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Realising the right to basic education through strategic litigation in Kenya

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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*

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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]

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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

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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.