AFRICAN HUMAN RIGHTS LAW JOURNAL

THIS JOURNAL SHOULD BE CITED AS (2024) 24 AHRLJ

The *African Human Rights Law Journal* publishes contributions dealing with human rights, with a special focus on topics of relevance to Africa, Africans and scholars of Africa. The *Journal* appears twice a year, in June and December.

The *Journal* is an open access online publication; see www.ahrlj.up.ac.za

The *African Human Rights Journal* is indexed in SCOPUS, the International Bibliography of Social Sciences (IBSS), the Directory of Open Access Journals (DOAJ), the Scientific Electronic Library Online (SCIELO), and is accredited by the South African Department of Higher Education and Training (DHET).

AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 24 No 1 2024

Pretoria University Law Press
PULP

2024

African Human Rights Law Journal **Volume 24 No 1 2024**

Published by:

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher, based in Africa, launched and managed by the Centre for Human Rights and the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa that have been peer-reviewed. PULP also publishes a number of journals, series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa.

For more information on PULP, see: www.pulp.up.ac.za

To order, contact:

Centre for Human Rights
Faculty of Law
University of Pretoria
South Africa
0002
pulp@up.ac.za
www.pulp.up.ac.za

Printed and bound by:

Pinetown Printers, Durban

Cover design:

Lizette Hermann, Centre for Human Rights, University of Pretoria

ISSN: 1609-073X
EISSN: 1996-2096

Co-funded by the European Union

The financial assistance of the European Union is gratefully acknowledged.

Contents

Please note that the editors will only consider submissions that have not already been submitted for publication or published elsewhere. Submissions should be no longer than 10 000 words (footnotes included).

For further information, see 'Guidelines for Contributors' after the last contribution in this *Journal*. Also see http://www.ahrlj.up.ac.za/submissions for detailed style guidelines.

AFRICAN HUMAN RIGHTS LAW JOURNAL

http://dx.doi.org/10.17159/1996-2096/2024/v24n1a17

Editorial

This issue consists of six articles on human rights that are of concern to Africa generally, and nine articles that together form a 'Special focus' on aspects of the rights of children in sub-Saharan Africa, specifically.

Ilori takes a closer look at one of the most prominent and influential soft law instruments adopted by the African Commission on Human and Peoples' Rights (African Commission), the Declaration of Principles on Freedom of Expression, and Access to Information in Africa. Initially adopted in 2002 simply as the 'Declaration of Principles on Freedom of Expression', it was revised in 2019. The contribution provides a useful schematic comparison between the 2002 and 2019 versions. It illustrates how the revised Declaration addresses human rights challenges posed by internet shutdowns, social media bans, problematic laws on online harms and expensive internet access. The article further highlights how state and non-state actors must play their role in safeguarding human rights online.

In a contribution directed at Nigeria, Olika laments that this country, similar to many other African states, is still many years away from a sustainable realisation of socio-economic rights. He draws our attention to the basic reality that socio-economic rights cannot be enforced in the absence of adequate fiscal resources. As identified by development practitioners, taxation is one of the most sustainable ways for governments to raise revenue. Olika looks into the factors that impact negatively on a government's ability to raise revenue, such as illicit financial flows, corruption and a large informal economy. His article advances that the obligation to respect, protect, and fulfil the essential minimum socio-economic rights standards is an important avenue to mobilise domestic resources for the protection and promotion of socio-economic rights.

In 2024, South Africa marks 30 years since its transition to a true democratic dispensation, with the adoption of the 1993 'interim' Constitution, and its entry into force on 27 April 1994. The next two

articles relate to an issue of great contemporary interest in South Africa: property rights and land reform. Van Huffel discusses the legal implications of applying an approach of state custodianship to communal land. She contends that the South African state resorts to misconstructions of customary land tenure rights in its land reform policy that emulate apartheid era thinking, rather than facing the realities of modern-day land practices. The author argues that public participation and consultation with communities can be used as a means to accurately assess the reasonableness of regulatory legislation and policies. Viljoen departs by outlining the distinction between openly accessible public property and public property that is exclusively managed by the state for specific governmental purposes. Drawing on experience related to public property in the city of Cape Town, she highlights the fact that regular private property discourse is ill-suited to uncover and explore the nature, character, as well as the rights and interests of the state as public land owner. She argues that, from a human rights perspective, public land ownership should be approached and repurposed in line with constitutional commitments expressed in relation to property.

Interrogating the justiciability of economic, social and cultural rights under the legal system of South Sudan, Valfredo argues that these rights are judicially enforceable by virtue of their inclusion in the Constitution and domestic legislation. He adds that socio-economic rights may also be legally enforced within the domestic context of South Sudan, by reliance on the relevant treaties that are automatically incorporated as part of the Bill of Rights. In addition, and subsidiary to the national system, distinct frameworks for justiciability and legal enforcement of these rights may be established at the supranational level – within the United Nations, African Union and East African Community contexts.

Drawing attention to women's participation in politics, Lihiru interrogates the gender quota system for the Zimbabwean National Assembly, and assesses its compatibility with domestic and international law norms and standards. She demonstrates that the 30 per cent quota violates domestic law (specifically section 17 of the 2013 Zimbabwean Constitution). She points out that, although women are allowed to also compete for first-past-the-post (FPTP) parliamentary seats, the number of women elected for FPTP seats has decreased. Lihiru argues that Zimbabwe should extend the proportional representation electoral system and 'Zebra' system applicable in the election of senators to the election of Members of Parliament.

This issue of the *Journal* continues the tradition of collaboration between the *Journal* and scholars working in and on aspects of human rights in Africa, to bring together articles around a particular theme in the form of a 'Special focus' section. In this issue, the 'special focus' falls on promoting access to basic education through the law in sub-Saharan Africa. This theme is all the more pertinent in 2024, a year in which the African Union chose the following as its annual theme: 'Educate an African fit for the 21st century: Building resilient education systems for increased access to inclusive, lifelong, quality, and relevant learning in Africa'. The year 2024 also marks 25 years since the entry into force of the African Charter on the Rights and Welfare of the Child. Children's rights to education are extensively provided for in article 11 of this African-centred treaty. The 'Special focus', therefore, is very timely. It contains nine contributions of a wide thematic and regional reach, preceded by an introductory editorial.

Professor Ann Skelton (UNESCO Chair: Education Law in Africa, Department of Private Law, University of Pretoria, South Africa, and also the current Chairperson of the United Nations Committee on the Rights of the Child), Dr Faranaaz Veriava (Senior Lecturer, Department of Private Law, University of Pretoria, South Africa) and Dr Perekeme Mutu (post-doctoral research fellow with the UNESCO Chair) served as editors of this special focus. The *Journal* editors gladly acknowledge the professionalism and collegiality of the three co-editors.

The editors would also, once again, wish to thank all the reviewers who devoted their time and expertise to ensuring the quality of the Journal.

Editors
June 2024

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: T Ilori 'Protecting digital rights through soft law: Ensuring the implementation of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa' (2024) 24 *African Human Rights Law Journal* 1-30
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a1

Protecting digital rights through soft law: Ensuring the implementation of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa

*Tomiwa Ilori**
Post-Doctoral Fellow, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa
https://orcid.org/0000-0002-2765-3103

Summary: *This article examines the use of soft law for digital rights protection in African countries. Focusing particularly on the Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019 (revised Declaration) adopted by the African Commission on Human and Peoples' Rights, it highlights some of the digital rights challenges in African countries that necessitated normative guidance for African states. Some of these challenges include increased internet shutdowns; unlawful interception of communication; social media bans; expensive internet access; attacks on media freedom; inadequate protection of personal data; and problematic laws on online harms. The article then examines the need for soft international human rights law to address these challenges, the provisions of the revised Declaration as soft law and how these provisions address digital rights challenges in African countries. It concludes that the revised Declaration is a unique soft international human rights law instrument and that it should not be treated as ornamental. It recommends that the African Commission*

* LLB (Ife) LLM LLD (Pretoria); tomiwailori@gmail.com

should formulate an implementation plan that mainstreams the legislative, administrative, judicial and other measures provided for in the revised Declaration into African national contexts.

Key words: *digital rights; soft law; African Commission on Human and Peoples' Rights; implementation; freedom of expression; revised Declaration*

1 Introduction

There has been more focus on digital rights challenges in Africa compared to efforts designed to tackle them. Some of these challenges include increased internet shutdowns; unlawful interception of communication; social media bans; expensive internet access; attacks on media freedom; inadequate protection of personal data; and problematic laws on online harms.[1] However, while these challenges exist and continue to pose problems for digital rights protection in African countries, there is a limited focus on how various actors and, as it concerns this article, the African Commission on Human and Peoples' Rights (African Commission) have committed to overcome these challenges through their mandates. Therefore, this article examines the African Commission's soft law instrument – the revised Declaration of Principles on Freedom of Expression and Access to Information (revised Declaration) 2019 – and how it provides an important means of digital rights protection through normative guidance for African states.

1 MD Hernández & F Anthonio 'The return of digital authoritarianism: Internet shutdowns in 2021' Access Now (2022), https://www.accessnow.org/cms/assets/uploads/2022/05/2021-KIO-Report-May-24-2022.pdf (accessed 15 June 2022); International Commission of Jurists 'Regulation of communications surveillance and access to internet in selected African states' (2021), https://www.kas.de/documents/275350/0/Report-on-Regulation-of-Communications-Surveillance-and-Access-to-Internet-in-Selected-African-States.pdf/66dbd47d-4d7d-2779-a595-a34e9f93cfbb?t=1639140695434 (accessed 15 June 2022); T Ilori 'Social media regulation in African countries will require more than international human rights law' *Techdirt* 30 September 2021, https://www.techdirt.com/2021/09/30/social-media-regulation-african-countries-will-require-more-than-international-human-rights-law/ (accessed 15 June 2022); M Onkokame & A Gillwald 'COVID-19 compounds historical disparities and extends the digital divide' Research ICT Africa 2021 Policy Brief 5/2021 (April 2021), https://researchictafrica.net/wp/wp-content/uploads/2021/05/Policy-Brief-April-2021-COVID19-compound-historical-disparities.pdf (accessed 15 June 2022); Collaboration on International ICT Policy for East and Southern Africa (CIPESA) 'Mapping and analysis of privacy laws and policies in Africa: Summary report' (2021), https://cipesa.org/?wpfb_dl=454 (accessed 15 June 2022); T Ilori 'How social media companies help African governments abuse "disinformation laws" to target critics' *Rest of World* 4 November 2021, https://restofworld.org/2021/social-media-africa-democracy/ (accessed 15 June 2022).

In conducting this examination, the article is organised in five parts. The first part introduces the article, while the second part highlights some of the digital rights challenges that necessitated the revised Declaration. The third part discusses the need for a soft law instrument to address these challenges, highlights the various processes that led to the adoption by the African Commission to address the revised Declaration and examines its substantive provisions. The fourth part identifies some of the ways in which these provisions can be implemented to protect digital rights in Africa, while the last part concludes that the revised Declaration should be seen as an indispensable instrument, and recommends that the African Commission should draw up an implementation plan to guide African states on how to mainstream specific legislative, administrative, judicial and other measures into national contexts to facilitate its compliance.

2 Digital rights challenges in African countries

While the use of digital technologies was not as popular when the Declaration of Principles on Freedom of Expression (Declaration) was first adopted in 2002, by the turn of the decade they had begun to lead to various persisting human rights challenges.[2] These persisting challenges are best seen in the way in which the actions and omissions of state and non-state actors in African countries impact the enjoyment of and protection from digital technologies. Some of these persisting challenges are discussed below.

2.1 Increased internet shutdowns

Internet shutdowns have been described as the deliberate restriction of network access. They have also been identified as a disproportionate measure of restricting human rights under international human rights law.[3] Since the first recorded internet shutdown incident in Guinea in 2007, more than 30 African countries have blocked internet access.[4] It has been noted that in African countries, these shutdowns are mostly used by authoritarian governments to quell dissent, mask atrocities and violate human rights. Some of these countries include Cameroon, Chad, Equatorial Guinea, Uganda, Togo, and several others.[5] Not only do these shutdowns have negative impacts on

2 As above.
3 G de Gregorio & N Stremlau 'Internet shutdowns and the limits of law' (2020) 14 *International Journal of Communication* 4224, 4226, 4230.
4 As above.
5 CIPESA 'Despots and disruptions: Five dimensions of internet shutdowns in Africa' (2019), https://cipesa.org/2019/03/despots-and-disruptions-five-dimensions-of-internet-shutdowns-in-africa/ (accessed 16 June 2022).

economic development, but they also violate specific human rights, such as the right to development, freedom to hold opinions, freedom of expression, association, assembly, and political participation. They have been noted to have adverse impacts on political,[6] economic[7] and social rights[8] in African countries. Governments' reasons for these shutdowns range from ensuring public order to electoral integrity.[9] However, these shutdowns have not been shown to ensure any of these.[10] Rather, what has been shown is that internet access, not shutdowns, guarantees public order through unfettered access to information online.[11]

2.2 Unlawful interception of communication

Unlawful interception of communication is rife in African countries.[12] This kind of interception may be defined as the unauthorised access to communication or data.[13] A report by Citizen Lab, a university-based research organisation that works on information technologies, human rights and global security, reveals that African states such as Nigeria, Zambia, Equatorial Guinea, Kenya and Zimbabwe are heavily invested in the purchase, deployment and misuse of surveillance tools that facilitate these interceptions.[14] While African states may require the aid of surveillance technologies to fight

6 C Heyns and others 'The right to political participation in sub-Saharan Africa' (2019) 8 *Global Journal of Comparative Law* 128, 149-154, 155-159; T Ilori & M Killander 'Internet shutdowns in Africa threaten democracy and development' *The Conversation* 26 July 2020, http://theconversation.com/internet-shutdowns-in-africa-threaten-democracy-and-development-142868 (accessed 16 June 2022).

7 S Woodhams & M Migliano 'The global cost of internet shutdowns 2021 report' (2022), https://www.top10vpn.com/research/cost-of-internet-shutdowns/2021/ (accessed 16 June 2022).

8 T Ilori 'Life interrupted: Centring the social impacts of network disruptions in advocacy in Africa' GNI (2021), https://globalnetworkinitiative.org/wp-content/uploads/2021/03/Life-Interrupted-Report.pdf (accessed 16 June 2022).

9 As above.

10 J Rydzak, M Karanja & N Opiyo 'Dissent does not die in darkness: Networked shutdowns and collective actions in African countries' (2020) 14 *International Journal of Communication* 4266, 4280.

11 E Lirri 'How weaponisation of network disruptions during elections threaten democracy' *CIPESA* 16 November 2021, https://cipesa.org/2021/11/how-weaponization-of-network-disruptions-during-elections-threatens-democracy/ (accessed 16 June 2022).

12 T Roberts and others *Surveillance law in Africa: A review of six countries* Institute of Development Studies (2021), https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/16893/Roberts_Surveillance_Law_in_Africa.pdf?sequence=1&isAllowed=y (accessed 16 June 2022).

13 T Ilori 'Framing a human rights approach to communication surveillance laws through the African human rights system in Nigeria, South Africa and Uganda' (2021) 5 *African Human Rights Yearbook* 140.

14 B Marczak and others 'Running in circles: Uncovering the clients of cyberespionage firm circles' Citizen Lab Research Report 133 (2020), https://tspace.library.utoronto.ca/bitstream/1807/106212/1/Report%23133--runningincircles.pdf (accessed 16 June 2022).

crime, state actors are unable to justify their arbitrary use of these technologies. Currently, only a few African countries have primary and substantive communication surveillance laws, and those that do, including Uganda, Zimbabwe and South Africa, do not comply with international human rights standards.[15] This lack of compliance is characterised by inadequate provisions of legal principles on lawful interception and oversight mechanisms to ensure transparency, due diligence and accountability.[16] In addition to these, many African countries do not provide for the establishment and maintenance of 'independent, effective, adequately resourced and impartial administrative and/or parliamentary domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for state surveillance of communication, their interception and collection of personal data'.[17]

Most of the laws that provide for lawful interception or communication surveillance may be found in dedicated and single-purpose laws and others that focus on public interest themes, such as cybercrimes, terrorism, national security, mutual assistance, and so forth.

2.3 Social media bans

International human rights law is clear on the impropriety of social media bans.[18] Social media bans should not be confused with social media regulation or social media platform governance. Social media bans are an extreme and disproportionate form of content regulation, while social media regulation refers to the use of legal or extra-legal actions to determine the type of content that stays on a platform.[19] Social media platform governance is also different from social media bans in that it refers to the actors involved in the regulation of platform content.[20]

15 Ilori (n 13) 134.
16 As above.
17 United Nations General Assembly The right to privacy in the digital age A/RES/69/199 (10 February 2015) para 4(d), https://undocs.org/en/A/RES/69/166 (accessed 16 June 2022).
18 United Nations General Assembly The role of digital access providers A/HRC/35/22 (30 March 2017) paras 9, 77, https://undocs.org/en/A/HRC/35/22 (accessed 16 June 2022); B Sander 'Democratic disruption in the age of social media: Between marketized and structural conceptions of human rights law' (2021) 32 *European Journal of International Law* 159, 168.
19 GNI 'Content regulation and human rights: Analysis and recommendations' (2020), https://globalnetworkinitiative.org/wp-content/uploads/2020/10/GNI-Content-Regulation-HR-Policy-Brief.pdf (accessed 16 June 2022).
20 T Flew 'Social media governance' (2015) 1 *Social Media and Society* 1.

African governments have found social media bans fashionable. Oftentimes, the excuse given by governments is that social media platforms foment disorder during a political or public event.[21] However, it has been noted that governments have not been able to demonstrate the direct connection between access to these platforms and public disorder.[22] Since African governments began to restrict social media platforms, there has not been any meaningful human rights assessment done by states or the private sector on the impacts of these bans. A chronic feature of these bans is that internet service providers (ISPs) roll over without any hesitation when they are asked by the government to block access to online content.[23] The kind of future this portends for the general digital rights landscape in Africa is that it would become normal for governments to ban social media platforms at every turn, and the state would gradually become the sole determinant of what media is and what part of it is free. One obvious impact of this will be over-censorship and state-designed information controls.[24] More than 16 African countries have specifically blocked social media platforms in Africa, including Uganda, Nigeria, Tanzania, the Democratic Republic of the Congo (DRC), Morocco, Egypt, and others.[25] These platforms include sites such as Facebook, Twitter, Instagram and communication applications such as WhatsApp, Skype and Viber.

2.4 Expensive internet access

The cost of accessing the internet is beyond the reach of many Africans.[26] Internet access in African countries is expensive, which poses challenges to the enjoyment of human rights such as the rights to freedom of expression, access to information, participate in government, work, sexual and reproductive health information, and many more.[27] This costly access is due to various reasons that

21 United Nations Human Rights Council Internet shutdowns: Trends, causes, legal implications and impacts on a range of human rights A/HRC/50/55 (13 May 2022) para 31, https://undocs.org/en/A/HRC/50/55 (accessed 23 July 2022).
22 Gregorio & Stremlau (n 3) 4228.
23 Rydzak and others (n 10) 4271.
24 Rydzak and others (n 10) 4270.
25 C Mureithi 'These are African countries that have restricted social media access' *QUARTZ* 9 August 2021, https://qz.com/africa/2044586/african-countries-that-have-restricted-social-media-access (accessed 7 October 2023).
26 Web Foundation 'Mobile data costs fall but as demand for internet services surges, progress remains too slow' *Web Foundation* 4 March 2021, https://webfoundation.org/2021/03/mobile-data-costs-fall-but-as-demand-for-internet-services-surges-progress-remains-too-slow/ (accessed 16 June 2022).
27 DM Nyokabi and others 'The right to development and internet shutdowns: Assessing the role of information and communications technology in democratic development in Africa' (2019) 3 *Global Campus of Human Rights Journal* 147.

include inadequate investment in broadband infrastructure;[28] internet tariffs and taxation;[29] the availability of and access to a reliable power supply;[30] digital divides;[31] low smartphone adoption;[32] and many more. Some of the countries with expensive internet access include Benin, Burkina Faso, Ethiopia, Malawi, Mali, and others. In addition to this, African governments have been noted to underutilise the Universal Service Access Funds (USAFs).[33] USAFs are unique government agencies whose main function is to provide information and communications technology (ICT) access for underserved communities. ICT tools here may refer to various aspects of information and communication technologies, such as computers, mobile smart phones, fast, affordable, safe and reliable internet access, accessible and free basic digital education. While maximising the USAFs is one out of many ways to bring Africa's offline population online, it is one of the most available opportunities to ensure affordable internet access in African countries. Some other ways of ensuring more affordable internet access is by reducing the cost of last-mile connections;[34] removing bureaucratic and cumbersome regulatory and licensing requirements for investors in the telecom sector;[35] maximising public-private partnerships (PPPs)

28 T Corrigan 'Africa's ICT infrastructure: Its present and prospects' South African Institute of International Affairs (2020), https://media.africaportal.org/documents/Policy-Briefing-197-corrigan.pdf (accessed 16 June 2022).

29 S Ahmed & A Gillwald 'Multifaceted challenges of digital taxation in Africa' Research ICT Africa (2020), https://researchictafrica.net/wp/wp-content/uploads/2021/05/Revised-Final-Tax-PB-Nov-2020-SA-AG.pdf (accessed 16 June 2022).

30 CIPESA 'Towards an accessible and affordable internet in Africa: Key challenges ahead' (2021), https://cipesa.org/?wpfb_dl=482 (accessed 16 June 2022).

31 Alliance for Affordable Internet 'Rural broadband policy framework: Connecting the unconnected' (2020), https://a4ai.org/wp-content/uploads/2020/02/Rural-Broadband-Policy-Framework-Report-web-ready.pdf (accessed 16 June 2022); A Johnson 'Human rights and the gender digital divide in Africa's COVID-19 era' *GC Human Rights Preparedness* 21 January 2021, https://gchumanrights.org/preparedness/article-on/human-rights-and-the-gender-digital-divide-in-africas-covid-19-era.html (accessed 16 June 2022).

32 A4AI 'From luxury to lifeline: Reducing the cost of mobile devices to reach universal internet access' *Alliance for Affordable Internet* 5 August 2020, https://a4ai.org/research/report/from-luxury-to-lifeline-reducing-the-cost-of-mobile-devices-to-reach-universal-internet-access/ (accessed 16 June 2022).

33 T Woodhouse 'Affordability report 2021: A new strategy for universal access' Alliance for Affordable Internet (2021), https://a4ai.org/wp-content/uploads/2021/12/A4AI_2021_AR_AW.pdf (accessed 16 June 2022).

34 USAID 'Barriers to investing in last mile connectivity' (2020), https://www.usaid.gov/sites/default/files/documents/15396/Barriers_to_Investing_in_Last-Mile_Connectivity.pdf (accessed 16 June 2022).

35 As above.

for broadband development;[36] gender mainstreaming;[37] building more community networks;[38] and many more.

2.5 Attacks on media freedom

In 2002 when the first Declaration was adopted, internet penetration was 1 per cent in Africa.[39] What this suggests with respect to media freedom is that internet was not accessible to many in Africa's media ecosystem before 2002 as it is now. Therefore, while the 2002 Declaration provided safeguards for traditional media such as print, broadcast, public, private and community media, it could not have provided guidance for new media such as social media platforms and internet-based information sources. Unfortunately, despite the safeguards provided for by the 2002 Declaration and now in the 2019 version, both traditional and new media are under attack.[40] These attacks include both legal and extra-legal tools used to harass, arrest and jail journalists, bloggers, government critics and human rights defenders by African governments such as Burkina Faso, Mali, Ethiopia, DRC, Cameroon, Somalia, Rwanda, Senegal, Burundi, Niger and Uganda.[41] There have been several incidents of state-sanctioned unlawful surveillance of media practitioners, state-ordered blockage of online news outlets, physical attacks on media offices and violence against media workers.[42]

---

36 D Baxter & DA Dodd 'We need more progress on delivering digital broadband PPPs to underserved communities' *World Bank Blogs* 28 April 2021, https://blogs.worldbank.org/ppps/we-need-more-progress-delivering-digital-broadband-ppps-underserved-communities (accessed 16 June 2022).

37 NO Alozie & P Akpan-Obong 'The digital gender divide: Confronting obstacles to women's development in Africa' (2017) 35 *Development Policy Review* 137, https://onlinelibrary.wiley.com/doi/abs/10.1111/dpr.12204 (accessed 16 June 2022).

38 LT Gwaka and others 'Towards low-cost community networks in rural communities: The impact of context using the case study of Beitbridge, Zimbabwe' (2018) 84 *Electronic Journal of Information Systems in Developing Countries* e12029, https://onlinelibrary.wiley.com/doi/abs/10.1002/isd2.12029 (accessed 16 June 2022).

39 World Bank 'Individuals using the internet (% of population) – Sub-Saharan Africa', https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=ZG (accessed 16 June 2022).

40 J Conroy-Krutz 'The squeeze on African media freedom' (2020) 31 *Journal of Democracy* 96, https://muse.jhu.edu/article/753197 (accessed 16 June 2022).

41 CIPESA 'The state of media freedom and safety of journalists in Africa' (2022), https://cipesa.org/wp-content/files/The_State_of_Media_Freedom_and_Safety_of_Journalists_in_Africa_Report.pdf (accessed 12 October 2023); Reporters Without Borders 'Africa: The new disinformation and propaganda laboratory' (2023), https://rsf.org/en/classement/2023/africa (accessed 18 October 2023).

42 A Munoriyarwa & SH Chiumbu 'Big brother is watching: Surveillance regulation and its effects on journalistic practices in Zimbabwe' (2019) 40 *African Journalism Studies* 26, https://doi.org/10.1080/23743670.2020.1729831 (accessed 16 June 2022).

2.6 Inadequate protection for personal data

While many African countries are slowly embracing data protection laws, there have been various challenges with the implementation of these laws to meet the challenge of increasing misuse of personal data.[43] These challenges manifest in different ways. For example, while there are strong regulatory frameworks in some African countries with respect to data protection authorities (DPAs), these frameworks are not met with equally strong implementation.[44] In addition to these, data breaches continue to occur as a result of weak implementation mechanisms.[45] Another example with respect to implementation is that while some countries do not have DPAs, countries that do, do not have them fully functional. Some of the reasons for this include under-funding and lack of capacity.[46] In addition, in order for data protection laws to be properly implemented, DPAs should be independent and dedicated.[47]

2.7 Problematic laws on online harms

Various laws seek to regulate speech-related online harms. These online harms, which include misinformation, disinformation, malinformation, cyberbullying, online violence against women, online violence against children, online hate speech and others, have been sought to be regulated by African governments.[48] However, most of the provisions that seek to regulate these harms often are overbroad and not in compliance with international human rights

43 Thirty-three African countries have data protection legislation. African Declaration on Internet Rights and Freedoms Coalition 'Privacy and personal data protection in Africa: A rights-based survey of legislation in eight countries' Association for Progressive Communications (2021), https://www.apc.org/sites/default/files/PrivacyDataProtectionAfrica_CountryReports.pdf (accessed 16 June 2022); United Nations Conference on Trade and Development 'Data protection and privacy legislation worldwide', https://unctad.org/page/data-protection-and-privacy-legislation-worldwide (accessed 16 June 2022).

44 As above.

45 N Kshetri 'Cybercrime and cybersecurity in Africa' (2019) 22 *Journal of Global Information Technology Management* 77, 79, https://doi.org/10.1080/1097198X.2019.1603527 (accessed 16 June 2022).

46 T Ilori 'Data protection in Africa and the COVID-19 pandemic: Old problems, new challenges and multistakeholder solutions' African Declaration on Internet Rights and Freedoms (2020), https://africaninternetrights.org/sites/default/files/Tomiwa%20Ilori_AfDec_Data%20protection%20in%20Africa%20and%20the%20COVID-19%20pandemic_Final%20paper.pdf (accessed 16 June 2022); J Bryant 'Africa in the information age: Challenges, opportunities, and strategies for data protection and digital rights' (2021) 24 *Stanford Technology Law Review* 389, 438.

47 Art 11 African Union Convention on Cyber Security and Personal Data Protection; LA Abdulrauf 'The legal protection of data privacy in Nigeria: Lessons from Canada and South Africa' PhD thesis, University of Pretoria, 2015 373.

48 Ilori (n 1).

standards.[49] These provisions have their roots in colonial criminal and penal codes that provide for human rights-averse offences such as sedition, false news, insult and criminal defamation.[50] These are what governments rely upon when seeking to regulate online harms and, unfortunately, social media platforms also defer to these problematic laws.

For example, in Nigeria, several attempts to regulate online harms on social media platforms may be described as abuse of power by state actors.[51] Interestingly, these attempts at online regulation of content were justified by these problematic laws.[52] Between 5 June 2021 and 12 January 2022 the Nigerian federal government placed a ban on Twitter for threatening Nigeria's corporate existence, a claim that was neither substantiated by facts nor backed by any law.[53] The ban was effected by internet intermediaries based on the Nigerian federal government's order to block the micro-blogging website. This excessive abuse of power may also be found in Uganda where the government banned the Facebook platform as it suspended its official accounts for spreading online harm.[54] Ethiopia's Hate Speech and Disinformation Prevention and Suppression Proclamation 1185/202 has also been criticised as having broad provisions capable of arbitrary use.[55]

49 As above.

50 T Ilori 'Stemming digital colonialism through reform of cybercrime laws in Africa' Yale Law School Information Society Project 19 June 2020, https://law.yale.edu/isp/initiatives/wikimedia-initiative-intermediaries-and-information/wiii-blog/stemming-digital-colonialism-through-reform-cybercrime-laws-africa (accessed 16 June 2022).

51 S Olaniyi 'Senate throws out frivolous petitions bill' *The Guardian* 18 May 2016, https://guardian.ng/news/senate-throws-out-frivolous-petitions-bill/ (accessed 16 June 2022); T Ilori 'A socio-legal analysis of Nigeria's Protection from Internet Falsehoods, Manipulations and Other Related Matters Bill' *AfricLaw* 5 December 2019, https://africlaw.com/2019/12/05/a-socio-legal-analysis-of-nigerias-protection-from-internet-falsehoods-manipulations-and-other-related-matters-bill/ (accessed 16 June 2022).

52 T Ilori 'In Nigeria, the government weaponises the law against online expression' *Global Voices* 17 December 2021, https://globalvoices.org/2021/12/17/in-nigeria-the-government-weaponises-the-law-against-online-expression/ (accessed 16 June 2022).

53 A Akintayo 'Nigeria's decision to ban Twitter has no legal basis. Here's why' *The Conversation* 24 June 2021, http://theconversation.com/nigerias-decision-to-ban-twitter-has-no-legal-basis-heres-why-163023 (accessed 16 June 2022).

54 S Kafeero 'Facebook has taken down hundreds of political accounts in Uganda ahead of a tense election' *Quartz* 11 January 2021, https://qz.com/africa/1955331/facebook-takes-down-pro-museveni-accounts-as-election-nears/ (accessed 16 June 2022).

55 A Degol & B Mulugeta 'Freedom of expression and hate speech in Ethiopia: Observations (Amharic)' (2021) 15 *Mizan Law Review* 195, https://www.ajol.info/index.php/mlr/article/view/215352 (accessed 16 June 2022).

3 The need for a soft international human rights instrument for digital rights in Africa

Laws are made to adapt to contexts and needs while they are also tasked with earning their legitimacy.[56] Oftentimes, the type of law adapted by state and non-state actors depends on contexts and needs. Whether hard or soft law, actors often consider the kind of law that best serves their interests.[57] For example, where there is a need to address an urgent issue requiring strict and specific compliance under international law, states may agree to develop a binding instrument.[58] What this primarily means is that state actors must accede to such instrument and ensure its implementation in their various contexts. Examples of such instruments include binding treaties.

In some instances, soft law instruments are *opinio juris*, that is, they are adopted as a legal obligation to interpret a treaty and require a certain degree of compliance.[59] Soft laws are categorised differently. Primary soft law refers to 'normative texts, not adopted in treaty form, addressed to the international community as a whole or to the entire membership of the adopting institution or organisation'.[60] The major features of primary soft law are that it sets forth new standards, reaffirms previous stndards and further elaborates on previously-accepted vague or general standards.[61] Examples of primary soft law include declarations, model laws and guidelines. Oftentimes, primary soft laws are easily adaptable to contexts – flexible in application but with clear principles as guardrails.

Secondary soft law refers to recommendations and General Comments of international human rights supervisory organs.[62] These supervisory organs include the African Commission. Examples

56 KW Abott & D Snidal 'Hard and soft law in international governance' (2000) 54 *Legalisation and World Politics* 441-444; AE Boyle 'Some reflections on the relationship of treaties and soft law' (1999) 48 *International and Comparative Law Quarterly* 901, 913.

57 D Bradlow & D Hunter 'Introduction: Exploring the relationship between hard and soft international law and social change' in D Bradlow & D Hunter (eds) *Advocating social change through international law* (2019) 2.

58 A Mudukuti 'The International Criminal Court and the use of hard law in the quest for accountability for core international crimes' in Bradlow & Hunter (n 57) 85.

59 Compare T Gruchalla-Wesierski 'A framework for understanding "soft law"' (1984) 30 *McGill Law Journal* 37 with the African Commission's obligation under art 45(1)(b) of the African Charter to formulate and lay down rules to solve human rights problems.

60 D Shelton 'Compliance with international human rights soft law' (1997) 29 *Studies in Transnational Policy* 120.

61 As above.

62 Shelton (n 60) 122.

of secondary soft law include General Comments or interpretative declarations and specific recommendations. Usually, secondary soft laws are used to shed more light on a particular right or issue of concern, and they often take a definitive stand with respect to how state and, in some cases, non-state actors must protect such right or address a particular concern.

Soft laws have also been categorised based on who makes them. These include state-generated soft law (by national governments); non-state generated soft law (by organisations other than the government); and quasi-state-generated soft law (by state-created treaty-making bodies). These categories may be used to 'advance more substantively legitimate outcomes' and 'democratise and humanise international law'.[63] For example, the revised Declaration is a primary and quasi-state-generated soft law qualifying it as a 'higher' form of soft law because it sets forth new standards by state-created treaty-making bodies for states, which could further strengthen its legitimacy.

Just as the name suggests, the 'softness' of the law is characterised by benefits and risks. Some of the benefits include 'simplified negotiation, agreement facilitation and quick process; flexibility and adaptability; multi-stakeholder collaboration', while some of the risks include 'unaccountable actors and lack of legitimacy; interference or conflict with existing laws; lack of representation and weak legal enforcement mechanisms'.[64]

In 2019 the African Commission adopted a revised set of principles in order to guide African governments with respect to protecting the right to freedom of expression and access to information in the digital age.[65] These principles were revised based on the 2002 version of the Declaration of Principles on Freedom of Expression.[66] Seventeen years later, and given new technological developments, the revised Principles adopted in 2019 provided directions for African governments not only on how to protect the right to freedom of

63 B Kabumba 'Soft law and legitimacy in the African Union: The case of the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the AU Constitutive Act' in O Shyllon (ed) *The Model Law on Access of Information for Africa and other regional instruments: Soft law and human rights in Africa* (2018) 167, 189.

64 M Naicker 'The use of soft law in the international legal system in the context of global governance' LLM dissertation, University of Pretoria, 2013.

65 African Commission 'Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019' (2019), https://www.achpr.org/legalinstruments/detail?id=69 (accessed 16 June 2022).

66 African Commission 'Declaration of Principles on Freedom of Expression in Africa 2002' (2002), https://www.achpr.org/presspublic/publication?id=3 (accessed 16 June 2022).

expression and access to information, but also on how to protect aspects of the right to privacy with respect to the surveillance and protection of personal information.

These rights may be described as digital rights that are freedoms enjoyed through digital technologies.[67] Some of these freedoms include the right to opinion, expression, privacy, association and assembly, property, work, education, and many others. Digital rights can also be understood based on the need to protect human rights from violations.[68] This article adopts the term 'digital rights' because other than digital freedoms, most terms used to describe digital rights suggest that they are freedoms that only occur online through the internet. Digital rights accommodate a broader scope of rights beyond those enjoyed through the internet because the term 'digital' is not limited to the internet but inclusive of it and other digital technologies.[69] In protecting digital rights, it is important to keep in mind that its scope changes to include multi-dimensional issues even if its meaning remains relatively the same. Digital rights can best be understood as a phenomenon capable of assuming broader meanings and scope due to the multi-dimensional impacts of dynamic technologies on human rights.[70] This is one of the reasons why it would be normatively expedient to use soft law instruments to advance digital rights – a flexible normative guide for dynamic technologies. In the context of this article, digital rights refer to the respect, protection and fulfilment of the rights to freedom of opinion, expression, access to information, privacy and other related rights. What is most important, when thinking of digital rights, is what would best protect and promote them in every possible circumstance.

Research into how African governments have protected these rights has shown that between 2009 to 2021, out of all the African countries assessed, only South Africa has remained 'free' in terms of how countries protect internet freedoms.[71] While this does not point

67 K Karppinen & O Puukko 'Four discourses of digital rights: Promises and problems of rights-based politics' (2020) 10 *Journal of Information Policy* 304, 309.

68 Karppinen & Puukko (n 67) 313.

69 Eg, software and hardware such as mobile phones and computers, as information and communication technology tools, are all capable of being used to protect or violate human rights. These tools also facilitate internet access but are different from the internet both in its technical and non-technical aspects.

70 Identifying the fluidity and the role of context in defining digital rights, Karppinen & Puukko argued that 'there is need to be aware of the assumptions, intentions, and effects of the different uses of digital rights'. See Karppinen & Puukko (n 67) 324.

71 'Freedom on the net' *Freedom House*, https://freedomhouse.org/report/freedom-net (accessed 16 June 2022). There was no report in 2010.

to the conclusion that all African countries do not protect digital rights, it suggests that based on assessed countries, digital rights protection in African countries is at risk. A prominent challenge in the reports and, as seen in many other African countries identified in other analyses, is that while African governments use extra-legal means to violate digital rights, they also pass laws that violate them.[72] This then raises the question of how to provide an elaborate normative foundation that protects digital rights.

The revised Declaration is premised on the African Charter on Human and Peoples' Rights (African Charter).[73] The provisions of article 45(1)(b) of the African Charter allows the African Commission to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights'. Given this background, it is apposite to note that the revised Declaration was adopted to solve legal problems and, in this context, legal problems that have to do with developments on the right to freedom of expression and access to information in the digital age.[74]

3.1 The revised Declaration and digital rights protection

Many normative developments on the right to freedom of expression and digital technologies have been carried through the United Nations (UN) human rights procedures and regional human rights systems. This includes decisions and General Comments by the Human Rights Committee and various activities of the UN Special Rapporteurs.[75] Within the African human rights system, these normative developments have been spearheaded by the Special Rapporteur on Freedom of Expression and Access to Information in Africa through various resolutions of the African Commission and the adoption of soft law instruments, including the revised Declaration.[76] The empowering provisions of article 45 of the African Charter

72 Check Global Network Initiative (GNI)'s newly-updated resource 'Country legal frameworks resource (CLFR)' GNI, https://clfr.globalnetworkinitiative.org/ (accessed 16 June 2022).

73 Art 45 African Charter on Human and Peoples' Rights; Preamble Declaration of Principles on Freedom of Expression and Access to Information in Africa.

74 African Commission '362 Resolution on the Right to Freedom of Information and Expression on the Internet in Africa' ACHPR/Res.362(LIX)2016 (2016), https://www.achpr.org/sessions/resolutions?id=374 (accessed 16 June 2022).

75 Special Rapporteur on Freedom of Expression and Opinion 'Comments on legislation and policy' *OHCHR*, https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/comments-legislation-and-policy (accessed 16 June 2022); UNHRC 'General Comment 34' UN Doc CCPR/C/GC/34 (2011), https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf; (accessed 16 June 2022).

76 African Commission 'Model Law on Access to Information for Africa 2013', https://www.achpr.org/presspublic/publication?id=82 (accessed 16 June 2022); African Commission (n 74); African Commission 'Guidelines on Access to

and the complementary provisions of article 60 of the African Charter enables the African Commission to consider and develop applicable developments under the UN human rights system. All these developments, therefore, have been useful in that they fill a normative gap that would otherwise be created due to the dynamic impacts of digital technologies on human rights. However, most of these developments are fragmented across UN and African Union (AU) human rights documents.

Given the challenging history of human rights protection in African countries, African states may argue that international human rights standards are too distant for application to digital technologies in their local contexts. However, this argument by states no longer is tenable because not only has the African human rights system provided guidance and contextualisation of various human rights issues through norm-setting and application, but the African human rights system also is a global leader in what Okafor and Dzah describe as 'innovative, and even radical, production and clarification of aspects of the normative life of human and peoples' rights'. [77] The revised Declaration pointedly tackles this argument, especially as it concerns fragmented human rights standards by providing clear principles that African governments can apply to their contexts to protect the digital rights, especially as it concerns the rights to freedom of expression and access to information in Africa.[78] The revised Declaration therefore is one of such clarified aspects of normative life referred to by Okafor and Dzah – it is a uniquely designed soft law instrument that provides for elaborate normative foundation for digital rights protection not only in Africa, but across the world.

The process for the revised Declaration was kick-started at the African Commission in June 2016.[79] One of the major objectives of the revision was to take account of developments in the areas of freedom of expression and access to information since the previous Declaration was adopted. These objectives were to be carried out by the Special Rapporteur on Freedom of Expression and Access to Information in Africa. Building on the objectives of previous resolutions, Resolution 362 specifically requested that the Special

Information and Elections in Africa 2017', https://www.achpr.org/presspublic/publication?id=4 (accessed 16 June 2022).

77 OC Okafor & GEK Dzah 'The African human rights system as "norm leader": Three case studies' (2021) 21 *African Human Rights Law Journal* 669, 697.

78 Preamble (73).

79 African Commission '350 Resolution to Revise the Declaration of Principles on Freedom of Expression in Africa' ACHPR/Res.350(EXT.OS/XX)2016 (2016), https://www.achpr.org/sessions/resolutions?id=301 (accessed 16 June 2022).

Rapporteur should take note of developments in the digital age in revising the Declaration. It urged state and non-state actors to collaborate with the Special Rapporteur on the issues of internet rights during the revision.[80]

In her Activity Report at the 61st ordinary session of the African Commission in 2017, the Special Rapporteur on Freedom of Expression and Access to Information in Africa, Advocate Pansy Tlakula, made a recommendation that the provision to expand the Declaration should continue.[81] She initiated the process of revising the Declaration but it was further taken on fully by her successor, Commissioner Lawrence Mute. Through his mandate as the Special Rapporteur on Freedom of Expression and Access to Information in Africa, Commissioner Mute was able to hold strategic activities such as workshops, meetings and consultations with respect to the planning, drafting and publication of the revised Declaration. These activities were kick-started by a discussion event in Nairobi in February 2018,[82] followed by technical meetings in Nouakchott in April 2018,[83] Mombasa, Kenya in October 2018 and March 2019 respectively[84] and in Pretoria, South Africa in October 2019.[85] The technical drafting team was made up of 15 individuals with various expertise. Public consultation on the draft revisions was launched at the 64th ordinary session of the African Commission and took place between May and June 2019. This call for consultations was not only made public but was sent to each state party to the African Charter to provide feedback.[86] After this process, validation workshops were held in Maputo, Mozambique in July 2019; Windhoek, Namibia in September 2019 and Banjul, The Gambia in October 2019. The revised Declaration was finally adopted at the 65th ordinary session

80 African Commission (n 74).

81 P Tlakula 'Inter-session activity report (May to November 2017)' (2017) presented during the 61st ordinary session of the African Commission on Human and Peoples' Rights, https://www.achpr.org/public/Document/file/English/comm_tlakula_cp_srfoe_61_act_report_eng.pdf (accessed 16 June 2022).

82 LM Mute 'Inter-session activity report (November 2017 to April 2018)' (2018) presented to the 62nd ordinary session of the African Commission on Human and Peoples' Rights, https://www.achpr.org/public/Document/file/English/comm_mute_62_act_report_feaia_eng.pdf (accessed 16 June 2022).

83 Mute (n 82) para m.

84 LM Mute 'Inter-session activity report (November 2018 to April 2019)' (2019) presented to the 64th ordinary session of the African Commission on Human and Peoples' Rights paras e, j, https://www.achpr.org/public/Document/file/English/Comm%20Mute_64_Act_Report_FEAI_ENG.pdf (accessed 16 June 2022).

85 LM Mute 'Inter-session activity report (May to October 2019)' (2019) presented to the 65th ordinary session of the African Commission on Human and Peoples' Rights paras c & f, https://www.achpr.org/public/Document/file/English/Com Mute%20_InterssionReport%2065OS_ENG.pdf (accessed 16 June 2022).

86 This could be an argument against the arguments of illegitimacy and representation highlighted above.

of the African Commission in November 2019.[87] This was followed by a press release by the Special Rapporteur in April 2020 and a webinar launch in May 2020.

This background highlights the various steps that led to the adoption of the revised Declaration. It also sets the tone for the revised Declaration as the new testament of the African Commission's commitment to the protection and promotion of human rights through norm setting in the digital age. Some of the major features of the revised Declaration and how it can be used to protect digital rights are further discussed below.

3.1.1 Substantive provisions for digital rights in the revised Declaration

The revised Declaration is made up of various substantive provisions. In terms of structure, the revised Declaration may be divided into two broad sections. The first section introduces the revised Declaration and provides for its Preamble. The introduction linked the revised Declaration to the African Charter; historicised the revised Declaration, why it was necessary, and identified its general outline and objectives. The Preamble to the revised Declaration, like the introduction, also demonstrated that it is a product of international human rights standards and foregrounds its necessity in the digital age.

The second section is made up of five parts consisting of 43 principles. Part I provides for general principles on the right to freedom of expression and access to information with nine major principles. Part II focuses on the right to freedom of expression with 16 major principles. Part III focuses on the right of access to information with 11 major principles, while freedom of expression and access to information on the internet is covered under part IV with six major principles. Part V contains only just one major principle on implementing the revised Declaration. It is important to note that the revised Declaration cannot be divorced from the 2002 version because the latter laid a solid foundation for the former to build on. The strong relationship between both versions can be seen in a textual analysis that yields four categories of digital rights principles. These categories include deleted, new, surviving and revised principles.

87 LM Mute 'Inter-session activity report (October 2019 to June 2020)' (2020) presented to the 66th ordinary session of the African Commission on Human and Peoples' Rights, https://www.achpr.org/public/Document/file/English/ComMute%20_InterssionReport%2066OS_ENG.pdf (accessed 16 June 2022).

Deleted principles are principles of the 2002 Declaration that did not make it into the revised Declaration. It is important to also note that the revised Declaration only deleted a few principles, as shown in the table below. New principles are those that were introduced by the revised Declaration and were not in any way provided for in the 2002 version. Some of these include principles with a thematic focus on the importance of the rights to freedom of expression and access to information. Principle 1(1) defined the responsibilities of states in holding non-state actors responsible for violations of free expression and access to information in Africa.

Surviving principles refer to those principles that were contained in the 2002 version and were retained by the revised Declaration. Some of these include themes on guarantee of freedom of expression, private and public broadcasting, protecting reputations, and others. Revised principles refer to the principles that were provided for in the 2002 version but have been revised to accommodate developments in the digital age and other contemporary issues. All these principles are highlighted in the table below. Generally, the revised Declaration retained and revised most of the older principles from the 2002 version while it also added many new principles. In fact, only two principles from the old Declaration – interference with freedom of expression and freedom of information – were partly deleted.

Table: A comparison of the 2002 and 2019 Declaration

Deleted principles	**New principles**	**Surviving principles**		**Revised principles**	
2002	**2019**	**2002**	**2019**	**2002**	**2019**
Principle II(1) *(Interference with freedom of expression)*	Principle 1, 2, 4, 5, 6, 7, and 8) *(Importance of the rights to freedom of expression and access to information; Non-interference with freedom of expression; Most Favourable provision to prevail; Protection of the rights to freedom of expression*	Principle I(1) *(The guarantee of freedom of expression)*	Principle 10 *(Guarantee of freedom of expression)*	Principle I(2) *(The guarantee of freedom of expression)*	Principle 3 *(Non-discrimination)*

	and access to information online; Protection of human rights defenders and others; Specific measures; and Evolving capacities of children)				
Principle IV (3) (*Freedom of information*)	Principles 11(1), (2) (3) (c), (d) & (e) *(Media diversity and pluralism)*	Principle V(2) *(Private broadcasting)*	Principle 14(3) & (4) *(Private media)*	Principle II(2) *(Interference with freedom of expression)*	Principle 9 *(Justifiable limitations)*
	Principle 12(1) *(Media independence)*	Principle VI *(Public broadcasting)*	13(1), (3), (4), (5) & (6) *(Public service media)*	Principle III *(Diversity)*	Principles 11 (3)(a), (b) (f) & (g) *(Media diversity and pluralism)*
	Principle 13(2) *(Public service media)*	Principle XII *(Protecting reputations)*	Principle 21 *(Protecting reputations)*	Principle IV(2) *(Freedom of information)*	Principle 26(1), 29(1) *(Right of access to information, Proactive disclosure)*
	Principles 14(2), (4)(a), (b) & (c) *(Private media)*	Principle XIII(2) *(Criminal measures)*	Principle 22(5) *(Criminal measures)*	Principle V(1) *(Private broadcasting)*	Principle 14(1) *(Private media)*
	Principles 15 & 16 *(Community media and Self-regulation and co-regulation)*			Principle VII(1), (2) & (3) *(Regulatory bodies for broadcast and telecommunications)*	Principle 17(1), (2) & (3) *(Regulatory bodies for broadcast, telecommunications and the Internet)*
	Principles 17(4) & (5) *(Regulatory bodies for broadcast, telecommunications and the Internet)*			Principle VIII(1) & (4) *(Print media)*	Principle 12(2) & (3) *(Media independence)*
	Principle 20(1), (3), (5) & (6) *(Safety of journalists and other media practitioners)*			Principle IX *(Complaints)*	Principle 18 *(Complaints)*

	Principles 22(2), (3) & (4) *(Criminal measures)*			Principle X(1) *(Promoting professionalism)*	Principle 19(2) *(Protecting journalists and other media practitioners)*
	Principle 23 *(Prohibited speech)*			Principle X(2) *(Promoting professionalism)*	Principle 19(1) *(Protecting journalists and other media practitioners)*
	Principle 25(3) *(Protection of sources and other journalistic material)*			Principle XI(1), (2) & (3) *(Attacks on media practitioners)*	Principle 20(2), (4) & (7) *(Safety of journalists and other media practitioners)*
	Principle 26(2) *(Right of access to information)*			Principle XIII(1) *(Criminal measures)*	Principle 22(1) *(Criminal measures)*
	Principle 27-28 *(Primacy and Maximum disclosure)*			Principle XIV(1), (2) & (3) *(Economic measures)*	Principle 24(1), (2), (3) *(Economic measures)*
	Principles 30-42 *(Duty to create, keep, organise and maintain information; Procedure for accessing information; Appeals; Exemptions; Oversight mechanism; Protected disclosures in the public interest; Sanctions; Access to the Internet; Non-interference; Internet intermediaries; Privacy and the protection of personal information; Privacy and communication surveillance;*			Principle XV *(Protection of sources and other journalistic material)*	Principle 25(1) & (2) *(Protection of sources and other journalistic material)*

	and Legal framework for the protection of personal information)				
				Principle XVI *(Implementation)*	Principle 43 *(Implementation)*

The added value of the revised Declaration as an improvement of the 2002 version is how it provides normative guidance for state and non-state actors on the challenges identified above. For example, principles 17, 37, 38, 39 and 43, which are new principles, address the human rights challenges posed by internet shutdowns, social media bans, problematic laws on online harms and expensive internet access discussed above by elaborating on how state and non-state actors must play their role in safeguarding human rights online.

In addition to this, the revised Declaration, through the provisions of principles 40 and 41, addresses the challenges of unlawful interception of communications, attacks on media freedom and inadequate protection of personal data. As a result, Principles 40 and 41 are the most comprehensive provisions by the African Commission on the right to privacy, communication surveillance and data protection in Africa. These additions are important for two reasons. One, the revised Declaration draws its legitimacy from the African Charter, but the African Charter does not provide for the right to privacy as in the case of other regional human rights instruments. Therefore, these principles address an important normative gap on the right to privacy in the African Charter. Two, these principles assert and demonstrate the symbiotic relationship between information rights such as the rights to privacy, freedom of expression and access to information, which may also be referred to as a subset of digital rights.

A closer look at how the revised Declaration was adopted does not only showcase its benefit as a soft law instrument, but it also addresses some of the risks associated with soft laws. For example, while the revised Declaration may not be referred to as a 'simplified negotiation', it was able to facilitate agreement and quicken the process for adopting the revised Declaration, which is a sorely-needed instrument for the protection of human rights online in Africa. While the language of the revised Declaration may also not be said to provide for flexibility, especially for states in its implementation, given the constant use of the word 'shall' and its mandatory language, it

is couched in such a way as to ensure adaptability by state and non-state actors.

The revised Declaration also addresses the risk of 'unaccountable actors, lack of legitimacy and lack of representation' in two ways. First, it identifies a broad set of actors through the various measures with which state parties must comply, for example, actors within the legislative, executive and judicial arms of government.[88] Second, the process that led to the adoption of the revised Declaration went through various iterations for approval from proximate stakeholders such as state parties, the private sector, civil society, academia, and others. This shows that the revised Declaration as a soft law facilitates multi-stakeholder collaboration. These actors will be involved in the implementation of the revised Declaration and, as a result, it cannot be said to lack accountable actors, legitimacy or representation.

Additionally, the Declaration addresses the risk of 'interference or conflict with existing laws' by drawing its authority from the African Charter with which state parties have obligations to comply, including through their domestic laws. Where a domestic law is in conflict with international human rights standards, the latter prevails and, as a result, the risk of interference does not arise or apply and the conflict is resolved.[89] The provisions of Principle 43(1) address the challenge of 'weak legal enforcement mechanisms' in that it does not only prescribe legislative measures as forms of enforcing the revised Declaration in national contexts, but adds other measures such as administrative, judicial and other measures as ways of enforcing the revised Declaration. These innovations point to some of the ways in which the revised Declaration benefits digital rights protection as a soft law instrument while also addressing the risks associated with it. The revised Declaration provides a useful template for setting digital rights norms in national contexts in Africa. The specific measures that can be taken to maximise this template are discussed below.

4 Ensuring the protection of digital rights in Africa by implementing the revised Declaration

There have been deliberate, traceable and ongoing commitments by the African Commission to develop the rights to freedom of expression and access to information in Africa. Some of these

88 Principle 43(1) of the revised Declaration.
89 Principle 4 of the revised Declaration; United Nations General Assembly Hate speech and incitement to hatred A/67/357 (30 March 2017) paras 51-55, http://undocs.org/en/ A/67/357 (accessed 16 June 2022).

commitments can be seen in the adoption of the first Declaration in 2002; the establishment of the mandate of the Special Rapporteur on the Right to Freedom of Expression in 2004;[90] the inclusion of access to information in the Special Rapporteur's mandate in 2007;[91] and the two Resolutions for the revision of the 2002 Declaration in 2012 and 2016.[92] What this iteration shows is that developing the right to freedom of expression in African countries through the African Commission is deliberate and traceable. However, there is a need for more commitments towards the revised Declaration. These commitments may be implemented in two ways.

First, the African Commission should commit to further develop the substantive principles in the revised Declaration in additional documents. These developments should include collaborative initiatives that seek to develop more branched-out and specific soft law instruments on digital rights issues based on the revised Declaration. This is particularly necessary because the 2002 Declaration laid the foundation for many other soft and hard laws. For example, the Model Law on Access to Information for Africa and the Guidelines on Access to Information and Elections by the African Commission are examples of soft law instruments that were developed from the 2002 Declaration. These instruments have been further adopted and applied to national contexts to improve access to information in African countries. In particular, the Model Law has increased the adoption of access to information and freedom of information laws in Africa since it was adopted.[93] This means that protecting digital rights through the revised Declaration is possible.

Second, the African Commission should ensure active implementation of the revised Declaration by state parties to the African Charter. What this would mean is to draw up an implementation plan on how to enforce the revised Declaration in the African context.[94] According to Mutua, international law standards

90 African Commission 'Special Rapporteur on Freedom of Expression and Access to Information', https://www.achpr.org/specialmechanisms/detail?id=2 (accessed 16 June 2022).

91 African Commission '122 Resolution on the Expansion of the Mandate and Re-Appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa' ACHPR/Res.122(XXXXII)07 (2017), https://www.achpr.org/sessions/resolutions?id=174 (accessed 16 June 2022).

92 African Commission (n 79).

93 F Adeleke 'The impact of the model law on access to information in Africa' in Shyllon (n 63) 14.

94 In 2006, Article 19, a civil society organisation, developed a checklist for implementing the 2002 Declaration. See Article 19 'Implementing freedom of expression: A checklist for the implementation of the Declaration of Principles on Freedom of Expression in Africa' (2006), https://www.article19.org/data/files/pdfs/tools/africa-foe-checklist.pdf (accessed 16 June 2022); Heyns and others (n 23) 161. Focusing on the right to political participation, Heyns and

'must have a clear path for their implementation and enforcement'.[95] One of the main objectives of the plan would be to mainstream the various provisions of the revised Declaration, including Principle 43, which could actively implement the revised Declaration in national contexts. The plan may focus on pilot countries and ensure that specific legislative, judicial, administrative and other measures, such as public awareness and education, capacity building and targeted advocacy and campaigns, are carried out in African national contexts. Some of these specific measures are discussed below.

4.1 Legislative measures

Legislative measures in the context of digital rights protection refers to the mainstreaming of the revised Declaration into national contexts. This could be done through law and policy reforms targeted solely at digital rights protection. Therefore, the normative guidance of the revised Declaration does not stop at the regional level. It can safely be assumed that one of the most important reasons why the revised Declaration was adopted was to ensure that digital rights laws in African national contexts comply with international human rights standards on issues such as online and offline expression, access to information, privacy and protection of personal information, content governance and regulation, internet shutdowns, and many others. One of the major objectives of these legislative measures would be to repeal and amend existing problematic laws and enact new laws that protect digital rights.

For example, various illegitimate, disproportionate and unnecessary provisions often found in colonial criminal and penal laws should be repealed. Criminal offences such as sedition, insult, false news, criminal defamation and libel must be repealed. In addition to this, various problematic provisions on offensive communications, cyberstalking, cyberbullying, cyberharassment in existing laws must be amended and brought in line with international human rights standards.[96] Telecommunication regulation laws and existing

---

others argued that the African Union must take concrete steps to encourage members to establish a mechanism and the legal framework for monitoring state implementation of its laws.

95 M Mutua 'Standard setting in human rights: Critique and prognosis' (2007) *29 Human Rights Quarterly* 547, 620.

96 Eg, the International Centre for Non-for-Profit Law (ICNL) identified at least six possible legal responses to disinformation. These responses include the requirement of social media platforms to uphold their community standards and do so without arbitrariness and subjectivity; the establishment of an independent agency to ensure that businesses comply with rights-respecting laws; administrative tribunals to hear claims; complaint and review mechanisms; education; transparency requirements; and limiting disinformation from

communication surveillance laws in African countries must also be amended and brought in line with international human rights standards. This is particularly necessary in light of the way in which African governments weaponise public interest provisions in these laws to disproportionately limit human rights. In terms of possible new laws, countries need to enact a *sui generis* data protection law and rights-respecting and primary content regulation and communication surveillance laws.[97] States can also adopt national community network plans to use community networks to buffer cheaper and quality internet access, especially in underserved areas through the USAFs. Given the dynamism of digital rights, it is pertinent that actors, including governments, businesses and civil society, start considering the need to enact new laws that could help provide specific normative guidance. For example, given the constant and needless bans on social media platforms, actors need to begin conversations on how to address online harms while also protecting online expression in African countries. All these issues should be the main focus of the legislative measures to be provided for in the implementation plan.

4.2 Judicial measures

In a report published by Media Legal Defence Initiative (MLDI), it was found that digital rights litigation is growing in African countries.[98] Analyses of court cases across the region between 1994 to 2021 illustrate that these cases are mostly public interest litigation adjudicated by national and regional judicial systems. The cases deal with digital rights issues such as restricting access and content, internet shutdowns, cybercrimes, media regulation, data protection, defamation, and others. In strengthening judicial capacity to effectively adjudicate digital rights issues in African countries, the implementation plan can focus on a more targeted capacity building, not only for judicial officers but other actors within the justice sector.

---

messaging apps. These efforts, which must be geared towards the protection of human rights and digital trust and safety, can be set forth in a national soft law instrument such as a social media charter. ICNL 'Legal responses to disinformation', https://www.icnl.org/wp-content/uploads/2021.03-Disinformation-Policy-Prospectus-final.pdf (accessed 16 June 2022).

97 Principle 17(1) of the revised Declaration on regulatory bodies for telecommunication services requires states to ensure that such services are 'independent and adequately protected against interference of a political, commercial or other nature'. In an African context, internet shutdowns, social media bans and unlawful interception of communications can reasonably fall under interferences of 'other nature' envisaged by the Declaration.

98 Media Defence 'Mapping digital rights and online freedom of expression litigation in East, West and Southern Africa' (2021), https://www.mediadefence.org/resource-hub/resources/mapping-digital-rights-and-online-freedom-of-expression-litigation-in-east-west-and-southern-africa/ (accessed 18 June 2022).

For example, it would be important to have digital rights workshops convened by experts on various aspects of digital rights for judicial officers. In addition, such workshops would also be necessary for law enforcement agencies, state security departments, journalists and other stakeholders.

In addition to these, there is a need for more concerted efforts by various judicial institutions to team up with other strategic stakeholders on various capacity-building initiatives that could improve the judiciary's ability to adjudicate on digital rights issues.[99] For example, as provided, there usually is a designated judicial officer solely responsible for considering communication surveillance requests in existing laws.[100] A region-wide training that targets these officers could yield useful reforms within national court systems.[101] Including judicial measures such as these in the implementation plan could improve the jurisprudential landscape on digital rights protection in African countries. In addition to these, the African Commission should ensure that it publishes the official records of negotiations that led to the eventual adoption of the revised Declaration. This will assist both state and non-state actors to understand the thinking behind various principles.

4.3 Administrative measures

It is important that administrative measures to be adopted for the implementation of the revised Declaration are not cumbersome. According to Bagley, in administering measures, to which he refers as procedures in administrative systems, such measures should be

99 The African Commission adopted the Dakar Declaration and Resolution (Declaration and Resolution) on the right to fair trial and legal assistance in Africa through Resolution 41. The Declaration and Resolution point to the interrelatedness of rights, especially with how the right to fair trial and legal assistance is necessary to protect and implement digital rights in national contexts. See African Commission '41 Resolution on the Right to Fair Trial and Legal Aid in Africa' ACHPR/Res.41(XXVI)99, https://www.achpr.org/sessions/resolutions?id=46 (accessed 18 June 2022). The Dakar Declaration made various recommendations to the African Commission, state parties to the African Charter, judicial officers, bar associations, non-governmental organisations and community-based organisations. See 'Resolution on the Right to a Fair Trial and Legal Assistance in Africa – The Dakar Declaration and Resolution' *Criminal Defence Wiki*, http://defensewiki.ibj.org/index.php/Resolution_on_the_Right_to_a_Fair_Trial_and_Legal_Assistance_in_Africa_-_The_Dakar_Declaration_and_Resolution (accessed 18 June 2022).

100 JA Mavedzenge 'The right to privacy v national security in Africa: Towards a legislative framework which guarantees proportionality in communication surveillance' (2020) 12 *African Journal of Legal Studies* 378.

101 'Report of the Special Rapporteur on the Right to Privacy' UN Doc A/HRC/34/60 para 28, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/260/54/PDF/G1726054.pdf?OpenElement (accessed 18 June 2022).

made to achieve more by doing less.[102] One of the reasons for this, especially as it concerns this article, is to ensure that administrative measures do actually achieve digital rights protection and do not bug such protection down. Where new administrative measures are to be introduced for the implementation of the revised Declaration, they must be carefully chosen and serve a specific purpose towards the enforcement of the revised Declaration in national contexts. Such choice and specific purpose would ensure that the implementation plan is realisable and achievable.

For example, one of the ways such administrative measures can be achieved is by provisioning a dedicated desk at each national human rights institution (NHRI) across African countries. The main responsibility of such a desk would be to ensure that the various objectives of the revised Declaration, as indicated in the implementation plan, are realised. In order to ensure that such desks run smoothly, NHRIs should commit to an ethical funding system that protects the integrity and purpose of digital rights protection and also expand their scope of grant making to include philanthropy organisations and the private sector. This desk would also assist states to comply with the provisions of Principle 43(4) of the revised Declaration that requires states to submit periodic reports based on their obligations under article 62 of the African Charter on how they have complied with the revised Declaration.

4.4 Other measures

Principle 43(1) of the revised Declaration requires states to adopt other measures to give effect to the Declaration and facilitate its dissemination. While these other measures are not defined like the previous measures, 'other measures' as used in the revised Declaration could be used to design creative measures that could help protect digital rights in national contexts in Africa. This, therefore, suggests that the revised Declaration has again played to one of the strengths of soft law that allows for flexibility that could best protect digital rights. For example, one such other measure could ensure that an implementation plan includes a national plan designed by states on how they intend to mainstream the various principles of the revised Declaration.

Other measures could ensure that an implementation plan includes a national plan designed by states on how they intend to

102 N Bagley 'The procedure fetish' (2019) 118 *Michigan Law Review* 345, 401, https://repository.law.umich.edu/mlr/vol118/iss3/2 (accessed 18 June 2022).

mainstream the various principles of the revised Declaration. These other measures could include drawing up human rights impact assessment principles or national artificial intelligence plans in the region. There also is a need for more multi-disciplinary research on various aspects of the Declaration that could be used to improve the revised Declaration. So far, these other measures are an open-ended option for African countries to carry out legal, legitimate, necessary and proportionate measures that are not immediately provided for in the revised Declaration due to the dynamic nature of digital technologies and how they impact human rights.

In addition to these, there currently is no publicly-available information on how the African Commission intends to create region-wide awareness on the revised Declaration. In the past, such region-wide awareness has been through an implementation plan that was used to ramp up awareness about a soft law instrument in the form of a model law. For example, the purpose of the implementation plan for the Model Law on Access to Information for Africa was to increase awareness about the Model Law and the importance of access to information in six African countries as pilot countries.[103] When the Model Law was adopted in 2013, there were only four countries with *sui generis* access to information laws. With the launch of more awareness on the need to mainstream the Model Law into national contexts, by 2022, at least, more than half of the African countries now have *sui generis* access to information laws.[104] While the increase in the number of states may be due to various factors, the adoption of the Model Law by the African Commission contributed to setting a regional normative tone on the right to access information in Africa. In addition to this, the status of state compliance with the Guidelines on Access to Information and Elections, which is another soft law by the African Commission on the roles of eight stakeholders in ensuring access to information before, during and after elections, has been carried out in a number of African countries.[105]

Therefore, it has become important for the African Commission to collaborate with proximate state and non-state actors on actionable

103 O Shyllon 'Introduction' in Shyllon (n 63) 5.

104 Adeleke (n 93); J Asunka & C Logan 'Access denied: Freedom of information in Africa falls short of public expectations' Afrobarometer (2021), https://www.africaportal.org/publications/access-denied-freedom-information-africa-falls-short-public-expectations/ (accessed 18 June 2022).

105 Centre for Human Rights, University of Pretoria 'Proactive disclosure of information and elections in South Africa' (2020), https://www.chr.up.ac.za/images/researchunits/dgdr/documents/reports/Proactive_Disclosure_of_Information_and_Elections_in_South_Africa.pdf (accessed 18 June 2022).

and measurable implementation of the revised Declaration.[106] Some of the ways through which such awareness may be carried out is by drawing up a strategic plan that mainstreams the revised Declaration into national policy making through advocacy, campaigns, capacity building and research. As a result of such plan, the revised Declaration could be a system of organic norms on digital rights in Africa from which other finer and specific aspects of digital rights policy, such as online expression, communication surveillance, affordable internet access,and protection of personal information, could be developed.

In addition to this, efforts should be intensified to publish the revised Declaration in African Union languages and other local languages. In particular, the revised Declaration should be published in Swahili with concrete plans to publish it in other local languages as well. In further compliance with article 45(1)(b) of the African Charter, the African Commission should develop more normative standards from the revised Declaration as states will be greatly assisted in domesticating various principles provided for in the revised Declaration. For example, states can be provided with model laws on communication surveillance, the protection of personal information, online speech governance, safety of media practitioners, and many others.

5 Conclusion

This article examined some of the ways in which the revised Declaration may be used to protect digital rights in African countries. It did this in three major ways. First, it highlighted some of the digital rights challenges that led to the adoption of the revised Declaration. Second, it identified the revised Declaration as a soft law instrument that has set the useful normative foundation for digital rights protection in Africa. Third, it noted that one major way in which the revised Declaration can be further utilised involves the African Commission drawing up an implementation plan for the revised Declaration that mainstreams specific legislative, administrative, judicial and other measures into African national contexts to facilitate its implementation. In summary, the 'soft' part of soft law instruments such as the revised Declaration neither means that they are weak, nor does it mean that they lack legitimacy. On the contrary, as demonstrated above, the revised Declaration is a strong example of

106 LA Abdulrauf & CM Fombad 'The African Union's Data Protection Convention 2014: A possible cause for celebration of human rights in Africa?' Article presented at the 7th International Conference on Information Law and Ethics (ICIL) held at the University of Pretoria, South Africa on 22-23 February 2016 25.

how soft law can be used to design normative flexibility for effective digital rights protection in Africa. A soft law instrument such as the revised Declaration provides African governments with more clarity, direction and relevant principles on how to protect digital rights in their various contexts. This can be further achieved by working closely with the African Commission to draw up an implementation plan.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: D Olika 'Taxation and human rights: Towards a sustainable realisation of minimum core obligations in Nigeria' (2024) 24
African Human Rights Law Journal 31-57
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a2

Taxation and human rights: Towards a sustainable realisation of minimum core obligations in Nigeria

*Daniel Olika**
Tax Attorney, Florida Department of Business and Professional Regulation, Florida, USA; Fiscal Policy Lead, Borg Research, Lagos, Nigeria
https://orcid.org/0000-0002-0637-1385

Summary: *Twenty-four years after the establishment of the fourth republic and the Constitution that ushered in the democratic regime in Nigeria, the 1999 Constitution of the Federal Republic of Nigeria, socio-economic rights remain non-justiciable. Efforts by human rights organisations, academics and the bench (both within the country and regionally) have led to the design and development of various theories to support the measured enforcement of socio-economic rights. One such principle is the principle of minimum core obligations. This principle enjoins states to strive to satisfy the basic levels of these socio-economic rights. Despite these efforts, Nigeria and most African countries are still many years away from the sustainable realisation of socio-economic rights. There are a plethora of journal articles and textbook pages examining why this is so, but one thing remains certain, namely, that socio-economic rights cannot be enforced in the absence of adequate fiscal resources. While states have many sources of raising revenue, development practitioners have long realised that taxation remains the most sustainable way for governments to raise revenue. Thus, beyond the rights framework developed to ensure the promotion and protection of minimum core obligations, taxation*

* LLB (Lagos) LLM (International Taxation) (Florida); daniel_olika@yahoo.com

remains a critical consideration to the realisation of this objective. This article addresses the scope of minimum core obligations and analyses the roles and limitations of taxation as a means of sustainably realising minimum core obligations in Nigeria. It argues that illicit financial flows, corruption and a large informal economy, among others, tend to affect the ability of the government to raise revenues, and that there is a direct link between these problems and an inadequate socio-economic rights framework in Nigeria. Implicit in the obligation to respect, protect, and fulfil the essential minimum standards of these socio-economic rights is the obligation of the government to mobilise domestic resources for the protection and promotion of socio-economic rights.

Key words: *taxation; taxation and human rights; minimum core obligations; progressive realisation; socio-economic rights*

1 Introduction

In the wake of the numerous socio-economic challenges facing Nigeria today, including extreme poverty and economic inequality, there is a growing realisation that tax policies play a crucial role in the fulfilment of human rights in the country. Taxation remains a sustainable means through which the government can generate the revenue needed to provide essential public services and protect rights.[1] It is a tool key to raising resources in order to tackle inequality, reduce poverty, and achieve minimum core obligations in Nigeria. The concept of minimum core obligations aims to determine a minimum legal standard for the ambitious and indeterminate nature of socio-economic rights.[2] Nigeria today continues to face massive developmental issues that indirectly affect human rights. According to the World Bank, inequality with respect to income and job opportunities remains high and has heightened the rate of poverty in the country, with an expected 84 million Nigerians living below the poverty line in 2023.[3] As of 2022, as many as four in ten Nigerians live below the national poverty line and are unable to access education and basic infrastructural facilities such as electricity,

1 Centre for Human Rights and Global Justice Organisation 'Tax and human rights', https://chrgj.org/focus-areas/inequalities/tax-and-human-rights/ (accessed 7 May 2022).

2 KG Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 113-114. In its most basic form, it is seen that this concept creates a minimalist strategy to protecting socio-economic rights and trades 'rights-inflation for rights-ambition'.

3 The World Bank 'Nigeria oOverview: Development news, research, data' 2021, https://www.worldbank.org/en/country/nigeria/overview#1 (accessed 7 May 2022).

safe drinking water and improved sanitation.[4] These basic amenities represent minimum core human rights obligations that the Nigerian government ought to provide for its citizenry. There is no doubt that the unavailability of resources represents a major barrier to the realisation of human rights, particularly economic, social and cultural rights. Taxation, therefore, plays an important role in the fulfilment of human rights and sustainable development.[5]

Indeed, tax policy has both economic and non-economic aspects. Fiscal policy makers in Nigeria are mostly concerned with the maximisation of tax revenues which is the economic aspect of taxation, while paying little attention to non-economic aspects such as human rights that are often regarded as secondary.[6] To achieve minimum core obligations and a rights-based approach to taxation, there is a need for Nigerian fiscal policy makers to take into account the human rights of citizens, as well as the needs of the general public when implementing tax policies. This article assesses the relationship between taxation and human rights, and the role of taxation in helping the Nigerian government meet its minimum core obligations. The second part of the article examines the concept of minimum core obligations and its applicability under Nigerian law. The third part discusses the prospects of taxation as a tool for socio-economic development. The fourth part analyses the relationship between taxation and minimum core obligations in Nigeria. This part addresses the numerous tax challenges that hinder the realisation of minimum core obligations in Nigeria, and the role of taxation in the fulfilment of human rights and minimum core obligations in Nigeria. This part discusses the importance of taxation and the need to strengthen tax revenue collection tools to ensure that the Nigerian government is adequately enriched with resources to meet its minimum core obligations. The fifth and final part concludes the article and provides recommendations on how the government can raise revenue for the protection of human rights in Nigeria.

4 The World Bank 'Deep structural reforms guided by evidence are urgently needed to lift millions of Nigerians out of poverty, says New World Bank Report' 22 March 2022, https://www.worldbank.org/en/news/press-release/2022/03/21/afw-deep-structural-reforms-guided-by-evidence-are-urgently-needed-to-lift-millions-of-nigerians-out-of-poverty (accessed 7 May 2022).

5 International Bar Association's Human Rights Institute 'The obligation to mobilise resources: Bridging human rights, Sustainable Development Goals, and economic and fiscal policies' December 2017, https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/IBA_Obligation_to_Mobilise_Resources_SDG_2017_En.pdf (accessed 7 May 2022).

6 Tax Justice Network 'Taxation and human rights' (2011) 2 *Africa Tax Spotlight*, https://www.taxjustice.net/cms/upload/pdf/Africa_Tax_Spotlight_6th_edition.pdf (accessed 7 May 2022).

2 The concept of minimum core obligations and its applicability under Nigerian law

The concept of minimum core obligations was introduced by the United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) for the purpose of ensuring that the 'satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party'.[7] The principle requires states to strive to satisfy and protect the basic minimum levels of socio-economic rights of their citizens. There are two cogent facets of this obligation, namely, the essential elements that are crucial for socio-economic rights to have meaningful significance; and the immediate actions that a state must take to fulfil the minimum core obligations.[8] The *raison d'être* for this concept was articulated by Alston who enthused that if socio-economic rights are recognised as such, it would entail the provision of minimum benefits, and the absence of these benefits would be equivalent to a violation.[9] Minimum core obligations cover a set of economic, social and cultural rights that require both immediate and progressive realisation.

The principle of progressive realisation of socio-economic and cultural rights is recognised under the International Covenant on Economic, Social and Cultural Rights (ICESCR)[10] and refers to the obligation of states to as 'expeditiously and effectively as possible' protect socio-economic and cultural rights, such as the right to education, the right to health, the right to adequate housing, the right to adequate food, water, and sanitation, among others.[11] The principle of progressive realisation recognises that states cannot

7 United Nations Office of the High Commissioner for Human Rights, ESCR Committee General Comment 3: The nature of states parties' obligations (art 2(1) of the Covenant) adopted at the 5th session of the Committee on Economic, Social and Cultural Rights on 14 December 1990 (contained in Document E/1991/2314 December 1990 E/1991/23) para 10.

8 N Orago 'The place of the minimum core approach in the realisation of the entrenched socio-economic rights in the 2010 Kenyan Constitution' (2015) 59 *Journal of African Law* 237.

9 P Alston 'Out of the abyss: The challenges confronting the new United Nations Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 352-353.

10 Art 2 of ICESCR states that '[e]ach state party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. See International Covenant on Economic, Social and Cultural Rights.

11 As above. The ESCR Committee also prohibits states from taking retrogressive measures in relation to socio-economic rights. See AJ Ali 'Interpretation of economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2018) 30 *Journal of Ethiopian Law* 1.

completely and immediately protect socio-economic rights (as they would civil and political rights) due to the inadequacy of resources.[12] Accordingly, these rights are to be gradually recognised over time and progress be made toward the complete realisation of these rights based on the availability of resources.[13]

Indeed, minimum core obligations developed as a response to the problem created by the concept of progressive realisation of resources.[14] The concept of minimum core obligations recognises that socio-economic rights have core components that cannot and should not be limited by the freedom of states to progressively and gradually realise socio-economic rights.[15] Minimum core obligations encompass the responsibility of states to protect their citizens from poverty and starvation, provide basic housing, primary education and emergency health care, to ensure that every individual in their territory enjoys a dignified life at all times. Even during times of economic crisis or emergency, these obligations are to be implemented and states are required to use all available resources, including international assistance, to ensure that their citizens enjoy the bare minimum of socio-economic rights.[16] The developments in international human rights law, especially the ESCR Committee's General Comment 3, have underscored the fact that states can no longer rely on the justification of resource constraints to evade their minimum core obligations.[17] There is a higher threshold for states to prove that they exhausted all the resources at their disposal in meeting these minimum core obligations.[18] According to scholars such as Brand, the interpretation and enforcement of socio-economic rights should be directed towards establishing a society in which all

12 L Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure* 742.
13 As above.
14 L Forman and others 'Conceptualising minimum core obligations under the right to health: How should we define and implement the "morality of the depths"' (2016) 20 *International Journal of Human Rights* 531, 533.
15 As above. In this sense, the 'core' refers to the irreducible component of the right without which it loses its value. In this context, states have an obligation to protect the irreducible component of socio-economic rights. See Forman and others (n 14) 537.
16 International Network for Economic, Social and Cultural Rights 'Minimum core obligations', https://www.escr-net.org/resources/minimum-core-obligations (accessed 7 May 2022).
17 General Comment 14 and General Comment 15 demonstrate that these obligations are non-derogable. See ESCR Committee General Comment 14: The right to the highest attainable standard of health; and ESCR Committee General Comment 15: The right to water (arts 11 and 12 of the Covenant).
18 General Comment 3 (n 7) para 10.

the fundamental needs of its citizens are fulfilled, and they are not subjected to deprivation.[19]

In realising socio-economic and cultural rights, states have both general and specific obligations. The specific obligations refer to the obligation of states to respect, protect and fulfil rights of citizens by taking steps toward their realisation.[20] A specific obligation, in particular, is interpreted into a series of obligations, some of which demand immediate application, and others being subject to progressive realisation.[21] General obligations, on the other hand, require states to take appropriate measures toward realising socio-economic rights, and adopt effective and cost-efficient programmes to protect these rights.[22] According to General Comment 3 of the ESCR Committee, there are certain human rights provisions contained in ICESCR that states must immediately implement at all times, even in situations of emergency or economic downturn.[23] Some of these provisions include the freedom from discrimination;[24] equality between men and women;[25] the right to fair wages and remuneration;[26] the right to form trade unions and the right to strike;[27] a provision on special protection of minors;[28] free and compulsory primary education;[29] freedom of parents' choice in educational matters;[30] the right to private education;[31] freedom of scientific research;[32] and so forth. States, therefore, have an obligation to take immediate steps to apply these human rights provisions and use all appropriate means to ensure that these rights are protected. Some of these 'appropriate means' may take the form of financial, administrative, educational or social measures such as adopting a national policy in the educational, health or sanitation sector to ensure the immediate protection of human rights. Governments may also adopt legislative measures such as incorporating international

19 D Brand 'The proceduralisation of South African socio-economic rights jurisprudence or "what are socio-economic rights for?"' in H Botha, A van der Walt & J van der Walt (eds) *Rights and democracy in a transformative constitution* (2003) 33.
20 International Commission of Jurists 'Adjudicating economic, social and cultural rights at national level: A practitioners guide' 2014, https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf (accessed 7 May 2022).
21 As above.
22 As above.
23 General Comment 3 (n 7) para 5.
24 Art 2(2) ICESCR.
25 Art 3 ICESCR.
26 Art 7(a)(i) ICESCR.
27 Art 8 ICESCR.
28 Art 10(3) ICESCR.
29 Art 13(2)(a) ICESCR.
30 Art 13(3) ICESCR.
31 Art 13(4) ICESCR.
32 Art 15(3) ICESCR.

human rights treaties such as ICESCR into national law to ensure that the law is directly applied in their country, and that their citizens can have access to judicial or administrative remedies.[33]

The African Charter on Human and Peoples' Rights (African Charter) in articles 2, 14-18, 20-22 and 24 contains specific economic, social and cultural rights, such as the right to freedom from discrimination; the right to property; the right to work under equitable and satisfactory conditions; the right to good health; the right to education; the protection of the rights of the child; the right to self-determination; the right to an existence; and the right to development; among others.[34] These rights have been held to be justiciable by the African Commission on Human and Peoples' Rights (African Commission)by virtue of article 45 of the African Charter. This was the rationale behind the African Commission's decision in *SERAC*,[35] where it held the Nigerian government liable for the environmental degradation resulting from oil exploration in the Niger Delta region and, by extension, guilty of violating the socio-economic and other rights of its inhabitants, such as the right to life, the right to property; the right to health; and the right to a safe environment.

The African Charter is said to diverge from the usual approach to implementing economic, social and cultural rights as observed in ICESCR. This is due to a few factors: First, the African Charter lacks clauses that allow for the reduction or suspension of these rights. Additionally, the obligations outlined in the Charter are immediately applicable rather than being gradually fulfilled over time, which means that they are afforded the same level of importance and safeguarding as other rights in the African Charter.[36] In *Free Legal Assistance Group & Others v Zaire*[37] the African Commission held that the failure of the government 'to provide basic services such as drinking water and electricity and the shortage of medicine' violated the right to health. The African Commission did not pay regard to whether the respondent government had all the necessary resources or whether it needed more time to provide these amenities.

33 General Comment 3 (n 7) para 6.
34 C Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327.
35 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).
36 See S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 225.
37 (2000) AHRLR 74 (ACHPR 1995) para 47.

However, scholars such as Yeshanew argue that the African Commission interpreted the progressive realisation qualification into article 16 of the African Charter.[38] In the 2009 *Southern Cameroon* case[39] the African Commission held that the respondent state was under the obligation to invest its resources in the best way possible to attain the progressive realisation of the right to development, and other economic, social and cultural rights. However, this case was faulted for introducing the term inadvertently since the right in contention was not an economic, social or cultural right according to the Commission's classification in the first place.[40] Nonetheless, this concept has been fully transplanted through soft law instruments such as the Pretoria Declaration 2004[41] and the Nairobi Principles 2011[42] that apply the concept of progressive realisation of economic, social and cultural rights under the African Charter. Furthermore, soft law instruments recognise the application of minimum core obligations under the human rights jurisprudence of the African Charter.[43] Thus, state parties have an obligation to ensure that a significant number of citizens are not 'deprived of the availability of the essential elements of a particular right. This obligation exists regardless of the availability of resources and is non-derogable.'[44]

Nigeria is a party to ICESCR and, therefore, is obligated to take steps, to the maximum of its available resources, to achieve the immediate and progressive realisation of economic, social and cultural rights in the country. Furthermore, its obligations under the African Charter (as can be seen above) also require it to ensure the fulfilment of minimum core obligations in relation to socio-economic rights. In line with its obligations under international law, the country recognises socio-economic rights in chapter II of its 1999 Constitution titled 'The Fundamental Objectives and Directive Principles of State Policy'.[45]

Section 14 of the 1999 Constitution recognises the principles of democracy and social justice upon which Nigeria is built. In particular, sections 14(2)(b) and (c) provide that 'the security and

38 S Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: Theory, practice and prospect* (2013) 251.
39 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 205.
40 Ali (n 11) 11.
41 Resolution on Economic, Social and Cultural Rights in Africa, 36th ordinary session, Dakar (7 December 2004).
42 The Commission reported the adoption of the Nairobi Principles in its 31st Activity Report to the Executive Council of the AU, EX.CL/717(XX).
43 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.
44 Principles and Guidelines (n 43) para 17.
45 Constitution of the Federal Republic of Nigeria 1999 Cap C.23 Laws of the Federation of Nigeria, 2004.

welfare of the people shall be the primary purpose of government' and that the people's participation in their government 'shall be ensured in accordance with the provisions of this Constitution'. Nigeria's economic obligations are contained in section 16 which urges the state to direct its policy towards ensuring the promotion of a planned and balanced economic development,[46] including providing suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment and sick benefits and welfare of the disabled.[47]

Section 17 provides for a state social order founded on ideals of freedom, equality and justice, in furtherance of which the exploitation of human resources in any form shall be for the good of the community.[48] In addition, this section urges the government to direct its policy towards ensuring that all citizens have equal opportunities to secure an adequate means of livelihood as well as adequate opportunities to secure suitable employment;[49] that the conditions of work are just and humane and that there are adequate facilities for leisure, social, religious and cultural life;[50] that the health, safety and welfare of all individuals in employment are protected;[51] that there are adequate medical and health facilities for all persons;[52] that there is equal pay for equal work without discrimination;[53] and that children, young persons and the aged are protected from exploitation.[54]

Section 18 directs the Nigerian government to provide equal and adequate educational opportunities at all levels including *as and when practicable* free, compulsory and universal primary education, free secondary education, free university education and free adult literacy programmes.[55] The use of the phrase 'as and when practicable' represents the progressive realisation of rights as explained by the ESCR Committee in General Comment 3 on ICESCR.[56] Section 20 of the 1999 Constitution recognises the obligation of the state to 'protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria'.

46 Sec 16(2)(a) Constitution of Nigeria (n 46).
47 Sec 16(2)(d) Constitution of Nigeria (n 46).
48 Sec 17(1)(d) Constitution of Nigeria (n 46).
49 Sec 17(2)(a) Constitution of Nigeria (n 46).
50 Sec 17(2)(b) Constitution of Nigeria (n 46).
51 Sec 17(2)(c) Constitution of Nigeria (n 46).
52 Sec 17(2)(d) Constitution of Nigeria (n 46).
53 Sec 17(2)(e) Constitution of Nigeria (n 46).
54 Sec 17(2)(f) Constitution of Nigeria (n 46).
55 Secs 18(1) & (3) Constitution of Nigeria (n 46).
56 General Comment 3 (n 7) para 9.

The above-mentioned provisions of chapter II of the Constitution have been interpreted to reflect the ideals of the democratic system upon which Nigeria was built and serve as a guide for policy action by the government.[57] These provisions have been held to be unenforceable in Nigerian courts by virtue of section 6(6)(c) of the Constitution which prohibits the courts from entertaining claims arising under or as a result of the provisions of chapter II.[58]

Nonetheless, there has been significant judicial activism in this regard domestically, such as in *Aiyeyemi & Others v The Government of Lagos State & Others*,[59] where SERAC argued on the principles of equity, good conscience and *ubi jus ibi remedium* to make a case for the socio-economic rights of these persons against the demolition of their homes and eviction by the Lagos state government. This supports the argument that the African Charter is considered an integral part of Nigerian legislation since it has been by ratified by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act[60] and there are no gaps in its enforcement in the Nigerian legal system. The fact that the African Charter does not have a specific provision for enforcing its human and people's rights within the domestic jurisdiction is deemed unimportant. In the case of *Ogugu v State*[61] it was established that Nigerian courts have the authority to enforce the African Charter.

From this analysis above, one can glean that Nigeria has minimum core obligations as part of its international human rights obligations (under both ICESCR and the African Charter) to protect socio-economic rights. Additionally, since the human rights jurisprudence in Nigeria recognises the application of the African Charter provisions and its jurisprudence, the minimum core obligations, by extension, form part of Nigerian law. Thus, notwithstanding the fact that chapter II of the Nigerian Constitution appears to make socio-economic rights non-justiciable, the minimum core obligations of the government are enforceable through any of the creative strategies adopted for the enforcement of socio-economic rights in Nigeria, namely, liberal

57 Ibe (n 36).
58 See the case of *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350 where the Court of Appeal held that socio-economic claims arising from ch II are non-justiciable in Nigerian courts.
59 Unreported Suit M/474/2003.
60 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.
61 *Ogugu v State* (1994) 9 NWLR Part 475 710.

interpretation of the courts,[62] the enactment of legislation by the national assembly, and through the African Charter Act.[63]

3 Making a case for taxation as a tool for socio-economic development

Philip Alston, UN Special Rapporteur on Extreme Poverty, 2014-2020 outlined the inadequacy of measuring well-being through a single economic measure, and instead suggested that governments can adopt a more holistic approach that includes using tax revenue not only to promote economic growth but also to address social inequalities, improve public services, protect the environment, and enhance the overall quality of life of citizens.[64] To this end, the Tax Justice Network highlighted the need for sustainable tax revenue that may be leveraged as a tool for wealth redistribution and income to address inherent inequalities in our society. This is because it serves as a linchpin that helps states to achieve their responsibilities towards the citizenry through its mechanisms geared at increased revenue. Magdalena Sepulveda, the former UN Special Rapporteur on Extreme Poverty, supported this viewpoint by emphasising the fact that progressive tax systems have the potential to serve as a means of reducing poverty and addressing the associated human rights violations frequently endured by individuals affected by poverty.[65] This then lends credence to the concept of tax justice which is built on equitable tax policies and laws to help states to meet their obligations towards its citizenry.

Furthermore, in achieving the human rights objectives of taxation, it is relevant to adhere to four principles outlined by the Tax Justice Network, referred to as the '4 R's' of taxation, which are revenue to fund public services; redistribution to reduce existing inequalities; repricing as a tool for disincentivising certain societal ills; and

62 See *Gbemre v Shell Petroleum Development Company Nigeria Limited & Others* (2005) AHRLR 151 (NgHC 2005).

63 DG Olika 'Economic, social and cultural rights under the 1999 Constitution and the enforceability problem' AfricLaw, https://africlaw.com/2016/07/08/economic-social-and-cultural-rights-under-the-1999-constitution-of-the-federal-republic-of-nigeria-and-the-enforceability-problem/ (accessed 2 October 2023).

64 Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, United National General Assembly, 27 May 2015.

65 Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, United Nations General Assembly, A/HRC/26/28, 22 May 2014.

representation as a tool for achieving wider political participation and better governance.[66]

The first 'r', which is revenue, becomes advantageous for states in fulfilling their human rights commitments when it is adequately raised through taxation. This aligns with international human rights law, which requires states to gradually maximise their domestic resources and engage in international cooperation (as outlined in the Maastricht Principles) to effectively achieve human rights obligations. Furthermore, it encompasses a human rights approach which mandates that a state's tax is progressive since it is the hallmark of a good tax system for the tax system to provide a level field across all economic strata. While this does not guarantee the achievement of government obligations, it is a step in the right direction.[67]

The second 'r', which is redistribution, is a potent tool for achieving government objectives by redistributing wealth and resources within society. This entails levying higher taxes on the 'haves' so as to finance government obligations that would benefit the 'have-nots'. More specifically, this approach can assist governments in fulfilling their minimum core obligations by allocating funds to essential sectors such as health care, education, social welfare and infrastructure. By so doing, it would promote human rights through the mitigation of socio-economic inequalities and the advancement of inclusivity within society.[68]

The third 'r', which is repricing, serves as a valuable tool for social engineering and shaping certain behaviours within society to foster sustainable development. For example, in order to safeguard the right to health, tax authorities may impose higher taxes on harmful products, thereby increasing their prices and reducing demand. The revenue generated from these taxes can then be utilised to finance the healthcare sector.[69]

The fourth 'r', representation, indicates that increased dependence of governments on tax revenue is frequently associated with

66 Tax Justice Network 'What are the four "Rs" of tax?', https://taxjustice.net/faq/what-are-the-four-rs-of-tax/#:~:text=The%20four%20%E2%80%9CRs%E2%80%9D%20of%20tax%20refer%20to%20the%20key%20benefits,tobacco%20consumption%20and%20carbon%20emissions (accessed 2 October 2023).

67 Tax Justice Network 'Tax justice and human rights: The 4 Rs and the realisation of rights' July 2021, https://taxjustice.net/wp-content/uploads/2021/12/Tax-Justice-Human-Rights-Report_July_2021.pdf (accessed 2 October 2023).

68 As above.

69 M Kooshkebaghi and others 'The role of taxation measures in the management of harmful products, services, and practices in Iran: A qualitative study' (2022) 22 *BMC Public Health* 2307.

improved governance and political representation. This is because when citizens actively participate in the integration and utilisation of tax revenue, governments are held accountable to ensure that resources are appropriately and efficiently allocated towards fulfilling their minimum core obligations.

Nonetheless, there must be active efforts to ensure that taxation does not work counterintuitively. There are cases, such as in Brazil, whereby proposed tax reforms during the Cardoso presidency (1995-2003) threatened the realisation of socio-economic rights. This often was primarily due to inequitable and regressive tax systems whereby lower earners bear the highest burden of taxation in form of taxes on consumption, and instances where tax reforms cut the allocation of funding to programmes that foster the economic and social rights of the vulnerable.[70] On the contrary, progressive taxation is praised for its potential to facilitate the redistribution of wealth, which is crucial for ensuring access to essential goods and services for both privileged and disadvantaged groups through increased government revenue and budgetary allocations. It is essential for these tax systems to possess transparency, accountability and effectiveness. If tax systems fail to embody these principles, they would contradict the objective of a fair tax system. The next part of this article examines the relationship between taxation and minimum core obligations in Nigeria.

4 Taxation and minimum core obligations in Nigeria

4.1 Tax challenges to achieving minimum core obligations in Nigeria

There is no doubt that governments turn to taxation to fulfil human rights and minimum core obligations since taxes are important to the economic wealth and development of any nation. Nevertheless, the Nigerian tax regime continues to face myriads of challenges that make the country lag behind in every statistic on taxes. According to the Organisation for Economic Cooperation and Development (OECD),[71] Nigeria's tax-to-gross domestic product (GDP) ratio in

70 A Blyberg & H Hofbauer 'Progressive realisation article 2 & governments' budgets: Retrogression due to tax reforms reducing funds for the realisation of ESC rights', https://internationalbudget.org/wp-content/uploads/PR-Retrogression-due-to-tax-reforms-booklet.pdf (accessed 2 October 2023).

71 Organisation for Economic Cooperation and Development (OECD) 'Revenue statistics in Africa 2021 – Nigeria', https://www.oecd.org/ctp/tax-policy/revenue-statistics-africa-nigeria.pdf (accessed 7 May 2022).

2019 stood at 6 per cent which is far below the recommended 15 per cent required to achieve poverty reduction and economic growth.[72] The country's tax-to-GDP ratio decreased by 0,3 per cent from 6,3 per cent in 2018, which is significantly lower than the 16,6 per cent average for 30 African countries, including Morocco and Seychelles, which recorded 34,3 per cent, South Africa with 26,2 per cent and Rwanda with 17,2 per cent.[73] The lagging tax revenue index of Nigeria is often attributed to several factors, including the low level of tax compliance due to tax evasion and avoidance, corruption and illicit financial flows (IFFs), a lack of expansion of the tax net, complex tax procedures and a lack of transparency and accountability. These issues are discussed expansively in this part.

4.1.1 Tax evasion and tax avoidance

The low level of tax compliance in Nigeria is a huge problem that renders the country one of the lowest income tax countries in the world in terms of GDP percentage.[74] Across Nigeria, the overall number of taxpayers, including individuals and companies, that are not paying any form of tax is alarming. As of the second quarter of 2019, the Federal Inland Revenue Service (FIRS) confirmed that there were only 20 million taxpayers in the country, leaving at least 49 million people evading taxes.[75] Tax evasion and tax avoidance are forms of tax non-compliance in Nigeria, with the former being illegal and the latter being legal. Usually, tax evaders in Nigeria fail to render tax returns to the relevant tax authority in order to escape the liability to tax.

Tax evasion may also come in the form of issuing fraudulent tax returns so as to reduce tax liabilities, making a false declaration of income receipt from any professional, business, trade or employment, or intentionally omitting to state the gross amount of dividends or rents received in Nigeria from foreign sources. According to a 2019 survey about tax perceptions conducted by the Nigeria Economic Support Group (NESG), low tax morale constitutes a major factor

72 V Gasper and others 'Tax capacity and growth: Is there a tipping point?' (2016) IMF Working Paper WP/16/234, https://www.imf.org/external/pubs/ft/wp/2016/wp16234.pdf (accessed 7 May 2022).
73 Report of the Special Rapporteur (n 65).
74 M Umar and others 'Income tax non-compliance in Nigeria and the moderating effect of public governance quality: A suggested framework' (2016) 7 *Mediterranean Journal of Social Sciences* 339.
75 M Abdullahi 'FIRS: Nigeria now has 41 million taxpayers – but revenue generation still low' *TheCable* 8 October 2021, https://www.thecable.ng/firs-nigeria-now-has-41-million-taxpayers-but-revenue-generation-still-low/amp (accessed 7 May 2022).

driving tax evasion and non-compliance in Nigeria.[76] Other factors that may result in this behaviour include poor management and misuse of taxes, lack of sense of civic responsibility, the inability of taxpayers to access public services and the unfair distribution of basic amenities in the country.[77]

The complex tax laws and complicated computing methods also contribute to the tax apathy of many Nigerians. Indeed, the average Nigerian sees taxes as an act of unfairly deducting a percentage of their frugal income to an undeserving country, since the government does not provide adequate basic infrastructure to commensurate the taxes being paid. In addition, the ignorance of many citizens as to their civil obligations to pay taxes also serves as a major cause of tax evasion in Nigeria. On the other hand, tax avoidance refers to a long list of complex strategies that individuals and corporate entities adopt to reduce their tax obligations. These strategies are legal and usually involve an exploitation of the loopholes in the tax law by the taxpayers or their advisers.[78]

Tax evasion and avoidance can have devastating impacts on the Nigerian economy and could prevent the government from achieving its minimum core obligations to its citizens. As pointed out by the FIRS,[79] Nigeria is losing US $15 billion every year to tax evasion and avoidance, particularly due to the practices of multinational corporations that use different loopholes in tax laws to avoid paying taxes. As of 2021, over US $170 billion in tax revenues was reported to have been lost as a result of the tax-evading practices of multinationals carrying on their businesses in Nigeria.[80] Some of the wealthiest taxpayers and many multinationals use several means to undermine tax revenues and break out of the Nigerian corporate tax system.[81] Some of the strategies adopted include the shifting of profits to tax havens; the utilisation of huge tax concessions granted by the

76 ICTD 'The NESG Nigeria tax and subsidy perception dataset' 11 March 2019, https://www.ictd.ac/dataset/nesg-nigeria-tax-subsidy-perception-dataset/ (accessed 7 May 2022).

77 G Zakariya'u and others 'Tax evasion and Nigeria tax system: An overview' (2015) 6 *Research Journal of Finance and Accounting* 202.

78 See DG Olika 'Tax morality: Examining the BEPS debate, work of the OECD and its impact on Africa' (2017) 11 *Pretoria Student Law Review* 89, 91.

79 M Okwe 'Nigeria is losing $15 billion annually to tax evasion, says FIRS' *The Guardian* 4 October 2019, https://guardian.ng/business-services/nigeria-loses-15-billion-annually-to-tax-evasion-says-firs/ (accessed 7 May 2022).

80 E Ujah 'How Nigeria lost over $178 bn to tax evasion by multi-nationals-FIRS Boss' *Vanguard* 11 January 2021, https://www.vanguardngr.com/2021/01/how-nigeria-lost-178bn-to-tax-evasion-by-multi-nationals-%E2%80%95-firs-boss/amp/ (accessed 7 May 2022).

81 J Liu & O Otusanya 'How multinationals avoid taxes in Africa and what should change' 5 April 2022, https://theconversation.com/amp/how-multinationals-avoid-taxes-in-africa-and-what-should-change-179797 (accessed 7 May 2022).

government; tax treaty abuse; and hybrid mismatch arrangement. In doing this, they end up drastically reducing the revenue that was calculated to be generated from a total number of taxpayers, and this in turn prevents the government from providing essential basic facilities such as electricity, roads, clean water, healthcare services, education, social security, pensions, and other public services. An ancillary issue to the tax evasion and tax avoidance problem is the fact that Nigeria, like the governments of most African countries, appears not to be giving the issue the attention it deserves.[82]

4.1.2 Corruption and illicit financial flows

Corruption is prevalent in the administration of taxes in Nigeria and undoubtedly has contributed to the current abysmal state of the economy. The aftermath of corruption and illicit financial flows (IFFs) in Nigeria has increased the rate of poverty, unemployment, human rights abuses, and organised crimes in the country, with the Nigerian people being deprived of basic public services and infrastructure.[83] According to the OECD, IFFs generally involve illegal or corrupt practices such as money laundering, smuggling, fraud or counterfeiting, or where the source of funds may be legal, but their transfer may be illegal such as tax evasion or transfer mispricing by individuals and companies. It may also cover funds intended for other illegal activities such as terrorist financing or bribery by international companies.[84] All of these illegal and corrupt practices pose a great challenge to the political and economic security of Nigeria and result in a diversion of revenues from public priorities. The huge resources lost to IFFs are sufficient to fund public services and infrastructure, create jobs, alleviate poverty, and revamp the Nigerian economy.[85] Although it may be difficult to quantify IFFs, there is widespread agreement that the amounts involved are significant and growing, and that they cause significant economic problems, particularly in resource-rich countries such as Nigeria.[86] According to estimates

82 See generally Y Brauner 'Serenity now! The (not so) inclusive framework and the multilateral instrument' (2022) 25 *Florida Tax Review* 489.

83 L Micah and others 'Tax system in Nigeria – Challenges and the way forward' (2012) 3 *Research Journal of Finance and Accounting* 9-16, https://core.ac.uk/reader/234629280 (accessed 7 May 2022).

84 OECD 'Illicit financial flows from developing countries: Measuring OECD responses' 2014, https://www.oecd.org/corruption/illicit_financial_flows_from_developing_countries.pdf (accessed 7 May 2022).

85 Independent Corrupt Practices Commission (ICPC) 'Illicit financial flows (IFFs)', https://icpc.gov.ng/special-projects/illicit-financial-flows-iffs/ (accessed 7 May 2022).

86 The World Bank 'Illicit financial flows (IFFs)' 7 July 2017, https://www.worldbank.org/en/topic/financialsector/brief/illicit-financial-flows-iffs (accessed 7 May 2022).

of the African Union (AU) Illicit Financial Flows Report,[87] Africa is losing nearly US $50 billion through profit shifting by multinational corporations and approximately 20 per cent of this amount is from Nigeria alone.

In 2021 the Human and Environmental Development Agenda (HEDA) Resource Centre projected that Nigeria loses approximately US $15 to 18 billion annually as a result of IFFs. This amount accounts for about 30 per cent of Africa's loss to IFFs in the last ten years.[88] The Central Bank of Nigeria further re-echoed the assertion of Global Financial Integrity that Nigeria ranks as one of the largest countries experiencing IFFs in the world.[89] Therefore, there is no doubt that the inflow and outflow of money laundering linked to corruption, terrorism and organised crime, reduce tax revenue needed to fund poverty-reducing programmes and infrastructure in Nigeria. In light of the multidimensional and transnational nature of IFFs,[90] significant domestic resources are lost, which hinders the Nigerian government from improving infrastructure, creating job opportunities, and reducing poverty and inequality. An ancillary issue around corruption and IFFs is the failure of the government to combat corruption and fight IFFs in Nigeria.[91]

4.1.3 Informal economy

The need to increase the revenue base of the government remains a human rights obligation – to mobilise maximum available resources – in the context of achieving minimum core obligations in Nigeria. There is no doubt that Nigeria can raise revenues needed to provide basic amenities by expanding its tax net to accommodate individuals and corporations operating outside the tax net. The informal economy is one sector in particular that many stakeholders and experts have advocated to be brought into the tax base. This is

87 African Union 'Illicit financial flows: Report of the High Level Panel on Illicit Financial Flows from Africa', https://www.unodc.org/documents/NGO/AU_ECA_Illicit_Financial_Flows_report_EN.pdf (accessed 7 May 2022).

88 E Addeh 'Nigeria loses $18bn to illicit financial flows annually' *This Day* 16 April 2021, https://www.thisdaylive.com/index.php/2021/04/16/heda-nigeria-loses-18bn-to-illicit-financial-flows-annually/ (accessed 7 May 2021).

89 Central Bank of Nigeria 'Renewed vigilance to prohibit illicit financial flows in Nigeria's banking system', https://www.cbn.gov.ng/out/2015/ccd/illicit_financial_flows.pdf (accessed 7 May 2022).

90 M Moyo 'Tackling illicit financial flows, a matter of survival for Africa's development' 15 June 2021, https://www.un.org/africarenewal/magazine/july-2021/tackling-illicit-financial-flows-matter-survival-africas-development (accessed 7 May 2022).

91 For innovative ways to combat corruption and protect taxpayers' money, see D Olika, 'Taxpayers' right in challenging the mismanagement of public funds in Nigeria: Towards a liberal approach' (2021) 13 *Italian Journal of Public Law* 569.

largely because with participants in the informal economy not being subjected to tax, this causes relatively fewer resources to be available to the government and, by implication, fewer available resources for the government to meet its minimum core obligations.

The informal economy in Nigeria is the largest employer of labour and makes significant contributions to the country's GDP.[92] The exact nature of the informal economy, however, is difficult to describe and define.[93] In simple terms, the informal economy is defined as all aspects of the economy falling outside the scope of the formal economy.[94] The informal economy or certain aspects of it sometimes is referred to in the development literature with different terms, such as shadow economy, underground economy, and so forth. The informal economy is an important subject in the international development agenda, due to its considerable nature and the role it plays in driving economic growth and employment in Nigeria and the rest of the developing world. This is particularly because, despite its role in the economy of Nigeria, the informal economy is difficult to regulate and tax.[95]

The literature on taxing the informal economy in Nigeria is fairly developed, with the position of the scholars or policy researchers differing depending on the writer. The idea behind taxing the informal economy is premised on the considerable nature of the informal economy, its contribution to economic growth in Nigeria and the belief that taxing the informal economy will improve domestic resource mobilsation.[96] Scholars have also argued that taxing the informal economy can help improve accountability levels in society,[97] address equity considerations, improve the possibility

92 E Etim & O Daramola 'The informal sector and economic growth of South Africa and Nigeria: A comparative systematic review' (2020) 6 *Journal of Open Innovation: Technology, Market, Complexity* 135.

93 T Kundt 'Opportunities and challenges for taxing the informal economy and subnational taxation' (K4D Emerging Issues Report. Institute of Development Studies; Brighton, UK) 2.

94 The informal economy refers to activities that necessitate a cost but are removed from the rights and benefits of the formal economy. See N Khuong 'Does informal economy impede economic growth? Evidence from an emerging economy' (2021) 11 *Journal of Sustainable Finance and Investment* 104.

95 See F Mpofu 'Informal sector taxation and enforcement in African countries: How plausible and achievable are the motives behind? A critical literature review' (2021) 4 *Open Economics* 72. The informal economy is often considered a hinderance to domestic resource mobilisation on the continent. See also N Benjamin & A Mbaye 'The informal sector in Francophone Africa: The other side of weak structural transformation' (2020) Policy Brief, Africa Growth Initiative at Brookings 7.

96 A Makochekanwa 'Informal economy in SSA: Characteristics, size and tax potential' (2020) MPRA Paper 98644, University Library of Munich, Germany 19.

97 S de Mel & C Woodruff 'The demand for, and consequences of, formalisation among informal firms in Sri Lanka' (2013) 5 *American Economic Journal: Applied*

of the informal sector participants to scale,[98] and so forth. This argument intuitively accords with reason and has been the driving force behind formalisation policies such as areduction in the cost of registration of businesses, government regulation, which makes banks agents for the collection of taxes from informal sector players, and so forth.[99] In addition to these formalisation policies, the government has deployed innovative means to tax informal sector participants without drawing them into the formal economy, such as presumptive taxation,[100] partnering with associations that informal sector participants belong to for the purpose of administering taxes on the informal businesses, and so forth.[101]

While these measures have contributed to ensuring that informal sector participants pay their taxes, there is a near unanimous position in the existing literature that tax contributions from the informal sector participants are negligible.[102] Thus, it is questionable whether it accords with sound economic judgment to allocate resources to effectively taxing the informal economy where the cost of doing so may outweigh the potential revenue to be derived.[103] To further complicate the debate, it is the position of some scholars that in most cases, informal sector players already pay some form of or multiple levies on their income to some form of association, war lord, local government authority, and so forth. This position

Economics 122. Although there also is research that suggests that this notion is based on a Eurocentric understanding of taxation and state formation and based on fieldwork in Northern Nigeria, it is to be believed that increased taxation of the informal economy will heighten social divisions rather than positively influence accountability and the social contract. See K Meagher 'Taxing times: Taxation, divided societies and the informal economy in Northern Nigeria' (2018) 54 *Journal of Development Studies* 1.

98 This is based on the 'growth gains theory' which posits that informal sector participants are in the informal sector for the purpose of expanding and growing into the formal sector, although research on the sector in other parts of the developing world reveals the contrary. See L Medina & F Schneider 'Shadow economies around the world: What did we learn over the last 20 years?' (2018) IMF Working Papers 18(17) 28. See also D McKenzie & Y Sakho 'Does it pay firms to register for taxes? The impact of formality on firm profitability' (2010) 91 *Journal of Development Economics* 15.

99 M Rogan 'Tax justice and the informal economy: A review of the debates' (2019) WIEGO Working Paper 41, WIEGO 5.

100 F Mpofu 'Taxing the informal sector through presumptive taxes in Zimbabwe: An avenue for a broadened tax base, stifling of the informal sector activities or both' (2021) 13 *Journal of Accounting and Taxation* 155.

101 Such as the Identifiable Group Taxation (IGT) that was adopted in Ghana based on the activities of informal sector businesses and individuals. See G Dube & D Casale 'The implementation of informal sector taxation: Evidence from selected African countries' (2016) 14 *eJournal of Tax Research* 607.

102 A Joshi and others 'Taxing the informal economy in Africa: The current state of knowledge and agendas for future research' (2014) 50 *Journal of Development Studies* 1325.

103 This is the case as the evidence that taxing the informal sector will yield to improved domestic resources is less established in the literature. See A Joshi and others 'Taxing the informal economy: Challenges, possibilities, and remaining questions' (2012) ICTD Working Paper 4, 9.

canvasses the point that the data on the population of the informal economy not being taxed is grossly inaccurate as taxes are for the most part being paid to local governments or associations but not to central or state governments.[104] To this school, it is unclear whether imposing income taxes applicable to formal sector players will not further reduce the income of the players in the informal economy, subject them to multiple taxes,[105] and further limit their capacity to grow. In recent times, the question has also arisen as to whether taxing the informal economy amidst economic recovery post-COVID would not only help to deepen the prevalent social inequalities on the continent.[106]

Interventions for the purpose of improving the taxation of the informal economy has come in the form of either trying to make the process of formalisation easier for taxing purposes or designing innovative ways in which to tax the participants without formalising them. The varying forms of interventions notwithstanding, the progress made by the stakeholders in taxing the informal economy in Nigeria has been limited. A review of the existing literature reveals that providing a strategy to improve formalisation with minimal cost implications for the informal sector players is the objective of scholars and policy makers.[107] However, one criticism of the approaches that have been implemented thus far is that the problem of taxing the informal economy is often discussed as the primary problem (with most policy interventions directed primarily at it). Meanwhile, this problem is a manifestation of the larger problem of large-scale informal economic activity that is evidenced by informal trading activity and informal cross-border trade,[108] that is, if there was no informal economic activity, the problem of taxing the informal economy would not exist. Thus, where this problem is treated as the primary problem and made the focal point of policy interventions; it could greatly assist in addressing the issues of taxing and financing the informal economy.

Accordingly, while it is clear that expanding the tax net to cater to the participants of the informal economy would significantly

104 K Meagher 'Disempowerment from below: Informal enterprise networks and the limits of political voice in Nigeria' (2014) 42 *Oxford Development Studies* 419-438.

105 D Resnick 'Taxing the informality: Compliance and policy preferences in urban Zambia' (2021) 57 *The Journal of Development Studies* 1063.

106 M Gallien and others 'Taxing the informal economy is not a silver bullet for financing development – Or the COVID-19 recovery' Summary Brief 24, ICTD.

107 A Mbaye & N Benjamin 'Informality, growth and development in Africa' in C Monga & J Lin (eds) *The Oxford handbook of Africa and economics: Volume 1: Contexts and concepts* (2015) 620.

108 See A Bouet and others 'Informal cross-border trade in Africa: How much? Why? And what impact?' (2018) IFPRI Discussion Paper 01783 1.

improve tax revenues for the government, and make more resources available to finance socio-economic rights, the government has to be deliberate about ensuring that strategies to tax the informal economy are not counterproductive or totally ineffective.

4.1.4 Complex tax laws and policies

Nigeria's tax laws are complex and difficult for the average taxpayer to understand, and can even be challenging for literate officials.[109] Most individuals and businesses in the country find the process of paying taxes too cumbersome and bureaucratic, and this problem encourages tax non-compliance in the country. For example, some states in Nigeria still require taxpayers to file their tax returns and pay their taxes using paper forms (with the exception of Lagos and the FIRS where taxes can be paid online). This bureaucratic process may be too onerous for taxpayers and significantly contributes to the low level of compliance in Nigeria.[110] In addition to a lack of understanding and complex tax procedures, tax laws in Nigeria contain several ambiguities since the law is from time to time subjected to change. This problem is coupled with the fact that many taxpayers lack information as to the existence of tax laws and have no awareness of their tax obligations. Additionally, the lack of an efficient and comprehensive tax system in Nigeria has created a problem of multiplicity of taxes for taxpayers within the tax net.[111] The taxes, therefore, should be designed to meet the basic tenets of a good tax system.[112]

4.1.5 Lack of transparency and accountability

The lack of transparency and accountability represents another tax challenge that prevents the Nigerian government from achieving its minimum core obligations. The Nigerian tax system is laden with issues relating to the misuse of funds and taxpayers' monies, which generally affect the delivery of public services. This challenge has led to a high level of tax non-compliance in the country, as many taxpayers do not wish to pay taxes to an unaccountable government that

109 Micah (n 83).

110 F Eleanya 'Complex tax procedures drive Nigerian SMEs away from paying taxes – Taxmingo CEO' *Business Day* 21 January 2021, https://businessday.ng/amp/interview/article/complex-tax-procedures-drive-nigerian-smes-away-from-paying-taxes-taxmingo-ceo/ (accessed 7 May 2022).

111 E Nwaolisa 'The effect of poor implementation of tax policies on developing economies. A study of Nigerian economy (1999-2010)' (2012) 1 *Review of Public Administration and Management* 38.

112 FY Mpofu & T Moloi 'Direct digital services taxes in Africa and the canons of taxation' (2022) 11 *Laws* 57, 60.

cannot account for the taxes that are paid.[113] The high level of moral decadence among government officials who aggrandise themselves by using tax revenues, while the rest of the populace suffer economic hardship, has created tax apathy among many Nigerians.[114] Nigeria presently has no effective transparency or accountability mechanism to protect itself against IFFs, the misappropriation of tax revenues by government officials, international tax evasion, and transfer mispricing.[115] Consequently, the country continues to suffer a loss of revenues and domestic resources, in turn affecting economic growth and hindering its achievement of minimum core obligations.

4.2 The role of taxation in the fulfilment of human rights and minimum core obligations in Nigeria

Taxation plays an enormous role not only in the realisation of human rights, but also for the fulfilment of a state's minimum core obligations. Taxes have the potential of financing development, stimulating economic growth and providing sufficient resources needed for a state to meet the basic needs of its citizens.[116] The higher and more stable the tax revenues, the more a state is able to increase sustainable investment in public services and infrastructure and create long-term competitiveness of its economy.[117] States, therefore, have a duty to mobilise resources in such a way as to ensure that the resources are utilised by the government to fulfil their human rights obligations. There is no doubt that taxation is not the only source of revenue for governments, yet it is remains the most sustainable source for the realisation of socio-economic and cultural rights and for financing development. It has been observed that domestic resource mobilisation from taxation is critical towards creating more 'responsive, accountable and capable states'.[118] According to the 2014 report of the UN Special Rapporteur on Extreme Poverty and Human Rights, taxation plays three primary

113 E Appah & KZA Appiah 'Fraud and development of sound financial institutions in Nigeria' (2010) 1 *Nigerian Journal for Development Research* 49.

114 E Igbeng and others 'Evaluation of public accountability and tax culture among tax payers in Nigeria' (2015) 1 *International Journal of Management Science and Business Administration* 7-13.

115 J Emejo & S Mayomi 'Nigeria: Experts – Transparent, accountable tax system will boost compliance, reset economy' 20 September 2021, https://allafrica.com/stories/202109200475.html (accessed 7 May 2022).

116 Report of the Special Rapporteur (n 65).

117 M Tuazon & M Stenlund 'The role of taxation in the fulfilment of human rights and sustainable development' 2019, https://www.diva-portal.org/smash/get/diva2:1353116/FULLTEXT01.pdf (accessed 7 May 2022).

118 Overseas Development Institute 'Supporting domestic revenue mobilisation: We must learn from the failures of the past' 16 March 2018, https://odi.org/en/insights/supporting-domestic-revenue-mobilisation-we-must-learn-from-the-failures-of-the-past/ (accessed 7 May 2022).

functions: generating revenue for the realisation of human rights; achieving equality and tackling discrimination; and strengthening governance and accountability.[119] Indeed, states with a high tax-to-GDP ratio can use taxes to meet all these targets, while ensuring the sustainable realisation of their minimum core obligations.

In Nigeria, taxation is of strategic importance towards improving the country's economic performance, reducing poverty and achieving investments in areas such as food security, water, health and education. The quality and availability of these public services are dependent on the resources the Nigerian government is able to mobilise in order to fulfil human rights and achieve its minimum core obligations. According to the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the right to education can only be properly achieved if states strengthen their tax systems and tap their tax bases sufficiently in order to derive substantial revenue.[120]

In addition, tax policies have the potential of reducing income and wealth inequalities and shaping the transparency and accountability of the government. This is crucial because inequalities have been observed to pose devastating impacts on economies by heightening the pace of poverty, creating intergenerational poverty through uneven access to health and education, and increasing the vulnerability of states to economic downturns.[121] It therefore is necessary for Nigeria to use taxation as a means of redistributing wealth in society in order to address issues relating to discrimination (whether based on age, race, gender, disability or sexual orientation) and to spur progress towards substantive equality.[122] It is important to note that the more the Nigerian government can rely on domestic rather than external resource mobilisation for its financing, the more it will be able to realise human rights and achieve its minimum core obligations to meet the needs of the people.

It is argued in this article that all tiers of government in Nigeria have the obligation to ensure that they meet their minimum core obligations owed to the citizens with the tax revenues that come into

119 Report of the Special Rapporteur (n 65) para 36.

120 UNESCO '2013/4 Education for All Global Monitoring Report: Teaching and learning: Achieving quality for all' (2014) 116, http://unesdoc.unesco.org/images/0022/002256/225660e.pdf (accessed 7 May 2022).

121 See Department of Economic and Social Affairs 'Inequality matters: Report on the world social situation' 2013 66-68; Fiscal Policy and Income Inequality, IMF Policy Paper, 23 January 2014; Centre for Economic and Social Rights 'Challenging fiscal injustice through human rights' 25 November 2015, https://www.cesr.org/human-rights-taxation/ (accessed 7 May 2022).

122 I Saiz 'Resourcing rights: Combating tax injustice from a human rights perspective' in A Nolan and others (eds) *Human rights and public finance* (2013) 77.

their coffers. This notwithstanding, it is important to take cognisance of the nuances of taxation in relation to Nigeria's federal system and the impact on the implementation of minimum core responsibilities by the different tiers of government under Nigeria's federal system. For context, in Nigeria, the division of taxing powers follows the separation of powers, meaning that each level of government can only impose taxes within its specified jurisdiction as outlined in the Constitution. In this sense, the federal government has the broadest taxing powers, with the power to tax of the state and local governments being significantly limited by the Constitution.[123] However, tax revenue generated is deposited into the federation account and distributed among the three levels of government in accordance with section 162(2) of the 1999 Constitution. Additionally, there are instances where, while the power to tax is vested in one level of government, the collection is entrusted to another level.[124]

Therefore, considering the existence of tax administration at various levels of government and the fact that revenues accruing to the federation account are divided across the various levels of government, it is possible to take actions aimed at fulfilling minimum core obligations at these respective levels.[125]

5 Conclusion and way forward

From the analysis undertaken in this article, it is clear that taxation plays a significant role in the fulfilment of human rights and the realisation of a state's minimum core obligations. This statement is not conjectural as it may also be proven by empirical evidence in Nordic countries such as Denmark, Finland and Norway. The common theme in these countries is that the distribution of their tax expenditure often is predominantly towards social welfarism, in business development and housing, social security and housing, and contributory pension schemes respectively.[126] In these countries,

123 See D Olika 'Interrogating the constitutional foundations for local government financing in Nigeria' (2023) 6 *Unilag Law Review* 12.

124 A Sanni 'Division of taxing powers under the 1999 Constitution', https://ir.unilag.edu.ng/bitstreams/7ca9af50-eb55-4d4b-899f-f488162258a4/download#:~:text=The%20Federal%20Government%20has%20the,extent%20permitted%20by%20the%20Constitution (accessed 2 October 2023). Eg, the personal income tax is imposed by the federal government but administered and collected by the state government.

125 See O Fuo & A du Plessis 'In the face of judicial deference: Taking the "minimum core" of socio-economic rights to the local government sphere' (2015) 19 *Law, Democracy and Development* 1.

126 M Jacobsen and others 'Tax expenditures in the Nordic countries: A report from a Nordic working group' presented at the Nordic Tax Economist Meeting in

the tax expenditures are annually reported to the government and these activities are geared towards ensuring efficiency, fairness and simplicity in tax and fiscal policy. In these Nordic countries, there are universal welfare systems, strong social safety nets and infrastructure development that safeguard the social and economic rights of their citizens.[127]

However, notwithstanding the numerous potentials of taxes, the Nigerian government continues to struggle in mobilising domestic resources needed to eradicate poverty, achieve economic growth and provide basic amenities such as education, health care, food security, clean water, electricity, and so forth. In order to realise its minimum core obligations towards the people, the Nigerian government must take active steps to increase tax revenues and address the numerous challenges facing its tax system. In particular, government must take strong measures towards tackling tax evasion and tax avoidance by individuals and businesses in the country. In light of the adverse economic implications of tax evasion and avoidance, preventing and punishing such conduct is essential if Nigeria is to comply with human rights principles and fulfil its minimum core obligations.[128]

Tax evasion and avoidance is most likely to reduce if tax laws in the country are properly enforced and tax defaulters and evaders prosecuted. The government, therefore, must invest heavily in the tax enforcement to position it to effectively combat tax avoidance and tax evasion. To further discourage non-compliance with tax laws, there is a need to put in place effective transparency and accountability mechanisms to ensure that all tax revenues payable to the government are paid directly to the government account and to ensure that tax officials cannot divert taxpayers' monies to enrich themselves.[129]

The government can also improve voluntary tax compliance by simplifying tax laws and procedures to ensure that the ordinary taxpayer understands their tax duties and obligations. Although the government has introduced several electronic channels to transform the tax compliance process away from the manual system, which is

Oslo, June 2009, https://www.ft.dk/samling/20091/almdel/sau/spm/106/svar/716635/847543.pdf (accessed 2 October 2023).

127 L Herning 'Social policy and welfare', https://www.norden.org/en/information/social-policy-and-welfare (accessed 2 October 2023).

128 Report of the Special Rapporteur (n 65) para 60.

129 O Oladejo 'Strategy to close tax gaps created by tax avoidance and tax evasion in Nigeria: An overview' (2021) 9 *European Journal of Accounting, Auditing and Finance Research* 55.

cumbersome and bureaucratic,[130] some states are yet to adopt these platforms for tax payment and filing of returns. It is essential that these states simplify their tax procedures by using online channels to increase the level of voluntary payments, as well as to improve tax assessment, the filing of returns, debit and credit management, tax audit and investigation.

To further strengthen revenue raising to achieve minimum core obligations, it is essential for the Nigerian government to widen the tax base and improve tax collection efficiency. The informal economy is one sector that, if tapped, can contribute a fair share to the country's tax revenues since it makes up 50 per cent of the Nigerian GDP. It therefore is necessary for the government to adopt measures towards improving the taxation of the informal economy. In addition, policy interventions are to be made to address the numerous challenges faced by stakeholders in the informal sector, such as inadequacy of finance, technology and physical infrastructure[131] needed to drive their businesses and improve productivity.

Addressing IFFs is another way in which Nigeria can swiftly achieve its minimum core obligations and achieve sustainable economic growth. To successfully track IFFs, efforts must be made to reduce the bureaucracy involved in the repatriation of stolen funds through simplifying mutual legal assistance agreements between source and destination countries. The Nigerian government, therefore, needs to work towards closing loopholes in tax laws, strengthening regulatory enforcement and collecting better trade data in collaboration with other countries. Concerted international cooperation, therefore, is necessary in order for Nigeria to raise the maximum domestic resources needed to realise its minimum core obligations and ensure the progressive realisation of socio-economic and cultural rights.

These recommendations are important in light of the central argument of this article – that implicit in the Nigerian government minimum core obligation is the duty to ensure that it utilises the resources available for the protection of the essential and irreducible

130 PwC 'FIRS introduces electronic filing of tax returns and online payment of taxes' February 2015, https://pwcnigeria.typepad.com/files/pwc-tax-alert_firs-introduces-electronic-tax-filing-2.pdf (accessed 7 May 2022); Andersen 'FIRS introduces new online tax administration solution' 25 June 2021, https://www.mondaq.com/nigeria/withholding-tax/1083942/firs-introduces-new-online-tax-administration-solution (accessed 7 May 2022).

131 See Bank of Industry 'Economic development through the Nigerian informal sector: A BOI perspective' 17 May 2018 Working Paper Series 2, https://www.boi.ng/wp-content/uploads/2018/05/BOI-Working-Paper-Series-No2_Economic-Development-through-the-Nigerian-Informal-Sector-A-BOI-perspective.pdf (accessed 7 May 2022).

socio-economic rights of its citizens. For this to be possible, the government needs sufficient tax revenues. Thus, to improve the ability of the government to meet this obligation; the government would have to improve its tax regime to raise the maximum resources possible. The implication of this is that failing to take deliberate steps to improve its tax revenues only complicates the ability of the Nigerian government to meet its minimum core obligations in relation to socio-economic rights.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: A September van Huffel 'State regulation and misconstructions of customary land tenure in South Africa' (2024) 24
African Human Rights Law Journal 58-76
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a3

State regulation and misconstructions of customary land tenure in South Africa

*Anthea-lee September van Huffel**
Lecturer, Department of Private Law, University of the Free State, Bloemfontein, South Africa
https://orcid.org/0000-0003-1179-4144

Summary: *The state resorts to misconstructions of customary land tenure rights in its land reform policy that emulate apartheid-era thinking, rather than facing the realities of modern-day land practices, which include collective decision making in the everyday management of land separate from the state's regulatory control. A developmental custodial state treads a thin line in the implementation of its statutory and policy interferences so as not to overstep the boundaries of existing land rights already operating under a living customary law system. Only through public participation and consultation with communities can the reasonableness of regulatory legislation and policies be accurately assessed and determined. Space must be created for all South Africans to participate in the economy to enable inclusive growth in various ways. In so doing, the state should avoid creating a hierarchy of land rights holders and should regulate the natural resource through policies that are aligned with reform objectives, without encroaching on spaces already regulated by customary and communal law systems. In this article the legal implications of applying a state custodianship approach to communal land, traditional leadership and misconstructions of customary law, and the political interpretation of constitutional land reform objectives is discussed.*

* LLB (UWC) LLM (UWC) LLD (UFS); SeptemberVanHuffelA@ufs.ac.za

Key words: *traditional leadership; living customary law; state regulation; custodianship and stewardship; secure land rights*

1 Introduction

The legal implications of applying a state custodianship approach to communal land, traditional leadership and misconstructions of customary law, and constitutional land reform objectives that are influenced by political agendas are critically discussed in this article. South Africa's security of land tenure is replete with tenure legislation and policy that seeks to protect and 'upgrade' so-called informal land rights. However, the socio-economic benefits associated with secure land tenure and the equitable access to resources such as land, water and other natural resources receive little attention in tenure legislation and policy formulation. This article demonstrates how regulatory laws and policies in the statutory land tenure space can result in the circumvention of intended constitutional reforms such as equitable access and benefit in natural resources such as land, in ways that lead to continued dispossession and life-long custodianship, and little regard for lived customary and informal land rights practices. It results in poor socio-economic circumstances for land reform beneficiaries if the purpose and outcomes of tenure security legislation and policy reforms are not carefully examined.

Land holding continues to evolve in the modern context, and for many individual and communal rural landholders this means acquiring ownership title, while still operating under living customary law. In *Tongoane v National Minister for Agriculture and Land Affairs* (*Tongoane*)[1] the Constitutional Court held that the Communal Land Rights Act,[2] which was promulgated to give effect to section 25(6) of the Constitution of the Republic of South Africa, 1996, seemed to be stepping back into a space already regulated by living customary law.[3] Consequently, South African courts recognise the developmental nature of living customary law.[4] Ownership is but one form of tenure

1 2010 (6) SA 214 (CC).
2 Communal Land Rights Act 11 of 2004 which has since been declared unconstitutional.
3 *Tongoane* (n 1) para 79; W Wicomb 'The exceptionalism and identity of customary law under the Constitution' (2014) 6 *Constitutional Court Review* 131.
4 Presidential Report, *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 489. 'The judiciary has established an understanding of customary law as a 'living system of law' that develops as it is lived by the community, taking care to give effect to an understanding of customary law not as mere cultural practice, but as law. It recognised customary property rights, customary land and resource governance and customary rules of evidence. The legislature, on the other hand, focused on the institution of traditional leadership. This de-recognition of customary law by the legislature

although it is highly valued largely due to the prevailing insecurity of land tenure and the private property system that historically prioritises ownership title as a form of security. However, living customary law is able to adapt to modern-day land practices, with some individual land holders possessing ownership title to meet their unique needs, all the while continuing to apply norms based on shared communal value systems and customary principles of land management.[5] Therefore, the enjoyment of one does not automatically prevent the benefit of the other, and the pursuit of common values and collective objectives remains an essential function of rural land-holding communities. This article discusses how these customary law communities define their own values which, in turn, define the community[6] and shapes its land tenure rights and limitations. The article highlights that a developmental *custodial* state treads a thin line in the implementation of its interferences through statute so as not to overstep the boundaries of existing land rights already operating under a living customary law system, a system that requires active participation and consultation on any proposed legislation and other measures that directly affect the land rights of communities and their interests. Only through public participation and consultation with communities can the reasonableness of regulatory legislation and policies be accurately assessed and determined.[7]

---

has far-reaching consequences for communities who live by customary law. Their customary land rights continue to be denied while the powers of traditional leaders are bolstered through laws such as the Traditional Leadership and Governance Framework Act 41 of 2003 and Mineral and Petroleum Resources Development Act 28 of 2002.' Since the 2017 High Level Panel Report the following notable developments has taken place: the Traditional and Khoi-San Leadership Act 3 of 2019 (TKLA) which was intended to repeal the Traditional Leadership and Governance Framework Act 41 of 2003; the National House of Traditional Leaders Act 22 of 2009; and the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 was declared unconstitutional and invalid for its failure to facilitate public participation in the passing of the TKLA, which deficiencies were numerous and material. The Constitutional Court struck down the TKLA, stressing the transformative significance that this legislation holds for the lives of millions of South Africans and directing Parliament to revisit the constitutional processes.

5 A Pope 'Get rights right in the interests of security of tenure' (2010) 14 *Law, Democracy and Development* 338; A Claassens 'Denying ownership and equal citizenship: Continuities in the state's use of law and "custom" 1913-2013' (2010) 40 *Journal for Southern African Studies* 768. See also sec 211(1) of the Constitution. 'The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.'

6 H Bull *The anarchical society: A study of order in world politics* (1995) 51; R Barnes *Property rights and natural resources* (2009) 70.

7 HG van Dijk & PA Croucamp 'The social origins of the developmental state: Reflections on South Africa and its local sphere of government' (2009) 42 *Journal of Public Administration* 666, who comment that '[m]odern society, and the involvement of civil society in South Africa, has called for a new type of state, namely one that is both democratic as well as developmental in both content and character, and maintains that the centrality of the state in nation-building and socio-economic development be reaffirmed, while also asserting participatory democracy and a culture of human rights as key features of the developmental state'.

A failure to consult with communities increases the risk of inadvertently infringing on the human dignity of communities and individuals with existing land rights, as well as on their individual and collective sense of self-determination as contributing members of society.[8] It would also have a detrimental impact on democracy.[9] Conversely, research and real-world experience have shown that economic progress for marginalised groups emerges in contexts where the law permits individual liberty in the broadest possible sense.[10] For example, not all rural land owners and communities wish to be commercial irrigation farmers. Land can have a multitude of other uses that are equally productive and valuable to the economy and environmental sustainability.[11] The state should avoid creating a hierarchy of land rights holders that prioritises and prefers commercial farmers over all other land users. Furthermore, the state, as steward, must regulate the natural resource through land policy that seeks to achieve reform objectives, without encroaching on spaces already regulated by customary and communal law systems.[12] Otherwise, the state runs the risk of replacing existing land rights that are already operating under established living customary law with

8 GWF Hegel *Elements of the philosophy of right* (1991) 46; P Drahos *A philosophy of intellectual property* (1996) 73-94; H Mostert & C Lei 'The dynamics of constitutional property clauses in the developing world: China and South Africa' (2010) 17 *Maastricht Journal of European and Comparative Law* 378.

9 Van Dijk & Croucamp (n 7) 664. 'Democracy provides a voice for the poor and marginalised, protects and accrues the rights of citizens, promotes institutional separation of powers and functions, transparent decision making, accountability and effective monitoring and control.'

10 W Njoya *Economic freedom and social justice: The classical ideal of equality in racial diversity* (2021) 192.

11 P Mograbi 'South Africa's land reform policies need to embrace social, economic and ecological sustainability', https://theconversation.com/south-africas-land-reform-policies-need-to-embrace-social-economic-and-ecological-sustainability-145571 (accessed 20 September 2022). 'They [land reform discussions] haven't included the multiple functions that land offers humans, beyond its agricultural potential. The success (or failure) of many land reform programmes is measured in hectares of farmland transferred. This approach portrays the land as uniform, static, independent from its social-environmental context and disconnected from future beneficiaries and broader society ... [T]his narrow focus undermines the goals of equitable and sustainable land reform … Land provides more than just food … The multiple possible benefits derived from land suggest multiple possible uses. Beneficiaries of a land reform programme may be able to use land in various ways other than farming. The state has explicitly emphasised maintaining agricultural productivity and food security during the land reform process. This limits the function land should provide, especially in the land redistribution models. The state should support a variety of livelihood options, especially on land with low agricultural potential.'

12 AJ van der Walt *Constitutional property law* (2003). See also GJ Pienaar & E van der Schyff 'The reform of water rights in South Africa' (2007) 3 *Law, Environment and Development Journal* 189, partly citing Van der Walt. '[P]roperty has a … "propriety" aspect to it that transcends individual economic interests and that involves interdependency and the common obligations that result from it. Individual and public interests are the weights that must balance the scale of property as a social construct.' Mostert & Lei (n 8) 384-385. '[T]he individual freedom to exercise property rights is protected to the same extent as the public interest in individual property.'

regulatory measures that are politically motivated and are unable to meet the particular needs of communal land holders. Yet, this appears to be exactly what is transpiring under recent land reform laws and policies. What follows is a discussion that highlights how statutory regulation of communal land by the state can inadvertently create land tenure confusion and support the misconstructions of customary law in ways that disempower the community but instead favour despotic traditional authorities.

2 Disempowering regulatory land reform laws and policies

The Constitution (the supreme law of South Africa) expressly recognises the role of traditional leaders in sections 211(2) and 211(3) of the Constitution. However, the unfortunate wording of the provision is open to misinterpretation and abuse. It creates the opportunity for a narrative that elevates the status of traditional authorities above that of the community they serve. It is argued that the wording only muddies the status of living customary law in respect of traditional authorities by placing emphasis on the relationship between the traditional authorities and the state, with no mention of the communities on whose behalf they serve and in whose best interests they must act. These two provisions provide the loophole needed for the statutory regulation of communal land by the state: The phrasing is wide enough to be understood to allow traditional leaders control over the meaning and intention of customs, making the functioning of traditional authority both justified by and subject to the Constitution, and to 'any legislation that specifically deals with customary law'.[13]

A steady stream of state land reform laws, policies and plans continues to be churned out.[14] These laws and policies often

13 Secs 211(2)-(3) of the Constitution. '(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

14 Including the Department of Rural Development and Land Reform *Communal Land Tenure Policy* (2014); the Communal Land Rights Act 11 of 2004 (declared unconstitutional in 2010); the Traditional Leadership and Governance Framework Act 41 of 2003; the Traditional Leadership and Khoi-San Leadership Act 3 of 2019 (declared unconstitutional and invalid due to Parliament's lack of public participation); the Traditional Courts Bill B1-2017 (signed into law on 16 September 2023 and becomes Act 9 of 2022); the Restitution of Land Rights Amendment Bill B19-2017 (the Bill lapsed in terms of National Assembly Rule 333(2) in 2019); the Department of Rural Development and Land Reform Recapitalisation and Development Policy Programme (2010); the Department of Rural Development and Land Reform Green Paper on Land Reform (2011);

perpetuate paternalistic misconstructions of customary communal land tenure with disempowering outcomes, thereby establishing a dual land-holding system by eliminating privately-controlled means of production on the assumption that individual forms of production do not exist within customary and communal landholding structures.[15] This is despite the fact that the Constitutional Court has found that customary law provides for ownership of land; that people in rural areas are entitled to the same rights as all South Africans, including the recognition of their customary ownership of land; and that Parliament must ensure that no laws or policies abrogate these rights.[16]

Disempowering outcomes are a consequence of land reform laws and policies that often rely on the same ideological assumptions used to justify the denial of black land rights during apartheid.[17] The rigid regulation of land is not conducive to the socially-transformative

---

the Rural Development and Land Reform Strategic Plan (2010-2013) and its accompanying Comprehensive Rural Development Programme (2013); the Department of Rural Development and Land Reform Land Tenure Security Policy and draft Land Tenure Security Bill (2011).

15 W Greffrath 'Land reform, political instability and commercial agriculture in South Africa: An assessment', https://www.academia.edu/37320502/Land_reform_political_instability_and_ commercial _agriculture_in_South_Africa_An_assessment (accessed 30 November 2022).

16 Presidential Report (n 4) 39; *Bhe v Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC) paras 11 & 87. See also *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) fn 51: 'The Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system.' A Claassens & B Matlala 'Platinum, poverty and princes in post-apartheid South Africa: New laws, old repertoires' in C Ballard and others *New South African review* (2018) 121; A Claassens 'Who told them we want this bill? Traditional Courts Bill and rural women' (2009) 23 *Gender and the Legal System* 9-10. See also S Mnwana 'Why giving South Africa's chiefs more power adds to land dispossession', https://theconversation.com/why-giving-south-africas-chiefs-more-power-adds-to-land-dispossession-93958 (accessed 15 September 2022). 'Distributive power over land doesn't rest exclusively with chiefs. There are multiple layers of power that rests in different social units, families (and individuals within them). Most importantly, chiefs have never had powers to alienate land rights from ordinary residents. African land rights are acquired through membership to a group – a productive and social unit such as a family or clan. Once allocated, land rights were passed from one generation to the next. It is at the level of this unit that, by and large, decisions about distribution of such rights were taken in precolonial times ... The assumption that chiefs are custodians of rural land and mineral wealth – and as such can distribute and alienate land rights and sign complex mining deals on behalf of rural residents – has no precolonial precedent. It's no surprise that ordinary people are resisting chiefly power over their property. It's even more crucial to closely examine and understand the character of power over land and landed resources as rural land increasingly becomes a target for large scale resource extraction.'

17 Presidential Report (n 4) 54. See also HWO Okoth-Ogendo 'The nature of land rights under indigenous law in Africa' in A Claassens & B Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) ch 4 95. referring to 'juridical fallacies' imposed by the colonial state and subsequently internalised by postcolonial governments', with the 'central fallacy' being that indigenous law 'confers no property rights in land'. See also TW Bennett *Customary law in South Africa* (2004); M Chanock *The making of South African legal culture 1902–1936: Fear, favour and prejudice* (2001); Claassens (n 5) 772.

character of indigenous land law, which inherently includes collective decision making to deal with the infrastructural needs that would enable socio-economic development.[18] For example, customary communal landholders are expected to comply with unnecessarily procedural statutory requirements, even though this is challenging given their rural conditions and the limited support they receive from the state. The consequence is that uneducated and poorer land claimants and/or beneficiaries are inevitably regarded as non-compliant.[19] A non-compliant status may result in the skewed perception that these categories of land tenure make no real contribution to national agrarian markets and food security, whereas they are likely contributing to the sustainability of local lower-income households. Furthermore, an excessive regulatory approach to communal land tenure only adds to state officials' administrative burden of state officials and is impractical given their lack of capacity, limited resources and fights against corruption.[20]

The continued mode of custodial overregulation through statutory mechanisms with little to no consultation with the people who hold the rights in the natural resources is untenable. This coupled with a *modus operandi* whereby the state exercises its statutory regulation and custodianship almost exclusively through traditional leaders wherever communal land tenure occurs poses practical challenges. These lead to disempowering challenges that influence political ideologies, the legitimacy of the living customary law reporting structure, community's prior informed consent and participation in decision making, and the accountability of traditional leaders. In the next parts, to illustrate these practical challenges, I examine the implementation of traditional leadership and state custodianship and the political misinterpretation of constitutional objectives.

18 Pope (n 5) 353.

19 M Weeks 'Securing women's property inheritance in the context of plurality: Negotiations of law and authority in Mbuzini customary courts and beyond' (2011) *Acta Juridica* 147, who comments that 'while customary norms exist to be invoked, they should not be thought to be either strictly dictated by a sovereign or by 'rules, compliance or non-compliance' which determine dispute resolution outcomes'. Moreover, at Agriculture, Rural Development and Land Reform Minister Thoko Didiza's ministerial oversight visit in April 2022 at Ilanga Estate, Free State, most CPAs voiced concern about the lack of support received from government, and the fact that they were still awaiting their ownership title deeds.

20 C Engelbrecht 'The ANC's two-state South African state: Its own colonialism and affinity for monopoly capital in the era of the Capitalocene', http://academia.edu/39392895/The_ANCs_Two_state_South_African_State (accessed 5 May 2022); CF Swanepoel 'The slippery slope to state capture: Cadre deployment as an enabler of corruption and contributor to blurred party-state lines', http://dx.doi.org/10.17159/2077-4907/2021/ldd.v25 (accessed 15 July 2022); M Siboto 'The betrayal of the struggle: ANC, EFF and VBS Bank'; J Cronin 'We've been structured to be looted – Some reflections on the systemic underpinnings of corruption in contemporary South Africa', https://works.bepress.com/jeremy_cronin/2/2 (accessed 10 October 2022).

2.1 Traditional leadership and state custodianship of communal land

Central to the political ideology found in recent land policy is the significant administrative and political role that traditional leaders are positioned to play in the management of communal land. This is a noticeable shift in national land reform policy away from the previous position, which demonstrated sensitivity to the controversial history of 'tribal' or traditional authorities.[21] Earlier land policies of the African National Congress (ANC) aligned with the Constitutional Court that traditional leadership derived their authority from (living) customary law, and not the other way around.[22]

However, a definitive shift in political ideology and perhaps allegiances was made clear through the enactment of the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) and, subsequently, the Traditional and Khoi-San Leadership Act 3 of 2019 (TKLA). These laws have made the existence of customs entirely dependent on traditional leadership and have codified traditional leadership powers through statute rather than the authority of the defined community in accordance with living customary law.[23] The TKLA has since been declared unconstitutional and invalid after its constitutionality was challenged in the Constitutional Court primarily due to the lack of public participation and democratic engagement on the statute, among other concerns echoed in this article.

Land reform experts have persistently expressed their concerns about the dangers of changing or overregulating custom and community decision-making structures through statutory interventions. However, the tenure of communal land continues

21 Land and Accountability Research Centre *Submission to National Council of Provinces on the Traditional Leadership and Governance Framework Amendment Bill* (2017) 2. 'Tribal authorities were fiercely contested by many ordinary people and political activists, who recognised their role in the oppressive apartheid state machinery.' See also Wicomb (n 3) 132-133. 'The customary structures of governance of traditional leadership were put aside or transformed by the colonial and apartheid governments.'

22 *Alexcor Ltd v the Richtersveld Community* 2004 (5) SA 469 (CC); *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC); *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC); Du Plessis & Frantz 'African customary land rights in a private ownership paradigm', https://ssrn.com/abstract=2381922 or http://dx.doi.org/10.2139/ssrn.2381922 (accessed 30 November 2022); Wicomb (n 3) 128; Claassens (n 5) 769; C Lund & C Boone 'Introduction: Land politics in Africa – Constituting authority over territory, property and persons' (2013) 83 *Africa* 13. See also Presidential Report (n 4) 486. 'The Constitution of South Africa recognises customary law as a part of the South African legal system equal to the common law. As such, the Constitution presents a radical departure from the pre-constitutional position that recognised customary law rules only where no rules could be sourced from the common law or statute law.'

23 Wicomb (n 3) 132-133.

to be the target of several statutory interventions that have placed large tracts of communal land under the control of traditional councils which, in turn, report to the state. This in effect removes the legitimacy of the customary reporting structure of traditional leaders to their communities and *vice versa* and undermines the authority by silencing the voices of the collective. It creates the impression that the community no longer is a stakeholder in rural development and decision making.[24] State custodianship has similarly resulted in the silencing of land-holding communities under the Mineral and Petroleum Resources Development Act (MPRDA).[25] While communal land tenure is customarily ruled by an inclusive collective majority decision under living customary law, the state custodianship approach as applied to land ostensibly has little regard for the unique customs and diversity of communal land holders. In reality, the statutory authority granted to traditional leaders could very well reduce the ability of customary communities to hold their traditional leaders accountable.[26] The statute supplants living customary law practices, rendering shared values, such as informed collective decision making, subordinate to the authority of traditional leaders and the state. It assumes that traditional leaders have the support based on their status as representatives and that consultation with representatives absolves the state of its responsibility to consult the

24 Parliament of RSA 'The National Development Plan unpacked', https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (accessed 30 November 2022). 'High-level leadership meetings will be held regularly between government and business, government and labour, and government and civil society …These high-level meetings will be underpinned by more focused stakeholder engagements … intended to find solutions to specific challenges.' It is not clear whether the engagements will involve rural communities as well, or whether only traditional leaders will be included.

25 Presidential Report (n 4) 503-507. '[T]he MPRDA abolished landowners' rights to say no to mining on their land. While intended to advance transformation, this change has had devastating impacts for members of rural and customary communities, who have borne the brunt of the removal of the express right to say no. With much of mining's expansion taking place on "communal land", communities have faced land dispossession, displacement and loss of traditional agrarian livelihoods.' Pope (n 5) 352, citing Claassens & Cousins (n 17), commenting that 'the law should not be permitted to impose mechanisms that stifle "democratic possibilities inherent in the development of a living customary law that reflects all the voices currently engaged in negotiating transformative social change in rural areas"'.

26 Pope (n 5) 339-340; Claassens & Cousins (n 17) 98-100. See also Okoth-Ogendo (n 17) 95, who states that (paraphrased) indigenous or living customary law cannot be summarised in its entirety as communal in nature. Instead, the social order creates reciprocal rights and obligations that bind members together and vest power in community members over the land. It is the continuous performance of rights and obligations that determine who may have access to or exercise control over land and associated resources. Access to land is a function of membership of a group, and it is the group that is self-limiting rather than artificial bureaucracy.

community on partnerships and agreements with respect to their land.[27] The state places the (patriarchal) status of traditional leaders as 'functionaries'[28] or state agents above that of the community, enabling the ongoing establishment of untransformed colonial-apartheid structures in the form of tribal authorities, first established in terms of the Black Authorities Act 68 of 1951.[29] These tribal authorities had been transformed into traditional councils for the purposes of section 28(4) of the TLGFA.[30] Therefore, it is contended that while the state, as custodian of all land, has the fiduciary duty to ensure the security of tenure of land claimants and beneficiaries, it has opted by statute to delegate or outsource its fiduciary duty to traditional leaders.[31]

27 Sec 24(3)(c)(i) of the TKLA. The TKLA did not provide for community consent for any partnerships or agreements regarding communal land entered into by traditional leaders. In addition, the phrasing pertaining to consultation is unclear, stating that such agreements are subject to 'a prior consultation with the relevant community represented by such traditional council'. This implies that consultation with the community is considered to have taken place if the traditional council, as representative of the larger community, is consulted. See also Land and Accountability Research Centre *Submission to National Council of Provinces on the Traditional Leadership and Governance Framework Amendment Bill* (2017) 6. '[C]lause 24 of the Traditional and Khoi-San Leadership Bill of 2015 now proposes to cement this reality [of traditional authorities negotiating mining deals without consulting communities] into law by giving traditional councils the power to conclude contracts with any institutions with no corresponding duty to consult or obtain the consent of persons living within their jurisdiction.' Therefore, by enabling the enactment of legislation that contravenes its fiduciary duties owed to communal land beneficiaries, the state has failed to protect land as a natural resource for the public good.

28 Land and Accountability Research Centre (n 27) 1-2, where it was submitted that the TLGFA failed to provide clarity regarding the status of traditional councils. Sec 20 of the TKLA. The administrative functions of traditional councils include supporting municipalities in the identification of community needs, participating in the development of policy and legislation at a municipal level, participating in development programmes of the local, provincial and national spheres of government, and performing the functions conferred by customary law, customs and statutory law consistent with the Constitution. D Atkinson 'Patriarchalism and paternalism in South African 'Native Administration' in the 1950s' (2009) 54 *Historia* 271-272. 'This paternalistic approach was nothing new. The Native Affairs Department had, since its re-organisation in 1910, prided itself on its benign, sympathetic attitude towards the needs of blacks. This approach had evolved from early forms of colonial administration, and it flourished where administration involved personal contact between rulers and ruled ... According to Dubow, "the administrator's [functionary's] role was portrayed in terms reminiscent at once of a chief in traditional society, and a Victorian patriarch"'.

29 The Black Authorities Act 68 of 1951 authorised the state president to establish tribal authorities for African 'tribes', as the basic unit of administration.

30 *Tongoane* (n 1) para 24.

31 F von Benda-Beckmann, K von Benda-Beckmann & J Eckert 'Rules of law and laws of ruling: Law and governance between past and future' in F von Benda-Beckmann, K von Benda-Beckmann and J Eckert (eds) *Rules of law and laws of ruling: On the governance of law* (2009) 2, listing examples of outsourcing demonstrated over time, including colonial regimes relying on indirect rules, and social and economic corporations and private agencies that are put in charge of security and justice in specific areas. See also Claassens (n 16) 20.

The delegation of authority is problematic as it inevitably blurs the lines of accountability. This is particularly problematic in the event of mismanagement of agricultural land and associated resources. It also raises questions as to who the true trustee or custodian of communal land is: Is it the state or the traditional authority? For example, in the event of corruption or unscrupulous decision making that places communal land and other natural resources at risk, does the community to whom the stewardship duty of care is owed hold the state, as custodian, accountable? Or should the state hold traditional leaders accountable? Moreover, in the event of collusion between the state and traditional leaders, accountability would be virtually impossible and would necessitate collective court action by the community to safeguard their rights. Ordinarily, in terms of living customary law, communities would have decisively removed corrupt traditional leaders by way of a majority decision. However, because of the commanding role of traditional leaders in land governance statutes, their removal may carry political implications, which complicates matters.

In fact, according to the provisions of the now unconstitutional and invalid TKLA, the withdrawal of the recognition of headmanship or headwomanship could be considered only where the relevant traditional council (not the community) requested the premier concerned to withdraw such recognition, unless done through a court order.[32] Furthermore, the recognition, establishment and constituency of traditional communities and traditional councils were made expressly subject to determinations by the state.[33] The recognition of traditional structures in the TLGFA affirmed tribalism as the centre of traditional councils and retained the obsolete discriminatory apartheid land divisions of the former homelands, which was built upon undemocratic power relations between traditional leaders and their subjects under the colonial and apartheid regimes.[34] In so doing, it is made clear that the state, through its regulatory powers, will control traditional councils and

32 Sec 4(8)(a) TKLA.
33 Secs 3 & 16 TKLA.
34 Land and Accountability Research Centre *Submission to National Council of Provinces on the Traditional Leadership and Governance Framework Amendment Bill* (2017) 3; Law, Race and Gender Research Unit 'Custom, citizenship and rights: Community voices on the repeal of the Black Authorities Act July 2010', http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/LRG_ book_ combined%2c_Dec_2010_-_Final%2c_Amended.pdf (accessed 2 May 2022); G Capps & S Mnwana 'Claims from below: Platinum and the politics of land in the Bakgatla-ba-Kgafela traditional authority area' (2015) 42 *Review of African Political Economy* 611.

hold traditional leaders accountable – it is not up to the community these councils and leaders represent.[35]

The present trajectory of land reform laws in the form of the TLGFA, the TLKA, and the 2017 Traditional Courts Bill (TCB),[36] the latter now known as the Traditional Courts Act 9 of 2022, makes the erroneous assumption that individuals and groups living and farming on communally-held land automatically ascribe to 'tribal' and 'traditional' constructs as their way of life. This discriminatory assumption – the same one made by previous apartheid land policies – does not take into account the diversity of South Africa's people. The state's abdication of its fiduciary responsibility to traditional leaders by statute is in conflict with the public trust that informs the state's role as a trustee of the environment.[37] Traditional leadership should exist to promote the interests of the community through modern-day communal land-holding practices that the community develops collectively over time. Instead, the state has statutorily positioned traditional leaders above living customary law by essentially removing their obligation to acquire consent from the community, and making the exercise of community decisions subject to the consent of the state.[38] The state's custodial land policy does not mean that the state acquires the communal land as its private

35 Sec 22(1) TKLA. 'A kingship or queenship council, principal traditional council, traditional council, traditional sub-council and a Khoi-San council (in this section jointly referred to as a council) must endeavour to perform its statutory, financial and customary obligations in the best interest of its community and is accountable to the Premier concerned for the efficient and effective performance of such obligations.'

36 Presidential Report (n 4) 54. The panel reported on the status of the Traditional Courts Bill 2017 (TCB) and that the National Assembly was seeking legal advice on the constitutionality of not allowing people to opt out of the proceedings in the traditional courts. The underlying assumption made by the TCB appeared to be that people in the former homelands were more appropriately governed by traditional leaders than elected local government, and its limitation on access to other courts and the inclination towards the sole jurisdiction of traditional courts was concerning.

37 CN Brown 'Drinking from a deep well: The public trust doctrine and Western water law' (2006) 34 *Florida State University Law Review* 12. 'The state was neither free to alienate its navigable waters nor abdicate its public trust responsibilities over such waters in a manner inconsistent with its public trust duties.' See also Presidential Report (n 4) 482. It is at odds with the duty to ensure that 'individual families should have secure rights legally equivalent to ownership … along with defined rights to grazing and natural resources held in common'. According to GJ Pienaar & E van der Schyff 'The reform of water rights in South Africa' (2007) 3 *Law, Environment and Development Journal* 184, '[t]he public trust doctrine is the legal tool that encapsulates the state's fiduciary responsibility towards its people and bridges the gap between the Roman-Dutch based property concept and the notion that water as a natural resource "belongs to all people"'.

38 Sec 24(3)(d) TKLA. Traditional councils may enter into partnerships and agreements with one another and with municipalities, government departments and any other person, body or institution, but such partnership or agreement is subject to 'ratification by the Premier of the province in which the relevant council is situated and will have no effect until such ratification has been obtained'.

property. Yet, the state does hold ownership-like entitlements as custodian and regulates the use of the communal land through its statutory establishment of, and authority over, traditional councils. This is an overregulation of communal land rights that subjugates the exercise of customary communal land rights by adopting the paternalistic notion that 'native' land rights cannot contribute to modern agrarian development without supervision.[39] It smacks of the colonial-apartheid action of vesting ownership of land in the state and using traditional leaders as 'state employees',[40] which gave traditional leaders the same kind of power to the detriment of the communities they served.

It therefore is clear that security of land tenure involves much more than land ownership, as there are varying interests and stakeholders involved. Each stakeholder has a vested interest in the land use and benefits that can be derived from the land, but none more so than the communities themselves. It therefore is unsurprising that, even with the extensive tenure land laws and policies that the socio-economic benefits associated with secure land tenure and the equitable access to resources such as land, water and other mineral resources are not expressly secured in favour of previously-disadvantaged communities in tenure reform legislation and land reform policy formulation. At this juncture, the next part will examine the political misinterpretations of constitutional objectives and how the political interpretation of legally-secure tenure and redistribution for equitable access to natural resources is developed and/or changed dependent on the stakeholder interests and political ideologies involved.

2.2 Political misinterpretation of constitutional objectives

Economic wealth redistribution and legally-secure tenure are interdependent and, as such, the state must apply mechanisms that achieve just outcomes. Land reform for the most part is a process embodied in the state, and its policies must allocate funds to the development of land in a way that promotes wider access to the resource, though *without* undermining the property rights of land reform claimants and beneficiaries. The constitutional land reform objectives require the colonial-apartheid legacy to be reversed, land to be restored to those dispossessed, and people's tenure to be made legally secure or comparable redress to be provided for land unlawfully taken.[41] Ngcobo CJ has emphasised just how important

39 Pope (n 5) 339-340.
40 Pope (n 5) 345.
41 Sec 25(6) Constitution.

it is for legislation to do precisely this.[42] Why, then, do recent land reform laws and policies seem to run counter to these foundational objectives?

It is proposed that, in the context of land reform, the political interpretation of legally-secure tenure and redistribution for equitable access has changed. It would appear that the state has reviewed its role according to a different political interpretation of the security of tenure and redistribution, which interpretation requires the state to have authority as custodian of all agricultural land. For now, this occurs through its implicit state custodianship approach to rural land through land reform policies. If, however, state custodianship were to be expressly enacted by statute on the same basis as in the MPRDA, it would facilitate a property regime change that eliminates the need to pay compensation. Whereas expropriation is procedural law and is not applied along racial lines, and even though expropriation would inevitably affect predominantly white agricultural land owners, it could also have a negative effect on the business interests of a handful of black elite land owners, who would expect commensurate compensation. As such, without a credible threat of expropriation, the (underperforming) *status quo* of land reform is likely to continue.[43] In addition, the regular utilisation of expropriation ultimately depends on the political will of the state. Therefore, positioning of the state as the custodian of land by way of policy and not by statute could be a political preference that protects the private capitalist interests of both groups, although at the institutionalised material disadvantage of all South Africans.[44]

It is contrary to living customary law to confer proprietary powers of alienation and control on individuals without obtaining the

42 *Tongoane* (n 1) para 2.

43 E du Plessis 'Silence is golden: The lack of direction on compensation for expropriation in the 2011 Green Paper on Land Reform' (2014) 17 *Potchefstroom Electronic Law Journal* 805. See also E Lahiff 'Willing buyer, willing seller: South Africa's failed experiment in market-led agrarian reform: Trajectories and contestations' (2007) 28 *Third World Quarterly* 1577. 'One of the reasons why land reform failed is that the farms are too big to make it suitable for new entrants to the agricultural sector. Farmers seem to be hesitant to sell off only small portions of land, and there seems to be resistance against the Subdivision of Agricultural Land Act 70 of 1970.'

44 Engelbrecht (n 20) [extracts]: '[The] institutionalised self-enrichment at the material disadvantage of all South Africans … It stems from the party's ideological limitations. Privilege, of some black and white people, capital, in the hands of some black and white people, and corruption, perpetuated by some black and white people, did not just one morning appear from nowhere – they are all human creations and colour blind … The ANC has systematically colonised the country depriving all South Africans of its material wealth … In this process, the ANC's bourgeois elite's new-found "wealth" was "purchased at a dehumanising cost", meaning at the expense of everyone else in society.'

consent of the community.[45] The result is conflict with the state's role as trustee, in terms of which the state must protect natural resources for both present and future generations. The state must act as steward in the public interest and cannot directly or indirectly dispose of or alienate natural resources held in its trust. The public trustee role of the state with regard to land implies an overarching, holistic, facilitative, developmental role, and not the interventionist and prescriptive state custodianship approach identified in recent land reform laws and policies.[46] Through state custodianship land policies, traditional leaders have been granted powers that essentially are an extension of the state's authority (indirect rule).[47] These extensive powers in the hands of traditional leaders strengthen the state's custodial governance and that of the traditional leaders over communal land, allowing for the disposal of communal land and related resources through various types of agreements without obtaining the prior informed consent of, or being accountable to, the community.[48]

The combined effect of the TLGFA, TKLA and TCB (traditional custodianship laws) is the centralisation of control over communal land and its resources in the hands of traditional authorities, who are simultaneously subject to and agents of the state. This makes it possible to deprive community members of their benefits in land and resources should they be found to be in contravention of their version of customary law or custom, as a possible means of competing for resources.[49] These traditional custodianship laws foster

45 D Mailula 'Customary (communal) land tenure in South Africa: Did *Tongoane* overlook or avoid the core issue?' (2011) 4 *Constitutional Court Review* 80.

46 Pope (n 5) 341. 'The Minister's statutory power to prescribe "standard rules" makes the land administration system one of public administration rather than community-based ... [T]he basis of indigenous land rights is changed to the extent that the self-regulating aspects of a well-functioning social organisation are undermined. The flexible and socially transformative character of indigenous land law becomes calcified and linked to the inevitably slow pace possible with legislative changes.'

47 P Delius 'Contested terrain: Land rights and chiefly power in historical perspective' in Claassens & Cousins (n 17) 237.

48 Presidential Report (n 4) 479. 'Land owned collectively through title deeds held by Traditional Councils, Trusts and Communal Property Associations is highly susceptible to abuse by leaders of these collectives, who claim ownership when their role should be that of trusteeship or custodianship on behalf of the members of the collective.' See also Claassens & Matlala (n 16) 113-135.

49 S Roberts 'Law and dispute processes' in T Ingold (ed) *Companion encyclopedia of anthropology: Humanity, culture and social life* (1994) 972; T Thipe 'Defining boundaries: Gender and property rights in South Africa's Traditional Courts Bill' (2013) 2 *Laws* 510. See also secs 10(2)(i), 11(c), 11(8)-(11) & 20(c) of the TCB. Read together, the TCB provisions force people to use the traditional courts, blocking the use of magistrate's courts, and enable traditional leaders to unilaterally interpret custom. Sec 20(c) makes it a criminal offence for people not to appear before a traditional leader if called, while sec 10(2)(i) allows traditional leaders to issue an order 'depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom. Customary entitlements include land and community membership'.

an indifference to the self-determination of the very community members who are to benefit from the land – an attitude that makes one think of the kind of 'trusteeship' employed during the apartheid regime. Furthermore, traditional custodianship laws only give lip service to gender equity in the transition from colonial-apartheid traditional authorities to traditional councils. The statutes do little to compel the transformation of traditional authority structures that are innately patriarchal and exclusionary towards women. By not making gender representation compulsory without exception, these laws fail to safeguard the unique position of women in rural areas, leaving their security of tenure vulnerable to patriarchal structures,[50] and then go even further by limiting their ability to seek recourse outside of the same patriarchal structures to defend their rights.[51]

As an asset, land takes on added importance, since customary institutions may either permit or deny women access and rights, thereby permitting or denying them their livelihoods. Women's rights are also uncertain by customary institutions' own interests in their pursuit of power and authority, making claims on land that are similar to or compete with claims made by women.[52]

This approach negates the realities of women living in rural areas and the multiple roles they play in society, including their occupation of and farming on agricultural land. Security of land tenure affords one the legal and practical ability to defend one's ownership,

50 Thipe (n 49) 483-510. In denying women control over land, traditional leaders not only assert their existing authority, but also (re)declare land as a solely masculine entitlement. In this way, traditional leaders are able to consolidate their institutional power as well as the power associated with gendered identities. S Marks 'Patriotism, patriarchy and purity: Natal and the politics of Zulu ethnic consciousness' in L Vail (ed) *The creation of tribalism in Southern Africa* (1989) 215-234; sec 3(b) of the TLGFA. While the law requires at least 30% or a third women representation on traditional councils, the drafters have left the wording open to interpretation. This makes women's accession to traditional councils uncertain because the provision in the act allows for the premier to establish a lower threshold if insufficient women are available to participate.

51 Custom Contested 'Traditional Courts Bill', https://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/ (accessed 20 August 2022). On 2 December 2020 the TCB was passed by a plenary of the National Council of Provinces (NCOP) – the version passed by the NCOP did not provide for opting out that gives people the choice of where to take their matters, between traditional courts and magistrates' courts. The Traditional Courts Bill had a long legislative history spanning more than 10 years since the introduction of the first version of the Bill in 2008. Attempts to pass the initial version and subsequent versions of the Bill were all met with strong public outcry, especially from rural communities and rural women concerned with what the Bill will mean for them and how it distorts customary law. Although an improved version of the Bill that included the opt-out clause was introduced to Parliament during 2017, this provision was removed by the Portfolio Committee in 2018. The new Traditional Courts Act 9 of 2022 almost entirely removes reference to the consensual and voluntary nature of customary law and creates a parallel legal system for rural citizens in South Africa, compared to people living in urban areas.

52 Weeks (n 19) 145.

occupation, use of and access to land from interference.[53] This includes the right to access courts of one's own choosing.[54] Laws and policies must seek to do more than merely regulate formalistically, without proper regard for the unique circumstances of the lives that are being affected, and should not assume that laws and policies affect everyone in the same way. Following such a neoliberal notion of equality based on sameness would be a setback to constitutional jurisprudence and would fail to achieve substantive equality for marginalised groups such as women. According to Albertyn, this is precisely why transformative substantive equality is concerned with complex, structural, intersectional and relational inequalities. At a broad level, these relate to structures of capitalism[55] and patriarchy that create and reproduce inequalities that affect particular groups and individuals.[56]

It is the responsibility of the legislature to promote the socio-economic and political participation of women in South Africa's laws and policies. This is done by advancing the spirit, purport and objects of the Constitution and its democratic principles.[57] This is yet another shift in land policy away from earlier socialist policies, which understood that land reform intrinsically included elements such as gender equity as one of the contributing factors to its success.[58] It also points to the recurring theme of disconnect or disassociation between recent land reform laws and policies and the lived realities of rural individual and communal land holders exercising their land rights in accordance with customary law.

---

53 T Weinberg 'Overcoming the legacy of the Land Act requires a government that is less paternalistic, more accountable to rural people' (2013) 70 *Journal of the Helen Suzman Foundation* 30.

54 Sec 34 Constitution. 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

55 AJ van der Walt 'Government interventionism and sustainable development: The case of South Africa' (2015) 8 *African Journal of Public Affairs* 37. 'In this regard Kropotkin and Woodcock … argue that government intervention is a prominent feature of capitalism. According to them, nowhere has the system of "non-intervention of the state" ever existed. Everywhere the state has been, and still is, the main pillar and the creator, direct and indirect, of capitalism and its powers over the masses. The state has always interfered in the economic life in favour of the capitalist exploiter. Kropotkin and Woodcock … further insist that even in a truly *laissez-faire* capitalist system, the state would still be protecting capitalist property rights as well as hierarchical social relationships.'

56 C Albertyn 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 465. 'Substantive equality should not only focus on substantive outcomes and concrete effects but also on the "structures, processes, relationships and norms" that reproduce hierarchy, marginalisation, exclusion and inequality in everyday life (context).'

57 *Rahube v Rahube* 2019 (2) SA 54 (CC) para 2.

58 JM Pienaar 'Restitutionary road: Reflecting on good governance and the role of the Land Claims Court' (2011) 14 *Potchefstroom Electronic Law Journal* 30-34; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's the law of property* (2006) 593.

Therefore, this disconnect has implications for the stewardship ethic, particularly for African countries that place social justice at the core of the stewardship ethic expected from their governments. As such, their (stewardship) ethical systems should naturally include a keen understanding of the mutual normative constitution of individuals who operate within a shared conception of ethical life, which is vastly different from the unilateral imposition of ideologies through laws and policy. The former translates into shared conceptions of the appropriate allocation of rights and obligations,[59] while the latter may struggle to achieve social cohesion which, in turn, could impair inclusive economic development.

3 Conclusion

By enacting the Constitution, the South African nation has committed to property reforms to bring about equitable access to all the country's natural resources, and land is expressly included in this public interest.[60] This primary commitment is clear from the prescript that no provision in the property clause may impede the state from taking legislative and other measures to achieve land, water and related reforms to redress the results of past racial discrimination.[61] This is qualified by the understanding that any limitation on existing property rights to achieve redistribution can only take place in terms of a law of general application, and the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[62]

In addition, the Constitution demands that the exercise of administrative and, consequently, regulatory powers by the state be lawful, reasonable and procedurally fair.[63] These constraints within which state regulation is intended to operate are necessary to hold the state accountable for arbitrary actions and decisions that are

59 Atkinson (n 28) 77.
60 Sec 25(4)(a) Constitution.
61 Sec 25(8) Constitution. See also Mostert & Lei (n 8) 398, who state that sec 25(8) 'enables the state to deviate from those aspects in the property clause which protect vested individual property interests where land and related reform initiatives may be hampered by their protection'.
62 Sec 36(1) Constitution (Bill of Rights limitation test).
63 Secs 33(1)-(3) Constitution. '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote efficient administration.'

contrary to the fiduciary duties of public trusteeship, while also safeguarding the stewardship ethic.

However, Parliament and the legislature should be careful not to enact regulatory laws and policies that can be used to circumvent constitutional constraints and protections by creating separate spaces for the exercise and adjudication of socio-economic justice, outside of, and to the exclusion of, constitutional protections. This article explores the detrimental implications of a statutory communal land tenure rights system that does not recognise the developmental nature of living customary law. It further highlights the confusion and potential for abuse that land tenure statutes create when the roles of traditional leaders are given primacy above the role of the community that they were elected to serve. This leads to disempowering outcomes that are impractical and untenable. The article examines the political ideologies and misinterpretations of constitutional objectives and how these influences can derail tenure reforms with dire implications for the socio-economic well-being and inclusive economic growth in these communities. The article emphasises the recurring theme of disconnect or disassociation between recent land reform laws and policies and the lived realities of rural individuals and communal land holders who should be the principal authors of their land tenure rights, but are excluded from the formulation and decision-making processes. A regulatory approach of what amounts to state custodianship over communal land tenure structures simply is inappropriate in its current form, as it leads to disempowering outcomes and life-long dependency on the state; the threat of dispossession and thus insecure tenure; the misinterpretation of constitutional objectives as discussed; and remains far too susceptible to political and ideological abuse.

It is recommended that any attempt at sustainable land tenure reform must recognise the importance of community engagement in the legislative and policy formulation of their land tenure rights. The reality is that informal land tenure rights are exercised and lived on a daily basis. These rights, therefore, are already in operation and established and in existence. These existing informal land tenure rights must be comprehensively understood, protected and acknowledged in law.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: S Viljoen 'Public property in South Africa: A human rights perspective' (2024) 24 *African Human Rights Law Journal* 77-100
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a4

Public property in South Africa: A human rights perspective

*Sue-Mari Viljoen**
Associate Professor, Department of Private Law, University of the Western Cape, South Africa
https://orcid.org/0000-0001-6121-5572

Summary: *This article reviews public property and the distinct role of the state as public land owner within a rich human rights framework. To critically rethink the significance and purpose of this understudied legal subject, foundational observations are shared in the article. From a conceptual perspective, a distinction is drawn between common property that is openly accessible to all, and public property that is exclusively managed by the state for specific governmental purposes. Characteristically, the article suggests that these are two vastly divergent types of property that serve distinct aims; they are also subject to separate regulatory frameworks. The notion and communal significance of common property is unpacked with reference to the use of such property in the city of Cape Town to engage with some theoretical concerns dealing with the gradual degeneration of the public sphere. In the context of public property that is exclusively used and managed by the South African government, the article submits that the accustomed private property discourse is ill-suited to uncover and explore the nature, character, as well as the rights and interests of the state as public land owner. Instead, public land ownership should be approached and repurposed in line with constitutional commitments expressed in relation to property.*

Key words: *public property; public land ownership; common property; housing; land reform; human rights; resilient property theory*

* BCom (Law) LLB LLD (Stellenbosch); suviljoen@uwc.ac.za

1 Introduction

Property law is customarily narrated as the rules and principles that regulate the relationship between private persons in relation to things, where the state is depicted as an outsider, or intruder, to this distinctly private law institution. The position of the state consequently is limited to that of regulating private relationships as they relate to property for mostly public purposes. The aim of this article is to reposition the state in the property law discourse, away from its hierarchical position as interferer or regulator, to that of being a distinct legal subject with profuse power to give effect to fundamental human rights objectives. I focus on the state as public land owner to argue that more emphasis should be placed on its role to provide access to property and, specifically land, for destitute groups.

To realign the position of the state as public land owner within a complex human rights framework, I first tease out the different taxonomies of public property to conceptualise and unpack two vastly divergent types of public property, namely, common property and public property that is exclusively held and managed by the state. The former, also referred to as 'inherently public property',[1] is explained as state property that is openly accessible to all and subject to overpowering societal claims regarding the needs-based use thereof. The regulatory control of common property in the city of Cape Town is used to critically reflect on the norms-based, societal use of such property against the backdrop of pressing housing claims. The city faces excessive rough sleeping resulting from the inaccessibility of property where the vulnerable can perform essential private acts. In this context, I reflect on theoretical pitfalls associated with the gradual degeneration of common property to suggest that a dynamic interplay exists between this type of public property and the second category of exclusively-held and managed public property.

The remainder of the article explores the nature and character of public land ownership where the state administers property in close resemblance to that of private ownership. Despite these analogies, I argue that the regulatory framework governing public property/land is patently different from the rules, principles and regulatory measures pertaining to private property. Additionally, the structure of private law rights and entitlements arguably is inapt to reflect on

1 C Rose 'The comedy of the commons: Custom, commerce, and inherently public property' (1986) 53 *University of Chicago Law Review* 720.

the relationship between the rights/interests of the state and human rights, in relation to public land. Instead, I argue that any analysis relating to public land, state actions and the fulfilment of human rights must evidently start with the Constitution of the Republic of South Africa, 1996 and, specifically, the property and housing clauses: State land must serve societal needs and the most important of those needs, by law, is to create access to property for landless/homeless persons. A more resourceful, pressing governmental approach arguably is required to actively repurpose underutilised public properties and ensure that extant land holdings, mostly settlements, as well as land reform and housing programmes are structured to adhere to these constitutional aims.

2 Concept of public property

2.1 A global perspective

From the outset, the law of property is a distinctly private law subject.[2] Property is customarily defined as the law of things and further narrated as exclusionary, individualised, and alienable; it expresses a series of abstract relations among private persons and things.[3] The concept of property remains grounded in the idea that the individual is entitled to deal with their property in an autonomous manner, within the boundaries of the law.[4] The role of the state is limited to that of regulating property for various societal and state-ordained objectives.[5] It is generally accepted that property is a wealth-enhancing commodity, prompting property theorists to argue that sources should ideally be privately held.[6] Strong arguments have also been voiced to suggest that things should not be left to the public realm as they would likely end up wasted.[7] From this perspective,

2 G Muller and others *Silberberg and Schoeman's the law of property* (2019) 6 mention that property law has always been the 'pith and essence' of private law. Property law is also customarily taught as a distinctly private law subject.

3 H Smith 'Property as the law of things' (2011) 125 *Harvard Law Review* 1691; W Hohfield 'Some fundamental legal conceptions as applied in legal reasoning' (1913) 23 *Yale Law Journal* 16. See also AJ van der Walt 'The modest systemic status of property rights' (2014) 1 *Journal of Law, Property and Society* 15.

4 See specifically JW Singer 'Property as the law of democracy' (2014) 63 *Duke Law Journal* 1287. It is widely accepted that property is subject to regulatory control. See also E van der Sijde *Property regulation: An integrated approach under the Constitution* (2022).

5 See sec 25 of the Constitution of the Republic of South Africa, 1996. See also L Fox O'Mahony & ML Roark *Squatting and the state: Resilient property in an age of crisis* (2022) for the account of the state and how property relates to state-backed interests.

6 See, eg, R Posner *Economic analysis of law* (1977) 28.

7 The 'tragedy of the commons' was pinned by G Hardin 'The tragedy of the commons' (1968) 162 *Science* 1243.

public property is recounted as contradictory to what property resembles: public property is the 'antithesis' of property.[8]

The law of property as it is currently developing, therefore, is not only ill-equipped to reflect on the nature and character of public property, but also remarkably silent where public things are concerned. According to Page, '[p]ublic real property is an undeveloped, underthought subject, a doctrinal and theoretical paradox disproportionate to the sheer acreage of public lands'.[9] He further argues that the dissonance between law and public things, as well as the context within which public things are used, burdened, alienated and abandoned, are dilemmas that the law of property – a subject that has developed to regulate mainly private things – is ill-suited to resolve.[10] Public property is an outlier for modern property scholars and peculiarly undertheorised, especially in countries where vast tracts of land are public property. Nevertheless, the notion of 'public property' is commonly used in the law of the Western world,[11] as it was in ancient Rome.[12] The most profound literature on public property divisions is briefly outlined, before I turn to the South African taxonomy to further engage with the nature and character of public land ownership.

Rose identifies two types of public property: one owned and actively managed by a governmental body, and the other collectively 'owned' and 'managed' by society at large. In the case of the latter, also termed 'inherently public property', societal claims are independent and superior to those of the state.[13] This does not mean that the public owner is 'disorganised'; norms of usage and settled practices often ensure peaceful, yet regulated ordering of such public resources, such as beaches or foreshores.[14] 'Inherently public property' is explained as follows:[15]

8 Rose (n 1) 712.
9 J Page 'Public property' in N Graham and others (eds) *The Routledge handbook of property, law and society* (2022) 362. See also J Page *Public property, law and society* (2020).
10 Page 'Public property' in Graham and others (n 9) 362.
11 Rose (n 1) 713.
12 In Roman law, *res communes* referred to communal natural resources, including the air and sea, which was accessible for use by citizens and non-citizens; *res publicae* were reserved for citizen use only and were premised on rights of public use/purpose. It included rights of trade and rights to fish. *Res universitatis* were the corporate, income-producing property of public bodies, such as theatres and race courses: C Rose 'Romans, roads and romantic creators: Traditions of public property in the information age' (2003) 66 *Law and Contemporary Problems* 89.
13 Rose (n 1).
14 Page 'Public property' in Graham and others (n 9) 367.
15 Rose (n 1) 720.

> There lies outside purely private property and government-controlled 'public property' a distinct class of 'inherently public property' which is fully controlled by neither government nor private agents … this category of 'inherently public property' has provided each member of some 'public' with a bundle of rights, neither entirely alienable by state or other collective action, nor necessarily 'managed' in any explicitly organised manner.

Waldron makes a similar distinction where he unpacks the private/public property divide in the context of homelessness. He makes the apparent, yet overlooked, point that all humans are embodied beings, which means that all human-related performances must be done somewhere.[16] Of course, private persons cannot select any location to perform activities, or simply seize whichever space they prefer. Apart from physical inaccessibility, a significant percentage of the earth's surface is off bounds. A core function of property rules is to set these boundaries, either for the benefit of one or a selected group of people (private property) or for the use of the state.[17] Waldron classifies rules of state property as a sub-category of the rules of collective property.[18] The other sub-category of collective property is common property, which he defines as a place that is openly accessible to all.[19] Examples of common property include streets, sidewalks, parks and bus stops. Even though these spaces are held and intended for a rather indeterminate range of uses, they are not unregulated.[20]

The public property categorisations by Rose and Waldron are similar to the extent that they make a distinction between what is essentially state property – public property not only owned but also actively managed by a governmental body that is properly authorised to exercise such control for a public purpose – and all other forms of public property that is commonly, or collectively, used by society at large. In relation to the former, the authors seemingly recognise the broad powers of the state to manage its property as it sees fit, closely resembling the rights and entitlements associated with private ownership. Likewise, state ownership is also regulated: All property is subject to regulatory control, yet the logic for doing

16 J Waldron 'Homelessness and the issue of freedom' (1991) 39 *UCLA Law Review* 296.

17 In the case of the latter, the property usually serves a specific state function and citizens are denied access. It follows that 'if a person is in a place where he is not allowed to be, not only may he be physically removed, but there is a social rule to the effect that his removal may be facilitated and aided by the forces of the state'. Waldron (n 16) 297.

18 The use of collective property is determined by the state that acts in the community's interests.

19 Waldron (n 16) 297-298.

20 Waldron (n 16) 298.

so differs. Extensive scholarly analyses have been dedicated to the regulatory nature of private property,[21] whereas the regulation of state property remains largely unexplored. In relation to the latter category of common property, limited academic engagement has been undertaken, especially from a property perspective in the context of a complex human rights framework.[22]

More recently, and specifically in the context of land, Page adopts the term 'public real property' to refer to interests in land that the public may use/enjoy; this includes 'publicly held interests in land where the public's use or enjoyment of those interests is subsidiary to an overriding public purpose'.[23] Public real property ostensibly is vested in the state,[24] yet this does not mean that the question of public ownership is uncontested. Page argues that the boundaries that divide the public and the private are porous and less binary in the context of public land ownership than when dealing with private ownership. He suggests three answers, or divisions, to the public proprietary conundrum: 'the state as absolute owner, the public trust, and the "unorganised public at large"'.[25] The unorganised public at large is based on and similar to what Rose defines as 'inherently public property'. According to Page, the state as sole legal and beneficial owner is an uncomplicated and workable depiction as the state's relation to property replicates that of private ownership – the state holds the key bundle of sticks,[26] including control over access. The disadvantage of the 'government as owner' mentality, however, is that it weakens a shared sense of propriety about public assets, and it often simply is inaccurate due to the overpowering public purpose served by some public property.[27] Some state properties do not have a shared propriety component and are legislatively protected and off bounds, for sound reasons.[28] The second classification of public trust is doctrinally evolving; in the United States it initially applied to land beneath navigable waters (or washed by tides) and later expanded

21 See, eg, Singer (n 4) 1287; AJ van der Walt *Constitutional property law* (2011) 102; G Muller & S Viljoen *Property in housing* (2021) 34; BD Barros 'Property and freedom' (2009) 4 *New York University Journal of Law and Liberty* 50-51; AR Amar 'Forty acres and a mule: A Republican theory of minimal entitlements' (1990) 13 *Harvard Journal of Law and Public Policy* 37.

22 Recently published, see S Viljoen 'Regulating public property: The account of the homeless' (2024) *Social and Legal Studies* 1.

23 Page 'Public property' in Graham and others (n 9) 363.

24 As above.

25 Page 'Public property' in Graham and others (n 9) 366, quoting Rose (n 1). Page argues that '[e]ach is a gradation on yet another continuum – one that starts with a clear legal owner, then sits astride a split legal/beneficial ownership in the middle, and ends with a vague beneficial-only ownership at the other spectral extreme'.

26 Page 'Public property' in Graham and others (n 9) 366.

27 As above.

28 Eg, property used for military purposes, state residencies or conservation protected areas.

to land onshore.[29] The arrangement offered by Page aligns with what is suggested by Waldron and Rose, except for the distinctive public trust class. I briefly reflect on the most recent classification of things in South African property law, before turning to the untheorised position of the state as public owner.

2.2 The South African portrayal

In its latest edition, *Silberberg and Schoeman's the law of property*, one of South Africa's most authoritative property law sources, things are classified with reference to Grotius[30] and, specifically, property's relation to persons.[31] In Roman law, public property consisted of four categories, which were distinctly different from things that could be privately held. Things are classified as either out of commerce – things that cannot be privately owned – or in commerce (things capable of private ownership).[32] The authors remark that this classification largely is 'a matter of principle' and 'a matter of convenience'; instead the function of a thing is determinative of its classification.[33] Yet, the remainder of the discussion on the classification of things is founded on the classic taxonomy as pinned by Grotius:[34] Things outside of commerce are characterised as common things (those things that by natural law are common to everyone, such as the air and sea);[35] public things; things belonging to corporate bodies (theatres, race courses and 'all common property of a city');[36] and religious things (things dedicated to the gods, such as temples and graves).[37]

For contemporary scholarly analyses, reliance on this traditional arrangement raises conceptual challenges as some categories have transformed (for example, religious things, such as churches, currently are considered private property and subject to alienation),[38] whereas

29 Page 'Public property' in Graham and others (n 9) 367, referring to C Rose 'Joseph Sax and the idea of the public trust' (1998) 25 *Ecology Law Quarterly* 351. In South Africa, property held in trust is regulated by distinct laws, such as the National Water Act 36 of 1998. Each of these laws regulates the use of the property for specific purposes.
30 2.1.4.
31 Things may also be classified according to their nature, yet this categorisation is irrelevant for purposes of this article as it relates to things being corporeal or incorporeal, movable or immovable, etc. Muller and others (n 2) 30.
32 The former is further divided into common things (*res communes*); public things (*res publicae*); things belonging to a corporate body (*res universitatis*); and religious things (*res divini iuris*). Muller and others (n 2) 30.
33 Muller and others (n 2) 30-31.
34 Muller and others (n 2) 30-52.
35 Muller and others (n 2) 31-32.
36 Muller and others (n 2) 35.
37 Muller and others (n 2) 36.
38 See, eg, https://www.remax.co.za/property/for-sale/south-africa/gauteng/johannesburg/la-rochelle/-commercial-property-for-sale-in-la-rochelle-4305782/ (accessed 12 March 2024) as well as https://www.remax.co.za/property/

others nowadays overlap (for instance, 'all common property of a city' is likely to fall under the realm of 'public things').[39] Of particular interest to this article is the conceptualisation of public things:[40]

> Public things (*res publicae*) are things which belong (though not in private ownership) to an entire civil community and are often also referred to as state property … a distinction should however be made between things intended for public use, that is to say, things which directly benefit the members of the community concerned, for example public roads, and things belonging to the state which only indirectly benefit the individual members of the community, such as buildings used merely for administrative purposes. Only the former … things intended for public use, can be classified as public and, therefore, out of commerce. Things not intended for public use are in commerce, falling within the sphere of private law.

According to this definition, public things are generally classified as state property, with a distinction drawn between public things that are directly used by the public and public things that indirectly benefit members of the community. Property that directly benefits the public, such as a public road or sidewalk, is truly public and out of commerce, whereas the remainder, for example, an administrative building, is in commerce, open to trade in terms of private law principles and, therefore, not public. It seems contradictory to claim from the outright that public things are state property, and later qualify that those things that are actively used and managed by the state are not public. If an administrative building is not public, because it is not directly used by the public, can it be classified as private property, based on the (false) assumption that it can be dealt with in terms of private law rules and principles? Perhaps more confusing is the example of a residential block of flats that is leased by the state as public landlord to low-income occupiers. Some members of the public draw substantial benefit from the exclusive use of the property, while the remainder of the community is prohibited from using it (let alone having any use of it); the state is actively involved in the management of its property, it can deal with it within the bounds of the law. The regulatory framework arguably is distinctly different from the common law rules and principles, in addition to the landlord-tenant laws that regulate private tenancies.[41] Theoretically,

---

for-sale/south-africa/north-west/rustenburg/rustenburg-central/-commercial-property-for-sale-in-rustenburg-central-4250965/ (accessed 12 March 2024) where church property is listed as commercial property and offered for sale.

39 This is particularly true when working with the above-mentioned taxonomies offered by Radin, Waldron and Page.

40 Muller and others (n 2) 32-33.

41 Social tenancies are regulated by the Social Housing Act 16 of 2008, whereas private tenancies are regulated under the Rental Housing Act 50 of 1999. For more detail on these vastly different sectors, as well as the nature of public tenancies, see S Viljoen *The law of landlord and tenant* (2016) 67-75.

the governmental approach to public property, for what it should be used and the objectives that it should serve, also is fundamentally different from what private owners usually set out to achieve.

Muller and others further state that public roads, national parks and the sea are things intended for public use. With reference to the National Water Act 36 of 1998, they mention that 'public trusteeship of the nation's water resources is vested in the state'[42] and, according to the National Environmental Management: Integrated Coastal Management Act 24 of 2008, coastal property, including the sea, is 'owned by citizens of the Republic of South Africa and are held in trust by the state as public things'.[43] To streamline these taxonomies, Muller and others finally submit that the classification of things as they relate to persons should be rationalised by simply distinguishing between public and private things: 'Public things should be seen as things belonging to the state, municipalities or state organ but directly benefit members of the public, such as the sea … Whether private or public things indirectly benefit members of the public is determined by the appropriate legal rules.'[44]

Overall, the arrangement as suggested by *Silberberg and Schoeman's the law of property* is structured according to the use or benefit obtainable by property: If it benefits the public, it is public, provided that it 'belongs' to the state, a municipality or state organ. Contrarily, property that does not directly benefit the public is not public, although it is state property and, therefore, also not entirely private. A more workable categorisation arguably is offered by Rose, Waldron and Page, noting minor divergences amongst their work. As a point of departure, it should be emphasised that public property vests in the state.[45] The state, mostly the government of the day, is the sole owner of the property, although some or an unlimited number of community members may directly or indirectly use and enjoy the property. The distinction between public property that is actively and, often exclusively, used by the state for specific governmental purposes and public property that is open to the public for mostly unlimited, shared usages offers a valuable stepping stone to further explore doctrinal and theoretical approaches to these inherently opposing types of public property. Property held in trust arguably is also public property, although it does not fit under either of these two categories. In South African law, public trusteeship arguably

42 Muller and others (n 2) 33.
43 Muller and others (n 2) 34.
44 Muller and others (n 2) 51.
45 Page 'Public property' in Graham and others (n 9) 363.

should be understood within its distinct regulatory frameworks as each law is geared to achieve different outcomes.[46]

3 Common property

Before I turn to public property that is exclusively held, used and administered by the state, this category is juxtaposed with public property that is openly accessible to all, also referred to as common or inherently public property; here termed 'common property'. Even though common property is state property, societal claims in relation to the use, and even appropriation, of such property are instrumental when theorising the nature thereof. The state as public owner is neither absent nor impartial as it has a distinct stake in the peaceful, norms-based use of common property, which is why it is usually regulated.[47] This does not mean that the regulatory framework is normatively neutral, uncontested, let alone homogeneous.

For example, in the city of Cape Town, the Streets, Public Places and the Prevention of Noise Nuisance By-Law, 2007[48] regulates the use of common property, as well as individuals' behaviour in the public domain.[49] A 'public place'[50] includes a public road;[51] parks and squares; beaches; vacant municipal land; and all public land. In terms of this law, no person may in a public place use abusive language, fight, urinate or defecate, bath or wash themselves, perform any sexual act, appear nude, consume any liquor or drugs, be drunk or under the influence of drugs, start or keep a fire, or sleep overnight or erect any shelter.[52] Any person who contravenes the by-law shall be guilty of an offence.[53] The by-law forms part of distinct policy

46 Compare sec 2 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 with secs 2 and 3 of the National Water Act 36 of 1998.
47 Page 'Public property' in Graham and others (n 9) 367.
48 Western Cape Provincial Gazette 6469 28 September 2007.
49 Preamble.
50 See sec 1 of the by-law for the definitions.
51 A 'public road' includes any road, street or thoroughfare as well as the verge of any such road. Any bridge, ferry or drift traversed by such road is also included.
52 Sec 2(3). Some of these acts are permitted when specifically authorised.
53 Sec 23(1). Noting some exceptions, the perpetrator will be liable to a fine or imprisonment for a period not exceeding six months, or to both a fine and such imprisonment. Most of the offences as regulated in the Public Places By-law may be described as 'petty offences'. In terms of the Principles of the Decriminalisation of Petty Offences in Africa (2017) 10, to which South Africa is a state party, the criminalisation of petty offences contributes to 'discrimination and marginalisation by criminalising poverty, homelessness and unemployment, and impact the poorest and most marginalised persons in our communities'. See also T Walsh 'Poverty, police and the offence of public nuisance' (2008) 20 *Bond Law Review* 198.

framework that supports social order,[54] yet the socio-economic reality of the city – specifically the profile of its homeless population – is in direct conflict with this vision and the utilisation of common property. The extent of homelessness in the city (also known as the Mother City) has turned into a rough sleeping disaster where thousands occupy common property.[55] The by-law, as part of the regulatory scheme, is rendered partly obsolete[56] as its enforcement conflicts with the human rights framework as underpinned by the Constitution.[57] More unsettling is the normative framework that has at least partly been established in relation to rough sleepers.

Even though the state can and should control behaviour in public spaces for various objectives, such as public safety, 'to provide a fair basis on which all citizens could make use of the public spaces of their city'[58] or ensure recreational activities, the state cannot enforce a detached, run-of-the-mill approach to the regulation of common property when rough sleeping is excessive, and the state fails to provide the requisite land/dwellings as dictated by the Constitution. Waldron correctly argues that 'the less the society provides in the way of public assistance, the more unfair is its enforcement of norms for

54 Viljoen (n 22) 9, referring to AM Gossar 'City of Cape Town's "broken windows" policy demands more than a criminal justice response' *Daily Maverick* 7 December 2021.

55 In 2020 it was estimated that 14 357 people live on the streets of Cape Town: J Hopkins, J Reaper & S Vos 'The cost of homelessness in Cape Town – Summary report' (2020) 7, https://homeless.org.za/wp-content/uploads/2021/02/THE-COST-OF-HOMELESSNESS-CAPE-TOWN-_Full-Report_Web.pdf (accessed 13 December 2022). In comparison, 2 000 rough sleepers are estimated in Darwin, Australia; 2 648 in New York City; 12 977 in Los Angeles City; and 446 in London: C Parsall & R Phillips 'Indigenous rough sleeping in Darwin, Australia: "Out of place" in an urban setting' (2014) 51 *Urban Studies* 191. Cape Town, therefore, has a very high percentage of rough sleepers.

56 Most magistrates are reluctant to issue warrants and 'where warrants of arrest are issued and executed, street people appearing before a court seldom face any consequences'. The Inkathalo Conversations 166, https://www.groundup.org.za/media/uploads/documents/Inkathalo-2021-compressed.pdf (accessed 13 December 2022).

57 In South Africa, two fundamental rights underscore the regulation of property when the housing interests of marginalised persons are involved. The property clause mandates the state to progressively foster spaces where landless persons, and specifically previously-dispossessed persons, may reside (sec 25(5) of the Constitution), whereas the housing clause confirms everyone's right of access to adequate housing (sec 26(1) of the Constitution). These rights are directed at persons who are destitute, homeless, and desperately in need of a space to live. It is generally accepted that property (land or a dwelling) should be distributed to landless/homeless persons or realigned entitlement-wise, to shore up resilience: S Viljoen 'Resistance to reform property: A "resilient property" perspective' (2022) 38 *South African Journal on Human Rights* 24. Even though the realisation of these rights is challenging, they are embedded in a network of rights and values that aspire to create a more egalitarian society, one in which human dignity and equality serve as the cornerstone of the constitutional order. The Constitution sets a distinct culture for all communities that is founded on human rights. Adherence to this culture and the maturity thereof, however, is dependent upon actions of the state and the way in which it regulates property.

58 J Waldron 'Homelessness and community' (2000) 50 *University of Toronto Law Review* 373.

public places that depend on complementarity that simply doesn't apply to a considerable number of citizens'.[59] The use of common property in the city of Cape Town serves as a typical example of where the norms-based, societal use of such property outweighs the state-ordained objectives of the law. It shows that the use of common property can shift at a radical pace when societal claims and needs in relation to property, in general, are not prioritised and addressed by the state.

This is regrettable for various reasons, including the sheer disregard of the rule of law, as well as the gradual degeneration of common property. The presence of thousands of rough sleepers in public spaces forces all other residents to share in their company as the homeless perform private acts in areas that should preferably be used for exercising civic rights and social pursuits. In effect, the state not only sanctions an undignified way of living – for individuals to conduct private acts in public as private alternatives are unavailable – bit also sets the groundwork for

> an impoverishment of the public dimension of culture and civil society, as those who have a choice flee the downtown streets and parks and take refuge in cyberspace, suburban malls, or gated communities, leaving public places to the mercy of those who have no option about remaining there. But it is important to see that this is not the sort of dilemma that we can solve by simply adjusting the regulations.[60]

Traditional policies, or even some adjustment thereof, will grapple to address socio-economic challenges, such as rough sleeping, if the regulatory framework is at variance with what is normatively accepted – social norms include informal customs and practices, to which state law often takes second place,[61] and property remains inaccessible for welfare-orientated, human rights objectives. More generally, Page argues that public things represent public wealth. Public things serve authoritative, symbolic and fundamental ends.[62] In the context of public wealth, Page engages with three overlapping public ideals: 'the democratic nature of a public thing; the public estate's (uneven) capacity for spatial justice; and its fostering of human flourishing,

59 Waldron (n 58) 399. At 301 he explains complementarity as follows: 'Since the public and the private are complementary, the activities performed in public are to be the complement of those appropriately performed in private. This complementarity works fine for those who have the benefit of both sorts of places. However, it is disastrous for those who must live their whole lives on common land.' See also C Capozzi 'Hiding the homeless' (2022) 5 *University of Central Florida Department of Legal Studies Law Journal* 109.

60 Waldron (n 58) 399, referring to RC Ellickson 'Controlling chronic misconduct in city spaces: Of panhandlers, skid rows, and public-space zoning' (1996) 105 *Yale Law Journal* 1172.

61 Waldron (n 58) 400.

62 Page 'Public property' in Graham and others (n 9) 369.

happiness, and the well-lived life'.[63] It is generally accepted that the public terrain – I would argue, specifically common property – is the place for democratic deliberation and engagement; it is the focal, physical anchor where democratic citizenship takes shape. It follows that the fall of democracy arguably lies in the neglect of common property, which represents communal life.[64]

Related to this ideal of property for democracy is spatial justice in the sense that property should not only be distributed more equally for private gain, but also for the public. Sufficient public land – common property – arguably is required to counterbalance private property holdings for the sake of spatial equality and inclusivity.[65] Finally, with reference to the social aspect of property, Page relies on the notion of human flourishing, as developed by Alexander and Peñalver, to argue that the public realm is integral to the well-lived life.[66] Access to public places (common property) and the ability to perform activities in public is constituent of living a fulfilled, civic life. Public property values also reflect communitarian commitments, such as 'environmental stewardship, civic responsibility, and aggregate wealth'.[67]

These claims mostly relate to common property, rather than public property that is exclusively held and used by a governmental body. As suggested in *Silberberg and Schoeman's the law of property*, the publicness of common property truly sets it apart from the latter category of public property. The public at large must have unconstrained access to use the property within the bounds of the law. If this is unfeasible due to private acquisition, which effectively is what ensues when public parks, sidewalks or bus stops are occupied by the homeless, detrimental civic consequences will follow.[68]

63 As above.

64 Page 'Public property' in Graham and others (n 9) 370, referring to D Brooks 'The heart and soul of the Biden project: It's daring revival of the "American system"' *The New York Times* (New York) 8 April 2021.

65 Page 'Public property' in Graham and others (n 9) 370, referring to J Boughton *Municipal dreams: The rise and fall of council housing* (2019).

66 J Page *Public property, law and society: Owning, belonging, connecting in the public realm* (2021) 69, referring to G Alexander & E Penalver *An introduction to property theory* (2012) 87.

67 Page (n 66) 69. 'Public wealth is the dividend of a robust, vibrant public estate, one that, it is hoped, adds to the democratic fabric, militates against spatial injustice, and maybe even makes us happy.' Page 'Public property' in Graham and others (n 9) 371.

68 M Keuschnigg & T Wolbring 'Disorder, social capital, and norm violation: Three field experiments on the broken windows thesis' (2015) 27 *Rationality and Society* 100-101 argue that non-compliance with antisocial behaviour laws creates the impression that there is social disorder. The outright manifestation of disorder – the observation of illegal activities, without any consequence – suggests that rules may be violated. Such governmental sanctioning is in conflict with the basic premise of the rule of law, namely, that rules will be applied without preference, not only by courts but the local authority; the rule of law

Arguably, to prevent the misdirected use of common property, public property that is exclusively used (or not used at all), managed and controlled by the state, should be earmarked, or repurposed to fulfil the requisite needs. Stated differently, the inadvertent use of common property signals the mismanagement of the latter category of public property, which of course is also subject to regulation, albeit of a completely different kind.

4 Public property, exclusively managed by the state

4.1 Original narratives

In South Africa remarkably little has been written on the nature and extent of the rights, or entitlements, that rest with the state as public owner. In 1964, Wiechers originally contended that the state has a 'public law right' regarding property that fall under its territory.[69] He argued that the state's capacities on account of this right are largely similar to those of private persons: 'The legal rules with regard to public property form, as a rule, no exception to those of private law.'[70] The rules governing public property, however, are different from those relating to private property when the state enters into legal relationships with private persons in respect of state property since administrative law relationships are consequently created and the rules of administrative law would apply. At the time, it did not appear to be incorrect to say that in this respect – in the administrative law context – the state would defend its rights, and act in its best interests, in the 'subjective' sense, which can only be understood and conceptualised within the public law realm.[71] Wiechers fiercely criticised the contention that the state can only exercise its rights in the common interest, meaning that it cannot have rights in the 'subjective' sense.[72]

demands fair and democratic exercise of public power, grounded in fundamental rights: R Kruger 'The South African Constitutional Court and the rule of law: The *Masethla* jugdment, a cause for concern?' (2010) 13 *Potchefstroom Electronic Law Journal* 469. The duty to uphold human dignity and to progressively ensure that all persons have access to adequate housing are aspects of the rule of law (*Chief Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC)). Property rules – such as by-laws that regulate the use of public spaces – set behavioural boundaries. If they are not enforced or, even worse, unequally enforced, uncertainty, social disorder, community resentment and compassion fatigue are likely to ensue.

69 M Wiechers 'Die sistematiek van die administratiefreg' LLD thesis, University of Pretoria, 1964 162-163.

70 P van Niekerk 'The "stronger position" argument and public-law rights of the state: A methodological problem?' (1992) 7 *Southern African Public Law* 269.

71 As above.

72 M Wiechers *Administratiefreg* (1973) 79; M Wiechers *Administratiefreg* (1984) 86.

The relationship between 'public law rights', including the interests of the state, and 'human rights' is explained by Van Niekerk as 'not one of either/or but one of "and" because the existence of the former without the latter [including mechanisms to curb the exercise of state power] would indeed, amount to nothing but state absolutism'.[73] The state as public law legal subject does bear public law rights and interests, but the nature of its rights and interests cannot be narrated by merely projecting 'the structure of private-law rights onto the state-citizenship relationship' as this would disregard the foundational structural difference between civil private law and public law.[74] Beyond the state-citizen relationship, I argue that the state as public land owner is a distinctly different legal subject than the private owner, because of its definitive regulatory context underscored by constitutional demands.

The above-mentioned remarks are unpacked and reevaluated in the context of constitutional supremacy where the state has an outright objective to redistributive land and make housing available. I acknowledge that the state as public owner is entitled to deal with its property in ways that resemble private ownership. In the context of land it can, of course, use, alienate and burden its land. Yet, Wiechers is correct to argue that the regulatory framework governing public property/land is patently different from rules regulating private property. This pertains to relationships between the state and private persons in respect of public property[75] as well as all other governmental decisions made when managing or disposing of such property.

4.2 *Adonisi*

A case in point is that of *Adonisi v Minister for Transport and Public Works Western Cape; Minister of Human Settlements v Premier of the Western Cape Province* (*Adonisi*)[76] where the state's decision to sell public property (Tafelberg Properties) was challenged. The Minister of Transport and Public Works: Western Cape (the MEC) was the official responsible for the disposal of immovable assets. Those functions were exercised in terms of the Western Cape Land Administration Act 6 of 1998 (WCLAA) and the Government Immovable Asset Management

73 Van Niekerk (n 70) 272.
74 As above.
75 See, eg, *Rakgase v Minister of Rural Development and Land Reform* 2020 (1) SA 605 (GP) para 5.2.3.
76 [2021] 4 All SA 69 (WCC).

Act 19 of 2007[77] (GIAMA). The applicants challenged the sale of the land[78] and argued that the way in which the state as public owner dealt with its property ultimately infringed the constitutional duty to redistribute land an make housing available,[79] to redress spatial apartheid in Cape Town.[80] The applicants contended that the public property in question presented a unique opportunity for the city and province to promote social rental housing, arguably outweighing the state's economic interest in selling the property to a private entity at considerable gain.[81] For the province, the sale presented an ideal opportunity to 'supplement its coffers' as income generation is restricted and the offer of R135 million (for property valued at R108 million) was a 'no-brainer'.[82]

It was acknowledged that the acquisition of private land in the inner city had become prohibitively expensive. The parties also agreed over the 'shortage of state-owned land in or near the inner city which is available for the development of affordable housing'.[83] The Court held that the state 'enjoys all the rights customarily afforded to private land owners',[84] but such powers/duties in relation to state land are subject to the constitutional property clause in addition to any applicable laws.[85] Accordingly, the state must attend to its 'broader societal obligation' – in this case, the past perversity of the unequal distribution of land – and exercise its individual property rights. The Court held that a balancing act is subsequently required, for which the approach as described in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*[86] (*FNB*) was relied upon. In terms of this approach, the Court contextualised the commitment to redress the unequal distribution of land (sub-sections 25(4)-(9)) as a core consideration whenever section 25 is

77 Para 10. Various other officials were cited in respect of their duties, including the Minister of Public Works in the National Government as the custodian of immovable assets in the national sphere of government under GIAMA. The Social Housing Regulatory Authority (SHRA) was cited as the ninth respondent as the custodian of social housing.
78 The sale was attacked based on illegality, alleging that the state failed to comply with various statutory obligations. The reasonableness of the state's actions was also contested as it failed to consider the rental housing option: para 49.
79 Para 26 .
80 Para 27. See para 33 for an account of the city's segregated residential landscape. At para 35 in Prof Susan Parnell's affidavit, she states that '[g]overnment's constitutional duty to progressively realise the right to physical housing structures cannot be divorced from its responsibility to advance spatial justice'.
81 Paras 36 and 37. The location of the property in central Cape Town and the suitability thereof to provide social rental housing were central to the applicants' case: paras 42 and 46.
82 Para 52.
83 Para 102.
84 Para 111.
85 The laws in question were GIAMA and WCLAA.
86 2002 (4) SA 768 (CC) para 49.

construed because these provisions 'emphasise that under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal consideration'.[87] The High Court's reliance on this description and weighing of societal and individual interests arguably is misplaced as the Court's approach in *FNB* relates to the protection of private property, not public property.

Public property is not protected under the property clause. Instead, it has a profound purpose in terms of the land reform (and housing) provisions. With reference to the constitutional duty to redistribute land (section 25(5)), the High Court interpreted this justiciable socio-economic right via the reasonableness standard, 'to be assessed with reference to context'.[88] An assessment of the context was subsequently done in terms of the regulatory framework and, specifically, GIAMA.

The objects of GIAMA include to provide of a uniform immovable asset management framework that promotes accountability and transparency in government; to effectively manage immovable assets within government; to coordinate the use of immovable assets with service delivery objects of a national or provincial department and ensure the efficient utilisation of such property; and to optimise the cost of service delivery by, for instance, disposing of immovable assets.[89] Section 4 of the Act regulates the powers of the state in relation to public property: Executive organs of state are defined as custodians/caretakers of such property and they may acquire, manage and dispose of public property, subject to the law.[90] Section 5 of the Act sets out statutory principles relevant to the management and disposal of public property.[91] Of importance to *Adonisi* are the following:

> (a) An immovable asset must be used efficiently and becomes surplus to a user if it does not support its service delivery objects at an efficient level and if it cannot be upgraded to that level;
>
> …
>
> (e) when an immovable asset is acquired or disposed of best value for money must be realised;

87 Para 111, citing para 49 of *FNB*. See also T Coggin '"They're not making land anymore": A reading of the social function of property in *Adonisi*' (2021) 138 *South African Law Journal* 697.
88 Para 113.
89 Sec 3 GIAMA.
90 See also para 117 of the case. Sec 4(2) defines the role of the public owner as a custodian, which is further described as a caretaker.
91 See also secs 6-8 of the Act for the preparation of plans relating to public property.

> (f) in relation to a disposal, the custodian must consider whether the immovable asset concerned can be used –
>
> (i) by another user or jointly by different users;
> (ii) in relation to social development initiatives of government; and
> (iii) in relation to government's socio-economic objectives, including land reform, black economic empowerment, alleviation of poverty, job creation and the redistribution of wealth.

A surplus immovable asset – an asset that no longer supports the service delivery objectives of a user – can only be disposed of to a private entity if it is established that the asset in fact is surplus, that it cannot be upgraded to that level and that the asset cannot be allocated to another user or jointly to different users. Throughout this inquiry, the state must have regard to its social development initiatives and socio-economic objectives, including land reform and housing delivery.[92] In *Adonisi* the MEC was the custodian/caretaker of the property and, therefore, entitled to dispose of it,[93] although only after having gone through the legislative process to confirm that the state no longer had any use for it. In addition, the province must have adhered to WCLAA[94] as it regulates the disposal of land in the Western Cape. The premier must coordinate the management of public property with other spheres of government with a view to realising land reform objectives and rationalising the custody, administration and disposal of such land.[95] The WCLAA Regulations set out additional, cumbersome processes to be followed in order for the province to dispose of public land, including a notice-and-comment public participation process.[96]

Gamble J provides an in-depth account of what transpired when the MEC decided to dispose of the property, and concludes that throughout this process the option of social housing never featured, nor was the constitutional commitment to redistribute land truly considered.[97] With reference to *Government of the Republic of South Africa v Grootboom*[98] and the state's commitment to create conditions that would enable all persons to gain access to adequate housing,[99] Gamble J held that the province failed to introduce any policies or legislative measures to reverse apartheid spatial planning or

92 Sec 13(3) GIAMA; see specifically also paras 120-127 of the case.
93 Sec 4(2)(b)(ii) GIAMA. See also para 118 of the case.
94 Relevant provincial land administration law as stated in sec 4(2)(b)(ii) of GIAMA.
95 Secs 3 and 4 WCLAA; see also para 130 of the case.
96 See para 131 of the case for details on the process.
97 Paras 174-175.
98 2001 (1) SA 46 (CC).
99 Para 474, referring to *Grootboom* (n 98) para 35.

promote social housing.[100] The province decided to sell the property, secretively, without any documentary record of this decision, and failed to apply GIAMA.[101] The province outrightly failed to discharge its constitutional obligations by side-stepping or redesigning policies.[102]

To remedy the situation, the Court decided that the province and city should be subjected to a statutory interdict to allow for the proper 'design and implementation of a comprehensive, inclusive social housing policy in the context of the use of both state-owned and municipal land in and around central Cape Town' that adheres to the Social Housing Act.[103] The Provincial Cabinet's decision to sell the land, and later not resile from that decision, was held to be unlawful and set aside.[104] Finally, prayer 12 of the draft order for declaratory relief reads as follows:[105]

> The Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet, is directed to take into account, and have due regard to, the legal obligation to provide, and the need for, affordable social housing in central Cape Town, and the suitability of the Tafelberg Properties for social housing, in any decision in respect of the use or disposal of the Tafelberg Properties.

This and similar prayers were dismissed on the basis of it requiring the Court 'to tell the province (at various levels) how to do its job', amounting to an impermissible intrusion into the executive arm of government.[106] Similar to *Grootboom*, the Court opted for a less intrusive order: for the state to introduce a policy that would promote social housing. It is questionable whether yet another regulatory measure will make any difference when the local authority, tasked with taking everyday, bureaucratic decisions that would promote land reform and housing, shows scant interest in pursuing these human rights objectives.

The regulatory scheme pertaining to public property – specifically land/buildings that are managed by the state for countless public pursuits – evidently is instructured to work against the disposal of state property. Various, complex loopholes must first be overcome before the state can get rid of its property, although the laws are inexplicably silent when it comes to the effectual utilisation of

100 Para 480. See also Coggin (n 87) 702.
101 Para 482.
102 Para 491.
103 Para 493. See also *Thubakgale & Others v Ekurhuleni Metropolitan Municipality & Others* [2021] ZACC 45 paras 108-109.
104 Para 507.
105 Para 27.
106 Para 510.

state property. GIAMA merely states that property must be used 'efficiently' and, if the use thereof does not support the state's 'service delivery objects at an efficient level', it becomes surplus. The meaning of 'efficient use' is open to interpretation. *Adonisi* clearly shows that the courts are reluctant to prescribe how and for what purposes the state should make its property work, let alone delve into a purposive interpretation of 'efficient use'. The extent of the High Court's averseness manifests in its decision to dismiss prayer 12 of the draft order, which merely requested that the state 'take into account, and have due regard to' its constitutional obligations, and the need for, social housing.[107] For the state to *consider* its constitutional obligations when deciding how to put public property to use arguably is the least of what society, including other spheres of government, can ask.

4.3 Preliminary remarks on the public land owner

Adonisi brings into question the nature and character – as well as the rights, interests, and obligations – of the public land owner as legal subject at a time when thousands of households (mostly previously dispossessed) live in deplorable conditions against the backdrop of a rich human rights framework. The judgment confirms Wiechers's contention that the state does have rights in the 'subjective' sense;[108] the state as legal subject can deal with its property to serve its own, state-backed interests. States are not unbiased intermediaries when having to deal with complex land claims. Resilient property theory reveals the realities of state action in response to complex property problems: 'that states are required to negotiate their "other-regarding" responsibilities – adjudicating and allocating resilience to individuals and institutions – against the backdrop of their own "self-regarding" need for resilience'.[109] The 'other regarding' role of the state, which is concerned with property interests, the protection of private property, and property allocations (distributions), has garnered extensive scholarly work,[110] whereas the 'self-regarding'

107 Pragmatically, social housing seemed like the most obvious housing option due to the structure and location of the property.
108 Wiechers (n 72).
109 Fox O'Mahony & Roark (n 5) 216. They further argue that '[t]he insight that states are simultaneously both "self-regarding" – that is, motivated to shore up their authority and legitimacy (the state's own resilience), particularly in periods of crisis – and "other-regarding" in the discharge of governance functions, opens up a new frame for property theory'.
110 Underkuffler, eg, has argued that the relationship between the government and its citizens is grounded in a 'fiduciary relationship' – the state, therefore, acts under an obligation to take account of the needs of all, all citizens are beneficiaries of the state's power and the government must engage with everyone's needs: LS Underkuffler 'Property, sovereignty, and the public trust' (2017) 18 *Theoretical Inquiries in Law* 330, 348.

interests of the state – and the measures that states implement to bolster its own resilience – have received limited scholarly analyses, especially in the context of resource allocation.

Resilient property also shows that it is highly problematic when the state's individual interests fail to align with what is envisioned, and democratically demanded, in the Constitution.[111] Some balancing of the public land owner's rights and societal needs as explained by Gamble J suggests diverse commitments, namely, that for the state and the public. Even though the state as public land owner is an autonomous subject with the legal capacity to exercise 'individual' property rights, broader societal obligations should form the core of the state's pursuit. Constitutional commitments must be prioritised when the public land owner exercises its property rights.

For the city of Cape Town, the monetary gain when selling the property – supposedly to allow the state to fulfil other societal obligations – outweighed the option of making social housing available, despite the aptness of the property for this specific constitutional goal. Logically, the state is tasked to serve common interests as it represents the interests of all persons within the state,[112] yet this is no easy task as budgetary constraints curb the state's ability to fulfil mounting needs and obligations. A matter that perhaps precedes the issue of whether courts can or should scrutinise the way in which the public land owner deals with its property, is some description of the relationship between the rights/interests of the state and human rights, *in relation to public land*. As pointed out by Van Niekerk, the structure of private law rights/entitlements falls outside this inquiry.[113] Instead, inquiries relating to public land, limited resources, state actions and the fulfilment of human rights evidently must start with the Constitution and, specifically, the property and housing clauses.

Sections 25(5) and 26(2) mandate the state to take proactive steps to ensure that people have access to property; by no interpretation is public property exempted from this obligation. The Bill of Rights foregrounds all governmental decisions to align the state's approach and vision for society in pursuit of the fulfilment of fundamental rights. A unique, complex relationship, therefore, exists between the state as public land owner and vulnerable, homeless groups because the state controls their means to emerge from desperate, inhumane

111 Viljoen (n 57).
112 Van Niekerk (n 70) 270.
113 Van Niekerk (n 70) 272.

conditions.[114] Public property comprising open, vacant spaces, informal settlements[115] or inner-city buildings constitutes central means that can be unlocked by the state to serve as a stepping stone for marginalised groups to not only access spaces where they may legally reside, but also to live with dignity and security.

The nature and character of public land ownership, therefore, are vastly different from private ownership as state land must serve societal needs and the most important of those needs, by law, is to create access to property for landless/homeless persons. Of course, this does not mean that the state should convert all public property to achieve this goal as public property serves endless public purposes. Instead, a more resourceful, pressing governmental approach arguably is required to actively repurpose underutilised public properties and ensure that extant land holdings, mostly settlements, as well as land reform and housing programmes are structured to adhere to constitutional goals. It is unsettling to see that the existing governmental approach is pushing quite strongly in the opposite direction.[116] *Adonisi* shows that the state not only is unaware of the importance of the demands laid bare by sections 25(5) and 26(2), but it also acts in direct conflict with it. Where vulnerable groups live on state land, and have done so over decades, some laws (continue

114 Property – land or a dwelling – should either be distributed to the landless/homeless or aligned, entitlement-wise, to strengthen resilience. Once successful, the institution (property) can act as an enabling mechanism: allowing the previously dispossessed to take their rightful place in society, live with dignity, without fear of eviction, and shore up their own resilience: MA Fineman 'The vulnerable subject: Anchoring equality in the human condition' (2008) 20 *Yale Journal of Law and Feminism* 19; S Viljoen 'Property and "human flourishing": A reassessment in the housing framework' (2019) 22 *Potchefstroom Electronic Law Journal* 1. A legally-recognised entitlement to reside on land (or within a dwelling) is critical for poverty alleviation and directly linked with human dignity: A Durand-Lasserve & L Royston 'International trends and country contexts – From tenure regularization to tenure security' in A Durand-Lasserve & A Royston (eds) *Holding their ground, secure land tenure for the urban poor in developing countries* (2002) 1; *Grootboom* (n 98) para 83. The normative argument, as famously put forward by progressive property scholars, for property and the distribution thereof is to allow all persons to actively participate in objectively valuable patterns of existence and interaction: GS Alexander 'The social-obligation norm in American property law' (2009) 94 *Cornell Law Review* 760, referring to M Nussbaum *Women and human development: The capabilities approach* (2000); A Sen *Development as freedom* (1999) 70-86. As a matter of human dignity, individuals are entitled to flourish: 'Every person must be equally entitled to those things essential for human flourishing, ie, the capabilities that are the foundation of flourishing and the material resources required to nurture those capabilities.' Alexander 768. The acquisition of limited, natural resources, specifically land, therefore is a prerequisite for human flourishing, which justifies distributive justice. Social transformation is subject to the dispersal of access to land/dwellings and strengthening of tenure.

115 S Viljoen & J Strydom 'Tenure security and the reform of servitude law' in G Muller and others (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 98.

116 Viljoen (n 57).

to) inhibit tenure reform.[117] In the redistribution context, recent policy measures and case law confirm unyielding state directives for beneficiaries to acquire leasehold, not land ownership.[118]

5 Way forward

The purpose of this article is to rethink public property and the distinct role of the state as public land owner within a complex and rich human rights framework. To critically delve into the importance and purpose of this understudied legal subject, some preliminary observations are made in the article. From a conceptual perspective, a distinction is drawn between common property that is openly accessible to all, and public property that is exclusively managed by the state for specific governmental purposes. Characteristically, these are two vastly-divergent types of property that serve distinct aims. Common property is inherently structured to serve societal needs, it is inclusionary and essential for political, civic and recreational pursuits, whereas the regulatory position of the state is to ensure that these interests are safeguarded. Public property that is off bounds to the public at large and managed by the state for distinct public purposes resembles rights and entitlements customarily associated with private property. Yet, it should be acknowledged, from the outset, that the accustomed private property discourse is ill-suited to uncover and explore the nature, character, as well as rights and interests of the state as public land owner. Instead, public land ownership should be approached and repurposed in line with the Constitution and the commitments expressed in relation to property.

From a constitutional viewpoint, I argue that the progressive realisation of access to land and housing should start with the state and its position as public land owner; a remarkably understudied legal subject with sweeping powers and responsibilities. An innovative, urgent governmental approach in relation to public land ownership arguably should consist of three divisions: the repurposing of public property that is not efficiently utilised; a comprehensive privatisation drive relating to public land, specifically informal settlements, that already house thousands of vulnerable groups to secure tenure and formalise housing rights; and a complete overhaul of land reform policies and laws that continue to entrench public land ownership

117 Viljoen & Strydom (n 115) 113-114.

118 See, eg, R Hall & T Kepe 'Elite capture and state neglect: New evidence on South Africa's land reform' (2017) *Review of African Political Economy* 1; *Rakgase v Minister of Rural Development and Land Reform* 2020 (1) SA 605 (GP); S Viljoen 'The South African redistribution imperative: Incongruities in theory and practice' (2021) 65 *Journal of African Law* 403.

(with leasehold) instead of private land ownership for land reform beneficiaries.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: RSP Valfredo 'Justiciability of economic, social and cultural rights under the legal system of South Sudan: A preliminary assessment' (2024) 24 *African Human Rights Law Journal* 101-126
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a5

Justiciability of economic, social and cultural rights under the legal system of South Sudan: A preliminary assessment

*Ruben SP Valfredo**
Legal researcher and former lecturer, School of Law, University of Juba, South Sudan
https://orcid.org/0009-0003-2640-7351

Summary: *This article provides an overall assessment on the justiciability of economic, social and cultural rights (ESCRs) within the legal system of South Sudan. It establishes that, in theory, ESCRs are justiciable under the legal system of South Sudan in a complementary and collaborative manner at two levels, namely, the national and supranational. The article argues that ESCRs may in theory be legally and judicially enforceable by virtue of the Constitution and domestic legislation. Furthermore, ESCRs are justiciable by virtue of the automatic incorporation of numerous treaties into the Bill of Rights in the Constitution, with these treaties also effecting justiciability as part of the international treaty obligations of South Sudan. It further asserts that there are two parallel layers, national and supranational, which give effect to the legal realisation of ESCRs in South Sudan. This is presented through numerous domestic*

* LLB (Hons) (Khartoum) LLM (Leicester); ruben.valfredo@gmail.com. This article builds upon lectures on the topic as previously delivered by the author as part of the course on Economic, Social and Cultural Rights for the postgraduate diploma in human rights programme at the University of Juba. This piece has benefited much from and is enriched by the insightful discussions and assertations expressed by the students on the programme. Furthermore, the comments and suggestions of the editor and peer reviewers were extremely invaluable and beneficial to sharpen and refine the article. However, the article and its positions are entirely those of the author, and do not necessarily reflect the views or opinions of any entity with which the author is associated. Any shortcomings and errors rest with the author.

constitutional and legal provisions, and also international and regional treaty obligations of South Sudan. For that purpose, the article appraises relevant provisions in the Constitution, domestic laws, and United Nations and regional treaties to which South Sudan is a state party. In addition, the article examines a number of bodies and entities that are established by these frameworks to operationalise the enforcement of ESCRs. The article concludes that this composite situation forms a basis for all the instruments and structures to supplement and complement one another in a non-hierarchical perspective. The view expressed in the article is that the current status remains theoretical and is empirically and practically challenged by the factual realities that hinder and hamper the operationalisation of justiciability in South Sudan. It recommends that a practical test is required in order for a comprehensive legal jurisprudence about the justiciability of ESCRs in and for South Sudan to materialise.

Key words: *justiciability; legal and judicial enforcement; complaint; communication, reference, inquiry; South Sudan; economic, social and cultural rights; education; workers' and labour rights; adequate standard of living*

1 Introduction

Since the inception of the modern human rights system, debates about a number of normative human rights principles have recurred.[1] Among these topical matters is the classification of human rights standards into categories.[2] Of important and significant ramification is the classification into civil and political rights, on the one hand, and economic, social and cultural rights (ESCRs), on the other.[3] This categorisation has resulted in an arguable determination that ESCRs are described as welfare rights, aspirations and standards of achievement.[4] However, as human rights evolved to its contemporary status, such descriptions currently are deemed outdated and possibly in contradiction with the core notion that human rights are 'universal, indivisible, interdependent and interrelated'.[5]

1 S Besson 'Justifications' in D Moeckli and others (eds) *International human rights law* (2022) 23.
2 SP Marks 'The past and future of the separation of human rights into categories' (2009) 24 *Maryland Journal of International Law* 209.
3 As above.
4 P Alston & R Goodman *International human rights* (2012) 297.
5 Vienna Declaration and Programme of Action 1994 art 5; World Summit Outcome 2005 art 13; Resolution 60/251 of 3 April 2006 by the General Assembly of the United Nations para 3.

Then again, these terms – with which ESCRs are coined – have further attracted the attributes that these rights are deemed second-generation rights, implying that they are subsidiary and secondary to civil and political rights.[6] Furthermore and, in essence, the nature of state obligations in regard thereto is largely viewed as positive rather than negative; in addition to the role pertaining to the actual realisation of the rights as progressive and not immediate.[7]

As a result, and in view of all these aforementioned factors, a further essential question about the ability for the legal enforcement of ESCRs has been constantly raised and scrutinised,[8] with the discussion being centred around the possibility of judicially challenging the realisation, the failure to realise, and the violation of these rights.[9] In this respect, there appears to be a two-sided position on the matter. The first side asserts that ESCRs, by virtue of their nature, cannot be enforced as legal rights of individuals and legal duties of states before a judicial, semi-judicial or administrative body.[10] On the contrary, the second side advances that irrespective of the distinct nature and attributes of ESCRs, these rights could be legally enforced and/or their violations challenged before courts of law, judicial or administrative tribunals.[11] In other words, ESCRs are justiciable, meaning 'proper to be examined in courts of justice'.[12]

This article assesses the justiciability of ESCRs in the context of the legal system of South Sudan. For the purposes of the article, 'justiciability' is not understood to be confined to judicial enforcement and litigation before courts of law, but includes legal enforcement before quasi-judicial or administrative tribunals. Further, the legal system of South Sudan is considered broadly to be comprised of the domestic legal framework,[13] as well as supranational ESCR instruments to which South Sudan is a state party.[14] However, the article narrows its research focus to the following ESCRs: education; workers' and labour rights; and adequate standard of living consisting

6 J Donnelly & DJ Whelan *International human rights* (2020) 65.
7 KG Young 'Rights and obligations' in Moeckli and others (n 1) 129.
8 SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: Theory, practice and prospect* (2013) 46.
9 As above.
10 DM Chirwa & L Chenwi 'The protection of economic, social and cultural rights in Africa' in DM Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 22.
11 As above.
12 *Black's law dictionary* (2019).
13 This consists of the Constitution, domestic legislations and customary laws, in addition to constitutional, legal and administrative entities, and customary authorities established in their purview.
14 This includes international, regional, and sub-regional treaties and conventions, and treaty bodies created by these conventions.

of food and water, housing and shelter, health and medical care, and social security and assistance.

The desire to research and explore the status of ESCRs in South Sudan arises from the fact that these rights are important entitlements for the realisation and dispensation of all the fundamental human rights in South Sudan, and also for being critical to the survival, prosperity and advancement of the populace. Optimistically viewed, the status of the realisation of ESCRs in South Sudan is severely hindered and curtailed.[15] More pessimistically viewed, ESCRs in the country hardly exist and are by some accounts in tatters.[16] Therefore, the article aims to investigate and interrogate the means and methods by which the realisation and rendering of these rights could be legally and judicially enforced at the domestic level within South Sudan or at the supranational level outside the country. It has also taken into account that empirically and, as per the evidence that has been unearthed, there have been minimal to no attempts in exploring the justiciability of ESCRs.

The article argues that the domestic legal framework – Constitution and laws – provides for a modality to enable a broad ground for the justiciability of ESCRs before domestic courts and quasi-judicial tribunals. Conversely, the remaining aspects of these stipulated ESCRs, in addition to those ESCRs that are not explicitly mentioned, derive the ground for legal or judicial enforcement before a domestic court or quasi-judicial tribunal in South Sudan by virtue of the automatic incorporation of the respective treaties as part of the Bill of Rights in the Constitution. Furthermore, the article asserts that the supranational instruments – ESCR treaties and conventions – that South Sudan has ratified or acceded to provide for a complementing and parallel mechanism – under the legal system of South Sudan – for the justiciability of these ESCRs before international, regional and sub-regional bodies or entities established by these supranational instruments. Notwithstanding the ideal theoretical status, the article also contends that practical realities and challenges might impact on the operationalisation of justiciability at the domestic arena of South Sudan.

The article presents its abstract analysis and critical perspective in two main parts. The first part advances the concept of justiciability in accordance with the provisions of the Constitution and all other pertinent laws of South Sudan. The second part digests the provisions

15 South Sudan Country Report 2024, BTI Transformation Index, https://bti-project.org/en/reports/country-report/SSD#pos9 (accessed 3 May 2024).
16 As above.

of relevant ESCR treaties and conventions in which realm, and due to the nature of their obligations, these rights are rendered justiciable. The article concludes by summarising its findings and alluding to appropriate recommendations.

2 Justiciability under the Constitution and laws of South Sudan

This part asserts that certain ESCRs could be justiciable before the Supreme Court and other competent courts of South Sudan by virtue of being incorporated in the Bill of Rights chapter in the Constitution. Further, the South Sudan Human Rights Commission is empowered to provide semi-judicial or administrative remedies. In addition, some aspects of other ESCRs could be litigated upon before other courts of law because they are enshrined in laws enacted by the legislature in addition to the Constitution.

This part also establishes that some other ESCRs could not be justiciable by the mere consideration of them under the 'guiding objectives' chapter in the Constitution because they are therein stipulated as aspirations and standards of achievement. Simultaneously, there is a lack of legislative enactments about these rights and they only exist as policies and plans of respective line ministries. Nevertheless, these ESCRs that are not expressly stipulated – in the Constitution and/or laws – as justiciable could be judicially enforced before the Supreme Court and other competent courts of South Sudan, because the Constitution automatically incorporates in the Bill of Rights human rights treaties ratified or acceded to by South Sudan.[17]

The part is divided into two components. Component 1 captures the two contrasting aspects under the Constitution, and component 2 illustrates the peculiar aspects of the relevant laws respectively.

17 This overall multilayered situation and context could be attributed to the overall legacy of constitutional development in South Sudan, which has been inextricably linked to constitutional developments of the Sudan. This particular provision, which has been incorporated in the Transitional Constitution of the Republic of South Sudan 2011, is reproduced from the Interim National Constitution of the Republic of the Sudan 2005, and the Interim Constitution of Southern Sudan 2005. The latter was the supreme law of the southern region prior to secession from the Sudan in 2011. Prior academic research on the context of the Sudan have advanced and determined similar positions and assertations. See R Miamingi 'Inclusion by exclusion? An assessment of the justiciability of socio-economic rights under the 2005 Interim National Constitution of Sudan' (2009) 9 *African Human Rights Law Journal* 76.

2.1 Transitional Constitution of the Republic of South Sudan 2011

2.1.1 Bill of Rights

Justiciability of certain ESCRs is evident by virtue of article 9(2) of the Transitional Constitution of the Republic of South Sudan 2011 (TCRSS 2011) which requires the Supreme Court to 'uphold the rights and freedoms enshrined in the Bill of Rights',[18] in addition to protecting and applying these rights.[19] Enabling legislation has elaborated that 'to uphold the Bill of Rights' means to empower the court with the jurisdiction to 'protect the rights and freedoms conferred by the Constitution'.[20] As such, this article determines that the manner in which a court protects rights and freedoms is effected via judicial enforcement which renders these rights and freedoms justiciable.

In addition to the constitutional panel of the Supreme Court and other competent courts, the South Sudan Human Rights Commission is empowered by its establishing legislation to monitor and enforce the rights and freedoms enshrined in the Constitution or international human rights treaties and conventions ratified or acceded to by South Sudan.[21] In doing such monitoring, the Commission has the competence to receive and investigate complaints of human rights violations.[22]

The set of rights stipulated in the Bill of Rights are inclusive of civil, political, economic, social and cultural rights in addition to group rights.[23] However, the following ESCRs are explicitly stipulated: education,[24] public health care[25] and housing.[26]

As far as education is concerned, as an ESCR, it is to be noted that the provision in the Bill of Rights codifies it as follows: 'Education is a right for every citizen and all levels of government shall provide access to education without discrimination as to religion, race,

18 No separate Constitutional Court exists in South Sudan and the Supreme Court, in applicable situations, sits as a constitutional panel in accordance with sec 11(1)(a) of the Judiciary Act 2008.
19 Art 10 Transitional Constitution of the Republic of South Sudan (TCRSS) 2011.
20 Sec 18(2)(g) Civil Procedures Act 2007.
21 Sec 3 Southern Sudan Human Rights Commission Act 2009.
22 Secs 6(1), 7(1)(a) & (i) Southern Sudan Human Rights Commission Act 2009.
23 Part 2 TCRSS 2011 (n 19).
24 Art 29 TCRSS 2011.
25 Art 31 TCRSS 2011.
26 Art 34 TCRSS 2011.

ethnicity, health status including HIV/AIDS, gender or disability.'[27] 'All levels of government shall promote education at all levels and shall ensure free and compulsory education at the primary level; they shall also provide free illiteracy eradication programmes.'[28]

A succinct reading of these provisions would lead to the determination that discrimination based on the specified characteristics is unconstitutional and can be challenged before the Supreme Court of South Sudan. Furthermore, paid or optional and noncompulsory primary education would contravene the Constitution; likewise, for literacy programmes that are offered subject to the payment of fees.

Pertaining to the right to health care, the justiciable aspects appear to be the duty to 'provide free primary health care and emergency services'.[29] However, this article contends that it would be a judicial marathon and intangible to attempt to judicially litigate the manifestation of the expected role of the government to 'promote public health, establish, rehabilitate and develop basic medical and diagnostic institutions'.[30] This is due to the vagueness of the terms 'promote' and 'develop'.[31]

Along the same line, the right to housing as enshrined in the Bill of Rights section of the Constitution has aspects that apparently are justiciable while other aspects would be difficult to be tested and legally enforced before a court.[32] The justiciable element is apparent in the provision which states that 'no one shall be evicted from his or her lawfully-acquired home or have his or her home demolished save in accordance with the law'.[33]

However and, to the contrary, it remains to be seen how the provisions of 'every citizen has the right to have access to decent housing',[34] and 'the state shall formulate policies and take reasonable legislative measures within its available resources to achieve the

27 Art 29(1) TCRSS 2011.
28 Art 29(2) TCRSS 2011.
29 Art 31 TCRSS 2011.
30 Art 31 TCRSS 2011.
31 The duty to promote obligates states to adopt measures for raising awareness and sensitisation in order to inform the population about their human rights. However, it is the view of this article that it remains uncertain how this could be determined as justiciable in the context of the right to health in South Sudan.
32 It is worth pointing out that some scholars assert that regardless of the right being considered an ESCR or not, governments have a legal duty to refrain from evicting people, which in itself is a basis of rendering the right justiciable.
33 Art 34(3) TCRSS 2011.
34 Art 34(1) TCRSS 2011.

progressive realisation of these rights' are to be executed.[35] To be particular, the question arises as to how to determine access to decent housing and/or the adoption of policies and legislative measures for ensuring decent housing, which might in the end revolve around the mere existence of access or no access, and the adoption or non-adoption of policies and measures.

This incorporation of a set of ESCRs within the Bill of Rights and fundamental rights part of the Constitution, which then renders these rights legally justiciable and judicially enforceable, remains an untested area as empirical research has revealed that such matters appear not to have been considered by the Supreme Court or other courts in South Sudan. However, legal inspiration and persuasion could by noticed and drawn from the constitutions of some other states worldwide. For instance, the Constitution of the Republic of South Africa, 1996, incorporates numerous ESCRs, such as housing, health care, food, water, social security, and education, in the Bill of Rights.[36] Such incorporation has been the basis and evidence for the judicial enforcement of these rights before the Constitutional Court in addition to other courts of law in South Africa.[37]

2.1.2 Guiding objectives

A selection of some ESCRs is stipulated in the part of the Constitution under the 'guiding objectives and principles' of the government.[38] Hence, the ESCRs that fall under this chapter cannot be rendered justiciable or enforceable in a court of law by sole reliance on this chapter of the Constitution. As a matter of fact, article 44 of TCRSS expressly states:

> Unless this Constitution otherwise provides or a duly enacted law guarantees, the rights and liberties described and the provisions contained in this Chapter are not by themselves enforceable in a court of law; however, the principles expressed herein are basic to governance and the state shall be guided by them, especially in making policies and laws.

As such, it would not be possible to judicially enforce the following rights by the exclusive reliance and sole referencing of their stipulations within this chapter: the rights to work, to health and

35 Art 34(2) TCRSS 2011.
36 D Brand 'Introduction to socio-economic rights in the South African Constitution' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 1.
37 Brand (n 36) 6.
38 Part 3 ch I TCRSS 2011.

medical assistance, and to food and water.[39] Similarly, the right to an adequate standard of living or, as the Constitution has coined it, 'achieving a decent standard of life',[40] academic freedom in higher education and protection of the freedom of scientific research,[41] and affordable education at 'secondary and higher levels, including technical and vocational training' should be deemed similarly unenforceable.[42]

While it could be argued that the specification in article 44 of TCRSS 2011 appears to exclude the justiciability of these rights, it is also wise to assert that the provision of the same article provides for an avenue for the same ESCRs to be judicially enforced should they be codified under other parts of the Constitution, such as the Bill of Rights, by explicit stipulation, automatic incorporation of their respective international or regional treaties, or if they are enshrined in legislation. Furthermore, such arguable determination in article 44 cannot be used as a basis to violate these fundamental rights. As an essential factor, there is an expectation on the government to aspire and excel in rendering appropriate policies, plans and allocate resources for the realisation of these rights.[43] Similarly, upon the implementation of such plans, there would be no justification for the government to retreat or retrieve an already rolled-out policy for implementing ESCRs.[44]

While the afore-mentioned assertation remains an abstract assumption, a similar reflective context of such contrast could be observed from the Constitution of India 1950, which incorporates some ESCRs in the fundamental rights part,[45] and includes others in the 'directive principles of state policy'.[46] As a result, the ESCRs that are in the fundamental rights part of the Constitution were deemed justiciable and, hence, enforced by courts,[47] while those rights falling

39 Art 35(2) of TCRSS 2011 pronounces that '[t]his Constitution shall be interpreted and applied to advance the individual dignity and address the particular needs of the people by dedicating public resources and focusing attention on the provision of gainful employment for the people, and improving their lives by building roads, schools, airports, community institutions, hospitals, providing clean water, food security, electric power and telecommunication services to every part of the country'.
40 Art 37(1)(e) TCRSS 2011.
41 Art 38(2)(a) TCRSS 2011.
42 Art 38(2)(b) TCRSS 2011.
43 Part 3 ch I arts 35 & 44 TCRSS 2011.
44 This role here could be considered under the negative obligations of the state and the duty to respect human rights, in general, and ESCRs, in particular.
45 Part III Constitution of India 1950.
46 Part IV Constitution of India 1950.
47 S Shankar & PB Mehta 'Courts and socio-economic rights in India' in V Gauri & D Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 147.

within the state policy part were considered not adjudicative, albeit justiciable via other means and measures.[48]

2.1.3 Treaty provisions that are automatically incorporated in the Bill of Rights of TCRSS 2011

ESCRs are justiciable and judicially enforceable under the legal system of South Sudan by virtue of the automatic incorporation of international and regional human rights – ESCR – treaties and conventions.[49] In this respect, article 9(3) of TCRSS 2011 states that '[a]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill'.

Therefore, it is prudent to argue that ESCR treaties, and their justiciable provisions, which are ratified or acceded to by South Sudan, are considered part of the Bill of Rights in the Constitution.[50] Hence, they would have the same effect of being upheld and protected by the Supreme Court, in addition to other competent courts, just as the other provisions on other human rights that are expressly enshrined in the Bill of Rights.

This automatic incorporation status includes the following international and regional treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966,[51] and its Optional Protocol (ICESCR Protocol) of 2008;[52] the provisions on ESCRs in the following treaties: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979,[53] and its Optional Protocol (CEDAW Protocol) 1999;[54] the Convention on the Rights of the Child (CRC) 1989;[55] the Convention on the Rights of Persons with Disabilities (CRPD) 2006,[56] and its Optional Protocol

48 As above.
49 RSP Valfredo 'Domesticating treaties in the legal system of South Sudan – A monist or dualist approach?' (2020) 28 *African Journal of International and Comparative Law* 378.
50 Miamingi (n 17) 92.
51 The Covenant was adopted on 16 December 1966 and entered into force on 3 January 1976. South Sudan acceded to the Covenant on 7 June 2019 and deposited its instrument of accession on 5 February 2024.
52 The Protocol was adopted on 10 December 2008 and entered into force on 5 May 2023. South Sudan acceded to the Protocol on 5 February 2024.
53 The Convention was adopted on 17 July 1980 and entered into force on 3 September 1981. South Sudan acceded to the Convention on 30 April 2015.
54 The Protocol was adopted on 6 October 1999 and entered into force on 22 December 2000. South Sudan acceded to the Protocol on 30 April 2015.
55 The Convention was adopted on 20 November 1989 and entered into force on 2 September 1990. South Sudan acceded to the Convention on 23 January 2015.
56 The Convention was adopted on 12 December 2006 and entered into force on 3 May 2008. South Sudan acceded to the Convention on 5 February 2024.

(CRPD Protocol) 2007[57] of the United Nations (UN); the African Charter on Human and Peoples' Rights (African Charter) 1981,[58] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) 2003,[59] at the African Union (AU) level.

To back up this article's line of argument, this same determination could also be argued to have been asserted in the context of the evolution of the justiciability of ESCRs under the German Constitution,[60] which dictates for the automatic incorporation of treaties pertaining to these rights as part of the constitutional rights in the basic law, and also renders them justiciable,[61] and judicially enforceable before the Constitutional Court.[62]

2.2 Domestic legislation

Further to the provisions of the Constitution that render ESCRs justiciable, there are also a number of ESCRs-related stipulations that are enacted in domestic legislations. These legislative provisions could be litigated upon by any concerned citizen before a competent court in South Sudan, and appropriate remedies shall be awarded and enforced accordingly. However, it should be stated that while the theory might paint an ideal situation, the operationalisation and achievement of such legal remedies before judicial and/or quasi-judicial bodies in South Sudan might be marred by practical challenges and logistical hindrances.

2.2.1 Legalisation on the right to education

Upon scrutiny of the Child Act 2008 as a specific law on the rights of children,[63] it could be established that certain aspects of the right to education are stipulated as provisions of law that are legally

57 The Protocol was adopted on 30 March 2007 and entered into force on 3 May 2008. South Sudan acceded to the Protocol on 5 February 2024.
58 The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. South Sudan acceded to the Charter on 23 October 2013 and deposited its instrument of accession on 19 May 2016.
59 The Protocol was adopted on 11 July 2003 and entered into force on 25 November 2005. South Sudan acceded to the Protocol on 24 February 2023 and deposited its instrument of accession on 7 June 2023.
60 Part I Basic Law for the Federal Republic of Germany 1949.
61 C Enders 'Social and economic rights in the German Basic Law? An analysis with respect to jurisprudence of the Federal Constitutional Court' (2020) 2 *Constitutional Review* 191.
62 Y Schoog 'Germany' in D Landau & A Nussberger (eds) *The justiciability of economic, social and cultural rights* (2023) 174.
63 Child Act 2008, Acts supplement no 1 to the Southern Sudan gazette no 1 vol 1 dated 10 February 2009.

enforceable. To be specific, the Child Act requires that all levels of government ensure the rights enshrined in the Act,[64] and to 'provide effective remedies to redress violations of the rights … including through access to child-friendly, independent complaints procedures and competent courts',[65] which includes in addition to competent courts, an independent child commission.[66]

Of particular interest on justiciability and judicial enforcement of education is the legal requirement that primary education shall be free and compulsory to every child.[67] Likewise, is the right of children with disabilities to be in education 'regardless of the type or severity of the disability he or she may have'.[68]

Hence, these duties on the government to recognise, respect;[69] and to ensure that necessary measures are available to remedy situations of noncompliance,[70] and also to protect these rights of children by penalising violators,[71] are all manifestations of justiciability and judicial enforcement. In addition, as a practical justiciability procedure, the Child Act also provides for the establishment of courts with the jurisdiction to hear and determine matters conferred by this law, and to provide judicial remedies for the observance of these rights.[72] It also provides for the establishment of an 'independent child commission' to function as a semi-judicial entity or administrative tribunal for the enforcement of children's rights;[73] more particularly, the power 'to investigate on its own motion or on a complaint … of violations'.[74]

In the same vein, the General Education Act 2012,[75] as a dedicated legislation for primary, secondary, fundamental and vocational education(s), strikes an argument for the justiciability and judicial enforcement in South Sudan of significant obligations of the government of South Sudan as provided for in the legislation. The legislation expressly stipulates that any legal issues arising from its implementation shall be first addressed to the respective ministry of education[76] and, thereafter, referred to a court of law or the public

64 Sec 36(1) Child Act 2008.
65 Sec 36(2)(u) Child Act 2008.
66 Sec 193(1) Child Act 2008.
67 Sec 14(1) Child Act 2008.
68 Sec 14(2) Child Act 2008.
69 Sec 36(1) Child Act 2008.
70 Sec 36(2 Child Act 2008).
71 Sec 35 Child Act 2008.
72 Sec 192(1) Child Act 2008.
73 Sec 193(1) Child Act 2008.
74 Sec 193(2)(a) Child Act 2008.
75 Act 30.
76 Sec 33(a) General Education Act (n 75).

grievances chamber,[77] which is an apparent procedure for judicial remedy by a court, or an administrative relief of complaints by a semi-judicial tribunal, as the public grievances chamber could be deemed.[78] Moreover, on legally-enforceable provisions, the General Education Act 2012 stipulates that at least 10 per cent of the annual budget shall be allocated for general education;[79] that public schools shall be free of charge,[80] which could potentially include, at equal footing, in addition to primary education schools, schools that provide secondary, vocational and fundamental education.

In the same vein, the Higher Education Act of 2012 provides for justiciable provisions on the enforcement of tertiary education. For example, it sets out that the 'financial allocation … shall constitute at least 5% of the Total National Annual Budget' allocated by the government for higher education.[81]

It is worth highlighting that inspiration and insight into matters of judicial adjudication of discrimination in the context of education could be drawn from the landmark decisions of the United States Supreme Court in *Brown v Board of Education of Topeka,*[82] in which case the Supreme Court ruled that the existence of a segregated system of schooling based on race was unconstitutional or unlawful.[83] Inspiration could also be drawn from *San Antonio Independent School District v Rodriguez,*[84] in which case the Supreme Court decided that the existence of a school funding system via local domestic taxations that results in a situation of imbalanced financial resources to schools based on area was not discriminatory and, therefore, not unlawful.[85]

2.2.2 Legalisation on the workers' and labour rights

South Sudanese legislation caters for the two sectors of formal employment – public and private. These are the Civil Service Act 2011 and the Labour Act 2017. These two pieces of legislation provide for numerous legal provisions that are justiciable and legally enforceable before a court of law and other semi-judicial tribunals.

77 Sec 33(b) General Education Act.
78 Sec 3 Public Grievances Act 2011.
79 Sec 15(b) General Education Act.
80 Sec 21(a)(i) General Education Act.
81 Sec 51(a) Higher Education Act 2012.
82 347 US 483 (1954).
83 As above.
84 411 US 1 (1973).
85 As above.

The Civil Service Act 2011 indicates that the relevant governmental institution in which an employee is employed should be the first administrative entity to be held liable for employment management matters.[86] To be particular, certain rights, such as the right to non-discrimination,[87] the requirement to pay salaries 'on time at the end of each calendar month',[88] among other legal provisions in the legislation, permit an employee to lodge a grievance with the South Sudan Civil Service Commission or the South Sudan Employees Justice Chamber,[89] which are the semi-judicial entities for administrative relief and remedy.[90] These avenues are without prejudice to the right of lodging a complaint before a competent court.[91]

Regarding similar perspectives, the Labour Act 2017 incorporates a set of workplace fundamental rights and renders them legally enforceable,[92] namely, non-discrimination,[93] the prohibition of forced labour[94] and child labour.[95] In addition to this are the payment of wages or salaries;[96] work hours and leave entitlements;[97] and the termination of employment contracts.[98] The practical enforcement of these rights is enabled by the establishment of a labour commission to provide conciliation,[99] as an administrative remedy,[100] and also a labour court,[101] to adjudicate such matters.[102]

As an expansion to these overreaching labour provisions, it could be established that the Child Act 2008 has peculiar labour and employment provisions that are legally enforceable pertaining to children.[103] The judicially-enforceable rights are the prohibition of paid employment for those under 14 years of age,[104] and light work for those under the age of 12 years.[105] This is effected through

86 Secs 9(2),18(1) & 98(1)(b) Civil Service Act 2011.
87 Sec 19(a) Civil Service Act 2011.
88 Sec 57(1) Civil Service Act 2011.
89 Secs 98(2) & 97 Civil Service Act 2011.
90 Secs 3 & 27 Employees Justice Chamber Act 2011; sec 3 Public Grievances Act 2011.
91 Sec 30 and sec 25 of each of the above Acts respectively.
92 Sec 3 Labour Act 2017.
93 Sec 6(1) Labour Act 2017.
94 Sec 10(1) Labour Act 2017.
95 Secs 12 & 13 Labour Act 2017.
96 Secs 49(1), (2) & (3) Labour Act 2017.
97 Secs 56-68 Labour Act 2017.
98 Secs 73-77 Labour Act 2017.
99 Secs 15(1), 71(1) & 83(1) Labour Act 2017.
100 Secs 102-104 Labour Act 2017.
101 Secs 15(2), 71(2) & 83(5) Labour Act 2017.
102 Sec 108 Labour Act 2017.
103 Child Act 2008 (n 63), sec 36(1) which stipulates that 'all levels of government ensure the rights enshrined in the act'; and sec 36(2)(u) which requires the government to 'provide effective remedies to redress violations of the rights in this Act'.
104 Sec 25(3) Child Act 2008.
105 Sec 25(4) Child Act 2008.

access to child-friendly, independent complaints procedures and competent courts,[106] which includes, in addition to competent courts, an independent child commission.[107]

This status of the existence of domestic legislations that cater for legislative rights pertaining to work and labour, and also pave the way for the establishment of numerous judicial and semi-judicial entities to judicially and administratively enforce labour rights, can be observed in the legal frameworks of the majority of African states.[108] This signifies that, at least, the theoretical framework for the justiciability of work and labour rights is comparatively enshrined in the domestic legal systems of most African countries.[109]

2.2.3 Legalisation on adequate standard of living

As opposed to the existence of legislation on education and labour, it appears that limited or no legislation on the right to adequate standard of living exists.[110] However, at least, it might be determined that the Child Act 2008 solely forms the basis for justiciability of the right to health for children. Relying on the same legislation, it can be determined that providing free basic health care to children is the responsibility of parents and the government,[111] just as the provision of free immunisation;[112] similarly, the absence of discrimination in accessing medical treatment on whatsoever basis.[113]

Hence, it could be asserted that this limited assertion on the justiciability of the right to an adequate standard of living, and its sub-rights – food and water, housing and shelter, health and medical care, and social security and assistance – appear to be a dominant domestic context in numerous countries worldwide,[114] and most of these right formulations are reflected as policies and strategies.[115] Notwithstanding this, a lesson or best practice could be drawn from the South African legal jurisprudence on how to effect justiciability and legal enforcement of the right to an adequate standard of living. There are interesting and persuasive judicial precedents on the judicial

106 Secs 36(2)(u) & 192(1) Child Act 2008.
107 Secs 193(1) & (2) Child Act 2008.
108 Labour Laws in Africa, https://www.cliffedekkerhofmeyr.com/export/sites/cdh/practice-areas/downloads/Labour-Laws-in-Africa.pdf (accessed 23 February 2024)
109 As above.
110 Most of the issuances on this right are policy documents, strategies or plans.
111 Sec 15(1) Child Act 2008 (n 63).
112 Sec 15(2) Child Act 2008.
113 Secs 15(2) & 15(3) Child Act 2008.
114 A Eide & WB Eide 'Adequate standard of living' in D Moeckli and others (n 1) 187.
115 As above.

enforcement of the right to an adequate standard of living, which could ultimately be the foundation on justiciability for any possible future adaptation in South Sudan. In this regard, the domestic courts in South Africa have pronounced judicial decisions that rendered the following rights justiciable: the rights to housing;[116] water;[117] health and medical care;[118] and social security and assistance.[119]

3 Justiciability mechanism and process under the structures of UN and regional human rights treaties ratified or acceded to by South Sudan

This part investigates the multitude of United Nations (UN), African Union (AU) and East African Community (EAC) treaties and conventions on ESCRs, to which South Sudan is a state party. It also assesses the jurisprudence of a handful of human rights bodies and entities that are established by these treaties which rationalise and effect the justiciability of ESCRs in the context of South Sudan before these entities and bodies. This part maintains that these bodies provide for and enable the justiciability of ESCRs at supra-national level(s) as a complementing and supplementing – yet parallel and simultaneous – extension of legal and judicial enforcements at the domestic level of the legal system of South Sudan.

However, it is also evident that the complementary and supplementary factor should not suggest that the structures at national level are superior and should be placed first, while the international structures are inferior and in second place. As a matter of fact, the supranational structure operates distinctively and independently without any procedural influence by the national structure.[120] Hence, these structures could provide for a basis for justiciability of ESCRs notwithstanding and irrespective of the national domestic layer. An assessment of structures established under the UN is presented first, then the status under the AU, followed by the structures of the EAC.

116 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46.
117 *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC); *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W).
118 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC).
119 *Khosa & Others v Minister of Social Development & Others*; *Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC).
120 W Vandenhole *The procedures before the UN human rights treaty bodies: Divergence or convergence* (2004) 309.

3.1 United Nations structures

South Sudan became the 193rd member of the UN,[121] and it has also acceded to pertinent UN human rights treaties that cater either exclusively or inclusively – along with other rights – for ESCRs.[122] Therefore, due to its membership of the UN and also being a state party to the afore-mentioned instruments, the following bodies established in the realm of or by such structures could extend and apply their semi-judicial or adjudicating authority concerning ESCRs on South Sudan. These bodies are the Human Rights Council (HRC);[123] the ESCR Committee and its individual complaints procedure;[124] the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and its individual complaints procedure;[125] and the Committee on the Rights of Persons with Disabilities (CRPD Committee) and its individual complaints procedure.[126]

In addition to this, South Sudan is a member of the International Labour Organisation (ILO),[127] and it has acceded to the following Labour Conventions: the Forced Labour Convention 1930;[128] the Right to Organise and Collective Bargaining Convention 1949;[129] the Equal Remuneration Convention 1951;[130] the Abolition of Forced Labour Convention 1957;[131] the Discrimination (Employment and Occupation) Convention 1958;[132] the Minimum Age Convention 1973;[133] and the Worst Forms of Child Labour Convention 1999.[134] This context renders the standards set under these conventions

121 The Republic of South Sudan seceded from the Republic of the Sudan on 9 July 2011, and was admitted to the UN on 14 July 2011.
122 See (n 51 to 57).
123 Created on 15 March 2006 by Resolution 60/251 of the UN General Assembly.
124 The Committee was established by ICESCR (n 51); and the individual complaints mechanism is provided by the ICESCR Protocol (n 52).
125 The Committee was established by CEDAW (n 53), and the individual complaints mechanism is provided by the CEDAW Protocol (n 54).
126 The Committee was established by CRPD (n 56), and the individual complaints mechanism is provided by the CRPD Protocol (n 57).
127 South Sudan has become the 184th member of the organisation on 29 April 2012, by virtue of its acceptance of the obligations in the Constitution of the ILO which was adopted in April 1919 and became part of the Treaty of Versailles of 28 June 1919.
128 Convention 29 which was adopted on 28 June 1930 and entered into force on 1 May 1932. South acceded to the Convention on 29 April 2012.
129 Convention 98 which was adopted on 1 July 1949 and entered into force on 18 July 1951. South acceded to the Convention on 29 April 2012.
130 Convention 100 which was adopted on 29 June 1951 and entered into force on 23 May 1953. South acceded to the Convention on 29 April 2012.
131 Convention 105 which was adopted on 25 June 1957 and entered into force on 17 January 1959. South acceded to the Convention on 29 April 2012.
132 Convention 111 which was adopted on 25 June 1958 and entered into force on 15 June 1960. South acceded to the Convention on 29 April 2012.
133 Convention 138 which was adopted on 26 June 1973 and entered into force on 19 June 1976. South acceded to the Convention on 29 April 2012.
134 Convention 182 which was adopted on 17 June 1999 and entered into force on 19 November 2000. South acceded to the Convention on 29 April 2012.

justiciable and legally enforceable before the complaints procedures of the international labour office (ILO office) established by the constitution of the organisation.[135]

All these entities and bodies cater procedurally and substantively for the justiciability of ESCRs, each in its own right and unique manner, as follows:

First, the HRC mandate extends to addressing all human rights situations that emanate or transpire from human rights treaty obligations within the UN.[136] As such, the HRC has established its authority to consider, review and determine any situation relating to the human rights treaties ratified or acceded to by a state,[137] including the competence to receive complaints, and examine and decide on these.[138] Henceforth, this article argues that this context suggests that all the treaty obligations of South Sudan and their ESCRs obligations, particularly, could be the subject matter of complaints through the complaint procedures established by the HRC.[139] As such, it could be advanced that they are admissible before the complaints mechanism of the HRC and, as such, appropriate recommendations to rectify the respective matter could be made for South Sudan. It would be anticipated that the latter will undertake appropriate and necessary required measures in view of the recommendations.[140] This concrete assertation for justiciability of ESCRs could be observed from the jurisprudence of the work of the HRC.[141] Most significantly, one convincing argument in this respect is the adoption of a resolution[142] by the HRC, for the attention of the General Assembly of the UN on an optional protocol[143] to ICESCR.

Second, the ESCR Committee,[144] which is the successor of the UN Economic and Social Council tasked with monitoring states'

135 Arts 26-34 Constitution of the ILO (n 127).
136 UN General Assembly UN Resolution 60/251 (n 123) para 3.
137 HRC Resolution 5/1 of 18 June 2007.
138 HRC Resolution 5/1 (n 137), an annex to the Resolution, para 85.
139 Throughout the universal periodic cycle reviews of South Sudan, a recommendation on ensuring the realisation of ESCRs via accession to its pertinent instruments were made. See the following Report(s) of the Working Group on the Universal Periodic Review: A/HRC/18/16 of 11 July 2011, para 83.6; A/HRC/34/13 of 28 December 2016, paras 128.4-128.9, 128.12-128.14 & 129.5; and A/HRC/50/14 of 28 March 2022, paras 113.8-113.14, 113.17-113.18, 113.20, 113.23, 113.25 & 113.37.
140 L Richardson 'Economic, social and cultural rights (and beyond) in the UN Human Rights Council' (2015) 15 *Human Rights Law Review* 409.
141 Richardson (n 140) 416.
142 HRC Resolution 8/2 of 18 June 2008.
143 UN General Assembly Resolution A/RES/63/117 of 10 December 2008.
144 Resolution 17 on 'Review of the composition, organisation and administrative arrangements of the Sessional Working Group of Governmental Experts on the

compliance with ICESCR,[145] has the competence to receive and consider communications and conduct inquiries enabled by the ICESCR Protocol 2008.[146] In view of these developments, all ESCRs are peculiarly deemed justiciable and legally enforceable before a dedicated mechanism of the UN.[147] An assessment of the jurisprudence of the ESCR Committee[148] points towards such trend whereby complaints against states could be examined by the ESCR Committee if the respective state is party to the ICESCR Protocol 2008, particularly pertaining to the rights to food,[149] water,[150] housing,[151] land,[152] work,[153] education,[154] health[155] and social security.[156] As such, ESCRs could be legally enforced against South Sudan before the ESCR Committee as a state party to ICESCR and the ICESCR Protocol.

The accession of South Sudan to this premier complaints' procedure for ESCRs is a recent development which has only occurred in February 2024, and has become operational from May 2024.[157] Notwithstanding that the formal deposit of the instrument of accession is recent, the domestic internal process could be traced back to 2019 when the national legislature ratified it,[158] followed by the assent of the head of state in 2023.[159] All these processes

---

Implementation of the International Covenant on Economic, Social and Cultural Rights' of 28 May 1985 by the Economic and Social Council of the UN.

145 Part IV ICESCR.

146 Arts 1, 10 & 11 ICESCR Protocol 2008.

147 M Langford and others 'Introduction' in M Langford and others (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A commentary* (2016) 1.

148 M Langford & JA King 'Committee on Economic, Social and Cultural Rights: Past, present and future' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2009) 477.

149 General Comment 12 on the right to adequate food by the ESCR Committee, E/C.12/1999/5 of 12 May 1999.

150 General Comment 15 on the right to water by the ESCR Committee, E/C.12/2002/11 of 20 January 2003.

151 General Comment 7 on the right to adequate housing by the ESCR Committee, E/1998/22 of 14 May 1997.

152 General Comment 26 on land and economic, social, and cultural rights by the ESCR Committee, E/C.12/GC/26 of 24 January 2023.

153 General Comment 23 on the right to just and favourable conditions of work by the ESCR Committee, E/C.12/GC/23 of 27 April 2016.

154 General Comment 13 on the right to education by the ESCRS Committee, E/C.12/1999/10 of 8 December 1999.

155 General Comment 14 on the right to the highest attainable standard of health by the ESCR Committee, E/C.12/2000/4 of 11 August 2000; and General Comment 22 on the right to sexual and reproductive health by the ESCR Committee, E/C.12/GC/22 of 2 May 2016.

156 General Comment 19 on the right to social security by the ESCR Committee, E/C.12/GC/19 of 4 February 2008.

157 ICESCR Protocol 2008 and Rules of Procedure 2012.

158 https://www.ohchr.org/en/press-briefing-notes/2019/06/press-briefing-note-south-sudan#:~:text=(3)%20South%20Sudan,-We%20welcome%20the&text=The%20TNLA%20on%20Monday%20ratified,which%20establish%20individual%20complaints%20procedures (accessed 30 May 2024).

159 https://www.eyeradio.org/kiir-signs-four-international-conventions-into-law/ (accessed 30 May 2024).

have culminated due to the apparent recommendations made by various states to South Sudan in the course of its Universal Periodic Review process before the HRC.[160] This reality makes South Sudan the fifth African, and twenty-ninth worldwide state to accord the ESCR Committee the competence to receive complaints against them for violations relating to ESCRs.[161] Therefore, it is expected that the absence of domestic legal enforcement might open the way for justiciability of these rights before the ESCRs Committee under the caveat that domestic remedies for ESCRs within South Sudan are not available, nor accessible or effective in providing remedy, hence no need to exhaust them.[162]

Third, the CEDAW Committee, as the expert body established to monitor state parties' compliance with CEDAW,[163] has the competence to receive communications against any state party for violations of CEDAW, by virtue of the CEDAW Protocol,[164] which renders these rights justiciable and legally enforceable.[165] Therefore, and since South Sudan is a state party to both CEDAW and the CEDAW Protocol, the stipulated ESCRs[166] could be considered and examined by the CEDAW Committee as its jurisprudence provides.[167]

Fourth, the CRPD Committee, which monitors state parties' compliance with CRPD,[168] and through the CRPD Protocol, it could receive communications against, or conduct inquiries into, a state party to the Protocol.[169] This relates to all rights, including the ESCRs incorporated in CRPD,[170] which as such renders them justiciable,[171]

160 Recommendations, UPR of South Sudan (Second Cycle 7 November 2016) and (third cycle 31 January 2022).
161 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR-OP (accessed 30 May 2024). The other African state parties are Cabo Verde, Central African Republic, Gabon and Niger.
162 TS Bulto 'Exception as norm: the local remedies rule in the context of socio-economic rights in the African human rights system' (2012) 16 *International Journal of Human Rights* 555.
163 Art 17 CEDAW.
164 Art 1 CEDAW Protocol.
165 L Hodson 'Women's rights and the periphery: CEDAW's Optional Protocol' (2014) 2 *European Journal of International Law* 561.
166 Arts 3, 10, 11-13 CEDAW.
167 General recommendation 36 on the right of girls and women to education, CEDAW/C/GC/36 of 27 November 2017, part II; General recommendation 24: Article 12 of the Convention (women and health), A/54/38/Rev.1 of 1999, ch I; General recommendation 13: Equal remuneration for work of equal value, A/44/38 of 1989, part IV; General recommendation 8: Implementation of article 8 of the Convention, A/43/38 of 7 March 1988, part IV.
168 Art 34 CRPD.
169 Arts 1 & 6 CRPD Protocol.
170 Arts 24, 25, 27 & 28 CRPD.
171 O Ferrajolo 'Optional Protocol to the Convention on the Rights of Persons with Disabilities' in VD Fina and others (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A commentary* (2017) 703.

and legally enforceable for persons with disabilities.[172] This status indeed is applicable and extended to South Sudan as a state party to both CRPD and the CRPD Protocol.

Fifth, a last peculiar justiciability layer for ESCRs in the context of South Sudan pertains to the right to work solely and, most particularly, labour rights in the context of the ILO. The constitution of the ILO establishes a complaints procedure against its member states for non-compliance with the ILO conventions to which a state is party.[173] A complaint as such would be examined by a commission of inquiry, which in turn makes recommendations for the concerned state to comply with.[174]

Based on these factors, this article asserts that the existing and established mechanism caters for the justiciability of the labour standards relating to the right to work.[175] Hence, the relevant ILO conventions acceded to by South Sudan provide for such context of legal enforcement against South Sudan.[176]

3.2 African Union and East African Community structures

3.2.1 African Commission on Human and Peoples' Rights

As a member of the AU,[177] and within the realm of the AU, and its predecessor, the Organisation of African unity (OAU) structures, South Sudan has acceded to the following treaties that cater inclusively for ESCRs: the African Charter[178] and the African Women's Protocol.[179] Therefore, the obligations emanating from these two treaties put South Sudan under the radar and within the work of the African Commission on Human and Peoples' rights (African Commission).[180] The African Commission is the continental human rights body that

172 General Comment 4 on the right to inclusive education by the CRPD Committee, CRPD/C/GC/4 of 25 November 2016; and General Comment 8 on the right of persons with disabilities to work and employment by the CRPD Committee, CRPD/C/GC/8 of 7 October 2022.
173 Arts 26-34 ILO Constitution (n 127).
174 As above.
175 L Swepston 'Human rights complaint procedures of the International Labour Organisation' in H Hannum (ed) *Guide to international human rights practice* (1992) 99.
176 South Sudan has acceded to seven ILO conventions (nn 128-134).
177 South Sudan became the 54th member of the AU on 15 August 2011 upon deposit of its instrument of accession to the Constitutive Act of the AU (adopted on 11 July 2000 and entered into force on 26 May 2001).
178 African Charter (n 58).
179 African Women's Protocol (n 59).
180 Part II ch I African Charter (n 58).

has been tasked with monitoring state parties' compliance with their human rights treaties obligations under the African Charter.[181]

In dealing with such role, the African Commission has been empowered with the competence to receive communications (that is, complaints),[182] and conduct inquiries.[183] Such measures indicate the justiciability of human rights and their legal enforcement before the African Commission.[184] Furthermore, the justiciability and legal enforcement could be determined to extend to all categories of rights, including ESCRs.[185]

Hence, the stipulated ESCRs in the African Charter, namely, property,[186] work,[187] health[188] and education,[189] , according to the jurisprudence of the African Commission, are legally enforceable.[190] This could further be deduced from the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.[191] The Principles and Guidelines clearly recognise that 'economic, social and cultural rights are justiciable and enforceable rights and that state parties to the African Charter have obligations to ensure that individuals and peoples have access to enforceable administrative and/or judicial remedies for any violation of these rights'.[192] Furthermore, numerous decisions of the African Commission point towards the same finding and conclusion.[193]

181 Art 45 African Charter.
182 Arts 48, 49 (inter-state complaints) & 55 (individual complaints) African Charter.
183 Art 58 African Charter.
184 S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118.
185 MA Baderin 'The African Commission on Human and Peoples' Rights and the implementation of economic, social, and cultural rights in Africa' in MA Baderin & R McCorquodale (eds) *Economic, social, and cultural rights in action* (2007) 139.
186 Art 14 African Charter.
187 Art 15 African Charter.
188 Art 16 African Charter.
189 Art 17 African Charter.
190 SA Yeshanew 'Approaches to the justiciability of economic, social, and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives' (2011) 11 *African Human Rights Law Journal* 317.
191 Adopted by the African Commission on 24 October 2011.
192 Principles and Guidelines (n 191) preambular paras & para 22.
193 See eg decisions such as in *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Sudan Human Rights Organisation & Others v Sudan* (2009) AHRLR 153 (ACHPR 2009); *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995); and *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009). See also See JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*' (2005) 2 *African Journal of Legal Studies* 129.

Therefore, in view of this situation and ground, justifiable arguments on justiciability of ESCRs and their legal enforcement against South Sudan before the African Commission could be advanced and asserted.[194]

3.2.2 East African Court of Justice

Another structure that could provide a ground for judicial enforcement of ESCRs against South Sudan is the East African Court of Justice (EACJ).[195] By virtue of membership of the East African Community (EAC),[196] the EACJ is empowered with the competence to determine references or matters of violations of the EAC treaty provisions that are brought against a partner state.[197] While the EAC Treaty has explicitly stipulated the jurisdiction of the EACJ on interpretation and application of the EAC Treaty,[198] it deferred the EACJ's jurisdiction pertaining to human rights matters to the adoption of a subsequent protocol.[199]

This notwithstanding, the EACJ has innovatively determined that, pending the conclusion of such protocol, it has jurisdiction to examine matters of human rights relating to the interpretation and application of the provisions of the EAC Treaty.[200] Hence, the basis for the Court exercising jurisdiction on human rights matters is the fact that human rights are reflected as one of the fundamental principles of the EAC,[201] which is evident as the basis for the EACJ in asserting jurisdiction over human rights issues.[202]

Therefore, it could be argued that the EACJ could examine human rights matters in South Sudan, which might also include ESCRs.[203]

194 Bulto (n 169) 555.
195 Established by virtue of art 23, ch 8 of the Treaty for the Establishment of the East African Community (adopted on 30 November 1999 and entered into force on 7 July 2000) (EAC Treaty).
196 South Sudan joined the EAC on 15 April 2016 upon accession to the EAC Treaty 1999 and became a member on 5 September 2016.
197 Arts 27 & 30 EAC Treaty (n 198).
198 Art 27(1) EAC Treaty.
199 Art 27(2) EAC Treaty.
200 *James Katabazi & 21 Others v the Secretary General of the EAC and Attorney General of Uganda* (refence 1/2007). The EACJ decision decreed that 'the court … will not abdicate from exercising its jurisdiction of interpretation … merely because the reference includes allegation of human rights violation'.
201 Art 6 EAC Treaty which stipulates as one of the fundamental principles 'good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.
202 TR Luambano 'Litigating human rights through the East African Court of Justice: Overview and challenges' (2018) 71 *Journal of Law, Policy and Globalisation* 76.
203 Art 6(d) EAC Treaty (n 201).

The existing jurisprudence could be argued to be providing such composite human rights situations, including ESCRs situations.[204] In this respect, it is worth pointing out that the following matters relating to adjudication of ESCRs are already being considered by the EACJ: a reference brought by a former justice of the Court of Appeal of South Sudan that addresses workers' and labour rights,[205] and two others references brought by private citizens and relating to the right to land, in connection with the right to housing and shelter.[206]

4 Conclusion and recommendations

This article has set out an abstract and analytical perspective pertaining to the justiciability and legal enforcement of ESCRs in the context of the legal system of South Sudan. It has provided a comprehensive assessment of the multi-layered legal system relating to ESCRs applicable in the context of South Sudan. The domestic layer included the TCRSS 2011, in addition to legislation that addresses ESCRs which are enacted by the national legislature, such as the General Education Act 2011; the Higher Education Act 2012; the Child Act 2008; the Civil Service Act 2011; the Labour Act 2017; and customary laws where relevant. Furthermore, the article has also evaluated the provisions of selected international and regional human rights conventions on ESCRs, to which South Sudan is a state party, including ICESCR; CEDAW; CRC; CRPD; the African Charter; the African Women's Protocol; and the EAC Treaty.

The article establishes that, in theory and in view of the aforementioned legal instruments, ESCRs are justiciable and legally enforceable within the domestic context of South Sudan by relying on the Constitution and the laws. In addition, some ESCRs could be legally enforced, within the domestic context of South Sudan, by reliance on the ESCRs treaties that are automatically incorporated as part of the Bill of Rights. Furthermore and, alternatively, these ESCRs treaties establish distinct frameworks for justiciability and legal enforcement at a supranational layer for the legal system of South Sudan. Regardless and, in practice, the ultimate operationalisation of

204 EM Nijiru 'Adjudication of human rights disputes in the sub-regional courts in Africa: A case study of the East African Court of Justice' (2021) *De Jure* 493. Also see *African Network for Animal Welfare v Attorney General of the Republic of Tanzania* (Ref 9 of 2010) EACJ First Instance Division (20 June 2014).

205 *Hon Justice Malek Mathiang Malek v The Minister of Justice of the Republic of South Sudan (Attorney General of the Republic of South Sudan) and The Secretary General of the East African Community* reference 9 of 2017.

206 *Bishop Jambo Mulla & 4 Others v the Attorney General of the Republic of South Sudan* reference 35 of 2022; *Christopher Serafino Wani Swaka v The Attorney General of the Republic of South Sudan* reference 36 of 2022.

the process appears to be hindered by factual realities and challenges pertaining to the domestic entities that are bestowed with the mandate to effect justiciability.

The article advances the view that such a multilayered context enables judicial enforcement before courts of law and administrative remedies before semi or quasi-judicial bodies and entities. At the domestic level, these courts and entities include the Supreme Court of South Sudan; other courts of law, including the Labour Court; the Human Rights Commission of South Sudan; the Independent Child Commission; the Public Grievances Chamber; the South Sudan Civil Service Commission; the South Sudan Employee Justice Chamber; the Labour Commission; and customary courts when they are seized with relevant and related matters. At the supranational level, the following bodies and entities are empowered: the HRC; the ESCR Committee; the CEDAW Committee; the CRPD Committee; the ILO office; the African Commission; and the EACJ. However, the article contends that the numerous operational challenges faced by the domestic entities might impact on proper and full justiciability within South Sudan.

The article has determined that these various instruments and composite entities, both domestic and international, exist side by side and hand in hand, and that their work would supplement and complement the others' work respectively without any hierarchy or subordination among the two layers, in ensuring the ultimate realisation of ESCRs. Further, the article concludes that this determination is deduced from theoretical perspectives that remain untested in the particular context of South Sudan. Hence, it advises that these conceptual aspects require a practical test before any of the respective entities in order for such determinations to materialise as a practice and also to legally solidify. This is anticipated to result in an enhanced understanding of the importance of realising ESCRs, either through state policies or, in lieu of that, legal and judicial measures to enforce realisation, with the ultimate outcome of achieving the enjoyment of these fundamental rights.

Nevertheless, the article recommends that, as it stands, these legal instruments, and their pertinent frameworks and structures, provide the foundation for a progressive legal ground and steady practical steps towards the justiciability of ESCRs in South Sudan, which needs to be retained and built upon in any future constitutional and legal dispensations for South Sudan. Similarly, any arising legal gaps and challenges should be filled and clarified through practical application, which would ultimately inform the legal interpretation on the realisation of ESCRs in South Sudan. This practical application

could materialise via public interest litigation and advocacy, at the respective national and supranational fora, which would then form judicial precedents, and legal reforms to introduce additional or revised bills of legislations and other legal manuals on the matter. In addition, the foreseen future constitutional and legal developments in South Sudan, and any supranational treaty obligations, should further be cognisant of and aim to harness the justiciability of all ESCRs, including the provision of legal and judicial enforcement of all aspects and specifications of these rights that are deemed mere aspirations, welfare rights, standards of achievement or policies for realisation, and craft ESCRs as constitutional and/or clear-cut legal rights and provisions.

Finally, the article professes that further legal and empirical research could be explored in respect of each of the ESCRs on its own, as this could unearth particular matters that might be privy to each ESCR apart from others. Further, the scope and extent of justiciability before the international and regional structures might expand and widen further should South Sudan become a state party to additional human rights treaties at the supranational level and accepts the complaints procedures established therein, either via declarations or accessions to their respective additional protocols, as appropriate and relevant.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: VM Lihiru 'Domestic and international law contradictions in Zimbabwe's gender quota system' (2024) 24
African Human Rights Law Journal 127-146
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a6

Domestic and international law contradictions in Zimbabwe's gender quota system

*Victoria Melkisedeck Lihiru**
Senior lecturer, Department of Public Law, The Open University of Tanzania, Dar es Salaam, Tanzania; Postdoctoral Research Fellow, SARChI Chair in International Constitutional Law, Faculty of Law, University of Pretoria, South Africa
http://orcid.org/0000-0003-2666-5804

Summary: *In 2013 Zimbabwe adopted a gender quota system for the National Assembly. However, the quota system is set at 30 per cent, contrary to international law obligations domesticated under section 17 of the 2013 Zimbabwean Constitution, which requires women to constitute at least half of all elected and nominated positions of power. While the Constitution further allows women to compete for first-past-the-post (FPTP) parliamentary seats, there are neither constitutional measures to ensure that women win FPTP seats, nor mechanisms to transition women from quota seats to FPTP seats. While the gender quota and FPTP constituency seats have increased the number of women in Parliament, they have decreased the number of women nominated and elected for FPTP seats. The quota parliamentarians are not voted by the electorate, lack a link to constituencies, and are not entitled to constituency funds. Each political party applies discretion in the nomination of women for quota seats, exposing them to exploitation and corruption. This negatively affects the quality of quota parliamentarians and, in turn, their transition to constituency seats. The article suggests that Zimbabwe extend the proportional representation electoral system and Zebra system applicable in the election of senators to the*

* LLB (Mzumbe) LLM (Dar es Salaam) PhD (Cape Town); victoria.lihiru@out.ac.tz

election of members of parliament. This will facilitate the alignment of Zimbabwe's political representation gender equality commitments with its constitutional and international law obligations.

Key words: *gender quota; temporary special measures; constitutions; women's political representation; Parliament; Zimbabwe*

1 Introduction

Women in Zimbabwe comprise the majority of the population, at 52 per cent, compared to 48 per cent of their male counterparts.[1] However, since time immemorial, Zimbabwean women have experienced significant levels of marginalisation and relegation to private and domestic spheres, as having a voice in public spheres is considered unwomanly and uncultured.[2] Nevertheless, women, including Joice Mujuru,[3] played a vital role during liberation struggles, resulting in women's emancipation being recognised as a critical part of the fight for independence.[4] Obtaining its independence in 1980 from the British, Zimbabwe adopted the Lancaster Constitution, which was the result of a compromise agreement attained at the Lancaster House Conference in 1979.[5] The making of the Lancaster Constitution was closed to the public, with a few Zimbabwean leaders negotiating with the British.[6] Consequently, the Lancaster Constitution contained serious inadequacies, including being neutral regarding citizens' participation in public life. It contained no specific measures to promote the participation of historically-marginalised groups in public life, including women. The 1996 amendment to

1 Zimbabwe National Statistics Agency 'Zimbabwe 2022 Population and Housing Census Report' (2022) in 2018 xxv, https://www.zimstat.co.zw/wp-content/uploads/Demography/Census/2022_PHC_Report_27012023_Final.pdf (accessed 6 January 2024). The total population is 15 178 979, of which 7 289 558 (48%) are male, and 7 889 421 (52%) are female.

2 M Kolawole 'Rethinking African gender theory: Feminism, womanism and the Arere metaphor' in S Arnfred (ed) *Re-thinking sexualities in Africa* (2004) 251.

3 T Mangena 'Narratives of women in politics in Zimbabwe's recent past: The case of Joice Mujuru and Grace Mugabe' (2022) 56 *Canadian Journal of African Studies* 407-425.

4 B Chiroro 'Persistent inequalities: Women and electoral politics in the Zimbabwe elections in 2005' (2005) 4 *Journal of African Elections* 94, 95.

5 Constitution Net 'Milestones towards a new constitution for Zimbabwe: Overview of constitution-making process', https://constitutionnet.org/sites/default/files/zimbabweoverview_of_the_constitution_making_process.pdf (accessed 26 December 2023).

6 The Lancaster Constitution was negotiated by the British government, the Patriotic Front (led by Robert Mugabe's Zimbabwe African National Union (ZANU) and Joshua Nkomo's Zimbabwe African Peoples Union (ZAPU)), and the Zimbabwe-Rhodesia government (represented by Abel Muzorewa and Ian Smith). G Dzinesa 'Zimbabwe's constitutional reform process: Challenges and prospects' (2012) *Institute for Justice and Reconciliation* 1.

the Lancaster Constitution outlawed gender discrimination[7] but maintained a clause permitting discrimination on the grounds of marriage, divorce, inheritance, and customary law.[8]

The 1980s independence barely moved women in Zimbabwe from the margins of public life. The number of women in decision making fluctuated and moved at a snail's pace. For example, women constituted 9 per cent of the parliamentary seats in 1980, 8 per cent in 1985, and 14 per cent in both the 1990 and 1995 elections. The percentage of women in parliament dropped from 14,1 per cent in 1995 to 9,3 per cent in 2000 and rose to 16 per cent in 2005.[9] The fluctuation of women's representation in parliament between 1980 and 2010 reflected the dynamics in Zimbabwe's electoral context since the 1980s independence. The elections were characterised by hostility, endemic violence and impunity, evidenced by the electoral violence that occurred in 2000, 2002, 2005 and 2008, which further pushed women to the margins of political life.[10]

The slow pace of women's representation in Zimbabwe's Parliament in the 1980s to 2000s existed while the government of Zimbabwe was, on the other hand, demonstrating its commitment to respect human rights and women's rights in all spheres of life. Zimbabwe signed and ratified the 1948 Universal Declaration for Human Rights (Universal Declaration);[11] the 1966 International Covenant on Civil and Political Rights (ICCPR);[12] the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[13] the 1995 Beijing Declaration and Platform for Action;[14] the Protocol to the African Charter on Human and Peoples' Rights on the Rights

7 Sec 23.
8 Chiroro (n 4) 94, 95.
9 Chiroro (n 4) 92.
10 Both the 2000 and 2002 elections were marked by structural and organised violence involving the army, the military and para-governmental wings, including ruling party supporters. In the 2002 presidential election, 36 people were killed and thousands injured; 7 000 people were displaced, and intimidation, electoral manipulation and violence were recorded. LM Sachikonye 'The electoral system and democratisation in Zimbabwe since 1980' (2003) 2 *Journal of African Elections* 130.
11 Art 1 of the Universal Declaration regards all humans as born free and equal in dignity and rights. UN General Assembly, Universal Declaration of Human Rights, 217 A (III), 10 December 1948, https://www.refworld.org/legal/resolution/unga/1948/en/11563 (accessed 20 February 2024).
12 UN General Assembly International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), UN Doc. A/6316 (1966), entered into force 23 March 1976, acceded to by Zimbabwe on 13 August 1991.
13 UN General Assembly Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, Vol 1249 13, http://www.un.org/womenwatch/daw/cedaw/cedaw.htm (accessed 20 February 2024).
14 Fourth World Conference on Women in Beijing China, http://www.un.org/womenwatch/daw/beijing/platform/declar.htm (accessed 13 November 2019).

of Women in Africa (African Women's Protocol);[15] and the SADC Protocol on Gender and Development (SADC Gender Protocol),[16] to mention but a few. These international and regional instruments, overall, require state parties to take deliberate measures to eradicate all forms of discrimination against women, to ensure that women can vote and be voted for and to take measures to attain equal representation of men and women in all decision-making positions.[17]

Bowing to both internal and external pressure,[18] Zimbabwe adopted a home-grown Constitution in 2013, resulting from a participatory process between 2009 and 2013. Through section 17 of the 2013 Constitution, Zimbabwe commits to

> promote full gender balance in Zimbabwean society, and in particular
> (a) promote the full participation of women in all spheres of Zimbabwean society on the basis of equality with men;
> (b) take all measures, including legislative measures, needed to ensure that –
> (i) both genders are equally represented in all institutions and agencies of government at every level, and
> (ii) women constitute at least half the membership of all Commissions and other elective and appointed governmental bodies established by or under this Constitution or any Act of Parliament.

While section 17(1) of the Constitution requires women to constitute at least half of decision-making positions, a deviation is witnessed regarding women's representation in the National Assembly. Women can access the National Assembly through either competitive seats

15 African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Union, 11 July 2003, https://www.refworld.org/legal/agreements/au/2003/en/18176 (accessed 28 February 2024) (African Women'sProtocol).

16 Initially adopted in 2008 as the SADC Protocol on Gender and Development (see https://www.sadc.int/sites/default/files/2021-08/Protocol_on_Gender_and_Development_2008.pdf), the 2016 Consolidated Text of the Protocol on Gender and Development combined the SADC Protocol on Gender and Development, 2008, the agreement Amending the SADC Protocol on Gender and Development, 2016. Reference in this article is to the 2016 revised SADC Gender Protocol, unless otherwise stated. This Consolidated Text Edition of the Protocol on Gender and Development replaces the 2008 version. See https://www.sadc.int/sites/default/files/2023-02/EN-REVISED_SADC_PROTOCOL_ON_GENDER_AND_DEVELOPMENT_2016-final.pdf (accessed 16 June 2024).

17 Art 21 Universal Declaration; arts 3 & 25 ICCPR; art 2,4 & 7 CEDAW; art 9 African Women's Protocol.

18 The 2008-2013 constitution-making process in Zimbabwe was one of the deliverables of the Global Political Agreement (GPA) signed on 15 September 2008 by the three political parties represented in Parliament – the Zimbabwe African National Union-Patriotic Front (ZANU-PF) led by Robert Mugabe, and the two formations of the Movement for Democratic Change (MDC), namely, the MDC-T led by Morgan Tsvangirai, and the MDC-N led by Welshman Ncube. The GPA was negotiated by the Southern African Development Community (SADC) to end the 2007 election dispute between Tsvangirai and Mugabe.

via the first-past-the-post (FPTP) electoral system[19] or through a reserved 60-seat (30 per cent) gender quota system established under section 124 of the Constitution. Although the combination of FPTP seats and quota system has increased the overall number of women in parliament, it has not facilitated women to constitute at least half of the National Assembly as required under section 17 of the Zimbabwean Constitution.

Zvobgo and Dziva argue that the adoption of gender quota immediately increased the number of women in the National Assembly, from 14,29 per cent in 2008 to 32 per cent in 2013.[20] Disputedly, Tshuma demonstrates the negative impact the quota system has had on the nomination and election of parliamentarians. He argues that the number of women contesting for parliamentary seats dwindled from 105 in 2008 to 90 in the 2013 elections, causing a decline of the number of elected women parliamentarians from 34 in 2008 to 26 in 2013.[21] Tshuma further argues that the quota system brought into parliament a tokenist representation, patronage and clientelist politics that brings along 'unqualified' women with an interest in serving the party rather than women's or community interests.[22] Musasa and others add that the women's system benefits spouses of established politicians and women who have been in politics for a long period of time and have the knowledge to navigate party politics. They also point to the absence of geographical location, thematic focus, and constituency funds that consequently affect the performance of quota parliamentarians. In addition, Musasa and others argue that quota parliamentarians are taken as second-class and experience name-calling, ridicule, and endless squabbles with elected parliamentarians.[23] In the same vein, Mangena argues that political parties nominate quota parliamentarians for their mediocrity and incapacity to disturb the status quota as one of the strategies to sustain patriarchal domination. [24]

19 The first-past-the-post, also referred to as the Single Member Plurality System. In Zimbabwe this system is used for elections in the National Assembly and for local authority elections. Under this electoral system, the country is divided into 210 electoral constituencies and 1 970 wards, respectively, with each represented by a candidate. The candidate who attains the highest number of votes against the other candidate(s) is declared the winner.

20 EF Zvobgo & C Dziva 'Practices and challenges in implementing women's right to political participation under the African Women's Rights Protocol in Zimbabwe' (2017) *African Human Rights Yearbook* 69.

21 D Tshuma 'Looking beyond 2023: What next after Zimbabwe's parliamentary quota system?' (2018) 3 *Conflict Trends* 12-20.

22 As above.

23 T Musasa, F Nhekede & F Koke 'Examining the effectiveness of the women's quota in Zimbabwe: Opportunities and challenges' (2022) 6 *International Journal of Research and Innovation in Social Science* 761-768.

24 Mangena (n 3).

Notably, the missing puzzle in this scholarly conversation and literature is the demonstration of the extent to which the implementation of the gender quota system in Zimbabwe is compatible with international law.

This article, therefore, depicts the extent to which the design and implementation of the gender quota system in Zimbabwe align with the international and regional conventions that the country willingly signed, ratified and domesticated in the national laws. ICCPR, CEDAW, the African Women's Protocol and the SADC Gender Protocol call upon state parties to take measures to ensure equal representation of men and women in all decision-making positions.[25] While section 17 of the 2013 Zimbabwean Constitution domesticates the international law obligations by requiring women to hold at least half of all nominated and elected positions, an apparent deviation is witnessed under section 124, which establishes a 30 per cent gender quota system. The contradiction of sections 17 and 124 of the 2013 Zimbabwean Constitution in light of the international law obligations presents a stimulating legal puzzle worthy of scholarly exploration. Therefore, this article is informed by election reports released since 2013, including reports from election observers, as well as scholarly work on the subject matter. It has also benefited significantly from the data collection exercise that was done between September 2023 and December 2023.[26] Twenty-two interviews were undertaken with civil society organisations working in the area of women's political participation as well as political party leaders and government officials.[27]

The article is divided into three parts. The first part situates gender quota under international law, while part two demonstrates the inconsistency of Zimbabwe women's quotas with national and international law. The third part concludes the article and provides recommendations.

25 Arts 3 & 25 ICCPR; arts 2, 4 & 7 CEDAW; art 9 African Women's Protocol; arts 12 & 13 SADC revised Gender Protocol.

26 Ethical research clearance was granted by the Open University of Tanzania on 23 September 2023. This clearance covered the interviews conducted in Zimbabwe, conducted by the author while undertaking a research visit to that country.

27 The interviews included civil society leaders from Gender Links, Women Coalition of Zimbabwe, Women in Law in Southern Africa, Women Institute for Leadership Development, Women in Politics Support Unit, Southern Africa Defenders Coalition, Women's Academy for Leadership and Political Excellence, Youth Empowerment and Transformation Trust, Election Resource Centre, and Women in Local Government Forum. Interviews were also undertaken with women leaders, candidates and parliamentarians from ZANU-PF, MDC, and staff from the Zimbabwe Gender Commission. These interviews are on file with the author.

2 Gender quotas under international law

Before the promulgation of the 2013 Constitution, Zimbabwe had signed and ratified the global and regional instruments that contain commitments to promote the realisation of equal representation of men and women in positions of power. For example, Zimbabwe signed the 1948 Universal Declaration for Human Rights (Universal Declaration). Article 21(1) of the Universal Declaration provides everyone with the right to participate in the government of their country, directly or through freely-chosen representatives. Article 3 of ICCPR, which Zimbabwe ratified in 1991, calls upon state parties to ensure equal rights of men and women to the enjoyment of all civil and political rights. In addition, articles 25(a) and (c) of ICCPR provide every citizen the right to take part in the conduct of public affairs directly or through freely chosen representatives, including the right to vote and to be elected. Zimbabwe also signed and ratified women-specific international and regional conventions. Article 4(1) of CEDAW, which Zimbabwe ratified in 1997, states as follows:

> Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

The framing of article 4 of CEDAW encourages the deployment of temporary special measures by state parties to address gender inequalities and accelerate substantive and *de facto* equality of men and women in all spheres of life.[28] The meaning of 'temporary special measures' is provided under General Recommendation 25, which expounds article 4 of CEDAW.[29] It defines 'measures' to encompass a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems.

28 Substantive and *de facto* equality is the type of equality that requires more actions than formally prohibiting discrimination based on sex or gender. It considers the actual conditions of women's lives rather than guaranteeing formal equality to all people and ensures women experience equality in their lives. Substantive and *de facto* equality considers not only negative discrimination but both negative and positive legal obligations.

29 General recommendation 25, on art 4, para 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20 (English).ppdf (accessed 5 December 2023).

General Recommendation 25 appreciates that although the term 'special' conforms with human rights discourse, it needs to be carefully explained as it is sometimes used to cast subjects of past discrimination as weak, vulnerable and in need of extra 'support' to participate in society. According to General Recommendation 25, the real meaning of 'special' in the formulation of article 4(1) of CEDAW is that the measures are designed to serve a 'specific goal' of addressing inequalities. Such special measures are sometimes referred to as 'affirmative action', 'positive action', 'special measures' or 'positive measures'. Such measures are not considered discriminatory and can be applied in various fields, including in politics and public life.[30] Further, article 7 of CEDAW provides as follows:

> States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and … shall ensure to women, on equal terms with men, the right (a) to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies …

Furthermore, Zimbabwe is also part of the 1995 Beijing Declaration and Platform for Action, which requires state parties to take steps to achieve equal representation of men and women in political spaces.

As a member of the African Union (AU)[31] and the South African Development Community (SADC),[32] Zimbabwe has ratified the African Charter on Human and Peoples' Rights (African Charter) in 1986,[33] and the African Women's Protocol in 2009.[34] Article 9(1) of the African Women's Protocol provides as follows:

> States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that

30 Special measures have also been used to provide scholarships for women and grant women rights in line with their biological needs, such as maternity leave, to name a few. In the political sphere, such measures have been used to allocate seats for women in parliaments and local councils in many countries.

31 The AU is a continental body consisting of the 55 member states of the African continent. It was officially launched in 2002 as a successor to the Organisation of African Unity (OAU, 1963-1999).

32 The SADC is a regional economic community comprising 16 member states: Angola, Botswana, Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia and Zimbabwe. The SADC's objective is to promote sustainable and equitable economic growth and socio-economic development among the member states and as a sub-regional block.

33 Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights (African Charter) CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982), 27 June 1981, https://www.refworld.org/legal/agreements/oau/1981/en/17306 (accessed 20 February 2024).

34 African Women's Protocol (n 15).

(a) women participate without any discrimination in all elections;
(b) women are represented equally at all levels with men in all electoral processes.

In addition, the Zimbabwean government signed the 2008 SADC Gender Protocol in 2008, ratified it in 2009,[35] and signed the 2016 revised SADC Gender Protocol in 2016.[36] Article 12 of the Revised SADC Gender Protocol calls upon state parties to ensure equal and effective representation of women in decision-making positions in the political, public and private sectors, including through the use of special measures. Article 13 of this Protocol demands that state parties adopt specific legislative measures and other strategies to enable women to have equal opportunities with men to participate in all electoral processes. [37] Zimbabwe further is a signatory to the SADC Updated Principles and Guidelines Governing Democratic Elections, which require that state parties ensure that at least 50 per cent of women are in decision-making positions by 2015.[38]

Despite the goodwill of signing and ratifying, the international and regional conventions do not have automatic operation in Zimbabwe.[39] Being a dualist state,[40] section 34 of the 2013 Zimbabwean Constitution calls upon the state to ensure that all international conventions, treaties and agreements that Zimbabwe has signed and ratified are incorporated into domestic law. Further, section 327(2) of the Constitution states:

> An international treaty which has been concluded or executed by the President or under the President's authority
> (a) does not bind Zimbabwe until it has been approved by Parliament; and

35 P Made 'Southern Africa Gender Protocol 2015 Barometer – Zimbabwe' (2015) 5, https://www.veritaszim.net/sites/veritas_d/files/SADC%20Gender%20Protocol%202015%20-%20Zimbabwe.pdf (accessed 17 May 2024).
36 See Consolidated Text of the Protocol on Gender and Development, 2016.
37 The Protocol provides other measures under arts 13(2) and (3) to include (a) building the capacity of women to participate effectively through leadership and gender sensitivity training and mentoring; (b) providing support structures for women in decision-making positions; (c) the establishment and strengthening of structures to enhance gender mainstreaming; and (d) changing discriminatory attitudes and norms of decision-making structures and procedures … (3) gender training and community mobilisation.
38 Southern African Development Community (SADC) SADC Principles and Guidelines Governing Democratic Elections, adopted on 20 July 2015, Pretoria, South Africa.
39 R Phooko 'The direct applicability of SADC community law in South Africa and Zimbabwe: A call for supranationality and the uniform application of SADC community law' (2018) 21 *Potchefstroom Electronic Law Journal* 5.
40 As above. There are two theories pertaining to the relationship between international law and municipal law: the dualist and monist theory. According to the dualist theory, international law and municipal law are different legal systems. International law is only applicable in the national courts if it has been adopted into national law through legislation. This is different from the monist theory, in which international law has automatic application in the country.

(b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.

Evidently, through the 2013 Constitution, the Zimbabwean government has largely succeeded in the domestication of gender equality-related international law obligations set forth in the Universal Declaration, ICCPR, CEDAW, the African Women's Protocol and the SADC Gender Protocol. Gender equality was one of the negotiated pillars during the 2009-2013 constitution-making process. Henceforth, the 2013 Constitution was celebrated for containing progressive gender equality provisions,[41] including in the area women's political participation.[42] Section 3 of the 2013 Constitution provides for Zimbabwe's founding values and principles, which include principles of equality of all human beings, gender equality, and recognition of women's rights. Expressly, in line with CEDAW, the 2013 Constitution bans discrimination of all forms under section 56 and demands Zimbabwe to take measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination to redress circumstances of genuine need and, under no circumstances, such measures shall be regarded as unfair. Section 80(3) of the Constitution considers that all laws, customs, traditions and cultural practices that infringe the rights of women conferred by the Constitution are void to the extent of the infringement. The 2013 Constitution guarantees every Zimbabwean citizen of or over the age of 18 years the right to vote and stand for election.[43] Remarkably, section 17 of the Constitution domesticates the international law obligations that call upon state parties to ensure equal representation of men and women in all elected and nominated positions of power as stipulated under the Universal Declaration, ICCPR, CEDAW, the African Women's Protocol and the SADC Gender Protocol. As a dualist state, the domestication of international law obligations requiring states to take measures to attain equal representation of men and women in positions of power is profound and demonstrates Zimbabwe's commitment to abide by its obligations. Section 17(b) of the Zimbabwean Constitution commits to ensuring that

41 The Constitution guarantees women equal rights to own land and have equal pay and contains a specific section on women's rights. Sec 80(1) of the 2013 Constitution provides every woman with full and equal dignity of the person to men, including equal opportunities in political, economic and social activities.

42 Institutions such as the Parliamentary Women Caucus and the G20 women during COPAC proceedings have been instrumental in ensuring that gender parity laws are enacted towards a new constitution in 2013. The G20 comprised women parliamentarians, the Ministry of Women Affairs, the Women Movement in Zimbabwe and women academics. The group drafted the critical demands for gender equality in the Constitution, provided constitutional literacy across the country and lobbied for a gender-sensitive constitution.

43 Secs 67(3)(a) & (b) 2013 Zimbabwe Constitution.

> both genders are equally represented in all institutions and agencies of government at every level, and women constitute at least half the membership of all commissions and other elective and appointed governmental bodies established under the Constitution or any Act of Parliament.

Despite the clarity of section 17 of the 2013 Constitution, the provisions guiding gender representation in the National Assembly demonstrate a clear non-conformity and have not facilitated the attainment of equal representation of men and women in the National Assembly, as expanded on below.

3 Inconsistency in Zimbabwe's gender quota system in light of national and international law

Women in Zimbabwe can access the National Assembly through either constituency seats via the FPTP electoral system or through a reserved 60-seat gender quota established under section 124 of the Constitution. However, the drafting of section 124(1) of the Zimbabwean Constitution overlooked section 17 of the same Constitution, as well as the state's international law obligations.[44] The section sets the parliamentary quota system at 30 per cent, while section 17 of the Constitution requires women to constitute at least half of those holding positions of power. Similarly, as noted in the previous part, the international and regional treaties to which Zimbabwe is party, including CEDAW,[45] the Constitutive Act of the African Union[46] and the African Women's Protocol,[47] call for equal representation of men and women in decision-making positions. Aside from being set below the 50 per cent target, the design and execution of gender quota in Zimbabwe are constrained by a number of shortcomings when further fully mirrored against the gender equality obligations set under the Universal Declaration, ICCPR, CEDAW, the Beijing Declaration and Plan for Action, the African Women's Protocol and the SADC Gender Protocol domesticated under section 17 of Zimbabwe's Constitution.

There is an unspoken presumption within the political parties that if the Constitution provides for 60 seats for women, then the FPTP constituencies are designated for men.[48] Since the introduction of gender quota in Zimbabwe in 2013, the political parties, including

44 Tshuma (n 21).
45 Art 7 CEDAW.
46 Art 4 Constitutive Act of the African Union.
47 Arts 9 & 11 African Women's Protocol.
48 An online Interview with a political party leader (anonymous) on 18 October 2023.

ZANU-PF and MDC-Alliance, have discouraged women from vying for FPTP seats contrary to article 4 of CEDAW that requires temporary special measures, including quota system, not to cause discrimination against women. Political parties argue that women already have guaranteed seats under a quota system and, hence, should not be vying for FPTP seats.[49] Consequently, since the onset of the quota system in 2013, women have been consistently leaving FPTP seats for quota seats. Also, the nomination of women for FPTP seats by political parties declined from 105 in 2008 to 90 (13 per cent) in 2013 and subsequently to 12,4 per cent in the 2018 elections.[50] Only 70 (11 per cent) of women contested for FPTP seats out of 636 candidates in the 2023 general elections.[51] Similarly, since 2013, the number of women elected from FPTP constituencies has declined. After Zimbabwe's 2013 elections, the number of elected women in the National Assembly fell from 34 to 29 and then to 25 (11,9 per cent) in the 2018 elections.[52] After the 2023 elections, the number of women directly elected to parliament dropped to 22 (10,5 per cent).[53] Only 30 per cent of the women who contested won, a decline of 1,9 per cent from the 2018 elections.[54] The evidence that gender quota causes a decline in the number of women winning constituencies communicates that the purpose of gender quota to facilitate the realisation of equal representation of men and women in Zimbabwe's parliament is far-fetched.

On the other hand, it is the requirement of the CEDAW Committee that member states institutionalise clear guidelines to guide the political parties' nomination of women for quota seats.[55] In Zimbabwe, however, the nomination of women for quota seats is not

49 Tshuma (n 21).

50 Zimbabwe Human Rights NGO Forum 'Human rights violations in the context of the 2018 harmonised elections' 36, https://ntjwg.uwazi.io/api/files/1572944113287d5g3mfabq2w.pdf (accessed 5 February 2024).

51 Zimbabwe Electoral Commission 'Zimbabwe 2023 harmonised elections report' 32, https://www.zec.org.zw/download-category/elections-reports/ (accessed 12 February 2024).

52 The Carter Center 'The Republic of Zimbabwe 2018 presidential, parliamentary, and local council (harmonized) elections' (2020) Election Expert Mission Final Report 39, https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/zimbabwe-final-2018-elections.pdf (accessed 6 December 2023).

53 Twelve women won from ZANU-PF and 10 from CCC. Men took 187 parliamentary seats.

54 European Union Election Observation Mission 'Final Report for 23 August 2023 harmonised elections, Zimbabwe' (2023) 28, https://www.eeas.europa.eu/sites/default/files/documents/2023/ EU%20EOM%20ZWE%202023%20FR.pdf (accessed 10 January 2024).

55 General Recommendation 25 on article 4 paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 30th session, 2004.

guided by the nationally-recognised uniform procedure.[56] Political parties apply absolute discretion: Each party has its own mechanism to obtain women for quota seats, resulting in several ramifications. To get their names at the top of the party list and increase the chance of being nominated, women must either come from a background of privilege, such as being a member of the liberation struggle, or have a powerful husband or male relative to root for them within a political party. Other quota aspirants are subjected to exploitation and corruption, including sexual corruption.[57] After making it to the party list, the quota seat aspirants use their own resources to campaign extensively for FPTP seat candidates. This is because a share of quota parliamentarians to the party is dependent upon the number of FPTP seats won by the respective party. Nevertheless, there is no meaningful engagement between the electorate and gender quota aspirants during campaigns because the latter do not campaign for themselves but for FPTP seat candidates. After the quota women get to parliament, the disconnection with voters is further exacerbated by the tug of war with the elected parliamentarians. As quota parliamentarians officially operate in no designated constituencies, they are obliged to constantly ask permission from elected parliamentarians before engaging and/or undertaking any development-related projects in constituencies.[58] Elected parliamentarians consider quota parliamentarians as potential competitors and often block their engagement in FPTP constituencies. The *status quo* affects the engagement of quota parliamentarians with voters and further hampers their decision to transition to FPTP seats. Similarly, constituency engagement by quota parliamentarians is further faced yet with another layer of challenges. While article 4 of CEDAW calls upon the special measure not to cause discrimination to the beneficiaries, there are practices that discriminate against quota parliamentarians in Zimbabwe. Although elected parliamentarians receive $50 000 as a constituency fund to finance development projects in their constituencies, quota parliamentarians do not receive such funding as they are considered as operating without constituencies. Accordingly, quota parliamentarians use their salaries and stipends to finance constituency work, limiting their financial power to engage with the electorate, build rapport and a political network, and add constraints hindering their transition to FPTP seats. Similarly, the fact that quota parliamentarians are nominated

56 The Electoral Act ch 2:13, only provides a formula for allocating the seats to eligible parties but not how political parties should nominate women for the quota system.

57 An online interview with a woman leader in a political party (anonymous) on 15 October 2023.

58 An online interview with a non-governmental organisation leader (anonymous) on 16 October 2023.

by their political parties and not citizens makes them accountable to the party and distances them from citizens. Quota parliamentarians diligently work to serve party interests, sometimes at the expense of citizens and or women's interests, mainly as a strategy to maintain the quota seat and secure nomination in the next round of elections.

It is also argued that political parties often nominate weak women, party stalwarts whose ability to disrupt the *status quo* is compromised.[59] This is because of the strong patriarchal veins and the desire to maintain patriarchal hegemony within the political parties.[60] Political parties perceive quota seats as a mechanism to maximise their political grip rather than to promote gender equality.[61] While the amendment to section 124 of the 2013 Zimbabwean Constitution requires political parties to ensure that 10 of the 60 quota parliamentarians are under the age of 35 and that women with disabilities are represented in party lists, the period between 2013 and 2023 witnessed quota seats occupied by old women with no energy, capacity, or interest to engineer the transformation of gender relations, leading to the quota seats being nicknamed as 'retirement seats'.[62] The *status quo* births underperformance, has caused a slow change in society's perception of women's political leadership and brought ridicule to the quota system. The quota parliamentarians are called BACOSSI and are considered substandard and token representatives.[63] These challenges affect how voters regard quota parliamentarians, have intensified female parliamentarians' preference for quota seats, and affect progress towards the realisation of equal representation of men and women in the National Assembly as required under section 17 of the Constitution, ICCPR, CEDAW, the African Women's Protocol and the SADC Gender Protocol.

With the view to complementing the 30 per cent gender quota system, section 124(1)(a) of the 2013 Constitution allows men and

59 An online interview with a woman leader in a political party (anonymous) on 15 October 2023.

60 As above.

61 E Jarnegård & P Zetterberg 'Gender equality reforms on an uneven playing field: Candidate selection and quota implementation in electoral authoritarian Tanzania' (2016) 51 *Government and Opposition* 464-486.

62 Sec 124(1)(c) of the Zimbabwe Constitution requires political parties to ensure that (a) ten of the sixty women members are under the age of thirty-five; (b) women with disabilities are represented on their party lists; and (c) young women with disabilities are represented on their party lists in terms of an Act of Parliament. This proviso was inserted by sec 11 of Act 2 of 2021.

63 According to Mangena, the name 'Bacossi Parliamentarians' has been taken from the Basic Commodity Supply Intervention Facility (BACOSSI), 'a 2008 Zimbabwe Reserve Bank initiative aimed at subsidising basic commodities. Just as the basic commodities were considered substandard, so were the women who became parliamentarians through the women's quota policy. They are seen as having a "lower status politically" and as being essentially incompetent and incapable of winning contests based on merit.' Mangena (n 3).

women to vie for competitive seats through their political parties via the FPTP electoral system and as independent candidates. [64] The fact that women can also run in FPTP constituency seats has not helped to close the gender gap in Zimbabwe's National Assembly. Since the start of the gender quota in 2013, women have not constituted at least half of the National Assembly, contrary to the requirement of section 17 of the Constitution. By April 2024, the Inter-Parliamentary Union data shows that women make up only 28,9 per cent of the National Assembly, a decline from 32 per cent after the 2018 elections.[65]

The dynamics of Zimbabwe's elections since 2013 reveal the challenges for getting nominated and winning a constituency seat. Primaries and campaigns for FPTP seats are tainted with manipulation, vote buying, impunity, violence and corruption, including sexual corruption.[66] Aspirants and candidates, including women, are abducted, disappear, beaten and subjected to sextortion.[67] Elections are increasingly becoming unbearably expensive. For example, in the August 2023 elections, aspirants were required to pay $100, $1000 and $20 000 to be nominated to vie for local councils and parliamentary and presidential seats, respectively.[68] In Zimbabwe, men, in comparison to women, still control financial resources, have wider political networks, leverage political patronage systems, and generally dominate politics. Negative beliefs on the role of women in society as chief officers in homes and as main executors of unpaid care work still dictate political parties and voters' preference for male candidates.[69] Nevertheless, there is no constitutional appreciation of ways in which the entrenched social, economic and cultural beliefs disproportionally prevent women from aspiring, nominating, and being elected for an FPTP seat. There are neither ring-fenced FPTP seats for women, nor do the electoral laws provide for legislated quotas for FPTP seats. There is no legal obligation for political parties to ensure that a certain percentage of nominated candidates for FPTP seats are women.[70] Political parties' gender policies, strategies

64 Secs 67(3)(a) and (b) of the 2013 Constitution provides every Zimbabwean citizen who is of or over 18 years of age the right to vote in all elections and to stand for election for public office and, if elected, to hold such office.
65 Inter-Parliamentary Union 'Monthly ranking of women in national parliaments' (2024), https://data.ipu.org/women-ranking/?date_month=1&date_year=2024 (accessed 8 June 2024).
66 An online interview with a non-governmental organisation leader (anonymous) on 3 October 2023.
67 With sextortion, women are asked to provide sexual favours in return for political favour or position.
68 European Union Election Observation Mission (n 54) 28.
69 An online interview with a non-governmental organisation leader (anonymous) on 13 October 2023.
70 An online interview with a staff member of the Zimbabwe Gender Commission (anonymous) on 9 October 2023.

and/or manifestos rarely contain concrete and actionable strategies to nominate women candidates and protect them from politically-motivated violence and sexual harassment.[71] While some political parties have adopted a one-third voluntary candidate quota, the measures remain aspirational and discretionally implemented. The few women leaders in political parties often are patriarchal subjects, and women wings, merely appendages to the party with no real power to influence equitable candidate nomination procedures.[72] The women in party leadership positions and those in women's wings prefer to maintain the *status quo* and shy away from demanding favourable candidate nomination procedures as they benefit from and/or are on a waiting list to benefit from gender quota seats.[73] Political parties avoid placing women candidates, fearing that other political parties would field strong male candidates in a constituency where they plan to field a female candidate. When the ruling party nominates a woman candidate, she is often fielded in opposition strongholds, and when the opposition party nominates a woman candidate, she becomes likely to be placed in the ruling party's stronghold.[74] It is normal for women candidates to be fielded in big, rural and challenging constituencies where the possibility of success is flimsy.[75] These compounding challenges negatively affect how women stand and win FPTP seats. In turn, it affects how FPTP seats complement the 30 per cent gender quota to close the gender gap for women to account for half of the national assembly as required by section 17 of the 2013 Constitution, ICCPR, CEDAW, the African Women's Protocol and the SADC Gender Protocol.

Finally, article 4 of CEDAW requires temporary special measures to be removed after the goal of achieving equal representation of men and women has been achieved. However, the design and the implementation of the first phase of the gender quota system between 2013 and 2023 and the circumstances under which the quota system and FPTP system continue to operate will hardly result in an equal representation of men and women in Zimbabwe's national assembly to warrant its abolition. The CEDAW Committee advises countries to operate a quota system alongside long-term measures that set favourable conditions for men and women to equally access decision-making positions before disbanding the

71 An interview with a political party leader (anonymous) on 11 October 2023.
72 An online interview with a non-governmental organisation leader (anonymous) on 4 October 2023.
73 An online interview with a political party leader (anonymous) on 18 October 2023.
74 An online interview with a non-governmental organisation leader (anonymous) on 23 October 2023.
75 An online interview with a non-governmental organisation leader (anonymous) on 12 October 2023.

affirmative action measures.[76] In Zimbabwe, the 2013 Constitution set the quota system to apply for two terms, from 2013 to 2023. The 10-year duration, however, was institutionalised while the gender quota was set at 30 per cent and with neither legal mechanisms to transition women from quota to FPTP seats, nor mechanisms to ensure that FPTP seats close the 20 per cent gender gap for women to make up at least half of parliament as required under section 17 of the Constitution.

According to General Recommendation 25 on article 4 of CEDAW, the duration of a temporary special measure is determined by its outcomes and not by a mere predetermined passage of time, as is the case in the Zimbabwean Constitution. Overall, special measures must be discontinued when the desired results of bringing about equal representation of men and women in positions of power have been achieved and sustained for a period of time. I have argued elsewhere that a well-planned and executed quota system should not time the system itself; instead, the quota parliamentarians should hold the quota seats for predetermined fixed terms (preferably two terms) with deliberate measures in place to transition quota parliamentarians to competitive seats.[77] This would allow more women to leverage the quota system to gain political knowledge, skills, experience, and financial muscles to transition to FPTP seats, hence producing cycling benefits for the quota system. Once there is wide community acceptance of women as leaders and a level of playground, the quota system can be eradicated.

4 Conclusion and recommendations

A decade of operation of gender quota in Zimbabwe ended in 2023. The system, however, is extended for another decade, until 2033.[78] The quota system is also replicated in local councils.[79] The extension of the quota system to 2033 and its replication to the local council, however, has been done without adequately addressing the

76 Pacific Islands Forum Secretariat (PIFS) and United Nations Development Programme (UNDP) Pacific Centre 'Utilising temporary special measures to promote gender balance in pacific legislatures: A guide to your options' (2009) Suva.

77 V Lihiru 'The 2020 CHADEMA special seats dispute in Tanzania: Does the National Electoral Commission comply with the law?' (2021) 20 *Journal of African Elections* 1-18.

78 Sec 124(b) Zimbabwe Constitution. This para was amended by sec 11 of Act 2 of 2021.

79 Secs 277(4) & (5) Zimbabwe Constitution. This sub-sec was inserted by sec 20 of Act 2 of 2021.

challenges discussed in the previous part.[80] Accordingly, the extension of quota seats for ten more years and its subsequent duplication to the local councils, albeit without substantive modification, can be summed as an absolute replication of the past decade's misery to the coming decade, not only at the parliamentary level but also in local councils. The experience from the implementation of the quota system from 2013 to 2023 points to a reasonable expectation that its extension to 2033 will still not facilitate women to make up at least half of the national assembly.

Notably, Zimbabwe has a useful home-grown example for proper execution of section 17 of the Constitution at the senate level. According to sections 120(1) and (2), the senate consists of eighty senators, of whom six are elected in each province from party lists through a proportional representation (PR) electoral system in which male and female candidates are listed alternately, and every list is headed by a female candidate. While other groups of senators, such as the traditional chiefs, have made it difficult for women to comprise half of the senate, the percentage of women senators has been sustained between 40 and 49 per cent since 2013.[81]

Although the PR electoral system is partly applicable in Zimbabwe, the country is not reaping its full benefits, particularly at the national assembly level, because its application has been limited to the allocation of quota seats to the political parties and does not apply in the election of constituency parliamentarians.[82] The recommendation for the country to fully move from the FPTP electoral system to the PR electoral system in conducting elections at local councils and the national assembly level is often met with scepticism regarding its effectiveness in measuring accountability and the desire to

80 The only change is seen under sec 124(1)(c) of the Zimbabwe Constitution, which presently requires political parties to ensure that (a) ten of the sixty women members are under the age of thirty-five; (b) women with disabilities are represented on their party lists; and (c) young women with disabilities are represented on their party lists in terms of an Act of Parliament. No further changes have been made to the mechanisms to obtain women for quota seats.

81 Sec 120(b) of the Zimbabwe Constitution provides that 16 traditional chiefs elected by the provincial assembly of chiefs from each of the provinces shall also be in the senate. It is rare for women to be traditional chiefs in Zimbabwe; hence, these positions are often dominated by men. Currently, all traditional chiefs in the National Assembly are men. The percentage of women in Zimbabwe's senate as of April 2024 is 49%; Inter-Parliamentary Union 'Monthly ranking of women in national parliaments' (2024), https://data.ipu.org/women-ranking/?date_year=2024&date_month=04 (accessed 7 June 2024).

82 In secs 120, 124 and 277 of the 2013 Constitution, the PR system is applied to 60 members of the senate; 60 members of the National Assembly Women's Quota; 10 members of the National Assembly Youth Quota; 10 members in each Provincial/Metropolitan Council; and 30% Local Authority Women's Quota. Zimbabwe uses FPTP for the 210 National Assembly seats and 1970 wards available in local government authorities.

leave behind the colonial legacy.[83] This notwithstanding, scholarly evidence points to the usefulness of the PR electoral system in delivering inclusive elections. Women are four times more likely to win elections in a PR system than in an FPTP electoral system.[84]

Zimbabwe was part of the Beijing World Conference in 1995, which calls on countries to 'review the impact of electoral systems on the political representation of women and consider reforming those systems by adopting the electoral systems that encourage political parties to integrate women in elective and non-elective public positions in the same proportion and level as men'. African countries are currently considering PR as an electoral system of choice. While most of the 42 per cent of African countries (23/52) still follow the FPTP system, 33 per cent of African countries (18/52) have transitioned to the PR electoral system.[85] Zimbabwe's decision to transition from an FPTP electoral system to a PR electoral system accompanied by a Zebra system has the potential of facilitating more women to win elections, often close to 50 per cent, as witnessed in Namibia, South Africa and Rwanda,[86] thus facilitating the country to meet the national legal obligation under section 17 of the Constitution and the international law obligations set forth under the ICCPR, CEDAW, the African Women's Protocol and the SADC Gender Protocol.[87]

As Zimbabwe considers the recommendation to move from FPTP to the PR electoral system, preliminarily, the quota system needs urgent reforms to deliver the intended objectives. Zimbabwe's quota system realignment to international law benchmarks calls for the creation of uniform procedures to guide all political parties in the nomination of women for quota seats. The procedure should prescribe a mechanism for quota parliamentarians to be voted by the electorate and should designate constituencies from which the quota parliament will operate and be responsible. The quota parliamentarians should qualify for constituency funds, and a clear

83 An online interview with a non-governmental organisation leader (anonymous) on 16 October 2023.

84 V Lihiru 'Exploring suitable electoral systems for promotion of women's representation in Tanzania and Rwanda' (2022) 21 *African Studies Quarterly* 61-75.

85 Lihiru (n 84).

86 The Zebra System model requires political parties to alternate women and men in their candidate lists. An additional requirement for the list to be headed by a woman makes the election of women certain. As a result of the application of the PR electoral system, Rwanda has 61%, South Africa 46% and Namibia 44% of women in their respective parliaments. Inter-Parliamentary Union 'Monthly ranking of women in national parliaments' (2024), https://data.ipu.org/women-ranking?month=1&year=2024, (accessed 10 February 2024).

87 Lihiru (n 84).

mechanism for their transition to constituency seats should be in place. Zimbabwe should also invest in public awareness to complement the legal measures for accelerating mindset transformation on the role of women in public life. Article 12 of the Revised SADC Gender Protocol,[88] which Zimbabwe signed in 2016, calls upon state parties to ensure that all legislative and other measures are accompanied by public awareness campaigns that demonstrate the vital link between the equal representation and participation of women and men in decision-making positions, democracy, good governance and citizen participation. Holding free and fair elections and addressing violence against women in politics are key building blocks for creating a conducive environment for meaningful women's participation in Zimbabwe's political processes.

88 Gender Protocol (n 16).

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: A Skelton, F Veriava & P Mutu 'Editorial: Special focus on promoting access to basic education through the law in sub-Saharan Africa' (2024) 24 *African Human Rights Law Journal* 147-152
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a7

Editorial: Special focus on promoting access to basic education through the law in sub-Saharan Africa

Prof Ann Skelton, Dr Faranaaz Veriava and Dr Perekeme Mutu
(affiliated to the UNESCO Chair: Education Law in Africa, Department of Private Law, University of Pretoria, South Africa)

1 Introduction

There is broad acceptance that the right to basic education is a fundamental multiplier right. However, the implementation of the right to education has still not been fully achieved in sub-Saharan Africa. Over the last two decades, educational development has witnessed notable improvement in Africa, as the number of children accessing school at all levels has increased. Despite this considerable gain, equal access to quality education remains far from being achieved. This is evidenced in a 2022 report released by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) on out-of-school children, which indicates that an estimated 244 million children between the ages of six and 18 years worldwide were not attending school. Ninety-eight million of these children reside in sub-Saharan Africa. There have also been further setbacks due to the COVID-19 pandemic which impeded the progress of many children at school, and caused many to disengage. Without urgent political will and investment in education, the situation will likely get worse as the region faces a rising demand for education due to an expanding school age population. This requires a scaling up of education by the public sector. A further risk is the spread of low fee private schooling which, while it may serve a purpose on a temporary basis, endangers

the public system if it is unregulated or causes governments to cut back on planning, budgeting and spending on public education.

While each country's education system may face unique problems, general issues that characterise most countries are the perennial challenges of the lack of resources, inadequate planning and budgeting, an insufficient number of schools, charging of fees and hidden costs, inequality in access to education, dilapidated learning facilities, ill-equipped teachers, and overcrowded classrooms. These challenges have continued despite the existence of legal frameworks (international, regional and domestic) that impose an obligation on government to provide access not only to education for all children within their jurisdiction, but quality education. The potential of these legal instruments has not been fully explored to achieve the goal of ensuring access to quality education for every child. It is in this context that the UNESCO Chair on Education Law in Africa at the University of Pretoria explores the legal solutions to some of these challenges, and aims to advance access to quality basic education for children in sub-Saharan Africa.

Education law creates the normative framework for education, within international and regional human rights standards. All countries in sub-Saharan Africa have ratified the United Nations (UN) Convention on the Rights of the Child (CRC); almost all have ratified the African Charter on the Rights and Welfare of the Child (African Children's Charter) and many have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). All of these instruments require states to ensure universal access to free and compulsory basic education. Some of the constitutions of countries in the region make similar promises, and also commit to achieving greater access to basic education. This strong normative framework, together with national constitutions, provides space for the law and legal processes to be used to achieve gains in education.

2 The special focus edition on 'Promoting access to basic education through the law in sub-Saharan Africa'

The nine articles in this special focus edition emanate from a call by the UNESCO Chair on Education Law in Africa, University of Pretoria for contributions on topics or themes reflecting the use of the existing legal framework on the right to basic education to promote the right to basic education of children in sub-Saharan Africa, either through law reform or litigation.

In particular, the editors were keen to receive articles using law reform or litigation to advance the right to education (or rights in education). We invited accounts of work already done, or explorations of plans or strategies to use law reform or litigation to advance the right to education (or rights in education).

The articles received provide many fascinating narratives about the use of law in the battle to ensure that states respect, protect and fulfil the right to basic education. An overview of the articles provides a landscape of selected 'legal stories' stretching from South Africa to Nigeria.

Veriava brings together the themes of law reform and strategic litigation in her article which examines the impact of the Basic Education Laws Amendment Bill (BELA Bill) on the policy-making functions of the school governing bodies (SGBs), in particular, changes to the unchecked autonomy of the SGBs in making language and admissions policies for schools. The author argues that the jurisprudence emanating from earlier school governance litigation acknowledges the history of racism and apartheid spatial injustice which has had the effect of limiting access to well-resourced schools for black people in South Africa. The South African Constitutional Court, therefore, placed a duty on SGBs when formulating policies to be cognisant of the broader systemic concerns in education impacting the access rights of learners. The jurisprudence has now been codified into law in the school governance reforms in the BELA Bill. The author illustrates how the formulation of school governance principles and their ultimate inclusion in the BELA Bill stands as a case study in transformative constitutionalism beyond the courts.

Ally and Kazim examine the lessons to be gleaned from the minimum core approach. Drawing on case law, the authors unravel the South African judicial approach to minimum core, and observe that the courts have never expressly disowned a minimum core approach to basic education. The authors also observe that the Constitutional Court in *AB v Pridwin Preparatory School* implicitly acknowledged that the state is obliged to provide education of a certain quality or standard. The authors examined the case law through which the courts have given the right to basic education minimum content: The courts have held that the right to basic education includes a right to textbooks, classroom furniture, basic infrastructure, sufficient teachers, transport and, more recently, nutrition. The authors identify three lessons that can be drawn from this 'minimum core' type approach, including a shift from minimum inputs to minimum outcomes, the prospects for applying the 'minimum core' approach to the interpretation and development of

other immediately realisable rights recognised by the Constitution, such as the right of every child to basic nutrition, and the potential for developing the minimum content of progressively realisable socio-economic rights.

Smit looks at the human rights duties of private schools in giving effect to the right to basic education. Relying on the case of *AB & Another v Pridwin Preparatory School & Others,* in South Africa, the author notes that private schools have constitutional obligations to give effect to the right to basic education. However, she argues that much uncertainty remains on the effect this has on a private school's ability to suspend or expel a learner for failure to pay school fees.

Maistry and Van Schalkwyk reflect on the use of litigation to promote the right to basic education of undocumented children in South Africa. The authors interrogate the *Centre for Child Law & Others v Minister of Basic Education & Others* judgment and its implication in advancing the right to basic education in South Africa. The authors in this article map the events leading up to the litigation, the strategy adopted in bringing the case, the eventual findings of the Court, and the challenges in implementing the judgment. The authors argue that while the findings of the Court have provided some clarity on the interpretation of section 29(1) of the Constitution and its application to undocumented learners, some ambiguity in the framing of the order and a lack of awareness of the judgment among schools and provincial education departments have hampered implementation.

Quan, Fambasayi and Ferreira explore the right to receive education in an official language of one's choice as enshrined in section 29(2) of the South African Constitution. The authors argue that the South African education system has not offered sustained learning as well as equal opportunities for most of the population in more than one language. Although language in education determines the language of learning and teaching (LOLT), language in education remains contentious in South Africa. They observed that the Department of Basic Education policy has failed to address the need to ensure sustained use of the mother tongue by prompting a switch to English in grade four. The authors interrogate how the learning and teaching in schools could potentially perpetuate discrimination in accessing schools, against the backdrop of constitutional rights and values such as equality and non-discrimination.

Moving to another part of the sub-continent, Skelton and Mutu explore the crucial role that strategic litigation can play in actualising the right to basic education in Kenya, focusing on the constitutional provisions that underpin this legal strategy and the pivotal role of

the judiciary. The authors argue that the Kenyan Constitution and the entire legal framework provide a solid legal background for civil society organisations and other interested parties to deploy strategic litigation to pressure the government for the realisation of the right to basic education in the country. However, the success of such an effort is largely dependent on how the judiciary understands its crucial role in driving the transformative potential of the Constitution.

The next article moves to neighbouring Uganda, where Mutu investigates the effectiveness of strategic litigation in promoting access to equal quality education, with a specific focus on the landmark case of the *Initiative for Social and Economic Rights (ISER) versus the Attorney General*. The article adopted a multidimensional impact model (material impact, instrumental impact and non-material impact) to determine the impact of the litigation in advancing the right to education in Uganda. The author not only interrogates the implication of the Court's decision in the understanding and protection of the right to education, but also in establishing a legal precedent for holding the government accountable for providing quality basic education.

Chitha reflects on the barrier that impedes access to education for Rastafarian children and female Muslim children in Malawi. The author notes that Rastafarian children and female Muslim students are denied access to education for having dreadlocks or long hair and wearing of the hijab, respectively. The author interrogates the various efforts deployed by stakeholders to ensure that such barriers are removed to give equal opportunity to every child to access school. The author identifies litigation, the drafting of memoranda of understandings, and the issuing of circulars as some of the measures deployed to address the access to education challenge for these children. The author observes that as much as the adopted approaches have played a crucial role in ensuring access to education for Rastafarian and female Muslim children, there is a need for more action in terms of legislative reform as well as dissemination and public awareness, in particular about the recent High Court decision concerning Rastafarian children and their access to education.

Safety in schools is the theme explored by Onuora-Oguno and Silas. The authors argue that beyond the obligation of states to promote and fulfil the right to education, the obligation to protect, which is crucial, is often neglected. The authors spotlight how access and availability of education are limited when states do not protect the school space and make it safe for learners. With a focus on Nigeria, and particularly the failure to deal effectively with the education-related actions of Boko Haram, they argued that the lack

of fulfilment of the obligation to protect on the part of the Nigerian state is a violation of its obligations under international human rights law. Relying on Nigeria's obligations under various African human rights treaties, the authors make recommendations on how the obligation to protect will be realised and, thus, the right to education respected in its entirety in Nigeria.

3 Conclusion

Law provides us with avenues to pursue the goal that quality education should be provided to all children. The articles in this special focus edition provide examples of the way in which law and lawyers are filling the gaps in policy, law and practice. There is a growing awareness on the sub-continent that lawyering can enhance learning. In particular, strategic litigation has shown promising results in several countries. In South Africa the courts have upheld the principle that the right to basic education is immediately realisable, and in a series of cases have fleshed out some of the content of the right to include textbooks, desks and chairs, teachers and school transport. There have also been several cases on the rights of children within education, such as positive findings regarding corporal punishment, the exclusion of pregnant girls, and the rights of children in private schools. In Eswatini, lawyers brought a series of cases which initially garnered a declarator on the rights of all children to free primary education and, although the appeal was ultimately lost, the case seemed to get the government moving on rolling out primary education. In Nigeria, lawyers have been successful in the Economic Community of West African States (ECOWAS) Court and in the High Court in establishing that education is a justiciable right, despite being included in the non-justiciable part of the Constitution. Cases in Uganda and Kenya have caused closure of private schools that failed to meet standard. The ECOWAS Court has issued a decision finding that the exclusion of pregnant learners in Sierra Leone is not in line with the African regional standards – and similar cases at the national level have been brought in Kenya. Treaty bodies such as the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) have also been engaged to hold state parties such as Senegal, Kenya, Uganda and Sudan accountable for violating the right to education of children within their jurisdiction.

These remarkable narratives are not the only ones that tell a positive story about what law can do to advance the right to education, and hopefully they are just the beginning of many legal journeys.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: F Veriava 'The Basic Education Laws Amendment Bill: A case study in transformative constitutionalism beyond the courts' (2024) 24 *African Human Rights Law Journal* 153-178
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a8

The Basic Education Laws Amendment Bill: A case study in transformative constitutionalism beyond the courts

*Faranaaz Veriava**
Senior Lecturer, Department of Private Law, University of Pretoria, South Africa
https://orcid.org/0009-0004-1028-4796

Summary: *The Basic Education Laws Amendment Bill (BELA Bill) is one of the most significant reforms to the South African basic education legal framework since 1994. While the amendments impact on a wide range of issues, this article focuses specifically on the BELA Bill's amendments to the policy-making functions of the localised structures in education governance, known as school governing bodies (SGBs), in particular, changes to the unchecked autonomy the SGBs in making language and admission policies for schools. The article notes that the model of education decentralisation that was adopted in post-1994 democratic South African has been highly contested. This manifested during the country's 1994 negotiated transition, continued in the school governance litigation and in the BELA Bill public participation processes. The article argues that the jurisprudence emanating from school governance litigation acknowledges the history of racism and apartheid spatial injustice that has had the effect of limiting access to well-resourced schools for black people in South Africa. The South African Constitutional Court, therefore, placed a duty on SGBs when formulating policies to be cognisant of the broader systemic concerns in education impacting on the access rights*

* BA LLB (Witwatersrand) LLM LLD (Pretoria); Faranaaz.veriava@up.ac.za. I wish to thank Nurina Ally and two anonymous referees for their thoughtful comments. I would also like to acknowledge Jonathan West for his monitoring and researching of the BELA Bill process, which has informed much of the analysis in this article.

of learners. The jurisprudence has now been codified into law in the school governance reforms in the BELA Bill. The article illustrates how the formulation of school governance principles, and their ultimate inclusion in the BELA Bill, exists as a case study in transformative constitutionalism beyond the courts. This is due to a range of contributing factors, such as the interventions of progressive amici *in these cases; a degree of judicial activism displayed by the Constitutional Court in the school governance litigation; the proactive codification by the state of the jurisprudential principles; and the progressive support for the inclusion of the school governance amendments in the BELA Bill during the public participation processes.*

Key words: *Basic Education Laws Amendment Bill; basic education; school governing bodies; transformative constitutionalism*

1 Introduction

The Basic Education Laws Amendment Bill (BELA Bill)[1] constitutes one of the most significant reforms to the South African legal framework for basic education since 1994. The BELA Bill entails amendments to the South African Schools Act of 1996 (Schools Act) and the Employment of Educators Act of 1998.

The BELA Bill covers a wide array of amendments to the legal framework, including, but not limited to, the tightening of the prohibition against corporal punishment; the extension of the compulsory phase of education to include grade R; the imposition of criminal sanctions on parents who fail to send their children to school during the compulsory phase of education; and the registration of home schooling. A significant and highly-contested aspect of the amendments, and which is the focus of this article, is the alignment of the legal framework with the school governance jurisprudence of the South African Constitutional Court (Constitutional Court), in particular, the language and admission policy-making functions of the localised structures in education governance known as the school governing bodies (SGBs).

The BELA Bill was first published for comment in 2017 by the Department of Basic Education and received more than 5 000 written submissions. A revised version was introduced to Parliament

1 GG 45601 of December 2021.

four years later, in 2021.[2] Public hearings on the BELA Bill were held both nationally and provincially.[3] Following further amendments, the BELA Bill was passed in the National Assembly on 16 May 2024. As at the date of national elections at the end of May 2024, the BELA Bill was on President Ramaphosa's desk waiting to be signed into law. This version of the BELA Bill contains significant changes to earlier iterations.

South Africa's transition to a constitutional democracy in 1994 was characterised by, among others, the inclusion of a Bill of Rights in the Constitution; the recognition of the necessity to redress apartheid inequalities; the principle of cooperative governance between national, provincial and localised structures of government; and the notion of a participatory democracy. In basic education, this necessitated the complete overhaul of a system of centralised and authoritarian control of school governance to a three-tier model of decentralised and devolved system of governance.

Within this model, the Department of Basic Education establishes broad-based norms and policies.[4] The implementation of law and policy and the provision of schooling is a provincial function. SGBs, which are made of up parents, educators, non-educator staff and older learners, are designated specific functions by the Schools Act to facilitate the smooth running of their schools and to make school-based policies.

The policy-making functions of SGBs include determining the mission statement of a school;[5] admissions policy;[6] language policy;[7] the school's code of conduct, including pregnancy policies;[8] religion policy;[9] and the fees to be charged at a school.[10]

The aim of this article is to illustrate how the school governance amendments in the BELA Bill serve as a case study in transformative constitutionalism beyond the courts. The article sets out how

2 Some of the more highly-contested provisions included the school governance amendments, the sale of alcohol on school premises and the home schooling provisions. See Parliament of the Republic of South Africa 'The Basic Education Laws Amendment Bill [B2-22] Draft National Report' (August 2023) 9 (Draft National Report).
3 According to a parliamentary report on the hearings, there were 11 264 participants who attended the public hearings and 32 941 made written submissions. Draft National Report (n 2) 14 & 37.
4 Sec 3 National Policy Act of 1996.
5 Sec 20(1)(c).
6 Sec 5(5).
7 Sec 6(2).
8 Sec 7.
9 Sec 8.
10 Sec 39.

the progressive principles developed by the school governance jurisprudence are codified by the amendments in the BELA Bill and are now infused into the SGB policy-making processes. It is hoped that this will have the effect of constraining the hitherto unchecked autonomy that SGBs of former predominantly white schools utilised to determine who may access these schools. The article further aims to illustrate how the formulation of these principles, and their ultimate inclusion in the BELA Bill, is due in parts to a degree of judicial activism displayed by the Constitutional Court in the school governance litigation; the interventions of progressive *amici* in these cases;[11] the codification by the state of these principles; and the progressive support for the amendments during the public participation in the legislative processes.

Part 2 of the article discusses the doctrine of transformative constitutionalism and the critique of this doctrine as being too court centric, with limited permeation of progressive legal principles beyond the courts to redress structural inequality. Part 3 provides an historical overview to some of the education decentralisation debates that led to the formulation of the original SGB policy-making functions in the Schools Act. Part 4 highlights some prevailing commentary on how SGB functions have been exploited by predominantly former white schools to limit access to these schools. The part then summarises the school governance litigation that occurred mainly between SGBs and provincial education departments and extracts the main principles from this jurisprudence. Part 5 discusses the BELA Bill and the submissions made to the Bill, and finally provides some analysis on the transformative potential of the Bill.

2 Transformative constitutionalism ought not to end on the steps of the court

Klare in his seminal article outlining his vision of the doctrine describes transformative constitutionalism as

> a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in historical context of conducive political developments) to transforming a

11 Progressive civil society organisations include organisations advocating equal access to quality education for all. These include organisations such as Equal Education, the Equal Education Law Centre, the Legal Resources Centre, the Centre for Child Law and Section27. See F Veriava *Realising the right to basic education: The role of the courts and civil society* (2019) 155-159.

> country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.[12]

Klare goes on to identify a host of features within a constitution that justify the description of it as having transformative potential. This includes a substantive or 'redistributive' conception of equality; the inclusion of several socio-economic rights that impose duties on government to reduce inequality; the notion of participatory governance; the horizontal application of the Bill of Rights; multiculturalism and ubuntu; and, significantly in the context of this article, which analyses how access to a quality education was racialised, a commitment to the redress of the apartheid legacy.[13]

Critics of the doctrine of transformative constitutionalism, however, charge the doctrine with being too 'court centric'.[14] These critics argue that there is an over-reliance on the courts and on rights discourse to address the deep structural issues of inequality in South African society and that this approach has failed to address these issues. Critical legal scholar Sibanda notes that

> [f]rom the literature, there is little evidence of other sustained work within the discourse *directed at inculcating or influencing institutional or structural power shifts or far-reaching redistributive innovations beyond the courts*.[15]

> So, while it certainly is arguable that transformative constitutionalism has successfully established some measure of internal discursive coherence, I argue that this has been possible largely through proponents focusing their discursive interventions on institutional and rights-related adjudication, whilst rarely demonstrating how transformative constitutionalism grapples with undoing the realities of South Africa's largely-undisturbed racial, social, cultural and epistemic hierarchies that obviously are fertile ground for what undoubtedly is a growing sense of disillusionment with respect to the Constitution and its popular promise to 'improve the quality of life of all citizens'.

This article submits that the BELA Bill case study provides a counter-narrative to the view that the doctrine of transformative constitutionalism is ineffective due to it being overly court centric. The BELA Bill case study illustrates how the principles from the school governance jurisprudence emanating from the courts have served to guide the legislative process. Furthermore, the reforms introduced

12 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 150.
13 Klare (n 12) 155.
14 S Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 3 *Stellenbosch Law Review* 390.
15 Sibanda (n 14) 402 (my emphasis).

within this legislative process have the potential to transform the institutional power relationships, specifically those of SGBs of former white schools that have continued to maintain patterns of apartheid spatial geography, thereby limiting access to these schools. As such, the case study is in alignment with the approach adopted by scholars such as Brickhill and Van Leeve in analysing transformative constitutionalism. They assert that it is the executive and legislature, through law and policy making, that play the primary role in structural change. They note further that this places a

> greater responsibility on rights claimants who must, in addition to legal battles, engage in political struggles with these two branches of government to develop the content of socio-economic rights as a basis for transforming the quality and access to social and material resources and services necessary to live a dignified life.[16]

3 Decentralisation debates during the negotiated transition

Van der Westhuizen has noted that during the negotiations prior to South Africa's 1994 transition, minority groups had proposed that while schools be open to all children living in the neighbourhood, the system be 'flexible' enough, to allow for schools to serve 'the particular language, religious, cultural and philosophical needs' of communities.[17] Van der Westhuizen disagreed with this, noting:[18]

> Public schools exclusively or specifically for cultural, religious, or linguistic groups would not seem to be acceptable either. Not only would such a state of affairs serve to perpetuate apartheid in disguise with state funding and official blessing, but as a practical matter, it would be extremely difficult to allocate funds and other supporting facilities on an equal basis.

The prevailing education scholarship on the education decentralisation debates that occurred during South Africa's negotiated transition highlight how the negotiations translated into the imperfect architecture of the basic education legal framework. Sayed, for example, notes that both the previous ruling National Party and the liberation movements, including the current ruling party, the African National Congress (ANC), shared a commitment

16 J Brickhill & Y van Leeve 'Transformative constitutionalism – Guiding light or empty slogan?' in A Price & M Bishop (eds) *A transformative justice: Essays in honour of Pius Langa* (2015) 150-151.

17 J van der Westhuizen 'A post-apartheid educational system: Constitutional provisions' (1989) 21 *Columbia Human Rights Law Review* 130. Van der Westhuizen was involved in the drafting of the Constitution. He would later serve as a justice of the Constitutional Court.

18 Van der Westhuizen (n 17) 130.

to some form of educational decentralisation albeit for very different political and ideological reasons.[19]

For the National Party, education decentralisation was about parental choice and parental autonomy for those who paid school fees. Sayed notes: [20]

> The National Party in the last years of apartheid was committed to the ideal of total individual freedom of choice without any forms of intervention or regulation by the state. Underlying this ideal was the notion of the 'individual as consumer' reflected in the discourse of 'parental choice' and 'consumer power'.

The notion of parental choice has been entrenched in the education clauses of certain international and regional instruments to ensure the protection of minority rights.[21] In South Africa it has often been used as proxy by conservative white groupings to justify an entitlement to ethnic and cultural separateness.[22]

On the other hand, for the ANC, decentralisation was rooted in resistance politics.[23] Sayed notes:[24]

> The notion of grassroots community participation was constituted in the context of a state which was oppressive and where the state itself was the primary apparatus of oppression. Thus, grassroots community control was the antithesis of state control. Power to the people as opposed to that of the state reflected a strong commitment to participatory democracy and the decentralisation of control.

---

19 See, eg, Y Sayed 'Discourse of the policy of educational decentralisation in South Africa since 1994: An examination of the South African Schools Act' (1999) 29 *Compare: A Journal of Comparative and International Education* 141; N Carrim 'Democratic participation, decentralisation and educational reform' in Y Sayed & J Jansen (eds) *Implementing educational policy: The South African experience* (2001) 98.

20 Carrim (n 19) 142.

21 Art 13(3) of the International Covenant on Economic Social and Cultural Rights (ICESCR) requires states to respect parents' rights to establish schools 'to ensure the religious and moral education of their children in conformity with their own convictions'. Art 2 of Protocol 1 to the European Convention on Human Rights (ECHR) requires states to 'respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions'.

22 See, eg, *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC). The *amicus curiae,* the South African Foundation for Education and Training, made arguments relying on parental choice and the protection of minority rights. The mission of the Foundation was described as 'to support a Christian value system and prescribe to the principle of mother tongue education. The Foundation also aspires to promote education in the South African community as a whole with special reference to the Afrikaans medium education.'

23 Sayed (n 19) 143.

24 As above.

Macfarlane, in a 2022 article responding to the condemnation of the BELA Bill by various organisations such as AfriForum and Solidariteit,[25] makes similar observations. She states that while the liberation movements advocated parental involvement, particularly following the 1976 Soweto uprising and as response to the authoritarian style of education of the apartheid regime,'[f]or the Nats, placing as much power as possible – and the ability to raise funds – at the school level would largely isolate former white schools from significant changes after the transition'.[26] She describes this as 'transition tricks'.[27] She then goes on to describe how in 1992, shortly before the transition to democracy and while negotiations with the ANC were under way, the apartheid government converted most white public schools to model C schools[28] and control of these schools was handed to SGBs elected by parents.[29] McFarlane notes further that that the current arrangement of total autonomy of SGBs in policy making as provided in the Schools Act was because of pressure to reach a negotiated settlement at a time when South Africa was on the brink of civil war.[30]

On the model of decentralisation that was adopted by the Schools Act, Woolman and Fleisch note:[31]

> The new government realised that various political and legal choices would have a number of unintended consequences. The drafting history is as a result, replete with references to the 'provisional' nature of the structure being created by the state's commitment to revisiting

25 Afriforum and Solidariteit are both civil society organisations representing white minority interests. AfriForum describes itself as a civil rights organisation that 'mobilised Afrikaners, Afrikaans-speaking people and other minority groups in South African and protects their rights', http://AfriForum.co.za/en/ (accessed 13 December 2023).

26 R McFarlane 'School Bill is not betrayal, it's a belated moved to update the law' *Sundays Times* (Johannesburg) 3 July 2022, http://www.timeslive.co.za/sunday-times/opinion-and-analysis/opinion/2022-07-03-schools-bill-is-no-betrayal-its-a-belated-move-to-update-the-law/ (accessed 25 October 2023).

27 As above.

28 In its dying days, the apartheid government developed a set of governance options for white schools that would pass substantial powers to the parent bodies of these schools. Under Model A, the school would become fully private; under Model B it would remain a state school; and under Model C the school would become state-aided or semi-private, with SGBs and determining the school fees for the hiring of more teachers beyond that provided by the state and maintenance of facilities.

29 McFarlane (n 26).

30 The FW de Klerk Foundation in its submission has argued that the amendments would amount to an 'irreparable, unilateral and permanent violation' of the 1994 settlement with ANC. FW de Klerk Foundation 'Comments on the Draft Basic Education Laws Amendment Bill, 2022' para 12, http://15-08-2022-FW-de-Klerk-Foundation-submissions-on-BELA-Bill14897.pdf (fwdeklerk.org) (accessed 25 October 2023).

31 S Woolman & B Fleisch *The Constitution in the classroom: Law and education in South Africa 1994-2008* (2009) 6.

and revamping those structures as it consolidated its power and shifted its policy imperatives.

Thus, it appears that the original policy-making functions of SGBs in the Schools Act were legislated within the political context of the negotiated transition wherein the then National Party sought to entrench group rights through an absolutist model of decentralisation. Liberation movements conceded to this to avoid a stalemate, but as suggested by Sayed, a more cooperative governance model, where centralised norms were established, was imagined by the liberation movements to transform the education system.[32] Woolman and Fleisch also note that the model that was adopted during the transition was never meant to be immutable, particularly once it was tried and tested.[33]

4 The school governance jurisprudence

4.1 Context in which the school governance litigation emerged

The various policy-making functions of SGBs were highlighted in the introductory part of this article. According to Brickhill and Van Leeve, the SGBs of former white schools have used their policy-making functions to determine who has access to their schools. They note that these schools have often utilised their powers to 'act as gatekeepers at the "doors of learning", purporting to represent both the internal and broader community within which a school is located'.[34]

In this context, language disputes in former white schools have had racial overtones as they at times have excluded African learners in single-medium Afrikaans-language schools.[35] Similarly, in admission disputes where these schools have capped learner enrolment and only allowed access to feeder communities in historically-white areas, this has also had the impact of restricting access for learners who are not white to these schools. Furthermore, school fees have tended

32 Sayed (n 19) 150.
33 Woolman & Fleisch (n 31).
34 J Brickhill & Y van Leeve 'From the classroom to the courtroom: Litigating education rights in South Africa' in S Fredman and others (eds) *Human rights and equality in education* (2018) 152.
35 In *Matukane v Laerskool Potgietersrus* 1996 (3) SA 223 (WLD) the High Court held that black learners had been unfairly discriminated against when their application to a dual-medium school had been rejected on the basis that the school had an exclusively Afrikaans culture and ethos, which would be detrimentally affected by admitting learners from a different cultural background.

to weed out poor learners at wealthy schools, particularly when exemption policies are not implemented.[36] Homogenous Christian schools have been unwelcoming spaces for learners who are secular or of other religions.[37] Codes of conduct that prohibit pregnant learners from school have discriminated against girl learners on the grounds of gender and pregnancy.[38]

Thus, within these ongoing disputes, provincial education departments have sought to curb the powers of the SGBs as gatekeepers. Unfortunately, this has often occurred unlawfully with provincial education departments bypassing the due process procedures outlined in the Schools Act. This has resulted in litigation initiated by SGBs against provincial education departments framed as lawfulness disputes, without delving into the rights implications for the learners impacted by the SGB policies.

Various progressive civil society organisations, therefore, entered the fray as *amici* to highlight the rights violations of learners and the broader systemic concerns at play. Another noteworthy repeat player in these disputes has been the Federation of Governing Bodies for South African Schools (FEDSAS). FEDSAS is a national representative organisation of SGBs that is largely representative of former white schools. FEDSAS has litigated, both as a party to litigation as well as by intervening as *amicus curiae* in cases, to argue for the autonomy of SGBs to formulate their own policy on issues such as language, admissions and religious policy at former white schools.[39]

4.2 The school governance case law

The first school governance case before the Constitutional Court was *Head of Department, Mpumalanga Education Department v Hoerskool Ermelo (Ermelo)*.[40] The school was a single-medium Afrikaans school

36 See *Centre for Applied Legal Studies & Others v Hunt Secondary* [2007] ZAKZHC 6, in which the Centre for Applied Legal Studies assisted parents who were being sued by the schools for outstanding school fees, despite being legally entitled to exemptions. See also *Western Cape Education Department v S* 2018 (2) SA 418 (SCA). A single mother was refused an exemption because she could not give details of the income of the child's father.

37 *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* 2017 (6) SA 129 (GJ) (*OGOD*).

38 *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC) (*Welkom*).

39 FEDSAS intervened as *amicus curiae* in *Rivonia*. In *Federation of Governing Bodies for South Africa v MEC for Education, Gauteng* 2016 (4) SA 546 (CC) FEDSAS was the applicant. In *OGOD* (n 37) the CEO of FEDSAS was the main deponent on behalf of the respondent schools.

40 2010 (2) SA 415 (CC). In an earlier language case of *Laerskool Middelburg v Departmentshoof: Mpumalanga Department van Onderwys* 2003 (4) SA 160 (T)

that was not filled to capacity. There were African learners struggling to find spaces in English-medium schools as these were full. The head of department (HOD) of the Mpumalanga Provincial Department of Education, therefore, requested that these learners be admitted to Ermelo High School. When the SGB refused, the HOD withdrew the functions of the SGB and appointed an interim SGB that altered the school's language policy to a dual-medium school.

The Constitutional Court considered whether the HOD had the power to override the SGB's power to determine the language policy and to appoint a new SGB. The Court held that an HOD could only do this on 'reasonable grounds and in order to pursue a legitimate purpose', and in accordance with specified due process provisions, which were not followed in this instance. Despite this finding, the Court nevertheless directed the school to review its language policy to accommodate English-speaking learners.

In *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* (*Welkom*)[41] the Constitutional Court was asked to address the legality of an instruction from the HOD in the Free State to two school principals to ignore the pregnancy policies developed by their respective SGBs. The principals at both schools had in terms of their SGB policies prohibited two learners from returning to school in the year they had given birth. The HOD in both cases instructed the principals to immediately readmit the learners. The Centre for Child Law and Equal Education intervened as *amici* to argue that the pregnancy policies were discriminatory and violated the rights of girl learners. Equal Education further argued that provincial education departments ought to be permitted to raise the unconstitutionality of pregnancy policies.[42] The schools

---

the HOD instructed an Afrikaans-medium school to admit 20 learners seeking English medium instruction. The SGB challenged the authority of the provincial department to do this. However, the High Court held that the learners' right to choose their medium of instruction could not be undermined where there was a need to share the school's facilities. A different stance was adopted in *Minister of Education, Western Cape v Governing Body Mikro Primary* 2006 (1) SA (SCA) 66. Noteworthy also is *Governing Body Hoerskool Overvaal v Head of Department of Education* [2018] ZAGPPHC (1) that occurred after *Ermelo.* The High Court set aside a provincial department instruction to change the Afrikaans school to a dual-medium school and admit 55, predominantly African, learners seeking English instruction. The Court held that the provincial department was not entitled to override the school's language and admission policies, particularly when English-medium schools in the area had the capacity to accommodate the 55 learners. This case is distinguishable from the other language cases specifically because schools in the area did have capacity. Despite this, those organisations arguing for SGB autonomy rely on this case as precedent in their favour.

41 *Welkom* (n 38).

42 Equal Education's heads of argument 12 February.

had argued the constitutionality of the pregnancy policies were not before the Court.

The Court held that SGBs had the power to develop pregnancy policies, even though the policies undermined the rights of pregnant learners. The HOD, therefore, could not merely override these policies but had to follow the processes set out in the Schools Act. The Court nevertheless ordered the two schools to review their respective pregnancy policies in terms of section 172(1)(b) of the Constitution, which gives the court a wide discretion to make any order that is just and equitable on the basis that the policies *prima facie* violated several of the girl learners' rights.

The case of *MEC for Education in Gauteng v Governing Body of Rivonia Primary* (*Rivonia*)[43] arose because of a dispute between Rivonia Primary, a former model C school, and the Gauteng Department of Education when a learner was refused a place in grade one at the school. The school's reason for its refusal was that it had reached its capacity in terms of its admission policy determined by the SGB. The HOD overturned the school's refusal of the application and issued an instruction to the principal to admit the learner. The school approached the courts for a determination of whether the HOD had the power to override the SGB's admission policy, specifically, its capacity determination, and thereby direct the school to admit the learner to the school. Equal Education and the Centre for Child Law jointly intervened as *amici curiae*, as did FEDSAS.[44]

The Constitutional Court held that the way in which the HOD had changed the SGBs admission policy was not done fairly or reasonably.[45] Despite this, the Court held that the school could not be completely inflexible in their policies when deciding the fate of an individual learner. It held that while SGBs have the power to determine their

43 *Rivonia* (n 10).

44 Equal Education and the Centre for Child Law argued that any interpretation of the Schools Act must consider the socio-economic context, in particular, the systemic inequality that persists in public education. Such an interpretation should also promote the rights to equality and basic education. They argued that an 'appropriate balance' must be sought between the powers of the SGB to make a capacity determination to develop its own admission policy, and that of the obligation of the provincial department in terms of the Schools Act to ensure that every eligible learner had a place in a school. Their intervention, therefore, sought to develop criteria setting out the conditions and circumstances when it would be appropriate for the provincial department to intervene to admit children, in excess of the initial capacity determination of the SGB. See Heads of argument of Equal Education and the Centre for Child Law 18 April 2013 paras 45-46. FEDSAS, by contrast, argued that the Schools Act grants the power to admit learners to the individual SGBs and not to the provincial department. See FEDSAS' Heads of argument 23 April 2013.

45 *Rivonia* (n 10).

admission policy in terms of the Schools Act, that power is never final but is subject to provincial department confirmation[46].

In the Constitutional Court case of *Federation of Governing Bodies for South Africa v MEC for Education, Gauteng (FEDSAS)*,[47] FEDSAS brought an application challenging the validity of specific provisions of the Gauteng regulations concerning the admission of learners to public schools. The most contentious was an interim provision that, until the MEC has determined a feeder zone for schools, parents must enrol their children in schools within a five kilometre radius of their homes or place of work. FEDSAS argued that the provision entitling the MEC to declare school feeder zones undermined the powers of SGBs to formulate their own policies.

Equal Education intervened as *amicus curiae*. The nub of their intervention was that the interim provision entrenched current discriminatory practices that resulted in the exclusion of poorer learners from more affluent schools, because it was largely affluent people that lived in these areas. Equal Education requested that the Constitutional Court compel the MEC to determine the feeder zones within a specific time frame so as to facilitate the redress of the legacy of apartheid spatial planning.[48] The Court stated in relation to the *amicus curiae* intervention:[49]

> The *amicus* also made a substantive attack on the constitutional validity of the default feeder zones presently prescribed in regulation 4(2) on the ground that they unfairly discriminate by perpetuating apartheid geography. The gut of the objection is that default feeder zones are defined in spatial terms of place of residence or of work. *Since the apartheid residential and workplace lines remain firm, the impact of the criteria of the MEC is to prolong and legalise racial exclusion.*

The Court held that there was traction in the contention of the *amicus curiae* that the default feeder zone position had the impact of prolonging racial exclusion, but held that the *amicus curiae* was potentially introducing a new cause of action that the Court was not certain was permissible.[50]

46 This was in terms of sec 5 (7) of the Schools Act.
47 *FEDSAS* (n 39).
48 EE argued further that the obligations imposed by the right to equality and the right to basic education required that the state 'not only provide education but … also simultaneously redress past imbalances caused by the racially discriminatory laws and practices of the apartheid era'. See Equal Education's heads of argument 14 April 2016 546 (CC) paras 9-10.
49 *FEDSAS* (n 39) paras 38-39.
50 As above.

The Court held that the regulations, including the power of the MEC to declare feeder zones, were valid, but simultaneously held that such feeder zones had to be finalised within one year from the judgment, thus ensuring that the default interim provision did not exist indefinitely.

Religion policies of SGBs were in issue in the case of *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* (*OGOD*).[51] While this was not a Constitutional Court case, it is worth mentioning because the case relied on the principles established in the *Ermelo* matter. The applicants instituted proceedings against six public schools, challenging the Christian-only religious practices at these schools on the basis that they violated the National Policy on Religion and Education (Religion Policy)[52] and various constitutional rights of learners. In response, the schools, supported by FEDSAS, challenged the constitutionality of the Religion Policy as violating the religious freedom of the schools in terms of section 15 of the Constitution to single religion practices within largely homogenous Christian schools.

The Council for the Advancement of the South African Constitution (CASAC) intervened as *amicus curiae*.[53] CASAC argued that the constitutionality of the Religion Policy was underpinned by the principles of diversity and equity and that the policy was premised on undoing the harms of Christian national education under apartheid. CASAC argued that SGB religious policies must conform to the Religion Policy as this was consistent with the Constitution. This would enable SGBs to issue rules accommodating the school's circumstances, provided that these rules are consistent with national policy and the Constitution. CASAC further argued that single religion schools constituted a state endorsement of a particular religion, which it asserted was unlawful.

The High Court confirmed that public schools were not permitted to promote, or allow their staff to promote, only one or predominantly one religion to the exclusion of others. It explained that '[f]irst, feeder communities continually evolve, and must be encouraged to evolve, given an unnatural residential demographic configuration that has resulted from historic laws that were racially skewed'.[54]

51 *OGOD* (n 37).
52 GG 25459 of September 2003.
53 A plethora of other *amici* were also admitted in support of the SGB religion policies, including Afriforum and Solidariteit.
54 *OGOD* (n 37) para 92.

The next part distils some of the key principles that have emerged from these cases and which this article submits is now being codified in the BELA Bill amendments.

4.3 Key principles regarding school governance

4.3.1 The duty on SGBs to be cognisant of systemic concerns in education

A significant aspect of the Constitutional Court's education jurisprudence in the school governance cases and, in fact, in all its education cases,[55] is the acknowledgment of the impact of apartheid education in perpetuating inequality and the necessity to redress this. As noted in part 2, redressing apartheid racial inequality is one of the central features of the doctrine of transformative constitutionalism. The Constitutional Court stated in *Ermelo:*[56]

> It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.
>
> In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular.

Flowing from this, the Court held that the powers of SGBs at individual schools cannot be exercised in isolation from the broader systemic issues in education, but must be understood within the context of the broader constitutional scheme and the imperative to redress the legacy of apartheid education. The Court held that while an SGB is enjoined to promote the best interests of the school and all learners at it, it

> must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interests of the

55 See, eg, *Governing Body of the Juma Musjid Primary School v Ahmed Asruff Essay NO* 2011 (8) BCLR 761 (CC) para 42; *Rivonia* (n 10) para 2; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 121-124.

56 *Ermelo* (n 40) paras 46-47.

> broader community in which the school is located and in the light of the values of our Constitution.[57]

In the *FEDSAS* case, in requiring that the provincial department develop feeder zones within a year to redress racial inequality entrenched by apartheid spatial geography, the Constitutional Court notes:[58]

> It is trite that the admission policy of a school must conform to all applicable law including provincial law. It cannot be otherwise because that is what the rule of law requires. It is so that when a school fashions its admission policy it will be actuated by the internal interests of its learners. It is also quite in order that a school seeks to be a centre of excellence and to produce glittering examination and other good outcomes. *But public schools are not rarefied spaces only for the bright, well-mannered and financially well-heeled learners. They are public assets which must advance not only the parochial interest of its immediate learners but may, by law, also be required to help achieve universal and non-discriminatory access to education.*

So too, in *OGOD,* in concluding that single-religion schools were unconstitutional, the High Court relying on *Ermelo* stated:[59]

> At the level of principle then, the overarching constitutional theme is that our society is diverse, that that diversity is to be celebrated, and that specific rights are conferred and dealt with in pursuance of that principle. *Within this context, public schools are public assets which serve the interests of society as a whole.*

Thus, in the development of admission, language and religion policies, while SGBs may make policies in the interests of its school community, they also have a fiduciary duty to be cognisant of and, if necessary, balance the interests of the school community against the wider systemic concerns relating to educational inequality. This means acknowledging the profound impact that racism and apartheid spatial geography have had on limiting access to former white, well-resourced schools and redressing that.

This principle of being cognisant of the broader needs of the community and, therefore, the imperative to address systemic issues in education, established in *Ermelo*, is the *leitmotif* that permeates the successive school governance judgments.[60] As highlighted in the discussion of cases, what these systemic issues are in each of the school governance was often brought to the fore by the progressive *amici curiae* that intervened in these cases.

57 *Ermelo* (n 40) para 80.
58 *FEDSAS* (n 39) para 44 (my emphasis).
59 *OGOD* (n 37) para 89 (my emphasis).
60 *Rivonia* (n 10) para 70 and *FEDSAS* (n 39) para 44.

It may also be argued that the duty to be cognisant of the broader needs of the community is the rationale for the remedies the Court adopted requiring the respective SGBs to revise their language policy in *Ermelo* and pregnancy policies in *Welkom*. Thus, while the Court did not establish normative human rights principle in respect of language or pregnancy rights, restricting itself to the issue of lawfulness of the provincial departments only, it nevertheless employed its wide remedial powers to remedy the rights issues at play in these cases at a school level. This principle is also the rationale for the SGB-related amendments to the BELA Bill and which is likely to form the basis for any justification by the state to threatened challenges to the BELA Bill.[61]

4.3.2 Cooperative governance and meaningful engagement

The other significant principle identified by the Constitutional Court is that of cooperative governance. *Ermelo* referred to SGBs, provincial government and the national government as the 'three crucial partners' that run public schools.[62] It held:[63]

> An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role it is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercise defined autonomy over some of the domestic affairs of the school.

Pursuant to the relationship of cooperative governance and intrinsic to this relationship, first in *Welkom*[64] and then in *Rivonia*, the Court imported the doctrine of 'meaningful engagement' from the Constitutional Court's housing evictions jurisprudence into its school governance jurisprudence. It emphasised that, in terms of the 'partnership model', provincial departments and SGBs are legally

61 Organisations have threatened to challenge the amendments if they were passed into law. See Afriforum Press Statement 'Afriforum continues preparation for litigation after National Assembly approves BELA Bill', http://AfriForum continues preparations for litigation after National Assembly approves Bela Bill - AfriForum (accessed 26 October 2023).
62 *Ermelo* (n 40) para 187.
63 *Ermelo* (n 40) para 56.
64 *Welkom* (n 38) paras 120-124.

obliged to negotiate with one another in good faith and in the 'best interests of the learners' before resorting to litigation.[65]

4.3.3 Grassroots democracy

The Court in *Ermelo* emphasised the importance of participative or local democracy, referring to an SGB as a 'beacon of grassroots democracy'.[66] This was affirmed in *Welkom*[67] and again in *Rivonia.*[68]

The point that is made in this article, however, is that grassroots democracy is not a stand-alone principle. SGBs form part and parcel of the tripartite, cooperative model of governance. In *Rivonia* the Constitutional Court stated that '[s]uch cooperation is rooted in the shared goal of ensuring *that the best interests of learners are furthered and the right to a basic education is realised*'.[69]

Both provincial government and individual schools have to grapple with systemic capacity problems and their impact on education. *At school level, parents and governing bodies have an immediate interest in the quality of children's education, and they play an important role in improving that quality by supplementing state resources* with school fees. However, the needs and interests of all other learners cannot be ignored.

Thus, highlighting that while parents pay school fees and have an immediate interest in the quality of education at their own school, this function cannot exist in isolation of the broader educational needs of society.

5 Codifying the school governance jurisprudence

5.1 An overview of the school governance amendments in the BELA Bill

The Department of Basic Education in 2017 took the assertive step to align the legal framework with these jurisprudential developments discussed.

65 *Rivonia* (n 10) para 78.
66 *Ermelo* (n 40) para 57.
67 *Welkom* (n 38) para 49.
68 *Rivonia* (n 10) para 40.
69 *Rivonia* (n 10) paras 69-70 (my emphasis).

The iteration of the BELA Bill that was introduced into Parliament in 2021 required that SGBs submit their admission[70] and language policies[71] to the HOD for approval. The HOD could approve or return these to the SGB with the necessary recommendations and reasons. When considering admission policies, the HOD had to be satisfied that SGBs considered the needs of the broader community in the specific education district in which the school is located. This was directly derived from the school governance jurisprudence. The HOD also had to consider certain other factors, including the best interests of the child principle, which is provided for in section 28 of the Constitution; equality as provided for in section 9 of the Constitution; whether there are other schools in the community that are accessible to learners; the efficient and effective use of state resources; and the space available at the school. In respect of language policies, a few additional criteria had to be considered, such as sections 6(2) and 29(2) of the Constitution as well as the changing number of learners who speak the language of learning and teaching at the public school.

SGBs also had to review their admission and language policies every three years or whenever some of the factors above have changed. This made the approval process subject to clear normative and rights-based criteria. The amendments provided for appeal procedures by the SGBs – or, in the case of an admission decision, even by a learner – to the MEC of a decision taken by the HOD.

The amendments further codified the holding in *Rivonia* in respect of admissions that, after consultation with the SGB, the HOD has the final authority to admit a learner.[72] Furthermore, the amendments gave the HOD the power to direct a school to adopt more than one language of instruction after following specified stringent procedural requirements.[73] For example, the Bill obliges a HOD to hold public hearings and afford parents, SGBs and members of the school community opportunities to make representations before making the decision.

The April 2024 iteration of the BELA Bill removes the HOD approval process. SGB admission and language policies need not be approved by the HOD, but the policies must reflect the normative and rights-based criteria that would have informed the HOD approval processes. SGBs must still review their policies every three years or when some

70 Clause 4.
71 Clause 5.
72 Clause 4.
73 Clause 5.

of the factors listed above have changed. The HOD can still direct a school to admit learners or to adopt an additional language. SGBs can appeal these directives.

5.2 The contestation in the BELA Bill public participation process

The contestation that occurred around the BELA Bill during the public participation process has largely mirrored that which occurred during the negotiations prior to South Africa's democratic transition and the kind of school governance disputes that have taken place in the courts.

The Parliamentary Report that analysed the BELA Bill during the National Assembly public participation process notes that

> [t]he Bill was in the main rejected by an organisation from the Home-Schooling Sector, the Democratic Alliance, African Christian Democratic Party, AfriForum and Freedom Front Plus. The Federation of School Governing Bodies of South Africa (FEDSAS) and the Suid-Afrikaanse Onderwyser Unie (SAOU) partially rejected the Bill as they specified the clauses they rejected.[74]

Most of the parties listed here objected to the school-governing provisions. Some of the other organisations not listed in that section of the report but who also objected to the school governance amendments include the South African Institute for Race Relations (SAIRR); Solidariteit; Cause for Justice; and the FW de Klerk Foundation.

The Parliamentary Report notes that '[t]hose that rejected the Bill argued that the centralisation of power to determine the language and admission policy was counterproductive as it will create an unnecessary burden for the Head of Department'.[75] A reading of the submissions suggests a much wider, ideological critique of the amendments underpinned by notions of parental choice and which aligns with the early attempts of minority parties to create language, religious and cultural enclaves. The Afriforum submission, for example, refers to the amendments as 'a calculated attack on the Afrikaans language'.[76]

74 Draft National Report (n 2) 17.
75 Draft National Report (n 2) 9.
76 AfriForum 'Afriforum's oral submission to the Portfolio Committee on Basic Education on the Basic Education Amendment Laws Bill (B2-22)' 15 November 2022 4 (copy on file with author).

Many of these submissions rely on the case law discussed – albeit selectively – to argue that the BELA Bill contradicts the principles established in the school governance jurisprudence. Some assert that by imposing a model of centralised control of decision making on schools, the partnership model of cooperative governance is violated.[77] Many argue that the principle of grassroots democracy is undermined by requiring admission and language policies be ratified by the HOD.[78] Interestingly, none of the organisations that assert the jurisprudence as the basis for their submissions mention the duty of SGBs to be cognisant of the broader systemic concerns in education. The submissions also allege violations of education rights, especially language rights in education. Organisations such as the FW de Klerk Foundation also assert specific group rights such as section 30 in respect of language and culture, and section 31 in respect of cultural, religious and linguistic communities.[79] Some of the submissions emphasise the rights of parents to choose.[80] Finally, some of the submissions such as the Afriforum submission argue that former white schools are being forced to take on more learners to overcome the provincial department failures to provide infrastructure in provinces where infrastructure is lacking.[81]

On the other hand, progressive civil society organisations such as Equal Education, the Equal Education Law Centre and SECTION27, while they objected to certain amendments, such as the sale of alcohol on school grounds and the extent of the criminal sanctions of parents who do not send their children during the compulsory phase of education, these organisations supported the amendments relating to the language and admission policy-making functions of SGBs.[82] The parliamentary report notes that '[t]he participants in the public hearings who supported the Bill *stressed the transformative nature of the Bill particularly in language and admission policies*, as historically disadvantaged children are denied access to former Model C schools due to language and admission policies'.

77 As above. 'South African Institute of Race Relations 'Submission to the Portfolio Committee on Basic Education regarding the Basic Education Laws Amendment Bill of 2022 [B2-2022]' 15 June 2022, http://irr-submission-bela-bill-2022-15-june-2022-1.pdf (accessed 25 October 2023).

78 AfriForum's submission (n 76). Cause for Justice Submissions to the Basic Education Laws Amendment Bill', http://Cause for Justice submission_10.01.2018 (accessed 25 October 2023).

79 FW de Klerk Foundation (n 30) para 6.

80 Cause for Justice (n 78).

81 AfriForum's submission (n 76).

82 Equal Education and Equal Education Law Centre 'Joint submission on the Basic Education Laws Amendment Bill – 2022' 15 June 2022, http://FINAL DRAFT DOC 220526 BELA Combined submission and exec summary (equaleducation.org.za) (accessed 25 October 2023); SECTION27 'Submission on the Basic Education Laws Amendment Bill' (15 June 2023), http://Section27s-BELA-submission-FINAL-June-2022.pdf (accessed 25 October 2023) (my emphasis).

Despite this, organisations opposing the BELA Bill have managed to maintain a sustained and well-resourced campaign that has threatened litigation as noted above, packed the various public participation processes, and engaged in various other tactics.[83] This undoubtedly led to the further amendment to the BELA Bill withdrawing the necessity of the HOD approval process.

5.3 Analysing the school governance amendments in the BELA Bill

5.3.1 Adopting substantive human rights norms to guide SGB policy making

According to Brickhill and Van Leeve, while the courts in the school governance cases have acknowledged that in appropriate cases the HOD can intervene in policy-making decisions, and in accordance with procedural safeguards:[84]

> [T]he courts have paid insufficient attention to the conflict of interests among the insular school governing bodies, the state and those who are outside of the school. It is generally being left to the parties and friends of the court (amici curiae) to ensure that these considerations are properly before the courts by introducing relevant evidence and argument that broadens the scope of the issues.

Therefore, they suggest that 'education departments must take an assertive approach in mediating these contestations through appropriate regulatory or policy guidance, instead of leaving it up to the school governing bodies or the courts to resolve'.[85]

Fredman goes a step further in her critique of the Constitutional Court's approach in school governance cases. She argues:[86]

> Local democracy by its nature serves the interests of insiders … it is not sufficient to leave the resolution of basic human rights to these bodies alone. Nor is it enough to expect co-operation and meaningful

83 Afriforum has an Afrikaans campaign 'Red Afrikaanse skole', translated meaning 'Save Afrikaans schools'. This has included billboards on South Africa's highways, https://afriforum.co.za/tag/red-afrikaanse-skole/ (accessed 25 April 2024).
84 Brickhill & Van Leeve (n 34) 156.
85 Brickhill & Van Leeve (n 34) 157.
86 S Fredman 'Procedure or principle: The role of adjudication in achieving the right to education' (2016) 6 *Constitutional Court Review* 197. In a reply to Fredman, Van Leeve argues that ensuring respect for the rule of law and the principle of legality by provincial governments is as important as substantive human rights principles. See Y van Leeve 'Executive heavy handedness and the right to basic education – A reply to Sandra Fredman' (2014) 6 *Constitutional Court Review* 211.

> engagement on issues which have already triggered fundamental conflict.

She, therefore, suggests that a procedural approach has been favoured by the courts at the expense of the courts adopting substantive human rights principles that could provide a guiding framework for SGBs. Perhaps so but, as the Court stated in *FEDSAS,* this would be introducing a new cause of action into the case. Fredman's critique also does not interrogate the failure of the Department of Basic Education to set norms and standards protecting learners' rights which is its role and function within the cooperative governance framework and to which SGBs would have to conform.

It is worth mentioning that while the Constitutional Court did not establish any normative principles in *Welkom* in respect of discrimination on the grounds of pregnancy, in 2021 a policy titled Department of Basic Education Policy on the Prevention and Management of Learner Pregnancy in Schools was finalised. The policy expressly provides that a school may not discriminate against a learner based on her pregnancy status. Furthermore, subsequent and, pursuant to the *FEDSAS* judgments, regulations relating to the admission of learners to public schools in Gauteng were passed. These regulations require that the learner's residence must be within 30 kilometres of the school.[87]

While the latest iteration of the school governance amendments reflects a significant shift from previous iterations by removing the approval process of the HOD, the SGB policy-making processes must still be guided by the specific normative and rights-based criteria that were introduced by the Department of Basic Education and then into the parliamentary processes. Thus, it is asserted, the appropriate regulatory guidance endures into this last iteration of the BELA Bill.

5.3.2 The amendments do not violate the principles developed in the jurisprudence

Those who opposed the National Assembly draft of the BELA Bill asserted that it constituted a usurpation of grassroots democracy and as undermining of the principles of cooperative governance.

These principles remain intact and are potentially enhanced within the tripartite relationship between the Department of Basic

87 G Ritchie 'Gauteng school feeder zones expanded to 30 km' *Mail and Guardian* (Johannesburg) 16 November 2018.

Education, provincial authorities and SGBs. This is because the Department of Basic Education has fulfilled its function through the development of normative rights-based principles to guide SGB policy making. The HOD must oversee the implementation of these criteria and must meaningly engage in a dialogue with SGBs where polices require adjustment. SGBs may appeal a directive of the HOD where an agreement cannot be reached. For provincial departments, where an agreement cannot be reached and SGBs policies do not reflect normative rights-based principles, the department may take SGBs on review and these reviews will be considered against the normative rights-based criteria.

Furthermore, given that these principles remain intact, the amendments are likely to withstand constitutional challenges from those who continue to oppose even this latest iteration of the BELA Bill.[88]

5.3.3 The remaining systemic concerns

Certain systemic concerns remain.

First, space and overcrowding in schools remain a systemic problem in South African education.[89] Redressing the school infrastructure backlog is a significant concern and an impediment to a quality education for all. This is also why many of the progressive civil society organisations that supported the BELA Bill simultaneously advocated the implementation of minimum standards in school infrastructure. Requiring that more schools and classrooms be built does not, however, negate the necessity for the school governance reforms. The two issues are not mutually exclusive. In fact, both are necessary to ensure access to a quality education.

A second issue is that former white schools continue to charge high school fees to ensure that schools remain well sourced. While these schools are required to provide exemptions from school fees, access to well-resourced schools remains out of reach of the poorest families.[90] Most poor learners attend fee-free schools that are under-

88 J Botha 'BELA: Afrikaans remains in jeopardy – Solidarity' *Politics Web* (Johannesburg) 24 April 2024, http://BELA: Afrikaans remains in jeopardy – Solidarity - POLITICS | Politicsweb/ (accessed 25 April 2024).

89 See, eg, Equal Education 'No space for us' (23 November 2021), http://equal-education-no-space-for-us-overcrowding-booklet-digital-sgl-pages-agent-orange-design-20211123 (equaleducation.org.za) (accessed 30 October 2023).

90 The Schools Act of 1996 introduced school fees at all public schools. However, pursuant to a review due to the unaffordability of schooling for the poorest learners and the likelihood of a constitutional challenge to the charging of school fees, significant policy reforms were introduced from including that

resourced and which provide an inferior education. Thus, while language and admission barriers may be addressed by the BELA Bill's school governance amendments and facilitate improved access to former white schools, overwhelmingly, the class barriers to access well-resourced and high-performing schools remain as structural constraint.

6 Conclusion

This article has noted that the decentralisation model adopted in the Schools Act occurred in the political context of the negotiated transition and has remained highly contested. The experience of the school governance litigation has highlighted how SGB power in policy-making functions has been exploited by some former white schools. The article has argued that while the jurisprudence has affirmed the principles of cooperative governance, grassroots democracy and meaningful engagement, the overwhelming *leitmotif* of the Constitutional Court jurisprudence has been to place a duty on SGBs to be cognisant of the broader systemic concerns in education so as to ensure redress of apartheid education. This jurisprudence has been codified in the BELA Bill. Thus, SGBs must now develop their policies in accordance with the normative rights-based principles emanating from this jurisprudence. Rather than undermining the notion of tripartite governance, the codification of these normative rights-based principles in fact may enhance the relationship.

Finally, the article illustrates how the systemic concerns that underpinned the school governance disputes were highlighted by progressive *amici*. This in turn led to the development of progressive principles in the Constitutional Court. The Department of Basic Education, as the executive, and then the legislature, has sought to address this through their respective law-making functions by codifying these principles in the BELA Bill. Thus, the BELA Bill serves as an example of how a process to address systemic concerns may be initiated through the courts, but which then can be codified by executive and legislative processes.

As McFarlane correctly notes of these policy changes, 'rather than signifying a betrayal of the 1994 settlement, it is to be expected

60% of the poorest schools were made fee free while schools in the wealthier areas continued to charge schools fees. See, eg, F Veriava 'The amended legal framework: A boon or a barrier?' (2007) 23 *South African Journal on Human Rights* 180; D Roithmayr 'Access, adequacy and equality: The constitutionality of school fee financing in public education' (2003) 19 *South African Journal on Human Rights* 382.

that in the almost 30 years since then, some rethinking of these arrangements is necessary'.[91]

91 McFarlane (n 26).

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: N Ally & T Kazim 'Lessons from the "minimum core" approach to the right to basic education in South Africa' (2024) 24
African Human Rights Law Journal 179-208
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a9

Lessons from the 'minimum core' approach to the right to basic education in South Africa

Nurina Ally
Senior Lecturer, Department of Public Law; Director, Centre for Law and Society, Faculty of Law, University of Cape Town, South Africa
https://orcid.org/0000-0003-1587-7676

Tatiana Kazim
Legal Researcher, Equal Education Law Centre, Cape Town, South Africa
https://orcid.org/0009-0003-2804-2990

Summary: *South Africa's Constitutional Court has seemed notoriously reluctant to accept that socio-economic rights have a 'minimum core'. Following* Mazibuko v City of Johannesburg*, the Constitutional Court is generally viewed as having rejected a minimum core approach altogether. However, the position in relation to the right to basic education has been much less clearcut. The courts have never expressly disowned a minimum core approach to basic education. In fact, the Constitutional Court in* AB v Pridwin Preparatory School *implicitly acknowledged that the state is obliged to provide education of a certain quality or standard. There is also a line of case law in which the right to basic education has been given minimum content: The courts have held that it includes a right to textbooks, classroom furniture, basic infrastructure, sufficient teachers, transport and, more recently, nutrition. We argue that three lessons may be drawn from this 'minimum core' type approach. First, there is scope*

* BA LLB (Wits) MSc (Edinburgh) MSt (Oxford); Nurina.Ally@uct.ac.za. We are grateful to Leo Boonzaier, Sandra Fredman, Faranaaz Veriava and Robyn Beere for their helpful comments on earlier drafts. Any errors remain our own.
** BSc (LSE) BA Jurisprudence (Oxford) BCL (Oxford); tatiana@eelawcentre.org.za

for courts to further develop the content of the right to basic education by specifying not only minimum inputs but also minimum outcomes entailed by the right. This shift in the jurisprudence, from inputs to outcomes, may be needed to hold government to account and ensure that the right to basic education is more than just an on-paper promise. Second, the 'minimum core' approach in the basic education context could also be applied to the interpretation and development of other immediately realisable rights recognised by the Constitution, such as the right of every child to basic nutrition. Third, jurisprudence on the right to basic education demonstrates the potential for developing the minimum content of progressively realisable socio-economic rights.

Key words: *basic education; socio-economic rights; minimum core; immediately realisable rights; progressively realisable rights*

1 The concept of the 'minimum core'

The idea that socio-economic rights have a 'minimum core' emanates from General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights:[1]

> [A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant.

Supposedly, South Africa's courts, up to and including the Constitutional Court, have been reluctant to accept this idea. Especially following the Constitutional Court judgment in *Mazibuko v City of Johannesburg* (*Mazibuko*),[2] some concluded that the minimum core approach had been rejected altogether.[3] They can be forgiven for doing so; *Mazibuko* did contain strong statements against the

1 General Comment 3: The nature of states parties' obligations (art 2 para 1 of the Covenant) (14 December 1990) UN Doc E/1991/23 (1990) para 10.

2 2010 (4) SA 1 (CC).

3 See, eg, S Majiedt '"Dreams and aspirations deferred?": The Constitutional Court's approach to the fulfilment of socio-economic rights in the Constitution' (2022) 26 *Law, Democracy and Development* 6 (the Court has 'firmly rejected' the minimum core concept); L Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure* 754 (the Court has 'failed to recognise minimum core obligations' and the 'door seems to be closed at least for the foreseeable future' on revisiting its approach); D Roithmayr 'Lessons from *Mazibuko*: Persistent inequality and the commons' (2010) 3 *Constitutional Court Review* 322-323 (the Court has rejected recognition

minimum core. However, in this article we argue that the courts have in fact taken a minimum core approach (or something very close) to at least one type of socio-economic right, namely, the right to basic education.

While there is no real consensus on what a 'minimum core' approach entails,[4] the concept can be said to have at least two dimensions. The first concerns the *content* of the right – that is, the minimum entitlements of rights holders. The minimum entitlements may be specified at a concrete level (for instance, the provision of at least 50 litres of water per person per day)[5] or a more abstract level (for instance, sufficient water to lead a dignified life).[6] The applicability of statements about the minimum content of the right may also range from being universally applicable, on the one hand (applying to all people at all times) to more context-specific on the other (applying only to a more specific group or section of the population, in specific circumstances).[7] The second dimension concerns the *time scale* or *urgency* with which the right must be realised by the relevant duty bearer. The minimum core of the right is generally considered to represent the floor below which no person can fall, meaning that the state (as duty bearer) must prioritise its realisation when allocating resources.[8]

We will argue that South African courts have been willing to give both abstract, universally-applicable content to the right to basic education and, in some cases, also more concrete content. In this sense, at least, one could say that the South African courts have taken a 'minimum core' approach to the right to basic education.

---

of minimum core approaches and 'retreated behind principles of reasonableness and progressive realisability').

4 Young provides an illuminating analysis of the 'inconsistencies and controversies' that have accompanied the concept; see K Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 116.

5 As Young (n 4) 115 notes, one of the questions arising from the minimum core concept is whether it involves 'a more general or more precise instantiation of the parent right'.

6 See, eg, D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 488 ('the role of the court in this respect would be to set the general standard that must be met for the state to comply with its minimum core obligation').

7 As we discuss below, the Constitutional Court seemed open to the context-specific approach in two of its early socio-economic rights cases. Some scholars take the view that context-specific determinations are inconsistent with a minimum core approach; see Bilchitz (n 6) 489; Young (n 4) 131.

8 The minimum core approach has been described as a 'means of specifying priorities', requiring the state to most urgently address the needs of 'those in a condition where their survival is threatened'; D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 15-16.

Applying the second dimension of the minimum core concept to the right to basic education is more complicated. The right to basic education is a socio-economic right, in that it gives people entitlements to the resources, opportunities and services needed to lead a dignified life.[9] However, it is distinct from many other socio-economic rights contained in the South African Constitution in that it is unqualified or 'immediately realisable'. Most other socio-economic rights contain what is often described as a 'progressive realisation clause'. For example, while everyone has the right to have access to adequate housing under section 26 of the Constitution, this right is qualified: The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 27, which gives everyone the right to have access to healthcare services, sufficient food and water, and social security, contains an almost identical clause. Section 29(1)(a) contains no such clause; it states, without qualification, that everyone has the right to a basic education.

On one view, the minimum core concept – especially in light of its second dimension – has no application except in relation to progressively-realisable socio-economic rights. On this view, qualified or progressively-realisable rights have two tiers: (i) the minimum core of the right, to which resources must be devoted as a matter of priority; and (ii) the full content of the right (beyond the minimum), which must be realised progressively, within the resources available once constitutional priorities have been taken into account.[10] By contrast, unqualified or immediately-realisable rights have just one tier: The entire content of right must be realised as a matter of priority, with state resources to be allocated accordingly. Put differently, one might say that the entirety of the right to basic education (an unqualified or immediately realisable right) is on par, constitutionally speaking, with the minimum core of the right to access to housing (a qualified or progressively realisable right) and they warrant the same degree of prioritisation when it comes to the allocation of state resources.[11]

9 That said, the distinction between socio-economic and civil and political rights should not be overstated. As Tobin notes, the right to education, which enables the enjoyment of various other rights, 'defies any watertight classification'; J Tobin 'Article 28: The right to education' in J Tobin *The UN Convention on the Rights of the Child: A commentary* (2019) 1058.

10 Bilchitz (n 8) 11-12, eg, sees the minimum core requirement as an incident of progressive realisation ('[t]he notion of progressive realisation must thus be read to include as a base-line the provision of minimum essential levels of a right').

11 Viljoen illustrates this conception with reference to the unqualified right of every child to 'shelter' (set out in sec 28(1)(c) of the Constitution) and the progressively-realisable right of everyone to have access to 'adequate housing' (in sec 26 of the Constitution); see F Viljoen 'Children's rights: A response from a South African perspective' in D Brand & S Russell (eds) *Exploring the content of socio-economic rights: South African and international perspectives* (2002) 206. See also C Scott & P Alston 'Adjudicating constitutional priorities in a transnational

One may object to this characterisation. It seems to imply that, once the minimum entitlements entailed by the right to basic education are fulfilled, the state can have no further constitutional duties in respect of that right. Why should the right to basic education have a ceiling that is equivalent to its floor, when the same cannot be said for other, progressively-realisable socio-economic rights?[12] Given the repeated statements from South Africa's courts, as well as international treaty bodies, about the special importance of education, this may seem odd.[13] A possible response is that the right to basic education constitutes the minimum core of the broader right to education. This broader right includes the right to further education, which is progressively realisable.[14] However, even if one accepts that the second dimension of the 'minimum core' concept does not straightforwardly apply to the right to basic education, one must still ask: What is the minimum *content* of the right to basic education? What minimum entitlements does the right entail? In this sense, as Scott and Alston note, 'a minimum core content analysis is also unavoidable' even in respect of immediately realisable rights.[15] As we see it, regardless of whether one argues that the right to basic education *has* a minimum core or *just is* the minimum entitlement of each person, the key point remains: The minimum content of the right has been specified by the courts on a number of occasions and in some detail.

2 Discourse on the minimum core approach to socio-economic rights in South Africa

The Constitutional Court has been urged to adopt a minimum core approach in three landmark socio-economic rights cases. In the first case, *Government of the Republic of South Africa v Grootboom* (*Grootboom*),[16] a community of around 400 adults and 500 children

context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *South African Journal on Human Rights* 260.

12 For this reason, Viljoen (n 11) 203 is wary of employing the concept of minimum core obligations in relation to immediately-realisable rights. It risks, he says, the 'danger of a "floor" (a minimum) becoming a "ceiling" (a maximum)'.

13 In *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (4) SA 546 (CC) para 1, eg, Moseneke J emphasised that 'education's formative goodness to the body, intellect and soul' has been 'beyond question from antiquity'.

14 This view is advanced by C Simbo 'The right to basic education, the South African Constitution and the *Juma Musjid* case: An unqualified human right and a minimum core standard' (2013) 17 *Law, Democracy and Development* 499. Even on this approach, one still needs to determine the minimum entitlements necessary for basic education, on the one hand, and for further education, on the other.

15 Scott & Alston (n 11) 264.

16 2001 (1) SA 46.

had been rendered homeless following an eviction from their informal homes by the City of Cape Town. The applicants sought an order requiring the municipality to provide them with temporary shelter or housing pending their securing of permanent accommodation. In support of the applicants' case, two *amici curiae* contended that the right of access to adequate housing entailed a minimum obligation on the part of the state to provide shelter to the claimants.

Yacoob J rejected this contention,[17] but in doing so he was careful not to foreclose the possibility of a minimum core approach to the interpretation of rights. Instead, he expressly contemplated that it may be 'possible and appropriate' to 'have regard to the content of a minimum core obligation' in determining the reasonableness of measures taken by the state to realise the right in question.[18] Such a determination, however, would require context-specific information on the 'needs and the opportunities for the enjoyment' of the relevant right.[19] In the absence of such information, Yacoob J opted to leave open the question as to whether it is 'appropriate for a court to determine in the first instance the minimum core content of a right'.[20] He proceeded to determine the issue based on an assessment of whether, under section 27(2), the measures adopted by the state to progressively realise the right to access adequate housing were reasonable. The Court held that the state's housing programme was unreasonable and unconstitutional as it failed to make provision for those in most desperate need.

Following *Grootboom*, the Court in *Minister of Health v Treatment Action Campaign (No 2)* (*TAC II*)[21] also relied on a reasonableness framework when determining a claim based on the right to have access to healthcare services. At issue was the government's decision to restrict the availability of nevirapine, an anti-retroviral drug used to prevent pre-natal transmission of HIV, to only certain sites in the public sector. Writing collectively as 'the Court', the justices held that such restrictions were unreasonable and unconstitutional. The state was ordered to take reasonable measures to facilitate and expedite the use of nevirapine beyond the identified sites.

The Court in *TAC II* definitively rejected arguments by the *amici* that the right to have access to healthcare services, as set out in section 27(1), includes a minimum core entitlement to which every

17 Yacoob J disagreed with the suggestion that shelter constitutes an 'attenuated form of housing'; see *Grootboom* (n 16) paras 72-73.
18 *Grootboom* (n 16) para 33.
19 *Grootboom* (n 16) para 32.
20 *Grootboom* (n 16) para 33.
21 2002 (5) SA 721 (CC).

person in need is *immediately* entitled. According to the Court, this account of minimum core obligations was incompatible with section 27(2) of the Constitution, which obliges the state to adopt reasonable measures to *progressively* realise the right within its available resources. The Court also cautioned that the determination of minimum-core standards requires 'wide-ranging factual and political enquiries' for which 'courts are not institutionally equipped'.[22] Nonetheless, despite this definitive stance, the Court did not contradict the suggestion in *Grootboom* that context-specific evidence in a particular case may 'show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable'.[23]

The approach to socio-economic rights adjudication in *Grootboom* and *TAC II* generated significant scholarly attention.[24] Some commentators praised the Court's reasonableness framework as a 'novel and promising approach to judicial protection of socio-economic rights'.[25] Others criticised the Court for its unwillingness to recognise that socio-economic rights include minimum core protection of every individual's 'most urgent survival interests'.[26] However, even critics of the Court's approach endorsed the practical outcome in both cases, with some optimism that the Court may still be open to supplementing its reasonableness framework with an analysis of the 'minimum core' content of rights.[27]

22 *TAC II* (n 21) para 37.
23 *TAC II* (n 21) para 34.
24 A non-exhaustive list of discussions includes Chenwi (n 3); S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 146-183; Young (n 4); K Lehmann 'In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22 *American University International Law Review* 163-198; M Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882-905; D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for?"' in H Botha and others (eds) *Rights and democracy in a transformative constitution* (2003) 33-56; MS Kende 'The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective' (2006) 6 *Chapman Law Review* 137-160; Bilchitz (n 8); Bilchitz (n 6); T Roux 'Understanding *Grootboom* – A response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41-51; CR Sunstein 'Social and economic rights – Lessons from South Africa' (2000) 11 *Constitutional Forum* 123-132.
25 Sunstein (n 24) 123. Lehmann (n 24) and Kende (n 24) also defended the Court's approach.
26 Bilchitz (n 8) 2. For similar critiques, see Pieterse (n 24) 897-898; Brand (n 24) 46-49.
27 Liebenberg, eg, suggested possibilities for 'reconceiving reasonableness'; see Liebenberg (n 24) 173-186. For more recent commentary, see S Liebenberg 'Reasonableness review' in M Langford & K Young (eds) *The Oxford handbook of economic and social rights* (2022) C48S1-C48N156.

Then came *Mazibuko*. That case concerned the right of access to 'sufficient' water under section 27(1)(b) of the Constitution.[28] The applicants were five people living in Phiri, Soweto. They challenged two actions of the City of Johannesburg: first, the implementation of the municipality's free basic water policy, under which six kilolitres of free water was supplied every month to every account holder in the city and, second, the installation of pre-paid water meters. The applicants argued that six kilolitres of water was not sufficient, and the free basic water policy, therefore, was contrary to their rights under section 27(1)(b). They said that a sufficient amount of water for a dignified life is 50 litres per person per day and they asked the Court to declare as much.

Overturning the decisions of the High Court and Supreme Court of Appeal, the Constitutional Court rejected these arguments and held that the free basic water policy fell within the bounds of reasonableness and, therefore, was not in conflict with section 27 of the Constitution. O'Regan J described the applicants' argument in relation to the free basic water policy as 'similar to a minimum core argument though ... more extensive because it goes beyond the minimum'.[29] She stated that the argument 'must fail for the same reasons that the minimum core argument failed in *Grootboom* and *Treatment Action Campaign No 2*'.[30] These reasons were two-fold. First, the claim that minimum core obligations must be realised immediately is irreconcilable with the text of the Constitution, which specifically makes some rights progressively realisable and subject to available resources. Second, it is not appropriate for courts to determine the precise steps that must be taken by the legislature and executive to progressively realise socio-economic rights. As O'Regan put it:[31]

> [O]rdinarily *it is institutionally inappropriate for a 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.* This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.

28 The section provides that everyone has the 'right to have access to sufficient food and water'.

29 This was because the applicants asked the Court to declare what level of provisioning would be 'sufficient'; see *Mazibuko* (n 2) para 55.

30 *Mazibuko* (n 2) para 55. The suggestion that the minimum core argument failed in *Grootboom* is misleading. As we have noted, Yacoob J left that question open (*Grootboom* (n 16) para 33).

31 *Mazibuko* (n 2) para 60 (our emphasis).

In *Mazibuko*, O'Regan J seemed to go further than merely rejecting what she described as the minimum core argument put forward in that particular case. She appeared to reject a minimum core approach to socio-economic rights altogether. While not dismissing it, her opinion does not engage the possibility, raised in *Grootboom* and *TAC II*, that a context-sensitive and evidence-based determination of minimum core obligations may inform an assessment of the reasonableness of the state's measures in some cases. Instead, she emphasised that '[t]he concept of reasonableness places context at the centre of the enquiry' and cautioned that '[f]ixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context'.[32]

Mazibuko has been widely interpreted as delivering the death blow to the adoption of a minimum core approach in South Africa.[33] In the 15 years since the judgment was handed down, the Constitutional Court has not directly engaged minimum core arguments in respect of socio-economic rights.[34] Critics have since bemoaned the Court's 'proceduralisation' of socio-economic rights and the adoption of on 'an over-flexible, abstract and decontextualised'[35] reasonableness standard, which they say offers claimants little more than a right to a reasonable government plan (as opposed to a right to concrete socio-economic goods and services).[36]

At first blush, the Court's approach in *Grootboom*, *TAC II* and *Mazibuko* seems to leave little room for developing any minimum substantive content for socio-economic rights. However, it is important to recognise that the Court's pronouncements in these

32 *Mazibuko* (n 2) para 59.

33 *Mazibuko* (n 2). Compare J Fowkes 'Socio-economic rights' in J Fowkes *Building the Constitution – The practice of constitutional interpretation in post-apartheid South Africa* (2016) 297-300 (*Mazibuko* was neither as definitive nor as restrictive as critics suggest).

34 The concept of minimum core obligations was raised obliquely in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC) (*Eskom Holdings*). The applicants sought an interim interdict restraining the reduction of their electricity supply by the national electricity supplier. Madlanga J, leading the Court's majority, upheld the interim interdict. Writing for the minority, Unterhalter J characterised the majority's approach as imposing an obligation on the state to supply a specific resource at a specific level (paras 129-135).

35 S Wilson & J Dugard 'Constitutional jurisprudence: The first and second waves' in M Langford and others (eds) *Socio-economic rights in South Africa – Symbols or substance?* (2013) 56.

36 See, eg, Roithmayr (n 3); P O'Connell 'The death of socio-economic rights' (2011) *74 Modern Law Review* 552 (*Mazibuko* recast socio-economic rights guarantees as 'some form of hyper-procedural requirement' as opposed to 'a guarantee of substantive material change'). As noted earlier, some commentators had already taken a grim view of the Court's jurisprudence following *Grootboom* and *TAC II*; see, eg, Pieterse (n 24) 897-898; Brand (n 24) 46-49; Bilchitz (n 8); Bilchitz (n 6). For recent defence of the Court's approach, see Majiedt (n 3).

cases were in response to a particular conception of minimum core obligations, as contended for by the *amici* and the applicants. Those claims, which engaged progressively-realisable rights, asked the Court to adopt the thickest version of both the content and temporal dimensions of a minimum core approach; that is, (i) immediate provisioning (ii) of certain resources (iii) at a concrete level (iv) for all people. It was this type of claim that the Court rejected. However, this should not, in our view, be read as foreclosing the development of the minimum *content* of socio-economic rights altogether.

3 The approach to the right to basic education

The judgment in *Mazibuko* notwithstanding, there are good reasons to think that the right to basic education entails minimum individual entitlements.

One of the foremost Constitutional Court cases on the right to basic education was *Governing Body of the Juma Musjid Primary School v Essay NO* (*Juma Musjid*).[37] Nkabinde J, having regard to the purpose of the right to basic education, established that one component of the right to basic education is access to school:[38]

> [B]asic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.

The courts have since developed the jurisprudence on access to school, and have held that the scope of the right to basic education extends at least up to grade 12. Khampepe J in the Constitutional Court case of *Moko v Acting Principal of Malusi Secondary School* (*Moko*)[39] said that

> [t]o limit basic education under section 29(1)(a) either to only primary school education or education up until grade 9 or the age of 15 is … an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right.[40]

37 2011 (8) BCLR 761 (CC).
38 *Juma Musjid* (n 37) para 43.
39 2021 (3) SA 323 (CC).
40 *Moko* (n 39) para 32.

Accordingly, she held that 'the applicant's matric examinations fell within the definition of basic education'.

There have also been some indications that the scope of the right extends down to early learning delivered at early childhood development (ECD) programmes. For example, the recent High Court case of *Sernė NO v Mzamomhle Educare* (*Sernė*)[41] involved the attempted eviction of an ECD centre from land in Wallacedene, Cape Town. The High Court stated that this was an ECD centre in which 'young and vulnerable children are educated'[42] and asked itself 'whether the applicants by instituting the eviction proceeding … are not hampering the best interests of the child as entrenched in section 28(2) of the Constitution and a right to basic education as protected in section 29(1) of the Constitution'.[43] Having regard to the likely impact on children's rights under sections 28 and 29 of the Constitution, the application for the eviction was dismissed.

In addition to establishing that the right to basic education includes access to school, the Constitutional Court in *Juma Musjid* also established that the right to basic education is immediately realisable and may only be limited in terms of a law of general application, as per section 36 of the Constitution. The facts of *Juma Musjid* involved the attempted eviction of a public school from the applicant's private property. Technically, then, the case did not directly concern state obligations in respect of the right to basic education. Nonetheless, in a much-quoted passage, the Court stated:[44]

> It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). *Unlike some of the other socio-economic rights, this right is immediately realisable*. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. *The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'*.[45]

41 [2021] ZAWCHC 189.
42 *Sernė* (n 41) para 5.
43 *Sernė* (n 41) para 63. On the relationship between the right to basic education, the best interests of the child, and children's broader rights to development, see N Ally, R Parker & TN Peacock 'Litigation and social mobilisation for early childhood development during COVID-19 and beyond' (2022) 12 *South African Journal of Childhood Education* 6-9; J Sloth-Neilsen & S Philpott 'The intersection between article 6 of the UN Convention on the Rights of the Child and early childhood development' (2015) 2 *Stellenbosch Law Review* 316-317.
44 *Juma Musjid* (n 37) para 37.
45 Our emphasis.

This begs the question: What, exactly, is it that must be immediately realised? 'Education' is an ambiguous and complex concept. In the absence of a clear articulation of its content, it would be difficult to know whether or not the right to basic education has in fact been realised for any given learner. As it happens, the courts lost little time in providing an answer. Building on *Juma Musjid*, there is a line of case law in which the content of the right to basic education has been fleshed out: The courts have held that it includes a right to basic school infrastructure, textbooks, classroom furniture, teachers, transport and, more recently, nutrition.[46]

The first major set of cases that presented the opportunity to develop the content of the right to basic education concerned school infrastructure. These cases are sometimes referred to as the *Mud Schools* cases.[47] The first *Mud Schools* case was brought by seven schools in the Eastern Cape. The seven applicant schools were some of many schools across the country that had been built by members of the local community using mud bricks and wooden frames, in response to the neglect of the apartheid government. These structures were generally in a bad state of repair and were not considered safe or adequate, and in 2004 President Mbeki committed to improving or replacing these. Yet, by 2011 many mud schools remained. The case was settled before the hearing began.[48] The national and provincial Department of Basic Education (DBE) committed to providing safe structures for the seven applicant schools. Importantly, the national DBE also committed to eradicating all mud schools in the country. They allocated R8,2 billion over four years and also launched the Accelerated Schools Infrastructure Development Initiative (ASIDI), to 'eradicate' mud schools and provide water, electricity and sanitation in the Eastern Cape. The second *Mud Schools* case was brought three years later, in response to delays in implementing ASIDI. This second case was also settled, with the settlement being made an order of court.[49]

46 For discussion, see S Fredman *Comparative human rights law* (2018) 393-396. See also F Veriava *Realising the right to basic education – The role of the courts and civil society* (2019) for an enlightening analysis of the contribution of courts and civil society to a 'transformative constitutionalist narrative' on the right to basic education.

47 For more detailed discussion, see S Budlender, G Marcus & N Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2014) *Atlantic Philanthropies* 79-81.

48 Budlender and others (n 47) 80 record that applicants' lawyers initially wanted to use the matter as a test case for establishing a minimum core approach in respect of basic education. Given the precedents in *Grootboom* and *TAC II*, however, it was thought that this would be 'unhelpful and counterproductive'. Instead, the case was framed using a reasonableness inquiry.

49 See J Brickhill 'Strategic litigation in South Africa: Understanding and evaluating impact' PhD thesis, University of Oxford, 2021 192.

While the *Mud Schools* cases did not result in binding precedent, subsequent litigation would build on the practical foundation they established. Following advocacy and litigation by the social movement, Equal Education, the DBE eventually promulgated minimum norms and standards for school infrastructure.[50] The regulations required the state, within certain timelines, to ensure that all public schools complied with various basic infrastructure requirements (such as the provisioning of toilets and water, libraries, classrooms and electricity). Concerned that the regulations failed to give proper effect to the right to basic education, Equal Education approached the High Court to declare certain of its provisions unconstitutional. The impugned provisions included, for example, a so-called 'escape clause': a provision making the DBE's obligation to implement the norms and standards 'subject to the resources and co-operation' of other government agencies.[51] Upholding Equal Education's challenge,[52] Msizi AJ held that it is 'indisputable' that school infrastructure 'plays a significantly high role in the delivery of basic education'[53] and that the right to basic education 'includes the provision of proper facilities'.[54] In other words, the High Court made it clear that, at minimum, the right to basic education requires the provision of basic infrastructure.[55]

Another major set of cases concerned the provision of textbooks. The most authoritative judgment was given by the Supreme Court of Appeal. Navsa J described the issue in dispute as follows:[56]

> *The centrality of textbooks in the realisation of the right to a basic education is uncontested. The DBE, however, insisted that the right to a basic education did not mean that each learner in a class has the right to his or her own textbook.* It adopts the position that its own policy documents indicate only that the DBE set itself the 'lofty' ideal of

50 Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure Government Notice R 920 published in *Government Gazette* 37081 of 29 November 2013 ('School Infrastructure Regulations'). For a comprehensive account of the campaign and litigation, see Budlender and others (n 47) 81-84.

51 Regulation 4(5) of the School Infrastructure Regulations (n 50).

52 *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB) (*Equal Education*).

53 *Equal Education* (n 52) para 170.

54 *Equal Education* (n 52) para 176. See Veriava (n 46) 98-99 for general discussion on the case.

55 It is notable that the Constitutional Court recently held that a decision by the national power utility to reduce electricity supply to two municipalities infringed, among others, the right to basic education (*Eskom Holdings* (n 34)). As Madlanga J put it: 'Does the negative impact on schooling caused by the reduced supply of electricity not infringe the right to basic education? Surely, it does' (para 288). Writing for the dissent, Unterhalter AJ took the view that the mere fact that electricity may be a means to secure the enjoyment of the right 'does not make that means the subject matter of the right' (para 113).

56 *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) (*BEFA*) para 41 (our emphasis).

> providing a textbook for each learner but that it could not be held to that ideal or what it describes as the 'standard of perfection'.

Rejecting the DBE's argument, Navsa J held that 'the DBE is obliged to provide a textbook to every learner to ensure compliance with s 29(1)(a) of the Constitution'.[57] As indicated in the passage quoted above, the DBE had already adopted a policy of providing each learner with a copy of each prescribed textbook. It had not, however, met this standard and teachers at the applicant schools were forced to write out the content of the textbooks on blackboards, make copies, or borrow from other schools. The Supreme Court of Appeal did not accept that the provision of a textbook to each learner was a mere policy goal; it held that, in the circumstances, it was a binding component of the right to basic education. For the learners at the applicant schools, this right was being violated.

Veriava has critiqued the Supreme Court of Appeal's reliance on government's policy prescriptions as a basis for determining the content of the right to basic education.[58] We agree that courts should avoid making the content of rights contingent on the state's own policy statements and commitments. It is notable, however, that in *BEFA* Navsa J did recognise that textbooks are inherently necessary to the realisation of basic education, independent of government determinations. In holding that the failure to provide textbooks to learners in schools in Limpopo was a violation of the learners' rights to a basic education, Navsa J cited with approval the earlier High Court case of *Section 27 v Minister of Education* (*Section 27*).[59] In that case Kollapen J stated that 'the provision of learner support material in the form of textbooks, as may be prescribed, is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right'.[60] He went on by stating that '[i]n fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks'.[61] This last sentence, in particular, indicates an independent assessment on Kollapen J's part that textbooks are part of the right to basic education. The fact that Navsa J agreed with Kollapen J's judgment, in our view, is instructive.

Recently, in *Blind SA v Minister of Trade, Industry and Competition* (*Blind SA*)[62] the Constitutional Court affirmed the importance of

57 *BEFA* (n 56) para 50.
58 Veriava (n 46) 112-113.
59 2013 (2) SA 40 (GNP) cited by Navsa J in *BEFA* (n 56) para 46.
60 *Section 27* (n 59) para 25.
61 As above.
62 [2022] ZACC 33.

textbooks to both basic and further education. Blind SA, the applicant, challenged the constitutionality of national copyright laws,[63] which limited the ability of persons with visual and print disabilities to access published works in an accessible format. Declaring that the impugned provisions infringed sections 29(1)(a) and (b) of the Constitution, Unterhalter AJ held:[64]

> Children, and especially poor children, cannot secure the textbooks they require. Others who are admitted to university cannot access the articles and books they need, a substantial impairment to the benefits of a higher education. *The right of persons with print and visual disabilities to basic education, as set out in section 29(1)(a) of the Constitution, is thus plainly infringed.* That is also so in respect of the right to further education protected in terms of section 29(1)(b) of the Constitution.[65]

The right to basic education has also been held to include furniture. In *Madzodzo v Minister of Basic Education* (*Madzodzo*)[66] Goosen J specifically declared that the respondents had breached the right of learners under 29(1)(a) of the Constitution 'by failing to provide adequate, age and grade appropriate furniture which will enable each child to have his or her own reading and writing space'.[67] This clear statement of the minimum content of the right to basic education encompasses not only the *type of input* – namely, furniture – but also the *standard* of furniture required. Notably, the Court specified the standard at a concrete level (that is, age and grade appropriate furniture enabling every learner to their have *own* reading and writing space). Moreover, in articulating this standard, the Court did not merely affirm a pre-existing government policy. Instead, the Court determined the minimum content of the right independent of the state's policy prescriptions.

There has also been jurisprudence establishing that the right to basic education includes teachers. In 2015 the High Court gave judgment in the case of *Linkside v Minister of Basic Education* (*Linkside*),[68] a class action brought by 90 public schools in the Eastern Cape where the provincial education department had repeatedly failed to fill teacher vacancies. In some instances, these failures had forced schools to appoint and pay teachers themselves. The High Court held that 'the ongoing failure by the Eastern Cape Department of Basic Education (the Department) to appoint educators in vacant posts at various public schools throughout the province' amounted

63 Copyright Act 98 of 1978.
64 *Blind SA* (n 62) para 73.
65 Our emphasis.
66 2014 (3) SA 441 (ECM).
67 *Madzodzo* (n 66) para 41.
68 [2015] ZAECGHC 36; 2015 JDR 0032 (ECG).

to 'a violation of the right of the children at those schools to basic education as guaranteed by section 29 of the Constitution'.[69]

Importantly, the *Linkside* judgment contains some indications that the right to basic education includes an element of quality. The judgment states:[70]

> For those people in this country who take for granted not just education but quality education, *the notion of a school with insufficient educators, or no educators, is unthinkable and incomprehensible*. In some instances, lost academic years might never be recovered. Who knows the extent to which the futures of some children … will be adversely affected? The children of poor families will suffer the most because the schools they attend cannot afford to pay educators to occupy the vacant posts. A *decent education* is probably the only means of escape for these children from the confines of their poverty.

This paragraph comes immediately after an acknowledgment that the right to basic education is an 'important socio-economic right', providing the 'foundation for a child's lifetime learning and work opportunities' and is particularly significant 'in light of the legacy of apartheid'.[71]

Our interpretation of this part of the *Linkside* judgment is that, because a *decent* education at a school with *sufficient* educators is the standard required in order to improve a child's future prospects and enable them to escape poverty, then it is also part of the minimum content of the right to basic education. If this were not so, then the right to basic education would not be meaningful and its purpose would be defeated. In our view, the judgment can be taken as authority for the proposition that the right to basic education includes not only teachers, but sufficient numbers of teachers with suitable qualifications.

In *Tripartite Steering Committee v Minister of Basic Education* (*Tripartite* case)[72] Plasket J affirmed that the components of the right to basic education include teachers, administrators, furniture and textbooks and added that they also includes scholar transport:[73]

> [I]n instances where scholars' access to schools is hindered by distance and an inability to afford the costs of transport, the state is obliged to provide transport to them in order to meet its obligations, in terms

69 *Linkside* (n 68) para 2.
70 *Linkside* (n 68) para 25 (our emphasis).
71 *Linkside* (n 68) para 24 quoting *Juma Musjid* (n 37) paras 42-43.
72 2015 (5) SA 107 (ECG).
73 *Tripartite* (n 72) para 18 (our emphasis).

> of s 7(2) of the Constitution, to promote and fulfil the right to basic education.

Plasket J further held that the Eastern Cape's provincial policy, stating that learners who have to walk more than 10 kilometres to and from school, or five kilometres each way, qualify for free scholar transport, was 'the framework within which scholar transport as an aspect of s 29 of the Constitution is applied'.[74] However, the judgment makes clear that the policy must be applied 'flexibly':[75]

> The distance requirement of five kilometres from school is arbitrary, but understandably and unavoidably so: a distance had to be settled upon and it could just as easily have been four or six kilometres. This element of arbitrariness is one reason why the policy has to be applied flexibly. Otherwise deserving scholars may live 4,9 or 4,8 kilometres from their schools; or a very young scholar who is no longer in grade R may only live 4,7 kilometres from school. *In my view, the distance requirement is a guideline which has to be applied flexibly in order to achieve the ultimate purpose of providing scholar transport to all of those who need it.* Precisely the same considerations apply to all of the other aspects of the policy. In its application, it must be borne in mind that *the policy is not an end in itself but a means to the department's end of meeting its obligations in terms of s 29 of the Constitution.*

This passage implies that the scholar transport component of the right to basic education exists independently of the provincial policy, and the minimum requisite provisioning thereof may be more demanding than the policy stipulates. The minimum standard set by Plasket J is one of 'need': If a learner demonstrates that they 'need' scholar transport, then section 29 of the Constitution gives them an entitlement to it. This contextually-sensitive approach caters for the differing circumstances of learners. If a learner's walk to school is short but dangerous – passing through violent communities or across busy roads or difficult terrain, for example – then it is likely that they will have a need for, and a constitutional entitlement to, scholar transport. This will be so even if their total walking distance is less than 10 kilometres.

Most recently, the High Court added to the jurisprudence on the content of the right to basic education in the case of *Equal Education v Minister of Basic Education* (*School Meals* case).[76] This case concerned the cessation of the provision of school meals under the National School Nutrition Programme (NSNP) during the COVID-19 lockdown. The Court unequivocally stated that '[t]he Minister and

74 *Tripartite* (n 72) para 20.
75 *Tripartite* (n 72) para 57 (our emphasis).
76 2021 (1) SA 198 (GP).

MECs have a constitutional and statutory duty to provide basic nutrition in terms of s 29(1)(a)'.[77] Again, this was a judgment involving the affirmation of a pre-existing government policy. However, while the DBE's position was that the provision of nutrition under the NSNP was merely a 'by-product' of their duty to educate,[78] the High Court was clear that basic nutrition is a component of the right to basic education.[79]

In addition to the jurisprudence on the 'components' or types of input to which people are entitled as part of the right to basic education, the Constitutional Court in *AB v Pridwin Preparatory School* (*Pridwin*)[80] has also acknowledged that the state is obliged to provide education of a certain *standard*. In this way, the Constitutional Court cemented the position that the Eastern Cape High Court began developing in *Linkside.*

Pridwin concerned two children who had been expelled from their private school on the basis of their father's unruly behaviour. In deciding whether the expulsions amounted to breaches of the children's rights to basic education, the Court remarked on the content of that right. The Court stated:[81]

> [T]he term 'basic education' refers primarily to the content of the right to education. On this understanding of the term, children attending non-subsidised independent schools are undoubtedly receiving and enjoying a basic education. *The quality of the education may, at times, extend beyond what section 29(1)(a) requires from the state.* But that does not mean that children stop receiving a basic education the moment they enrol at these independent schools.

In our view, the clear implication of this passage is that the state is 'required' to provide education of a minimum standard or 'quality', albeit that the standard of education in fact provided at a school (whether public or private) may exceed this minimum.

In light of this jurisprudence one might feel that existing debates on the reception and application of the minimum core concept in South African law obscure more than they reveal. Our analysis

77 *School Meals* (n 76) para 42.
78 *School Meals* (n 76) para 40.
79 See F Veriava & N Ally 'Legal mobilisation for education in the time of COVID-19' 2021 37 *South African Journal on Human Rights* 239-242.
80 2020 (5) SA 327 (CC).
81 *Pridwin* (n 80) para 164 (our emphasis). *Pridwin's* treatment of the right to basic education is discussed in N Ally & D Linde '*Pridwin* – Private school contracts, the Bill of Rights and a missed opportunity' (2021) 11 *Constitutional Court Review* 282-286; T Lowenthal '*AB v Pridwin Preparatory School:* Progress and problems in horizontal human rights law' (2020) 36 *South African Journal on Human Rights* 261-274.

exposes an important fact: The courts, in a long line of cases, have given minimum content to the right to basic education. Given this clear and detailed articulation of the content of the right to basic education by the courts, it perhaps is unsurprising that they have never expressly denied that the right to basic education has a minimum core. The jurisprudence tells us that basic education must, at minimum, be available up to grade 12. It must, at minimum, include textbooks, classroom furniture, sufficient teachers, basic infrastructure, transport, and nutrition, and it must be of a minimum standard or quality.

The courts have thus given abstract and universally-applicable minimum content to the right to basic education (that is, the right requires basic infrastructure, adequate furniture, textbooks, teachers, and nutrition for all learners). In some cases, this has extended to more concrete content – such as the requirement that every learner is entitled to their *own* textbook, or that every learner is entitled to their *own* reading and writing space. In this sense, at least, South African courts have in fact taken a 'minimum core' approach to the right to basic education.

4 Lessons from the 'minimum core' approach to the right to basic education

In the previous part we argued that the courts have, in some senses, taken a 'minimum core' approach to the right to basic education. In this part we set out three lessons that can be learned from this approach.

4.1 Lesson one

The first lesson is that the courts can and should continue to specify the minimum content of the right to basic education.

In our view, this could include not only the minimum 'inputs' to which each person is entitled, but also the minimum 'outcomes'. It may also include a determination of the standard, level or amount of each input and outcome. For example, one of the minimum 'inputs' of the right to basic education might be teachers in the ratio of one teacher to 35 learners (put in concrete terms) or, alternatively, sufficient teachers to facilitate effective teaching and learning (put in more abstract terms). One of the minimum 'outcomes' might be the ability to read for meaning (in more abstract terms), or the ability to read for meaning in one's home language by grade 4 (as a more

concrete specification). This is reflected in the table below (Figure 1).[82]

It should be noted that the more concrete the statement of a minimum outcome or input, the less likely it is to have general applicability. This is true in both a normative sense and a factual sense: it would be less appropriate to apply a more concrete statement of the content of the right to all people at all times, and courts will likely be less willing to do so.

	Outcomes	**Inputs**
Type	eg The ability to read	eg Teachers
Standard, level or amount	eg The ability to read for meaning in their home language and/or language of teaching and learning by grade 4	eg The ratio of teachers to learners should be 1:35

These outcomes and inputs are not to be plucked out of thin air; rather, they must be informed by the purposes of the right to basic education, as articulated in cases such as *Juma Musjid*. We suggest that 'outcomes' are logically prior to 'inputs' (even though, empirically speaking, the outcomes will flow from the inputs). The purposes of the right to basic education inform the minimum outcomes required if those purposes are to be met, and the minimum outcomes inform the minimum inputs necessary for achieving the outcomes. For example, *Juma Musjid* tells us that the purposes of the right to basic education include the development of a person's personality, talents, and mental abilities and the provision of a foundation for lifetime learning and work opportunities.[83] One of the minimum outcomes required to meet this purpose is likely to be the ability to read for meaning by a certain developmental stage. The minimum inputs necessary to achieve that outcome may include early grade reading material for each learner and sufficient teachers trained in teaching reading skills.[84] Another minimum outcome may be the ability to

82 Others, including Brickhill, have also analysed basic education and the associated jurisprudence using a distinction between inputs and outcomes. See Brickhill n (50) 238-239, 258-259, 273-277.

83 *Juma Musjid* (n 37) para 43.

84 Our model of the relationship between purposes, outcomes and inputs bears similarity to that proposed by McConnachie and McConnachie (C McConnachie & C McConnachie 'Concretising the right to a basic education' (2012) 129 *South African Law Journal* 567-568). They suggest that identifying the substantive content of the right to basic education should proceed through a three-stage inquiry, which identifies, first, the purposes of education; second, basic learning

emotionally self-regulate and resolve conflict in a non-violent and pro-social manner.[85] The minimum inputs necessary to achieve this outcome may include teachers trained in positive discipline and restorative justice and access to social workers at school.[86]

Already, the courts have drawn on the purposes of the right to basic education to specify some of the constituent inputs – textbooks, teachers, classroom furniture, basic infrastructure, transport, and nutrition – and could continue to do so. For the most part, when specifying these minimum inputs, courts have relied on pre-existing government policies. In future, however, the courts should not feel straitjacketed by such policies. Following the example set in *Madzodzo*, they could exercise independent judgment and, if presented with the appropriate evidence, hold that pre-existing government policies would not – even if properly implemented – be sufficient. They may conclude, based on the evidence before them, that a necessary *type* of input is missing from existing policies, or that the *standard, level or amount* of a given input must be higher than specified in the policies.[87]

Though they have not yet done so, the courts could similarly specify what minimum outcomes are part of the right to basic education. Indeed, with South Africa's education system in a widely-recognised and ongoing crisis,[88] a shift in the jurisprudence, from inputs to outcomes, may be needed to hold government to account

---

needs in light of these purposes; and, third, the inputs required to meet those needs. While this framework is useful, the concept of 'learning needs' appears to overlap with both 'purposes' and 'inputs', which may result in some slippage between the proposed stages of the inquiry.

85 See, eg, UN Committee on the Rights of the Child, General Comment 1: Article 29(1): The aims of education (17 April 2001)UN Doc CRC/GC/2001/1 (2001) para 9: 'Education must also be aimed at ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life. Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.'

86 For discussion, see M Reyneke & R Reyneke *Restorative school discipline: The law and practice* (2020).

87 Even in relation to progressively realisable rights, *Grootboom* and *TAC II* left open the possibility that a context-sensitive and evidence-based determination of the 'minimum core' content of a right may inform an assessment of the reasonableness of the state's measures. While *Mazibuko* did not raise this possibility, the Court did not expressly reject it. Judges can also ensure that necessary evidence and information is placed before the court through requests for further submissions and evidence (see, eg, *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12 para 3).

88 See, eg, S Schirmer & R Visser 'The silent crisis: South Africa's failing education system' in A Bernstein (ed) *The silent crisis: Time to fix South Africa's schools* (2023) (Centre for Development and Enterprise).

and ensure that the right to basic education is more than just an on-paper promise.

The results of the 2021 Progress in International Reading Literacy Study were released in May 2023. Notoriously, the study found that 81 per cent of grade 4 learners in South Africa cannot read for meaning in any language, including their home languages.[89] What is more, South Africa performed significantly worse than it did in the 2016 assessments, with the results reflecting the same levels of literacy as in 2011. The study acknowledges the role of the COVID-19 pandemic in undoing South Africa's slow progress in improving reading outcomes. However, it seems clear that the pandemic only deepened existing inequalities in the education system. Quintile 4 and 5 schools, teaching mostly in English and Afrikaans, did not experience a decline in reading outcomes. The decline was experienced only by quintile one to three schools, teaching mostly in African languages. Against this backdrop, it may be helpful if courts – when presented with the appropriate facts – make clear and explicit that one of the outcomes of the right to basic education is the ability to read for meaning. From this would follow the recognition that the state is obliged to ensure that the inputs needed for achieving this outcome are in place.

This is something that, according to the South African Human Rights Commission, thus far has been 'lacking' in the jurisprudence.[90] In a recent report, they ask: 'What is the minimum set of knowledge, skills and dispositions that an individual must possess for their right to a basic education to be said to have been realised?' They argue that one of the 'minimum core outcomes' of the right to a basic education is the ability to read and write 'with understanding, at a basic level' in one's home language by the age of 10. In our view, existing case law leaves the door open for the courts to, in the least, specify that the ability to read and the ability to write as at least some of the minimum outcomes of the right to basic education. The courts arguably could go further, specifying that basic education requires literacy at a certain standard or level by a certain developmental stage – though we accept that, if the courts want to articulate minimum outcomes in more concrete terms, they may have to adopt a more tailored, context-specific approach in order to ensure that they do not overstep their institutional competence.

89 I Mullis and others 'PIRLS 2021 international results in Reading' (2023) (Boston College, TIMSS & PIRLS International Study Center).

90 A Nkomo and others 'The right to read and write' (2021) (South African Human Rights Commission).

An outcomes-oriented approach may attract some criticism. McConnachie and Brener, for example, have cautioned that '[t]he litigation process lends itself to focusing on education inputs' and that courts may be reluctant to adjudicate more complex 'outputs' claims.[91] We agree that outcomes-oriented litigation raises complex issues. One such issue is the separation of powers.[92] Moreover, when shifting from inputs to outcomes, it is important to recognise that the state cannot, and should not try to, exercise the same degree of control over the latter. While the state may have a duty to identify and create the conditions needed for children to read, monitor reading outcomes, or create accountability mechanisms, it would be difficult, and potentially dangerous,[93] to argue that the state has a duty to *guarantee* that every child can *in fact* read by a particular age, grade, or developmental stage.

However, recognising this complexity should not, in our view, dissuade litigants. Instead, as we have sought to demonstrate, there is scope for courts to make more explicit the link between the minimum 'inputs' required by a right to basic education, and the minimum 'outcomes' that those inputs are geared toward.[94] This outcomes-oriented approach may enable courts to better articulate the full range of state duties in relation to the right. If the courts restrict themselves to merely specifying the inputs that are part of the right to basic education, without reference to the outcomes sought to be achieved through those inputs, then they will ultimately have very limited traction on issues like the reading crisis. If, however, the courts were to specify that the right to basic education aims toward certain reading outcomes, among others, then more possibilities

91 C McConnachie & S Brener 'Litigating the right to basic education' in J Brickhill (ed) *Public interest litigation in South Africa* (2018) 302-303. They caution that 'learners with skill sets at particular levels, improved pass rates and better empowered parent bodies are all outcomes that may be too complex to be translated into specific relief in court papers'.

92 Compare Skelton who, writing a decade ago, suggests that with South Africa's 'embarrassing record of under-achieving' it may 'be easy to convince a court of the government's failure to provide an adequate education'. However, while 'diagnosis' may be 'the easy part of the process', developing judicial remedies to improve education quality while respecting separation of powers is challenging. Even then, Skelton argues that such challenges are not intractable. She offers useful suggestions on the fashioning of participatory or other non-court-centric remedial interventions that can be aimed at improving the education quality. See A Skelton 'How far will courts go in ensuring the right to a basic education?' (2012) 27 *Southern African Public Law* 405.

93 One of the main dangers of this kind of argument is that it may encourage the state to take highly interventionist measures that violate people's privacy and autonomy.

94 Litigation on adequate education in the United States has made some strides in this direction; see discussion of relevant cases by McConnachie & McConnachie (n 85) 574-575, and Fredman (n 46) 391-393. These developments, however, have been uneven. For recent analysis, see LJ Obhof 'School finance litigation and the separation of powers' (2019) 45 *Mitchell Hamline Law Review* 539-577.

may open up: Essentially, the courts may be better able to impose duties on the state to monitor reading outcomes, regulate for reading and, crucially, identify which inputs will be necessary and effective to achieve better reading outcomes.

Litigants can also assist courts by bringing carefully-circumscribed and evidence-based cases. The case of *Pease v Government of the Republic of South Africa* (*Pease*)[95] offers an example of outcomes-oriented litigation seeking wide-ranging relief, based on broad, sweeping causes of action, and without sufficient supporting evidence.[96] The applicants, frustrated with the state of the country's education provisioning, cast their challenge as an abstract attack on the adequacy of the entirety of the basic education system. Amongst numerous claims,[97] they argued that the state had consistently failed to ensure that the majority of the country's learners were equipped with the skills needed to attain functional literacy, and that this violated the right to basic education. Given the manner in which the case was litigated, it is unsurprising that the High Court – in an unreported judgment – dismissed the case. Nonetheless, it is noteworthy that Erasmus J took the view that the right to basic education cannot be interpreted as requiring the achievement of certain outcomes. In part, this conclusion was informed by the mistaken belief that the Constitutional Court's rejection of the minimum core approach in some socio-economic rights cases constrains the ability of courts to develop the minimum content of the right to basic education.[98] As we have argued, this is not the case. This type of misapprehension is precisely why we consider it necessary and useful to highlight the ways in which courts can and have developed the minimum content of the right to basic education.

4.2 Lesson two

The second lesson, we suggest, is that the rights of children under section 28 of the Constitution – such as the right to basic education – also have minimum content. Courts should take the same approach to section 28 rights as they have to the right to basic education.

95 Case 18904/13, Western Cape Division of the High Court, 18 September 2015 (unreported judgment).
96 Veriava (n 46) 159-160 describes the case as a 'perfect example of litigation that does not conform to a model of strategic public interest litigation'.
97 This included challenging the government's systemic failure to equip the majority of children with functional literacy skills; deliver adequate learning and teaching support materials; professionalise educators; provide foundation phase mother-tongue instruction; and deliver comprehensive early childhood development services to children.
98 *Pease* (n 95) paras 140, 148-151.

Section 28(1)(c) of the Constitution gives every child the right to basic nutrition, shelter, basic healthcare services and social services, where a 'child' means a person under the age of 18 years.[99] In contrast to other socio-economic rights under sections 25, 26 and 27 – and in common with the right to basic education under section 29(1)(a) – there is no progressive realisation clause contained within section 28(1)(c). It follows that the rights of children under section 28(1)(c) share some key features with the right to basic education under section 29(1)(a): They, too, are unqualified and immediately realisable, and resources must be prioritised accordingly. Indeed, these features were clearly articulated by the High Court in *Centre for Child Law v MEC for Education Gauteng* (*Centre for Child Law*).[100] This case concerned the state's failure to provide sleeping bags, access control services, psychological support, and therapeutic services to children staying at the hostel attached to a school of industry in Gauteng. The Centre for Child Law alleged that the conditions at the hostel violated the pupils' rights under section 28, as well as their rights to not to be subjected to cruel, inhuman or degrading treatment under section 12 and to dignity under section 10. The Court contrasted children's rights with other socio-economic rights, noting that section 28 'contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation'. Hence, children's rights are 'unqualified and immediate'.[101]

Admittedly, the jurisprudence also points to an important difference between sections 29(1)(a) and 28(1)(c). In respect of section 29(1)(a), the state is the primary duty bearer. When it comes to section 28(1)(c), parents and caregivers are the primary duty bearers.[102] In *Centre for Child Law* the children concerned were in the care of the state, having been sent to the school of industry pursuant to section 15 of the (now repealed) Child Care Act 74 of 1983. However, in cases where children are in the care of their parents, grandparents or other relatives, it is they – and not the state – who have the primary duty to ensure that the child is properly fed and has a roof over their head. Nonetheless, the state must step in where parents are unable to meet these needs. This was made abundantly clear in *TAC II*, where the Constitutional Court recognised that the state is 'obliged to ensure that children are accorded the protection contemplated by section 28' in circumstances where 'the implementation of the right

99 Sec 28(3) Constitution.
100 2008 (1) SA 223 (T).
101 *Centre for Child Law* (n 100) 227-228.
102 As confirmed by the Constitutional Court in *Grootboom* (n 16) paras 75-77.

to parental or family care is lacking'.[103] The High Court in the *School Meals* case reiterated this point:[104]

> The Constitution does not contemplate that children whose parents cannot afford to feed them should be left to starve or must be removed from their parents. The Constitution envisages that section 28 of the Constitution will protect those children. In the *Grootboom* matter the Constitutional Court did find that s 28(1)(c) ensures that children are properly cared for by their parents and parents cannot shirk their parental responsibilities. But what is to happen when parents cannot provide basic nutrition to a child? … The state remains responsible to provide families with other socio-economic rights to enable them to provide for their children.

It may be suggested that, notwithstanding High Court jurisprudence, the Constitutional Court in *Grootboom* declared section 28(1)(c) to be subject to progressive realisation. Indeed, the Court did state:[105]

> The obligation created by section 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by sections 25(5), 26 and 27 of the Constitution. Each of these sections expressly obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the rights with which they are concerned.

However, context matters. The Court in this passage was outlining the scope of the state's obligations as a *secondary* duty bearer (that is, in circumstances where parents are able to fulfil their responsibilities as primary duty bearers). The Court does not suggest that children's section 28 entitlements are progressively realisable as against their primary duty bearers. Understood in this light, High Court jurisprudence is not inconsistent with the Constitutional Court's approach in *Grootboom*. In fact, recognition that section 28 rights give rise to immediately-realisable obligations by primary duty bearers coheres with the textual interpretation of section 29(1)(a) that was adopted in *Juma Musjid*.[106]

Given the similarities between the rights under section 29(1)(a) and the rights under section 28(1)(c), the courts, in our view, should be similarly willing to articulate the minimum outcomes and inputs that constitute the rights of children under section 28(1)(c). Such an approach, for example, could help to facilitate significant gains in the provision of early childhood development services to children in South Africa. ECD programmes not only provide early learning

103 *TAC II* (n 21) para 79.
104 *School Meals* (n 76) para 51; for analysis of this aspect of the judgment, see Veriava & Ally (n 79) 240.
105 *Grootboom* (n 16) para 74.
106 *Juma Musjid* (n 37) para 37.

opportunities; they also facilitate early identification of disabilities and developmental delays and referrals to the necessary healthcare services, help to support child protection by offering a setting in which at-risk children can be identified, and often provide meals. Yet, currently, access to ECD programmes is limited. In 2022 only 31,5 per cent of children aged 0 to 4 were recorded as having attended an ECD programme.[107] Even for those children in programmes, most will not benefit from state funding and support. According to the Early Childhood Development Census 2021, only 33 per cent of programmes received the ECD subsidy.[108]

Relatedly, many young children continue to be malnourished. The Child Gauge 2020 noted that stunting affects more than one in four children (27 per cent).[109] Stunting rates are at their highest among children 18 to 27 months old, at 40 per cent. The Child Gauge 2020 also noted the prevalence of 'hidden hunger', whereby deficiencies in micro-nutrients impair immunity and cognitive development.[110]

By recognising that the rights of children under section 28(1)(c) are immediately realisable, by articulating the inputs and outcomes that constitute those rights, and by setting out the nature and extent of the state's duties to provide those inputs and outcomes, the courts could help to ensure universal access to much-needed ECD services for South Africa's young children.

4.3 Lesson three

The third lesson we draw from jurisprudence on the right to basic education is the potential scope for developing the minimum content of *progressively*-realisable socio-economic rights.

It is true that the Constitutional Court in *Mazibuko* definitively rejected two propositions: first, that progressively-realisable rights oblige the *immediate* provision of some resources to everyone; second, that it is appropriate for courts to independently establish a concrete, quantifiable and universally-applicable level at which a minimum core resource should be provided. Despite the rejection of these claims (which together amount to quite a thick conception of minimum core obligations) this should not be read as an absolute

107 Statistics South Africa 'General Household Survey 2022, Statistical Release P0318' (2023) 9.
108 Department of Basic Education 'ECD Census 2021: Report' (2022) 33.
109 W Sambu 'Child nutrition' in J May and others (eds) *South African child gauge 2020: Food and nutrition security* (2020) 171.
110 Sambu (n 109) 173.

bar on developing some minimum *content* of progressively realisable rights (as some critics have suggested).[111]

Rather, as has been established for the right to basic education, the minimum *types* of outcomes for a specific right, and related *types* of inputs, can be recognised at a higher level of abstraction, without necessarily specifying the *concrete levels* of provisioning for each component. Moreover, as we have shown, the courts in most cases have either (a) affirmed the level of provisioning prescribed by existing policies, as in scholar transport, or (b) left it to the government to specify the requisite amounts or standards. As Fredman has recently argued,[112] even though the right to basic education is immediately realisable, there is no principled reason why the substantive content of progressively realisable rights cannot be developed in a similarly deliberative manner.[113] The reasonableness of the state's measures would then be assessed having regard to such substantive content, thus mitigating the potential for the reasonableness standard to be employed in an 'over-flexible, abstract and decontextualised' manner.[114]

Indeed, there are examples of the Constitutional Court recognising the minimum content of the right of access to adequate housing in this way. In *Grootboom* Yacoob J recognised that the right entails 'more than bricks and mortar',[115] and went on to specify at least some of the minimum components (or types of input) required by the right:[116]

> [The right of access to adequate housing] requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. *For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling.*

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (*Joe Slovo*)[117] the Court recognised that even temporary

111 See, eg, the commentary cited at n 36.
112 S Fredman 'Adjudicating socio-economic rights: A lasting legacy' in N Ally & L Boonzaier 'Edwin Cameron: Influences and impact' (forthcoming).
113 It may be said that one can only sensibly refer to the 'minimum core' of a right to the extent that it is immediately claimable (that is, the temporal and content dimensions of the concept are inextricably linked). In our view, a modified conception of the minimum core approach, which de-links its content and temporal dimensions, would be useful in a South African context (where the Constitution clearly distinguishes between immediately and progressively-realisable rights).
114 Wilson & Dugard (n 35) 56.
115 *Grootboom* (n 16) para 35.
116 As above.
117 2010 (3) SA 454 (CC).

housing, provided in the context of an eviction, must meet some minimum requirements.[118] In that case, a housing development agency sought an order for the relocation of approximately 20 000 residents from an informal settlement, which had been earmarked for reconstruction and upgrading. The High Court granted an order requiring the residents to relocate to state-provided temporary accommodation, but did not stipulate any minimum conditions for such accommodation. On appeal, the Constitutional Court indicated that temporary housing has to provide 'sufficient protection and dignity' to residents,[119] and required the respondents to produce a draft order that would ensure the same. The order finally endorsed by the Court stipulated that the temporary accommodation provided by the respondents include basic services such as roads, electricity, water and toilet facilities.[120]

More recently, in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*Thubakgale*),[121] four judges of the Constitutional Court (led by Majiedt J) held that South Africa's legacy of spatial injustice must be considered when assessing the right to access adequate housing. In the context of that case, this meant that access to adequate housing required 'continued access to schools, jobs, social networks and other resources'.[122] While Majiedt J was in the minority on the central question in that matter (whether the applicants were entitled to the remedy of constitutional damages), his interpretation of the right to access adequate housing remains instructive for future cases.[123]

118 *Joe Slovo* concerned sec 26(3) of the Constitution, which provides: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

119 *Joe Slovo* (n 117) para 119. Cameron J adopted a similar approach in a minority opinion in *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) para 57. The applicants in that case challenged restrictive conditions placed on their residence at a temporary shelter. Cameron held that the right to access adequate housing was engaged, and that temporary accommodation 'entails more than just providing a roof and four walls'. Instead, it must include 'all that is reasonably appurtenant to making the accommodation adequate'. The majority of the Court held that the shelter's rules did not implicate sec 26 of the Constitution, but upheld the claim that the rules violated the applicants' rights to dignity, freedom and security of the person and privacy (see Fredman (n 112)).

120 O'Regan J's opinion emphasises this point (*Joe Slovo* (n 117) para 319). Interestingly, the respondents further concretised their commitments by, among others, stipulating that each temporary accommodation unit would be no less than 24m2 in size, have a galvanised iron roof, and be serviced with tarred roads. While the Court did not independently prescribe these standards, its willingness to accept the proposal indicates that these concrete measures were considered reasonable in the context of this case.

121 2022 (8) BCLR 985 (CC).

122 *Thubakgale* (n 121) para 110.

123 Fredman (n 113). Our analysis has focused on the positive obligations to which the minimum content of rights may give rise. The content of a right may also be established in relation to the negative protections it confers. A recent Supreme Court of Appeal judgment on the progressively realisable right to *further* education (sec 29(1)(b)) is illustrative. Unterhalter J (Acting Judge of Appeal)

5 Conclusion

After *Mazibuko*, the prevailing sentiment among observers of South Africa's socio-economic rights jurisprudence has been rather pessimistic. Some have even declared the 'death' of socio-economic rights.[124] However, jurisprudence on the right to basic education tells a different story. Courts across the country have demonstrated a willingness to develop the substantive content of that right. Rights holders and duty bearers have clarity that, at minimum, basic education requires textbooks, furniture, infrastructure, teachers, transport and nutrition. This case law offers fertile ground for further developing the right to basic education, as well as advancing other immediately-realisable rights. It also illuminates pathways for giving progressively-realisable rights meaningful content, notwithstanding the Constitutional Court's jurisprudence on minimum core claims.

Of course, while courts can (and should) give socio-economic rights 'teeth',[125] other institutions have a crucial role to play. A 'constitutional ethos' has to take root across all levels of government in order for socio-economic rights to translate into material impact,[126] and it is vital for activists seeking accountability and social change to engage with democratic mechanisms beyond constitutional litigation. After all, as Justice Cameron reminds us, 'courts cannot achieve social justice alone: far from it. Other branches of government and civil society activism are indispensable.'[127]

declared that a policy prohibiting prisoners from using personal computers in their cells to further their studies violated their right to a further education. In doing so, he held that the right 'at a minimum' entitles prisoners to the ability to enjoy the freedom to enrol in 'a course of study for which they qualify … and for which they have paid'. Even though the right may 'have a richer content', the 'negative freedom the right confers' restrains the state from, absent justification, interfering with this minimum entitlement. See *Minister of Justice and Constitutional Development & Others v Ntuli* [2023] ZASCA 146 para 20.

124 O'Connell (n 36) 532 (critiquing a perceived neo-liberal turn in the jurisprudence of apex courts in Canada, India and South Africa and the resultant 'end, in substantive terms, for the prospect of meaningful protection of socio-economic rights'.)

125 Bilchitz (n 6).

126 Scott & Alston (n 11).

127 E Cameron 'A South African perspective on the judicial development of socio-economic rights' in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning rights: Comparative judicial engagement* (2014) 338. See also Fowkes (n 33) 295 on the limitations of court-centric perspectives (emphasising that the Court is 'one institution among many').

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: S Smit 'Private schools in South Africa: Pay the bill for the child's best interests? Terms and conditions apply' (2024) 24
African Human Rights Law Journal 209-228
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a10

Private schools in South Africa: Pay the bill for the child's best interests? Terms and conditions apply

*Samantha Smit**
Researcher, University of Johannesburg, South Africa
https://orcid.org/0000-0003-1525-3943

Summary: *In South Africa, the right to basic education is immediately realisable as set out in the Constitution and confirmed in the case of* Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others*. Another contentious point recently seen being developed in courts is the role and duties of a private school. Private schools, unlike public schools, can suspend a student due to failure to pay their school fees. However, in the case of a private school, the question arises as to the constitutional and human rights duties of a private party to give effect to the right to basic education. In the case of* AB & Another v Pridwin Preparatory School & Others *the Court definitively pronounced that private schools have constitutional obligations to give effect to the right to basic education. However, much uncertainty remains on the effect this has on a private school's ability to suspend or expel a learner for failure to pay school fees.*

Key words: *basic education; public power; private schools; horizontal application*

* BCom Law (Johannesburg); smitsamantha95@gmail.com

1 Introduction

The extent to which private entities bear constitutional duties has long been debated in our constitutional democracy. Section 8 of the South African Constitution imposes duties on juristic persons such as a school if and to the extent applicable as well as the nature of the right.[1] A prominent and, as some may argue, superior right such as the right to basic education could impose certain obligations on a private school.[2] There is a fine line between the left-wing pushing to impose as many obligations as possible, the right separating the private and public sphere completely, and the midpoint.

This debate has become even more topical due to the *Juma Musjid* and *Pridwin* cases.[3] On the one hand, a subsidised public school on private land; on the other, a private school seeking to expel students due to the sins of their fathers. The common denominator in both cases is the importance of protecting the right to basic education of children.

If a student is unable to pay their school fees at a public school, the school cannot expel them.[4] However, it is uncertain if that is the case with a private school. The question then arises as to the extent to which a private school bears obligations in relation to providing and protecting a child's right and access to education and their right to property, respectively.

In order to answer these questions, the article first considers recent developments in our law in relation to the right to basic education. Second, this contribution critically evaluates the *Pridwin* decision and its implications for private schools' ability to suspend or expel learners due to non-payment of school fees. Third, the article outlines the negative obligations of a private school and, finally, it is argued that

1 Sec 8 Constitution of the Republic of South Africa, 1996.

2 T Boezaart 'A constitutional perspective on the rights of children with disabilities in an educational context' (2012) 27 *South African Public Law Journal* 456; R Roithmayr 'Access, adequacy and equality: The constitutionality of school fee financing in public education' (2003) 19 *South African Journal on Human Rights* 422; sec 39(2) of the Constitution also requires the law to be developed to promote the spirit, purport and objects of the Bill of Rights. Considering how prominent the right to basic education is and the fact that it is immediately realisable together with the best interests of the child, the protection of such a right should be protected, which may temporarily diminish a private party's rights.

3 *AB & Another v Pridwin Preparatory School & Others* 2020 (5) SA 327 (CC); *Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others* 2011 (8) BCLR 761 (CC) (*Juma Musjid*).

4 Sec 41(7) South African Schools Act 84 of 1996; Regulations relating to the exemption of parents from payment of school fees in public schools.

the school's obligation to give effect to the right to basic education places a limitation on its ability to suspend or expel such learners.

2 The right to basic education

The concept of basic education has long eluded a precise definition. The Constitution does not provide clarity either and merely distinguishes between the right to basic education, which is immediately realisable, and the right to further education, which is progressively realisable.[5] Liebenberg explains that basic education is afforded heightened protection as it is the foundation of all future learning and affects a person's ability to earn a living.[6] Without a basic education, a person's ability to participate in the political and economic life of a society is compromised.[7] Therefore, education is an enabler of multiple other rights. The World Declaration on Education for All explains that education is necessary to survive and develop their full capacities and to live and work with dignity.[8]

The state guarantees the right to basic education. However, where a private school provides such an education, the state must ensure that the private school respects the objectives and the standards set in international human rights law instruments.[9] In South Africa, a private school is merely a school that is not (entirely) operated by the state. However, such schools still provide a basic education, whether subsidised or not.[10]

A definition of basic education is not provided in terms of legislation. However, the concept of further education is defined in legislation such as the General and Further Education and Training Quality Assurance Act.[11] In terms of this Act, further education would include all qualifications obtained post-grade 9, effectively meaning that basic education would end at the ninth grade.[12]

A similar argument was advanced in the *Moko* case where it was argued that the Schools Act only makes attendance compulsory

5 *Moko v Acting Principal of Malusi Secondary School* 2021 (3) SA 323 (CC) para 27.
6 S Liebenberg 'Socio-economic rights: Adjudication under a Transformative Constitution' (2010) 24 *European Journal of International Law* 244-245.
7 As above.
8 United Nations Educational, Scientific and Cultural Organisation World Declaration on Education for All.
9 United Nations Educational Scientific and Cultural Organisation Experts' Consultation on the Operational Definition of Basic Education ED/BAS/RVE/2009/PI/1, 18 December 2007.
10 Second *amicus curiae* heads of argument of the *Pridwin* case para 18.
11 General and Further Education and Training Quality Assurance Act 58 of 2001.
12 Sec 1 General and Further Education and Training Quality Assurance Act.

until grade 9, alluding thereto that basic education only extends to education up until the ninth grade.[13] However, the Court rightly held that legislation cannot be used to interpret the constitutional provisions. This has long been accepted by our courts, given that legislation derives its force from the Constitution. Interpreting the Constitution through the prism of legislation will have the proverbial effect of 'the tail wagging the dog'.[14] The court is duty bound to derive its own independent interpretation of what the concept of basic education entails.

In the *Moko* judgment Khampepe J cautions against interpreting the concept of basic education within the confines of either primary school education or education up to grade 9 or the age of 15, as this represents an excessively narrow understanding of the term. Such an interpretation, in her opinion, fails to align with the transformative purpose and historical context of the right to education.[15] To illustrate, she highlights the potential adverse consequences for the school system and society if section 29(1)(a) were so narrowly construed to obligate the state solely to provide desks for primary school learners, excluding those in secondary schools or beyond grade 9.[16] Khampepe J further argues against a restricted interpretation by pointing out the absurd outcome to which it would lead, such as in the *Welkom High School* case, where school policies penalising pregnant learners would only be deemed a violation of their fundamental right to basic education if they were in grade 9 or below.[17]

This has seen a move towards defining basic education with reference to the content of the education provided. While this is broader than a strict limit to the grade in question, courts have now accepted that every person 'that provides non-secondary or non-tertiary education is necessarily simultaneously engaged in providing those attending it a basic education'.[18] This would mean that the provision of education to primary school learners and high school learners would *per se* amount to basic education.

There is a burden on the state to provide basic education to children. In accordance with section 8 of the Constitution, a private school has a duty not to interfere with or diminish a learner's right

13 *Moko* (n 5) para 27.
14 *South African Broadcasting Corporation Soc Ltd & Others v Democratic Alliance* 2015 (4) All SA 719 (SCA) para 43.
15 *Moko* (n 5) para 32.
16 As above.
17 As above.
18 *AB & Another v Pridwin Preparatory School & Others* 2020 (5) SA 327 (CC) (*Pridwin CC)* para 80.

to education if such education is already being provided due to the non-payment of school fees. This is prohibited by the Schools Act for public schools, but no such express prohibition exists in the case of private schools. Therefore, private schools attempt to transform the issue of providing education into a contractual issue. However, providing education to children is a particularly important right and not merely an ordinary commercial service being rendered.[19]

3 The *Pridwin* decision: A tremor before the quake

In the *Pridwin* case[20] the school cancelled the parent contract between the parents and the school, which resulted in the children, aged six and ten, having to find a new school. The school, in this regard, cancelled the contract without meeting with parents or attempting to come to some other agreement. The students were expelled purely because of their father's conduct, and the children were described as nothing short of model students.[21]

The parents approached the High Court to set aside the decision by the school to cancel the contract. The parents challenged the constitutionality of the contract. However, the Court found it to be valid and entered into freely by the parties.[22]

The parents first submitted that the cancellation of the contract infringed on the children's right to education in section 29 of the Constitution.[23] It was argued that the state has a duty to provide for education and that Pridwin has a negative obligation to not diminish that right or act unreasonably.[24] Pridwin, they argued, was performing a constitutional function and, as a private institution, had a duty to not impair the children's access to education,[25] unless the school, in fact, were exercising a public power and would then be fulfilling a constitutional duty.[26] The High Court found that Pridwin had no constitutional duty to provide basic education as it is not the state or a public school, and there is no contract between it and the state to perform such a function.[27]

19 ESCR Committee General Comment 13 on the International Covenant on Economic, Social and Cultural Rights.
20 *AB and Another v Pridwin Preparatory School and Others* (38670/2016) [2017] ZAGPJHC 186 (3 July 2017) (*Pridwin HC* case).
21 *Pridwin CC* (n 18) para 10.
22 *Pridwin HC* (n 20) paras 14-15.
23 *Pridwin HC* (n 20) para 17.
24 As above.
25 *Pridwin HC* (n 20) para 18.
26 Sec 239 Constitution of the Republic of South Africa, 1996.
27 *Pridwin HC* (n 20) para 26.

The High Court held that there was no right to equal education and there was no right to attend a private school.[28] Additionally, the Court held that the school had no negative duty towards the children to not diminish their right to education as the state did not provide them with a subsidy.[29] Pridwin also wrote to the Department of Education to secure places for the two minor children in public schools for the following year.[30] The Court stated that by doing this, Pridwin complied with its obligation, if any at all.[31]

The second submission by the parents was that the school breached the best interests of the child by cancelling the parent contract.[32] Section 28(2) provides that when a decision is being taken concerning a child, their best interests must enjoy paramount importance.[33] The parents contended that this obligation entails giving the parents an opportunity to make representations on the best interests of the child, whereas the school, while agreeing that they are bound by this provision, stated that it merely obliges them to take into account the best interest of the child.[34] The Court found that the school did give appropriate consideration to the best interests of the child in balancing their rights with those of the other children in the school.[35]

Third, the parents argued that the termination of the parent contract was procedurally unfair as they did not have an opportunity to make representations before the decision was taken.[36] However, this application was not made in terms of the Promotion of Administrative Justice Act (PAJA).[37] The judge held that because this was not an administrative action, there was no obligation on the school to give the parents a hearing before taking a decision, especially as this matter concerned a commercial contract and doing so would open the floodgates.[38]

Fourth, the parents contended that the contract gave them a right to be heard in line with the principle of natural justice.[39] According to the Court, the principle of natural justice only has a role to play

28 *Pridwin HC* (n 20) para 34.
29 *Pridwin HC* (n 20) para 38.
30 *Pridwin HC* (n 20) para 40.
31 *Pridwin HC* (n 20) para 42.
32 *Pridwin HC* (n 20) para 49.
33 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development & Others* 2009 (4) SA 222 (CC) para 73.
34 *Pridwin HC* (n 20) para 53.
35 *Pridwin HC* (n 20) para 77.
36 *Pridwin HC* (n 20) para 78.
37 *Pridwin HC* (n 20) para 80.
38 *Pridwin HC* (n 20) paras 88-89.
39 *Pridwin HC* (n 20) para 94.

if it is incorporated into the contract itself.[40] However, there was no implied or express incorporation of this principle in terms of the termination of the parent contract.

Finally, the parents argued that the decision by the school was substantially unlawful. The parents argued that the 'sins of the father', that is, the actions of the father should not negatively affect their children's access to education.[41] If a contract is not fair, this does not make it invalid.[42] A contract will only be unenforceable if it is against public policy or constitutional values.[43] For a contract to be against public policy, it must be contrary to the values enshrined in the Constitution.[44] The judge found that ultimately the school acted reasonably in terminating the contract.[45]

Before the Constitutional Court and the Supreme Court of Appel (SCA) the applicants stated that the primary challenge was not to the validity of the clause on its face, but to the manner in which it was enforced without affording the parties a hearing.[46] The Supreme Court reasoned that, since one is dealing with a private power, no right to be heard arises.[47] The SCA explained that '[t]o preclude a party from relying on a breach clause before cancelling any contract without a hearing on the best interests of the child, would lead to an absurd result'.[48]

The Constitutional Court held that such an approach fails to account for the fact that this is not a mere commercial contract but one governing the fundamental right of basic education of children.[49] Such contracts are special in nature and have different interests at stake compared to a lessee and lessor.[50] The Court held that the issue was not the cancellation clause itself, but rather the effects of the enforcement of such clause on the children.[51] The Constitutional Court, therefore, had to determine whether the school had a constitutional duty and to what extent.

The Court held that although no private institution can be forced to establish and maintain a private school, once they have

40 *Pridwin HC* (n 20) para 96.
41 *Pridwin HC* (n 20) para 109.
42 *Pridwin HC* (n 20) para 112.
43 As above.
44 *Pridwin HC* (n 20) para 121.
45 *Pridwin HC* (n 20) para 137.
46 *Pridwin CC* (n 18) para 60.
47 *Pridwin CC* (n 18) para 62.
48 A s above.
49 *Pridwin CC* (n 18) para 63.
50 As above.
51 *Pridwin CC* (n 18) para 66.

done so voluntarily, they will inevitably take on some constitutional obligations.[52] The Court held that although the private school did not necessarily have a positive obligation, it had a negative obligation not to diminish the children's rights.[53] The Court also held that once a private school has provided education, it has a negative obligation not to interfere with such education, which includes the right to be heard before discontinuing the education.[54] Additionally, once a child receives private education, the school cannot take away or diminish the right without proper justification.[55]

In the second judgment Theron J pointed out that the rights in section 29 are not mutually-exclusive rights. Section 29(1) created obligations to provide education and section 29(3) gives independent/private schools the ability to provide such education.[56] In providing this education, private schools have a negative obligation to not interfere with that right and a positive obligation to maintain standards not inferior to that of comparable public schools.[57] The learned judge explained that the education private schools provide may be more than 'basic', but in order to have advanced education, basic education is a component of this.[58] Thus, independent schools do provide basic education, perhaps not merely basic education.

From the case it is accordingly clear that private schools can no longer argue that the education provided by them is not basic education. Sections 29(1) and (3) are evidently not mutually exclusive but rather complimentary. It is now beyond dispute that where private schools voluntarily undertake educational responsibilities, they inherit certain constitutional obligations. Nevertheless, the precise content of these obligations may still give rise to some debate, an issue explored in more detail in the part that follows.

4 Role and duties of a private school

In *Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others* the Constitutional Court confirmed that section

52 *Pridwin CC* (n 18) para 85.
53 *Pridwin CC* (n 18) para 86.
54 *Pridwin CC* (n 18) para 88.
55 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 52.
56 *Pridwin CC* (n 18) para 157. In the case of *Jaftha v Schoeman & Others, Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC) it is explained what a negative duty is: 'at the very least, any measure which permits a person to be deprived of existing access to adequate housing', whereas a positive duty entails promoting releasing a right.
57 *Pridwin CC* (n 18) para 157.
58 *Pridwin CC* (n 18) para 178.

8(2) may impose negative obligations upon a juristic person.[59] In that case, the Court pointed out that a trust had the constitutional obligation 'not to impair the learners' right to a basic education'.[60]

Nevertheless, the Court emphasised that this duty does not aim to burden private entities with the same extensive responsibilities as the state in protecting constitutional rights. Instead, it is focused on ensuring that private parties do not hinder or diminish the enjoyment of the right to basic education. The application of this duty depends on factors such as the importance of the constitutional right and the potential for its infringement by non-state actors.

In the *Daniels* case the Court held that section 8(2) of the Constitution must not be misconstrued to say that a private institution can never have positive obligations in terms of the Bill of Rights.[61] Additionally, as Liebenberg pointed out, private parties have positive obligations, for example, in legislation. At times the legislature can effect change better through legislation than by courts expanding how private persons relate to one another.[62] Thus, it is not as obscure as some might think to impose such obligations.

As pointed out by the Court, the reluctance to confirm that independent schools do in fact provide a basic education is premised on the idea that a person will only provide a basic education if they have a positive constitutional obligation to do so,[63] thereby conflating what the right entails with who has the duty to provide such a right.[64]

Ally and Linde point out that the lower courts in *Pridwin* conflate the content of the right with the identity of the provider by stating that there would only be such an obligation if contained in a contract such as in *All Pay*.[65] A duty to provide a constitutional right or obligation does not arise only if there is a contract with the state requiring the private party to do so.[66] Thus, a private school does provide a basic education to learners and the legal entitlement to

59 *Juma Musjid* (n 3).
60 *Juma Musjid* (n 3) para 65.
61 *Daniels v Scribante & Another* 2017 (4) SA 341 (CC) (*Daniels*) paras 37-48.
62 M Finn 'Befriending the bogeyman: Direct horizontal application in *AB v Pridwin*' (2020) 137 *South African Law Journal* 13.
63 *Pridwin CC* (n 18) para 177.
64 *Pridwin CC* (n 18) para 178.
65 N Ally & D Linde '*Pridwin*: Private school contracts, the Bill of Rights and a missed opportunity' (2021) 11 *Constitutional Court Review* 10.
66 As above.

basic education does not cease to exist the moment a learner is enrolled in a private school.[67]

Fredman argues that the obligation in section 29(3) of the Constitution to maintain standards that are not inferior to those at public schools imposes a general duty on a private school not to obstruct a learner's ability to obtain a basic education.[68] This argument is supported by reliance on the jurisprudence of the European Court of Human Rights, in particular the case of *Costello-Roberts v the United Kingdom*, in which the Court held that

> [f]unctions relating to the internal administration of a school, such as discipline, cannot be said to be merely ancillary to the educational process … The fundamental right of everyone to education is a right guaranteed equally to pupils in state and independent schools, no distinction being made between the two.[69]

Fredman uses this dictum to argue that every policy affecting a learner's ability to obtain a basic education is a standard for purposes of section 29(3)(c) of the Constitution.[70] As a consequence, any policy by a private school that obstructs a child's access to basic education would breach its constitutional duty to maintain standards comparable to those of public schools.[71] While the Court in *Pridwin* was not called upon to address a similar argument, the Court accepted that the school's 'obligations are reinforced by section 29(3)(c)'.[72] This purposive reading of section 29 as a whole supports the argument by Fredman.

The author acknowledges that some controversy may arise with this interpretation, particularly surrounding the meaning of the term 'standards'. Ally appears to suggest that the term 'standards' in section 29(3)(c) refers to standards of education.[73] Her interpretation would align with one accepted meaning of the term 'standards' as defined in the *Oxford dictionary* as 'a level of quality, especially one that people think is acceptable'.[74] However, the ordinary meaning of standards is not restricted to the level of quality, but includes 'a unit of measurement that is officially used; an official rule used when producing something'.[75]

67 *Pridwin CC* (n 18) para 164.
68 S Fredman and others *Obligations of independent schools in South Africa (*2013) 12.
69 *Costello- Roberts v the United Kingdom* App 13134/87 ECHR 25 March 1993.
70 Fredman and others (n 68) 12.
71 Fredman and others (n 68) 13.
72 *Pridwin CC* (n 18) para 167.
73 Ally & Linde (n 65) 11.
74 *Oxford learner dictionary*, https://www.oxfordlearnersdictionaries.com/definition/english/standard_1 (accessed 28 February 2024).
75 As above.

It is submitted that the provision accordingly is capable of two reasonable interpretations. However, the argument by Fredman would be better aligned with international law, and where any reasonable interpretation consistent with international law can be adopted, this interpretation should be preferred. In the author's view, the broader interpretation advanced by Fredman should accordingly be adopted.

In the *AllPay* case the contract concluded between Cash Pay Master and SASSA made clear that the former undertook constitutional obligations.[76] The Court, however, did not come to the conclusion that Cash Pay Master (CPM) had a positive obligation solely because of the contract concluded with SASSA. CPM's obligations outlived the contract as the contract was terminated, and yet CPM had to provide social grants as they had assumed the role of the state and by ceasing to perform their function, they would be breaching a social grant recipient's rights.[77] Thus, the obligation of providing basic education flows from the performance of a constitutional function rather than the existence of a contract.

In the *AllPay II* case[78] the Constitutional Court developed this approach further, albeit in the context of the right to social assistance. It also re-affirmed the position as set out in *Juma Musjid* and added that '[w]here an entity has performed a constitutional function for a significant period already ... considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all'.

In the case of Pridwin, it has been voluntarily providing education since 1923.[79] A private entity cannot be forced or obliged to provide education or admit a certain learner. However, once a private school voluntarily admits a student, the school still bears certain obligations towards that learner. Once a learner receives education from a private institution, access to education cannot be taken away without justification and a fair procedure.

If such a right is taken away without appropriate justification, it is a regression of a child's right to basic education. The Constitutional Court has stated that a socio-economic right can be negatively

76 *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) (*AllPay I*).
77 *Pridwin CC* (n 18) para 179.
78 *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others (No 2)* 2014 (4) SA 179 (CC) (*AllPay II*) para 66.
79 *Pridwin CC* (n 18) para 40.

protected from improper infringement, such as not taking measures to protect the existing right and allowing it to be diminished.[80] The duty of a private party is to not diminish or interfere with a right that the child already had, that is, their access to education.[81]

In *Equal Education v Minister of Basic Education*[82] the High Court had to determine whether the Department of Basic Education breached its constitutional and statutory duties when it elected to bring to an unprecedented halt a national nutrition programme that provided meals to learners on a daily basis during a period where the schools were temporarily closed. The Court considered the CRC Committee in General Comment 19, which states that no deliberate regressive measures should be taken in relation to a child's economic, cultural and social rights unless, during an economic crisis, there is no other alternative.[83]

The Court concluded that the state had taken regressive measures towards the children by taking away their access to daily meals as not all other options were considered.[84] Even though this is in the context of a state's obligations, a private party exercising a public power, as discussed below, has an obligation not to diminish a student's existing access to education unless there are no other alternatives.

This would entail, as an example, that a private school endures a limitation of the right to property for a certain duration if a student is unable to pay school fees in order to prevent the regression of a child's right to education, especially if they have had access to such a right for a period of time.[85]

5 The suspension of a learner as the exercise of public power

Every exercise of public power is constrained by the principle of legality. In a South African context, administrative law is not limited to constraining the exercise of public power by the state only, but extends to any natural or juristic person exercising such powers as well.[86] The principle of legality is read into the Constitution as an

80 *Juma Musjid* (n 3) para 58.
81 As above.
82 *Equal Education & Others v Minister of Basic Education* 2021 (1) SA 198 (GP) (*Equal Education)* para 26.
83 *Equal Education* (n 82) para 57.
84 *Equal Education* (n 82) para 60.
85 This will be discussed under heading 6.
86 *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W).

incident of the rule of law and requires the exercise of any public power to be lawful and reasonable.[87] However, the principle of legality is itself dependent upon the exercise of the power in question being the exercise of a public power.[88] In *AAA Investments* the Court held that if an entity performs a public function, it is subject to the principle of legality.[89]

In order for a decision to be seen as an administrative action, a juristic or natural person must be exercising a public power or performing a public function in terms of an empowering provision.[90] To determine whether a public power is being exercised, we consider how the power is being exercised rather than by whom. In this respect, the Court has emphasized that what is relevant is the function rather than the functionary.[91]

Private schools conclude a contract with parents to provide their children with education and, as discussed earlier, this includes basic education. Thus, a private school, such as Pridwin, was providing education to the students enrolled,[92] a function that would otherwise have been performed by the state. In *AllPay* one of the factors the Court took into account was the fact that Cash Pay Master had effectively assumed the role of the state in relation to the payment of social grants. Similarly, a private school assumed the role of the state in relation to the learners enrolled in their institution. It is argued that this would make the provision of education through a private school an inherently-public power.

In the case of *Mlawuli v St Francis College*[93] the High Court held that a private school does not exercise a public power. It explained that because the Minister of Education does not prescribe which learners or how many are admitted, it does not exercise a public function.[94] The Court argued that a public school provides education to the public in general compared to a private school, which only provides education to a child because of a contractual obligation.[95] The judge also explained that as the contract does not give any indication to incorporate the requirements of an administrative action, PAJA is

87 *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 49.
88 *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) (*AAA Investments)* para 68.
89 *AAA Investments* (n 88) paras 40-41.
90 Prof Hoexter's criticism of the statutory definition of 'administrative action' in ch 4 of her book *Administrative law in South Africa* (2017) 218.
91 *President of the Republic of South Africa & Others v South African Rugby Football Union and Others* 2000 (1) SA 1.
92 This is also in terms of the South African Schools Act, ch 5.
93 *Mlawuli v St Francis College* (1102/2016) 2016 ZAKZDHC 17 (20 April 2016).
94 *Mlawuli* (n 93) para 5.
95 *Mlawuli* (n 93) para 6.

not applicable.[96] The judge also noted that a child's rights, dignity and best interests have nothing to do with what contractual and administrative remedies are available.[97]

The High Court's findings in this respect are clearly flawed for various reasons, including the over-emphasis on the school's power to decide who it admits. The mere fact that a private school decides who they admit does not mean that once the students are admitted, the school does not exercise a public power. The Constitutional Court in *Pridwin* held that a contract with a private school to provide an education is not a mere commercial contract but one governing the fundamental right of basic education of children.[98] In *Masetlha* the Constitutional Court held that

> [t]he contractual element in the powers of the President must therefore not be allowed to obscure the fact that the President's powers are derived from the Constitution and the provisions of the applicable statutes and therefore subject to constitutional constraints in their exercise.[99]

Private schools similarly derive the right to their establishment from section 29(3) of the Constitution. Therefore, notwithstanding the contractual elements, the exercise of powers conferred by the Constitution and legislation should clearly be subject to public law constraints.

The concept of an empowering provision is much broader than just the Constitution or legislation and is defined to encompass 'a law, a rule of common law, customary law, *or an agreement*, instrument or other document in terms of which an administrative action was purportedly taken'.[100] In *South African National Parks v MTO Forestry*[101] the SCA confirmed that an empowering provision can include a contract. Rogers J held that when reviewing the decision by the state, the empowering provision must be in terms of the Constitution, provincial constitution or legislation.[102] However, if a private party is exercising a public function, a contract can be seen as an empowering provision from which they derive power.[103] Pridwin alleges that their power to expel the learners is derived from

96 *Mlawuli* (n 93) para 7.
97 *Mlawuli* (n 93) para 10.
98 *Pridwin CC* (n 18) para 63.
99 *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC).
100 Sec 1 Promotion of Administrative Justice Act (PAJA).
101 *South African National Parks v MTO Forestry (Pty) Ltd* 2018 (5) SA 177 (SCA) (*MTO Forestry)* para 27.
102 *MTO Forestry* (n 101) para 49.
103 *MTO Forestry* (n 101) para 54.

the parent contract and, therefore, it is the empowering provision in the dispute.

Equal Education submitted to the Court that Pridwin was a member of the Independent Schools Association of South Africa (ISASA), and the clause in dispute is from the model contract provided by ISASA.[104] This model contract is provided by ISASA as standardised precedents used in a number of its member schools.[105] Thus, the consequences of the *Pridwin* decision will be far-reaching as many independent schools' parent contracts include such a clause. ISASA stated that it has a member base of over 760 schools.[106] This is relevant as it informs the broader context of the power being exercised and the potential impact of the contractual clause.[107]

A fundamental aspect of a lawful exercise of public power involves a fair procedure. In *Pridwin* the Centre of Child Law made submissions regarding the effect of section 28(2) of the Constitution on the right to a fair procedure in relation to the termination of a contract with a learner's parents.

Section 28(2) dictates that a fair and determinable process must be followed whenever a decision is taken concerning children.[108] This may not necessarily amount to an oral hearing. In the case of *C v Department of Health and Social Development, Gauteng* the Constitutional Court held that section 28(2) of the Constitution includes a procedural component of the child having a fair hearing when their interests are at stake.[109] Some would distinguish this case by arguing that it was in the context of a public power being performed. However, in *Pridwin* the school was exercising a public power.

The school argued that they did not have an obligation to have a hearing before expelling the students. In this regard, the majority in *Pridwin* came to the following conclusion regarding the duty of a private school:[110]

> In most circumstances, this would entail alerting the parents involved to the proposed termination; providing reasons therefor; *and affording an opportunity for a fair and appropriate hearing*. Of course, this would

104 Second *amicus curiae* heads of argument of the *Pridwin* case para 7.
105 As above.
106 As above.
107 As above; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 85.
108 *Pridwin CC* (n 18) para 151.
109 *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC) para 27.
110 *Pridwin CC* (n 18) para 93-94.

> entail giving the children themselves the opportunity to express their views on a matter that concerns them, where this would be appropriate … The constitutional requirement is that there should be both substantive and procedural fairness before any child is excluded from a school.

Therefore, when a decision to expel students from a private school is being contemplated, the school must give either the students or their parents as representatives the opportunity to be heard on the issue, as when a person is given the opportunity to be heard, a better, well-informed decision can be taken. Where children are involved, this should be of even greater significance to ensure that their right and access to education is not arbitrarily being taken away. Section 28(2) also recognises the particular vulnerability of children and the additional protection required where they are concerned, as emphasised in the *Teddy Bear* case.[111]

Section 10 of the Children's Act confers a specific right on children to participate in all decisions affecting them.[112] Section 6(3) of the Children's Act provides for the right of family members, for example, their parents, to express their views concerning the interests of children.[113] These provisions give effect to South Africa's international law obligations. Both the Constitution and the African Charter on the Rights and Welfare of the Child (African Children's Charter) recognises children's rights to be heard, either in person or through representatives, in decisions affecting their interests. Therefore, a child has a right to be heard and, inevitably, procedural fairness when a decision is taken affecting their interests, such as expelling them from school.

The United Nations Committee on the Rights of the Child has described the procedural element of the best interests standard, in the following terms: 'Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account.'[114]

Therefore, in order for the decision maker, in the present example *Pridwin's* decision, to be lawful under the principle of legality, it must comply with fairness, especially because the Constitution and the

111 *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) para 1.
112 Sec 10 Children's Act 38 of 2005.
113 Sec 6(3) Children's Act 38 of 2005.
114 United Nations Committee on the Rights of the Child General Comment 14 (2013) on the right of a child to have his or her best interests taken as a primary consideration (adopted 29 May 2013) 4 (art 3 para 1).

Children's Act afford children the right to a fair procedure when a decision affecting their interests is being taken. If a private school does not allow a child to make representations, such a decision can be reviewed and set aside by a court.

6 Everyone has the right to basic education (terms and conditions apply)

A private school's ability to suspend a learner for failure to pay school fees is an infringement of their right to basic education.

In *Port Elizabeth Municipality v Various Occupiers*[115] the Constitutional Court emphasised that the Constitution introduces new responsibilities for the courts regarding property rights, which were not previously recognised under common law.[116] It introduces a new and equally significant right to not be arbitrarily deprived of a home, in addition to the traditional rights of possession, use, and occupation.[117] The Court acknowledged that conflicts may arise between the expectations associated with property ownership and the genuine needs of individuals in desperate need of housing.[118] In such cases, the judicial role is not to prioritise one set of rights over the other, but rather to carefully balance and reconcile the conflicting claims, considering all relevant interests and specific factors in each case.[119]

The courts have observed that in striking a balance between these competing interests, there certainly are instances where a private landowner may need to endure the limitation on access to their property for a reasonable period.[120] This is particularly where the landowner was aware of the presence of unlawful occupiers at the time of purchasing the land.[121] The courts have accepted that while it is not feasible to expect a property owner to indefinitely provide free housing, there are circumstances such as these where the owner may need to be patient and recognise that the right to occupation may be temporarily restricted.[122]

115 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
116 *PE Municipality* (n 115) para 23.
117 As above.
118 As above.
119 As above.
120 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* (CC) 2012 (2) BCLR 150 (CC) para 40.
121 *Blue Moonlight* (n 120) para 40.
122 As above.

In both the *Pridwin* and *Juma Musjid* cases the parties were not compelled to provide basic education. However, they voluntarily did so and with that comes certain risks such as a learner not being able to pay their school fees.[123] When a school admits students, certain risks, such as a student not being able to pay school fees, is a foreseeable risk and, therefore, the school should endure the limitation of their right to property to a certain extent.

It may be argued that requiring the school to continue providing education to a non-paying learner indirectly imposes a positive obligation on the school to fulfil the right to basic education. In this respect, it must be emphasised that the Constitution does not state that a private party can never bear a positive obligation. This was reflected upon by the Court in *Daniels v Scribante,* where the respondents argued that allowing an occupier the right to effect improvements would essentially place a positive obligation on a private person to fund improvements given that section 13 of the Extension of Security of Tenure Act (ESTA) allows a court to order compensation for occupier-made improvements.[124]

The respondents asserted that in line with the jurisprudence of the Constitutional Court and, in particular, the *Juma Musjid* case, the imposition of such a positive duty on a private party is not permissible.[125] However, the Court rejected this line of argumentation and held that after weighing up the relevant factors, if a court concludes that a private party bears a positive obligation, they may be duty bound to impose such an obligation.[126] The Court emphasised that *Juma Musjid* clearly did not say that a private party can never bear a positive obligation but rather that the primary positive obligation in that case rested upon the state.[127]

Recently the High Court saw this issue playing out in the *Mhlongo v John Wesley School* case.[128] The case involved a private school that barred the applicant's son from writing examinations as well as separated him from his peers because his parents did not pay overdue school fees in the amount of R3 000.[129] The school similarly relied on an ISASA exclusion policy that condoned such sanctions.

123 T Lowenthal '*AB v Pridwin Preparatory School*: Progress and problems in horizontal human rights law' (2020) 36 *South African Journal on Human Rights* 268.
124 *Daniels* (n 61) para 37.
125 *Daniels* (n 61) para 37.
126 *Daniels* (n 61) para 39.
127 *Daniels* (n 61) para 44.
128 *Mhlongo v John Wesley School & Another* [2018] ZAKZDHC 64 (19 December 2018).
129 *Mhlongo* (n 128) paras 8-9.

The applicant attempted to enter an agreement to pay the outstanding fees on a schedule, but the school rejected such an agreement, stating that fees are due and no negotiation will take place.[130] The applicant argued that rather than excluding the learner from writing examinations, the school could have entered into a settlement agreement or instituted legal proceedings against the applicant as ultimately the harsh actions by the school severely impacted their son, and the responsibility to pay the fees is on the parents.[131]

Significantly, the High Court held that '[s] ince the Constitution require[s] private parties or bodies not to interfere with or diminish the right to basic education, independent schools must act in a manner that minimises any harm on the learner's right to basic education'.[132]

However, by separating the applicant's son, the school's actions were humiliating, degrading and inhumane,[133] especially because other measures could have been used that would reduce the harm, such as retaining the student's report card. It was also of an inferior standard compared to public schools, contrary to section 29(3) of the Constitution.[134]

The High Court held that although it was not prohibited to exclude students due to failure to pay fees, this must be accompanied by a fair procedure while considering the best interests of the child.[135] The Court concluded that such a standard was applicable whether it is a private or a public school.[136] The Court explained that excluding or suspending a student due to non-payment of school fees was not in line with section 28(2) of the Constitution.[137] The Court therefore concluded that the exclusion policy and conduct by the school was unconstitutional and invalid.[138]

Therefore, it is argued that the school's obligation to give effect to the right to basic education places a limitation on its ability to suspend or expel such learners. Drawing on eviction law as an example, in certain circumstances a private party needs to endure limitations of their rights for a reasonable period to give effect to the

130 *Mhlongo* (n 128) para 13.
131 *Mhlongo* (n 128) para 18.
132 *Mhlongo* (n 128) para 69.
133 *Mhlongo* (n 128) para 82.
134 *Mhlongo* (n 128) para 84.
135 *Mhlongo* (n 128) para 77.
136 As above.
137 *Mhlongo* (n 128) para 80.
138 *Mhlongo* (n 128) para 84.

socio-economic rights of others. Therefore, it is argued that a private school cannot immediately suspend or expel a student who is unable to pay their fees.

7 Conclusion

The debate surrounding the constitutional duties of private entities, particularly private schools, has been a longstanding and contentious issue in our constitutional democracy. The recent *Pridwin* and *Juma Musjid* cases have brought this debate to the forefront, emphasising the importance of protecting the right to basic education of children.

The central question revolves around the extent to which private schools bear obligations in providing and safeguarding a child's right to education. In the *Pridwin* decision the High Court held that private schools did not have a constitutional duty to provide basic education. However, the subsequent Constitutional Court ruling nuanced this stance, recognising that once a private school voluntarily provides education, it assumes certain constitutional obligations, particularly a negative obligation not to interfere with a child's right to education.

From this article it becomes clear that while private schools are not burdened with the same extensive responsibilities as the state, they are obligated to uphold certain standards and not act in a manner that undermines a child's right to education. If the state is of the opinion that private schools should have positive obligations, it can enforce such responsibilities through legislation. In this respect, the article argues that the principle of legality, applicable to any entity exercising public power, applies to private schools, whose provision of education constitutes an inherently-public power. Therefore, private schools, despite being private entities, are subject to certain public law constraints, including the requirement for a fair procedure when making decisions affecting learners.

In light of these considerations, it is argued that a private school's obligation to give effect to the right to basic education places limitations on their ability to suspend or expel learners, especially in cases where non-payment of fees is a foreseeable risk. The recent *Mhlongo v John Wesley School* case further reinforces this perspective, highlighting the importance of fair procedures and the best interests of the child in decisions related to non-payment of school fees.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: A Maistry & C van Schalkwyk 'Litigating the right to basic education for undocumented children in South Africa: The role of the courts in advancing access to schools' (2024) 24 *African Human Rights Law Journal* 229-263
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a11

Litigating the right to basic education for undocumented children in South Africa: The role of the courts in advancing access to schools

*Anjuli Maistry**
Senior attorney, Equal Education Law Centre, Cape Town, South Africa
https://orcid.org/0009-0002-3908-622X

*Cecile van Schalkwyk***
Senior attorney, Legal Resources Centre, Makhanda, South Africa
https://orcid.org/0009-0008-8925-5953

Summary: *The right to basic education is enshrined in section 29(1) of the Constitution of the Republic of South Africa, 1996, which clearly states that basic education is extended to 'everyone'. In 2016 the Eastern Cape Department of Education took a decision to stop funding the education of learners without birth certificates, passports or permits. In 2019 the High Court in Makhanda declared this decision unconstitutional and found that all learners, irrespective of their documentary status or their nationality, are entitled to attend school in South Africa. This article considers the* Centre for Child Law & Others v Minister of Basic Education & Others *judgment and its role in advancing the right to basic education in South Africa. It maps the events leading up to the litigation, the strategy in bringing the matter and the findings of the*

* BA LLB (Cape Town) LLM (Pretoria); anjuli@eelawcentre.org.za
* BA LLB LLM (Stellenbosch); cecile@lrc.org.za

Court, and considers the challenges in implementing the judgment. It finds that while the findings of the Court have provided some clarity on the interpretation of section 29(1) of the Constitution and its application to undocumented learners, some ambiguity in the framing of the order and a lack of awareness of the judgment among schools and provincial education departments have hampered implementation. In addition, new legislative and policy developments may undo some of the strides occasioned by the judgment.

Key words: *education; undocumented; schools; section 29(1)*

1 Introduction

The right to basic education is enshrined in section 29(1) of the Constitution of the Republic of South Africa, 1996, which clearly states that basic education is extended to 'everyone'. However, in 2016 the Eastern Cape Provincial Department of Education (ECDOE) took a decision that education funding would only be provided to learners who are in possession of valid birth certificates, identity documents, passports or permits. This seriously compromised access to education for children who were undocumented as many schools began denying access to undocumented children – ultimately calling into question whether they are holders of the right to education.

ECDOE decided that going forward, education funding would only be provided for learners who were in possession of valid birth certificates, identity documents, passports or permits. Undocumented learners, on the other hand, would receive no education funding, until such time as they were in possession of valid documentation and their documentary information had been captured on the South African School Administration and Management System (SA-SAMS).[1] The decision set in motion litigation that would result in

1 The SA-SAMS is a national school management system that was introduced by the Department of Basic Education in 2008 to allow for the uploading of data onto provincial databases and to improve data management at the school level. It contains information on learners in each of the provinces and can be used to extract various data indicators to assist the national and provincial education departments with school management and planning. For more information, see K Maremi and others 'Scoping the aspects and capabilities of South African School Administration and Management Systems (SA-SAMS)' (2020) Conference on Information Communications Technology Society, https://www.researchgate.net/profile/Marlien-Herselman/publication/341077413_Scoping_the_aspects_and_capabilities_of_South_African_School_Administration_and_Management_Systems_SA-SAMS/links/5ec395af458515626cb4d65b/Scoping-the-aspects-and-capabilities-of-South-African-School-Administration-and-Management-Systems-SA-SAMS.pdf (accessed 23 August 2023).

the Makhanda High Court's landmark judgment in *Centre for Child Law & Others v Minister of Basic Education & Others,*[2] where the Court found that the right to education extended to everyone, irrespective of their documentary status.

This article reflects on the use of this litigation to ensure that the right to basic education in South Africa is available to all children, regardless of their documentation status.[3] The aim of the article is three-fold. First, it seeks to document the litigation and judgment and provide an overview of the findings of the Court. Second, it reflects on and evaluates the litigation strategies employed in the *Centre for Child Law* case, with a view to informing future litigation on the right to education and the rights of undocumented children. Lastly, it considers the implementation phase of the judgment and the actual and potential challenges that have impacted the success of the litigation.

The authors were the attorneys of record on behalf of the applicants in *Centre for Child Law*.[4] In this article we rely on the court papers filed in the case, as well as the inside knowledge we acquired during the litigation. We also draw on our experiences in attempting to ensure compliance with the judgment and order.

2 Undocumented children in South Africa

The *Centre for Child Law* case was borne out of a larger systemic challenge in South Africa related to the ineffectual issuing of documentation by the Department of Home Affairs, the department responsible for the issuing of birth certificates and other forms of documentation. Essentially, the existing laws and regulations on birth registration have not kept up with the complex realities of children's circumstances and do not provide for the many contingencies that families may face.[5] In these circumstances, parents or caregivers are often unable to comply with the strict legislative framework prescribed by the Births and Deaths Registration Act 51 of 1992 (BDRA) and the Regulations and cannot provide the prescribed documents required

2 *Centre for Child Law & Others v Minister of Basic Education & Others* 2020 (3) SA 141 (ECG) (12 December 2019) (*Centre for Child Law*).

3 Documentation status is a term that denotes whether the children are holders of identifying documentation such as birth certificates, or whether they are holders of documents entitling them to reside here, such as visas and permits.

4 Anjuli Maistry was employed as a senior attorney at the Centre for Child Law and Cecile van Schalkwyk was employed as an attorney at the Legal Resources Centre's Makhanda office.

5 See, eg, P Proudlock 'A closer look at birth certificates' in K Hall and others (eds) *South African child gauge 2018*: *Children, families and the state* (2018) 121.

for birth registration and the issuing of a birth certificate.[6] The inability of Home Affairs to amend its laws to reflect the lived realities of families often results in children being undocumented.

These barriers have resulted in large numbers of undocumented children in South Africa. Expert evidence submitted by Hall as part of the application in the *Centre for Child Law* case showed that according to the National Income Dynamics Study (NIDS) data, 431 000 children between six and 15 years old did not have birth certificates in 2019.[7] When this data is extended to include children under the age of 17 years, it revealed that in 2019 around 500 000 children of school-going age did not possess birth certificates. Most learners within this group are identified as black or African, making up 87 per cent of the learners.[8]

Further insights into the scale of the problem arose during the exchange of papers during the litigation.[9] The Department of Basic Education provided information on the number of undocumented learners that did not have identity numbers captured on the SA-SAMS system at school level. In 2019 there were 1 190 434 undocumented learners on the SA-SAMS system.[10] Of this number, 989 432 learners had no valid identity numbers that could be retrieved from Home Affairs.[11] These numbers were far higher than the data obtained by way of the NIDS and provided further credence to the fact that children face serious barriers to birth registration and the obtainment of migration documents in South Africa.

Cumulatively, the data also reveals that this is a problem that disproportionately impacts on black African learners in South Africa, as well as children who in fact are South African citizens, but whose births were not registered. Any decision to stop funding these learners for their education, therefore, would have a disproportionately negative impact on black South African children, most of whom live in impoverished areas and do not have access to the documents or resources to have their births registered.

6 Children's Institute 'Children's Institute's submission on the 2022 BELA Bill' 6.
7 K Hall 'Expert affidavit' in *Centre for Child Law & Others v Minister of Basic Education & Others* 2020 (3) SA 141 (ECG).
8 As above.
9 SG Padayachee 'First to third respondents' supplementary affidavit' in *Centre for Child Law* (8 July 2019) para 24.
10 As above.
11 Padayachee (n 9) para 21.

3 Legal framework governing school admissions in South Africa

Before discussing the litigation in *Centre for Child Law*, we will provide a brief overview of the legislative framework governing the admission of learners to schools in South Africa and, in particular, the legislative and policy provisions that were relevant to the legal challenge. As set out above, section 29(1) of the Constitution guarantees a basic education to everyone in South Africa. In addition to section 29(1), constitutional provisions related to the right to equality (section 9), human dignity (section 10), and the best interests of the child (section 28(2)) provide a clear constitutional framework to guide the formulation and constitutionality of legislation and policy related to education in South Africa.

There are two important pieces of legislation that have been enacted to give effect to these constitutional rights, namely, the National Education Policy Act 27 of 1996 (NEPA) and the South African Schools Act 84 of 1996 (Schools Act). Section 3(4)(i) of NEPA explicitly gives the Minister the power to determine a national policy for the admission of students to education institutions. The Admission Policy for Ordinary Public Schools (Admission Policy) was enacted on 19 October 1998, and deals with the admission of learners to ordinary public schools. It applies uniformly to all provincial education departments and all ordinary public schools.

Clauses 15 and 21 of the Admission Policy would become one of the focal points in the *Centre for Child Law* litigation. Clause 15 of the Admission Policy was entitled 'Documents required for admission of learner' and read

> [w]hen a parent applies for admission of a learner to an ordinary public school, the parent must present an official birth certificate of the learner to the principal of the public school. If the parent is unable to submit the birth certificate, the learner may be admitted conditionally until a copy of the birth certificate is obtained from the regional office of the Department of Home Affairs. The parent must ensure that the admission of the learner is finalised within three months of conditional admission.

In effect, clause 15 made the admission of children who are citizens of South Africa conditional upon the production of a birth certificate within three months. While the provision does not explicitly state that a learner who cannot provide their birth certificate within three months should be excluded from enrolment, schools had adopted such an interpretation.

Clause 21 of the Admission Policy, on the other hand, dealt with the admission of 'illegal aliens'.[12] Clause 21, entitled 'Admission of non-citizens', stated that '[p]ersons classified as illegal aliens must, when they apply for admission for their children or for themselves, show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Aliens Control Act, 1991 (No 96 of 1991)'. Clause 21 was often used by schools to prevent the admission of non-national learners who were undocumented and unable to provide permits or evidence that they had submitted applications for their documents to Home Affairs.

In addition to the Admission Policy, the Schools Act also provides for school admission. Section 5 states that schools must admit learners and serve their educational requirements without in any way unfairly discriminating against learners. Importantly, the Schools Act also makes it clear that all children have to attend school in the country from the age of seven years, and that parents, guardians, and caregivers have a duty to ensure that the children were attending schools.[13]

Because the Department of Home Affairs had demanded that certain schools in Pretoria remove their non-national learners on the basis of sections 39 and 42 of the Immigration Act 13 of 2002 (Immigration Act), these sections became relevant to the litigation. Section 39(1), under the title 'Learning Institutions', stated that

> [n]o learning institution shall knowingly provide training or instruction to an (a) illegal foreigner; (b) a foreigner whose status does not authorise him or her to receive such training or instruction by such person; or (c) a foreigner on terms or conditions or in a capacity different from those contemplated in such foreigner's status.

Section 42 of the Immigration Act, entitled 'Aiding and abetting illegal foreigners', states that

> [s]ubject to this Act, and save for necessary humanitarian assistance, no person, shall aid, abet, assist, enable or in any manner help (a) an illegal foreigner; or (b) a foreigner in respect of any matter, conduct or transaction which violates such foreigner's status, when applicable,

12 The term 'illegal alien' appears to have been used in conformity with the Aliens Control Act 96 of 1991 and the Aliens Control Amendment Act 76 of 1995 that were later repealed by the Immigration Act 13 of 2002. In terms of these laws, an 'alien' meant a person who is not a South African citizen or a citizen of a state the territory of which formerly formed part of the Republic. Despite these Acts being repealed in 2002, the term endured in the Admission Policy and was never amended to reflect the changes in immigration legislation.

13 Sec 3 Schools Act.

including but not limited to (i) providing instruction or training to him or her, or allowing him or her to receive instruction or training.

The Department of Basic Education, Home Affairs and ECDOE took the stance during the litigation that these provisions of the Immigration Act made it unlawful for them to provide education to undocumented non-national children, arguing that providing these learners with education would effectively result in them breaking their own immigration laws.

In sum, the culmination of the provisions of the Admission Policy and the provisions of the Immigration Act ultimately gave rise to the refusal to admit undocumented learners as well as to exclude learners from schools they already attended.

4 Background to the litigation

4.1 Background to *Centre for Child Law*

The litigation in *Centre for Child Law* initially emanated from ECDOE's decision to issue Circular 6 of 2016[14] in March 2016. The circular informed school governing bodies and principals in the province that schools must update SA-SAMS with the identity or passport numbers of all learners. The circular also indicated that any norms and standards, post provisioning allocation, and nutrition transfers to school would only be given for the children whose identity or passport numbers were captured on SA-SAMS. In other words, ECDOE took a stance that it would not fund undocumented learners. This was a departure from ECDOE's practice of using the learner numbers from the snap survey in January of every school year to allocate funding. In terms of the previous system, the schools would submit the actual learner numbers in January of the school year to ECDOE, and all the learners, irrespective of their documentary status, would receive funding.

The impact of the decision was devastating for schools and learners. It meant a lack of teachers, school nutrition funding, as well as funding for critical education resources such as textbooks, stationery, municipal services, and the maintenance of the school

14 Eastern Cape Department of Education 'Circular 6 of 2016: Schools to update SASAMS with identity or passport numbers of learners' 17 March 2016, https://www.eccurriculum.co.za/Circulars/2016_Circulars/Circular%206%20of%202016%20ID%20Numbers.pdf (accessed 23 August 2023).

building.[15] This impacted all learners in school and not only those that were undocumented. As a result of the decision, many schools also began excluding undocumented learners as they could simply not afford to provide them with education.

On 26 May 2017 legal proceedings were instituted against ECDOE as well as the Minister of Basic Education to challenge Circular 6 of 2016. The initial application was almost entirely based on the circular itself. It sought to declare the circular inconsistent with the Constitution and the Schools Act. It also sought to compel the respondents to issue all schools with revised educator post-establishment, which considers all learners enrolled at the school, including those without valid identity, permit, or passport numbers. Similar relief was sought in respect of the Norms and Standards for School Funding budgets, and the National School Nutrition Programme budgets.

At the time of the institution of the proceedings and the crafting of the relief, the budget issue was the focus of the application. While anecdotally the Legal Resources Centre (LRC) was aware that learners were being excluded because of a lack of documents, the LRC had no individual clients to represent on this issue. In addition, prior to the issuing of Circular 6 of 2016, undocumented learners in general, though not always, were gaining access to schools and being funded. Accordingly, the LRC believed that if the circular were set aside, it would also cure any exclusion issues.

Accordingly, as far as admission was concerned, the Centre for Child Law and the school governing body of Phakamisa High School asked the Court to direct that the three-month period for the finalisation of the admission of a learner without an identity document, passport or permit in Clause 15 of the Admission Policy was not mandatory, that where a learner cannot comply with this requirement, they must remain conditionally registered at the school and that the principal is directed to accept alternative proof in place of birth certificates, passports or permits. Furthermore, the applicants asked the Court to direct that schools could not exclude a learner from a public school on the basis that they do not have an identity number, permit or passport. Lastly, they asked the Court to direct the respondents and all public schools to admit any learner who does not have a South African identity number, passport or permit and to accept a sworn statement or affidavit as alternative proof of identity.

15 RL Ozah 'Founding affidavit' in *Centre for Child Law* (26 May 2017) paras 49-60.

4.2 Background to the intervention of 37 children as applicants into the *Centre for Child Law* case

By 2018, in large part as a result of the circular, many undocumented learners were being excluded from school or were not admitted to school at all. In that year the Centre for Child Law received an email query regarding the exclusion of hundreds of learners from schools. The children were based in Aliwal North in the Eastern Cape. The Centre for Child Law consulted with the children. The consultations revealed that they were removed from school or not admitted at all because they did not have documents. Realising that the Admissions Policy and Immigration Act barred the children from making successful requests to be admitted or readmitted to school, the Centre for Child Law began preparing litigation focused solely on the constitutionality of the above-mentioned provisions of the Admissions Policy and Immigration Act.

Specifically, two important questions had to be addressed: first, whether Clauses 15 and 21 of the Admission Policy were unconstitutional to the extent that they made the right to education conditional on the possession of documents; and, second, whether sections 39(1) and 42 of the Immigration Act were unconstitutional for prohibiting the provision of basic education to children whose presence in the country is irregular.

Because relief regarding the constitutionality of the Admissions Policy and the Immigration Act overlapped to a degree with the relief being sought in the *Centre for Child Law* case – specifically the relief relating to the exclusion of undocumented learners from schools – the 37 affected undocumented children applied to join the *Centre for Child Law* application on 13 December 2018. Once the 37 children had successfully joined, two *amici curiae* applied to join the litigation – specifically Section27, another civil society organisation, and the South African Human Rights Commission (SAHRC), a national institution established in terms of the Constitution to support constitutional democracy.

The 37 children argued that the Constitution affords everyone the right to basic education and that a child's best interests are of paramount importance in every matter concerning the child. When both constitutional provisions are read together in the context of this case, the applicants contended that the rights of these children to education cannot be subject to a condition that they provide identification documents. They also argued that the decision not to fund the undocumented learners and to insist on documentation before admission infringed sections 10, 28(2) and

29(1) of the Constitution. It was also submitted that the decision was discriminatory within the meaning and contemplation of the equality clause in section 9 of the Constitution and section 5 of the Schools Act.

In opposition to the relief sought by the applicants, the respondents relied on the existing legislative and policy framework in support of their argument. They submitted that the BDRA stipulates that every birth to a child by South African citizens must be registered within 30 days, and that birth registration was an important government objective that was being advanced by the decision not to fund undocumented learners and the provisions of the Admissions Policy. They also argued that undocumented minors were most vulnerable to human trafficking, child prostitution, child labour, and all other related abuses affecting minor children, and that documents are an important part of attempting to protect learners against these practices.

In relation to the Admission Policy, they argued that it minimises over-reporting and eliminates 'ghost learners' for the preservation of state resources; that it promotes accountability in terms of financial management and funding allocation and protects the relevant department from providing a social right to people who are in the Republic irregularly and are not documented. They also argued that the decision not to fund undocumented learners, as well as the Admission Policy were necessary to uphold the Constitution, the Children's Act 38 of 2005, the Immigration Act, BDRA, and the rule of law. They further contended that it is essential that measures prohibiting free access to public education as well as those contained in the Immigration Act be in place to prevent or, at the very least, dissuade persons who are not citizens or otherwise legally entitled to free government services from burdening the country's constrained financial resources. They further argued that undocumented children ought to claim whatever rights they may have regarding basic education from their country of citizenship, lest South Africa becomes a destination for persons requiring or desiring free education.

5 Findings of the Court

Judgment was handed down on 12 December 2019. The Court effectively made three important findings that will be addressed separately. First, it found that Circular 6 of 2016 was unlawful and unconstitutional; second, it found Clauses 15 and 21 of the Admission Policy to be unlawful and unconstitutional; and, third, it found that sections 39 and 42 of the Immigration Act do not apply

to children receiving basic education in South Africa (and therefore do not prevent undocumented non-national children from receiving education in South Africa).

5.1 Constitutionality of Circular 6 of 2016

As set out above, the issuing of Circular 6 of 2016 was the catalyst for the institution of legal proceedings. Despite this, the Court did not substantively address the question of funding in the judgment. Part of the reason for this is that on the morning of the hearing, counsel for the respondents conceded that the respondents have a duty to provide funding for undocumented learners attending schools in the Eastern Cape, and attempted to settle this point by way of a draft order. As a result, no arguments were led in court on the constitutionality of the circular insofar as it related to the question of funding for undocumented learners. The respondents accepted that it had the duty to fund all learners in schools and that the circular was unconstitutional and unlawful in as much as it withheld funding from undocumented learners.

Nonetheless, the Court in its order made a definitive finding on the constitutionality of the circular. It declared Circular 6 of 2016 to be inconsistent with the Schools Act and the Constitution and set it aside to the extent that it based any Norms and Standards, post-provisioning allocation and National School Nutrition Programme transfers to schools in the Eastern Cape Province on only the learner numbers where valid identity, permit or passport numbers have been captured in the SA-SAMS system. As will be set out below, while the Court set the circular aside, the framing of the order and the lack of substantive engagement by the Court on the question of funding has resulted in some subsequent challenges regarding the implementation of the order.

5.2 Constitutionality of Clause 15 of the Admission Policy

The Court held that Clause 15 constituted a severe limitation to other rights enshrined in the Constitution for the protection of children, namely, the right of children to have their best interests considered paramount; the right to dignity; and the right to equality. The Court considered the impact that Clause 15 had on each of these rights. Mbenenge JP found that section 28 of the Constitution, which addresses the best interests of the child standard, did not

permit a restrictive interpretation.[16] Instead, section 28 must be given a wide interpretation, encompassing 'every child' and not only children who are South African citizens, lawfully present in the country, or in possession of birth certificates.[17] The Court also found that section 28(2) of the Constitution does not only create a stand-alone right, but instead strengthens the right to basic education, and in upholding the children's best interests in every matter, the right to education is augmented.[18]

In addition to the child's best interests, the Court also addressed the impact of Clause 15 on the dignity of the affected children. It reiterated Sachs J's dictum in *S v M* where he found that '[e]very child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.'[19]

Mbenenge JP then considered the devastating consequences that the lack of access to schools had on the affected children. In affidavits filed by the 37 children, they expressed their feelings of shame and embarrassment at being unable to perform tasks that other children of their age can perform, of becoming depressed, or finding themselves in dangerous situations because they were not attending school.[20] The Court stated that the children were without hope of being able to rise above poverty or being allowed to participate meaningfully in the societies of which they are part.[21] This impacted their self-esteem and self-worth, and the potential for human fulfilment.[22] In addition, the Court held that some of the children could end up involved in criminal activities and become a menace to the social fabric.[23]

The Court also considered the impact of Clause 15 on the right to equality. It highlighted the prohibition against unfair discrimination in section 9(3) of the Constitution as well as section 5(1) of the Schools Act, which makes it incumbent on a public school to admit learners and serve their educational requirements without in any way unfairly discriminating against learners. Mbenenge JP found that

16 *Centre for Child Law* (n 2) para 76.
17 As above.
18 *Centre for Child Law* (n 2) para 77.
19 *S v M* 2007 (2) SACR 539 (CC) (26 September 2007) para 18.
20 *Centre for Child Law* (n 2) para 80.
21 *Centre for Child Law* para 81.
22 As above.
23 As above.

Clause 15 effectively denied children access to education based on their documentation status, which constitutes unfair discrimination.[24] While documentary status is not a listed ground of discrimination in terms of section 9(3) of the Constitution, the Court found that the differentiation between documented and undocumented learners amounted to discrimination on a ground analogous to those listed in section 9(3). For documentary status to be considered an analogous ground of differentiation to those listed in section 9(3), the Court had to consider whether the classification had an adverse effect on the dignity of the undocumented learners, or some other comparable effect.[25]

In applying this test, the Court found that the children's argument that their documentary status is a ground analogous to those listed in section 9(3) of the Constitution had merit. First, the children had no control over their documentary status, and differentiating them on their documentation status impaired their fundamental right to dignity, placing this differentiation on par with those expressly listed in section 9(3) of the Constitution. Mbenenge JP stated:[26]

> It is an undeniable fact that the children affected by the impugned Circular are disadvantaged by their lack of documentation and emanate from the vulnerable, poor black community. If one adds to this the fact that this differentiation is based on attributes that have the potential to impair human dignity, the inescapable conclusion is that clause 15 limits the right to equality as discriminating between children on the basis of their documentation status, as well. If, as enjoined by Harksen, one must have regard inter alia to the position of children in society and whether they have been disadvantaged in part and the extent to which their fundamental right to dignity has been impaired, one is led to the ineluctable conclusion that clause 15 of the Admission Policy is unfair.

The finding that documentary status is an analogous ground of discrimination to the listed grounds in section 9(3) of the Constitution is important, as it is the first time a South African court has pronounced on this question and is something that holds significance for future litigation for undocumented children, particularly in respect of access to education. The Court linked the differentiation experienced by the affected undocumented learners to the impairment of their dignity, and ultimately concluded that it amounted to discrimination. The Court found further support for this conclusion in international human rights instruments to which South Africa is a signatory and that expressly prohibit discrimination

24 *Centre for Child Law* para 83.
25 *Centre for Child Law* para 84.
26 *Centre for Child Law* para 86.

in the enjoyment of entrenched rights. In particular, the Court relied on the Convention on the Rights of the Child, 1989 (CRC), which is applicable to each child within a state party's jurisdiction without discrimination of any kind, irrespective of the child's or their parent's or legal guardian's national ethnic, social origin, birth or other status.[27]

5.3 Constitutionality of clause 21 of the Admission Policy

The Court proceeded to consider the constitutionality of Clause 21, which requires that learners classified as 'illegal aliens' must prove that they have applied to legalise their stay before they can be admitted to public schools.[28] This, the Court held, was impossible.[29] It found that if regard is had to the fact that the children were brought into South Africa illegally, then they cannot meet the requirements of a residence or study permit.[30] They can therefore not apply to legalise their stay. They have no choice in being brought to the country but end up bearing the negative consequences attached to their parents' choices.[31]

The Court then made an important finding as to the ambit of the right to basic education in section 29(1) of the Constitution. It finds that the right to education extends to 'everyone' within the boundaries of South Africa, and that their nationality or immigration status is immaterial. It relies on the Constitutional Court's finding in *Lawyers for Human Rights*[32] where the Court had to interpret the ambit of 'everyone' in sections 12 and 35(2) of the Constitution. The Constitutional Court found that these rights were integral to the values of human dignity, equality, and freedom that are fundamental to South Africa's constitutional order, and that denying these rights to human beings who are physically inside the country, merely because they have not entered South Africa formally, would negate the values underlying the Constitution. As a result, 'everyone' in sections 12(2) and 35(2) should be given its ordinary meaning. The Court found that where the Constitution intends to confine rights to citizens, it says so. Mbenenge JP found further support for this in international law, which makes it plain that children, including those with irregular status, are bearers of the right to education.[33]

27 *Centre for Child Law* para 87; art 2(2) Convention on the Rights of the Child.
28 *Centre for Child Law* para 89.
29 As above.
30 As above.
31 As above.
32 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC) paras 26-27.
33 *Centre for Child Law* para 91.

It was conceded by counsel for the respondents that the Admission Policy is not a law of general application for purposes of section 36 of the Constitution and that, therefore, the policy is incapable of authorising a limitation of the rights in the Bill of Rights.[34] The Court therefore concluded that Clauses 15 and 21 unjustifiably limit the rights under sections 9(1), 10, 28(2) and 29(1)(a) of the Constitution. An attempt was made by counsel for the respondents to suggest that even though the policy was not subject to the justifiability analysis in section 36, it did accord well with the 'laws of the land', of which sections 39 and 42 of the Immigration Act were the most important.[35] It was argued by the respondents that sections 39 and 42 have the legitimate purpose of advancing the interests of South African citizens and of putting in place measures to discourage illegal foreigners from coming to the country to receive free basic education.

Before addressing the constitutionality of sections 39 and 42 of the Immigration Act, the Court dealt with this argument by the respondents. The Court stated that no evidence was presented to the Court to suggest that illegal foreigners[36] come to South Africa to receive free basic education. Rather, all indications were that immigrants come to South Africa to seek employment. The Court made it clear that it remained the responsibility of the government to enforce compliance with labour laws, put immigration controls in place, and impose appropriate sanctions for the hiring of illegal foreigners without compliance with the law. All this could be achieved without the invasion of the fundamental rights of children to access education.

In addition to this, the Court also pointed out that the Admission Policy was *ultra vires* the Schools Act, as well as NEPA. Section 3(4)(i) of NEPA empowers the Minister to make national policy for the admission of students to education institutions, and section 4 of NEPA provides that the policy shall be directed towards specific objectives, including the advancement of the right 'of every person to basic education'. Section 3(1) of the Schools Act provides that it is compulsory for all children to attend school from the age of seven 7 until the age of 15, or on reaching grade 9, or whichever comes sooner. The Court found that Clauses 15 and 21 of the Admission Policy purport to impose additional requirements on children who seek admission to public schools. That is not contemplated by the Schools

34 *Centre for Child Law* para 97.
35 *Centre for Child Law* para 98.
36 The authors prefer the term 'non-nationals' but use the term 'illegal foreigners' as it was used in the judgment.

Act. NEPA also contains no provision, either expressly or impliedly, authorising the imposition of the requirement of providing a birth certificate or identification document as a necessary precondition for admission to a public school. As a result, the Admission Policy was found to be *ultra vires* the Schools Act as well as NEPA in as much as it requires documents to be provided upon admission. The Court then proceeded to address the challenge to sections 39 and 42 of the Immigration Act.

5.4 Proper interpretation of sections 39 and 42 of the Immigration Act

The Court relied on the SAHRC's (second *amicus curiae*) submissions on how sections 39 and 42 of the Immigration Act should be interpreted. The SAHRC argued that the interpretation hinged on three invocations, namely, (i) section 39(2) of the Constitution which requires that all legislation be interpreted to promote the spirit, purport and objects of the Bill of Rights; (ii) the principle enunciated in section 233 of the Constitution requiring that legislation be interpreted in conformity with international law; and (iii) the presumption that legislation does not intend to change the law more than is necessary, and that Parliament knows the existing law when it legislates.

First, the Court reasoned that sections 39 and 42 ought to be interpreted so as not to conflict with section 29(1) of the Constitution. In doing so, the Court opted for an interpretative approach that would save sections 39 and 42 from constitutional invalidity. This, the Court stated, accords with section 39(2) of the Constitution which requires the courts, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights.

Second, the Court found that sections 39 and 42 of the Immigration Act had to be interpreted consistent with international law, as envisioned by section 233 of the Constitution. The Court, throughout the judgment, had referred to international law instruments that supported the provision of education to all children, irrespective of their documentary status. It therefore found that given that South Africa has signed and ratified these international law instruments, the courts were bound to give effect to them.[37]

Third, the Court reiterated the longstanding presumption that the legislature does not intend to alter the existing legislation more

37 *Centre for Child Law* para 122.

than is necessary, and that it is presumed that the legislature knows the law.[38] The Court stated that the Schools Act was promulgated before the Immigration Act and that it does not draw any distinction between learners who are legally present in the country and those that are not.[39] Instead, the Court found that section 3(1) of the Schools Act places an obligation on every parent to cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which the learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of 15 years or the ninth grade.[40]

Section 3(6)(b) provides that any person who, without just cause, prevents a learner who is subject to compulsory attendance from attending school is guilty of an offence, and section 5 places an obligation on public schools to admit learners to their schools and to serve their educational needs without in any way unfairly discriminating.[41] The Court found that in light of the absence of any express indication that the Immigration Act intended to amend the Schools Act, the Immigration Act must be interpreted not to detract from the rights recognised under the Schools Act for learners to receive education.[42]

The Court further pointed out that the Immigration Act makes no reference to 'school', 'education' or 'basic education'.[43] The significance of this, the Court elaborated, is that the Act was promulgated at a time when the Constitution already referred to a right to 'basic education' in section 29; the international law that bound South Africa referred to the right of the child to 'education'; and the Schools Act referred to 'school', and 'education' when it conferred rights on learners.[44] Accordingly, it is appropriate to interpret the Immigration Act's reference to 'learning institution' and 'training or instructions' as *not* referring to the basic education that schools provide to children.[45] The Court, therefore, held that sections 39 and 42 of the Immigration Act had to be interpreted in a way that does not prohibit children from receiving basic education from schools.[46] This approach saved the provisions from being declared unconstitutional in their entirety.

38 *Centre for Child Law* para 124.
39 As above.
40 As above.
41 As above.
42 *Centre for Child Law* para 125.
43 As above.
44 As above.
45 As above.
46 *Centre for Child Law* para 126.

The Court ultimately found that the Department of Basic Education and the Provincial Department acted unconstitutionally in not permitting children to continue receiving education in public schools purely by reason of the fact that they lack identification documents.[47] It also directed the respondents to admit all children not in possession of an official birth certificate into public schools in the Eastern Cape Province and that where a learner cannot provide a birth certificate, the principal of the relevant school was directed to accept alternative proof of identity, such as an affidavit or sworn statement deposed to by the parent, care giver or guardian of the learner wherein the learner is fully identified.[48] The respondents were also interdicted and restrained from removing or excluding from schools children, including illegal foreign children, already admitted, purely by reason of the fact that the children have no identity document number, permit or passport, or have not produced any identification documents.[49]

6 Reflections on litigation strategies

When reflecting on the litigation, several strategies were employed that assisted with the litigation. In this part we address some of these strategies.

6.1 Bringing the matter on behalf of 37 children

After consultations with the children were completed, the Centre for Child Law researched, strategised and discussed whether the matter, if launched, had prospects of success. Several factors were taken into account when it considered the potential for success – or whether bringing the litigation could in fact have a damaging effect. While it struck the Centre for Child Law that the challenge in respect of South African children had higher prospects of success, it acknowledged that the same was not true for the undocumented migrant children it represented. It accordingly required research and a significant degree of contemplation.

The first consideration was international and foreign law. Special regard was given to a 2017 Joint General Comment of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families the Committee on the Rights of the Child.[50] It stated

47 *Centre for Child Law* para 135.
48 As above.
49 As above.
50 ESCR Committee General Comment 13: The Right to Education (article 3).

that children, regardless of their documentation status and whether they were irregularly in a country, should be given access to education. Special regard was also given to the Committee on Economic, Social and Cultural Rights (ESCR Committee)'s General Comment on the right to education,[51] which expanded on the special nature of the right to education – particularly its status as an empowerment right. The General Comment notes that '[e]ducation is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.'[52] The importance of the right to education is similarly recognised in the Constitution, where it is also given unique status – for instance, that it is immediately realisable.

In addition to international law, the Centre for Child Law carefully considered *Plyler v Doe*,[53] an American case, which held that 'undocumented immigrants' could attend school. An important dictum from the case that propelled the Centre for Child Law to move forward with litigation on behalf of the undocumented migrant children included the Court's statement that

> [t]he deprivation of public education is not like the deprivation of some other governmental benefit. Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage; the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement. In determining the rationality of the Texas statute, its costs to the Nation and to the innocent children may properly be considered.

While *Plyer* was certainly correct that excluding undocumented children from being able to access education damaged the social fabric, a more critical factor for the Centre for Child Law was the impact on migrant children themselves – in particular, that their rights were being limited in respect of something over which they had no control and over their parents' actions. With children being holders of their own rights, punishing adults through their children's deprivation was legally incorrect. The Centre for Child Law was not opposed to the Department of Home Affairs performing its function of immigration control – it only required that the Department of

51 Joint General Comment 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and 23 (2017) of the Committee on the Rights of the Child on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return para 59.
52 General Comment 13 (n 50).
53 *Plyler v Doe* 457 US 202 (1982).

Home Affairs do so in a lawful manner and not in a manner that punished children for their parent's actions.

6.2 Including children's voices

A strategy that proved invaluable was to place before the Court affidavits from the 37 children who joined the proceedings, setting out their stories and experiences with accessing education while undocumented. Once the Centre for Child Law felt confident that it was legally sound to proceed with the matter, a decision was taken to represent the children rather than their parents, where the child's maturity allowed for it. This also had the effect that affidavits were taken from many of the children even where the parents were representing them – ensuring that even the voices of younger children were heard. The experiences of the children, as told by them, played an important role in the Court's conclusion that their human dignity was impaired by the decision to stop funding them and their exclusion from school.

6.3 The use of an institutional client

There are three reasons why it can be strategic to include an institutional client in litigation of this nature. First, as in the *Centre for Child Law* case, it allows for an institution with expertise on the issue to represent the interests of children beyond the individual applicants. In this case, the Centre for Child Law acted in their own interest,[54] in the interests of those learners who attended Phakamisa High School and whose rights were materially and adversely affected by the decision,[55] on behalf of a class of learners consisting of all learners without identity numbers, permits, or passports,[56] and in the public interest.[57] This means that the relief sought would not only apply to the learners at the applicant school but would also extend to all other learners that are affected by the decision.

Second, it often happens that the state agrees to the demands of the individual applicants and provides them with the relief that they sought to try and settle litigation. However, where the law, policy, decision or action that is challenged is of a large-scale, systemic nature, the unlawful or unconstitutional conduct may persist beyond the point of settlement where the institutional client is mandated to

54 Sec 38(a) Constitution.
55 Sec 38(b) Constitution.
56 Sec 38(c) Constitution.
57 Sec 38(d) Constitution.

represent wider interests. It is then important to have an institutional client who cares about the larger systemic issues and will persist with relief that would result in systemic change, even in instances where the individual applicants are no longer affected by it.

Third, it can often add credence to the case of the individual applicants to have a reputable institutional client join their cause. This creates the impression that the applicants are not alone in their belief that a law or practice is unlawful or unconstitutional, but an institution with expertise on the issue also supports their application. The decision to approach the Centre for Child Law, therefore, was a strategic attempt to bolster the case of the individual school governing body and its learners, and to extend the relief to all the learners in the province.

6.4 The role of the *amici curiae*

As set out above, Section27 and the SAHRC joined the application as *amici curiae.* The admission of the *amici curiae* proved invaluable for the success of the litigation as, in the manner described above, it provided further credence to the applicants' case – particularly given the importance of the SAHRC as a Chapter 9 institution.

This was especially important in a case in which the applicants were asking for relief that could be considered controversial. It also reinforced the fact that this issue did not only affect the individual school and its learners but in fact was widespread. The fact that other civil society organisations and South Africa's constitutional rights watchdog supported the relief, therefore, was crucial.

Second, on a practical level, the submissions by the *amici curiae* helped to secure a successful outcome in the case. While international law was at the core of why the Centre for Child Law thought it was legally sound to bring the matter, and while it had intended to rely on international law in its heads of argument, Section27 provided the Court with an overview of international law at an in-depth and detailed level that the Centre for Child Law did not have the scope to do.[58]

There was debate regarding the SAHRC's intervention, as some civil society organisations took the view that a declaration of constitutional invalidity was preferable to a constitutional reading of the Immigration Act. This view stemmed from a fear that leaving the

58 *Centre for Child Law* paras 112-123.

provisions as they are in the statute book could lead to departmental officials continuing to misinterpret the law – lower-level officials who approach schools with demands that non-national learners must be removed might not have access to the Makhanda High Court's judgment that stated how to interpret the Immigration Act. This was especially true for the Centre for Child Law, whose experience in Pretoria and Johannesburg was of lower-level Department of Home Affairs officials attending at schools and removing children from school on the basis of sections 39 and 42. However, the SAHRC's approach was legally correct and was accepted by the Court. In many ways this was preferable, as the Court would have been more inclined to read the provisions of the Immigration Act constitutionally and less inclined to declare them unconstitutional.

7 Implementation of the judgment

Following the judgment in December 2019, the Department of Basic Education and the various provincial education departments had to implement the judgment and the order. This process has been challenging and, as will be set out below, some of the formal steps undertaken by the state to implement the order have not always resulted in practical changes for learners on ground level. It is difficult to determine with certainty how many children continue to be excluded because of the lack of documentation. Civil society organisations continue to report assisting learners with obtaining access,[59] mostly in instances where schools were unaware of the judgment and Circular 1 of 2020.

In June 2023 the Eastern Cape Department of Education indicated that it had 73 391 undocumented learners on SA-SAMS in the province.[60] This is an increase from the 43 534 learners that were on the system in 2019 at the time of the *Centre for Child Law* judgment.[61] This data illustrates an obvious increase in the number of learners attending school in the province without documentation, but it may be incorrect to simply deduce that it can entirely be attributed to the *Centre for Child Law* judgment. During the COVID-19 pandemic,

59 In 2021 Section27 reported assisting 75 learners to obtain admission to school, while the LRC reported assisting 21 learners to obtain access to school.

60 Eastern Cape Department of Education 'Eastern Cape learners without IDs' Presentation to the South African Human Rights Commission (28 June 2023), Mthatha.

61 This information was provided in a supplementary affidavit of Shunmugam Govindasamy Padayachee, the then acting Director-General of the Department of Basic Education that was filed as part of the litigation in *Centre for Child Law*. The information was extracted from the Department of Basic Education's Learner Unit Record Information and Tracking System (LURITS).

Home Affairs suspended some of its services, including applications for late birth registrations. As a result, the number of children whose births were not registered increased over this period, and Home Affairs faces a serious backlog in the processing of late birth registration applications.[62]

Thus, at least part of this increase in the number of undocumented children attending school in the Eastern Cape may be attributed to an overall increase in the number of undocumented children whose births have not been registered due to challenges at Home Affairs. As the number of undocumented learners increase overall, the prevalence of these learners in the school system will also increase. Despite this contributing factor, the data does show that undocumented learners are increasingly gaining access to schools in the province and retained in the schools once they are admitted. This is indicative of the fact that the Eastern Cape province has started to align its practices with the *Centre for Child Law* case.

However, challenges do remain, and we have identified three difficulties with the implementation of the judgment and the order that continue to limit undocumented children's access to schools: first, the framing of the order itself and the lack of oversight and follow-up by education authorities to ensure implementation of the order; second, the continued failure to fund undocumented learners in some provinces; and, third, proposed legislative and policy changes that have the potential to undo the legal precedent in *Centre for Child Law*.

7.1 Framing of the court order

Unfortunately, the court order created some ambiguity as to its scope, particularly in relation to its application across all provinces in South Africa. The Admission Policy applied nationally and to all provincial education departments. The declaration of unconstitutionality of Clauses 15 and 21 of the Admission Policy, therefore, was applicable at a national level and not confined to the Eastern Cape province. However, the Court only directed the respondents to admit all children not in possession of an official birth certificate into schools in the Eastern Cape, and where the learner cannot provide the birth certificate, the principal of the relevant school was directed to accept alternative proof of identity such as an affidavit deposed to by the

62 Department of Home Affairs National Assembly Question for Written Reply: Question No 1798, https://pmg.org.za/committee-question/22858/ (accessed 30 September 2023); the total backlog of late birth registrations was 57 267 by December 2022.

parents, care giver or guardian of the learner wherein the learner is fully identified.[63] This directive to accept alternative proof of identity is confined to the Eastern Cape province, and the same practice was not ordered at a national level.

Despite this, the directive to national education authorities preventing them from removing or excluding a child from school by reason of the fact that they do not have identity numbers, permits or passports or have not produced these identification documents,[64] appears to apply nationally. This has the potential to create confusion among the other provincial education departments, that may have difficulty in interpreting the order and its application in provinces other than the Eastern Cape. In response to the judgment, and to clarify the application of the judgment and order, the Department of Basic Education issued a circular to all heads of provincial education departments, school districts offices, school governing bodies, school principals, and all South African schools in January 2020.

Circular 1 of 2020[65] served to inform all schools and education authorities about the *Centre for Child Law* judgment and its implications for the admission of learners to public schools. In particular, the circular clarified that while the judgment related to matters that emanated in the Eastern Cape province, it 'set the tone of the appetite of courts on the learners' right to basic education throughout the country'.[66] The circular reiterated some of the Court's findings, including that the right to education extends to everyone within the boundaries of South Africa despite their nationality or immigration status.[67] It also informed schools and education authorities that amendments would be effected to clauses of the Admission Policy to align it with the judgment and order and that all schools are advised to follow the precedent set in the order of the High Court.[68]

Circular 1 of 2020, while a positive step by the department to ensure compliance with the order, did not sufficiently address the confusion that arose from the order. It simply advised schools to follow the precedent in the judgment and order, without providing guidelines on how this must be achieved. There are two challenges with respect to this approach. First, the circular expected schools,

63 *Centre for Child Law* para 4 of the order.
64 *Centre for Child Law* para 6 of the order.
65 Department of Basic Education 'Circular 1 of 2020: Admission of learners to public schools', https://section27.org.za/wp-content/uploads/2020/02/Circular-1-of-2020-Undocumented-Learners.pdf (accessed 30 September 2023).
66 Para 2.1 of Circular 1 of 2020.
67 Para 2.2 of Circular 1 of 2020.
68 Paras 2.3 and 2.4 of Circular 1 of 2020.

principals and school governing bodies, as well as other education authorities, to search for the order, interpret it, and then apply it in their schools. It required significant effort on the side of school governing bodies, principals and schools, and relied on the ability of lay people to correctly interpret and apply the law. Second, those who took the steps to read the order would still be confronted by the obvious ambiguous nature of the order.

Civil society organisations[69] reported that despite the issuing of the circular, they still encountered numerous cases of undocumented South African, migrant, stateless, asylum-seeking and refugee learners being denied access to basic education.[70] Schools remain ill-informed regarding the rights of migrant and undocumented children to access education and are often unaware of Circular 1 of 2020 or the *Centre for Child Law* judgment. Importantly, civil society noted that at times, when schools are aware of the judgment and the circular, they have argued that it is only advisory, and that the judgment applies only to schools in the Eastern Cape province.[71] Consequently, schools continue to insist on identity documentation being submitted to obtain admission to schools, or excluding learners who are not documented. This is aggravated by the fact that the judgment was handed down by an Eastern Cape High Court and not by a national court. The perception seems to exist that because of the jurisdictional purview of the Court, the judgment is not binding on other provinces.

Additionally, some of the provinces have shifted their admission processes to an online portal, where parents and caregivers no longer apply at the school directly, but rather on a centralised electronic system. The online portal to apply for admission at a public school in the Gauteng and Mpumalanga provinces requires learners, parents and caregivers to submit identity documentation.[72] There is no option to by-pass this requirement on the portal when a learner, parent or care giver does not have identity documentation, which means that many undocumented learners are simply unable to apply to attend school in these provinces.

69 Section27, Centre for Child Law, Children's Institute, Legal Resources Centre, Equal Education Law Centre, and Lawyers for Human Rights.

70 Section27 and others 'Joint submission to the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the review of the information received from South Africa on follow-up to the Concluding Observations on its initial report' (14 May 2021).

71 As above.

72 K Mutandiro '"I want to be in school ... but we have no papers": Undocumented children struggle to find schools' *Groundup* 13 January 2023, https://www.news24.com/news24/southafrica/news/i-want-to-be-in-school-but-we-have-no-papers-undocumented-children-struggle-to-find-schools-20230113 (accessed 30 September 2023).

In the authors' experience of assisting undocumented learners to obtain admission following the judgment, much of the problem remains at school and provincial level. The Department of Basic Education has generally been responsive when complaints of learner exclusion have been filed, and attempt to address the challenge with the individual school or provincial education department.

Upon the joint request of the LRC, the Centre for Child Law and the Children's Institute, the Department of Basic Education also recirculated Circular 1 of 2020 in June 2022, with a clear instruction to schools and provincial departments to admit undocumented learners and provide them with basic education. Despite this, instances of learner exclusion continue at school level, and learners remain confronted by the need to produce a birth certificate, passport or permit.

This phenomenon illustrates the limitations of the courts in advancing the rights of undocumented learners. While the *Centre for Child Law* judgment was meant to rectify the situation of undocumented learners being denied access to schools, its impact is limited by the state departments tasked with enforcing the order. Even though the Department of Basic Education has taken some steps to attempt to implement the order, it requires a much more concerted and continuous effort to ensure that all schools are aware of the judgment and are abiding by the order. It also requires an effort on the part of civil society to make sure that the orders are complied with, and that implementation is continuously monitored and evaluated.[73]

7.2 Continued failure of provincial education departments to fund undocumented learners

In addition to instances of learners not being admitted to the schools, civil society organisations have also found that some provinces in South Africa are still not funding their undocumented learners. During 2022 the LRC undertook field research across all provinces in South Africa with a view to establishing whether schools are receiving

73 Following the handing down of the judgment, the LRC, Centre for Child Law, Children's Institute and Section27 established the Phakamisa Monitoring Alliance. It is an informal grouping of organisations committed to ensuring the implementation of the order. This includes engaging with government where challenges arise, collating data on the implementation of the order, and making submissions to regional and international bodies on South Africa's attempts to provide education to undocumented learners.

funding for their undocumented learners.[74] As stated above, the *Centre for Child Law* case was launched because of ECDOE's decision to stop funding undocumented learners. Given the outcome of the judgment, it was important to determine whether all learners, particularly Eastern Cape learners, were being funded for their undocumented learners.

The research revealed that most provinces in the country were abiding by the judgment and including undocumented learners when allocating education funding. However, in KwaZulu-Natal, Limpopo and the North West provinces, schools reported that undocumented learners were not being funded.[75] The interviewed schools indicated that while they had never received formal communication from the provincial education departments in these provinces addressing the funding of undocumented learners, they were told informally by district and provincial education officials that undocumented learners were not included when funding was allocated to schools.[76] Despite this, they all admitted undocumented learners as they had been instructed to do so by the provincial education departments.[77]

It therefore appears from the research that while these three provincial education departments follow the *Centre for Child Law* judgment in respect of the admission of learners, it does not fund the schools accordingly. It should be noted that all three provincial education departments deny that they are not funding undocumented learners. In correspondence to the LRC, all three departments stated that they did fund undocumented learners, but provided no proof to this effect. This claim by the provincial departments also contradicted the experiences of the schools themselves. A joint research project by the LRC, the Centre for Child Law and the Children's Institute during 2023 and 2024 is aimed at investigating the prevalence of the lack of funding in these provinces.

The SAHRC embarked on a similar exercise in the Eastern Cape to determine whether schools are funded for undocumented learners.[78] They reported interviewing schools during 2023 that

74 C van Schalkwyk and others 'Pro-poor education funding in South Africa' (March 2023), available from authors upon request.
75 Research was only conducted at 10 schools in each province, so the sample is too small to represent a conclusive finding that none of the schools are receiving funding for their undocumented learners. The research, however, was conducted in three different education districts in each of the provinces, with schools in all the education districts reporting a lack of funding.
76 Van Schalkwyk and others (n 74).
77 As above.
78 SAHRC 'Stakeholder engagement on undocumented children and access to education' (28 June 2023), Mthatha.

were not receiving funding for their undocumented learners.[79] This contradicts the findings of the LRC of which the research indicated that schools were receiving funding for their undocumented learners in the Eastern Cape.[80] ECDOE also indicates that it does fund undocumented learners in accordance with the *Centre for Child Law* case.[81]

It is unclear from the SAHRC's research what the exact reason is for the lack of funding in the schools. It appears that some schools experience administrative challenges and are not able to enter the details of the learners onto SA-SAMS, resulting in some learners not being captured on the system at all.[82] While most of the schools can enter their learner details without the required documentation, others appear unable to navigate SA-SAMS, resulting in the lack of funding.[83] This requires an intervention by ECDOE to ensure that all its schools and administrators are adequately trained to enable them to enter learner details on SA-SAMS.

As mentioned above, one of the shortfalls of the *Centre for Child Law* case is the failure to adequately address the question of funding. The finding by the Court that Circular 6 of 2016 should be set aside was important in addressing the funding issue in the Eastern Cape. It removed the immediate impediment to funding for learners in the province, but the Court did not make a clear finding that all undocumented learners across all provinces are entitled to education funding. Since the judgment itself does not provide guidance on the funding question, it is left to provincial education departments to interpret the judgment as per Circular 1 of 2020. As mentioned above, the circular is no more enlightening than the judgment and order, but relies on the abilities of lay people to interpret the law.

Upon a proper interpretation of the *Centre for Child Law* judgment, the Constitution,[84] the Norms and Standards for School Funding[85] and the Schools Act[86] it is submitted that any decision

79 As above.
80 It should be noted that the SAHRC interviewed 40 schools, while the LRC only interviewed 10 schools. The SAHRC reported that 23 of the 40 schools complained about a lack of funding for the undocumented learners, while the remaining 17 schools were receiving funding.
81 Eastern Cape Department of Education (n 60).
82 SAHRC (n 78).
83 As above.
84 Secs 7(2), 9, 10, 28(2) & 29(1).
85 *Government Gazette* Notice 2362 of 1998.
86 Secs 34 and 35 of the South African Schools Act. Sec 34(1) states that '[t]he state must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision'.

by any provincial education department not to fund undocumented learners is unconstitutional and unlawful. An analysis of the legal framework supporting this argument is outside the scope of this article. However, it is submitted that where a court is confronted by a question around funding for undocumented learners, it should undertake a proper analysis of the legal framework and make a clear finding on this question. This will prevent any uncertainty or potential ambiguity that could provide provincial education departments with a reason not to fund undocumented learners.

7.3 New legislative and policy framework

Following the *Centre for Child Law* judgment, there have been two significant legal developments that could potentially undo some of the positive legal changes brought about by the judgment. First, on 11 February 2021 the Department of Basic Education published a new draft Admissions Policy for Ordinary Public Schools for public comment.[87] The policy was drafted in part as a reaction to the *Centre for Child* judgment and the unconstitutionality of clauses 15 and 21 of the Admission Policy. The draft policy creates three categories of learners, namely, South African citizens;[88] learners who are not South African citizens;[89] and undocumented learners.[90]

Clause 15 of the draft policy states that when a parent applies for the admission of a learner to an ordinary public school, the parent must present an official birth certificate (with an identity number) of the learner or a written affirmation or sworn written statement (in the form of an affidavit) about the age of the learner to the principal of the school. Clause 15.1 further states that if the parent is unable to submit the birth certificate or has only submitted a written affirmation or sworn written statement about the age of a learner, the learner must be admitted. These two clauses align with the findings in the *Centre for Child Law* judgment that makes provision for an affidavit or sworn statement to be provided in the absence of a birth certificate.

In addition, clause 15.3 of the draft policy states that

> [i]f the parent fails to submit the birth certificate of a learner, the principal must admit the learner and refer the matter to the Head of Department concerned. The Head of Department must hold the parents accountable to acquire birth certificates for their children. The Head

87 *Government Gazette* 44139, https://www.gov.za/sites/default/files/gcis_document/202102/44139gen39.pdf; public comments closed on 12 March 2021.
88 Clauses 14 & 15.
89 Clauses 20-22.
90 Clauses 23 & 24.

> of Department may liaise with the nearest office of the Department of Home Affairs for assistance relating to the matter. It remains the primary responsibility of parents to acquire birth certificates for their children.

This obligation on the head of department to hold the parents accountable is reiterated in clause 24 of the draft policy which addresses the issue of undocumented learners.

Clauses 20 to 22 of the draft policy address the issue of admission for children who are not South African citizens but are in possession of some documentation to regulate their status in South Africa. It makes provision for learners in possession of a permanent residence permit, a temporary residence visa, and an asylum-seeker visa or refugee visa. Clause 20 sets out the documents that are required for these categories of learners and lists a number of documents, such as the learners' birth certificates from their country of origin, their passports, study visas, permanent residency certificates, or asylum-seeker permits. This list of documents is incredibly burdensome for children who are not South African citizens. It places a much more strenuous obligation on non-national children than the now unconstitutional Clause 21 of the existing Admission Policy, in turn creating the potential for these learners to face exclusion from schools should they be unable to fulfil all the documentary obligations set out in the draft policy.

Clauses 23 and 24 make specific provision for learners who are undocumented. Clause 23 states that the right to education extends to everyone within the boundaries of South Africa, and that the nationality and immigrant status is immaterial. It further states that '[a]ll schools are *advised* to admit learners and serve their educational needs irrespective of whether the learner or the parent of the learner does not produce the documents listed in paragraphs 15, 17 to 20 of the policy'.

Unfortunately, clause 23 fails to reflect the gravity of the constitutional violation that the *Centre for Child Law* judgment addresses and the mandatory nature of the Constitution itself.[91] First, the judgment *directs* the educational authorities to admit undocumented learners and does not simply *advise* them to admit the learners.[92] The wording of this clause is not strong enough to reflect the actual findings of the Court and to appropriately reflect

91 Legal Resources Centre 'Submission to the Department of Basic Education on the Admission Policy for ordinary public schools' (March 2021) 8.
92 *Centre for Child Law* para 6 of the order.

what the Constitution requires in respect of the admission of undocumented learners.[93]

In addition to this, clause 24 of the draft policy reiterates the obligation placed on the head of department to hold parents of undocumented learners accountable for acquiring birth certificates for their children. The draft policy does not clarify what form this accountability will take, or what steps the head of department must take to hold parents to account. In addition, this provision of the draft policy perhaps incorrectly assumes that the lack of documentation is the result of the dereliction of the parents' duty to obtain documents. As discussed above, the lack of documentation very often is not the fault of the parent, guardian or care giver, but rather the result of a myriad of challenges at Home Affairs.

This includes cases related to the inability of unmarried fathers to register the birth of their children, difficulties in obtaining citizenship, and problems with obtaining birth certificates due to an inability to meet the requirements for late birth registration in the Birth and Death Registration Act.[94] By the time that the child accesses school, parents, guardians and care givers have often tried multiple avenues to ensure that the births of their children are registered and that they obtain documentation for the child. Their inability to do so often is through no fault of their own, and holding these parents to account will achieve very little if state departments responsible for the issuing of documents do not align their laws and practices to assist children to obtain documents. While the draft policy was published for comments, no further steps have been taken to move the policy through the legislative process, and it is unclear when, if ever, the policy will be promulgated. Part of the delay in the finalisation of the draft policy may be the legislative process currently being undertaken to promulgate the Basic Education Laws Amendment Act (BELA). BELA will amend the South African Schools Act and sets out the requirements for the admission of learners to ordinary public schools. It was adopted by the National Assembly and the National Council of Provinces and awaits the President's signature.

BELA proposes amendments to the South African Schools Act and sets out requirements for the admission of learners to ordinary public schools. It was adopted by the National Assembly on 27 September 2023, and has been referred to the National Council of Provinces for concurrence. It provides a definition for 'required

93 LRC (n 91) 8.
94 As above.

documents' and proposes an amendment to section 5 of the Schools Act. Section 5(1) of BELA states that '[a] public school must admit and provide education to learners and must serve their educational requirements for the duration of their school attendance without unfairly discriminating in any way'. It then proposes a new section 1A and 1B which read as follows:

> 1A Any learner whose parent or guardian has not provided any required documents, whether of the learner or such adult person acting on behalf of the learner, during the application for admission, shall nonetheless be allowed to attend school.
>
> 1B The principal of the school must advise the parent or guardian to secure the required documents.

There are several difficulties with the proposed amendment, particularly considering the *Centre for Child Law* judgment. First, civil society organisations have pointed out that considering the judgment, documents are in fact not required at all.[95] The term 'required' documents, therefore, is misleading and gives the impression that they *must* be provided, failing which the child will not be able to attend school. Second, the actual list of required documents is problematic. The definition creates four categories of learners whose documents are required for purposes of admission to a public school. It refers to children born to a South African parent;[96] children born to two foreign national parents who are permanent residents or temporary residents;[97] refugees and asylum-seeker children;[98] and children in alternative care.[99]

95 Equal Education Law Centre & Equal Education 'Joint submission on the Basic Education Laws Amendment Bill – 2022' (15 June 2022) 34, https://equaleducation.org.za/wp-content/uploads/2022/06/EELC-EE-SUBMISSION_DRAFT-BELA-BILL-2022_FINAL-1.pdf (accessed 30 September 2023).

96 'Where at least one or both biological or adoptive parents of a learner are South African citizens, the following documents: (i) an unabridged birth certificate of the learner; (ii) the South African identity documents or cards of the learner's parents; and (iii) where either or both parents are deceased, the relevant death certificates.'

97 'Where both parents of the learner are foreign nationals and hold either permanent residence permits or temporary residence visas, the following documents: (i) the learner's foreign issued birth certificate; (ii) the learner's passport; (iii) a study visa or permanent residence permit issued to the learner; (iv) the parents' passports; and (v) the parents' temporary residence visas or permanent residence permits.'

98 'Where the parents of the learner are refugees or asylum seekers, the following documents: (i) the parent's asylum seeker or refugee visa; (ii) the learner's asylum seeker or refugee visa; (iii) the learner's birth certificate if the learner was born in the Republic; and (iv) where asylum seeker visas are provided, a refugee or long term study visa must be provided within three years of admission of the learner.'

99 'Where the learner is in alternative care, the following documents: (i) the relevant court order granting guardianship or custody; and (ii) the learner's unabridged birth certificate.'

Many of the documents that are listed as part of these categories are either impossible to obtain, are not legal requirements under other laws, or do not appear to serve a valid purpose.[100] As set out above, South African children often are unable to obtain their birth certificates due to obstacles within the Department of Home Affairs. The same is true for their parents, whose identity documents are now also required by schools. Permanent and temporary resident children must produce foreign-issued birth certificates, their passports, permanent or temporary residence visas, their parents' passports, and their parents' temporary or permanent residence permits. Many permanent or temporary residents never had passports or foreign-issued birth certificates, or no longer have access to these documents.[101]

Asylum-seeker children must produce a refugee permit or study visa within three years after being admitted to school. However, the Refugees Act does not state that an asylum claim will be determined within three years.[102] In reality, it can take many years for these documents to be provided by Home Affairs. Just like clauses 15 and 21 of the Admission Policy, which placed an obligation on parents to obtain documents within three months, the proposed three-year obligation for asylum children can result in schools interpreting the provision as requiring them to exclude those learners who are unable to meet this requirement. Not only is this provision contrary to the *Centre for Child Law* judgment, but it is completely irrational considering the provisions of the Refugees Act and the challenges faced by asylum-seeker children in obtaining documentation.

It is also important to note that many of these documents do not appear to serve any practical purpose for school administration or learning.[103] It is unclear why schools would require asylum seekers' refugee permits or long-term study visas within three years, or why both the birth certificate from South Africa and the country of origin would be required for temporary or permanent residents. It is also unclear why the documents of the parents would need to be provided. Under the current Admission Policy, these documents are not required. The *Centre for Child Law* case specifically addressed the challenges of providing documents to schools that are difficult to obtain, thus adding further documentary burdens for parents and care givers, effectively multiplying these challenges. In this sense, it has the potential to undo much of the progress that was

100 Equal Education & Equal Education Law Centre (n 95) 34.
101 Equal Education & Equal Education Law Centre (n 95) 35.
102 As above.
103 Equal Education & Equal Education Law Centre (n 95) 36.

made through the *Centre for Child Law* case and create a legislative framework that will again lead to the exclusion of learners, or act as a barrier to admission.

The four categories of learners that must provide the required documents does not include children whose parents are Zimbabwean special permit holders, Lesotho special permit holders, and children who are completely undocumented.[104] This has the potential to create confusion. The definition of 'required documents' sets out certain strict categories of children and the documents that are required for them. The categories of children contained in the 'required documents' section are South African children; permanent residents; temporary residents; refugees; and asylum seekers, giving the impression that if a child does not fall into one of these categories, there is no way to facilitate their admission into school.

It also does not reflect the finding in *Centre for Child Law* that an affidavit or sworn statement can be provided in lieu of documentation. Instead, sections 4(1A) and 4(1B) state that where these documents cannot be provided, the learner must still be admitted and that the principal must advise the parent or guardian to secure the documents. When section 5(1A) states that a child who is unable to produce the 'required documents' shall nonetheless be admitted to school, it by implication is silent on the status of undocumented children and children who are not covered by the categories listed under 'required documents'. Read as a whole, BELA does not sufficiently address the position of undocumented learners, places an irrational documentary burden on learners trying to obtain admission to school, and does not make it clear that, in line with *Centre for Child Law*, undocumented learners can attain admission by submitting a sworn statement or affidavit to the school.

Lastly, the list of required documents does not align with the list of documents that will be required through the Amended National Admission Policy for Ordinary Public Schools, should those amendments pass. The same is true for the procedures regarding what will happen if the documents are not produced – there are different procedures in the Amended National Admission Policy for Ordinary Public Schools than those currently set out in BELA. It is not clear whether the legislature is awaiting the finalisation of BELA before addressing the amendments to the National Admission Policy for Ordinary Public Schools to align the provisions of the legislative and policy framework.

104 Equal Education & Equal Education Law Centre (n 95) 39.

These proposed legislative and policy changes have the potential to negate some of the advances made because of the *Centre for Child Law* judgment. The legislature makes no reference to the Court's directive that an affidavit or sworn statement can be accepted as alternative proof of identity, but rather places a more cumbersome documentary burden on learners. Should BELA and the Admission Policy be promulgated, it creates scope for further litigation on this issue, where the courts will again have to step in to ensure that the right to education for undocumented learners are realised.

8 Conclusion

The litigation in *Centre for Child Law* was an incredibly important tool to provide clarity on the legal rights of undocumented learners in South Africa. The judgment and order, although not perfect, significantly improved access to education for undocumented children in the country and brought about positive steps on the part of the education authorities to ensure that undocumented learners access education. It set an important precedent for future litigation on the issue, particularly in respect of documentary status as an analogous ground of discrimination under section 9(3) of the Constitution.

However, it is clear that judgments of this nature are not a silver bullet that immediately solves all the challenges faced by undocumented learners. Challenges in implementing the judgment and the order remain and, as set out, potential new law and policy developments could require further interventions by the court. In this sense, the role of the court, while important, is limited. Judgments and orders of this nature are partly dependent upon a willing government that will take action to implement it, an active civil society that will monitor implementation, and a clear understanding of the judgment and the order by those most affected by it.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: GM Quan, R Fambasayi & T Ferreira 'Transforming education through mother tongue language as a language of instruction in South Africa' (2024) 24 *African Human Rights Law Journal* 264-291
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a12

Transforming education through mother tongue language as a language of instruction in South Africa

*Gertrude Mafoa Quan**
NRF SARChI Chair Post-Doctoral Research Fellow in International Children's Rights, University of the Witwatersrand, South Africa
https://orcid.org/0000-0002-1039-2680

*Rongedzayi Fambasayi***
Research Fellow, South African Research Chair in Cities, Law and Environmental Sustainability, Faculty of Law, North-West University, South Africa
https://orcid.org/0000-0002-5154-0977

*Tasreeq Ferreira****
Candidate Attorney, Werksmans Attorneys, Cape Town, South Africa
https://orcid.org/0009-0005-2344-7571

Summary: *The right to receive education in an official language of one's choice is enshrined in section 29(2) of the Constitution. However, the South African education system has not offered sustained learning as well as equal opportunities for most of the population in more than one language. Although language in education determines the language of learning and teaching, language in education remains contentious in South Africa. Jurisprudence supports the idea that schools should be inclusive in language policies. The National Department of Basic Education policy fails to address the need to ensure the sustained use*

* BA (Rhodes) LLD (Pretoria); gertrudequan91@gmail.com
** LLM PhD (North-West); rongedzayi@gmail.com
*** LLB (Western Cape); Tasreeqferreira@gmail.com

of mother tongue language by prompting a switch to English in grade 4. This article explores how the learning and teaching in schools could potentially perpetuate discrimination in accessing schools, against the backdrop of constitutional rights and values, such as equality and non-discrimination.

Key words: *basic education; language; mother tongue; language of learning and teaching; National Department of Basic Education; discrimination; equality; Afrikaans; English; policy*

1 Introduction

> While there are many factors involved in delivering quality basic education, language is clearly the key to communication and understanding in the classroom. Many developing countries are characterised by individual as well as societal multilingualism yet continue to allow a single foreign language to dominate the education sector. Instruction through a language that learners do not speak has been called 'submersion' … because it is analogous to holding learners under water without teaching them how to swim.[1]

Access to education through one's mother language has the potential to transform education. The mother tongue is a key source of identification and self-confidence, edifying an individual learner.[2] Growing evidence shows that learners who are taught to read and write in their mother tongue are better off in terms of their comprehension of concepts as well as a grasp of a foreign language in its written and oral mode.[3]

The right to education recognises equality and diversity, which arguably are some of the driving forces of any progressive country.[4] In general, scholarship on the right to education is not in short supply, covering the different dimensions of the right, such as litigating the right to education,[5] and the tenets of the right under

1 C Benson 'The importance of mother tongue-based schooling for educational quality' Paper commissioned for the EFA Global Monitoring Report 2005, The Quality Imperative, UNESCO 1.

2 A Ouane & C Glanz 'Mother tongue literacy in sub-Saharan Africa' Background paper for the Education for All global monitoring report Literacy for Life, UNESCO (2005) 5.

3 As above.

4 L Arendse 'Unequal access to quality-to-quality education for black and or poor learners in the post-apartheid public school system' (2019) *Law Democracy and Development* 20.

5 See, eg, A Skelton 'The role of the courts in ensuring the right to a basic education in a democratic South Africa: A critical evaluation of recent education case law' (2013) 46 *De Jure* 1; C Churr 'Realisation of a child's right in the South

international and African human rights systems.[6] However, despite the solid framing of the right and the interpretative guidance from hard and soft law as well as judicial bodies, Beiter[7] argues that the right to education has become problematic to implement, partly because the very configuration of the right in international law is outdated. In part, Beiter notes that the advanced level of normative density around the right to education creates more complexities in the implementation of the right, leading to an argument on the need to reconfigure the right to education under international law.

Despite the suggestions made on the reconfiguration of the right to education, little argument is made regarding the use of mother language as a language of instruction. Yet, the language of instruction is central to the realisation of the right to education. Vos and Fouche note that language is a driving factor in an education system as it determines the language of learning and teaching (LOLT).[8] This means that an education language policy adopted by any given state has the potential to hinder or transform the delivery of and access to education and, by implication, the enjoyment of all other rights.[9] There is growing evidence showing how the use of mother language in education is an essential factor for inclusion and delivery of quality learning, as well as improving learning outcomes and academic performance, especially in pre-primary and primary school, in order to avoid knowledge gaps and increase the speed of learning and comprehension.[10] In this contribution we build on existing scholarship, taking the argument further to demonstrate that the right to education can only fully and effectively be realised when the learner understands and comprehends the language of instruction.

African school system: Some lessons from Germany' (2015) 18 *Potchefstroom Electronic Law Journal* 2405; S Liebenberg 'Remedial principles and meaningful engagement in education rights' (2016) 19 *Potchefstroom Electronic Law Journal* 1.

6 See KD Beiter *The protection of the right to education by international law: Including a systematic analysis of article 13 of the International Covenant on Economic, Social and Cultural Rights* (2006); KD Beiter 'Is the age of human rights really over? The right to education in Africa – Domesticisation, human rights-based development, and extraterritorial state obligations' (2018) *Georgetown Journal of International Law* 9.

7 KD Beiter 'Why neoliberal ideology, privatisation, and other challenges make a reframing of the right to education in international law necessary' (2023) *International Journal of Human Rights* 426.

8 L Vos & N Fouche 'Language as contextual factor of an education system: Reading development as a necessity'(2021) 41 *South African Journal of Education* 1.

9 Y Fessha 'A tale of two federations: Comparing language rights in South Africa and Ethiopia' (2009) 9 *African Human Rights Law Journal* 2.

10 UNESCO 'Why mother language-based education is essential' (February 2022), https://www.unesco.org/en/articles/why-mother-language-based-education-essential (accessed 12 November 2023).

South Africa is a member state to international children's rights and other human rights instruments, such as the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter), to mention but a few. Aligning with section 39 of the Constitution of the Republic of South Africa, 1996 (Constitution),[11] this article explores insights from international law regarding the right to education and the use of mother tongue language as a means to realise the right. At the time of writing, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) is finalising a General Comment on education that provides an opportunity to elaborate on the importance of mother tongue as LOLT.[12] In the domestic sphere, the right to receive education in the official language of one's choice is enshrined in section 29(2) of the Constitution. Mkhize has argued that the education system in South Africa has not offered sustained learning as well as equal opportunities for most of the population in more than one language through schooling.[13] Furthermore, not sufficient planning and investment has gone into African language development as languages of learning.[14]

The hegemony of the use of the English language in education in South Africa, and indeed in most African countries, is entrenched by several factors such as colonial legacies (within the Anglophone countries), globalisation and access to the global market place, as English proficiency is considered 'cultural capital' instrumental for 'social integration and upward mobility'.[15] English linguistic hegemony has contributed to shaping important decisions such as LOLT, which has far-reaching, real and practical implications for African learners.[16] The aim of this contribution is not to argue that English be substituted for another South African language as the dominant language of learning and teaching. Instead, the research explores bilingual education[17] in South Africa and the need to achieve equality between English and other South African languages.

Structurally, the article begins with a search of international law perspectives on the use of mother tongue language as a pathway

11 Sec 39(1)(b) notes that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.
12 See part 2 below.
13 R Balfour & D Mkhize 'Language rights in education in South Africa' (2018) 31 *South African Journal of Higher Education* 2.
14 As above.
15 L Dalvit, S Murray & A Terzoli 'Deconstructing language myths: Which languages of learning and teaching in South Africa?' (2009) 46 *Journal of Education* 33.
16 Davit and others (n 15) 34.
17 Noting that Afrikaans is used as a LOLT in some schools, 'bilingual' education is used herein to mean African languages.

to realise the right to education. This is followed by an exploration of the legal and policy framework within which the right to receive education in South Africa in an official language of one's choice is structured. This contribution does not propose the use of only African languages as the language of learning and teaching, but suggests that there is great potential in supplementing the use of English and Afrikaans with a view to ensuring inclusive and transformative education that is fit for purpose in different African contexts. Instead, it promotes the need to develop the nine African languages to the same level as English and Afrikaans, to enable their use as mediums of instruction from early childhood developmental stages to higher institutions. In practice, this would entail the allocation of sufficient resources to develop the nine African languages the same way English and Afrikaans have been developed so that all learners will have the opportunity to learn and to be taught in any of the official languages from grade 4 throughout higher education. The research also presents the need for multilingual education, considering constitutional values such as equality and the need for transformation within South Africa's education system.

2 Language of learning and access to education under international law

The right to education provisions in the African Children's Charter and CRC are mute on the language of instruction and learning.[18] This silence is in line with tenets of international law instruments in that they provide the foundational pillars of fundamental human rights and freedoms and leave the interpretation and implementation to signatory states. Be that as it may, it is critical to note that the agency responsible for education, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) has been emphasising the inescapable move to improve education using mother tongue language as a language of instruction and learning.[19]

CRC and the African Children's Charter are explicitly clear on the obligations of states towards the full enjoyment of the right to education.[20] For example, article 11(1) of the African Children's

18 See art 11 African Children's Charter; arts 28 & 29 CRC.

19 At 1999 UNESCO's General Conference it was agreed that 21 February of every year is a day to celebrate International Mother Language. Many initiatives have been carried out to elevate the importance of mother language in education. See UNESCO 'From rights to country-level action: Results of the tenth consultation of member states on the 1960 Convention and Recommendation' (2022), https://unesdoc.unesco.org/ark:/48223/pf0000380609 (accessed 12 November 2023).

20 See also art 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) noting that states recognise the right of everyone to education

Charter declares, in peremptory terms, that every child shall have the right to education. The education shall be directed to the promotion and development of the child's personality, talents and abilities to their fullest potential, including the strengthening and preservation of African morals and positive traditional values and culture.[21] The reference to every child implies that the right must be enjoyed without any distinction or discrimination. Similarly, article 29(1)(c) of CRC notes that the education shall be directed towards, among other things, the development of respect for the child or family's cultural *identity, language* and values. There is little scholarship on this part of the right, and how language is critical in realising one's identity and cultural values in the context of education. The same relates to linguistic identity.

Article 2(1) of CRC declares that states shall respect and ensure the rights provided in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's language or other status. Similarly, article 3 of the African Children's Charter proclaims that every child is entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's language, among other factors. As such, this implies that the right to education has to be enjoyed without discrimination, even on the basis of language of instruction or linguistic identity.

Regarding the diversity of linguistic identity, the Committee on the Rights of Persons with Disabilities notes that inclusive education should, among other things, ensure the respect for and value for diversity within the learning community,[22] including the language and linguistic culture of learners. The Committee further notes that the Convention against Discrimination in Education establishes the right of children to be taught in their *own language*,[23] in line with article 30(4) of the Convention on the Rights of Persons with Disabilities (CRPD), persons with disabilities are entitled, on an equal basis with others, to recognition of and support for their specific cultural and linguistic identity, including sign languages and deaf culture.[24]

---

and contending that education shall be directed to the full development of the personality, the preservation of dignity and the strengthening of the respect for human rights and fundamental freedoms.

21 See art 11(2)(c) of the African Children's Charter.

22 Committee on the Rights of Persons with Disabilities General Comment 4 (2016) on the right to inclusive education CRPD/C/GC/4 para 12(e).

23 Art 5(1)(c) Convention against Discrimination in Education, 1960.

24 Committee on the Rights of Persons with Disabilities General Comment 4 (n 22) para 35(b).

The provisions in the treaties discussed above are clear that the right to education must be assured without discrimination, and the right should be enjoyed on the basis of equality of opportunity. Educational language policies that promote single language preferences have the unintended effects of discriminating against other learners and creating barriers to accessing the right to education and, more, so other rights.[25] The Committee on the Rights of Persons with Disabilities (RPD Committee) urges states to guard against the risk of discriminating against learners, specifically children with disabilities,[26] for the reasons that learners with disabilities often experience intersectional discrimination on the basis of disability, gender, ethnic origin or language.[27] Thus, states must put in place measures to address all forms of discrimination, including identifying and removing legal, physical*, communication and linguistic* barriers within educational institutions and the community.[28] Similar concerns are expressed by UNESCO in its Convention against Discrimination in Education.[29]

It is critical to observe that the right to non-discrimination is an absolute right subject to no qualification or conditionality.[30] Non-discrimination is an inherent right, and is considered a non-autonomous provision without independent existence.[31] What this means is that the rights to equality and non-discrimination are applicable with reference to and only to be invoked concerning the implementation of all or other children's rights.[32] The right to education is one of the rights that must be enjoyed without any distinction on the basis of language of instruction. The Human Rights Committee views non-discrimination as a basic and general principle of human rights protection.[33]

The United Nations (UN) and African children's rights treaty-monitoring bodies have not yet authoritatively pronounced the

25 Fessha (n 9) 2.
26 See art 24(1) of the Convention on the Rights of Persons with Disabilities on the right to education for persons with disabilities.
27 General Comment 4 (n 22) para 13.
28 As above.
29 See art 3 of the Convention against Discrimination in Education 1960.
30 G Lansdown 'Article 2: The rights to non-discrimination' in Z Vaghri and others (eds) *Monitoring state compliance with the UN Convention on the Rights of the Child – Children's well-being: Indicators and research* (2022) 12.
31 See W Vandenhole *Non-discrimination and equality in the view of the UN human rights treaty bodies* (2005) 32.
32 For Achilihu, non-discrimination is a right that qualifies all the other substantive and procedural rights as if it were a part of each one. See S Achilihu *Do African children have rights? A comparative and legal analysis of the United Nations Convention on the Rights of the Child* (2010) 32.
33 See Convention on Civil and Political Rights General Comment 18 on Non-Discrimination 1989 1.

use of mother tongue language in education in their promotional or protective mandates. The African Children's Committee is in the process of finalising a General Comment on education to elaborate on the right to education in the African Children's Charter. The draft General Comment only mentions 'mother tongue' once, in the context of interpreting article 11(2)(c) on strengthening and preserving African morals and positive traditional values and culture. For instance, the African Children's Committee urges states to

> incorporate in pedagogy and curricula for teaching, methods, language medium and modules that permeate positive African morals and values. Profound cross-cutting values and traditions that should not be against key African ethos, such as tolerance, resilience, inclusive hospitality, respect, community cohesion, oral tradition, including the introduction of 'mother tongue' education.[34]

Based on the above context, we note that the draft General Comment relegates the use of mother tongue language in education as a fundamental African, moral, cultural and traditional value rather as a right that state parties should enforce and ensure that children enjoy and access education through the use of mother tongue language as LOLT. This observation is buttressed by the confidence of the African Children's Committee that inclusion of teachings of these values in curricula would play a vital role in bridging the gap between generations and ensuring the transmission of positive cultural knowledge and practices.[35] While the General Comment has not yet been finalised, we contend that the omission to elaborate the importance of mother tongue language as a conduit towards the full realisation of the right to education, and failing to reinforce mother tongue language as an indispensable part of the right could be a missed strategic opportunity to pronounce and guide African member states on the need to transform education through the use of mother tongue language as a language of instruction.

3 South African historical background on the right to education

Education, and particularly language in education, was used as a vehicle to implement and strengthen the system of apartheid.[36] Education during apartheid was structured in a manner that would

34 Draft General Comment on Education on art 11 African Children's Charter – the Right to Education (2024) para 64 (on file with authors).
35 As above.
36 L Arendse 'The South African Constitution's empty promise of "radical transformation": Unequal access to quality education for blacks and/or poor learners in the public basic education system' (2019) 23 *Law Democracy and Development* 20.

not only remind non-whites of their inferiority but also subordinate them.[37] Parity was nothing but a foreign term. Education during apartheid became more detrimental when the National Party (NP) took control of South Africa in 1948. The NP reinforced segregation in education in all areas of the country, particularly where language was concerned.[38]

This was evidenced by the government's establishment of the Eiselein Commission to perpetuate the issue of language in education. The Eiselein Commission's task was to examine the black education system and make suggestions for a national education policy.[39] The government thereafter enacted the Bantu Education Act 47 of 1953 (BEA) that established a separate department of education for black education and aimed to standardise control of education across provinces.

Ndimande distinguishes between bantu education (BE) and apartheid. He states that 'apartheid education lumped together the oppressive education system offered to black, coloured and Indian people collectively, while BE was specifically offered only to black people through the Department of Native Affairs and later the Department of Bantu Education'.[40] Through the BEA, the NP aimed at imposing English and Afrikaans as a medium of instruction (MOI) in secondary schools, but the black students 'revolted' against the decision, resulting in the 1976 Soweto protest.[41]

Students identified Afrikaans as the language of the oppressor. The protestors and the government responded with violence, which resulted in the death of many students.[42] The above occurrences illustrate resistance against the education system during apartheid and, in particular, language policies under the same system. The apartheid government had a method of structuring the language policies in the education system in a manner that prevented black students from making progress.[43] Some of these methodologies and

37 D Woodroffe 'When visions of the rainbow nation are not enough: Effect of post-apartheid higher education reform on social cohesion in South Africa' (2011) 86 *Peabody Journal of Education* 2.
38 As above.
39 K Eriksson 'Does the language of instruction in primary school affect later labour marker outcomes? Evidence from South Africa' (2014) 29 *Economic History of Developing Regions* 5.
40 B Ndimande 'From bantu education to the fight for socially just education' (2013) 46 *Equity and Excellence in Education* 4.
41 Ndimande (n 40) 5.
42 V Webb, M Lafon & P Pare 'Bantu languages in education in South Africa: An overview. *Ongekho akekho!* – The absentee owner' (2010) 38 *Language Learning Journal* 6.
43 T Reagan 'The politics of linguistic apartheid: Language policies in black education in South Africa' (1987) *Journal of Negro Education* 302.

the effects of the language policies implemented by the state in the education system will be discussed below.

The apartheid government used basic education as a tool of racial segregation. Indeed, one of the objectives was to train and teach people in accordance with what the government perceived as their opportunities.[44] African language speakers were rarely given the opportunities to reach their full potential. This is evident where 'they could only attend universities if the Minister of Education granted them permission'.[45] Mda notes that African language students were not prepared to participate in the mainstream economy.[46] One can infer that the chances of non-whites accessing institutions were slim and if they were allowed to attend, they would have struggled with grasping the content due to the language barriers.

These institutions only provided training programmes rather than research-based content to augment the skills of non-whites.[47] Erikson asserts that it was more likely for non-whites to obtain semi-skilled employment as there were also numerous restrictions on the type of jobs for which they could apply.[48] It has also been noted that 'bantu education was aimed at shrinking the minds of African children by denying educational challenges'.[49] One could, therefore, argue that the language barrier exacerbated the difficulty of being able to think critically. A further impact of BE and its language policies was the lower enrolment rates for non-whites. To illustrate, in 1953 only 15 to 30 per cent of students who were enrolled in the education system were black.[50] This was because African languages were not accepted as languages of instruction (LOI) during the colonial era.[51] Eriksson also remarks that the language of instruction during these times reflected those of the mission schools because these students were also subjected to be taught in Afrikaans and English.[52] Therefore, there is evidence to show that language policies adopted before democracy did not accommodate indigenous languages other than Afrikaans and English.

Another impact of BE was that it essentially left African writers with no option but to write in a language that would give their work

44 Ndimande (n 40) 5.
45 Woodroffe (n 37) 3.
46 T Mda 'Issues in the making of South Africa's language in education policy' (1997) 66 *Journal of Negro Education* 5.
47 Woodroffe (n 37) 3.
48 Eriksson (n 39) 5.
49 Ndimande (n 40) 5.
50 Eriksson (n 39) 6.
51 Mda (n 46) 5.
52 Eriksson (n 39) 5.

publicity. They, therefore, chose English, and Lafon is of the view that it 'deprived African language literature [of] potentially creative and original texts arguably thwarted, or seriously compromised, the literacy appropriation process that was in progress'.[53] This indicates that African language speakers had no choice but to adjust to the language policy of the apartheid state to remain in the education system. Black teachers were also dissatisfied with the language policy implemented by the state, and they showed their frustrations by not attending school on certain days.[54] However, the state was determined that the policy would be implemented by sending some of their members to do follow-ups on the policy's enforcement at all schools.[55]

The above indicates the effects of bantu education and the apartheid government's language preference on the education system. The language policies designed by the then apartheid government served as a barrier to education for non-whites.

4 South African legal and policy framework on the right to education

With the enactment of the Constitution, the state was tasked with correcting the injustices in the education system, including the use of languages. This part discusses the constitutional and legislative as well as policy provisions that give recognition to language in the education system in a new South African legal order. The Constitution is the supreme law of South Africa and offers the highest level of protection of the right to education,[56] as well as equality, and non-discrimination.[57] Efforts have been made to ensure linguistic diversity in the country. This is behind the backdrop that the Constitution recognises the apartheid historical exclusionary practices of prioritising English and Afrikaans as preferred languages. Constitutionally, local languages are fundamental to ensure tolerance of diversity and inclusion. Section 6(1) of the Constitution provides a list of official languages, such as Sepedi, Sesotho, Setswana, Siswati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.[58] However, their use as LOLT was not prioritised. Section

53 M Lafon 'The impact of language on educational access in South Africa' (2009) *The Consortium for Research on Educational Access Transitions and Equity* 15.
54 Eriksson (n 39) 7.
55 As above.
56 See sec 29 of the Constitution.
57 See sec 9 of the Constitution.
58 We note that sec 6 of the Constitution has been amended to now include South African sign language as the 12th official language.

29(2) of the Constitution promotes multilingualism in the education system. It provides:

> Everyone has the right to receive education in the official language of their choice in public educational institutions where the education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account (a) equity, (b) practicability and (c) the need to redress the results of past discriminatory laws and practices.

As noted above, accessing education through the 'official language' of choice refers to those listed in section 6(1) of the Constitution. Furthermore, sections 30 and 30(1) uphold the rights of citizens to use the language of their choice.[59]

The right to access education through the language of one's choice, also referred to as mother tongue language in this contribution, has also been under contest resulting in litigation. In the case of *Matukane & Others v Laerskool Potgietersrus*[60] the respondents refused to admit the appellants, who were seeking to be instructed in English, into their school. The appellants argued that their refusal was unfair based on section 8(1) of the interim Constitution (now section 9) which prevented discrimination based on various grounds, including race and language. The respondent argued that even though they are an English/Afrikaans parallel-medium school, the school predominately is Afrikaans. They, therefore, had the authority to refuse to admit the learners to protect the culture of the school based on international law principles.[61] The Court, however, stated that the argument was far-fetched and that admitting the learners would make the school more diverse. The Court directed that the learners be admitted and mentioned that all languages should be treated equally, and Afrikaans students should not have more rights than English students.[62]

Another important case that dealt with section 29(2) of the Constitution is the case of *Western Cape Minister of Education & Others v Governing Body of Mikro Primary School & Another.*[63] The respondents in this case refused to change their language policy as requested by the appellant head of department (HoD) to accommodate learners who needed to be instructed in English because it was an Afrikaans-

59 This is closely linked to the importance of sec 29(2) and its link with the right to equality.
60 *Matukane & Others v Laerskool Potgietersrus* [1996] All SA 468 para 4.
61 As above.
62 *Matukane* (n 60) para 8.
63 *Western Cape Minister of Education & Others v Governing Body of Mikro Primary School & Another* 2005 (10) BCLR 973 (SCA).

medium school.[64] The appellant then instructed the respondent to register the learners, but the respondents refused and made an urgent application to the High Court to set aside the appellants instruction.[65] The High Court granted the order sought, leading to the appellant appealing to the Supreme Court of Appeal.

The appellants argued that, in terms of section 29(2) of the Constitution, it was reasonably practicable for the 40 learners to be instructed in English.[66] They also argued that the school's language policy was subject to the provisions of the Constitution and the Constitution supersedes any policy.[67] The Court interpreted the right in section 29(2) of the Constitution to mean that the state and not the school had a duty to provide education in the official language to the learners. Based on the Court's interpretation, the state should have considered an English-medium school in the area as an alternative for the learners. The Court also stated that even if it was reasonably practicable for the learners to receive education from the respondent, they did not have the right to be instructed in English at the school.[68]

In addition, the Court mentioned that the School Governing Body (SGB) is the only body that can determine the language policy of a school and that, on that basis, the school's language policy was not contrary to the Norms and Standards for Language Policy in public schools and standards of the South African Schools Act (SASA).[69] The norms and standards are merely guidelines and therefore, they do not provide an automatic right to be instructed in the language of one's choice.[70] The Court held that the appellant acted unlawfully by not using the provisions or procedures in the Schools Act to withdraw the functions of the SGB to change the language policy.[71]

The Court in the case above provides a narrow interpretation of the powers of the state over schools in relation to the right in section 29(2) of the Constitution. The case of *Head of Department v Ermelo* provides a clearer interpretation of the state's power in terms of determining school language policies.

64 *Mikro* (n 63) para 2.
65 *Mikro* (n 63) para 5.
66 *Mikro* (n 63) para 29.
67 *Mikro* (n 63) para 49.
68 *Mikro* (n 63) para 31.
69 *Mikro* (n 63) para 34.
70 As above.
71 *Mikro* (n 63) para 59.

In *Ermelo* the HoD requested that the school (Ermelo) admit several learners who wanted to be instructed in English because the schools in the surrounding areas were oversubscribed. The school stated that its language policy only catered for Afrikaans students, and it would only admit the learners if they agreed to be instructed in Afrikaans.[72] Based on the school's refusal to amend its language policy, the HoD revoked the powers of the SGB and appointed an interim committee to amend the policy to accommodate the learners.[73] The matter reached the Constitutional Court where it had to decide whether the HoD had the authority to withdraw the functions of the SGB in determining the school's language policy.

It was confirmed that SGBs have the power to determine a school's language policies, but the policies should give effect to the values of the Constitution and enhance historical redress.[74] The purpose of the SGB's power to develop language policies is to transform and develop the education system in South Africa to be more inclusive.[75] The Court also stated that where the SGBs unreasonably execute the power, the HoD is entitled to intervene to ensure that the constitutional right to receive education in one's language is granted. Moreover, when developing language policies, the needs of the community should be taken into consideration.[76] A flexible approach should be adopted when developing language policies. The applicants' (the head of department, Mpumalanga Department of Education) application to overturn the Supreme Court of Appel (SCA)'s ruling that upheld the language policy of Hoërskool Ermelo was dismissed, but the school was obliged to revisit its language policy in a manner that gives effect to section 29(2) of the Constitution and section 6(2) of the Schools Act.[77] This judgment gives clarity that language policies need to promote multilingualism and be more inclusive.

The courts have emphasised that the SGB has the power to determine the language policy of a school. In *Ermelo*, however, there is a shift in that the Constitutional Court clearly mentioned that the power to determine a school's language does not rest solely in the hands of the SGB. The Constitutional Court in *Ermelo* pointed out that the SCA had erred in its finding that the HoD had no power to withdraw the power of the school governing body to determine

72 *Head of Department: Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32; 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC).
73 *Ermelo* (n 72) para 22.
74 *Ermelo* (n 72) para 61.
75 *Ermelo* (n 72) para 55.
76 *Ermelo* (n 72) para 92.
77 *Ermelo* (n 72) para 99.

a school's language policy.[78] The Court read section 22(1) (the reasonable grounds requirement) together with section 22(3) (the procedure fairness requirement) and showed that the department's power to withdraw a function of a governing body extends also to the language policy of a school.

The Court in *Ermelo* added that section 29 of the Constitution required school language policies to be designed in such a way that they consider the complex relationship between the right to education, the right to education in a language of one's choice, the right of access to basic education by all children, the duty not to discriminate unfairly against a learner upon admission to school, and the importance of historical redress and transformation in the schooling system.[79]

Furthermore, the Court reminded the parties that a public school is a public resource and had to be managed in the interests of the learners, parents and the broader interests of the members of the community in which the school is in light of the values enshrined in the South African Constitution.[80] Considering that the *Ermelo* judgment was given in 2009, the view that the power to determine a school's language policy is not vested solely in the SGB should long have been incorporated in SASA.

In addition, SASA[81] is a pivotal statute enacted to give effect to the Constitution and language policies that should be adopted in the education system. SASA aims to provide education of high quality to all learners.[82] Currently, section 6(1) of SASA gives the Minister the authority to determine certain norms and standards for language in public schools. In terms of section 6(2), the school governing body of a public school may determine the language policy of the school but this is subject to the Constitution, SASA and any applicable provincial policy. We note and discuss the amendments to this requirement under the Basic Education Laws Amendment Bill (BELA Bill),[83] which has been passed by Parliament, later in this article.

Section 6(3) of SASA further states that no form of racial discrimination may be practised in implementing the policy, and section 6(4) provides that sign language has the status of an official

78 *Ermelo* (n 72) paras 63-81.
79 *Ermelo* (n 72) paras 76-78.
80 *Ermelo* (n 72) para 80.
81 Act 84 of 1996.
82 See the Preamble to SASA.
83 Department of Basic Education 'The Draft Basic Education Laws Amendment Bill' (December 2021) *Government Gazette* 45601.

language for purposes of learning at a public school.[84] SASA is a pivotal piece of legislation as it specifies which role players are responsible for promoting the use of language in basic education.

In terms of the powers given to the Minister in section 6(1) of SASA, the Minister published norms and standards for language policy in public schools – the Norms and Standards Regarding Language Policy, 1997.[85] The norms and standards are cognisant of the need for diversity and aims to promote and fulfil the language rights of learners. Most importantly, it aims to redress the historically-disadvantaged languages in schools.[86]

The Norms and Standards further provide that a learner (or if the learner is a minor, his or her parents) must choose the language of teaching upon application for admission at a school and if the school offers the language chosen, the school must admit the learner. Where no school in a district offers the desired language as a medium of learning and teaching, the learner may request the provincial education department to make provision for the instruction in the chosen language.[87]

Regarding the rights and duties of the school, the norms and standards provides that the governing body must stipulate how the school will promote multilingualism through using more than one LOLT, through teaching different languages as the first additional language, through immersion programmes, or through any other means approved by the head of the provincial education department.

What is also crucial to note is that the Norms and Standards provide that '[i]t is reasonably practicable to provide education in a particular language of learning if at least 40 in grade 1 to 6 or 35 in grade 7 to 12 learners in a particular grade request it at a particular school'.[88]

84 We note that South African sign language now is recognised as an official language under the Constitution.
85 The Norms and Standards Regarding Language Policy published in terms of sec 6(1) of the South African Schools Act, 1996.
86 The Norms and Standards Regarding Language Policy (n 85) sec C – The rights and duties of the school para 6.
87 The Norms and Standards Regarding Language Policy (n 85) sec B – Protection of individual rights paras 1-4.
88 The Norms and Standards Regarding Language Policy (n 85) sec C – Rights and duties of the school para 2.

It is evident that the Norms and Standards place an obligation on provincial departments to promote multilingualism and to fulfil the rights enshrined in section 29(2) of the Constitution.[89]

Further, the power to determine the national education policy is vested in the Minister in terms of section 3 of the National Education Policy Act (NEPA).[90] Section 3(4)(m) of NEPA states that the Minister may determine the national policy for language in education. Section 3 of NEPA should be read in conjunction with section 4(a)(vii) of NEPA, which states that the language policy to be implemented by the Minister should reflect the purpose of section 29(2) of the Constitution. More importantly, the policy should protect and advance the right of every person to use the language and participate in the cultural life of his or her choice within an educational institution.

More so, the Language in Education Policy, 1997 (LIEP) [91] aims to promote multilingualism, diversity and to develop the official languages used in the country, including South African sign language. More importantly, LIEP aims to support the teaching and learning of all languages required by learners or used by communities in South Africa.[92]

In terms of LIEP, the languages of LOLT in a public school must be an official language of languages, and it further provides:[93]

(1) All learners shall offer at least one approved language as a subject in Grade 1 and 2.

(2) From Grade 3 onwards, all learners shall offer their LOLT and at least one additional approved language as subjects.

To promote multilingualism, LIEP states that all language subjects shall receive equitable time and resources.[94]

The Language in Education Policy promotes home language education, especially in grades 1 to 3 (foundation phase) and makes it possible to extend the use of home language education into the intermediate phase.[95] In most cases, the elected language is English,

89 The Norms and Standards for Language Policy (n 85) sec A – Preamble para1.
90 Act 27 of 1996.
91 The Language in Education Policy in terms of sec 3(4)(m) of the National Education Policy Act 27, 1996.
92 The Language in Education Policy (n 91) The aims of the policy for language in education sec 5 paras 1-6.
93 The Language in Education Policy (n 91) Languages as subjects, sec 6 paras 1-2.
94 The language in Education Policy (n 91) Languages as subjects, sec 6 para 3.
95 The language in Education Policy (n 91) Preamble para 5.

and the language offered by the school is English.[96] Consequently, learners speaking an African language face an immense challenge regarding their further tuition. The DBE's rationale for the provision that learners must be taught in their mother tongue from grades 1 to 3 is based on the principle of the rights of children to be educated in their mother tongue while having access to a global language such as English.[97]

The DBE terms the transition from mother tongue language to English 'the transitional bilingual education'. Section 29(2) of the Constitution provides that everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practical. As noted above, section 6 of the Constitution proclaims the official languages that can be used for learning and teaching. This position is reiterated in SASA, the National Education Policy Act and the Language in Education Policy. However, since the nine African languages have not been developed to function as languages of learning and teaching, only English and Afrikaans dominate the school system in so far as the languages of learning and teaching are concerned.[98] Moreover, contestations in school language policies have been about the power tussle between the HOD and SGBs on who has the final say on school language policy determinations. The focus, therefore, is not on the need to develop African languages to bring them at par with English and Afrikaans as languages of learning and teaching.

The DBE has developed the National Curriculum Statement (NCS) Grades 1-12, which makes provision for the equal use of all 11 languages and South African sign language in the schooling system.[99] According to the DBE, the National Curriculum Statement Grades 1-12 encourages learners to learn through their home language(s) particularly, although not limited to the foundation phase. The DBE

96 See G Steyn 'The transition of grade 4 learners to English as a medium of instruction' LLM dissertation, University of Pretoria, 2017.

97 Parliamentary Monitoring Group 'Language in education policy: Briefing by DBE to the Portfolio Committee on basic education' (2006), https://pmg.org.za/committeemeeting/7281/#:~:text=The%20Department%20of%20Education's%20Language,global%20language%20such%20as%20English (accessed 15 July 2023).

98 A Foley 'Language policy for higher education in South Africa: Implications and complications' (2004) 18 *South African Journal of Higher Education* 58. See also B Nzimande 'African languages need to be developed' (2012) Keynote address by Minister of Higher Education and Training at the 10th Anniversary of the Stellenbosch University Language Centre, https://www.ru.ac.za/schooloflanguagesandliteratures/latestnews/africanlanguagesneedtobedeveloped-bladenzimande.html (accessed 13 March 2024).

99 Parliamentary Monitoring Group 'Questions to the Minister', https://pmg.org.za/committee-question/18311/ (accessed 8 July 2022).

has explained that the policy does not restrict the use of home language instruction up to grade 3, but emphasises the use of home language in grades 1 to 3 to reinforce the skills of reading, writing, and counting.[100]

Yet, English and Afrikaans continue to be the dominant languages in the education system, despite less than 10 per cent of South Africans indicating that English is their home language.[101] Desai observes that although it is not explicitly stated in the policy that English should be the medium of instruction after grade 3, parents perceive that should their children be taught in African languages, they will be at a disadvantage in so far as access to economic opportunities are concerned.[102] It has further been found that pupils from grades 4 to 7 have poor writing abilities, indicating that they are not prepared to switch to English or Afrikaans as a medium of instruction in grade 4.[103] In another study conducted, it was found that African children learn better when instructed in IsiXhosa.[104]

Moreover, not only are the learners not proficient in English, but the teachers are also struggling.[105] To illustrate, at a school in Limpopo only 16,5 per cent of the teachers stated they do not encounter difficulties when teaching in English.[106] It is difficult to understand how the learners can be expected to do well when the teachers are finding difficulties with teaching in the mediums of instruction. As a result of the difficulty to understand English as a medium of instruction, the drop-out rate of African learners increased in schools where English is used as the medium of instruction.[107]

On the contrary, Afrikaans and English learners have an advantage because they do not have to switch to another language in grade

100 Parliamentary Monitoring Group 'Questions to the Minister', https://pmg.org.za/committee-question/18311/ (accessed 8 July 2022).
101 Z Desai 'Local languages: Good for the informal marketplace but not for the formal classroom?' (2013) *University of the Western Cape Research Repository* 9.
102 As above.
103 As above.
104 N Spaull 'Disentangling the language effect in South African schools: Measuring the impact of "language of assessment" in grade 3 literacy and numeracy' (2016) 6 *South African Journal of Higher Education* 4.
105 A Potgieter & C Anthonissen 'The language-in-education policies – Managing the multilingualism of learners in the 21st century' in R Kaschular (ed) *Multilingualism and intercultural communication: A South African perspective* (2017) 12.
106 M Kretzer 'South African teachers switch languages in class: Why policy should follow' September 2019, https://theconversation.com./south-african-teachers-switch-langauges-in-class-why-policy-should-follow-122087 (accessed 7 July 2023).
107 D Greenfield '"When I hear Afrikaans in the classroom and never my language, I get rebellious": Linguistic apartheid in South African higher education' (2010) 24 *Language and Education* 5.

4.[108] This begs the question as to why African learners need to switch to a language in which they are not proficient. Various authors have observed that the education system discriminates against African speakers by not giving them the same treatment as English and Afrikaans speakers.[109] This also indicates that language policies fail to promote mother tongue languages.

According to the Norms and Standards regarding language policy, the parent exercises the minor learner's language rights on behalf of the minor learner.[110] The learner must choose the language of teaching upon application for admission to a particular school.[111] Where a school uses the language of learning and teaching chosen by the learner, and where there is a place available in the relevant grade, the school must admit the learner.[112] Where no school in a school district offers the desired language as a medium of learning and teaching, the learner may request the provincial education department to make provision for instruction in the chosen language.[113] The provincial education department must make copies of the request available to all schools in the relevant school district.[114]

In South Africa the default position is that the LOLT is always going to be either English or Afrikaans,[115] which creates inequality for those learners whose home languages are neither English nor Afrikaans. Although education is made available to them, they do not have equal access to it because they are taught in a language in which they do not have a proper grasp and understanding of. Moreover, as argued below, in some instances learners are faced with obstacles when they apply to certain schools because the LOLT is Afrikaans in a community where most residents are not Afrikaans speaking. Despite several international law instruments prohibiting discrimination on various grounds, discrimination in education persists.[116]

108 B Ntombela 'Switch from mother tongue to English: A double jeopardy' (2020) 8 *Studies in English Language Teaching* 21. We note that the switch from mother tongue education is only applicable to Afrikaans learners if they choose an English medium school, because like English learners, Afrikaans learners can continue to be taught in Afrikaans.

109 Potgieter & Anthonissen (n 105) 12.

110 The Norms and Standards Regarding Language Policy (n 85) sec B – Protection of individual rights para 1.

111 The Norms and Standards Regarding Language Policy (n 85) sec B – Protection of individual rights para 2.

112 The Norms and Standards Regarding Language Policy (n 85) sec B – Protection of individual rights para 3.

113 The Norms and Standards Regarding Language Policy (n 85) sec B – Protection of individual rights para 4.

114 As above.

115 R Wildsmith-Cromarty & R Balfour 'Language learning and teaching in South African primary schools' (2019) 52 *Language Teaching* 296.

116 See, generally, Convention Against Discrimination in Education (n 23). See also arts 3 and 11 of the African Charter on the Rights and Welfare of the Child, and

As discussed earlier, the South African school system has been shaped by unfair discrimination and unequal access, which has created deeper inequalities in the South African school system. Section 9 of the South African Constitution also provides for the right to equality. The right to equality viewed against school language policies should mean eliminating previous patterns of privilege and disadvantage for and against certain groups.[117] Equality in terms of language also means amending laws on school language policies that preserve the exclusive use of certain languages to the exclusion of some learners. It also means to prevent previous barriers and practices that were deeply rooted in our school system from forming again.

It has been argued that an important contributor to English and Afrikaans being the LOLT is parental choice. According to De Wet, parents' memories of bantu education, combined with their perceptions of English as a gateway to a better education and economic empowerment, prompt the majority of black parents to favour English as a LOLT.[118]

There were proposed amendments to the requirement in section 6(2) of SASA that the SGB may determine the language policy of a school in the BELA Bill. Civil society organisations and various stakeholders in the basic education sector made submissions to the effect that SGBs must submit their language policies to the HoD for approval, and further that the HoD may approve the policy or return it to the SGB with recommendations.[119] Furthermore, before signing off on a school's language policy, the HoD must be satisfied that the policy considers the best interests of the child (with emphasis on equality and equity); the changing number of learners who speak the language of learning and teaching; the effective use of resources and classroom space; the enrolment trends of the public school; and the broader language needs of the community where the school is located. Civil society organisations also submitted that SGBs must also review language policies every three years, or when circumstances necessitate a change in a school's language policy or

arts 2 and 28 of the United Nations Convention on the Rights of the Child.

117 C McConnachie 'Equality and unfair discrimination in education' in F Veriava, A Thom & T Fish Hodgson *Basic education rights handbook* (2022) 128.

118 C de Wet 'Factors influencing the choice of English as language of learning and teaching (LOLT) – A South African perspective' (2007) 22 *South African Journal of Education* 2.

119 See clause 5(c) of the 2022 Draft BELA Bill. See also the Equal Education Law Centre and Equal Education's joint submission on the Basic Education Laws Amendment Bill (2022) para 111, https://eelawcentre.org.za/wp-content/uploads/eelc-ee-submission_draft-bela-bill-2022_final-1.pdf (accessed 14 March 2024).

at the request of the HoD. This is to ensure that language policies remain in line with the Constitution and provincial law.[120]

In September 2023, after extensive deliberations and public participation campaigns, the National Assembly adopted the BELA Bill. Potential amendments to the school language policy include the requirement that SGBs submit their school language policies and amendments to the head of department for approval.[121] The DBE also confirmed that school language policies must consider the language needs of the broader community in which a school is located, and that the head of department, after consultation with the school governing body, has the final authority to admit a learner to a school.[122] Perhaps one of the most important amendments in the BELA Bill is the insertion that the best interests of the child and the right to equality must be considered when the HoD is considering the language policy of a public school or any such amendments to language policies in public schools.[123]

These amendments are largely reflective of the submissions made by civil society organisations on school language policies.[124] Section 6(2) of SASA will eventually be amended to clarify that the HoD, and not the SGB, has the final say in school language policies.[125] With this amendment, it is hoped that school language policies will be more inclusive and conscious of the needs of communities and learners, thereby allowing for accessibility by learner groups who previously faced obstacles due to language barriers.

The Constitutional Court in *AfriForum & Another v University of the Free State* has stated:[126]

> It would be unreasonable to slavishly hold on to a language policy that has proved to be the practical antithesis of fairness, feasibility,

120 See clause 5(c) of the 2022 Draft BELA Bill. See also the Equal Education Law Centre and Equal Education's joint submission on the Basic Education Laws Amendment Bill (2022) para 111, https://eelawcentre.org.za/wp-content/uploads/eelc-ee-submission_draft-bela-bill-2022_final-1.pdf (accessed 14 March 2024)

121 Parliamentary Monitoring Group 'BELA Bill adoption with deputy minister' (September 2023), https://pmg.org.za/committee-meeting/37584/ (accessed 2 December 2023).

122 The Basic Education Amendment Bill B2B – 2022 sec 5(7)(a), https://pmg.org.za/bill/1055/ (accessed 11 December 2023).

123 As above.

124 Examples of such amendments are the need to consider the best interests of the child; the changing number of learners who speak the language of teaching and learning at the public school; and the enrolment trends of the public school when the HoD is considering school language policies.

125 See sec 5(c) of the Basic Education Amendment Bill B2B – 2022 https://pmg.org.za/bill/1055/ (accessed 11 December 2023).

126 *AfriForum & Another v University of the Free State* [2017] ZACC 48 para 50.

> inclusivity and the remedial action necessary to shake racism and its tendencies out of their comfort zone. Section 29 of the Constitution … is fundamentally about … the impermissibility of racial discrimination, intended or otherwise, in all our educational institutions.

The Court also explained that the decision-making process under section 29(2) is a 'critical need … to undo the damage caused by racial discrimination'.[127] The Court also pointed out the danger in allocating scarce resources to a few students, thus placing them in advantageous positions while other students are crowded in classrooms.[128]

5 Concluding remarks

From the discussions in this article, the most rational solution would be to continue with the use of African languages as LOLT from grades 4 onwards, so that it can eliminate the issue of language barriers in accessing schools, and place black learners in the same position as their peers who are taught in English or Afrikaans, thereby resolving the problem of inequality. Realistically, none of the nine African languages have been developed to the level of academic discourse to enable them to stand as languages of learning and teaching, in the same way English and Afrikaans have developed.[129] As Foley notes, for the most parts, African languages were standardised for purposes of converting Africans to Christianity by missionaries, and later by the apartheid government, as a means of oppressing and suppressing the education rights and levels of education that black South Africans received. Therefore, the existing forms in which African languages were standardised remain archaic and limited to the context in which they were initially written, which were for proselytisation and control.[130]

The fact that one cannot rely on the existing standardised forms of African languages as springboards to advance their position as fully-fledged languages for purposes of learning and teaching is obvious. A report by the Department of Higher Education and Training in 2015 indicated that little progress had been made in exploring the potential of African languages to 'facilitate access and success

127 *AfriForum* (n 126) para 52.
128 As above.
129 A Foley 'Language policy for higher education in South Africa: Implications and complications' (2004) 18 *South African Journal of Higher Education* 57-58. See also Ministry of Education 'The language policy for higher education' (2002) 4-5, https://www.gov.za/sites/default/files/gcis_document/202011/43860gon1160.pdf (accessed 14 March 2024).
130 Foley (n 129) 61.

in higher institutions'.[131] However, African languages can still be elevated to the same level as that of English and Afrikaans, but before African languages can be included as LOLT beyond grade 3, resources will need to be developed. The details of such resources are beyond the scope of this article. However, we submit that for indigenous languages to be advanced to the same level as English and Afrikaans, the level of resourcing that the government must put into it needs to be comparable with that used in the past to develop Afrikaans as a medium of instruction.[132] By the development of African languages, perhaps one needs to observe how Afrikaans came to be developed and adopt a similar strategy. Therefore, we recommend that like the apartheid government, the current government must be the driving force behind the goal of developing African languages.[133] Using this approach, African language development in higher education means:

- the mobilisation of intellectuals who speak the nine African languages, promoting and speaking to them;
- the establishment of an academy to drive the development of the nine African languages as a scientific language;
- organising politicians to support the elevation of the nine African languages;
- introducing the nine African languages as mediums of instruction at all levels of education;
- establishing lexicography units to promote the development of dictionaries, in different subjects and disciplines and for all levels of education;
- finally, promoting print culture in all nine African languages.[134]

At the primary and basic education level, the Incremental Introduction of African Languages draft policy (IIAL),[135] introduced by the DBE in 2013, aims to, among others, promote the use of African languages by all learners in school through the incremental introduction of an African language to learners from grades 1 to 12. This is to ensure that all non-African home language speakers can speak an African language. It also aims to strengthen the use of African languages at

131 Ministry for Higher Education and Training 'Report on the use of African languages as mediums of instruction in higher education' (2015), https://www.dhet.gov.za/Policy%20and%20Development%20Support/African%20Langauges%20report_2015.pdf (accessed 14 March 2024).

132 Ministry of Education 'The language policy for higher education' (2002) 10, https://www.dhet.gov.za/Management%20Support/Language%20Policy%20for%20Higher%20Education.pdf (accessed 14 March 2024).

133 Foley (n 129) 61.

134 H Giliomee 'The rise and possible demise of Afrikaans as a public language' (2003) *PRAESA Occasional Paper* 14.

135 Department of Basic Education 'Incremental introduction of African languages: Draft policy' (September 2013), www.education.gov.za (accessed 14 March 2024).

home language level, improve the utility of African languages that were previously marginalised, and increase access to languages by all learners beyond English and Afrikaans.[136] The IIAL policy aims to develop African languages by –

- providing resources in the form of publication of textbooks at the first additional language level;
- providing all schools with African language teachers, who will teach African languages at first additional language level;
- seeking additional funding from the national treasury to fund resources to support the incremental introduction of African languages;
- monitoring and evaluating the development of African languages from school level, up to the DBE.[137]

Assuming that one or more African language(s) was developed in the same way as Afrikaans and English, to enable their use as languages of learning and teaching, the obstacle remains of which learners would face in the employment world, in that the commercial languages in South Africa are English and Afrikaans[138] and, in most parts of the world, English.[139] Therefore, learners who will be taught in their mother tongue language (in this instance being any of the nine African languages) will have no place in the working world.[140] The first problem described is only based on the assumption that the use of African languages as LOLT from grade 4 onwards would continue up to higher education and that students would receive their degrees and diplomas in an African language.

Based on the reality that the national senior examinations (NSC) are only written in English and Afrikaans,[141] the other obstacle that learners would face, first and foremost, is how they will be able to write their NSC examinations in English, when they have been taught in an African language all their lives. Second, assuming that the NSC examinations are written in the LOLT to which learners are used in school, the challenge will now be at the tertiary institutions. Which tertiary institution has the required resources (lecturers and

136 As above.
137 As above.
138 See D Casale & D Posel 'English language proficiency and earnings in a developing country: The case of South Africa' (2010) *Conference paper* 5.
139 Casale & Posel (n 138) 3.
140 We note here that learners could learn English as an additional language. However, they would have acquired formal and working terms in the language of learning and teaching and, therefore, may still experience constraints in commercial spaces.
141 See Parliamentary Monitoring Group 'Question NW1087 to the Minister for Basic Education' (2020), https://pmg.org.za/committee-question/13744/ (accessed 14 March 2024).

textbooks) to accommodate their situation? The question, therefore, remains, where to from here?

First, as Desai notes, although LIEP does not explicitly state that English should be the medium of instruction after grade 3, parents perceive English as a gateway to accessing economic opportunities and, therefore, opt for their children to be taught in English.[142] This raises the question of whether the current position is due to practice created by the DBE, and which has not been challenged. In the alternative, it also suggests whether it is due to parental choice and preference of the English language over African languages. It is recommended that parents need to be educated on the fact that they have a right to opt for their children to be taught in a language of their choice where that is practical. The benefits of learners being taught in their mother tongue can also be taught and encouraged among parents.

Second, it often is the case that the language of learning and teaching can serve as barriers in accessing education and perpetuate historical inequalities in the basic education system. This manifests in instances where single-medium and better-resourced schools are restricted to white learners, while black learners wishing to access them remain in poorly-resourced and overcrowded public schools.[143] While the BELA Bill has clarified that SGBs must submit their language policies to the HoD for approval, it is recommended that the following factors will aid the HoD in deciding whether to approve a language policy:

(1) the extent of excess capacity in the case of a single medium school and the trends in this regard;
(2) the availability of and accessibility to other similarly-resourced public schools, for learners who are language barred from attending the single medium school;
(3) the geographical areas from where learners attending the single-medium school come, and the curriculum options offered.[144]

Third, and finally, it is recommended that parents must be made aware that according to the Norms and Standards, it is reasonably practicable for the provincial department to provide education in a

142 Desai (n 101) 5.
143 See the Equal Education Law Centre and Equal Education's joint submission on the Basic Education Laws Amendment Bill 2022 para 111, https://eelawcentre.org.za/wp-content/uploads/eelc-ee-submission_draft-bela-bill-2022_final-1.pdf (accessed 14 March 2024).
144 These recommendations were extracted from the Equal Education and Equal Education Law Centre's joint submission on the BELA Bill in 2022, https://eelawcentre.org.za/wp-content/uploads/eelc-ee-submission_draft-bela-bill-2022_final-1.pdf (accessed 14 March 2024).

particular LOLT if at least 40 learners in grades 1 to 6 or 35 in grades 7 to 12 request to be taught in that particular language and bearing in mind that the LOLT must be an official language. The Department of Basic Education needs to be engaged in such instances to give effect to section 29(2) of the Constitution.[145] In particular, it should be made clear that schools should not be permitted to refuse to accept applications from learners whose choice of LOLT differs from a school's language of tuition or refuse to include these learners on admissions waiting lists for consideration by the Department. Schools must further inform the DBE of learners on waiting lists. This will help ensure that the Department has the information needed to aid its understanding of why some single medium schools are not filled, whether single medium schools are favouring learners from outside the school's feeder zone over learners within the feeder zone, and what the demand for the school would otherwise be if parallel/dual medium is offered.[146]

The sudden switch from mother tongue education to English in grade 4 is a great disadvantage to African learners who must abandon their mother tongue languages and switch to English. The English and Afrikaans learners are immediately placed at an advantage because for them, such a switch does not exist, and they proceed in their mother tongue.[147] As Ntombela notes:[148]

> The majority of African learners who attend government schools are double disadvantaged in that those who attend former Model 'C' schools do not experience the switch. What exacerbates this disadvantage is that the English they switch to is inferior to the English in former Model 'C' schools. This does not only imply educational inequality which is the scourge inherited from the infamous apartheid regime, but also linguistic illiteracy where different forms of English language are at play.

When black learners switch to the English medium of instruction, they switch to English first additional language[149] in which learners have not received a sufficient grounding, which perpetually sets them behind. It is recommended that more educational resources such as textbooks and dictionaries should also be developed in learners'

145 EE and EELC submissions on the BELA Bill 2022, https://eelawcentre.org.za/wp-content/uploads/eelc-ee-submission_draft-bela-bill-2022_final-1.pdf (accessed 14 March 2024).
146 For more on feeder zones, see Gauteng Department of Education, https://www.gdeadmissions.gov.za/ (accessed 14 March 2024).
147 Ntombela (n108) 21.
148 As above.
149 According to the Curriculum and Assessment Policy Statement, a first additional language refers to 'a language which is not a mother tongue but which is used for certain communicative functions in society, that is medium of learning and teaching in education'.

mother tongue languages to foster a culture of multilingualism within basic education. The same funding, time and effort that was put into developing resources for Afrikaans and English should also be given in developing these resources in indigenous languages. This necessitates the inclusion of indigenous languages as a medium of instruction in language policies after grade 3. This does not mean that English should be disregarded. By investing in training, the state will ensure that those students who learn better in their home language can continue to be instructed in these languages.

As argued earlier, parents should be made aware of their children's right to be taught in their official languages where this is reasonably practicable. They should not be put in a position to concede for their children to be taught in another language when provincial departments must explore ways to fulfil this constitutional right, given that parental choice is one of the main reasons why the LOLT is English.[150] Steps can be taken to strengthen foundation phase FAL instruction to ensure that learners are more proficient in the language.

150 V de Klerk 'Language issues in our schools: Whose voice counts? Part 1: The parents speak' (2002) *Perspectives in Education* 4.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: A Skelton & P Mutu 'Realising the right to basic education through strategic litigation in Kenya ' (2024) 24
African Human Rights Law Journal 292-321
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a13

Realising the right to basic education through strategic litigation in Kenya

Ann Skelton
Professor of Law, UNESCO Chair: Education Law in Africa, University of Pretoria, South Africa
https://orcid.org/0000-0003-4320-8904

Perekeme Mutu
Post-doctoral researcher, UNESCO Chair: Education Law in Africa, University of Pretoria, South Africa
http://orcid.orcid.org/0000-0003-1175-218X

Summary: *In pursuit of creating an inclusive and equitable society, the right to basic education stands as a cornerstone, serving as a catalyst for individual empowerment and social progress. It is not surprising that in Kenya's Vision 2030, education stands as one of the pillars to actualise the objectives set out in that document. The constitutional framework of Kenya recognises education as a fundamental human right, which is the basis for the development of a knowledgeable and skilled citizenry. This article examines the crucial role that strategic litigation can play in actualising the right to basic education in Kenya, exploring the constitutional provisions that underpin this legal strategy and emphasising the pivotal role of the judiciary. The article argues that the Kenyan Constitution and the entire legal framework provide a solid legal background for civil society organisations and other interested parties to deploy strategic litigation to pressure the government for the realisation of the right to basic education in the country. However, the success of*

* BA LLB (KwaZulu-Natal) LLD (Pretoria); ann.skelton@up.ac.za
** BPolsc BA (Hons) LLB MPhil PhD (Pretoria); perekeme.mutu@up.ac.za

such efforts is largely dependent on how the judiciary understands its crucial role in driving the transformative potential of the Constitution.

Key words: *right to basic education; strategic litigation; Kenya; court*

1 Introduction

In pursuit of creating an inclusive and equitable society, the right to basic education stands as a cornerstone, serving as a catalyst for individual empowerment and social progress. It is not surprising that in Kenya's Vision 2030, education stands as one of the pillars to actualise the objectives set out in that document. The constitutional framework of Kenya recognises education as a fundamental human right, which is the basis for the development of a knowledgeable and skilled citizenry. This article examines the crucial role that strategic litigation can play in actualising the right to basic education in Kenya, exploring the constitutional provisions that underpin this legal strategy and emphasising the pivotal role of the judiciary. In this context, the article is divided into four parts.

The first part examines the Kenyan Constitution and legal framework, with a specific focus on the constitutional provisions that create an enabling environment for strategic litigation of the right to basic education in Kenya. The second part considers the justiciability of the right to basic education in Kenya. This part also carries out a situational analysis of the right to basic education in the country. The third part interrogates strategic litigation as a tool for social transformation and the critique that has accompanied strategic litigation, with a focus on African scholarship. The fourth part examines selected cases where strategic litigation has been deployed to advance the right to basic education in Kenya.

2 Kenyan Constitution and legal system

The Constitution and legal system of Kenya have undergone significant developments since the country gained its independence.[1]

1 Kenya gained independence on 12 December 1963, and adopted it first Constitution which included a Bill of Rights that protected certain fundamental rights and freedoms of Kenyan citizens, and established an independent judiciary. See further AG Benard 'Evolution of the judicial independence in Kenya – An overview' (2021) 7/4 Research Paper 2. Also see SF Joireman 'The evolution of the common law: Legal development in Kenya and India' (2006) *Political Science Faculty Publications* 12.

The 2010 Constitution introduced fundamental changes in the country's political and legal system. These changes have been significant in providing the enabling environment for advancing strategic litigation.[2]

Key features of the 2010 Constitution include the establishment of a presidential system of government; the devolution of powers and resources to the 47 counties;[3] an independent judiciary;[4] and an extensive Bill of Rights that guarantees various civil and political rights and socio-economic rights.[5] Relevant for this research, the 2010 Constitution contains several key provisions that create the enabling environment for strategic or public interest litigation, which is significant in promoting the right to basic education in the country. A notable feature is the broadening of standing rules.[6] One of the major impediments to strategic litigation is the strict application of the *locus standi* rule.[7] The *locus standi* requirements in Kenyan law were based on the common law restrictive approach that required plaintiffs to demonstrate a personal or propriety interest in a matter.[8]

Prior to the 2010 Constitution, the standing rules made it difficult to bring and sustain a public interest litigation case in Kenyan courts.[9] For example, in 2002, in the case between *El-Busaidy v Commissioner of Land & 2 Others*, the High Court at Mombasa held that for any person to qualify to file a case in court, they needed to show that their interest is affected or is about to be impeded beyond the impact on the general public.[10] In that case, the Court held that the issues of public interest could only be litigated by the attorney-general,[11] demonstrating that *locus standi* operated to limit the scope for litigants to pursue causes in the public interest under the earlier constitutional dispensation.

However, the 2010 Constitution opened the legal space for public interest litigation. Articles 22 and 258 of the Constitution empower anyone to institute court proceedings, where provisions of the

2 Media Development Association *History of constitution making in Kenya* (2012) 6.
3 Art 6 Kenyan Constitution 2010.
4 Art 160 Kenyan Constitution 2010.
5 Art 43 Kenyan Constitution 2010.
6 Art 22 Kenyan Constitution 2010.
7 LA Omuko-Jung 'The evolving *locus standi* and causation requirements in Kenya: A precautionary turn for climate change litigation' (2021) 2 *Carbon and Climate Law Review* 171.
8 As above.
9 MM Ogeto & W Wanyoike 'Judicary and public interest litigation in protecting the rights of assembly in Kenya' in M Ruteere & P Mutahi (eds) *Policing protests in Kenya* (2019) 55. Also see Omuko-Jung (n 7) 171.
10 *El-Busaidy v Commissioner of Land & 2 Others* Civil Case 613 of 2001.
11 As above.

Constitution are violated or where there are threats to the violation of provisions of the Constitution. In addition to a person acting in their own interest, article 258(2)(a) empowers a person to act on behalf of another person who cannot act in their own name; sub-section (b) enables person to act in the interest of a group or class of person; sub-section (c) empowers individuals to act in the public interest; and sub-section (d) ensures that associations are empowered to act in individual interest or interests if its members.

The liberal standing approach enshrined in the Constitution has also received positive acceptance from the courts. In the case of *Randu Nzai Ruwa & 2 Others v the Secretary, the Independent Electoral & Others* the Court of Appeal at Nairobi noted that the stringent application of *locus standi* requirements has been buried in the annals of history.[12] The Court emphasised that the Constitution today gives standing to any member of the public who acts in good faith to institute proceedings challenging any violations under the Bill of Rights.[13] This sends a positive signal for the deployment of strategic litigation to enforce the right to basic education and other human rights in Kenya.

Another essential element of the 2010 Constitution that is significant for the prospects of strategic litigation is a justiciable Bill of Rights, including justiciable socio-economic rights, such as the right to basic education. The essential element of a right is that it bestows legal entitlements on the holder, and also imposes legal obligations for such a right to be respected, protected and fulfilled. It entitles the rights holder (and, depending on standing rules, a person or organisation acting on behalf of the rights holder) to litigate and claim remedies in the event of the obligation not being fulfilled.[14] In the case of a violation or denial, there is an avenue for legal recourse to the courts on the basis of constitutional provisions. According to Arwa, the justiciability of socio-economic rights in the Kenyan Constitution has greatly enhanced the scope for litigation of socio-economic rights before domestic courts in Kenya.[15] The recognition of the right to basic education in the Kenyan Constitution as a justiciable right places the right to basic education on a solid legal

12 *Randu Nzai Ruwa & 2 Others v the Secretary, the Independent Electoral & Others* Civil Appeal 9 of 2013.

13 As above. Also see Katiba institute 'The Court of Appeal baptises the rules of *locus standi* in the river of constitutionalism', https://katibainstitute.org/court-of-appeal-baptises-the-rules-of-locus-standi-in-the-river-of-constitutionalism/ (accessed 4 April 2024.)

14 K Singh 'Justiciability of the right to education' (2013) Report of the Special Rapporteur on the Right to Education A/HRC/23/35 9.

15 JO Arwa 'Economic rights in domestics courts: The Kenyan experience' (2013) 17 *Law, Democracy and Development* 422.

footing in the country. This will enable individuals, civil society organisations and other stakeholders to hold the state accountable through the courts where it fails to fulfil its obligations regarding this right.

Another positive provision in the Kenyan Constitution that has the potential to promote strategic litigation of the right to basic education is the direct incorporation of international law into the Kenyan legal system. Article 2(6) of the Constitution of Kenya provides that the international laws as well as international legal instruments that have been ratified are part of Kenyan law.[16] Kenya has ratified several international law instruments that deal with socio-economic rights, specifically, the right to basic education. These include the UN International Covenant on Economic, Social and Cultural Rights (ICESRC); the UN Convention on the Rights of the Child (CRC); and other instruments that provide for the right to education. In addition, at the regional level, Kenya has ratified the African Charter on Human and Peoples' Rights (African Charter) as well as the African Charter on the Rights and Welfare of the Child (African Children's Charter), both of which include provisions on the right to education.

It is highly relevant to the prospects of strategic litigation in Kenya that the provisions of international legal instruments that Kenya has ratified now apply directly in domestic courts. Groups and individuals can now directly enforce their socio-economic rights, such as the right to basic education, in the domestic courts, and can measure government's laws, policies and programmes against not only the Constitution, but also the international and regional instruments that Kenya has ratified. Arwa observes that this provision marks a deviation from the common law doctrine of dualism to which Kenya subscribed under previous constitutions.[17] Under the dualist doctrine, international instruments ratified by Kenya could not be directly enforced before the domestic courts unless they had been domesticated. However, this changed under the 2010 Constitution, which allows groups and individuals to rely on international instruments that have been ratified by Kenya to enforce their rights in domestic courts.[18] The incorporation of international law into the

16 The relevant subsecs in sec 1 of the Kenyan Constitution read as follows: '(5) The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

17 As above. Also see NW Orago 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13 *African Human Rights Law Journal* 415-440.

18 Orago (n 17) 421.

Kenyan legal system was affirmed by the High Court at Nairobi in the case of *David Ndugo Maina v Zippora Wambui Mathara.*[19] In this case the Court held that article 2(6) of the Kenyan Constitution imported the provision of international treaties ratified by Kenya into the legal system and have become part of the sources of Kenyan law.[20]

Similarly, the integration of international human rights treaties into the domestic legal system was affirmed in the case of *Beatrice Wanjiku & Another v the Attorney-General & Another*. [21] In this case the High Court at Nairobi underscored that Kenya had followed a dualist approach prior to 2010, and remarked that the 2010 Constitution, in particular articles 2(5) and 2(6), 'gave new colour to the relationship between international law and national law'.[22]

Furthermore, article 20(3)(b) of the Constitution obliges the courts to interpret any provision of the Bill of Rights in a manner that most favours of rights enforcement.[23] Article 20(b) read together with article 2(6) of the Constitution ensures that the courts apply international law when interpreting any provisions of the Bill of Rights, and that the interpretation is in line with standards as enunciated in international law.

For instance, in ascertaining the scope and the nature of state obligations relating to the right to basic education, the courts are empowered to rely on various General Comments, issued by the Committee on Economic, Social and Cultural Rights (ESCR Committee), the Committee on the Rights of the Child, and other treaty bodies relating to the right to education.[24] This greatly enhances the potential of enforcing the right to basic education through strategic litigation in Kenya, and paves the way for lawyers to use international law and authoritative interpretations in their arguments, and for judges to include references to these in their judgments.

19 2010 eKLR para 9.
20 As above.
21 Petition 190 of 2011 para 17.
22 As above.
23 Art 20(3)(b) of the Kenya Constitution 2010 reads as follows: 'In applying a provision of the Bill of Rights, a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom.'
24 In South Africa, the courts have relied on General Comments for the interpretation of the constitutional provision of the right to education. Eg, in the case of *Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others* CCT 29/10 [2011] ZACC 13, the South African Constitutional Court relied heavily on international law, specifically General Comment 13, to highlight the significance of education and the legal framework protecting the right to education; para 35.

To sum up, the standing rules and the monist nature of the application of international law provide an institutional framework that is primed for strategic litigation, providing the courts as a channel through which the right to basic education of children can be realised. The next part of the article examines the legal framework for the protection of the right to basic education in Kenya.

3 Protection of the right to education in Kenya

Education is a fundamental human right in Kenya, and the legal framework reflects a commitment to providing universal access to basic education.[25] Article 43(1)(f) provides for everyone's right to education. Article 53(1)(b) provides for every child's right to free and compulsory basic education. Article 56(b)(1) of the Constitution obliges the government to take measures, which include affirmative action programmes that will ensure that minorities and marginalised groups are given special opportunities to acquire education.

To give effect to the constitutional provisions, the Basic Education Act 14 of 2013 was enacted. The Basic Education Act gives effect to articles 43, 53 and 55 of the Constitution and other enabling provisions that guarantee the right to education. The Act provides the legal framework for the administration, management and regulation of education in Kenya. It outlines the responsibilities of the government, parents and other stakeholders in ensuring access to basic education.

The Act also establishes the Kenya Institute of Curriculum Development (KICD), which plays a crucial role in curriculum development and review to improve the quality of education. Most importantly, section 28 of the Act provides for free and compulsory education.[26] The section obliges the government to implement the

25 The term 'basic education' has its origin in the World Declaration on Education for All (1990). In contrast to other international legal instruments, the African Charter on the Rights and Welfare of the Child also uses the concept of 'basic education' as the first layer of formal learning. In terms of the World Declaration on Education for All, basic education should focus on the content of education, actual learning acquisition and outcome as opposed to just enrolment, continued participation in organised programmes, and completion of certification requirement. In South Africa, the Constitutional Court in the case of *Moko v Acting Principal of Malusi Secondary School & Others* [2020] ZACC 30 has defined basic education in terms of sec 29(1)(a) of the Constitution as education not limited to primary school education or education up to grade 9, or the age of 15 years, but should include learning up to grade 12 and the matric examination. In Kenya, basic education means a programme offered at pre-primary, primary, junior and senior school and includes a programme offered at adult and continuing education centres.

26 Sec 28 Basic Education Act 14 of 2013.

right of every child to free and compulsory basic education. Section 29 of the Basic Education Act 2013 also ensures that fees are not charged in public schools at the basic education level, or that no child is refused school attendance because of a failure to pay fees.

The provision of free basic education In Kenya has come under judicial scrutiny, with the courts considering what free basic education actually means. In the case of *Githunguri Residents Association v Cabinet Secretary Ministry of Education & Others*[27] parents challenged the payment of fees at the basic education level in schools despite both the Constitution and the Act providing for free basic education. The applicants sought an interpretation of article 53 of the Constitution which deals with the right to free and compulsory basic education, as well as clarity on the legal implications of sections 29(1) and 2(b) of the Basic Education Act of 2013.

The High Court at Nairobi held that the district school had unlawfully imposed several monetary costs, charges and levies, which parents could not afford for their children.[28] Consequently, several learners had in practice been excluded from school. Drawing copiously from international law,[29] the Court held that the imposition of monetary fees, levies and costs was illegal. The Court reiterated that 'free' means free and not subject to any other cost. The outcome of this case underscores the potential of strategic litigation in promoting the right to basic education. The ruling resulted in the abolition of all types of fees in the district schools, thereby allowing all learners to enjoy their right to basic education.

Furthermore, as discussed earlier, the Kenyan Constitution enforces the direct incorporation of international legal instruments that Kenya has ratified into the domestic legal system. By implication, legal instruments such as ICESCR, CRC, the African Children's Charter and

27 Petition 464 of 2013 [2015] eKLR.
28 *Githunguri Residents* (n 27) para 57.
29 The Court referred to art 26 of the Universal Declaration of Human Rights (Universal Declaration) which provides that 'everyone has the right to education' and that 'education shall be free, at least in the elementary and fundamental stages'. It adds that 'elementary education shall be compulsory'. The Court also relied on the UNESCO Convention Against Discrimination in Education (CDE) which requires that state parties should 'promote equality of opportunity and treatment in the matter of education and in particular to make primary education compulsory and free'. The International Covenant on Social, Economic and Cultural Rights (ICESCR) obligates state parties to take steps to ensure that primary education is compulsory and free, while secondary education should be 'generally available and accessible'. The same language is used in the Convention on the Rights of the Child (CRC), and the above background is important in understanding art 53(b) of the Constitution which is born of the international principles set out in the cited Declarations and Conventions; paras 27-29.

other instruments that provide for the extensive protection of the right to education, all form part of Kenya's domestic legal system. This provides a solid legal framework to facilitate strategic litigation of the right to basic education in Kenya. It is not surprising that the Court in *Githunguri Residents Association* discussed earlier drew copiously from international law when delivering its judgment.[30]

In addition to the legal framework, the government has introduced several policies aimed at enhancing access to education in the country. This includes Kenya's Vision 2030, which is a long-term development policy for the country. It places education as one of the key social pillars to steer the country into a middle-level income country within 20 years. [31] As such, it committed to investing heavily in education. As part of this Vision, the overall goal for 2020 was to reduce illiteracy by increasing access to education, improving the transition rate from primary to secondary schools, and raising the quality of education.[32]

The measures put in place by the government have resulted in some tangible gains. For example, it was revealed in the Kenyan Basic Education Statistical Booklet for 2019 that there has been a steady growth in the number of basic education learning institutions. At the primary school level, the number of learning institutions increased from 31 449 in 2017 to 32 344 as at 2019.[33] At the secondary school level, the number of schools increased from 8 958 in 2017 to 10 487 in 2019.[34] The government has also invested heavily in public pre-primary learning centres. This has resulted in an increase in pre-primary learning centres from 41 779 in 2017 to 46 530 as at 2019.[35] This is significant in the context of the ongoing debate at the international level on whether the status of early childhood education should be elevated to form part of the right to basic education framework.[36] Kenya has carried out reforms in its education

30 See n 29 for further information about the Court's use of international law.
31 Republic of Kenya 'Kenya Vision 2030 Medium Term Plan II Education and Training 2013-2018: Towards a global competitive and prosperous Kenya'.
32 As above.
33 Republic of Kenya Ministry of Education 'Basic education statistical booklet' (2019) Ministry of Education 8.
34 As above.
35 As above.
36 R Machaelsamy 'The right to equality in early childhood care and education: A precondition for the right to education' (2023), https://www.right-to-education.org/blog/right-equality-early-childhood-care-and-education-precondition-right-education (accessed 11 November 2023). Also see J Beckmann & N Phatudi 'Access to and the provision of pre-school education: The trajectory since 1994' (2012) 27 *Southern African Public Law* 474; LM Richter and others 'Measuring and forecasting progress in education: What about early childhood?' (2021) 6 *Science of Learning* 27; S Fredman, G Donati & S Naicker 'New beginnings: The right to equality and early childhood care and education' (2022) 38 *South African Journal on Human Rights* 167.

sector, which include curriculum reforms and the development of Pre-Primary Education Standard Policy Guidelines.[37] The Guidelines provide that pre-primary education shall be free and compulsory for all children.[38] The implication of this is that, unlike in several other jurisdictions where early childhood education or pre-primary education is the responsibility of parents, the Kenyan government has assumed the responsibility of providing such education. The government has committed to developing early childhood education centres across the country.

Other government programmes and policies, such as Free Primary Education, Free Day Secondary Education and the 100 per cent transition from primary school to secondary school, have resulted in increased enrolment in schools. According to the Kenyan Educational Sector Medium-Term Expenditure Framework for 2022 Report, there was an improved gross enrolment in public schools. [39] The number of learners enrolled in public primary school increased from 8 488 274 pupils in 2019/2020 to 8 849 268 in 2021/2022. [40] At the secondary school level, enrolment increased from 3 045 227 in 2019/2020 to 3 587 081 in 2021/2022.[41]

However, despite these efforts and the successes recorded, challenges in the education sector persist. As observed by the UN Committee on the Rights of the Child, these challenges include low enrolment and completion rates in the arid and semi-arid areas and in urban informal settlements, as well as the low retention rate of teachers in these areas, which undermines the quality of education.[42] Girls continue to face greater barriers in accessing and completing education, compared to boys.[43] This has been attributed to heavy domestic workloads, adolescent marriages and pregnancies, negative societal attitudes towards the importance of educating the girl child, as well as unaffordable menstrual protection and sanitary wear and the lack of sanitation facilities in schools.[44]

37 Republic of Kenya Ministry of Education *National pre-primary education policy standard guidelines* (2018).
38 As above. This is in line with the Tashkent Declaration and Commitments to Action for Transforming Early Childhood Care and Education 16 November 2022, https://www.unesco.org/sites/default/files/medias/fichiers/2022/11/tashkent-declaration-ecce-2022.pdf (accessed 17 March 2024).
39 Republic of Kenya 'Education Sector Report: Medium Framework 2023/2024-2025/26 (2022) IV.
40 As above.
41 As above.
42 Committee on the Rights of the Child Concluding Observations on the combined 3rd to 5th period reports of Kenya 2016, CRC/KEN/CO/3-5 para 57.
43 As above.
44 As above.

These challenges were also amplified by the auditor-general of Kenya's 2021 Report. The audit assessed the extent to which the Ministry of Education has ensured adequate expansion, improvement and maintenance of infrastructure in public primary schools in Kenya.[45] In terms of section 39(e) of the Basic Education Act of 2013, it is the responsibility of the Ministry of Education to provide infrastructure in public schools. Therefore, it is expected that the Ministry would put policies and long-term strategies in place for the expansion, improvement and maintenance of infrastructure in primary schools. Unfortunately, the Ministry of Education has not developed and implemented a sustainable long-term plan for the expansion, improvement and maintenance of infrastructure in public primary schools.[46]

This lack of planning has resulted in an infrastructure deficit which, in turn, has caused overcrowding in some of the schools in the country. For example, data obtained by the auditor-general's report from 55 schools sampled revealed that 46 schools, representing 86 per cent, require extra classrooms; 41 schools, representing 75 per cent, need extra toilets; 44 schools, representing 80 per cent, had insufficient desks; 43 schools, representing 78 per cent, had insufficient administration offices; and 23 schools, representing 42 per cent, had no source of reliable water supply.[47]

According to the report, 19 of the schools sampled, representing 35 per cent, had a student classroom ratio that is higher than the recommended 50 students per classroom, while 34 of the schools, representing 62 per cent, had more than the recommended 30 students sharing a toilet. The highest student's classroom ratio was 94 students in a classroom at Chepkurkur Primary School in Baringo county, while the lowest was 10 students in a classroom in Kotoron Primary School in Baringo county.[48] The highest student toilet ratio was 161 students sharing a toilet in Bungoma DEB primary Schools in Bungoma county, while the lowest was nine students sharing a toilet in Mwanyambevo Primary School in Makueni county.[49]

The auditor-general's report clearly demonstrates the infrastructural gap that still exists despite government's efforts to ensure the protection of the right to basic education. The question arises as to

45 Office of the Auditor-General 'Performance audit report on expansion, improvement and maintenance of infrastructure in public primary school by the Ministry of Education' (2021) Office of the Auditor-General 18-25.
46 As above.
47 As above.
48 As above.
49 As above.

how the existing legal framework can be mobilised to ensure that the highlighted challenges affecting the quality of basic education are addressed. What are the prospects and challenges of strategic litigation to enforce the right to basic education in Kenya? The next part critically examines the use of strategic litigation as a means of social change and of the right to basic education in Kenya.

4 Strategic litigation: Conceptual framework

Generally considered part of the family of public interest litigation, strategic litigation 'seeks to use the courts to help produce systemic policy change in society on behalf of individuals who are members of groups that are underrepresented or disadvantaged, women, the poor, and ethnic religious minorities'.[50] Strategic litigation is viewed as a legal approach in which legal proceedings are intentionally initiated with the broader objective that is often beyond just winning a particular case for a particular individual or group. This approach is generally deployed to advance social, political or policy goals.

Strategic litigation has its roots in the civil rights and social justice movements of the twentieth century and has evolved over time to address various issues. The earliest and most influential instances of strategic litigation occurred during the American civil rights movement. Civil rights activists, including organisations such as the National Association for the Advancement of Coloured People (NAACP), strategically filed lawsuits challenging segregation and discrimination in education, public facilities, and voting rights. Landmark cases such as *Brown v Board of Education* 1954 and the Montgomery bus boycott (1955-1956) used the legal system to challenge racially-discriminatory laws and practices.

In the African context, Ngcukaitobi has identified similar historical claims in the colonial period. He traced the origin of public interest litigation in South Africa to the nineteenth and twentieth centuries.[51] He narrates that from 1845, after the seizure of land by the colonial invaders, black and coloured lawyers turned to the court as a new

50 H Hershkoff & A McCutcheon 'Public interest litigation: An international perspective' in M McClymount & S Golup (eds) *Many roads to justice: The law-related work of Ford Foundation grantees around the world* (2000) 54. Also see LK McAllister 'Revisiting a promising institution: Litigation in civil law world' (2012) 24 *Georgia State University Law Review* 696.

51 T Ngcukaitobi 'The forgotten origins of public interest litigation in South Africa' (2016) 29 *Advocate* 36. Ngcukaitobi has since expanded his writing on this subject in T Ngcukaitobi *The land is ours: South Africa's first black lawyers and the birth of constitutionalism* (2018).

phase in the struggle to claim back the land.[52] Ngcukaitobi asserts that these lawyers used public interest litigation to challenge state power and to resolve 'systematic, rather than individual concerns'.[53] He argued that the use of law by these lawyers was not for personal or individual interest but for the interests of the entire community.[54] He observes that during this period, the public interest litigation was largely a reaction to oppressive state policies and conducts, deprivation of land and state-sponsored violence.[55]

The reliance on the court-based approach to bring about social change has been a source of global debate. While it is impossible to fully canvass the nuances of this debate in this article, some significant aspects of the debate will be highlighted. At the international level, the work of Rosenberg, *The hollow hope*, was influential in shaping the early trajectory of this debate. Rosenberg has argued that, in general, litigation cannot produce social change.[56] Relying on the case study of the courts in the United States, Rosenberg made this assertion based on three factors that he considered limiting the potential of the courts to play such a transformative role. The first factor he identified was the limited nature of rights.[57] The second factor was related to whether the judiciary had sufficient judicial independence from other branches of government; third, was the courts' lack of capacity to develop policies and implement their own decisions.[58]

In the African context, similar predictions and observations have been expressed. In South Africa, for example, the framework for constitutional democracy in post-apartheid South Africa assigned a pivotal role to the courts in ensuring the effective protection and translation of the range of entrenched socio-economic rights into

52 As above.
53 As above.
54 As above.
55 As above.
56 GN Rosenburg *The hollow hope: Can courts bring about social change?* (1991) 13-19.
57 Rosenburg (n 56) argued that not all rights are enshrined in the Constitution. This, he said, created problems for litigators pressing the court for significant social reform, because some litigation is based on constitutional claims or rights that are not recognised or denied.
58 Rosenburg (n 56). Breger also criticised public interest litigation lawyers for accepting only clients whose cases accord with the lawyers' own beliefs and ideologies, thus paying little or no attention to other possible clients. M Breger 'Legal aid for the poor: A conceptual analysis' (1982) 60 *North Carolina Law Review* 284. For more on the critic of strategic litigation and the actors involved, see M McCann & H Silverstein 'Rethinking law's allurements: A relational analysis of social movement lawyers in the United States' in A Sarat & SA Scheingold *Cause lawyering: Political commitments and professional responsibilitie*s (1998) 263; S Meil 'Cause lawyers and social movements: A comparative perspective on democratic change in Argentina and Brazil' in A Sarat & SA Scheingold *Cause lawyering: Political commitments and professional responsibilities* (1998) 489.

material entitlement,[59] thereby promoting the constitutional vision of social transformation. However, some scholars have been critical of the potential of the courts and the Constitution to bring about this social transformation vision.

Klare, writing in the early years of the South African Constitution, described the Constitution as transformative. Klare was the first to categorise the South African Constitution as transformative.[60] Klare describes the South African Constitution as a 'transformative' project in the following terms:[61]

> a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.

While Klare highlighted the transformative potentials of the Constitution, he also pointed out the constraints or conditions that could limit this transformative potential. Chief among these constraints is the conservative culture of the South African judicial system.[62] Klare found a disconnect between the constitutional transformative aspirations and the conservative character of the South African legal culture. He observed that the 'legal culture and socialisation constraints legal outcome' regardless of the substantive mandate entrenched in the Constitution.[63] Klare believed that if the South African Constitution was to achieve its transformative mandate, the legal culture and legal education transformation would also have to be transformed to bring these into closer harmony with the transformative values and aspirations contained in the Constitution.[64]

Modiri has raised questions about the ability of the Constitution and the courts to bring about social transformation.[65] Writing more than 20 years after Klare's predictions, Modiri criticises the Constitution as representing a continuation and reproduction of the

59 CC Ngang 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take "other measures"' (2014) 14 *African Human Rights Law Journal* 655.
60 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.
61 As above.
62 Klare referred to the conservatism of the South Africa legal culture to mean cautious tradition of analysis common to South African lawyers.
63 Klare (n 62)165.
64 As above.
65 JM Modiri 'Law's poverty' (2015) 18 *Potchefstroom Electronic Law Journal* 224; also see JM Modiri 'Conquest and constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* 300.

constituent elements of colonialism and apartheid.[66] Consequently, he views the law and human rights discourse, which is dominating post-apartheid South Africa, as an elite-driven process that serves to insulate perpetrators of apartheid atrocities and its beneficiaries as opposed to serving as a means of political restructuring and social transformation.[67]

Madlingozi has also been critical of the ability of the South African Constitution and legal system to bring about the desired social transformation it promises.[68] He posits that the law cannot be an instrument for radical social change, as it is 'complicit in the continuation of the anti-black bifurcated social structure'. Madlingozi has observed that 90 per cent of the recorded court victories have been hollow victories.[69] He attributed this to the fact that the courts do not have the power to implement their own decisions – reminiscent of the Roseburg critique.[70] However, Brickhill disagreed with Madlingozi in this regard. Brickhill argued that the South African Constitution confers broad and flexible remedial powers on the courts, which the courts can and have extensively utilised. The South African courts have used a range of remedies to secure compliance from government departments, including contempt orders, and attachment of properties of government officials in their personal capacities. According to Brickhill, these combinations of remedies

66 As above.
67 As above.
68 T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, in incorporating and distribution' (2017) 1 *Stellenbosch Law Review* 123.
69 T Madlingozi 'There is no "outside the law": How can social movements use the law to bring about radical change and social justice' NGOs and Social Justice in Africa blog, 26 May 2014.
70 As above. Madlingozi's view on whether or not the law and the court can bring about social change is mixed. While he stresses the limits of litigation to bring about social change, he acknowledges positive elements of litigation, especially regarding its use by social movements to achieve certain objectives. Eg, Madlingozi acknowledged that social movement has used court cases as a means to expose and publicise injustices. He referred to the *Mazibuko* case where the Anti-Privatisation Forum (APF) was able to publicise the fact that rich suburban residents get credit for water usage, while poor townships, mostly black communities, do not. He further pointed out that litigation compels evasive and dishonest local politicians and officials to engage with local communities and disclose details of state policies. He used the example of a case brought by the Concerned Citizens Groups in Durban. According to Madlingozi, the case ripped aside the mask of political rhetoric and forced the council to reveal in sworn affidavit the brutality of the anti-poor policies. Madlingozi also noted that courtroom battles, even if unsuccessful, can also afford a breathing space to besieged movement activists and can also enable ordinary residents to still be part of the movement without the fear of being caught up in violence. As correctly pointed out by Madlingozi, the success or impact of litigation is not only measured or defined by the final outcome of the case. A losing case in court could also have transformative potential, depending on the strategic aim of the litigants or the litigation. Consequently, the assertion by Madlingozi that 90% of court victories are hollow victory is not supported by facts on the ground, facts he has also acknowledged.

make up for the institutional limitations identified by Madlingozi and Rosenberg.[71]

Another stream of scholarship, through empirical studies, has demonstrated the transformative potential of the South African Constitution and courts through strategic litigation. For example, a study commissioned by Atlantic Philanthropy in 2014 demonstrates the strength and transformative potential of the courts and public interest litigation. The report observed that based on available evidence of what has been achieved through public interest litigation, the capacity of public interest litigation to bring about social transformation has been clearly demonstrated.[72]

In her book *Realising the right to basic education: The role of the courts and civil society*, Veriava interrogated the role of the courts and civil society in realising the right to basic education in South Africa.[73] Drawing on several case studies, Veriava demonstrated how civil society organisations in South Africa have advanced the right to basic education in South Africa through strategic litigation. Skelton has also weighed on the positive side of these debates, indicating that the courts have gone some distance in bringing about tangible change in the education system.[74]

Similar debates are unfolding in relation to other constitutions in Africa. Oloka-Onyago has examined the growing potential of public interest litigation in impacting the structures of governance, accountability and equality in the East African countries of Kenya, Uganda and Tanzania.[75] While acknowledging that historical factors, such as the strict application of the standing rule, have impeded the growth of public interest litigation in these countries, he observes that it is beginning to gain a foothold and will become more relevant in the future in the three East African countries he selected for examination, for a number of reasons. First, the residue of inherited problematic laws dating back to the colonial era, several of which

71 J Brickhill 'Strategic litigation in South Africa: Understanding and evaluating impact' PhD thesis, University of Oxford, 2021 121.

72 S Budlender, G Marcus & N Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons*' (2014).

73 F Veriava *Realising the right to basic education: The role of the courts and civil society* (2019).

74 A Skelton 'The role of the courts in ensuring the right to a basic education in a democratic South Africa: A critical evaluation of recent education case law' (2013) 46 *De Jure* 1-23; A Skelton 'Leveraging funds for school infrastructure: The South African "mud schools" case study' (2014) 39 *International Journal of Educational Development* 59-63; AM Skelton and SD Kamga 'Broken promises: Constitutional litigation for free primary education in Swaziland' (2017) 61 *Journal of African Law* 419-442.

75 J Oloka-Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' (2015) 47 *The Geoge Washington International Law Review* 763.

are penal codes, will invite legal challenges. Second, public interest litigation will increasingly become important because of growing government impunity and the efforts that will be required to protect vulnerable individuals and groups in these countries. Third, the inclusion of socio-economic rights in the constitutions of some of these countries will sometimes require their enforcement through public interest litigation.[76]

The current debates in Kenya are reminiscent of the discussions that were taking place over 20 years ago in South Africa when it was at the initial stages of constitutional development. According to Orago, Kenya's 2010 Constitution contains several features aimed at the transformation of Kenya's political as well socio-economic situation, to enhance human dignity, social justice and respect for human rights and fundamental freedoms.[77] Orago argues that with these features the Kenyan 2010 Constitution, like the South African Constitution, may be regarded as a transformative constitution, which the courts can effectively use to bring about socio-economic transformation in Kenya.

However, just as was with the case of the South African Constitution, some scholars have been critical of the potential of the 2010 Kenyan Constitution in realising this transformative objective or potential. For example, while examining the adjudication of socio-economic rights in Kenyan domestic courts, Arwa identifies a similar conservative culture with the Kenyan judiciary just as Klare had observed in South Africa in the late 1990s. Arwa observes that the Kenyan judiciary has adopted a more conservative approach when adjudicating socio-economic rights-related cases.[78] Consequently, the strategic use of litigation to pressure the government to fulfil its obligations towards socio-economic rights and, by extension, the transformative potential of the Constitution will be hampered. He articulates reasons why the courts in Kenya have adopted such conservative judicial interpretations. Prominent among these are the judicial conservatism and deference to the executive.[79]

Supporting the concerns raised by Arwa, Thiankolu has observed that the conservative approach adopted by Kenyan courts will have a detrimental impact on the transformative potential of the

76 As above.
77 NW Orago 'Political and socio-economic transformation under a new constitutional dispensation: An analysis of the 2010 Kenya Constitution as a transformative constitution' (2014) 1 *Africa Nazarene University Law Journal* 30.
78 JO Arwa 'Economic rights in domestic courts: The Kenyan experience' (2013) 17 *Law, Democracy and Development* 428.
79 As above.

Constitution.[80] Thiankolu observes that prior to 2010, judges in Kenya pandered to the executive branch.[81] They adopted an ultraconservative approach to constitutional and legal interpretation. In his view, the 2010 Constitution is transformative in nature because it seeks to bring about large-scale egalitarian socio-economic and political changes in Kenya.[82] He argues that this transformative agenda can only be realised by adopting a 'value-centric as opposed to a legal-centric or process-centric-approach' to the interpretation of and implementation of the law.[83] Thiankolu observes that this needs to be radically different from the ultraconservative approach that held sway before the 2010 Constitution. He concludes that this conservative type of judicial interpretation will hamper the transformative intention of the 2010 Constitution.

The concerns raised seem to be valid at the initial stage. Some of the initial socio-economic rights judgments seem to exhibit this conservative approach. This will be demonstrated in the next part of the article that examines litigation of the right to basic education in Kenya.

5 Litigation of the right to basic education in Kenya

Government's obligation toward the right to basic education includes making education available and accessible to everyone without discrimination. It is well documented that access to education for children living in rural and coastal areas of Kenya presents a major problem.[84] The difficulties of children accessing basic education in these rural and coastal areas resulted in the litigation of the right to education in the case of *Reverend Ndoria Stephen v The Minister of Education & Others*.[85] In this case the petitioner challenged the Minister for Education, the Kenya National Examination Council and the attorney-general of Kenya before the Kenyan High Court in October 2012. The petitioner brought the case on behalf of marginalised communities in Kenya. The petitioner contends

80 M Thiankolu 'Why Kenya's judge recruiters are sceptical about activism on the bench' *The Conversation* 9 May 2021, https://theconversation.com/why-kenyas-judge-recruiters-are-sceptical-about-activism-on-the-bench-160125 (accessed 3 April 2024).
81 As above.
82 As above.
83 As above.
84 Committee on the Rights of the Child Concluding Observations on the combined 3rd to 5th period reports of Kenya 2016, CRC/KEN/CO/3-5. Also see Office of the Auditor-General 'Performance audit report on expansion, improvement and maintenance of infrastructure in public primary school by the Ministry of Education' (2021) Office of the Auditor-General 18-25.
85 *Reverend Ndoria Stephen v The Minister of Education & Others* Petition 464 of 2012 [2015] eKLR.

that children coming from geographically-disadvantaged and marginalised areas have been excluded and discriminated against by the government's educational policy that does not allow them to compete fairly with other children from more affluent areas in securing seats in secondary schools and public universities. As a result, these learners have been performing very poorly in examinations.[86]

The petitioner noted that schools in these marginalised areas are deserted because children are forced to travel miles to get to school and are without proper sanitation and access to water. The petitioner argued that requiring these learners to sit for the same examination as the rest of the children in the country was discriminatory. The petitioner illustrated this discrimination by stating that, whereas a country-wide teacher strike resulted in a national examination being suspended by three weeks, tribal clashes in Tana, River county and other areas did not result in such postponement even though schools remained closed during the conflict.

The petitioner noted that several learners who were displaced after Kenya's 2008 election violence were still in camps and learning under extremely challenging situations.[87] Consequently, it was discriminatory for the government to subject such learners to the same examination that learners elsewhere in the country would be sitting. As such, the petitioner requested that pending the hearing and determination of the case, the Court should stop the respondent from conducting the Kenya Certificate for Primary School Education (KCPE) and Kenya Certificate of Secondary Education (KCSE) examination in 2012 across the country. The petitioner also requested the Court to compel the respondents to produce the quotas and policies that were being used by the government to ensure that learners from these marginalised areas were not disadvantaged or discriminated against by the KCPE and KCSE examinations.[88]

The petitioner further challenged the action of the government by establishing admission quotas to secondary schools and public universities on the basis that such a system did not benefit the affected children but rather those from districts or provinces where parents could otherwise afford to enrol their children in private schools. Such parents enrolled their children in the affected areas only in order to benefit from the quotas. The petitioner contended that this violated section 53(1)(b) of the Constitution, which guarantees the right to free and compulsory basic education of every child, and article

86 As above.
87 As above.
88 *Ndoria Stephen* (n 85) para 16.

56(b) which obligates the state to put in place affirmative action programmes designed to ensure that minorities and marginalised groups are provided special opportunities in the educational and economic fields.[89] The petition also alleged a violation of article 27, which guarantees everyone's right to equality and freedom from discrimination.

In response to the petitioner's submissions, the government argued that it had undertaken various interventions to guarantee access to education for children in marginalised areas. These include measures such as financial support, the provision of meals to encourage children to go to school, and mobile schools for the pastoralist communities.[90] The government submitted that it had adopted policies to ensure that children from marginalised communities sitting for national examinations do so in a more conducive environment.[91]

In the judgment, the High Court at Nairobi agreed with the petitioner that in some marginalised areas access to adequate learning facilities and teaching materials was very challenging.[92] The Court also noted that the government had not disputed the point that the Constitution provides for the immediate realisation of the right of every child to basic education in a way that is non-discriminatory. The Court considered the issues raised by the petition one after the other. The first issue the Court considered was whether there was a case of discrimination in government policies and actions toward the right to education of children residing in marginalised areas. The Court held that there was no basis for alleging discrimination against the children by the government, as the petitioner's claim did not meet the legal definition of discrimination.[93] The Court made this finding by relying on a standard set regarding the definition of discrimination in the case of *Peter K Waweru v Republic of Kenya.*[94] By relying on the standard set *Waweru*, the High Court in the *Ndoria Stephen* case made the following observation:[95]

> Discrimination means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which person of another

89 *Ndoria Stephen* (n 85) para 14.
90 *Ndoria Stephen* (n 85) paras 40-41.
91 As above.
92 *Ndoria Stephen* (n 85) para 51.
93 *Ndoria Stephen* (n 85) para 62.
94 *Peter K Waweru v Republic of Kenya* Civil Application 118 of 2004 [2006] eKLR para 50.
95 As above.

> such description are not made subject or are accorded privileges or disadvantages which are not accorded to persons of another such description.

The Court noted that it was not in dispute that there had been disparities in access to education for children in marginalised areas. However, the government has put measures in place, such as policies and grants, to address the challenges of the children living in these marginalised areas.[96] However, one of the contentions of the petitioner was that such policies had not been properly implemented, resulting in the disparities. The Court noted that it had only the government's testimony as to whether the policies and strategies to enhance access to education were properly implemented.

The Court further observed that it had no way of knowing whether the systems in place indeed were implemented as the government claimed or as the petitioner alleged. The Court went further to state that the formulation and implementation of policies was within the jurisdiction of the executive and, consequently, it was satisfied by the mere fact that the government had put in place policies and these policies were being implemented.[97] The Court held that it could not find that the state had failed in its obligations to ensure that every child has access to basic education in Kenya.[98] Consequently, the petition was dismissed.

Certain aspects of the judgment require further interrogation. While the outcome of the case is disappointing, it presented the judiciary in Kenya with the opportunity to adjudicate on arguably one of the most important socio-economic rights. Certain pronouncements made by the Court place the right to basic education on a stronger legal footing in Kenya. For example, the Court noted that the right to basic education as enshrined in the Constitution was an immediately-realisable right and not subject to progressive realisation. In other words, the right to basic education imposes an immediate obligation on the government to ensure that such right is fulfilled.

The second aspect of the decision of the Court that is worth interrogating is the approach adopted by the Court to arrive at its judgment. The Court was reluctant to stray into the sphere it regarded as belonging to the executive. The Court observed that the Constitution conferred the authority to formulate and implement policy on the executive. Consequently, it was satisfied with the fact

96 *Ndoria Stephen* (n 85) para 66.
97 *Ndoria Stephen* (n 85) para 55.
98 *Ndoria Stephen* (n 85) para 57.

that the government had put in place policies to address the access to education challenge faced by children in the marginalised areas.

The approach adopted by the Court in concluding the case has been criticised by some scholars. Mahadew observed that the Court could have assessed the reasonableness of the policies and strategies put in place by the government to enhance access to education in the marginalised areas.[99] Drawing inference from the case of *Government of the Republic of South Africa & Others v Grootboom & Others*[100] in South Africa, Mahadew noted that this was the approach that the Constitutional Court in South Africa had adopted in several cases.[101] This includes the *Grootboom* case, where the reasonableness of the low-cost housing programme was assessed in view of the progressive realisation of the right to housing.[102] The reasonableness of approach was also adopted in the *Treatment Action Campaign* case,[103] where the reasonableness of the measure to provide Nevirapine to only selected state hospitals was assessed with the aim of progressively realising the right to health.[104]

The Court in this case noted that it was bound by the arguments and evidence produced before it. Unfortunately, the petitioner did not advance this argument in terms of accessing the reasonableness and effectiveness of the policies put in place by the government to address the challenges of access to basic education for children in marginalised areas. The government also did not present evidence to show the effectiveness of its strategies and policies in addressing the access to basic education challenge for children in marginalised areas. Mahadew acknowledges that the petitioner did not request the Court to assess the reasonableness or effectiveness of the measures put forward by the government to address the plight of the children in the affected areas, but observes that the Court could have exercised its discretion and requested such evidence, which would have been a more effective or appropriate approach.

There should be clear evidence on the ground that suggests that the measures put in place by the government are achieving the desired result and that the quality of and access to basic education in the marginalised areas is seen to be improving. There should also be

99 AR Mahadew '*Reverend Ndoria Stephen v The Minister for Education & 2 Others*' (2019) 1 *ESR Review* 21.
100 *Government of the Republic of South Africa & Others v Grootboom & Others* CCT11/00 [2000] ZACC 19.
101 Mahadew (n 99) 21.
102 As above.
103 *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* CCT8/02 [2002] ZACC 15.
104 Mahadew (n 99) 21.

evidence of the investment the government claimed it has made to improve access to quality basic education in the affected areas. There should be visible maintenance and improvement of infrastructure such as sufficient classrooms, sanitary facilities, equipment, libraries, and so forth that are essential for the enjoyment of the right to basic education in those marginalised areas. It is not enough for the Court to accept a mere statement from the government that it has put policies in place to address those challenges, without interrogating the effectiveness or reasonableness of such measures.

The Court in this case seems to have adopted a more conservative approach so as not to stray into the sphere it regarded as belonging to the executive. The Court observed that policy formulation and implementation belong to the realm of the executive and that the judiciary, therefore, is very reluctant to interfere in such realm. Such a conservative approach could not only have negative effects on the realisation of the constitutional promise, especially socio-economic rights, but also on the use of strategic litigation to pressure the government into fulfilling its obligation toward the right to basic education. Arwa submits that the conservative approach adopted by the Court is likely to discourage litigants from filing socio-economic rights-related suits.[105]

The culture of conservatism and deference to the decisions of the executive by the judiciary in Kenya has been highlighted by scholars in a number of cases relating to the right to education. An example is *John Kabui Mwai & Others v Kenya National Examination Council & Others*.[106] In this case the Ministry of Education introduced an affirmative action policy in the admission of learners into public schools. This was done by lowering the entry marks for students from public primary schools compared to those of learners from private primary schools. These parents, through their association, instituted legal proceedings against the Kenya National Examination Council for subjecting learners from private primary schools to a different examination grading system from that which is applicable to learners in public primary schools. The High Court at Nairobi adopted a conservative interpretative approach, which resulted in a decision that favoured the government. The Court made the following remark:[107]

105 JO Arwa 'Economic rights in domestic courts: The Kenyan experience' (2013) 17 *Law, Democracy and Development* 428.
106 *John Kabui Mwai & Others v Kenya National Examinational Council & Others* Petition 15 of 2011 [2011] eKLR High Court 16 September 2011.
107 *Mwai* (n 106) para 15.

> Socio-economic rights are by their very nature ideologically loaded. The realisation of these rights involves the making of ideological choices which, among others, impact on the nature of the country's economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligation.

The interpretation that can be inferred from the above statement is that the Court adopted a position that suggested that the Court should leave the adjudication of socio-economic rights, such as the right to basic education, to the executive and the legislative branches of government. This is the interpretation that can be inferred from the Court's finding that 'in our view, a public body should be given the leeway of meeting its constitutional obligation'.[108] According to Gichuhi, this is a position that disregards article 20(5)(c) of the Kenyan Constitution, which empowers courts to interfere in the decision of other state organs in the allocation of available resources, where necessary.[109] The courts are under obligation to monitor and enforce compliance with constitutional obligations. Where state policy is challenged as being inconsistent with the Constitution, the courts have the mandate to consider whether, in formulating and implementing a policy, the government has given effect to its constitutional obligations. Gichuhi observes that the conservative approach adopted by the Court in this case indicates that the Court has not fulfilled this mandate.[110]

In the case of *Ndoria Stephen*, discussed above, which sought to provide access to education for all children in rural areas, judicial deference and conservatism also ere at play. This is illustrated by the Court's observation that policy formulation and implementation is within the purview of the executive, and the Court is satisfied with the fact that the government has put in place policies and programmes to address the challenges of access to education for children in those marginalised areas.[111] The Court in that case also highlighted the fact that even if the disparity in access to education was the result of discrimination, based on the material evidence placed before it, the executive was performing its constitutional

108 As above.
109 J Gichuhi 'Judicial enforcement of human rights in Kenya: A critique of the case of *John Kabui Mwai & 3 Others v Kenya National Examination Council & Others*' (2014), https://www.academia.edu/7296897/John_Gichuhi_Judicial_Enforcement_of_Human_Rights_in_Kenya_A_Critique_of_the_Case_of_John_Kabui_Mwai_and_3_Others_v_Kenya_National_Examination_Council_and_2_Others_2014_ (accessed 29 November).
110 As above.
111 *Ndoria Stephen* (n 85) para 55.

duty.[112] This suggests that the Court was not willing to look into the nature of the policy implemented by the government, and whether such policy was reasonable or effective in addressing the plight of learners in marginalised areas.

It was on this basis that Thiankolu argues that this conservative type of judicial interpretation will hamper the transformative intention of the 2010 Constitution.[113] They adopted an ultraconservative approach to constitutional and legal interpretation.

The significance of strategic litigation in advancing the right to basic education was also demonstrated during the COVID-19 pandemic. It is well documented that COVID-19 caused huge disruption to education systems all over the world, where schools were shut down to curtail the spread of the pandemic.[114] Kenya was not an exception to this situation. Following the spread of the pandemic in the country, the President in a nationwide address ordered the closure of schools starting from 16 March 2020 in the country indefinitely. On 9 September 2020 the constitutionality of this decision was challenged in the case of *Aura v The Cabinet Secretary, Minister of Education, Science and Technology & Others*.[115]

The questions raised by the petitioners included the following: Was the closure of schools following a directive issued by the President in a state of the nation address as part of the measures to combat the COVID-19 pandemic constitutional? Did the closure of schools as part of the measures to combat the pandemic cause psychological harm to children enrolled in schools? Did the laws enacted to address the pandemic meet legal and constitutional thresholds with respect to the right to education of school children?

The High Court at Nairobi addressed each of these questions. The Court declared that while the Constitution empowers the President to address the nation on any national issue, including the closure of schools, such closure must be done in accordance with the law. The Court had to assess the benefit of children attending school against the risk posed by the COVID-19 pandemic. The Court concluded that the benefit of children attending school in person outweighed

112 As above.
113 Thiankolu (n 80).
114 UNESCO 'Education: From COVID-19 school closure to recovery' (2020), https://www.unesco.org/en/covid-19/education-response (accessed 4 April 2023). Also see D Shepherd & N Mohohlwane 'The impact of COVID-19 in education – More than a year of disruption' (2021) *National Income Dynamics Study* 1.
115 *Aura v The Cabinet Secretary, Minister of Education, Science and Technology & Others* Petition 2189 of 2020 [2020] eKLR (19 November 2020).

the risk.[116] In coming to this conclusion the Court aligned itself with the submission made by the petitioners, who argued that the closure of schools for a long period of time would result in children dropping out of school, and the female learners will be exposed to child marriage and early pregnancies.[117]

The Court further held that the best interests of the child in these circumstances were for the children to be at school as there was more control, guidance and provision of health safety measures in schools than leaving the children to roam the streets without observing COVID-19 protocols. Consequently, the Court found a violation of the right to education of every child affected by the closure of schools in the country.[118] The Court therefore issued an order of *mandamus* compelling the government to open all schools for in-person learning in Kenya within 60 days of the date the order was made.[119]

The outcome of this case may herald a shift in the approach of the courts as it demonstrates a departure from the two cases previously discussed (*Githunguri Residents Association* and *Ndoria Stephen*). In the earlier two cases, the Court displayed a culture of judicial conservativism and deference to the executive decisions. In this case, as in the previous cases, the government had characterised the closing down of schools as a policy issue that fell solely within the purview of the executive. The Court, therefore, was urged to exercise restraint regarding the request sought by the petition. The Court noted that the President had the power to close down schools when necessary. However, such action must comply with laid-down procedures. Part of the laid-down procedure stipulates that any decision to shut down schools must be done in consultation with all stakeholders, which include parents and civil society organisations.[120] The Court found that such closure must be done through a legislative process. The Court observed that the 'state of the national address' through which the President shut down schools did not qualify as a legislative process. The Court concluded that the insufficient consultation and lack of a legislative process rendered the President's actions *ultra vires*.

116 *Aura* (n 115) para 48.
117 *Aura* (n 115) para 17.
118 *Aura* (n 115) para 141(a).
119 *Aura* (n 115) para 141(f).
120 See sec 4(t) of the Basic Education Act of 2013, which requires wide consultation with stakeholders on any decision that will affect education. The Court found that in in closing down schools, these statutory requirements were not followed.

The Court also addressed the question of whether it had the power to interfere on the issue, since this was a policy issue and fell within the purview of the executive. In responding to this question, the Court drew inference from the case of *Geoge Bala v Attorney General*.[121] In that case Oduga J held as follows:[122]

> I therefore hold and affirm that this Court has the power to enquire into the constitutionality of the actions of the executive notwithstanding the doctrine of separation of powers. This finding is fortified under the principle that the Constitution is the Supreme Law of this Country and the Executive must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permits it to do, it cannot seek refuge in illegality and hide under the twin doctrine of parliamentary privilege and separation of powers to escape judicial scrutiny.

In the *Aura* case the High Court struck an appropriate balance with regard to the separation of powers, and found the process of closing down schools by the executive arm of government to be a violation of the right to education of every child in Kenya. The Court ordered the immediate reopening of schools for in-person learning. This was an assertive remedy and bodes well for the courts' future balancing of the separation of powers. The rationale for the shift in this case from the more conservative and deferential approach displayed in earlier cases is not absolutely clear. We note that the previous two cases examined earlier in this article were litigated within two to three years of the new constitutional dispensation, which incorporated socio-economics rights as justiciable rights in Kenya. It is logical to assume that the courts were still adapting to the substantial changes in the legal system and the political transformation brought about by the new Constitution. Jothan has observed that despite the explicit constitutional provision on the justiciability of socio-economic rights, various courts in Kenya at the initial stage entertained doubts about the justiciability of these rights.[123]

Jothan attributed this uncertainty to the historical hostility of Kenyan courts to human rights. He went further to note that '[e]ven though the new Constitution has fundamentally changed the legal, political and constitution order, the ghosts of the past era continue to ominously torment human rights litigation under the new constitutional order'.[124] This is largely due to the fact that most of the judges who served under the old constitutional era still served under the reformed judiciary and some were even promoted to the

121 *Aura* (n 115) para 125.
122 As above.
123 Arwa (n 78) 425.
124 As above.

Supreme Court.[125] Similarly, Thiankolu has observed that prior to the 2010 Constitution, the Kenyan judges pandered to the executive branch of government.[126] They adopted a conservative approach to constitutional and legal interpretation, especially in cases that concerned human rights, the rule of law, constitutionalism and separation of powers.[127] Consequently, it is not surprising that in the previous two cases discussed, the outcomes and observations made by the judges suggest that the courts adopted a more conservative approach.

That said, the *Aura* case suggests a gradual development of the judiciary's acceptance of its role in the context of the legal and political transformation that has occurred in the country. This is similar to the situation in South Africa, where Klare identified the culture of judicial conservatism as limiting the transformative potential of the Constitution. The conservative approach adopted by the judiciary in South Africa at the initial stage following the adoption of the new Constitution resulted in a slow start by the judiciary in driving the transformative potential of the Constitution to deliver the right to education, but that was later overcome by the courts. While some authors, such as Modiri and, to some extent, Madlingozi, remain unconvinced of the power of litigation to deliver change, a more sanguine approach is taken by other South African authors such as Ngcukaitobi and Brickhill and, in relation to the right to education, Veriava and Skelton who have identified many examples of tangible results brought about through strategic litigation.

6 Conclusion

The Kenyan Constitution and the entire legal framework provide a solid legal background for civil society organisations and other interested parties to deploy strategic litigation to pressure the government for the realisation of the right to basic education in the country. However, the success of such efforts is largely dependent on how the judiciary understands its crucial role in driving the transformative potential of the Constitution. If the judiciary does not engage with the enormous responsibility placed on it by the 2010 Constitution and then acts accordingly, the opportunity to realise the promise of the Constitution will be missed. Thiankolu's observation that the transformative agenda can only be realised by adopting a 'value-centric' as opposed to a 'legal-centric or process-centric

125 As above.
126 Thiankolu (n 80).
127 As above.

approach' to the interpretation and implementation of the law is correct in our view.[128] Thus, for the achievement of equal access to basic education in Kenya, the courts will have to continue the path that has been set by the *Aura* decision. Strategic litigators can build on this shift in jurisprudence, and should plan to take cases to court that will incrementally advance the right to education; deciding on which cases is a matter best left to those who know the context very well. A good starting point would be to consider the failures and weaknesses in the system that were identified by the Committee on the Rights of the Child[129] and the auditor-general,[130] as their observations provide a good evidentiary basis of the failure to meet international and national standards. These include low enrolment and completion rates in the arid and semi-arid areas and in urban informal settlements; low retention rates of teachers in those areas; and barriers faced by girls in accessing and completing education. Infrastructure weaknesses, such as poor conditions for teaching and learning, overcrowded classrooms and a lack of sanitation facilities in schools all appear to be matters that could be ripe for litigation.

The pursuit of realising the right to basic education in Kenya is a crucial endeavour. The Kenyan 2010 Constitution serves as a formidable tool in advancing the cause of education as a fundamental right. The explicit recognition of the right to education in the Kenyan Constitution lays a solid foundation for strategic litigation aimed at addressing systemic issues in the education sector. Strategic litigation can leverage these constitutional guarantees to challenge and rectify deficiencies in the implementation of the right to basic education.

The constitutional mandate for the state to allocate resources to ensure the realisation of the right to basic education reinforces the legal basis for the litigation that seeks to compel the government to fulfil its obligations in providing quality and accessible education for every child in Kenya. Strategic litigation emerges as a potent instrument for promoting accountability and social justice. This was demonstrated in the few cases that were discussed in this article. Although the outcome of some of the cases was disappointing, the fact that the courts are open to public interest litigation, the openness and flexibility of the standing rules, and the fact that international law is binding in Kenya are all factors that create a very fertile environment for this work to be done.

128 As above.
129 See n 42.
130 See n 45.

Despite the losses in the early cases, the fact that there are litigators who see the potential to use litigation as a means to provide education for children, and have attempted to do this, is a positive indicator, and the winning case of *Aura* no doubt will have strengthened the confidence of potential litigators. By harnessing the constitutional provisions, litigants can seek redress not only for individual cases but also catalyse systemic changes that benefit a broader section of the population. Therefore, the realisation of the right to basic education in Kenya is intricately linked to the strategic and judicious application of constitutional principles through strategic litigation, ensuring that the promises of the Constitution translate into tangible improvements in the education sector.

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: P Mutu 'Strategic litigation for educational equity: Analysing the impact of *ISER v Attorney-General* on access to quality education in Uganda' (2024) 24 *African Human Rights Law Journal* 322-349
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a14

Strategic litigation for educational equity: Analysing the impact of *ISER v Attorney-General* on access to quality education in Uganda

*Perekeme Mutu**
Post-doctoral researcher, UNESCO Chair: Education Law in Africa, University of Pretoria, South Africa
http://orcid.orcid.org/0000-0003-1175-218X

Summary: *In recent years, strategic litigation has emerged as a powerful tool for advancing human rights and promoting social justice around the world. This legal approach involves the deliberate use of legal action to bring about broader social or systemic change. In the context of Uganda, where access to quality education has been a concern, the impact of strategic litigation in advancing access to education cannot be understated. This article delves into the effectiveness of strategic litigation in promoting access to equal quality education in Uganda, with a specific focus on the 2019 landmark High Court decision in the case of* Initiative for Social and Economic Rights v Attorney-General.

Key words: *strategic litigation; access to quality education; Uganda;* Initiative for Social and Economic Rights v Attorney-General

* BPolsc BA (Hons) LLB MPhil PhD (Pretoria); perekeme.mutu@up.ac.za

1 Introduction

In recent years, strategic litigation has emerged as a powerful tool for advancing human rights and promoting social justice around the world. This legal approach involves the deliberate use of legal action to bring about broader social or systemic change.[1] In the context of Uganda, where access to quality education has been a concern, strategic litigation to advance access to quality education is a potential avenue for bringing about systemic change. This article explores the impact of strategic litigation in promoting access to quality basic education for every child in Uganda, with a specific focus on the landmark case of the *Initiative for Social and Economic Rights (ISER) v the Attorney-General* (*ISER*) as a case study.[2] The article adopted a multidimensional impact model (material impact, instrumental impact and non-material impact) to determine the impact of the litigation in advancing the right to education in Uganda. The article not only interrogates the implication of the Court's decision in the understanding and protection of the right to education, but in establishing a legal precedent for holding the government accountable for providing quality basic education.

As a fundamental human right, education serves as a cornerstone for individual development, societal progress, and the realisation of other human rights.[3] In Uganda, as is the case in several other developing countries, education is recognised as a fundamental human right in the Constitution.[4] Notwithstanding this constitutional recognition, the effective implementation and protection of the right to basic education have encountered various challenges. Uganda has achieved significant success in expanding access to basic education, but disparities persist, especially in rural and marginal communities. Challenges such as inadequate infrastructure, shortages of teachers, the dominance of private education providers and socio-economic barriers hinder the realisation of quality education for all.[5]

1 H Hershkoff & A McCutcheon 'Public interest litigation: An international perspective' in M McClymount & S Golup (eds) *Many roads to justice: The law related work of Ford Foundation grantees around the world* (2000) 54. Also see J Brickhill (ed) *Public interest litigation in South Africa* (2018) 6.

2 Civil Suit 353 of 2016 High Court judgment (17 July 2019), https://www.escr-net.org/sites/default/files/caselaw/iser_v_ag_ruling.pdf (accessed 15 February 2024).

3 ESCR Committee General Comment 13: The right to education E/C.12/1999/10 para 1.

4 Arts 30 & 34(2) Uganda Constitution 1995.

5 J O'Donoghue and others 'A review of Uganda's universal secondary education public private partnership programme' (2018) Education Partnership Group. Also see Alternative Report submitted by the Initiative for Social and Economic Rights and the Global Initiative for Social Economic Rights to the African Commission on Human and Peoples' Rights, 56th ordinary session submitted in October 2014, Uganda Bureau of Statistics 'Statistical Abstract' (2022), https://

Against this background, the Initiative for Social and Economic Rights (ISER), a non-governmental organisation committed to promoting economic and social rights in Uganda, initiated a litigation process against the government, aimed at ensuring access to quality basic education. This article scrutinises the *ISER* case by focusing on the strategic tactics employed, the legal arguments presented and, most importantly, the subsequent impact on the right to basic education in Uganda.

By analysing the outcomes and implications of this case, the article seeks to understand how strategic litigation can be a catalyst for positive change, influencing policy reforms and institutional improvement in the education sector in the country. It seeks to highlight not only the implications of the Court's decision in understanding and protecting the right to education, but also in establishing a legal precedent for holding the government accountable to provide quality education. Against this background, the article will be divided into four main parts.

The first part examines the legal framework protecting the right to education in Uganda. This begins with an overview of the international legal instruments ratified by Uganda. This is followed by domestic legal instruments, which include the constitutional provisions, legislation and policies put in place to ensure not only access to education, but also quality education.

The article also highlights two policies introduced by government, namely, the Universal Primary Education (UPE) and the Universal Secondary Education (USE) policy. The article interrogates these two policies by highlighting the positive aspects but also stressing the implementation challenges that have characterised the application of these policies. The second part of the article looks at how strategic litigation can be used to address some of the issues identified in the education sector. In this regard, this part conceptualises what strategic litigation entails, and some of the debates about its efficacy. The part further examines the criticism that has characterised the use of strategic litigation or reliance on the courts to achieve social transformation. Despite the limitations highlighted by critiques, the article explores how strategic litigation can be used and has been used to advance access to quality basic education in other jurisdictions.

www.ubos.org/wp-content/uploads/publications/05_20232022_Statistical_Abstract.pdf (accessed 15 February 2024).

The third part of the article interrogates the development of strategic litigation in Uganda, with a focus on the provisions of the 1995 Constitution, which provides the enablement for strategic litigation. This part also looks at how ISER leverages the constitutional enablement to institute litigation against the government for failing to fulfil its constitutional obligation towards the right to education. This part further examines the background to the case, the outcome of the case and the impact of the case using the multidimensional impact model to ascertain the extent of impact the case has had in advancing access to quality basic education in the country.

2 Legal framework on the right to basic education in Uganda

The right to education is a fundamental human right that is protected under various international, regional and domestic legal frameworks. This part examines some of these legal frames, beginning with international legal instruments ratified by Uganda.

2.1 Uganda's international commitment towards the right to basic education

When states ratify international treaties, they legally commit to respecting their provisions. Consequently, the educational situation in the country can be measured against the standards set in the treaty. The ratification of treaties that address the right to education further indicates that the right to education does not emanate from a vacuum, but corresponds to international standards that many states have committed to enforce. Ugandan has ratified several international legal instruments that protect the right to education. Uganda ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1987.[6] ICESCR provides for comprehensive protection of the right to education.[7] By ratifying this important international legal instrument, Uganda committed to fulfilling the provision of ICESCR, which includes the right to education.

6 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID= 182&Lang=en (accessed 4 April 2024).

7 Art 13(2) provides as follows: 'State parties to the present Covenant recognise that, with a view to achieving the full realisation of this right: (a) primary education shall be compulsory and available free to all; (b) secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.'

Another significant international legal instrument Uganda has ratified as it concerns the right to education is the Convention on the Rights of the Child (CRC).[8] CRC was adopted in 1989, to protect and promote the rights of children. Like ICESCR, CRC contains extensive provisions concerning the realisation of children's rights to education.[9] Uganda ratified CRC in 1990.

At the regional level, Uganda has also ratified several significant legal instruments that protect the right to education. The African Charter on Human and Peoples' Rights (African Charter) was adopted in 1981 and provides for the right to education. Article 17 of the African Charter stipulates that 'every individual shall have the right to education'.[10] Uganda ratified this instrument in 1986.[11] Another important regional instrument which Uganda has ratified is the African Charter on the Rights and Welfare of the Child (African Children's Charter). The purpose of the African Children's Charter, like CRC, is to protect the rights and welfare of African children. Like CRC, the African Children's Charter embodies an array of different children's rights, including the right to education.[12]

By ratifying these instruments, Uganda aligns itself with the standards provided in these instruments and is committed to upholding and protecting the right to education of every child within its jurisdiction. Consequently, Uganda is expected to align its domestic laws and policies with the provisions of these treaties.

The ratification of these international legal instruments by Uganda does not mean that they automatically form part of the domestic law. Uganda is a dualist state, and international law can only form part of the domestic legal system once it has been domesticated by enabling law. Despite this limitation, Ugandan judges have relied on international law when interpreting certain provisions of the Constitution.[13]

8 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID= 182&Lang=en (accessed 4 April 2024).

9 Art 28(1) of CRC provides that state parties must recognise the child's right to education; art 28(1)(a) provides that state parties must make primary education compulsory and free for everyone; arts 28(1)(b) and (c) provide for higher education to be made accessible on the basis of capacity by every appropriate means.

10 Art 17 African Charter on Human and Peoples' Rights.

11 https://achpr.au.int/en/states (accessed 4 April 2024).

12 Art 11(1) of the African Children's Charter provides that '[e]very child shall have the right to an education'. Art 11(3)(a) provides that basic education should be made free and compulsory, while arts 11(3)(b) and (c) obligate state parties to make secondary and higher education progressively accessible for free.

13 JD Mujuzi 'International human rights law and foreign case in interpreting constitutional rights: The Supreme Court of Uganda and the death penalty question' (2009) 9 *African Human Rights Law Journal* 582.

The next part examines Uganda's domestic legal framework and the extent to which it aligns with its international law obligations.

2.2 Constitutional provisions

The right to education is recognised in the Ugandan Constitution. Article 30 of the Constitution provides that '[a]ll persons have a right to education'.[14] Article 34(2) of the Constitution went further to provide that a child is entitled to basic education which shall be the responsibility of the state and the parent of the child.[15]

The right to education is the only socio-economic right that is substantively recognised by the Constitution. Education is reflected both in the Bill of Rights and under the National Objectives and Directive Principles of State Policy, which are generally considered unenforceable. This raised the question as to the justiciability of the right to education in Uganda despite its inclusion in the Bill of Rights. However, this concern was laid to rest in the *ISER* case,[16] which will be discussed in detail later. In this case the Court held that government policy on public financing of secondary education violates the right to education under articles 30 and 34(2) of the Constitution.

The relevance of the constitutional provision of the right to basic education lies in its provision to address inequalities and promote inclusivity. By guaranteeing every child's right to basic education in Uganda, regardless of their socio-economic background, the Constitution sets the stage for more equitable access to education. It underscores the responsibility of the government to allocate sufficient resources, build infrastructure, and establish mechanisms that facilitate the delivery of education to every child in Uganda. By entrenching the right to basic education in the Constitution, Uganda aligns its legal framework with its international commitment. In addition to the constitutional provisions, Uganda has enacted other legislations and policies to support the implementation of the right to education.

2.3 Legislation and policies

While the Ugandan government has enacted several laws and policies relating to the promotion and protection of the right to education in the country, this part of the article will focus only on

14 Art 30 Constitution of Uganda 1995.
15 Art 34(2) Constitution of Uganda 1995.
16 *ISER* (n 2).

selected laws and policies that are relevant to the realisation of the right to basic education in Uganda. In this regard, one of the laws that will be considered is the Education (Pre-Primary, Primary and Post-Primary) Act 13 of 2008. This legislation forms the basis for education governance and provision. Section 4(1) of the Act provides that the provision of education shall be the joint responsibility of the state, parents and other stakeholders.[17] This provision re-echoed the constitutional provisions. Section 4(2) further provides that basic education shall be provided and enjoyed as a right by all persons.[18] In other words, basic education is recognised as a fundamental human right that should be enjoyed by every child in Uganda.

Another important section of this Act that is worth highlighting is section 9, which prohibits the charging of fees at primary school level. Section 9(1) of the Act stipulates that no person or institution should charge fees for education in any primary or post-primary institution implementing the Universal Primary Education (UPE) programme or Universal Post Primary Education and Training (UPPET) programme.[19] Section 9(3) of the Act prohibits children or pupils from being expelled from school or denied access to education for failure to pay any contribution or fees.[20]

The Education Act not only implements the constitutional provision on the right to education, but also ensures that the country's educational framework complies with its international obligation.

The government has also introduced a number of policies that promote the right to basic education in the country. Of note is the Universal Primary Education (UPE) policy that was introduced in 1997. The main components of the UPE policy include the abolition of school fees, which initially applied to up to four children per family, but this was amended in 2003 to include all children.[21] It also includes increasing the government expenditure on primary education.[22] The education expenditure as a percentage of gross domestic product (GDP) increased from 1,6 per cent to 4 per cent, and the share of primary education in the total education expenditure rose from

17 Sec 4(1) Education (Pre-Primary, Primary and Post-Primary) Act 13 of 2008.
18 Sec 4(2) Act 13 of 2008.
19 Sec 9(1) Act 13 of 2008.
20 Sec 9(3) Act 13 of 2008.
21 A Mwesigye 'The advent of universal primary education (UPE) in Uganda: Challenges and possible solutions' (2015) 3 *Journal of Education Research and Studies* 1.
22 M Nishimura, T Yamano & Y Sasaoka 'Internal efficiency under the universal primary education policy in rural Uganda' (2007) 16 *Journal of International Development Studies* 71.

40 per cent to 65 to 70 per cent.[23] The UPE policy also ensures the abolition of parent teachers association (PTA) fees with an exception for the urban areas where voluntary labour is hard to obtain and the cost of utilities is high.[24]

The evidence of the impact of the introduction of the UPE seems to be mixed. Studies have shown that the UPE policy has effectively improved access to primary education, especially for children from poor families, by removing tuition for public primary education.[25] Simon Datzberger interrogated school enrolment data in Uganda between 1996 and 2015 and concluded that the introduction of the UPE resulted in an increase in enrolment from 3 million at the primary education level in 1996 to 8,3 million in 2015.[26] Data from Uganda's Bureau of Statistics shows a similar increment in primary school enrolment from 8,5 million in 2013 to approximately 8,8 million pupils in 2017.[27] The data also reveals an increase in the number of teachers employed over the year from approximately 186 000 in 2013 to 207 000 in 2017.[28]

Another positive aspect of the policy is that it assists in closing the gender gap in access to education, which has been a major problem.[29] While the impact of the policy on primary school enrolment has been positive, certain aspects of the policy have remained a concern. For example, the significant increase in enrolment raised concern about the quality of the education being provided.[30] The transition, retention and completion rates have remained a challenge. Data from Uganda's Bureau of Statistics shows that as learners progress to higher classes, enrolment also decreases.[31] The data shows that in 2017 enrolment decreased from approximately 2 million in primary

23 As above. Also see M Nishimura and others 'A comparative analysis of the universal primary education policy in Ghana, Kenya, Malawi and Uganda' (2009) 12 *Journal of International Cooperation in Education* 147.
24 Nishimura and others (n 23) 147.
25 M Nishimura, T Yamano & Y Sasaoka 'Impacts of the universal primary education policy on educational attainment and primary cost in rural Uganda' (2008) 28 *Internal Journal of Educational Development*. Also see Nishimura and others (n 22) 69.
26 S Datzberger 'Why education is not helping the poor: Findings from Uganda' (2018) 110 *World Development* 125.
27 Uganda Bureau of Statistics 'Statistical abstract' (2022), https://www.ubos.org/wp-content/uploads/publications/05_20232022_Statistical_Abstract.pdf (accessed 5 February 2024).
28 As above.
29 Kl Lamichhane & T Tsujimoto 'Impact of universal primary education policy on the schooling of girls and children with disabilities in Uganda' (2013) *Education Science* 3. Also see Nishimura and others (n 25).
30 P Asankha & Y Takashi 'Impact of universal secondary education policy on secondary school enrolments in Uganda' (2011) 11 *Journal of Accounting, Financing and Economics* 17.
31 Uganda Bureau of Statistics 'Statistical abstract' (2022) 23, https://www.ubos.org/2022-statistical-abstract/ (accessed 15 April 2024).

one to about 0,62 million in primary seven.[32] What this data indicates is that, while there has been an increment in enrolment, retention and completion have remained a challenge.

With the relative success of the UPE policy, the Ugandan government took it a step further by introducing the free Universal Secondary Education (USE) policy in 2007. The government began to offer free secondary education to all students who passed the primary-leaving examination in 2006. Unlike the UPE, the USE policy only applies to junior secondary schools.[33] This policy was implemented in selected secondary schools, which are mostly public schools, and a few private secondary schools that are enlisted to implement this policy.[34] Parents are allowed to send their children to any of the secondary schools around the country that are enlisted to implement the USE. Parents may also send their children to other secondary schools that do not take part in or are enlisted to implement the USE policy if they can afford to pay the fees.[35] Although the policy exempts students from paying tuition fees, they still have to pay boarding fees, scholastic materials, medical care and other related fees.[36]

As part of the measures put in place to implement this policy, the government adopted a public-private partnership (PPP) approach that involves the private sector in the provision of education. Under the Universal Secondary PPP arrangement, the government pays tuition and registration fees for eligible students enrolled in private secondary schools.[37] Research done on the impact of the policy indicates that the initiative has significantly led to increased enrolment.[38] It is observed that as of 2014, USE students are approximately five times what they were at the inception of the USE programme in 2007.[39]

Despite the success recorded by the introduction of the USE policy, challenges remained. Approximately 41 per cent of the government secondary schools, especially the old prestigious schools, are boarding

32 As above.
33 L Huylebroeck & K Teteca 'Universal secondary education in Uganda: Blessing or curse? The impact of USE on educational attainment and performance' (2015) *L'Afrique Des Grands Lacs: Annuaire* 353.
34 J Wokadala & M Barungi 'Benefit incidence analysis of government spending on public-private partnership schooling under universal secondary education policy in Uganda' (2015) 12 *Africa Education Review* 383.
35 Asankha & Takashi (n 30) 17.
36 As above.
37 Wokadala & Barungi (n 34) 383.
38 As above. Also see Development Monitoring and Evaluation Office 'Government of Uganda introduce a universal secondary education (USE) policy in partnership with the private section to boost enrolment at secondary level' (2021) Human Resource Development Sector.
39 As above.

schools and both in practice and policy, the costs of boarding are borne by parents.[40] These schools are often as expensive as private schools.[41] Also, in about 43 per cent of the schools that are under the USE arrangement where the government supports parents in educating their children, the contribution of parents is three to four times that of the government.[42] The implication of this is that children whose parents could not afford this extra cost might not benefit from this policy. Another challenge highlighted is the fact that several sub-counties (smaller local government units in a district) had neither a public nor private secondary school.[43] In essence, access to basic education for children in rural areas remains a major problem.

As shown from the discussion above, the Ugandan government has put in place legal and policy measures to ensure access to basic education for every child within its jurisdiction. However, as highlighted previously, significant gaps remain in terms of government's obligation towards achieving the right to basic education in the country. For example, despite government measures to increase access to basic education for children in the country, is it observed that the average spending of the Ugandan government on education has been 2,4 per cent of the GDP.[44] This is significantly below the 6 per cent of its GDP it committed to in the Dakar Framework or Action in Education for All.[45] The inadequate investment in education has resulted in inadequate resources needed for effective learning. For example, government data shows that two in five learners lack adequate sitting space in government schools, with notable regional differences, particularly in Northwestern Uganda.[46] The data also indicates that, on average, there are 84 students per classroom at the primary level.[47] Schools are also said to be lacking qualified teachers, with pupil-teacher ratios on the high.[48] A government report shows that there is an average of 53 students per teacher in government primary schools.[49]

40 C Kakuba and others 'Who accesses secondary schooling in Uganda: Was the universal secondary education policy ubiquitously effective? (2021) 83 *International Journal of Educational Development* 2.
41 As above.
42 As above.
43 As above.
44 Centre for Economic and Social Rights 'Right to education' (2016) Uganda UPR Factsheet, https://www.cesr.org/sites/default/files/downloads/1.Education_Uganda_UPR.pdf (accessed 4 February 2024).
45 As above.
46 Ministry of Education, Sports, Science and Technology Education, Sports, Science and Technology Annual Performance Sector Review (2015).
47 Uwezo 'Are our children learning?' (2016) Uwezo Uganda 6th Learning Assessment Report Kampala: Twaweza East Africa.
48 As above.
49 Ministry of Education, Sports, Science and Technology Education, Sports, Science and Technology Annual Performance Sector Review (2015).

The poor quality of public schools has resulted in several parents sending their children to private schools despite the cost associated with these schools. This has led to the high prevalence of unregulated private schools, as private school owners see the high demand for private education as a means of making money.[50] For example, data from the Ministry of Education shows that only 38 per cent of secondary schools were public and 62 per cent were private.[51] Even at the primary level, 48 per cent of schools in urban areas are private, compared to 23 per cent in rural areas.[52] The role of the private sector in education has grown so rapidly that it is putting a strain on the government's ability to effectively regulate it.[53]

The situational analysis of the state of education, specifically basic education, shows that the government has put some measures in place to ensure the realisation of the right to basic education in the country. However, as highlighted in the previous parts, despite these measures, existing gaps have continued to impede the enjoyment or realisation of the right to basic education in the country. Most often, these gaps stem not from the lack of existence of a legal framework and policy, but from the lack of efficient and effective implementation of existing legal frameworks and policies. It is in this context that the next part of the article examines how strategic litigation can be used to compel those saddled with the responsibility of ensuring access to quality basic education, with a focus on the *ISER* case.

3 Understanding the impact of strategic litigation

Recent decades have experienced extensive research focused on the use of litigation to cause broad social change that has resulted in an increased enjoyment of rights. Different labels have been used to denote the use of law to bring about this form of social transformation. A study commissioned by the Open Society Justice Initiative on the impact of strategic litigation highlighted the different concepts used to denote this form of litigation.[54] The Open Society study denotes this form of litigation as strategic litigation, which is also used interchangeably with other concepts such as impact litigation, social action litigation, cause lawyering, interest group litigation, test case litigation, public interest litigation, class action, and so forth.[55]

50 Centre for Economic and Social Rights (n 44).
51 Ministry of Education, Sports, Science and Technology Education, Sports, Science and Technology Annual Performance Sector Review (2015).
52 As above.
53 As above.
54 Open Society Justice Initiative *Strategic litigation impacts: Equal access to quality education* (2017) 13.
55 JO Otteh (ed) *Litigating for justice: A primer on public interest litigation* (2012) 7.

While these concepts overlap with one another, they also have different connotations.[56] According to McClymount and Golup, regardless of the name it goes by, these forms of litigation seek to use the courts to help produce systemic policy change in society on behalf of individuals who are members of groups that are underrepresented or disadvantaged, women, the poor, and ethnic religious minorities.[57] Similarly, McAllister observes that '[a]lthough their definitional contours vary, each of these terms expresses the idea that civil lawsuits are being used in a new way to benefit the condition of groups within society or society as a whole'.[58]

Nolan and Skelton observe that the predominance of a particular term or concept varies from a specific nation or legal context and over time.[59] For example, public interest litigation has been viewed as a term of choice in the United States (US) since its emergence in the 1960s.[60] In recent years there has also been a growing tendency on the part of some litigators to use the term 'impact litigation'. Other litigators that are engaged with bureaucracies have adopted the concept of 'structural reform' litigation.[61]

Regardless of the name it goes by, these forms of litigation 'seek to use the courts to help produce a systemic change in society'.[62] Against this background, this article focuses on the use of strategic litigation as a tool to promote and protect the right to basic education of children in Uganda. Strategic litigation is a legal action 'consciously designed selected and pursued in order to achieve impacts beyond the case involved'.[63]

Strategic litigation has been effectively deployed to promote the right to education in several jurisdictions. For example, in the US, the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU) mobilised public interest litigation as a tool against segregation in schools in the case of *Brown v Board of Education*.[64] This resulted in a historical decision in which the US Supreme Court declared racial segregation in public schools unconstitutional.

56 Brickhill (n 1) 6.
57 Hershkoff & McCutcheon (n 1) 54.
58 LK Mcallister 'Revisiting a promising institution: Litigation in civil law world' (2012) 24 *Georgia State University Law Review* 696.
59 A Nolan & A Skelton 'Turning the rights lens inwards: The case or child rights-consistent strategic litigation practice' (2022) 22 *Human Rights Law Review* 3.
60 As above.
61 As above.
62 Hershkoff & McCutcheon (n 1) 54. Also see Brickhill (n 1) 6.
63 Nolan & Skelton (n 59).
64 *Brown v Board of Education* 347 US 483 (1954).

Evidence regarding the impact of this kind of litigation is mixed and sometimes difficult to ascertain. Some cases are easy to evaluate and to see the positive impact, while others have been more difficult because the issues themselves are more difficult and multifaceted. For example, using the *Brown* case as a case study, Rosenberg challenges the effectiveness of public interest litigation as a tool that can be relied upon for social transformation. Rosenberg argued that the court victory in the *Brown* case did not end racial segregation in schools.[65] He regards the court victory as a hollow victory.

However, other authors have argued that the impact of public interest or strategic litigation cannot be viewed from a narrow perspective. For example, Rodriguez-Garavito argues that the measurement of the impact of litigation may be viewed from two theoretical perspectives or schools of thought, namely, the 'neorealist perspective' and the 'structuralist perspective'.[66] Rodriguez-Garavito noted that authors who focus on the direct and palpable outcome of the court judgment adopt a 'neorealist perspective'. This school of thought views the law as a set of norms that shape human conduct, and applies a 'strict causality test to measure the impact of judicial interventions'.[67] For such authors, the outcome of a case is effective if it is able to produce an observable change in the conduct of those it directly targeted.[68] In other words, such authors focused their attention on the direct and palpable impact of the case.[69]

This form of measurement is what the Open Society Justice Initiative (OSJI)-sponsored study referred to as the material impact measurement of public interest litigation.[70] According to Rodriguez-Garavito, the adoption of this approach by Rosenberg was evidenced in his criticism of the impact of the historic *Brown* case.[71] Unlike the popular view, which suggests that the outcome of the *Brown* case actually revolutionised race relations in the US and gave birth to social movements such as the civil rights movement in the 1960s, Rosenberg concludes that the outcome of the case had little effect on the desegregation of schools.[72]

65 GN Rosenburg *The hollow hope: Can court brings bring about social change?* (1991) 13-19.
66 C Rodriguez-Garavito 'Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America' (2011) 89 *Texas Law Review* 1677.
67 As above.
68 As above.
69 As above.
70 Open Society Justice Initiative *Strategic litigation impacts: Insight from global experience* (2018).
71 *Brown* (n 64).
72 Rosenberg (n 65) 52.

Rosenberg may have come to a different conclusion if he had analysed the impact of the *Brown* case from the structuralist theoretical perspective. Rodriguez-Garavito observed that authors who are inspired by a constructivist understanding of the relation between law and society have criticised Rosenberg and the neorealists for concentrating only on the direct or material impact of the Court's decision.[73] According to the constructivist view, law and judicial decisions generate social transformation, not only when they bring about changes in the conduct of the individuals directly involved in the case, but also when they affect the perceptions of people who are not directly involved.[74]

A prominent proponent of the constructivist view is McCann. According to McCann, the indirect impact of litigation and the judicial outcome may be more important than the direct impact.[75] The approach adopted in assessing the impact of litigation by a civil society organisation (CSO) may significantly influence its decision whether or not to litigate a particular case. Adopting a neorealist approach or perspective to assess the impact of litigation is too narrow and ignores the significant indirect impact.

A study commissioned by OSJI also identifies three categories of impact measurement. These are material impact, instrumental impact and non-material impact.[76] In terms of material impact, strategic litigation is engaged because it occasionally produces concrete benefits that can substantially improve the enjoyment of the rights of the clients and the affected communities.[77] The material impact of strategic litigation can be easily ascertained and evaluated. These material impacts include momentary restitution, compensation for harm, or an order that a violator be prosecuted.[78]

Instrumental impacts can be measured in the changes in policy, law, jurisprudence, and an institution, including the judiciary itself that can have the greatest impact on the largest number of

73 Rodriguez-Garavito (n 66) 1677.
74 The constructivist approach also finds support in the work of S Gloppen 'Public interest litigation, social rights and social policy' (2005) *New Frontiers of Social Policy* 1. Also see SERI Report Public interest legal service in South Africa (2015) Project Report 46; OSJI *Strategic litigation impact: Quality access to quality education* (2017).
75 MW McCann *Rights at work: Pay equity reform and the politics of legal mobilization* (1994) 1-2.
76 Open Society Justice Initiative *Strategic litigation impacts: Insight from global experience* (2018) 43.
77 As above.
78 As above.

people.[79] Far-reaching changes most often require enabling policies, jurisprudence, institutions, and legislation that will translate the benefits of a judicial decision to those who are directly or indirectly involved in the litigation.[80] Instrumental impact could be a change of law that might only be adopted years after the judgment was delivered.

Non-material impacts of strategic litigation may be viewed as impacts that are indirect and difficult to quantify.[81] The non-material impact could also be measured in terms of changes in the complainant's sense of empowerment, the behaviour of policy makers and teachers, the direction of public discourse, and the demonstrative power of the rule of law in action.[82] Non-material impacts are hardly the primary goal of strategic litigation, and never the legal remedy. However, their significance in the context of strategic litigation cannot be overstated. That said, critiques of strategic litigation have continued to be sceptical about strategic litigation as a tool for social change.[83]

The value and effectiveness of strategic litigation in bringing about social transformation is an ongoing debate that cannot be fully canvassed in one article. The author acknowledges this criticism and limitation and does not embark on this research with the view that strategic litigation is the silver bullet that will resolve the access to quality basic education crisis in Uganda. However, with skilful supervision of the litigation process, some of these concerns can be moderated. Even as these criticisms and concerns persist, strategic litigation in the defence of human rights has continued to expand into previously-untested jurisdictions and new rights fields.[84] The outcome and impact of such litigation have varied greatly, depending on the theoretical lens used to assess such impact, 'neorealist' or 'structuralist' theoretical perspective, material impact, instrument impact, or non-material impact. The school's thought or model of evaluation adopted will determine the conclusion that can be drawn in relation to the kind of impact strategic litigation has had.

79 As above. Also see Redress 'Evaluating the impact of strategic litigation against torture' (2022) Practice Note 9, https://redress.org/wp-content/uploads/2022/12/Practice-Note_Evaluation-of-Strategic-Impact_EN_WEB-1.pdf (accessed 15 April 2024).
80 As above.
81 As above.
82 Open Society Justice Initiative (n 76) 48.
83 For more on this, see T Madlingozi *Post-apartheid social movements and legal mobilisation* (2013) 112. Also see S Meili *Cause lawyers and social movements: A comparative perspective on democratic change in Argentina and Brazil* (1998) 489, M Breger 'Legal aid for the poor: A conceptual analysis' (1982) 60 *North Carolina Law Review* 284.
84 Open Society Justice Initiative (n 76).

There is some published analysis on how strategic litigation has been used to advance the right to basic education in different jurisdictions. In Sierra Leone, for instance, strategic litigation was deployed to challenge the exclusion of pregnant learners from schools at the Economic Community of West African States (ECOWAS) Court.[85] The courts found the exclusion of pregnant learners a violation of their right to education. The litigation resulted in the government overturning the ban.[86] The ban was replaced with the introduction of the National Policy on Radical Inclusion in Schools.[87] The policy aims at four groups of people who, based on Sierra Leone's history, have been marginalised. These include pregnant girls and adolescent parents; children living with disabilities; pupils from rural and underserved or disadvantaged areas; and pupils from low-income families.[88] In Eswatini, strategic litigation has been engaged to achieve a declarator on the right of all children to free primary education. Although on appeal the initial victory recorded in the lower court was revised, the case seems to have put pressure on the government to address some of the issues raised by the litigants.

In Nigeria, strategic litigation has been engaged to establish that the right to basic education is a justiciable right, despite its reflection in the Nigerian Constitution as a directive principle of state policy. This is not by any means exhaustive of the promising result of strategic litigation in advancing the right to basic education on the continent.

In South Africa, for instance, through strategic litigation, the content of the right to basic education has been gradually fleshed out in a series of litigations.[89] Through strategic litigation, the courts have held that adequate furniture is part of the right to basic education, and the government is under an obligation to make adequate furniture available.[90] Where there has been a lack of adequate teachers, strategic litigation has been used to pressure the

85 *Women Against Violence and Exploitation in Society (WAVES) v The Republic of Sierra Leone* Suit ECW/CCJ/APP/22/18.
86 HRCSL State of the Human Rights Report 2020 17, http://www.hrc-sl.org/PDF/Media/SOHRR per cent202020.pdf (accessed 22 October 2023).
87 D Sengeh 'National Policy on Radical Inclusion in Schools (Implementation Plan 2021-2026) validated in March 2022' 5, https://mbsse.gov.sl/wp-content/uploads/2022/05/MBSSE-Radical-Inclusion-DIGITAL.pdf (accessed 2 October 2022).
88 As above.
89 F Veriava *Realising the right to basic education: The role of the courts and civil society* (2019). Also see C McConnachie & S Brener 'Litigating the right basic education' in Brickhill (n 1) 281-302.
90 *Madzodzo & Others v Minister of Basic Education & Others* (2144/2012) [2014] ZAECMHC.

government into ensuring that teachers are provided in schools.[91] Where there have been shortages of textbooks, strategic litigation has been deployed to ensure that the government is pressured into supplying the needed textbooks for adequate learning.[92] CSOs have intervened using litigation or the threat of it to ensure that dilapidated or mud structures that threatened the safety of learners are replaced with better classrooms.[93] Where learners live far away from schools, and have to walk to and from school every day, strategic litigation has been engaged as an instrument to ensure that the government provides such learners with transport as part of the right to basic education.[94] The outcome of these cases has had material, instrumental and non-material impacts.

It is in this context that the next part of the article explores the legal initiative deployed by ISER to realise the right to basic education in Uganda, with a specific focus on the *ISER* case. The article assesses the impact of this litigation not through the narrow perspective of neorealists, but through the broader perspective of the structuralist school of thought. It also deploys the material impact model, instrumental impact model and non-material impact model to assess the impact of this litigation.

3.1 Development of strategic litigation in Uganda

Even though efforts were made by lawyers and activists immediately after the country won independence to use strategic litigation to obtain political, social, and economic justice,[95] it was the 1995 Constitution that heralded in a new era of strategic litigation in Uganda.[96] The 1995 Constitution is a great document that provided

91 *Centre for Child Law & Others v Minister of Basic Education & Others* (1749/2012) [2012] ZAECGHC 60; also see *Linkside & Others v Ministers of Basic Education & Others* (3844/2013) [2015] ZAECGHC 36.

92 *Section27 & Others v Minister of Basic Education* (24565/2012) [2012] ZAGPPHC 114; *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198.

93 *Centre for Child Law & Seven Others v Government of Eastern Cape Province & Others* Eastern Cape High Court, Bhisho, Case 504/10 (also referred to as the *Mud Schools* case).

94 *Tripartite Steering Committee & Another v Minister of Basic Education & Others* (1830/2015) [2015] ZAECGHC 67. The case raises the question as to whether the right to basic education includes the state providing transport for students who live far away from their school, and the failure of government to provide such transport.

95 The earliest most important and remarkable public interest litigation case took place in 1966. This is the case between *Uganda v Commissioner of Prisons, Ex Parte Matovu* [1966] EA 524.

96 A Kyomuhendo 'Public interest litigation in Uganda: History, practices and impediments' (2019) Paper presented at the inaugural Oxfam international conference on strategic litigation in Africa, University of Nairobi, Kenya, 2-4 October 2019.

the enablement for the effective deployment of strategic litigation, beginning with the judiciary, which is a vital component of any successful and effective strategic litigation.

Without judicial independence, and broad remedial powers to adjudicate on issues, reliance on strategic litigation as a tool for social transformation will be ineffective. The 1995 Constitution of Uganda addressed this issue. Article 128(1) of the Ugandan Constitution provides for judicial independence. It ensures that no person or authority interferes with the court or the judiciary in the exercise of their judicial responsibility.[97] While this is the case in theory, whether this is also the case in practice remains to be seen. Recent developments in the country have raised concerns about the independence of the judiciary. It is observed that the judiciary recently released a statement titled 'Interference of court processes undermines judicial independence'[98] in which it voiced its displeasure about a government district commissioner who had been meddling in court affairs.[99] More disturbing is a leaked letter written by the country's President, Yoweri Museveni, to the chief justice (CJ), where the President requested the CJ to investigate a judicial decision that authorises the auctioning of the national mosque.[100] This directive is viewed by commentators as ordering the CJ to ensure that the decision was overturned.[101] This is seen as the President interfering with the independence of the judiciary.[102]

Judicial independence is even more important in the context of the adjudication of the right to education and other socio-economic rights. This is because the courts will be called upon through litigation or petition to hold the government accountable for fulfilling its obligation towards these rights. The court can only perform this duty if it is truly independent. Where there is a general perception that the judiciary is not independent, there will be reluctance to engage the mechanism of strategic litigation to bring about the desired change in society. In essence, while it is significant to entrench judicial independence in the Constitution, it is more important to observe it in practice.

97 Art 128 Constitution of Uganda 1995.
98 C Rickard 'New challenges to judicial independence in Uganda' (2024), https://africanlii.org/articles/2024-01-11/carmel-rickard/new-challenges-to-judicial-independence-in-uganda (accessed 8 February 2024.).
99 As above.
100 As above.
101 As above.
102 As above.

Another important provision of the 1995 Constitution that enables strategic litigation is the inclusion of the liberal *locus standi* rule. *Locus standi* is described as a 'generic term covering the rules or principles identifying the person or persons competent to launch such a case'.[103] In linking *locus standi* to access to justice, Kamga describes standing as 'an applicant's right to make a legal claim or seek judicial enforcement of duty or rights'.[104] It relates to whether a particular applicant is entitled to seek redress from the courts regarding a particular issue.[105] Chiduza and Makiwane argue that access to justice is central to the realisation of human rights and, therefore, it is imperative that *locus standi* rules are not excessively strict to the extent that they deny potential litigants access to a court.[106] The application of *locus standi* is said to be predicated on the assumption that no court is obliged to attend to a claim in which the applicant has a remote, 'hypothetical or non-existent interest'.[107] Such a strict application of the *locus standi* rule raises challenges for access to justice and strategic litigation.

With this understanding, the 1995 Constitution of Uganda addressed this potential challenge by adopting a more liberal *locus standi* rule. Article 50(1) of the Constitution provides as follows: 'Any person who claims that a fundamental or other right freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.' Article 50(2) provides that any person or organisation may bring an action against the violation of another person's or group's human rights.

According to Teddy, the use of the word 'any person' rather than 'aggrieved person' in the provision abolished the requirement for *locus standi* in these situations as established by common law doctrines.[108]

103 Institute for Human Rights and Development in Africa (IHRDA) 'Judicial colloquium on *locus standi* in administrative justice and human rights enforcement' (2001) Report' presented on 8-9 October at Kairaba Beach Hotel, The Gambia 4.

104 SD Kamga 'An assessment of the possibilities for impact litigation in Francophone African countries' (2014) 14 *African Human Rights Law Journal* 465.

105 L Chiduza & PN Makiwane 'Strengthening *locus standi* in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution' (2016) *Potchefstroom Electronic Law Journa*l 2.

106 As above. For more on this, also see KS Richard 'Standing to raise constitutional issues: A comparative analysis' (2006) *University of Connecticut School of Law Articles and Working Papers* 1; and P Keyzer 'Standing to raise constitutional issues reconsidered, considered' (2011) 22 *Bond Law Review* 60.

107 E Brems & CO Adekoya 'Human rights enforcement by people living in poverty: Access to justice in Nigeria' (2010) 54 *Journal of African Law* 266.

108 AP Teddy 'Public interest litigation and environmental law in Uganda: Popularising the movement' LLB dissertation, Makerere University, Uganda, 2016 27.

Another important Act that has provided the enablement for strategic litigation is the Human Rights (Enforcement) Act 2019. The purpose of the Act is to give effect to article 50(4) of the 1995 Constitution of the country. The Act provides the procedure for enforcing human rights contained in chapter 4 of the Constitution.[109] It provides steps through which any person or organisation in Uganda can file a complaint to court when his or her human rights have not been respected.

These legal provisions and frameworks provided an enabling environment for ISER to bring a case on behalf of children against the government for not fulfilling its constitutional and statutory obligation towards the right to education. The next part analyses ISER's legal initiative to realise the right to education in Uganda.

3.2 ISER's legal initiative to promote the right to education in Uganda

The Initiative for Social and Economic Rights is a non-profit human rights organisation in Uganda. ISER works toward realising this objective by strengthening the legal framework, policy and institutional framework, empowering communities to monitor and demand the realisation of social and economic rights, and promoting access to remedies for violation of these rights.[110] It was on this basis that in 2016 ISER challenged the government policy on financing for universal secondary education, which it believes violates the right to quality education of children in the country.

3.3 Background to the case

Following the introduction of the Universal Secondary Education Programme by the government in 2007, the implementation of this policy has raised a number of concerns, which led ISER to institute legal action against the government. The policy was implemented through three types of public-private partnerships (PPPs): (i) for-profit schools (these are schools established by private entities, mainly to make profit); (ii) not-for-profit schools (these are schools established by charitable organisations, not to make profit, but to advance their charitable cause; and (iii) community schools (these are schools that are established and run by the communities where the schools are

109 Human Rights Enforcement Act 2019.
110 https://iser-uganda.org/about/ (accessed 12 February 2024).

located).[111] Of the 1 820 schools implementing the USE programme, 943 representing 52 per cent are government-aided schools,[112] while 852 representing 48 per cent are private schools operating under the PPP arrangement.[113] As part of the programme, the government paid UGX 47 000 per student for those enrolled in PPP schools, as opposed to UGX 230 000 per student enrolled in government-aided and public schools.[114] The implication of this financing discrepancy often affects the quality of education in the PPP schools, and the students' ability to get an education equal to the education provided at the government grant-aided and public schools.[115]

In its application ISER argued that the government's pattern of funding was discriminatory and violated the right to quality education for children attending the PPP schools.[116] ISER in its submission explained that the UGX 230 000 per learner in government-aided schools contributed towards paying staff salaries, and providing science and laboratory equipment, while the UGX 47 000 per learner constituted the entire contribution per student enrolled in a PPP school.[117] As a result, these schools were unable to recruit qualified teachers, resulting in a high turnover rate, large classroom sizes and low learner performance. ISER further submitted that PPP schools charge students high non-tuition fees such as examination, laboratory and development fees, among others, that inhibit access to education for disadvantaged children, including girls, children with disabilities and children from poor backgrounds.[118] This is against the aims and intention of the USE programme, especially policy guidelines and the memorandum of understanding signed between the Ministry of Education and Sport and the PPPs.

In response to the submission made by ISER, the government argued that it released the policy guidelines to the PPP implementing the Universal Secondary Education programme, where the requirements and responsibilities of private schools are laid out.[119] As such, private schools are responsible for ensuring class sizes, quality teachers, and basic infrastructure.[120] The government surmised that it had fulfilled

111 Ministry of Education and Sports 'Education Abstract' (2013) Kampala Education Planning and Policy Analysis Department.
112 Initiative for Social and Economic Rights 'A threat or opportunity? Public-private partnerships in Education in Uganda' (2016).
113 As above.
114 *Initiative for Social and Economic Rights (ISER) v Attorney-General* Suit 353 of 2016 (n 2).
115 As above.
116 *ISER* (n 2) para 5.
117 *ISER* (n 2) para 4.
118 As above.
119 *ISER* (n 2) para 6.
120 As above.

its obligation and could not be held liable for the alleged omission of the PPP schools. Consequently, it argued that there was no cause of action against the government.[121]

3.4 Judgment

In deciding the case, the Court highlighted the various international and domestic legal frameworks that guarantee the right to education, equality and non-discrimination.[122] The reference to international law by the Court for guidance is in tandem with previous practices of the courts to seek guidance from international law when interpreting provisions of the Constitution. This practice was highlighted in the section that dealt with the international legal framework protecting the right to basic education. The Court interrogated the government's duties and obligations, under both international and domestic law. The Court found that the Ugandan government was under obligation to continually monitor the implementation of the USE policy in PPP schools.[123]

This obligation requires the government to take positive measures, including regulating and monitoring non-state actors, that will ensure the effective implementation of relevant legislation and programmes, and providing remedies for such violations.[124] The Court further found that nothing in the agreement between the government and the private schools can take away the government's obligation to regulate the private actors and protect the constitutionally-guaranteed right to education.[125] The Court determined that the government had failed in its obligation to monitor and regulate the PPP schools, leading to violations of the rights to education as recognised in articles 30 and 34(2) of the Constitution.[126] The Court also found a violation of the principle of equality and non-discrimination under article 21 of the Ugandan Constitution.[127]

Consequently, the Court ordered the government to ensure equity for all children in the design and implementation of education programmes.[128] The Court further ordered the government to take a leading position in regulating private involvement in education to ensure that minimum standards are maintained by private actors

121 *ISER* (n 2).
122 *ISER* (n 2) paras 12-17.
123 *ISER* (n 2) paras 19-22.
124 As above.
125 *ISER* (n 2) para 25.
126 *ISER* (n 2) para 40.
127 As above.
128 *ISER* (n 2) para 43.

and that defaulters are sanctioned.[129] The Court further urged the government to draw inference from the Abidjan Principles on the human rights obligations of states to provide public education and to regulate private involvement in designing education programmes and policies in the country.[130]

3.5 Impact of the case from a strategic litigation perspective

To determine the impact of this litigation, the tools discussed earlier (material impact, instrumental impact and non-material impact measurement model) will be utilised. The litigation and eventual outcome of the case have had some impact in terms of the promotion and protection of the right to basic education in Uganda. Whether this impact is material impact, instrumental or non-material impact will be assessed.

3.5.1 Material impact of the case

Material impacts of strategic litigation, as previously discussed, are the direct changes that occur as a result of the litigation.[131] In this case, given the court victory, the material impact that is or was expected is the increment of the amount of UGX 47 000 that is been paid per learner in a public-private partnership school to UGX 230 000 that is paid per learner in government-aided schools, so as to bring them on par with one another. Unfortunately, at the time of writing this article there has been no record of the government implementing the court order. In this case, if we are to evaluate the impact of the court victory through the theoretical lens of a neorealist perspective, the conclusion will be that the court victory has had no impact on the lives of those whose rights were violated, because the court order has not be implemented and learning conditions of the affected learners have not improved. From the material impact point of view, the victory of this case up to this point is tantamount to the 'hollow victory' to which Rosenberg referred in his work that was earlier discussed.

The reasons for these minimal material impacts are not far-fetched. The capacity of strategic litigation to produce effective social change is based on the willingness of government institutions to implement

129 *ISER* (n 2) para 40.
130 *ISER* (n 2) para 43. The Abidjan Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education were drafted by experts and were adopted in February 2019, https://www.abidjanprinciples.org/ (accessed 12 February 2024).
131 Open Society Justice Initiative (n 76) 48.

the outcome of court decisions.[132] Court orders have the compelling force of the rule of law and the 'foundational constitutional values that government must respect in order to preserve the ever fragile fabric of constitutional democracy'.[133] However, given the reality of increasing hostility or indifference towards court orders, especially orders that compel the government to fulfil its constitutional obligations, achieving compliance has increasingly become a challenge.[134] A study sponsored by the Centre on Housing Rights and Eviction reveals that one of the challenges regarding the litigation of socio-economic rights is the enforcement of the decision or the capitalisation on the gains made during the legal action.[135] The study shows that the enforcement and follow-up of court decisions is a more difficult task than the litigation itself.

According to Adam Kyomuhendo, the executive attitude towards decisions that arise out of public interest litigation in Uganda has ranged from that of acceptance, non-compliance to that of open confrontation.[136] On the whole, the executive has largely been unenthusiastic about strategic litigation, and on several occasions has taken steps to amend existing laws or altogether enact new laws to subvert progressive judicial decisions and declarations on the rights and freedoms of Ugandans.[137] It is not surprising that in the context of this case, ISER raised the concern that while the judgment is significant, it remains to be seen how the Ministry of Education and Sports will implement the court judgment.[138] In other jurisdictions, civil society organisations involved in the litigation have adopted follow-up strategies and other innovative strategies to ensure the enforcement of court decisions.[139]

3.5.2 Instrumental impacts

Instrumental impact, as discussed earlier, includes changes in policy, jurisprudence and institutions.[140] In this case, an argument could

132 Redress (n 79).
133 NL Raja 'Court orders and reluctant governments' (2016), thehindu.com/opinion/columns/Courts-order-and-reluctant-governments/article16074092.ece (accessed 29 August 2019).
134 As above. Also see SA Joshua 'The relevance of public interest litigation to democracy and good governance in Nigeria' (2018) 17 *Journal of Law, Policy and Globalisation* 67. Joshua observes that one of the challenges facing public interest litigation in Nigeria is disobedience of court orders by the government.
135 Centre on Housing Rights and Eviction *Litigating economic, social and cultural rights: Achievements, challenges and strategies* (2003) 25.
136 Kyomuhendo (n 96) 21.
137 As above.
138 *ISER* (n 2) (case summary by the Initiative for Social and Economic Rights) 3.
139 As above.
140 Open Society Justice Initiative (n 76) 48; *ISER* (n 2).

be made that there has been some instrumental impact resulting from the victory of the *ISER* case. The first instrumental impact of the case is the jurisprudential development. For example, the Court declared that Uganda's obligation under domestic and international law requires it to monitor, regulate and ensure that private entities comply with the minimum educational standards.[141] This means that, going forward, it should now be clear to the government that it has the obligation to regulate and monitor the activities of private actors in the provision of education. Where it fails to fulfil this obligation, it will be violating its obligation towards the right to education.

Another jurisprudential impact of the case is the Court's affirmation of the well-established principles that despite government reliance on private actors to provide education, such measures should be temporary, and that it is the government's primary responsibility to ensure that all children within its jurisdiction have access to education. The outcome of the case signals the need for the government to reduce its reliance on private education providers to fulfil its obligation. It requires the government to put measures in place to take full control of the provision of education to children within its jurisdiction.

A further instrumental impact that could be deduced from the outcome of the Court's decision is the directive to the government of Uganda to seek guidance from the Abidjan Principles in developing education-related policies. This is viewed as a ground-breaking normative and jurisprudential development on account of the fact that this is the first case anywhere in the world where a court is directing the government to seek direction from the Abidjan Principles in the development of its education policies. As these principles were developed by a group of experts and are not binding, this makes this jurisprudence even more significant.

Consequently, the Court's decision provided a clear statement about the recognition of the constitutional right to education, within the framework of international and regional law. It also established a legal precedent that should have alerted government to its responsibilities, and can be relied upon by stakeholders seeking to enhance the right to education in Uganda to hold the government accountable for providing quality basic education.

The immediate outcome of the case is that the government was held accountable concerning its obligation relating to the actions

141 As above.

of businesses and private individuals. The Court declared that Uganda's obligations under domestic and international law requires it to monitor, regulate and ensure that private entities comply with the minimum educational standards.[142] Another immediate impact of the case in the context of government obligations regarding the provision of public education is the Court's affirmation of the well-established principles that, where government relies on private actors to provide education, such measures should be temporary, and that it is the government's primary responsibility to ensure that all children within its jurisdiction have access to education.[143]

Furthermore, article 30 of the Ugandan Constitution provides that '[a]ll persons have a right to education'. What this right entails is not expounded upon in the Constitution. This is tantamount to the 'empty signifier' to which Harvey referred.[144] However, through this litigation, the Court was able to infuse the right to education with meaning, by developing its normative framework on what the right to education entails. The Court in this case established that the right to education as provided for in the Constitution and other legal instruments confer on the government the primary responsibility to provide education.

Another instrumental impact of the case is the change in policy and practice of the government. Most often the aim, objective and target of strategic litigation are to engender change in policy, law, behaviour and attitudes of policy makers and institutions and, ultimately, material impact.[145] It is reported that in 2018, in a bid to address some of the issues highlighted in the judgment, the Ministry of Education and Sport commenced the phasing out of the USE programme in PPP schools.[146] This is done so that the funds can be moved to either constructing or grant aiding of community secondary schools to implement the government policy of providing secondary education in each of the sub-counties.[147] This indicates that there is a policy shift resulting from the outcome of the litigation.

142 As above.
143 As above.
144 D Harvey *Rebel cities: From the right to the city to the urban revolution* (2012) xv.
145 Open Society Justice Initiative (n 76).
146 ESCR-Net 'High Court of Uganda finds discrepancy in quality between public, government aided and public partnership schools, violates right to education and equality' (2019).
147 As above.

3.5.3 Non-material impacts of the litigation

Non-material impacts of strategic litigation, as earlier discussed, are impacts that are indirect and are difficult if not impossible to quantify.[148] The litigation of this case has resulted in certain non-material impacts.

3.5.4 Public awareness and discourse on the right to education in Uganda

It is observed that awareness of rights is an absolute precondition if communities are to enforce their rights in a way that will lead to social change.[149] The use of strategic litigation in promoting human rights raises public awareness about a particular human rights issue. Strategic litigation helps to put important issues on the public agenda. In this way, it creates a public debate that can influence public opinion and change the way in which the issues are viewed. In this context, one of the non-material impacts made by the *ISER* case is that it created public awareness of the plight of children at PPP schools. It created public awareness of the discriminatory funding model, which affected the quality of education in PPP schools.[150] The litigation exposed the lack of basic infrastructure such as libraries, sufficient classrooms, laboratories and sports fields in some of the private schools to effectively implement the USE policy. The litigation highlighted how, as a result of the funding discrepancies, these PPP schools were unable to recruit qualified teachers, resulting in high turnover rates, large classrooms and low performance rates by students. With this litigation, these issues have become public knowledge, and the government is put under pressure to address these challenges as soon as possible.[151]

Another impact of strategic litigation is that it enlightens the public about what they are entitled to. Most often, the meaning and content of a particular right is not immediately clear or well defined. It requires the intervention of the court through litigation to define

148 Open Society Justice Initiative (n 76) 48.
149 G Marcus & S Budlender *A strategic evaluation of public interest litigation in South Africa* (2008) 69.
150 Initiative for Social and Economic Rights 'Meaningful access to justice for economic, social and social rights' (2019) Uganda's Progress Report Summary 5, https://iser-uganda.org/wp-content/uploads/2022/07/meaningful_access_to_justice_for_ESRs.pdf (accessed 15 March 2024). Also see ESCR-NET 'High Court of Uganda finds discrepancy in quality between public, governance aided and public private partnership schools, violates the right to education and equality' (2019), https://www.escr-net.org/caselaw/2020/initiative-social-and-economic-rights-v-attorney-general-civil-suit-no-353-2016 (accessed 15 March 2024).
151 As above.

and provide an interpretation of what such a right entails. It is in this context that Harvey used the concept of 'empty signifiers' to describe human rights.[152] He observed that everything depends on who gets to fill the right with meaning.[153] The definition of a right is an object of struggle, and that struggle has to proceed concomitantly with the struggle to materialise it.[154]

4 Conclusion

In conclusion, the *Initiative for Social and Economic Rights v Attorney-General* case stands as an important landmark in the quest for educational equity in Uganda. However, as shown in the discussion, the material impact of the litigation remains unclear at this point. Through the litigation, there have been instrumental impacts and non-material impacts. Through the litigation, the case has brought to the fore the systemic issues that have hampered access to quality education in Uganda. The decision of the Court not only highlighted and established the constitutional rights of Ugandan children to education but also set the stage for legal action and advocacy that will be directed towards addressing issues of quality education.

The impact of the case goes beyond the courtroom as it has triggered important discussions[155] about the necessity for educational reforms. The focus on addressing issues, such as teacher shortages, disparities in the allocation of resources and inadequate infrastructure, demonstrates a commitment by the Court to play its role in ensuring a more equitable quality education in the country. While the move towards achieving quality and equitable education is continuing, the *ISER* case has paved the way for more transparency and accountability in the education sector. The case has empowered advocacy groups and individuals to challenge systemic barriers that impede access to quality education, urging the government to be proactive in ensuring that every child has equal access to quality education. The *ISER* case, consequently, not only marks a legal victory but also signals a positive step towards the provision of more equitable quality education in the country.

152 Harvey (n 144) xv.
153 As above.
154 As above.
155 In 2018 the Ministry of Education and Sports commenced the phasing out of the USE programme in PPP schools, such that the funds can be shifted to either construction or grant aiding of community secondary schools to implement the government policy of providing secondary education in each sub-county. See ESCR-NET (n 150).

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: MF Chitha 'Evaluating access to education for Rastafarian children and Muslim girls in Malawi' (2024) 24 *African Human Rights Law Journal* 350-368
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a15

Evaluating access to education for Rastafarian children and Muslim girls in Malawi

*Mateo Fatsani Chitha**
Senior Resident Magistrate under the Malawi Judiciary
https://orcid.org/0009-0009-1882-8408

Summary: *Over the years, there has been a challenge for Rastafarian and female Muslim children to access education in public schools as well as Christian-aided or assisted schools in Malawi. This challenge has been due to a policy requiring all students or learners in public schools to have short and combed hair. There is a belief that the policy, dating back to Malawi's one-party era, targeted Rastafarian children and female Muslim children due to their maintaining dreadlocks or long hair and wearing of the hijab, respectively. In challenging this infringement of access to education by Rastafarian and female Muslim students in Malawi, the country has witnessed litigation, circulars and memoranda of understanding. This article examines the effectiveness of the adopted approaches in addressing access to education for Rastafarian and female Muslim children. In so doing, the author presents the applicable legal and policy framework. The article subsequently looks at how access to education challenges have been addressed in relation to female Muslim students and Rastafarian children, respectively. Before the conclusion, there is a brief discussion of the justiciability of the right to education in Malawi and related issues of the role of the courts and other stakeholders. Based on this analysis and examination, the article concludes that much as the adopted approaches have played a crucial role in ensuring access to education for Rastafarian and female Muslim children, there is a need*

* LLB (Hons) (Malawi) Advanced LLM (Leiden University); mateofatsanic@gmail.com

for more action in terms of legislative reform as well as dissemination and public awareness, in particular regarding the recent High Court decision concerning Rastafarian children and their access to education. The article recommends further study on the issue of access to education in Malawi, especially on other aspects of education accessibility as well as dealing with other religious groups.

Key words: *education; right to education; access; accessibility; strategic litigation; circulars; memorandum of understanding; Muslim children; Rastafarian children*

1 Introduction

Due to a policy requiring all students in public schools to have short and combed hair, Rastafarian and female Muslim students have faced protracted challenges to access education in government and Christian-aided schools[1] in the country. It is believed that the policy targeted Rastafarian and female Muslim children. Concerning Rastafarian children, one of the core tenets of the Rastafarian faith is that they must observe the Nazerite prescription that requires that they must not cut their hair but let it grow.[2] Through their adherence to the Nazerite requirement, by keeping long hair or dreadlocks, Rastafarian children have been adjudged as contravening the policy and, thus, have been denied access to education in public schools, including Christian-aided schools. Regarding female Muslim children, their wearing of the hijab, a headscarf worn by many Muslim women and girls as a way of demonstrating modest behaviour,[3] has equally been deemed as violating the policy and, hence, they have been denied access to education in public schools.

This policy, though it is not known when it was officially adopted, originates from Malawi's one-party era, particularly with reference to the repealed section 180(g) of the Penal Code[4] and the Decency in Dress Act of 1974 which regulated how people should dress and

1 Christian-aided/assisted schools are schools that are under the Malawi government subvention but are constructed by different churches in the country.

2 *State v The Attorney General & Others; Ex Parte MM & Others* (Judicial Review Case 55/2019 & Judicial Review Case 48/2017) (High Court) (Zomba District Registry) (unreported) para 4.23 (*MM*).

3 A Piela 'Muslim women and the politics of the headscarf' *JSTOR Daily* (New York) 6 April 2022, https://daily.jstor.org/muslim-women-and-the-politics-of-the-headscarf/ (accessed 15 November 2023).

4 Penal Code (Amendment) Act 11 of 1973.

look.[5] The ideology behind the regulation of peoples' dress and appearance, notably, restricting or stopping persons, especially men or students, from keeping long hair, was to ensure that it was neat looking and well kept.[6] Thus, the Decency in Dress Act, among others, prohibited males from keeping long hair and prescribed the style and legal length of hair for males in Malawi.[7] In the same manner as it was provided in the Decency in Dress Act, section 180(g) of the Penal Code regulated the keeping of hair by male individuals.[8] While the Decency in Dress Act was repealed in 1993, section 180(g) of the Penal Code was repealed by the Penal Code (Amendment) Act 1 of 2011.

Unfortunately, the policy survived the repeal of section 180(g) of the Penal Code and the Decency in Dress Act as well as the dawn of the human rights-centred 1994 Republic of Malawi Constitution.[9] There have been numerous incidences of Rastafarian children being denied admission into government schools because of their dreadlocks. For instance, in 2006 a 14 year-old Rastafari secondary school student was denied enrolment at a public school in Blantyre due to his dreadlocks.[10] Then, in September 2012, three Rastafarian children were sent home from Makwapa Primary School due to their dreadlocks.[11] Intriguingly, the public relations officer of the Ministry of Education supported the removal of the children on the basis that there was a policy that prohibited dreadlocks and encouraged uniform appearance.[12] In March 2017 a similar incident arose and the Ministry of Education publication relations officer reiterated that dreadlocks and hijabs remained banned in government schools.[13] Similarly, there has been evidence of misunderstandings regarding a policy disallowing female Muslim students from wearing the hijab, particularly in Christian-owned schools based in Muslim-dominated

5 *MM* (n 2) para 4.11.
6 As above.
7 Southern African Litigation Centre 'Malawi: Challenging refusal of admission to school' (21 December 2017), https://www.southernafricalitigationcentre.org/2017/12/21/malawi-challenging-refusal-of-admission-to-school/ (accessed 15 November 2023).
8 Law Commission 'Report of the Law Commission on criminal justice reform on the review of the Penal Code (Cap 7:01)' (31 March 2000) 52, https://www.lawcom.gov.mw/sites/default/files/Law%20Commission%20Report%20on%20the%20Review%20of%20the%20Penal%20Code.pdf (accessed 15 November 2023).
9 *MM* (n 2) para 4.11.
10 MO Mhango 'The constitutional protection of minority religious rights in Malawi: The case of Rastafari students' (2008) 52 *Journal of African Law* 219, http://journals.cambridge.org/abstract_S0021855308000107 (accessed 17 November 2023).
11 DN Boaz *Banning black gods: Law and religions of the African diaspora* (2021) 242, as cited in *MM* (n 2).
12 As above.
13 As above.

parts of Malawi. For instance, in 2013 the Ministry of Education closed a primary school in Mangochi[14] on the grounds that the community was insisting on students attending classes in hijab.[15]

This policy has mainly been challenged through strategic litigation, and also through circulars in respect of Rastafarian children and negotiations, leading to a memorandum of understanding (MoU) concerning female Muslim students. The adoption of various approaches implies the need for a holistic approach to successfully iron out the tensions between the right to education and the right to freedom of religion in relation to Rastafarian and female Muslim students. The starting point for that endeavour is to probe the various approaches so far adopted. Against this background, this article aims to review the effectiveness of the approaches so far adopted in ensuring education accessibility for Rastafarian and female Muslim children in Malawi. In doing so, through a desk-based research and interviews, the study draws lessons from and scrutinises the impact of the litigations in comparison to the MoU and circulars in addressing access to education for Rastafarian and female Muslim children. Eventually, before presenting the conclusion of the article, the author briefly reviews the justiciability of the right to education in Malawi and the role of the courts and other stakeholders in ensuring access to education for Rastafarian and female Muslim students. Before that, the article provides an overview of the relevant legal and policy framework in relation to education accessibility in Malawi.

2 Education accessibility in Malawi: An overview of the applicable legal and policy framework

To properly review the effectiveness of the approaches adopted to ensure education accessibility for Rastafarian and Muslim children in Malawi, it is important that the right to education, especially education accessibility in the country, be briefly presented. This necessitates laying out the relevant legal and policy framework. As such, this part examines the relevant international and regional treaties, specifically looking at the International Covenant on Economic, Social and Cultural Rights (ICESCR); the UN Convention on the Rights of the Child (CRC); the African Charter on Human and Peoples' Rights (African Charter); and the African Charter on the Rights and Welfare of the Child (African Children's Charter). The

14 Mangochi is one of the few districts in Malawi with a predominant Muslim population.

15 Telephonic interview with counsel Chidothe of Chidothe, Chidothe & Company 27 October 2023.

part then construes education accessibility under the typology '4-A scheme' guided by the Committee on Economic, Social and Cultural Rights (ESCR Committee) in its General Comment 13 on the right to education (article 13) as well as the Abidjan Principles.[16] Finally, the part details the applicable domestic legal and policy framework, focusing on the Constitution, the Education Act[17] and the National Education Policy of 2016.[18]

The mentioned international and regional treaties, apart from containing specific provisions on education rights, are all binding on and applicable to the state party of Malawi. Malawi ratified ICESCR in 1993;[19] the African Charter in 1989;[20] and CRC in 1991[21] The state having ratified ICESCR, the African Charter and CRC before the entry into force of the Constitution, per section 211(2) Constitution, the treaties are binding on and applicable in Malawi. The African Children's Charter was ratified by Malawi in 1999.[22] Hence, having been adopted after the commencement of the Constitution, it is also binding on and applicable in Malawi in accordance with section 211(1) Constitution as read with the Third Schedule of the Child Care, Protection and Justice Act.[23]

2.1 Applicable international and regional treaties

From an international perspective, articles 13 and 14 of ICESCR expansively provide for education rights. According to article 13(1) of ICESCR, state parties to the Covenant recognise the right of everyone to education. A further provision of article 13(1) of ICESCR specifies the aims of education. Article 13(2) expounds on various aspects of access to education for all persons.

16 The Abidjan Principles, https://www.abidjanprinciples.org/en/principles/overview (accessed 15 November 2023).
17 Education Act (Cap 30:01 Laws of Malawi).
18 Government of the Republic of Malawi 'National education policy' (October 2016), https://planipolis.iiep.unesco.org/sites/default/files/ressources/national_education_policy.pdf (accessed 15 November 2023).
19 UN Treaty Body Database 'Ratification status for CESCR – International Covenant on Economic, Social and Cultural Rights', https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/treaty.aspx?treaty=cescr&lang=en (accessed 15 November 2023).
20 African Union 'Ratification Table: African Charter on Human and Peoples' Rights', https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights (accessed 15 November 2023).
21 UN Treaty Body Database 'Ratification Status for CRC - Convention on the Rights of the Child' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en (accessed 15 November 2023).
22 ACERWC 'Ratifications Table: List of Countries which have signed, ratified/acceded to the African Charter on the Rights and Welfare of the Child', https://www.acerwc.africa/ratifications-table/ (accessed 15 November 2023).
23 Child Care, Protection and Justice Act (Cap 26:03 Laws of Malawi).

Although education is not a right exclusively available to children, it is widely acknowledged that education is mainly experienced by children and that it is fundamental to their development and capacity to enable them to enjoy their other rights.[24] At the international level, CRC comes into play to provide a child-specific version of the right to education. CRC does so by containing two dedicated provisions, namely, articles 28 and 29, the former focusing on access to education issues, and the latter focusing on the aims of education.[25]

At the regional level, article 17(1) of the African Charter stipulates that every individual shall have the right to education. Just like CRC, the African Charter provides a child-specific version of the right to education. Article 11(1) of the African Children's Charter provides that every child shall have the right to education. In a similar manner to CRC, while article 11(2) of the African Children's Charter focuses on what the education of the child must be directed to, article 11(3) of the Children's Charter focuses on access to education issues. Given that Malawi has ratified these legal instruments, it is obligated to fulfil the rights provided in these instruments, specifically the right to education as it concerns this study.

As to what access to education, under the applicable international and regional treaties, entails, the next part expounds on education accessibility under the typology 4-A scheme.

2.2 Education accessibility under the typology 4-A scheme

Developed by the former United Nations (UN) Special Rapporteur, Katarina Tomaševski, on the right to education, the '4-A' scheme is a widely-applied approach used to analyse the extent to which states fulfil their obligations towards the right to education.[26] Using this typology, obligations imposed on states and duty bearers in relation to education rights are classified under the headings of 'availability, accessibility, acceptability, and adaptability'.[27] This typology basically entails that 'education should be *available* and *accessible* to all and that the form of education on offer should be of an *acceptable standard* that is also *adaptable* to the needs of each individual learner'.[28]

24 L Lundy & P O'Lynn 'The education rights of children' in U Kilkelly & T Liefaard (eds) *International human rights of children* (2019) 260.
25 As above.
26 Lundy & O'Lynn (n 24) 261.
27 As above.
28 As above (my emphasis).

As underscored by the ESCR Committee in its General Comment 13 on the right to education (article 13), accessibility, under the '4-A scheme', entails that institutions and programmes of education are accessible to everyone without discrimination, within the state party's jurisdiction.[29] Further, accessibility requires that education is accessible to all, particularly the most marginalised groups, without discrimination on any of the prohibited grounds.[30] This means that the government of Malawi is under an obligation to make education accessible to every child, including Rastafarian and female Muslim children, within its jurisdiction.

Similarly, overarching principle 1 of the Abidjan Principles requires states to respect, protect and fulfil the right to education of everyone within their jurisdiction in accordance with the rights to equality and non-discrimination.[31] According to article 14(b) of the Abidjan Principles on accessibility, educational institutions and programmes must, among others, be physically accessible to everyone within the jurisdiction of the state without discrimination of any kind.

This article proceeds with its discussion on education accessibility for Rastafarian and Muslim children based on the above interpretation of accessibility under the '4-A' scheme. Focusing on physical accessibility, Malawi has an obligation to ensure that educational institutions and programmes are accessible to everyone, including Rastafarian and Muslim children, without discrimination. This understanding is in line with the provisions of the above highlighted domestic legal and written policy framework as well as the international and regional standards.

2.3 Domestic legal and policy framework

Section 25 of the Constitution provides for the right to education. Section 13(f)(iv) of the Constitution, under the principles of national policy, provides that the state must actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving education by providing adequate resources to the education sector and devising programmes to promote national goals, such as unity and the elimination of, among others, religious intolerance. In general,

29 ESCR Committee General Comment 13: The Right to Education (Art 13) 6(b).
30 As above.
31 Abidjan Principles (n 16) 10. See also art 10 of the Abidjan Principles.

sections 25 and 13 of the Constitution underscore the importance of education in Malawi.[32]

In relation to religion, section 33 of the Constitution stipulates that every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom. Thus, section 20(1) of the Constitution prohibits discrimination on, among others, the grounds of religion. In essence, these provisions enshrine every person's right to freedom of religion within their right to education.

The Education Act and the 2016 National Education Policy are two notable pieces of legislation and policy, respectively, supporting the stipulation of the right to education under the above provisions of the Constitution. Section 4(1)(a) of the Education Act mandates the Minister responsible for education to 'promote education *for all people* in Malawi; *irrespective of* race, ethnicity, gender, *religion*, disability *or any other discriminatory characteristics*'.[33] In the exercise of such duty, the Minister should have regard to, among others, the general guiding principles of access.[34] Sections 5 and 76 of the Education Act outline the goals of education in Malawi, and what should be contained in the national curriculum for schools and colleges, respectively. One of the objectives of the National Education Policy, which spells out the education aspirations of the Malawian government,[35] is to 'create an enabling environment for the expansion of equitable access to education for all Malawians'.[36] Consequently, education accessibility is central to five out of seven identified priority areas of the Policy.[37]

Overall, based on the highlighted domestic legal and policy framework, there seems to be a compatibility between the right to education and the freedom to exercise one's religion. The relevant provisions clearly advocate the right to education in harmony with the right to freedom of religion. However, tensions arise because of the 'unwritten', yet vehemently practised, policy requiring all students in government schools in Malawi to keep short-combed hair.[38] This unwritten policy goes against the spirit of not only the

32 *ON & 13 Others v Child Protection Team* Miscellaneous Application 116 of 2016 (High Court) (Mzuzu Registry) (unreported) [6.1], https://www.afyanahaki.org/download/olika-nkhoma-and-13-others-v-child-protection-team-miscellaneous-application-no-116-of-2016/ (accessed 15 November 2023).
33 Education Act (my emphasis).
34 Sec 4(2)(a) Education Act.
35 National Education Policy (n 18) 10.
36 National Education Policy 13.
37 National Education Policy 14.
38 *MM* (n 2) para 4.11.

written policy framework but also the applicable provisions in the Constitution and the Education Act.

3 Addressing education accessibility for female Muslim children in Malawi through litigations, circular and memoranda of understanding

3.1 2013 litigation against hijab prohibition at a primary school in Mangochi

The fight for a religious dress code in schools on the part of Muslims in Malawi can be traced to the year 2013 when the Ministry of Education closed a primary school in Mangochi due to the community's insistence that students should be attending classes in hijab.[39] A legal action against the Ministry of Education was instituted in the High Court by the community members through Chidothe, Chidothe and Company.[40] The Court granted an injunction against both the closure and prohibition of hijab.[41] Arguably, the litigation positively led to a subsequent government circular on the religious dress code in public schools in Malawi. At the same time, however, as can be seen from other emerging litigations on similar issues, the 2013 apparent successful litigation did not provide an all-encompassing solution to the tensions between the right to education and the right to freedom of religion in relation to Rastafarian and female Muslim students.

3.2 Ministry of Education, Science and Technology circular, 7 May 2019

On 7 May 2019 the Malawian government through the Ministry of Education, Science and Technology issued a circular allowing religious dress codes in public schools. The circular directed all schools, including assisted schools, not to exclude any child from school for dressing according to their religious rights or engaging in acts that violate or threaten the students' rights to education, freedom of conscience, religion, belief and thought in the schools.[42]

39 Chidothe (n 15).
40 As above.
41 As above.
42 *Sakina Nembo & 6 Others v Fr Mphatso Bango & 2 Others* (Civil Cause 3/2020) (High Court) (Principal Registry).

3.3 Some resentment to the circular leading to litigation and MoU

3.3.1 Litigation in Nembo & 6 Others v Bango & 2 Others

Even though the 7 May 2019 circular effectively allowed female Muslim students to wear hijab in public schools, including Christian-aided schools, there was resentment from some religious groups, among which was the Anglican church. This resentment led to litigation in the case of *Sakina Nembo & 2 Others v Fr Mphatso Bango & 2 Others*,[43] which was later amended to *Sakina Nembo & 6 Others v Fr Mphatso Bango and 2 Others*.[44]

In *Nembo & 2 Others v Bango & 2 Others*,[45] through an order of interlocutory injunction issued by the High Court on 4 January 2020, it was ordered that

> the Defendants either by themselves, their servants, agents or howsoever otherwise from preventing or continuing to prevent the operations of Mmanga Primary School or stopping or continuing to stop or preventing or continuing to prevent Muslim female students from attending classes at Mmanga Primary School and Mmanga Community Day Secondary School whilst dressed in hijab (Islamic dress code) or otherwise engaging in any conduct that frustrates or is contrary to the circular issued by the Ministry of Education, Science and Technology dated thh day of May, 2019 ... and/or an order requiring the Defendants to permit Mmanga Primary School to resume operations until the determination of the matter herein or a further order of the court.[46]

The resentment by the Anglican church as regards Mmanga Primary School and Mmanga Community Day Secondary School can be clearly deduced from the continuation of *Nembo & 2 Others v Fr Mphatso Bango & 2 Others*. According to Amended Summons issued by the High Court on 7 March 2023,[47] the claimants, all Muslims by religion, brought the action on their own behalf and on behalf of all the parents of and female Muslim students pursuing their studies at Mmanga Community Day Secondary School and Mmanga Primary School situated in Mmanga village in Traditional Authority Nsamala in Balaka district.

43 *Sakina Nembo & 2 Others v Fr Mphatso Bango & 2 Others* (Civil Cause 3/2020) (High Court) (Principal Registry).
44 As above.
45 As above.
46 *Nembo* (n 42) 2.
47 *Nembo* (n 42).

In compliance with the 7 May 2019 Ministry of Education, Science and Technology circular, all female Muslim students in Mmanga Primary School and Mmanga Community Day Secondary School were allowed to attend classes while in hijab for the rest of the 2018/2019 academic year that ended in July 2019. However, within the first term of the 2019/2020 academic year, on 17 September 2019, female Muslim students were prohibited from attending classes at the schools while dressed in hijab. Due to continued disagreements over the issue, the schools were closed on or about 1 October 2019.

Following several meetings attended by the defendants, the leadership of the Muslim Association of Malawi and officials from the Ministry of Education, Science and Technology, it was resolved that the schools should allow female Muslim students to attend classes while wearing hijab. However, when the schools opened on 4 November 2019, members of the Anglican church, on instruction from the first and second defendants, stood in the corners of the school premises and forcibly removed the hijab from female Muslim students who had gone there to attend classes. Those that managed to resist the removal of the hijab from their heads were not allowed to attend classes and were sent back. Reacting to this, the Ministry of Education, Science and Technology directed that teaching should stop in the schools.

Based on the above claims, the claimants sought several reliefs from the Court. Among others, the claimants prayed for a declaration that the defendants' prohibition of female Muslim students from attending classes in the schools while wearing hijab contravened the female Muslim student's right to freedom of conscience, religion, belief and thought and to equality as provided for under sections 33 and 20 of the Constitution, respectively, as well as the rights to education and development as enshrined in sections 25 and 30 of the Constitution.

Counsel for the claimants in an interview revealed that the judge maintained the injunction after an inter-parties hearing on the basis that stopping Muslim girls from dressing in accordance with their religion was a violation of their right to education.[48] Nevertheless, the case file shows that the matter last came for conference scheduling and the lawyers are yet to file anything.

48 Chidothe (n 15).

3.3.2 17 June 2021 MoU enabling female Muslim learners to dress in hijab in Christian-aided schools

Apart from the litigation, following protracted misunderstandings, especially in Christian-owned schools located in Muslim-dominated communities which prohibited female Muslim students from wearing hijab, on 17 June 2021 the Public Affairs Committee (PAC) facilitated the signing of a MoU to allow female Muslim learners to wear hijab in Christian-aided schools.[49] The MoU was signed by leaders or representatives of the following faith based organisations: Episcopal Conference of Malawi (ECM); Malawi Council of Churches; Muslim Association of Malawi; and Evangelical Association of Malawi. The ceremony was witnessed by the Minister of Education, the National Unity Minister, and the UN Senior Human Rights Advisor to Malawi, Sabina Lauber, and representatives of civil society organisations (CSOs).[50] The wearing of the hijab was allowed on condition that it must match the school uniform of the school concerned.[51]

Emphasising access to education through adherence to non-discrimination in Christian-aided schools in relation to religious dress code by female Muslim students, part of the MoU reads as follows:[52]

> It is hereby agreed that a Muslim girl child shall not be discriminated against on the ground of religion and shall, in addition to other rights, be allowed to dress modestly which include wearing hijab in Assisted Christian Schools. The wearing of hijab shall not deter in any way the learners' active participation in other school extra-curricular activities which do not infringe on their right to religion such as sports among others.

Observing the linkage between the right to education and the right to freedom of religion, the MoU further reads:[53]

> Parties hereto mutually agree that learners' right to education and freedom of religion particularly that of the girl child, ought to be recognized and respected in Assisted Christian schools. The principal practice of religion is not only confined to belief but may include ceremonial acts, customs such as the observance of dietary regulations,

49 J Pasungwi 'Faith leaders sign MoU to allow hijab in schools' *The Nation* (Blantyre) 18 June 2021, https://mwnation.com/faith-leaders-sign-mou-to-allow-hijab-in-schools/ (accessed 17 November 2023).

50 C Kambale Muslims 'Christians end hijab rangles as they sign MoU' *Face of Malawi* (Lilongwe) 17 June 2021, https://www.faceofmalawi.com/2021/06/17/muslims-christians-end-hijab-rangles-as-they-sign-mou/ (accessed 21 June 2023).

51 As above.

52 B Mlenga 'Minister Mtambo hails Muslim, Christians on hijab deal' *Malawi Muslims Official Website* 2021, https://malawimuslims.com/news/minister-mtambo-hails-muslim-christians-on-hijab-deal/ (accessed 17 November 2023).

53 As above.

the wearing of distinctive clothing or head coverings, participating in rituals associated with certain stages of life, among others.

In terms of its implementation, according to one of the leaders of the Muslim Association of Malawi, there has been general adherence to the 2021 MoU.[54] The MoU currently is in three language versions of English, Chichewa and Yao with plans to further translate it to the Tumbuka language.[55] This illustrates a willingness to ensure wide dissemination of the MoU.

4 Tackling education accessibility for Rastafarian children in Malawi through strategic litigation and circulars

The 2021 MoU recommended that the Public Affairs Committee (PAC) should address the concerns of Rastafarians, Bible believers, as well as other concerned faith groups.[56] Nevertheless, no similar MoU emerged in relation to the concerned faith groups including Rastafarian children to enable them to access education while keeping dreadlocks or long hair. Instead, access to education for Rastafarian children has been addressed through strategic litigation in the consolidated case of *Ex Parte MM & Others*[57] and a subsequent circular issued by the Ministry of Education in conformity with the High Court's directive in the *MM* case.

4.1 Vindicating access to education for Rastafarian children through strategic litigation: *Ex Parte MM & Others*

In 2017 a minor girl (regarded in the case as MM), suing through her father, filed an application for judicial review against a decision of not being enrolled and registered at Blantyre Girls Primary School on the ground that she had dreadlocked hair.[58] Then, in 2020, a minor boy (regarded as IN in the case), suing through his father, applied for judicial review challenging a decision of being denied registration and enrolment at Malindi Secondary School on the ground that he had dreadlocked hair.[59] Judicial review leave was duly granted by the High Court, separately, on 27 November 2017 and 13 January

54 Telephonic interview with one of the leaders of the Muslim Association of Malawi on 1 November 2023.
55 As above.
56 Kambale (n 50).
57 *MM* (n 2).
58 *MM* (n 2) para 1.1.
59 As above.

2020, respectively.[60] In so granting them leave, the High Court also granted the applicants injunctions allowing them to be registered and enrolled into the schools. Subsequently, the two matters were consolidated and continued before one judge of the High Court.

The applicants prayed for several reliefs, including a declaration that the policy of the Ministry of Education (second respondent) requiring them and all other Rastafarian children to have short hair contravened sections 4(1)(a)(b) and 5(2)(i) of the Education Act;[61] and a declaration that the Policy of the Ministry of Education requiring that MM and IN and all Rastafarian children to cut their hair for them to be allowed in government schools as being unlawful and unconstitutional on the ground that it violated their rights to religion, education and not to be discriminated against on the grounds of religious affiliation as stipulated in sections 120, 25 and 33 of the Constitution.[62]

In the High Court's judgment delivered on 8 May 2023, in analysing and determining the substantive issues before the Court, Zione Ntaba J, the presiding judge, was guided by, among others, the provisions of the Constitution, the Education Act, the African Children's Charter and CRC, as well the ESCR Committee's General Comment 13, and comparable court decisions from Kenya, Zimbabwe, Ghana and South Africa. To be specific, from the legal framework, Ntaba J cited and interpreted the right to education in section 25 of the Constitution; the Constitution's prohibition of discrimination under section 20; sections 4(1)(a) and (2), 5(1) and (5(2) and 76 of the Education Act; article 11(1)(e) of the African Children's Charter; article 29(1)c) of CRC; and article 18(4) of the International Covenant on Civil and Political Rights (ICCPR). On the foreign case law, the judge cited and applied *JWM (alias P) v Board of Management of High School & 2 Others*[63] (Kenya); *Farai Dzvova v Minister of Education, Sports and Culture & Others*[64] (Zimbabwe); *Tyron Iras Marhguy v Board of Governors Achimota Senior High School & Another*[65] (Ghana); and *MEC for Education: KwaZulu-Natal & Others v Pillay Sunali*[66] (South Africa).

60 As above.
61 *MM* (n 2) para 1.2.1.
62 *MM* (n 2) para 1.2.2.
63 *JWM (alias P) v Board of Management of High School & 2 Others* [2019] eKLR.
64 *Farai Dzvova v Minister of Education, Sports and Culture & Others* SC 26/07 (2007) ZNSC 26.
65 *Tyron Iras Marhguy v Board of Governors Achimota Senior High School and the Attorney General* (2021) JELR 107192 (HC).
66 *MEC for Education: KwaZulu-Natal & Others v Sunali* 2007 (2) SA 106 (CC).

In its reasoning the Court placed emphasis on access, equity, equality, diversity, inclusion and liberalisation. It was the Court's view that school codes of conduct as well as national policies on education must incorporate diversity 'and be conscious of their potential to exclude, particularly in relation to hair, but also be more comprehensively inclusive'.[67] In reviewing the evidence before it, the Court concluded that the totality of the evidence proved that the Ministry of Education breached its own overall duty of ensuring educational promotion for all people in Malawi regardless of their religion, race, disability or any other discriminatory ground.[68]

Finding in favour of the applicants, the High Court determined that the decision not to allow MM and IN to register and enrol into the schools on the ground that they had dreadlocked hair was illegal and unconstitutional.[69] Further, the Court determined that the policy was unlawful and unconstitutional on the ground that it violated the Rastafarian children's rights to religion, education, equality and not to be discriminated against on the grounds of religious affiliation as stipulated in sections 20, 25 and 33 of the Constitution.[70] Hence, the High Court granted the reliefs sought by the applicants.

Under its additional declarations, the Court ordered the executive through the Ministry of Education to immediately remove the policy that bans the registration and enrolment of Rastafarian children unless they cut their dreadlocks.[71] In relation to that, the Court further ordered the Ministry of Education to issue a directive, not later than 30 June 2023, to all government schools, that Rastafarian children should not be stopped from registration and enrolment.[72]

4.2 June 2023 circular from the Secretary for Education, Ministry of Education and compliance therewith

On 26 June 2023, before the expiry of the period given by the High Court in *Ex Parte MM & Others*,[73] the Ministry of Education through the Secretary for Education issued a circular titled Admission of students of various religious beliefs into public schools. The circular reads as follows:[74]

67 *MM* (n 2) para 4.15.
68 *MM* (n 2) para 4.24.
69 *MM* (n 2) paras 5.3.1 & 5.3.2.
70 *MM* (n 2) para 5.3.3.
71 *MM* (n 2) para 5.6.1.
72 *MM* (n 2) para 5.6.2.
73 As above.
74 Secretary for Education 'Ministry of Education admission of students of various religious beliefs into public schools' 26 June 2023.

> Pursuant to the High Court's decision in Judicial Review Cause No 55 of 2019 as consolidated with Judicial Review Cause No 48 of 2017, I would like to advise that no public school should stop a student from being registered and enrolled at a school on the grounds of religious affiliation or practice including Rastafarian children in dreadlocks. A student should not be prevented from attending school because of their religious belief.

From the wording of the above circular, despite a mention of Rastafarian children, the Ministry of Education's statement is positively broader than what was ordered by the High Court. Whereas the Court ordered the Ministry to issue a directive that those Rastafarian children should not be stopped from registration and enrolment in government schools, the circular promotes access to education for not only Rastafarian children but, broadly, students of various religious faiths. The circular underlines that students must not be denied access to education in public schools due to their religious beliefs.

On the effectiveness of the circular so far, according to the Rastafari for Education Committee, there have been reports that some government schools are still denying class attendance by students with dreadlocks.[75] On a positive note, Blantyre Synod of the Church of Central Africa Presbyterian (CCAP) resolved that, in line with the circular, Rastafarian children with dreadlocks must be allowed to attend its schools.[76]

The MoU that resulted from the litigation, despite its limited implementation, demonstrates how the courts can be relied upon to play a role in promoting the right to education in Malawi.

5 A review of justiciability of the right to education in Malawi and the role of the courts and other stakeholders

In order to review the justiciability of the right to education in Malawi, it is important to position socio-economic rights generally within the legal framework in Malawi. As observed by one scholar, considering

75 E Phompho *Zodiak Online* 30 September 2023, https://www.zodiakmalawi.com/ also see https://www.southernafricalitigationcentre.org/2023/02/15/media-advisory-rastafari-children-challenging-refusal-of-admission-to-malawi-government-schools/ (accessed 18 November 2023).

76 Nation Online 'Blantyre synod schools nod to Rastafarian children' *The Nation* (Blantyre) 1 September 2023, https://mwnation.com/blantyre-synod-schools-nod-to-rastafarian-children/ (accessed 1 November 2023).

that 'socio-economic rights are empowering rights',[77] they are central to the country's constitutional design, Malawi being a developmental state.[78] In adopting the Constitution, the people of Malawi sought to guarantee the welfare and development of all the people of Malawi.[79] Consequently, socio-economic rights are guaranteed in either chapter IV of the Constitution providing for human rights, or chapter III which stipulates the fundamental principles, otherwise known as directive principles, of national policy. The Malawian constitutional model, as regards socio-economic rights, falls into the scheme of bifurcation of protection of socio-economic rights into, on the one hand, those rights entrenched in the human rights chapter and, on the other, those merely recognised as principles of national policy.[80] Nevertheless, the country must adopt a progressive mindset toward the justiciability of socio-economic rights with a more innovative and robust interpretation of these rights, which will ensure that this bifurcation has a minimal effect on the judicial enforcement of socio-economic rights in Malawi.[81]

The right to education is one of the few socio-economic rights expressly enshrined in Malawi's human rights chapter.[82] The right to education is stipulated as a right under the human rights chapter and at the same time recognised as a principle of national policy under the fundamental principles chapter. While there is no logical explanation for the inclusion of the right to education as a justiciable right under the human rights chapter and, at the same time, as merely a principle of national policy under the fundamental principles chapter,[83] there should be no doubt that the right to education is justiciable in Malawi, especially in consideration of the High Court decision in *Ex Parte MM & Others*.[84]

From the strategic litigation point of view, it is commendable that several stakeholders have actively challenged the violation of Rastafarian and female Muslim children's rights to education due

77 RE Kapindu 'Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities' (2013) 13 *African Human Rights Law Journal* 126, http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962013000100007 (accessed 17 November 2023).
78 Kapindu (n 77) 127.
79 Preamble to the Republic of Malawi (Constitution) Act 1994.
80 DM Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49 *Journal of African Law* 212, http://journals.cambridge.org/abstract_S0021855305000148 (accessed 17 November 2023).
81 Kapindu (n 77) 128.
82 C Mbazira 'Bolstering the protection of economic, social and cultural rights under the Malawian Constitution (2007) *Malawi Law Journal* 224, https://journals.co.za/doi/pdf/10.10520/EJC76187 (accessed 17 November 2023).
83 Chirwa (n 80) 2018.
84 *MM* (n 2).

to their religious faith. For example, the Centre for Human Rights Education Advice and Assistance (CHREA), a human rights non-governmental organization (NGO), has been at the forefront of ensuring that every child in Malawi has access to education.[85] Similar to CHREA, the Lost History Foundation has also been active in ensuring that all children are provided access to education in the country. The Lost History Foundation appeared as the second *amicus curiae* in the case discussed above, and submitted evidence in support of the applicants and extensively guided the Court on the historical background of the Rastafarian faith and the keeping of dreadlocks.[86]

Equally commendable is the role played by the courts by issuing injunctions to ensure that Rastafarian and female Muslim children are not denied access to education because of their dreadlocks and the wearing of the hijab, respectively. On a positive note, there is a clear position taken by the Court in relation to Rastafarian children as espoused in *Ex Parte MM & Others*.[87] Regrettably, the *Nembo* case concerning female Muslim students' access to education in the Mmanga schools is still pending. There is, therefore, a gap as regards Malawian courts' jurisprudence on the wearing of hijab by female Muslim students in relation to their access to education.

6 Conclusion

The stock of approaches adopted to ensure access to education for Rastafarian and female Muslim children in public schools in Malawi turns out to be a significant contribution to the right to education in the country.

All the approaches, be it litigations, circulars or MoUs, have jointly played a crucial role in ensuring access to education for Rastafarian and female Muslim children. Nonetheless, as it was rightly pointed out by the judge in *Ex Parte MM & Others*, it is not advisable that the issue of religious faith and access to education be purely regulated by policy statements or be left to the courts.[88] To achieve comprehensive access to education for Rastafarian children and female Muslim children as well as other students belonging to concerned religious beliefs, there is a need for legislative reform, particularly targeting the Education Act. The legislative reform must aim at providing extensive

85 *MM* (n 2) para 1.3.
86 *MM* (n 2) paras 3.1 & 3.2-3.9.
87 *MM* (n 2) (n 2).
88 *MM* (n 2) para 4.22.

education accessibility not only for Rastafarian children and female Muslim children, but also other students belonging to concerned or minority religious beliefs. Additionally, like the MoU, which currently is in three languages with plans to have it in a fourth language, there is a need for a proper dissemination of the High Court decision in *Ex Parte MM & Others*[89] by interpreting in several local languages and presenting it in a simplified manner.

Although this article focused on the physical aspect of education accessibility, further research must be undertaken in relation to the other aspects of access to education. For example, there are issues of content access to education in relation to Muslim organisations' requests to the Ministry of Education to discontinue the use of the optional Bible knowledge course and instead use the broad based 'moral and religious education' curriculum in primary schools, particularly in areas inhabited predominantly by Muslims.[90] Furthermore, the issue of access to education in Malawi goes beyond Rastafarian and female Muslim children. As hinted at in the 2021 MoU, there is a need to also deal with and analyse concerns of Bible believers and other concerned faith groups[91] as regards access to education in Malawi.

89 *MM* (n 2).
90 US Department of State 2022 Report on International Religious Freedom: Malawi, https://www.state.gov/reports/2022-report-on-international-religious-freedom/malawi (accessed 10 November 2023).
91 Kambale (n 50).

AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: AC Onuora-Oguno & T Silas 'The constitutional obligation to protect the right to education in Nigeria: A call for action' (2024) 24 *African Human Rights Law Journal* 369-384
http://dx.doi.org/10.17159/1996-2096/2024/v24n1a16

The constitutional obligation to protect the right to education in Nigeria: A call for action

Azubike C Onuora-Oguno
Department of Jurisprudence and International Law, Faculty of Law, University of Ilorin, Nigeria
https://orcid.org/00009-0009-1926-8764

Theophilus Silas
Bar Candidate, Nigeria Law School, Abuja, Nigeria
https://orcid.org/0009-0007-2234-9499

Summary: *This article argues that beyond the obligation of states to respect, promote and fulfil the right to education, the obligation to protect, which is crucial, is often neglected. Additionally, it highlights that access to and availability of education is limited when states do not protect the school space by making it safe for learners. With a focus on Nigeria, the article argues that the lack of fulfilment of the obligation to protect by the Nigerian state is a violation of its obligations under international human rights law. Relying on Nigeria's commitments under various African human rights treaties, national law and policies, the article makes recommendations on how the obligation to protect can be realised and, thus, the right to education respected in its entirety in Nigeria.*

Key words: *right to education; obligation to protect; safety; international human rights law; Nigeria*

* BL LLB (Ilorin) LLM LLD (Pretoria); Onuoraoguno.ac@unilorin.edu.ng
** LLB (Ilorin); teewai1836@gmail.com

1 Introduction

Regardless of gender, race, ethnicity, country of birth, colour, religion, or any other status, everyone has the same fundamental human rights. The foundation of world freedom, justice and peace is human rights. These rights are expressly acknowledged by the 1948 Universal Declaration of Human Rights (Universal Declaration) and several other treaties, including, at the global level, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and, at the regional level in Africa, the African Charter on Human and Peoples' Rights (African Charter).

International human rights law outlines states' obligations to respect, protect, promote and fulfil human rights. The term 'human rights' as used in this sense includes the broad category of civil and political rights, as well as economic and social rights. These conditions impose specific obligations on governments, regardless of their political, economic or cultural systems. The core principles that characterise all human rights are universality, indivisibility and interdependency.[1] This implies that rights are interwoven and interlinked. For the purposes of this article, it is our argument that the right to education is intrinsically linked to other rights such as the right to life. This position is adopted on the premise that the fundamental and all-encompassing principles of equality and non-discrimination serve as the foundation for international human rights law.

According to the Universal Declaration, everyone has a right to an education.[2] The full development and dignity of every individual, the capacity to make a significant contribution to society, and the promotion of respect for human rights are all objectives of education. Education is crucial in and of itself but is usually referred to as a 'multiplier' human right since the degree of access to it influences the degree to which other rights are enjoyed.[3] Education provides the premise on which other rights, such as the right to life, health and freedom of expression, can be enjoyed.

Articles 13 and 14 of ICESCR guarantee the right to education. Article 13(1) ensures that everyone's right to an education is respected. According to article 13(2)(b), secondary education must be generally

1 UN General Assembly Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23 para 5, https://www.refworld.org/docid/3ae6b39ec.html (accessed 30 August 2023).
2 Art 26 Universal Declaration.
3 AC Onuora-Oguno *Development and the right to education in Africa* (2019) 123.

accessible to all people, while article 13(2)(c) requires that higher education should be open to all people, based on capacity. Article 14 requires state parties to ensure that free and mandatory education is implemented within their jurisdiction. Article 14 specifically places an obligation on each state party, within two years of becoming a party to ICESCR, to 'work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principles of compulsory education free of charge for all'. This latitude is provided on the premise that, among other relevant conditions or circumstances, such a state party may not be able to secure its metropolitan territory or other territories under its jurisdiction at the time of becoming a party to the Covenant.

Other fundamental provisions that enshrine the right to education in Africa include the 1981 African Charter,[4] the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter),[5] and the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).[6]

A collective reading of the above provisions spotlights the importance of education as a fundamental right and an obligation that states must pursue to ensure that every individual is properly placed in society to impact positively.[7] This article reviews the obligation to protect in the context of safety of schools. It argues that overall security of both students and teachers is the responsibility of the government of each country. We examine the situation in Nigeria and argue that the failure to meet the obligation to protect in the context of the right to education is a breach of the principles of international law.[8]

The article deals with the questions raised in seven parts, starting with the impact of insecurity on education in Nigeria in the context of sub-Saharan Africa. The content of the right to education and the

4 Art 17(1) African Charter.
5 Art 11 African Children's Charter.
6 Art 12 African Women's Protocol.
7 See, generally; KD Beiter *The protection of the right to education by international law* (2006); M Addaney & AC Onuora-Oguno 'Education as a contrivance to ending child marriage in Africa: Perspective from Nigeria and Uganda' (2017) 9 *Amsterdam Law Forum* 110.
8 It is noted that paras 46 and 47 of the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 13: The Right to Education (Art 13 of the Covenant), 8 December 1999, E/C.12/1999/10, makes specific provision of the obligation of the government to protect the right to education. Under para 47 it goes further to state that the obligation includes the duty of the government to prevent third parties from any form of interference in the enjoyment of the right to education, which in this case includes ensuring the safety of schools.

obligations of states to protect the right to education are explored, including by focusing on the obligation to protect and the Safe School Initiative in Nigeria. The justiciability of the right to education is discussed to demonstrate the duty of the government of a country, and Nigeria in particular, to protect and ensure that the safety of children in the educational system is paramount. The article ends with conclusions and recommendations.

2 Impact of insecurity on education in Nigeria in the context of sub-Saharan Africa

Nigeria holds a vital role in the context of sub-Saharan Africa. Economically and population-wise, it is a strong state and to a great extent reflects the situation of economic and social status of the majority of the population. This is reflected also in security, governance and education.

Section 18 of the Constitution of the Federal Republic of Nigeria places the responsibility to provide education for everyone on the government. The responsibility includes the provision of 'equal and adequate' opportunity to access education. Despite this constitutional obligation, United Nations Children's Fund (UNICEF) statistics reveal that the number of out-of-school children in Nigeria continues to surge, with the North-East and West the most disadvantaged.[9] The data from UNICEF shows that close to 10,5 million children in Nigeria remain out of school, and one of the major factors that are responsible is the safety of the school space, especially in the north. According to Statistics, the country is in a deficit of close to 50 000 classrooms to meet the required number of classrooms for effective learning.[10]

As at 2019, over one-fifth of African children between the ages of six and 11 years and approximately 60 per cent of teenagers between the ages of 15 and 17 years do not attend school, according to the United Nations Education, Scientific and Cultural Organisation (UNESCO).[11] In comparison to only 6 million boys, 9 million girls between the ages of six and 11 years across the continent will never attend school, raising serious concerns about their education. Girls

9 U Chioma 'UNICEF: Nigeria has world's largest number of out-of-school children' (2024), https://thenigerialawyer.com/unicef-nigeria-has-worlds-largest-number-of-out-of-school-children/ (accessed 12 May 2024).

10 https://www.statista.com/topics/6658/education-in-nigeria/ (accessed 8 April 2024).

11 Fact Sheet 56 September 2019 UIS/2019/ED/FS/56.

had a 36 per cent exclusion rate by the time they reached puberty, compared to 32 per cent in the case of boys.[12]

Sub-Saharan Africa has the highest rate of illiteracy in the world. According to statistics,[13] more than 70 per cent of the poorest children in Mali, Niger, Nigeria and Guinea do not attend school. In East and West Africa, extreme poverty has a negative impact on a variety of aspects of daily living, including health, malnutrition, access to clean energy and water, low levels of education, and other associated problems. Only about half of the 128 million children of school-going age in sub-Saharan Africa that are now enrolled in courses, according to the Africa Learning Barometer,[14] are expected to acquire the core knowledge and skills necessary for them to live healthy and successful lives. Research by the Africa Learning Barometer also reveals that poor female students currently enrolled in school in a distant or remote location are far more likely not to be learning important skills, such as reading, writing and mathematics.[15]

Several factors combine to limit the state of access to education in sub-Saharan Africa. Even though every child has the right to education, millions of children today – including those from the most underprivileged families and communities – are denied this right. Some barriers to schooling are visible, such as extreme poverty or illiteracy. Due to concerns about security, and poor educational policies in countries, millions of children are unable to attend school. According to Onuora-Oguno and Mustapha, the violence against Western education in Nigeria as perpetrated by Boko Haram is a huge factor impeding the realisation of the right to access education.[16] Noting that several factors impact on access to education, we focus on insecurity.

The education sphere and its environment must be treated as sanctuaries.[17] According to data from the Global Coalition to Protect

12 I Kaledzi 'Why education remains a challenge in Africa', https://www.dw.com/en/africa-right-to-education-remains-a-challenge/a-60518000 (accessed 10 June 2024).
13 L Kramer 'Poor children not attending school in Africa 2020 by country' 1 February 2022.
14 J van Fleet, K Watkins & L Greubel *Africa learning barometer* (2012).
15 Van Fleet and others (n 14) 3.
16 AC Onuora-Oguno & MA Abdulraheem-Mustapha 'Beyond the law to socio-legal intervention: The Boko Haram insurgency and the Nigerian child' (2018) *Boko Haram and International Law* 371.
17 FV Leeuwen 'Schools shall be safe sanctuaries' (2009) A Guide to the Declaration by Education International 2, https://download.ei-ie.org/Docs/WebDepot/2009_booklet_Schools-As-Safe-Sanctuaries_en.pdf (accessed 27 May 2024).

Education from Attack (GCPEA),[18] the number of attacks on schools in the six conflict-affected countries in Africa (Burkina Faso, Cameroon, Central African Republic, Mali, Niger and Nigeria) increased from 303 to 802 during 2019 and 2020.[19]

Two million children in Western and Central Africa are unable to attend school because of the increased insecurity in and around schools.[20] Schools are regularly the direct targets of attacks; data shows that more than a quarter of all confirmed attacks on schools globally occurred in this area.[21] According to an analysis by the Armed Conflict Location and Event Data Project (ACLED),[22] at least 2 880 violent incidents, including fighting, explosions and brutality against civilians, have taken place in and around educational institutions.

Over the years there have been increasing attacks on educational facilities. In 2010 there were 39 reported incidences of attack, in 2020 there were 559 reported incidences, and 440 in the first half of 2021.[23] An emerging dimension of these attacks is the escalation of kidnapping of school pupils. More than 1 037 locals – mostly teachers and students – were kidnapped at or close to educational facilities during the first seven months of 2021. This includes a situation where up to 300 children were kidnapped in one incident.[24] Attacks on educational facilities result in fatalities, injuries and the destruction of educational infrastructures. As a result of these attacks and the resulting terror, numerous schools have been closed across the region, school attendance has been disrupted, and enrolment has decreased. By the deployment of improvised explosive devices (IEDs), air strikes, ground strikes, raids and looting, attacks on schools might entail the intentional or unexpected use of force against school buildings by the military, the police, other state security services, and non-state armed groups (NSAGs).[25] Teachers are killed, students are abducted, and local buildings are burnt down or plundered.

18 Global Coalition to Protect Education from Attack, https:// protectingeducation.org/ (accessed 8 April 2024).
19 As above.
20 UNICEF 'Education under threat in West and Central Africa' August (2019), https://www.unicef.org/child-alert/education-threat-west-central-africa (accessed 30 August 2023).
21 S Cherkaoui 'Education under attack in West and Central Africa' Note by the Regional Education in Emergencies Working Group October (2021).
22 https://acleddata.com/#/dashboard (accessed 30 August 2023).
23 ME de Simone and others 'How can we protect education from attack? A focus on Western and Central Africa' World Bank Blogs September (2021), https://blogs.worldbank.org/education/how-can-we-protect-education-attack-focus-western-and-central-africa (accessed 30 August 2023).
24 As above.
25 As above.

Almost 5 000 schools were closed at the beginning of 2021 in Western Africa, depriving hundreds of thousands of children of access to education.[26] Six hundred schools were reportedly closed in Nigeria.[27] The kidnapping wave has a substantial impact on enrolment to and attendance of schools. The incidences of attacks on educational facilities and kidnapping imperil the accomplishments during the prior years where the number of out-of-school children reduced from 10,1 million to 6,9 million in 2020.[28] In 2024 alone, over 500 cases of school kidnapping and abduction have taken place in various schools in Nigeria, with the federal government of Nigeria stating that over 14 schools are at risk of attacks in the country.[29] The largest of these is the abduction of approximately 287 school pupils from Kaduna state.[30]

The above scenarios limit access to education and constitute a violation of the right of individuals to access education. It further reinforces the need to amplify the government's obligation to protect, in respect of which it is falling short in this situation. This situation reinforces the views of Tomasveski[31] and Onuora-Oguno[32] on the need to protect the right to education as enshrined in international law.

Having noted the obstacles that impede the realisation of access to education, it is imperative to conduct a cursory examination of the content of education and what the right to education entails.

---

26 Sahel Crisis: Humanitarian needs and requirements overview – Burkina Faso *Relief Web* 26 April 2021, https://reliefweb.int/report/burkina-faso/sahel-crisis-humanitarian-needs-and-requirements-overview-april-2021 (accessed 30 August 2023).

27 T Obiezu 'Hundreds of schools are shut down in Nigeria due to insecurity' VOA 21 September 2022, https://www.voanews.com/a/hundreds-of-schools-are-shut-down-in-nigeria-due-to-insecurity-/6756329.html (accessed 30 August 2023).

28 E Okogba 'Nigeria's more than 10m out-of-school children' *Vanguard News*, https://www.vanguardngr.com/2023/01/nigerias-more-than-10m-out-of-school-children/#:~:text=MORE%20than%2010%20million%20Nigerian,or%20torn%20polythene%20school%20bags (accessed 31 January 2024).

29 https://punchng.com/schools-in-14-states-fct-risk-attacks-says-fg/ (accessed 20 August 2023).

30 https://www.channelstv.com/2024/03/08/287-students-were-abducted-from-kaduna-schools-says-teacher/ (accessed 20 April 2024).

31 K Tomaševski *Removing obstacles in the way of the right to education* (2001) 44. The emphasis is placed on ensuring that all obstacles, such as fees in education, are eliminated as well as ensuring that access to education is unfettered by any social factors such as violence, discrimination and poor infrastructure.

32 See, generally, AC Onuora-Oguno *Development and the right to education in Africa* (2018). Legislative, judicial and social efforts towards protecting the right to education is emphasised, exploring the role of the courts, lawyers and other stakeholder in realising the right to education.

3 Content of the right to education

Generally, the content of education must ensure that the general development of an individual is enhanced. To achieve this, education has to be available and accessible, as discussed in the previous part of the article. Thus, for education to be properly implemented, it must meet some laid-down minimum thresholds. General Comment 13 sets out this requirement and is discussed next. General Comment 13, as adopted by the Committee on Economic, Social and Cultural Rights of the United Nations (UN) (ESCR Committee),[33] states the characteristics and features of the right to education, which are availability, accessibility, acceptability and adaptability (often referred to as 'the 4As') that apply to education in all its forms and at all levels.

The first salient element of the right is availability.[34] The government should provide sufficient educational infrastructure (institutions and activities) to accommodate everyone. These should have all the facilities and equipment needed to function efficiently in the environment, such as buildings, teaching aids, qualified staff members who are paid fairly, protection from the elements, gender-neutral rest rooms, and clean water.

The second feature of the right to education is accessibility.[35] The three basic elements of access to education are non-discrimination, physical accessibility and financial accessibility. Nobody should be the target of discrimination based on factors such as sex, race, locality, economic status, disability, citizenship or residence status, membership of a minority group, religion, detention, or sexual orientation, among others. Everybody should have access to educational facilities, especially the most vulnerable. In remote areas or at a safe, reasonable distance from populated areas, schools should be accessible via modern technologies. States should gradually introduce free education at all levels, and all students should have access to affordable education.

Acceptability is the third characteristic under discussion.[36] Subject to the overarching objectives of education and the minimal educational standards mandated by the state, curricula and teaching methods should be accepted by students and, in the right situations,

33 Adopted 8 December 1999 , https://www.refworld.org/legal/general/cescr/1999/en/37937 (accessed 3 June 2024).
34 General Comment 13 (n 8) para 6(a).
35 General Comment 13 (n 8) para 6(b).
36 General Comment 13 (n 8) para 6(c).

by parents. This means that training should be of a high standard and suitable to the child's needs, circumstances and cultural background.

The last feature of the right to education is adaptability:[37] The demands of pupils in various social and cultural contexts should be met, and education should be sufficiently adaptable to do so.

It is evident that each state has an obligation to protect the right to education in all these dimensions. Thus, in the next part of the article a detailed examination of the obligation is provided.

4 Obligations of states to protect the right to education

Relying on the concept of the 4As, it is instructive to note that instead of merely discussing education, it is imperative to centre the discourse by adopting a human rights perspective. This approach provides a context within which one can situate the obligation of states in promoting the fulfilment and protection of the right to education.

The human rights approach resonates with Tomasevki's position that governmental misuse of power is constrained by human rights.[38] Tomasevki underlines the need to acknowledge 'government in its double role, as a protector and violator of human rights'.[39] According to Tomasveski, 'international human rights law as a conceptual framework'[40] places a high priority on the rule of law when it comes to holding governments accountable for their commitments, both individually and collectively, and views the rule of law as essential. The failure to realise obligations must lead to accountability and must be remedied by ensuring that such violations never reoccur.[41]

It is advanced that a combination of the Tomasevski theory of the 4As and the obligation that is placed on the government to not only promote and fulfil fundamental rights, but the obligation also to protect, is equally important. Consequently, the incessant attacks in the school sphere in Nigeria against pupils and teachers should ordinarily be matters that are adjudicated before the courts and the state be found liable as the circumstances and facts dictate. This will

37 General Comment 13 (n 8) para 6(d).
38 K Tomasevski *Education denied: Costs and remedies* (2003) 205.
39 K Tomasevski *Human rights obligations in education: The 4-A scheme* (2006) 148.
40 Tomasevski (n 38) 2.
41 Tomasevski (n 38) 1.

consequently ensure the respect of the legal dictum of *ubi jus ibi remedium* (where there is a right, there is a remedy).

5 Obligation to protect and the Safe School Initiative in Nigeria

In response to the challenges of security and safety in schools, the Nigerian government established the National Safe School Response Coordination Centre (NSSRCC), which is housed in the office of the Nigeria Security and Civil Defence Corps (NSCDC).[42] The Safe School Initiative Declaration of 2015, which was championed by Norway and Argentina, with 119 states already part of the initiative,[43] represents a commitment of states to partner with other institution to make the education sphere safe and conducive to learning.[44]

To determine the performance of the Safe School Initiative, a three-pronged benchmark must be used, comprising safe learning facilities, school disaster management and risk reduction and resilience education.

The importance of Safe School is further advanced by Ikekoronye and Opara where they state the following:[45]

> It is, therefore, necessary to stress that in order for children to have full access to basic education and for the optimum realisation of the objectives of basic education to be achieved, both students and teachers should perceive the school environment as being totally safe and secure for teaching and learning to take place.

An appraisal of recent statistics discussed in previous parts of the article reveals that the performance level remains abysmal, as evidenced in the most recent Kaduna attacks and other attacks at the University of Calabar and Confluence University of Science and Technology Kogi State on 10 May 2024.[46] An appraisal of the community intervention and special measures in the declaration and aspiration in Nigeria equally shows a deficit in policy implementation, leaving

42 https://nssrcc.gov.ng/ (accessed 8 April 2024).

43 SafeSchoolsDeclaration,https://ssd.protectingeducation.org/#:~:text=UNICEF%2FTremeau%2C%202018-The%20Safe%20Schools%20Declaration,protecting%20education%20in%20armed%20conflict. (accessed 29 May 2024).

44 For a brief history of the initiative, see generally E Minor 'The safe schools declaration: Reflections on effective post-agreement work', https://article36.org/wp-content/uploads/2021/07/2021-Safe-Schools-Declaration-reflections-elizabethminor.pdf (accessed 8 April 2024).

45 EO Ihekoronye & JC Opara 'Safe School Initiative: A necessary tool for promoting safe and secure children's access to basic education in Nigeria in the 21st century' (2021) 2 *Benue State University Journal of Educational Management* 1.

46 BBC report 'Kidnap of students for Kogi University – How e happun', https://www.bbc.com/pidgin/articles/cxwv70781dyo (accessed 12 May 2024).

much to be desired.[47] Gever identifies poverty and corruption as key elements that impede the successful implementation of safe schools in Nigeria.[48]

While the efforts to ensure that the schools are safe in Nigeria are appreciated, it is the opinion of the authors that the law must be engaged more proactively in terms of holding the state accountable when they fail to meet the minimum core requirements of safety that is demanded of them. This includes ensuring proper risk management and data intelligence.[49] Additionally, the adequate utilisation of knowledge and risk management is another component that needs to be effectively deployed in Nigeria.[50]

The role of the courts in thus holding the state accountable is advanced in light of the fact that the law and courts are pivotal in holding both states and individuals responsible when they fail, either by omission or commission, to carry out tasks expected of them.[51] An important means of ensuring that states meet their obligations under international human rights law is by ensuring that the right to education is justiciable and that the courts play its part in this regard. This topic is examined in the next part of the article.

6 Justiciability of the right to education

'Justiciability' is an essential requirement for each case that is brought before a court of law for the resolution of a dispute of any kind.[52] It also refers to the subjects that may be decided upon by a judicial or quasi-judicial body.[53] Section 6(6)(c) of the 1999 Constitution of Nigeria states clearly that no court has the authority to rule on whether any organ of the government has acted or is acting in

47 https://mptf.undp.org/sites/default/files/documents/20000/mptfo_safe_schools_initiative_mdtf_concept_note_final_2_september_201.pdf (accessed 8 April 2024).

48 CV Gever 'Questioning the Safe School Initiative and making a case for a safe Nigeria model' (2016) 1 *Sokoto Journal of the Social Sciences* 2.

49 R Paci-Green & V Adriana 'Comprehensive school safety policy: A global baseline survey' (2020) 44 *International Journal of Disaster Risk Reduction* 1.

50 P Bastidas 'School safety baseline study' UNISDR: Thematic Platform on Knowledge and Education (TPKE) (2011) 8, https://www.preventionweb.net/files/23587_doc18766contenido.pdf (accessed 13 May 2024).

51 AC Onuora-Oguno & BO Onuora-Oguno 'The law as a tool to guarantee the inclusive education of the Nigerian child' (2018) 32 *Educor Multidisciplinary Journal* 32.

52 https://www.law.cornell.edu/wex/justiciable#:~:text=Justiciable%20refers%20to%20a%20matter,the%20court%20must%20dismiss%20it (accessed 20 August 2023).

53 https://www.right-to-education.org/issue-page/justiciability (accessed 20 August 2023).

accordance with the fundamental objectives and directive principles of state policy.

The ability to seek justice through an impartial court or tribunal may be described as justiciable when a right has been infringed or is likely to be violated. It implies that one can attain justice and accountability. The rights holders possess a legal basis to file a law suit to defend their rights when the duty bearer disobeys their obligations.[54] The notion of a legal remedy should be seen as encompassing both the process of offering the victim adequate redress as well as the supply of a procedural remedy when a right has been infringed or is about to be violated.

National constitutions, bills of rights and various other national laws have enshrined the right to fundamental education. Substantial provisions on the right to education are included throughout Nigeria's laws, legislation, related policies and white papers. These include the 1999 Constitution of the Federal Republic of Nigeria, the 2003 Child Rights Act, and its responsibilities under international law. Importantly, the Universal Basic Education Act of 2004 (UBE Act) places obvious demands on the government towards ensuring free and compulsory basic education. Part of the goals of the Act is ensuring that the education cycle is completed, implying that the state must do all in its power to guarantee safe schools and the security of all persons within the education sphere. As stated previously in this article, the 'right' to education is established in section 18 of Nigeria's 1999 Constitution. The provision mandates the government to concentrate its efforts on ensuring that there are enough opportunities for education at all levels. The provision also requires the government to take steps to lower illiteracy rates and provide free, universal and elementary education wherever feasible. The UBE Act has proved a strong basis for the adjudication and protection of the rights enshrined in the Act. Notably, in *Legal Defence and Assistance Project (LEDAP) GTE & LTD v Federal Ministry of Education & Another* (Ruling), a Nigerian Federal Hight Court sitting in Abuja relied on the Act to reach a decision that the provisions of section 2(1) of the Act must be read in conjunction with section 18(3) to ensure the realisation of the right to education.[55]

Additionally, section 20 of the Child Rights Act mandates that guardians, institutions, parents and authorities responsible for a child's care, upkeep, development, learning, schooling, socialisation,

54 https://constitutionallawreporter.com/article-03-section-02/justiciability/ (accessed 20 August 2023).
55 (FHC/ABJ/CS/978/15) [2017] NGFCHC 1.

employment and rehabilitation provide the guidance, discipline, education and training required to ensure the child's assimilation and observance of the obligations to promote the welfare of the child.

Socio-economic rights, such as the right to free public education, have always been considered non-justiciable in Nigeria.[56] This perspective was influenced by the constitutional limitations placed on the exercise of these rights. Unfortunately, the Supreme Court decided in favour of this position in the case of *Archbishop Olubunmi Okogie & Others v Attorney General of Lagos State*,[57] where it was questioned whether a circular issued by the Lagos state government regarding private schools violated section 13 of the 1979 Constitution. The Court in that case posited that despite section 13 of the Constitution requiring the judiciary to conform to and apply the provisions of chapter 2, the case was not justiciable.

Similarly, Abba-Aji JCA in the Court of Appeal sitting in Benin reached the conclusion in *Ogboru v President, Court of Appeal*[58] that when a right does not fall under any of the provisions of chapter IV, no declaration, other determination or judgment can be made in the name of basic rights. No matter how severely a right was infringed, if it is not expressly listed in chapter IV, which contains the fundamental human rights provisions, the court cannot raise it to the level of a fundamental right. It is reiterated that the non-justiciable argument regarding the provisions of chapter II of the Nigerian Constitution (which provides the fundamental objective of state obligations) has developed significantly with recent jurisprudential positions of scholars.[59]

It is noted that the obligation to protect placed on states includes ensuring that the decline of safety, economy and social conditions is not allowed to impede the educational experience of anyone. Article 19 of the UN Convention on the Rights of the Child (CRC)

56 I Ogunniran 'Enforceability of socio-economic rights: Seeing Nigeria through the eyes of other jurisdictions' (2020), http://www.ajolinfo/index.php/naujilj/article/view138181 (accessed 21 August 2023). For further insight into this debate, see I Stanley 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria (2007) 7 *African Human Rights Law Journal* 225; WO Egbewole & TN Alatise 'Realizing socio-economic rights in Nigeria and the justiciability question: Lessons from South Africa and India' (2017) 34 *International Journal of Politics and Good Governance* 1; AC Onuora-Oguno 'Commentary on the right to education: An expository of article 12 of the Maputo Protocol' (2023) 43 *Public Governance, Administration and Finances Law Review* 8.

57 6 (1981) 1 NCLR 218 350.

58 (2005) JELR 45299 (CA).

59 See generally AC Onuora-Oguno (ed) *Promoting efficiency in jurisprudence and constitutional development in Africa* (2022).

identifies the right to education to improve children's prospects of a higher standard of living and helps to avoid situations that would be detrimental to both individuals and society. This position is reiterated in the case of *Dilcia Yean and Violeta Bosica v Dominican Republic*,[60] where it was found by the Inter-American Court of Human Rights that the government had discriminatorily infringed the petitioners' right to education by depriving them of their legal identities under domestic law. The state was consequently called upon to ensure that it takes all necessary measures to protect the right to education. The Court held that the state had to 'guarantee access to free elementary education for all children regardless of their background or origin'.[61]

These cases illustrate that the duty of the government of a country to protect and ensure the safety of children in the educational system is paramount. General Comment 13 emphasises the importance of the fact that governments should ensure the protection of the right to education. Governmental entities are claimed to have 'an urgent responsibility' to remove barriers to universal education.[62] If a state cannot provide free and compulsory education, it should be prepared to do so and seek assistance from the international community.[63] States have a responsibility to offer every person a first-class education that follows international best practices.[64] In the case of the security of schools and students, it is incumbent on the government to ensure that no third parties are allowed to interfere with the right to education of students.

States have a duty to guarantee that instruction takes place in a friendly, secure and engaging setting. Tolerance, peace and gender equality among all peoples, ethnic, national and religious groups, as well as those of indigenous heritage, must therefore be reflected in the school environment.[65] States must emphasise the quality of the learning environment, which includes instruction and academic resources, to guarantee the right to education of a high quality.[66]

60 *Yean and Bosico Children v The Dominican Republic* Inter-American Court of Human Rights (IACrtHR), https://www.refworld.org/cases,IACRTHR,44e497d94.html (accessed 22 August 2023).
61 *Yean* (n 60) para 2.
62 Art 14 ICESCR.
63 See, eg, art 4 of CRC which provides that 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, *within the framework of international co-operation*' (our emphasis).
64 Art 26 Universal Declaration.
65 CRC General Comment 1: Aims of Education para 19.
66 As above.

7 Conclusions and recommendations

Under international human rights law, states carry the primary obligation for ensuring that the right to education is directly provided for and protected. When they formally accept to be bound by international human rights treaties, governments commit to enacting domestic laws and policies that are consistent with their duties and obligations under these treaties. Similar to civil and political rights, socio-economic and cultural rights impose three separate types of obligations on states: the duty to respect, protect and fulfil. These rights are breached when *any one of these three duties* is not fulfilled. States have a commitment to respect and not to impede people's ability to exercise their economic, social and cultural rights. This article comes to the following conclusions:

First, states have an obligation to respect the right to education by abstaining from actions that obstruct or restrict the exercise of this right. States are required under the obligation to respect to abstain from impeding the exercise of the right to education. States, for example, are barred from enacting laws that discriminate against people or groups in the sphere of education.

Second, states have a commitment to safeguard citizens, which means that they must take action to prevent outsiders from interfering with the exercise of their right to education. The state's duty to protect entails preventing third parties – such as other people, organisations, private schools and other educational institutions, private businesses, donors, and other non-state actors – from interfering with the enjoyment of the right to an education.

Third, states have an obligation to fulfil their citizens' rights to education by implementing proactive measures that support and facilitate the rights of people and communities to an education. To accomplish its commitment, the state must implement the necessary legislative, executive, judicial, financial and other measures to ensure that every student's right to an education is fully realised.

Fourth, the article further concludes that to the extent to which the government has an incumbent duty to protect the right to education as a justiciable right, the government of Nigeria is in violation of its international obligations by its failure to address the state of insecurity in Nigeria that has primarily targeted and hampered the implementation and progression of education rights in the territory.

Based on the above conclusion and observations, especially the developments relating to the government's responsibility to protect,

fulfil and promote the right to education and ensure the safety in schools, the following measures are recommended:

- Policies designed by the government for internally-displaced persons (IDPs) must incorporate principles for the protection of the right to education. This manifests as ensuring that IDP camps are constructed in secure locations with temporary educational facilities made available.
- States must create secure school zones, covering the school buildings (especially at schools with boarding facilities that are particularly vulnerable to attacks by armed Islamist groups) and ensure that the distances covered by students from their homes to schools are characterised by heavy security measures taken by military and non-military forces.
- States must act swiftly and decisively when students are attacked or abducted at school. The Nigerian government's response to school attacks has traditionally been sluggish. Where the right to education is violated by insurgent groups, we recommend that upon apprehension, full implementation of child protection laws be implemented. This includes full-scale prosecution of crimes that hamper the realisation of the right to education.
- Positive action must be taken to facilitate the enjoyment of the right to education. The state should explore collaboration with civil society organisations (CSOs) to provide psychological support to children who are victims of conflict, in addition to the provision of education. It should also cooperate with local communities in recovery to ensure that girls and other vulnerable persons are not excluded from back-to-school programmes.
- States must allocate funding for rebuilding damaged infrastructure, including schools, in post-conflict communities in accordance with international standards.

THE CENTRE FOR HUMAN RIGHTS
UNIVERSITY OF PRETORIA

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see **www.chr.up.ac.za** or contact

The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
PRETORIA 0002
Tel: (012) 420-3810/3034
chr@up.ac.za

Staff

Foluso Adegalu
Co-manager: Advocacy and Litigation Unit; Doctoral candidate

Clement Agyemang
Tutor; Doctoral candidate

Victoria Ameachi
Assistant: Marketing and Communications

Dennis Antwi
Manager: Advanced Human Rights Courses

Abiy Ashenafi
Manager: Migration Unit

Landilani Banda
Manager: SOGIESC Unit, Post-doctoral Fellow

Dorcas Basimanyane
Post-doctoral Fellow

Samuel Chamboko
Financial Manager

Lydia Chibwe
Project Officer: Women's Rights Unit

Rutendo Chinamona
Project Coordinator: LLM (Sexual and Reproductive Rights in Africa)

Shyreen Chirwa
Doctoral candidate; Project Officer, Children's Rights Unit

Busisiwe Crafford
Graphic Designer: Communications and Marketing

Isabeau de Meyer
Publication Manager: *African Human Rights Law Journal*

Hlengiwe Dube
Manager: Expression, Information and Digital Rights Unit

Ebenezer Durojaye
Professor of Sexual and Reproductive Health Rights

Elvis Fokala
Manager: Children's Rights Unit

Charles Fombad
Professor of Law, Director, Institute for International and Comparative Law in Africa (ICLA)

Janet Gbam
Research Assistant

Ivy Gikonyo
Doctoral candidate

Lizette Hermann
Manager: Pretoria University Law Press (PULP)

David Ikpo
Project Coordinator: Communications and Marketing

Simphiwe Khumalo
Acting Manager: Marketing and Website Development

Brian Kibirango
Christof Heyns Scholarship holder; Doctoral candidate

Magnus Killander
Professor and Head of Research

Bianca Knight
Project Officer: Women's Rights Unit

Henok Kremte
Tutor; Doctoral candidate

Lloyd Kuveya
Assistant Director

Matilda Lasseko-Phooko
Manager: Women's Rights Unit

Emily Laubscher
Assistant Financial Manager

Sydney Madhlophe
Assistant: Pretoria University Law Press (PULP)

Bonolo Makgale
Manager: Democracy and Civic Engagement

Sabeeha Majid
Project Assistant: Disability Rights Unit

Rotondwa Mashige
Programme Coordinator: LLM/MPhil (Human Rights and Democratisation in Africa)

Michelle Masiwisa
Programme Manager: LLM/MPhil (Human Rights and Democratisation in Africa)

Pumeza Matwa
Office Manager: Institute for International and Comparative Law (ICLA)

Tendai Mbanje
Doctoral candidate; Project Officer: Expression, Information and Digital Rights Unit

Tapiwa Mhuru
Project Coordinator: Nelson Mandela World Human Rights Moot Court Competition

Naledi Mpanza
Research Assistant: SOGIESC Unit

Lyse Mpema
Communications Officer: African Coalition for Corporate Accountability (ACCA)

Dianah Msipa
Manager: Disability Rights Unit; Doctoral candidate

Davina Murden
Alumni Coordinator; Doctoral candidate

Nkatha Murungi
Acting Director

Tatenda Mushwaika
Academic Associate

Susan Mutambusere
Tutor; Doctoral candidate; Project Officer: Women's Rights Unit

Tinyiko Ngobeni
Programme Coordinator: LLM (International Trade and Investment Law in Africa)

Charles Ngwena
Professor of Sexual and Reproductive Health Rights; Disability Rights

Sindiso Nkomo
Doctoral candidate

Michael Nyarko
Co-Manager: Advocacy and Litigation Unit; Doctoral candidate; Editor: *AfricLaw.com*

Nqobani Nyathi
Research Assistant: Children's Rights Unit; Doctoral candidate

Zainab Olaitan
Post-doctoral Fellow; Migration Unit

Lourika Pienaar
Webmaster

Sarita Pienaar-Erasmus
Assistant Financial Manager

Ahmed Sayaad
Project Coordinator: Christof Heyns African Human Rights Moot Court Competition

Tariro Sekeramayi
Project Assistant: Democracy and Civic Engagement

Marystella Simiyu
Tutor; Doctoral candidate

Seyitan Solademi
Project Officer: Women's Rights Unit; Doctoral candidate

Ompha Tshanamo
Research Assistant: Expression, Information and Digital Rights Unit

Tamika Thumbiran
Clooney Foundation Fellow

Chanel van der Linde
Project Officer: SOGIESC Unit

Ruth Versfeld
Project Officer: Advocacay and Litigation Unit

Carole Viljoen
Office Manager

Frans Viljoen
Professor of Law

Extraordinary/Honorary professors

Bonny Ibhawoh
Chair: United Nations Expert Mechanism in the Right to Development

Dan Kuwali
Lawyer in private practice, Malawi

Stuart Maslen-Casey
Geneva Academy of International Humanitarian Law and Human Rights

Michael Stein
Harvard Law School, United States of America

Extraordinary lecturers

Adem Abebe
Senior Research Fellow, Max Planck Institute, Germany

Horace Adjolohoun
Principal Legal Officer, African Court

Jay Aronson
Carnegie Mellon University, United States of America

Japhet Biegon
Amnesty International, Kenya

Ashwanee Budoo-Scholtz
African Director: Human Rights Watch

Solomon Ebobrah
Professor of Law, Niger Delta University, Nigeria

Magalie Masamba
Law and Policy advisor: Global Economic Governance

Jan Mutton
Ambassador of Belgium to South Africa (retired)

Saro Persaud
Expert: Law and sustainable development

Benjamin Traore
Associate Professor at Mohammed VI Polytechnic University, Morocco

Advisory board

Orquidea Massarongo-Jona
Universidade Eduardo Mondlane (UEM) (Mozambique)

Elsabe Schoeman
Dean, Faculty of Law, University of Pretoria

Sylvia Tamale
Retired Professor of Law, School of Law, Makerere University, Uganda

Johann van der Westhuizen
Retired Justice of the Constitutional Court of South Africa

Academic Programmes

- LLM/MPhil (Human Rights and Democratisation in Africa)
- LLM (International Trade and Investment Law in Africa)
- LLM/MPhil (Multidisciplinary Human Rights)
- LLM/MPhil (Sexual and Reproductive Rights in Africa)
- LLM/MPhil (Disability Rights in Africa)
- LLM (Dissertation) Human Rights
- Doctoral Programme (LLD)
- Alumni Association: LLM (HRDA)

Projects

- Advanced Human Rights Courses (AHRC)
- Christof Heyns African Human Rights Moot Court Competition

- Nelson Mandela World Human Rights Moot Court Competition
- Human Rights Clinics
- Human Rights Conferences
- Impact of the Charter/Maputo Protocol/African Children's Charter
- Implementation and Compliance Project

Research and Advocacy Units

- Business and Human Rights Unit
- Children's Rights Unit
- Democracy and Civic Engagement Unit
- Disability Rights Unit
- Expression, Information and Digital Rights Unit
- Freedom from Violence Unit
- Litigation and Implementation Unit
- Migration Unit
- Sexual Orientation, Gender Identity and Expression and Sex Characteristics Unit
- Women's Rights Unit

Affiliated entities

- Institute for International and Comparative Law in Africa (ICLA)
- International Development Law Unit (IDLU)

Secretariat

- African Coalition for Corporate Accountability (ACCA)

Regular publications

- *AfricLaw.com*
- *African Human Rights Law Journal*
- *African Human Rights Law Reports* (English and French)
- *African Disability Rights Yearbook*
- *African Human Rights Yearbook*

AFRICAN HUMAN RIGHTS LAW JOURNAL
GUIDE FOR CONTRIBUTORS

Contributions should be e-mailed to:
idemeyer1@gmail.com

All communications should be sent to the same address.

Books for review should be sent to:
The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria 0002
South Africa

The editors will consider only material that complies with the following requirements:

- The submission must be original.
- The submission must indicate that it has not already been published or submitted elsewhere.
- Articles that do not conform to the *African Human Rights Law Journal's* style guidelines will be rejected out of hand.
- Manuscripts will not be considered if the English is below standard. In case of doubt about the correct use of the English language, authors are advised to have their text checked by a native English speaker before submission.
- The *African Human Rights Law Journal* utilises plagiarism detection software. Please ensure that submissions do not infringe other persons' intellectual property rights.
- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- The manuscript should be in Arial, 12 point (footnotes 10 point), 1½ spacing.
- Authors of contributions are to supply their university degrees, academic qualifications (with institutions where obtained) and professional or academic status.
- Authors need to provide their ORCID identifier. ORCID provides a persistent digital identifier that distinguishes them from every other researcher and, through integration in key research workflows such as manuscript and grant submission, supports automated linkages between them and their professional activities ensuring that their work is recognised. If authors do not have such an ID, they can register at the website https://orcid.org/register.
- Authors should supply a summary of their contributions (setting out the main *findings* of the article) of between 250 and 300 words, and at least four keywords.

- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets.
- The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them in conformity with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.
- The following general style pointers should be followed:
- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34) 243.
- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used. Words in a foreign language should be italicised. Numbering should be done as follows:

  1
  2
  3.1
  3.2.1
- Do NOT use automatic page numbering in headings.
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used ('Constitution').
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* or https://www.ahrlj.up.ac.za/submissions for additional aspects of house style.

CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2023
Compiled by: I de Meyer
Source: http//www.au.int (accessed 31 May 2024)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	20/11/16	10/01/17
Angola	02/03/90	30/04/81	11/04/92		30/08/07	08/06/21
Benin	20/01/86	26/02/73	17/04/97	10/06/14	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70	07/07/16			24/04/07
Chad	09/10/86	12/08/81	30/03/00	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	30/11/16
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73	31/01/17	31/01/17	09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	11/07/17
Eritrea	14/01/99		22/12/99			
Eswatini	15/09/95	16/01/89	05/10/12		05/10/12	
Ethiopia	15/06/98	15/10/73	02/10/02		18/07/18	05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99*	25/05/05	11/06/08
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11

Guinea-Bissau	04/12/85	27/06/89	19/06/08	4/10/21*	19/06/08	23/12/11
Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	07/01/21
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05	12/10/21		23/02/17
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03	16/06/17	
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	24/04/18
Namibia	30/07/92		23/07/04		11/08/04	23/08/16
Niger	15/07/86	16/09/71	11/12/99	17/05/04*		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86			27/11/13	19/03/22	27/11/13
São Tomé and Príncipe	23/05/86		18/04/19		18/04/19	18/04/19
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	12/08/16
Sierra Leone	21/09/83	28/12/87	13/05/02		03/07/15	17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan	24/01/13	04/12/13			24/02/23	13/04/15
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07*	23/08/18	
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08	28/12/22	02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	06/04/22
TOTAL NUMBER OF STATES	**54**	**46**	**50**	**34**	**44**	**38**

Ratifications after 31 December 2023 are indicated in bold

* State parties to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights that have made a declaration under article 34(6) of this Protocol, which is still valid.