a society in which there are great disparities in wealth; millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security and many do not have access to clean water or to adequate health services.'[334]

He further recognises a commitment to address these disparities and such inequality, and 'to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.'[335] This recognition of the socio-economic context in interpreting rights is critical, as it establishes a link between socio-economic rights and the foundational constitutional values of human dignity, equality and freedom.[336] Furthermore, it affirms the constitutional aspiration to address conditions such as poverty and inequality, to give meaningful effect to the attainment of the core values, for the whole population.[337]

In relation to the application of the Constitution, s 8(1) provides for the direct vertical application, describing circumstances in which legislation and conduct of the state may be challenged for being inconsistent with the Bill of Rights. This section provides that the legislature, the executive, the judiciary and all organs of state are bound by the Bill of Rights. An applicant may therefore challenge the conduct of any of these state institutions in the event of any alleged breach of their obligations envisaged by the Bill of Rights.[338] Courts are empowered by s 8(3) to grant appropriate remedies in instances of such infringement.

In addition, the Bill of Rights applies indirectly in relation to state legislation and conduct, in that it influences the interpretation and development of the common law and legislation.[339] It has been argued that any legal dispute should in principle be determined in accordance with existing legal principles or common law rules, duly developed or interpreted with reference to constitutional values and the rights contained in the Bill of Rights, prior to any direct application of the Bill of Rights.[340] Accordingly, s 39 of the Constitution imposes a general duty on every court, tribunal or forum to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom', when interpreting any

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[334] *Soobramoney* supra note 333 at para 11.
[335] Supra.
[336] Sandra Liebenberg 'Interpretation of socio economic rights' in S Woolman and M Bishop (eds) *Constitutional Law of South Africa*, 2 ed (2013) 33- 1 – 9.
[337] Ibid.
[338] Constitution s 8(1).
[339] Iain Currie and Johan de Waal op cit note 301 at 41 – 42.
[340] See *S v Mhlungu* supra note 320 at para 59; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 21; and *Mazibuko and Others v City of Johannesburg and Others* 2010 4 SA 1 (CC) at para 73.

legislation,[341] and to promote the spirit, purport and objects of the Bill of Rights.'[342] Statutory interpretation by the court must positively promote the Bill of Rights and the other provisions of the Constitution, particularly the fundamental values contained in s 1.[343]

In *Govender v Minister of Safety and Security*,[344] the Supreme Court of Appeal developed guidelines on considering a constitutional challenge to legislation. It held that a judge, magistrate or presiding officer of a tribunal is required:

> '(a) To examine the objects and purport of the Act or the section under consideration;
>
> (b) To examine the ambit and meaning of the rights protected by the Constitution;
>
> (c) To ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms to the Constitution, i.e. by protecting the rights therein protected;
>
> (d) If such interpretation is possible, to give effect to it, and
>
> (e) If it is not possible, to initiate steps leading to a declaration of constitutional invalidity.'[345]

According to the court, such legislative interpretation is constrained by the requirement that it must be 'reasonably possible.'[346]

The Constitution's potential to transform inequality in access to rights has been acknowledged,[347] and the significance of the attainment of substantive equality in enabling access to socio-economic rights, in particular.[348] This section lays the ground for the transformative nature of the Constitution, to promote the values of dignity, equality and freedom. This notion of transformative constitutionalism[349] has been described as a response to South Africa's history of inequality and discrimination, and embodies the constitutional commitment to necessary social, economic, legal and political transformation to redress this

[341] Constitution s 39(1)(a).
[342] Constitution s 39(2).
[343] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) at para 22.
[344] 2001 (4) SA 273 (SCA).
[345] *Govender* supra at para 11.
[346] Supra.
[347] Christopher Mbazira 'Appropriate, just and equitable relief in socio-economic rights litigation: The tension between corrective and distributive forms of justice' (2008) 125 *SALJ* 71 at 85.
[348] Ibid; see, also, Theunis Roux 'Understanding *Grootboom* - A Response to Cass R Sunstein' (2002) 12(2) *Constitutional Forum* 41–9.
[349] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) at para 81.

historic imbalance.[350] The courts have noted this in their interpretation of the Constitution, recognising that in attempting to create the society envisaged by the Constitution, '[b]eyond these plain strictures [of Apartheid] there were indeed other markers of exclusion and oppression, some of which our Constitution lists. So, plainly, it has a transformative mission. It hopes to have us re-imagine power relations within society'.[351] Accordingly, '[e]very aspect of the South African legal order is, therefore, subject to re-evaluation in light of the Constitution and the values it enshrines,'[352] and 'where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.'[353]

(c) The rights to equality, dignity and life

The right to equality[354] read with the right to dignity,[355] forms the basis for determining whether the state's failure to enact a mechanism to extend social security and maternity protections to informal economy workers constitutes unfair discrimination, in violation of the state's constitutional obligations. The Constitution declares that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law.'[356] The right to equality constitutes a crucial element of the transformative Constitution, in that it encapsulates the aspiration for a society in which everyone enjoys equal access to the resources and amenities of life, and can develop their full human potential.[357] The Constitution states further that the formal right to equality includes a guarantee of the attainment of substantive equality, which requires the 'full and equal enjoyment of all rights and freedoms', with measures permitted to promote the achievement of equality for those disadvantaged by unfair discrimination.[358]

Provision for positive discrimination as a remedial measure is fundamental to the attainment of substantive equality, and enabling conditions for people's full and equal participation in society.[359] This view was expressed by the court in *Minister of Finance v Van Heerden*, when it noted that the equality right is part of 'a credible and abiding process of reparation for past

[350] Pius Langa 'Transformative constitutionalism' (2006) 17(3) *Stellenbosch LR* at 351–60.
[351] *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para 29.
[352] Evadné Grant 'Dignity and Equality' (2007) 7(2) *Human Rights LR* 299–329 at 311.
[353] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 33.
[354] Constitution s 9.
[355] Ibid s 10.
[356] Ibid s 9(1).
[357] Langa op cit note 355 at 352–3.
[358] Constitution s 9(2).
[359] Catherine Albertyn and Beth Goldblatt (2008) 'Equality' In: Woolman & Bishop eds., *Constitutional Law of South Africa* 2 ed at 35-30.

exclusion, dispossession, and indignity within the discipline of our constitutional framework.'[360] Moreover, in *Van Heerden,* the court upheld the importance of such positive measures, noting that:

> '… [r]emedial measures are not a derogation from, but [are] a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality.'[361]

The notion of formal equality requires that all persons who are in the same situation be accorded the same treatment, and that people should not be treated differently because of arbitrary characteristics such as religion, race or gender.[362] A formal approach to equality calls for equal application of the law, without examining the particular circumstances or context of the affected individual or group and, consequently, the content and the potential discriminatory impact of that equal application.[363] Conversely, a substantive approach to equality is one that seeks to ensure that laws or policies do not reinforce the subordination of groups already suffering social, political or economic disadvantage. It requires that laws adopt an asymmetrical approach, and recognise and accommodate peoples' differences, thereby eliminating barriers that exclude certain groups from equal participation and access to opportunities and resources.[364] As the court held in *Hugo*, '[a]lthough the long term goal of our constitutional order is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality.[365]

This commitment to substantive equality can be viewed as a means to dismantle systemic injustice, and as a commitment to 'redistribution, and dismantling and restructuring social and economic relations that maintained multiple forms of domination and subordination, particularly of race. This understanding of equality recognises the manner in which different groups (in all their complexity) are subject to relational and intersecting political, social/cultural, economic and legal inequalities, and are affected by different configurations of misrecognition and maldistribution in public and private spheres.'[366]

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[360] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at para 25.
[361] *Minister of Finance v Van Heerden* supra note 365 at para 32.
[362] Anne Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *AHRLJ* 609- 632 at 611.
[363] Ibid at 612.
[364] Ibid at 613.
[365] *President of the Republic of South Africa v Hugo* supra note 28 at para 112.
[366] Catherine Albertyn '(In)equality and the South African Constitution' (2019) 36 (6) *Development Southern Africa* 751 at 758–9.

The Constitutional Court has held that '[a] comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of section 9.'[367] This requires the right to equality to be viewed holistically rather than formulaically, to adopt an approach to achieving equality which is 'cumulative, interrelated and indivisible.'[368] Section 9(1) provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law.' Section 9(3) expressly prohibits state discrimination on the listed grounds of 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth' – the so-called vertical prohibition on discrimination.[369] It also introduces the concept of horizontal prohibition against discrimination by others, to be governed by appropriate national legislation, for instance the Promotion of Equality and Prevention of Unfair Discrimination Act.[370] The extensive listed grounds indicate the systemic forms of discrimination inherent in South Africa, which potentially undermine the right to equality. As noted in *Brink v Kitshoff*:

> '[41] Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting section 8, the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and may continue to cause, considerable harm. For this reason, section 8(2) lists a wide, and not exhaustive, list of prohibited grounds of discrimination.' *[371]*

The judgment goes on to note that the equality clause recognises that discrimination on such grounds can lead to 'patterns of group disadvantage and harm'.[372] Such discrimination is inherently unfair, as it entrenches inequality among different groups in our society, and needs to be prohibited – with remedial measures enacted to redress its effects.[373] While the grounds for non-discrimination do not expressly speak to employment discrimination, an interrogation will be conducted into whether, in applying the inquiry used by the courts in interpreting these provisions, employment may be included as a form of unfair discrimination. In this regard, the

[367] *Minister of Finance v Van Heerden* supra note 365 at para 28.
[368] Catherine Albertyn and Beth Goldblatt op cit note 364 at 35-15.
[369] Constitution s 9(3).
[370] Ibid s 9(4), as governed by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).
[371] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).
[372] Supra at para 42.
[373] Supra at paras 41–2.

courts have held that differentiation on illegitimate grounds, or analogous grounds based on a person's attributes or characteristics that have the potential to impair a person's fundamental dignity would constitute discrimination.[374]

Finally, and importantly, the equality clause introduces the presumption of unfairness, in that discrimination on one or more of the grounds listed in s 9(3) is automatically deemed unfair, unless the discrimination is proven fair.[375] This clause has important implications for the burden of proof in establishing and rebutting an allegation of unfair discrimination, and will be addressed in this chapter. Central to an inquiry into whether discrimination is regarded as unfair, the impact on its victims and their dignity is pivotal to answering this question, and is examined later in this study.[376]

The Constitution declares that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'.[377] At the very core of the prohibition of unfair discrimination 'lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.'[378] Dignity is regarded as comprising both psychological and physical considerations, as '[t]he entitlement to a dignified existence, in the sense of being afforded the basic requirements to live as a human being who is valued, straddles both dimensions. Being abandoned to a life of abject poverty is an infringement of human dignity both in a physical and in a psychological sense. The two dimensions are inextricably linked (to) the context of socio-economic rights.'[379]

Respect for and protection of the dignity of all human beings is a fundamental component of a democratic South Africa. Recognising that the system of apartheid denied particularly black people respect, dignity, and their very humanity, the Constitution affirms the equal worth of all South Africans. In recognising this, our courts have held that 'recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.'[380] South African equality jurisprudence effectively proscribes the treatment of

[374] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).
[375] Constitution s 9(5).
[376] Iain Currie & Johan De Waal op cit note 301.
[377] Constitution s 10.
[378] *Hugo* supra note 28 at para 41.
[379] Evadné Grant 'Dignity and Equality' op cit note 357 at 312.
[380] *Makwanyane* supra note 164 at para 329.

people as 'lesser human beings', simply because they belong to a particular group.[381] It recognises that 'the indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream'[382]

As O'Regan J noted in *Dawood*:

> 'Human . . . . dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. . . . Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.'[383]

Our courts have developed significant jurisprudence in engaging with the right to human dignity, including drawing on foreign and international law to deepen their understanding and interpretation of this right.[384] Chaskalson J refers to *Law v Canada (Minister of Employment and Immigration)*[385] in this regard, citing the Canadian Supreme Court of Appeal's definition of human dignity as follows:[386]

> 'Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups."[387]

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[381] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 129.
[382] Supra.
[383] *Dawood & Another v Minister of Home Affairs & Others* supra note 295 at para 35.
[384] Pierre de Vos 'Equality, Human Dignity and Privacy Rights' in P de Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) 418-466 at 457.
[385][1999] 170 DLR 4th 1 (SCC).
[386] Arthur Chaskalson (2000) 'The Third Bram Fischer Lecture: Human dignity as a foundational value of our constitutional order' *SAJHR* 16 (2).
[387] *Law v Canada* supra note 390 at para 53.

It can be seen that a broad conceptualisation of dignity ensures that every individual has the opportunity to attain their full potential and complete freedom. Our courts have underscored such sentiments holding, for instance in *Ferreira v Levin NO and Others;Vryenhoek and Others v Powell NO and Others*[388] that:

> 'Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.'[389]

In this vein, this study considers the impact of exclusion from the maternity benefits and social security regime on the dignity of a particular group of workers: self-employed workers. This interrogation assesses whether such exclusion constitutes unfair discrimination, noting that it is 'primarily a violation of dignity that offends the equality clause.'[390] The experience of this category of workers is fundamental to such an equality enquiry. The Constitutional Court has adopted such a dignity-based approach, by validating and exploring the actual experience of victims of discrimination. [391] Such an approach unflinchingly examines the diverse forms and impact of inequality and discrimination in South Africa, to recreate a society in which every person is valued equally.'[392]

The right to life is formulated in the interim and final Constitution in a broad and unqualified manner, with its interpretation accordingly requiring judicial resolution on controversial issues such as abortion and the death penalty.[393] Together with the s 7(2) Constitutional requirements on the state to 'respect, protect, promote and fulfil' the rights in the Bill of rights, and limited only by provisions of the limitations clause contained in s 36 of the Constitution, this has led to a broad interpretation of the right to life in South Africa.[394]

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[388] 1996 (1) SA 984 (CC).
[389] Supra at para 49.
[390] Susie Cowen 'Can Dignity guide South Africa's Equality Jurisprudence?' (2001) 17 *SAJHR* 34–58 at 40.
[391] Evadné Grant 'Dignity and Equality' op cit note 357 at 299.
[392] Ibid.
[393] Marius Pieterse 'Life' in Woolman, S & Bishop, M (2013) *Constitutional Law of South Africa* 2nd ed 39-1 - 39- 21 at 39 – 1 and 39 -2.
[394] Ibid.

In particular, as noted in *Makwanyane:*

> 'The right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognized and treasured. The right to life is central to such a society.'[395]

This sentiment is central to establishing a critical inter-connectedness between the attainment of socio-economic rights, such as those to health and social security, and the right to life. Sachs J opined that an 'objective approach in relation to the enjoyment of the right to life' entailed that 'the State is under a duty to create conditions to enable all persons to enjoy the right.'[396] The implication of this argument is profound: The s 7(2) obligation on the state to fulfil the right to life, therefore, requires the state to enact necessary measures to ensure the attainment of the socio-economic dimensions of this right. This underscores the positive obligations on the state to deliver in particular on the substantive socio-economic rights envisaged in terms of the Constitution, including the rights to health and social security, and children's rights, envisaged in ss 27 and 28, and affirms the Constitution's commitment to human dignity and life.[397] This is evidenced in judgments such as *Soobramoney*, where the court held that '[s]atisfaction of needs for access to medical care, food, water, housing and employment form part of the right to "human life"'[398] and in *Victoria and Alfred Waterfront*, where the court opined:

> 'The rights to life and dignity are the most important of all human rights. By committing ourselves to a society founded on the recognition of human rights, we are required to value those rights above all others. Furthermore, the right to life encompasses more than "mere animal existence." It includes the right to livelihood.'[399]

[395] *S v Makwanyane* supra note 164 at para 326.
[396] *Makwanyane* supra at para 353.
[397] Marius Pieterse op cit note 398 at 39- 17 and 39-18.
[398] *Soobramoney v Minister of Health, KwaZulu-Natal* supra note 333 at para 31.

[399] *Victoria & Alfred Waterfront v Police Commissioner, Western Cape* 2004 (4) SA 444, 446 D-G (C).

The right to life, as guaranteed under the Bill of Rights,[400] could arguably be threatened in instances where paid maternity leave is not available. Self-employed workers reported that they were not able to afford to reduce their workloads or take leave from work upon the birth of a child, but instead continued trading right up to their due date – returning to work days after giving birth, often having to take the new-born infant with them.[401] Being actively engaged in work activities too late into pregnancy, or commencing work too soon after the birth of a child, exposes both the woman and her new born child to significant health risks'.[402] Apart from the impact on the quality of life of working women under such circumstances and their rights to livelihood, as outlined in the court judgements cited above, the very real threat to the health and lives of these women and their new-born infants cannot be understated, and the implications for maternal and child mortality is grim.

(d) Labour and environmental protections

The Constitution guarantees to everyone the right to choose his or her trade, occupation or profession freely, although this may be regulated by law.[403] In a gendered socio-economic context where women are accorded an inferior social status to men, and are predominantly found in lower paid, less secure positions than men, many women do not have the choice to opt for an occupation that offers social protections, including maternity benefits.[404] The gendered nature of poverty results in women 'being continually subjected to inequalities and vulnerability'.[405] The limited opportunities and support available to them result in many women being forced into the informal sector, where no such benefits are available.[406]

A similar argument emerges in criticism of the *Volks NO v Robinson*[407] majority judgment. Here, the court held that differentiation between married and unmarried partners, and therefore exclusion from maintenance provisions, did not constitute unfair discrimination or the violation of dignity, in that partners have the option to choose to marry and acquire maintenance support.[408] The minority view, articulated by Justice Sachs, is that the court did not consider

[400] Constitution s 11.
[401] CGE op cit note 5.
[402] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 1.

[403] Constitution s 22.
[404] Elsje Bonthuys and Catherine Albertyn op cit note 17; see, also, Stats SA op cit note 34.
[405] Department of Women 'The Status of Women in the South African Economy' (2015) at 22.
[406] Ibid.
[407] *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).
[408] Supra at paras 90–3.

the social context and obstacles potentially excluding the possibility of such a choice.[409] In many instances, because of gendered power imbalances in their relationships, women are not able to choose the option of marrying their partner, and the court should have considered the real life context of those affected. In this decision, the court, as in the *President of the Republic of South Africa v Hugo*[410] judgment, failed to alleviate existing systemic disadvantages such as gender inequality, and failed to recognise how the law is complicit in and contributes to such gendered disadvantages.[411] On this basis, it could be argued that an apparently gender-neutral legal framework, such as the exclusion of self-employed workers from social protections, perpetuates gender discrimination and disadvantage, in that many women are not freely able to choose an occupation that provides them with social security, including maternity protection.

Equally, within such trade, occupation and profession, everyone has the right to fair labour practices[412] and a safe environment.[413] Where pregnant informal economy workers are denied workplace protections guaranteed under labour provisions for designated 'employees', either in the form of non-discrimination and dismissal on the basis of pregnancy, or the provision of appropriate protective clothing or alternative duties non-harmful to the mother or her foetus, these rights may be violated.

(e) The rights to health and social security

The constitutional provisions in this regard are key to an appreciation of the denial of maternity benefits and social security to informal economy workers. The Constitution guarantees everyone the right to have access to health care services, including reproductive health care,[414] and to social security, 'including, if they are unable to support themselves and their dependants, appropriate social assistance.'[415] There has been debate on what constitutes 'appropriate' social assistance. As indicated by Liebenberg, 'This adjective is clearly intended to import a qualitative dimension in respect of the social assistance provided … The kind of benefits

[409] Supra at paras 157–63.
[410] *Hugo* supra note 28.
[411] Bradley Smith 'Rethinking *Volks v Robinson*: the implications of applying a "contextualised choice model" to prospective South African Domestic Partnerships Legislation' (2010) 13 (3) *PELJ* 238–300.
[412] Constitution s 23(1).
[413] Ibid s 24.
[414] Ibid s 27(1)(a).
[415] Ibid s 27(1)(c).

provided should also be appropriate to the situation and needs of the particular beneficiary group.'[416]

In addition, the guarantees outlined in this section of the Constitution, while subject to the limitations outlined in s 36 of the Constitution, are subject to an inbuilt qualifier. Here, the Constitution imposes on the state the obligation to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.[417] The context within which the state is obliged to deliver on the right to social security is significant. According to Liebenberg:

> 'The deep structural problems of poverty and inequality in South Africa have created a crisis of immediate needs for large numbers of people. In this context, it is argued that the effective implementation of social assistance programmes combined with far-reaching measures to improve access to social assistance are necessary to give effect to s 27 of the 1996 Constitution and the values underpinning it.'[418]

A review of South Africa's jurisprudence indicates that courts are reluctant to accord rights substantive content, and the Constitutional Court especially has been criticized for its failure to define the minimum core content of socio-economic rights.[419] O' Regan J defends this approach, and states that courts avoid such definition because what such rights might require of the state 'will vary over time and context', and that 'fixing qualified content might, in a rigid and counterproductive manner, prevent an analysis of context.'[420] Citing further the doctrine of the separation of powers, she goes on to find that '…it is institutionally inappropriate for the court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.'[421] Liebenberg however believes that such an approach is incorrect and argues that '[a] court cannot evaluate whether the state's conduct or omissions are reasonable in relation to the fulfilment of socio-economic rights unless it develops a prior understanding of the normative goal to be achieved.'[422] In resolving this issue, it is suggested that the courts look to the core

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[416] Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 17 (2) *SAJHR* 232 at 240–1.
[417] Constitution s 27(2).
[418] Liebenberg op cit note 421 at 232.
[419] Adrian Friedman, Angelo Pantazis and Ann Skelton 'Children's Rights' in Woolman S and Bishop M. (eds) *Constitutional Law of South Africa* 2nd ed (2013) at 47–9.
[420] *Mazibuko and Others v City of Johannesburg and Others* supra note 345 at para 60 – 61.
[421] *Mazibuko* supra at para 61.
[422] Sandra Liebenberg 'Water rights reduced to a trickle' as cited in Mariana Buchner-Everleigh 'Children's rights of access to health care services and to basic health care services: a critical analysis of case law, legislation and policy' (2016) *De Jure* 307-325 at 314.

values and the transformative aims of the Constitution, as the present study will argue in Chapter 7, as well as international law in this regard. The monitoring committee of the International Covenant on Economic, Social and Cultural Rights (ICESCR) introduced the notion of 'a minimum core obligation' to 'ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.'[423]

Such a standard required of the state in giving effect to its obligations in relation to socio-economic rights in particular, was the subject of inquiry in the landmark case of *Government of South Africa v Grootboom*, where the state rejected the notion of a minimum core content of rights.[424] This case is enlightening in considering whether, within a context of limited state resources and competing policy interests, the state is obliged to prioritise the provision of maternity protection and benefits to informal economy workers, as a category of vulnerable, and in the main, previously disadvantaged, workers. *Grootboom* had to do with the s 26 right to adequate housing, and the rights of children to shelter, in terms of s 28(1)*(c)*. In this case, a community desperate for housing occupied adjacent, private land – resulting in their eviction and the destruction of their building materials by the provincial government. Their High Court application for the state to provide them with adequate housing or shelter until they obtained permanent accommodation was successful. The state appealed to the Constitutional Court against the High Court's decision. The court, while providing clarity on the responsibilities in relation to the provision of a child's right to shelter, also provided guidelines in determining whether the state had discharged its responsibilities to ensure the progressive realisation of socio-economic rights such as the right to housing.

The court held, first, that the right in question should be considered in context, requiring a 'consideration of Chapter 2 and the Constitution as a whole', but equally that rights 'must also be understood in their social and historical context', meaning that the right to housing needs to be interpreted in light of its close relationship with other socio-economic rights.[425] The court held further that the state was obliged to enact positive measures to address the needs of those living in extreme conditions of poverty, homelessness, or intolerable housing. The impact of the interconnectedness of these factors should be taken into account in interpreting socio-economic rights, and whether the state has met its obligations in relation to these rights.[426] The

[423] UN Committee on Economic, Social and Cultural Rights 'General Comment 3 op cit note 170 at para 10.
[424] *Grootboom* supra note 169.
[425] Supra at paras 22 - 24.
[426] Supra at para 24.

court opined that a society based on human dignity, freedom and equality requires that the basic necessities of life be provided to all.[427] It stated that socio-economic rights entrenched in the Constitution are rooted in respect for human dignity, questioning 'how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance?'[428]

The court held that the s 26(2) requirements of 'reasonable legislative and other measures, within its available resources', ensuring the 'progressive realization' of the right to housing required that the state had to take positive action to meet the needs of those living in desperate poverty. In determining the reasonableness of such measures, it stated that in considering the historic, socio-economic challenges in access to housing in South Africa, such action should include the development of balanced and flexible plans, addressing short- and medium- and long-term needs, and providing for a larger number and a wider range of people over time. A programme excluding a significant segment of society would not be deemed reasonable, and reasonableness should be understood within the context of the Bill of Rights as a whole, particularly the constitutional guarantee of the right to dignity.[429] In Yacoob J's view, the 'reasonableness' standard requires that a programme implemented to realise a socio-economic right must be 'comprehensive', 'coherent', 'balanced' and flexible. More importantly, he concluded that a programme that excludes a significant sector of society cannot be said to be reasonable.[430]The court found, therefore, that s 26(3) required the state to devise and implement a comprehensive and coordinated programme[431] to realise progressively the right of access to adequate housing, which the respondents were not entitled to claim immediately or on demand.[432]

It must be noted that children's right to health care is encapsulated in two sections of the Constitution: s 27(1) accords the right to everyone to have access to health care services, while s 28(1)(c) stipulates that every child has the right to basic health care services. The implications of the difference in meaning of the words "the right to have access to" compared with the "right to" in these two provisions, in relation to children's health rights, must be briefly considered.

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[427] Supra at para 44.
[428] Arthur Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 (2) *SAJHR* 193 at 204.
[429] *Grootboom* supra note 169 at paras 41 & 43–45.
[430] Supra at para 43.
[431] Supra at para 96.
[432] Supra at paras 66–69.

Prior to *Grootboom*[433] there was an assumption that the socio-economic rights of children as enshrined in s 28(1) of the Constitution were superior because they were not subject to the internal limitations enshrined in s 27(2) of the Constitution. In *Grootboom*, the Constitutional Court rightfully noted that such an interpretation had 'an anomalous result' in terms of which people who have children have a direct and enforceable rights claim against the state, while those without children, or whose children are older, do not enjoy such a claim, no matter how deserving.[434] 'Similarly, it is argued that the right to basic health care services has different implications from the right to access to health care services because the former right does not include the word "access."'[435]

The court opined that s 28 must be read in context and stated that 'the obligation created by s 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by the abovementioned sections.'[436] This could imply that s 28(1) rights may also be subject to the internal limitations found in s 27(21).[437] In its judgment, the court interpreted s 28(1) in its entirety and found that children who were under parental care had to claim their socio-economic rights first from their parents, and not the state. It was only in instances where parental care was lacking that the state as the upper guardian of all minors was expected to step in and provide these rights.[438] This principle was illustrated in *Centre of Child Law v MEC for Education*,[439] where the court ordered that children housed at a school of industry be immediately provided with sleeping bags, as well as with interim psychological and therapeutic support pending an investigation and recommendations pertaining to the implementation of permanent support structures at the school.[440]

However, having said that, the state is not without obligation to deliver on these rights. As was outlined in *Grootboom*, even when parental care is not lacking the state must still '…provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms.'[441] This judgment recognises that while parents

[433] *Grootboom* supra note 169.
[434] *Grootboom* supra at para 71.
[435] Mariana Buchner-Everleigh 'Children's rights of access to health care services and to basic health care services: a critical analysis of case law, legislation and policy' (2016) *De Jure* 307-325 at 309.
[436] *Grootboom* supra at para 74.
[437] Mariana Buchner-Everleigh op cit note 440 at 311.
[438] *Grootboom* supra at para 77; Mariana Buchner-Everleigh op cit at 440.
[439] *Centre of Child Law v MEC for Education* 2008 1 SA 223 (T) at 227I-J & 228G.
[440] *Centre of Child Law* supra at 230F-231F.
[441] *Grootboom* supra note 169 at para 78.

constitute the primary providers and caregivers of children, and children must accordingly first claim their socio-economic rights from their parents, the state is still obliged to create the necessary environment to enable children the opportunity to claim such rights. It can be argued, therefore, that the state should enact appropriate mechanisms for self-employed women to access their rights to health and social security, particularly when considering the vulnerability of their socio-economic context, so that their children can in turn enjoy their rights.

This point was established in *Treatment Action Campaign,*[442] in relation to the rights of newborn children. The state, relying on the finding in the *Grootboom* judgment, submitted that s 28(1)(c) of the Constitution imposes an obligation on the parents of the newborn child, and not the state, to provide the child with the required basic health care services.[443] The court held that those children who had family and parents who could afford the drug would not be able to claim this right from the state. However, the court acknowledged the context of the case and the fact that in the main, the women and children who were denied access to the drug were mostly vulnerable and indigent. It therefore held that the state was compelled to provide the necessary assistance even if parental care was not lacking, because of the lack of financial resources available to the parents:

> 'The provision of a single dose of nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are most urgent and their inability to have access to nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are most in peril as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to nevirapine.'[444]

The court held further:

> 'The state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment that is beyond their means. They and their children are in the main dependent upon the state to make health care services available to them.'[445]

[442] *Minister of Health v Treatment Action Campaign* supra note 338.
[443] *TAC* supra at para 76.
[444] *TAC* supra at para 78.
[445] Supra at para 79.

This case is pertinent to this study, in that the state's failure to enact a mechanism to afford an already vulnerable group of women access to paid maternity leave, results in their being unable to provide for their new-born children adequately, if at all. This is occasioned either because of the lack of income replacement before and after the period of childbirth, or the absence of the mother in instances where she has been obliged to return to work earlier, to generate an income, which impacts substantively on the early childhood development of her infant[446], as this study argues.

Despite the above clarification, the court did not base its decision on s 28(1)(c) when it held that children are direct bearers of individual rights to health care services, if their parents are indigent and unable to provide this care. Instead, in this case, as in *Grootboom*, the Constitutional Court declared that ss 27(1) and 27(2) of the Constitution had been violated in that the state did not adopt reasonable measures to implement the relevant rights, as outlined above.[447] Most importantly, as noted, the court in *Grootboom* held that a programme that excludes a significant sector of the society cannot be said to be reasonable.[448] Through these judgments and its definition of the test of reasonableness, the court has emphasised the need for the state to pay attention to vulnerable and marginalised groups when implementing socio-economic rights. The *TAC* judgement demonstrates that within the test there is space for children's rights to be invoked.[449]

On this basis, it is argued that the inbuilt qualifying clause of s 27(2), in relation to the state's obligations to deliver on people's right to access health care services, social security and social assistance, in relation to maternity benefits, would be required to pass constitutional muster and meet the reasonableness standards as developed in the *Grootboom* judgment. The courts have applied this standard in several cases that challenged the state's delivery on s 27 rights. In the *Soobramoney* matter, for instance, it was held that an indigent person is entitled to access emergency health care when their life is threatened.[450]

In the *Khosa* matter, the court found that the constitutional guarantee that '[e]veryone has the right to have access to … social security' rendered the state's restriction of social security

[446] National Integrated Early Childhood Development Policy (2015), s91.
[447] Mariana Buchner-Everleigh op cit at 440.
[448] *Grootboom* supra note 169 at para 43.
[449] Mariana Buchner-Everleigh op cit at 440.
[450] *Soobramoney v Minister of Health (KwaZulu-Natal)* supra note 333.

benefits to South African citizens – thereby excluding foreign nationals – unconstitutional.[451] The court held that:

> 'There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance.'[452]

By extension, the state's limitation of access to social security in the form of employment benefits to only formally designated 'employees', thereby excluding self-employed workers, could successfully be argued as being unconstitutional. This argument would find support in the court's assertion that '[i]n the present case, where the right to social assistance is conferred by the Constitution on "everyone" and permanent residents are denied access to this right, the equality rights entrenched in section 9 are directly implicated.'[453] The case for unconstitutionality is further strengthened if it is argued that affected workers in the informal economy fall in the category of most vulnerable. The court in this instance noted that the consequences of the denial of the right to social security are grave. The affected permanent residents were accordingly 'relegated to the margins of society and … deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution. Denying them their right under section 27(1) therefore affects them in a most fundamental way.'[454]

The final verdict in the *Khosa* matter is damning for the state's failure to deliver on self-employed workers' right to social security:

> 'The Constitution vests the right to social security in "everyone". By excluding permanent residents from the scheme for social security, the legislation limits their rights in a manner that affects their dignity and equality in material respects. Dignity and equality are founding values of the Constitution and lie at the heart of the Bill of Rights. Sufficient reason for such invasive

[451] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC).
[452] Supra at para 74.
[453] Supra at para 49.
[454] Supra at para 77.

> treatment of the rights of permanent residents has not been established. The exclusion of permanent residents is therefore inconsistent with section 27 of the Constitution.'[455]

In addition, in considering the impact that the exclusion from social security had on the dignity of indigent permanent residents, as distinct from the purpose for their exclusion, the court made it clear that the needs of vulnerable permanent residents take precedence.[456] The court rejected the state's argument that including permanent residents would result in the diversion of resources from other social assistance needs,[457] and held that the state would need to show that the additional expense would place an unsustainable burden on it.[458] Accordingly, the same critique might successfully be applied to the denial of the right to maternity benefits to self-employed workers, regarding the impact this has on their economic participation and livelihoods and the constitutional rights outlined in this section. What the *Khosa* judgement tells us is if the state cannot justify the exclusion of a certain group of persons from its social security measures, such exclusions are irrational, and unfairly discriminatory.

It could be argued, following the *Grootboom* judgment, that the state would be required to demonstrate that it was enacting reasonable measures to ensure that a larger number and wider segment of the population was able to attain access to such social security. Furthermore, that it was contextualising historic socio-economic challenges in access to social security and prioritising those in situations of greatest need, and, finally, that comprehensive, coordinated and funded programmes were being implemented to this end. Equally, it could also be successfully argued that the state's existing measures cannot be held to be reasonable, in that a significant segment of society, in the form of informal economy working women, are affected by the failure to provide them with the opportunity of access to maternity protections. Olivier argues likewise, that, 'It is clear that this approach is unable to comprehend, give sufficient recognition to and support informal forms of social security obtaining in marginalised communities, consisting mainly of the rural and urban poor as well as the structurally unemployed and the informally employed amongst them.'[459]

Gender and poverty statistics indicate that while just under half of South Africa's population lives below the poverty line, adult females, who constitute 52 per cent of the population of

[455] *Khosa* supra note 456 at para 85.
[456] Supra at para 82.
[457] Supra at paras 60–2.
[458] Supra at para 62.
[459] Marius Olivier 'Revisiting the social security policy framework in South Africa' (2000) 4 (1) *Law, Democracy & Development* 101 at 103.

South Africa, experienced higher levels of poverty when compared to their male counterparts.[460] Furthermore, when examining patterns of employment, women are predominantly employed in the informal sector, in micro enterprises, or are self-employed.[461] The National Development Plan (NDP) states that 90 per cent of jobs created between 1998 and 2005 were in micro, small and medium firms,[462] and that such microenterprises and entrepreneurial activity often 'provide shock absorbers for extreme poverty and platforms for self-development.'[463] It further notes that women dominate in domestic work, and are under-represented in other categories of work in the South African economy. In addition, the NDP acknowledges that:

> 'Women in South Africa earn less than men, have fewer employment opportunities and are poorer than men. They assume the bulk of the care-giving functions in a society that has been deeply affected by Apartheid and its legacy of internal labour migration and consequent family breakdown.' [464]

Categories of working women most affected by inadequate social security and maternity protections upon the birth of a child, fall in the main in the informal sector, and include unemployed women, women who work for small businesses and those who perform seasonal work. [465] In addition, such women rely entirely on their partners for financial support during confinement, in the absence of any state or employer-subsidised maternity benefits system.

It is egregious, therefore, that in a context where women constitute the majority of those affected by poverty, and work predominantly in the informal economy, the state has failed to enact social security measures, including maternity benefits, to support this vulnerable and needy category of workers. With the overwhelming majority of such workers being Black women, a category most affected by apartheid and patriarchy in terms of economic participation and access to socio-economic rights, it is self-evident that the state should prioritise enabling such access to this category of workers.[466] With such significant impact on access to rights by this category of workers, '[a]bsent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised

[460] Stats SA 'Men, Women and Children: Findings of the Living Conditions Survey (2014/15)' (2015).
[461] Stats SA op cit note 34.
[462] National Development Plan 2030 (2012) at 117.
[463] Ibid at 119.
[464] Beth Goldblatt 'Social Security in South Africa – a Gender and Human Rights Analysis' (2014) 47(1) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 22 at 23.
[465] Bernard Tanner *Social Justice and Equal Treatment for Pregnant Women in the Workplace* (unpublished LLD thesis, University of Johannesburg, 2012) at 293.
[466] Stats SA 'Marginalised Groups Indicator Report' (2018).

under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow'.[467]

(f) The paramountcy of the rights of the child

Section 28(2) of the Constitution states: 'A child's best interests are of paramount importance in every matter concerning the child.' This 'best interest' clause constitutes a subsection of a comprehensive framing of children's rights enshrined in s 28, guaranteeing to every child the right to a name, family or parental care, basic nutrition, shelter, basic health care services and social services, and protection from a slate of harmful or exploitative instances.[468] In addition, children are entitled to many of the other rights articulated in the Bill of Rights, except where their age precludes them from exercising those rights.[469]

The courts have come to lend judicial interpretation to the precise meaning of the principle of the paramountcy of children's rights, and the best interests of the child in particular. A key decision in this regard is *Minister of Welfare and Population Development v Fitzpatrick* where the court held that:

> 'Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1)."[470]

In some instances, the courts have viewed this provision as an interpretation tool, or strengthening agent,[471] rather than a stand-alone right, in the event other more appropriate constitutional provisions are not applicable, as was alluded to in *S v William and others.*[472] In this matter, the court held that juvenile whipping was unconstitutional in that it amounted to "cruel, inhumane and degrading treatment", rather than a violation of the child's best interests principle.[473] Of particular relevance to this point, is the decision in *S v M,* as this gives best

[467] *Minister of Finance and Other v Van Heerden* supra note 365 at para 31.
[468] Constitution s 28(1)(a)-(i).
[469] Anne Skelton 'Constitutional protection of children's rights' in T Boezaart *Child Law in South* Africa (2009) 265-290 at 277; Anne Skelton 'Too much of a good thing? Best interests of the child in South African jurisprudence' (2019) *De Jure Law Journal* 557-579 at 559. Also refer to *Christian Lawyers South Africa v Minister of Health* 2005 (1) SA 509 (T), where the court found that certain constitutional provisions apply to everyone including children under the age of 18.
[470] 2000 (3) SA 422 (CC) at para 17.
[471] Anne Skelton 'Too much of a good thing? Best interests of the child in South African jurisprudence' op cit note 474 at 563.
[472] 1995 (3) SA 632 (CC).
[473] Interim Constitution s 11(2).

expression of the content and scope of children's rights as articulated in s 28.[474] It addresses the question of whether the separation from her children of a mother convicted of a criminal offence, amounted to a violation of those children's best interests, contrary to the paramountcy provision.[475] In assessing the implications of not considering the children's best interests at the time of sentencing, the court developed guidelines on how these might be established.[476]

The court confirmed the central nature of the best interests of the child standard as held in *Fitzpatrick*,[477] articulating this as a necessarily contextual and flexible constitutional provision, holding that:

> 'A truly principled child centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.'[478]

In determining whether there are any reasonable limits on the application of the best interests provision, the court held that the paramountcy of children's rights is not absolute and should not be spread too thin so as to lose meaning.[479] Further, it cannot be interpreted to mean that 'the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations.'[480] Rather, the court held that '…appropriate weight [must be given] in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned.'[481]

The application of this principle was further considered in *J v National Director of Public Prosecution*[482] and *Radhuva v Minister of Safety and Security and Another*.[483] In *J*, the court held that in considering whether the particulars of a minor sexual offender could be entered into the National Register for Sex Offenders, 'the starting point for matters concerning the child

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[474] Anne Skelton 'Severing the umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers' (2008) *1 CCR* 351 at 354; Jacqui Gallinetti '2kul2Btru: What children would say about the jurisprudence of Albie Sachs' (2010) 25 *SAPL* 108 – 123 at 110.
[475] 2008 (3) SA 232 (CC).
[476] Anne Skelton 'Too much of a good thing? Best interests of the child in South African jurisprudence' op cit note 474 at 566.
[477] Supra note 475 at paras 14 and 22.
[478] Supra at para 24.
[479] Supra at para 25.
[480] Supra at para 25; also refer to Anne Skelton 'Too much of a good thing? Best interests of the child in South African jurisprudence' op cit note 474 at 569.
[481] *Fitzpatrick* supra note 475 at para 42.
[482] 2014 (2) SACR 1 (CC).

[483] 2016 (2) SACR 540 (CC).

is s 28(2).'[484] The court found that the statutory provisions in question violated the best interests principle, and it was therefore not necessary to consider any of the other alleged constitutional violations, upholding s 28(2) as a stand-alone right.[485] In *Radhuva*, a minor was detained in police custody for 19 hours for attempting to prevent the arrest of her mother. Although the court opined that such detention was contrary to the 'last resort' and 'shortest appropriate period of time' provisions pertaining to child detention,[486] the arrest did not breach this right. However, relying on the s 28(2) best interest provision, the court found the arrest to have violated this right. These judgments have a significant bearing on whether the provisions of s 28(2) should be invoked only when there is no specific right in s 28(1) that can be relied upon, or whether it should be used from the outset as a stand-alone right, as was articulated in *Le Roux and Others v Dey*.[487] In this instance, the court held that s 28(2):

> '…forms the basis and starting point from which the matter is to be considered. Once the considerations relevant to this foundation are clearly cemented, one can then begin to examine the other rights that enter the balance, without losing sight of the fact that the best interests of the child remain 'of paramount importance.'[488]

The relevance of these judgments to this study is in asserting the paramountcy of children's best interests in ascertaining whether the denial of paid maternity leave to their self-employed mothers constitutes a violation of their s 28(2) right. It is apparent that there is merit in using the best interests provision, beyond a narrow, common law approach limiting its application to family law matters,[489] and distinct from any other possible rights violations involved. The constitutional application of this provision to 'every matter concerning the child' is unequivocal,[490] and the implications of rendering constitutionally invalid any provision found to be inconsistent with s 28(2), profound.[491] A child's best interests must prevail unless the infringement of those rights can be justified in terms of s 36 of the Constitution.[492]

III. LEGISLATIVE FRAMEWORK

[484] *J* supra note 487 at para 35.
[485] Supra at para 44; Meda Couzens op cit note 206 at 378.
[486] Constitution s 28(1)(g).
[487] 2011 (3) SA 274 (CC) at para 210.
[488] Supra at para 211.
[489] Meda Couzens op cit note 206 at 370.
[490] Constitution s 28(2).
[491] Meda Couzens op cit note 206 at 370.
[492] Minority judgment *S v M* supra note 480, as cited in Sandra Ferreira 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) *THRHR* 201 – 213 at 206.

(a) Introduction

Maternity and parental benefits in South Africa are governed by the Basic Conditions of Employment Act 75 of 1997 (BCEA), in conjunction with the Unemployment Insurance Act 63 of 2001 (UIA) and the Labour Relations Act 66 of 1995 (LRA). The recently adopted Labour Law Amendment Act (LLAA) 10 of 2018 has brought long overdue increments and improvements to the maternity and paternity benefits regime through the adoption of a gender-neutral parental leave, as described in the definitions section of this chapter, and by introducing amendments to the former two pieces of legislation in this regard.

As noted previously, the BCEA does not apply to self-employed and own account workers, whether in the formal or informal economy sectors, because of the defining of an employee to mean-

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.[493]

With the determination of qualifying beneficiaries anchored in the definition of 'employee', a broad category of workers is excluded. Furthermore, the use of the vehicle of the Unemployment Insurance Fund (UIF) to facilitate the payment of all maternity and parental leave prevents such workers from contributing to and benefiting from the UIF. As a result, the benefits detailed in this section are categorically denied to self-employed workers. This section provides a brief synthesis of the existing, limited provisions.

(b) The Basic Conditions of Employment Act 75 of 1997 (BCEA)

As noted, the BCEA, as amended by the LLAA, as the principle legislation governing maternity and parental leave, does not apply to informal economy workers. It defines an employee as: 'Any person, excluding an independent contractor, who works for another person or the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer'.[494]

[493] BCEA op cit note 40.
[494] Ibid s 1

The BCEA speaks to the primary provisions of maternity benefits, parental benefits, family responsibility leave, adoption benefits and commissioning parent benefits – as outlined in the definitions section of this chapter. The LLAA amends the BCEA by incorporating ten days' parental and ten weeks' commissioning parental leave into the system. Sections 8 (a)(cA), 11, 15 and 16 were brought into operation on 4 November 2019.

The maternity benefits provisions outlined in s 25 of the BCEA, in addition to the four consecutive months' leave granted, stipulate that an employee can commence maternity leave at any time from four weeks before the expected date of birth, but may not return to work before six weeks after the birth of her child, unless authorised by a medical practitioner or midwife.[495] Provision is made for notification to an employer, and for the payment of maternity benefits in accordance with the UIA.[496] Further provisions to safeguard the health of the pregnant worker and her child prohibit an employer from requiring a pregnant or breastfeeding employee to perform hazardous work. These require an employer to offer such an employee 'suitable, alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment', for up to a period of six months after the birth of her child.[497]

The BCEA further encapsulates the *Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child*, to give effect to s 26(1), in recognition that many women continue to work until late in their pregnancies, and return to work while they are breastfeeding. The Code sets out standards and guidelines relating to the health and safety of pregnant and breastfeeding employees. That such protections and safeguards are not extended to informal economy workers to ensure their health and safety and that of their children, on the basis of the nature of their employment, is untenable, and, as this chapter argues, unconstitutional.

(c) The Unemployment Insurance Act 63 of 2001 (UIA), and Unemployment Insurance Contributions Act 4 of 2002

The purpose of the UIA is 'to establish an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful

[495] Ibid s 25.
[496] Ibid.
[497] Ibid s 26(1) & (2).

economic and social effects of unemployment.'[498] As noted, the LLAA has brought amendments to this Act, permitting qualifying employees to apply for parental benefits[499] and commissioning parental benefits[500] through the Unemployment Insurance Fund (UIF). Parental, adoption and commissioning parental benefits are all payable at a rate of 66 per cent of the earnings of the beneficiary at the date of application – subject to the maximum income threshold as determined by the Minister.

As with the BCEA, the UIA and UIF Act do not apply to self-employed workers or independent contractors in the formal or informal sector. The UIA specifically states that 'a contributor who is pregnant is entitled to the maternity benefits contemplated in this Part'.[501] The UIA defines an employee as 'any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor'.[502] The UIA defines a contributor to the UIF as 'a natural person (a) who is or was employed; … and (c) who can satisfy the Commissioner that he or she has made contributions for the purposes of this Act.'[503] The Unemployment Insurance Contributions Act governs the payment of contributions to the UIF. This currently requires both employers and employees to contribute to the fund, for employees to receive benefits,[504] and with payments to the UIF to be effected by the employer.[505] Employers and workers each contribute 1 per cent of the value of the worker's monthly salary.

In terms of South Africa's current maternity benefits system, benefits are provided through the UIF. Since 2003, the UIF explicitly includes domestic and seasonal workers, yet excludes farm workers. Benefits are paid over a maximum period of seventeen weeks, up to 66 per cent of the workers' previous earnings. Where a worker's earnings fluctuate, the calculation of benefits is based on the average daily remuneration of the beneficiary over the previous 6 months.[506]

With self-employed workers and independent contractors effectively excluded from this definition of 'employee', and disqualified from contributing to the UIF as non-contributors,

[498] UIA op cit note 2, s 2.
[499] Labour Laws Amendment Act op cit note 55, part DA.
[500] Ibid part EA.
[501] UIA s 24(1).
[502] UIA chap 1 op cit note 41.
[503] Ibid.
[504] Unemployment Insurance Contributions Act op cit note 2, s 5(1).
[505] Ibid s 5(2).
[506] The Solidarity Center 'Maternity Protection for Self-Employed Workers' (2016).

they are not able to claim any of the benefits outlined in the BCEA. Conversely, those employed by such categories of workers would qualify for benefits, but only if they were registered with and their employers made contributions to the UIF. Noting the informal, unregistered nature of many forms of businesses operating in the informal economy, this is highly unlikely.

(d) The Labour Relations Act 66 of 1995 (LRA)

One of the key significant contributions of the LRA to the employment sector is to protect employees against unfair labour practices and from unfair dismissals. In relation to maternity rights, the LRA defines dismissal on the basis of pregnancy as automatically unfair, significantly addressing challenges in the burden of proof in this regard. It provides that:

> 'A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 48 or, if the reason for the dismissal is:
> …
> (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
>
> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility….'[507]

As noted, the LRA's definition of an employee aligns with that of the BCEA, and is governed by the Code in this regard – as outlined in the definitions section of this chapter. As such, self-employed workers and independent contractors in both the formal and informal sectors would not be covered by the provisions and protections of the LRA, while their employees would.

(e) The Children's Act 38 of 2005

The Children's Act (the Act) gives effect to the children's rights enshrined in the Constitution, drawing on the concept of the best interests of the child, as outlined earlier in this study. Significantly, s 6(2) requires that 'in all proceedings concerning a child, his/her best interests must be respected, protected, promoted and fulfilled'. Section 7 details factors to be considered in determining what would constitute a child's best interests, as developed in *McCall v*

[507] LRA s 187.

McCall,[508] with the court further making provision for 'any other factor which is relevant to the particular case with which the court is concerned.'[509] However, it should be noted for the purposes of this study, that it has been held that the finite list of factors referred to in s 7 are not mandatory in cases beyond the ambit of the Act.[510] It is submitted therefore that none of the factors listed in s (7) supports the arguments of this study and given the finite nature of this list, this is unavoidable. Section 9 however stipulates that the best interests of the child shall be paramount in all matters concerning the care, protection and well-being of a child, thereby giving effect to the s 28(2) principle outlined earlier in this study.[511]

The Legal Resources Centre makes the case that as the Act 'acknowledges that it is impossible to protect the rights of children without also protecting their families', this may augment the case for the extension of maternity and parental benefits to informal economy self-employed workers, and other categories of workers excluded from the definition of employee.[512] The Act seeks to give effect to the constitutional rights of children as outlined in s 28 of the Constitution, noting, in particular, the provision that the best interests of the child are of paramount importance in every matter concerning the child.[513]

This point is demonstrated in *MIA v State Information Technology Agency.*[514] Here, the court held that interpreting the BCEA provisions in relation to maternity benefits as only applicable to women, 'ignores the fact that the right to maternity leave as created in the Basic Conditions of Employment Act in the current circumstances is an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to and take into account the best interests of the child.' Moreover, the court held, 'not to do so would be to ignore the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act.'[515]

This point provides leverage in arguing for the extension of maternity benefit protection to own-account and self-employed workers, in both the formal and informal sectors, in order to promote the best interests of the child. This is particularly relevant in instances where such

[508] 1994 (3) SA 201 (C).
[509] Supra refer to factor (m) in judgment.
[510] Meda Couzens op cit note 206 at 370.
[511] Sandra Ferreira op cit note 497 at 210 – 211.
[512] Legal Resources Centre 'Maternity and Paternity Benefits for Self-Employed Workers in South Africa: A Survey of Relevant Law' (2018). .
[513] Children's Act 38 of 2005, s 2(b).
[514] *MIA v State Information Technology Agency (Pty) Ltd* 2015 (6) SA 250 (LC).
[515] Supra at para 13.

benefits would enable the child to access its constitutional rights to family or parental care and protection from maltreatment, neglect or abuse, as envisaged by s 28 and the Act.[516]

(f) National Integrated Early Childhood Development (ECD) Policy[517]

In addition, the state is obliged to ensure the provision of early childhood development (ECD) services, as a fundamental right to which all children are entitled, without discrimination. Framed in international law,[518] such obligation is domesticated into the Children's Act, which defines ECD as the processes by which children from birth to nine years of age grow and thrive mentally, physically, morally, spiritually, emotionally and socially.[519] The National Integrated ECD Policy provides for the implementation of such services, noting as follows:

> 'There exists an overwhelming scientific evidence that attests to the tremendous importance of the early years for human development and to the need for investing resources to support and promote optimal child development from conception. Lack of opportunities and interventions, or poor quality interventions, during early childhood can significantly disadvantage young children and diminish their potential for success.'[520]

Pertinent to this study, the policy notes that the realisation of children's constitutional rights 'is dependent on the quality of the biological, social and economic environment in which the foetus, infant and young child develops, especially whilst in utero and in the first two years after birth…. [This includes] the good health and nutritional status of the mother, infant and child.'[521] The policy warns of certain biological, social and environmental risk factors that are adverse to a child's ECD.[522] Key among these is poverty or low socio-economic status, identified as a root cause of poor child development. The policy notes that 'persistent, cumulative poverty and exposure to hardship in the first year of life have a detrimental effect on cognitive functioning.'[523] Psychosocial risks linked to maternal depression, induced by 'poverty, low education, high stress, lack of empowerment and poor social support' are also identified as risk factors for poor child development. Furthermore, disrupted caregiving

[516] Children's Act s 2(b)(i) & (iii).
[517] National Integrated ECD Policy (2015) at 8.
[518] CRC; CEDAW.
[519] Children's Act s 91.
[520] National Integrated ECD Policy op cit note 522 ibid.
[521] National Integrated ECD Policy op cit note 522 at 21.
[522] Ibid.
[523] Ibid.

brought on by the abandonment of the child and the assumption of the care-giving role by a non-parent, is a risk factor.[524]

The policy accordingly assigns the state with the responsibility to provide a publicly funded, rights-based national integrated ECD system. The policy stipulates that this system should ensure universal availability of ECD services that provide a continuum of quality care, early learning and protection. Notably, the policy obliges the state to 'ensure equitable access to early childhood development services for children especially vulnerable to environmental, social, and economic and other early childhood development risk factors.'[525] Significantly, the policy observes that:

> '..increased family income in the first four years of a child's life has a comparable, if not greater, impact on early childhood development than other determinants of optimal development of infants and young children, especially for children living in poverty, therefore protecting households with young children from the stress and insecurity related to poverty is one of the most promising and cost-effective investments to secure early childhood and human development.'[526]

The accounts detailed earlier in this study of self-employed women giving birth and caring for newborn infants in situations of financial hardship and stress, occasioned by the absence of income replacement and poor social support over this period, present indisputable evidence of significant risk to childhood development. The state's failure to provide such mothers with access to paid maternity leave has undoubtedly violated its obligations in terms of international law, legislation and policy to ensure equitable access to ECD services, particularly for children in vulnerable socio-economic circumstances.

(g) The Employment Equity Act 55 of 1998

The Employment Equity Act (EEA) was enacted to 'achieve equity in the workplace, by (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups…'.[527] Furthermore, the Act specifically states that it must be interpreted in line with the Constitution, taking into account any relevant code of good practice issued by any employment law, and in compliance with

[524] Ibid.
[525] Ibid at 24.
[526] Ibid at 25.
[527] Employment Equity Act 55 of 1998, s 2.

South Africa's international law obligations.[528] Finally, in relation to the case for the extension of maternity benefits to self-employed workers, and, most significantly, the Act prohibits unfair discrimination in the workplace, by providing that:

> 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'[529]

These provisions have been tested in our Labour courts. In *Mahlangu v Samancor Chrome Ltd*,[530] the appellant fell pregnant for the second time in three years, and was placed on unpaid leave by the respondent, which claimed it was unable to find her a suitable, alternative position. The appellant argued that this constituted unfair discrimination, as she was the only pregnant employee who was not offered alternative employment, which argument was upheld by the court. Citing the *Harksen v Lane*[531] inquiry to determine whether such differentiation amounts to unfair discrimination, and noting that the differential treatment was based on the appellant's second pregnancy in a three-year cycle, the court held that the respondent failed to prove that 'the discrimination was rational and not unfair or was otherwise justifiable'.[532]

In *Numsa and Others v Gabriel (Pty) Ltd*, the applicants alleged that their pay disparity amounted to unfair direct discrimination within the meaning of section 6(1) of the EEA.[533] The court made the point that where a complainant alleges unfair discrimination within the meaning of this provision, it must establish that the differential treatment experienced amounts to discrimination that is unfair.[534] Where the basis for this differential treatment is on a listed ground, the presumption of unfair discrimination operates.[535] Where the differential treatment is not on a listed ground, the complainant is required to prove that such treatment is on an analogous ground.[536] To do so, a complainant must identify that the ground relied upon 'is based on attributes or characteristics which have the potential to impair the fundamental dignity

[528] Ibid s 3.
[529] Ibid s 6(1).
[530] *Mahlangu v Samancor Chrome Ltd* (Eastern Chrome Mines) (2020) 41 (ILJ) 1910 (LAC).
[531] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).
[532] *Mahlangu v Samancor Chrome Ltd* supra note 535, para 23.
[533] *Numsa and Others v Gabriel (Pty) Ltd* (2002) 23 ILJ 2088 (LC).
[534] Supra at para 18.
[535] Constitution s 9(5).
[536] *Numsa* supra note 538 at para 18.

of persons as human beings, or to affect them adversely in a comparable manner'.[537] Furthermore, the complainant must establish that the alleged discrimination is unfair, which hinges upon the impact of that discrimination on the complainant and others in their situation.[538]

Based on these provisions and findings, it is possible to argue that through its differential treatment of self-employed workers, by failing to extend maternity benefits and protections available to other workers to this category of workers, the state is indirectly permitting unfair discrimination. The basis for discrimination in this instance would be that of the category of employment, which could arguably constitute an analogous ground, as highlighted in *Numsa*, above, and akin to that envisaged in the *Hoffmann v SAA* case, discussed below.[539] It is further egregious to note that such discrimination is rooted in the intersectionalities of the gender, sex and pregnancy of the workers – with devastating impact on the workers' dignity and livelihoods. This would support the assertion that the exclusion of such workers from maternity benefits and protections is tantamount to unfair discrimination in the workplace, prohibited by the EEA.

However, in order to benefit from protection under the EEA, workers have to qualify as an "employee". The EEA defines an employee as:

> '… any person other than an independent contractor who –
>
> (a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
>
> (b) in any manner assists in carrying on or conducting the business of an employer.'[540]

Most self-employed workers would not be classified as employees, and would therefore seek remedies in accordance with the Promotion of Equality and Prevention of Unfair Discrimination Act[541], and not the EEA.

(h) The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)

[537] Supra at para 19.
[538] Supra at para 20.
[539] *Hoffmann* supra note 379 at para 40.
[540] Employment Equity Act 55 of 1998, s 1.
[541] PEPUDA op cit.

PEPUDA was enacted as envisaged in s 9(4) of the Bill of Rights, as the national legislation to prevent and prohibit unfair discrimination.[542] It defines discrimination[543] as:

> 'any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-
>
> (a) imposes burdens, obligations or disadvantage on; or
>
> (b) withholds benefits, opportunities or advantages from,
>
> any person on one or more of the prohibited grounds'

Prohibited grounds are defined as:

> (a) 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
>
> (b) any other ground where discrimination based on that other ground-
>
> (i) causes or perpetuates systemic disadvantage;
>
> (ii) undermines human dignity; or
>
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph *(a)'*

In terms of its prevention and general prohibition of unfair discrimination, PEPUDA provides that "[n]either the State nor any person may unfairly discriminate against any person.'[544] Its prohibition on the basis of gender declares that 'no person may unfairly discriminate against any person on the ground of gender, including … (f) discrimination on the ground of pregnancy; (g) limiting women's access to social services or benefits, such as health, education and social security ...'.[545]

It will be argued in this chapter that the state is unfairly discriminating against a particular category of women, namely self-employed workers, by denying their inclusion in a social security measure. That PEPUDA includes as a prohibited ground of discrimination on the basis

[542] Constitution s 9(4).
[543] PEPUDA s 1.
[544] Ibid s 6.
[545] Ibid s 8.

of gender, the limiting of women's access to social services – particularly enforces this argument. In addition, PEPUDA includes a provision relating to the impact on equality of, amongst other things, 'socio-economic status and family responsibility and status', noting that:

> '(1) In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status-
>
> (a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of 'prohibited grounds' by the Minister;'[546].

By excluding self-employed workers from the maternity benefits' regime, it could be argued that the state is discriminating unfairly against this category of workers on an additional prohibited ground.

IV. LACK OF ACCESS TO SOCIAL SECURITY: A CASE OF UNFAIR DISCRIMINATION?

As has been referenced throughout this chapter, a key issue to be determined, is, first, whether the state's failure to provide self-employed workers a mechanism to access social security in the form of maternity protection and benefits, constitutes discrimination; and, second, whether such discrimination amounts to unfair discrimination, in violation of s 9 of the Constitution. Ultimately, this enquiry requires examination of whether such unfair discrimination is permissible in terms of the limitation's clause proportionality test, set out in s 36 of the Constitution. As noted, a central consideration in assessing whether such exclusion should be considered unfair discrimination, is the impact of such discrimination on the affected group, and on self-employed workers' dignity, in particular. The court in *Harksen v Lane*[547] developed guidelines for determining what constitutes unfair discrimination, effectively outlining a test for constitutional invalidity.

The first point of inquiry in the *Harksen* test is as follows:

> '(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not

[546] Ibid s 34(1)(a).
[547] *Harksen v Lane* supra note 536.

then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.'[548]

The starting point is to determine whether the offending provision differentiates between people or categories of people, and, if so, whether the differentiation bears a rational connection to a legitimate government purpose. Where there is no discernible purpose for differentiation, the court will find the legislative provision to be in breach of the s 9(1)[549] provision that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law.'[550]

The Constitutional Court has held that this section implies a dual meaning, that everyone is first entitled to equal treatment by the courts of law and that no one is above or beneath the law; and second, that everyone is subject to law that is impartially applied and administered.[551] The issue of differential treatment of persons will fall foul of both these elements of s 9(1) if it can be shown that the state did not act in a rational manner when differentiating between individuals or groups of individuals.[552] The state is required to function 'in a rational manner,'[553] and not distinguish between people or groups of people in a manner that is irrational or serves no legitimate government purpose.[554] In a rationality inquiry, a court 'remains obliged to identify and examine the specific government object sought to be achieved.'[555]

Any law or conduct differentiating between groups will be valid as long as it does not deny equal protection or benefit of the law, or does not amount to unequal treatment of the law.[556] This was upheld in *Prinsloo v van der Linde*,[557] where the court held that any such law or conduct would violate the provisions of s 9(1), if the differentiation does not have a legitimate purpose, and if no rational connection exists between the differentiation and such purpose. Therefore, the test applied by the court was whether the differentiation was rationally connected to a legitimate government purpose. The court contended that:

'… the state should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law

[548] Supra at para 43.
[549] *Ngewu and Another v Post office Retirement Fund and Others* 2013 (4) BCLR 421 (CC).
[550] Constitution s 9(1).
[551] *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) at para 22.
[552] De Vos & Freedman op cit note 292 at 431.
[553] *Prinsloo* supra note 556 at para 25.
[554] De Vos & Freedman op cit note 292 at 432.
[555] *Van der Merwe v Road Accident Fund and Another* 2006 (4) SA 230 (CC) at para 33.
[556] Constitution, s 9(1).
[557] *Prinsloo v Van der Linde & Another* supra note 556.

> and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.'[558]

To avoid falling foul of the s 9(1) provision, the state has to prove that the object or purpose of the differential treatment was neither arbitrary nor irrational. It need not show that the purpose pursued was a wise one nor that it was one with which the court agrees.[559] As held by the court in *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council*:

> 'The question is not whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purpose. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose.[560]

Where there is no discernible purpose for differentiation, the court will find the legislative provision to be in breach of s 9(1).[561] However, the court does not often invalidate legislation because it breaches this provision as the rationality test is applied relatively strictly.[562] In addition, even in instances where the differentiation is found to be rational, the pervasive question is whether it amounts to discrimination, and if so, whether this could be viewed as fair or unfair discrimination. The court in *Harksen* held that what makes discrimination unfair is the impact of the discrimination on its victims, and that dignity is central to this. Thus, even if a rational connection is proven, the offending conduct may still constitute unfair discrimination, and, therefore, fall foul of s 9(3).[563]

Accordingly, as the second point of inquiry, the court in *Harksen* went on to examine:

> '(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
>
> (b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established.'[564]

The equality clause prohibits unfair discrimination by asserting that the state may not unfairly discriminate directly or indirectly against anyone, on one or more of the listed grounds.[565]

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[558] Supra at para 25.
[559] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) at para 17.
[560] *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 24.
[561] Refer to *Ngewu and Another v Post office Retirement Fund and Others* supra note 554.
[562] De Vos & Freedman op cit note 292 at 432.
[563] *Harksen v Lane* supra note 536 at para 44.
[564] Supra at para 46.
[565] Constitution s 9(3).

Discrimination will be deemed to have occurred where there is a direct or indirect act or omission, which imposes a burden or denies an advantage.[566] Discrimination on any of the prohibited grounds is deemed unfair until the contrary is proven, in accordance with the presumption of unfairness.[567]

The courts have held that even where the basis of the discrimination is innocent, the impact or effect of the differentiation may be discriminatory. Any law or act which has an unfairly discriminatory effect or consequences, or which is unfairly administered, may amount to prohibited discrimination, even if the law appears to be neutral and non-discriminatory – as was seen in *Pretoria City Council v Walker*.[568] Here, the court held that the flat rate charged for electricity consumption by township users, as opposed to the direct billing mechanism for – and concomitant subsidisation by – other users, constituted fair discrimination by the municipality in light of the prior disadvantage suffered by township residents in accessing electricity, and their socio-economic context. However, the court found that the municipality's selective recovery of debt for non-payment of electricity bills constituted unfair discrimination on the basis of race, and that the municipality had not discharged the burden of proof showing that the racial discrimination was not unfair.[569] Equally, discrimination need not be intentional – applicants are only required to show that there is a resulting unfair discrimination, and not the intent to discriminate unfairly.[570] The court held that:

> 'The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of section 8(2).'[571]

The court in *Harksen* continues with its inquiry addressing differentiation that is not on a specified ground, introducing the concept of 'analogous grounds':

> (b)(i) '…..If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which

[566] Currie & De Waal op cit note 257, chap 9.
[567] Constitution s 9(5).
[568] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para 73.
[569] Supra at para 81.
[570] Supra at para 91.
[571] Supra at para 31.

> have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.'[572]

In this regard, the court in *Prinsloo* clarified that the prohibition on discrimination contemplates two distinct categories of discrimination:[573]

> 'The first is differentiation on one (or more) of the fourteen grounds specified in the subsection (a "specified ground") [574] The second is differentiation on a ground not specified in subsection (2) but analogous to such ground (for convenience hereinafter called an "unspecified" ground) … In regard to this second form there is no presumption in favour of unfairness.[575]
>
> . . . . Given the history of this country we are of the view that 'discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them . . . [U]nfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.'[576]

If the basis for discrimination is on an unlisted ground, the complainant will be required to prove, on a balance of probabilities, that such ground causes or perpetuates a disadvantage, undermines their human dignity, or adversely affects their rights in a comparably serious manner.[577] In other words, the complainant will have to prove that the discrimination is on an analogous ground. This was evidenced in *Hoffmann v SAA*.[578] Here, the court held that differentiation against a person would be deemed to be on a ground analogous to the illegitimate grounds outlined in s 9(3), where such differentiation is based on attributes or characteristics that have the potential to impair a person's fundamental dignity, such as, in this instance, a person's HIV status, and will therefore constitute discrimination.[579]

Analogous grounds have come to be viewed as differentiation 'relating to the unequal treatment of people based on attributes and characteristics attaching to them', which are not associated

[572] *Harksen v Lane* supra note 536 at para 47.
[573] *Harksen v Lane* supra note 536 at para 46.
[574] The expression "grounds specified" is used in subsection (4).
[575] *Prinsloo* supra note 556 at para 28.
[576] Supra at para 31.
[577] *Harksen v Lane* supra note 536 at para 46.
[578] *Hoffmann* supra note 379 at para 40.
[579] Supra.

with the prohibited grounds but are nonetheless akin to them.[580] Such differentiation has the effect of 'treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity', or 'in some other way affect persons adversely in a comparably serious manner'.[581] Through this interpretation of the constitutional provisions, our courts recognise that despite the gains of our constitutional democracy, '… there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage ... In the assessment of fairness or otherwise a flexible but 'situation sensitive' approach is indispensable, because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society'[582]

If the differentiation in question is thus found to amount to discrimination, it must then be established whether this constitutes unfair discrimination, for the purposes of the equality clause.[583] Concluding its two-stage inquiry, the court in *Harksen* continued:

> '(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

As noted by the court, if the differentiation is on one of the prohibited grounds in terms of s 9(3), then discrimination will have been established, in accordance with the s 9(5) presumption of unfairness.[584] If it is not on a specified prohibited ground, discrimination will depend on whether the fundamental dignity of the person is affected, or whether they are seriously adversely affected[585], which will have to be established by the complainant.[586] The court observed that the prohibition of unfair discrimination 'provides a bulwark against the invasions which impair human dignity or which affect people adversely in a comparably serious manner.'[587] This has been interpreted to imply that the determination of the unfairness of

[580] *Harksen v Lane* supra note 536 at para 46.
[581] Supra at para 46, as explained in De Vos & Freedman op cit note 292 at 446.
[582] *Van Heerden* supra note 365 at para 27.
[583] Supra.
[584] *Harksen v Lane* supra note 536 at para 49.
[585] Supra at para 50.
[586] Supra at para 46.
[587] *Harksen v Lane* supra note 536 at para 47.

discrimination rests on whether the human dignity of the complainant has been impaired.[588] The court noted in this regard, that '[w]here discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2).'[589]

Harksen established unequivocally that the test of unfairness focuses on the impact of the discrimination on the complainant and others in his or her situation. The guidelines the court developed in this regard are intended to assist in establishing unfairness. As mentioned above, these include the position of the complainant in society and whether they have been the victim of past patterns of discrimination, the purpose of the discriminatory law or practice and particularly whether it is aimed at achieving a worthy and important societal goal, and the extent to which the rights of the complainant have been impaired.[590] In *President v Hugo*,[591] the court applied these guidelines, stating:

> '[41] The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.
>
> . . . .
>
> [43] To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.'

Applying this test to the case in point, the court in *Hugo* concluded that while the differential treatment occasioned by the Presidential pardon in releasing female prisoners who were primary caregivers of infants, and not male prisoners in this category, did in fact constitute discrimination on the basis of gender – one of the listed prohibited grounds for discrimination

[588] De Vos & Freedman op cit note 292 at 450.
[589] *Harksen v Lane* supra note 536 at para 51.
[590] Supra.
[591] *Hugo* supra note 28 at paras 41 and 43.

– this was deemed to be fair discrimination.[592] The court made this determination in light of the burden on and vulnerability of mothers who were victims of previous discrimination on the basis of their gender in a way that fathers had not been.[593]

Our courts have recognised the significance of addressing the impact of discrimination and inequality on the lived realities of particular groups of people, in pursuit of the attainment of substantive equality. This is seen in the *National Coalition for Gay and Lesbian Equality* matter, in which the following was stated:

> 'One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably ... The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.'[594]

The court in *Harksen* noted that if, 'at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2)'.[595] Conversely, for the third and final leg of the unfair discrimination inquiry, it held:

> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).'[596]

This clause states as follows:

> 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.'[597]

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[592] *Hugo* supra note 28 at para 47.
[593] Supra.
[594] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* supra note 386 at para 126.
[595] *Harksen v Lane* supra note 536 at para 47.
[596] *Harksen v Lane* supra note 536 at para 53.

[597] Constitution s 36(1).

In deciding whether the limiting act or conduct can be permitted in terms of the limitations clause, regard must be had to the test of proportionality outlined in s 36. This requires considering the purpose of the limitation and all the other factors referred to in s 36, which include: the right being limited and its importance to an open and democratic society; the nature and extent of the limitation, which would require an assessment of the extent to which the right is infringed; the relationship between the limitation and its purpose, which would require an assessment of the nexus or link between the limitation and the purpose sought to be attained; and whether there is a less restrictive means to achieve the purpose.[598] The impact on the complainant is of central importance in this deliberation, as the more egregious the violation, the less likely it is to be deemed fair. As stated in the *Hugo* case, '[t]he more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair.'[599] The implications of this constitutional inquiry for the key questions of this study are now considered.

V. CONCLUSION: A CONSTITUTIONAL CASE FOR LAW REFORM

It can be argued that the state's maternity benefits legislative framework constitutes differential treatment, effectively preventing categories of female workers from accessing maternity benefits while granting the same to others, based on their category of employment. It can be argued further that this differential treatment constitutes discrimination, in violation of s 9(1) of the Constitution, in that there cannot be said to be any rational connection between the exclusion of self-employed workers from the maternity benefits regime, and a legitimate government purpose – beyond possible concerns about affordability and an appropriate mechanism to manage their inclusion.[600]

The question must be asked whether such discrimination constitutes unfair discrimination, noting that the basis for the exclusion of these workers is their category of employment, which does not form one of the prohibited grounds for discrimination envisaged by s 9(3) of the Constitution. It could be argued that this should be viewed as an analogous ground, following the rationale of the *Hoffmann* judgment.[601] The justification for this argument is that discrimination on this ground impairs the fundamental dignity of self-employed, informal

[598] Constitution s 36.
[599] *Hugo* supra note 28 para 112.
[600] The next chapter will explore best practice implemented in comparable countries to South Africa, where states have managed to implement effective and affordable mechanisms to ensure the extension of maternity protections to all categories of workers.
[601] *Hoffmann* supra note 379.

economy workers, and does not represent what the drafters of the Constitution intended when they decreed that everyone has the right to social security, as opposed to only designated employees in the formal economy. While ensuring that female 'employees' have access to maternity benefits is a victory in the promotion of gender equality, and by excluding atypical female workers from such benefits, the state is widening the divide between categories of workers based on employment. In South Africa, as noted, this is inextricably linked to class, race and socio-economic status.

In applying the *Harksen v Lane* inquiry to determine whether such discrimination constitutes unfair discrimination, the position of self-employed workers as victims of past patterns of discrimination, their unequal access to economic participation and their impoverished socio-economic status in society has been argued in this chapter. There can be no worthy or important societal goal put forward by the state that justifies excluding such workers from the maternity protection regime. In addition, the gendered component of this discrimination must be highlighted, in that it is women self-employed workers who are affected by this exclusion. In this, we see the persistence of gender inequality in that many cases which on the face of it may not constitute a gender equality matter, nonetheless have gender implications. This amplifies the convergence between poverty and gender inequality.[602] Finally, the implication for the denial and abuse of fundamental constitutional rights has been extensively detailed, including the impact on such workers' right to dignity. On the basis of this inquiry, it is evident that this exclusion constitutes unfair discrimination.

In determining whether this unfair discrimination could be permitted in terms of the limitations clause as governed by s 36 of the Constitution, it can be argued that the limitation of the rights to equality and dignity would not pass the test of proportionality as envisaged by this section. An open and democratic society could not countenance such harm occasioned against rights forming part of the foundational principles and values of our Constitution. The purpose of the exclusion of this category of workers from the right to social security is not apparent from the framing of the legislation – an assumption being that the cost and logistical implications might be challenging to address.

[602] Kate O'Regan 'The Right to Equality in the South African Constitution' (2013) 25 *Columbia Journal of Gender and Law* 110 at 114.

It has been argued that a better approach to contesting discrimination might be to 'base claims relating to material disadvantage in terms of deprivation of their socio-economic rights rather than bringing such complaints under the equality clause.'[603] Conversely, however, analysts argue in favour of 'couching claims of material disadvantage in terms of inequality precisely because the contextual approach developed by the Constitutional Court for determining unfair discrimination provides an ideal avenue for focussing the Court's attention on social and economic deprivation and disadvantage'.[604] Such an approach accordingly remains the central thrust of this study.

This chapter has therefore made the case that the state has failed to enact measures to ensure the progressive realisation of self-employed workers' constitutional right to social security, thereby undermining numerous additional constitutional rights including those to equality, dignity and life. Equally, it has established that the exclusion of this category of workers from the existing maternity benefits regime, effectively differential treatment, constitutes unlawful discrimination that would not be countenanced by the limitations clause. It has further considered the impact of this exclusion on the rights and early childhood development of such workers' infants, and concluded that the state's failure to accord paramountcy to the best interests of the child amounts to a violation of its obligations as countenanced by s 28(2) of the Constitution. It is apparent that law reform is required to bring South Africa's maternity benefits regime in line with its constitutional and international obligations. The following chapter will examine potential models in this regard, and the implications for amendment to existing legislation.

[603] Evadné Grant 'Dignity and Equality' op cit note 357 at 326.
[604] Ibid, citing Pierre De Vos 'Substantive Equality after Grootboom: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence' (2001) *Acta Juridica* 52 at 63.

CHAPTER 6
COMPARATIVE APPROACHES: EXTENSION OF MATERNITY PROTECTION TO SELF-EMPLOYED WORKERS

I. INTRODUCTION

This study has made the argument that South Africa is legally bound, in terms of its obligations in international law and the Constitution, to enact a mechanism to extend maternity benefits to all categories of workers, and not merely those designated as 'employees' in our current labour legislative framework.[605] Equally, it must be recognised that the state has acknowledged this *lacuna* in our maternity benefits legislation, through it designating the South African Law Reform Commission (SALRC) to interrogate this issue and develop recommendations for extending such benefits to self-employed workers, as outlined earlier in this study.[606] With the SALRC investigative process currently underway, the obvious issue for consideration is what form would such an extension take? The International Labour Organisation (ILO) notes that such an extension 'requires the adaptation of benefit design, legal frameworks, financing mechanisms and administrative procedures to the needs and circumstances of these groups of workers. This is also key for extending social insurance coverage to workers in the informal economy.'[607] This study considers comparative maternity protection models from an international best practice perspective, to assess appropriate mechanisms that might give effect to South Africa's international and constitutional obligations.

There are two considerations of particular importance in such an inquiry. The first is to assess what mechanisms would best give effect to South Africa's obligations should it opt to ratify ILO Maternity Convention 183,[608] with its accompanying Maternity Protection Recommendation 191.[609] Convention 183 sets the bar for appropriate state responses to ensure the progressive extension of maternity benefits to all categories of workers. For member states to meet the core requirements of Convention 183, they need to provide for at least 14 weeks' paid leave, at least two-thirds of the worker's prior earnings, which are paid 'by social security,

[605] UIA, UICA & LRA op cit note 2.
[606] SALRC 'Briefing Document, Project 143: Maternity and Paternity Benefits for Self-Employed Workers' op cit note 12.
[607] ILO 'Maternity cash benefits for workers in the informal economy', op cit note 69; ILO 'World Social Protection Report 2014-15: Building economic recovery, inclusive development and social justice' (2014).
[608] ILO Convention 183 op cit note 227.
[609] ILO Recommendation 191 op cit note 232.

public funds or in a manner determined by national law and practice where the employer is not solely responsible for payment.'[610] Secondly, it is necessary to assess international mechanisms that might fit South Africa's particular economic context, and considerations such as prevailing inequality in South Africa[611] and the pervasiveness of the informal economy. An overarching question to interrogate when evaluating potential maternity benefits models to emulate, is whether South Africa's existing UIF legislative framework could accommodate self-employed workers, or does a separate legislative model need to be developed? The nature of maternity benefits, and the contributory mechanisms enacted to finance these, is a further key consideration to ensure universal coverage in access to maternity protections, as identified by the ILO:

> 'In many cases, the extension of maternity cash benefits for women workers in the informal economy will rely on a combination of contributory and non-contributory mechanisms to achieve universal coverage. An effective coordination of these mechanisms within the social protection system is essential to guarantee at least a basic level of income security for women workers in case of maternity, and to facilitate their access to maternal and child health care. These elements are key to building a social protection floor for all as part of each country's national social security system and comprehensive continuum of care policies, and to contribute to the broader objectives of promoting the health and well-being of mothers and their children, to achieve gender equality at work and to advance decent work for both women and men.'[612]

Most countries that have ratified Convention 183 provide for a cash benefit linked with maternity leave, thus providing for income protection during a permitted period of absence from work. The ILO notes that 'globally, 51 per cent of countries provide a maternity leave period of at least 14 weeks, the standard established by Convention 183',[613] and 56 per cent stipulate that of this period, at least six weeks should be compulsory leave after childbirth, as required by Convention 183.[614] Many countries provide for the extension of the period of leave in the event of illness or complications, in accordance with Article 5 of Convention 183,[615] or in the event of multiple births, as guided by Paragraph 1(2) of Recommendation 191.[616]

[610] ILO 'Maternity at Work. A review of national legislation' op cit note 233 at ix.
[611] World Bank, Development Research Group 'Gini index (World Bank estimate)', available at *https://data.worldbank.org/indicator/SI.POV.GINI*, accessed on 9 November 2020
[612] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 4 & 8.
[613] ILO 'Maternity at Work. A review of national legislation' op cit note 233 at 6.
[614] Ibid at 13.
[615] Ibid at 15.
[616] Ibid at 16.

Furthermore, women are free to structure the non-compulsory portion of their maternity leave in accordance with their needs.[617]

The ILO notes that 97 per cent of member states surveyed provide cash benefits to women during this period of maternity leave, in accordance with Article 6(1) of Convention 183.[618] Convention 183 further stipulates that maternity benefits should be at a level which ensures that a woman can maintain her health and that of her child, and in a suitable standard of living,[619] and not less than two-thirds of her prior earnings.[620] Recommendation 191 suggests that benefits could be increased to 100 per cent of a woman's prior earnings.[621]

There is an additional form of maternity protection that can be extended to self-employed workers and particularly those in the informal economy, in the form of non-contributory cash transfer schemes funded by the fiscus. Many such programmes have a particular focus, for instance in addressing health and nutritional needs of pregnant women and newborn children below the age of two years, in low-income and food-insecure households.[622] For the past 30 years, cash transfer schemes providing cash benefits to defined groups of people, typically based on a means test, 'have become an important element of social protection in the Global South'.[623] There is no doubt that such schemes contribute to household income security and the reduction of extreme poverty,[624] but studies indicate that the 'level and frequency of cash benefits is not sufficient to ensure adequate protection against economic and health-related hardships for women and their children over the entire critical period'.[625] Furthermore, they are generally not embedded in national legislation, with clear provisions relating to eligibility criteria, benefits and funding, making this unsustainable.[626] Nonetheless, studies indicate that:

> '… social assistance has short-term goals of relieving poverty, but also of accumulating human capital and thus reducing intergenerational effects of poverty, among other benefits. Pregnancy support is most uniquely able to achieve both goals ….. More generally, the overall benefits of

[617] Ibid at 14.
[618] Ibid at 17.
[619] ILO Convention 183 op cit note 227, article 6(2).
[620] Ibid, article 6(3).
[621] ILO Recommendation 191 op cit note 232, para 2.
[622] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 5.
[623] Alfers 'WIEGO Child Care Initiative: Literature Review' op cit note 27 at 26.
[624] Babatunde Omilola and Sheshangai Kaniki, 'Social Protection in Africa: A Review of Potential Contribution and Impact on Poverty Reduction' UNDP (2014) at 19.
[625] Ibid.
[626] Ibid.

> cash transfers are established beyond doubt; the absence of pregnancy support in [South Africa] is a serious design flaw …., and is long overdue.'[627]

Accordingly, while this study retains as its focus possible models for the extension of contributory social insurance mechanisms to self-employed workers, it recognises that universal coverage in access to maternity protection can be supplemented by non-contributory social protection schemes. This latter form of protection is particularly significant in instances where workers' income is marginal, or where they opt not to voluntarily register and contribute to a social insurance scheme. A set of recommendations in this regard is included in the final chapter of this study.

In selecting countries for comparative analysis, the researcher considered factors such as the population size of such countries, the socio-economic status of most of their citizens, and the prevalence of the informal economy in those countries – to determine whether there are sufficient country parallels to be useful for South Africa. Guided by existing research in this field,[628] the researcher then assessed the measures enacted in these countries to extend maternity benefits to self-employed workers, especially those in the informal economy. Issues such as eligibility criteria and requirements were also assessed, for instance, whether eligibility should be linked to a formal leave provision, which would not be relevant to the informal economy. In addition, further questions for consideration include whether there should be a means test for eligibility, whether contribution periods and benefit levels should be the same for self-employed workers as for employed workers, and whether benefits should be linked to conditions such as prior employment, or contribution to social insurance.

The sole prerequisite for the right to maternity leave as stipulated by Convention 183 is the production of a medical certificate with the presumed date of birth.[629] Nonetheless, the ILO notes that many countries have introduced additional eligibility requirements for taking leave, such as having being employed for a certain period of time, providing a certain period of notice and the number of times a women can take maternity leave.[630] Equally, countries have introduced eligibility requirements for receiving cash benefits, such as having been employed for a certain period of time, or having made a particular number of contributions towards a

[627] Chersich op cit note 24.
[628] The Solidarity Center 'Maternity Protection for Self-Employed Workers' op cit note 511.
[629] ILO Convention 183 op cit note 227 article 4(1).
[630] ILO 'Maternity at Work. A review of national legislation' op cit note 233 at 39–40.

social insurance fund, prior to taking leave.[631] Although Convention 183 permits such conditions imposed by member states for women to qualify for cash benefits, it requires the conditions to be such that 'these can be satisfied by a large majority of women workers and that women who do not qualify for cash maternity benefits are entitled to adequate benefits paid out of social assistance funds.'[632]

The researcher then considered the type of benefits extended by the countries under review, and whether these comprise social insurance in the form of income protection and cash benefits, and/or forms of social assistance, such as child and health care, and social health insurance. This distinction is critical, as the aims of such benefits and the necessary funding mechanisms differ. In a social insurance scheme such as the Unemployment Insurance Fund (UIF) in South Africa, the UIF is based on contributions by the employee and matching contributions by the employer. Registration is compulsory for employees at certain income levels, and the UIF is state managed in terms of administration and disbursement of benefits.[633] Questions emerging when considering integrating self-employed workers in such a scheme include whether registration should be compulsory or voluntary, and how the 'employer' portion of contributions should be financed, whether by the self-employed worker in addition to their own contribution, or subsidised by the state.

A further mechanism used in some countries to provide paid maternity leave or maternity cash benefits to women workers, is that of employer liability schemes.[634] In this model, employers bear the total cost of paid maternity leave through a private insurance platform, in some instances supplemented by social insurance schemes. The ILO notes that in several countries in Africa, Asia and the Middle East, this is the only mechanism available to provide income security for women workers.[635] Such a scheme is obviously not available for self-employed workers, particularly in the informal economy. Equally, this is not regarded as a desirable mechanism, due to challenges in enforcement, and, as a result, Convention 183 'explicitly discourages reliance on employer liability as it may entail disincentives for employers to hire, retain and promote women workers.'[636] The ILO notes that there has been a gradual shift by member states away from this system of financing maternity benefits.[637]

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[631] Ibid at 41.
[632] Ibid.
[633] UIA op cit note 2, s 3 & 4.
[634] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 3.
[635] Ibid.
[636] Ibid.
[637] ILO 'Maternity at Work. A review of national legislation' op cit note 233 at x.

From a funding perspective, a critical issue, as noted above, is how capital in the form of the 'employer's' contribution can be leveraged where there is no employment relationship, as funding is a critical component of any social protection system. In this regard, considering that the nature of employment is self-employment or atypical forms of employment, this requires examination of who funds and contributes to the scheme. Key questions here are whether the social insurance scheme is funded through member contribution alone, how this is calculated, and how benefits are disbursed, and through what institutional arrangements. The researcher accordingly assessed country models to determine their funding mechanism. This examination considered whether the matching contribution is borne by the worker, so that they effectively make a double contribution to the state insurance scheme, or whether the state contributes on their behalf to subsidise the worker's contribution.

Different countries calculate the cash component of the benefit in different ways, but the most common appears to be based on previous earnings.[638] The unstable nature of income in the informal economy poses challenges in determining prior income to calculate a worker's percentage contribution to the insurance scheme. Where a worker has not previously been employed or cannot provide a history of prior earnings, a flat rate may be a viable consideration.[639]

By contrast, social assistance models typically constitute non-contributory social protection funded by the state – such as the old age pension and disability grant mechanisms in South Africa.[640] In some jurisdictions, this form of social assistance constitutes the primary source of funding for all benefits, while in others it constitutes a last resort for workers who do not qualify for social insurance.[641] The danger of de-linking work and social protection, however, is the resulting burden imposed on the state to finance the full slate of benefits, without the contributions of workers.

This study argues that the primary constitutional right is to social security,[642] in the form of a social insurance mechanism, and, accordingly, this has been the lens used in this comparative analysis. This study examines these characteristics and issues, first through comparison with

[638] Ibid at 20.
[639] Danielle Boyer & Jeanne Fagnani 'France country note' in Alison Koslowski, Sonja Blum et al. (eds) *15th International Review of Leave Policies and Related Research* (2019) as part of the International Network on Leave Policies and Research.
[640] Social Assistance Act, 13 of 2004; Older Persons Act, 13 of 2006.
[641] Koslowski op cit note 674.
[642] Constitution s 27(1)(c).

wealthier countries in the global North, and then, through comparison with countries more analogous to South Africa.

II. COMPARISON WITH THE GLOBAL NORTH[643]

Maternity leave and benefits considerations in Europe are guided by the European Union Maternity Leave Directive,[644] which provides for at least fourteen continuous weeks of maternity leave, at least two weeks of which are compulsory, either before or after childbirth.[645] The paid allowance to which women are entitled through this provision is deemed to be adequate if it 'guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on a ground connected with her state of health, subject to any ceiling laid down under national legislation'.[646]

Almost all EU member states comply with the Directive's provision of granting at least two weeks' maternity leave before and/or after birth, with most opting to provide for a compulsory leave period of between eight to sixteen weeks' leave. The majority pay out a maternity allowance of 100 per cent of workers' previous earnings – except for Ireland, which uses a flat rate scheme.[647] The Directive permits member states to link a worker's entitlement to the maternity allowance to conditionalities proscribed for in national legislation, provided that these do not require employment for a period longer than a year prior to the maternity leave.[648] Studies show that almost half of the member states impose the conditionality of prior employment, for periods between six months and a year, or payment of social security contributions.[649] The remaining member states have not imposed such conditionalities, with eligibility for maternity allowance merely contingent on a worker's being in employment at the time her maternity leave commences.[650]

Studies in relation to the implementation of the Directive have largely focused on the situation pertaining to formally employed workers, as opposed to that of self-employed workers. In this regard, the EU Parliament and Council adopted the Directive on the Equal Treatment of Men

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[643] The researcher acknowledges, with gratitude, research support received for this section from Ms Didem Demir.
[644] European Union 'Maternity Leave Directive' (92/85(EEC), 1992.
[645] Ibid article 8.
[646] Ibid, article 11(2)(b).
[647] European Foundation for the Improvement of Living and Working Conditions *Maternity leave provisions in the EU Member States: Duration and allowances* (2015) at 23.
[648] EU 'Maternity Leave Directive' op cit note 679, article 11(4).
[649] European Foundation for the Improvement of Living and Working Conditions op cit note 682 at 2.
[650] Ibid at 25.

and Women, which aims to strengthen social protection for self-employed workers and their assisting spouses.[651] This Directive provides for maternity leave benefits for a minimum duration of fourteen weeks,[652] extending such benefits to self-employed workers for the first time in EU history.[653]

Research undertaken by The Solidarity Center indicates that at least 40 countries in the global North, mainly in Europe, provide for paid maternity leave for self-employed workers, using a mechanism that mirrors that for formally designated employees. In the main, however, the extension of benefits to self-employed workers is voluntary, in that those who opt to make contributions to the social insurance scheme are entitled to benefits similar to those available to employed workers.[654] The Center's findings indicate that in most cases, the value of cash benefits paid to workers is calculated on prior earnings, and constitutes 70–100 per cent of these. As an alternative, in some countries such as Belgium, Croatia, Malta, Spain and Sweden, the cash benefit offered is a minimum flat rate, calculated as a percentage of minimum wages for the sector.[655]

The financing of the social insurance schemes studied is by means of taxation (a social assistance model), and/or own contributions by employers and/or workers to the social security fund (a social insurance model). In this latter case, studies indicate that countries typically impose eligibility criteria, in that self-employed workers must have contributed toward the fund for a period of six to twelve months prior to taking leave.[656] The calculation of self-employed workers' contributions is typically a percentage of their declared earnings. In the social assistance model, funded entirely by the state through taxation, payment of benefits is not contingent on workers' own contribution, as is seen in Croatia, Belgium, Denmark, New Zealand and Norway.[657] Some countries, such as New Zealand, Denmark and Norway, pose a further eligibility criterion, in that the self-employed worker must have worked for a required period prior to the date of childbirth, while in others eligibility for benefits is not linked with employment at all, but is based on residency in that country – for instance Finland or the EU.[658] The duration of paid maternity benefits for self-employed workers varies from eight weeks in

[651] European Union 'Directive on the Equal Treatment of Men and Women' (2010/41/EU), 2010.
[652] Ibid article 8(1).
[653] European Foundation for the Improvement of Living and Working Conditions, op cit note 682.
[654] The Solidarity Center 'Maternity Protection for Self-Employed Workers' op cit note 511 at 3.
[655] Ibid.
[656] Ibid.
[657] Ibid.
[658] Ibid at 4.

Belgium, to 42 weeks in Ireland, but many countries complement maternity leave for women with paid parental leave, to which either parent is entitled.[659]

The situation in Germany is of interest from the perspective of self-employed workers. Germany has a fourteen-week maternity leave duration, eight weeks of which are compulsory, after the birth of a child. During that leave period, employees are paid 100 per cent of their previous earnings, through the German health insurance mechanism. The benefits are paid directly to the employee by the employer, who then claims reimbursement through the health insurance mechanism. Self-employed workers are entitled to this benefit as well, which can pay up to 67 per cent of the income they generated in the previous tax year's assessment.[660] Self-employed and unemployed workers are also entitled to paid parental leave, which is financed through public health insurance, and are entitled to a total of 24 months' parental leave, which either parent can take, up to the child's eighth birthday. Those workers who are not members of the public health insurance scheme can apply for state social security.[661] France employs a similar mechanism, in that sixteen weeks' maternity leave, at 100 per cent of a worker's prior earnings, is afforded to employees and self-employed workers, although self-employed workers must have been working for at least ten months prior to taking leave. Such leave is financed through health insurance to which employers and workers contribute.[662]

III. COMPARISON WITH THE GLOBAL SOUTH

As noted, to draw meaningful insights from country models, for South African comparative purposes, key considerations include socio-economic factors such as the country population size, the scale of the informal economy within that country, and an indication of poverty and inequality levels within that country. The Solidarity Center study echoes similar views in embarking upon a comparable study, selecting countries with similar population size,[663] GDP per capita,[664] and the scale of their informal, or emerging markets[665] to South Africa. Further legal considerations are included in the Center's study, such as whether there are comparable

[659] Ibid.
[660] European Foundation for the Improvement of Living and Working Conditions, op cit note 682.
[661] Thordis Reimer et al. 'Germany country note' in *15th International Review of Leave Policies and Related Research* op cit note 454.
[662] Danielle Boyer & Jeanne Fagnani 'France country note' in Alison Koslowski, Sonja Blum et al. (eds) *15th International Review of Leave Policies and Related Research* op cit note 674.
[663] Comparable populations are those that are within 0.2 percentage points (measuring percentage of world population) of South Africa.
[664] The World Bank 'GDP per capita (current US$)', World Development Indicators.
[665] Bloomberg 'The Top 20 Emerging Markets', available at *http://www.bloomberg.com/news/photo-essays/2013-01-31/the-top-20-emerging-markets*, accessed on 30 November 2020.

country legal systems, like English, Roman-Dutch and customary law, and the availability of legislation and case law.[666] From this set of data, the Center's study identified the following countries as 'representative of the maternity protections available to self-employed women in comparable countries: Colombia; Chile; Namibia; Philippines; Tanzania'.[667]

Key elements of the study country findings in relation to self-employed workers' access to maternity benefits[668] have been synthesised by the researcher in the following table:

Country	Eligibility criteria	% contribution to fund	Benefits paid	Duration of paid leave	Parental leave/other provisions
Chile	Registered with social insurance system. Paid 6 monthly contributions, at least 3 prior to pregnancy	7% of monthly-declared earnings (same for employed workers, as employers do not contribute)	100% of workers' average earnings over past 6 months	18 weeks – 6 weeks prior to birth, 12 weeks after	12 weeks' paid parental leave, after maternity leave. If mother dies while entitled to receive leave and benefits, these accrue to the father
Colombia	Registered with social health insurance system. Paid 9 contributions prior to childbirth. Only those workers earning above minimum wage required to contribute	12.5% of monthly-declared earnings (employed workers pay 4%, employers pay 8.5%)	100% of workers' average earnings over past year	14 weeks – 2 weeks prior to birth, 12 weeks after[669]	-
Namibia	Requires voluntary registration with and contribution to social insurance fund, at least 6 months prior to claiming benefits	1.8% of basic declared earnings (employed workers pay 0.9%, employers pay 0.9%)	100% of workers' earnings.	12 weeks – 4 weeks prior to birth, 8 weeks after	If mother dies while entitled to receive benefits, these are paid to the person in whose care the child is placed

[666] The Solidarity Center 'Maternity Protection for Self-Employed Workers' op cit note 511 at 5.
[667] Ibid.
[668] Ibid at 6–10.
[669] Maternity leave in Colombia has recently been increased to 18 weeks – one week prior to birth, and 17 weeks after, Law 1822 of 2017.

Philippines	Requires voluntary contribution to social insurance system. Paid 3 monthly contributions in the 12 months prior to claiming benefits.	11% of gross monthly earnings (employed workers pay 3.63% and employers pay 7.37%)	100% of average daily earnings	60 days (78 days in cases of birth by caesarean)	-
Tanzania	Requires contribution to social security fund. Paid 36 monthly contributions of which 12 must have been in 36 months prior to claiming benefits	Determined by affiliated scheme, but no less than an employed worker's share (10% of declared earnings), and no more than joint employer and employee shares (20%)	100% of average daily earnings	12 weeks	-

Table 1: Comparative study findings: Self-employed workers' access to maternity benefits

An analysis of the critical components of eligibility criteria, nature and calculation of benefits and finance models in these countries, as captured in this above table, reveals useful recommendations for the extension of maternity benefits to self-employed workers in South Africa.

As a starting point, in all five of these countries, to be eligible for maternity benefits, self-employed workers are required to register with the state's social insurance system, and to have made a specified percentage contribution to a social insurance or social security fund.[670] The duration or number of contributions prior to claiming benefits varies considerably among the selected countries, from three months in the Philippines, to six months in Chile and Namibia, nine months in Colombia, and 36 months in Tanzania.

Regarding whether contribution to the fund is voluntary or mandatory in nature, in Namibia, while employed workers' contribution is mandatory, self-employed workers are required to voluntarily register with the national social insurance fund to qualify for benefits. In Colombia and the Philippines, in instances where self-employed workers' income reaches a prescribed minimum level, contribution to the fund is mandatory.[671]

[670] The Solidarity Center 'Maternity Protection for Self-Employed Workers' op cit note 511 at 6.
[671] Ibid.

In relation to financing and calculation of the percentage of worker contributions to the social security fund, in Chile, employed workers and self-employed workers pay the same percentage contribution. In Colombia, Namibia and the Philippines, however, self-employed workers are required to contribute both their own percentage as well as that which an employer would have contributed; that is, the sum total of both contributions is borne by the self-employed worker.[672] Significantly, in Colombia only workers earning above minimum wage are required to contribute to the fund.

Finally, in all five countries, while the period of paid maternity leave varies between countries, from 12 weeks in Namibia and Tanzania, to 14 weeks in Colombia and 18 weeks in Chile, all countries paid maternity benefits at 100 per cent of the self-employed workers' prior earnings.[673]

IV. IMPLICATIONS FOR SOUTH AFRICAN LAW REFORM

It is argued that the state should scrutinise the existing maternity benefits mechanism, through the UIF, and extend this to accommodate self-employed workers, along the lines of the eligibility criteria, funding mechanisms and benefit provisions outlined above. In addition, however, the ILO's observation in relation to social assistance models is key:

> 'Social insurance mechanisms can play a significant role in extending maternity protection coverage to those categories of workers in the informal economy who have some contributory capacities. For those with limited contributory capacities, it is necessary to consider alternative options. Governments may subsidize (fully or partially) contributions for categories of workers with limited contributory capacities, or combine contributory and non-contributory mechanisms to reach universal coverage'.[674]

This study develops particular recommendations and identifies implications for law reform in this regard, as outlined in the concluding chapter.

Suffice to say that what is evident from this comparative study, is that factors to be determined include: the nature of worker contribution, whether voluntary or mandatory; eligibility criteria, such as number of contributions made prior to claiming benefits; percentage contribution and its determination, whether this is the same as or double that of employed workers; the value and duration of paid benefits; and any additional considerations. Such considerations might

[672] Ibid.
[673] Ibid.
[674] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 5.

include any potential state subsidising of contributions to make up for an 'employer's' contribution to the UIF, and to waive contributions where workers' income falls below a minimum wage for the sector. Equally, additional considerations could include social assistance measures for workers who do not meet eligibility requirements. These state-subsidised measures would probably require the administration of a means test. Finally, the possibility of a minimum value for paid benefits should be considered, to ensure access to adequate health and living standards for all.

Further implications for law reform relate to the existing distinction between employees, self-employed workers and independent contractors, noting that 'some workers that appear to be self-employed workers may actually be considered employees in some cases'.[675] This would require legislation to better address the distinction between these categories of workers. The statutory definitions of employee and self-employed worker in South Africa and Namibia are worth consideration at this point, as the latter provides greater protection in law to self-employed workers than South Africa.[676] When considering the rebuttal presumption of employment as outlined in both countries' labour legislation, Namibia presumes an employment relationship exists and deems a worker to be an employee if they have worked for another person for an average of at least 20 hours per month over the prior three months,[677] whereas South Africa requires an average of 40 hours work.[678] In addition, Namibian law includes an expansive provision of 'any other prescribed factor' in its list of factors leading to the creation of the rebuttable presumption of employment.[679]

Namibian courts have also been more generous in their interpretation of a relationship of employment, to extend the presumption and protections to categories of workers that would otherwise be viewed as self-employed workers.[680] South African courts have tended slavishly to identify a worker as an independent contractor if this is stated in the terms of the relevant contract – regardless of the degree of control and direction imposed on the worker, indicative of an employment relationship.[681] This will require legislative definition of an employee to be carefully articulated to avoid such exclusion of workers from protections and benefits offered by formal employment.

[675] The Solidarity Center 'Maternity Protection for Self-Employed Workers' op cit note 511 at 13.
[676] Ibid.
[677] Ibid.
[678] LRA op cit note 2 s 200A(d).
[679] The Solidarity Center 'Maternity Protection for Self-Employed Workers' op cit note 511 at 13.
[680] Ibid.
[681] Ibid.

V. CONCLUSION

The implications for law reform outlined in this study could not be more critical. This is also reflected in the ILO's view that:

> 'Maternity protection is essential to promote the health, nutrition and well-being of mothers and their children, to achieve gender equality at work, prevent and reduce poverty and to advance decent work for both women and men. This makes maternity protection the first key step of the comprehensive set of care policies that promote women's economic empowerment, prevent informalization and enable individuals and societies to thrive, especially in the context of demographic transitions.'[682]

The review of measures implemented by countries in the global North to meet obligations flowing from Convention 183 and Recommendation 191 provides guidance on the range of issues to be considered in South Africa's law reform process. Such measures are better nuanced when narrowing the lens of inquiry to consider specific measures adopted by countries of similar socio-economic status to South Africa. This analysis provides insightful guidance to the design of legislative amendments by presenting practical, affordable measures that have been proven implementable in an informal economy context, without imposing an unrealistic burden on the state fiscus. Critically, however, this combined lens of necessary measures from a compliance perspective, together with workable solutions from an emerging economy perspective, generates a slate of policy choices for consideration by South Africa.

South Africa is already faced with budget constraints in relation to the burden on the fiscus imposed by its extensive social assistance system and the extent of unemployment in South Africa. Expenditure on social grants is set to increase at an average annual rate of 7.6 per cent from R162.9 billion in 2018/19 to R202.9 billion in 2021/22,[683] while the expanded unemployment rate rose to an all-time high of 42 per cent.[684] From a funding perspective, it would appear that a more palatable option for financing the extension of maternity protection to self-employed workers would be through the extension of the existing, contributory social insurance system. The ILO Recommendation 204 process[685] suggests that the existing system

[682] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 1.
[683] National Treasury '2019 Budget: Estimates of National Expenditure. Vote 17: Social Development', available at *http://www.treasury.gov.za/documents/National%20Budget/2019/enebooklets/Vote%2017%20Social%20Development.pdf*, accessed on 11 November 2020.
[684] Stats SA, 'Quarterly Labour Force Survey: 2nd Quarter 2020', available at http://www.statssa.gov.za/?page_id=1856&PPN=P0211&SCH=72661, accessed on 11 November 2020.
[685] ILO Recommendation 204 op cit note 31.

should be extended, as is, to workers in the informal sector, to promote the equivalence between the formal and informal sector. It is therefore suggested that this approach be adopted – rather than perpetuating the discrimination and unequal treatment of informal economy workers, and creating a separate scheme.

In addition, however, this study suggests recommendations for the state to extend its social assistance mechanisms to reach vulnerable, income-insecure households, where self-employed workers do not earn sufficient income to contribute to the UIF, and may not be able to take up the voluntary contribution mechanism proposed. Priority may have to be given to the most vulnerable category of workers in this regard, being women – as identified earlier in this study. To distinguish between this category of workers and those who are in a position to contribute to the UIF mechanism on a voluntary basis, a means test may have to be introduced.

The following, concluding chapter of this study, will therefore critically examine the obligations imposed on South Africa to extend its existing maternity benefits system to self-employed workers. The researcher will outline the particular obligations that should be crafted into the law reform process – particularly if South Africa is to ratify Convention 183 – nuancing these with the practical insights gained from the global South. This concluding chapter will develop recommendations in this regard for the law reform process currently underway.

CHAPTER 7
CONCLUSION AND RECOMMENDATIONS

I. INTRODUCTION

This study sought to address the implications of the central issue that only workers recognised as 'employees' by South Africa's labour law framework qualify for social security benefits.[686] It highlights the fact that, as a result, self-employed and atypical workers have no access to maternity benefits in the form of paid maternity leave – resulting in economic hardship, particularly for those in informal employment. The focus of this study, therefore, is on the impact this exclusion from maternity protections has on the rights and livelihoods of workers, finding that such exclusion constitutes a violation of core constitutional rights to equality, dignity, life, health, social security and those of children.

What this study goes on to analyse and argue, is that South Africa is constitutionally obliged to enact measures to give effect to the conventions and treaties that make up the relevant body of international law in relation to access to social security, and to maternity benefits in particular. By examining the current labour law framework pertaining to definitions of employees, the establishment of South Africa's social insurance scheme, the Unemployment Insurance Fund (UIF), and its concurrent maternity benefits mechanism,[687] the study argues that the resulting exclusion of this category of workers constitutes a failure on the part of the state to give effect to its legal obligations in this regard. The study further analyses the human rights violated by the state through this exclusion. Through engaging with equality law jurisprudence, the study makes the point that the state's differential treatment of self-employed workers, and the resulting impact on their constitutional rights to equality and dignity, constitutes unfair discrimination that would not be permitted in terms of the limitations clause.[688]

Equally, the study considers what policy advocacy strategies would be effective for vulnerable categories of workers, such as self-employed women in the informal economy, to mobilise and lobby for law reform to address the violation of their rights. In this regard, it examines whether state institutions supporting democracy such as the Commission for Gender Equality (CGE),[689]

[686] UIA, UICA & LRA op cit note 2.
[687] Ibid UIA.
[688] Constitution s 36.
[689] CGE Act op cit note 10.

can play a role in initiating law reform processes to leverage state accountability on its gender equality obligations and commitments, as part of the CGE mandate to promote the attainment of gender equality in South Africa.[690] In this regard, the study tracks a complaint lodged with the CGE pertaining to the exclusion of self-employed workers from South Africa's maternity benefits regime. It recounts the consultative and mobilising processes that ensued, documenting the hardships and discrimination experienced by primarily marginalised women workers in the informal economy.[691]

The study presents insight into the policy advocacy process that led to the South African Law Reform Commission (SALRC) being tasked with investigating maternity benefits for self-employed women.[692] It examines the internal process and power considerations within the CGE, its mandate and the opportunities to influence national policy. It concludes that while the CGE provides the potential for leveraging state accountability on its international and constitutional gender equality commitments, current weaknesses in the National Gender Machinery (NGM) undermine this. It took the crafting of a strategic political partnership with the Congress of South African Trade Unions (COSATU) to escalate this issue before decision-makers and to secure the potential for law reform.[693] Drawing on the participant observer insights of the researcher in her capacity as a former commissioner, it interrogates the political and power differentials that have to be navigated by a commissioner to influence decision-making within the CGE. It concludes that the measures required for the institution to take up and act on an individual complaint and escalate this to the national policy level are unsustainable, and indicate failed institutionalism.

Finally, recognising that the state's establishment of the SALRC investigation into maternity benefits for self-employed workers constitutes an acknowledgement by the state that law reform is required to bring South Africa's legislative framework in line with its international and constitutional obligations, the study considers what international best practice exists that South Africa could draw on in its design considerations. In this regard, the study analyses and presents core obligations required of member states to the International Labour Organisation's (ILO) benchmark convention for this sector, the Maternity Protection Convention 183,[694] and

[690] Constitution, s 119(3).
[691] CGE 'Accessing Maternity Benefits for Working Women Consultative: Workshops concept note and report, Johannesburg', op cit note 5.
[692] SALRC 'Briefing Document, Project 143: Maternity and Paternity Benefits for Self-Employed Workers', op cit note 12.
[693] COSATU 'Draft discussion document: Maternity Protection' op cit note 11.
[694] ILO Convention 183 op cit note 227.

its accompanying Maternity Protection Recommendation 191,[695] and how these have been taken up by ILO member states.

Through a particular lens that examines practice in countries of similar socio-economic status to South Africa, the study finds that such countries have successfully extended maternity benefits to self-employed workers, through affordable, administratively efficient mechanisms that give effect to key components of Convention 183. It draws out practical design and implementation considerations that would need to be addressed in South Africa to ensure that the most vulnerable category of self-employed workers, predominantly in the informal economy, would be able to access maternity benefits. A slate of potential implications for eligibility criteria, financing options and supplementary state support have accordingly been presented.

This chapter analyses these findings and implications for the law reform process underway, and presents recommendations on proposed legislative amendments to give effect to the design and implementation considerations outlined. Such measures are not only with the view to bring South Africa's maternity benefits regime in line with its core obligations – particularly should it opt to ratify Convention 183 – but also to ensure universal access to benefits for the most marginalised categories of self-employed workers, whose earnings and contexts might preclude them from participating in a contributory social insurance scheme. As a starting point, however, an important further consideration is how South African courts might respond to a potential challenge to the Unemployment Insurance Act (UIA),[696] and the obligations on these courts to transform South Africa's common law to bring it in line with the Constitution.

II. A CASE FOR TRANSFORMATIVE CONSTITUTIONALISM[697]

The Constitution stipulates the following in relation to the obligation on the courts to adopt a transformative jurisprudential approach to the interpretation of the Bill of Rights, upon the challenge to any existing statute or practice:

> '(1) When interpreting the Bill of Rights, a court, tribunal or forum –
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

[695] ILO Recommendation 191 op cit note 232.
[696] UIA op cit note 2.
[697] An in depth analysis of this aspect has been conducted in chapter 5.

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'[698]

If a constitutional challenge of the UIA's provisions excluding self-employed workers from South Africa's maternity benefits regime were to be brought before the court, and the argument put forward that this constitutes unfair discrimination, it is likely that the court would order the state to enact necessary measures to redress this unfair discrimination, as part of this transformative project. Albertyn argues that the transformative project in South Africa has as its objective the attainment of the constitutional founding values of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms',[699] linked with the eradication of poverty and inequality.[700] This transformation project aims to 'improve the quality of life and free the potential of all persons', which includes the poverty and inequality experienced by poor women. Albertyn makes the case that the transformation project needs to be grounded in the courts' understanding of 'the actual conditions in which people are living', and that attaining these constitutional values requires that people are provided with equal and substantive conditions and opportunities to exercise their life choices.[701] This entails the attainment of substantive equality, including the use of remedial and redistributive measures, to ensure people can satisfy their basic needs and enjoy equal levels of well-being.[702] The realities of poor women require transformation strategies to pay attention 'to structure and agency, to redistribution and recognition, to individual and community, to public and private (especially care-giving roles in family), to inequality and poverty'.[703]

There have been calls for a more interventionist state, which assumes stronger positive duties to respect, protect, promote and fulfil the rights contained in the Constitution,[704] including the taking of remedial and redistribution measures to address persistent, institutionalised inequality and discrimination. The courts have a critical role to play in the context of separation of powers,

[698] Constitution s 39(1) and (2).
[699] Constitution s 1(a).
[700] Catherine Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court' op cit note 23 at 591.
[701] Ibid at 592.
[702] Ibid at 595.
[703] Ibid.
[704] Constitution s 7(2).

in holding the state to account in fulfilling its obligations and upholding a '"pro-poor" constitutional democracy'.[705] Courts provide a platform for transformation through law, so that when faced with a case such as this, addressing the alleged violation of poor women's rights, the courts should be provided with information to support the contextual analysis required in determining whether rights, including dignity, have been violated. This should include information to support the court's understanding of how gender inequality and poverty intersect,[706] particularly in equality and socio-economic rights cases such as the one pertaining to the attainment of social security and maternity benefits, in particular. An intersectional approach recognises that different categories of identity, such as gender, race and class, can 'intersect and co-exist in the same individual thus creating a qualitatively different experience when compared to that of another individual. These overlapping burdens can lead to excessive hardship for an individual'.[707]

When a court is presented with evidence to bolster such an understanding, this has a bearing on the interpretation, findings and remedial measures that could be sought of a court. For instance, it could be argued that addressing the impact of the absence of statutory protections on self-employed workers, predominantly in the informal economy, does not demand a poverty-alleviating, social assistance response. Rather, this requires the court's understanding that at the heart of this case lies an intersecting set of factors that have a specifically gendered impact. The non-recognition of atypical workers and thereby their exclusion from a slate of labour legislation geared purely to support the formal economy, has devastating implications for the protection of labour rights of such workers, and their attainment of human rights such as equality,[708] dignity[709] and social security.[710] Poor women's particular socio-economic context, as outlined earlier in this study, often forces them to take on work within these circumstances, whereupon they find themselves further marginalised and compromised upon childbirth. The gendered implications of this skewed approach to labour protections are devastating, and demand a transformative response.

[705] Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 150; John Baker, Kathleen Lynch, Sara Cantillon & Judy Walsh *Equality: From Theory to Action* 2 ed (2009) 33–41.
[706] Catherine Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court' op cit note 23.
[707] Ben Smith 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' (2016) 16 *The Equal Rights Review* 73 at 73.
[708] Constitution s 9.
[709] Constitution s 10.
[710] Constitution s 27.

In *Mahlangu and Another v Minister of Labour and Others*,[711] the Constitutional Court was required to consider the exclusion of domestic workers employed in private households from the definition of 'employee' in the Compensation for Occupational Injuries and Diseases Act (COIDA).[712] The result of this exclusion effectively denied such workers compensation in the event of disease, disability, injury or death occasioned during the course of their employment. The applicants made the case that such exclusion constitutes indirect discrimination on the basis of race and gender, because domestic workers are predominantly black women.[713] They described the intersectional impact of this discrimination on domestic workers, 'as a result of a breach of their rights to equality and dignity on grounds of social status, gender, race and class'.[714] Noting that '[t]he cornerstone of any young democracy is a comprehensive social security system, particularly for the most vulnerable members of society',[715] the court held that such exclusion constitutes a violation of domestic workers' rights to equality and dignity, and made a declaration of constitutional invalidity of the impugned section.[716]

The court stated that the founding values of the Constitution, as expressed in the Preamble, confirm that one of the aims of the Constitution is 'to heal the divisions of the past, improve the quality of life of all citizens and free the potential of each person'.[717] The court went further to make reference to its earlier decision in *Tshwane City v Afriforum*,[718] noting that 'this principle in the Preamble imposes a constitutional obligation to eradicate all systems of subordination and oppression inherited from South Africa's colonial and apartheid past'.[719] The court observed that by being excluded from the social security statutory protections afforded by COIDA, domestic workers' fate had been 'blighted.'[720]

It could, therefore, be argued that a court considering a constitutional challenge to the exclusion of self-employed workers from the definition of 'employee' in South Africa's labour legislation, would adopt a similar approach to this Constitutional Court judgment. A court might consider the intersectionalities impacting on the discrimination experienced by self-employed workers as persuasive evidence of unfair, indirect discrimination, and would

[711] *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24.
[712] Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 1(xix)(v).
[713] *Mahlangu* supra note 750 at para 18.
[714] Supra.
[715] Supra at para 3.
[716] Supra at para 131(1).
[717] Preamble of the Constitution.
[718] *Tshwane City v Afriforum* 2016 (6) SA 279 (CC).
[719] Supra at para 8.
[720] *Mahlangu* supra note 750 at para 5.

arguably declare the resulting denial of statutory protections in the form of social security and maternity benefits unconstitutional. The applicants in *Mahlangu* argued that 'an analysis within an intersectional framework is appropriate because it leads to a nuanced, purposive and socio-contextual consideration when interpreting the implementation and amendment of COIDA'.[721] The court further agreed that COIDA should be interpreted 'through the prism of the Bill of Rights and the foundational values of human dignity, equality and freedom'.[722]

What might be requested of a court, therefore, is the re-casting of the current understanding and recognition of labour and employment relationships, atypical workplaces, and the state's approach to social insurance, rather than (or in addition to) the provision of child care, for instance. Transformative jurisprudence requires that courts address immediate instances of practical relief, while simultaneously tilting at institutionalised discrimination and making judgments that challenge traditional understandings of gender.[723]

In *Mahlangu*, not only did the court declare the offending section of COIDA unconstitutional, but further stated that its order was to have immediate and retrospective effect, from 27 April 1994.[724] In the current instance, a court could be required to declare the current exclusion of self-employed workers from the definition of 'employee' to be unconstitutional, and require the state to effect necessary legislative reform to remedy this, and bring this category of workers into the statutory social security protections afforded by labour legislation. In accordance with notions of transformative jurisprudence, the court could go further and grant immediate practical relief to this vulnerable category of workers and order as an interim measure, until legislative amendments are adopted, the extension of the existing Child Support Grant to all pregnant workers meeting a means test requirement. This proposal is detailed below in this chapter.

III. DESIGN OF MEASURES: IMPLICATIONS FOR POSSIBLE RATIFICATION OF CONVENTION 183

(a) Giving effect to Convention 183 requirements: motivation

The argument has been made that the state is obliged to enact measures to enable self-employed women to access maternity benefits. Equally, it has been argued that should a challenge relating

[721] Supra at para 18.
[722] Supra at para 49.
[723] Catherine Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court' op cit note 23.
[724] *Mahlangu* supra note 750 at para 131(2).

to self-employed workers' exclusion from the current maternity benefits regime be brought before a South African court, in all likelihood, as in the *Mahlangu* judgement,[725] the court would declare such exclusion unconstitutional, and order the state to remedy this. The question that arises is what should those measures look like? A transformative project that pursues the attainment of dignity, equality and freedoms, would be obliged to identify remedies that meet the immediate, practical needs of poor, working women, while at the same time transform the legislative framework and institutional arrangements that buttress the state's social insurance system. An appropriate starting point is to enact measures that would give effect to the standard and requirements set out in Convention 183. This study argues that this Convention sets the bar in terms of minimum standards for maternity protection, and makes the case for the state's ratification thereof.

(b) Minimum standards demanded by Convention 183: design implications

To map out the implications for South Africa to ratify Convention 183 requires first the identifying of the measures to be woven into the unemployment insurance institutional framework, and second, to undertake a legislative gap analysis to inform the ensuring law reform process. To consolidate what has been identified earlier, through this study's comparative component, for member states to meet the core requirements of Convention 183, they need to provide for at least fourteen weeks' paid leave, at least two-thirds of the worker's prior earnings, and which are paid 'by social security, public funds or in a manner determined by national law and practice where the employer is not solely responsible for payment.'[726] These are set out in more detail as follows:

As a starting point, Convention 183 applies to all employed women, including those in atypical forms of work, such as self-employed workers, [727]and does not limit the scope of maternity protection to women in the formal economy.[728] The ILO notes with concern that despite the Convention stipulating that it should apply to all categories of working women, 'no matter what occupation or type of undertaking, including women employed in atypical forms of dependent work' – nonetheless, many countries exclude different groups of workers from protection in their legislation.[729]

[725] Supra.
[726] ILO 'Maternity at Work. A review of national legislation' op cit note 233 at ix.
[727] ILO Convention 183 op cit note 227, article 2(1).
[728] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 2.
[729] ILO 'Maternity at Work. A review of national legislation' op cit note 233 at x.

While states are permitted to exclude limited categories of workers either wholly or in part from the scope of the Convention's protections, should their application to these workers result in substantive challenges,[730] this may only be done after consultation with representative structures of workers and employers concerned. Thereafter, states are obliged to report to the ILO on those categories excluded, the reasons therefore, and the measures being adopted by that state to ensure the progressive extension of the Convention's protections to these workers.[731] Clearly, the South African government would need to enact amendments to existing definitions of employees that exclude self-employed women from contributing to the Unemployment Insurance Fund (UIF), and thereby qualifying to claim maternity benefits. The only exception available is to consult with representative bodies of such workers, report this non-compliance to the ILO, and advise on measures being enacted to ensure the gradual extension of these benefits to these workers.

Secondly, relating to maternity leave, every worker to whom Convention 183 applies is entitled to a period of maternity leave of not less than fourteen weeks, although Recommendation 191[732] recommends extending this to eighteen weeks. This leave period shall include a period of six weeks' compulsory leave after the birth of the child.[733] Other than this compulsory period, women are entitled to structure their remaining weeks' leave around their particular needs.[734] In the event that there is a lapse between the presumed and actual date of childbirth, the prenatal portion of the maternity leave shall be extended, without any reduction in the compulsory portion of the postnatal leave.[735] Furthermore, in the event of illness or birth-related complications verified by medical certificate, leave shall be accorded before or after the maternity leave period.[736]

Thirdly, relating to benefits to which workers are entitled, these include cash benefits linked to the maternity leave provision. Convention 183 stipulates that benefits should be in the form of cash benefits for the duration of the maternity leave, 'at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.'[737] Where these cash benefits are earnings-related, as would be the case with self-

[730] ILO Convention 183 op cit note 227, article 2(2).
[731] Ibid article 2(3).
[732] ILO Recommendation 191 op cit note 232.
[733] ILO Convention 183 op cit note 227, article 4(4).
[734] ILO 'Maternity at Work. A review of national legislation' op cit note 233 at 14.
[735] ILO Convention 183 op cit note 227, article 4(5).
[736] Ibid article 5.
[737] Ibid article 6(1) & (2).

employed workers, the benefits should not be less than two-thirds of the workers' previous earnings,[738] or comparable to an amount calculated on average,[739] although Recommendation 191 suggests benefits should constitute the full amount of previous earnings.[740] States are obliged to ensure that a large majority of women to whom Convention 183 applies, can qualify for these benefits in terms of national laws and regulations enacted to give effect to this Convention.[741]

Convention 183 does make provision for states whose economy and social security systems are not adequately developed to encompass the payment of benefits as envisaged by Article 6(3) and (4). It states that they would be deemed to be in compliance with these requirements, provided that 'cash benefits are provided at a rate no lower than a rate payable for sickness or temporary disability in accordance with national laws and regulations.'[742] In such an instance, states are obliged to report accordingly to the ILO, providing reasons for non-compliance with these articles, indicate the rate at which such cash benefits will be provided, and in later reports, describe measures enacted to raise the level of benefits progressively.[743]

In the event that a worker does not qualify for cash benefits, the state is obliged to enact a mechanism to ensure she receives adequate benefits through social assistance funds, subject to a means test to determine the need for such assistance.[744] 'In practice, this applies to millions of women in the informal economy, with limited or no capacity to regularly contribute to social insurance schemes.'[745] An example might be where a self-employed worker is either unable to make contributions to the UIF, or is not able to report prior earnings and is therefore excluded from claiming cash benefits during her period of maternity leave. In this instance, the South African government would have to introduce into the social assistance cluster of grants a support mechanism to extend adequate benefits during this period, and a recommendation in this regard is put forward by this study. Convention 183 also makes provision for medical benefits for the woman and her child, including prenatal, childbirth and postnatal care, as well as hospitalisation care when necessary.[746]

[738] Ibid article 6(3).
[739] Ibid article 6(4).
[740] ILO Recommendation 191 op cit note 232.
[741] ILO Convention 183 op cit note 227, article 6(5).
[742] Ibid article 7(1).
[743] Ibid article 7(2).
[744] Ibid article 6(6).
[745] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 2.
[746] Ibid article 6(7).

Fourthly, in relation to the financing of the cash benefits during the period of leave to which workers are entitled, Convention 183 stipulates that this shall be provided through 'compulsory social insurance or public funds, or in a manner determined by national law and practice'.[747] As noted earlier, benefits should not be based on an individual employer's liability, unless this is provided for in national legislation and agreed to by national government and representative organisations of workers and employers.[748]

In addition to these measures provided for in Convention 183, the Transition from the Informal to the Formal Economy Recommendation 204, to which South Africa is signatory, requires member states to make provision for the progressive extension, in law and in practice, of social security, maternity protection, decent working conditions and a minimum wage to all workers in the informal economy.[749] This requires careful consideration by the South African government of the needs and contributory capacities of workers in the informal economy, and their families, when designing its national social protection floors, and extending the coverage of social insurance to workers in the informal economy. Recommendation 204 encourages, in addition, the provision of and access to affordable quality childcare and other care services to promote gender equality in entrepreneurship and employment opportunities, and to enable the transition to the formal economy.[750]

(c) State ratification of Convention 183

Having been a member of the ILO from 1919 until it left in 1966, South Africa re-joined the ILO on 26 May 1994. South Africa has ratified 27 ILO conventions since this time, of which 24 are in force.[751] The question arises as to why South Africa has opted not to ratify Convention 183, despite organised labour advocating for ratification. For instance, at its 10th Congress, COSATU resolved on the need to ratify key ILO conventions, including Convention 183 and

[747] Ibid article 6(8)
[748] Ibid article 6(8)(a) & (b).
[749] ILO Recommendation 204 op cit note 31.
[750] Recommendation 204 Task Team op cit note 31 at 12.
[751] ILO 'Ratifications for South Africa', available at *https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888*, accessed on 13 November 2020. These include: Forced Labour Convention C029 of 1930; Freedom of Association and Protection of the Right to Organise Convention C087 of 1948; Right to Organise and Collective Bargaining Convention C098 of 1949; Equal Remuneration Convention C100 of 1951; Abolition of Forced Labour Convention c105 of 1957; and Discrimination (Employment and Occupation) Convention C111 of 1958. Its most recent ratification includes Domestic Workers Convention C189 of 2011, which was ratified in June 2013.

Recommendation 191.[752] COSATU raised this issue at its National Gender Conference of 2012, making the following point:

> '…. when is South Africa as a signatory of the ILO going to respect the international laws and bring the Convention before the competent authority for a decision on a possible ratification of Convention C183? Yet the national labour laws created an opportunity for the Ratification of this Convention. The paper concludes that a blind eye paid by the government to adoption of this very important instrument for working women's lives denotes not only to workplace discrimination but to the undervaluing of women's contribution, to the country's overall Gross Domestic Product (GDP) and the entire economy (sic).'[753]

COSATU concluded its national conference with the following included in its slate of recommendations: 'COSATU should take the lead in the campaign for the ratification of ILO Convention No. 183 at NEDLAC level.'[754] There is no reported reason as to why South Africa has failed to action this recommendation or why there might be resistance at the level of the National Economic Development and Labour Council (NEDLAC) – of which COSATU is a member. At an ILO-sponsored workshop to promote ratification of ILO Convention 183, it was reported that 'South Africa and Zimbabwe are already in a position to ratify the Convention because they already have 14 weeks of maternity leave. South Africa must raise the cash benefits to 66 percent from 60.'[755] With organised labour clearly behind the ratification of Convention 183, it can only be assumed that there is resistance on the part of business or government to extend their obligations to meet the provisions outlined in this Convention. It will take political pressure to make this Convention a priority issue for the state, which has thus far managed to avoid calls by its partner in the tripartite alliance[756] to do so. It can only be hoped that once the SALRC investigation has concluded and tabled its recommendations before the Minister of Justice and Constitutional Development, that these find favour in Cabinet – the ultimate arbiter on proposed law reform.

IV. APPROPRIATE LEGAL MECHANISMS

(a) Considering possible approaches: The case for social insurance

[752] COSATU op cit note 11 at 6.
[753] Ibid at 5.
[754] Ibid at 24.
[755] Industrial Global Union 'Maternity Protection Meeting on Ratification of ILO Convention 183', available at *http://www.industriall-union.org/events/maternity-protection-meeting-on-ratification-of-ilo-convention-183*, accessed on 13 November 2020.
[756] Alexander Beresford 'Comrades "Back on Track?" The Durability of the Tripartite Alliance in South Africa" (2009) 108 (432) *African Affairs* 391.

The final recommendations from the SALRC investigation into maternity benefits for self-employed workers have yet to be concluded, adopted by the SALRC, and tabled at and adopted by Cabinet. Likewise, South Africa has yet to ratify Convention 183. Both of these actions will generate deliberation on the appropriate legal mechanism to adopt in order to enable the extension of maternity benefits to self-employed workers.

There are several possible legal mechanisms that can be considered, bearing in mind the approaches adopted by other countries, as outlined in the comparative component of this study. First is to extend the existing statutory, contributory social insurance scheme, the UIF, so that the provision of maternity benefits as outlined in the Unemployment Insurance Act (UIA)[757] and the Basic Conditions of Employment Act (BCEA)[758] is extended to all workers. The challenge inherent in this approach is that the UIF scheme is based on compulsory participation, and is geared towards accommodating designated employees, primarily in the formal sector, whose earnings and contributions can easily be calculated and collected through recognised employers with the capacity to comply with formal registration and other administrative requirements.

If the South African government resolves to extend the UIF mechanism to self-employed workers, this will result in the need for a review of the institutional arrangements in relation to registration, calculation and collection of contributions. Noting the informal nature of many self-employed workers' businesses, and irregular income, the administrative systems required to facilitate registration and obtain appropriate records will generate complexity for the state.

In addition, according to the ILO, in designing more inclusive social insurance schemes, states should consider the various barriers workers face in the informal economy, such as 'limited contributory capacities, irregular and unpredictable income, low visibility and voice in policy making and collective bargaining processes and geographical and time constraints in registering and paying contributions'.[759] Institutional and administrative arrangements should be designed in a manner that enables access for these categories of workers. The ILO notes that mechanisms to simplify enrolments and subsidise the payment of contributions for both employers and workers have been successful in overcoming some of the practical barriers to

[757] UIA op cit note 2.
[758] BCEA op cit note 40.
[759] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 6.

access. These have included, for instance, the use of decentralised, mobile registration units, and online registration options supported by new technologies.[760]

The second option is to extend the state's non-contributory social assistance programme, such as by using an existing vehicle such as the current Child Support Grant (CSG).[761] Studies have recommended the commencement of the CSG during the period of pregnancy, to support maternal and child nutrition and health, and extend this into the first year post childbirth.[762] Such extension could compensate the working mother for lost income during this period, and is already based on a means test to determine need. This and other forms of non-contributory social assistance are outlined in more detail below.

In addition, a far bigger project could see the amalgamation of social security mechanisms into one comprehensive social security system, covering all workers and including self-employed and atypical workers. Indeed, the South African government is proposing the introduction of the National Social Security Fund (NSSF), which will provide pension, risk and unemployment benefits.[763] The intention behind this initiative is to increase social security cover and alleviate poverty. The NSSF is, however, silent on the issue of maternity benefits, and would have to consider their inclusion, should the state opt to go for the non-contributory social assistance model for this type of benefit. Noting the resulting burden on the fiscus, however, should the state not opt to enact a contributory mechanism that would collect workers contributions to the fund, it is highly unlikely that the state will opt to go either of these social assistance routes. As noted in this study, however, and recommended more specifically, there is scope for a combination of social insurance and social assistance measures, to ensure universal coverage for self-employed workers, including those who might not meet the requirements to qualify for maternity benefits.

Finally, the door is open for private insurance companies to step into the breach and create a fund that would enable self-employed workers to self-insure. This remains possible, but clearly does not give effect to the state's obligations to enact a mechanism to enable such workers to

[760] Ibid at 7.
[761] Chersich 'Safeguarding maternal and child health in South Africa by starting the Child Support Grant before birth: Design lessons from pregnancy support programmes in 27 countries' op cit note 24.
[762] Ibid.
[763] Alexander Pick 'Social Security Reform – A Long Term Modelling Perspective' (2012) Government Technical Advisory Centre, available at *https://www.gtac.gov.za/publications-and-resources/social-security-retirement-reform*, accessed on 13 November 2020.

access maternity benefits, in accordance with the international and constitutional obligations outlined in this study.

(b) Supplement social insurance with social assistance

The ILO notes that in many instances, to achieve universal coverage in maternity protection will require a combination of contributory and non-contributory mechanisms, for instance in the form of social insurance and social assistance. It advises that:

> 'An effective coordination of these mechanisms within the social protection system is essential to guarantee at least a basic level of income security for women workers in case of maternity, and to facilitate their access to maternal and child health care. These elements are key to building a social protection floor for all as part of each country's national social security system and comprehensive continuum of care policies, and to contribute to the broader objectives of promoting the health and well-being of mothers and their children, to achieve gender equality at work and to advance decent work for both women and men.'[764]

Non-contributory social assistance would be applicable where workers do not meet the requirements to qualify for contributory social insurance cash benefits. These women would then be entitled to receive adequate benefits to replace their income, and maintain their and their child's health and a suitable standard of living, as stipulated in Convention 183.[765] The ILO notes that in practice, 'this applies to millions of women in the informal economy, with limited or no capacity to regularly contribute to social insurance schemes'.[766]

By adopting this combination of social insurance and social assistance models, states would effectively increase universal coverage of maternity protection for all women workers. The Committee on Economic, Social and Cultural rights observes that the measures that are to be used to provide social security benefits can include:

> '(a) Contributory or insurance-based schemes such as social insurance, which is expressly mentioned in article 9. These generally involve compulsory contributions from beneficiaries, employers and, sometimes, the State, in conjunction with the payment of benefits and administrative expenses from a common fund; (b) Non-contributory schemes such as universal schemes (which provide the relevant benefit in principle to everyone who experiences a particular risk or contingency) or targeted social assistance schemes (where benefits are

[764] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 8.
[765] ILO Convention 183 op cit note 227, article 6(1) & (2).
[766] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 2.

> received by those in a situation of need). In almost all States parties, non-contributory schemes will be required since it is unlikely that every person can be adequately covered through an insurance-based system.'[767]

As a starting point, such a measure would require not only the creation of a more inclusive contributory social insurance scheme, but also the provision of support, particularly for vulnerable women workers, through a non-contributory social assistance scheme. This would require the implementation of a means test to identify low-income and food-insecure homes.

Non-contributory cash transfer programmes have been recognised for their potential to ensure a basic level of income security, to reduce and prevent poverty, and contribute to the economic empowerment of women.[768] Cash transfers are universally 'the least administratively onerous means of social support, meet the wide ranging and shifting needs of pregnant women and, by extension, of unborn children'.[769] Availing such a social assistance mechanism during pregnancy, and creating incentives such as regular attendance at antenatal clinics, improves pregnancy outcomes, in particular in the South African context where 30 per cent of pregnant woman are HIV-infected.[770] Earlier attendance at clinics and access to antiretrovirals during pregnancy significantly reduces the transmission of HIV to children. Support and outcomes for breastfeeding are also enhanced.[771] Appropriate eligibility criteria and levels of cash transfers would need to be determined in a manner that ensures the inclusion of poor working women, so that they are not disqualified for earning an income.[772] As noted, the implementation of a means test would be needed to identify the most vulnerable women.

In addition to cash transfer programmes, additional forms of social assistance are available. These can include childcare programmes, as studies in India demonstrate that improved access to childcare facilities increases the earnings of self-employed women workers.[773] In some countries, states link cash transfers to conditionalities such as attendance at antenatal clinics, or allowing postpartum care visits, while in others states used other forms of linkages between support and access to critical services, such as cash and vouchers to attend health facilities, delivery of babies in medical institutions, and transport costs. Other approaches include the

[767] CESCR 'General Comment 14' op cit note 212 at para 4.
[768] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 7.
[769] The DSD/Centre for Health Policy op cit note 68 at 2–3.
[770] Ibid.
[771] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 7.
[772] Ibid.
[773] Alfers op cit note 27 at 16.

provision of gift hampers, nutritional education and supplements, cooking lessons and counselling sessions – in addition to cash transfers and vouchers.[774]

In South Africa, in considering the most efficient and appropriate vehicle for access to such a cash transfer social assistance mechanism, research indicates that the best possible approach would be to extend the current CSG to women who qualify for this support – in the final six months of their pregnancy – rather than create a new social grant. This would bring such women into the social security system, with the grant registered in their name, which would be converted to a CSG after the birth of their child.[775] The CSG is currently available to the primary care giver of a child below the age of eighteen, where the caregiver earns less than R52 800 per year. A monthly sum of R450 is paid in cash to the caregiver, or deposited into their bank account.[776]

Not all primary caregivers who qualify to receive a CSG are necessarily the biological mothers of these children, for instance where such primary care is taken on by alternative family members or people outside of the family. What is proposed effectively is to afford a pregnancy grant to all women qualifying for such support through the administration of a means test, after the first trimester of their pregnancy. The means test would assess applicants' compliance with eligibility criteria, the chief provision being that they do not meet the requirements to qualify for contributory social insurance benefits. Upon the birth of the child, should continued support be required, the grant would be converted to a CSG. Such an approach is supported by additional studies that demonstrate that it is most feasible and efficient to extend such grants to women during pregnancy 'through integrating support for women and children within one system, and adopting simplified procedures, including uncomplicated enrolment and disbursement procedures, cash-only support, and few or no conditionalities.'[777]

(c) Recommended legislative model

Drawing on the Convention 183 core requirements outlined above, together with comparable best practice emerging from the comparative component of this study, the researcher makes the following recommendations on a legislative approach to extending maternity benefits to

[774] Chersich op cit note 24.
[775] ILO 'Maternity cash benefits for workers in the informal economy' op cit note 69 at 3.
[776] South African Government 'Child Support Grant', available at, *https://www.gov.za/services/child-care-social-benefits/child-support-grant*, accessed on 13 November 2020.
[777] Chersich op cit note 24 at 1206.

self-employed workers, in a manner that mirrors that of employed workers or employees. Where possible, actual proposed legislative amendments are proposed. In such instances, words in bold type in square brackets indicate omissions from existing enactments, while words underlined with a solid line indicate insertions in existing enactments.

1) Amend the Unemployment Insurance Amendment (UIA) Act[778] and the Unemployment Insurance Contributions (UIC) Act to include the extension of the statutory social insurance scheme, the Unemployment Insurance Fund (UIF), to self-employed and atypical workers, thereby extending the maternity leave system to all categories of workers. The UIA makes provision for such extension of categories of persons. The Minister of Labour may after receipt of an application in the prescribed forms and with the concurrence of the Unemployment Insurance Board, 'by notice in the *Gazette*, declare that as from a date specified in the notice any specified class of persons, or any person employed in any specified business of section of a business or in any specified area, must be regarded as contributors for purposes of this Act.'[779]

   Should self-employed workers be introduced as such a specified class of persons or specified business, the researcher submits that the UIA be amended as follows: [780]

   'Section 1:

   > "Employee" means, <u>for the purposes of this Act</u>, any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person,**[but excludes any independent contractors]**, <u>and includes self-employed workers</u>.'

   'Section 3:

   > (1) This Act applies to **[~~all~~]** employers and employees <u>of all kinds, including informal and self-employed workers, but</u> other than—'

   In addition, the Unemployment Insurance Contributions (UIC) Act[781] would require the following amendments:

   'Section 1:[782]

   > "Employee" means, <u>for the purposes of this Act</u>, any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, **[but**

[778] UIA op cit note 2.
[779] Ibid at s 69(1).
[780] The Solidarity Center 'Maternity Protection for Self-Employed Workers' op cit note 511 at 17.
[781] No. 4 of 2002.
[782] The Solidarity Center 'Maternity Protection for Self-Employed Workers' op cit note 511 at 17.

excludes any independent contractor], and includes self-employed workers.'

'Section 4:

(1) This Act applies to **[all]** employers and employees of all kinds, including informal and self-employed workers, other than—'

2) While registration with and contribution to the UIF for formally employed workers is compulsory, this should be made voluntary for self-employed and atypical workers. However, such registration and contribution should be made a condition for claiming cash benefits. No amendments are required to the UIA, which provides that a contributor or dependent, as the case may be, is entitled to the unemployment insurance benefits contained in that Act.[783] This would effectively result in non-contributors being excluded from applying for benefits.

3) Retain the current maximum period of seventeen weeks maternity leave, accommodating the Convention 183 provisions for instances of illness, complications arising through birth, or risk thereof, and any gaps between the presumed and actual date of birth. No amendments are required to the UIA, which currently provides that the maximum period of maternity leave is 17,32 weeks.[784]

4) Provide cash benefits for the duration of the period of maternity leave, at 100 per cent of the worker's previous earnings.[785] While ILO Convention 183 requires that benefits be paid at a rate of at least two-thirds of a worker's prior earnings,[786] the comparative studies undertaken by the researcher indicate that best practice in the countries examined is to pay out maternity benefits at 100 per cent of a worker's prior earnings.[787] In addition, the significance of income replacement for early child development, particularly in vulnerable households, to promote the best interests of the child, has been firmly established, and provides the rationale for this proposed increase in

[783] UIA op cit note 2 s 12(1).
[784] Ibid s 24(4).
[785] The researcher acknowledges the implications of disparity in providing for 100% maternity benefits, distinct from the 66% benefits accorded for parental leave, adoption leave and commissioning parental leave, as enacted by the recent Labour Laws Amendment Act of 2018, op cit. The researcher asserts that all three additional categories of benefits should be increased to 100%, on the same basis outlined in this rationale, but notes that making this case is beyond the scope of this study. Should maternity benefits be increased to 100%, this will lay the ground for a future challenge to the prescribed benefits for these other categories of parental leave.
[786] ILO Convention 183 op cit note 227.
[787] See table in Chapter 6, above.

benefits. [788] Where the worker's earnings fluctuate, this amount should be calculated on the average daily remuneration of the worker over the previous six months. On this point, no amendments are required to the UIA, which already makes such a provision for fluctuation in income.[789] The increase in maternity cash benefits would require the following amendment to the UIA:

Amend s 12(c) by the insertion in subsection (3) after (b) of the following paragraph:

'(c) For the purposes of Part D, maternity benefits must be paid at a rate of 100% of the earnings of the beneficiary at the date of application, subject to the maximum income threshold set in terms of paragraph (a), and the prescribed minimum benefits set in terms of section 13(6).'[790]

5) Employers and workers should each contribute one per cent of the value of the worker's monthly salary to the UIF. Where there is no employment relationship, as in the case of self-employed workers, the state should subsidise the employer's portion, and contribute the equivalent one per cent of the worker's earnings over the previous six months. The financing of the maternity benefits scheme is accordingly a combination of taxation and worker contribution. The Solidarity Center has identified a raft of amendments to the UIA to incorporate such a provision.[791] The following amendments are proposed for insertion in the UIA as follows:

'Section 5:

(3) In the event that the insured is a self-employed worker, the insured must pay contributions to the Comissioner in terms of section 8.'

'Section 6 (1):

(c) by a self-employed worker, must be one per cent of the average monthly remuneration earned, as calculated based upon the six preceding monthly remunerations. Each month, the Commissioner shall make a complementary contribution on behalf of the self-employed worker that is equal to the amount of the self-employed worker's monthly contribution.

'Section 8:

[788] See discussion on ECD in Chapter 5, above.
[789] This latter provision is catered for in s 13(2) in the UIA.
[790] See recommendation 7), below.
[791] The Solidarity Center 'Maternity Protection for Self-Employed Workers' op cit note 511 at 18-19.

(1) Every employer, other than an employer contemplated in section 9(1), must on a monthly basis pay the amount of all employees' contributions and the employer's contributions in respect of every employee in the employment of that employer to the Commissioner not later than seven days, or such longer period as the Commissioner may determine, after the end of the month in respect of which the contributions are payable.

Every self-employed worker must on a monthly basis pay the amount of his or her own contribution to the Commissioner not later than seven days, or such longer period as the Commissioner may determine, after the end of the month in respect of which the contributions are payable.

(2) An employer, or self-employed worker, must, together with the payment contemplated in subsection (1), submit a statement in such form as the Commissioner may require and reflecting the amount of the payment and such other particulars as the Minister may prescribe by regulation.

(3) If the amount of any contribution, interest or penalty paid by an employer, or self-employed worker, to the Commissioner was not due or payable, or is in excess of the amount due or payable in terms of this Act, that amount, or such excess amount, must be refunded to that employer, or self-employed worker, by the Commissioner.

(4) The Commissioner must notify the Director-General, within such period as may be agreed upon between the Commissioner and the Director-General, of the amount of the contributions, interest and penalties collected from, and refunds made to, employers, or self-employed workers, during the previous month and provide such further particulars as may be agreed upon by the Commissioner and the Director-General.

'Section 10:

(1) An employer, or self-employed worker, to whom this Act applies must apply for registration to the Commissioner or the Unemployment Insurance Commissioner, whichever is applicable to such employer in terms of section 8 or 9, in such manner and within such period as may be prescribed by the Commissioner or Unemployment Insurance Commissioner, respectively.

(2) The employer, or self-employed worker, must, together with the registration contemplated in subsection (1) provide such information as the Minister may prescribe by regulation.

(3) The employer must, before the seventh day of each month, submit to the Commissioner or the Unemployment Insurance Commissioner, whichever is applicable to such employer in terms of section 8 or 9, such information relating to its employees as the Minister may prescribe by regulation, including details relating to-

(a) the termination of the employment of any employee; and

(b) the appointment of any employee by the employer.

(4) The Commissioner or the Unemployment Insurance Commissioner, as the case may be, may request the employer, or self-employed worker, to provide within 30 days of the request, or such extended period as the Commissioner or Unemployment Insurance Commissioner may allow, such additional particulars as may reasonably be required to give effect to the purpose of this Act.'

6) As a condition for claiming cash benefits, while international best practice indicates that workers should have made six monthly payments to the social insurance fund prior to their claim, the researcher proposes that the current requirement that the contributor must have been in employment for at least 13 weeks prior to claiming maternity benefits be retained.[792]

7) Establish a minimum monthly maternity benefit, based on a percentage of the minimum wage per sector, so that all workers attain the Convention 183 requirement of maintaining maternal and child health and an adequate standard of life. Section 13(3) of the UIA provides that 'a contributor's entitlement to benefits … accrues at a rate of one day's benefit for every completed six days of employment as a contributor subject to a maximum accrual of 238 days benefit in the four year period immediately preceding the date of application for benefits.' Should the maternity benefits for any worker calculated according to this formula fall below the proposed minimum monthly maternity benefit, then the state should subsidise this gap. The following amendments are proposed for insertion in the UIA as follows:

'Section 13:

(3) Subject to subsections (5) and (6) a contributor's entitlement to benefits… accrues at a rate of one day's benefit for every completed six days' of employment as a contributor subject to a maximum accrual of 238 days' benefit in the four year period immediately preceding the date of application for benefits….'

792 UIA s 24(6).

(6) The maternity benefits that a contributor is entitled to in terms of subsection (3) and as outlined in Part D of this Chapter shall not fall below a minimum monthly maternity benefit to be declared by the Minister after receipt of an application in the prescribed forms and with the concurrence of the Board, by notice in the *Gazette*. In the event the benefits contained in Schedule 2 as calculated in Schedule 3 fall below this prescribed minimum benefit, any such deficit will be paid out to the contributor by the Fund.

8) Include the provision that if the mother dies while still entitled to receive maternity leave and cash benefits, these would accrue to the child's guardian. This would require the following amendment to the UIA:

'Section 30:

30 (1) The surviving spouse or a life partner of a deceased contributor is entitled to the deceased's benefits as contemplated in this Part,

(a) in accordance with prescribed requirements and the provisions of this Part and

(b) within six months of the death of the contributor except that, on just cause shown, the Commissioner may accept an application after the six-month period.

(2) Any dependent child of a deceased contributor is entitled to the dependant's benefits as contemplated in this Part, if application is made in accordance with the provisions of this Part and-

(a) there is no surviving spouse or life partner; or

(b) the surviving spouse or life partner has not made application for the benefits within six months of the contributor's death.

(3) The benefit payable to the dependant is the unemployment benefit referred to in Part B of this Chapter and the maternity benefit referred to in Part D of this Chapter, that would have been payable to the deceased contributor if the contributor had been alive.'

9) Supplement the UIF social insurance maternity benefits model with a non-contributory social assistance scheme to ensure universal coverage, particularly in instances where a worker does not qualify for maternity benefits – in that she has not registered with the UIF and/or made monthly contributions, in accordance with a means test. In this regard, extend the current CSG to commence after three months' of pregnancy, to operate six

months prior to the child's birth, and for the year following the birth of the child. This would require the following amendment to the Social Assistance Act:[793]

'Section 6:

(a) A person is, subject to the provisions of section 5, eligible for a child support grant if he or she is the primary care giver of the child.

(b) Benefits shall be payable from the 12th week of pregnancy in instances where the beneficiary is the biological mother of the child. '

10) Consider institutional arrangements and administrative procedures for the registration for and provision of social insurance and assistance benefits, and ensure that these are accessible and address the barriers many self-employed workers experience, particularly those within the informal economy, as noted above. These would need to be developed in the implementation of the UIA and its regulations.

V. CONCLUSION

This study has provided a solid legal basis for the extension of maternity benefits to self-employed workers. It established a basis for the argument that the state has been acting unconstitutionally and unfairly discriminating against self-employed workers, by excluding them from its maternity protection regime. The study has also shown that there is a strong legal obligation on the state to act. Investigating possible mechanisms to extend maternity benefits to self-employed workers, particularly considering the implications for law reform should South Africa ratify Convention 183, the study has explored how best South African can implement its obligations in terms of international law and the Constitution. The recommendations outlined above are based on comparative analysis with countries comparable to South Africa – demonstrating that these are both workable and affordable, and would not be prohibitive for the state to implement.

While the state has clearly conceded that there is a gap in the maternity benefits framework, and hence the establishment of the SALRC Project 143, assumptions cannot be made that this will necessarily result in the extension of maternity benefits to self-employed workers. The SALRC will agree upon a final report and recommendations based on the project committee

[793] Social Assistance Act No. 13 of 2004.

proposals, and will table this with the Minister of Justice and Constitutional Development. Thereafter, if accepted, it will be put before Cabinet. Critical decisions regarding funding and costing will need to be made and the buy-in of labour partners and NEDLAC sought.

The SALRC Project 143 process requires deft engagement with other state entities engaged in social development, and labour and health policy reforms currently underway. This is essential to ensure that the issue of maternity protection is synergised and included among these competing policy issues, and that a coherent slate of law reform for the labour sector emerges, with the necessary support from organised labour, business and the state.

Recommendations on necessary law reform will require careful costing and inclusion in state budgetary processes, at a time when the South African economy is under threat, and poverty and inequality are deepening. It cannot be disputed that the state has an obligation to enable an appropriate mechanism to ensure the provision of maternity benefits. While the current law reform process should take its course, with the SALRC duty bound to deliver on its mandate and advise the Minister of Justice and Correctional Services on appropriate reform, final uptake by the state will ultimately be a political decision, weighted against competing policy issues and financial constraints. Within such a context of uncertainty, independent bodies such as the Commission for Gender Equality, and organised structures of self-employed and informal economy women workers would be well placed to keep pressure on the state to enact necessary reforms. Such pressure should include active participation in the unfolding law reform process, monitoring of the uptake of inputs into this process, ongoing policy advocacy to secure the ratification of Convention 183 and strategic litigation, if needed.

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