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## Strategic litigation for educational equity: Analysing the impact of *ISER v Attorney-General* on access to quality education in Uganda

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**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*

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## 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> In Uganda, as is the case in several other developing countries, education is recognised as a fundamental human right in the Constitution.<sup>4</sup> 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.<sup>5</sup>

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](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.

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. Uganda 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.<sup>6</sup> ICESCR provides for comprehensive protection of the right to education.<sup>7</sup> 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](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).<sup>8</sup> 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.<sup>9</sup> 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'.<sup>10</sup> Uganda ratified this instrument in 1986.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

8 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=182&Lang=en](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'.<sup>14</sup> 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.<sup>15</sup>

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,<sup>16</sup> 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

<sup>14</sup> Art 30 Constitution of Uganda 1995.

<sup>15</sup> Art 34(2) Constitution of Uganda 1995.

<sup>16</sup> *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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> It also includes increasing the government expenditure on primary education.<sup>22</sup> 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

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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.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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](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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> Although the policy exempts students from paying tuition fees, they still have to pay boarding fees, scholastic materials, medical care and other related fees.<sup>36</sup>

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.<sup>37</sup> Research done on the impact of the policy indicates that the initiative has significantly led to increased enrolment.<sup>38</sup> 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.<sup>39</sup>

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

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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.<sup>40</sup> These schools are often as expensive as private schools.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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, it is observed that the average spending of the Ugandan government on education has been 2,4 per cent of the GDP.<sup>44</sup> This is significantly below the 6 per cent of its GDP it committed to in the Dakar Framework or Action in Education for All.<sup>45</sup> 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.<sup>46</sup> The data also indicates that, on average, there are 84 students per classroom at the primary level.<sup>47</sup> Schools are also said to be lacking qualified teachers, with pupil-teacher ratios on the high.<sup>48</sup> A government report shows that there is an average of 53 students per teacher in government primary schools.<sup>49</sup>

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](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.<sup>50</sup> 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.<sup>51</sup> Even at the primary level, 48 per cent of schools in urban areas are private, compared to 23 per cent in rural areas.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup>

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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.<sup>56</sup> 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.<sup>57</sup> 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'.<sup>58</sup>

Nolan and Skelton observe that the predominance of a particular term or concept varies from a specific nation or legal context and over time.<sup>59</sup> For example, public interest litigation has been viewed as a term of choice in the United States (US) since its emergence in the 1960s.<sup>60</sup> 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.<sup>61</sup>

Regardless of the name it goes by, these forms of litigation 'seek to use the courts to help produce a systemic change in society'.<sup>62</sup> 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'.<sup>63</sup>

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*.<sup>64</sup> 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.<sup>65</sup> 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'.<sup>66</sup> 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'.<sup>67</sup> 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.<sup>68</sup> In other words, such authors focused their attention on the direct and palpable impact of the case.<sup>69</sup>

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.<sup>70</sup> According to Rodriguez-Garavito, the adoption of this approach by Rosenberg was evidenced in his criticism of the impact of the historic *Brown* case.<sup>71</sup> 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.<sup>72</sup>

65 GN Rosenberg *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.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup>

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.<sup>84</sup> 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](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.<sup>85</sup> The courts found the exclusion of pregnant learners a violation of their right to education. The litigation resulted in the government overturning the ban.<sup>86</sup> The ban was replaced with the introduction of the National Policy on Radical Inclusion in Schools.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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](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] ZACMHC.



government into ensuring that teachers are provided in schools.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> 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,<sup>95</sup> it was the 1995 Constitution that heralded in a new era of strategic litigation in Uganda.<sup>96</sup> 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 *Section 27 & 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.<sup>97</sup> 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'<sup>98</sup> in which it voiced its displeasure about a government district commissioner who had been meddling in court affairs.<sup>99</sup> 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.<sup>100</sup> This directive is viewed by commentators as ordering the CJ to ensure that the decision was overturned.<sup>101</sup> This is seen as the President interfering with the independence of the judiciary.<sup>102</sup>

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'.<sup>103</sup> 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'.<sup>104</sup> It relates to whether a particular applicant is entitled to seek redress from the courts regarding a particular issue.<sup>105</sup> Chiduzza 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.<sup>106</sup> 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'.<sup>107</sup> 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.<sup>108</sup>

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 Chiduzza & 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 Journal* 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.<sup>109</sup> 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.<sup>110</sup> 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

<sup>109</sup> Human Rights Enforcement Act 2019.

<sup>110</sup> <https://iser-uganda.org/about/> (accessed 12 February 2024).

located).<sup>111</sup> Of the 1 820 schools implementing the USE programme, 943 representing 52 per cent are government-aided schools,<sup>112</sup> while 852 representing 48 per cent are private schools operating under the PPP arrangement.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> 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.<sup>119</sup> As such, private schools are responsible for ensuring class sizes, quality teachers, and basic infrastructure.<sup>120</sup> 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.<sup>121</sup>

### 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.<sup>122</sup> 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.<sup>123</sup>

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.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> The Court also found a violation of the principle of equality and non-discrimination under article 21 of the Ugandan Constitution.<sup>127</sup>

Consequently, the Court ordered the government to ensure equity for all children in the design and implementation of education programmes.<sup>128</sup> 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

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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.<sup>129</sup> 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.<sup>130</sup>

### 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.<sup>131</sup> 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

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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.<sup>132</sup> 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'.<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup>

### 3.5.2 Instrumental impacts

Instrumental impact, as discussed earlier, includes changes in policy, jurisprudence and institutions.<sup>140</sup> 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](http://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.<sup>141</sup> 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

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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.<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup> This indicates that there is a policy shift resulting from the outcome of the litigation.

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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.<sup>148</sup> 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.<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup>

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](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.<sup>152</sup> He observed that everything depends on who gets to fill the right with meaning.<sup>153</sup> The definition of a right is an object of struggle, and that struggle has to proceed concomitantly with the struggle to materialise it.<sup>154</sup>

## 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<sup>155</sup> 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).