

Critical reflections on the justiciability of the right to education in Ghana

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Summary: *Article 38(1) of the 1992 Constitution of Ghana provides that 'the state shall provide educational facilities at all levels and in all the regions of Ghana, and shall to the greatest extent feasible, make those facilities available to all citizens'. 'Feasible' in plain language means 'if possible'. This means that if it not possible, educational facilities would not be made available to all. Article 38(3) also provides that the state shall 'subject to the availability of resources' provide equal and balanced access to secondary education and other pre-tertiary education. The wording of article 38(3) suggests that, in the event of a lack of resources, there would be no equal and balanced access to basic education. Articles 38(1) and 38(3) serve as a constitutional*

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constraint to the Free Compulsory Basic Education in Ghana because, if the provision of educational facilities is subject to 'feasibility' and if its equal and balanced access is subject to resource availability, then free compulsory universal basic education as envisaged under international human rights instruments will be difficult to realise. Through a doctrinal approach to research based on legal literature, this article analyses the issue of whether or not the justiciability of the right to education has been adequately addressed by the legal jurisprudence in Ghana. We conclude that the Constitution, legislation, policy and jurisprudence of the courts acknowledge that the right to education is a right that can be enforced in courts. In this sense, there are many avenues through which one can argue for justiciability of the right in Ghana, including through article 33(5) of the Constitution.

Key words: *Ghana; education; justiciability; human rights; 1992 Constitution of Ghana*

1 Introduction

This article aims to address the issue of whether or not the justiciability of the right to basic education has been adequately addressed by the legal jurisprudence in Ghana. The definitive question to answer in this discussion is whether Ghana provides the milieu to satisfy rights holders to seek redress in its courts on the right to education.

Education surfaces as a critical index to ascertaining the achievement of a human development trajectory any time human development discourse is activated.¹ Education is regarded as a critical priority area for securing the right to sustainable development.² The commitments required in the legal, political and policy framework are non-negotiable to achieving the objectives set under the United Nation (UN) 2030 Agenda for Sustainable Development (Agenda 2030).³ Agenda 2030 spells out the scope of commitments of UN member states to the obligation of 'providing inclusive and equitable quality education at all levels – early childhood, primary, secondary, tertiary, technical and vocational training'.⁴ Agenda 2030 emphasises that

1 See the Transforming the World: The 2030 Agenda for Sustainable Development.

2 RA Ige & CC Ngang 'The right to development: An African feminist view' in CC Ngang, SD Kamga & V Gumede (eds) *Perspectives on the right to development* (2018) 112.

3 'Education', <https://www.right-to-education.org/issue-page/education-2030> (accessed 24 February 2020).

4 Agenda 25, 2030 Agenda for Sustainable Development.

[a]ll people, irrespective of sex, age, race, ethnicity, and persons with disabilities, migrants, indigenous peoples, children and youth, especially those in vulnerable situations, should have access to life-long learning opportunities that help them acquire the knowledge and skills needed to exploit opportunities and to participate fully in society.⁵

The inclusion of the 17 Sustainable Development Goals (SDGs) in Agenda 2030 was a step towards committing all states to specific issues that are pivotal to fighting hunger, poverty, inequality and bad governance in the world. SDG 4, which is dedicated to education, is to 'ensure inclusive and equitable quality education and promote lifelong learning opportunities for all'.⁶ This sets the clear basis for the argument that there is a nexus between the right to education and Agenda 2030. The educational goal under the SDGs 'is right-based and seeks to ensure the full enjoyment of human rights as fundamental to achieving sustainable development'.⁷

To this end, the proximate obligation to this goal under international law is for states to provide free, compulsory, and progressive basic education to all.⁸ Ghana has since 2017 reached this target through a deliberate government policy towards free access to secondary education with a commitment to non-discriminatory access to quality pre-school (early childhood care and education which, although regarded as critical, are not seriously attended to under international human rights law)⁹ and primary education.

The educational right under Agenda 2030 only commits countries to implementing mechanisms that ensure a participatory, transparent, accountable and effective framework that secures this right at both the local and national levels.¹⁰ It is argued that accountability as envisaged by Agenda 2030 should incorporate judicial accountability to ensure the effective implementation of its mandate. This will also empower rights holders to seek legal remedies for violations, and hold violators to account for their positive and negative duties.

The duty of the state to safeguard the rights of citizens includes steps to prevent third parties from infringing on the rights of others. It requires that the state provides the environment for the vulnerable, such as children of school-going age, to enjoy such rights. What

5 As above. For further reading, see also 'Human rights guide to the Sustainable Development Goals'.

6 Sustainable Development Goal 4 Agenda 2030.

7 'Education' (n 3).

8 Ghana's obligation to this goal is captured under arts 38(2) & (3)(a)-(c) of the Constitution.

9 'Education' (n 3).

10 As above.

has become the most difficult obligations relating to justiciability are those that concern positive duties, to fulfil the positive duties imposed by the courts and to simultaneously provide the needed resources to meet the conditions of the obligations.¹¹ However, it must be emphasised that the verdicts of the judiciary on issues of justiciability of socio-economic and cultural rights have an enormous impact on the development of justice jurisprudence and the psychology of the ordinary person on access to justice.¹² The courts, therefore, must place at the centre of their reasoning in judgments the importance of the right at stake in cases involving social, economic and cultural issues, to protect and restore the fundamental human rights of plaintiffs.

The article will focus on analysing Ghana's legal obligations under international human rights law *vis-à-vis* justiciability of the right to education under its domestic law, and proffer some recommendations for the way forward.

2 Right to education under international and regional human rights law

In December 1948 in Paris, France, the UN proclaimed through its General Assembly Resolution 217A and adopted the Universal Declaration of Human Rights (Universal Declaration) to work towards achieving the protection of the fundamental human rights of all citizens of the world as a cardinal foundation for equality and world peace. To the extent of fostering development and world peace, the Universal Declaration emphasised education to provide comprehensive and all-embracing access and focus to all. It emboldened the synergies between education, development and peace and provided:¹³

Education shall be directed to the full development of the human personality and [to] the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Particularly noted in its Preamble, the Universal Declaration affirms that 'recognition of the inherent dignity and [of] the equal and inalienable rights of all members of the human family is the

11 See A Nolan, B Porter & M Langford 'The justiciability of social and economic rights: An updated appraisal' (2007) 36.

12 As above.

13 Art 26(2) Universal Declaration.

foundation of freedom, justice and peace in the world'.¹⁴ Giving impetus to this affirmation, the Universal Declaration emphasises in article 1 that '[a]ll human beings are born free and equal in dignity and rights'.¹⁵ It is contended that any deviations from any of the rights set hereafter in the preceding articles of this Declaration (the right to education inclusive) amount to the usurpation and detraction from the dignified life of anyone who suffers such violation(s). Education is a human right. It is right that must be realised, respected and protected by all duty bearers. At the least, this is what the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁶ affirm.

Without shades of grey, the Declaration concerning education is that '[e]veryone has the right to education'.¹⁷ Article 13 of ICESCR states that '[e]veryone has the right to education. Primary education should be compulsory and free to all'.¹⁸ The emphasis of these provisions to this end reinforces free and compulsory education at least at the basic level of education.¹⁹ The African Charter on Human and Peoples' Rights (African Charter)²⁰ legitimises the improvement of the well-being of its citizens through the practicalisation of total realisation of the fundamental human rights²¹ proclaimed under ICESCR. Again, the right to education is also guaranteed in the Convention on the Rights of the Child (CRC) and African Charter on the Rights and Welfare of the Child (African Children's Charter).²² The challenge again remains with how the ordinary citizen could be informed about these rights. It is also a matter of importance to highlight the relevant avenues to seek enforcement by overcoming the complex legal architecture for justice and equity.²³

14 Preamble to the Universal Declaration para 1.

15 Art 1 Universal Declaration.

16 International Covenant on Economic, Social and Cultural Rights (1966), together with the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966) make up the International Bill of Human Rights.

17 Art 26 Universal Declaration.

18 International Covenant on Economic, Social and Cultural Rights, <https://www.coe.int/en/web/compass/international-covenant-on-economic-social-and-cultural-rights> (accessed 20 July 2020).

19 As above.

20 Ghana ratified the African Charter in 1989, <https://www.achpr.org/statepartiestotheafricancharter> (accessed 4 August 2020).

21 Preamble to the African Charter on Human and Peoples' Rights (1981/1986).

22 African Charter on the Rights and Welfare of the Child adopted on 11 July 1990, enforced from 29 November 1999.

23 E Durojaye, O Adeniyi & CC Ngang 'Accesses to justice as a mechanism for the enforcement of the right to development in Africa' in Ngang et al (n 2) 47.

3 Nature of article 17 of the African Charter

As indicated above, the provision on the right to education in the African Charter, as it were, was a direct follow-up to article 26(1) of the Universal Declaration and article 13 of ICESCR. The Universal Declaration and ICESCR demand education as a right for every individual. The link between the provisions in the three instruments therefore is obvious. The provisions should be seen in the same context, except for their jurisprudential application. While the Universal Declaration and ICESCR provisions bind all UN member states, the African Charter applies only to African Union (AU) member states.

There is no contestation on the explicit expositions given under article 17(1) concerning the right to education in the African Charter. Deontologically, the right to education imposes an ethical duty on member states of the AU to prioritise education as a moral norm. The full text of article 17 thus states the following:²⁴

- (1) Every individual shall have the right to education.
- (2) Every individual may freely take part in [the] cultural life of his community.
- (3) The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.

The duty inherent in article 17(1) enjoins countries, not only out of necessity but as a moral obligation, to structure their legal architecture to prevent the violation of the right espoused therein. The natural flow from the obligation under this article 17(1), therefore, is nothing but a legal and ethical obligation which requires fairness, equity, non-discrimination, responsiveness, equality and accountability. A textual interpretation²⁵ of the article confirms an explicit enunciation of the right to education under 17(1). The obligatory wording of the article leaves no ambiguity in its justiciability and, for that matter, its enforceability.

It should be emphasised to underline that article 17 does not split the components or levels of education to be covered as a right. In its totality and, read in conjunction with the African Children's Charter, it presumably is consistent to underscore that this right contemplates a person up to the age of 18 years,²⁶ at which stage most children in Ghana are undergoing pre-university education.

²⁴ Arts 17(1) to (3) African Charter.

²⁵ For more on what a textualist do, see the case of *Green v Bock Laundry Mach Co* 490 U.S. 504 528 (1989).

²⁶ Art 2 African Children's Charter.

Article 2 of the African Children's Charter states that '[f]or [the purposes of] this Charter, a child means every human being below the age of 18 years'.²⁷ In specificity and consistent with this holding in the foregoing, the Childre's Charter specifies that '[e]very child shall have the right to education'²⁸ and emphasises the provision of free and compulsory basic education²⁹ while encouraging progressively free and accessible secondary education in its different forms to all.³⁰ From the perspective of human rights discourse, article 17(1) presents no scintilla of doubt about the fact that education is a justiciable right under the African Charter.

The normative provisions on which any human being qualifies as a child in the African Charter read in tandem with the African Children's Charter seem conterminous with the constitutional and legislative underpinnings of Ghana's definition of a child.³¹ This therefore resonates with the call to push for more 'complete' justiciable provisions under the laws of Ghana to give meaning to seeking the welfare of the child under the Children's Act 560 of 1998 of Ghana.³²

4 Justiciability of the right to education under international law

Justiciability connotes access to justice. Access to justice is a fundamental credential of any democratic and progressive society.³³ It is critical as an opportunity to seek accountability from violators of the rights of others.³⁴ It deters impunity and discourages trumping on the fundamental human rights of other citizens.³⁵ Justiciability brings out the issue of whether the right holder has access to a structured and existing mechanism to remedy the abuse or to seek restoration. ICESCR defined justiciability as 'those matters which are appropriately resolved by the courts'.³⁶ In the international fora, bodies such as the African Commission on Human and Peoples'

27 As above.

28 Art 11(1) African Children's Charter.

29 Art 11(3)(a) African Children's Charter.

30 Art 11(3)(b) African Children's Charter.

31 Sec 1 Children's Act 560 of 1998; art 28(5) 1992 Constitution.

32 The Preamble to the Children's Act states among the objects to reform and consolidate the law relating to children in order to provide for the rights of the child.

33 FK Korankye-Sakyi 'The civil justice reform debate: An African perspective' in ET Yin & NF Kofie (eds) *Advancing civil justice reform and conflict resolution in Africa and Asia: Comparative analyses and case studies* (2021) 46.

34 'Justiciability', <https://www.right-to-education.org/issue-page/justiciability> (accessed 24 February 2020).

35 As above.

36 Para 10 ICESCR (n 18).

Rights (African Commission), the African Court on Human and Peoples' Rights (African Court),³⁷ the European Court of Human Rights, the European Committee of Social Rights,³⁸ and UN treaty bodies have jurisdictions over such issues of human rights violations.

A quick review of human rights jurisprudence under international law will reveal that there has always been a dichotomy between socio-economic and cultural rights, on the one hand, and civil and political rights, on the other.³⁹ In 1966 two distinct instruments were adopted to clarify this distinction: ICESCR⁴⁰ and the International Covenant on Civil and Political Rights (ICCPR).⁴¹ One argument postulated for the separation of the instruments as against a unified Bill of Rights at that stage was the fact that socio-economic and cultural rights are not justiciable as compared to civil and political rights, which cases go before the courts every time, irrespective of the jurisdiction the latter was occasioned.⁴² Again, socio-economic and cultural rights present varied and complex obligations on the state as compared to civil and political rights. The freedom of association, for instance, as a right under civil and political rights, may only impose a negative responsibility on the state to prevent interferences with the right of a citizen to freely associate. On the other hand, the right to education may demand positive and cumbersome duties that would require the state to provide school buildings, qualified teaching personnel as well as teaching and learning materials as a result of a successful adjudication against the state.

The resistance to incorporating socio-economic and cultural rights into the national legislative framework to make them justiciable stems from the apparent anxiety that when the courts make holdings on these rights, they invariably constitute policy decisions that have binding effects on resource allocations, a situation which often is abhorred by the executive arm of governments, as constituting a violation of the principle of separation of powers under any democratic dispensation.⁴³

37 Established under the auspices of the African Charter on Human and Peoples' Rights in 1998.

38 The ESCR Committee has a very narrow jurisdiction related to 'vocational guidance and vocational training'; see arts 9 and 10 of the Revised Social Charter.

39 KK Mwenda & SG Owusu 'Human rights law in context: The case of Ghana' (1998) 7 *Tilburg Law Review* 263.

40 This instrument guaranteed *inter alia* the rights to education, health and work.

41 This instrument guaranteed *inter alia* the rights to life, freedom of expression and a free trial.

42 'Justiciability' (n 34). See also Nolan et al (n 11).

43 Mwenda & Owusu (n 39); M Langford et al 'Introduction: A new mechanism' in M Langford et al (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A commentary* (2016) 2; see also 5th session

However, the case for the strict confinement of these rights into categorisations has been whittled down in recent developments, on the basis that human rights generally are a composite phenomenon, indivisible, interconnected and interrelated.⁴⁴ It has been posited that the arbitral classification of these sets of rights puts them out of the purview of the courts, which runs contrarily to the indivisibility tag accorded to these human rights.⁴⁵ Again, the arguments for the dichotomy have been severally debunked as it is now generally accepted that all human rights, whether civil and political rights or socio-economic rights, endanger three forms of obligations – the obligation to respect, protect and fulfil.⁴⁶ To buttress why the dichotomy is wrong, it is instructive to note that even though the right to form or join trade unions is a socio-economic right, it also imposes negative responsibilities on the state as civil and political rights will do. Again, just as the right to education which requires positive responsibilities on the state do, the same can be said about the right to fair trial as a civil and political right which would require a working police and prosecution service, court buildings, personnel and judges and funding for legal aid to the victim.⁴⁷ The position of the UN on this issue is that the distinctions ostensibly created between these rights are needless simply because of the nature of these rights or by the dictates of the provisions of ICESCR.⁴⁸

For instance, both CRC (1989) and the African Children's Charter fuse both civil and political rights and socio-economic and cultural rights. There is stronger evidence to the effect that socio-economic and cultural rights can easily be made justiciable and effectively enforced as seen under regional laws and the complaints procedures for ICESCR and CRC.⁴⁹ There are options to satisfactory justice delivery apart from judicial remedy if administrative options are adequately provided within a jurisdiction of a state party in line with the tenets and procedures established by ICESCR.⁵⁰

(1990) document E/1991/23 General Comment 3: The nature of states parties' obligations (art 2, para 1 of the Covenant).

44 Para 5 of the Vienna Declaration and Programme of Action (1993).

45 Para 10 of ESCR Committee 'General comment No 9: The domestic application of the Covenant' E/C.12/1998/24.

46 D Bilchitz 'Socio-economic rights, economic crisis, and legal doctrine' (2014) 12 *International Journal of Constitutional Law* 710.

47 As above; D Robertson 'A dictionary of human rights' (2004); Y Ghai 'Human rights and social development toward democratisation and social justice' United Nations Research Institute for Social Development. Democracy, Governance and Human Rights Programme Paper (5 October 2001) 33-34; TJ Melish 'Protecting economic, social and cultural rights in the Inter-American human rights system: A manual on presenting claims' (2002) 36.

48 Bilchitz (n 46).

49 'Justiciability' (n 34). See also Nolan et al (n 11).

50 Para 9 ESCR Committee 'General Comment 9: The domestic application of the Covenant' E/C.12/1998/24.

Under international and the regional bills of human rights, the right to education is guaranteed and universal to every person.⁵¹ In that regard, such right can be actualised through a national legislation. Since Ghana is a common law state that follows a dualist approach to international treaty implementation, it is required of it to nationalise or domesticate any instrument ratified through its Parliament before they become enforceable.⁵²

Again, it has been argued that the mere presence of legal backing for a right does not lend it the potency expected, unless appropriate mechanisms are put in place to enforce it.⁵³ The avenue for legal enforcement and recourse, therefore, is the prescription to make the right to education justiciable in any dispensation.⁵⁴ To consider the right to education as a justiciable right requires that upon its violation, the citizen or the right holder has the avenue to claim an enforceable remedy (including, but not limited to, interlocutory or perpetual injunctions, changes in policy measures, the striking down or amendment of laws, administrative penalties, and criminal punishment) before a properly-constituted fair and unbiased entity.⁵⁵ This also infers that the institutions of the state, such as the courts or administrative bodies, can compel the state as a duty bearer to account for its actions or otherwise in line with its obligations under international, regional and national laws which it has signed, ratified or enacted on its own.

The role of the courts to hold the state and state actors liable for violations of rights and to compel them to appease such victims or the aggrieved (complainants) with commensurable remedies is founded on good tenets of the rule of law under international law. In the event of the failure of a case on merit or on account of technicalities, it is still useful to amplify the tenets of such right and 'attract media attention, which may lead to accountability and change in the future'.⁵⁶ Individuals and groups are allowed under such circumstances where their rights to education are violated to seek redress before the courts for appropriate interventions and protections. By giving the right to education a total justiciable status

51 Art 26 Universal Declaration; art 16 African Charter. See 'Justiciability' (n 34).

52 EK Quansah 'An examination of the use of international law as in interpretative tool in human rights litigation in Ghana and Botswana' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 37-39; AKP Kludze 'Constitutional rights and their relationship with international human rights in Ghana' (2008) 41 *Israel Law Review* 677-679.

53 'Justiciability' (n 34).

54 As above.

55 International Commission of Jurists (2008) 1.

56 'Justiciability' (n 34).

under the jurisprudence of Ghana reinforces accountability for the economic, social and civil rights of the people.

At the level of international law, the justiciability of the right to education has been explicitly coded, and finds expression, for example, under the complaint's procedures under ICESCR and CRC.⁵⁷ The entry into force of these procedures reflects on the number of case laws that have emerged under the purview of international law.⁵⁸ By reason of this, various dimensions of the right to education have been taken through judicial tests in various international fora with varying outcomes.

Regional level interventions on the justiciability of the right to education are catered for with mechanisms that have proven applicable and accessible. These mechanisms have been well received and passed as accountable, compared to national procedures as pertains in Ghana. For example, in the case of *Free Legal Assistance Group & Others v Zaire*⁵⁹ the African Commission ruled that the closure of universities and senior high schools in Zaire (presently the Democratic Republic of the Congo (DRC)) for about two years on the grounds of mismanagement of public funds was a violation of the provisions of the African Charter.⁶⁰

In most jurisdictions discrimination has been noted as the reason for amenability to their domestic laws for the justiciability of the right to education.⁶¹ Issues on access, quality and educational funding also surface as rampant infractions for litigations at the national level⁶² as well as matters concerning private participation in the provision of educational services in a sovereign nation.⁶³ It has been noted that in some jurisdictions there are clear manifestations of impediments to the justiciability of the right to basic education.⁶⁴

Constraining elements to access to justice in the face of clear legal provisions for the justiciability of the right to education have their effects on the subject matter under discussion. There have been

57 As above.

58 See F Coomans 'Justiciability of the right to education' (2009); K Singh 'Report of the United Nations Special Rapporteur on the Right to Education: Justiciability and the right to education (2012); Interights 'Litigating the right to education in Africa' (2013).

59 (2000) AHRLR 74 (ACHPR 1995).

60 Art 17 African Charter.

61 'Justiciability' (n 34); see the case of *Brown v Board of Education*.

62 *Progressive Peoples Party (PPP) v Attorney General* (J1/8/2014) [2015] GHASC 95. See also *Awuni v West African Examinations Council* [2003-2004] 1SCGLR 471.

63 'Justiciability' (n 34). See *Asare v Attorney General and Ghana Legal Council* (2020) No J1/01/2020.

64 As above.

instances where the General Comments of the ESCR Committee on the right to education has brought to light some factors, such as availability, accessibility, acceptability, adaptability, affordability, and the effectiveness of the judicial forum, that impede rights holders, including marginalised groups, who wish to bring before the courts cases of violations of their rights to education.⁶⁵ These factors have been established as major constraints to the civil justice jurisprudence in Africa generally.⁶⁶

5 Status of education in Ghana

In 1996 the Free, Compulsory and Universal Basic Education (fCUBE) policy was promulgated and launched. The ten-year programme from 1996 to 2005 was to fashion out the policy framework, activities and desired strategies to realise the aims of the fCUBE for all children from the ages of four to 14 who are expected to be in the kindergarten to the junior high school.⁶⁷

The management of education at the pre-tertiary levels is the responsibility of the Ghana Education Service (GES) under the Ministry of Education with the mandate to develop policies and policy implementation strategies at that level.⁶⁸ It is headed by a Director-General and very decentralised at all districts in the 16 regions of the country. The management of education at this level receives support from parent-teacher associations, school management committees, teacher-organised associations and other civil society organisations dedicated to education. It must be pointed out that in Ghana, child welfare, training and education also fall under the scope of mandates of the Ministry of Employment and Social Welfare as well as the Ministry for Gender, Children and Social Protection for the provision of facilities to resource creches, day-care centres, nurseries and kindergartens. However, at the tertiary level the institutions are autonomous and are governed by their respective charters under the supervision of the Ministry in charge of Education.

Pre-school (ages three to five) in Ghana is not nominally compulsory but, as stated earlier, kindergarten education (ages four to five) is compulsory under the fCUBE and regarded as part

65 As above. See ESCR Committee General Comment 3 (1990) paras 5 & 6; ESCR Committee General Comment 9 (1998) paras 9-15.

66 Korankye-Sakyi (n 33).

67 In 2007/2008 kindergarten education was formerly incorporated into the fCUBE.

68 Sec 4 of Act 778. See also Ministry of Education, Ghana 'Education Sector Analysis 2018' (2018) xiv.

of basic education.⁶⁹ Primary education (ages six to 12), which is divided into lower and upper grades, constitutes the second stage of education and is deemed to be compulsory. The 2007 education reform generally divided secondary education into junior and senior high levels, with three years' duration at each level. Vocational and technical education (TVET) is considered analogous with the senior high education and therefore takes the same three years to complete.⁷⁰ Non-formal education and special schools target at improving the literacy levels of people who did not have access to the formal stream of education and/or persons with disabilities, respectively. The tertiary level of education covers traditional universities, technical universities (formerly polytechnics), colleges of education and nursing training institutions and other post-secondary accredited institutions.

The Education Sector Analysis (ESA) report of 2018⁷¹ represents that gross enrolment rates exceeded 100 per cent for kindergarten and primary and had over 85 per cent for junior high school in the past years.⁷² At the senior high school level, the report indicates a significant increase in access from 37 per cent in 2011/2012 to 50 per cent in 2016/2017 in the gross enrolment rates and it is expected to appreciate with the intervention of the Free SHS policy.⁷³ Focus and interest in TVET in Ghana is woefully low. It is estimated that in 2013 only approximately 2,1 per cent of students chose TVET institutions of their own volition through the placement system.⁷⁴ Only about 3 per cent of the total education budget goes to finance that section.⁷⁵

As the tertiary gross enrolment rate for 2014/2015 indicates, even though some improvement was registered for both the numbers of institutions and admissions, it could only manage as low as 14,2 per cent. Remarkably, private tertiary institutions constitute about 50 per cent of the number of tertiary institutions in Ghana, although the enrolment stood at only about 19 per cent.⁷⁶

69 United Nations Education, Scientific and Cultural Organisation 'World data on education – Ghana' 7th edition (2010/11).

70 Ministry of Education, Ghana 'Education Sector Analysis 2018' (2018).

71 This project was developed based on the United Nations Educational, Scientific and Cultural Organisation (UNESCO)/International Institution for Educational Planning (IIEP) guidelines for sector analysis and underscores 'both the strengths and the weaknesses of the current education system to inform and direct necessary changes'.

72 Ministry of Education (n 70) xvi.

73 Ministry of Education (n 70) xvii.

74 Ministry of Education (n 70) xviii.

75 As above.

76 As above.

Over the years, interventions and schemes such as the Capitation Grant (CG), the School Feeding Programme (SFP) and the Free School Uniform Programme (FSUP) have been adopted by different regimes to enhance the access to and quality of education.⁷⁷

Significant funding allocations are annually budgeted for the education sector from the national budget to improve on access, infrastructure, man-power development, compensation, quality, expansion, and so forth. In 2015 it was reported that 78 per cent of the funding for the sector came from central government's coffers while the rest was sourced from the Ghana Education Trust Fund (GETFund) and the Annual Budget Funding Amount (sourced from the oil revenue).⁷⁸ It is also instructive to note that a huge chunk of the budget allocations goes into goods, services and capital expenditures. Significantly, Ghana is singled out among its peers in West Africa as the only country that exceeds its budget allocation to education by international benchmarks of 6 and 20 per cent of a country's gross domestic product (GDP) by UNESCO and Global Partnership for Education (GPE) respectively.⁷⁹

Significant investments and commitments have so far been made to education in Ghana at all levels under different regimes of governments to make the right to education a fulfilled reality.⁸⁰ Despite these strides, it is important to highlight some key challenges in the education sector in Ghana which include, but are not limited to, the lack of resources for teaching and learning; the inadequate supply of trained and qualified teachers which affects the teacher-pupils ratio negatively; and the low enrolment of girl learners.⁸¹ These challenges have informed the introduction of various measures by governments to resolve their impacts on the right to education.⁸²

77 JK Brenyah 'Implementation of social protection interventions in Africa: The trend in the outcomes of free basic education in Ghana, Malawi, Kenya and Uganda' (2018) 6 *Universal Journal of Educational Research* 2822; VE Arkorful et al 'Equitable access and inclusiveness in basic education: Roadblocks to sustainable development goals' (2019) *International Journal of Public Administration* 1; A Abotsi 'Expectation of school feeding programme: Impact on school enrolment, attendance and academic performance in elementary Ghanaian school' (2013) 3 *British Journal of Education, Society and Behavioural Sciences* 76.

78 Ministry of Education (n 70) xiv.

79 Ministry of Education (n 70) 11.

80 Brenyah (n 77).

81 C Aheto-Tsegah 'Education in Ghana: Status and challenges' Commonwealth Education Partnerships 2011, <https://www.cedol.org/wp-content/uploads/2012/02/Charles-Aheto-Tsegah-article.pdf> (accessed 29 October 2021).

82 As above.

6 Justiciability of the right to education in Ghana

The constitutional injunctions that underpin the right to education in Ghana are spelled out in article 25 of the Constitution with clear objectives elaborated in the Directive Principles of State Policy under article 38 of the Constitution.⁸³ Other legislations that serve as enabling instruments for same are Act 560,⁸⁴ Act 778⁸⁵ and Act 718,⁸⁶ which receive more elaboration in previous and subsequent parts. The constraints that inhibit the conformity of legislative underpinnings with the international human rights instruments are those found under articles 38(1) and 38(3)(a), despite the expressed provisions in article 25 of the Constitution. Even though international human rights instruments are aimed at achieving availability, accessibility, acceptability and adaptability, judicial jurisprudence upheld by the courts⁸⁷ has not totally conformed to these expectations as their holdings have yielded to the constraints encumbered on the rights to education under the Constitution.⁸⁸

Education as a right is not an absolute constitutional entitlement in Ghana.⁸⁹ The obligation of the state only goes to the extent of providing 'equal educational facilities and opportunities' at all levels to all citizens as far as practicable.⁹⁰ This position was given a judicial endorsement in *Federation of Youth Associations of Ghana (FEDYAG) (No 2) v Public Universities of Ghana & Others*⁹¹ and instructively affirmed in the case of *Progressive Peoples Party (PPP) v Attorney General*,⁹² as will be discussed later.

6.1 Textual constraints to the right to education under the 1992 Constitution

As already noted, the 1992 Constitution of Ghana provides for free compulsory and available basic education for all. In the Ghanaian legal system legislation is recognised as an important tool for constitutional interpretation.⁹³ Free education is defined in section

83 See arts 38(1)-(3)(a) 1992 Constitution.

84 Children's Act 560 of 1988.

85 Education Act 778 of 2008.

86 Council for Technical, Vocational Educational Training Act 718 of 2006.

87 *FEDYAG (No 2)* (n 91) and *Progressive Peoples Party* (n 92).

88 Arts 38(1) & 38(3)(a) 1992 Constitution.

89 See the dichotomy in states' obligations under arts 38(2) and (3) of the Constitution.

90 Art 25(1) read in conjunction with art 38(1) of the Constitution.

91 *Federation of Youth Associations of Ghana (FEDYAG) (No 2) v Public Universities of Ghana & Others* [2011] 2 SCGLR 1081.

92 *Progressive Peoples Party* (n 58). See also *Awuni v West African Examinations Council* [2003-2004] 1SCGLR 471.

93 Art 11 1992 Constitution.

30 of the Education Act as ‘the provision of teachers and the relevant materials for the quality teaching and learning in basic education by the authority responsible’. The authority responsible for the provision of these materials is the government. Regrettably, as noted, there is a paucity of educational infrastructure to actualise this provision. There is no enforcement mechanism for a clearly-defined remedy in the Constitution nor in the legislation even if the state chose not to provide these materials, unless one relies on the prescriptive provisions in articles 2 and 33.

Section 2 (1) of the Education Act⁹⁴ conveys the intention behind compulsory education. It provides that ‘a child who has attained school going age shall attend a course of instruction by the Minister in a school recognised for that purpose by the Minister’. The question arises as to who is responsible to ensure that a child goes to school. From sections 2(4) and 6 of Act 778 it appears that the duty is imposed on parents. The respective provisions require the parent of a child who has refused to go to school to report themselves to the District Assembly Social Welfare Committee. This obligation is practically impossible since most parents will not be willing to undertake this. Thus, some parents even engage the services of children who are not going to school on the farms and trade. In instances where a parent genuinely cannot afford to send their child to school, the district assembly may support such children. The use of the word ‘may’ does not make the duty imposed on the district assembly mandatory and, hence, the district assembly may exercise a discretion as to whether or not to assist. This renders the enforcement of compulsory education as envisaged under the Constitution and relevant legislation elusive.

The universality of free education is also challenged by the text of article 38 of the Constitution. Article 38(1) of the Constitution 1992 provides that ‘[t]he state shall provide educational facilities at all levels and in all regions of Ghana, and shall, to the greatest extent feasible, make those facilities available to all citizens’. ‘Feasible’ in plain language means ‘if possible’. This means that if it not possible, educational facilities would not be made available to all. Article 38(3) also provides that the state shall ‘subject to the availability of resources’ provide equal and balanced access to all levels and forms of pre-university education. The wording of article 38(3) suggests that, in the event of a lack of resources, there would be no equal and balanced access to education. Therefore, articles 38(1) and 38(3) serve as constitutional constraint to the fCUBE in Ghana because, if the provision of educational facilities is subject to ‘feasibility’ and if

94 Act 778 (n 85).

its equal and balanced access is subject to resource availability, the fCUBE as envisaged under international human rights instruments will be difficult to realise. However, one may argue that unlike article 38, which is part of the Directive Principles of State Policy and sparks the educational objectives of the Constitution, and which is presumed to be justiciable, article 25 as a provision of the Bill of Rights is justiciable as of right.

6.2 Justiciability of the right to education in Ghanaian jurisprudence: Evidence from case law

'The right to education has been a cause for civil rights activis[m] in the history of many nations.'⁹⁵ The legal basis for approaching the courts in Ghana to enforce the right to education finds expression under various constitutional and judicial precedents. Articles 25 and 38(3)(a) are specific to this enunciation; and by alleging that 'a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to [a person], then, without pre-judice to any other action that is lawfully available, that person may apply to the high court for redress'.⁹⁶ Under the exclusive original interpretative and enforcement jurisdiction of the Supreme Court, a person may also seek redress by invoking articles 2(1) and 130(1) of the Constitution on grey areas of the law in pursuit of his right to education for compliance. This invocation must satisfy the prerequisite⁹⁷ set out in

95 Per Adinyira JSC in JSC in *FEDYAG (No 2)* (n 91) 1.

96 Art 33(1) 1992 Constitution.

97 In what has become a *locus classicus* on the subject matter, in *Republic v Special Tribunal; Ex Parte Akosah* [1980] GLR 592, the Court of Appeal (sitting as the Supreme Court) examined the width and ambit of the original jurisdiction of the Court, when determining an issue on the enforcement or interpretation of art 118(1)(a) of the Constitution, 1979, which is *in pari materia* with art 130(1) (a) of the 1992 Constitution. It held as follows: '(1) An issue of enforcement or interpretation of the Constitution, 1979, under article 118 (1) (a) would arise in any of the following eventualities: (a) where the words of the provision were imprecise or unclear or ambiguous. Put in another way, it would arise if one party invited the court to declare that the words of the article had a double meaning or were obscure or else meant something different from or more than what they said; (b) where rival meanings had been placed by the litigants on the words of any provision of the Constitution; (c) where there was a conflict in the meaning and effect of two or more articles of the Constitution and the question was raised as to which provision should prevail; and (d) where on the face of the provisions, there was a conflict between the operations of particular institutions set up under the Constitution. And in the event of the trial court holding that there was no case of 'enforcement or interpretation' because the language of the article of the Constitution was clear, precise and unambiguous, the aggrieved party might appeal in the usual way to a higher court against what he might consider to be an erroneous construction of those words. Also, where the submission made related to no more than a proper application of the provisions of the Constitution to the facts in issue, that was a matter for the trial court to deal with.'

the oft-cited *Republic v Special Tribunal; Ex-parte Akosah* case,⁹⁸ and which has been followed in subsequent holdings of the Court.⁹⁹

How has the Court approached the question of enforcement of the right to education when it is directly in issue? In other words, does the empirical evidence by way of case law suggest that these rights, being of the nature of socio-economic rights, are justiciable? It is to this question that we now turn. The analysis will be based on two overlapping decided cases of the Ghanaian Supreme Court on the right to education. These cases are *Progressive People's Party (PPP) v Attorney General* and *Federation of Youth Association of Ghana and (FEDYAG) v Public Universities of Ghana & Others*.

6.2.1 *Progressive Peoples Party (PPP) v Attorney General (J1/8/2014) [2015] GHASC 95*

In this case the plaintiff political party issued a writ in the Supreme Court for the interpretation and enforcement of the Constitution.

The summary of the plaintiff's claims was that because as many as 500 000 children of school-going age were outside school after the ten-year timeline given by the Constitution under article 38(2) as at year 2006, the government's inaction was inconsistent with articles 25(1)(a) and 38(2). The plaintiff counsel further made the argument that the posture of section 2 of the Education Act fails to compel the government to make children of school-going age be in the classroom compulsorily and same is inconsistent with the Constitution.

The defendants for their part stated in their written submissions that the plaintiffs had wrongfully invoked the exclusive original jurisdiction of the court as their complaint did not raise any genuine or real issue of interpretation or enforcement of any provision of the 1992 Constitution. They further contended that there was no constitutional duty on the government of Ghana to forcefully compel children of school-going age to attend school.

In handing down the judgment of the Supreme Court, Akamba JSC granted the defendant's claim that the plaintiff's claim did not raise any genuine or real issue of interpretation or enforcement of any provision of the 1992 Constitution since it did not satisfy the

⁹⁸ *Republic v Special Tribunal; Ex-parte Akosah* [1980] GLR 592 605.

⁹⁹ *Ghana Bar Association v Attorney General & Another (Abban case)* [2003-2004] ISCLR 250; *Osei Boateng v National Media Commission and Apenteng* [2012] SCCLR 1038; *Bimpong-Buta v General Legal Council* [2003-2004] 2SCCLR 1200.

threshold laid down in the decision of *Osei Boateng v National Media Commission*.¹⁰⁰ By far, the interpretation the plaintiff was searching was deemed to have been rendered in an earlier case of *FEDYAG* and, hence, the interpretative question posed by plaintiff's case was adjudged as having been disposed of by a previous case and as such requiring no interpretation. Curiously, in the case of *FEDYAG* the main question before the Court was whether a policy implemented by higher education institutions in Ghana was constitutional in light of articles 28 and 38. There was no issue raised on primary or basic education.

In providing reasons for not assuming jurisdiction in light of the *FEDYAG* case, the Court made the following observations which have cascading consequences on the right to primary education in Ghana:¹⁰¹

The effect of article 25(1) of the 1992 Constitution was to confer on every Ghanaian the right to have the same or equivalent chance and opportunities for educational advancement; and also the right to the same educational facilities in which to achieve that purpose regardless of his or her social or economic status, place of origin, sex or religion. However, there were inherent limitations, regulating and controlling the enjoyment of the right to equal educational opportunities and facilities. That right was subject to the capacity on the part of the student and the availability of educational facilities to be provided by the State. In the same article 25(1), the right was qualified by clauses (a), (b) and (c) by the controlling words: 'with a view to achieving the full realisation of that right'. Thus, under the following clauses: (a) basic education should be free and compulsory and available to all; (b) generally available and accessible at secondary, technical and vocational level; and (c) in respect to university or higher education, equally accessible to all on the basis of merit of the students and capacity of the institution; and, in particular by progressive introduction of free education at all levels. The ultimate objective of article 25(1) was to make education free by a gradual and progressive introduction to free education at all levels. And since the right to education was for every person, article 25(1)(d) required that functional literacy be encouraged and intensified for those who for one reason or other would be unable to pursue formal education. And under article 25(2), persons had the right to run private schools at all levels but at their own expense. It

100 Holding 2: 'The requirement of an ambiguity/imprecision or lack of clarity in a constitutional provision was as much a precondition for the exercise of the exclusive original enforcement jurisdiction of the Supreme Court as it was for the exclusive original interpretation jurisdiction under Articles 2(1) and 130 of the 1992 Constitution; that was clearly right in principle since to hold otherwise would imply opening the floodgates for enforcement actions to 6 overwhelm the Supreme Court. Accordingly, where a constitutional provision was clear and unambiguous any court in the hierarchy of courts might enforce it and the Supreme Court's exclusive original jurisdiction would not apply to it.'

101 *FEDYAG* (n 91).

was therefore the duty of the State to formulate and execute policies to achieve that purpose. However, under article 38 of the Constitution those educational objectives could only be implemented by the availability of resource.

To the learned judges, what is left for a party in these circumstances is to seek to enforce the outcome of the Court's interpretation in the *FEDYAG* (No 2) decision or for stated good reasons to call for a departure from that decision and not to call for another interpretation simpliciter, as the plaintiff sought to do by the present writ. In the said case the Court was of the view that a doctrinal approach to the interpretation of the provisions in the Constitution would not do.

Aside the defendant's inability to argue the threshold for bringing an issue of interpretation and enforcement, the reliance of the court on the *FEDYAG* case to arrive at a similar conclusion in the *PPP v AG* raises important questions about the justiciability of the right to basic education. This is because, as already observed, the *FEDYAG* case was brought in respect of higher education as espoused in article 25(1) (c). However, the *PPP v AG* case concerned basic education.

It is prudent to note that despite the fact that the two levels of education are all captured under article 25, the wording for both are different and stated in different paragraphs of clause (1). It must be noted that while the guidelines for achieving primary education are given under article 38(2), those of the other levels of education are given under article 38(3) and both provisions are different in terms of meaning. Although clause (1) of article 25 starts with the introductory sentence '[a]ll persons shall have the right to equal education opportunities and facilities and with a view to achieving the full realisation of that right', it was stated unequivocally in paragraph (a) that basic education shall be free, compulsory and available to all. However, in paragraphs (b) and (c) the means of achieving free education at the secondary and higher level of education is to be progressive.

Further, the wording of article 38(2) gives clear-cut guidelines and timelines as to when the state shall provide free, compulsory and universal basic education. Also, section 2(2) of Act 778 provides that education at the basic level is free and compulsory. However, with regard to the guidelines for achieving the other levels of education as provided for under article 38(3), there is an introductory clause which is to the effect that the provision of the other levels of education is subject to the availability of resources of the state, which is not different from the provisions of ICESCR.

6.2.2 Federation of Youth Associations of Ghana (FEDYAG) (No 2) v Public Universities of Ghana & Others

The jurisprudential efficacy of the right to education at the tertiary came before the highest court of the land in the case of *Federation of Youth Associations of Ghana (FEDYAG) (No 2) v Public Universities of Ghana & Others*.¹⁰² This case came before the eminent justices of the Supreme Court of Ghana between 2009 and 2010. In this case the plaintiff, Federation of Youth Association of Ghana (FEDYAG) brought an action against Public Universities of Ghana, the Ministry of Education, the National Council for Tertiary Education, and the Attorney-General as the first, second, third and fourth defendants respectively. The writ invoked the original jurisdiction of the Supreme Court under articles 2(1) and 130 of the Constitution, to seek an interpretation of the enshrined provisions under article 25, the extent of the citizen's right to education in Ghana. Due to the 13 issues presented together from each side of the litigants in their memoranda, the Court merged the issues in two in line with their pleadings as follows:

- (i) whether or not the full fee-paying policy of the first defendant universities is in contravention of the letter and spirit of articles 25(1)(c), 38(1)(3)(a) and (c) of the 1992 Constitution of Ghana;
- (2) whether or not the first defendant's offer of admission spaces not taken up by foreign students to students who qualify but not admitted for lack of government subvention amounts to discrimination, in contravention of articles 17(2), (3) (4)(a) of the 1992 Constitution.

After considering the issues and arguments of the parties, the Court held that

- (i) the fee-paying policy does not contravene the letter and spirit of articles 25(1)(c) and 38(1) (3) (a) and (c) of the Constitution;
- (ii) the full fee-paying policy does not discriminate and does not contravene article 17 of the Constitution.

The Court considered that the plaintiff did not claim for the right to free university education but instead based it on the 'right to equal access to the limited opportunities available to Ghanaian to public universities as required by article 25(1) of the Constitution'.¹⁰³

The Court concluded that the full fee-paying policy was a common phenomenon in Africa and witnessed in other parts of the world.¹⁰⁴

¹⁰² *FEDYAG (No 2)* (n 91).

¹⁰³ *FEDYAG (No 2)* (n 91) per Adinyira JSC 14.

¹⁰⁴ *FEDYAG (No 2)* (n 91) per Adinyira JSC 20.

It further entreated that the fee-paying policy would have to persist to provide wider access to many more qualified students seeking admission into Ghanaian universities until such time that adequate resources are given by the state to provide free education at all levels to all citizens of the country. The Court agreed with the position of the first defendant that the management of the system had mechanisms for transparency and posited that applications must be considered on merit rather than on the ability to afford.

The Court also agreed that article 25 of the Constitution is based on article 26(1) of the Universal Declaration and, by implication, article 13 of ICESCR. By reason of this correlation, we deduce that article 25 is also based on article 17(1) of the African Charter. By a reflection of article 25, the Court observed that the difference in provisions with article 26 (and by extension article 17(1) of the African Charter) lies in the 'national experiences, challenges and weaknesses in our educational system and economic imbalances, which needed to be addressed to prevent the erosion of the gains that have so far been made'.¹⁰⁵ The spirit underpinning the constitutional provision of article 25, therefore, as the Court held is 'to address the imbalances in the infrastructural development of educational facilities in the country and the urgency to improve the quality of education particularly in the field of science and technology; for effective national development'.¹⁰⁶

To clarify this point, whereas the Universal Declaration directly enjoins that everyone has a right to education as required under article 26, the Constitution requires that the state provides equal educational opportunities and facilities to all persons in its jurisdiction. To this end, the limit of the right under article 25(1) on the citizen is the conferment of just the right to same educational opportunities and facilities to achieve his socio-economic advancement irrespective of his status and demographic traits.¹⁰⁷ This brings to the fore an implicit limitation to the enjoyment of these opportunities and facilities attached to the right,¹⁰⁸ subject to the availability of the citizen to take advantage of such, and the capacity of the state to provide same. The Court emphatically proclaimed that the objective of article 25 was to provide free but gradual and progressive education at all levels to all citizens of the country.¹⁰⁹ However, this

105 *FEDYAG (No 2)* (n 91) per Adinyira JSC 9-10.

106 *FEDYAG (No 2)* (n 91) per Adinyira JSC 10.

107 Arts 25(1)(a), (b) and (c) of the Constitution.

108 *FEDYAG (No 2)* (n 91) per Adinyira JSC 11.

109 As above.

and other educational objectives are not absolute but can only be implemented on conditions stipulated under the Constitution.¹¹⁰

This case to a large extent settled the question of whether the right to education is a justiciable right under the human rights legal jurisprudence of Ghana. Justiciability only refers to whether one can enforce the right to education in court or other quasi-judicial fora, with which the Court clearly agrees, even though it reaches the conclusion that the fee-paying policy does not infringe on the right to education guaranteed in article 25.

The analysis of the two cases above indicates that it was an error to interpret the obligations on the state in relation to primary education in the same manner as higher education. Also, the treatment of the constitutional provision on basic education by the courts, just like that of higher education, supports the notion about the classical economic social and cultural rights that hitherto were deemed to be non-justiciable because of the fact that it is capital-intensive. This is because, in respect of the state's obligations under education, there is a clear dichotomy between basic, secondary and tertiary levels in Ghana under articles 38(2)¹¹¹ and 38(3)¹¹² of the Constitution respectively. This is despite the generic provision under article 38 which, in our view, contemplates the provision of educational facilities 'at all levels and in all the regions of Ghana, and shall, to the greatest extent feasible, make those facilities available to *all* citizens'.¹¹³

7 Impact of international human rights law in the justiciability debate in Ghana

This part particularly looks at how article 33(5) can be used as a means of enforcing the international human rights law in Ghanaian courts. It discusses how the African Charter may be used to ground a claim for justiciability of the right to education in Ghana. It has been observed that not many cases have come before the courts of Ghana where the courts have been invited to apply the international human rights instruments as foundations for adjudications.¹¹⁴ It must be

¹¹⁰ Art 38 1992 Constitution.

¹¹¹ This provision sets a definite time line on the implementation of the mandate of achieving free, compulsory and universal basic education by the state.

¹¹² Contrary to art 38(2) above, this provision is not time bound and open to discretionary actions of the state.

¹¹³ Art 38(1) 1992 Constitution (our emphasis).

¹¹⁴ MG Nyarko 'The impact of the African Charter and Maputo Protocol in Ghana' in VO Ayeni (ed) *The impact of the African Charter and Maputo Protocol in selected African states* (2016) 85.

reiterated that the principle of justiciability of the right to education under the African Charter is a settled reality.

Not all rights are envisaged to be covered under constitutionalism, and it is always expected to encompass those not specifically mentioned but inherent in any democratic dispensation¹¹⁵ and 'intended to secure the freedom and dignity of man'.¹¹⁶ The Supreme Court in the past had held that 'such rights may include those guaranteed in treaties, conventions, international or regional accords, norms and usages'.¹¹⁷ These rights have been held to include 'provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states'.¹¹⁸ The holdings in *Adjei-Ampofo*¹¹⁹ and *Ghana Lotto Operators Association & Others*¹²⁰ have the effect that article 33(5) can be used as a means of enforcing the international human rights law in Ghanaian courts. It is welcoming in this debate to note that the Supreme Court of Ghana has moved from a position of strict interpretation of the laws to a more liberal approach in enforcing international human rights treaties by holding that the non-domestication of international treaties does not preclude the courts from regarding these in their jurisdictions.¹²¹ The Supreme Court in its previous positions had intimated that even though Ghana had not domesticated the African Charter, it did not prevent it from applying the Charter because the non-exclusion clause under article 33(5) makes it possible for international human rights provisions and their practices to be relied upon where express provisions have not been made under the Constitution.¹²² Consequently, in the case of *FEDYAG (No 2)* the Supreme Court confirmed that article 25 of the Constitution conformed to article 26(1) of the Universal Declaration.¹²³

The right to appear before the African Commission¹²⁴ by any state of the AU to seek redress is guaranteed under the African Charter as follows: 'The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been

115 Art 33(5) 1992 Constitution.

116 As above.

117 *Adjei-Ampofo v Attorney General* [2003-2004] SCGLR 418.

118 *Ghana Lotto Operators Association & Others v National Lottery Authority* [2007-2008] SCGLR 1088.

119 *Adjei-Ampofo* (n 117).

120 *Ghana Lotto Operators Association & Others* (n 118).

121 *New Patriotic Party v Inspector-General of Police* [1993-94] 459 482.

122 See *Adjei-Ampofo* (n 117); *Ghana Lotto Operators Association & Others* (n 118); *NPP v Inspector General of Police* (n 121).

123 *FEDYAG (No 2)* (n 91).

124 A commission established art 30 of ch II of the African Charter to promote human and peoples' rights and ensure their protection in Africa.

exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.¹²⁵

The condition precedent to activating this provision is that all available local remedies are exhausted within the jurisdiction of the complainant before he can be entertained by the Commission. Where a state intentionally and unconventionally places impediments in the way of the right holder to seek justice, it is also gratifying to note that the African Commission, on the merit of the complaint, may grant audience to the plaintiff to be heard. This reinforces the point that there exists a forum to seek redress outside the jurisdiction of Ghana on matters pertaining to the justiciability of the right to education. It does appear quite clear that state parties to the African Charter are under an unequivocal duty to adjust to the provision of the Charter in respect of legislating 'to giving effect to the rights and freedoms recognised by the Charter'.¹²⁶

The African Charter requires that '[e]ach party [shall] undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'.¹²⁷

It is clear that the legal framework in Ghana which has been given judicial pronouncements endorses the position of article 62 of the African Charter, as produced in the *dictum* of the provision above. The right to education may also be enforced by the African Court and the African Committee of Experts on the Rights and Welfare of the Child.

8 Conclusion

The justiciability of the legal provisions of the right to education in the Constitution of Ghana has sufficiently been assessed and established in the jurisdiction. In Ghana the Constitution, legislation, policy and jurisprudence of the courts acknowledge that the right to education is a right that can be enforced in courts. There are many avenues through which one can argue for justiciability in Ghana, including through article 33(5) of the Constitution. Again, Ghana's membership of international bodies such as the UN and AU enjoins it to abide by all treaties, protocols, conventions and

125 Art 50 African Charter.

126 Art 62 African Charter.

127 As above.

laws it has voluntarily ratified as dictated by international human rights jurisprudence.¹²⁸ We have emphasised in this article that even though the right to education is not 'absolute' in the judicial realms of the jurisdiction of Ghana, a right holder who has the conviction to litigate further for any violation or contest the action(s) or inaction(s) of the state or its agents may have solace in the quasi-judicial systems or under the jurisdiction of the African Commission as provided for under the African Charter.

In compliance with Ghana's obligations towards ensuring respect for the fundamental human rights of its citizens under all the numerous international treaties¹²⁹ it has ratified, and of its own constitutional provisions, it is our respectful contention that it is about time an amendment is done to all constitutional bottlenecks and further enabling legislation is enacted to remove all bottlenecks to the full enjoyment of the right to education. This will require political will and an extra advocacy campaign from civil society organisations in the education sector. The African Commission and the new African Court would be required to make a clear case in defining its jurisdiction to reach its membership to enforce compliance with its protocols on human rights violations.

128 Ar 2 Vienna Convention on the Law of Treaties.

129 Ghana is obligated under various protocols including, but not limited to, the provisions of art 28(1) of the Convention on the Rights of the Child; art 13(1) of the International Covenant on Economic, Social and Cultural Rights, to ensure compliance with and respect for the right to education.