

Realising undocumented immigrant children's right
to a basic education in South Africa in accordance
with international law

BJ Machaka



Orcid.org/0000-0002-4188-0345

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LIST OF ABBREVIATIONS AND ACRONYMS

A	Appellate Division
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AD	Appellate Division
ARCWC	African Charter on the Rights and Welfare of the Child
ASA	Journal of the American Sociological Association
AU	African Union
BELA	Basic Education Law Amendment
BCLR	Butterworths Constitutional Law Reports
CALS	Centre for Applied Legal Studies
CC	Constitutional Court
CCPR	Committee on Civil and Political Rights
CCR	Constitutional Court Review
CEPS	Centre for Educational Policy Studies
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMC	Claremont McKenna College

CMW	Committee on the Rights of Migrant Workers and their Families
CoRMSA	Consortium for Refugees and Migrants in South Africa
COVID-19	Coronavirus Disease 2019
CRC	Convention on the Rights of the Child
DACA	Deferred Action for Childhood Arrivals
DAPA	Deferred Action for Parents of Americans and Lawful Permanent Residents
DCJ	Deputy Chief Justice
DHA	Department of Home Affairs
DJCS	Department of Justice and Constitutional Development
DNA	Deoxyribonucleic Acid
DOB	Department of Basic Education
DREAM Act	Development, Relief and Education Minors Act
ECB	Eastern Cape High Court, Bhisho
ECDE	Eastern Cape Department of Education
ECG	Eastern Cape Division, Grahamstown
EDC	Eastern District Cases
EE	Equal Education Centre
EEL	Equal Education Law
EELC	Equal Education Law Centre

ELT	English Language Training
ESCR-NET	International Network for Economic, Social and Cultural Rights
ESEA	Elementary and Secondary Education Act
ESSA	Every Student Succeeds Act
GED	General Development Certificate
GG	Government Gazette
GN	Government Notice
GNP	North Gauteng High Court, Pretoria
GP	Gauteng High Court, Pretoria
HIV	Human Immuno-Deficiency Syndrome
HOD	Head of Department
HRC	Human Rights Council
HRQ	Human Rights Quarterly
IALR	Inter-America Law Review
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICON	International Journal of Constitutional Law
IHRDA	Institute for Human Rights and Development in Africa

IJCL	International Journal of Corpus Linguistics
IJHR	International Journal of Human Rights
IJRL	International Journal of Refugee Law
ILO	International Labour Organisation
IMISCOE	International Migration Research Network
INS	Immigration and Naturalization Service
Int J Child Rights	International Journal of Children's Rights
Int J Law Policy Fam	International Journal of Law, Policy and the Family
Int J Law	International Journal of Law
IOM	International Organisation for Migration
ISCED	International Standards Classification of Education
JCT	Journal of Curriculum and Teaching
JIMI	Journal of International Migration and Integration
KZP	KwaZulu-Natal Division, Pietermaritzburg
LLM	Master of Laws
LOLT	Language of Learning and Teaching
LRC	Legal Resources Centre
LTSM	Learning and Teaching Support Material
MEC	Member of the Executive Council
MP	Member of Parliament
NFSP	No Fee School Policy

NGO	Non-Governmental Organisation
NNSSF	Norms and Standard for School Funding Policy
NPO	Non-Profit Organisations
NQF	National Qualification Framework
NSFAS	National Student Financial Aid Scheme
NSNP	National School Nutrition Programme
NWIRP	Northwest Immigrant Rights Project
OHCHR	Office of the High Commissioner for Human Rights
PAJA	Promotion of Administrative Justice Act
PED	Provincial Education Department
PELJ	Potchefstroom Electronic Law Journal
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PG	Provincial Gazette
PULP	Pretoria University Law Press
RCL	Representative Council of Learners
RRO	Refugee Reception Office
SA	South African Law Reports
SACR	South African Criminal Reports
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission

SAJCE	South African Journal of Childhood
SAJE	South African Journal of Education
SAJHR	South Africa Journal on Human Rights
SAPL	Southern African Public Law
SCA	Supreme Court of Appeal
SDG	Sustainable Development Goal
SEA	State Educational Agencies
SERI	Socio-Economic Rights Institute
SEUJASS	Southeast University Journal of Arts and Social Sciences
SFEP	School Fee Exemption Policy
SGB	School Governing Bodies
T	Transvaal Supreme Court
TBVC	Transkei, Bophuthatswana, Venda and Ciskei
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNISA	University of South Africa
UNODC	United Nations Office on Drug and Crime

US	United States
USA	United States of America
WCC	Western Cape High Court, Cape Town
ZACC	South Africa: Constitutional Court
ZAECQBHC	South Africa: Eastern Cape High Court, Gqeberha
ZAGPJHC	South Gauteng High Court, Johannesburg
ZAKZHC	South Africa: KwaZulu-Natal High Court
ZAMPMBHC	High Court of South Africa Mpumalanga, Mbombela
ZASCA	Supreme Court of Appeal
ZAWCHC	South Africa: Western Cape High Court, Cape Town
ZEP	Zimbabwe Exemption Permit

ABSTRACT

Many people in Africa are moving to countries that offer them prospects of peace, economic stability, and protection from political violence. South Africa is one of the most attractive destinations due to its relatively improved economy, political stability and good human rights record. Although asylum seekers and refugees form a part of immigrants, most people who arrive in South Africa are voluntary immigrants seeking greener pastures. Due to stringent visa requirements, which most of them do not meet, South Africa has seen exponential growth in undocumented immigrants who arrive with their young children and who also bear children inside South Africa. Undocumented immigrant children, like all other children, are entitled to all rights to which children are entitled in terms of the *Constitution of the Republic of South Africa*, 1996 and treaties to which South Africa is a State Party. One of these rights is the right to a basic education.

However, there are concerns that South African policies and legislation potentially violate its constitutional and international obligations as far as the provision of basic education for undocumented immigrant children is concerned. This is so because some policies and legislation prohibit or restrict the enrolment of undocumented immigrant children in schools. Also, there have been attempts to cut off funding for schools which provide learning opportunities for undocumented immigrant children. Although the courts interdicted such acts and interpreted legislation in a way that can be reconciled with the right to a basic education for undocumented immigrant children, barriers to access basic education persist. In this context, this thesis uses the doctrinal legal research method to ascertain the extent to which South Africa fulfils its international and domestic obligations to realise the right to access a basic education for undocumented immigrant children.

The thesis contributes to legal knowledge by adding new insights into the right to a basic education for undocumented immigrant children in South Africa. After a diligent search of legal materials, no comprehensive work could be found on the legal challenges undocumented immigrant children face in accessing basic education in South Africa. The thesis further contributes to knowledge by bringing insights and

recommendations from the treatment of undocumented children in the United States of America (USA) education system to bear on the South African perspective. The USA also experiences high levels of illegal immigration and has grappled with some of the same challenges facing South Africa in providing basic education for undocumented immigrant children. While other countries (and their legal systems) encounter immigration, the USA is looked at specifically as it has probably adopted the most far-reaching decision to fully grant education rights and benefits to undocumented immigrant children.

Keywords: Basic education; child rights-based approach; primary and secondary education; admission to school; undocumented immigrant children; South Africa

Chapter 1 Introduction

1.1 Overview of undocumented immigrant children

1.1.1 Immigration and undocumented persons

In the last two decades, South Africa has received more immigrants than its counterparts on the continent because of the attractiveness of its relatively advanced and industrialised economy, internal peace and security, and good human rights record.¹ South Africa is regarded as a haven by people seeking job opportunities and moving away from political persecution. Owing to its improved political, economic, and social standards, it attracts more immigrants from the rest of the world than its continental counterparts.² However, many immigrants enter South Africa illegally, particularly those from Zimbabwe, Nigeria, Ethiopia, Pakistan, Bangladesh, and Somalia.³ Most immigrants are running away from insecurity, unfavourable economic conditions, and political instability in their countries.⁴ These conditions have pushed people to embark on risky and illegal migration routes in South Africa.⁵

There has been a surge in the search for greener pastures, which seems to be one of the major reasons for the combined movement of illegal/undocumented and legal immigrants to South Africa.⁶ Other than that, it has come to a point where illegal immigration has worsened due to long and porous land and maritime borders, and immigrants are entering the country at a rate of one every five to ten minutes.⁷ These

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- ¹ Migration Data Portal 2021 <https://www.migrationdataportal.org/regional-data-overview/southern-africa#recent-trends>.
- ² International Organisation for Migration "World Migration Report 2020" 62; Segatti "Migration to South Africa" 9.
- ³ Migrants and Refugees Section "Migration Profile" 3.
- ⁴ International Organisation for Migration 2021 <https://www.iom.int/southern-africa>.
- ⁵ International Organisation for Migration 2021 <https://www.iom.int/southern-africa>.
- ⁶ Department of Home Affairs "White Paper on International Migration for South Africa" 5; Department of Science and Innovation *Migration, Displacement and Mobility in Africa: Complex Issues in Current Times* 5-8.
- ⁷ International Organisation for Migration 2023 <https://www.iom.int/countries/south-africa>; Department of Home Affairs "White Paper on International Migration for South Africa" 35 and Migration Policy Institute 2021 <https://www.migrationpolicy.org/article/south-africa-immigration-destination-history>.

factors seem to facilitate the inflow of undocumented immigrants. In this thesis, the terms "undocumented" and "illegal" immigrants (except where the context indicates otherwise) are used interchangeably, as reflected in the immigration discourse. However, some scholars argue that the term "illegal immigrant" is disparaging, as it describes persons as illegal.⁸ Without delving into the merits of and counterarguments to this argument – as it is not the focus of this study – this thesis uses the term "undocumented" to describe the status of persons who are not lawfully authorised to be in South Africa because their presence is considered to be unlawful, irregular and illegal.⁹

Reports have shown that certain employers tend to exploit undocumented immigrants for cheap labour because of their desperate need for employment.¹⁰ The proliferation of informal settlements also adds to other factors that aid the inflow of undocumented immigrants as it eases their blending into the mass population.¹¹ It is anticipated that approximately 1.6 million migrants, constituting 48% of all immigrants in South Africa, currently reside in the informal settlements of Gauteng Province.¹² Undocumented or illegal immigrants include both adults and children. The United Nations Children's Fund's (UNICEF) latest Data Snapshot of Migrant and Displaced Children estimated that there were more than 642,000 migrant or displaced children in South Africa.¹³ This figure includes refugees, asylum seekers, trafficking victims, smuggled migrants, and unaccompanied and separated minors.¹⁴ There are hardly any exact statistics on illegal or undocumented immigrants in South Africa. As is the case worldwide, much

⁸ Kashyap 2021 <https://www.nwirp.org/illegal-vs-undocumented-a-nwirp-board-members-perspective>.

⁹ International Organisation for Migration "International Migration Law" 102.

¹⁰ Dlamini 2023 <https://www.news24.com/citypress/news/exploitation-of-illegal-immigrants-by-sa-employers-inevitable-as-culprits-get-slap-on-the-wrist-nxesi-20230109>.

¹¹ Parliamentary Monitoring Group 2019 <https://pmg.org.za/committee-meeting/29125/>.

¹² Oksiutycz and Azionya "Informal Settlements: A Manifestation of Internal and Cross-Border Migration" 109.

¹³ UNICEF 2019 <https://data.unicef.org/resources/data-snapshot-of-migrant-and-displaced-children-in-africa/>.

¹⁴ UNICEF 2020 <https://www.unicef.org/southafrica/press-releases/unicef-and-south-african-red-cross-partner-assist-migrant-children>.

of the discussions on figures of illegal or undocumented immigration in South Africa are speculations.

South Africa, like most countries across the globe, regulates immigration through legislation, the principal Act being the *Immigration Act*,¹⁵ whose purpose is to "regulate the admission of foreigners to, their residence in, and their departure from the Republic."¹⁶ The Department of Home Affairs is obliged to implement the *Immigration Act* in accordance with the *Constitution*. The Minister of Home Affairs promulgates regulations to fulfil the provisions of the *Immigration Act*.¹⁷

Notwithstanding the legislation and regulations promulgated thereunder, South Africa has experienced an exponential increase in the number of immigrants who enter and stay illegally in the country. This is attributable to several factors, including weak border security, corruption at points of entry, and the weak enforcement of laws.¹⁸ After their arrival, illegal immigrants face many challenges in South Africa, including exclusion from basic human rights, such as access to housing, healthcare, and education.¹⁹ They also face various forms of exploitation by employers, law enforcement personnel, and ordinary citizens due to the lack of formal documentation authorising their entry and presence in the Republic.²⁰ Considering their vulnerability, the situation is much worse for their children. Due to their illegal status, undocumented immigrant children struggle to access the right to a basic education because some laws are not favourable to their circumstances; they either prohibit or restrict the enrolment of undocumented immigrant children in South African schools.²¹ Some prohibitions are reinforced by criminal penalties for school principals who admit such children.²² Until the recent case of *Centre for Child Law v Minister of Basic*

¹⁵ *Immigration Act* 13 of 2002 (hereafter *Immigration Act*).

¹⁶ Preamble of the *Immigration Act*.

¹⁷ Immigration Regulations GN R 413 of 22 May 2014.

¹⁸ Centre for Development and Enterprise "South Africa's Migration Policies" 7.

¹⁹ SAHRC "Non-Nationals" 7.

²⁰ Department of Home Affairs "White Paper on International Migration for South Africa" 3-10.

²¹ SAHRC "Position Paper" 7.

²² See Section 39(4) of the *Immigration Act*.

Education,²³ some provincial government departments threatened to withdraw financial support from schools that had enrolled undocumented children. As will be discussed later in this thesis, more challenges stem from the fact that South Africa enacted laws that restrict the admission of undocumented immigrant children to public schools. After that was resolved through the courts in *Centre for Child Law & 37 Children*, an initiation to amend the laws is ongoing. However, the proposed amendments come with even more discriminatory and more restrictive provisions towards the admission of undocumented immigrant children to schools.²⁴ This continues to pose a conflict between Acts and creates uncertainty regarding the laws governing the admission of undocumented immigrant children.

1.1.2 Brief historical overview: The enduring legal ramifications of apartheid's segregative practices

Discrimination in South Africa is deeply historical and is entrenched on a culture of excluding "the other."²⁵ Apartheid,²⁶ created a culture of exclusion, discrimination, sexism and patriarchy in the society and schools. Learners frequently experience discrimination on the basis of race, language and other status.²⁷ The discrimination faced by undocumented immigrant children in schools does not exclusively result from the idea that they lack documentation but it is already embedded in the societies.

The apartheid regime significantly influenced the educational landscape. During the early 1990s, South Africa transitioned from a profoundly divided educational framework, characterised by intentional neglect and systemic discrimination against

²³ *Centre for Child Law v Minister of Basic Education* [2020] 1 All SA 711 (ECG)(hereafter *Centre for Child Law & 37 Children*).

²⁴ *Basic Education Laws Amendment Bill B2-2022* (hereafter *BELA Bill*) and the Call for Comments on the Admission Policy for Ordinary Public Schools GN 38 in GG 44139 of 10 February 2021 (hereafter Proposed Amended Admission Policy). These will be thoroughly discussed in Chapter 3.

²⁵ National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (2019) para 39.

²⁶ Molteno "The Historical Foundations of the Schooling of Black South Africans" 107; Apartheid can be defined as racial segregation or separate development, under which different races were encouraged to develop separate societies according to their own traditions.

²⁷ *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC); *Centre for Child Law & 37 Children*.

black African learners, who were systematically marginalised and instructed to uphold a racial capitalist structure designed to favour the white populace, often at the detriment and exploitation of African, Coloured, and Indian communities.²⁸ The challenges experienced today are inextricably linked to this history of oppression.

Regarding educational access, the apartheid *Bantu Education Act*²⁹ mandated the implementation of racially segregated educational facilities, whereby individuals of Black ethnicity were compelled to attend schools determined by their ethnic group within their residential areas.³⁰ The enactment of the *Bantu Education Act* was designed to deliberately restrict the majority of the Black population from accessing educational opportunities.³¹ Within the framework of apartheid white supremacists, black education was envisioned to cultivate subservient individuals, and the Bantu education system served as the mechanism to achieve this objective.³² Bantu schools further suffered from deficiencies in human and physical resources, exacerbating the substandard educational environments and outcomes for the Black populace.³³ Bantu education system systematically deprived Black learners of equitable access to educational opportunities and resources that were available to their White counterparts in white schools.³⁴ The apartheid regime perpetuated the subordination of Black learners by allocating more favourable funding to white schools compared to black schools, thereby perpetuating a hierarchical classification system.³⁵ The education system under apartheid was notably characterised by gross inequality, firmly grounded on race, religion and culture.³⁶

However, post-apartheid, the *Constitution* of the Republic of South Africa brought in a new era of transformation in the education system based on dignity, equality and

²⁸ Brickhill and Van Leeve "Basic Education Provisioning" 282.

²⁹ *Bantu Education Act* 47 of 1953.

³⁰ Kaziboni A "Apartheid Racism and Post-apartheid Xenophobia: Bridging the Gap" 203.

³¹ Christie and Collins "Bantu Education: Apartheid Ideology and Labour Reproduction" 168.

³² Kaziboni A "Apartheid Racism and Post-apartheid Xenophobia: Bridging the Gap" 204.

³³ Kaziboni A "Apartheid Racism and Post-apartheid Xenophobia: Bridging the Gap" 204.

³⁴ Christie and Collins "Bantu Education: Apartheid Ideology and Labour Reproduction" 168.

³⁵ Christie and Collins "Bantu Education: Apartheid Ideology and Labour Reproduction" 168.

³⁶ *Bantu Education Act* 47 of 1953.

freedom.³⁷ The objectives of educational transformation included, amongst others, augmenting the enrolment and retention rates of Black learners, attaining equitable distribution of public school funding, eradicating unlawful discriminatory practices.³⁸ The significance of this historical overview within the scope of this thesis lies in examining whether the transformation ushered in substantive changes, particularly in ensuring equal access to education for all learners. This scrutiny is essential given the constitutional objectives and the imperatives outlined in the *South African Schools Act*, which collectively seek to facilitate the transformation of the South African education system.³⁹ Conversely, the education legislative conflicts regarding the admission of undocumented immigrant children suggest that despite the end of the apartheid era, substantial disparities in educational quality persists, rather the only difference is that apartheid made segregation laws official. The perpetuation of such inequalities and discriminatory practices continues to manifest in post-apartheid South Africa, with undocumented immigrant children often subjected to negative stereotypes within the educational system.

1.1.3 Distinguishing undocumented immigrants, documented immigrants and refugees

For clarity, undocumented immigrant children are persons under the age of 18 who are unlawfully in the country or who were born in the country from parents who are either legally or illegally in the country.⁴⁰ The unlawfulness of the presence of undocumented immigrants and their children denotes that they are in the country without the correct authorisation and accompanying documentation required for them

³⁷ Section 1(a) of the *Constitution* of the Republic of South Africa, 1996.

³⁸ Adams *The Impact of Quintile Funding System in Reducing Apartheid- Inherited Inequalities in Education* 5.

³⁹ Preamble of the *South African Schools Act* 84 of 1996

⁴⁰ Section 1(xvii) of the *Immigration Act*; International Organisation for Migration "International Migration Law" 12, 67 and Article 1 of the *Convention on the Rights of the Child* (1989) (hereafter *CRC*) definition of a child.

to enter, live, stay, and study in South Africa.⁴¹ While immigrants may possess their identity and travel documents, they may still lack authorisation to enter, stay, and study in South Africa due to a lack of relevant valid visas and permits.⁴² As such, their presence is not recorded, making them fall under the category of the "undocumented."⁴³ It is possible for illegal immigrants to be recorded when, for instance, they were initially lawfully present in the country but their status subsequently became unlawful because of expired visas and permits.⁴⁴ When this happens, their unlawful presence in South Africa is known to the Department of Home Affairs to the extent that it can record and trace their presence.⁴⁵ It is necessary to contextualise the plight of undocumented children by distinguishing between documented immigrants, undocumented immigrants, and refugees.

An immigrant is considered documented or in a regular situation in international law if they are authorised to enter, reside, and work in the host country in accordance with the domestic laws of the state and the international laws to which the state is a party.⁴⁶ Immigrants are non-documented or in an irregular situation in terms of international law if they do not comply with these conditions.⁴⁷ In South Africa, an undocumented person is a person who has been in the country and intends to reside in the country for an indefinite period of time but does not have valid immigration documents to be legally present in the country.⁴⁸ However, the term undocumented immigrants is not as straightforward as it seems. Factors such as changes in the laws

⁴¹ Section 1(xvii) of the *Immigration Act*; Regulation 37 of the Immigration Regulations GN R 413 in GG 37679 of 22 May 2014 and International Organisation for Migration "International Migration Law" 67.

⁴² Perruchoud *International Migration Law* 66.

⁴³ Article 5 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990) (hereafter *Convention on the Rights of Migrants*).

⁴⁴ Perruchoud *International Migration Law* 67.

⁴⁵ Department of Statistics South Africa 2021 <https://www.statssa.gov.za/?p=14569>.

⁴⁶ Article 5 of the *Convention on the Rights of Migrants*.

⁴⁷ Article 5 of the *Convention on the Rights of Migrants*.

⁴⁸ Legomsky 2009 *Global Law Review* 5.

of a country and personal situations may lead documented immigrants to lose legal status.⁴⁹

An undocumented immigrant is a person:

- (a) who has no legal documentation to enter a country but manages to enter clandestinely,
- (b) who enters using fraudulent documentation, or
- (c) who, after entering using legal documentation, stayed beyond the time authorised or otherwise violated the terms of entry and remained without authorisation.⁵⁰

Several contributing factors may lead to a loss of legal status, such as delays in the processing of visa renewals as a result of bottlenecks within the Department of Home Affairs, lack of resources to handle and process large numbers of applications, and corruption.⁵¹ As a result, waiting times for documents such as visas and permanent residence permits increase, creating fertile grounds for corrupt exploitation of immigrants by agents who work with syndicates within immigration offices.⁵²

Unlike undocumented immigrants, refugees are entitled to asylum status and protection in their host country based on persecution in their own countries.⁵³ They are protected in terms of Article 1 of the *Convention Relating to the Status of Refugees*, which defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁵⁴

⁴⁹ Legomsky 2009 *Global Law Review* 5.

⁵⁰ Perruchoud *International Migration Law* 67; see also Section 1(xviii) of the *Immigration Act*.

⁵¹ Daily Maverick 2019 <https://www.dailymaverick.co.za/article/2019-08-07-no-papers-no-rights-the-plight-of-undocumented-foreign-children-in-sa/>.

⁵² Amnesty International "Living in the Shadows" 5.

⁵³ Section 3 of the *Refugees Act* 130 of 1998 (hereafter *Refugees Act*).

⁵⁴ Article 1A.(2) of the *Convention Relating to the Status of Refugees* (1951) (hereafter *Convention Relating to the Status of Refugees*).

Hence, refugees and other immigrants are different in that the former are persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group in their home countries and, because of persecution, have no real choice but to leave (with or without documentation), whereas the latter may have socio-economic or cultural reasons to leave their home countries but are not forced to flee.⁵⁵ Refugees and other immigrants are not treated in the same manner under modern international law. However, it should be noted that the children of refugees who have not been granted refugee status and who do not have any legal documentation confirming their regularity are considered undocumented immigrants in this study.⁵⁶

1.1.4 Accompanied, unaccompanied and separated undocumented immigrant children

A report submitted by Maat for Peace, Development, and Human Rights indicates that children migrate for many reasons, some through regular channels and others through irregular ways.⁵⁷ There are many reasons that force the migration of children, such as poverty, death of parents/caregivers, seeking employment, and looking for schools.⁵⁸ Throughout their journey to their destination country, these children are extremely vulnerable and at risk of deportation, and they lack the legal protection to which they are entitled.⁵⁹ Hence, this study emphasises the critical importance of promptly safeguarding and acknowledging the rights of immigrant children within the country as an urgent need. This study focuses on undocumented immigrant children. There are, however, different categories of undocumented immigrant children, namely, accompanied undocumented immigrant children and unaccompanied and separated

⁵⁵ OHCHR "Differentiation Between Migrants and Refugees" 1.

⁵⁶ SAHRC "Non-Nationals" 3.

⁵⁷ Report on Ending Immigration Detention of Children and Seeking Adequate Reception and Care for Them UN Doc A/75/183 (2020) paras 11-15.

⁵⁸ Global Issue of Unaccompanied Migrant Children and Human Rights UN Doc A/HRC/36/51(2017) para 10-15 and Schreier 2011 *Canada's Journal on Refugees* 62.

⁵⁹ National Child Care and Protection Policy: Working Together to Advance the Rights of all Children to Care and Protection GN 472 in GG 44636 of 28 May 2021 para 5.9.1 (hereafter National Child Care and Protection Policy).

undocumented immigrant children.⁶⁰ Consequently, legal status and level of protection may vary accordingly. *Unaccompanied immigrant* children are those who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.⁶¹ *Accompanied immigrant* children are those in the care or company of either their parents or guardians.⁶² Separated children are those who have been separated from both parents and/or legal guardians but not necessarily from other relatives.⁶³ Therefore, they may include children who are accompanied by other adult family members. This research encompasses all undocumented immigrant children, whether accompanied or not. The protection or position of these groups of children may vary, primarily because accompanied immigrant children receive care and protection from their parents or guardians, whereas unaccompanied immigrants are more vulnerable and lack such support unless the state intervenes. In this research, the term "undocumented immigrant children" encompasses accompanied, unaccompanied, and separated minors unless explicitly specified otherwise.

While the law should provide protection to all children, unaccompanied and separated children receive special attention because of their specific circumstances.⁶⁴ These children require state intervention to ensure their protection and well-being, as they

⁶⁰ The Inter-American Court of Human Rights defines an immigrant as "a person who enters another state in order to reside there" Inter-American Court of Human Rights *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* OC-21/14 (2014) para 49(f).

⁶¹ Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997) 1; Inter-American Court of Human Rights *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection* OC-21/14 (2014) para 49(b); *Refugee Children: Guidelines on Protection and Care* (1994) 121. An unaccompanied or separated child is not defined in South African law.

⁶² Although not explicitly stated, it can be inferred from General Comment No. 6 that the definition of "accompanied" is clearly the opposite of "unaccompanied" children, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin* UN Doc CRC/GC/2005/6 (hereafter ComRC "General Comment No. 6"); see also Van der Burg 2006 *Law, Democracy and Development* 82.

⁶³ *Refugee Children: Guidelines on Protection and Care* (1994) 121; Principle 3 of the Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009).

⁶⁴ Principle 1 of the Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009).

lack parental care and support.⁶⁵ An overview of the applicable laws and legal positions of these children is provided later in Chapter 5. South Africa struggles with many undocumented immigrant children.⁶⁶ The Scalabrini Centre conducted a survey in the Gauteng, Limpopo and Western Cape provinces and found that approximately 39% of immigrant children had no documentation, 6% had passports, 8% were refugees, and 16% were asylum seekers.⁶⁷ The study found that among those who did not have documentation, 85% were in Limpopo Province, while a quarter were in Western Cape Province. Gauteng accounted for 27% of the undocumented immigrant children.⁶⁸

1.1.5 The main challenges facing undocumented immigrant children

The lack of documentation results in difficulties for children in exercising civil, political, cultural, and socio-economic rights.⁶⁹ These challenges are amplified when it comes to the right to access healthcare and education, as the exercise of these rights requires interaction with the state through public hospitals and schools.⁷⁰ Undocumented children face many challenges when attempting to access basic education in public schools.⁷¹ In accordance with the Admission Policy for Ordinary Public Schools,⁷² South African schools required all learners of foreign origin to produce passports and study visas before enrolment. Study visas authorise foreigners to study in South Africa and were required, together with passports, as proof of identification for school enrolment purposes.⁷³ Obviously, undocumented immigrant children could not produce such documents for the mere reason that they were undocumented. Provisional enrolment of undocumented immigrants while waiting for their official documents was permitted

⁶⁵ Principle 2 of the Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009).

⁶⁶ Scalabrini Centre "Foreign Children in Care" 20.

⁶⁷ Scalabrini Centre "Foreign Children in Care" 20.

⁶⁸ Scalabrini Centre "Foreign Children in Care" 22.

⁶⁹ The Economic, Social and Cultural Rights of Migrants in an Irregular Situation UN Doc HR/PUB/14/1 (2014) 126.

⁷⁰ Ramji-Nogales 2014 *Vanderbilt Journal of Transnational Law* 720.

⁷¹ SAHRC "Position Paper" 1.

⁷² Admission Policy for Ordinary Public Schools GN 2432 in GG 19377 of 19 October 1998 (hereafter Admission Policy).

⁷³ SAHRC "Position Paper" 7; Clause 15 and 21 of the Admission Policy.

for three months, after which the law required their automatic deregistration.⁷⁴ For the purposes of provisional enrolment, undocumented immigrant children had to produce evidence that they had applied to the Department of Home Affairs to legalise their stay.⁷⁵ The *Centre for Child Law & 37 Children* appear to have tackled the issue of admitting undocumented children, yet ongoing instances of non-admission based on the same grounds persist.⁷⁶ The proposed amended legislation to the Admission Policy and the *South African Schools Act* seem to exacerbate discrimination by demanding additional documents that were previously disregarded by the *Centre for Child Law & 37 Children*. Conflicting provisions exist within various Acts governing the admission of immigrant learners, thus the *Immigration Act*, *South African Schools Act*, Admission Policy, proposed BELA Bill, and Proposed Amended Admission Policy.⁷⁷ A thorough examination and critical analysis of these legislation will be conducted in Chapters 3 and 6.

All children are vulnerable, including undocumented immigrant children.⁷⁸ Their exposure to human rights violations is amplified by their illegal status.⁷⁹ Notwithstanding their vulnerability and status, these children are entitled to the recognition of their humanity and the enjoyment of human rights.⁸⁰ In addition to the struggle to enrol in public schools, undocumented immigrant children face many other hindrances in the school environment, including inequalities, lack of quality education, unsafe learning environments, and bullying.⁸¹ These issues mostly emanate from the inability of the school system to cater for the learning differences arising from, for

⁷⁴ Clause 15 of the Admission Policy.

⁷⁵ Clause 21 of the Admission Policy.

⁷⁶ The practical experiences of these children are provide for in Chapter 6 of the thesis.

⁷⁷ *Immigration Act* 13 of 2002; *South African Schools Act* 84 of 1996; Admission Policy for Ordinary Public Schools GN 2432 in GG 19377 of 19 October 1998; *Basic Education Laws Amendment Bill* B2-2022 and *Call for Comments on the Admission Policy for Ordinary Public Schools* GN 38 in GG44139 of 10 February 2021.

⁷⁸ CoRMSA "Protecting Refugees, Asylum Seekers and Immigrants in South Africa" 72.

⁷⁹ CoRMSA "Protecting Refugees, Asylum Seekers and Immigrants in South Africa" 72.

⁸⁰ Guajardo *Reducing Vulnerability and Empowering Migrants* 10.

⁸¹ Adair 2015 *Harvard Education Review* 4.

instance, language and cultural barriers.⁸² These problems not only affect immigrants, but the focus of this research is specifically on the rights of immigrant children.

While some immigrant children do not understand English, most of their native languages are not on the list of official or non-official languages recognised in South Africa.⁸³ This results in language barriers in the school environment because public schools teach learners from grades one to two in their mother tongue.⁸⁴ From grade 3 onwards, all learners receive instruction in at least one additional official language, which often entails English.⁸⁵ This results in language barriers for immigrant children. Section 6(2) of the *South African Schools Act*,⁸⁶ the principal statute regulating basic education, states that governing bodies of public schools may determine the language policies of their schools. In practice, teaching switches to English (or Afrikaans) from grade 4 onwards. While undocumented immigrant children in primary schools may not be able to understand and speak languages such as isiZulu, isiXhosa, Sesotho, Afrikaans, or English,⁸⁷ teachers often switch between several official South African languages during lessons.⁸⁸ As such, most migrant learners cannot understand the lessons offered in class.⁸⁹ Since they do not have appropriate training in English and other local languages, undocumented immigrant children find themselves spending most of their school days in classrooms but not understanding their teachers and peers.⁹⁰ This may lead to many students dropping out of school.⁹¹

⁸² *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* UN Doc HR/PUB/14/1(2014) 84; CoRMSA "Protecting Refugees, Asylum Seekers and Immigrants in South Africa" 72.

⁸³ Babane 2020 *SAJCE* 2.

⁸⁴ Languages in Education Policy, 1997 para 6.7.1.

⁸⁵ Clause V.D.2 of the Norms and Standards for Language Policy in Public Schools GN 1701 in GG 18546 of 19 December 1997; UNESCO "Migration, Displacement and Education" 44 and Sibanda 2019 *Journal of the Reading Association of South Africa* 1-2.

⁸⁶ *South African Schools Act* 84 of 1996 (hereafter *Schools Act*).

⁸⁷ Tawodzera and Crush *Right to the Classroom* 17.

⁸⁸ Tawodzera and Crush *Right to the Classroom* 17.

⁸⁹ UNESCO "Migration, Displacement and Education" 44.

⁹⁰ Tawodzera and Crush *Right to the Classroom* 21.

⁹¹ Tawodzera and Crush *Right to the Classroom* 21.

Research conducted in KwaZulu-Natal using female immigrant learners from grades 8 to 11 found that they faced discriminatory attitudes emanating from their inability to understand their teachers who speak local languages.⁹² This is a catch-22 situation for both learners and teachers because teachers are not trained in foreign languages and, therefore, cannot be expected to provide instruction in such languages. However, it is difficult for immigrant learners to understand the local languages. Although this is a huge problem, research indicates that children catch up quickly and learn a new language faster than adults.⁹³ Hence, inconveniences and language barriers are likely to occur for a limited time. Krumm and Plutzar⁹⁴ noted that when immigrants leave their countries, they leave their languages behind and have to adapt to their new countries. As such, indigenous languages and cultures are often lost during the process of assimilation into new countries.⁹⁵ The problem is that research proves quite clearly that mastery of the mother tongue is the most important basis for any other learning or cognitive development.⁹⁶ To mention a few, these are some of the challenges faced by immigrants and are accorded very little prominence in the educational curricula.

1.1.6 The right to a basic education in context

The failure to alleviate the challenges faced by undocumented immigrant children in enjoying the right to a basic education flies in the face of international law and the constitutional protection of the right to education.⁹⁷ The *Constitution of the Republic of South Africa*, 1996 provides for the right to a basic education, which is equivalent to primary and secondary education under international law.⁹⁸ The *Schools Act* does not define basic education but merely refers to compulsory education. It stipulates

⁹² Isseri, Muthukrishna and Philpott 2018 *Educational Research for Social Change* 45.

⁹³ Carnegie Mellon University 2021 <https://scitechdaily.com/researchers-explore-how-children-learn-language-far-faster-than-teenagers-or-adults/>.

⁹⁴ Krumm and Plutzar 2008 *Language Policy Division Journal* 1.

⁹⁵ Krumm and Plutzar 2008 *Language Policy Division Journal* 1. See also, *The Use of Vernacular Languages in Education* (1953) 47-58.

⁹⁶ *The Use of Vernacular Languages in Education* (1953) 11.

⁹⁷ Section 29(1)(a) of the *Constitution of the Republic of South Africa*, 1996 (hereafter *Constitution*).

⁹⁸ Section 29(1)(a) of the *Constitution*.

that attendance at school is mandatory for every learner, starting from the first day of the academic year in which the learner turns seven years old and continues until they reach the age of 15 or complete the ninth grade, whichever comes first.⁹⁹ However, the proposed *Basic Education Laws Amendment Bill*, which seeks to amend the *Schools Act*, contains a provision which states that basic education means grades R to 12, as evidenced in the National Curriculum Statement.¹⁰⁰

The meaning of primary and secondary education should be assessed in light of the United Nations Educational, Scientific and Cultural Organisation's (UNESCO) *International Standard Classification of Education*.¹⁰¹ In terms of these standards, primary and secondary education covers the period of normal schooling, that is, 12 years of study from ages six or seven and onwards.¹⁰² This study uses the term basic education as an equivalent to primary and secondary education. The *Jomtien World Declaration on Education for All*,¹⁰³ adopted in 1990, states that the acquisition of basic education is the same as the acquisition of basic learning needs. This Declaration is not legally binding. The formulation of basic education is more functional than formal education. Although not binding, the *Jomtien Declaration* has significantly contributed to the international understanding of the right to a basic education.¹⁰⁴ In its formulation, basic education is equivalent to certain learning content rather than the traditional levels of the education system.

⁹⁹ Section 3(1) of the *Schools Act*.

¹⁰⁰ Section 1(a) of the *BELA Bill*, National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R-12 GN 1115 and 1116 in GG 36042 of 28 December 2012 (definitions).

¹⁰¹ *International Standard Classification of Education* (2011) (hereafter *UNESCO ISCED*).

¹⁰² *UNESCO ISCED* para 70-71.

¹⁰³ Article 1(1) of the *World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs* (1990) (hereafter *World Declaration on Education*) provides that:

Every person -child, youth and adult- shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.

¹⁰⁴ McConnachie and Skelton "Constitution and the Right to Basic Education" 24.

There are speculations about whether basic education covers a period of time in school (time-based approach) or education of an appropriate standard (adequacy-based approach).¹⁰⁵ In South Africa, policymakers and courts increasingly favour an adequacy-based approach.¹⁰⁶ The first reason for an adequacy-based approach is the wording of section 29(1)(a) of the *Constitution*, which formulates the right to a basic education to include the right to adult basic education. This signifies that basic education is not confined to age groups or time spent in school. Secondly, an adequacy-based approach fits the purposes of the right to a basic education, as summarised in *Governing Body of the Juma Masjid Primary School v Essay*, in which the court explained that providing basic education is a vital socio-economic entitlement aimed at nurturing a child's personality, talents, and both mental and physical capacities to their maximum potential.¹⁰⁷ This lays the groundwork for a child's continuous learning and future vocational prospects, among other benefits.¹⁰⁸

In *Moko v Acting Principal of Malusi Secondary School*, the same court said that grades 10 to 12 fall within the ambit of basic education and further explained that

School education culminating in the "nationally recognised qualification" of the National Senior Certificate is basic education under section 29(1)(a). This includes Grade 12 and the matric examinations. Besides, the Ministry of Basic Education bears the responsibility for the entire educational regime that cannot be properly classified as tertiary or higher education. Grade 12 is part of that regime. To limit basic education under section 29(1)(a) either to only primary school education or education up until Grade 9 or the age of 15 is, in my view, an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right.¹⁰⁹

As such, this thesis treats basic education as the period of study from grades one to 12, which encompasses primary and secondary education. This is in line with both the UNESCO Standards alluded to above, the precedent set by the *Moko v Acting Principal*, and the amendments proposed by the *Basic Education Laws Amendment Bill*.

¹⁰⁵ McConnachie and Skelton "Constitution and the Right to Basic Education" 23.

¹⁰⁶ McConnachie and Skelton "Constitution and the Right to Basic Education" 23.

¹⁰⁷ *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC) (hereafter *Juma Masjid Primary School*) para 43.

¹⁰⁸ *Juma Masjid Primary School* para 43.

¹⁰⁹ *Moko v Acting Principal of Malusi Secondary School* 2021 (4) BCLR 420 (CC) para 30 (hereafter *Moko v Acting Principal*) para 31-32.

1.1.7 The right to primary and secondary education under international law and their applicability to basic education under the Constitution

An examination of the basic educational rights of undocumented immigrant children makes several international instruments applicable, such as the *Convention on the Rights of the Child*,¹¹⁰ the *International Covenant on Economic, Social and Cultural Rights*,¹¹¹ the *Convention against Discrimination in Education*,¹¹² and the *Convention on the Protection of Migrant Workers and their Families*.¹¹³ These instruments collectively determine the content of education as a socio-economic and cultural right in international law. They also set standards for the protection of human rights in general and for the protection of children, including migrant children, as far as the enjoyment of the right to a basic education is concerned. The analysis in this thesis will reveal that these instruments prescribe state obligations, including minimum core obligations, towards the fulfilment of the right to a basic education as well as other rights whose fulfilment enhances access to primary and secondary education for undocumented immigrant children. These instruments need to be analysed to ascertain the nature and scope of the obligations of States Parties towards undocumented immigrant children. In understanding South Africa's international and domestic obligations to realise the right to a basic education for undocumented children, it is imperative to bear in mind the constitutional provisions on the interpretation of the Bill of Rights and on the authoritativeness of international law and foreign law in South Africa. In this regard, one notes that international law is a source of obligations on its own because States Parties to such treaties bind themselves to perform their obligations in accordance with *pacta sunt servanda*, a principle that affirms the duty to perform obligations under an (international)

¹¹⁰ *CRC and the African Charter on the Rights and Welfare of the Child* (1990) (hereafter *ACRWC*).

¹¹¹ *International Covenant on Economic, Social and Cultural Rights* (1966) (hereafter *ICESCR*).

¹¹² *UNESCO Convention against Discrimination in Education* (1960) (hereafter *UNESCO Convention against Discrimination in Education*).

¹¹³ *Convention on the Rights of Migrants* (1990).

agreement.¹¹⁴ When these treaties have been domesticated, that is, adopted in the form of legislation, they create a binding law on the executive, legislative and judiciary.¹¹⁵ The *Constitution* accords international law a binding status, which is discussed in detail in Chapter 2 under the role and relevance of international law and the status of international law in South Africa.

1.2 Central questions

This thesis seeks to ascertain the extent to which South Africa fulfils its constitutional and international obligations to realise the right to access basic education for undocumented immigrant children. This entails answering the following questions.

- (i) What are South Africa's international obligations to realise the right to a basic education for undocumented immigrant children? (Chapter 2).
- (ii) What are the constitutional, statutory, and policy frameworks for the right to a basic education for undocumented immigrant children in South Africa? (Chapter 3).
- (iii) Which institutions contribute to the fulfilment of the right to a basic education for undocumented immigrant children in South Africa, and how do they do so? (Chapter 4).
- (iv) How has South Africa responded to the obligation to respect, protect, promote and fulfil the right "to, in and through" basic education? (Chapter 5)
- (v) Whether South Africa has complied with its international obligations and examine which practical barriers impede undocumented immigrant children from enjoying their right to a basic education in South Africa? (Chapter 6).
- (vi) Which initiatives have the USA taken after the prominent case of *Plyler v Doe*¹¹⁶ to protect the right to a basic education for undocumented immigrant

¹¹⁴ For an analysis of *pacta sunt servanda* and the obligation of states to fulfil their treaty obligations, see Lukashuk 1989 *American Journal of International Law* 513-518; Wehberg 1959 *American Journal of International Law* 775-786; Kunz 1945 *American Journal of International Law* 180-197.

¹¹⁵ Section 231(4) of the *Constitution*.

¹¹⁶ *Plyler, Superintendent, Tyler Independent School District v Doe* 457 US 202 (1982) (hereafter *Plyler v Doe*).

children, and which lessons can South Africa learn from the USA in this regard? (Chapter 7).

- (vii) In the context of its international and national legal obligations, how can South Africa enhance the enjoyment of the right to a basic education for undocumented immigrant children? (Chapter 8).

1.3 Aims and objectives

This thesis aims to examine how and to what extent South African law respects, protects, promotes, and fulfils the right to a basic education for undocumented immigrant children. To fulfil this aim, this study has the following objectives:

- (i) In relation to the legal framework governing the exercise of the right to a basic education by undocumented immigrant children in international law (Chapter 2):
 - a. To examine general human rights instruments that protect the right to a basic education in international law.
 - b. To analyse specific international instruments on the right to education.
 - c. To examine international and regional instruments on the protection of the rights of immigrant children.
 - d. To discuss African regional instruments on the right to a basic education.
 - e. To analyse human rights-based approaches to education in international law and the specific obligations of states to realise this right.
- (ii) Concerning the Constitutional, statutory, and policy framework on the right to a basic education for undocumented immigrant children in South Africa (Chapter 3):
 - a. To examine the constitutional, legislative and policy frameworks that give effect to the right to a basic education for undocumented immigrant children.

- (iii) Regarding state and private institutions that contribute to the realisation of the right to a basic education for undocumented immigrant children in South Africa (Chapter 4):
 - a. To discuss executive/administrative measures for the fulfilment of the right to a basic education for undocumented immigrant children.
 - b. To examine the contribution of the judiciary to the fulfilment of the right to a basic education for undocumented immigrant children.
 - c. To examine the contribution of the South African Human Rights Commission to the fulfilment of the right to a basic education for undocumented immigrant children.
 - d. To analyse the role of non-governmental organisations and private actors in fulfilling the right to a basic education for undocumented immigrant children.
 - e. To examine the contribution of school principals and school governing bodies to the fulfilment of the right to a basic education for undocumented immigrant children.
- (iv) In relation to South Africa's response to the obligation to respect, protect, promote, and fulfil the right to a basic (primary and secondary) education for undocumented immigrant children in accordance with international law (Chapter 5):
 - a. To discuss the notion of the right "to, in and through" education and its relevance for the right to a basic education of undocumented immigrant children.
 - b. To establish the extent to which South Africa complies with international law, norms and standards on the fulfilment of the right "to, in and through" basic education through national policies, laws and implementation strategies targeted at undocumented immigrant children.

- c. To examine the judiciary's approach to the promotion and protection of the rights "to, in and through" a basic education.
 - d. To critically analyse whether national laws contextualised with regard to the practical experience of undocumented immigrants are in harmony with international norms and if South Africa is meeting its obligations to respect, protect, promote, and fulfil the right "to, in and through" a basic education in accordance with international law standards.
- (v) In relation to compliance with South African law and the practice of international and national law obligations on the right to a basic education for undocumented immigrant children (Chapter 6):
 - a. To analyse the framework adopted for the implementation of international law.
 - b. To examine formal compliance, assessments by human rights bodies and outcomes, and actual enjoyment in practice of the right to a basic education.
 - c. To discuss obstacles faced by undocumented immigrant children in accessing public schools.
 - d. To analyse the reported practical experiences of undocumented immigrant children in attaining a basic education.
- (vi) On the fulfilment of the right to a basic education for undocumented immigrant children in the USA (Chapter 7):
 - a. To discuss the landmark case of *Plyler v Doe* and its implications for the rights of undocumented immigrant children in education in the USA.
 - b. To discuss laws and policies on the fulfilment of the right to a basic education for undocumented immigrant children in the USA.
 - c. To examine the initiatives taken by the USA after the prominent case and any lessons that South Africa might draw from them.

- (vii) The conclusions and recommendations for policy reform towards the fulfilment of the right to a basic education for undocumented immigrant children in South Africa are as follows (Chapter 8):
 - a. To propose a suitable framework for enhancing the accessibility, availability, acceptability, and adaptability of the South African education system to cater to the needs of undocumented immigrant children.
 - b. To provide recommendations for removing structural barriers to the enjoyment of the right to a basic education by undocumented immigrant children.
 - c. To propose a human right-centred approach to dealing with the plight of undocumented immigrant children in South African public schools.

1.4 Hypothesis and assumptions

1.4.1 Hypothesis

The main hypothesis of this thesis is that the right to a basic education for undocumented immigrant children remains unfulfilled in South Africa due to the unconducive, exclusionary, and contradictory legal and policy frameworks that govern access to public schools. This thesis is based on the following hypothesis:

- (i) Intersectionality factors such as nationality and immigration status exacerbate the challenges faced by undocumented immigrant children when trying to access basic education in South African public schools and create an exigency to find working solutions to respect, protect, promote, and fulfil their access to basic education.
- (ii) The lack of appropriate legal frameworks or conflicting legal frameworks hinders access to basic education, leading to educational disparities and the violation of other rights. A holistic legal, administrative, and policy framework based on human rights is needed to balance the competing interests of the state with the rights of undocumented immigrant children to access basic education in South Africa.

- (iii) Legislative restrictions to access schools for undocumented children constitute *prima facie* breaches of the international and constitutional obligation to realise the right to a basic education.
- (iv) Hindering undocumented immigrant children from access to schools to obtain basic education based on a lack of documentation violates aspects of the minimum core content of the right to education.

1.4.2 Assumptions

Several assumptions inform this thesis, including the following:

- (i) Compared to ordinary citizens, undocumented immigrant children are particularly vulnerable and thus require special protection.
- (ii) Compared to ordinary citizens, undocumented immigrant children face many challenges in exercising and enjoying civil, political, economic, social, and cultural rights.
- (iii) The right to a basic education for undocumented immigrant children remains unfulfilled despite South Africa being a State Party to many international instruments that protect the rights of immigrant children.
- (iv) The South African government's approach to immigration and its regulations are inadequate because they are reactive rather than proactive.

1.5 Contribution to knowledge

This thesis contributes to legal knowledge by adding new insights into existing knowledge on the right to a basic education for undocumented immigrant children. After a diligent search for legal materials, no comprehensive work could be found on the legal challenges facing undocumented immigrant children in accessing basic education in South Africa. The analysis in this thesis is based on section 29(1)(a) of the *Constitution*, the legislative and policy framework governing basic education and immigration, and, to some extent, the practical realities facing undocumented immigrant children in South African public schools. The plight of undocumented

immigrant children in accessing basic education in South African schools calls for urgent intervention and the promulgation of a suitable protection regime.

Legislation and policy fundamentally fail to alleviate the suffering of undocumented immigrant children in accessing basic education, contrary to the *Constitution's* provision that all children enjoy the right to a basic education. Systematic failures that hinder these children from accessing basic education can cause long-lasting disruptions to their lives and reduce their future economic potential. Hence, there is a need to prevent this by first examining the gaps in the law and how they can be counterbalanced against several considerations, such as controlling the influx of migrants to South Africa. A study on the challenges faced by undocumented immigrant children in relation to issues of accessibility, availability, acceptability, and adaptability of basic education is timely and relevant when one considers deficiencies in the provision of compulsory, free, and high-quality basic education to undocumented children in South Africa. These matters have been neglected for a while, notwithstanding the fact that they deserve urgent attention.

Education encompasses more than just the provision of school buildings and compulsory school attendance. Merely ensuring this does not guarantee that all children will stay in school and receive meaningful education. This study considers this argument and contributes to the discourse on the plight of undocumented immigrant children in South Africa, given the paucity of research on the educational situation of undocumented immigrant children in South Africa. As such, this thesis seeks to fill this gap and suggests a legal, administrative, and policy framework of compliance for setting up, operating, and monitoring a system of education that accords with international obligations on the right to a basic education for undocumented immigrants. In addition, the framework proposed in this thesis adds new insights into how to interpret and affect the constitutional right to a basic education. Given the broad scope of educational rights, this thesis confines itself to the right of undocumented immigrant children to a basic education. This implies that the right to further education provided for in section 29(1)(b) falls outside the scope of this thesis.

This thesis focuses on undocumented immigrant children and does not discuss the educational rights of adults. In the same context, this thesis does not address early childhood care or pre-primary education. Although these are covered by the term basic education in the national framework,¹¹⁷ they are not covered in the analysis because their examination justifies a separate comprehensive analysis. This thesis primarily concentrates on public schools, meaning that private schools are not discussed in detail. However, there may be occasional references to private schools. Reference to private schools can be helpful to explore how certain policies, initiatives, or reforms impact the broader educational landscape. In addition, the issues affecting documented immigrant children and South African children in schools are not discussed, although one accepts that social, economic, and cultural issues affecting undocumented, documented immigrants and all other children(citizens) are mostly similar.

Although best practices from other countries are considered, they should not be construed as full comparative studies. The positions of other countries on the basic education of undocumented immigrant children are discussed only as far as foreign law is one of the discretionary considerations for the interpretation of the Bill of Rights, which includes the right to a basic education. The research suggests a legal, administrative, and policy framework of compliance for setting up, operating, and monitoring a system of education that accords with international (and constitutional) obligations on the right to a basic education for undocumented immigrants. This framework could be beneficial to the state in implementing the right to a basic education for undocumented immigrant children.

1.6 Research method

The main aim of this study was to assess whether South Africa is fulfilling its international and national obligations to ensure access to basic education for undocumented immigrant children. In pursuing this study, various sources were consulted. This thesis adopts a doctrinal research approach that involves analysing and interpreting various legal resources, including international instruments and its

¹¹⁷ Section 1 of the *BELA Bill*; *Moko v Acting Principal* para 30.

general comments, the *Constitution*, legislation, case law, policies, circulars, and regulations.¹¹⁸ In examining the fulfilment of basic education rights for undocumented immigrant children in South Africa in alignment with international law, a doctrinal study would involve thoroughly examining the legal frameworks to identify gaps, inconsistencies, or areas where legal principles and obligations are not fully implemented or complied with. The study chooses this method as it allows for a comprehensive analysis of the legal framework and decisions of superior courts¹¹⁹ pertaining to the right to a basic education for undocumented immigrant children. It helps to establish a solid foundation of legal principles and provisions that underpin the topic, enabling a thorough understanding of the current legal context and identifying areas of concern. Doctrinal studies are primarily qualitative in nature.¹²⁰ This involves a qualitative analysis of legal texts, case law, and legal literature to derive insights, identify legal principles, and assess the implementation of laws and obligations. It focuses on understanding the legal framework and interpreting legal sources in order to draw conclusions and make recommendations. Literary works, such as books, journal articles, and other legal periodicals, were used in this study to supplement the understanding and expression of law in the primary sources of law. However, this thesis also considers grey literature, such as newspaper reports and online news reports (incidental or anecdotal evidence), which provide evidence of the realities faced by undocumented immigrant children in the South African school system.

This thesis also utilises materials from other jurisdictions for descriptive purposes and to address knowledge gaps, and the inclusion of foreign material is justified for several reasons. First, the *Constitution* recognises no geographical boundaries, making it relevant to consider legal perspectives from various jurisdictions. Second, the current South African legal system draws inspiration from foreign legal systems such as the

¹¹⁸ Hutchinson and Duncan 2012 *Deakin Law Review* 2; Gawas 2017 *Int J Law* 128.

¹¹⁹ In South Africa, the main superior courts are the different divisions of the High Court of South Africa, the Supreme Court of Appeal and the Constitutional Court - see sections 166-170 of the *Constitution*.

¹²⁰ Vibhute and Aynalem "Legal Research Methods" 17, 68.

USA.¹²¹ Section 39 of the *Constitution* explicitly acknowledges the relevance of foreign law. It is important to note that only sources that meaningfully contribute to the aims and objectives of the thesis were used, with no inclusion of irrelevant foreign concepts or inappropriate case law in the study.¹²² Noteworthy, this is not a comparative study.

1.7 Outline of the thesis

The remaining chapters of this thesis are framed as follows:

Chapter 2 The right to a basic education in international law

The second chapter examines the right to a basic education for undocumented immigrant children in international law by analysing international and regional instruments that are applicable to the protection of children and their right to a basic education, which, as pointed out earlier, usually means primary and secondary education under those instruments. This chapter also discusses the obligations of states under these instruments and introduces the human rights-based approach to respect, protect, promote, and fulfil the right to a basic education for undocumented immigrant children.

Chapter 3 The right to a basic education in South African law

The third chapter analyses the constitutional, statutory, and policy frameworks for the fulfilment of the right to a basic education in South Africa in general and for undocumented immigrant children in particular. It seeks to establish the applicable law and expose contradictions in regulation that result in the refusal of access to a basic education for undocumented immigrant children.

Chapter 4 Institutions promoting access to basic education

The fourth chapter examines state institutions and non-governmental organisations that are involved in respecting, promoting, protecting, and fulfilling the right to a basic

¹²¹ Davis 2003 *ICON* 187; Sarkin 1998 *Journal of Constitutional Law* 181.

¹²² In *Du Plessis v De Klerk* 1996 (5) BCLR 658 para 147, Kriegler was sceptical of comparative jurisprudence and refused to consider the position in the United States, Canada and Germany because he had "enough difficulty with our *Constitution* not to want to become embroiled in the intricacies" of foreign doctrine.

education for undocumented immigrant children. These include various administrative organs, from the national executive to school principals, the South African Human Rights Commission, the judiciary, school governing bodies, and non-governmental organisations. The litigation emanating from the functioning of these institutions and the results that they have achieved not only illustrate the hope for fulfilling the right to a basic education for undocumented immigrant children but also show that there are many barriers to the accessibility of basic education for these children.

Chapter 5 Obligations under international law and South Africa's response

The fifth chapter examines the rights to education, rights in education, and rights through education as part of the right to a (basic) education. The rights encompassed are quite extensive, and due to the limitations of the study, only some of these will be selected for analysis as the rights most pertinently at issue in fulfilling the right to a basic education for undocumented immigrants. The rights to be discussed include the best interests of the child principle, the right to name and nationality, the right to language, the right to free education, and the issue of deportation of undocumented immigrants. This chapter also highlights how courts have dealt with the rights mentioned above in specific disputes. This chapter will examine international law insofar as it facilitates each right and the response of South African laws and policies in facilitating the same rights.

Chapter 6 Barriers to access to basic education

In the sixth chapter, legal, policy, language, and funding barriers are examined, as well as formal compliance, assessments by human rights bodies, outcomes, and actual enjoyment in the practice of the right to a basic education for undocumented immigrant children. It also examines the extent to which South African law and practice, as found in the *Constitution*, legislation, policies, and circulars from education departments at the national and provincial levels, comply with international law in granting undocumented immigrant children the right to exercise and enjoy basic education. This is achieved by analysing the content of the laws, policies, and circulars against international standards and the reported practical experiences of undocumented immigrant children enrolled in public schools.

Chapter 7 Basic education for undocumented immigrant children in the USA

The seventh chapter discusses respect, protection, promotion, and fulfilment of the right to a basic education for undocumented immigrant children in the USA and the initiatives taken by the USA after the prominent case of *Plyler v Doe*, which guarantees the right to a basic education for all undocumented immigrant children. Since South Africa is not the only state that grapples with the challenges of providing basic education for undocumented immigrant children, an analysis of the USA approach will enhance the understanding of the challenges of providing access to a basic education for undocumented immigrant children, which will help South Africa learn from the approach of a country which has undertaken wide-ranging measures to guarantee the education rights of undocumented immigrant children.

Chapter 8

The last chapter concludes the study, presents the findings, and offers recommendations for legal and policy reform for respect, protection, promotion, and fulfilment of the right to a basic education for undocumented immigrant children in South Africa.

1.8 Conclusion

South Africa has experienced a large number of undocumented immigrant children for whom it has an obligation to provide access to a basic education. This obligation emanates from international law, the *Constitution*, and legislation. However, contradictions in education and immigration statutes and policies result in structural barriers that hinder undocumented children from exercising and enjoying their right to a basic education. The Chapter has highlighted that undocumented children comprises of accompanied, unaccompanied and separated immigrant children. The main challenges that these children face is being denied access to fundamental rights such as basic education due to lack of documentation. While the court has addressed and declared unconstitutional the denial of basic education to undocumented immigrants, discrimination against these children persists. Legislative amendments have been introduced, prompting this thesis to explore the extent to which South

African law respects, protects, promotes, and fulfils the right to a basic education for undocumented immigrants. The Chapter highlighted that the research aims to scrutinise how South African regulatory frameworks align with international law, the *Constitution*, and legislation concerning the right to basic education for undocumented immigrant children. The hypothesis guiding this discussion is that the right to basic education for these children remains unfulfilled in South Africa due to inconducive, exclusionary, and contradictory legal and policy frameworks governing access to public schools. This thesis contributes valuable insights to legal knowledge by examining the right to a basic education for undocumented immigrant children, drawing upon best practices from the USA framework as a reference point. A doctrinal research approach is used which include interpreting various legal resources. The next chapter discusses the international protection of the right to a basic education for undocumented immigrant children using principal instruments that guarantee civil, political, social, economic, and cultural rights.

Chapter 2 International Law and the Right to a Basic Education

2.1 Introduction

The right to a basic education within the context of international law is firmly rooted in various international instruments that recognise and affirm the significance of education as a fundamental human right. They provide a basis for addressing and advocating for the educational rights of vulnerable groups such as undocumented immigrant children, and serve as references for national legal systems when formulating policies and legislation related to education. Legal scholars, policymakers, and advocates often rely on these international instruments to shape discussions, legal frameworks, and practices aimed at ensuring the right to a basic education is respected, protected, and fulfilled on a global scale. Whereas the first chapter refers to the relevant instruments, this chapter delves deeper into their substantive content to examine specific instruments and the rights they guarantee for undocumented immigrant children in their quest to obtain basic education in South Africa.

The analysis of this Chapter begins with an examination of international law and regional law as a source of obligation in South Africa. This chapter seeks to illustrate how both hard and soft law instruments require South Africa to provide basic education for undocumented immigrant children. In this regard, various instruments are analysed as far as they impose direct obligations to provide children with basic education and proscribe different forms of conduct that impinge on access to basic education. In addition, the limitations of the right to a basic education in international law are examined to contextualise the limits of state obligations to provide basic education for undocumented immigrant children. The analysis of instruments is divided into general instruments that are directed at all states, regardless of their geographic location, and those solely directed at African states such as South Africa. This division affirms South Africa's obligations to provide undocumented immigrant children with access to basic education and to provide them with other rights and legal protections that make it possible for them to meaningfully access basic education. Then the chapter further discusses a human rights based approach can be used in safeguarding the rights of undocumented immigrant children. Enforcing a human

rights-centred approach to education for undocumented immigrant children entails that states are mandated to proactively undertake measures to actualise the rights vested in these children. Lastly, the chapter explores on how sustainable development imperatives can be used in enhancing the right to a basic for undocumented children. It is imperative at this point to firstly examine the context in which international law finds authoritative force in South Africa and analyse how international law regulates access to basic education.

2.2 International law as a source of obligations for South Africa

2.2.1 The relevance of and the role played by international law in South African law

To understand South Africa's obligations to provide a basic education for undocumented immigrant children, it is necessary to discuss international law as a source of law and its characteristics that make it a source of law in South Africa. In turn, this requires one to understand the meaning of international law and its sources. While there is no shortage of legal scholarship on the meaning of international law, its sources,¹ and its status as a genuine source of law,² it is necessary to briefly discuss them in this section for completeness. Generally understood, international law is the "normative body of rules and principles which are binding upon states in their relations with one another."³ To understand its sources, one must examine the authoritative sources that international courts apply. The Statute of the International Court of Justice (ICJ), for instance, states the following about the sources that the ICJ can apply:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

¹ See, for instance, Thirlway *The Sources of International Law*; Degan *Sources of International Law*.

² For contestations on whether international law is actually law, see D'Amato 1984 *Nw U L Rev* 1293.

³ Dugard and Du Plessis *Dugard's International Law* 1.

- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁴

International conventions, which states have ratified, bind not only because of their substantive content but also because of the *pacta sunt servanda* principle, which notes that states are bound by treaties that they ratified to the extent that they have not made any reservations about those treaties.⁵ In addition to treaties, South Africa's international law obligations also emanate from customary international law, which Dugard says is settled practice (*usus*) in international law and *opinion juris*, that is, the conviction by states that they are legally obliged to follow the practice concerned.⁶

The apartheid era sparked numerous discussions regarding the incorporation of international law into South Africa's domestic legal system.⁷ This period was characterised by numerous violations of international law.⁸ Slade's view provides a summary of the role of international law during the apartheid era as follows:

During the apartheid era, before the text of the 1993 Constitution and the constitutional principles were agreed to, international law was approached differently. Before the 1993 Constitution was enacted, international law played a secondary role in South African jurisprudence, since South African courts failed, ... 'to use the limited opportunities available to them to apply international human right norms'. With the enactment of the 1993 Constitution, the exclusion of any reference to international law in any previous constitutions was rectified by including provisions that call for an inclusive approach towards international law.⁹

However, international law has not been completely disregarded. Schaffer points out that South African courts recognised and applied international law in "politically neutral

⁴ Article 38(1) (a-d) of the *Statute of the ICJ* (1945).

⁵ For an analysis of this principle, see Wehberg 1959 *American Journal of International Law* 775-786; Lukashuk 1989 *American Journal of International Law* 513-518 and Kunz 1945 *American Journal of International Law* 180-197.

⁶ Dugard and Du Plessis *Dugard's International Law* 31-38.

⁷ Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* 20.

⁸ Olivier 2003 *Potchefstroom Electronic Law Journal* 26.

⁹ Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* 21.

matters," as evidenced by various court cases dating back to 1881.¹⁰ With the implementation of the *Interim Constitution*, international law began to assume a significant position within the broader South African legal framework, including in the realm of South African jurisprudence.¹¹ The current *Constitution* is recognised as the supreme law of the Republic of South Africa,¹² and it incorporates international law by means of clear provisions, as explained below. Both the *Interim Constitution* and final *Constitution* give international law a central place in the South African legal system.¹³

2.2.2 Status of international law in South Africa

The *Constitution* of South Africa is regarded internationally as an international law-friendly *Constitution*.¹⁴ The *Constitution* recognises the binding nature and importance of international law. Sections 231-233 of the *Constitution* recognise international law as a source of law in South Africa and set the parameters for its application. Section 231(2) stipulates that a treaty can only bind South Africa when both houses of Parliament (i.e., the National Assembly and the National Council of Provinces) have resolved to approve it.¹⁵ The *Constitution* further states that

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.¹⁶

Moreover, according to section 232, "customary international law is law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament."¹⁷ Customary law plays a role in the current context as compulsory and free primary education, and

¹⁰ Schaffer 1983 *International and Comparative Law Quarterly* 278: Some of the cases referred to by the author are the following: *Ncumata v Matwa* (1881-2) 2 E.D.C. 272; *Lemkuhl v Kock* 1903 T.S. 450; *Van Deventer v Hancke and Mossop* 1903 T.S. 401; *Olivier v Wessels* 1904 T.S. 235; *Mshwakezele v Guduza* (1901) 18 S.C. 167.

¹¹ Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* 21.

¹² Section 2 of the *Constitution*.

¹³ Section 4(1) of the *Interim Constitution of the Republic of South Africa Act* 200 of 1993.

¹⁴ Tladi 2016 *African Human Rights Law Journal* 310.

¹⁵ Section 231(2) of the *Constitution*.

¹⁶ Section 231(4) of the *Constitution*.

¹⁷ Section 232 of the *Constitution*.

the principle of non-discrimination in education may be said to form part of customary law.¹⁸ These rules are, therefore, part of the South African legal order, irrespective of the fact that they are also laid down in treaties ratified by South Africa. These rules benefit undocumented immigrant children.

At any rate, the non-discrimination principle in its negative dimension, as contained in documents such as the *ICESCR* article 13 (2)(a), (b) on the right to primary and secondary education read with article 2(2) on non-discrimination in the enjoyment of (Covenant rights), could be regarded as self-executing, that is, not requiring further legislative concretisation. This cannot be applied by a court of law. Clearly, there may be no (unjustified) discrimination against undocumented immigrant children in basic education. Section 231(4) is reinforced by section 231(5), which stipulates that all international treaties to which South Africa was a party before the *Constitution* came into effect are binding to South Africa. These include the *Convention on the Rights of the Child (CRC)*, which was ratified by South Africa on 16 June 1995.

Important aspects of international law on the right to education have not been clearly incorporated into South African law as will be discussed later in the thesis. This means that a court, in this regard, cannot "implement" international law as contained in article 13(2)(a) of the *ICESCR* (for instance on free primary education), as that provision is not, as such, part of South African law in accordance with section 231(4).¹⁹ The obligation of South African law is a watered-down provision.

Concerning the interpretation of the Bill of Rights, section 39(1)(b) of the *Constitution* provides that a court, tribunal, or forum must consider international law. This automatically means that any analysis of a right, such as the right to a basic education for undocumented immigrant children, must be undertaken with due regard to South Africa's obligations in international law. It is not immediately clear whether the reference to "forum" in section 39(1)(b) of the *Constitution* entails institutions like

¹⁸ Beiter *The Protection of the Right to Education by International Law* 8.

¹⁹ Section 231(1) of the *Constitution*.

Parliament or whether it only refers to judicial and quasi-judicial bodies that interpret the Bill of Rights. If the provision is construed to include "forums" like Parliament, which it is submitted it does, then it means that Parliament is also bound by international law.²⁰ The use of "must" imposes an obligation, not a discretion, on the courts to consider international law. Since international law in this section is understood to be composed of binding and non-binding sources,²¹ courts must consider customary international law, treaties, whether ratified or not, the general principles of law recognised by civilised nations, judicial decisions of international law forums such as the ICJ, the writings of prominent scholars in international law,²² and soft law documents. According to O'Shea, international law almost always forms part of the inquiry when interpreting the Bill of Rights.²³

In the case of *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*, the first to fourth *amici curiae*, including John Dugard as the first *amicus curiae*, put forward an argument regarding three distinct constitutional obligations within the South African *Constitution*.²⁴ These obligations, with varying degrees of strength, require an interpretation of domestic law in a manner consistent with international law. These were explained as follows:

First, s 233 imposes the strongest interpretive obligation on domestic courts, mandating that when interpreting any legislation, a court must adopt an interpretation of legislation that is consistent with international law over any inconsistent interpretation, as long as the interpretation is a "reasonable" one. Secondly, courts are subject to a weaker obligation that they must "consider" international law when interpreting the Bill of Rights. Finally, s 39(2) of the Constitution requires courts to promote the "spirit, purport, and object" of the Bill of Rights when interpreting any legislation or developing the common law. Though this

²⁰ See also, section 233 of the *Constitution*, which stipulates that courts must interpret legislation in ways that are consistent with international law, as opposed to interpretations that do not align with it.

²¹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

²² See Article 38 of the *Statute of the ICJ*, which lists the following sources of international law: treaties, general principles of law that civilised nations observe, judicial precedents, and academic writings by prominent scholars.

²³ O'Shea *International Law and the Bill of Rights* 7A-6.

²⁴ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) (hereafter *National Commissioner of SAPS v SAHRLC*) Written submissions of the first to the fourth *amici curiae* at para 14.

does not mention international law expressly, it has been held that determining the “spirit” of the Bill of Rights will often require consideration of international law, as many of the rights in the Bill were intentionally drawn from various international human rights instruments. These interpretive obligations have been used extensively by South African courts to give effect in domestic law even to provisions of international law that are not binding on South Africa and to untransformed treaty obligations.²⁵

After mandatorily considering international law on the right to a basic education for undocumented immigrant children, the courts *may* also consider foreign law, which is composed of the domestic constitutions and other legislation of foreign states, as well as their judicial pronouncements.²⁶

As the right to a basic education is found in the Bill of Rights,²⁷ international instruments and foreign laws that regulate the right to a basic education for undocumented immigrants are relevant to this thesis. This chapter examines the right to primary and secondary education in international law in order to provide a contextual analysis of South Africa's obligations to undocumented immigrant children. This chapter discusses international and regional human rights standards that require the right to a basic education for undocumented immigrant children to be respected, protected, promoted, and fulfilled.

South Africa ratified various international agreements (binding international laws in section 231). These also play an interpretative role in terms of section 39(1) and (b) of the *Constitution* mentioned above. Since this thesis examines the basic educational rights of undocumented immigrant children, instruments such as the *CRC* and *African Charter on the Rights and Welfare of the Child (ACRWC)*, which focus entirely on the protection of children, are relevant to the discussion. In this regard, the analysis includes an assessment of the rights extended to immigrants in the educational context. This makes instruments such as the *ICESCR* and UNESCO's *Convention against Discrimination in Education* relevant for exploration. This chapter examines these instruments to determine the content of education as a socio-economic and cultural right in international law and ascertain the scope of primary and secondary

²⁵ *National Commissioner of SAPS v SAHRLC* paras 15, 16 and 17 written submissions of the first to the fourth *amici curiae*.

²⁶ See Section 39(1)(c) of the *Constitution*.

²⁷ Section 29 (1)(a) of the *Constitution*.

education for undocumented immigrant children. These instruments are also necessary to ascertain the obligations of States Parties to undocumented immigrant children. After analysing these instruments, this chapter also sets out the elements of a human rights-based approach to education with reference to the situation of undocumented immigrant children in accessing basic education.

2.3 International instruments safeguarding the right to a basic education

2.3.1 The Universal Declaration of Human Rights

The *Universal Declaration of Human Rights*²⁸ was adopted by the General Assembly of the United Nations on 10 December 1948 to give content to human rights alluded to in the United Nations Charter. It recognises the right to education.²⁹ However, this is not binding because it is a resolution of the United Nations General Assembly. Notwithstanding, it has an effect in that it provides a framework for understanding all human rights instruments adopted by the United Nations.³⁰ Some scholars may question the value of declarations such as the Universal Declaration of Human Rights (*UDHR*) and other resolutions of the General Assembly.³¹ Van den Rul argues that the *UDHR* is one of the most influential resolutions because it contains principles and rights

²⁸ *Universal Declaration of Human Rights* (1948) (hereafter *UDHR*).

²⁹ Claude 2005 *IJHR* 39.

³⁰ OHCHR 2015 <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>.

³¹ Dolinger 2016 *IJLR* 199 posits that:

The Declaration was intended to protect individuals, but it does not deal with minorities or any kind of human collectivity that suffers under dictatorship or cruel regimes - where the real suffering of human beings is concentrated. Instead, the Declaration is nothing more than a mere declaration. It has no force of law and was a wasted effort.

Agbor 2020 *PELJ* 14 also opines that:

The UN Charter, in its Preamble, reaffirmed its "faith in fundamental human rights, in the dignity and worthy of the human person, in the equal rights of men and women and of nations large and small." However, the innate ineffectiveness of the *UDHR* would be reflected in the continued colonialism, during which the people in the said colonies were still consigned to the repressive, exclusive and brutal policies prescribed and implemented by people who had invaded them and without consent... in all fairness, one can argue that the contextual reality experienced by Africans was an unbridgeable distance from the aspirations of the *UDHR* and evidenced the inherent powerlessness of the *UDHR* itself.

that are based on human rights standards³² and are further enshrined in binding national constitutions and treaties.³³ Article 26 of the *UDHR* states the following regarding the right to education:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.³⁴

The *UDHR* encourages states to provide compulsory education to everyone and does not restrict it to their citizens. As such, undocumented immigrant children are included as persons protected by the *UDHR*.³⁵ Article 26(1) of the *UDHR* comprises various elements, including the right of every person to education and elementary education (formal schooling for children of primary school-age), which is free and compulsory.³⁶ Elementary education is not subject to progressive realisation. Hence, states cannot easily rely on the excuse of not fulfilling their obligations to realise elementary education due to the scarcity of resources.³⁷ On one hand, the obligation to provide elementary education is strict. On the other hand, secondary and higher education is subject to progressive realisation.³⁸

Article 26(2) of the *UDHR* sets out the aims of education. The reference to "full development of the human personality" covers physical, intellectual, spiritual,

³² Van den Rul 2016 *E-International Relations* 2.

³³ Van den Rul 2016 *E-International Relations* 2.

³⁴ Article 26 of the *UDHR*.

³⁵ Hathaway *The Rights of Refugees under International Law* 599.

³⁶ Coomans "The Right to Complain about Economic, Social and Cultural Rights" 53.

³⁷ Beiter *The Protection of the Right to Education by International Law* 92.

³⁸ Beiter *The Protection of the Right to Education by International Law* 92.

psychological and social development.³⁹ Therefore, the psychological and emotional aspects of undocumented immigrant children require special attention. The need for education to strengthen respect for human rights and fundamental freedom denotes the requirement for an education system that uplifts the dignity and integrity of each person.⁴⁰ The requirement for education systems that promote understanding, tolerance, and friendship among all nations, racial and religious groups denotes education that develops attitudes based on the recognition of the equality and interdependence of nations and peoples. This implies that education should also promote these values among groups within a state and that these values should prevail between citizens and undocumented non-citizens. Beiter noted that education should preserve peace and security by all means and that the content of education should preclude hostility among nations and groups.⁴¹

The *UDHR* provides that "parents have a prior right to choose the kind of education that shall be given to their children."⁴² This is essential to ensure that education upholds parents' expectations regarding their children's intellectual development. This also means that parents play a crucial role in the provision of education for children, even if they are not the primary beneficiaries of this article.⁴³ As unaccompanied immigrant children are on "their journey" without their parents, some attention may have to be given to what their parents would have desired for the education of their children to look like. This may relate to the aspects of philosophical, linguistic, or cultural education.

Article 2 of the *UDHR* is relevant to understanding the right to education. The non-discrimination clause states that no person should be discriminated against based on race, colour, sex, language, religion, political or other opinion, national or social origin,

³⁹ Arendse 2011 *PELJ* 108.

⁴⁰ Claude 2002 *IJHR* 40.

⁴¹ Beiter *The Protection of the Right to Education by International Law* 92.

⁴² Article 26(3) of the *UDHR*.

⁴³ Article 26(3) of the *UDHR*.

property, birth, or other status.⁴⁴ This extract denotes that every human being is entitled to equal treatment and, when read with article 26, requires that no one be discriminated against regarding access to education. This also means that the right to a basic education accrues to every person on equal terms, regardless of whether one is a citizen or non-citizen. When one reads articles 2 and 26 together, it is clear that states should adopt non-discriminatory legislation to achieve formal and material equality in exercising the right to education and all other rights.⁴⁵ They should also take other steps to realise the fundamental and equal enjoyment of the right to education.⁴⁶ This requires states to guarantee equal prospects and ensure equal treatment of all children, including undocumented immigrant children. Since the right to a basic education forms part of the *UDHR*, it means that the right to education must be considered one of the priorities in the conception of the United Nations Charter.

2.3.2 The International Covenant on Economic, Social and Cultural Rights

The *ICESCR* was adopted on 16 December 1966 because of the need to stimulate better standards of life, kindle social progress, and promote human rights to convert the economic, social, and cultural rights of the *UDHR* into legally binding obligations for states. Hence, the *ICESCR* was adopted to establish such commitments in binding law.⁴⁷ *ICESCR* creates legally binding obligations for States Parties.⁴⁸ In July 2020, 171 states ratified the *ICESCR*. This indicates that the *ICESCR* reflects a global consensus on universal human rights regarding economic, social, and cultural issues.⁴⁹ South Africa ratified the *ICESCR* in January 2015.⁵⁰ If South Africa does not affect the rules of *ICESCR*, the country violates international law.

⁴⁴ Article 2 of the *UDHR*.

⁴⁵ Beiter *The Protection of the Right to Education by International Law* 93.

⁴⁶ Beiter *The Protection of the Right to Education by International Law* 93.

⁴⁷ ESCR-NET 2015 <https://www.escr-net.org/resources/section-5-background-information-icescr>.

⁴⁸ ESCR-NET 2015 <https://www.escr-net.org/resources/section-5-background-information-icescr>.

⁴⁹ ESCR-NET 2015 <https://www.escr-net.org/resources/section-5-background-information-icescr>.

⁵⁰ ESCR-NET 2015 <https://www.escr-net.org/resources/section-5-background-information-icescr>.

Implementation of *ICESCR* is monitored by the Committee on Economic, Social, and Cultural Rights (CESCR). This is a body of independent experts.⁵¹ Article 16(1) of the *ICESCR* requires States Parties to submit reports on the measures taken and their progress in fulfilling obligations imposed by the *ICESCR*.⁵² Their reports are examined by the CESCR, which then comments on the degree of the realisation of the *ICESCR* rights by States Parties.⁵³ The CESCR also adopts General Comments, which are intended to define the provisions of the *ICESCR* and related topics to bring more clarity and certainty to their interpretation.⁵⁴

The Preamble of the *ICESCR* recognises that economic, social, and cultural rights derive from the "inherent dignity of the human person."⁵⁵ In this sense, the provision of quality education gives value and accords respect to an individual and the community at large. The *ICESCR* enshrines equality and non-discrimination in the enjoyment of all the rights it provides.⁵⁶ States Parties must respect, protect, promote, and fulfil economic, social, and cultural rights – the obligation to fulfil is usually progressive in nature, as emphasised by article 2(1) of the *ICESCR*.⁵⁷ However, the obligation to fulfil certain rights, such as the right to primary education under article 13(2)(a), is not subject to progressive realisation.⁵⁸ In articles 13 and 14, the *ICESCR* recognises the right to education, as discussed below.

2.3.2.1 Right to education

Article 13 of the *ICESCR* is the most crucial formulation of the right to education in any international instrument.⁵⁹ Therefore, it is necessary to discuss its substantive provisions. Although this thesis focuses on primary and secondary education, it is important to mention all levels of the right to education in the *ICESCR* to understand

⁵¹ OHCHR 2020 <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>.

⁵² Article 16(1) of the *ICESCR*.

⁵³ OHCHR 2020 <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>.

⁵⁴ OHCHR 2020 <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>.

⁵⁵ Preamble of the *ICESCR*.

⁵⁶ Articles 2(2) and (3) of the *ICESCR*.

⁵⁷ Article 2(1) of the *ICESCR*.

⁵⁸ *General Comment No. 13: The Right to Education* UN Doc E/C.12/1999/10 (1991) (hereafter CESCR "General Comment No. 13") para 51.

⁵⁹ Beiter *The Protection of the Right to Education by International Law* 341.

the significance of primary and secondary education in comparison to other educational levels. Article 13 of the *ICESCR* provides the following.

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States 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;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the

education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 13(1) of the *ICESCR* is comparable to article 26(2) of the *UDHR* in that it outlines the essential elements of acceptable education but adds to the aims of the *UDHR*. Education must, as said in the *UDHR*, aim to develop the human personality fully, which is the most important aim of education.⁶⁰ As human dignity is the basis of all human rights,⁶¹ the development of a sense of the dignity of human personality must be achieved through education. In this sense, education must make all human beings aware of their inherent worth and the rights to which they are entitled by virtue of their worth.⁶² Education must further enable all people to participate freely in society. This makes education the key to achieving various other human rights. For example, education enables one to get access to certain work, which may afford one the enjoyment of other socio-economic rights, such as access to healthcare, housing, and food.⁶³ Thus, education enables one to satisfy practical needs. Article 13 of the *ICESCR* further provides that States Parties agree to provide education that aims to ensure that individuals can actively engage in a society that values freedom and tolerance among nations, as well as among diverse racial and ethnic groups.⁶⁴ Additionally, it seeks to support the United Nations' endeavours to maintain global peace.⁶⁵

These aims are important for undocumented immigrant children because, like all people, they cannot meaningfully contribute to and participate in their societies in adulthood if they do not receive an education. They cannot secure good work opportunities and may never be in a position to contribute as professionals. For them, dignity may never be guaranteed, as they lack the relevant educational tools to live dignified lives in modern societies, which require some degree of education. Hence,

⁶⁰ CESCR "General Comment No. 13" para 4.

⁶¹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 328.

⁶² Flowers "Human Rights Here and Now" 5.

⁶³ Ilhan 2001 *Journal of Rural Development and Administration* 3.

⁶⁴ Article 13(1) of the *ICESCR*.

⁶⁵ Article 13(1) of the *ICESCR*.

denying education defeats the opportunity to overcome a difficult childhood. In addition, denying them education will contradict the *ICESCR*, which states that education shall be made available to all, regardless of their origins.⁶⁶

Article 13(2)(a) of the *ICESCR* directs parties to provide free and compulsory education, whereas article 13(2)(b) obliges them to provide secondary education and make it generally available and accessible to all.⁶⁷ Secondary education must be progressively free. Article 13(2) specifies obligations concerning the definitional qualities of the education system. The CESCR states that these should be understood with reference to the criteria of 4As; which are availability, accessibility, acceptability, and adaptability.⁶⁸ These 4As denote that, in all forms and at all levels, education should meet these standards.⁶⁹ The 4As are now discussed below:

2.3.2.2 Availability

The availability of education refers to the provision of functioning educational institutions and programmes.⁷⁰ The CESCR defines availability as follows:

Functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State Party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.⁷¹

Beiter explained that making education available means that schools, teachers, and teaching materials must be made available to all children.⁷² States Parties must fund public schools and ensure a free and high-quality education.⁷³ States Parties must

⁶⁶ CESCR "General Comment No. 13" para 6(b).

⁶⁷ Article 13(2) (a) and (b) of the *ICESCR*.

⁶⁸ Article 13(2) of the *ICESCR*; CESCR "General Comment No. 13" para 6.

⁶⁹ CESCR "General Comment No. 13" para 6.

⁷⁰ CESCR "General Comment No. 13" para 6 (a).

⁷¹ CESCR "General Comment No. 13" para 6(a).

⁷² Beiter *The Protection of the Right to Education by International Law* 485.

⁷³ Beiter *The Protection of the Right to Education by International Law* 485.

establish relevant and effective legislative and policy frameworks that provide adequate resources to enable the fulfilment of the right to education for all children. All children must be provided with access to schools and learning opportunities through appropriately qualified teachers and adequate school equipment.⁷⁴

2.3.2.3 Accessibility

Tomaševski submits that making education accessible means that educational institutions and programmes must be accessible to everyone without discrimination.⁷⁵ Hence, accessibility of educational institutions and programmes to every child without discrimination is important.⁷⁶ The CESCR states that education must be free from physical and financial obstacles and obstacles related to discrimination.

Educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State Party. Accessibility has three overlapping dimensions:

Non-discrimination accessibility - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds;

Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programme);

Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States Parties are required to progressively introduce free secondary and higher education.⁷⁷

The criterion of accessibility signifies that States Parties must eliminate obstacles that impede admission to educational institutions.⁷⁸ This interpretation creates a duty to safeguard undocumented immigrant children by giving them the same access to education as the children of citizens. This also means that schools should be within the reach of all the children. The physical inaccessibility of schools can serve as a

⁷⁴ CESCR "General Comment No. 13" para 50.

⁷⁵ Tomaševski *The Right to Education Primers* 3 27.

⁷⁶ CESCR "General Comment No. 13" para 6(b).

⁷⁷ CESCR "General Comment No. 13" para 6(b).

⁷⁸ Tomaševski *The Right to Education Primers* 3 27.

major barrier to exercising the right to education. Financial accessibility to education requires States Parties to provide free and compulsory primary education. Hence, the removal of school fees eliminates one of the most significant obstacles to the enjoyment of the right to education. Secondary education must be made progressively free, as fees may be an obstacle to the realisation of this right,⁷⁹ especially for the most vulnerable groups in society. Undocumented immigrant children experience financial hardship more intensely than ordinary citizens do. Special measures will, therefore, be required to help them cope with financial obstacles to education, which exist at the level of school fees but also beyond that, in the form of many other indirect costs, such as transportation, meals, accommodation, learning materials, school uniforms and so on.⁸⁰

2.3.2.4 Acceptability

The CESCR defines acceptability as follows:

The form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State.⁸¹

The acceptability of education denotes its form and substance, including its curricula and teaching methods. Hence, the acceptability of education means that the methods of instruction, content of textbooks, and conduct of teachers must respect human rights.⁸² This would also facilitate the development of immigrant children and aid their integration into school. It also enables them to grasp the concepts and principles of the subjects taught in schools. In this regard, special consideration should be given to immigrant children and their educational needs, particularly regarding instruction in

⁷⁹ Chenwi 2013 *De Jure* 744-746.

⁸⁰ Tomaševski 2006 *The State of the Right to Education Worldwide Free or Fee: 2006 Global Report* 4 and 158; *General Comment No. 11: Plans of Action for Primary Education (Art. 14)* UN Doc E/1992/23 (1999) (hereafter CESCR "General Comment No. 11") para 7.

⁸¹ CESCR "General Comment No. 13" para 6(c).

⁸² Beiter *The Protection of the Right to Education by International Law* 493.

the languages that they understand. Beiter posits that there is a misconception that education is an absolute good for the community irrespective of its quality.⁸³ He goes on to say that education can easily perpetuate human rights abuse.⁸⁴

The acceptability of education for undocumented immigrant children concerns quality, relevance, and cultural appropriateness. This means that education must be of sufficient quality to enable students to progress to higher levels of learning and obtain writing, reading, and reasoning skills to become self-sufficient members of society who can extract themselves from their situations of vulnerability. In terms of relevance, education must enable them to participate socio-economically in their new country. Culturally appropriate education for undocumented immigrant children may mean that the curricula must be sensitive to cultural differences and must foster diversity and inclusion without unnecessarily imposing the cultures of their host countries on them. This does not mean that children should not be taught the cultures of their host countries, but that the education provided must give room for the acceptance of cultural differences.⁸⁵

2.3.2.5 Adaptability

The adaptability of education to the changing needs of society and students is crucial.⁸⁶ The adaptability of education means that

Education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.⁸⁷

Hence, the adaptability of education entails that it must be flexible so that it can synchronise with the needs of a constantly changing society as a result of opposing pressures of globalisation and localisation.⁸⁸ This means, for instance, that educational systems should adapt to the needs of students and communities during global health emergencies such as COVID-19 by relying on distance learning instruments. Education

⁸³ Beiter *The Protection of the Right to Education by International Law* 493.

⁸⁴ Beiter *The Protection of the Right to Education by International Law* 493.

⁸⁵ Paterson "Religion and Culture in South African Schools" 246.

⁸⁶ CESCR "General Comment No. 13" para 6 (d).

⁸⁷ CESCR "General Comment No. 13" para 6(d).

⁸⁸ Tomaševski *The Right to Education Primers* 3 31.

must further adapt to accommodate the difficulties and hardships experienced by immigrant children. Undocumented immigrant children often come from diverse cultural backgrounds. Schools can adapt to this situation by implementing culturally responsive teaching methods. This approach involves recognising, understanding, and respecting students' cultural backgrounds. Teachers can incorporate diverse cultural perspectives into the curriculum, making learning more relatable and engaging for immigrant children.

2.3.2.6 Working with the 4A scheme

Wilson developed a legal framework to consider the 4-A scheme. He says that the terms *available* and *accessible* refer to the rights *to* education, whereas *acceptable* and *adaptable* refer to rights *in* education.⁸⁹ This thesis takes an interest in the acceptability and adaptability of education in South Africa mainly because, firstly, the accessibility element has, in a sense, been resolved by at least the courts, although barriers still persist, and secondly, because education is a hybrid right. It is not only a socio-economic right but also a civil and political right. Civil and political rights are strongly implied by the acceptability criteria. However, the reality for undocumented immigrant children, as will be seen in the sixth chapter of this thesis, is that while the "basics" of accessibility "may" have been resolved by case law, they still face many regulatory, policy and other barriers in enrolling in public schools and receiving education.

Article 13(2) of the *ICESCR* embodies the social aspects of the right to education. It must be read with article 2(1), which provides that the States Parties commit to taking measures, both individually and through international assistance and cooperation, including economic and technical support, "to the maximum extent of their available resources" towards "progressively" realising Covenant rights.⁹⁰ These measures aim

⁸⁹ *Human Rights: Promoting Gender Equality In and Through Education* background paper prepared for the Education for All Global Monitoring Report 2003/4 Gender and Education for All: The Leap to Equality [2004/ED/EFA/MRT/PI/78] 2.

⁹⁰ Article 13(2) and (1) of the *ICESCR*. Article 2(1) states that:

to gradually achieve the full realisation of the rights enshrined in this Covenant. The means to be employed include the adoption of legislative measures and other appropriate methods.⁹¹

In a nutshell, the *ICESCR* obligates States Parties to devote all available resources to make education available, accessible, acceptable, and adaptable. As such, States Parties cannot easily raise the defence of inadequate resources to fulfil the right to primary education. The *ICESCR* urges States Parties, if need be, to seek international assistance to fulfil the right to primary education.⁹² It also places the burden of proof on States Parties to ensure that the right to primary education is realised.⁹³ The progressive realisation requirement does not apply to primary education; it only applies to secondary education, whose provision is subject to available resources.⁹⁴ In this regard, the international sentiment is that secondary education should be compulsory in part (lower secondary education) and free immediately.⁹⁵

2.3.2.7 Right to primary education

Primary education entails "systematic instruction in fundamental knowledge, skills and competencies"⁹⁶ offered for children who first enter formal school and is mainly provided through instruction by a class teacher for any given class in a grade.⁹⁷ Hence, primary education offers children the basics of reading, writing and arithmetic. According to UNESCO's *International Standard Classification of Education*, primary education is categorised as International Standard Classification of Education (ISCED) level 1; it generally follows a customary or legally mandated age of entry between five

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

⁹¹ Article 13(2) and 2(1) of the *ICESCR*.

⁹² With regard to primary education, see CESCR "General Comment No. 11" para 9.

⁹³ CESCR "General Comment No. 11" para 9.

⁹⁴ Article 13(2) of the *ICESCR*.

⁹⁵ See Sheppard 2022 *Nordic Journal of Human Rights* 103-105 for a discussion in this context.

⁹⁶ *UNESCO ISCED* para 30.

⁹⁷ *UNESCO ISCED* para 30.

and seven years of age.⁹⁸ It encompasses a period of approximately six years, although the duration can vary from four to seven years. Typically, primary education continues until children reach the age of 10–12 years.⁹⁹

Article 13(2)(a) of the *ICESCR* provides compulsory and free primary education for all children.¹⁰⁰ Primary education, like all forms of education, must satisfy the elements of availability, accessibility, acceptability and adaptability. A proper interpretation of the term primary education and the scope of basic education is found in the *World Declaration on Education for All*, which stipulates that primary schooling serves as the primary mechanism for providing basic education to children beyond the scope of their families.¹⁰¹ It is crucial for primary education to be universally accessible; address the fundamental learning requirements of all children; and consider the culture, needs, and opportunities within the community.¹⁰²

The Declaration states that these basic needs comprise:

Essential learning tools (such as literacy, oral, expression, numeracy, and problem solving) and the basic learning needs content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop, to improve the quality of their lives, to make informed decisions and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and inevitably, changes with the passage of time.¹⁰³

Article 13(2)(a) of the *ICESCR* is similar to the provisions of the *UDHR* on elementary education in that primary education must be compulsory and free for all children. The requirement that primary education be compulsory implies that it must be *generally* available to all children; otherwise, it cannot be made compulsory.¹⁰⁴ This highlights the fact that parents, guardians and States Parties are not entitled to treat access to primary education as optional.¹⁰⁵ Primary education can only be made compulsory if there are sufficient schools to admit all pupils and if there are no barriers to the

⁹⁸ *UNESCO ISCED* para 122.

⁹⁹ *UNESCO ISCED* para 122.

¹⁰⁰ Article 13(2)(a) of the *ICESCR*.

¹⁰¹ Article 5 of the *World Declaration on Education*.

¹⁰² Article 5 of the *World Declaration on Education*.

¹⁰³ Article 1(1) of the *World Declaration on Education*.

¹⁰⁴ Beiter *The Protection of the Right to Education by International Law* 485.

¹⁰⁵ CESCR "General Comment No. 11" para 6.

admission of children to schools (such as fees). Denying children access to schools based on their undocumented status violates the obligation to make education compulsory for all children.

Payment of school fees is an obstacle to the accessibility of primary education. Hence, making primary education free means that it must be *generally* accessible to all children.¹⁰⁶ The formulation of this right seeks to ensure that primary education is available to all children without charges to the children concerned and their parents and guardians.¹⁰⁷ Abolishing school fees eliminates one of the most serious obstacles to the admission of children to school.¹⁰⁸ The CESCR notes that school fees imposed by national governments, local authorities, and schools constitute direct costs that disincentivise the enjoyment of the right to primary education and may actually jeopardise its realisation for poor children.¹⁰⁹

The CESCR highlights that the importance of recognising the right to education includes not only the provision of free primary education but also the indirect costs associated with education.¹¹⁰ Indirect costs, such as transport, meals, accommodation, learning materials, and school uniforms, can create barriers to accessing education, particularly for vulnerable groups,¹¹¹ such as unaccompanied and separated immigrant children. In such circumstances, States are encouraged to bear these costs to ensure that the right to a basic education is realised and everyone enjoys it.¹¹² When relating this to undocumented immigrant children, who often face unique challenges and vulnerabilities, it is especially important to consider these indirect costs. Undocumented children may lack the means to commute to school, especially if they reside in temporary or uncertain living situations. States should consider providing transportation assistance to ensure that these children attend school. Adequate

¹⁰⁶ Beiter *The Protection of the Right to Education by International Law* 485.

¹⁰⁷ CESCR "General Comment No. 11" para 7.

¹⁰⁸ Beiter *The Protection of the Right to Education by International Law* 485.

¹⁰⁹ CESCR "General Comment No. 11" para 7.

¹¹⁰ CESCR "General Comment No. 11" para 7.

¹¹¹ UNESCO "Enforcing the Right to Education of Refugees: A Policy Perspective" 8, 56.

¹¹² UNESCO "Enforcing the Right to Education of Refugees: A Policy Perspective" 8, 56.

nutrition is crucial for a child's ability to learn, and ensuring access to school meals or nutritional support is essential for their overall well-being and educational success.¹¹³ In some cases, unaccompanied immigrant children may not have stable housing arrangements. States may need to explore options for temporary or stable accommodation to ensure that these children have safe and conducive environments which foster their learning needs.¹¹⁴

Therefore, education can only be made compulsory if it is free. Many children whose parents cannot afford education are more vulnerable to impediments created by poverty in their ability to attend school. Compelling children to attend school when their parents cannot afford the costs of education does not make sense. Therefore, States Parties must emphasise that education needs to be adequate in quality and relevant to children and must promote the realisation of children's rights.¹¹⁵ For undocumented immigrant children, this means that primary education must be free. Moreover, primary education must be relevant to them; relevance is more related to education being useful in the future, notably to earn income.

2.3.2.8 Right to secondary education

The content of secondary education varies among States Parties but may be understood to include the completion of basic education and the consolidation of the foundations of knowledge for lifelong learning and human development.¹¹⁶ Primary education involves transitioning children from the basics of reading and writing to subject-oriented instruction.¹¹⁷ In secondary school, children first encounter standalone subjects such as geography, history, science, and others. Essentially, secondary education prepares students for vocational and higher educational

¹¹³ Chirwa *Child Poverty and Children's Rights of Access to Food and Basic Nutrition in South Africa: A Contextual, Jurisprudential and Policy Analysis* 1.

¹¹⁴ UNICEF and Habitat for Humanity "Children, Cities and Housing: Rights and Priorities" 6-24.

¹¹⁵ Tomaševski *The Right to Education Primers* 3 31.

¹¹⁶ International Organization for Migration "Human Rights of Migrant Children" 250.

¹¹⁷ *UNESCO ISCED* para 33.

opportunities.¹¹⁸ Article 13(2)(b) of the *ICESCR* applies to secondary education in all its various forms. It requires flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings.¹¹⁹ Therefore, secondary education must be acceptable. The *International Standard Classification of Education* classifies secondary education into two categories: lower and upper. ISCED Level 2 corresponds to lower secondary education, which is compulsory, and it follows 8–11 years of education from the start of ISCED Level 1.¹²⁰ The most common cumulative duration for lower secondary education is nine years. At the completion of ISCED Level 2, students are typically between the ages of 14 and 16.¹²¹ ISCED Level 3, known as upper secondary education, commences after 8–11 years of education from the start of ISCED Level 1.¹²² Students typically enter this level between the ages of 14 and 16. Upper secondary education programmes at ISCED Level 3 generally conclude 12 or 13 years after the beginning of ISCED Level 1, which typically aligns with the age of 17 or 18 years.¹²³

The *ICESCR* provides that States Parties must take all possible steps within their available resources to make secondary education generally available and accessible to all. This entails progressively realising access to secondary education, thus making it free for all children.¹²⁴ The phrase "generally available" signifies that secondary education is not dependent on the capacity and ability of individual children. It also means that secondary education should be distributed throughout the territories of States Parties in ways that make it available on the same basis for all children.¹²⁵ The phrase "every appropriate" reinforces the point that States Parties should adopt varied and innovative approaches to the delivery of secondary education in different social

¹¹⁸ International Organization for Migration "Human Rights of Migrant Children" 250.

¹¹⁹ International Organization for Migration "Human Rights of Migrant Children" 250.

¹²⁰ *UNESCO ISCED* para 146-148.

¹²¹ *UNESCO ISCED* para 146-148.

¹²² *UNESCO ISCED* para 164.

¹²³ *UNESCO ISCED* para 164

¹²⁴ Article 13 (2)(b) of the *ICESCR*; CESCR "General Comment No. 13" para 11-14.

¹²⁵ International Organization for Migration "Human Rights of Migrant Children" 250.

and cultural contexts.¹²⁶ Again, this emphasises the adaptability criterion of education, especially when it comes to designing secondary education for immigrant children, considering their special educational needs. The progressive introduction of free education entails that although States Parties must prioritise the provision of free primary education and immediately realise it, they must work towards free secondary education.¹²⁷ However, within the context of South Africa, basic education encompasses both primary and secondary education, necessitating that this educational phase be provided free of charge for all children.

2.3.2.9 Plan of action for primary education

The duty of the States Parties concerning primary education is also found in the stipulation in article 14 of the ICESCR:

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.¹²⁸

Article 14 of the *ICESCR* guides state action on the realisation of compulsory and free primary education. Compared to other parts of article 13(2), the legal obligation contained in article 13(2)(a) is more pressing, as it calls for the immediate realisation of the right to primary education. There is an unequivocal obligation on States Parties to realise the right to primary education. In line with the clear and unequivocal obligation under article 14, States Parties must present their plans of action for the immediate realisation of the right to primary education.¹²⁹ They must set targets within reasonable periods and provide fixed timeframes for their proposed plans.¹³⁰ This means that their plans must set out a series of targeted implementation dates for each

¹²⁶ International Organization for Migration "Human Rights of Migrant Children" 250.

¹²⁷ CESCR "General Comment No. 13" para 14; International Organization for Migration "Human Rights of Migrant Children" 250.

¹²⁸ Article 14 of the *ICESCR*.

¹²⁹ CESCR "General Comment No. 13" para 3.

¹³⁰ Article 14 of the *ICESCR*.

stage of the implementation of primary education within a limited period. This highlights the importance of the obligation to realise the right to primary education immediately.¹³¹

The CESCR explains the importance of plans of action prepared by States Parties to the *ICESCR*.¹³² These plans of action provide more certainty and assurance that primary education will be made compulsory, free of charge and available and accessible to every child without discrimination. The lack of educational opportunities for children often reinforces their subjection to various human rights violations such as forced labour. At times, this leads to poverty, which deprives them of good health. For girls, this can lead to marriage and sexual exploitation.¹³³ Many children have no access to primary education due to their undocumented status.¹³⁴ Hence, it is crucial for States Parties to adopt and submit plans of action to the CESCR on how they intend to make primary education available, compulsory, and free for all children, including undocumented immigrants.¹³⁵

2.3.2.10 Non-discrimination

The *ICESCR* provides that the parties to this Covenant commit to ensuring that the rights outlined within it are exercised without any form of discrimination, including on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or any other status.¹³⁶ The prohibition against discrimination in this provision is not subject to progressive realisation and the availability of resources in its negative and positive dimensions, at least as far as taking steps and the adoption of plans and policies is concerned. This applies fully and immediately to all aspects of education. It also encompasses all the internationally

¹³¹ CESCR "General Comment No. 13" para 3.

¹³² CESCR "General Comment No. 13" para 4.

¹³³ CESCR "General Comment No. 13" para 4.

¹³⁴ Human Rights Watch 2020 <https://www.hrw.org/news/2010/09/09/undocumented-migrant-childrens-right-education>.

¹³⁵ CESCR "General Comment No. 13" para 10.

¹³⁶ Article 2(2) of the *ICESCR*.

prohibited grounds for discrimination.¹³⁷ The CESCR interprets articles 2(2) and (3) of the *ICESCR* in light of other international instruments, such as the *UNESCO Convention against Discrimination in Education*¹³⁸ and the *CRC*.¹³⁹ However, the immediate realisation of the right to non-discrimination in the *ICESCR* cannot generally apply to static or systematic discrimination. Thus, there is a need for progressive realisation in terms of article 2(1) of the *ICESCR*.¹⁴⁰ Hence, rectifying the systemic unequal access to full socio-economic amenities for undocumented immigrant children, which impacts their basic education, may legitimately take more time.

The CESCR confirms that article 3(e) of the *Convention against Discrimination in Education*¹⁴¹ enshrines the principle of non-discrimination that extends to all school-age children residing in the territories of States Parties, including undocumented immigrant children.¹⁴² Disparities in spending policies that result in differing qualities of education for children residing in different geographic locations constitute discrimination under *ICESCR*.¹⁴³ To eliminate inequalities in access to education among undocumented immigrant children, States Parties must adopt special measures that address direct and indirect discrimination, legal and factual discrimination, and active and static discrimination.¹⁴⁴ Educational data should be disaggregated by prohibited grounds of discrimination.¹⁴⁵ The CESCR has recently further confirmed that all children, including undocumented children, have the right to receive education, in

¹³⁷ CESCR "General Comment No. 11") para 31.

¹³⁸ *UNESCO Convention against Discrimination in Education*.

¹³⁹ CESCR "General Comment No. 11" para 31.

¹⁴⁰ Beiter *The Protection of the Right to Education by International Law* 245. For an analysis of the different forms of discrimination, see Boddie "The Muddled Distinction Between De Jure and De Facto Segregation" 253–274.

¹⁴¹ Article 3(e) of the *UNESCO Convention against Discrimination in Education*.

¹⁴² CESCR "General Comment No. 13" para 34; Article 3(e) of the *UNESCO Convention against Discrimination in Education* provides:

In order to eliminate and prevent discrimination within the meaning of this Convention, the States parties thereto undertake, to give foreign nationals resident within their territory the same access to education as that given to their own nationals.

¹⁴³ CESCR "General Comment No. 13" para 35.

¹⁴⁴ CESCR "General Comment No. 13" para 36.

¹⁴⁵ CESCR "General Comment No. 13" para 37.

another General Comment addressing the topic of non-discrimination in relation to all Covenant rights.¹⁴⁶ Therefore, States Parties must ensure that the right to education is available to all children without discrimination.

2.3.2.11 Limitation of rights

The *ICESCR* identifies an exception to the general rule of equal and universal access to socio-economic rights by stating that developing countries, with due regard to human rights and their national economy, may determine the extent to which they would guarantee the economic rights recognised in the present Covenant to non-nationals.¹⁴⁷

This provision must be construed narrowly. It may apply only on developing countries, including South Africa and only applicable to economic rights. Therefore, States Parties may not treat citizens and non-citizens differently with respect to social and cultural rights. However, there is no universal understanding of economic rights.¹⁴⁸ While the right to primary and secondary education can be seen as such, it may also be considered a social and cultural right. The CESCR states that while some classify the right to education as an economic right, others see it as a social and cultural right. In fact, it is all three of these rights.¹⁴⁹ This interpretation makes it difficult to limit and deny access to primary and secondary education to undocumented immigrant children under article 2(3) of the *ICESCR*. In this regard, Meyer-Bisch opines that while the right to education is a mixed right, it is substantially a cultural right. He considers cultural rights as cross-sectoral rights and states the following.

Cultural rights are either economic and social rights in that they "necessitate State support, in the form of schooling programmes, cultural equipment and easy access to the 'benefits of culture' for the underprivileged", or civil and political rights in that they "constitute a claim on the State to the extent that

¹⁴⁶ *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/20 (2009) (hereafter CESCR "General Comment 20") para 30.

¹⁴⁷ Article 2(3) of the *ICESCR*.

¹⁴⁸ Eide and Rosas "Economic, Social and Cultural Rights" 3-9.

¹⁴⁹ CESCR "General Comment No. 11" para 2.

they signify that the latter cannot interfere with the cultural expression of the individuals and groups that make up the nation.¹⁵⁰

The right to education, like all rights in the *ICESCR*, is subject to potential limitations under article 4 of the *ICESCR*, which provides the following:

The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting general welfare in a democratic society.¹⁵¹

This provision lays down parameters for permissible limitations. Firstly, it shows that rights may only be limited by law. Secondly, it illustrates that such limitations must be compatible with the nature of the right to be limited. One could argue that non-discrimination is a part of the nature or essence of a right.¹⁵² Thirdly, the sole purpose of limiting rights must be to promote general welfare in a democratic society. Article 4 opens a grey area with regard to undocumented immigrant children, as States Parties might use these criteria to deny access to basic education on the pretext that resources are limited. This will be addressed in the subsequent sections of this thesis.¹⁵³

2.3.2.11.1 South Africa's reservation in respect of Articles 13(2)(a) and 14 of the ICESCR

On accession to the *ICESCR* in 2015, the South African government entered a reservation with respect to articles 13(2)(a) and 14 of the Covenant.¹⁵⁴ In this regard,

¹⁵⁰ Beiter *The Protection of the Right to Education by International Law* 42.

¹⁵¹ Article 4 of the *ICESCR*.

¹⁵² See Beiter *The Protection of the Right to Education by International Law* 101-102.

¹⁵³ See Chapter 3 of this thesis.

¹⁵⁴ Article 13 (2) (a) of the *ICESCR* provides that:

The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all. Article 14 provides that, each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable

the qualification provides that "the Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in article 13(2)(a) and article 14, within the framework of its National Education Policy and available resources."¹⁵⁵ This approach seeks to legitimise the gradual fulfilment of the right over time, including the right to a basic education.¹⁵⁶

The study in this regard opines that an assertion that acknowledges the need to fulfil the right to a basic education within available resources serves as an endeavour to qualify the unqualified nature of this right, as provided in section 29(1)(a) of the *Constitution*. The South African Constitutional Court confirmed the absolute nature of this right in the case of *Juma Masjid Primary School*.¹⁵⁷ There is no internal limitation in section 29(1)(a), which requires that the right be progressively realised within available resources. The right to a basic education is unqualified.¹⁵⁸ The obligation to provide basic education is immediately realisable.¹⁵⁹ The Declaration made by the South African government to qualify this right is, therefore, a deliberate attempt to insert "progressive realisation" and "available resources" qualifications into section 29(1)(a) of the *Constitution*. It is these same qualifications that the Constitutional Court has expressly rejected in its binding interpretation of the right to a basic education in the *Constitution*.¹⁶⁰ In the case of undocumented immigrant children, South Africa remains bound by its international human rights obligations to safeguard their right to education, as outlined in various instruments such as the *CRC*, *ACRWC*, and other relevant treaties.

number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

¹⁵⁵ United Nations "International Covenant on Economic, Social and Cultural Rights-South Africa: Declaration"1.

¹⁵⁶ United Nations "International Covenant on Economic, Social and Cultural Rights-South Africa: Declaration"1.

¹⁵⁷ *Juma Masjid Primary School* para 37.

¹⁵⁸ Nanima and Durojaye 2019 *Law Democracy and Development* 276.

¹⁵⁹ Nanima and Durojaye 2019 *Law Democracy and Development* 276.

¹⁶⁰ *Juma Masjid Primary School* para 37.

Additionally, the *Constitution* guarantees the right to a basic education for all children regardless of their immigration status.¹⁶¹ While reservation allows for the progressive realisation of the right to education, it does not absolve the government from ensuring that all children, including undocumented immigrant children, have access to basic education. The government should strive to provide inclusive and non-discriminatory educational policies and practices that address the specific needs and vulnerabilities of undocumented immigrant children. Under article 19(c) of the Vienna Convention on the Law of Treaties of 1969, a reservation to a treaty may not be contrary to its object and purpose.¹⁶² The reservation made by South Africa impinges on what the CESCR describes as a minimum core obligation. In General Comment No. 13, the CESCR considers immediate free and compulsory primary education as a core obligation.¹⁶³ A reservation that impinges on a core obligation is submitted here, contrary to the objective and purpose of the *ICESCR*, which seeks to guarantee at least a minimum of rights at any point in time.

2.3.2.12 Summary of obligations under the ICESCR

While article 2(1) of the *ICESCR* provides for the progressive realisation of rights and acknowledges the constraints emanating from limitations in the availability of resources, it also imposes immediate obligations on States Parties in relation to the right to education.¹⁶⁴ It requires them to guarantee the exercise of this right by all the children in their territories without discrimination. It also obliges them to "take steps" towards the full realisation of article 13.¹⁶⁵ Such steps must be "deliberate, concrete and targeted"¹⁶⁶ towards the full realisation of the right to education. However, the obligations of States Parties regarding primary, secondary and higher education are different. The wording of article 13(2) shows that States Parties must prioritise and

¹⁶¹ Section 29(1) (a) of the *Constitution*.

¹⁶² Article 19(3) of the *Vienna Convention on the Law of Treaties* (1969).

¹⁶³ CESCR "General Comment No. 13" para 51 and 57.

¹⁶⁴ CESCR "General Comment No. 13"; Beiter *The Protection of the Right to Education by International Law* para 43.

¹⁶⁵ CESCR "General Comment No. 13" para 43; Article 2(1)(2) of the *ICESCR*.

¹⁶⁶ CESCR "General Comment No. 13" para 43.

immediately realise the introduction of compulsory and free primary education.¹⁶⁷ In contrast, articles 13(2)(b)–(c) require States Parties to progressively realise secondary and higher education.¹⁶⁸

2.3.2.13 The obligation to respect, protect, promote and fulfil

The right to education, like all human rights, imposes three levels of obligations on States Parties: the obligations to respect, protect, and fulfil. The obligation to fulfil incorporates duties to facilitate, provide, and promote.¹⁶⁹

The obligation to *respect* requires States Parties to refrain from enacting any laws or adopting policies that deny children their right to education or that would jeopardise the choices and freedoms of individuals.¹⁷⁰ Hence, respecting the right to education means avoiding interference with the enjoyment of the right.¹⁷¹ States Parties must thus avoid actions that prevent undocumented immigrant children from accessing basic education. For example, criminalising the admission of undocumented children to schools would result in conduct that is prohibited. They must also protect the personal information of undocumented immigrant children against disclosure to state agencies, which may jeopardise the children and their families. For instance, it would be against the objectives of the *ICESCR* for schools to be the source through which undocumented children and their families can be reported to immigration authorities for deportation. This will make schools unsafe places for undocumented immigrant children.

The obligation to *protect* is positive and refers to the duty of States Parties to take measures to protect individuals against threats to their rights by private actors.¹⁷² This entails adopting legislation and regulations that protect undocumented immigrant children against interference with their right to access basic education by, for instance, teachers, other children, parents, and employers (in child labour cases).¹⁷³ Hence,

¹⁶⁷ Article 13(2) of the *ICESCR*; CESCR "General Comment No. 13" para 48.

¹⁶⁸ CESCR "General Comment No. 13" para 48.

¹⁶⁹ CESCR "General Comment No. 13" para 43.

¹⁷⁰ Olowu *An Integrative Right-based Approach on Human Development in Africa* 28.

¹⁷¹ Olowu *An Integrative Right-based Approach on Human Development in Africa* 28.

¹⁷² Beiter *The Protection of the Right to Education by International Law* 73.

¹⁷³ Beiter *The Protection of the Right to Education by International Law* 73.

undocumented immigrant children are particularly vulnerable to exploitation through child labour, as employers know that they will not complain about working conditions for the risk of being reported to the authorities. Such child labour prevents these children from attending school.

The obligation to *fulfil* requires States Parties to take active steps to realise fundamental human rights.¹⁷⁴ This obliges States Parties to facilitate the right to education by establishing an appropriate legislative and policy framework that enables migrant communities to ensure education of children belonging to such communities.¹⁷⁵ An example would be to facilitate community schools in which immigrant communities have a large scope to design education for their children. School governing bodies can provide compulsory representation of migrant communities on such bodies. The obligation to fulfil also entails *providing* funding for everyone.¹⁷⁶ This obligation is usually progressive in nature, but, as seen, it is immediate for compulsory and free primary education. The obligation to *promote* the right to education entails, *inter alia*, awareness campaigns on the plight of immigrant children and their need for education. Such campaigns can sensitise society to the plight of undocumented children and draw sympathy and acceptance from other members of society, thereby reducing instances of unconscious and deliberate exclusion, as well as physical attacks by other learners.

States Parties have "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of each of the rights enunciated in the Covenant, including "the most basic forms of education."¹⁷⁷ In the context of article 13, this core includes an obligation that guarantees access to public educational institutions and programmes without discrimination, ensuring education aligns with the goals stated in article 13(1), providing primary education for all as outlined in article 13(2)(a), and

¹⁷⁴ Olowu *An Integrative Right-based Approach on Human Development in Africa* 29.

¹⁷⁵ CESCR "General Comment No. 13" para 47.

¹⁷⁶ Arendse 2011 *PELJ* 103.

¹⁷⁷ *General Comment No. 3: The Nature of States Parties' Obligations (Art.2, Para. 1, of the Covenant)* UN Doc E/1991/23 (1990) (hereafter CESCR "General Comment No. 3") para 10.

safeguarding the freedom of individuals to choose their education without interference from the state.¹⁷⁸

The *ICESCR* imposes several immediate obligations that also apply for the benefit of individuals who are part of a large group of refugees or migrants who suddenly fall under the jurisdiction of States Parties.¹⁷⁹ The requirement to guarantee all rights without discrimination imposes an immediate obligation on States Parties to adopt measures that protect these vulnerable groups from discrimination.¹⁸⁰ Distinctions, exclusions, restrictions, preferences, or other differential treatments based on nationality or legal status should only apply in terms of the law and be pursued for legitimate aims, such as national security and public order. In addition, they should be proportionate to the aims pursued.¹⁸¹ The difference in treatment that does not satisfy such conditions should be seen as unlawful discrimination prohibited under article 2(2) of the *ICESCR*.¹⁸²

Protection from discrimination is not conditional on the status of an individual in the host country. Nationality should not bar access to most rights under the *ICESCR*. All children, including undocumented immigrants, have the right to receive education and access adequate food and affordable health care.¹⁸³ Access to education is necessary to integrate children into the host country. This reduces the dependence of refugees and migrants on public and private charity.¹⁸⁴ States Parties to the *ICESCR* should accommodate refugees and other migrants according to their available resources. As such, they are not justified in restricting the enjoyment of the essential content of the rights accorded by the Covenant based on a lack of resources, even when confronted

¹⁷⁸ CESCR "General Comment No. 13" para 57.

¹⁷⁹ *Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights* UN Doc E/C.12/2017/1 (2017) (hereafter CESCR "Duties of States Towards Refugees and Migrants") para 4.

¹⁸⁰ CESCR "Duties of States Towards Refugees and Migrants" para 5.

¹⁸¹ CESCR "Duties of States Towards Refugees and Migrants" para 5.

¹⁸² CESCR "Duties of States Towards Refugees and Migrants" para 6.

¹⁸³ CESCR "Duties of States Towards Refugees and Migrants" para 6.

¹⁸⁴ CESCR "Duties of States Towards Refugees and Migrants" para 6.

with sudden and significant flows of refugees and other migrants.¹⁸⁵ Basic education forms part of the minimum core content, making it "non-derogable" even in situations of emergency and resource unavailability.¹⁸⁶

The enjoyment of the rights granted by the *ICESCR* should not depend on the legal status of the concerned person.¹⁸⁷ However, undocumented migrant children face challenges, such as denial of access to schools and emergency medical treatment.¹⁸⁸ This is unacceptable. Hence, States Parties should allow undocumented immigrant children to enjoy their economic, social, and cultural rights without discrimination.¹⁸⁹ Although States Parties may order some immigrants to leave their territories, their presence imposes certain obligations until the immigrants have exited their jurisdictions.¹⁹⁰ The state must also put in place mechanisms to protect them from exclusions and other prejudices that restrict access to education. One may also argue that since deportation disrupts education, the state must put in place control mechanisms to ensure that undocumented immigrant children are not unnecessarily deported in such a way that will disrupt their education at critical moments, such as when they are writing primary and secondary school examinations. While deportation should ideally be the last resort, the duty to provide basic education also entails that the state put in place mechanisms that could lay down specific circumstances in which illegal immigrants could stay (for some time) or acquire the right to stay.

States Parties must provide CESCR with sufficient information on the extent to which refugees, asylum seekers, and undocumented immigrants enjoy the rights accorded by *ICESCR*.¹⁹¹ Hence, States Parties must collect such data to enable the CESCR to assess the extent to which they comply with their obligations.¹⁹² The collection of such

¹⁸⁵ CESCR "Duties of States Towards Refugees and Migrants" para 10.

¹⁸⁶ CESCR "Duties of States Towards Refugees and Migrants" para 10.

¹⁸⁷ CESCR "Duties of States Towards Refugees and Migrants" para 11.

¹⁸⁸ CESCR "Duties of States Towards Refugees and Migrants" para 12.

¹⁸⁹ CESCR "Duties of States Towards Refugees and Migrants" para 12.

¹⁹⁰ CESCR "Duties of States Towards Refugees and Migrants" para 12.

¹⁹¹ CESCR "Duties of States Towards Refugees and Migrants" para 17.

¹⁹² CESCR "Duties of States Towards Refugees and Migrants" para 17.

data can significantly contribute to the adoption and implementation of policies aimed at improving undocumented immigrants' access to education.¹⁹³ The application of the normative principles outlined in paragraphs 6 and 7 to the general and specific obligations of States Parties in paragraphs 8 to 10 initiates a dynamic process that enables the identification of violations pertaining to the right to education.¹⁹⁴

Violations of *ICESCR* occur in many respects, including in cases involving the right to a basic education of undocumented immigrant children. Violations take the form of negative conduct (omissions) or positive conduct (commission of certain acts). An omission occurs when a State Party deliberately chooses not to take the steps required by the *ICESCR*. Commissions occur through direct action that infringes on the rights of undocumented immigrant children, contrary to the stipulations of the *ICESCR*.¹⁹⁵ Examples of violations of the *ICESCR* include the introduction of discriminatory legislation, failure to repeal legislation that discriminates against undocumented immigrants, and failure to address issues that perpetuate the discrimination and deprivation of undocumented children of their educational freedoms. Also, violations occur when States Parties fail to prioritise basic education and make it (certainly primary education) compulsory, available, free and generally accessible to all children, including undocumented immigrant children.¹⁹⁶

2.3.3 International Covenant on Civil and Political Rights

It has been noted above that the right to education is not just a socio-economic and cultural right but also a civil and political right. Therefore, the provisions of the *International Covenant on Civil and Political Rights*¹⁹⁷ are important. This instrument has an identical history to the *ICESCR*, and, together with the latter, could be seen as the first attempt to codify human rights in line with the Charter of the United Nations and the *UDHR*.¹⁹⁸

¹⁹³ CESCR "Duties of States Towards Refugees and Migrants" para 17.

¹⁹⁴ CESCR "General Comment No. 13" para 6-10.

¹⁹⁵ CESCR "General Comment No. 13" para 58-59.

¹⁹⁶ CESCR "General Comment No. 13" para 58.

¹⁹⁷ *International Covenant on Civil and Political Rights* (1966) (hereafter *ICCPR*).

¹⁹⁸ Harland 2000 *Human Rights Quarterly* 189; McGoldrick *The Human Rights Committee* 577.

2.3.3.1 Non-discrimination

Like the *UDHR* and the *ICESCR*, the International Covenant on Civil and Political Rights (*ICCPR*) obligates States Parties to remove discrimination from the enjoyment of the rights that it enshrines. The non-discrimination provision includes forms of discrimination based on "national or social origin, property, birth or other status."¹⁹⁹ Hence, it covers undocumented immigrant children whose enjoyment of the rights under the *ICCPR* should not be curtailed based on these prohibited grounds.²⁰⁰ It should be remembered that rights, such as freedom of expression or privacy protected in *ICCPR*, have particular pertinence in the sphere of education.²⁰¹ The Human Rights Committee, an expert body supervising the implementation of the *ICCPR*, describes discrimination as any differentiation, exclusion, limitations, and preferences based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status that hinders the enjoyment or exercise of human rights and political, economic, social, and cultural freedom.²⁰²

2.3.3.2 Education

The *ICCPR* does not notably provide for the right to education *per se*, although it mirrors the *ICESCR* by stipulating that parents have the right to direct the religious and moral education of their children in accordance with their own convictions.²⁰³ It is submitted that this provision implies the acknowledgement of the right to education as a civil and political right.²⁰⁴ However, article 26 of the *ICCPR* affords everyone the right to equality before the law without any discrimination and prohibits discrimination on grounds such as nationality, social origin, language, religion, birth, or other status. This is an autonomous discrimination provision. This means that it provides protection against discrimination, irrespective of whether discrimination occurs in the context of a right protected by the Covenant. The implication of this is that discrimination against

¹⁹⁹ Article 2(1) of the *ICCPR*.

²⁰⁰ Article 2(1) of the *ICCPR*.

²⁰¹ Article 19(2) and 17 of the *ICCPR*.

²⁰² UN Human Rights Committee "CCPR General Comment No. 18: Non-discrimination" (1989) para 6.

²⁰³ Article 18(4) of the *ICCPR*.

²⁰⁴ Article 18(4) of the *ICCPR*.

undocumented immigrant children in education constitutes discrimination under article 26.

2.3.4 Convention on the Rights of the Child (1989)

The General Assembly adopted this instrument in November 1989, paving the way for it to enter into force on 2 September 1990. This is the most comprehensive international human rights treaty for children.²⁰⁵ South Africa ratified the *CRC* in 1995, thereby committing to protect the rights of all children in its territory, including undocumented immigrant children, without discrimination. The *CRC* addresses different situations in which children may find themselves. It spells out their needs and outlines how States Parties should fulfil them. Thus, its adoption was considered a turning point in the history of children's rights. This is also due to the fact that it is the most authoritative source on children's rights.²⁰⁶ Steinbock argues that the *CRC* constitutes "the normative frame of reference for actions concerning children."²⁰⁷ The standards set by the *CRC* are comprehensive as they cover most aspects of children's lives.²⁰⁸ Similar to the *ICESCR*, the *CRC* has a monitoring body in the form of the Committee on the Rights of the Child (ComRC).²⁰⁹

Article 1 of the *CRC* defines a child as any human being below 18 years of age unless the majority has been attained earlier in accordance with the law.²¹⁰ Every child within a State Party's jurisdiction is entitled to all rights in this Convention, including undocumented immigrant children. This is because when States Parties ratified the *CRC*, they undertook to put in place systems to protect all children, regardless of their

²⁰⁵ Doek 2009 *Child Abuse and Neglect* 771.

²⁰⁶ Kilkelly "The Convention on the Rights of the Child after Twenty-five Years" 80-82; Kilkelly 2019 *IJHR* 323, 324.

²⁰⁷ Steinbock 1996 *IJRL* 6.

²⁰⁸ Steinbock 1996 *IJRL* 6.

²⁰⁹ The Committee on the Rights of the Child is the body that monitors whether and how well States are meeting their obligations under the *CRC*. States Parties are expected to submit reports to the ComRC, initially two years after joining and thereafter every five years, stating their progress regarding the respect and implementation of the rights of children.

²¹⁰ Article 1 of the *CRC*.

legal status.²¹¹ The *CRC* reflects four general principles that guide the interpretation of all provisions. These are the right to non-discrimination (article 2); the best interests of the child (article 3); the right to life, survival, and development (article 6); and the right to express views and have them taken into account (article 12).²¹² The following discussion explores these principles, which serve as guides for interpreting the right to education for undocumented immigrant children.

2.3.4.1 Right to non-discrimination

Article 2(1) of the *CRC*, read together with articles 3(2) and 4 of the same, obligates States Parties to respect all the rights in the *CRC* and to ensure that such rights are respected for the benefit of all children in their jurisdictions without discrimination. Like the above-mentioned instruments, the *CRC* also prohibits the discrimination of children within the state's jurisdiction, and a child should not suffer discrimination based on his or her, or their parents/guardians', race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth, or other status.²¹³

Evidently, this provision protects children against discrimination when it comes to the enjoyment of the rights stipulated by the *CRC*, including the right to education. Article 3(2) states that the protection and care of children is essential for their well-being.²¹⁴ This implies special protection measures for undocumented children in the sphere of basic education. Article 4 resembles article 2(1) of the *ICESCR* in terms of economic, social, and cultural rights. It provides that States Parties must take all measures within their power to implement the rights of children, also considering their available resources.²¹⁵ Article 2(2) of the *CRC* goes beyond article 2(1) by emphasising that

²¹¹ *General Comment 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin* UN Doc CRC/GC/2005/6 (2005) (hereafter ComRC "General Comment No. 6") para 5 and 12.

²¹² Articles 2,3,6 and 12 of the *CRC*.

²¹³ Article 2(1) of the *CRC*.

²¹⁴ Article 3(2) of the *CRC*.

²¹⁵ Article 4 of the *CRC*.

children must be protected against discrimination even beyond their specific Convention rights. It stipulates that States Parties are obligated to implement necessary measures to safeguard children from any form of discrimination or punishment based on the status of their parents, legal guardians, or family members.²¹⁶ Article 2(2) applies directly to undocumented immigrant children who, unlike their peers, need more protection against discrimination in the sphere of education. However, articles 28 and 29 of the *CRC* do not explicitly protect the right to preschool education. In article 2(2), no discrimination against immigrant children may occur in that sphere.

The right to non-discrimination is not a passive obligation but a positive duty for States Parties to not only prohibit formal forms of discrimination in the enjoyment of rights under the *CRC* but also require them to take appropriate proactive measures to ensure equal opportunities for all children to enjoy the rights under the Convention. This requires the adoption and implementation of positive measures aimed at redressing inequality.²¹⁷ Discrimination includes any conduct or omission that has the purpose or effect of nullifying or impairing equal access to and enjoyment of economic, social and cultural rights.²¹⁸ Protecting children from discrimination is immediate and not subject to the qualifications of progressive realisation to the extent that negative obligations are concerned, obligations to positive conduct that can be implemented immediately because they do not cost money, or obligations to positive conduct concerning a minimum core obligation (such as compulsory and free primary education). *De facto* discrimination, however, will need to be addressed progressively. The language used in article 2 and its interpretation by the ComRC emphasises that the obligation of States Parties to prevent discrimination is an active one.²¹⁹ It requires a range of

²¹⁶ Article 2 of the *CRC*.

²¹⁷ *General Comment No. 14(2013): Right of the Child to have his or her Best Interest taken as a Primary Consideration* UN Doc CRC/C/GC/14 (2013) (hereafter ComRC "General Comment No. 14") para 41.

²¹⁸ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (in 1998 HRQ 20, 691-704) para 11 (hereafter Maastricht Guidelines).

²¹⁹ Maastricht Guidelines para 11.

measures, including review, strategic planning, legislation, monitoring, raising awareness, education and information campaigns, and evaluation of measures taken to reduce disparities.²²⁰

The non-discrimination clause requires States Parties to identify groups of children who need special protection²²¹ and whose circumstances require changes in legislation, administration, resource allocation, and educational measures aimed at changing negative attitudes harboured against them.²²² The ComRC reiterates in General Comment No. 6, addressing the situation of unaccompanied children, that the enjoyment of the rights stipulated in the *CRC* is not limited to children who are citizens but extends to all children, including undocumented immigrant children. This is because the *CRC* confers rights to all children irrespective of their nationality, immigration status and statelessness.²²³

The underlying principle in article 2 of the Convention means that immigrant children, irrespective of their nationality and legal status, must be able to live free from discrimination, including in the sphere of education. Many human rights problems affecting migrants stem from discrimination and concern failed inclusion and non-recognition of cultural identity.²²⁴ In worst cases, such challenges may take the form of violence in the sphere of education. Unequal enjoyment of economic, social, and cultural rights means that migrants, are excluded from education and denied access to education because of policies designed to deter irregular immigration.²²⁵

²²⁰ UNICEF "Implementation Handbook for the Convention on the Rights of the Child" 30.

²²¹ *General Comment 5 (2003): General Measures of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (2003) (hereafter ComRC "General Comment 5") para 12.

²²² ComRC "General Comment 5" para 12.

²²³ ComRC "General Comment No. 6" para 12.

²²⁴ International Organization for Migration "Human Rights of Migrant Children" 19.

²²⁵ ComRC "General Comment No. 6" para 18.

2.3.4.2 The best interests of the child

This is one of the most important principles of children's rights. It is derived from article 3(1) of the *CRC*, which states that

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.²²⁶

This principle recognises children as independent agents who bear their own rights. It aims to ensure the full and effective enjoyment of all rights recognised in the Convention. It also promotes the holistic development of children.²²⁷ The phrase 'in all actions' is purposively broad. The *CRC* emphasises that actions encompass decisions, acts, conduct, proposals, services, procedures, and other measures that involve or affect children.²²⁸

The Committee notes that the words "shall be" place a strong legal obligation on States Parties to assess and ascribe weight to the interests of children as primary considerations in all actions involving children.²²⁹ The expression "primary consideration" means that the best interests of children may not be considered at the same level as all other considerations.²³⁰ This position is justified by the special situation of children: dependency, immaturity, limited legal status, and voicelessness. Children have a reduced possibility of motivating their interests compared to adults. Hence, people who make decisions that affect children must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.²³¹

²²⁶ Article 3(1) of the *CRC*.

²²⁷ ComRC "General Comment No. 14" para 4.

²²⁸ ComRC "General Comment No. 14" para 7.

²²⁹ ComRC "General Comment No. 14" para 36.

²³⁰ ComRC "General Comment No. 14" para 36.

²³¹ ComRC "General Comment No. 14" para 37.

The best interests of the child are a right, principle, and rule of procedure based on an assessment of all elements of children's interests in specific situations.²³² When assessing the best interests of a child, the decision-maker must ascertain the relevant elements that are in the best interests of the child and give them due weight. Second, the decision-maker must use a procedure that provides legal guarantees to the best interests of the children involved and ensures the protection of their rights.²³³

The determination of what is in the best interests of the child starts with an assessment of the specific circumstances that make the child unique. This implies that not all issues about a particular child will be relevant in assessing what is in the best interests of the child. This also means that some issues carry more weight than others.²³⁴ The elements that must be considered when assessing the child's best interests are the child's views, his/her identity, preservation of the family environment and maintaining relations, care, protection, and safety of the child, the situation of vulnerability, and the child's right to health and education.²³⁵ Other important elements include non-discrimination, maximum survival and development, and respect for the views of the child.²³⁶

The best interests of undocumented immigrant children require consideration of all elements of their daily lives, as well as what the future could look like for them if they do not receive education and if they are deported. This means that the negative consequences of not receiving an education simply because the child is undocumented must be considered strongly in favour of the child to avoid unduly denying them access to education, as it will place their future in jeopardy. An extensive discussion of the best interests principle will be undertaken later in Chapter 5, where the study will

²³² ComRC "General Comment No. 14" para 46.

²³³ ComRC "General Comment No. 14" para 47.

²³⁴ ComRC "General Comment No. 14" para 49.

²³⁵ ComRC "General Comment No. 14" para 53-79.

²³⁶ International Organization for Migration "Human Rights of Migrant Children" 23.

evaluate whether South Africa is complying with its international obligation to safeguard the best interests of the child.

2.3.4.3 Rights to life, survival, and full development

Article 6 of the *CRC* stipulates that States Parties must recognise that every child has an inherent right to life.²³⁷ To the maximum extent possible, they must ensure the survival and development of the child.²³⁸ The *CRC* points out that 'development' embraces a child's physical, mental, spiritual, moral, psychological, and social development.²³⁹ It is not simply concerned with the preparation of children for adulthood. This is about providing the optimal conditions for childhood.²⁴⁰ Therefore, States Parties must promote such development by adopting appropriate administrative and legislative measures that make it possible for families who have the primary responsibility for children to promote such development.²⁴¹ States Parties should create conducive environments to ensure, to the maximum possible extent, the survival and physical, mental, spiritual, moral, psychological, and social development of children in a manner that is consistent with human dignity and prepares them for independent living.²⁴² Education is relevant for ensuring the maximum development of children. Hence, one of the aims of education is to promote the highest possible development of a child's personality, talents, and mental and physical abilities.²⁴³ Hindering undocumented immigrant children from accessing basic education may mask their talents, deprive them of the opportunity to discover intellectual gifts, and obstruct other aspects of their mental and physical development. Undocumented children experience special risks to their full development through education because of their precarious socio-economic situation.

²³⁷ Article 6(1) of the *CRC*.

²³⁸ Article 6(2) of the *CRC*.

²³⁹ ComRC "General Comment 5" para 4.

²⁴⁰ International Organization for Migration "Human Rights of Migrant Children" 23.

²⁴¹ International Organization for Migration "Human Rights of Migrant Children" 23.

²⁴² International Organization for Migration "Human Rights of Migrant Children" 23.

²⁴³ Article 29(1)(a) of the *CRC*.

2.3.4.4 Right to be heard

This is also known as the right to participation. This entails that a child has the right to express their views and to have them considered. Therefore, children's rights should be respected and taken seriously. This means that they should be involved in decision-making processes according to their age and maturity.²⁴⁴ Having their views taken into account contributes to their personal development, leads to better decision-making, protects them, prepares them for civil society development, tolerates and respects others, and strengthens accountability.²⁴⁵ The *CRC* affords children the right to be heard in article 12. Parties to *CRC* must ensure that children capable of expressing their opinions have the right to freely voice their views on all matters concerning them, taking into account the child's age and maturity level.²⁴⁶ To achieve this, the child should have the chance to express their thoughts in any legal or administrative processes that involve them. This can happen either directly or through a representative or suitable organisation, following the procedural regulations of the country's law.²⁴⁷ To ensure this, the government is responsible for implementing all necessary measures to guarantee the full realisation of the right for every child.²⁴⁸ Hence, legislation and policies must be implemented to enable children to express their views.²⁴⁹ Article 12 applies to children individually and to specific groups of children.²⁵⁰ As individuals, children must be heard when decisions and actions affecting them, such as judicial or administrative proceedings, are made.²⁵¹ Specific groups of children, such as immigrant children, must be heard when legislation or policies that affect them are introduced.²⁵² In the educational field, policies on the modalities of

²⁴⁴ Lansdown *Every Child's Right to be Heard* 3.

²⁴⁵ Lansdown *Every Child's Right to be Heard* 5-9.

²⁴⁶ Article 12(1) of the *CRC*.

²⁴⁷ Article 12(2) of the *CRC*.

²⁴⁸ Article 4 of the *CRC*.

²⁴⁹ Lansdown *Every Child's Right to be Heard* 20.

²⁵⁰ *General Comment No. 12 (2009): The Right of the Child to be Heard* CRC/C/GC/12 (2009) (hereafter ComRC "General Comment No. 12") para 9.

²⁵¹ ComRC "General Comment No. 12" para 9.

²⁵² Lansdown *Every Child's Right to be Heard* 20.

admission of undocumented immigrant children to schools require input from those affected.

However, undocumented immigrant children do not clearly understand that they have the right to participate in and influence decisions that affect their best interests.²⁵³ They also do not have the opportunity to participate in the decisions that affect them at school. Hence, when school governing bodies make policies and other administrative decisions, it is unlikely for them to hear the views of undocumented immigrant children and how such decisions will affect them. When such decisions negatively affect undocumented immigrant children, they may lead to a situation of unjust administrative action in which the input of the affected persons is not considered when a negative decision affecting them is made.²⁵⁴ Hence, procedures through which such bodies consider the views of undocumented immigrant children in schools need to be established.

2.3.4.5 Right to education

This right is the main focus of this study and is crucial for protecting children and aiding their development and empowerment.²⁵⁵ Articles 28 and 29 of the *CRC* contain extensive provisions on the right to education.²⁵⁶ Article 28(1)(a) requires States Parties to make primary education compulsory and free.²⁵⁷ Secondary education is subject to the availability of resources.²⁵⁸ However, the comments on headings 2.3.2.7 and 2.3.2.8 made with regard to the *ICESCR* apply here as well, such as that secondary education should be made "accessible to all on the basis of capacity by every appropriate means."²⁵⁹ Article 28(1)(e) obliges States Parties to use measures that encourage regular attendance at schools and reduce the number of children dropping

²⁵³ International Organization for Migration "Human Rights of Migrant Children" 26.

²⁵⁴ See Section 1 of *Promotion of Administrative Justice Act* 3 of 2000 (hereafter *PAJA*) on the definitional qualities of a just administrative decision.

²⁵⁵ International Organization for Migration "Human Rights of Migrant Children" 39.

²⁵⁶ Article 28, 29 of the *CRC*.

²⁵⁷ Article 28(1)(a) of the *CRC*.

²⁵⁸ Article 28(1)(b) of the *CRC*.

²⁵⁹ Article 28(1)(c) of the *CRC*.

out of school.²⁶⁰ Dropout rates are usually high among vulnerable groups such as immigrant children. The *CRC* is based on the recognition that children are entitled to special care and assistance and that they should be treated with humanity and respect for their inherent dignity.²⁶¹ Article 28(2) requires States Parties to ensure that children are disciplined at school, consistent with their dignity.²⁶²

Article 29 of the *CRC* stipulates the mandatory aims of education:

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.²⁶³

Article 29(1) describes the objectives that education must seek to achieve. These have been synthesised as follows by the ComRC in its first General Comment that specifically addresses the topic of the aims of education. Firstly, the provisions of the *CRC* are interconnected, meaning that they cannot be properly understood in isolation.²⁶⁴ In the context of undocumented immigrant children, this means that their right to a basic education cannot be construed in isolation from all the other rights to which they are

²⁶⁰ Article 28(1)(e) of the *CRC*.

²⁶¹ Preamble of the *CRC*.

²⁶² Article 28(2) of the *CRC*.

²⁶³ Article 29(1)(e) of the *CRC*.

²⁶⁴ *General Comment No. 1(2001): Article 29(1): The Aims of Education* UN Doc CRC/GC/2001/1 (2001) (hereafter ComRC "General Comment No. 1") para 6.

entitled, such as the right to dignity and having their best interests considered in all matters affecting them, including the quality of education offered to them.

Secondly, the provision of education must respect the inherent dignity of children and enable them to express their views freely and participate in school life.²⁶⁵ Education must encourage respect for undocumented immigrant children as human beings who are facing a particular vulnerability so that all persons who engage with them, including teachers and other learners, do not undermine their dignity with disparaging comments and treatment that show dislike and contempt for them. When undocumented immigrant children feel that they are free to express their views on issues that affect them, they will ideally be more open to their teachers about such issues, thereby fostering an environment of honest engagement and reporting of abuse and other prejudices so that they are addressed on time. Openness about the issues affecting them may create ideal conditions for them to engage in other school activities, such as competitions, thereby enhancing the quality of their learning and their experience of the learning environment as a safe place for the expression of views and participation.

Thirdly, education must be child-centred. This means that its key goal is the development of an individual child's personality, talent, and abilities. In this regard, States Parties must develop education with the understanding that every child has unique characteristics, interests, abilities, and learning needs.²⁶⁶ Education must also be aimed at ensuring that every child learns essential life skills, including the ability to make well-balanced decisions, resolve conflicts non-violently, and develop healthy lifestyles, good social relationships and responsibility, critical thinking, creative talent, and other abilities that give children the tools needed to pursue their options in life.²⁶⁷ These skills are culturally conditioned. A child-centred approach, in the case of undocumented immigrant children, will take into account and give due recognition to cultural specificities. In the case of these children, this research asserts that child-

²⁶⁵ ComRC "General Comment No. 1" para 8.

²⁶⁶ ComRC "General Comment No. 1" para 9; *The Salamanca Statement and Framework for Action on Special Needs Education* UN Doc ED.94/WS/18 (1994) para 2.

²⁶⁷ ComRC "General Comment No. 1" para 9.

centred education refers to education that gives them the opportunity to discover and harness their talent. It also means education that equips them with skills to resolve conflicts that they encounter daily in society, including issues such as prejudice, so that their responses to such treatments keep them within the confines of the law.

The fourth objective is to implement a comprehensive approach to education that ensures that the educational opportunities made available to children reflect an appropriate balance between promoting the physical, mental, spiritual, and emotional aspects of education; the intellectual, social, and practical dimensions; and childhood and lifelong aspects. Schools should foster a humane atmosphere and allow children to develop according to their evolving capacity.²⁶⁸ Like their citizens and documented counterparts, undocumented immigrant children are also eligible for education that promotes their physical, mental, emotional, and spiritual needs.

The fifth objective is to design and provide education in such a way that it promotes and reinforces the range of specific ethical values enshrined in the *CRC*, including education for peace, tolerance, and respect for the natural environment in an integrated and holistic manner.²⁶⁹ In the case of undocumented immigrant children, peace and tolerance are essential because of the hostile or violent attitudes of society against immigrants and the intolerance they face from their peers. Hence, the education they receive must mould them into peace-loving and tolerant members of society.

Article 29(1) of the *CRC* reflects the vital role of appropriate educational opportunities in the promotion of all other human rights and understanding of their indivisibility.²⁷⁰ A child's capacity to participate fully and responsibly in a free society can be impaired not only by outright denial of access to education but also by failure to promote an understanding of the values recognised in the *CRC*.²⁷¹ The *CRC* acknowledges the

²⁶⁸ ComRC "General Comment No. 1" para 12.

²⁶⁹ Article 29(1) of the *CRC*; ComRC "General Comment No. 1" para 4, 5 and 14.

²⁷⁰ ComRC "General Comment No. 1" para 13.

²⁷¹ ComRC "General Comment No. 1" para 14.

importance of education in combating discrimination against immigrant children as follows:

Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these failings is the provision of education which promotes an understanding and appreciation of the values reflected in article 29(1), including respect for differences, and challenges all aspects of discrimination and prejudice. Education should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena.²⁷²

Destination countries should use education as an effective instrument to foster equality, multiculturalism, and mutual understanding. They must ensure that all children within their territories have unimpeded access to compulsory education, irrespective of their legal status.²⁷³

Note should further be taken of article 29(2) of the *CRC*, which provides that States Parties must not "interfere with the liberty of individuals and bodies to establish and direct educational institutions." For undocumented immigrant children, this may mean that parents who can afford this may come together to establish educational institutions for their children and that States Parties may not impede such an establishment on the grounds that the children are not documented. It also means that States Parties may not preclude private education institutions from accepting, enrolling, and providing instruction to undocumented immigrant children on the grounds that they have no legal status. Such private institutions must meet otherwise prescribed minimum legal standards for the quality of education and observe the laws on education and human rights. However, the reality is that most undocumented immigrant children come from poor families who cannot afford private schools; hence, States Parties need to provide them with access to education through public schools.²⁷⁴

²⁷² ComRC "General Comment No. 1" para 11.

²⁷³ International Organization for Migration "Human Rights of Migrant Children" 39.

²⁷⁴ Hlatshway and Vally 2014 *School Psychology International* 7.

2.3.4.6 Summary of state obligations under the CRC

The duties of States Parties under the *CRC* apply within the borders of each state with respect to children who come under the state's jurisdiction by entering its territory.²⁷⁵ The rights in the *CRC* are not limited to citizens but are available to all children, including asylum seekers, refugees and undocumented immigrants. This shows that rights accrue to all children irrespective of their nationality, immigration status, or statelessness. As such, States Parties must respect, protect, and fulfil the rights of undocumented immigrant children and maintain full access to education for all children in their territories, irrespective of their status. This obligation is derived from articles 28, 29(1)(c), 30, and 32 of the *CRC* and the general principles developed by the ComRC.²⁷⁶

Article 29(1)(c) of the *CRC* requires education to develop respect towards the cultural identity, language, and values of the child as well as the national values of the country where the child resides and the country of origin.²⁷⁷ Article 30 states that children belonging to minority groups should not be deprived of the right, along with other members of their group, to freely engage in and appreciate their own culture, practice their religion, and utilise their language.²⁷⁸ This includes opportunities for immigrant minorities to do so in the educational context. A similarly negatively framed right in Article 27 of the *ICCPR* has been held to give rise to positive obligations for States Parties to ensure that right.²⁷⁹ Article 32 provides protection against child labour by mandating compulsory education.²⁸⁰ This follows from the fact that this provision states that children must be protected against economic exploitation, which is likely to interfere with their education.

²⁷⁵ ComRC "General Comment No. 1" para 12.

²⁷⁶ ComRC "General Comment No. 6" para 41.

²⁷⁷ Article 29(1)(c) of the *CRC*.

²⁷⁸ Article 30 of the *CRC*.

²⁷⁹ *CCPR General Comment No. 23: Article 27(Rights of Minorities)* UN Doc CCPR/C/21/Rev.1/Add.5 (2004) para 6.1 (hereafter UN Human Rights Committee *CCPR General Comment No. 23*).

²⁸⁰ Article 32(1) of the *CRC*.

2.3.4.7 General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin

The obligations of States Parties regarding foreign children are discussed in full in General Comment No. 6, adopted by the ComRC in 2005. This study examines what constitutes human rights-compliant treatment of unaccompanied and separated children who find themselves in other states. The primary aim of the General Comment is to highlight the vulnerable circumstances experienced by unaccompanied and separated children in a foreign land.²⁸¹ It seeks to outline the complex challenges faced by states and other stakeholders to ensure that these children can effectively exercise their rights.²⁸² Additionally, the General Comment provides guidance on the protection, care, and appropriate treatment of unaccompanied and separated children.²⁸³ It emphasises the principles of non-discrimination, the best interests of the child, and the child's right to freely express their views.²⁸⁴ First, the ComRC notes and emphasises that the best interest of a child is a primary consideration in all actions concerning the child.²⁸⁵ It further obliges states to ensure access to education for every unaccompanied and separated child, irrespective of their status.²⁸⁶ The ComRC further stresses that unaccompanied or separated foreign children must be registered with relevant school authorities and have access to all learning opportunities.²⁸⁷ The ComRC stresses that this helps these children maintain their cultural identity and values, including the preservation and enhancement of their native language.²⁸⁸ It encourages states to look for assistance from international organisations to ensure that the educational needs of unaccompanied and separated children are met.²⁸⁹ Unavailable or limited resources should not be sufficient reasons for failure to meet the needs of these children. A thorough discussion of the legal position of

²⁸¹ ComRC "General Comment No. 6" para 1

²⁸² ComRC "General Comment No. 6" para 1.

²⁸³ ComRC "General Comment No. 6" para 1.

²⁸⁴ ComRC "General Comment No. 6" para 1.

²⁸⁵ ComRC "General Comment No. 6" para 42. The importance of the best interest principle will further be examined in chapter five of this study on para 5.1.2.

²⁸⁶ ComRC "General Comment No. 6" para 42.

²⁸⁷ ComRC "General Comment No. 6" para 42.

²⁸⁸ ComRC "General Comment No. 6" para 42.

²⁸⁹ ComRC "General Comment No. 6" para 43. International agencies such as the United Nations Children's Fund, UNESCO, and the United Nations High Commissioner for Refugees.

unaccompanied and separated children in South Africa will be done in Chapter five of this study.

However, while acknowledging the protection of these children, it appears that the ComRC forgot to address important issues, such as potential conflicts that may arise between the rights of undocumented immigrant children (both accompanied and unaccompanied) and the immigration policies of states. The ComRC should have provided clearer guidance on how to navigate these complex issues, ensuring that the rights of undocumented immigrant children are protected while respecting the state's legitimate interest in controlling immigration. This lack of clarity can result in inconsistent implementation across different jurisdictions and hinder the realisation of undocumented immigrant children's rights to a basic education.

2.3.5 UNESCO Convention against Discrimination in Education (1960)

The Convention was adopted in 1960 and came into force on 22 May 1962.²⁹⁰ At the end of December 2020, 106 states had signed and ratified the Convention. As the name suggests, its aim is to combat discrimination in education. South Africa is a State Party to this instrument, which is recognised as a cornerstone of the government's *Education 2030 Agenda*,²⁹¹ which seeks to advance the UN's Sustainable Development Goal 4, that is, to ensure inclusive and equitable quality education for all.²⁹² One defining feature of the *Convention against Discrimination in Education* is that it does not permit reservations, meaning that when states sign and ratify it, they have no option to make reservations regarding provisions they do not wish to apply to them.²⁹³ The *Convention against Discrimination in Education* is part of the core of an international education code consisting of different UNESCO instruments on the right

²⁹⁰ See Daudet and Eisemann *Right to Education 1*, for a discussion of the binding force of this Convention.

²⁹¹ Education 2030: Incheon Declaration and Framework for Action for the Implementation of Sustainable Development Goal (2015) (hereafter *Incheon Declaration*).

²⁹² *Incheon Declaration* 15.

²⁹³ Article 9 of the *UNESCO Convention against Discrimination in Education*.

to education.²⁹⁴ Its purpose is to eliminate and prevent discrimination and to contribute to the realisation of equality in education.²⁹⁵

2.3.5.1 Constitutive elements of discrimination

Article 1 of the *Convention against Discrimination* defines active discrimination in education as follows:

1. For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:
 - (a) Of depriving any person or group of persons of access to education of any type or at any level;
 - (b) Of limiting any person or group of persons to education of an inferior standard;
 - (c) Subject to the provisions of article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons;
 - (d) Of inflicting on any person or group of persons' conditions which are in-compatible with the dignity of man.²⁹⁶

There is no explicit reference to migrant status as one of the prohibited grounds in the Convention. However, various grounds of discrimination, such as nationality and social origin, economic condition, birth and language, could also be applied to undocumented immigrants. Foreign nationals are recognised in article 3(e), which obliges States Parties to give them the same access to education as their citizens.²⁹⁷

²⁹⁴ Other instruments include the Recommendation against Discrimination in Education (1960); Convention on Technical and Vocational Education (1989); Recommendation Concerning the Status of Teachers (1966), Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms (1974), etc. See also Beiter *The Protection of the Right to Education by International Law* 243.

²⁹⁵ Preamble of the *UNESCO Convention against Discrimination in Education*.

²⁹⁶ Article 1 of the *UNESCO Convention against Discrimination in Education*.

²⁹⁷ Article 3(e) of the *UNESCO Convention against Discrimination in Education*.

In the case of undocumented immigrant children, the prohibition against "depriving any person or group of persons of access to education of any type or at any level"²⁹⁸ means that the South African government cannot deny children access to education because they fall under the category of "certain group." There is no justification for not holding undocumented immigrant children covered under this provision.

The provision against "limiting any person or group of persons to education of an inferior standard"²⁹⁹ means that if the state provides undocumented immigrant children with education, it cannot structure the system in such a way that undocumented immigrant children receive poor education. Hence, qualified teachers must be available and all necessary resources (such as books) must be provided for effective learning under standard curricula. This is in line with the prohibition of the apartheid-style of "establishing or maintaining separate educational systems or institutions for persons or groups of persons."³⁰⁰ It is also meant to ensure that the state does not "inflict...on any person or group of persons' conditions which are incompatible with the dignity of man"³⁰¹ – because such indignity emanates from creating separate conditions of living (and learning) for different people, which, as has been stated in the famous USA case of *Brown v. Board of Education of Topeka* 347, U.S. 483,³⁰² are inherently unequal.

2.3.5.2 Elimination and prevention of discrimination

Article 3 of the *Convention against Discrimination in Education* states that the aim of the Convention is to eliminate and prevent discrimination in education. Consequently, the States Parties must

- (a) abrogate any statutory provisions and administrative instructions and to discontinue any administrative practices that involve discrimination in education.
- (b) Ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions.

²⁹⁸ Article 1(a) of the *UNESCO Convention against Discrimination in Education*.

²⁹⁹ Article 1(b) of the *UNESCO Convention against Discrimination in Education*.

³⁰⁰ Article 1(c) of the *UNESCO Convention against Discrimination in Education*.

³⁰¹ Article 1(d) of the *UNESCO Convention against Discrimination in Education*.

³⁰² *Brown v Board of Education of Topeka* 347 U.S. 483.

- (c) not allow any differences in treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries.
- (d) not allow, in any form of assistance granted by public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group.
- (e) give foreign nationals residents within their territory the same access to education as that given to their own nationals.³⁰³

Article 3(e) provides that education should be accessible to all persons who need it, regardless of their nationality. This provision must be read with article 3(c). This provision does not permit discrimination between nationals as regards fees or assistance in education but seems to be silent on whether non-nationals may be discriminated against. Read together the provisions could imply that, although undocumented immigrant children may not be denied access to education, certain benefits in the education system could be denied to them. Such an interpretation would, however, likely be rendered impermissible by the higher protective standards on non-discrimination of the newer *CRC*. The difficulties faced by undocumented immigrants in accessing education must be addressed with special measures to ensure that children are not deprived of schooling. Special measures provided for ensuring that undocumented immigrant children have access to education must not lead to separate education for migrant children on a grand scale as that would result in unfair discrimination and impermissible classification.

2.3.5.3 Progressive achievement of equality of opportunity

Article 4 of the *Convention against Discrimination in Education* provides a framework for the progressive achievement of equality of opportunity in education. This was meant to eliminate static discrimination.³⁰⁴ Article 4 requires States Parties to take measures that promote equality of opportunity and treatment in matters of education. It defines the goals and different stages of national policymaking for primary, secondary, and higher education and requires States Parties to ensure that primary

³⁰³ Article 3 of the *UNESCO Convention against Discrimination in Education*.

³⁰⁴ Daudet and Eisemann *Right to Education* 18.

education is free and compulsory, provide widespread availability and accessibility of secondary education in its various forms, make higher education equally accessible to individuals based on their abilities, and ensure that all individuals comply with the legal obligation to attend school.³⁰⁵

The *Convention against Discrimination in Education* was the first international treaty to mandate that States Parties should provide free and compulsory primary education.³⁰⁶ Article 4(b) requires States Parties to guarantee uniform educational standards across all public institutions at the same level and to ensure that the conditions related to the quality of education offered are also uniform.³⁰⁷ For undocumented immigrant children, this means that States Parties must ensure that these children receive the same standard of education in all public schools in which immigrant children are given instruction. There may be no *de jure* or *de facto* disparity between schools frequented by ordinary citizens and schools with a high preponderance of immigrant children.

2.3.6 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)

On 18 December 1990, the General Assembly adopted the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. This instrument came into effect on 1 July 2003.³⁰⁸ However, South Africa did not sign the treaty. Even so, its provisions play a role through Section 39 of the *Constitution*, which requires the courts to consider international law when interpreting the Bill of Rights, which includes the right to education. Section 39 includes non-binding international laws. The *Convention on the Rights of Migrants* grants broad rights to all migrant workers and their families. It states that all rights provided in other

³⁰⁵ Article 4(a) of the *UNESCO Convention against Discrimination in Education*.

³⁰⁶ Beiter *The Protection of the Right to Education by International Law* 90.

³⁰⁷ Article 4(a) of the *UNESCO Convention against Discrimination in Education*.

³⁰⁸ World Health Organisation, IOM and OHCHR "International Migration, Health and Human Rights" 1; OHCHR "Fact Sheet No. 24" 1-2.

international instruments are applicable to migrants.³⁰⁹ It also includes a number of rights meant to provide specific protection and secure the needs of migrants. It does so by providing additional guarantees in light of the vulnerability of migrant workers and family members such as children.³¹⁰

2.3.6.1 Right to access education

Article 30 of the *Convention on the Rights of Migrants* stipulates that the children of migrant workers are entitled to all rights to access basic education, similar to their citizen counterparts.³¹¹ It extends this right to children in irregular situations, such as undocumented immigrants, by recognising that

Access to public preschool educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to staying or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.³¹²

This provision requires States Parties to ensure equal access to quality and inclusive education for all migrant children, irrespective of their migration status.³¹³ Hence, States Parties must repeal statutory provisions that prevent undocumented immigrants from accessing education.³¹⁴ Moreover, schools must be discouraged from processing information on undocumented immigrant children in a manner that leads to their detention by immigration authorities and which exposes their families to similar

³⁰⁹ OHCHR "Fact Sheet No. 24" 5.

³¹⁰ OHCHR "Fact Sheet No. 24" 5.

³¹¹ Article 30 of the *Convention on the Rights of Migrants*.

³¹² Article 30 of the *Convention on the Rights of Migrants*. The principle has also been reaffirmed by the CESCR "General Comment 20" para 30 and CESCR "General Comment No. 13" para 34.

³¹³ Joint General Comment 4 of the Committee on the Protection of the Rights of All Migrant Workers and No. 23 of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return UN Doc CMW/C/GC/4-CRC/C/GC/23 (2017) para 59 (hereafter Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23").

³¹⁴ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 60.

hardships. This will preserve their access to schools as part of the exercise of their right to education.³¹⁵

According to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the ComRC on the General Principles of the Human Rights of Children in the Context of International Migration, the obligation of states includes the prevention and reduction of migration-related risks faced by children, which may jeopardise their survival and development.³¹⁶ The Committee emphasised that children should receive and have access to education, even without documentation.³¹⁷ States, especially those of transit and destination, should devote special attention to the protection of undocumented children, whether unaccompanied and separated or with families, and to the protection of asylum-seeking and stateless children.³¹⁸

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the ComRC on States' Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination, and Return³¹⁹ further indicate that the principle of equality of treatment requires states to eliminate any discrimination against migrant children. They stressed that states should adopt appropriate gender-sensitive provisions to overcome the educational barriers.³²⁰ The Committees advocate for the addition of language

³¹⁵ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 60.

³¹⁶ Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration UN Doc CMW/C/GC/3-CRC/C/GC/22 (2017) para 40 (hereafter Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment No. 3 and No. 22").

³¹⁷ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment No. 3 and No. 22" para 6(a).

³¹⁸ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment No. 3 and No. 22" para 42.

³¹⁹ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 62.

³²⁰ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 62.

education and staff, as well as intercultural support.³²¹ This idea by the Committees promotes the integration of immigrant children into schools. Hence, in relation to undocumented immigrant children, states should promptly revise the regulations and practices that hinder immigrant children, especially those without proper documentation, from enrolling in schools and educational institutions. The Committee further encourages states to establish strong barriers between educational institutions and immigration authorities, prohibiting the sharing of students' data and preventing immigration enforcement operations on or near school premises.³²² These practices restrict education for migrant children or children in irregular situations. To uphold children's rights to education, states are also advised to minimise disruptions during migration-related procedures, avoiding the necessity for children to relocate during the school year whenever feasible.³²³

General Comment No. 2 on the Rights of Migrant Workers in Irregular Situations and Members of Their Families provides that States Parties must provide free and compulsory primary education for all, including the children of migrant workers, regardless of their migration status.³²⁴ The Committee encourages States Parties to ensure that children of migrant workers are registered soon after birth, irrespective of the migration status of their parents, and provides birth certificates and other identity documents.³²⁵ States Parties are advised not to require residence permits from migrant workers for purposes of registering a child, as this would effectively deprive migrant children in an irregular situation of their right to birth registration, which can also deny

³²¹ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 62.

³²² Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 21, 56 and 60.

³²³ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 60.

³²⁴ General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families UN Doc CMW/C/GC/2 (2013) (hereafter Committee on the Protection of the Rights of All Migrant Workers "General Comment No. 2") para 11.

³²⁵ Committee on the Protection of the Rights of All Migrant Workers "General Comment No. 2" para 79.

them access to education.³²⁶ The non-compliance of migrant workers with the obligation to register their children following birth should not justify their exclusion from education. The crux of this for undocumented immigrant children lies in providing equal educational opportunities and eliminating barriers related to their migration status.

2.4 African instruments

2.4.1 *African Charter on Human and Peoples' Rights (1981)*

The *Banjul Charter*, officially known as the *African Charter on Human and Peoples' Rights*, holds significant importance as a legal document in Africa.³²⁷ South Africa, as a member state of the African Union (AU) and having ratified the Charter, finds its relevance in multiple ways.³²⁸ It serves as a crucial framework for guiding the promotion and safeguarding of human rights in South Africa. Providing a comprehensive set of principles and guidelines, the *Banjul Charter* enables South Africa to formulate its domestic laws and policies pertaining to human rights.³²⁹ As a member of the African Union, South Africa is bound by the *Banjul Charter*, which plays a central role in fostering unity among the AU member states.³³⁰ South Africa's adherence to this Charter underscores its dedication to regional collaboration in upholding human rights across the continent.

The *Banjul Charter*,³³¹ whose article 17(1) provides succinctly that "every individual shall have the right to education." However, this provision does not differentiate between documented and undocumented individuals. When read with other provisions, it prohibits discrimination and other forms of prejudice in education.³³² If

³²⁶ Committee on the Protection of the Rights of All Migrant Workers "General Comment No. 2" para 79.

³²⁷ Preamble of the *African Charter on Human and Peoples Rights* (1981) (hereafter *Banjul Charter*).

³²⁸ Justice and Constitutional Development 2023

<https://www.justice.gov.za/policy/african%20charter/africancharter.htm#:~:text=South%20Africa%20acceded%20to%20the,be%20accompanied%20by%20a%20declaration.>

³²⁹ Justice and Constitutional Development 2023

<https://www.justice.gov.za/policy/african%20charter/africancharter.htm#:~:text=South%20Africa%20acceded%20to%20the,be%20accompanied%20by%20a%20declaration.>

³³⁰ Preamble of the *Banjul Charter*.

³³¹ Article 17(1) of the *Banjul Charter*.

³³² Articles 2, 3(1), 5 and 17 of the *Banjul Charter*.

one were to compare the *Banjul Charter* with other international human rights instruments, one could argue that it is the African Bill of Rights. This is because it embodies both civil and political rights and economic, social, and cultural rights, all of which are enshrined in the constitutive instruments of the International Bill of Rights alluded to above, such as the *UDHR*, *ICCPR* and *ICESCR*.

2.4.1.1 African Charter on Human and Peoples' Rights as interpreted by the Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2011)

In November 2010, the African Commission on Human and Peoples' Rights (African Commission), which oversaw the implementation of the *Banjul Charter*, adopted the Principles and Guidelines on the Interpretation of Economic, Social, and Cultural Rights in the African Charter on Human and Peoples' Rights (hereafter Principles and Guidelines).³³³ These principles clarify how economic, social, and cultural rights should be understood and interpreted within the African context.

The Principles and Guidelines serve as valuable tools for states to meet their obligations by providing directions on how to uphold these rights.³³⁴ According to the African Commission, education is a fundamental right that significantly influences the well-being, development, and prosperity of individuals, particularly children and young people.³³⁵ Recognised as a human right, education serves as the fundamental tool enabling marginalised children to escape poverty and gain the resources necessary to engage actively within their communities.³³⁶ Education plays an important role in safeguarding children from exploitative and hazardous labour and sexual exploitation.³³⁷ Children who are undocumented immigrants lack legal status in their countries, making them more susceptible to various forms of exploitation. These

³³³ Principles and Guidelines on the Interpretation of Economic, Social and Cultural Rights (2019) (hereafter Principles and Guidelines).

³³⁴ Preamble of the Principles and Guidelines.

³³⁵ Principles and Guidelines para 69.

³³⁶ Principle and Guidelines para 69.

³³⁷ Principles and Guidelines para 69.

children are often reluctant to report instances of abuse out of fear, as doing so might result in deportation.³³⁸ In these cases, education can be utilised as a means to raise awareness among undocumented immigrant children, enabling them to understand their rights and the legal protection available to shield them from exploitation.

Education fosters an understanding of human rights, democracy, and rule of law.³³⁹ By providing children with knowledge and skills, education enhances their social and economic integration while safeguarding them from possible abuse. Undocumented immigrant children, like all other children, have the inherent right to access quality education. Offering education to undocumented immigrant children promotes a sense of belonging and inclusion in society, which can enrich the learning environment for all students. The African Commission defined discrimination as any act that aims to distinguish, exclude, restrict, or prefer based on grounds such as national origin, birth, or other status, with the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise by all persons, on equal footing, of all rights and freedom.³⁴⁰ Therefore, any act that infringes on, hinder access to and deprives the enjoyment of basic education by undocumented immigrant children can be classified as unfair discrimination.

2.4.2 African Charter on the Rights and Welfare of the Child (1990)

This regional instrument was adopted by the Organisation of African Unity in 1990, entered into force in 1999, and ratified by South Africa in 2000.³⁴¹ The *ACRWC* was the first regional instrument to enshrine children's rights.³⁴² It applies to all human beings below the age of 18 years, who are defined as children,³⁴³ and echoes many

³³⁸ United Nations Office on Drug and Crime (UNODC) "Compacting Violence against Migrants" 2-3.

³³⁹ UNESCO and UNODC "Strengthening the Rule of Law through Education: A Guide for Policymakers" 17-20.

³⁴⁰ Communication 29/04- *Zimbabwe Lawyers for Human Rights and IHRDA (on behalf of Andrew Barclay Meldrum) v Zimbabwe* (2006) ACHPR para 91.

³⁴¹ Gose *The African Charter on the Rights and Welfare of the Child* 10.

³⁴² Chirwa 2002 *Int J Child Rights* 157; Sloth-Nielsen "The African Charter on the Rights and Welfare of the Child" 426; Mezmur and Kahbila 2018 *African Human Rights Yearb* 201.

³⁴³ Article 2 of the *ACRWC*.

elements of the *CRC*, including the primary consideration of the best interests of the child, participation, and non-discrimination.³⁴⁴ The *ACRWC* also reflects a collective rather than a purely individual approach, followed by *CRC*. In keeping with African culture, the *ACRWC* views children as holders of a series of duties that include respecting their parents, serving their communities, preserving African cultures and values, and contributing towards African unity.³⁴⁵

2.4.2.1 Right to education

Like all other treaties discussed above, the *ACRWC* protects the right to education for all children. However, unlike other instruments, it specifically uses the term basic education rather than primary education. Article 11(3)(a)–(b) obliges States Parties to provide free and compulsory basic education to all children and to encourage the development of secondary education and make it progressively free and accessible to all.³⁴⁶ Article 11(2) states that education must be directed towards the development of children, including personality, talent, and mental and physical development.³⁴⁷

The *ACRWC* also stipulates that education must be geared towards the strengthening and preservation of positive African morals, traditional values, and culture.³⁴⁸ The *ACRWC* provides for the binding aims of education and explains the advantages of receiving education in that it equips the child for a responsible life in a society that values freedom, promotes understanding, tolerance, dialogue, mutual respect, and fosters friendship among all ethnic, tribal and religious groups.³⁴⁹

Compared to the *CRC*, the *ACRWC* takes a different stance in its understanding of the content of the right to a basic education. It may be stated to reflect the value of *ubuntu*³⁵⁰ and emphasise that African children should be educated with the goal of

³⁴⁴ Article 4, 12 and 3 of the *ACRWC* respectively.

³⁴⁵ Article 31 of the *ACRWC*.

³⁴⁶ Article 11(3)(a)–(b) of the *ACRWC*.

³⁴⁷ Article 11(2) of the *ACRWC*.

³⁴⁸ Article 11(2) of the *ACRWC*.

³⁴⁹ Article 11(3) of the *ACRWC*.

³⁵⁰ Lefa *The African Philosophy of Ubuntu in South African Education* 5.

giving value to others and their communities (oneness). In *S v Makwanyane*, Langa J pointed out that *ubuntu* signifies emphatically that "the life of another person is at least as valuable as one's own" and that "respect for the dignity of every person is integral to this concept."³⁵¹ *Ubuntu* embodies an African way of living that honours the dignity and equality of every individual, regardless of their societal standing, within a communitarian context.³⁵² A deeper reflection on the provisions of the *ACRWC* shows that the content of African education should be based on communalism, self-development, and moral uprightness.³⁵³ The concept of *ubuntu* fully embraces and values humanism and requires schools to treat all learners fairly.³⁵⁴ This calls for acceptance and inclusive approaches to the provision of education. A school without *ubuntu* (honouring the dignity and equality of every individual, regardless of their societal standing, within a communitarian) easily results in disrespect, ignores human dignity, has discriminatory tendencies, and has no respect for children's rights.³⁵⁵

Article 31 of the *ACRWC* outlines the various responsibilities for children.³⁵⁶ Article 31 is a significant addition to the international human rights framework. A careful examination of its components suggests that children, as they mature, should be encouraged to participate at the family, community, national, and continental levels in alignment with their age and maturity. Participation is viewed as an integral aspect of heritage, empowerment, and development as active citizens. In contrast to the provisions of the *CRC*, article 31 envisions a type of active involvement in social and community life concerning children fulfilling their duties.³⁵⁷ The specified age and capability restrictions guarantee that, as children progress toward adulthood, their

³⁵¹ *S v Makwanyane* [1995] ZACC 3; 1995 3 SA 391 (CC) para 225.

³⁵² English 1996 *SAJHR* 641; Mchunu 1996 *Die landdros/The Magistrate* 55.

³⁵³ Sloth-Nielsen and Mezmur 2008 *Journal of African Law* 180; Article 11(2)(c)-(g) of the *ACRWC*.

³⁵⁴ Ngubane and Makua 2021 *Journal of Humanities and Social Sciences* 6.

³⁵⁵ Ngubane and Makua 2021 *Journal of Humanities and Social Sciences* 6.

³⁵⁶ These include amongst others, subject to his age and ability, a child has a duty to work for the cohesion of the family, to serve his national community, to preserve and strengthen social and national solidarity, to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, to preserve and strengthen the independence and the integrity of his country.

³⁵⁷ Sloth-Nielsen and Mezmur 2008 *Journal of African Law* 170.

engagement through fulfilling these responsibilities corresponds with their advancing maturity, including physical, mental and emotional abilities.³⁵⁸ Children need prior experience to take on adult responsibilities; hence, the formulation of the Charter postulates that it is undoubtedly in the best interests of children not to face the challenges of the adult world entirely unprepared.

In African societies, it is a practical reality that children are often given the opportunity to engage in adult tasks, chores, and traditions before they reach 18 years of age.³⁵⁹ This opportunity allows them to learn and develop the necessary skills for a future family life. The relevance of this with regard to the education of undocumented immigrant children, could be that the *ACRWC* requires states to create conditions of *ubuntu* that show compassion and humanness to these children through education so that society can view them as persons in need and not as takers of resources and opportunities. Therefore, schools must create learning conditions based on an understanding of the vulnerability and needs of undocumented immigrant children. Ultimately, school environments should embody values such as acceptance, responsibility and inclusivity. When formulating laws, both schools and states should consider the idea of unity, ensuring that every child receives the rights they are entitled to, irrespective of immigration status. At the same time, as they grow, children should also bear responsibility and recognise the importance of adhering to the laws of the country in which they reside.

The *ACRWC* also has a body tasked with monitoring the implementation processes of the *ACRWC* by States Parties, that is, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).³⁶⁰ The ACERWC is mandated to monitor and report the fulfilment of child rights in Africa, and it derives its mandate from article 46

³⁵⁸ Sloth-Nielsen and Mezmur 2008 *Journal of African Law* 171.

³⁵⁹ Sloth-Nielsen and Mezmur 2008 *Journal of African Law* 171.

³⁶⁰ Institute for Human Rights and Development in Africa 2023 <https://www.ihrda.org/african-committee-of-experts-on-the-rights-and-welfare-of-the-child-acerwc/>; Article 32 of the *ACRWC*.

of the *ACRWC*.³⁶¹ The ACERWC, in its Concluding Observations and Recommendations to the Government of the Republic of South Africa in 2019,³⁶² expressed deep concern over the discrimination and xenophobia experienced by migrant children and children of foreign parents in South Africa. The ACERWC highlighted that these children often face hostility from their peers and teachers and are sometimes denied access to schools and essential services because of their reported illegal entry or residence in the country.³⁶³

The ACERWC further pointed out that undocumented immigrant children are often refused admission to schools.³⁶⁴ In this context, research endeavours to tackle the concerns raised by ACERWC. It seeks to identify any initiatives implemented by the government, particularly after the *Centre for Child Law & 37 Children*, which dealt with the problem of access to and enjoyment of basic education among undocumented immigrants. ACERWC also highlighted its concern over the lack of a mechanism that regularises the status of unaccompanied immigrant children.³⁶⁵ These children are classified as requiring care and protection from the government but do not receive the expected support. However, the ACERWC recommends the government to recognise unaccompanied migrant children as a distinct category requiring special consideration and take steps to ensure that eligible unaccompanied children obtain permanent residence in South Africa.³⁶⁶ The ACERWC further emphasised the crucial role of education for unaccompanied immigrant children.³⁶⁷ ACERWC highlights the need for expedited processing of residential applications to enable immediate access to education.³⁶⁸ Even without proper documentation, they emphasised that these

³⁶¹ Article 46 of the *ACRWC* states that: The Committee shall draw inspiration from International Law on Human Rights, in the field of human rights, and from African values and traditions.

³⁶² Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of South Africa on its First Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child (2019) para 9 (hereafter ACERWC "Concluding Observations and Recommendations: First Periodic Report.").

³⁶³ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 9.

³⁶⁴ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 9.

³⁶⁵ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 39.

³⁶⁶ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 39(A).

³⁶⁷ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 39(B-C).

³⁶⁸ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 39(D).

children should be permitted to attend school while waiting for the outcome of their application. The state is further obliged to ensure that social workers are consistently assigned to assist unaccompanied children by amending section 32 of the *Refugees Act*.³⁶⁹ This provision gives discretionary to children's court to assign a social worker to assist the child in making an asylum application.

2.5 Soft law

2.5.1 *The Abidjan Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education (2019)*

Over 50 eminent experts on the right to education adopted the Guiding Principles on the Human Rights Obligations of States to Provide Public Education and Regulate Private Involvement in Education (hereafter Abidjan Principles)³⁷⁰. They have been endorsed in several resolutions by the United Nations Human Rights Council.³⁷¹ Essentially, the Abidjan Principles are guiding principles aimed at ensuring that states guarantee the right to education against potential exclusions that may arise as a result of increasing private sector involvement in the delivery of education.³⁷² The Abidjan Principles clarify the legal obligations of states regarding the delivery of education. In particular, they focus on the duty of states to limit and regulate the role of private actors in the provision of education.³⁷³ They can be considered soft law because they are not legally binding. Nevertheless, they carry considerable weight and serve as

³⁶⁹ Section 32(1) and (2) of the *Refugee Act* 130 of 1998 read as follows:

(1) Any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act, 1983 (Act No. 74 of 1983), must forthwith be brought before the Children's Court for the district in which he or she was found.

(2) The Children's Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of this Act.

³⁷⁰ The Abidjan Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education (2019) (Abidjan Principles).

³⁷¹ Global Initiative for Economic Social and Cultural Rights 2019 <https://www.gi-escr.org/latest-news/historic-recognition-of-the-abidjan-principles-by-top-un-human-rights-body>.

³⁷² Global Initiative for Economic Social and Cultural Rights 2019 <https://www.gi-escr.org/latest-news/historic-recognition-of-the-abidjan-principles-by-top-un-human-rights-body>.

³⁷³ Brunner 2019 <https://clpr.org.in/blog/the-abidjan-principles-adoption-conference-ensuring-the-right-to-education>.

benchmarks for assessing the delivery of education. This is because they were drafted by eminent jurists of international law.³⁷⁴ Kouame, in his speech, expresses delight that African states and institutions at the highest level are addressing the increased threats to the right to education, specifically concerning the uncontrolled growth of the private sector, and emphasises the importance of establishing global standards, following the example set by the Human Rights Council.³⁷⁵

The Abidjan Principles elucidate many dimensions of the right to education that require action, including matters concerning its progressive realisation. They require states to devote resources towards fulfilling the right to education and preventing retrogressions.³⁷⁶ Principle 27 states that whenever discrimination in education conflicts with international human rights standards, states should immediately implement measures to eradicate such discrimination and protect education.³⁷⁷ This should be performed even when the state does not directly cause discrimination.³⁷⁸ This clearly highlights the state's obligation to *protect*. The Abidjan Principles clarify that even at the private school level, the rights to free or affordable, equitable, and inclusive education for all, as well as the rights to equality and non-discrimination, must be upheld.³⁷⁹

These principles reiterate the obligations of states to establish free and high-quality public education systems for all children. They also clarified the obligation to regulate private actors, that is, to require such private provision to comply with minimum education standards and to guarantee that all participants involved in education are aligned towards the common aim of realising the right to education.³⁸⁰ Overarching Principle 1 emphasises the obligation of states to respect, protect, and fulfil the right

³⁷⁴ Brunner 2019 <https://clpr.org.in/blog/the-abidjan-principles-adoption-conference-ensuring-the-right-to-education>.

³⁷⁵ Global Initiative for Economic Social and Cultural Rights 2019 <https://www.gi-escr.org/latest-news/historic-recognition-of-the-abidjan-principles-by-top-un-human-rights-body>.

³⁷⁶ Overarching Principle 4 of the Abidjan Principles.

³⁷⁷ Overarching Principle 27 of the Abidjan Principles.

³⁷⁸ Overarching Principle 27 of the Abidjan Principles.

³⁷⁹ Overarching Principle 4 of the Abidjan Principles.

³⁸⁰ Overarching Principle 4 of the Abidjan Principles.

to education of everyone within their jurisdiction in accordance with the rights to equality and non-discrimination.³⁸¹ Principle 2 underlines that states must provide free education as effectively and expeditiously as possible to the maximum of their available resources.³⁸² Overarching Principle 7 stresses that states must establish effective mechanisms to ensure that they are held accountable for fulfilling their obligations to respect, protect, and fulfil the right to education.³⁸³

In recognising the right to equality and non-discrimination in education, the Abidjan Principles state:

23. States must ensure the realisation of the right to equality in the enjoyment of the right to education, which includes four dimensions:

- (a) a fair redistributive dimension to address socio-economic disadvantages;
- (b) a recognition dimension to combat stigma, stereotyping, prejudice, and violence, and to recognise the dignity of human beings and the intersectionality of different grounds of discrimination;
- (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
- (d) a transformative dimension to accommodate difference as a matter of human dignity and institute systemic change.

24. States must eliminate all forms of discrimination in the enjoyment of the right to education on grounds such as: age; birth; caste; colour; descent; disability; documentation; ethnicity; civil, family or career status; gender identity; health status, or genetic or other predisposition toward illness; language; migration status; national or social origin; nationality; political or other opinion; parental status; pregnancy; property; race; religion; sex; sexual orientation; socio-economic disadvantage; statelessness; or other status. The obligation to prohibit all forms of discrimination includes direct and indirect discrimination, harassment and denial of reasonable accommodation, as well as multiple, intersectional, associative, and perceptive discrimination.³⁸⁴

³⁸¹ Overarching Principle 1 of the Abidjan Principles.

³⁸² Overarching Principle 2 of the Abidjan Principles.

³⁸³ Overarching Principle 3 of the Abidjan Principles.

³⁸⁴ Overarching Principle 24 of the Abidjan Principles.

The importance of the Abidjan Principles to this study is that it clearly mentions that no one should be discriminated against based on "documentation and migration status" or even the status of parents. As will be discussed in the next chapters, one would realise that migrant children are often discriminated against or face attacks due to the status of their parents. The Abidjan Principles do not leave room for ambiguity, as in the case of many international laws, which just mention "other status." As such, no child should be deprived of education based on the fact that they do not have documents. It does not only stop there but it further encourages states to make sure that after accessing education, no child should suffer harassment such as xenophobic attacks in form of stigma, stereotyping, prejudice and physical violence.

2.6 Toward a human rights-based approach to education

The discussion above shows that states become parties to international treaties through signatures, ratification, or accession.³⁸⁵ When they complete these steps, states would have voluntarily accepted a range of legally binding obligations to realise/fulfill – in the case of human rights treaties – the realisation of all rights enumerated, except where they have made reservations.³⁸⁶ Upon ratification of or accession to these international agreements, States Parties subject themselves to the scrutiny of international committees of independent experts on the basis of the norms and standards contained in the respective treaties.³⁸⁷ Human rights instruments define the right to education and ancillary rights of all children as justified claims against States Parties. The aforementioned rights specify what governments and their departments/institutions should or should not do.³⁸⁸ Given that rights are entitlements that belong to all human beings, regardless of race, ethnicity, and socio-economic class, and that education has been laid down as a human right, it follows that a human rights-based approach to education is necessary. Such an approach entails the attainment of desired goals through a process that reflects human rights standards

³⁸⁵ Australian Human Rights Commission "Fact Sheet 6" 1.

³⁸⁶ Australian Human Rights Commission "Fact Sheet 6" 1.

³⁸⁷ ESCR-NET 2015 <https://www.escr-net.org/resources/section-5-background-information-icescr>.

³⁸⁸ Orend *Human Rights* 17.

and values.³⁸⁹ Therefore, attention should shift to capacity development and advocacy in a way that reflects human rights standards and values so that, *inter alia*, undocumented immigrant children can have unimpeded access to education.³⁹⁰ The objective of a human rights-based approach to education is to ensure that all children receive an education that respects and promotes their right to dignity and optimum development.³⁹¹ It focuses on those who are the most vulnerable, excluded and discriminated against, such as undocumented immigrant children.

The implementation of a human rights-based approach to education for undocumented immigrant children means that states are obliged to take positive action to realise the entitlements that accrue to these children. The right to education for undocumented immigrants involves these key participants: the state, immigrant parents (if available), immigrant children, and civil society. There is a trilateral relationship between the participants. In developing a human rights-based approach to basic education for undocumented immigrant children, it is vital to consider the interests of these participants and reconcile them towards the common goal of ensuring that undocumented immigrant children receive education.

In addition, a human rights-based approach to education entails that both duty-bearers and right-holders play active roles in the practical realisation of the right to education. Duty-bearers are accountable for respecting, protecting, and fulfilling the right to education, whereas undocumented immigrant children, who are right-holders, are entitled to education. Therefore, a human rights-based approach to education requires developing the capacity of undocumented immigrant children and their parents or guardians to claim the related rights.³⁹² This approach to education is a vital mechanism, as it allows individuals to appreciate, claim and enjoy their rights.³⁹³ The capability of right-holders to claim their rights keeps the state accountable. The

³⁸⁹ Orend *Human Rights* 17.

³⁹⁰ Orend *Human Rights* 17.

³⁹¹ UNICEF and UNESCO "A Human Rights - Based Approach to Educational for All" 11.

³⁹² UNICEF and UNESCO "A Human Rights - Based Approach to Educational for All" 11.

³⁹³ UNICEF and UNESCO "A Human Rights - Based Approach to Educational for All" 11.

human rights-based approach also has implications for the state. The correlation between rights and duties entails distinct responsibilities: assurances made under human rights are entitlements, not promises or charity.³⁹⁴ States are primary duty-bearers. As such, various duties accrue with respect to human rights. These obligations include duties to respect, protect, promote, and fulfil human rights.

2.7 Sustainable development imperatives in enhancing the right to a basic education for undocumented immigrant children

The UN Sustainable Development Goals (SDGs) are a set of 17 global goals established by the United Nations that aim to address the key social, economic, and environmental challenges faced by countries worldwide.³⁹⁵ Noteworthy, these are not legally binding but they are relevant to the discussion mainly because overarching principles of the SDGs, emphasise leaving no one behind and achieving sustainable development for all. Hence efforts to ensure inclusion of undocumented children contribute to building a more just and equitable society in line with the global goal. As a member of the United Nations, South Africa has committed to implementing and working towards achieving Sustainable Development Goals by 2030.³⁹⁶ One of the goals and objectives of the Sustainable Development Goals and the AU Agenda 2040–2063 is to ensure the well-being and equal enjoyment of the rights of children to survival, protection and development and participation to their full potential through education.³⁹⁷ The aim is to have multi-sectoral policies and integrated systems that secure a nurturing environment for all children to fully realise their rights and capacities.³⁹⁸ The sustainable development agenda is founded on the idea that the government and parents should work together to ensure the inclusive development, implementation,

³⁹⁴ UNICEF and UNESCO "A Human Rights - Based Approach to Educational for All" 15.

³⁹⁵ *Education 2030: Incheon Declaration and Framework for Action for the Implementation of Sustainable Development Goal* (2015) (hereafter *Incheon Declaration*).

³⁹⁶ Department of Statistics 2019

https://www.statssa.gov.za/MDG/SDGs_Country_Report_2019_South_Africa.pdf.

³⁹⁷ Aspiration 9-20 of the African Agenda for Children 2040: Fostering an African Fit for Children; Resolution 25 of the *Transforming Our World: The Agenda for Sustainable Development* UN Doc A/RES/70/1 (2015).

³⁹⁸ Resolution 8 and 25 of the *Transforming Our World: The Agenda for Sustainable Development*.

and monitoring of policies that provide access to education for all children.³⁹⁹ The *Incheon Declaration and Framework for Action Towards Inclusive and Equitable Quality Education and Lifelong Learning for All* reinforced the importance of access to education and regarded it as a "main driver of development in achieving the other proposed Sustainable Development Goals."⁴⁰⁰ Moreover, the 2030 Agenda for Sustainable Development Goals proposed that authorities should ensure inclusive, equitable, and accessible quality primary and secondary education.⁴⁰¹ It specifically mentions inclusiveness and states that the goal targets by 2030 are to have education facilities that are sensitive to the needs of all children and ensure safe, non-violent, inclusive and effective learning environments for all.⁴⁰² Another goal is to guarantee equal access to education at all levels, including for children in vulnerable situations.⁴⁰³ Undocumented immigrant children often encounter obstacles in accessing education because of discriminatory policies and practices. SDG4 underscores the necessity of ensuring equal educational opportunities for everyone regardless of their immigration status. Providing education to undocumented immigrant children not only upholds their basic right to education but also aids in fulfilling the targets outlined in SDG4. The Declaration clearly highlights that all people, irrespective of immigration status, should have access to inclusive, equitable and quality education and learning opportunities.⁴⁰⁴ Inclusive education involves designing educational systems that cater to the varied requirements of all learners.

Undocumented immigrant children often face social and legal barriers that hinder their access to education. Barriers might include fear of deportation, language barriers, or lack of awareness about available educational services.⁴⁰⁵ Governments and organisations working towards SDG4 can advocate for policies and initiatives that

³⁹⁹ Preamble of the *Incheon Declaration*; Policy Guidelines for Inclusive Sustainable Development Goals: Quality Education (2020) 40.

⁴⁰⁰ Preamble 5-11 of the *Incheon Declaration*.

⁴⁰¹ Preamble 6 of the *Incheon Declaration*.

⁴⁰² Goal 4.a of the *Incheon Declaration*.

⁴⁰³ Goal 4.5 of the *Incheon Declaration*.

⁴⁰⁴ Goal 4 and 5 of the *Incheon Declaration*.

⁴⁰⁵ Blessed-Sayah, Griffiths and Moll 2022 *Journal of Education* 150-157.

remove these barriers, ensuring that all children, regardless of their immigration status, can attend school safely and without fear. Undocumented immigrant children are a vulnerable population, ensuring that their access to education not only fulfils their right to learn but also provides them with a supportive environment that can protect them from exploitation, child labour, and other harmful practices.⁴⁰⁶ Education serves as a protective factor that enhances children's overall well-being. Inclusive education, as advocated by SDG4,⁴⁰⁷ promotes social cohesion by fostering understanding, tolerance, and respect among communities. By integrating undocumented immigrant children into the education system, societies can work towards breaking down prejudices and stereotypes, fostering a more inclusive and harmonious community. SDG4 and the rights of undocumented immigrant children are interconnected through the principles of equal access, inclusivity, quality education and protection of vulnerable populations. By addressing the educational needs of undocumented immigrant children, societies can contribute significantly to achieving the targets outlined in SDG4.

2.8 Conclusion

This chapter discusses international and regional instruments that regulate the treatment of undocumented immigrant children in terms of primary and secondary education. Various instruments provide for education and are the basis for ascertaining the meaning of basic education in international law. International and regional treaties establish South Africa's obligations towards undocumented immigrant children. It is evident that undocumented immigrant children are entitled to enjoy the right to a basic education under international law. South Africa is a State Party to most of the treaties discussed in this Chapter. As such, it has an obligation to respect, protect, promote, and fulfil the right to a basic education for undocumented immigrant children. Failure to comply with international standards results in violation of obligations under international law. As noted, the obligation to respect, protect, promote, and fulfil the right to primary and at least lower secondary education is

⁴⁰⁶ International Labour Organisation "The Role of Education to Eliminate Child Labour Access to Education-Key for Education Child Labour" 1-2.

⁴⁰⁷ Goal 4 para 7 of the *Incheon Declaration*.

immediate. Upper secondary education is subject to progressive realisation. South Africa follows the SDG whose 2030 Agenda for Sustainable Development Goals posited the imperative for authorities to secure primary and secondary education that is inclusive, equitable, and of accessible quality. This mandate explicitly emphasizes inclusivity, articulating the objective to establish, by 2030, educational facilities attuned to the requirements of all children, ensuring secure, non-violent, inclusive, and efficacious learning environments universally. Furthermore, the agenda underscores the goal of ensuring equal access to education across all levels, including undocumented immigrant children. On that note the Chapter opined that it is crucial that a human-rights based approach be used when addressing the issue of basic education for undocumented immigrants. This approach entails that States are obligated to actively adopt measures aimed at realising the rights inherent to these children. The next Chapter explores the legal framework realising the right to a basic education for undocumented immigrant children in South Africa.

Chapter 3 The Right to a Basic Education in South African Law

3.1 Introduction

This chapter continues the discussion of the legal framework which set standards for the respect, protection, promotion and fulfilment of the right to a basic education. However, the focus now is on the South African legal structure. The objective being to examine Constitutional, legislative and policy frameworks that give effect to the right to a basic education for undocumented immigrant children. It seeks to delineate the applicable law and uncover regulatory inconsistencies leading to the denial of access to basic education for undocumented immigrant children. This Chapter firstly, discusses the *Constitution* which is the supreme law that govern all the legislation. This chapter focuses on basic education, as provided in the *Constitution*, which, as alluded to above, is the main source of law governing the development of the legislative framework that regulates the protection of the right to a basic education for all children in South Africa. It will highlight the rights that accrue from basic education. The policies, laws and implementation strategies adopted by the government for the practical realisation of the right to a basic education for all children in South Africa are analysed in this chapter. This is intended to provide a holistic overview of the regulation of access to a basic education to determine the extent to which policy and law conform to the international obligations of South Africa to realise the right to a basic education for undocumented immigrant children. The analysis of the constitutional and statutory environment will aid in understanding the roles of various institutions that enhance access to the right to a basic education (Chapters 4 and 5) and the practical challenges facing undocumented immigrant children in exercising this right (Chapter 6). In this context, judicial cases will be examined, highlighting how the courts have adjudicated instances of infringements upon the right to a basic education. Additionally, the proposed amendments to certain instruments governing the admission policies concerning undocumented immigrants will be addressed. The objective is to assess whether South Africa has effectively addressed laws impeding access to basic education or if said laws, in fact, contribute to the exacerbation of the exclusion of undocumented immigrants.

This chapter illustrates that unlike international law, which uses the language of primary and secondary education, the *Constitution's* terminology alludes to the right to a basic education, enshrined in section 29(1)(a). This provision is given effect in various pieces of legislation, including the *South African Schools Act* 84 of 1996 and other legislation governing schools and the learning environment. In discussing these constitutional and statutory provisions, it should be noted that in South Africa, as in many jurisdictions across the world, education takes place in four levels: early childhood development, also known as preschool education; primary education (grades 1 to 6); secondary education (grades 7 to 12); and higher education (after grade 12).¹

3.2 The South African legal framework

3.2.1 The Constitution, 1996

The post-1996 South African educational system has been the subject of numerous laws, reforms and transformation policies that began with the advent of constitutional democracy.² The *Constitution* enshrines many rights found in the International Bill of Rights and the African Bill of Rights, both of which were examined in the preceding chapter.³ Among these rights are justiciable socio-economic rights, which include the right to a basic education.⁴ The influence of the *Constitution* on basic education and society emanates from the fact that it is transformative.⁵ For this reason, it guides, among other issues, educational policies that are formulated to facilitate educational provision.⁶

¹ Bray "Law, Education and the Learner" 457.

² Taiwo and Govindjee 2012 *Obiter* 115.

³ Chapter 2 of the *Constitution*.

⁴ Section 29(1) of the *Constitution*. See also Mubangizi 2006 *African Journal of Legal Studies* 2-3; Brand "Introduction to Socio-Economic Rights in the South African *Constitution*" 1 for an exposition of the protection, enforcement and justiciability of socio-economic rights in the *Constitution*.

⁵ McConnachie and Skelton "Constitution and the Right to Basic Education" 14.

⁶ Hoppers *Democracy and Human Rights in Education and Society, Explorations from South Africa and Sweden* 250-251.

The *Constitution* alone cannot lead to the realisation of socio-economic rights. This is because it relies on the willingness to implement it. Post-apartheid constitutionalism requires the robust implementation of the *Constitution* and legislation for the respect, protection, promotion, and fulfilment of human rights.⁷ When they adopted the *Constitution* as supreme law,⁸ the people of South Africa committed themselves to building an open and democratic society based on human dignity, equality and freedom.⁹ The *Constitution* will fulfil its true purpose if a culture of constitutional morality is nurtured and if its norms and values become the foundation of a way of thinking for all people.¹⁰ The *Constitution* also promotes unity in diversity as part of the fulfilment of the aspiration to accommodate all people in South Africa.¹¹ It may be argued that the preambular reference to "South Africa belongs to all who live in it" is a recognition that among the people of South Africa, there will always be non-citizens, such as refugees and undocumented immigrants, who need legal protection and a sense of belonging.¹² In realising the right to education for all children, the implementation of such a right is essential.¹³

The legal treatment of non-citizens must be consistent with the provisions of the *Constitution*,¹⁴ which provides that its Bill of Rights protects the rights of everyone,¹⁵ except with reference to rights that are exclusively reserved for citizens, such as the right to vote and hold public office.¹⁶ The Bill of Rights guarantees equal protection to all children and prohibits unfair discrimination¹⁷ based on grounds, such as race,

⁷ Klug 2019 *Buffalo Law Review* 701-702.

⁸ See section 2 of the *Constitution* on its supremacy.

⁹ Devenish *A Commentary on the South African Bill of Rights* 1-18.

¹⁰ Devenish *A Commentary on the South African Bill of Rights* 8; Currie and De Waal *The Bill of Rights Handbook* 1-18.

¹¹ For an appraisal of tolerance and diversity under the *Constitution*, see Dube 2022 *Obiter* 125.

¹² Preamble of the *Constitution*.

¹³ Hoppers *Democracy and Human Rights in Education and Society, Explorations from South Africa and Sweden* 250-251.

¹⁴ Section 2 of the *Constitution*.

¹⁵ Section 19 of the *Constitution*, section 9 and 10 entrench the rights to equality and human dignity of everyone, respectively.

¹⁶ Section 19 of the *Constitution*.

¹⁷ Section 9 of the *Constitution*.

ethnicity, culture, or birth.¹⁸ Section 28 of the *Constitution* enshrines children's rights, which apply to every child irrespective of their legal status or that of their parents.¹⁹ This section also provides for the best interests clause, which reads that "a child's best interests must be of paramount importance in any matter concerning the child."²⁰ In this context, the *Constitution* defines a child as a person under the age of 18 years.²¹

The best interests of the child principle is important in determining the treatment of undocumented immigrant children and their enjoyment of rights under the *Constitution*, as it is in international and regional instruments regarding the right to a basic education. Among the plethora of children's rights set out in Section 28 of the *Constitution*, children also enjoy the right to shelter, basic health care, and social services.²² They may not be detained except as a measure of the last resort.²³ Moreover, are supposed to be protected from exploitative labour practices, not to be required or permitted to perform work or provide services that are inappropriate for the child's age or place at risk the child's education.

The *Constitution* provides everyone with the right to dignity and must be respected, protected, promoted, and fulfilled.²⁴ Everyone is entitled to human dignity, irrespective of whether they are citizens or documented or undocumented immigrants. In *Minister of Home Affairs v Watchenuka* the court highlighted that:

Human dignity has no nationality. It is inherent in all people - citizen and non-citizens alike - simply because they are human. And while that person happens to be in this country - for whatever reasons - it must be respected and is protected by s10 of the Bill of Rights. The inherent dignity of all people - like human life itself - is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights.²⁵

¹⁸ Section 9(3) of the *Constitution*.

¹⁹ Section 28 of the *Constitution*.

²⁰ Section 28(2) of the *Constitution*.

²¹ Section 28(3) of the *Constitution*.

²² Section 28(1)(c) of the *Constitution*.

²³ Section 28(1)(g) of the *Constitution*.

²⁴ Section 10 of the *Constitution*.

²⁵ *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA) para 25-26.

Immigrant children are vulnerable to many fronts and often face human rights violations which impact their dignity. Moreover, denying them certain rights (such as education) violates and suppresses their dignity, contrary to the central constitutional objective of upholding the dignity of every person.²⁶ Some say that human dignity is an eminent value in the *Constitution*.²⁷ This is the most crucial human right.²⁸ The full realisation of the right to human dignity hinges upon the fulfilment of all socio-economic rights. The following discussion examines the constitutional provisions directly relevant to the right to a basic education.

3.2.1.1 Right to a basic education under the Constitution

Section 29(1) of the *Constitution* states that:

(1) Everyone has the right-

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.²⁹

This provision contains three sets of rights. One, it alludes to the general right to a basic education (which may be interpreted as primary and secondary education for all children in international law). Then, it enshrines the right to basic adult education, which means that even adults who need basic education are entitled to it. In this regard, one may theorise that constitutional drafters sought to provide a right to a basic education for adults whose circumstances may not have afforded them access to basic education when they were of school-going age. There could be various reasons for such deprivation, including disruptions to childhood due to the untimely deaths of their parents or legal guardians, forced labour, personal circumstances, or the apartheid denial of adequate basic education to people of colour.³⁰ Adult basic education also remains important in view of the fact that there are always those who lose related competencies to become functionally illiterate after attending ordinary

²⁶ Goolam 2001 *PELJ* 1-5.

²⁷ Goolam 2001 *PELJ* 1-5.

²⁸ *S v Makwanyane* para 328.

²⁹ Section 29(1)(a)-(b) of the *Constitution*.

³⁰ Arendse 2019 *Law, Democracy and Development* 103.

basic education. Lastly, this provision contains the right to further education, which may be interpreted as the right to post-secondary and tertiary education. The right to further education is qualified by the availability of resources (although not expressly mentioned in section 29(1)(b)), which the state must progressively allocate to increase access.³¹ As part of this conception, the state has implemented a system of post-secondary and tertiary education that aids students through study loans provided by the National Student Financial Aid Scheme (NSFAS).³²

As the Constitutional Court has held in the landmark case of *Juma Masjid Primary School*, the right to a basic education is an unqualified right that is distinct from other socio-economic rights:

Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures." The right to basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education "progressively available and accessible."³³

An unqualified right to a basic education means that every child is entitled to claim such an education as a standalone entitlement.³⁴ Unlike other socio-economic rights, access to basic education is an unqualified right because it is not subject to internal qualifiers that characterise other socio-economic rights, such as the right to housing, health, or further education.³⁵ These rights, insofar as they imply duties to fulfil, usually grant entitlements to government action that is reasonable, but not to

³¹ McConnachie, Skelton and McConnachie "The Constitution and the Right to a Basic Education" 26.

³² *National Student Financial Aid Scheme Act* 56 of 1999; Regulations on Additional Functions Assigned to the National Student Financial Aid Scheme GN 413 of GG 41554 of 03 April 2018; Mavunga 2019 *Journal of Student Affairs in Africa* 81; Mutekwe 2017 *Perspectives in Education* 142; South African Government 2016 <https://www.gov.za/speeches/president-jacob-zuma-announces-commission-inquiry-higher-education-funding-and-other-issues>.

³³ *Juma Masjid Primary School* para 37.

³⁴ *Juma Masjid Primary School* para 36-38.

³⁵ McConnachie and Skelton "Constitution and the Right to Basic Education" 26.

standalone entitlements as such. The right to a basic education is only subject to limitations in terms of the general limitation clause, that is, section 36 of the *Constitution*. This sets stricter requirements than the "reasonableness" approach applied by the courts to assess compliance with other socio-economic rights.

Reasonableness is one of the several standards of constitutional review.³⁶ It has developed over the years in the jurisprudence of the courts, particularly in *Government of the Republic of South Africa v Grootboom*,³⁷ *Minister of Health v Treatment Action Campaign*,³⁸ *Khosa v Minister of Social Development*, *Mahlaule v Minister of Social Development*,³⁹ and *Mazibuko v City of Johannesburg*,⁴⁰ among others, to become the main criterion for assessing the constitutionality of government action in the sphere of socio-economic rights. In its simplest form, it essentially requires answering the question of whether a reasonable decision-maker could have made the impugned decision.⁴¹ In socio-economic jurisprudence, this requirement is important because it establishes the principle that the decision must be reasonable and connected to its purpose. For undocumented immigrant children, this standard means that they are entitled to the protection of the courts where administrators have made decisions that are unreasonable as far as their socio-economic rights other than basic education are concerned.⁴²

³⁶ Other standards include legality, rationality and proportionality. These standards have been the subject of judicial inquiry and academic interest. On legality, see *Affordable Medicines Trust v Minister of Health* 2005 (6) BCLR 529 (CC). On rationality, see *Mohamed & Others v President of South Africa & Others* 2020 (5) SA 553 (GP); The relationships among legality, rationality and proportionality have been discussed in Courtis 2011 *CCR* 31-50; Wesson 2011 *Human Rights Law Review* 390-405.

³⁷ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*).

³⁸ *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) (hereafter *Minister of Health v Treatment Action Campaign*).

³⁹ *Khosa v Minister of Social Development*, *Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) (hereafter *Khosa & Mahlaule v Minister of Social Development*).

⁴⁰ *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC).

⁴¹ See also, Coomans 2005 *Heidelberg Journal of International Law* 167-196; Pillay 2005 *South African Law Journal* 419-440; Quinot and Liebenberg 2011 *Stellenbosch Law Review* 639-663.

⁴² See *Speaker of National Assembly v De Lille MP* [1999] 4 All SA 241 (A) (hereafter *Speaker of National Assembly v De Lille MP*) para 14 on protection by the courts against unlawful and unconstitutional conduct.

There is a difference between the right to a basic education in section 29(1)(a) and the right to further education in section 29(1)(b). The right to a basic education is not subject to internal limitations related to progressive realisation through reasonable legislative and other measures implemented within the limitations of available resources.⁴³ This means that the right to a basic education is immediately realisable.⁴⁴ Hence, the *White Paper on Education and Training* regards basic education as the pillar of "any modern, democratic society that aims to give all citizens a fair start in life and equal opportunities as adults."⁴⁵

Under the *Constitution*, socio-economic rights are justiciable.⁴⁶ In *Juma Masjid Primary School*, the court confirmed that in terms of section 29(1)(a), the right to a basic education is different because any interference with it is a limitation that immediately triggers section 36 of the *Constitution*.⁴⁷ This suggests that learners and their parents (or adult learners, in the case of the right to adult basic education) can approach courts for relief if the state fails to provide them with basic education. Where an applicant alleging a violation of the right to basic education makes out a *prima facie* case, the onus shifts to the state to demonstrate that the limitation is reasonable and justifiable under section 36 of the *Constitution*.

The courts have had the opportunity to comment on the meaning of basic education in *Moko v Acting Principal*. This case involved a learner who was denied access to the National Senior Certificate examinations on the basis that he had not attended extra lessons.⁴⁸ The court had to determine whether writing these examinations was within the ambit of basic education. In determining the scope of basic education, the court found that limiting basic education under section 29(1)(a) to primary and secondary education up to the age of 15 years (as compulsory education under the *Schools Act*)

⁴³ Veriava "Realising the Right to Basic Education in South Africa" 98.

⁴⁴ McConnachie and Skelton "Constitution and the Right to Basic Education" 26.

⁴⁵ White Paper on Education and Training GN 196 in GG 16312 of 15 March 1995 para 15.

⁴⁶ Brand "Socio-economic Rights and Courts in South Africa" 227.

⁴⁷ *Juma Masjid Primary School* para 36-38.

⁴⁸ *Moko v Acting Principal* para 7.

unduly fails to give effect to the transformative purpose and historical context of the right to education.⁴⁹ For example, it would be highly problematic for the school system or society as a whole if section 29(1)(a) only required the state to provide desks for learners at primary and lower secondary schools or only up to grade 9.⁵⁰ The court highlighted that the state could not plead insufficient resources as a reason for failing to provide sufficient grade 10-12 teachers. It is unreasonable to argue that those grades fell under further education thus, section 29(1)(b)) not section 29(1)(a).⁵¹

The court further noted that access to school is a necessary condition for the achievement of the right to education, and refusing a learner into a school undeniably breaches the right to a basic education under section 29(1)(a) of the *Constitution*.⁵² "When someone takes away your pens you realise quite how important education is."⁵³ In relation to the present study, the role players in the education system need to realise the critical importance of education to every child, including non-citizens. South Africa is a constitutional democracy that recognises the transformative nature of education and entrenches it as a socio-economic right in the *Constitution*.

3.2.1.2 Entitlements attached to the right to a basic education

The right to a basic education comes with the specific entitlements that learners possess while receiving basic education. Some of these entitlements have been legally guaranteed by the courts and are briefly outlined below. The entitlements that the courts have already held, which flow from the right to a basic education, include the immediate provision of infrastructure.⁵⁴ The court in *Equal Education v Minister of Basic Education* had to decide on the constitutionality of Sub-regulation 4(5)(a) of the Regulations Relating to Minimum Norms and Standards for Public School

⁴⁹ *Moko v Acting Principal* para 32.

⁵⁰ *Moko v Acting Principal* para 32.

⁵¹ *Moko v Acting Principal* para 32.

⁵² *Moko v Acting Principal* para 35.

⁵³ *Moko v Acting Principal* para 35.

⁵⁴ *Equal Education v Minister of Basic Education* 2018 (9) BCLR 1130 (ECB) (hereafter *Equal Education v Minister of Basic Education*)

Infrastructure, which states that the provision of infrastructure to schools is subject to available resources.⁵⁵ The court found that reference to the availability of resources is unconstitutional because basic education must be implemented immediately. The court pointed out that there is no justification, given the nature of the right to a basic education, for not planning and allocating resources immediately.⁵⁶ The delay in providing infrastructure cannot be justified under section 36 or section 172(1)(a) of the *Constitution*.⁵⁷ The court further pointed that parents send their children to school every day as they are expected to; hence, they expose these learners to dangers that could result in fatal incidents. This is a fate that confronts educators and other caregivers within the school environment.⁵⁸

The court's declaration that infrastructure is vital for the provision of basic education affirms that it constitutes a fundamental aspect of the right to a basic education.⁵⁹ Veriava emphasised that the significance of this court's decision lies in the broadened application of the right to education, benefiting a diverse range of learners who would otherwise have been excluded.⁶⁰ Undocumented immigrant children, like all other children, have the right to immediately access safe and proper school infrastructure. This entitlement does not depend on the immigration status.

Another important component of basic education was illustrated in the case of the *Centre for Child Law v Minister of Basic Education*.⁶¹ In this case, the court argued that a school cannot perform properly without sufficient staff, as this has an effect on

⁵⁵ *Equal Education v Minister of Basic Education* para 59; Sub-Regulation 4(5)(a) of the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure GG 37081 in GN 920 of 29 November 2013.

⁵⁶ *Equal Education v Minister of Basic Education* para 185.

⁵⁷ Section 172(1)(a) of the *Constitution* states that a court may declare any law or conduct inconsistent with the *Constitution* invalid.

⁵⁸ *Equal Education v Minister of Basic Education* para 194.

⁵⁹ Brickhill and Van Leeve "Basic Education Provisioning" 287.

⁶⁰ Daily Maverick 2018

<https://www.dailymaverick.co.za/article/2018-07-27-bhisho-court-judgmentmakes-infrastructure-part-of-the-right-to-basic-education/>; See also Arendse 2020 *African Human Rights Law Journal* 305-309.

⁶¹ *Centre for Child Law v Minister of Basic Education* 2012 (4) All SA 35 (ECG) (hereafter *Centre for Child Law v Minister of Basic Education*).

the right to a basic education and the potential to threaten other fundamental rights.⁶² When hostels are understaffed, for instance, or security is lacking, the right to dignity and security of person is violated.⁶³ As such, teaching posts in schools are an entitlement and the government should implement plans for the appointment of teachers and also pay teachers.⁶⁴

In *Madzodzo obo Parents of learners at Mpimbo Junior Secondary School v Minister of Basic Education*, the court interpreted the right to a basic education as an entitlement to a physical environment that takes account of a learner's right to dignity.⁶⁵ *Tripartite Steering Committee v Minister of Basic Education* involves direct entitlement to be provided with transport to and from school at the state's expense (for those learners who live a distance from school and who cannot afford the cost of transport).⁶⁶ The court pointed out that the issue of transport usually affects the quality of children's education. A learner is forced to wake up early and return home late; upon reaching home late, they will most likely have limited time to study and do homework.⁶⁷ This, in turn, affects the academic performance of learners and increases the dropout rate.⁶⁸ The court held that the right to a basic education, in order to be meaningful, includes issues such as infrastructure, transportation, security at schools, nutrition, and related matters.⁶⁹ The importance of this rule for undocumented immigrant children lies in the fact that many of them find themselves in similar circumstances. Owing to their undocumented status, these children are often unaware of their right to transportation and are afraid to assert their rights. This judgement guarantees that transportation challenges should not hinder children's access to education. This entitlement is considered an essential aspect of basic education.⁷⁰

⁶² *Centre for Child Law v Minister of Basic Education* para 21.

⁶³ *Centre for Child Law v Minister of Basic Education* para 21.

⁶⁴ *Centre for Child Law v Minister of Basic Education* para 2.

⁶⁵ *Madzodzo v Minister of Basic Education* 2014 (2) All SA 339 (ECM) para 20.

⁶⁶ *Tripartite Steering Committee v Minister of Basic Education* para 2.

⁶⁷ *Tripartite Steering Committee v Minister of Basic Education* para 14.

⁶⁸ *Tripartite Steering Committee v Minister of Basic Education* para 14.

⁶⁹ *Tripartite Steering Committee v Minister of Basic Education* para 17.

⁷⁰ Petherbridge "Scholar Transport" 357-371.

Textbooks are a core component of basic education. The court in *Section 27 v Minister of Education*⁷¹ had to decide whether the right to a basic education includes an obligation on the state to provide textbooks. Kollapen took note of Limpopo Education Department's Curriculum Strategy, which essentially states that effective teaching and learning are impossible without learning support materials.⁷² Kollapen stressed that providing learners with prescribed textbooks is a fundamental aspect of their right to a basic education.⁷³ The provision of textbooks is closely tied to fulfilling this requirement. Basic education cannot be realised without textbooks; hence, textbooks are an integral part of basic education.⁷⁴ Undocumented immigrant children face numerous barriers to accessing quality education, including financial and legal constraints.⁷⁵ Without textbooks and the necessary learning materials, students' ability to learn effectively is severely hampered. Textbooks serve as a vital tool that can bridge the educational gap and provide children with essential knowledge and skills despite their challenging circumstances.⁷⁶ In essence, ensuring that undocumented immigrant children have access to textbooks is a step toward breaking down the barriers they face in their education journey. It enables them to have a fair chance of acquiring knowledge, improving their academic performance, and ultimately empowering them to build better futures for themselves, regardless of their immigration status.

Lastly, nutrition is a central component of the right to a basic education as stated in *Equal Education, School Governing Board of Vhulaudzi Secondary School, School Governing Board of Mashao High Secondary School v Minister of Basic Education*.⁷⁷

⁷¹ *Section 27 v Minister of Education* Case 24565/12, 4 October 2012 (hereafter *Section 27 v Minister of Education*).

⁷² *Draft National Policy for the Provision and Management of Learning and Teaching Support Material* (2014) 3, textbooks are categorised as part of the broader Learner Teacher Support Materials (LTSM); *Section 27 v Minister of Education* para 23.3.

⁷³ *Section 27 v Minister of Education* para 43.

⁷⁴ *Section 27 v Minister of Education* para 25.

⁷⁵ A discussion on para 5.1.5.4 illustrates an example of financial constraints facing migrants.

⁷⁶ Stein "Textbooks" 342-352

⁷⁷ *Equal Education, School Governing Board of Vhulaudzi Secondary School, School Governing Board of Mashao High Secondary School v Minister of Basic Education* [2020] 4 All SA 102 (GP) (hereafter *Equal Education*).

The court affirmed that the violation of the duty to safeguard basic education happens directly when the right is not respected and indirectly when there is a failure to prevent someone else from directly violating the right.⁷⁸ This also encompasses failing to uphold the established protection of the right by implementing measures that reduce that protection.⁷⁹ Therefore, learners are entitled to receive basic nutrition. Children with access to nutritious meals are more likely to concentrate in class, participate actively, and absorb information effectively.⁸⁰ Children experiencing hunger face the threat of different forms of malnutrition, such as wasting, stunting, and micronutrient deficiencies, which significantly affect their health.⁸¹ Consequently, their access to basic education is compromised, as many of these children often miss school. It is difficult to conceive of a situation that is more degrading than a child suffering from starvation, and the violation of constitutional rights in such cases is incredibly severe. Proper nutrition is a central component of the right to a basic education and ensures the quality of education.⁸² Proper nutrition supports regular school attendance; when children receive adequate nutrition, they are more likely to attend school consistently. Adequate nutrition can alleviate certain vulnerabilities and difficulties experienced by undocumented immigrant children within the education system. It ensures, at the very least, that they are physically and mentally ready for learning, bridging the gap caused by their uncertain legal status.

3.2.1.3 Summary of section 29 of the Constitution

Section 29 captures all the definitional elements of the right to primary and secondary education provided by the International Bill of Rights. Section 29 must be read with section 7(2) of the *Constitution*, which states that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights."⁸³ Section 7(2) also denotes that the state must respect, protect, promote, and fulfil the right to a basic education for all children, inclusive of undocumented immigrant children. The implication of this

⁷⁸ *Equal Education* para 44.

⁷⁹ *Equal Education* para 45.

⁸⁰ *Equal Education* para 18.

⁸¹ *Equal Education* para 30

⁸² Brickhill and Van Leeve "Basic Education Provisioning" 299-300.

⁸³ Section 7(2) of the *Constitution*.

provision is that the state must not only refrain from interfering with the enjoyment of the right to education (respect) but must also act in a manner that actively protects, enhances and promotes the realisation of the right to education and its enjoyment by every child. Below is a summary of other rights that are interlinked with the right to a basic education.

3.2.1.4 Right to non-discrimination and equality in education as enshrined in the Constitution

The rights in the Bill of Rights must be read and interpreted together, and not in isolation, to provide a solid framework for the respect, protection, promotion, and fulfilment of the rights. Hence, the right to education must be understood in the context of all rights which makes exercising the right to education possible. Applicable rights include other socio-economic rights as well as the right to equality. The right to equality is enshrined in Section 9 of the *Constitution*, which provides that

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.⁸⁴

In reading this provision, it is important to bear in mind that non-citizens and undocumented persons may equally claim constitutional rights, including the right to

⁸⁴ Section 9 of the *Constitution*.

equality. In the context of this thesis, this means that undocumented immigrants are entitled to inclusion and not to be discriminated against in accessing public schools to receive basic education. It should also be argued that the state is obligated not only to refrain from discriminating against undocumented immigrants in schools but also to take measures to enhance their access to schools.⁸⁵ This is because these children are already at a disadvantage, and their vulnerability is amplified by their situation. They deserve special protection as they are discriminated against based on their social origin, nationality, language and birth. The fact that they were born outside South Africa does not make them lesser human beings and does not eliminate their need for special protection and access to education. As section 9(2) has shown, equality means "the *full and equal* enjoyment of all rights and freedoms" and calls for special measures designed to advance vulnerable groups of persons. The constitutional injunction against discrimination extends beyond the state to private providers of primary and secondary education as the Bill of Rights applies vertically (against the state) and horizontally (against other persons). Moreover, a natural or juristic person is bound by the provision of a Bill of Rights to the extent that it applies, considering the nature of the right and the nature of any duty imposed by that right.⁸⁶

South Africa responded to the *Constitution's* call to promote equality and prohibit unfair discrimination by enacting the *Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000* (hereafter *PEPUDA*). Discrimination under the Act refers to any act or omission in the formulation of laws or policies that, among other things, places burdens or denies benefits to a person based on certain prohibited grounds, directly or indirectly.⁸⁷ *PEPUDA* prohibits unfair practices and this would cover unfairly excluding learners, unfairly withholding scholarships, and failing to reasonably and practicably accommodate diversity in education.⁸⁸ A full discussion of *the PEPUDA* is presented in the next sections. The individual right to non-discrimination accrues to

⁸⁵ See *Centre for Child Law & 37 Children* for a discussion of state obligations in relation to the obligation to provide access to basic education.

⁸⁶ Section 8(2) of the *Constitution*.

⁸⁷ Section 1(1) of the *PEPUDA*.

⁸⁸ Schedule Section 29 (2) (a-c) of *PEPUDA*.

immigrants regardless of their level of education, age and skills. Immigrants are highly vulnerable to discrimination⁸⁹ for several reasons, which include the fact that they may not be equipped to access crucial information from their receiving states. This places them at a greater disadvantage when compared to citizens.⁹⁰

As envisaged in Section 9 of the *Constitution*, the concept of non-discrimination has been considered in the context of the immigration system. The preamble of the *Immigration Act* states that the statute envisages immigration control to be performed within the highest applicable standards of human rights protection.⁹¹ In view of inequalities in the education system, Arendse opines that the public education system should be transformed and integrated into a single system of education where all learners can thrive under the same conditions in which they receive the same quality of education. This requires disadvantaged schools and learners to be on par with what was formerly Model C schools and learners who are often seen as privileged.⁹²

Non-discrimination was dealt with in *Khosa & Mahlaule v Minister of Social Development*. In this case, unfair discrimination was argued in the context of the right to equality vis-à-vis right to social security. The applicants challenged the *Social Assistance Act*,⁹³ which gave social security to citizens but denied it to permanent residents.⁹⁴ The court considered the principle of reasonableness in conjunction with the rights accruing from citizenship in the context of social security, the impact of the exclusion on permanent residents, the relevance of citizenship requirements, and the effect of exclusion on other rights.⁹⁵ It was held that the exclusion of permanent residents from the social security scheme based on citizenship was irrational;

What is of particular importance in my view, however, and can be stressed again, is that the exclusion of permanent residents from the scheme is likely to have a severe impact on the dignity of the person concerned who, unable

⁸⁹ Ntlama "The South African Constitution and Immigration Law" 44.

⁹⁰ Ntlama "The South African Constitution and Immigration Law" 44.

⁹¹ Ntlama "The South African Constitution and Immigration Law" 44.

⁹² Arendse 2014 *SAPL* 173.

⁹³ *Social Assistance Act* 59 of 1992 (hereafter *Social Assistance Act*).

⁹⁴ *Khosa & Mahlaule v Minister of Social Development* paras 38 and 39.

⁹⁵ *Khosa & Mahlaule v Minister of Social Development* para 49.

to sustain themselves, have to turn to others to enable them to meet the necessities of life and thus cast in the role of supplicants... In my view, the importance of providing access to social assistance to all who live permanently in South Africa and impact on life and dignity that a denial of such access has far outweighs the financial and immigration considerations on which the state relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure, as contemplated by section 27(2) of the Constitution.⁹⁶

The court further highlighted the state's obligation to protect the rights of immigrants.

It held that:

At the time the immigrant applies for admission to take up permanent residence the state has a choice. If it chooses to allow immigrants to make their homes here it is because it sees some advantage to the state in doing so. Through careful immigration policies it can ensure that those admitted for the purpose of becoming permanent residents are persons who will profit, and not be a burden to, the state. If a mistake is made in this regard, and the permanent resident becomes a burden, that may be a cost we have to pay for the constitutional commitment to developing the caring society, and granting access to socio-economic rights to all who make their homes here. Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destination if they fall upon hard times.⁹⁷

The state must always be vigilant when it implements immigration laws and must ensure that it upholds the constitutional obligation of non-discrimination. While the *Khosa* case articulated criteria to meet constitutional standards of non-discrimination between citizens and permanent residents (who are "lawful" immigrants) in the sphere of social security benefits, the equality consideration will also have to play a consideration in assessing the reasonableness of distinctions between citizens and "illegal" immigrants in spheres such as basic education. In the sphere of basic education, which is crucial to any person's success in life, the scope for exclusions will also be limited as far as "illegal" immigrants are concerned.

⁹⁶ *Khosa & Mahlaule v Minister of Social Development* para 80 and 82.

⁹⁷ *Khosa & Mahlaule v Minister of Social Development* para 65.

3.2.1.5 Limitation of educational rights in terms of section 36 of the Constitution

To contextualise the relevant limitations, it is necessary to look at Section 39 of the *Constitution*, which regulates the interpretation of the Bill of Rights.⁹⁸ This provision states that courts and other forums must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom when interpreting the Bill of Rights.⁹⁹ They must consider international law and may also consider foreign law when interpreting the Bill of Rights (including the right to a basic education).¹⁰⁰ This means that provisions for the limitations of rights in international law will be relevant when considering the limitations of the constitutional right to a basic education.

The general constitutional position is that all rights, including fundamental rights, may be limited by the rights of others and legitimate needs of society. Therefore, no right is absolute.¹⁰¹ All of these may be limited in terms of section 36 of the *Constitution*, which states that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,¹⁰² including

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.¹⁰³

When assessing section 36, the initial step involves determining if a fundamental right is violated. If no fundamental right is infringed, the constitutional scrutiny under

⁹⁸ Section 39 of the *Constitution*.

⁹⁹ Section 39(1)(a) of the *Constitution*.

¹⁰⁰ Section 39(1)(b)-(c) of the *Constitution*.

¹⁰¹ Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* 93; Joubert and Prinsloo *The Law of Education in South Africa* 34.

¹⁰² Section 36(1) of the *Constitution*.

¹⁰³ Section 36(1) of the *Constitution*.

section 36 ends. For example, in this case basic education is a fundamental right and or impeding access of such a right constitutes an infringement on learners' fundamental right to basic education. Secondly one has to establish whether a law of general application limits the fundamental right. Smit in his interpretation of section 36 denotes that:

The attributes of a law of general are that: it must apply generally to all persons ; it must be non-arbitrary (the law must not be random, capricious or illogical); it must be accessible to all per-sons (everyone must be able to find out what the rule entails), and the law must be precise, specific and clear.¹⁰⁴

It is clear that the law only applies to a proportion of pupils and further the laws on admission of undocumented are not specific and clear. Hence, one cannot use section 36 to justify limiting the fundamental right to basic education for undocumented immigrants. Lastly proportionality test need to be applied (weighing the factors). On this one there question need to be addressed- (1) Does the objective of the law warrant the infringement (2) Is there a justifiable reason to limit the right by law (3) Could less restrictive means have been used.¹⁰⁵ The school has to consider the reasonableness and importance of the law denying/restricting undocumented immigrants access to basic education against the learners fundamental right. The reasons for such restriction need to be weighed up by taking into account the requirement for good and sufficiently important reasons that would be convincing in a democratic society based on dignity, equality and freedom.¹⁰⁶

It is not really possible to see how such a high standard can be met, at least in cases concerning actual access to schools, given that such limitations would be against the best interests of these children and also given the far-reaching implications of denying children access to education for the individual and for society. Although there could be legitimate grounds for supporting such limitations, namely, regulating the uncontrolled influx of foreigners into a state that places a burden on a state's capacities, there are less restrictive measures available, namely, better control of

¹⁰⁴ Smit 2008 *Acta Academica* 218.

¹⁰⁵ Smit 2008 *Acta Academica* 221.

¹⁰⁶ Section 36 of the *Constitution*, the limitation clause.

borders to prevent such persons from entering the country in the first place. Once they are in the country, affording them an education will also be a reduced cost to the state, as they can contribute to society and stay out of crime compared to when they are denied education. However, as is usually the case, they remain in the country even so and become a burden on the system by not having an education. Seleoane asserts that the limitations of a right should be considered independently from the interpretation of the right itself.¹⁰⁷ Additionally, he maintains that the determination of the meaning of the right should precede the assessment of its limitations, as it is essential to establish the specific right being restricted.¹⁰⁸ The right to a basic education does not have an internal limitation, such as the right to housing.¹⁰⁹

This foregoing analysis is premised on Currie and De Waal's observations that the *Constitution* vests power in the courts to declare invalid laws and conduct inconsistent with the *Constitution* if they do not meet the constitutional requirements for the limitation of rights.¹¹⁰ This is because the determination of whether constitutional requirements for limiting a right have been met is a judicial function, which is exercised by looking at the *Constitution* and international law, and, where necessary, foreign law, as alluded to earlier in this thesis. The importance of foreign law in the interpretation of the right to a basic education is explored in the seventh chapter, which examines the treatment of undocumented immigrant children in the context of the right to a basic education. However, it should be noted from the outset that reference to foreign law in interpreting the limitations of the right to a basic education is a matter of judicial discretion, not a constitutional requirement. For this reason, initiatives taken by the USA in the treatment of undocumented immigrant children in public schools are intended to determine whether there are any meaningful lessons for South Africa to learn from such a legal system. In the following section, the statute which regulate the right to a basic education under the constitutional framework is explored.

¹⁰⁷ Seleoane 2003 *Law, Democracy and Development* 140.

¹⁰⁸ Seleoane 2003 *Law, Democracy and Development* 140.

¹⁰⁹ Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* 245.

¹¹⁰ Currie and De Waal *The Bill of Rights Handbook* 2.

3.2.2 *South African Schools Act 84 of 1996*

3.2.2.1 Contextual overview

As noted at the beginning of this chapter, the reform of the education system was an integral part of South Africa's transformation after the constitutional transition into democracy.¹¹¹ However, one of the biggest difficulties faced during the transition was changing the previous discriminatory school system into a single democratic and non-discriminatory system.¹¹² The *Constitution* promotes a democratic government where powers are shared within the government spheres.¹¹³ The *Constitution* creates different but interrelated and interdependent spheres of government, as posited by Fuo.¹¹⁴ Hence, the Parliament introduced legislation to align the school system with the *Constitution's* human rights framework to fulfil the fundamental rights to equality, dignity and non-discrimination. These constitutional rights had to be captured in the school system.¹¹⁵ The resultant statute being the *South African Schools Act 84 of 1996*.¹¹⁶

The *Schools Act* prescribes norms and standards for all schools in South Africa.¹¹⁷ Its purpose is to provide for school education and to regulate the organisation, governance and funding of all schools. The statute affirms several rights and the framework within which school governing bodies (SGBs) can develop and adopt admission policies, language policies, school fees, rules regarding religious observance, and codes of conduct for learners.¹¹⁸ The preamble of the *Schools Act* is structured in such a way as to emphasise the aim of "recovering" from the previous education system based on racial inequality and segregation.¹¹⁹ The preamble states

¹¹¹ Rubinfeld 2013 *American Law and Economic Review* 1.

¹¹² Bray "The South Africa Schools Act" 475.

¹¹³ Fuo 2013 *PELJ* 15.

¹¹⁴ Fuo 2013 *PELJ* 15.

¹¹⁵ Bray "The South Africa Schools Act" 475.

¹¹⁶ Bray "The South Africa Schools Act" 475.

¹¹⁷ Bray "The South Africa Schools Act" 476.

¹¹⁸ Beckmann and Prinsloo 2009 *SAJE* 172.

¹¹⁹ Preamble of the *Schools Act*.

that this country "requires a new national system for schools that will redress past injustices in educational provision."¹²⁰ The new education system aims to ensure "progressively" high-quality education for all learners and serves as a solid foundation for the development of people's talents and capabilities.¹²¹ It promotes diverse cultures and languages, upholds the rights of learners, parents and educators and fosters their shared responsibility for school organisation, governance and funding.¹²² The *Schools Act* establishes (a basis for) consistent norms and standards for learners' education.¹²³

It is clear that the legislature's intention in enacting this statute was to reinforce the fundamental value of equal treatment and opportunities in a democratic and non-discriminatory education system. This preamble highlights the importance of creating norms and standards for the education of *all* learners.¹²⁴ The *Schools Act* does not leave parents out, as it prescribes their involvement in the running of schools. It imposes responsibilities on them to work towards improving the quality of education in schools in which their children learn.¹²⁵ This demonstrates the importance of involvement and constitutes the principle of partnership and mutual responsibility among public schools.¹²⁶

In *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC), the court summarised the legal framework of South Africa's education system under the *Schools Act* as follows:

An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools

¹²⁰ Preamble of the *Schools Act*.

¹²¹ Preamble of the *Schools Act*.

¹²² Preamble of the *Schools Act*.

¹²³ Preamble of the *Schools Act*.

¹²⁴ Preamble of the *Schools Act*.

¹²⁵ Maluleke *Parental Involvement in their Children's Education in the Vhembe District: Limpopo* 26.

¹²⁶ Naidoo *Educational Decentralization and School Governance in South Africa: From Policy to Practice* 13.

and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.¹²⁷

This legal framework encourages unity and equality among all stakeholders in the educational system and is vital in determining the rights and responsibilities concerning the school system.

The first determination that comes to mind is the question of who is a learner for the purpose of the *Schools Act*. Section 1 of the *Schools Act* defines a learner as a "person receiving education or obliged to receive education in terms of this Act."¹²⁸ Since a person can be a citizen or a non-citizen, documented or undocumented, it follows that a learner means any child who is subject to compulsory education and who has received or ought to receive such compulsory education. This does not exclude undocumented immigrant children.

The second determination is what constitutes compulsory education. Section 3(1) states that parents have an obligation to ensure that their children attend school from the first day of the year when they reach the age of seven years until the last school day of the year when they reach the age of 15 years or the ninth grade, whichever occurs first.¹²⁹ This obligation reinforces the fundamental right to education and, in part, ensures the fulfilment of the right to a basic education. As stated earlier in Chapter 1,¹³⁰ in *Moko*, the court said that grades 10 to 12 fall within the ambit of basic education as well as school education, leading to the National Senior Certificate. Grade 12 and matric examinations constitute basic education and are an integral part of basic education.¹³¹

¹²⁷ *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC) (hereafter *Head of Department: Mpumalanga Department of Education v Hoërskool*) para 56.

¹²⁸ Section 1(ix) of the *Schools Act*.

¹²⁹ Section 3(1) of the *Schools Act*.

¹³⁰ *Moko v Acting Principal* para 30.

¹³¹ *Moko v Acting Principal* para 30.

3.2.2.2 Compulsory school attendance

It has been noted above that the *Schools Act* prescribes compulsory school attendance for all learners. It is also clear that this obligation accrues with respect to all learners, whether citizens or non-citizen, documented or undocumented. Section 3 of the *Schools Act* provides that every Member of the Executive Council (hereafter MEC) who is responsible for education in each province must ensure that there are enough schools for all children in the province.¹³² If the MEC cannot comply with this because of a lack of capacity, it must take steps to remedy the lack of capacity as soon as possible.¹³³ This signifies the immediate nature of the right to a basic education. When a learner is neither enrolled in nor attends compulsory schooling, the Head of the Department of Education in the province may investigate the circumstances of the learner's absence from school and take appropriate measures to remedy the situation as soon as possible.¹³⁴ A parent, guardian, or any other person who prevents a child from attending compulsory schooling commits a criminal act¹³⁵ that is punishable by a fine or imprisonment that does not exceed six months.¹³⁶ The only circumstance in which a child may be exempted from attending compulsory schooling is when it is in the best interests of the child, for instance, when the child is to be home-schooled.¹³⁷

Like all other children, undocumented immigrant children are required to attend compulsory education. Schools must establish a way to register students without requiring information on their immigration status. The emphasis is on enrolment rather than immigration status verification. MEC can work with community organisations and local leaders to estimate the number of children in the area, ensuring that there are enough schools without specifically identifying undocumented students.¹³⁸ Anonymous

¹³² Section 3(3) of the *Schools Act*.

¹³³ Section 3(4) of the *Schools Act*.

¹³⁴ Section 3(5)(a)-(b) of the *Schools Act*.

¹³⁵ Section 3(6)(a) of the *Schools Act*.

¹³⁶ Section 3(6)(b) of the *Schools Act*.

¹³⁷ Clause 11(1) of the Education Policy on Home Education GN 1239 in GG 42037 of 16 November 2018; Section 4(1) of the *Schools Act*.

¹³⁸ Stuurman and Cooper-Bell "Learners Admissions" 103.

data collection methods can be employed to ensure that statistics are gathered without revealing the individual identities.¹³⁹ It is feasible to enrol undocumented immigrant children in schools without revealing their immigration status or the threat of deportation.

3.2.2.3 Admission policy

Section 5 of the *Schools Act* stipulates that the admission of learners to public schools must occur fairly without discrimination.¹⁴⁰ This means that public educational institutions must be made available and accessible to all the children who need them. Schools governing bodies are, in terms of the Act, to determine admission policies but they may not administer any tests related to such admissions or direct or authorise school principals or other persons to administer admission tests.¹⁴¹ Section 5(3) states the following:.

3. No learner may be refused admission to a public school on the grounds that the parent:
 - (a) is unable to pay or has not paid school fees as determined by the governing body under section 39;
 - (b) does not subscribe to the mission statement of the school; or
 - (c) has refused to enter into a contract in which the parent waives any claims for damages arising out of the education of the learner.¹⁴²

Hence, there may also not be any language tests that could deny admission to immigrant children for insufficient mastery of (any of) South Africa's official language(s). The parents of learners who have refused admission to public schools may appeal to MEC.¹⁴³ To determine the placement of learners with special education needs, the Head of the Department of Education and the principal must consider the rights and wishes of the parents of such learners.¹⁴⁴ However, section 5(3) does not help undocumented immigrant children because, among the prohibited grounds for

¹³⁹ UNESCO "Global Guidance: School-Related Gender-Based Violence" 77

¹⁴⁰ Section 5(1) of the *Schools Act*. A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.

¹⁴¹ Section 5(2) of the *Schools Act*.

¹⁴² Section 5(3) (a)-(c) of the *Schools Act*.

¹⁴³ Section 5(9) of the *Schools Act*.

¹⁴⁴ Section 5(9) of the *Schools Act*.

refusal of admission to a public school, it does not mention lack of documentation. The implication of this is that it creates an impression that the denial of admission to a public school is permissible if it is done on the basis of lack of documentation. Section 5(9) provides that any learner or parent who has been refused admission to a public school may appeal to the MEC against the decision. Further discussion of this is provided in Chapter 4.¹⁴⁵

3.2.2.4 Language policy

Chapter 5 of this thesis will provide a detailed discussion on the right to language and how languages may facilitate or hinder the enjoyment of the right to a basic education.¹⁴⁶ This difficulty is not limited to foreigners, but also local children face the same. The Minister of Education issued the *Language in Education Policy* in 1997,¹⁴⁷ which commits educational authorities to promote multilingualism and the development of official languages.¹⁴⁸ Its underlying principle is the promotion of home languages in education while providing access to and acquisition of additional languages.¹⁴⁹ Section 6 of the *Schools Act* stipulates that the school governing body of a public school may determine the language policy of the school but that this is subject to norms and standards which the Minister may determine for public schools.¹⁵⁰

Section 6(3) of the *Schools Act* prohibits all forms of racial discrimination in the implementation of language policies.¹⁵¹ This is because learning in one's home language has various advantages, including increased access, improved learning outcomes and reduced chances of repetition and dropout. It also offers socio-cultural benefits.¹⁵² Clearly, recognising and providing education in the languages of all immigrants will exceed the capacities of the state, which is not even able to cater for education in the existing official languages. However, larger immigrant language

¹⁴⁵ On the discussion of school governing bodies.

¹⁴⁶ Paragraph 5.1.4 of the thesis.

¹⁴⁷ Preamble of the *Language in Education Policy*, 1997.

¹⁴⁸ *Language in Education Policy* preamble; Bray "The South Africa Schools Act" 481.

¹⁴⁹ Bray "The South Africa Schools Act" 481.

¹⁵⁰ Section 6(1) of the *Schools Act*.

¹⁵¹ Section 6(3) of the *Schools Act*.

¹⁵² Franklin and McLaren 2015 *SPII* 21.

groups may have to be accommodated in one way or another. Moreover, the state should hold a long-term perspective. As the economy develops over time, the country may have additional resources available to provide an enhanced language offering, at least at certain levels of the education system. Language rights and policies are defined or informed by the state's obligation to make basic education publicly available and accessible to learners in the language of their choice as established in the *Constitution*, *Schools Act* and Language in Education Policy.¹⁵³ The *Basic Education Laws Amendment Bill*, which seeks to amend certain provisions of the *Schools Act*, will be analysed in the forthcoming discussion.

3.2.3 National Education Policy Act 27 of 1996

The *National Education Policy Act* empowers the Minister of Basic Education to determine national policies for the planning, provision, financing, staffing, coordination, management, governance, monitoring, evaluation and well-being of the education system.¹⁵⁴ Under this Act, the Minister of Basic Education works with the provinces to determine national norms and standards for the education system. Provincial education departments are responsible for implementing these norms and standards.¹⁵⁵ Section 4 of the *National Education Policy Act* aims to protect and guarantee these rights.

- (i) of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever;
- (ii) of every person to basic education and equal access to education institutions;
- (iii) of a parent or guardian in respect of the education of his or her child or ward;
- (iv) of every child in respect of his or her education;
- (v) of every student to be instructed in the language of his or her choice where this is reasonably practicable;

¹⁵³ Section 29(2) of the *Constitution*; section 6 of the *Schools Act*.

¹⁵⁴ Franklin and McLaren 2015 *SPII* 15.

¹⁵⁵ Franklin and McLaren 2015 *SPII* 15.

- (vi) of every person to the freedoms of conscience, religion, thought, belief, opinion, expression and association within education institutions
- (vii) of every person to establish, where practicable, education institutions based on a common language, culture or religion, as long as there is no discrimination on the ground of race;
- (viii) of every person to use the language and participate in the cultural life of his or her choice within an education institution.¹⁵⁶

Undocumented immigrant children are often excluded, bullied, or treated differently by peers or even educators because of their immigration status,¹⁵⁷ but sections 4(a)(i) above ensure that these children have the right to be protected against such discrimination and learn in an environment free from prejudice. In real-life situations, this means that regardless of their immigration status, these children should be able to attend public schools, access the necessary educational resources and receive the same quality of education as their peers.¹⁵⁸ Equal access ensures that they have opportunities to learn and succeed academically, as provided in sections 4(a) and (ii). Parents or guardians of undocumented immigrant children might fear involvement with the education system due to concerns about their immigration status, but sections 4(a) and (ii) protect their right to be actively engaged in their child's education. Practically, this means that parents and guardians have the right to participate in school activities, parent-teacher meetings, and decisions related to their child's education without fear of legal repercussions related to their immigration status.¹⁵⁹ In line with the *National Education Policy Act*, the Department of Basic Education drafted a policy (provided in the next section) intended to assist regular public schools in establishing their admission policies.

¹⁵⁶ Section 4(a) of the *National Education Policy Act 27 of 1996* (hereafter *National Education Policy Act*).

¹⁵⁷ Onukogu "Conceptualising Second Generation Immigrants in South Africa: The Experiences of Nigerian Second Generation Immigrants" 155-156.

¹⁵⁸ Onukogu "Conceptualising Second Generation Immigrants in South Africa: The Experiences of Nigerian Second Generation Immigrants" 165.

¹⁵⁹ Bunijevac and Đurišić 2017 *CEPS Journal* 146.

3.2.4 Admission Policy for Public Ordinary Schools, 1998

The Admission Policy for Public Ordinary Schools applies uniformly to all provincial departments of education and to ordinary public schools.¹⁶⁰ It sets the procedures that govern the administration of admissions,¹⁶¹ the documents required for admission of non-citizens,¹⁶² admission of undocumented learners,¹⁶³ learners with special education needs,¹⁶⁴ age requirements for the admission of learners to an ordinary public school,¹⁶⁵ school zoning,¹⁶⁶ and rights and obligations of parents, including the right of appeal, among others.¹⁶⁷ The determination of these issues in the policy makes it crucial to the present study. This policy explicitly regulates procedures for the admission of undocumented immigrant children in public schools.

This policy also provides for the monitoring and evaluation of education.¹⁶⁸ The *Schools Act* and Admission Policy govern the rights of learners and schools with respect to the development of school admission policies and the implementation of admission decisions.¹⁶⁹ As already noted, the purpose of this policy is to provide a framework to all provincial departments of education and governing bodies of public schools regarding the admission of learners.¹⁷⁰ It requires schools to admit learners without unfair discrimination.¹⁷¹ However, it also requires parents, when applying for the admission of learners to ordinary public schools, to provide official birth certificates to school principals, which may hinder undocumented immigrant children from qualifying.¹⁷² The provisions state that when applying for the admission of a learner, the parent must furnish the official birth certificate of the learner to the principal, and

¹⁶⁰ Clause 2 of the Admission Policy.

¹⁶¹ Clause 5-13 of the Admission Policy.

¹⁶² Clause 14-22 of the Admission Policy.

¹⁶³ Clause 23-24 of the Admission Policy.

¹⁶⁴ Clause 25-28 of the Admission Policy.

¹⁶⁵ Clause 29-31 of the Admission Policy.

¹⁶⁶ Clause 34-39 of the Admission Policy.

¹⁶⁷ Clause 43-45 of the Admission Policy.

¹⁶⁸ Section 2 of the *National Education Policy Act*.

¹⁶⁹ Franklin and McLaren 2015 *SPII* 15.

¹⁷⁰ Clause 4 of the Admission Policy.

¹⁷¹ Clause 9 of the Admission Policy.

¹⁷² Clause 15 of the Admission Policy.

if that is not available, they may be admitted conditionally until that is submitted.¹⁷³
The parent must ensure that this is done within three months of conditional admission.¹⁷⁴

The Admission Policy explicitly provides for the admission conditions of non-citizens. It states that:

19. The South African Schools Act, 1996 and this policy apply equally to learners who are not citizens of the Republic of South Africa and whose parents are in possession of a permit for temporary or permanent residence issued by the Department of Home Affairs.
20. A learner who entered the country on a study permit must present the study permit on admission to the public school.
21. Persons classified as illegal aliens must, when they apply for admission for their children or for themselves, show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Aliens Control Act, 1991 (No. 96 of 1991).¹⁷⁵

Adopting a literal interpretation, this shows that undocumented immigrant children merely have to show proof of application and that such an application to the Department of Home Affairs does not have to be successful. This gives a reprieve to undocumented immigrant children, as they can always produce proof of application to legalise their stay. As such, only children whose parents cannot produce proof of application will be denied admission in terms of this policy.

Adopting a more likely interpretation, failure to provide documentation showing the legalisation of status within three months of receiving conditional admission as a learner (Clause 15) results in the termination of the admission. The wording of the policy in this respect gives rise to an automatic right of schools to exclude learners from their schools if a three-month lapse and no evidence of the regularisation of stay has been submitted. Therefore, such learners are excluded from exercising their right

¹⁷³ Clause 15 of the Admission Policy.

¹⁷⁴ Clause 15 of the Admission Policy.

¹⁷⁵ Clause 19-21 of the Admission Policy.

to a basic education. This conflicts with the *Constitution* and international human rights instruments.¹⁷⁶ At this juncture, it is important to note that after the case of *Centre for Child Law & 37 Children*, steps have been taken to amend certain provisions of this Policy, and a critical discussion of the amended policy published for public comments will be dealt with later in this chapter.¹⁷⁷

Even if an undocumented immigrant child is admitted, some barriers still subsist and can hinder access to school. An example of such a hindrance is a lack of resources, such as school fees and other direct or indirect costs like learning materials or school uniforms. Although, as indicated, non-payment of fees may not lead to non-admission, the fact is that many undocumented immigrant children cannot afford many other costs that would exclude them from exercising their right to a basic education.

3.2.5 *Immigration Act 13 of 2002*

The *Immigration Act*¹⁷⁸ was promulgated in 2002 to provide for the purposes of controlling who comes into South Africa, for what purposes, for how long, and how they will depart. It says that its purpose is the "regulation of admission of persons to, their residence in, and their departure from the Republic."¹⁷⁹ This statute is crucial to this thesis because it specifically regulates issues concerning immigrants, who constitute the central focus of the thesis. The *Immigration Act* states that it seeks to give immigration control authorities the legal framework with which to "detect and deport illegal foreigners"¹⁸⁰ and to "inspect institutions of learning to ensure that illegal foreigners are not enrolled"¹⁸¹ to receive an education. This is part of the broader mandate for regulating the influx of foreigners into South Africa. Its objectives include educating communities and civil society on the rights of foreigners, including illegal

¹⁷⁶ Eide and Rosas "Economic, Social and Cultural Rights" 190.

¹⁷⁷ A detail discussion on para 3.2.10.

¹⁷⁸ *Immigration Act 13 of 2002*.

¹⁷⁹ Preamble of the *Immigration Act*.

¹⁸⁰ Section 2(1)(c) of the *Immigration Act*.

¹⁸¹ Section 2(b) of the *Immigration Act*.

immigrants, and also to prevent xenophobia.¹⁸² The *Immigration Act* regulates education and other learning institutions in section 39(1) and states the following:

No learning institution shall knowingly provide training or instruction to-

- (a) an illegal foreigner,¹⁸³
- (b) a foreigner whose status does not authorise him or her to receive such training or instruction by such person,¹⁸⁴ or
- (c) a foreigner on terms or conditions or in a capacity different from those contemplated in such foreigner's status.¹⁸⁵

Section 39(2) on the other hand provides that:

If an illegal foreigner is found on any premises where instruction or training is provided, it shall be presumed that such foreigner was receiving instruction or training from or allowed to receive instruction or training by, the person who has control over such premises; unless *prima facie* evidence to the contrary is adduced.¹⁸⁶

Although the *Constitution* affords everyone the right to a basic education¹⁸⁷ and notwithstanding the provisions of the *Schools Act* (which prescribes compulsory education)¹⁸⁸ and the Admission Policy (which provides for the conditional admission of undocumented immigrant children),¹⁸⁹ the *Immigration Act* makes schools responsible for ensuring that they do not admit learners whose legal status in South Africa is unknown or illegal.

Section 42(1) of the *Immigration Act* states that persons and institutions that admit illegal immigrants may be charged for aiding and abetting illegal foreigners.¹⁹⁰ This criminal sanction goes against the spirit of the constitutional right to a basic education. It also potentially violates the best interests of certain categories of children by prohibiting them from admission to receive training and instruction in certain

¹⁸² Section 2(e) of the *Immigration Act*.

¹⁸³ Section 39(1)(a) of the *Immigration Act*.

¹⁸⁴ Section 39(1)(b) of the *Immigration Act*.

¹⁸⁵ Section 39(1)(c) of the *Immigration Act*.

¹⁸⁶ Section 39(2) of the *Immigration Act*.

¹⁸⁷ Section 29(1)(a) of the *Constitution*.

¹⁸⁸ Section 3(5)-(6) of the *Schools Act*.

¹⁸⁹ Clause 21 of the Admission Policy.

¹⁹⁰ Section 42(1) of the *Immigration Act*. It provides that: no person, shall aid, abet, assist, enable or help an illegal foreigner; by providing or allowing them to receive instruction or training.

circumstances. The *Immigration Act* seeks to ensure the outright exclusion of undocumented immigrant children from admission and school attendance. In this regard, its wording poses legal uncertainty in the education system regarding the admission and acceptance of undocumented immigrant children. Although the constitutionality of sections 39 and 42 of the *Immigration Act* was addressed in *Centre for Child Law & 37 Children*, the study shows that schools continue to deny admission to undocumented immigrant children. Moreover, the court highlighted that learning institution does not include basic education but overlooked the Immigration Regulations which defines learning institutions as "school contemplated in section 1 of the Schools Act" (that's primary and secondary education).¹⁹¹

The *Immigration Act* directly addresses the specific needs and protections of immigrants in South Africa. However, sections 39 and 42, which directly speak about education, go against the principle of the best interests of the child. While the court stated that these provisions should be interpreted in a manner consistent with the *Constitution*,¹⁹² there is still a risk of misinterpretation. Provisions that are prone to interpretation contrary to the *Constitution* should be carefully reviewed and potentially amended. It is important to note that even court decisions can be overturned, therefore it is crucial to amend the legislation itself.

The Immigration Act should specifically make a provision which provides that "basic education" falls outside scope of learning institution, and it can be obtained without documentation. Since the Constitution allows for the consideration of foreign law,¹⁹³ one would suggest that the Immigration Act may formulate its provision as follows:

Mexican Migratory Act-

Migrants may access public and private education services, independent of their migratory status and in accordance with the applicable regulations and

¹⁹¹ Regulation 1(c) of the Immigration Regulations GN R 413 in GG 37679 of 22 May 2014.

¹⁹² The court in *Centre for Child Law & 37 Children* provided that sections 39 and 42 of the *Immigration Act* ought to be interpreted so as not to be in conflict with section 29(1)(a) of the *Constitution*. It should be read in a manner that promote the spirit, purport, and objects of the Bill of Rights.

¹⁹³ Section 39(1) (c) of the Constitution.

legal provisions.....With respect to the provision of educational and medical services, no administrative act will establish restrictions on foreigners that are more extensive than those generally established for Mexicans.¹⁹⁴

The *Argentina Immigration Act* also provided that:

Under no circumstances shall foreign national's illegal migration status preclude enrolment as a student in a public, private, national, provincial, or municipal educational institution at the elementary, secondary or higher levels. Officials of the educational institutions shall provide orientation and guidance regarding the corresponding procedures to correct illegal migratory status.¹⁹⁵

The importance of this inclusion is that *Immigration Act* specifically and exclusively deals with the rights of immigrant children.

3.2.6 *Children's Act 38 of 2005*

The *Children's Act*¹⁹⁶ provides a legislative spine for the wider strategy of improving children's lives.¹⁹⁷ It reinforces section 28 of the *Constitution*, which states that the best interests of the child are of paramount importance in all matters concerning children. The *Children's Act* was enacted to increase protection and ensure that children's rights are respected, including the rights to universal services to which every child is entitled to have access. It also provides targeted services to children with additional needs.¹⁹⁸ It does not specifically provide for the right to a basic education. Instead, sections 6(2)(a) and 8(1) acknowledge that all proceedings, actions, or decisions in any matter concerning a child must respect, protect, promote, and fulfil the child's rights as set out in the Bill of Rights.¹⁹⁹ It set distinct objectives pertaining to the care and protection of children.²⁰⁰ Some of its objectives include the preservation and enhancement of the family unit; the realisation of children's

¹⁹⁴ Article 8 of the Mexican Migratory Act 25th, 2011.

¹⁹⁵ Article 7 of the Argentina Immigration Act Law 25.871.

¹⁹⁶ *Children's Act 38 of 2005* (hereafter *Children's Act*)

¹⁹⁷ September 2008 *Social Work* 145.

¹⁹⁸ Preamble of the *Children's Act*.

¹⁹⁹ Section 6(2)(a) and s 8(1) of the *Children's Act*. The rights which a child has in terms of this Act concretise or supplement the rights which a child has in terms of the Bill of Rights.

²⁰⁰ Section 2 of the *Children's Act*.

constitutional rights; compliance with international obligations binding on South Africa; the establishment of resources to promote and monitor children's well-being; safeguarding children from discrimination, exploitation, and all forms of harm or risks; and providing care and protection for children in need.²⁰¹ An objective clearly relate to education is that in terms of which provision is to be made for "structures, services, and means for promoting and monitoring the sound physical, psychological, intellectual, emotional, and social development of children."²⁰² Schools are a prime place where children are to develop.

Undocumented immigrant children should be regarded as children in need of care among them are unaccompanied, abandoned, orphaned or stateless minors. All of these children find themselves in entirely unfamiliar surroundings. In accordance with the standards set by the *CRC* and *ACRWC*, the *Children's Act* adopts the best interests of the child principle,²⁰³ reinforces the child's right to participation,²⁰⁴ and prohibits non-discrimination.²⁰⁵ The best interests of the child principle is firmly established in international law, regional law, and the *Constitution*. It entails that the best interests of the child must "come first." This is the measure against which everything relating to a child is measured.²⁰⁶ Section 9 of the *Children's Act* states that "in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance, must be applied."²⁰⁷ The criteria for the determination of what is in the best interests of the child are set out in section 7 of the *Children's Act*, which concretises the best interests of the child standard.²⁰⁸ The standard includes *inter alia* the child's age, maturity, stage of development, gender, background and any other relevant characteristics.²⁰⁹ The "background" can be

²⁰¹ Section 2 of the *Children's Act*.

²⁰² Section 2(d) of the *Children's Act*.

²⁰³ Section 7 and s 9 of the *Children's Act*.

²⁰⁴ Section 10 of the *Children's Act*.

²⁰⁵ Section 2 of the *Children's Act*.

²⁰⁶ UNICEF "The Children's Act Explained -Booklet 1" 3.

²⁰⁷ Section 9 of the *Children's Act*.

²⁰⁸ Hansungule and Ozah "Upholding the Best Interest of the Child in South African Customary Law" 298.

²⁰⁹ Section 7(g)(i)-(iv) of the *Children's Act*.

interpreted to mean immigrational background. It also includes the need for a child to be brought up within a stable family environment, and where this is not possible, in an environment resembling a caring family environment as closely as possible.²¹⁰ Importantly, the standard reiterates the need to protect the child from any physical or psychological harm that may be caused by subjecting it to maltreatment, abuse, neglect, exploitation, exposure to violence, ill-treatment, and harmful behaviour towards another person.²¹¹ For undocumented immigrant children, this entails protecting them from physical, emotional and other forms of abuse by their local counterparts and teachers.

Section 6 of the *Children's Act*, which sets out general principles, provides that all proceedings, actions, or decisions concerning a child must respect the inherent dignity of the child,²¹² treat the child fairly and equitably,²¹³ protect the child from unfair discrimination on any ground, including on the grounds of the status of a family member of the child,²¹⁴ recognise a child's need for development, and the right to engage in play and other recreational activities appropriate to the child's age.²¹⁵ The state is obliged to ensure that all children are treated equally and that no specific group of children is discriminated against.²¹⁶ Access to basic education through schooling enables the development of children. Section 6, like section 7, recognises a child's need for development.²¹⁷ It is always important to consider the child's emotional and intellectual needs and any major changes in the child's life that would affect their development. In the context of undocumented immigrant children, denying them access to education hinders their intellectual development and deprives them of

²¹⁰ Section 7(k) of the *Children's Act*.

²¹¹ Section 7(l)(i)-(ii) of the *Children's Act*.

²¹² Section 6(2)(b) of the *Children's Act*.

²¹³ Section 6(2)(c) of the *Children's Act*.

²¹⁴ Section 6(2)(d) of the *Children's Act*.

²¹⁵ Section 6(2)(e) of the *Children's Act*.

²¹⁶ Section 4(1) of the *Children's Act*; Article 2(2) of the *CRC*.

²¹⁷ They all advocate for the best interest of the child to be upheld.

opportunities to experience the positive outcomes of having an education, such as the capacity to progress into certain professions and operate modern technologies.

Section 10 of the *Children's Act* states that all children have the right to participate and have their views considered of cause, considering the child's age, maturity, and stage of development.²¹⁸ Children are independent bearers of human rights. They have their own views and feelings. The *Children's Act* sets no age limits or boundaries for their participation in any matter concerning them.²¹⁹ Their right to participate is a central theme in the *Children's Act*, which states that children have the right to participate and express their views. Section 31 of the *Children's Act* obliges any holder of parental responsibilities and rights to consider the views and wishes of the child when making any decision which may have a substantial impact on or negative consequences for the child's living conditions, education, health, personal relationships with parents or family members, and overall well-being.²²⁰ By considering the child's views and potential adverse effects on their well-being, section 31 serves to protect the child's right to education. Regardless of the child's immigration status, they have the right to access quality education and decisions concerning their education must respect and uphold this right. Section 31 promotes a child-centric approach to decision-making, ensuring that the child's voice is heard and respected. In the context of undocumented immigrant children who might face additional challenges, this approach is crucial for safeguarding their rights.

Several factors must be considered when determining the nature of children's participation in questions concerning their schooling. These include their ability to understand questions and give appropriate answers and understand the consequences of their decisions, ability to write, read, and comprehend the circumstances of the school environment; emotional stability; school grade; and level of maturity and cognitive ability.²²¹ Decisions that have a significant effect on a child's life, such as

²¹⁸ Section 10 of the *Children's Act*.

²¹⁹ Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 30.

²²⁰ Section 31(4) of the *Children's Act*.

²²¹ Lidz *Early Childhood Assessment* 112; Muller *The Judicial Officer and the Child Witness* 81 and 201.

decisions about their right to education and rights in education, require the views of the child to be considered.

When undocumented children are denied or obstructed in their access to basic education, their views on the impact of that on their lives must be considered by any person presiding in the proceedings in which such a decision is being made to enable the person to make an informed decision about what would be in the best interests of the child. Arguably, the best interests of the child principle and the right to be heard play a role, even if the legislation does not expressly give undocumented immigrant children access to education. This is because what is in the best interests of the child is not cast in stone but must be ascertained in the specific circumstances of each child.²²² Significantly, sections 14 and 15 of the *Children's Act* give legal standing to every child to bring and assist in bringing a matter to court, provided that the matter falls within the jurisdiction of that court.²²³ The statutory language of this provision is indicative of the all-inclusive personal scope of the Act, which encompasses undocumented immigrants, who, like all children, possess the legal standing to seek redress in the courts of law and to obtain quasi-judicial remedies whenever their rights have been violated or there is a threat of violation.

3.2.7 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

This statute, known as *PEPUDA*, gives effect to section 9 of the *Constitution*,²²⁴ read with Item 23(1) of Schedule 6 of the *Constitution*.²²⁵ This Act was promulgated, *inter alia*, to create a caring South African society. To achieve this, it seeks to prevent and prohibit unfair discrimination and harassment, promote equality and eliminate unfair discrimination, prevent and prohibit hate speech, and provide for matters connected

²²² *S v M* 2008 3 SA 232 (CC) 40 (hereafter *S v M*).

²²³ Section 14 and 15 of the *Children's Act*.

²²⁴ Section 9 of the *Constitution* guarantees the right to equality. That is, the right to equality before law, and equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms.

²²⁵ National legislation envisaged in sections 9(4), 32(2) and 33(3) of the *Constitution* must be enacted within three years of the date on which the *Constitution* took effect.

with these issues. *PEPUDA* prohibits, *inter alia*, the following: unfairly excluding learners, unfairly denying scholarships or other aid to students belonging to specific groups, and the failure to embrace diversity adequately and feasibly in the education system.²²⁶

PEPUDA prohibits unfair discrimination by the state and by all individuals. Immigrant children may face hate speech or xenophobic comments from their peers or educators.²²⁷ *PEPUDA* prohibits hate speech, thus creating a safe environment where immigrant children are protected from derogatory language and discriminatory speech. *PEPUDA* stands as a key source of rights and solution when a learner experiences unfair discrimination within the school environment. The right to a basic education is closely linked to the right to equality and the prohibition of unfair discrimination. For example, the state cannot provide education to some learners but not to others based on their immigration status, which will be regarded as unfair discrimination.²²⁸ Exclusion because of nationality or immigration status, xenophobic attacks and hate speech, among many other forms of unfair discrimination, prevents learners from realising their full potential.²²⁹ Failure to reasonably accommodate those whose needs are different often results in unfair discrimination. Inclusive education welcomes learners from diverse backgrounds, caters to their diverse needs, and makes all learners feel safe and valued.²³⁰ It should be noted that equality is about accommodating and valuing differences rather than treating everyone identically or promoting uniformity.²³¹ Schools that attract learners from diverse backgrounds can promote understanding and tolerance. Learners in diverse schools are also better equipped to live in diverse countries.²³² In section 2(b), *PEPUDA* prohibits the unfair withholding of scholarships, bursaries, or assistance from learners of specific groups; this should be understood to include immigrants. Educational institutions must adapt

²²⁶ Section 29(2)(a)-(c) of the *PEPUDA*.

²²⁷ Times Live 2023 <https://www.timeslive.co.za/politics/2023-01-12-gayton-mckenzie-children-of-illegal-foreigners-shouldnt-be-allowed-in-sa-schools/>.

²²⁸ McConnachie "Equality and Unfair Discrimination in Education" 95-97.

²²⁹ McConnachie "Equality and Unfair Discrimination in Education" 93.

²³⁰ McConnachie "Equality and Unfair Discrimination in Education" 99.

²³¹ McConnachie "Equality and Unfair Discrimination in Education" 94.

²³² McConnachie "Equality and Unfair Discrimination in Education" 93-97.

to the diverse needs of immigrant children, ensuring that they receive inclusive education and equal educational opportunities same as citizens.

3.2.8 White Paper on Special Needs Education, 2001

The state recognises the need to eradicate inequalities in schools. Hence, the Department of Education's *White Paper on Special Needs Education* of 2001 aimed to build an inclusive education and training system.²³³ The White Paper outlines the department's commitment to the provision of educational opportunities for all children, including children who experience or have experienced barriers to learning and development and those who have dropped out of school because of the inability of the education and training system to accommodate their learning needs.²³⁴ The White Paper outlines inclusive education as recognising the inherent ability of every child to learn, emphasising the crucial requirement for developmental support. It emphasises the necessity of adapting educational frameworks, systems, and teaching methods to accommodate the varied requirements of all learners.²³⁵ This approach calls for respecting the distinctive traits of each learner and advocating for changes in attitudes, behaviours, teaching methods, curricula, and learning settings to adequately meet the needs of every student.²³⁶ This accommodating approach will help cater for diverse learner populations in schools and classrooms, enhance the physical and economic accessibility of schools to children, and make education available, acceptable, and adaptable.

The White Paper of the Department of Education on Special Needs Education has profound implications for the education of undocumented immigrant children. In the context of these children, who often face unique challenges due to their uncertain legal status, the White Paper serves as a crucial policy framework. It demands that schools recognise the inherent capacity of all children to learn,²³⁷ irrespective of their immigration status. This recognition translates into schools being mandated to provide

²³³ Department of Education "Education White Paper 6 Special Needs Education" para 9.

²³⁴ Department of Education "Education White Paper 6 Special Needs Education" para 9.

²³⁵ Department of Education "Education White Paper 6 Special Needs Education" para 9.

²³⁶ Department of Education "Education White Paper 6 Special Needs Education" para 10.

²³⁷ Hodgson and Beere "The Right to Basic Education for Children with Disabilities" 145.

support tailored to the diverse needs of every learner, including undocumented learners. For undocumented immigrant children who lack proper documentation, this paper implies that schools should adopt an approach that goes beyond traditional educational paradigms, taking into account the social and emotional needs of these children, many of whom might be fleeing difficult circumstances.²³⁸ Moreover, the White Paper's emphasis on enhancing the accessibility of schools, this has direct relevance to undocumented children who may face economic barriers in accessing education. By ensuring affordability and eliminating financial obstacles, schools can become truly accessible to all children regardless of their legal status or financial background.²³⁹ Essentially, as an aspirational document the White Paper's commitment to inclusive education acts as a beacon of hope for undocumented immigrant children. It asserts their right to education, ensuring that schools not only open their doors but also adapt their teaching methods, curricula, and environments to cater to the diverse and unique needs of every child, fostering a nurturing and supportive educational experience for irrespective of legal status.

3.2.9 The judicial approach: Centre for Child Law v Minister of Basic Education [2020] 1 All SA 711 (ECG)

3.2.9.1 Background

In this recently decided case, the High Court deliberated on the right to a basic education for undocumented children.²⁴⁰ This case addressed the issue of admission of undocumented children to public schools. In this matter, two separate applications were brought to court on the same issue. The first application was by the Centre for Child Law and the School Governing Body of Phakamisa High School (the main application) concerning the lawfulness of a policy decision by the Eastern Cape

²³⁸ UNICEF, UNHRC and IOM 2019 "Access to Education for Refugees and Migrant Children in Europe" 12.

²³⁹ UNICEF, UNHRC and IOM 2019 "Access to Education for Refugees and Migrant Children in Europe" 12.

²⁴⁰ *Centre for Child Law & 37 Children* para 5.

Department of Education (ECDE) to withdraw funding from schools in respect of undocumented learners.²⁴¹

Prior to 2016, the ECDE provided funding to all learners at schools, irrespective of documentation. This enabled all children to access basic education and nutrition through the National School Nutrition Programme.²⁴² In 2016, the provincial government issued Circular 6, which restricted funding to children enrolled through South African identity numbers and passport programmes.²⁴³ It excluded children who did not possess documentation under the pretext that these children were not in the Education Department's Management System Database.²⁴⁴ Consequently, undocumented learners were excluded from most schools because schools were unwilling and unable to shoulder the burden of providing education and meals to unfunded learners.²⁴⁵

The second application was brought on behalf of 37 children who challenged the lawfulness of clauses 15 and 21 of the Department of Basic Education's Admission Policy, as well as sections 39 and 42 of the *Immigration Act*. They argued that the clauses of the Admission Policy and sections of the *Immigration Act* infringed several constitutional rights of undocumented children.²⁴⁶ Clause 15 of the Admission Policy requires that a parent must provide a birth certificate for the child concerned when applying for admission of their child to a public school. It further stipulates that if the

²⁴¹ *Centre for Child Law & 37 Children* para 5.

²⁴² *Centre for Child Law & 37 Children* para 5.

²⁴³ *Centre for Child Law & 37 Children* para 5.

²⁴⁴ *Centre for Child Law & 37 Children*. Full term, otherwise referred to as SASAMS, is an electronic database of all the learners who attend public schools in South Africa and contains the personal and educational details of the learners. It is utilised to determine the learner numbers of a school for purposes of any Norms and Standards, Post Provisioning allocation, and the provision of funding for the schools' National School Nutrition program, which is an important program that contributes to the realisation of learners' rights to education and food and nutrition as it assures that learners are provided with one meal per school day to enable them to concentrate on their school activities and receive the necessary nutrition for their proper development.

²⁴⁵ *Centre for Child Law & 37 Children* para 8.

²⁴⁶ *Centre for Child Law & 37 Children* para 14.

parent is unable to produce a birth certificate, the child may be admitted conditionally for three months, after which they are removed from school if no birth certificate is provided.²⁴⁷ Clause 21 of the Admission Policy deals with illegal immigrants and provides that when persons who are not lawfully present in the Republic apply for admission of their children to public schools, they must show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the *Aliens Control Act*.²⁴⁸ Sections 39 and 42 of the *Immigration Act* prohibit learning institutions from providing training or instruction to illegal foreigners and make it an offence to aid and abet illegal foreigners in obtaining instruction or training.²⁴⁹

The South African Human Rights Commission (SAHRC), whose constitutional role was to protect and promote human rights,²⁵⁰ acted as *amicus curiae* and made representations to the court on the proper interpretation of sections 39 and 42 of the *Immigration Act*. Section27, an NGO committed to the protection of socio-economic rights,²⁵¹ submitted submissions to the court on the ambit of the right to a basic education as provided for international and foreign law.²⁵² The Department of Basic Education and the Department of Home Affairs defended both applications and argued that the policies and provisions in issue were essential measures for preventing and dissuading people from illegally entering the country to obtain free education and meals for their children.²⁵³ They argued that traditional methods of controlling and curbing illegal immigration through proper border control and the enforcement of laws regulating illegal immigration were ineffective.²⁵⁴ At the hearing, they argued that the entire matter had become moot because Circular 6 of 2016 had been withdrawn and that all learners were now being funded.²⁵⁵ They also argued that the Department of

²⁴⁷ Clause 15 of the Admission Policy; *Centre for Child Law & 37 Children* para 14.

²⁴⁸ Clause 21 of the Admission Policy; *Centre for Child Law & 37 Children* para 14.

²⁴⁹ Section 39 and 42 of the *Immigration Act*.

²⁵⁰ Section 184 (1) (a-c) of the *Constitution*.

²⁵¹ Section27 2023 <https://section27.org.za/about-us/>.

²⁵² *Centre for Child Law & 37 Children* para 30.

²⁵³ *Centre for Child Law & 37 Children* para 29.

²⁵⁴ *Centre for Child Law & 37 Children* para 29.

²⁵⁵ *Centre for Child Law & 37 Children* para 55; Circular 6 of 2016 restricted funding to children who did not have identity numbers or passport numbers captured on the Education Department's

Basic Education was considering amending its Admission Policy and issued a Circular in which the period during which parents were required to provide copies of their children's birth certificates was extended to 12 months.²⁵⁶

3.2.9.2 Issues for consideration

This application was launched in the High Court for more than 180 days from the date on which the administrative decision to preclude undocumented children from schools was made, contrary to the provisions of the *Promotion of Administrative Justice Act*.²⁵⁷ For this reason, the court had to first decide whether the delay in bringing the application was unreasonable and, if so, whether condonation could be granted. The second question was whether the issue that the parties brought to court was not moot, as the department withdrew the Circular that imposed the restrictions.

3.2.9.3 The reasoning of the court

The court rejected the argument that the matter had become moot and found that a "live controversy" existed. Based on the evidence, it was clear that due to the personal circumstances and systemic problems facing the Department of Home Affairs, it was virtually impossible for many children to obtain the documentation required by the Department of Basic Education to regularise their presence in South Africa by procuring the necessary visas and permits.²⁵⁸ Such children were vulnerable to expulsion from school in terms of the Admissions Policy, which is yet to be amended.²⁵⁹ The court also found that on the evidence of the Department of Basic Education, over a million undocumented children (most of whom are South African children) are in the schooling system and that all of them remain vulnerable to eventual expulsion in terms of the Admission Policy.²⁶⁰ Hence, there are two issues: one relates to the documents needed by illegal immigrants and the other to birth certificates needed by South

Management System Database. As a result of this decision, schools no longer received financial support for undocumented students enrolled with them. Consequently, some schools either unwilling or unable to bear the cost of educating unfunded learners started excluding undocumented students.

²⁵⁶ *Centre for Child Law & 37 Children* para 64-65.

²⁵⁷ Section 5 of the *PAJA*, according to *PAJA* the permissible timeframe is 90 days.

²⁵⁸ *Centre for Child Law & 37 Children* para 65.

²⁵⁹ *Centre for Child Law & 37 Children* para 65.

²⁶⁰ *Centre for Child Law & 37 Children* para 65.

African citizens. Thus, the issue seems to be the phrase "documents" because for these two groups of children "documents" mean two completely different things. One group is legal in the country but without documents, and the other is illegal in the country and without documents.

3.2.9.4 Findings and order

After considering the merits, the court confirmed that everyone has the right to a basic education regardless of their status or their ability to provide proof of identity through the production of a birth certificate or other official documentation.²⁶¹ In this context, the court scrutinised provision 15 and 21 of the Admission Policy and found that these provisions unjustifiably limit numerous constitutional rights,²⁶² including the right to equality,²⁶³ the right to dignity,²⁶⁴ the right of children to have their best interests considered,²⁶⁵ and the right to a basic education. Hence, these provisions excluded undocumented learners from public schools,²⁶⁶ and were declared unconstitutional. The court further held that these provisions were not justifiable limitations under section 36 of the *Constitution* because constitutional rights may only be limited by the law of general application.²⁶⁷ The Admission Policy is not a law of general application but merely a policy that is incapable of lawfully sanctioning the limitation of any right contained in the Bill of Rights.²⁶⁸

The court also noted that children have distinctive personalities that should not be measured in light of the actions of their parents or guardians.²⁶⁹ Therefore, learners who have no choice to be brought to South Africa and those who have been abandoned by their parents should not have to bear the negative consequences

²⁶¹ *Centre for Child Law & 37 Children* para 132.

²⁶² *Centre for Child Law & 37 Children* para 75 and 132.

²⁶³ Section 9 of the *Constitution*; *Centre for Child Law & 37 Children* para 75.

²⁶⁴ Section 10 of the *Constitution*; *Centre for Child Law & 37 Children* para 75.

²⁶⁵ Section 28(2) of the *Constitution*; *Centre for Child Law & 37 Children* para 75.

²⁶⁶ Section 29(1)(a) of the *Constitution*; *Centre for Child Law & 37 Children* para 94.

²⁶⁷ *Centre for Child Law & 37 Children* para 97.

²⁶⁸ *Centre for Child Law & 37 Children* para 97.

²⁶⁹ *Centre for Child Law & 37 Children* para 79.

attached to their parents' actions in entering the country illegally, failing to obtain documentation, or failing to apply to have their children documented.²⁷⁰ With respect to the interpretation of sections 39 and 42 of the *Immigration Act*, the court found that when properly interpreted through the prism of the Bill of Rights, the reference to learning institutions and training in section 39 of the *Immigration Act* should be construed not to include the provision of basic education.²⁷¹ This interpretation is consistent with sections 28 and 29 of the *Constitution* and international law. In light of this interpretation, the court found it unnecessary to declare these provisions unconstitutional.²⁷²

The court found that if the *Immigration Act* were reasonably capable of an interpretation that would not prohibit schools from providing basic education to the children of illegal immigrants, the court should follow that interpretation.²⁷³ The court concluded that the *Immigration Act* was reasonably capable of an interpretation that did not make it a criminal offence to provide basic education to the children of illegal immigrants. This meant that the *Immigration Act* could be interpreted in a way that would prevent it from violating the constitutional rights of the children of illegal immigrants to access basic education, have their best interests considered, and be treated equally with dignity.²⁷⁴

The next issue to be considered by the court was Circular 6 of 2016, which was found invalid and set aside.²⁷⁵ The state respondents were also directed to admit all children who were not in possession of official birth certificates into public schools in the relevant provinces. It ordered that where children were unable to provide birth certificates, the principals of the relevant schools had to accept alternative proof of identity, such as affidavits or sworn statements deposed by the guardians, parents,

²⁷⁰ *Centre for Child Law & 37 Children* para 79.

²⁷¹ *Centre for Child Law & 37 Children* para 126.

²⁷² *Centre for Child Law & 37 Children* para 127-128.

²⁷³ *Centre for Child Law & 37 Children* para 127-128.

²⁷⁴ *Centre for Child Law & 37 Children* para 127-128.

²⁷⁵ *Centre for Child Law & 37 Children* para 135.

and caregivers of the children with regard to their identification.²⁷⁶ It further interdicted the state respondents from removing or excluding children from schools, including undocumented immigrants who were already admitted, for the sole reason of not possessing identity documents such as passports and permits. This interdiction covered all the children who could not provide any identification.²⁷⁷ However, in reality, the issue is that despite this order, even public figures call for schools to turn away immigrant children from schools,²⁷⁸ and parents are denied entry because of a lack of documentation.²⁷⁹ Therefore, documentation remains an obstruction to the admission of these children.

In summary, the court declared the following as part of its order:

- (a) Clauses 15 and 21 of the Admission Policy were inconsistent with the *Constitution* and invalid.²⁸⁰
- (b) Sections 39 and 42 of the *Immigration Act* did not prohibit the admission of illegal foreign children into schools and did not prohibit the provision of basic education to illegal foreign children.²⁸¹
- (c) The state had no legitimate interest in removing or excluding illegal foreign children who were already admitted for lack of identity documents, passports, visas and other identification documents.²⁸²
- (d) The right to education extends to everyone within the boundaries of South Africa. As such, nationality and immigration status are immaterial.

²⁷⁶ *Centre for Child Law & 37 Children* para 135(4).

²⁷⁷ *Centre for Child Law & 37 Children* para 135(6).

²⁷⁸ Remarks by Gayton McKenzie is a leader of Patriotic Alliance, see Times Live 2023 <https://www.timeslive.co.za/politics/2023-01-12-gayton-mckenzie-children-of-illegal-foreigners-shouldnt-be-allowed-in-sa-schools/>.

²⁷⁹ Daily Maverick 2023 <https://www.dailymaverick.co.za/article/2023-01-13-undocumented-9-year-old-i-want-to-be-in-school-but-my-mother-says-we-have-no-papers-standing-at-the-robots-is-boring/>

²⁸⁰ *Centre for Child Law & 37 Children* para 135.

²⁸¹ *Centre for Child Law & 37 Children* para 135.

²⁸² *Centre for Child Law & 37 Children* para 135.

(e) It is disingenuous to offer conditional admission to illegal foreigners.²⁸³

3.2.9.5 Policy and statutory implications

This judgement provides much-needed protection for millions of undocumented and vulnerable children in South Africa. Due to various socio-economic reasons and challenges faced by the Department of Home Affairs, many parents and guardians of children will never obtain documentation for themselves, let alone for their children. Failure to obtain documentation can lead to statelessness, abuse, crimes and poverty. The *Centre for Child Law & 37 Children* judgement provides hope to many forgotten undocumented children who are victims of unfortunate circumstances that access to education will not be denied to them and that education may improve their lives.

After this judgement, the Department of Basic Education issued Circular 1 in 2020.²⁸⁴

Regarding the admission of undocumented learners, the Circular states as follows:

While the judgement relates to a matter that emanated in the Eastern Cape Province, it sets the tone of the appetite of Courts on the learners' right to basic education throughout the country. The fact that section 29 of the Constitution of the Republic of South Africa, 1996 provides that: "Everyone has a right to basic education" was a salient point in the judgement. The High Court amongst others found that the right to education is an immediately realizable right and stands on a high pedestal. The High Court further emphasised the Constitutional Court's ruling in *Juma Musjid* and stated that "there is no internal limitation requiring the right to be "progressively realised" within "available resources" subject to reasonable legislative measures." As Clauses 15 and 21 of the Admission Policy are not a law of general application but merely a policy, it is incapable of authorizing the limitation of a right in the Bill of Rights..... At paragraph 90 of the judgment it further expatiated that the right to education extends to everyone within the boundaries of South Africa, the nationality and immigration status is immaterial. The High Court further found; at paragraph 98 of the judgment, that it is disingenuous to offer admission to illegal foreigners conditionally.²⁸⁵

It further adds that sections 39 and 42 of the *Immigration Act* do not prohibit admission or the provision of basic education to illegal foreign children.²⁸⁶

²⁸³ *Centre for Child Law & 37 Children* para 135.

²⁸⁴ Department of Basic Education *Circular 1 of 2020*.

²⁸⁵ *Circular 1 of 2020* para 2.1 and 2.2.

²⁸⁶ *Circular 1 of 2020* para 1.2 (d).

However, the question remains whether the Department of Basic Education can adopt a policy that "unpacks" the full scope and content of the right to a basic education. There is also the question of whether policies give all children access to the enjoyment of the right to a basic education. Policies are objectives that a government or organisation sets for itself. They are adopted in response to issues that arise and, therefore, outline the position of the government and its aims.²⁸⁷ Policy documents can be issued through policy directives.²⁸⁸ However, laws are standard rules and regulations that are compulsory and enforceable and remain in force until an elected parliament changes them.²⁸⁹ Although Circular 1 of 2020 addresses the constitutionality of the *Immigration Act* and Admission Policy regarding the admission of undocumented learners, it does not override these documents. In *Akani v Pinnacle Point Casino*,²⁹⁰ the court articulated the relationship between policy and legislation, as follows:

Laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise, the separation between Legislature and Executive will disappear.²⁹¹

The legal gap that bars undocumented immigrant children from accessing education needs legislative correction because Circular 1 of 2020 is a policy that cannot override or amend the law and should not be in conflict with the legislation.²⁹² The State has initiated amendments to certain provisions of the Admission Policy, including sections 15 and 21. However, the proposed provisions may be criticised for potentially introducing additional discriminatory aspects that were not present before. The Proposed Amended Admission Policy is discussed below:

²⁸⁷ Lewis "Policy, Law and Regulation" 1.

²⁸⁸ Lewis "Policy, Law and Regulation" 1.

²⁸⁹ Lewis "Policy, Law and Regulation" 3.

²⁹⁰ *Akani Garden Route v Pinnacle Point Casino* [2001] ZASCA 59 (hereafter *Akani Garden Route v Pinnacle*) para 59.

²⁹¹ *Akani Garden Route v Pinnacle* para 7.

²⁹² Fuo 2013 PELJ 7.

3.2.10 Proposed Amendments to the Admission Policy for Public Ordinary Schools, 2021

After the decision was made by the High Court in the *Centre for Child Law & 37 Children* declaring clauses 15 and 21 of the Admission Policy unconstitutional,²⁹³ the Minister of Basic Education, after consultation with the Council of Education Ministers, published the proposed amendments to the Admission Policy for public comments.²⁹⁴ This is an important policy document because it addresses the requirements for the admission of undocumented immigrant children to schools. An analysis of the proposed amended provisions is crucial for this study as it determines whether the educational rights of undocumented immigrants have been adequately addressed.

Firstly, the court in *Centre for Child Law & 37 Children* found clauses 15 and 21 of the Admission Policy unconstitutional.²⁹⁵ Clause 15 of the Admission Policy requires the parent of a learner to produce an official birth certificate for the learner upon school admission.²⁹⁶ If the required document is unavailable, then the learner can only be admitted conditionally. It further provides that the parent of a learner should not make false statements regarding the age of the child, as it is an offence.²⁹⁷ It goes on to give a time limit of three months, within which the parent should ensure that the admission of a learner is finalised by producing the required document.²⁹⁸ The court in *Centre for Child Law & 37 Children* found this provision to be unconstitutional and urged the government to make amendments to it.²⁹⁹ Each of the proposed amended provisions relevant to this study will be critically analysed.

²⁹³ *Centre for Child Law & 37 Children* para 135.

²⁹⁴ *Call for Comments on the Admission Policy for Ordinary Public Schools* GN 38 in GG44139 of 10 February 2021 (hereafter Proposed Amended Admission Policy).

²⁹⁵ *Centre for Child Law & 37 Children* para 135.

²⁹⁶ Clause 15 of the Admission Policy.

²⁹⁷ Clause 15 of the Admission Policy; Section 31 (b) of the *Births and Deaths Registration Act* 51 of 1992.

²⁹⁸ Clause 15 of the Admission Policy.

²⁹⁹ *Centre for Child Law & 37 Children* para 135.

Clause 15 was amended, and the Proposed Amended Admission Policy now provides as follows,

15. When a parent applies for admission of a learner to an ordinary public school, the parent must present an official birth certificate (with an identity number) of the learner or a written affirmation or sworn written statement (in the form of an Affidavit) about the age of a learner to the principal of the school.

15.1. If the parent is unable to submit the birth certificate or has only submitted a written affirmation or sworn written statement about the age of a learner, the learner must be admitted.

15.2. The principal must advise the parents that section 31 of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992) makes it an offence to make a false statement or cause a false statement to be made about the age of a child.

15.3. If the parent fails to submit the birth certificate of a learner, the principal must admit the learner and refer the matter to the Head of Department concerned. The Head of Department must hold the parents accountable to acquire birth certificates for their children. The Head of Department may liaise with the nearest office of the Department of Home Affairs for assistance relating to the matter. It remains the primary responsibility of parents to acquire birth certificates for their children.³⁰⁰

The Department of Basic Education is to be applauded for taking the step in amending the provision as required by the courts. However, there are problems with the proposed amended provisions. The requirement that the birth certificate to be presented by a learner should contain an identity number is irrational. In South Africa, not all birth certificates are issued with identity numbers.³⁰¹ For instance, children born to a South African parent and a non-South African parent or to both non-South African citizen parents (without valid visa) are issued a birth certificate that does not contain an identity number.³⁰² The emphasis on "with an identity number" still presents a discriminatory effect on those that do have birth certificates but without an identity number.³⁰³ The policy's main aim should be to verify the age of the child. The requirement to produce a birth certificate that contains an identity number for admission serves as an impediment. The policy does not clarify the position of children who have birth certificates but without identity numbers – whether they should now

³⁰⁰ Clause 15 of the Proposed Amended Admission Policy.

³⁰¹ Regulation 8(5) of the Regulations on the Registration of Births and Deaths GN R128 in GG 37373 of 26 February 2014 (hereafter Regulations on the Registration of Births and Deaths).

³⁰² Regulation 8(5) of the Regulations on the Registration of Births and Deaths.

³⁰³ Article 2 of the *CRC*, Article 3 of the *CRC* and section 9(3) of the *Constitution*.

fall within the category of those who should only provide an affidavit attesting to their age.

The requirement that the Head of Department (HOD) liaise with the Department of Home Affairs for undocumented children to obtain birth certificates encourages co-operative governance, which is the main aim and objective of the *Constitution* and *Schools Act*.³⁰⁴ Let us assume that this is a good initiative (as will be argued below, it is not a good idea to refer such matters to the Department of Home Affairs). In reality, there are many barriers to the issuing of birth certificates, which brings one back to the *Births and Deaths Registration Act* 51 of 1992, which requires intensive review and amendments.³⁰⁵ Section 10 of the *Births and Deaths Registration Act* prohibits single, unmarried fathers from obtaining birth certificates for their children.³⁰⁶ The provision discriminates against fathers on the grounds of marital status, and impairs the dignity of unmarried fathers. Concerning this clause, the Constitutional Court acknowledged that the provision was discriminatory but held that the discrimination was reasonable, justifiable, and fair.³⁰⁷ It further contends that section 10 of the *Birth and Deaths Registration Act* should be read in a constitutionally compliant manner.³⁰⁸ In his concluding remarks, Chief Justice stated that the mother of the child should give consent and acknowledge whether the man claiming to be the father is indeed the father of the child, whether he is providing for the child, and whether his actions are advancing the best interests of the child.³⁰⁹ The reality is that most unmarried partners do not have good relationships.³¹⁰ The scope of prejudicing one another is very high. In such cases, it is very difficult to obtain a birth certificate, regardless of

³⁰⁴ Chapter of the *Constitution*, Preamble of the *Schools Act*; *Intergovernmental Relations Framework Act* 13 of 2005

³⁰⁵ *Births and Deaths Registration Act* 51 of 1992.

³⁰⁶ Section 10 of the *Births and Deaths Registration Act*.

³⁰⁷ *Centre for Child Law v Director General: Department of Home Affairs* 2022 (2) SA 131 (CC) (hereafter *Centre for Child Law v Director General: Department of Home Affairs*)

³⁰⁸ Section 10 of the *Births and Deaths Registration Act*.

³⁰⁹ *Centre for Child Law v Director General: Department of Home Affairs* para 121.

³¹⁰ See an example of how Ms Saffer explained to the court about her relationship with the ex-husband. *Saffer v Head of Department, Western Cape Education Department* (18775/2013) [2016] ZAWCHC 217 para 18.

how intensely the HOD may liaise with the Department of Home Affairs; many situations as personal as they may be are beyond the Department of Home Affairs. Also, amendments should begin with the *Births and Deaths Registration Act*,³¹¹ as no amount of assistance from the HOD can help if certain provisions are not amended. Although there is the option of using an affidavit for admission purposes, one needs to remember that these children are maturing and a time will come where proof of their identity is needed, for instance, during matriculation.³¹² Once they reach the age of 18 years without an identification document, they will not be eligible for childcare protection. Statelessness status is the eventual result.³¹³

The amended clause also leaves out of account unaccompanied and separated children who do not have parents to assist them to secure birth certificates.³¹⁴ Not all unaccompanied and separated children are considered, under legislation, as in need of care and protection; it is for social workers to determine if the child is in need of care and protection and deserves a refugee status.³¹⁵ It should therefore be emphasised that not all unaccompanied and separated children are classified as refugees. Only those regarded as in need of care and protection as outlined in section 150 of the *Children Act* can be assisted with applying for refugee status (and obtaining identification documents). Unfortunately, unaccompanied and separated children who are not deemed to be in need of care and protection as refugees do not have a defined process for attaining documentation.

³¹¹ For example, section 9 and 10 of the *Births and Deaths Registration Act* and Regulation 12 (1) of the Regulation on the Registration of Births and Deaths.

³¹² Regulation 103 of the Regulations Pertaining to the Conduct, Administration and Management of the National Senior Certificate Examination GN R872 in GG 31337 of 29 August 2008; Regulation 54 of the Approval of the Regulations Pertaining to the Conduct, Administration and Management of the National Senior Certificate Examination GN R317 in GG 37651 of 16 May 2014.

³¹³ *Convention Relating to the Status of Stateless Persons* (1954).

³¹⁴ International Organisation for Migration "The Protection of Unaccompanied Migrant Children" 3.

³¹⁵ Chapter 9 of the *Children's Act*.

Moreover, clause 19 of the Admission Policy provides that the *Schools Act* and Admission Policy also apply to learners who are non-South Africans and whose parents have valid visas.³¹⁶ The proposed amended provision to this clause states that:

20. The South African Schools Act, 1996, and this policy apply equally to learners who are not citizens of the Republic of South Africa. In terms of the applicable legislation, non-South African citizens are categorised as either foreigners who are in possession of a temporary residence visa, permanent residence permit or any other special dispensation residence document issued by the Department of Home Affairs in terms of the Immigration Act, 2002 (Act No. 13 of 2002), or as foreigners who are in possession of an asylum seeker's visa or refugee's visa issued, respectively, in accordance with sections 22 and 24 of the Refugees Act, 1998 (Act No. 130 of 1998). These visas and permits are issued by the Department of Home Affairs.³¹⁷

Subsections (a)–(c) specifically mention the documents required by learners with permanent residence,³¹⁸ temporary residence visas,³¹⁹ refugees, or asylum seekers.³²⁰ Initially, the Admission Policy provision did not include such a long list of document prerequisites for enrolment. However, with the Proposed Amended Admission Policy,

³¹⁶ Clause 19 of the Admission Policy apply equally to learners who are not citizens of the Republic of South Africa and whose parents are in possession of a permit for temporary or permanent residence issued by the Department of Home Affairs, the *Schools Act* is assumed to apply to all learners, there is no specific section which states that it applies to South Africans only.

³¹⁷ Clause 20 of the Proposed Amended Admission Policy.

³¹⁸ Clause 20(a) of the Proposed Amended Admission Policy states as follows:

A foreign learner in possession of a permanent residence permit must submit: (i) a birth certificate issued by the relevant authority from his or her country of origin; (ii) where the learner was born in the Republic, such a learner must submit a copy of a birth certificate issued by his or her country of origin or a handwritten birth certificate issued by the Department of Home Affairs in accordance with the Births and Deaths Registration Act, 1992; (iii) a copy of his or her permanent residence certificate; or (iv) a copy of his or her identity document from his or her country of origin, if he or she is 16 years and above, or a passport; and (v) the documents contemplated in paragraphs 14, 16 to 18 of this policy.

³¹⁹ Clause 20(b) of the Proposed Amended Admission Policy states as follows:

All the other requirements are the same as that of permanent residents except- (iii) a copy of his or her identity document from his or her country of origin, if he or she is 16 years and above, or a passport; (iv) a copy of his or her study visa.

³²⁰ Clause 20(c) of the Proposed Amended Admission Policy states as follows:

A foreign learner in possession of an asylum seeker visa or refugee visa must submit: (i) a copy of his or her birth certificate from his or her country of origin; (ii) a copy of his or her asylum seeker visa issued in terms of section 22 of the Refugees Act, 1998; (iii) a copy of his or her a refugee permit issued to him or her in terms of section 24 of the Refugees Act, 1998; or (iv) a copy of his or her identity document from his or her country of origin, if he or she is 16 years and above or a passport.

a comprehensive list of documents is being introduced in which learners are required to present for admission.³²¹ The amended provision states that the learner "must" produce these documents; this entails that the learner is compelled to have the listed documents without any permissible excuse.³²² In cases where a learner lacks "one" of the listed documents, the provision does not provide clarity on whether they can still be admitted. This lack of clarity can pose challenges, particularly for refugees and asylum seekers who frequently encounter difficulties in obtaining or retaining their birth certificates. In addition, requiring refugees and asylum seekers to provide birth certificates or identity documents from their countries of origin is unreasonable. In as much as there is a disclaimer "where available", to begin with, this requirement is nearly impossible for many refugees and asylum seekers to meet. It should be noted that these are involuntary immigrants who flee from their country of origin because of (perceived) political persecution.³²³ Requiring an identity document or a birth certificate from a refugee and asylum seeker, despite the added disclaimer, is unreasonable. Moreover, some schools put pressure on learners and parents to obtain and provide all the required documents.³²⁴ One may doubt that SGBs,³²⁵ will have legal experts who can thoroughly explain the meaning of certain exceptions such as "where available." If there were such experts and the school governing body well versed with the requirements and added exceptions, then the continuous non-admission of undocumented immigrants on the same grounds would not exist in the way it does,³²⁶ most particularly after the decision in *Centre for Child Law & 37 Children*.

³²¹ Clause 19 of the Admission Policy.

³²² Clause 20 (a-c) of the Proposed Amended Admission Policy.

³²³ Article 33 of the *Convention Relating to the Status of Refugees* (1951). The principle of non-refoulement applies here.

³²⁴ News24 2023 <https://www.news24.com/news24/southafrica/news/i-want-to-be-in-school-but-we-have-no-papers-undocumented-children-struggle-to-find-schools-20230113>.

³²⁵ Section 23 of the Schools Act provides that SGB comprises of: elected members; the principal; co-opted members, parents of learners at the school; educators at the school; members of staff at the school who are not educators; and learners in the eighth grade or higher at the school.

³²⁶ News24 2023 <https://www.news24.com/news24/southafrica/news/i-want-to-be-in-school-but-we-have-no-papers-undocumented-children-struggle-to-find-schools-20230113>.

The Admission Policy in clause 21 provides that proof stating that an application to the Department of Home Affairs (DHA) has been made to legalise stay in the Republic should be provided by an illegal alien upon application for admission.³²⁷

However, the Proposed Amended Admission Policy clause 23 holds that:

The right to education extends to everyone within the boundaries of South Africa, the nationality and immigration status is immaterial. All schools are advised to admit learners and serve their education requirements irrespective of whether the learner or parent of a learner does not produce documents listed in paragraph 15, 17 to 20 of this policy.³²⁸

The policy "advises" schools to admit learners, even in the absence of documentation. However, this approach raises concerns, as it implies that schools have the discretion to admit learners rather than being an obligation to do so, following the court judgement that "mandates" the admission of undocumented learners into schools.

One may commend the efforts made by the government to include exclusively a specific provision for undocumented immigrant children in its Proposed Amended Admission Policy.³²⁹ The significant progress achieved by the state since its ratification of the *ICESCR*, which is one of the international instruments which, according to the CESCR, calls for equal access to education regardless of immigration status, cannot be overlooked and due recognition is acknowledged.³³⁰ School governing bodies dealing with the admission of learners at school should be well informed of these policies. The non-enrolment of undocumented children is still happening even after the prominent court decision and the issuing of Circular 1 of 2020, which instructs schools to admit all learners irrespective of documentation.³³¹ Clause 7 states that the governing body must make a copy of the school's Admission Policy available to the

³²⁷ Clause 21 of the Admission Policy.

³²⁸ Clause 23 of the Proposed Amended Admission Policy.

³²⁹ Clause 23 and 24 of the Proposed Amended Admission Policy.

³³⁰ *Concluding Observations on the Initial Report of South Africa* UN Doc E/C.12/ZAF/CO/ (2018) para 73(c) (hereafter CESCR "Concluding Observations on the Initial Report of South Africa").

³³¹ News24 2023 <https://www.news24.com/news24/southafrica/news/i-want-to-be-in-school-but-we-have-no-papers-undocumented-children-struggle-to-find-schools-20230113>.

Head of Department for approval.³³² This is important as it advances the issue of accountability; multiple stakeholders need to be involved in decision-making.³³³ Government departments involved in child protection should collaborate to address the issue of admissions and ensure accountability for administrative shortcomings.³³⁴

The Equal Education (EE) and Equal Education Law (EEL) Centres,³³⁵ highlighted that they find the requirement of referral to the Department of Home Affairs or the Department of Justice and Correctional Services (DJCS) in cases where a certain document is unavailable or cannot be verified as irrational.³³⁶ First, they contend that there is no clarity on why such referrals should be made.³³⁷ They further pointed out that it is inappropriate to use the Proposed Amended Admission Policy to regulate learners obtaining documents.³³⁸ Evidently, the Department of Basic Education is not well versed, with the complication encountered when trying to acquire documentation and xenophobic attitudes by government officials at the Department of Home Affairs.³³⁹ Hence, at times, referrals to the Department of Home Affairs or DJCS are

³³² Clause 7 of the Proposed Amended Admission Policy.

³³³ Preamble of the *Schools Act*.

³³⁴ Stuurman and Cooper-Bell "Learners Admissions" 106-109.

³³⁵ See the Centres home page Equal Education Law Centre 2023 <https://equaleducation.org.za/equal-education-law-centre/> or <https://eelawcentre.org.za/> respectively.

EE is a movement of learners, post-school youth, parents and community members who strive for quality and equality in the South African education system. EE engages in a broad range of activities including campaigns rooted in public action and mobilisation, supported by rigorous research and policy analysis. The EELC is a registered law clinic. Its staff of social justice lawyers specialise in education law and policy, through conducting legal research and advocacy, community lawyering and public interest litigation. EELC's overriding goal is to use the law to ensure the realisation of every learner's right to equitable, safe and quality basic education regardless of the learner's circumstances.

³³⁶ Equal Education and Equal Education Law Centres "Joint Comments on the Department of Basic Education's Amended National Admission for Public Ordinary Schools" para 2.3.

³³⁷ Equal Education and Equal Education Law Centres "Joint Comments on the Department of Basic Education's Amended National Admission for Public Ordinary Schools" para 2.3.

³³⁸ Equal Education and Equal Education Law Centres "Joint Comments on the Department of Basic Education's Amended National Admission for Public Ordinary Schools" para 2.3.

³³⁹ Times Live 2023 <https://www.timeslive.co.za/politics/2023-01-12-gayton-mckenzie-children-of-illegal-foreigners-shouldnt-be-allowed-in-sa-schools/>; Daily Maverick 2023 <https://www.dailymaverick.co.za/article/2023-02-02-musina-home-affairs-accused-of-violating-childrens-rights-over-refusal-to-issue-birth-certificates/>.

pointless and even lead to inappropriate bias and discrimination of learners.³⁴⁰ Some officials,³⁴¹ will use information from the Department of Basic Education for immigration control which certainly violates the rules set by international laws.³⁴² To support this affirmation Beiter pointed out:

Following the *Plyler* decision [in the US], it has been suggested that undocumented children's right of access to public education entailed various procedural rights. Schools should not ask about a student's immigration status. They should not treat one student differently from others on the basis of undocumented status. They should further not make inquiries of a student or parent that might expose the undocumented status of either. Schools are not entitled to contact the immigration authorities about any undocumented student. Should a school inadvertently discover the undocumented status of a student, it may not supply such information to the immigration authorities.³⁴³

The study concurs with the comments made by EE and EEL; exposing these children to the Department of Home Affairs constitutes a violation of their privacy (section 14 of the *Constitution*). Many of these children live in fear, as some undocumented learners live with immigrant parents who, as well, are undocumented.³⁴⁴ The potential use of these referrals remains uncertain, but it is possible that they could be employed to detain undocumented parents. In this way, removing a child from his/her parents certainly violates the rights of the child in terms of the *CRC* and *ACRWC*, the *Constitution* and the *Children's Act*.³⁴⁵ Hence, all clauses requiring referral to other government departments, such as the Department of Home Affairs or DJCS, to obtain documentation must be revised. This study suggests that the Proposed Amended Admission Policy should also provide clear guidelines for handling cases in which

³⁴⁰ Equal Education and Equal Education Law Centres "Joint Comments on the Department of Basic Education's Amended National Admission for Public Ordinary Schools" para 2.3.

³⁴¹ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment No. 3 and No. 22" para 17,22,32.

³⁴² South African Government News Agency 2020 <https://www.sanews.gov.za/south-africa/home-affairs-officials-arrest-fraud>.

³⁴³ Beiter *The Protection of the Right to Education by International Law* 420.

³⁴⁴ Section 14 of the *Constitution* and section 34 and 35 of the *Protection of Personal Information Act* 4 of 2013.

³⁴⁵ Preamble and Article 22 of the *CRC*, Article 19 of the *ACRWC*, section 28(1)(b) of the *Constitution*, section 2(b)(i) of the *Children's Act*.

previously documented children become undocumented while they are already admitted at schools.

In general, the government's efforts to address the ambiguity of certain provisions of the Admission Policy are noted; the lawful inclusion of provision for undocumented immigrant children makes a huge difference. Since the Proposed Amended Admission Policy is published for public comments, there is a possibility of revising the policy again. However, the study contends that the court in *Centre for Child Law & 37 children* failed to comprehensively address the status of illegal foreigners with respect to the *Immigration Act*.³⁴⁶ Despite the court's decision on how sections 39 and 42 should be interpreted, it is asserted here that these sections should be amended in such a way that they do not leave room for any ambiguous interpretation. While the adoption of the Proposed Amended Admission Policy, currently in the draft stage, and its implementation timeline remain uncertain and its content is legally problematic, the admission of undocumented learners to schools remains difficult, despite directives from the court and Circular 1 of 2020 regarding the rights of undocumented immigrant learners to basic education.³⁴⁷

3.2.11 Basic Education Laws Amendment Bill B2-2022

The Basic Education Laws Amendment Bill reflects a timely effort to address the concerns and make amendments to the current law.³⁴⁸ The proposed Bill aims to amend the South African *Schools Act* and *Employment of Educators Act* 76 of 1998.³⁴⁹ The amendments seek to bring about changes in the education sector and to establish effective systems of learning that uphold the right to a basic education, as outlined in the Bill of Rights (section 29(1) (a)).³⁵⁰ The *BELA Bill* encompasses various aims and

³⁴⁶ *Centre for Child Law & 37 Children* para 135.

³⁴⁷ Times Live 2023 <https://www.timeslive.co.za/politics/2023-01-12-gayton-mckenzie-children-of-illegal-foreigners-shouldnt-be-allowed-in-sa-schools/>.

³⁴⁸ *Basic Education Laws Amendment Bill B2-2022*.

³⁴⁹ Publication of Explanatory Summary of Basic Education Laws Amendment Bill GN 705 in GG 45601 of 06 December 2021.

³⁵⁰ Publication of Explanatory Summary of Basic Education Laws Amendment Bill GN 705 in GG 45601 of 06 December 2021.

objectives, including but not limited to amending and adding specific definitions within the legislation, such as for basic education, which means grade R to grade 12³⁵¹ (which is in line with the recent Constitutional Court judgement of *Moko v Acting Principal*).³⁵² Second, it seeks to implement system improvements to enhance the admission process for learners in public schools and to establish financial and public accountability frameworks for governing bodies and provincial departments.³⁵³ In addition, it inserts provisions that are not provided in existing legislation, such as the provision for the admission of foreign nationals.³⁵⁴ The *BELA Bill* also includes provisions for granting the Minister of Basic Education additional regulatory powers and seeks to strengthen the decision-making and oversight powers of the Heads of Departments and Members of Executive Councils.³⁵⁵

The Bill adds a provision for certain documents required for the purposes of school admission: Clause 1(m) provides for a list of "required" documents which must be provided by the learner when applying for admission at public schools, including even those of parents.³⁵⁶ For foreign nationals, what is needed is the learner's foreign-issued birth certificate, passport, study visa, or asylum seeker's or refugee's visa.³⁵⁷ In addition, parents must also attach their passport and temporary residence visa or permanent residence permit, as well as the parent's asylum seeker's or refugee's visa.³⁵⁸ If the child is in alternative care (e.g., unaccompanied or separated children), a court order and an unabridged birth certificate are required.³⁵⁹ Clause 4 requires public schools to admit and provide education to learners and to ensure that their educational needs are met throughout their schooling period without engaging in any form of unfair discrimination.³⁶⁰ Subsection (b) further requires the establishment of

³⁵¹ Section 1(a) of the *BELA Bill*.

³⁵² *Moko v Acting Principal* para 30.

³⁵³ Preamble of the *BELA Bill*.

³⁵⁴ Section 1(m) of the *BELA Bill*.

³⁵⁵ Preamble of the *BELA Bill*.

³⁵⁶ Section 1 (m) of the *BELA Bill*.

³⁵⁷ Section 1 (m)(b) (i-ii) and 1 (m)(c)(ii) of the *BELA Bill*.

³⁵⁸ Section 1 (m)(b) (iv-v) and 1 (m)(c)(i) of the *BELA Bill*.

³⁵⁹ Section 1 (m)(d) of the *BELA Bill*.

³⁶⁰ Section 4 (a)(1) of the *BELA Bill*.

National Intergovernmental Committees and Provincial Intergovernmental Committees, which will be responsible for facilitating the admission of learners.³⁶¹ The Committee will comprise representatives from various entities, including the Department of Basic Education, Department of Social Development, Department of Home Affairs, and South African Police Services.³⁶²

Of importance at this juncture is the consideration that any amendments related to the documentation of learners should align with the principles established by the court in *Centre for Child Law & 37 Children*.³⁶³ In this case, the court ruled that schools are constitutionally obligated to accept learners and provide educational services, even in the absence of documentation.³⁶⁴ The court specified that documentation should be limited to a birth certificate or alternative proof of identity, such as an affidavit or sworn statement from a parent, caregiver, or guardian that fully identifies the learner.³⁶⁵ On the contrary, Clause 1(m) of the *BELA Bill* effectively reinserts the unconstitutional list of documents into the legislation and made it significantly more prescriptive and likely to lead to exclusion. The inclusion of such an unreasonably lengthy list of required documents is likely to reinforce the barriers to education that the *Centre for Child Law & 37 Children* case sought to address.

Furthermore, the requirement of parents to provide documentation such as their passports and visas,³⁶⁶ is unnecessary, unreasonable, and likely to impede learners' access to basic education. It should be noted that the parents' documents are not mentioned in the Proposed Amended Admission Policy as a requirement for the admission of learners. This creates a conflict between the two documents. It is imperative to acknowledge that parents are obligated to adhere to the laws of the country and maintain lawful residency. This imperative aligns with safeguarding the

³⁶¹ Section 4 (b)(1A) of the *BELA Bill*.

³⁶² Section 4 (b)(1E) (a,b,c,e) of the *BELA Bill*.

³⁶³ *Centre for Child Law & 37 Children* para 135 and Circular 1 of 2020.

³⁶⁴ *Centre for Child Law & 37 Children* para 135.

³⁶⁵ *Centre for Child Law & 37 Children* para 135.

³⁶⁶ Section 1 (m) (b) (iv-v) of the *BELA Bill*.

state's interests which includes preserving its national security and economic stability.³⁶⁷ Furthermore, the requirement for parents to furnish their valid visas and passports is rationalised by the state's need to ascertain the identity and whereabouts of the learner's parents. However, if these documents are used as criteria for learners admission, it may not be in the best interests of children whose parents do not possess such documentation. In addition, the *BELA Bill* requires refugees and asylum seeker learners to only produce birth certificates if the learner was born in the Republic, yet the Proposed Amended Admission Policy requires refugees and asylum seekers to submit birth certificates from their country of origin.³⁶⁸ It is these conflicts within the legal framework that results in the exclusion of children. A more prudent approach would involve establishing a uniform standard for all school admission policies and laws. Although the *BELA Bill* states that learners will still be admitted to school even if they cannot provide the required documents, the abovementioned provisions raise significant concerns.³⁶⁹

In addition, the *BELA Bill* provides that parents who provide inaccurate or deceptive information and documents or refuse to cooperate may face penalties such as imprisonment, fines, or a combination of both.³⁷⁰ It further proposes an increase in the maximum prison sentence from 6 to 12 months.³⁷¹ This thesis emphasises the illogical nature of these clauses, especially in the aspect of criminalising parents who do not cooperate. This gives rise to significant apprehensions about whether such measures genuinely uphold the best interests of the child.³⁷² Additionally, the act of criminalisation fails to adequately tackle the fundamental reasons hindering learners from attending school or their parents from cooperating. These underlying causes might involve financial limitations, challenges in obtaining birth certificates for

³⁶⁷ Department of International Relations and Cooperation "Framework Documents on South Africa's National Interest and Its Advancement in a Global Environment" 9-13.

³⁶⁸ Section 1 (m) (c) (ii) of the *BELA Bill*.

³⁶⁹ Section 4 (b)(1G) of the *BELA Bill*.

³⁷⁰ Section 38(3)(c) of the *BELA Bill*.

³⁷¹ Section 38(3)(c) of the *BELA Bill*.

³⁷² Section 2 (a)(1) and 2 (b)(a-c) of the *BELA Bill*. Best interest principle as envisaged in the section 28(2) of the *Constitution*, Article 3(1) of *CRC* and Article 4(1) of *ACRWC*.

undocumented non-citizen parents, and fear of apprehensions by immigration enforcement.³⁷³ It is essential to recognise that not all parents are eligible for fee exemptions, and not all learners have access to non-fee schools.³⁷⁴ Secondly, not all parents are in possession of passport/visas. It comes back to the fact that the ones who suffer from these penalties are parents who are already disadvantaged, often situated in precarious circumstances, experiencing financial hardship, undocumented and unemployed but striving for improved prospects for their children.³⁷⁵ Not that the study condone the illegality status of immigrant parents but reality is that most undocumented children come from households where parents are undocumented too.³⁷⁶ Penalising parents will likely have detrimental effects, adding further to the obstacles that impede learners from accessing basic education other than documentation. Additionally, this strategy disadvantages foreign citizens, especially those who have endeavoured to secure legal status but encounter difficulties like delays at the Department of Home Affairs.³⁷⁷ The approach overlooks the root causes behind the inability to obtain documentation. If the proposed provisions are enacted, they have the potential to compromise the precedent set by the ruling in the *Centre for Child Law & 37 Children*, which promote access to basic education for undocumented learners.

While on the other hand one has to note positive changes being initiated by the Bill such as the establishment of National Intergovernmental and Provincial Intergovernmental Committees. The function of the Provincial Intergovernmental Committee is to provide assistance to public schools that refer cases of learners who have not submitted the required documents to the school, and such assistances

³⁷³ SAHRC "Position Paper" 7-8.

³⁷⁴ Regulation 4 of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public School GN R1052 in GG 29311 of 18 October 2006.

³⁷⁵ Dewa 2022 <https://www.opendemocracy.net/en/5050/migrants-scapegoated-in-south-africa-as-inequality-and-unemployment-surge/>.

³⁷⁶ Tigere *De Rebus* 2015 1.

³⁷⁷ GroundUp 2022 <https://www.groundup.org.za/article/shambolic-home-affairs-leaves-immigrants-legally-in-country-undocumented/>.

include acquiring the missing required documents in respect of such learners.³⁷⁸ The function of the National Intergovernmental Committee is to monitor and evaluate the progress of the Provincial Intergovernmental Committee in obtaining documents for learners and to provide assistance where necessary.³⁷⁹ It rather seems to be a concerted effort to ensure that children do receive the necessary documents. The role of these committees in ensuring that children acquire admission are to be commended, at the very least the legislator tried to put something in place. However, upon every proposal there are pros and cons, hence the proposed establishment of National Intergovernmental and Provincial Intergovernmental Committees may also appear to be unlikely effective, as it fails to address the underlying issues within the Department of Home Affairs.³⁸⁰ Including the Department of Home Affairs/SAPS in the committee might prioritise immigration law enforcement over assisting learners in obtaining necessary documentation, potentially conflicting with established international law principles.³⁸¹ International principles prohibit schools from sharing information on the immigration status of students or their parents with immigration authorities or enforcement operations.³⁸² Additionally, there is a heightened risk of violating the *Protection of Personal Information Act*, as information exchange between governmental departments becomes more likely.³⁸³ Notwithstanding, pending the delineation of the respective roles of the various stakeholders, this rightfully raises a concern. However, it does not warrant a determination that the committee's primary objective of aiding children with documentation is unfounded, nor does it imply that the legislator failed to adequately safeguard and advance the rights of immigrant children.

³⁷⁸ Section 4 (b) (1C) of the BELA Bill.

³⁷⁹ Section 4 (b) (1D) of the BELA Bill.

³⁸⁰ GroundUp 2022

<https://www.groundup.org.za/article/shambolic-home-affairs-leaves-immigrants-legally-in-country-undocumented/>.

³⁸¹ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment No. 3 and No. 22" para 17, 22, 32.

³⁸² Committee on the Protection of the Rights of All Migrant Workers "General Comment No. 2" para 77.

³⁸³ Section 34 and 35 of the *Protection of Personal Information Act*.

An additional worry pertains to the amendments made regarding the authority of school governing bodies with regard to admission and language policies. These changes grant the final decision-making power on admissions and approval of language policies to the Head of Department, whereas currently they are with the school governing bodies on which parents are represented.³⁸⁴ While these changes are aimed at promoting co-operative governance and accountability between government spheres, there is a challenge in assigning the final decision-making power to the Head of Department. This limits the parental power regarding admission or language policies. Parents possess a better understanding of the challenges faced by their children. Immigrant parents have first-hand knowledge of the language and admission needs of their children. Whereas the parents bear the primary responsibility for nurturing, developing, and protecting their children.³⁸⁵ This duty includes respecting, protecting, promoting and fulfilling their children's constitutional rights such as the right to education.³⁸⁶ Centralising power in the hands of the state further complicates an already challenging situation. Even though appeals may be possible, the reality is that it is easier said than done, it is nearly impossible for undocumented immigrant parents (who logically are scared of deportation) to bring an appeal.³⁸⁷ Consequently, this arrangement deprives parents and school communities of the ability to make independent decisions regarding their children's educational interests in schools.

In the case of *Head of Department: Mpumalanga Department of Education v Hoërskool*, the Constitutional Court provided detailed insights into the significant functions and nature of a school governing body:

[A governing body] is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the

³⁸⁴ Preamble, Clause 4(d)(5a-d) and 5 (2.5.1) of the *BELA Bill*.

³⁸⁵ Section 18 of the *Children's Act*; National Child Care and Protection Policy para 4.3.

³⁸⁶ Section 18 of the *Children's Act*; National Child Care and Protection Policy para 4.3.

³⁸⁷ Section 4(g) of the *BELA Bill*.

local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that come with it.³⁸⁸

The extent of power given to the Head of Departments in relation to language and admission policies must be queried. Arguably, granting power to the Head of Department helps prevent the potential abuse of power and corruption by SGBs.³⁸⁹ It is important to note that the decisions made by the Head of Department can be appealed if they are deemed unsatisfactory. Additionally, the presence of timeframes for policy submission and approval is likely to prevent delays and promote accountability.³⁹⁰ However, it is worth emphasising that the Head of Department may encounter difficulties in effectively addressing and engaging with school policies within the designated timeframes due to capacity constraints. Nonetheless, it is crucial to stress that the policymaking authority of SGBs should not be completely undermined or rendered insignificant. Any decisions made by Head of Departments should prioritise the best interests of the child, promote equality, serve the broader interests of the community, and ensure the inclusivity of undocumented immigrant learners.³⁹¹

It is submitted here that the *BELA Bill* contains provisions that present a significant threat to the future of quality education in South Africa as a whole and to undocumented immigrants in particular. Certain aspects of the *BELA Bill* must be revised and amended to address the concerns raised above. In November 2021, the CESCR submitted that South Africa had not made satisfactory advancements in fulfilling its responsibility to provide educational access to undocumented migrants, refugees, or asylum-seeking learners, as mandated by its international obligations under the *ICSECR*.³⁹² The proposed legislative and policy frameworks must facilitate access to basic education for all children regardless of immigration status or lack of documentation, as outlined in the international instruments and the *Constitution*.³⁹³ It seems, however, that the proposed amendments now pose more threats and may

³⁸⁸ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 57.

³⁸⁹ Corruption Watch "Annual Report 2021: 10 Years Pushing for Change" 72.

³⁹⁰ Section 4(g) of the *BELA Bill*.

³⁹¹ Section 28(2) and section 9 of the *Constitution*.

³⁹² CESCR "Concluding Observations on the Initial Report of South Africa" para 72.

³⁹³ Section 29(1)(a) of the *Constitution* and right to education as enshrined by international instruments mentioned in Chapter 2.

impede undocumented immigrant children from receiving basic education. As much as the study emphasises the respect, protection, promotion, and fulfilment of the right to a basic education for undocumented immigrant children, the interests of the state should not be disregarded.

3.3 Conclusion

In compliance with its international obligations, South Africa enacted several statutes which enshrine the rights of all children, and which are directly applicable to the advancement of the right to a basic education for undocumented immigrant children. The *Constitution*, which is South Africa's supreme law, provides a guarantee for the rights of children that are protected by international law. It does this by providing for the right to a basic education for all children (including the entitlements that flow from basic education) and the right to equality and non-discrimination in education. Although the *Constitution* provides for a limitation of rights clause, its interpretation must be consistent with international law, which stipulates that the right to a basic (i.e., primary and secondary) education is immediately realisable and not subject to progressive realisation.

The *Constitution* empowers the legislature and the executive to develop and implement laws that advance the human rights of all the people in South Africa, including non-citizens. These laws include the *Children's Act*, the *Schools Act* and the *Immigration Act*. However, contradictions among these statutes have been noticed, which in some instances obstruct the admission of undocumented immigrant learners. This notwithstanding, the courts must adhere to the constitutional requirement of interpreting legislation in a manner that is consistent with the advancement of rights in the *Constitution* and international law. Thus, the *Constitution* signals a break from South Africa's past and marks a new legal order that is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. It is vital to give full effect to *Centre for Child Law & 37 Children*, which affirmed that it is unconstitutional to bar learners, who do not have documentation, from receiving a basic education. Despite the High Court's determination, some schools continue to refuse to enrol undocumented children, as will be elaborated in

Chapter 6.³⁹⁴ The legal position on the admission of undocumented immigrant children may have been addressed in *Centre for Child Law & 37 Children*, but the ongoing practices differ from what the court requires. Moreover, the conflict between the Proposed Amended Admission Policy and the *BELA Bill* raises more concerns regarding the realisation of undocumented immigrants' right to a basic education. The next chapter discusses the respective roles of the key role players responsible for fulfilling, implementing and/or overseeing the fulfilment of the right to a basic education in South Africa.

³⁹⁴ Twala 2021
<https://www.iol.co.za/education/schools/primary/migrants-and-refugees-protest-over-their-children-being-denied-schooling-since-they-have-no-birth-certificates-077bb5f7-902b-48a1-b8e9-454eb6a21dff>.

Chapter 4 Institutional Organs and Mechanisms Implementing and Promoting the Right to a Basic Education

4.1 Introduction

The second chapter of this thesis notes that international law requires states to use all appropriate means to enhance access to basic education. This entails that states must use their legal and administrative systems to fulfil this right.¹ There are several non-legislative measures for enhancing access to a basic education in South Africa. These include administrative, financial, educational, social and judicial measures that are regarded as appropriate means.² The understanding is that the inclusion of the right to a basic education in the *Constitution* and in legislation is not enough and that this right must be translated into reality through comprehensive measures and social action.³ This entails that, *inter alia*, executive spheres of government, human rights enforcement bodies, non-government organisations and the judiciary have a role to play in fulfilling the right to a basic education. Naturally, the structure, powers, and activities of these will be based on legislation.

In the foregoing context, this chapter seeks to illustrate institutional strengths and weaknesses in the fulfilment of the right to a basic education for undocumented immigrant children. The respect, protection, promotion and fulfilment of the right to a basic education in both international law and national legislation in South Africa depend on the attitudes and approaches of implementation and enforcement organs and mechanisms, which include institutions established to promote this (and other) right(s). In this chapter, the work of the executive (at national and provincial levels), school governing bodies, the South African Human Rights Commission (SAHRC) and the judiciary are examined as institutional organs or mechanisms for the respect, protection, promotion and fulfilment of the right to a basic education. The work of

¹ Taiwo and Govindjee 2012 *Obiter* 204.

² Taiwo and Govindjee 2012 *Obiter* 204.

³ Taiwo and Govindjee 2012 *Obiter* 204.

these institutions is discussed in conjunction with the efforts of other private entities which have been vocal about the right to a basic education, and which have secured the protection of this right for undocumented immigrant children through litigation, public outreach and supporting roles.⁴

4.2 Key education stakeholders at the provincial level

The *Schools Act* governs the enrolment of all learners in public schools and assigns specific roles and responsibilities to key stakeholders.⁵ These include the MEC, the Head of Department, the functionaries of education districts, SGBs, school principals, and parents.⁶ These stakeholders collaborate to ensure that every learner is admitted to an appropriate school. Significantly, in 2017, as mentioned in the previous chapter,⁷ the Department of Basic Education introduced the *BELA Bill*. This Bill proposes several amendments, *inter alia* envisioning changes to the existing school governance provisions. It also provides for system improvements in terms of the admission of learners, particularly undocumented learners.⁸ The primary objective of the *BELA Bill* is to strengthen the effective functioning and administration of governing bodies and provincial departments by incorporating accountability mechanisms.⁹

The Provincial Education Department (PED) plays a crucial role in the admission of learners to public schools. The *Schools Act* stipulates that the MEC (head of the PED) has an obligation to ensure that there are sufficient schools to accommodate learners in the province.¹⁰ Due to population growth, immigration influx, and insufficient funds, PEDs frequently fail to meet their obligations. However, basic education is an immediately realisable right to be fully implemented despite obstacles.¹¹ The

⁴ Such as Centre for Child Law, Centre for Applied Sciences and Scalabrini Centre.

⁵ Section 16, 17, 18 of the *Schools Act*.

⁶ Section 16, 17, 18 of the *Schools Act*.

⁷ As discussed on para 3.2.11 of Chapter 3.

⁸ *Publication of Explanatory Summary of Basic Education Laws Amendment Bill* GN705 in GG46601 of 06 December 2021 para 3.

⁹ *Publication of Explanatory Summary of Basic Education Laws Amendment Bill* GN705 in GG46601 of 06 December 2021 para 3.

¹⁰ Section 3(3) of the *Schools Act*.

¹¹ Section 3(4) of the *Schools Act*.

Admission Policy mandates that the Head of Department establish a registration process for admission to public schools, ensuring a timely and efficient admission process for learners.¹² The Head of Department has the authority to delegate the responsibility for learner admissions to officials within the department, including school officials.¹³ Parents also play a role, namely, to initiate the application process for their children's admission into school ahead of time, especially if the child falls within the compulsory school-going age.¹⁴ Section 3(6) of the *Schools Act* states that parents may be held legally accountable and potentially face criminal charges if they fail or refuse to apply to schools or if they prevent their children from attending school.¹⁵ The process of learner admission necessitates open communication and cooperation among all key stakeholders.

In addition, the national executive formulated policy guidelines through the Department of Education. These inform national policy in education and training and are set out in the *White Paper on Education* of 1995,¹⁶ which re-affirms that education and training are basic human rights. The *White Paper on Education* is also informed by the idea of democratic governance at all levels of the education system: the restoration of the culture of accountable teaching, learning, management, sustainability, and productivity.¹⁷ It recognises the need to combat discrimination and strengthen non-discrimination.¹⁸ It recognises the obligation of the state to advance and protect the right to education and commits the government to redress educational inequalities. Its vision is to help people who suffer particular disadvantages as a result of apartheid policies by advancing equity and rehabilitating schools and colleges. This *White Paper on Education* provides a framework for a single inclusive system of education and training.¹⁹ Provincial education departments, district education offices,

¹² Clause 5 of the Admission Policy.

¹³ Clause 6 of the Admission Policy.

¹⁴ Section 3 of the *Schools Act*.

¹⁵ Section 3 (6) of the *Schools Act*.

¹⁶ *White Paper on Education and Training* GN 196 in GG 16312 of 15 March 1995.

¹⁷ Para 5 of the *White Paper on Education and Training* GN 196 in GG 16312 of 15 March 1995.

¹⁸ Para 9 of the *White Paper on Education and Training* GN 196 in GG 16312 of 15 March 1995.

¹⁹ *White Paper on Education and Training* GN 196 in GG 16312 of 15 March 1995.

and school management enforce policies implemented by the national executive to share oversight and support, making them collectively responsible for monitoring, evaluating, and supporting teaching and learning at schools.²⁰ These institutions are supported by school governing bodies whose responsibilities and work shall be discussed after the following discussion.

4.2.1 School principals

A principal is defined in terms of section 1(xv) of the *Schools Act* "as an educator appointed or acting as the head of a school."²¹ In terms of section 15 of the *Schools Act*, a public school is "a legal person ("juristic person") with legal capacity to perform its functions under the Act."²² The *Schools Act* distinguishes between governance and professional management, assigning the former to the governing body and the latter to the principal of the school (sections 16(1) and 16(3)).²³ The principal operates under the authority of the Head of Department.²⁴ However, the principal is also answerable to the school governing body for carrying out statutory functions or policies related to admission, language, religion, and school funds.²⁵ These responsibilities are delegated to the principal by the governing body according to the *Schools Act*. The Department of Education published a policy on the South African Standard for Principals²⁶ in terms of section 3(4) of the *National Education Policy Act*, 1996. The policy is applicable to principals in all South African schools and outlines the essential aspects of the responsibilities expected from school principals.²⁷

The principal bears the overall responsibility of guiding and overseeing the school. Among their essential leadership responsibilities, the principal must foster conditions

²⁰ Franklin and McLaren 2015 *SPII* 38.

²¹ Section 1(xv) of the *Schools Act*.

²² Section 15 of the *Schools Act*.

²³ Section 16(1) and 16(3) of the *Schools Act*.

²⁴ Section 16(A) and 16(3) of the *Schools Act*.

²⁵ Prinsloo 2016 *South African Journal on Education* 1.

²⁶ Policy on the South African Standard for Principals GN 323 in GG 39827 of 18 March 2016 (hereafter Policy on the South African Standard for Principals).

²⁷ Policy on the South African Standard for Principals 6.

that prepare students for the future, stay abreast of current developments in national education policies and global schooling trends.²⁸ Moreover, principals need to establish frameworks that foster relationships and encourage individuals to voice their opinions.²⁹ He/she should spearhead continual enhancement in curriculum implementation, embracing the school's cultural diversity. Additionally, they must exhibit integrity toward people of all cultures and instil positive values and ethical perspectives in both educators and students, fostering mutual respect for diverse cultural practices within the school community.³⁰ According to the *Schools Act*, the principal is obligated, among other duties, to inform the governing body of policies and legislation. Furthermore, they must guarantee that the governing body, in carrying out its functions and responsibilities, does not contravene any legislation or policy.³¹

At times, principals find themselves in a difficult position, torn between their role as employees of the Department of Education and their role as *ex officio* members of their public school's governing body. As such, court cases have challenged the acts of the principal's roles and responsibilities. In the case of *Moko v Acting Principal*, the court outlines that the principal has a duty not to impair or diminish a learner's right to a basic education.³² Mr Moko came to write an exam for his matric. Upon arrival, the principal did not allow him to write the exam because the learner had missed a specific extra class.³³ This violated the right to a basic education and deprived the applicant of the opportunity to write the exam, which marked the National Senior Certificate.³⁴ The court stated that the principal, as an organ of the state, has not only a negative obligation to not infringe on a person's right to a basic education but also a positive obligation to ensure that the right is protected and fulfilled.³⁵ The court elaborated that school principals are key delivery agents in the education system and

²⁸ Policy on the South African Standard for Principals 8.

²⁹ Policy on the South African Standard for Principals 9.

³⁰ Policy on the South African Standard for Principals 10.

³¹ Section 16(A)(2)(e) of the *Schools Act*.

³² *Moko v Acting Principal* para 34.

³³ *Moko v Acting Principal* para 7.

³⁴ *Moko v Acting Principal* para 7.

³⁵ *Moko v Acting Principal* para 34.

are the most important partners in education.³⁶ Therefore, the principal's conduct should not breach the duty imposed on him by section 29(1)(a) of the *Constitution*.

The climate of immigrant learners in schools is most likely determined by the school principal. In light of the legal and leadership responsibilities outlined, school principals play a pivotal role in fostering an accommodating environment for undocumented immigrant children. Here's how they can ensure all learners have access to education and receive their entitlements to basic education: they should identify "at risk" learners, such as undocumented immigrant children and arrange appropriate interventions to support these students academically and emotionally.³⁷ Principals should remain updated with national education policies and legal obligations. In this situation, the principal is responsible for ensuring that the school is informed about the court judgement, for example, the *Centre for Child Law and 37 children* case, as well as Circular 01 of 2021, published regarding the admission of undocumented learners.³⁸ Additionally, it is the principal's obligation to ensure strict compliance with the courts' decisions. Principles should establish frameworks that encourage open communication within the school community. By fostering relationships and encouraging individuals to voice their opinions, they can create a safe space in which concerns regarding immigrant students can be addressed.³⁹ Principals should work with the governing body to develop inclusive policies that ensure equal access to education for all students and should regularly review school policies and procedures⁴⁰ to ensure that these policies do not discriminate against any students based on their immigration status.

³⁶ *Moko v Acting Principal* para 34.

³⁷ Draft Policy on Screening, Identification, Assessment and Support (2014) 32.

³⁸ As mentioned above in Chapter 3 para 3.2.9

³⁹ Policy on the South African Standard for Principals 13.

⁴⁰ Policy on the South African Standard for Principals 13.

4.2.2 School governing bodies

4.2.2.1 The role and responsibility of school governing bodies

The school governing body (SGB) plays the most vital role in the admission and exclusion of learners in public schools and in the management of the school.⁴¹ They have a mandate to decide and carry out policies that are suitable for the school, and this must be in line with the *Constitution* and the *Schools Act*.⁴² Undocumented immigrant children face various challenges, including being denied admission to school and encountering discriminatory practices.⁴³ Fully cognisant of these challenges, SGBs play a crucial role in school management, ensuring that they fulfil their responsibility of prioritising the best interests of education for all learners at the schools.⁴⁴ Therefore, an intensive discussion of the roles and responsibilities of SGBs in public schools is essential for this study.

Previously, public schools in black communities were governed by school committees that had not been elected through democratic processes.⁴⁵ The advent of the democratic *Constitution* created the need to change and develop education.⁴⁶ Democracy made it possible for parents, guardians, communities, and learners to exercise their rights and responsibilities by involving themselves in school governance.⁴⁷ Thus, the *Schools Act* provided a provision for the establishment of SGBs.⁴⁸ The SGB is a crucial aspect of the "government" of the school, established in terms of section 18(1) of the *Schools Act*. It is mandated to set policies and rules that govern the school and monitor the implementation of the rules.⁴⁹ The school governing

⁴¹ Section 17 and 18 of the *Schools Act*; Sujee "School Governance" 85.

⁴² Section 18 (1) of the *Schools Act*.

⁴³ *Centre for Child Law & 37 Children*.

⁴⁴ Section 17(1) and 20(a) of the *Schools Act*; Clause 7 of the Admission Policy.

⁴⁵ Quan-Baffour *The Role of School Governing Bodies in Improving School Performance in Taung Rural Areas* 9.

⁴⁶ Preamble of the *Constitution* and the *Schools Act*; see also *White Paper on Education and Training* GN 195 in GG 16312 of 15 March 1995.

⁴⁷ Mateus and Shange 2021 *Pretoria Student Law Review* 363.

⁴⁸ Section 18 of the *Schools Act*.

⁴⁹ Section 15 of the *Schools Act*.

body receives its mandate from different members (learners, parents, teaching, and non-teaching staff) of the school community.

One of the most crucial objectives of the *Schools Act* is the inclusivity and decentralisation of the education system.⁵⁰ Inclusivity refers to the inclusion and participation of parents, educators, and learners in school governance. Decentralisation is the cooperation of key players in the school system, thus avoiding power struggles.⁵¹ Instead of conferring all powers on the National Department of Education (Minister of Basic Education and Department of Education), some duties and responsibilities are shared among the Provincial Department of Education, District Directors, and SGBs.⁵² These various groups of governance in education should work together in mutual trust and good faith, as set out in the *Constitution*.⁵³ The main focus here is on the roles and responsibilities of SGBs in improving the quality of education for undocumented immigrant learners. As mentioned earlier, they play a crucial role in matters of the admission of learners at schools, school fees, language policies, codes of conduct and discipline, and rules for religious observances. All of these factors are pivotal in determining whether undocumented immigrant children can access education and enjoy their rights within the educational system.

4.2.2.2 Composition of school governing bodies

The governance of every public school is vested in its governing body and is subject to the *Schools Act*.⁵⁴ According to the *Schools Act*, schools consist of governance and professional management. While the governance of the school is the domain of the school governing body, the professional management is done by the principal of the school, who is also an ex officio member of the governing body.⁵⁵

⁵⁰ Preamble of the *Schools Act*.

⁵¹ Section 41(1) of the *Constitution*.

⁵² Section 16 of the *Schools Act*.

⁵³ Section 40(1) and 41(h)(i) of the *Constitution*.

⁵⁴ Section 16(1) of the *Schools Act*.

⁵⁵ Section 16(1) and 16(3) of the *Schools Act*.

The SGB comprises the following members: elected members, the principal in his or her official capacity, and co-opted members.⁵⁶ The elected members include parents of learners at the school, educators, members of staff at the school who are not educators, and learners at the school. A parent can be the biological parent of a learner, a person who fulfils the obligations of a parent or a guardian, or one legally entitled to the custody of a learner.⁵⁷ Educators at the school refer to persons employed by the school as either teachers or persons providing professional or psychological services.⁵⁸ Staff members who are not educators can be any staff member appointed in terms of the *Public Service Act* 103 of 1994.⁵⁹ Learners must be in grade 8 or higher and be elected members of the Representative Council of Learners (RCL).⁶⁰ A governing body may further "co-opt a member or members of the community to assist it in discharging its functions."⁶¹

4.2.2.3 The role of the school governing bodies

The school governing body of a public school has the power conferred upon it to decide on the admission policy of the school.⁶² The admission policy should not be discriminatory, nor should it exclude students from the school.⁶³ It has the power to decide on the language policy of a school, bearing in mind the need to promote multilingualism in schools as required by the *Constitution*.⁶⁴ The role of SGBs in language policies and related court decisions will be extensively discussed in the next

⁵⁶ Section 23 (1) (a-c) of *Schools Act*; Franklin and McLaren 2015 *SPII* 38.

⁵⁷ Section 23 (2)(a) of the *Schools Act*; Department of Basic Education 2022 <https://www.education.gov.za/Informationfor/SGBs.aspx>.

⁵⁸ Section 23 (2)(b) of the *Schools Act*; Department of Basic Education 2022 <https://www.education.gov.za/Informationfor/SGBs.aspx>.

⁵⁹ Section 23 (2)(d) of the *Schools Act*; Department of Basic Education 2022 <https://www.education.gov.za/Informationfor/SGBs.aspx>.

⁶⁰ Section 23(2)(c) of the *Schools Act*; Department of Basic Education 2022 <https://www.education.gov.za/Informationfor/SGBs.aspx>.

⁶¹ Regulation 8.2 of the Regulation for the Elections of and Determination for the Constitution of a School Governing Body GN 35 in GG 2089 of 25 April 2017.

⁶² Section 5(2) of the *Schools Act*.

⁶³ Section 5(2) of the *Schools Act*.

⁶⁴ Section 6 (2) of the *Schools Act*.

chapter.⁶⁵ SGBs can further decide on religious policies. Religious observances to be followed should not unfairly discriminate against any religion; they should be conducted on an equitable basis and participation should be free and voluntary.⁶⁶ Hence, no learner should be forced to participate in any religious observance that goes against their faith/belief/culture. Moreover, the *Schools Act* requires the school governing body to implement a resolution on school fees, as adopted by the majority of parents present at a general meeting of parents on the issue of school fees.⁶⁷ An extensive discussion of the quintile system and fees will be discussed in the next chapter. The management of school finances is crucial because mismanagement of school funds has a negative impact on the quality of the education learners receive.⁶⁸ It even has a detrimental effect on undocumented immigrants, who are believed to have come to use resources reserved for citizens. The school governing body should adopt a school code of conduct that aims to improve and maintain the quality of the learning process, after consultation with parents, learners and educators of the school.⁶⁹ Engaging different stakeholders in the process through consultations upholds the principle of inclusivity and promotes the progression of democracy. The school code of conduct must avoid discrimination against learners, such as refusing admission to pregnant learners or perpetrating xenophobic acts against undocumented immigrant children.⁷⁰

The functions of the school governing bodies are not exclusive. The Head of Department may, on reasonable grounds, withdraw the functions of a school governing body when the school governing body does not act in the best interest of

⁶⁵ Different courts have presided over this issue, and such shall be discussed in para 5.1.4.3 of Chapter 5.

⁶⁶ Section 7 of the *Schools Act*.

⁶⁷ Section 39(1-3) of the *Schools Act*.

⁶⁸ Rangongo, Mohlakwana and Beckmann 2016 *South African Journal of Education* 8.

⁶⁹ Section 8 (1) of the *Schools Act*; Example of code of conduct outline see Department of Education *Example of a Code of Conduct for a School* and Mtunzini Primary School (date unknown) http://www.mtunziniprimary.co.za/images/Forms/Code_of_conduct.pdf.

⁷⁰ *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2014 (2) SA 228 (CC) (hereafter *Head of Department v Welkom & Harmony*).

the school.⁷¹ First of all, the Head of Department must inform the school governing body of his/her intention to withdraw its functions. Then the school governing body is given a chance to respond as to why responsibility should not be withdrawn.⁷² Before taking action, the Head of Department should consider the school governing body's response.⁷³ Only then can he/she decide whether or not to withdraw the functions. In certain exceptional instances, the Head of Department has the authority to withdraw the functions of the school governing body without initially providing reasons. However, the Head of Department must provide reasons for the action after it has been taken.⁷⁴

4.2.2.4 The role of the school governing bodies and case law: Implications for undocumented immigrant children

A number of court cases have addressed matters pertaining to school governance and will be examined as they assist in understanding the role of government, on the one hand, and that of the "school community", as represented on school governing bodies, on the other. It is important to understand that either side could promote or stifle the realisation of the constitutional rights of vulnerable groups, such as undocumented immigrant children, in the educational context. Moreover, either side could potentially play a corrective role in relation to the way the other side has acted or failed to act. However, this depends on whether the system envisages or allows such a role. For this reason, the interaction between these two sides is examined below, based on the discussion of some relevant case laws.

⁷¹ Section 22 (1) of the *Schools Act*.

⁷² Section 22 (2) (a-c) of the *Schools Act*.

⁷³ Section 22 (2) (a-c) of the *Schools Act*.

⁷⁴ Section 22 (3) of the *Schools Act*.

4.2.2.4.1 Minister of Education (Western Cape) v Mikro Primary School Governing Body [2005] 3 All SA 436 (SCA)

The Department of Education Western Cape (The Department) approached Mikro Primary School, an Afrikaans-medium public school, to change its language policy into a parallel-medium school.⁷⁵ In response, the Mikro school governing body refused to adhere to the request. A directive was then issued by the Head of the Department instructing the principal and the school to admit a group of learners whose language of instruction was English.⁷⁶ The school appealed to the MEC, but the appeal was dismissed, thereby forcing the school to admit 21 English-speaking learners.⁷⁷ The school immediately brought an urgent application to the Cape High Court (court *a quo*) to set aside the directive. Thus, this application was successful.⁷⁸ The court decided that the department and the MEC had no right to compel the school to admit learners or interfere with the school's governance and management.⁷⁹ The admitted learners were placed in another suitable school(s).

An appeal against this decision was made by the department, MEC, and the parents of the 21 learners.⁸⁰ The court (Supreme Court of Appeal) first mentioned the responsibilities of the MEC at public schools and the legal status of the public schools as a juristic person, the governing functions of the school governing body and its principal as a professional manager, and the Head of the Department.⁸¹ It further explained the roles and responsibilities of the governing body as far as the admission policy and language policy of the school were concerned and in ensuring that these were consistent with the *Constitution* and applicable education legislation (hence, also guaranteeing rights of admission and language rights as laid down in the

⁷⁵ *Minister of Education (Western Cape) v Mikro Primary School Governing Body* [2005] 3 All SA 436 (SCA) para 1 (hereafter *Minister of Education (Western Cape) v Mikro*).

⁷⁶ *Minister of Education (Western Cape) v Mikro* para 1.

⁷⁷ *Minister of Education (Western Cape) v Mikro* para 1.

⁷⁸ *Minister of Education (Western Cape) v Mikro* para 1.

⁷⁹ *Minister of Education (Western Cape) v Mikro* para 1.

⁸⁰ *Minister of Education (Western Cape) v Mikro* para 2.

⁸¹ Section 15-16 of *Schools Act*; *Minister of Education (Western Cape) v Mikro* para 5.

Constitution).⁸² The power of the MEC was also discussed, which included the responsibility to determine the norms and standards for language policy in public schools, but subject to the *Constitution* and the *Schools Act*.⁸³

The court *a quo*, relying on *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting*,⁸⁴ submitted that a school is not an organ of the state because the legislature intended it to be independent of state or government control in the performance of its functions.⁸⁵ This argument was based on the *Interim Constitution's* definition of an organ of state "include[ing] any statutory body or functionary."⁸⁶ Nevertheless, the Supreme Court of Appeal rejected this because the new *Constitution* provides a different definition of an organ of state: here, an organ of state means "any functionary or institution exercising a public power or performing a public function in terms of any legislation."⁸⁷ A school governing body is considered an institution that performs public functions in terms of the *Schools Act*. An example can be drawn from *Independent Electoral Commission v Langeberg Municipality*,⁸⁸ where the court said that the Electoral Commission, as a state (public) structure, which is under a duty to perform its functions in line with legislation, is considered a state organ, even though it is not part of the governmental hierarchy. In agreement with the court *a quo*, the court *in casu* rejected the notion that the language and admission policy determined by the school fall under intergovernmental dispute, as contemplated by section 41(3) of the *Constitution*.⁸⁹ It further held that the provisions of the

⁸² Section 5-6 of the *Schools Act*; *Minister of Education (Western Cape) v Mikro* para 6.

⁸³ Norms and Standards for Language Policy in Public Schools GN1701 in GG18546 of 19 December 1997; Some of the duties include *inter alia* keeping of a register of request by learners for teaching in a language medium which cannot be accommodated by schools; the determination of the language policy of a new school in accordance with the regulations and in consultation with the governing body of such a school.

⁸⁴ *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T).

⁸⁵ *Minister of Education (Western Cape) v Mikro* para 19.

⁸⁶ Section 233 (ix) of the *Interim Constitution* 200 of 1993, Organ of state includes any statutory body or functionary; *Minister of Education (Western Cape) v Mikro* para 20.

⁸⁷ Section 239(b)(ii) of the *Constitution*; *Minister of Education (Western Cape) v Mikro* para 20.

⁸⁸ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 27; *Minister of Education (Western Cape) v Mikro* para 19.

⁸⁹ *Minister of Education (Western Cape) v Mikro* para 22.

Promotion of Administrative Justice Act,⁹⁰ dealing with the duty to use internal remedies and the provisions of the Norms and Standards were incorrectly used in this case.⁹¹

In order to adhere to the principles of a new democratic government and establish a uniform school education system, the government delegated responsibility to provincial public schools to create their governance structures.⁹² The governing body is mandated to fulfil its specific powers and obligations to advance democratic school education. Public schools, as organs of the state, function as institutions that exercise public powers and carry out public functions as stipulated in education legislation.⁹³ A public school is an "organ of state," and the governing body acts as its functionary and performs its functions in terms of the *Schools Act*. Although the governing body has no original power to act on its own outside the provisions of the *Schools Act*, it has the power to perform its functions in terms of the *Schools Act*. To fulfil their respective obligations, the governing body governs the school as an independent institution.⁹⁴ However, it appears that the *BELA Bill* envisages a modification by including a provision that grants the Head of Department the final authority in certain school policy issues, such as admission policy and language policy.⁹⁵ Transparency and accountability should be exercised, in any case.

The argument presented by the court *a quo*, asserting that the school governing body operates independently of national and provincial executive controls when formulating its language and admission policies, is irrational because the school governing body's actions should always align with the principles outlined in the *Constitution*.⁹⁶ Unfortunately, the Supreme Court of Appeal failed to provide a detailed explanation of its precise stance on this crucial matter. The significance of the co-operative government in cases involving undocumented immigrant children lies in establishing

⁹⁰ Section 7(2)(a) and (c) of the *PAJA*; *Minister of Education (Western Cape) v Mikro* para 17.

⁹¹ Sections V, D & E of the *PAJA* referring to arbitration; *Minister of Education (Western Cape) v Mikro* para 17.

⁹² Section 15-16 of the *Schools Act*.

⁹³ Section 239(b) (ii) of the *Constitution*.

⁹⁴ Stwayi and Mansfield-Barry "School Governance" 77.

⁹⁵ Section 4(c)(a) of *BELA Bill*.

⁹⁶ Section 2 of the *Constitution*. The supremacy of the *Constitution*, any law inconsistent with it is invalid.

checks and balances to prevent any single entity from possessing absolute power that could potentially harm these children. This collaborative approach makes it easier for a government to acknowledge its ethical and moral obligation to safeguard and support vulnerable groups such as undocumented immigrant children.

The national government is responsible for national education legislation, which sets the norms, standards, and qualifications for education.⁹⁷ The provincial government has control over school education, the management of all public schools (at the provincial level), and overall norms and standards.⁹⁸ While each sphere has distinct responsibilities, they should collaborate to ensure the provision of quality education to the public. It is crucial to prevent abuse of power within the government. SGBs also play a crucial role in this process. Thus, the school governing body played a crucial role in *Centre for Child Law & 37 Children*, a prominent case protecting the right of admission of undocumented immigrant children into public schools.⁹⁹ This case has been thoroughly examined in the previous chapter. The focus here is on the role of the school governing body in supporting the rights of undocumented learners. The school governing body, together with the first applicant, launched an application against the Minister of Basic Education, the MEC for Education, and the ECDE, seeking an order declaring Circular 06 in 2016 unconstitutional.¹⁰⁰ The matter concerned the lawfulness of a policy decision by the ECDE to effectively withdraw funding for undocumented learners from schools.¹⁰¹ The school governing body challenged the lawfulness of clauses 15 and 21 of the Admission Policy as well as sections 39 and 42 of the *Immigration Act*. Their argument centred on the assertion that the aforementioned provisions violated various constitutional rights of undocumented children in the sphere of education.¹⁰² The court indeed ruled that clauses 15 and 21

⁹⁷ South African Government 2023 <https://www.gov.za/about-sa/education>, for instance the *National Education Policy Act* and the *Schools Act*.

⁹⁸ South African Government 2023 <https://www.gov.za/about-sa/education>. Note that, District offices are the provincial departments' main interface with schools.

⁹⁹ *Centre for Child Law & 37 Children*.

¹⁰⁰ *Centre for Child Law & 37 Children* para 9.

¹⁰¹ *Centre for Child Law & 37 Children* para 10.

¹⁰² *Centre for Child Law & 37 Children* para 14.

violated the rights of undocumented children and that sections 39 and 42 had to be interpreted in an unusual way to ensure their constitutionality as protecting the rights of undocumented children in education.¹⁰³

This study commends a positive outcome in terms of the significant protection provided to numerous undocumented children as a result of litigation by the school governing body. As previously mentioned, one of the roles and responsibilities assigned to the school governing body is to ensure that the school's admission policies are non-discriminatory and inclusive. In this regard, one should acknowledge the role of the school governing body in taking steps to prevent the exclusion of undocumented children. It is within the school governing body's mandate to promote the interests of the school and work towards its overall development.¹⁰⁴

4.2.2.4.2 MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School 2013 (6) SA 582 (CC)

In *MEC for Education, Gauteng Province, v Governing Body, Rivonia Primary School* (hereafter *MEC for Education v Rivonia Primary School*), the Constitutional Court decided in a case where a grade one learner residing within the feeder-area of a school was refused admission at Rivonia Primary School.¹⁰⁵ The case involved a dispute between the school governing body and the Department of Education. The school governing body had refused to admit a learner, who the Head of Department had instructed should be admitted.¹⁰⁶ The reason for the school governing body's decision was that the school had reached its full capacity under its admission policy.¹⁰⁷ However, the capacity which the school had set for itself was somewhat lower than that of the national average in terms of the government's norms and standards. This is also the reason why the Head of Department insisted that the learner be

¹⁰³ *Centre for Child Law & 37 Children* para 101, 135.

¹⁰⁴ Section 20 (a) of the *Schools Act*.

¹⁰⁵ *MEC for Education v Rivonia Primary School* para 9.

¹⁰⁶ *MEC for Education v Rivonia Primary School* 12.

¹⁰⁷ *MEC for Education v Rivonia Primary School* para 9.

admitted.¹⁰⁸ As a result, the Head of Department took measures and opted to remove authority from the school governing body and appointed an interim committee responsible for determining school capacity and admissions.¹⁰⁹

The Constitutional Court judge stated that the way in which the Head of Department had handled the matter was not fair and reasonable.¹¹⁰ Despite that, the court provided that schools could not be completely inflexible in their policies when deciding the fate of an individual learner and that the MEC did have the final say in such a decision.¹¹¹ Therefore, although the Head of Department had acted in a procedurally unfair manner by placing the learner in the school, in terms of section 22 of the *Schools Act*.¹¹² The judge stated that, in determining its capacity, the school governing body should bear in mind its statutory responsibility, that is, to promote the best interests of the school, and to ensure its development through the provision of quality education.¹¹³ He further highlighted that a learner's right to a basic education is a right against the state, therefore the government must ensure that there are enough places for all learners to receive an education.¹¹⁴ While it is true that the learner can apply to another school, if there is no available space, it is crucial to hold the state accountable for this situation. In relation to this, Arendse asserts that the court *a quo* provided an interpretive approach that is more suitable for a judiciary that is constitutionally obligated to uphold the transformative vision of the South African *Constitution*.¹¹⁵ She further argues that the impact of *Rivonia* case judgements on the transformation of the public education system is that every learner in the public schools system must have an equal opportunity to access education, that learners must be educated under the same conditions and all learners must receive the same quality education.¹¹⁶

While the case centred around a single learner, it provides a wider perspective on the necessary balance between the right to access education (being allowed entry even if

¹⁰⁸ *MEC for Education v Rivonia Primary School* para 11

¹⁰⁹ *MEC for Education v Rivonia Primary School* para 47.

¹¹⁰ *MEC for Education v Rivonia Primary School* para 68.

¹¹¹ *MEC for Education v Rivonia Primary School* para 45.

¹¹² *MEC for Education v Rivonia Primary School* para 87.

¹¹³ *MEC for Education v Rivonia Primary School* para 69.

¹¹⁴ *MEC for Education v Rivonia Primary School* para 71.

¹¹⁵ Arendse 2014 *SAPL* 165.

¹¹⁶ Arendse 2014 *SAPL* 169.

a school is quite full) and the quality of education (which requires lower rather than higher student numbers per school). A valuable lesson derived from this case is the need for collaboration within the public school system and the importance of mutual trust and partnership among the different spheres of government, or stakeholders in, the education system. This includes the national government, provincial government, and school governing bodies, all working together in harmony. The judgment was also significant in establishing the authority responsible for making final decisions in admission disputes. Establishing clear guidelines and policies, as demonstrated, can help navigate admission disputes involving undocumented immigrant children, fostering an inclusive and equitable educational environment for all.

4.2.2.4.3 Conclusions from case law: Co-operative governance and creating an inclusive school environment

In relation to this study, the above two cases provide valuable lessons, as they highlight the importance of collaboration among governance spheres to ensure that undocumented learners obtain the necessary documents or are not obstructed from school enrolment without these. While each school governing body may have the authority to determine and regulate student capacity, it must ensure that the right to access education for all learners is fully upheld. Considering that overcrowded classrooms also violate learners' right to receive quality education, capacity policies should prioritise the best interests of the learner and aim for the highest quality of education.¹¹⁷

Head of Department: Mpumalanga Department of Education v Hoërskool accentuated the importance of co-operative governance.¹¹⁸ In summary, the Minister of Education is supposed to establish consistent guidelines and benchmarks for public schools. MEC is tasked with creating and maintaining public schools. Working in conjunction with

¹¹⁷ Arendse 2014 *SAPL* 169.

¹¹⁸ *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC)

the Head of the Provincial Department of Education, they oversee the day-to-day operation of public schools through school principals.¹¹⁹ In addition, the parents of students and community members residing in the vicinity of the school are represented in the school governing body.¹²⁰ All of these structures are supposed to work together to create a school environment that is conducive and inclusive of undocumented immigrant learners.

The support for cooperation between governance spheres was further emphasised by Khampepe J in the case of the *Head of Department v Welkom and Harmony*. The court elaborated on how the various players in school governance should work together:

Cooperative governance is a foundational tenet of our constitutional order and has been incorporated into the Schools Act through the provisions of Section 22. It is incumbent upon HODs and governing bodies to act as partners in the pursuit of the objects of the Schools Act. In *Schoonbee and Others v MEC for Education, Mpumalanga and Another*, the cooperative mandate contained within the Schools Act was described as follows: Having read the Act again, it seems to me that the new education regime introduced by the Schools Act, which came into operation on 1 January 1996, contemplates an education system in which all the stakeholders and there are four major stakeholders – the State, the parents, educators and learners – enter into a partnership in order to advance specified objectives around schooling and education. It was intended, it appears, to be a migration from a system where schools are entirely dependent on the largesse of the State to a system where a greater responsibility and accountability is assumed, not just by the learners and teachers, but also by parents.¹²¹

Hence, cooperative governance serves as the fundamental principle in school governance, requiring all parties involved in safeguarding the educational rights of undocumented immigrants to engage in meaningful collaboration.¹²² Looyen¹²³ illustrated that educational reform, particularly in the context of co-operative governance, extends beyond the simple enforcement of laws and policies or the adoption of new teaching methods and skills. It encompasses more than just political,

¹¹⁹ Sujee "School Governance" 94.

¹²⁰ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 56.

¹²¹ *Head of Department v Welkom and Harmony* para 121; *Schoonbee and Others v MEC for Education, Mpumalanga and Another* 2002 (4) SA 877 (T).

¹²² Serfontein 2018 *Africa Education Review* 8.

¹²³ Looyen *Co-operative Governance: From Policy to Practice* 15.

economic, or curricular dimensions. Genuine educational reform necessitates a shared commitment to a culture and values that empower the educational process to serve as a catalyst for democracy, equity, and accountability.¹²⁴

Merely having rules in place is insufficient to protect learners, as evidenced by the various cases where SGBs adopted, applied and interpreted admission, religion, language and pregnancy policies in a discriminatory manner.¹²⁵ Consequently, SGBs can contribute significantly to fostering a culture of exclusion and discrimination within schools. However, they can also do the opposite.

4.2.3 Some recommendations for improved governance in schools

Mncube argued that learners frequently lack adequate opportunities, whether directly or indirectly, to participate effectively in important decision-making processes.¹²⁶ Consequently, their right to participate is denied. This deprivation hinders learners from engaging meaningfully in discussions and expressing their opinions, which is essential for fostering democracy and social justice.¹²⁷ Mncube's argument implies a broader perspective of student participation. It advocates the involvement of immigrant children in schools' decision-making processes, ensuring that their voices are heard.¹²⁸ In diverse societies, it is essential to provide platforms on which immigrant children can express their unique perspectives and experiences. This inclusivity promotes understanding, tolerance, and cultural diversity in educational settings. Mncube's argument could be extended to advocate the rights of undocumented immigrant children to participate in these decision-making processes without fear of legal repercussions. Encouraging immigrant students' participation in governance involves involving them in discussions related to school policies, curricula, and other matters that directly affect their education and well-being. This engagement

¹²⁴ Looyen *Co-operative Governance: From Policy to Practice* 15.

¹²⁵ *Centre for Child Law & 37 Children; MEC for Education: Kwazulu-Natal v Pillay; Head of Department: Mpumalanga Department of Education v Hoërskool; Head of Department v Welkom and Harmony*.

¹²⁶ Mncube 2008 *South African Journal of Education* 77.

¹²⁷ Mncube 2008 *South African Journal of Education* 77.

¹²⁸ Mncube 2008 *South African Journal of Education* 82.

nurtures a feeling of accountability, improves critical reasoning skills, and helps students participate as active nationals in a democratic society.

This study emphasises the importance of informing SGBs and all relevant departments about changes in the law and any amendments made regarding the rights of undocumented immigrant learners. Moreover, accountability should be established in cases where there is a lack of knowledge or comprehension of the law among parties involved in school management. It is imperative to implement policies and strategies that protect and support immigrant learners and ensure their safety against xenophobic attacks and discrimination within educational institutions.¹²⁹ The school's code of conduct should include clear provisions regarding the inclusion of immigrant learners, as the absence of such policies hinders their access to quality education. It is crucial to acknowledge that the accommodation of immigrant learners does not imply granting them privileges over other children, as all learners encounter diverse challenges in the school environment. Nonetheless, immigrant learners may face additional or unique obstacles stemming from their foreign status, such as xenophobic attacks.

In *MEC for Education: Kwazulu-Natal v Pillay*,¹³⁰ the court said that if the school's code of conduct contradicts pupils' religious and cultural practices, the school should take reasonable measures to ensure that it does not limit learners' rights unjustly. This also applies to admission policies, which must be consistent with the constitutional values.¹³¹ Such policies cannot unjustly limit access to education. They must uphold the need for tolerance, diversity and inclusiveness.¹³² The recommendations in the concluding chapter will examine what these codes of conduct should provide and promote. This study advocates the expansion of SGBs by including additional members. For example, in the case of special schools, the school governing body

¹²⁹ Centre for Justice and Crime Prevention "Everyone's a Foreigner Somewhere: Understanding and Addressing Xenophobia" 7-9.

¹³⁰ *MEC for Education: Kwazulu-Natal v Pillay* para 173.

¹³¹ Right to equality, dignity, provision of a basic education to everyone.

¹³² Article 11(2)(d) of the *ACRWC*.

includes additional representatives from organisations of parents with special needs and experts in relevant fields related to special needs education.¹³³ Similarly, in ordinary public schools, it is recommended that the school governing body consider including representatives from organisations of immigrant learners' parents, immigrant learners themselves, and even experts in relevant fields related to immigration. By incorporating these stakeholders, the school governing body can ensure a more inclusive and informed decision-making process that addresses immigrant learners' specific needs and challenges.

In *Larbi Odam and Others v Member of the Executive Council for North West Province*,¹³⁴ the appellants brought a case against the education department. They argued against the constitutionality of regulation 2(2) of the Regulations regarding the Terms and Conditions of Employment of Education, which stated that only South African citizens qualified for permanent teaching positions.¹³⁵ In this case, the Constitutional Court found the regulations discriminatory.¹³⁶ Although this case dates back many years, it remains crucial to underscore the significance of promoting inclusivity in the education system. Such inclusivity should also prevail in SGBs, particularly in relation to undocumented, non-South African citizens. The presence of discriminatory practices based on nationality signifies a failure in the legal framework. However, it is important to note that the probability of parents of immigrant learners constituting a minority within the broader parent community of schools is high, which may result in their voices being marginalised or outnumbered during parental body meetings.¹³⁷ Immigrant learners and their parents possess unique insights and perspectives on the challenges they face, which can greatly contribute to the school governing body's understanding of issues and make informed decisions. By including

¹³³ Section 23 (5) of the *Schools Act*.

¹³⁴ *Larbi Odam v Member of the Executive Council for North West Province* 1997 (12) BCLR 1655 (CC) (hereafter *Larbi Odam v MEC for North West*).

¹³⁵ *Larbi Odam v MEC for North West* para 3; Check as well the Regulations Regarding the Terms and Conditions of Employment of Education GN R1743 in GG 16814 of 13 November 1995.

¹³⁶ *Larbi Odam v MEC for North West* para 49.

¹³⁷ Van Wyk, Wolhuter and Michael 2012 *C.E.P.S Journal* 68-71.

them in the school governing body, quality education for all learners can be strengthened.

When an unaccompanied or separated immigrant child arrives in the country or at a school, they are likely to be in need of care and protection (this will be discussed in length in the next chapter).¹³⁸ The school governing body should be provided for, and the school's bodies or functionaries should follow established procedures to ensure such children's safety and well-being.¹³⁹ This may involve notifying relevant authorities, such as child protection organisations or social services so that they can initiate the necessary assessments and interventions.¹⁴⁰ The school governing body and principal should also collaborate with other professionals, such as social workers and legal experts, to provide appropriate support and guidance to these children.

In summary, the needs of accompanied and unaccompanied undocumented immigrant children differ at schools, and the school governing body, together with the principal, should consider the specific circumstances of each child.¹⁴¹ It is important to consider the provisions of the *Children's Act* and collaborate with the relevant authorities to ensure appropriate care, protection, and educational support for these children.¹⁴² SGBs and parents constitute a network of interconnected relationships that should collaboratively strive for the realisation of the right to education for all learners, as protected by the *Constitution*.¹⁴³ The complex interplay between the school governing body and the Head of Department necessitates the establishment of a productive, functional, and harmonious working relationship between the principal, school governing body, parents, learners, and the community.¹⁴⁴

¹³⁸ Para 5.1.1 in Chapter 5 below.

¹³⁹ Section 150-154 of the *Children's Act*.

¹⁴⁰ Section 150-159 of the *Children's Act*.

¹⁴¹ Van der Burg 2018 *Law, Democracy and Development* 97.

¹⁴² Section 150-159 of the *Children's Act*.

¹⁴³ Section 28 and 29 of the *Constitution*.

¹⁴⁴ Beckmann and Sibanda 2021 *South African Journal of Education* 1.

The Plan of Action handbook addresses many issues that are key to improving and achieving quality education in South Africa.¹⁴⁵ Furthermore, the primary objective of the education system is to guarantee an inclusive education for every learner, with a particular focus on transforming education, fostering social justice, and promoting equal access to education for all.¹⁴⁶ While the state and other relevant parties bear the responsibility of ensuring the fulfilment of the right to a basic education for all children, including undocumented immigrants, it is also important to acknowledge the responsibilities that children themselves have. These responsibilities encompass attending school regularly, demonstrating respect towards their fellow classmates and teachers,¹⁴⁷ refraining from engaging in discriminatory or harmful behaviours, respecting the diverse cultures, languages, nationalities, and religions of others, avoiding actions that degrade or demean others and supporting vulnerable peers in understanding and accessing their rights.¹⁴⁸

4.3 Key role players in the educational sphere

4.3.1 South African Human Rights Commission

In most democracies across the globe, specialised human rights institutions set up by legislation/governments complement traditional government institutions to respect, protect, promote and fulfil human rights.¹⁴⁹ They have advanced constitutional democracy and enhanced the implementation of human rights. The *Constitution* provides for the SAHRC,¹⁵⁰ which mandates the promotion, monitoring, and assessment of the observance of human rights.¹⁵¹ The SAHRC is part of the Institutions Supporting Constitutional Democracy, which was established in Chapter 9 of the

¹⁴⁵ Department of Education 2003 "Plan of Action: Improving Access to Free and Quality Basic Education for All" 4-10.

¹⁴⁶ Department of Education "Education White Paper 6: Special Needs Education Building an Inclusive Education and Training System" 9.

¹⁴⁷ See section 16 of the *Children's Act* and Article 31 of the *ACRWC*.

¹⁴⁸ National Child Care and Protection Policy para 4.7.7.

¹⁴⁹ Taiwo and Govindjee 2012 *Obiter* 204.

¹⁵⁰ Chapter 9 of the *Constitution*, section 181(1)(b), 184(1)-(4).

¹⁵¹ Section 184(1) of the *Constitution*.

Constitution.¹⁵² The main function of these institutions is to ensure that South Africa becomes a true constitutional democracy, as opposed to an authoritarian regime with a superb but unfulfilled *Constitution*.¹⁵³ The SAHRC fits into this framework as a promoter of human rights, as stipulated in section 184 of the *Constitution*. This section shows that the functions of the SAHRC are to promote, protect, and develop human rights and monitor and assess the observance of human rights.¹⁵⁴

The most important aspect of this constitutional provision with regard to the aims and objectives of this thesis is that it does not exclude any people from benefiting from the work of the SAHRC. Thus, the SAHRC is responsible for promoting the protection, development, and attainment of the right to a basic education of undocumented immigrant children. It also follows that the observance of this right by state and non-state actors must be monitored and assessed. It is also empowered to support those whose rights have been violated, to seek remedy through the courts.

However, the SAHRC cannot issue binding remedial orders like Public Protectors because its work is more in the nature of promoting than enforcing human rights.¹⁵⁵ It may educate the nation about the vulnerabilities, needs, dignity, and rights of undocumented children in the sphere of education but does not have any power to punish violations of these rights. This is because neither the *Constitution* nor the *South African Human Rights Commission Act*,¹⁵⁶ the statute enacted to give effect to the constitutional establishment of the SAHRC, provide such powers. The courts recognise this and have held that the powers of the SAHRC are limited to educating the people of South Africa on human rights, enhancing transformation, and empowering

¹⁵² Chapter 9 institutions comprise of the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.

¹⁵³ *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC) para 1.

¹⁵⁴ Section 184(1) (a-c) of the *Constitution*.

¹⁵⁵ *South African Human Rights Commission v Agro Data CC* (1448/2021) [2022] ZAMPMBHC 58 para 47 (hereafter *SAHRC v Agro*).

¹⁵⁶ *South African Human Rights Commission Act* 40 of 2013.

communities and individuals whose rights have been violated.¹⁵⁷ Such empowerment entails assisting marginalised communities with legal representation to secure binding legal orders to prevent, stop, and redress human rights violations.¹⁵⁸

Hence, the SAHRC must advance accountability for human rights and report to Parliament annually on its work.¹⁵⁹ It must undertake investigations on how human rights are observed and initiate remedial steps to remedy any violations.¹⁶⁰ In the context of investigating violations of socio-economic rights, the *Constitution* obliges relevant organs of the state to provide the SAHRC with information on the measures they have taken towards the realisation of rights on a regular basis.¹⁶¹ To fulfil its obligation, the SAHRC developed a series of reporting protocols which have been periodically revised. As seen below, the SAHRC has been active in helping to secure the right to basic education for undocumented immigrant children.¹⁶²

In *Centre for Child Law v 37 Children* the court invited the SAHRC to make submissions as *amici curiae* on the proper interpretation of sections 39 and 42 of the *Immigration Act*. The SAHRC implored the court to interpret these sections, which prohibit learning institutions from providing training or instruction to persons deemed to be illegal foreigners, in a way that did not apply to schools.¹⁶³ The court did not find these sections unconstitutional but held that they were capable of being constructed in a way that did not preclude undocumented children from obtaining a basic education.¹⁶⁴ The SAHRC recommended that the Department of Basic Education should issue a directive to all district offices and public schools outlining the obligation of schools in

¹⁵⁷ *SAHRC v Agro* paras 60-61.

¹⁵⁸ See, for instance, *South African Human Rights Commission v Msunduzi Local Municipality* [2021] 3 All SA 939 (KZP) in which the court analysed the SAHRC's important role in protecting human rights through litigation and securing counsel for marginalised communities to enforce their rights in court.

¹⁵⁹ Section 181(5) of the *Constitution*.

¹⁶⁰ Section 184(2) of the *Constitution*.

¹⁶¹ Section 184(3) of the *Constitution*, measure taken towards the realisation of the rights such as health care, food, water, social security, education.

¹⁶² SAHRC "Position Paper" 19.

¹⁶³ *Centre for Child Law & 37 Children* para 30.

¹⁶⁴ *Centre for Child Law & 37 Children* para 30.

relation to undocumented learners¹⁶⁵ and that the directive should specify, among other things, that:

- (i) no learner may be denied admission or access to a school as a result of a lack of documentation;
- (ii) no learner, parent, or caregiver may be threatened with removal from school as a result of a lack of documentation;
- (iii) no learner may be excluded from school after the lapse of the stipulated period for the finalisation of admission;
- (iv) any Circulars issued by Provincial and/or District Departments restricting access to school for undocumented or migrant learners in any way must be immediately recalled. A copy of this communication must be provided to the Commission.¹⁶⁶

The SAHRC considers the impact of costs on the accessibility of education.¹⁶⁷ It suggested that the government should move rapidly to increase the number of fee-free schools for poor learners and that poor learners who live far away from their nearest schools should receive state-transport assistance.¹⁶⁸ In line with these recommendations, the government has increased the number of no-fee schools in the country but is yet to implement transport recommendations.¹⁶⁹ However, the SAHRC has not issued guidelines regarding monitoring and feedback timeframes.

4.3.2 Independent specialist institutes, non-governmental organisations and private actors

There are organisations that advance the right to a basic education such as independent institutes, private actors and non-governmental organisations. While their operating in the education system is not explicitly defined in the Constitution nor the Schools Act, the *locus standi* provision in the *Constitution* facilitates the right to establish and maintain independent educational institutions.¹⁷⁰ Their only direct

¹⁶⁵ SAHRC "Position Paper" 19.

¹⁶⁶ SAHRC "Position Paper" 19.

¹⁶⁷ SAHRC "Report of the Public Hearing on the Right to Basic Education" para 39–40.

¹⁶⁸ SAHRC "Report of the Public Hearing on the Right to Basic Education" para 39–40.

¹⁶⁹ SAHRC "Report of the Public Hearing on the Right to Basic Education" para 39–40.

¹⁷⁰ Section 29 (3) of the *Constitution*.

constitutional obligation is to respect the right to basic education. Private actors that decide to provide education have positive duties that includes to maintain standards not inferior to state institutions and not to discriminate on the basis of race.¹⁷¹

The activities of these organisations is to advance the observance of human rights through education, empowerment, and the promotion of respect for human rights.¹⁷² Some of these independent specialist institutes and non-governmental organisations have been at the forefront of human rights litigation to protect the rights of children to education and dignity, among others. The latter may be part of a government-supervised and/or funded organisation but is independent of its composition of members and functions. Non-Governmental Organisations (NGOs) are wholly separated from the government, although they may receive funding from the government.¹⁷³ The relevant organisations in this context include (but are not limited to) the Centre for Applied Legal Studies,¹⁷⁴ which played a role in the case of the Centre for Applied Legal Studies where it challenged Hunt school for non-compliance with the *Schools Act* and the Regulations relating to the legal enforcement of the collection of public school fees (section 41 of *Schools Act*).¹⁷⁵ The school admitted that it had taken judgement and enforced an emoluments attachment order (the so-called garnishee orders) without properly complying with the *Schools Act* and the Regulations.¹⁷⁶ In addition, the Centre for Child Law (the role of this organisation has been discussed in, for instance, the case of *Centre for Child Law & 37 Children*, where the organisation acted as *amicus curiae* for undocumented children),¹⁷⁷ Equal

¹⁷¹ Section 29(3) (a-c) of the *Constitution*.

¹⁷² Such as Centre for Child Law, Centre for Human Rights, Centre for Applied Legal Studies, Public Prosecutors, Section 27.

¹⁷³ Department of Social Development "Codes of Good Practice for South African Non-profit Organisations (NPOs)" 33.

¹⁷⁴ The Centre for Applied Legal Studies is a research unit at Witwatersrand University whose purpose is to promote human rights and challenging systems of power in South Africa and the region.

¹⁷⁵ *Centre for Applied Legal Studies v Hunt Road Secondary School* [2007] ZAKZHC (hereafter *Centre for Applied Legal Studies v Hunt*) para 2.

¹⁷⁶ One of the cases in which CALS played a role was *Centre for Applied Legal Studies v Hunt* para 2.

¹⁷⁷ In *Centre for Child Law & 37 Children*; *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC); and *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) the Centre for Child Law played a pivotal role.

Education Law Centre,¹⁷⁸ Legal Aid Justice Centre,¹⁷⁹ Lawyers for Human Rights,¹⁸⁰ Section27,¹⁸¹ Socio-Economic Rights Institute of South Africa (SERI),¹⁸² and law clinics in universities, probono.org, among many other organisations.¹⁸³ Foreign learners can complain about unfair treatment and related exclusions to these organisations and also organisations such as the Consortium for Refugees and Migrants in South Africa.¹⁸⁴ These bodies broadly promote and develop peace, friendship, humanity, tolerance, national unity, and respect for human rights based on equality, human dignity, and non-discrimination.

The *Juma Musjid Primary School* case,¹⁸⁵ further illustrates the obligations of private actors in realising the right to receive a basic education in the context of section 29(1)(a) of the *Constitution*. The court considered the scope and ambit of the right and its importance in the transformation of society in the context of an eviction of a public school from private property sought by the private owner because the state had failed to pay expenses for operating the school on private premises.¹⁸⁶ However, the court confirmed the eviction because the learners were successfully placed in other schools, and there was no danger of deprivation of education as a result of the eviction.¹⁸⁷ It is unlikely that this order would have been granted if the learners were not placed elsewhere.¹⁸⁸ The court emphasised that although private actors had no

¹⁷⁸ Some of the cases in which the Equal Education Law Centre played a role are *Head of Department: Mpumalanga Department of Education v Hoërskool*; *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) (hereafter *MEC for Education: Kwazulu-Natal v Pillay*); *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* 2013 (6) SA 582 (CC).

¹⁷⁹ See *Legal Aid Board: in re Four Children* [2011] ZASCA 39 for one of the cases in which the Legal Aid Board Justice Centre played a role.

¹⁸⁰ See *Chisuse v Director-General of Home Affairs* 2020 (6) SA 14 (CC) for one of the cases in which Lawyers for Human Rights advanced the right to education.

¹⁸¹ See, for example, *Section27 v Minister of Education* [2012] 3 All SA 579 (GNP).

¹⁸² *Rhodes University v Student Representative Council of Rhodes University* [2017] 1 All SA 617 (ECG).

¹⁸³ McConnachie and Skelton "Constitution and the Right to Basic Education" 20.

¹⁸⁴ Ramjathan "The Rights of Refugees and Migrant Workers" 139.

¹⁸⁵ *Juma Musjid Primary School* para 11-24.

¹⁸⁶ *Juma Musjid Primary School* para 36-44.

¹⁸⁷ *Juma Musjid Primary School*.

¹⁸⁸ For a discussion of *Juma Musjid Primary School*; see Arendse 2020 *African Human Rights Law Journal* 286-314; Skelton 2013 *De Jure* 4-22.

obligation to positively fulfil the right to education, they had a negative obligation to respect the right to education.¹⁸⁹

On aiding the realisation of the right to a basic education *AB v Pridwin Preparatory*,¹⁹⁰ the court considered the rights of children as guaranteed in by the *Constitution* in section 28(2) with respect to having their best interests considered as paramount in every matter concerning them. The school had cancelled the contract for the child to learn at a school because of the misconduct of the parent without affording the parent a proper opportunity to be heard.¹⁹¹ The court found this conduct unconstitutional also because it infringed on the child's right to a basic education.¹⁹² Therefore, the best interests of the child and their right to education trumped the school's contractual rights.¹⁹³ Again, the court emphasised that although private actors had no obligation to positively fulfil the right to education, they had a negative obligation to respect the right to education.¹⁹⁴ Once a private actor assumed the function of providing basic education, it is obliged not to interfere with the right to a basic education.¹⁹⁵ However, if these private entities choose to offer educational services, they are mandated to uphold and not infringe upon the right to a basic education, as specified in the laws of the respective jurisdiction. When admitted to, for example, private schools, immigrant children must be treated equally and cannot face discrimination based on their immigration status. Private schools cannot deny enrolment to undocumented immigrant children based solely on lack of legal documentation.¹⁹⁶ Additionally, after enrolment, private schools are prohibited from obstructing the educational rights of these children. This guarantees that undocumented immigrant children have the right to education without facing unnecessary barriers, regardless of their immigration

¹⁸⁹ *Juma Musjid Primary School* para 27.

¹⁹⁰ *AB v Pridwin Preparatory School* 2020 (9) BCLR 1029 (CC) (hereafter *AB v Pridwin Preparatory School*).

¹⁹¹ *AB v Pridwin Preparatory School* para 6-31.

¹⁹² *AB v Pridwin Preparatory School* para 99.

¹⁹³ For a discussion of this case, see Ally and Linde 2021 *Constitutional Court Review* 275-300; Laubscher 2020 *Obiter* 436-446; Fawole 2022 *South African Journal on Human Rights* 128-143.

¹⁹⁴ *AB v Pridwin Preparatory School* para 87.

¹⁹⁵ *AB v Pridwin Preparatory School* para 88.

¹⁹⁶ *AB v Pridwin Preparatory School* para 248.

status. The next section will now focus on the role of the judiciary as an institutional mechanism ensuring and advancing human rights in South Africa.

4.3.3 The judiciary and its case law

The fulfilment of the Bill of Rights requires a functionally independent, courageous, and vigorous judiciary.¹⁹⁷ Courts advance human rights in two ways: Firstly, they interpret legislation and develop the rules of common law in light of the *Constitution* in general and the Bill of Rights in particular. Secondly, they adjudicate constitutional and other challenges to state (and, to an extent, private) measures that impinge on human rights.¹⁹⁸ The judiciary ensures that everyone has the right to an effective remedy for acts that violate the fundamental rights granted by the *Constitution* and other laws.¹⁹⁹ Disputes always arise concerning the content of rights, even if they are clearly formulated, necessitating the involvement of the judiciary for the interpretation and resolution of disputes.

The *Constitution* provides that when applying the Bill of Rights to a natural or juristic person, a court must give effect to the Bill of Rights and develop the common law to the extent that legislation does not give effect to that right.²⁰⁰ The *Constitution* also obliges courts, tribunals and other forums to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.²⁰¹ Section 172 is also an important provision which gives courts wide remedial powers in case the right to a basic education is violated.²⁰²

¹⁹⁷ Liebenberg "Reflections on Drafting a Bill of Rights" 21.

¹⁹⁸ Brand "Introduction to Socio-Economic Rights in the South African Constitution" 38–39.

¹⁹⁹ Marie "National Systems for the Protection of Human Rights" 261.

²⁰⁰ Sections 8(3) and 39(2) of the *Constitution*.

²⁰¹ Section 39(1)(a) of the *Constitution*.

²⁰² Section 172 of the *Constitution* provides that:

- (1) When deciding a constitutional matter within its power, a court—
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;
 - and
 - (b) may make any order that is just and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and

However, some courts are reluctant to make orders that effectively bind the state in cases where a multiplicity of policy issues are at stake and often justify this on the pretext that "the courts may not be completely appraised of all the competing demands on the public purse."²⁰³ This is what is termed judicial restraint²⁰⁴ and it is driven by the reality that the courts must not unduly intrude into the exclusive domains of the legislature and the executive.²⁰⁵ Although there is merit in this view, the reality is that everyone who is affected by a statute or executive conduct in the form of administrative action is entitled to protection by the courts.²⁰⁶ Hence, the courts make orders that prevent human rights violations, stop ongoing violations and mitigate the impact of violations that have occurred or are in the process of occurring. They can do this through interdicts and other orders that secure respect for human rights.²⁰⁷

Another issue leading to the attractiveness of courts as enforcement mechanisms for rights is that the South African judiciary is seen as fiercely independent and experimentally activist.²⁰⁸ In a highly litigious society that thrives on lawfare,²⁰⁹ the judiciary is not hesitant to declare policies, administrative action and legislation that does not meet constitutional requirements invalid and of no effect. Thus, persons whose rights have been infringed or are at risk of infringement may rely on the courts for protection.²¹⁰ This means that undocumented immigrants, their parents and associations assisting them may use litigation to secure access to the right to a basic education. Undocumented immigrants are entitled to legal assistance in the courts in the same way as citizens and their documented non-citizens counterparts.²¹¹ When substantial injustice is otherwise likely to occur, the *Constitution* affords children the

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

²⁰³ Veriava "Basic Education Provisioning" 220.

²⁰⁴ Ali 2014 *SEUJASS* 142; Posner 2012 *Chicago Law Review* 520.

²⁰⁵ Posner 2012 *Chicago Law Review* 521.

²⁰⁶ *Speaker of National Assembly v De Lille MP* para 14.

²⁰⁷ Prest *The Law and Practice of Interdicts* 2.

²⁰⁸ Chima *Judicial Activism in South Africa's Constitutional Court* 5.

²⁰⁹ See Le Roux and Davis *Lawfare* for an analysis of lawfare as a tool of change in South Africa.

²¹⁰ *Speaker of National Assembly v De Lille MP* para 14.

²¹¹ Section 28(1)(h) of the *Constitution*.

right to legal representation provided by the state²¹² and it generally affords everyone the right to approach the courts.²¹³ The right to legal assistance at the state's expense also applies to persons who are accused of committing criminal offences.²¹⁴ Hence, undocumented immigrant children have a right to access legal assistance to protect their rights.

To exemplify the courts' potential to assist undocumented immigrant children in guaranteeing their constitutional rights, the case of *Minister of Home Affairs v Watchenuka* may be discussed. This matter was an appeal to the Supreme Court of Appeal launched by the Minister of Home Affairs against a Zimbabwean national who applied for asylum for herself and her disabled child.²¹⁵ Due to the need to provide for herself and her son, Ms Watchenuka sought employment and obtained a place to study at a college in Cape Town.²¹⁶ Although the Department of Home Affairs issued her permission to stay in South Africa, pending adjudication of her asylum application, it prohibited her and her son from studying and seeking employment. She was aggrieved by this decision and challenged it in the High Court.²¹⁷ She won the case here.

The appeal court was asked to consider whether asylum seekers are prohibited from obtaining employment and studying while awaiting the adjudication of their applications for recognition as refugees. In this case, the Supreme Court of Appeal reasoned that the lack of freedom to work or access education by immigrants often threatens to degrade them and violate their rights to human dignity.²¹⁸ The court stated that "human dignity has no nationality"²¹⁹ and that it is inherent in all people, whether they are citizens or non-citizens. The court opined that the blanket prohibition

²¹² Section 28(1)(h) of the *Constitution*.

²¹³ Section 34 of the *Constitution*.

²¹⁴ Section 35(3)(g) of the *Constitution*.

²¹⁵ *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA) (hereafter *Minister of Home Affairs v Watchenuka*).

²¹⁶ *Minister of Home Affairs v Watchenuka* para 2.

²¹⁷ *Minister of Home Affairs v Watchenuka* para 2.

²¹⁸ *Minister of Home Affairs v Watchenuka* para 25.

²¹⁹ *Minister of Home Affairs v Watchenuka* para 25.

on studying in South Africa violated the law.²²⁰ The right to pursue education is an essential aspect of human dignity as it enables individuals to reach their full potential.²²¹ This right is explicitly safeguarded by section 29(1) of the Bill of Rights, which ensures that every person has the right to receive basic education, including basic adult education, as well as access to further education.²²² The court stated that a person who happens to be in South Africa, for whatever reason, must be protected in accordance with the *Constitution*.²²³ The court further stated that prohibiting asylum seekers from obtaining employment for the first 180 days after their arrival in South Africa violates the Bill of Rights, specifically the right to dignity and the freedom to engage in productive work to obtain income for self-sustenance.²²⁴ The appeal court found that the government had failed to consider Ms Watchenuka's circumstances and those of her son on their own merits. Importantly, the court held that prohibiting asylum seekers from obtaining education infringed on one's human dignity, therefore, unlawful.²²⁵ The court ordered the Standing Committee for Refugees to determine Ms Watchenuka's application and that of her son afresh. This was done with a view to ascertaining whether their personal circumstances permit them to undertake employment and study pending finalisation of their applications for asylum.²²⁶

The Watchenuka case had profound implications for asylum seekers. Having lost in the Supreme Court of Appeal, the Minister of Home Affairs decided to amend the *Refugees Act*.²²⁷ The negative impact of this amendment, as highlighted by the Scalabrini Centre of Cape Town, is that, according to the *Refugees Amendment Act*,²²⁸ the entitlement of asylum seekers to work and study is no longer automatic.²²⁹ The

²²⁰ *Minister of Home Affairs v Watchenuka* para 37.

²²¹ *Minister of Home Affairs v Watchenuka* para 37.

²²² *Minister of Home Affairs v Watchenuka* para 37.

²²³ Section 10 of the *Constitution*.

²²⁴ *Minister of Home Affairs v Watchenuka* para 23.

²²⁵ *Minister of Home Affairs v Watchenuka* para 33.

²²⁶ *Minister of Home Affairs v Watchenuka* para 37.

²²⁷ *Refugees Act* 130 of 1998.

²²⁸ *Refugees Amendment Act* 11 of 2007 (hereafter *Refugees Amendment Act*).

²²⁹ Scalabrini Centre 2018 <https://www.scalabrini.org.za/teach-yourself-the-refugees-amendment-act-explained/>; Section 9(C) *Refugees Amendment Act* 11 of 2007.

Refugee Amendment Act introduced a provision requiring the Standing Committee to determine when work and study rights are to be granted to an asylum seeker.²³⁰ Instead, this right will be granted through an assessment process, which determines the applicant's ability to support themselves financially.²³¹ In cases where self-support is not feasible, the right to work will be endorsed on the asylum visa, but the applicant must provide evidence of employment within a two-week period after being employed, failure of which may result in significant fines for their employer.²³² Regarding the right to study, the provisions in the *Refugees Amendment Act* and Draft Regulations are not entirely clear. Asylum applicants will be required to provide proof of enrolment in an South African educational institution, suggesting that the right to study will not be automatically granted.²³³

Hence, the government's intention was to nullify the advancements made in the *Watchenuka* case by depriving asylum seekers of the right to seek employment, rendering it unfeasible for them to support themselves and pursue education. Since their children will also be classified as asylum seekers, it follows that they are prohibited from enrolling in institutions of learning as a matter of right. If this is the case, then it will violate the rights of undocumented immigrant children from seeking to exercise their right to a basic education. It is unlikely for this amendment to pass constitutional muster, given that the court has already ruled on the constitutionality of such prohibitions. This is so because any law or policy that prohibits children from accessing basic education is unconstitutional, as ruled in *Centre for Child Law & 37 children* mentioned in Chapter three.

4.4 Conclusion

The analysis in this chapter illustrates that, in line with its international and domestic legal obligations, South Africa has established administrative and judicial mechanisms

²³⁰ Section 9C (c) of the *Refugees Amendment Act*.

²³¹ Scalabrini Centre 2018 <https://www.scalabrini.org.za/teach-yourself-the-refugees-amendment-act-explained/>; Section 22(8)(a) of the *Refugees Amendment Act*.

²³² Scalabrini Centre 2018 <https://www.scalabrini.org.za/teach-yourself-the-refugees-amendment-act-explained/>; Section 22 (8)(c), 22(9) 22(10) of the *Refugees Amendment Act*.

²³³ Scalabrini Centre 2018 <https://www.scalabrini.org.za/teach-yourself-the-refugees-amendment-act-explained/>; Section 22(9) of the *Refugees Amendment Act*.

for respecting, protecting, promoting, and fulfilling the right to a basic education for all children (including undocumented immigrants). These institutional mechanisms are supported by human rights bodies, independent specialist institutes, and non-governmental organisations that advance the interests of marginalised communities such as undocumented immigrant children.

The discussion addressed the national executive headed by the Minister of Basic Education, a member of the cabinet who makes education policies and is responsible for the implementation of basic education legislation such as the *Schools Act*. The allocation of resources by the national government for the education sector depends on the choices of the Minister of Basic Education, who determines which areas need prioritisation. Thus, the determination of whether resources are allocated to the education of undocumented immigrant children falls squarely within the powers of the Minister of Basic Education. Provincial departments of education monitor, evaluate, and support the teaching and learning in schools. These departments could potentially make certain policy choices that may not be in favour of the needs of undocumented children, as seen in the 2016 Circular. In alliance with SGBs that determine admission criteria, these departments are equally capable of striking a blow to the right to a basic education for undocumented children as much as they may also advance this right.

In addition to the work of national and provincial departments in fulfilling the right to a basic education, South Africa established the SAHRC, whose work is to promote human rights for all, including the right to a basic education for undocumented immigrant children. The SAHRC relies on litigation to ensure effective redress for these children, just as organised civil society organisations do. This highlights the crucial role of the judiciary in protecting and promoting the right to a basic education for undocumented immigrant children. The strength of the judiciary as a protective mechanism lies in the fact that the courts can declare legislation, administrative action, and other conduct unconstitutional and invalid if such conduct is not in line with the *Constitution* and its Bill of Rights. Courts have already exercised this power by declaring executive policies barring undocumented immigrant children from enrolling in schools invalid, interpreting the *Immigration Act* in a way that reconciles it with the needs of undocumented immigrant children to access basic education, and stipulating

that undocumented non-citizens who are children are no less entitled to a right to a basic education than their refugee and citizen counterparts. In view of the international and national obligations of the state to provide access to basic education for undocumented immigrant children and given the discussion of institutions tasked with the respect, protection, promotion and fulfilment of this right, the following chapter examines South Africa's response to the obligation to respect, protect, promote and fulfil various rights "to, in and through" education.

Chapter 5 South Africa's Response to the Obligation to Respect, Protect, Promote and Fulfil the Rights "To, In and Through" Education

5.1 Introduction

The right to a basic education in the *Constitution* is granted to everyone within the boundaries of South Africa. It is a central empowerment right.¹ The empowering nature of the right to education stems from the fact that it effectively empowers individuals to exercise other fundamental rights of the Bill of Rights.² It is through education and knowledge that freedom and security of the person, freedom of religion, beliefs and opinions, freedom of expression, political rights, freedom of trade, occupation and profession, and access to information are effectively practised.³ An educated person can take control of his/her life and become an effective role player in the civil, political, economic, social, cultural, and developmental spheres of their country, and can afford health care, food and housing.⁴ The Committee on Economic, Social and Cultural Rights (CESCR) commented that education holds significance beyond its practical applications.⁵ A mind that is well-educated, enlightened, engaged and capable of exploring diverse subjects, is a source of joy and fulfilment in human life.⁶ One must have a certain level of understanding and awareness to fully appreciate the importance of cultural and language rights. On education, the former U.N. Secretary-General Kofi Annan said:

Literacy is a bridge from misery to hope. It is a tool for daily life in modern society. It is a bulwark against poverty and a building block of development, an essential

¹ Section 29 of the *Constitution*, stressed in McConnachie, Skelton and McConnachie "The Constitution and the Right to a Basic Education" 34.

² White Paper on Education and Training GN 196 in GG 16312 of 15 March 1995 part 2 para 2.

³ Section 12, section 15, section 16, section 19, section 22, section 32 of the *Constitution*. See also McConnachie, Skelton and McConnachie "The Constitution and the Right to a Basic Education" 34 and 35.

⁴ Part 2, para 2 of the White Paper on Education and Training GN 196 in GG 16312 of 15 March 1995.

⁵ CESCR "General Comment No. 13" para 1.

⁶ CESCR "General Comment No. 13" para 1.

complement to investment in roads, dams, clinics and factories. Literacy is a platform for democratisation, and a vehicle for the promotion of cultural and national identity. Especially for girls and women, it is an agent of family health and nutrition. For everyone, everywhere, literacy is, along with education in general, a basic human right.⁷

The rights in the Bill of Rights are intertwined, so there is always a link between the right to education and any other rights.⁸ Regardless of race or nationality, by virtue of being a human being, a person's dignity is preserved through education.⁹ The U.S. Supreme court stated in the landmark case of *Brown v Board of Education of Topeka*, "education is perhaps the most important function of state and local governments."¹⁰ From a dignity perspective, undocumented immigrant children must be considered entitled to the right to, in, and through education.¹¹

The following discussion explores certain rights that contribute to basic education, which are applicable to all children, regardless of nationality or immigration status. The rights concerned are the right to consider the best interests of the child, the right to name and nationality, the right to language, and the right to free basic education. It examines the international provisions concerning these rights and how South African legislation has incorporated them. Additionally, the measures taken to promote these rights and the approach taken by courts when interpreting and applying them are examined. However, it is important to note that this study has a specific focus and will primarily address the rights whose non-fulfilment poses obstacles to the admission of undocumented immigrant learners and their enjoyment of the right to a basic education. The objective of this Chapter is to determine whether domestic legislation, contextualised with consideration for the practical experiences of undocumented immigrant children, is in accordance with international norms and standards pertaining

⁷ Annan's speech was delivered on International Literacy Day in 1997 see *Secretary-General Stresses Need for Political Will and Resources to meet Challenge of Fight Against Illiteracy* 4 September 1997 [Press Release SG/SM/6316/OBV/9].

⁸ McConnachie, Skelton and McConnachie "The Constitution and the Right to a Basic Education" 34. Article 13 (1) of the *UDHR*.

¹⁰ *Brown v Board of Education of Topeka* para 49; Section 39(1)(c) of the *Constitution* provides that when interpreting the bill of Right, foreign law may be considered.

¹¹ Tomaševski *The Right to Education Primers* 3 12: Rights in education include right to equality and dignity; right to education include right to language, free education and religion and culture; rights through education consists of right to freedom of expression, right to health care and basic nutrition.

to the right to a basic education. Before delving into the aforementioned specific rights, it is important to highlight the legal position pertaining to immigrant children and the protection afforded to them.

5.1.1 The legal position pertaining to accompanied, unaccompanied and separated undocumented immigrant children

5.1.1.1 The legal position as guided by the international law

The primary sources of guidance for accompanied, unaccompanied, and separated undocumented immigrant children were obtained from the *CRC* and the *ACRWC*.¹² The *CRC* is considered a ground-breaking instrument in the legal protection of immigrant children.¹³ Although it caters for the general protection and welfare of all children, it is an international instrument that explicitly acknowledges the special needs of immigrant children.¹⁴ In article 22, the Convention gives a task to the States Parties to ensure that all children, whether accompanied or unaccompanied by their parents, receive adequate protection and assistance so that they can fully enjoy all the rights to which they are entitled by all international instruments to which the State Party concerned is a member.¹⁵ Many of these instruments, of course, protect the right to education "for all." Furthermore, it mandates States Parties, in collaboration with other organisations, to provide assistance to every child seeking refuge and to facilitate the process of tracing their parents or other family members. This was done with the aim of reuniting these children with their families.¹⁶ Particular attention is paid to children "temporarily or permanently deprived of [their] family environment" in article 20. This includes unaccompanied immigrant children who clearly lack a family environment.¹⁷ In such cases, the state is obligated to provide protection and assistance that may

¹² The instruments protect the rights of all children regardless of status.

¹³ Kilkelly 2019 *De Jure* 521.

¹⁴ Article 22(1) of the *CRC*.

¹⁵ Article 22(1) of the *CRC*.

¹⁶ Article 22(2) of the *CRC*.

¹⁷ Article 20 (1) of the *CRC*.

involve offering alternative care options.¹⁸ In the school context, this may entail providing accommodation and supervision to such children by professional care personnel. Under article 8, the state is also obliged to ensure that when a child is illegally deprived of some elements of his or her identity, protection and assistance are provided immediately.¹⁹ This provision underscores the need for immediate action. When applied to education, undocumented children must swiftly receive support to enrol in schools, irrespective of their immigration status. This ensures that they face no unnecessary delays in accessing education. Moreover, it mandates that educational institutions and authorities cannot discriminate against children based on their immigration status, thus guaranteeing an equitable educational experience for all. By promptly offering assistance and protection, especially in the realm of education for undocumented children, the state invests in their future. This investment opens avenues for better employment and enhanced quality of life, benefiting society as a whole.

Supplementing the above in the regional law sphere, the *ACRWC* provides that states are required to take necessary actions to safeguard the rights of refugees and asylum-seeking children, whether they are accompanied or unaccompanied. This includes providing them with protection and assistance and ensuring that they have access to all the rights to which they are entitled.²⁰ It further states that any child who is permanently or temporarily deprived of his or her family environment for any reason is entitled to special protection and assistance.²¹ The state has the responsibility to ensure that a child in such circumstances is provided with alternative family care that considers the best interests of the child.²²

The Committee on the Rights of the Child (ComRC)'s General Comment 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin

¹⁸ Article 20 (1) of the *CRC*.

¹⁹ Article 8(2) of the *CRC*.

²⁰ Article 23 of the *ARCWC*.

²¹ Article 25(1) of the *ARCWC*.

²² Article 25(2) (a) of the *ARCWC*.

emphasises that the enjoyment of the rights in the *CRC* is not limited to children who are citizens of the state.²³ The meaning of the best interest principle is stressed as it relates to unaccompanied and separated children. The Committee highlights that an assessment of the child's nationality, upbringing, ethnic, cultural and linguistic background, vulnerability and needs is what is required to safeguard the best interest of these children.²⁴ The ComRC also emphasises that states have a legal obligation to prioritise identifying separated and unaccompanied children at ports of entry as soon as their presence in the country is known.²⁵ For unaccompanied and separated children, it is imperative for states to promptly facilitate the provision of necessary documents, locate their families, establish suitable guardianship arrangements, and ensure access to legal representation for children involved in asylum-seeking procedures.²⁶ The Principles and Guidelines Supported by Practical Guidance on the Human Rights Protection of Migrants in Vulnerable Situations, as supported by the United Nations, state that states should provide unaccompanied and separated migrant children with specific protection and assistance.²⁷

In the context of education, unaccompanied and separated children may experience emotional distress due to their circumstances. Access to education is not just about physical presence in the classroom but also about ensuring a supportive and nurturing environment that is crucial for these children to thrive academically.²⁸ Although the state is responsible for assisting all children, there is a distinction between accompanied and unaccompanied children. Accompanied children receive the support of their parents or guardians to navigate certain procedures, whereas unaccompanied and separated children rely solely on the government for assistance.²⁹ These children are particularly vulnerable and require legal guardians to guide them through legal processes and advocate for their best interests. Relevant legal guardians should

²³ ComRC "General Comment No. 6" para 12.

²⁴ ComRC "General Comment No. 6" para 20.

²⁵ ComRC "General Comment No. 6" para 31 (A).

²⁶ ComRC "General Comment No. 6" para 20.

²⁷ Principle 10(7) of the Principles and Guidelines Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations (2017).

²⁸ Principle 15 of the Principles and Guidelines Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations (2017).

²⁹ See chapter 1 for the differentiation, para 1.1.3.

ensure regular attendance of these children in schools to prevent school dropout and promote continuous education and skill development. They should further ensure that these children receive additional language support, counselling services, or other resources to aid their integration into the education system.

5.1.1.2 The legal position as guided by the South African law

Section 28 of the *Constitution* provides special protection to all children in South Africa, irrespective of nationality or legal status.³⁰ It further provides every child the right to family or alternative care.³¹ One of the realities faced by undocumented immigrants in the Republic is deportation.³² As soon as a child is identified as an illegal/undocumented immigrant, the immigration officers call for deportation. Unlike in South Africa, Landgrave and Nowrasteh report that in the USA, individuals who are deported are often only those who have engaged in criminal activities within the country.³³ As the description below shows, formal procedures must be followed to decide whether such a child may be deported. These rules, important for the present purposes, seek to safeguard the educational interests of every undocumented child.

The *Constitution* provides that no child may be detained unless as a measure of last resort, and if that happens, they must be detained for the shortest time.³⁴ They should not be detained like adults and should be treated in a manner that considers the child's age.³⁵ This implies that if a child is discovered to be in the country unlawfully, immediate detention should not be the primary course of action; it should only be considered a last resort measure. What qualifies as a last resort and when detention is not a last resort will be discussed towards the conclusion of this chapter. There are guidelines applicable to unaccompanied and separated immigrant children, and steps

³⁰ Section 28(1)(a) of the *Constitution*.

³¹ Section 28(1) (b) of the *Constitution*.

³² Human Rights Watch 2022 <https://www.hrw.org/world-report/2023/country-chapters/south-africa>.

³³ Landgrave and Nowrasteh *Immigration Research and Policy Brief* 1-7.

³⁴ Section 28 (1) (g) of the *Constitution*.

³⁵ Section 28 (1) (g) (i-ii) of the *Constitution*.

that need to be taken to ensure that they are protected.³⁶ The Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa provide that, subject to assessment, separated and unaccompanied foreign children may be regarded as "children in need of care and protection."³⁷ Sections 150-159 of the *Children's Act* (see further below) and all other protective measures must be applied to these children.

If an unaccompanied and separated child is found to be in the country, the *Children's Act* provides steps that need to be followed when assisting these children.³⁸ The assumption is that an unaccompanied or separated child is in need of care and protection because they do not have anyone to look after them.³⁹ According to the *National Child Care and Protection Policy*, children in need of care and protection include, among others, a child that has been abandoned or orphaned and is not in the care of a family member, an unaccompanied migrant child from another country,⁴⁰ a child who is a victim of trafficking or has been sold by any person, a parent, caregiver, or guardian, or a child being maltreated, abused, deliberately neglected, or exploited by a parent or guardian.⁴¹ In cases where a child is deemed to require care and protection, the *Children's Act* stipulates that the child should be placed under alternative care by the children's court.⁴² The *National Social Development Children's Act*,⁴³ contains an exclusive section for foreign minors and states that all foreign children, whether documented or undocumented, who are reported to be in need of care and protection "must" be treated or assisted like South African children. The

³⁶ Section 289 (2) of the *Children's Act*; Davel and Skelton *Commentary on the Children's Act* 9-4 and 308; National Child Care and Protection Policy para 5.9.1- 5.9.7; Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 5.2.

³⁷ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 5.2.

³⁸ Section 150-159 of the *Children's Act*.

³⁹ Davel and Skelton *Commentary on the Children's Act* 9-4 and 308.

⁴⁰ Davel and Skelton *Commentary on the Children's Act* 9-4 and 308; National Child Care and Protection Policy 13.

⁴¹ National Child Care and Protection Policy 13.; Davel and Skelton *Commentary on the Children's Act* 9-4 and 308.

⁴² Section 156 (1) (e) of the *Children's Act*; General Regulations Relating to Children GN R261 in GG33076 of 01 April 2012 para 57.

⁴³ National Social Development Children's Act Practice Note No. 2 of 2011 para 10.

problem with the Act is that it only protects children who are reported to be in need of care. If a child is undocumented but is not considered to be in need of care and protection, then they fall out of the scope of protection.

The *Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa* provide for steps to be taken when assisting separated and unaccompanied children in South Africa in line with the *Children's Act*.⁴⁴ The first step is *identification*. Children identified as separated and unaccompanied should be referred to a social worker or police official.⁴⁵ Unaccompanied children are assumed to be in need of care and protection and may be placed in temporary safe care.⁴⁶ Then, for purposes of *assessment and documentation*, the local provincial Department of Social Development should be notified of each case.⁴⁷ The Department should then assign a social worker to accompany the child through every step of the process and assess the child.⁴⁸ A child should be registered and documented immediately.⁴⁹ The process should be done in an age-appropriate and gender-sensitive manner, in a language the child understands, and by professionally qualified persons.⁵⁰ Third, to ensure *temporary safe care*, the services that should be provided to the child include the following: a process of family tracing and restoration of family links should be initiated without delay, there should be full provision of education, the child should be registered with the appropriate school authorities, and be provided with their own

⁴⁴ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 5.2.

⁴⁵ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.1.

⁴⁶ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.1.

⁴⁷ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.2.

⁴⁸ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.2.

⁴⁹ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.2.

⁵⁰ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.2.

personal identifying documents as soon as possible.⁵¹ If they qualify for refugee status, a social worker must assist the child in applying for asylum.⁵² The next step is *formal placement and options for durable solutions*. If possible, family reunification, if in the best interest of the child, should be organised. Thus, the child should be placed in the care of the family in their country of origin as a durable solution.⁵³ If the family cannot be traced, but it is still in the best interest of the child, then he or she can be placed in formal care in the country of origin.⁵⁴ It should also be emphasised here that the principle of non-refoulement should be applied to these children. An undocumented immigrant child should not return to a place where their lives are threatened.⁵⁵ When it is found that family reunification or placement in the country of origin is not possible, then the child will be placed with family members or care centres in South Africa.⁵⁶

The guideline aligns with both constitutional and international obligations aimed at safeguarding the educational rights of unaccompanied immigrant children. These guidelines underscore the urgent need for immediate identification, registration, and educational access for immigrant children, regardless of their immigration status. This rapid process avoids unnecessary delays in their education, aligning with the constitutional and international entitlement to basic education. The guidelines seek to ensure that unaccompanied children are placed in places with educational facilities so as to enable uninterrupted learning.

⁵¹ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.3.

⁵² Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.3.

⁵³ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.4.1.

⁵⁴ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.4.2.

⁵⁵ Article 33 of the *Convention Relating to the Status of Refugees* (1951).

⁵⁶ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.4.3. General Regulations Regarding Children GN 261 in GG No. 33076 of 01 April 2010 para 53; Note that the Department of Social Development is the national government department whose duty is to ensure the protection and care of children in South Africa. It consists of social workers who have the power to conduct investigations on behalf of children and even open up a Children's Court inquiry.

The *Children's Act* provides a framework for assessing the circumstances of unaccompanied children, providing the necessary support, safeguarding their well-being and rights, and ensuring that their rights, including education, are upheld.⁵⁷ It should be highlighted that the *Children's Act* does not explicitly cover immigration status as such. Unaccompanied immigrant children face additional vulnerabilities and obstacles that undoubtedly affect their ability to exercise their right to education, particularly when it comes to gaining admission to school. This holds true for all their rights since they lack parental or guardian support to guide them through the necessary procedures. The *Children's Act* fails to explicitly acknowledge undocumented immigrant children as a vulnerable demographic. This explicit recognition is essential to ensure that their unique needs and challenges are recognised and dealt with appropriately within the educational system. To comprehensively protect the educational rights of immigrant children, the *Children's Act* needs to incorporate explicit recognition, measures against discrimination, access to support services, stability, psychological assistance, addressing social stigma, and systematic data collection.

5.1.1.3 Judicial approach

5.1.1.3.1 Centre for Child Law v Minister of Home Affairs 2005 (6) SA 50 (T)

This case established the link between the asylum-migrant system and the child protection system.⁵⁸ The Court found that the state has an active duty to provide the basic socio-economic rights to foreign unaccompanied children.⁵⁹ The case involved a group of unaccompanied immigrant children who were detained at Lindela Repatriation Centre with a group of adults.⁶⁰ These unaccompanied children were facing what seemed clearly unlawful deportation to their country of origin. The children

⁵⁷ Section 158(3)(a) of the *Children's Act*.

⁵⁸ *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) (hereafter *Centre for Child Law v Minister of Home Affairs*).

⁵⁹ *Centre for Child Law v Minister of Home Affairs* para 3.

⁶⁰ *Centre for Child Law v Minister of Home Affairs* para 3.

were to be transported by a truck and train to their country of origin's border.⁶¹ The method of detention, deportation and generally the procedures that were followed, seemed hardly lawful. An urgent application was made by the Centre for Child Law to prevent the unlawful deportation of these children to their country of origin.⁶² The Centre for Child Law argued that the government had a duty to protect unaccompanied children as they were children in need of care and protection in terms of the *Children's Act* and they also submitted that section 28 of the *Constitution* was being violated.⁶³ According to Judge de Vos, South Africa had evolved into a democratic and constitutional state. However, if the government disregarded the laws and policies it had established, this undermined the very essence of a democratic state.⁶⁴ The *Constitution* provides clear guidelines on the deportation of children. The judge highlighted that if government failed to translate the lofty ideals outlined in the *Constitution* and government policy into meaningful action, it rendered them devoid of substance.⁶⁵ The manner in which unaccompanied foreign children were deported in this case was deemed not only illegal but also disgraceful.⁶⁶

The court highlighted that South Africa had an obligations under international law to make sure that all children's rights were protected, including the right to health, right to education and social security.⁶⁷ Justice De Vos referred to *S v Thomas* 2001 (2) SACR 608 (W), in which the right to legal representation for foreign citizens who were facing criminal charges was confirmed.⁶⁸ The judge further stressed that, under section 28(1)(h) of the *Constitution*, all children within South Africa's jurisdiction, irrespective of immigration status or nationality, enjoy the right to legal representation.⁶⁹ The court ordered that unaccompanied foreign children detained be

⁶¹ *Centre for Child Law v Minister of Home Affairs* para 5.

⁶² *Centre for Child Law v Minister of Home Affairs* para 6.

⁶³ *Centre for Child Law v Minister of Home Affairs* para 10.

⁶⁴ *Centre for Child Law v Minister of Home Affairs* para 20.

⁶⁵ *Centre for Child Law v Minister of Home Affairs* para 23.

⁶⁶ *Centre for Child Law v Minister of Home Affairs* para 23.

⁶⁷ *Centre for Child Law v Minister of Home Affairs* Para 25.

⁶⁸ *S v Thomas* para 5.

⁶⁹ *Centre for Child Law v Minister of Home Affairs* para 36.

brought before the children's court as required by the *Constitution* and in terms of the *Children's Act*.⁷⁰ Welfare inquiries were to be opened for them in terms of the *Child Care Act* 17 of 1983.⁷¹ The detention and deportation process of the children was declared unlawful and invalid.⁷² The ruling in this case carries significant implications for the basic education rights of immigrant children. This decision underscores the fundamental principle that every child, regardless of their immigration status, is entitled to all the rights enshrined in the *Constitution* including the right to a basic education. Specifically for undocumented immigrant children, the ruling stresses the necessity of immediate educational access, ensuring these vulnerable children can learn and grow without being denied their rights due to their legal status. This case sets a significant legal precedent, emphasising the importance of compassionate, legal, and child-centred approaches when dealing with all children. However, despite the pronouncements of *Centre for Child Law v Minister of Home Affairs*, the literature reveals that normative practices and policies surrounding schools and immigration still prevent undocumented children from receiving education as shall be revealed in Chapter 6.

5.1.1.3.2 Shaafi Daahir Abdulahi v Minister of Home Affairs Case No. 26572/2011

In *Shaaf Daahir Abdulahi and others v Minister of Home Affairs*, the court pointed out that officials often misunderstood the way unaccompanied and separated foreign children are to be treated. It should be understood that an older immigrant child who, even if working, is still extremely vulnerable without documentation legalising his or her stay in the Republic.⁷³ The importance of the point raised by the court in the case here proves that, without legal documentation, immigrant children face significant barriers in accessing education and even face difficulties at workplaces. They may be denied access to many facilities; even if they manage to work, their legal status can result in discrimination, limited resources, and an unstable learning and/or working environment. They may be working to sustain themselves, but the absence of legal

⁷⁰ *Centre for Child Law v Minister of Home Affairs* para 40.

⁷¹ Section 12(2) (c) of the *Child Care Act* 74 of 1983.

⁷² *Centre for Child Law v Minister of Home Affairs* para 49.

⁷³ *Shaafi Daahir Abdulahi v Minister of Home Affairs* Case No. 26572/2011.

status endangers their safety and access to essential services such as education and overall well-being. The lack of legal documentation makes these children more susceptible to exploitation and discrimination.

5.1.1.4 Analysis and conclusion

This study emphasises the interconnectedness of the right to family and parental or alternative care with the right to a basic education.⁷⁴ The state is responsible for ensuring that undocumented children, particularly unaccompanied and separated children, are provided with appropriate documentation.⁷⁵ Supportive services play a crucial role in promoting children's overall well-being and facilitating their engagement in education. A child not enjoying care and support from parents/guardians will not be able to devote attention to education. Emotional and social support, alongside a sense of belonging, not only fosters a child's mental and emotional health but also creates a conducive environment for effective learning. Therefore, these supportive services are not just complementary but essential elements that enable children to fully engage and excel in their educational pursuits, emphasising the critical importance of their provision. Furthermore, this study underscores the significance of respecting the dignity of undocumented immigrant children.⁷⁶ Upholding a child's dignity involves recognising their inherent worth and safeguarding their rights in all aspects, including their right to a family environment, documentation, and basic education.⁷⁷ This calls for inclusive and supportive educational and family environments that uphold the dignity of every child, regardless of their immigration or documentation status.

All departments involved in assisting undocumented immigrants must recognise the importance of documentation for enjoying rights. Therefore, there is a need to develop durable solutions and documentation options for these children.⁷⁸ A durable solution should be a long-term resolution, potentially spanning several years, and should not

⁷⁴ Parental Choice and the Right to Education: Revisiting Article 26 of the Universal Declaration of Human Rights UN Doc ED/GEMR/MRT/2021/P1/36 (2021)10.

⁷⁵ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 3-4.

⁷⁶ UNESCO 2016 <https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right>.

⁷⁷ UNICEF and UNESCO "A Human Rights -Based Approach to Educational for All" 1 and 4.

⁷⁸ This duty is particularly incumbent also on the Department of Basic Education, Department of Social Development, Department of Home Affairs and the Courts.

involve interrupting basic education. Interrupting basic education once it begins in the country is generally not considered feasible from an educational and social integration standpoint. It is very difficult to guarantee holistic protection for undocumented immigrant children if there are no options to readily obtain available documents. There should be, as there is an outline, a possible option, especially for unaccompanied and separated undocumented immigrants, to apply to the Minister of Home Affairs for a Ministerial Exemption in terms of section 31(2)(b) of the *Immigration Act*.⁷⁹ An example of a Ministerial Exemption granted in practice was when the Minister of Home Affairs approved the Zimbabwe Dispensation Project, benefiting immigrant Zimbabweans in South Africa in recognition of the humanitarian nature of the crisis in Zimbabwe.⁸⁰ Such powers as exercised at the Minister of Home Affairs' discretion should also "work" in favour of unaccompanied and separated child immigrants. The Minister should consider many cases of unaccompanied and separated child immigrants as special circumstances. However, it is important to note that this should not be interpreted as a pathway to guaranteeing permanent residence for undocumented immigrants. In such cases, the decision to grant permanent residence is discretionary, and there are no fixed criteria that would guarantee approval. Additionally, there are currently no established guidelines or policies that provide specific guidance on the Minister's discretionary power on these matters. These guidelines could specify criteria for evaluation, such as the educational conditions awaiting such children in their home countries. As well, they should delineate risks, such as threats, violence, or persecution that could endanger their safety and welfare in their home country. If a child is at significant risk of child labour, human trafficking, or other forms of exploitation in their home country, this should be a crucial factor for exemption consideration. The exemption process can be more intricate, just, and

⁷⁹ "Upon application, the Minister, as he or she deems fit after consultation with the Board, may under terms and conditions determined by him or her, grant a foreigner or a category a foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision."

⁸⁰ Qoza *Sunday Times* 2; Implementation of the Decision to Extend Zimbabwean Nationals' Exemption Granted in terms of Section 31(2) (b), Read with Section 31(2) (d) of the Immigration Act 13 of 2002 GN 1666 in GG No. 45727 of 7 January 2022.

empathetic, providing suitable solutions for unaccompanied and separated immigrant children who encounter severe challenges in their nations of origin.

Nevertheless, Ministerial Exemption can be a helpful and possible solution to assist these children in acquiring a durable status, such as a permanent residence. The provision of the required documentation to unaccompanied and separated immigrant children should be regarded as a key element of the child protection process.⁸¹ Where documentation options are available, as mentioned above, they must be pursued immediately. While unaccompanied or separated immigrant children may arguably be the most vulnerable, one cannot ignore that all undocumented immigrant children deserve and are entitled to all special rights and that children should be protected.⁸²

One of the potential challenges in assisting immigrant children is the lack of training among social workers in immigration laws, which may result in a limited understanding of the issues faced by immigrants.⁸³ This lack of awareness can have serious consequences, particularly regarding the importance of documentation for immigrant children in South Africa. Access to education, healthcare, and protection from arrest and detention can be effectively secured only if an individual possesses proper identification.⁸⁴ At times, social workers are not adequately familiar with the laws that involve children's matters.⁸⁵ Therefore, it is crucial to have well-trained social workers who specialise in this field and possess a clear understanding of the procedures involved in addressing the specific needs of immigrant children.

This research also highlights a significant contributing factor to the lack of documentation, namely the geographical location of the Refugee Reception Office

⁸¹ Ackermann and Sloth-Nielsen 2016 *PELJ* 15.

⁸² International Organization for Migration "Human Rights of Migrant Children" 19,38,46,49.

⁸³ International Organization for Migration "Human Rights of Migrant Children" 235.

⁸⁴ International Organization for Migration "Human Rights of Migrant Children" 49.

⁸⁵ *Knowledge Kgaugelo Majola v Gauteng Department of Health and Social Development; Jabulani Place of Safety; the Minister of Safety and Security; and Cynthia Mosia* 1786/11 (unreported) para 4. The court highlighted that this case has raised concerns regarding the responsibility of social workers in implementing laws, particularly those pertaining to children, during the execution of their duties.

(RRO).⁸⁶ As mentioned earlier, unaccompanied and separated children who have potential grounds for being granted asylum are advised, with the support of a social worker, to visit a fully operational RRO to submit a new asylum claim.⁸⁷ Currently, fully operational RROs in South Africa are located in Durban, Musina, Cape Town, and Pretoria.⁸⁸ It appears that the Port Elizabeth RRO is not fully operational and does not accept any new asylum applications.⁸⁹ Consequently, an undocumented immigrant child residing in Port Elizabeth would need to travel to Pretoria or Musina to submit their application, which has financial implications for both parents and the organisations involved. It is important to note that asylum seeker permits are temporary and typically expire within one to six months, requiring these children to repeatedly travel for permit renewal.⁹⁰ In the concluding observations and recommendations of the ACERWC to the government of South Africa, the Committee highlighted the obstacles encountered by foreign children in obtaining the necessary documentation and the additional hurdles introduced by the Refugee Amendment Bill if it became a law.⁹¹ The Committee suggests that the government establish additional refugee centres across all nine provinces and eliminate both legal and non-legal obstacles hindering refugee children from accessing social services such as education.⁹²

Obtaining birth certificates is essential for undocumented immigrant children, as it allows them to have a name and legalise their stay in the Republic. However, it is important to note that having that documentation does not automatically grant them legal status. In some cases, undocumented immigrants may have the option of

⁸⁶ Department of Home Affairs 2023 <http://www.dha.gov.za/index.php/contact-us/refugee-centres>.

⁸⁷ Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009) para 6.4.3.

⁸⁸ Department of Home Affairs 2023
<http://www.dha.gov.za/index.php/contact-us/refugee-centres/28-port-elizabeth>.

⁸⁹ Department of Home Affairs 2023
<http://www.dha.gov.za/index.php/contact-us/refugee-centres/28-port-elizabeth>.

⁹⁰ Department of Home Affairs 2023
<http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum>.

⁹¹ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 38.

⁹² ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 38.

applying for study visas.⁹³ However, it is worth noting that the initial application for a study visa typically needs to be submitted to one's country of origin.⁹⁴ This means that individuals would need to leave the country and apply for a study visa from their home country. As mentioned earlier, the reasons for these children being in South Africa vary, and for some, returning to their country of origin may not be a feasible option.⁹⁵ Moreover, there is a risk that if they were to return to their country, they could be declared an undesirable person at the border because of their prior illegal stay in South Africa, which could result in a ban on entry for five years.⁹⁶ The next section highlights the significance of applying the best interests of the child principle to all children, regardless of immigration status.

5.1.2 The best interest of the child principle

5.1.2.1 The best interest of the child principle as guided by international law

The *CRC* and the *ACRWC* provide as follows:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁹⁷

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.⁹⁸

This research will use the umbrella term "the best interest principle" to refer to both the best interest of the child as "a" primary consideration, as "the" primary consideration, and as being of paramount importance. International law firmly upholds the principle of prioritising the best interests of the child. This principle aims to ensure

⁹³ Department of Home Affairs 2019 <http://www.dha.gov.za/index.php/statements-speeches/621-updated-advisory-new-requirements-for-children-travelling-through-south-african-ports-of-entry>

⁹⁴ Department of Home Affairs 2023 <http://www.dha.gov.za/index.php/types-of-visas>.

⁹⁵ For instance, refugees who flee away from their country of origin for different reasons of persecution.

⁹⁶ See section 30(1)(h) of the *Immigration Act* read with 50(1) of the *Immigration Amendment Act* 13 of 2011; Department of Home Affairs 2023 <http://www.dha.gov.za/index.php/immigration-services/overstay>.

⁹⁷ Article 3(1) of the *CRC*.

⁹⁸ Article 4(1) of the *ACRWC*.

the full and meaningful realisation of all rights enshrined in international instruments while also fostering the comprehensive development and well-being of the child.⁹⁹

To this end, the ComRC has proclaimed that the best interest of a child is a threefold concept and should be envisaged as follows:

(a) it is a substantive right: the child's entitlement to have their best interests evaluated and given paramount importance during the consideration of various conflicting interests, with the assurance that this right will be upheld whenever decisions are made regarding a child, a specific group of children, or children as a whole.¹⁰⁰

(b) A fundamental, interpretative legal principle: In cases where a legal provision can be interpreted in multiple ways, the interpretation that best promotes the child's best interests should be selected.¹⁰¹

(c) A rule of procedure: Whenever a decision is about to be made that will impact a child the decision-making process must include an assessment of the potential consequences, whether positive or negative, on the child or children involved. The rationale behind a decision should explicitly demonstrate that the right to best interests of the child has been taken into account.¹⁰²

The responsibility of states to thoroughly consider the child's best interests is an inclusive obligation that applies to all public and private social welfare institutions, courts of law, administrative authorities, and legislative bodies involved in or dealing with matters related to children.¹⁰³ These institutions encompass those dealing with the economic, social, and cultural rights of the child, as well as institutions of civil

⁹⁹ ComRC "General Comment No. 14" para 4.

¹⁰⁰ ComRC "General Comment No. 14" 6(a).

¹⁰¹ ComRC "General Comment No. 14" para 6(b).

¹⁰² ComRC "General Comment No. 14" para 6(c).

¹⁰³ ComRC "General Comment No. 14" para 25.

rights dealing with birth registration, such as securing identity documents for children.¹⁰⁴

Given the intricate nature of matters, determining the best interests of children should be performed on a case-by-case basis. No universal approach can be applied to all situations to determine the best interests of a child.¹⁰⁵ This signifies that, when enacting implementation measures, states are obliged to elucidate the best interests of all children, including those in vulnerable situations.¹⁰⁶ This would mean that the best interests of undocumented but accompanied, unaccompanied, and separated immigrant children would have to be fully respected to assure them. When implementing any implementation measures, such as enacting legislation, adopting policies, making any proposed laws, and planning budgetary allocations, the best interest principle should be applied.¹⁰⁷

All laws enacted by the state should consider the best interests of all children, regardless of their immigration status, as long as they are within the jurisdiction of the country.¹⁰⁸ A child's situation of vulnerability, such as being an immigrant, refugee, or asylum seeker, is a crucial factor to consider when assessing and determining their best interests.¹⁰⁹ The government and decision-makers must consider the varying types and levels of vulnerability shown by each child. For example, a documented immigrant child can be less vulnerable than an undocumented immigrant child. All decisions regarding measures and actions pertaining to a child should uphold their best interests, particularly concerning matters related to basic education.¹¹⁰

Accordingly, the government must ensure that the laws pertaining to education are inclusive of all children within their jurisdiction. This is so because the best interests

¹⁰⁴ ComRC "General Comment No. 14" para 26.

¹⁰⁵ ComRC "General Comment No. 14" para 32.

¹⁰⁶ ComRC "General Comment No. 14" para 33.

¹⁰⁷ ComRC "General Comment No. 14" para 35.

¹⁰⁸ ComRC "General Comment No. 6" para 12 and 19.

¹⁰⁹ ComRC "General Comment No. 14" para 75.

¹¹⁰ ComRC "General Comment No. 14" para 79.

of a child always are to receive an education to develop their personality, to be able to master the practicalities of everyday life and to be able to later find work and earn a salary.¹¹¹ The provision of education to these children should be of good quality, as mentioned earlier in the thesis, and quality education should include competent teachers, appropriate learning materials, and safe and conducive learning environments.¹¹² Educational standards and quality should not be compromised based on the immigration status of the child. It is important to recognise that education is not only a means of investment in the future but also an avenue for fostering and promoting respect and upholding one's dignity.¹¹³ In addition, schools and education should serve as safe havens against the exploitation and abuse of undocumented immigrant children. Hence, the Concluding Recommendations by the ACERWC to South Africa call for the state to implement additional measures to uphold and advance the principle of the best interest of the child in legislation and practice.¹¹⁴

5.1.2.2 The best interest of the child principle as guided by the South African law

South African law articulates the concept of the best interest principle in the *Constitution* and *Children's Act*. It is provided:

A child's best interests are of paramount importance in every matter concerning the child.¹¹⁵

In all actions concerning the care, protection, and well-being of a child, the standard that the best interest of the child is of paramount importance must be applied.¹¹⁶

Reyneke¹¹⁷ highlighted that putting the best interests of the child first is a principle applicable to the enforcement of any laws that are relevant to a child or children. It further extends to any proceedings, actions, or decisions carried out by the state in

¹¹¹ Du Plessis 2013 *De Jure* 76.

¹¹² See Chapter 3 on the entitlements attached to a basic education.

¹¹³ UNESCO and UNICEF 2007 "A Human Rights -Based Approach to Education for All" 5.

¹¹⁴ ACERWC "Concluding Observations and Recommendations: First Periodic Report " para 17.

¹¹⁵ Section 28(2) of the *Constitution*.

¹¹⁶ Section 9 of the *Children's Act*.

¹¹⁷ Reyneke 2016 *PELJ* 5.

relation to the children.¹¹⁸ Sloth-Nielsen emphasises that incorporating "the best interest of a child principle" into the *Constitution* serves as a standard for evaluating all proceedings that involve decisions about children.¹¹⁹ This means that the courts and all government spheres are bound by the *Constitution* to carefully consider the impact of their choices when a child is involved.¹²⁰ In this regard, the state has utilised various protective measures outlined in international instruments, as well as the *Constitution* and *Children's Act*, to safeguard and promote the best interests of children during legal proceedings. In its First Periodic Report on South Africa, ACERWC acknowledges and commends the South African judiciary system for its effective utilisation, diligence, and effort to uphold the principle of the best interest of the child.¹²¹

Schäfer stresses that section 28(2) of the *Constitution* is not articulated as a right by the courts, but it is categorised as such.¹²² In the case of *Jooste v Botha*,¹²³ the court examined the best interest approach and concluded that section 28(2) is better understood as a general guiding principle rather than a distinct right. It was determined that section 28(2) could be employed to define the interpretation, extent, and constraints of other rights enshrined in the Bill of Rights.¹²⁴ The principle of the best interests of the child, as outlined in section 28(2) of the *Constitution*, is not only a guiding principle but is also recognised as the "benchmark" for the treatment and safeguarding of children.¹²⁵ In *Scalabrini Centre of Cape Town v Minister of Home Affairs*,¹²⁶ the court postulates that the best interest of the child principle is the "golden thread" which runs throughout our law relating to children.

¹¹⁸ Reyneke 2016 *PELJ* 5.

¹¹⁹ Sloth-Nielsen 1996 *Acta Juridica* 25.

¹²⁰ Sloth-Nielsen 1996 *Acta Juridica* 25.

¹²¹ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 10.

¹²² Schäfer *Child Law in South Africa: Domestic and International Perspectives* 153.

¹²³ *Jooste v Botha* 2000 2 SA 199 (T).

¹²⁴ Skelton "Constitutional and International Protection of Children's Rights" 280.

¹²⁵ *Centre for Child Law v Media 24 Limited* 2020 (3) BCLR 245 (CC) para 37.

¹²⁶ *Scalabrini Centre of Cape Town v Minister of Home Affairs* (2023) 2 All SA 256 (WCC) para 42.

5.1.2.3 Judicial approach

5.1.2.3.1 McCall v McCall 1994 (3) SA 201 (C)

In this case, the court provided a comprehensive list of pertinent elements that must be considered to determine the child's best interests. These factors, as outlined in *McCall*, were subsequently incorporated into section 7 of the *Children's Act* and enumerated as follows: Among others, is the personal bond between a child and their parents and other relevant individuals.¹²⁷ Parental stance towards the child and how they carry out their parental duties and rights concerning the child.¹²⁸ The ability of parents to meet their children's emotional and intellectual needs.¹²⁹ The probable impact of any changes in the child's circumstances and separation of parents, family, and children has been living with.¹³⁰ The practical difficulty for the child is maintaining connections and communication with his/her family, culture, and traditions.¹³¹ The child needs to be brought into a stable family environment or an environment resembling a family environment.¹³² The need to protect the child from any harm that may result from maltreatment, abuse, neglect, or exploitation.¹³³

Parental involvement is essential to uphold the principle of prioritising a child's best interests, as highlighted above. Supportive parents are pivotal in encouraging their children's school enrolment and active participation in the education system.¹³⁴ The same responsibility falls on guardians, including social workers, assigned to unaccompanied children, who must create a stable emotional environment for these children. The well-being of the child must be put first; by doing that, one can expect outstanding academic performance from them in school. When a child receives proper

¹²⁷ Section 7(a)(i-ii) of the *Children's Act*.

¹²⁸ Section 7((b) of the *Children's Act*.

¹²⁹ Section 7(c) of the *Children's Act*.

¹³⁰ Section 7(d)(i-ii) of the *Children's Act*.

¹³¹ Section 7 (e) of the *Children's Act*.

¹³² Section 7(k) of the *Children's Act*.

¹³³ Section 7(I)(i-ii) of the *Children's Act*.

¹³⁴ Bunijevac and Đurišić 2017 *CEPS Journal* 144.

education regardless of their documentation status, it nurtures their personality and talent.¹³⁵

In addition, when considering the child's best interests, it is essential to consider the practical challenges and costs associated with the child's access to education, as undocumented status may restrict school options and transportation as a result of regular attendance and participation.¹³⁶ Additionally, efforts should be made to identify and eliminate administrative and bureaucratic obstacles that hinder these children from enrolling in school.¹³⁷ There should be strong advocacy for the rigorous enforcement of non-discrimination policies within schools, ensuring that undocumented children are not subjected to prejudice or exclusion based on their immigration status. Although these challenges affect all children, including citizens, this study specifically examined the rights of undocumented immigrant children. The aim was to provide tailored recommendations to address their unique needs. The primary focus of this research was to provide insights that can contribute to the development of policies and enhance societal awareness of undocumented immigrant children's rights.

It is imperative to consider the best interest of the child in all matters concerning the child, as emphasised.¹³⁸ Furthermore, it is important to point out that the best interest approach should be used in cases where undocumented immigrant children's constitutional or legal rights are affected, such as the right to a basic education. Failure by the state to acknowledge this right or to address obstacles that hinder children from accessing and enjoying a basic education would result in grave injustice.

¹³⁵ *Juma Musjid Primary School* para 43.

¹³⁶ See Chapter 3 para 3.2.1.2 above.

¹³⁷ See Chapter 3 para 3.2.1.2 above.

¹³⁸ Malherbe *Tydskrif vir die Suid-Afrikaanse Reg* 268.

5.1.2.3.2 S v M 2008 (3) SA 232 (C)

In the case of *S v M*, the court was tasked with determining the meaning of "paramount importance" in the phrase that the best interest of the child shall be of paramount importance. Justice Sachs noted that no universal formula can be applied because the best interest of the child is determined based on the specific circumstances of each individual case.¹³⁹ As further confirmed in *AD and Another v DW* 2008 (3) SA 183 (CC),¹⁴⁰ the court pointed out that "child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case."¹⁴¹ The inclusive and forceful language of section 28 suggests that similar to the requirement for law enforcement to be gender-sensitive, it should also consistently be sensitive to the needs and rights of children.¹⁴² The court also highlighted that section 28 responds to the obligation under international law instruments such as the *CRC*, which promotes the best interest of the child principle.¹⁴³ Section 28(2) is perceived as a broad assurance that the best interests of the child principle are paramount in every matter concerning the child. However, contrary to the general perception that section 28(2) of the *Constitution* "surpasses other rights," the court, in this case, elaborated that the best interest of the child principle is subject to limitations.¹⁴⁴ In relation to the application of the best interest of the child principle, the Court in *Minister of Welfare and Population Development v Fitzpatrick* found no convincing justification under section 36 of the *Constitution* which supports the prohibition of non-citizens on adopting citizen-born children; any ban put forward was contrary to the best interest of the child.¹⁴⁵ It urges the state to treat equally all people in its jurisdiction citizen or non-citizens.

¹³⁹ *S v M* para 24.

¹⁴⁰ *AD v DW* 2008 (3) SA 183 (CC) (hereafter *AD v DW*) para 55.

¹⁴¹ *AD v DW* para 55.

¹⁴² *S v M* para 15.

¹⁴³ *S v M* para 16.

¹⁴⁴ *S v M* para 26

¹⁴⁵ *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) para 20.

5.1.2.3.3 De Reuck v Director of Public Prosecutions, Witwatersrand Local Division
2003 (12) BCLR 1333 (CC)

Similarly, *De Reuck*¹⁴⁶ case dealt with assessment of whether the definition and criminalisation of child pornography was constitutional, the court held that section 28(2) does not automatically take precedence over other constitutional rights. The court emphasised the interconnected and interdependent nature of constitutional rights, forming a unified constitutional value system.¹⁴⁷ It held that section 28(2), like other rights enshrined in the Bill of Rights, is subject to reasonable and justifiable limitations in accordance with section 36 of the *Constitution*.¹⁴⁸ Hence, although the primacy of the child's best interests is acknowledged, this does not entail absolute superiority.¹⁴⁹

5.1.2.4 Analysis and conclusion

Like all rights enshrined in the Bill of Rights, the implementation of section 28(2) must take into account interaction with other rights and legitimate public or state interests, which may require certain limitations. Even the rights of undocumented immigrant children protected under the best interest principle, also in the sphere of education, are not absolute; they can be limited as long as the limitation is reasonable and justifiable and in compliance with the requirements of section 36 of the *Constitution*. In this context, prioritising the best interests of undocumented immigrant children does not imply disregarding other conflicting constitutional rights, legitimate public or state interests, or prohibiting any limitations on the child's best interests. The court's decision in *S v M* was that the best interest in the child principle, as provided for in international law and South African law, should not be considered in isolation. There is a need for a balanced approach that balances the best interests of children and the

¹⁴⁶ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (12) BCLR 1333 (CC) para 54-55 (hereafter *De Reuck v Director of Public Prosecutions, Witwatersrand*); *S v M* para 26.

¹⁴⁷ *De Reuck v Director of Public Prosecutions, Witwatersrand* para 54-55; *S v M* para 26.

¹⁴⁸ *De Reuck v Director of Public Prosecutions, Witwatersrand* para 54-55; *S v M* para 26.

¹⁴⁹ *S v M* para 26; Skelton 2019 *De Jure* 565.

interests of society in terms of deterrence, punishment, and retribution, which were at stake in that particular case.¹⁵⁰

When using the best interest of the child principle in realising undocumented immigrant children's right to a basic education, the research would like to point out that there is a gap that needs to be filled. The *Schools Act* does not explicitly mention the best interests of a child's principle. Reyneke contends that,

[i]n contrast to this explicit child-centred requirement of the Constitution, the Schools Act does not have an explicit child focus. The hypothesis that the Schools Act does not focus sufficiently on the best interests of the child is based *inter alia* on the lack of reference to children in the legislation, the lack of focus on the needs of children of different age groups, the lack of focus on the different needs of different children, and the lack of child-friendly processes.¹⁵¹

The importance of an exclusive clause of the best interest of the child principle in the *Schools Act* is based on the fact that it would regulate or influence the steps that the school governing body and other government spheres should follow when admitting undocumented immigrant children, but also when adopting and implementing other relevant policies on school life, discipline, language, religion, and so on. However, none of these actors is cautioned in the *Schools Act* in admitting learners within the parameters of the best interest of the child principle. This, in logical terms, argues that the current legislation regarding school admission does not give primary consideration to the best interests of children. It is advisable that the legislature undertake amendments to the *Schools Act* to ensure that it explicitly addresses the imperative of safeguarding and promoting the principle of the best interests of the child. According to the CESCR, the standard set for the consideration of the interrelated and essential features of education is "the best interest of the student."¹⁵² The importance of the best interests of the child principle is that it serves as a guiding principle for children's rights. It can protect undocumented immigrants from potential discrimination in terms of exercising their rights in schools. South Africa, in compliance

¹⁵⁰ *S v M* para 116.

¹⁵¹ Reyneke 2016 *PELJ* 5.

¹⁵² CESCR "General Comment No. 13" para 7.

with international law, has however, integrated the principle of the child's best interests into its legal framework, which has been consistently applied by its courts.

However, the existing gap lies in the fact that the *Schools Act*, which directly addresses educational rights, does not incorporate the principle of the best interests of children in its provisions.¹⁵³ Additionally, the *Schools Act* should include a clear and comprehensive definition of vulnerable groups. This definition encompasses various categories, such as children with disabilities, orphans, refugees, asylum seekers, and immigrant children, among others, and further prohibits discrimination based on nationality, immigration status, or any other characteristic within the education system. Explicit mentions ensure that the rights of vulnerable groups, including immigrants, are clearly stated, leaving no room for misinterpretations. Explicitly mentioning vulnerable groups, such as immigrants, is essential because it allows for tailored support mechanisms to address unique challenges faced by immigrant children, such as trauma related to migration experiences and xenophobic attacks in schools. South Africa is a signatory to the international agreements mentioned in Chapter two that advocates for the rights of vulnerable populations, including immigrants.¹⁵⁴ Explicit mentions align the national legislation with these commitments. The next section highlights some of the problems encountered by immigrant children in exercising their rights to a name and nationality.

5.1.3 The right to a name and nationality

5.1.3.1 The right to a name and nationality as guided by international law

The *ACRWC* and the *CRC*, to which South Africa is a party, recognise the right of every child to be registered and to acquire a nationality.¹⁵⁵ Article 29 of the *Convention on the Rights of Migrants* also provides that "each child of a migrant worker should have

¹⁵³ The best interest of the child principle was never incorporated as a standalone right in the legislation that oversees the fundamental right of children's education.

¹⁵⁴ Such as the *CRC*, *ACRWC*, *ICESCR* and *Convention on the Rights Migrants*

¹⁵⁵ Article 6 of the *ACRWC* and Article 7 of the *CRC*.

the right to a name, to registration and a nationality."¹⁵⁶ International law establishes obligations that South Africa is bound to uphold; therefore, any unjustified restriction or limitation on the registration of a child's birth would constitute a violation of these international obligations.¹⁵⁷ It is important to note that the right to name and nationality is closely intertwined with the right to a basic education.¹⁵⁸ Without a recognised identity, including a name or nationality, accessing fundamental rights, such as education and healthcare, becomes significantly challenging.¹⁵⁹ Thus, the right to acquire identity holds immense importance in the lives of every child. Lack of documentation as a child is generally antithetical to the best interests of children. A major difficulty in making the right to nationality effective for some undocumented immigrant children is the fact that some of the immigrant parents have difficulty registering the birth of their children. In *Nubian Community in Kenya v The Republic of Kenya*, the African Commission on Human and Peoples' Rights highlighted that nationality creates a formal connection between a person and the state and places a person under the safeguard of the state's protection.¹⁶⁰ The amicus further pointed out that states have the responsibility to confer their nationality on anyone within their borders who might otherwise be without nationality to prevent statelessness.¹⁶¹ This is because stateless individuals are more vulnerable and it hampers their capacity to access other rights. The international law prohibition on statelessness applies not only to those who are *de jure* stateless but also to those who are *de facto* stateless.¹⁶²

¹⁵⁶ Article 29 of the *Convention on the Rights Migrants*.

¹⁵⁷ Maastricht Guidelines 4.

¹⁵⁸ *General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality* ACERWC/GC/02 (2014) (hereafter ACERWC "General Comment No. 2") para 31.

¹⁵⁹ ACERWC "General Comment No. 2" para 31.

¹⁶⁰ *Communication 317/2006 The Nubian Community in Kenya vs The Republic of Kenya* para 139

¹⁶¹ *Communication 317/2006 The Nubian Community in Kenya vs The Republic of Kenya* para 114

¹⁶² *Communication 317/2006 The Nubian Community in Kenya vs The Republic of Kenya* para 114

5.1.3.2 The right to a name and nationality as guided by the South African law

The *Constitution* states that every child has the right to name and nationality from birth.¹⁶³ Essentially, this provision can only be fully realised with the possession of a birth certificate. Birth registration is governed by the *Births and Deaths Registration Act* 51 of 1992. The *Act* applies to everyone, including non-South African citizens, who stay permanently and temporarily in the Republic ¹⁶⁴ (in other words, who are legally in the country and hold valid visas). The child's birth should be registered within 30 days.¹⁶⁵ For non-South African citizens, a notice of birth issued at a clinic or hospital is given to the parents and should be submitted to the Director General together with, among other documents, a valid passport and a valid visa or permit of the parents.¹⁶⁶ If parents hold a valid permanent residence permit or refugee permit, then a birth certificate of the child is issued with an identity number.¹⁶⁷

For non-South African citizens who hold neither permanent residence nor a refugee permit, the *Births and Deaths Registration Act* requires that when submitting a note of birth, the parents should also provide a valid passport and visa or permit of either the mother, father or both.¹⁶⁸ However, the birth certificate of a child under these circumstances does not contain an identity number, nor is it entered into the National Population Register.¹⁶⁹ For abandoned or orphaned children, a social worker is assigned to give notice of birth within 60 days of obtaining a court order in terms of section 156 of the *Children's Act* and the social worker can give a name or surname to the child.¹⁷⁰ Finally, if the child is born out of wedlock, then the notice of birth will be made by the mother of the child on Form DHA-24.¹⁷¹ If the father wishes to be

¹⁶³ Section 28(1)(a) of the *Constitution*.

¹⁶⁴ Section 2 of the *Births and Deaths Registration Act*.

¹⁶⁵ Regulation 3(1) of the Regulations on the Registration of Births and Deaths

¹⁶⁶ Regulation 3 (3) (f) of the Regulations on the Registration of Births and Deaths.

¹⁶⁷ Regulation 7(2) (a-b) of the Regulations on the Registration of Births and Deaths.

¹⁶⁸ Regulation 8(3) (c) of the Regulations on the Registration of Births and Deaths.

¹⁶⁹ Regulation 8(5) of the Regulations on the Registration of Births and Deaths; Section 5 (3) of the *Births and Deaths Registration Act*.

¹⁷⁰ Regulation 9(1) (b) and 9(3) of the Regulations on the Registration of Births and Deaths; Read also section 6 of the *Births and Deaths Registration Amendment Act* 18 of 2012.

¹⁷¹ Regulation 12 (1) of the Regulations on the Registration of Births and Deaths.

involved in the process, he must substantiate his relationship with the mother by undergoing a paternity test and submitting valid documentation, such as a passport, valid permit, permanent resident's identity document, or refugee's identity document.¹⁷² As noted above, the legislation makes distinctions in the issuance of birth certificates to children based on the marital status, nationality, and immigration status of their parents. It categorises children based on whether their parents are married or unmarried and whether their parents are citizens or non-citizens of South Africa. The question at hand is whether such differentiation is fair, justifiable, and reasonable in accordance with the *Constitution* and international standards.¹⁷³ In such cases, courts play a crucial role in determining the constitutionality of specific provisions.

5.1.3.3 Judicial approach

5.1.3.3.1 Centre for Child Law v Director General: Department of Home Affairs 2022 (2) SA 131 (CC)

The court, in the case of *Centre for Child Law v Director General: Department of Home Affairs*, decided on the constitutionality of section 10 of the *Births and Deaths Registration Act*, which prohibits unmarried fathers from giving notice of the birth of their children under their surname in the absence or absence of consent from the mother of the child.¹⁷⁴ The case involves a child who was born to a South African citizen (father) and a non-South African citizen (mother).¹⁷⁵ The mother's visitor's visa expired towards giving birth, and she could not travel back to renew it; this made her presence in the country illegal.¹⁷⁶ Eventually, she lacked a valid visa required for birth registration. On that basis, the department refused to register the child's birth.¹⁷⁷ The

¹⁷² Regulation 12 (2) (a-c) of the Regulations on the Registration of Births and Deaths.

¹⁷³ Section 36 of the *Constitution* on the limitation of a right and section 9(3) of the *Constitution* to determine if the discrimination is fair and justified.

¹⁷⁴ *Centre for Child Law v Director General: Department of Home Affairs* para 4

¹⁷⁵ *Centre for Child Law v Director General: Department of Home Affairs* para 8.

¹⁷⁶ *Centre for Child Law v Director General: Department of Home Affairs* para 8.

¹⁷⁷ *Centre for Child Law v Director General: Department of Home Affairs* para 9.

couple sought orders declaring sections 9 and 10 of the *Births and Deaths Registration Act* and Sub-regulations (3) and (5) of regulations 3, 4, and 5, and regulation 12(1) of the Regulations unconstitutional.¹⁷⁸

First, the High Court held that sections 9 and 10 do not prohibit unmarried fathers from registering the birth of their children. The requirement is that such children be born alive. The marital status of the parents is immaterial, and either of the parents can give notice of birth.¹⁷⁹ The Full Court opined otherwise and held that the High Court's interpretation of section 9 failed to consider that the notification of any child born alive is subject to the provisions of section 10.¹⁸⁰ Section 9 can only be fulfilled subject to the provisions in section 10. Although section 9 authorises the unmarried father to give notice of the child's birth, this must be done in the mother's presence or with her consent.¹⁸¹ Hence, section 10 was declared invalid and unconstitutional. The Centre for Child Law argued before the Constitutional Court that a distinction between children born within wedlock and those born out of wedlock is discriminatory, and the result is that children born out of wedlock are not able to fully exercise certain rights, as guaranteed in the Bill of Rights.¹⁸²

The Constitutional Court highlighted that whenever there is a dispute regarding the constitutionality of legislation, the court should scrutinise the objects and purport of the given legislation and ensure that it is in line with the *Constitution*.¹⁸³ The majority judgement agreed with the order of the Full Court, which declared section 10 unconstitutional, whereas the dissenting judgement opines that the discrimination in section 10 is reasonable, justifiable, and fair.¹⁸⁴ The reason was that children are vulnerable and should not be exposed to the risks of being claimed and adopted by

¹⁷⁸ *Centre for Child Law v Director General: Department of Home Affairs* para 11.

¹⁷⁹ *Centre for Child Law v Director General: Department of Home Affairs* para 14.

¹⁸⁰ *Centre for Child Law v Director General: Department of Home Affairs* para 17-19.

¹⁸¹ *Centre for Child Law v Director General: Department of Home Affairs* para 17-19.

¹⁸² *Centre for Child Law v Director General: Department of Home Affairs* para 20.

¹⁸³ *Centre for Child Law v Director General: Department of Home Affairs* para 27. See also Section 39(2) of the *Constitution*.

¹⁸⁴ *Centre for Child Law v Director General: Department of Home Affairs* para 143.

anyone, as long as their relationship with them has not been established.¹⁸⁵ Sections 9 and 10 must be read in a constitutionally compliant manner.¹⁸⁶

The central issue in this case revolves around the fundamental right to education for undocumented immigrant children, hinging on their entitlement to legal identity and its direct impact on educational access. Irrespective of their parent's immigration status, children encounter significant hurdles in accessing basic education when they lack proper birth registration and legal documentation. In this instance, the child was effectively deprived of the opportunity to be officially recognised and registered. This recognition would have facilitated their enrolment in schools. This case highlights the interrelated nature of various rights, such as the right to legal identity, education, and freedom from discrimination. Refusing birth registration can set off a chain reaction, hindering a child's capacity to enjoy other essential rights, including education.

5.1.3.3.2 U.J.D.J v Minister of Home Affairs (1986/2021) [2023] ZAECQBHC

Whereas in *Centre for Child Law* case above, the mother is the one who did not have valid documents, in *U.J.D.J v Minister of Home Affairs*, the biological father of the child was the one who lacked valid documentation. The first applicant, the mother of the child, was a South African citizen, and the second applicant, the father of the child, was a non-South African citizen who came to South Africa on a visitor's visa.¹⁸⁷ However, the visa expired, making his presence illegal in South Africa.¹⁸⁸ The Department of Home Affairs refused to amend and issue an unabridged birth certificate to the child because, one, the father was now an illegal immigrant and, two, there was no proof of paternity.¹⁸⁹

¹⁸⁵ *Centre for Child Law v Director General: Department of Home Affairs* para 135-136.

¹⁸⁶ *Centre for Child Law v Director General: Department of Home Affairs* para 27, 94.

¹⁸⁷ *U.J.D.J v Minister of Home Affairs* (1986/2021) [2023] ZAECQBHC 1 (hereafter *U.J.D.J v Minister of Home Affairs*) para 1.

¹⁸⁸ *U.J.D.J v Minister of Home Affairs* para 1.

¹⁸⁹ *U.J.D.J v Minister of Home Affairs* para 2.

Applicants challenged the constitutionality of regulation 12(2) (c) of the *Births and Deaths Registration Act*.¹⁹⁰ The court emphasised the need for careful consideration when assessing the constitutionality of legislation or regulations dealing with children. Mishandling such cases could have significant implications for the doctrine of the separation of powers. The court stated that the respondent's answering affidavit indicated how crucial it was to address the constitutionality of regulation 12(2) (c) because illegal parents were "chased away" from the Department of Home Affairs daily throughout the country.¹⁹¹ The court opined that children should never be subjected to the whims of government officials.¹⁹² The anecdotal evidence indicates that many illegal foreigners residing in South Africa intermingle with local citizens. Consequently, many children in South Africa are born to illegal mothers or fathers.¹⁹³ Neither the *Constitution* nor the *Children's Act* differentiates children based on nationality. The court, in determining whether regulation 12(2) (c) was constitutional, found it discriminatory. Discrimination is based on the fact that the child is born to unmarried parents and that the father is an illegal immigrant.¹⁹⁴ Therefore, the circumstances of the birth of a child are used to determine whether to issue a birth certificate, which obviously prejudices and discriminates against the child.¹⁹⁵ The marital or immigration status of the parents has nothing to do with the child's right to identity.¹⁹⁶ The court provided that the right to the dignity of the child and the principle of putting the interest of the child first are imperilled by the regulation.¹⁹⁷ The right to identity is interlinked with many other rights, such as cultural, educational, and health rights. The court further declares that, when dealing with matters that concern the child, international law standards must be considered and followed.¹⁹⁸ The court

¹⁹⁰ *U.J.D.J v Minister of Home Affairs* para 3.

¹⁹¹ *U.J.D.J v Minister of Home Affairs* para 16.

¹⁹² *U.J.D.J v Minister of Home Affairs* para 16.

¹⁹³ *U.J.D.J v Minister of Home Affairs* para 22.

¹⁹⁴ *U.J.D.J v Minister of Home Affairs* para 24.

¹⁹⁵ *U.J.D.J v Minister of Home Affairs* para 24-27.

¹⁹⁶ *U.J.D.J v Minister of Home Affairs* para 24-27.

¹⁹⁷ *U.J.D.J v Minister of Home Affairs* para 24-27.

¹⁹⁸ *U.J.D.J v Minister of Home Affairs* para 30-33.

concluded that regulation 12(2)(c) was unconstitutional. It imposes discrimination based on immigration status and marital status.¹⁹⁹

The case highlighted that denying a birth certificate based on parents' immigration and marital status constitutes discrimination. Without a birth certificate, children encounter obstacles in enrolling in school and accessing educational services, impeding their educational progress.²⁰⁰ The systematic failure to acknowledge the nationality of immigrant children breaches other rights linked to it. The lack of any valid or reasonable justification for this exclusion is particularly glaring, considering the pivotal role of education as a fundamental right to other human rights. Education serves as an empowerment tool, enabling socially and economically marginalised adults and children to escape poverty and actively participate in their communities.²⁰¹

5.1.3.4 Analysis and conclusion

In *S v M*,²⁰² the court stated that every child has inherent dignity and that it was essential to acknowledge them as unique individuals with their own distinct personalities rather than simply smaller versions of adults waiting to mature. Treating children as mere extensions of their parents is contrary to this recognition.²⁰³ Children should not bear the burden or enjoy the benefits of their parents' actions, whether positive or negative.²⁰⁴ Section 28 of the *Constitution*, with its comprehensive and empowering provisions, reflects the understanding that in today's world, mistakes and traumas experienced by parents should not be imposed upon their children.²⁰⁵

In *Speaker of National Assembly v De Lille MP*, the court expressed the following apt sentiments when it came to the courts' constitutional obligation to intervene where the rights of people are adversely affected:

¹⁹⁹ *U.J.D.J v Minister of Home Affairs* para 38.

²⁰⁰ Beko *The Impact of Unregistered Births of Children in South Africa and how their Rights to Essential Services and Basic Education are Affected* 40.

²⁰¹ Beko *The Impact of Unregistered Births of Children in South Africa and how their Rights to Essential Services and Basic Education are Affected* 5.

²⁰² *S v M* para 18.

²⁰³ *S v M* para 18.

²⁰⁴ *S v M* para 18.

²⁰⁵ Section 28 of the *Constitution*. See also *S v M* para 18.

This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is supreme - not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances.²⁰⁶

Despite the unconstitutionality of regulations 9, 10, and 12, Chiguvare reported in 2023 that the Department of Home Affairs refused to register many children of undocumented or illegal parents in Musina.²⁰⁷ Additionally, there are situations in which a parent passes away or when a mother returns to their country of origin, and the Department of Home Affairs refuses to register the children.²⁰⁸

The aforementioned cases highlight the challenges faced by numerous children born to non-South African citizens without documents or valid permits as they navigate complex administrative processes to obtain birth certificates. The irregularities of the legislation and the actions of government officials contribute to many children remaining undocumented. This is exemplified by the practical cases provided by Chiguvare. This study identifies that the first problem lies with the legislation that differentiates between citizens and immigrants, which leads to discrimination based on nationality and migration status. Registration of a child's birth is heavily dependent on the production of valid documentation. Failing to provide the required documents by parents renders these children stateless, as one cannot obtain a national identity without a birth certificate.²⁰⁹ In the context of illegal immigrants, the purpose of the registration of birth in South Africa is to help these people obtain the nationality of

²⁰⁶ *Speaker of the National Assembly v De Lille MP* at para 14.

²⁰⁷ Chiguvare 2023
<https://www.groundup.org.za/article/undocumented-mothers-struggle-to-register-their-children/>.

²⁰⁸ Chiguvare 2023
<https://www.groundup.org.za/article/undocumented-mothers-struggle-to-register-their-children/>.

²⁰⁹ Section 4(3) of the *South African Citizenship Amendment Act* 17 of 2010; Section 8(b) of the *Identification Act* 68 of 1997. The information needed here is obtained upon the birth of the child, if the child is not registered in the population register then an identity cannot be issued.

their country of origin, not that of South Africa. However, foreigners have no right to South African citizenship/nationality.

The government needs to review and amend all provisions that have punitive or discriminatory impacts on immigrant children pertaining to the birth registration of such children to ensure that the provisions conform to international laws and the *Constitution*.²¹⁰ An excessively restrictive birth certification system has a detrimental effect on immigrant children and the consequences of failure to acquire a birth certificate result in violations of many other rights for the child.²¹¹ The rights in the Bill of Rights are intertwined: access to essential services in life requires a birth certificate and an identity document (upon reaching majority).²¹² The ultimate objective is to uphold the principle of acting in the best interests of the child, thus complying with the international legal principles that South Africa has committed to as a State Party.²¹³ This includes safeguarding the well-being and protection of all children regardless of their parents' immigration status.²¹⁴ It is highly irrational to withhold birth certificates from immigrant children born to undocumented immigrant parents or parents who do not hold valid visas. Denying these children's right to a name and nationality is denying them the chance to make informed choices regarding their socio-economic well-being. Birth certificates serve as a doorway for these services, guaranteeing that immigrant children receive essential support for their education.

In its initial report on South Africa, the CESCR urges South Africa to streamline the birth registration process and assist parents in meeting the requirements set forth by the *Births and Deaths Registration Act*.²¹⁵ This may involve reimbursing the costs associated with establishing paternity if paternity is proven, as well as decentralising

²¹⁰ Right to nationality and the best interest principle according to international law.

²¹¹ Tigere 2015 *De Rebus* 42.

²¹² Mail & Guardian 2019
<https://mg.co.za/article/2019-09-27-00-children-without-documentation-are-denied-their-basic-rights/>.

²¹³ Article 3(1) of the *CRC*, and Article 4(1) of the *ACRWC*.

²¹⁴ Skelton 2018 *International Journal of Children's Rights* 54.

²¹⁵ CESCR "Concluding Observations on the Initial Report of South Africa" para 51.

the facilities of the National Health Laboratory Service where paternity tests can be conducted.²¹⁶ Many challenges faced by immigrant children in South Africa stem from a lack of documentation.²¹⁷ These challenges include but are not limited to, the risk of statelessness, detention, deportation, human trafficking, sexual exploitation, child labour, and limited access to basic education.²¹⁸ A birth certificate holds immense significance for every child regardless of their immigration status. While it may not confer legal status, it serves as proof of birth, facilitates the acquisition of nationality, and confirms identity. The absence of birth certificates places children at a heightened risk of statelessness.²¹⁹ Registration of a child's birth is heavily dependent on the production of valid documentation. Failing to provide the required documents by parents renders these children stateless, as one cannot obtain a national identity without a birth certificate. When children lack proper documentation, they are often subject to discrimination in an educational setting.

5.1.4 The right to language

5.1.4.1 The right to language as guided by international law

The *ICESCR* prohibits States Parties from denying any Covenant rights to individuals based on language, as well as the right to education in Article 13.²²⁰ Article 13 of the *ICESCR* does not address language rights in education or mention the right to education in one's native language.²²¹ This can be considered one of the gaps in the formulation of the right to education in article 13 of the *ICESCR*. Given that language was used as one of the grounds to discriminate against learners in schools during apartheid in South Africa,²²² it is regrettable that this provision does not provide clear

²¹⁶ CESCR "Concluding Observations on the Initial Report of South Africa" para 51.

²¹⁷ Mfubu and Willie 2016 *African Human Mobility Review* 432-435.

²¹⁸ Tigere 2015 *De Rebus* 4.

²¹⁹ United Nations High Commissioner for Refugees "I Am Here, I Belong: The Urgent Need to End Childhood Statelessness" 8.

²²⁰ Article 2(2) of the *ICESCR*.

²²¹ Article 13 of the *ICESCR*.

²²² Christie and Collins "Bantu Education: Apartheid Ideology and Labour Reproduction" 167; Molteno "The historical foundation of the schooling of black South Africans" 67.

guidance. However, the *CRC* made it a point that the aim of educating a child should be to develop "his/her own cultural identity, language, and values" while simultaneously strengthening respect for the values of the country of his/her origin and the country where the child is living.²²³ Language in education is regarded as a tool that can be used to make a child adapt to wherever they are.²²⁴ In the Canadian case of *Mahe v Alberta*,²²⁵ the court affirmed that language plays a vital role in cultural development. Although language and culture are distinct, vibrant language is essential to fully preserve a culture.²²⁶ The objective of education should be to offer minority members an education that aligns with their linguistic and cultural identities.²²⁷ Related to this research, the above case acknowledges that individuals from immigrant groups should gain a thorough understanding of their native language during their education. In line with the need for multilingualism, they should also integrate and attain proficiency in official languages spoken in South Africa.

Furthermore, the *UNESCO Convention against Discrimination in Education* provides a specific provision on the issue of language for members of national minorities.²²⁸ Members of minority groups can be interpreted to include immigrant children.²²⁹ Article 27 of the *ICCPR*,²³⁰ as well as article 30 of the *CRC*, protects the rights of members of minorities "not [to] be denied the right, in community with the other members of [their] group ... to use their own language."²³¹ It has been held further by the Human Rights Committee in General Comment No. 23 that individuals

²²³ Article 29 (1) (c) of the *CRC*.

²²⁴ The South Africa National Curriculum Framework for Children from Birth to Four (2015) 9.

²²⁵ *Mahe v. Alberta* (1990) 1 S.C.R. at 362-363.

²²⁶ *Mahe v. Alberta* (1990) 1 S.C.R. at 362-363.

²²⁷ *Mahe v. Alberta* (1990) 1 S.C.R. at 362-363.

²²⁸ Article 5 (1) (c) of the *UNESCO Convention against Discrimination in Education*.

²²⁹ Article 2 (1), 4(2), 4(4) of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992); the United Nations Human Rights Office of the Commissioner states that:

An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these.

²³⁰ Article 27 of the *ICCPR*.

²³¹ Article 30 of the *CRC*.

belonging to minorities have the right, within their community, to embrace their own culture, practice their religion, and speak their language.²³² Importantly, these individuals do not need to be nationals, citizens, or permanent residents of a State Party.²³³ Therefore, migrant workers or even visitors who are part of such minorities are entitled to exercise these rights.²³⁴

Moreover, the Hague Recommendations Regarding the Education Rights of National Minorities of 1996 (hereafter Hague Recommendations) emphasise the significance of mutual understanding between the majority and minority communities living within a state.²³⁵ This highlights the need for both groups to learn about each other's histories, cultures, and traditions. Therefore, the fundamental objective of the Hague Recommendations is "equality and freedom through integration."²³⁶ The Hague Recommendations suggest a specific language mix at the pre-primary, primary, and secondary levels of education. This further suggests that in primary education, the curriculum should be delivered in the minority language, with the minority language being taught as a subject.²³⁷ Additionally, state language should ideally be introduced as a subject by bilingual teachers. In secondary education, the curriculum should still be taught in the minority language, and the state language should continue to be taught, but there should be a gradual increase in the number of subjects taught in the state language.²³⁸ The aim is for children to gain a strong understanding of both their native language and their official state language in primary and secondary education.²³⁹ Ideally, minority languages serve as the primary medium of instruction. The other aim of the education system should be to allow the mother tongue ample

²³² CCPR General Comment No. 23: Article 27(Rights of Minorities) para 5.2.

²³³ CCPR General Comment No. 23: Article 27(Rights of Minorities) para 5.2.

²³⁴ CCPR General Comment No. 23: Article 27(Rights of Minorities) para 5.2.

²³⁵ The Hague Recommendations have been published as The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note, The Hague: Foundation on Inter-Ethnic Relations (1996) (hereafter Hague Recommendations).

²³⁶ Objectives of the Hague Recommendations; See also Beiter *The Protection of the Right to Education by International Law* 439-450.

²³⁷ Hague Recommendations para 12.

²³⁸ Hague Recommendations para 13.

²³⁹ Beiter *The Protection of the Right to Education by International Law* 439-450.

space and time to firmly establish itself in the child's mind, and this approach facilitates cognitive learning in any language.²⁴⁰

In relation to the above, one can infer that respecting and safeguarding the languages of immigrant children is crucial, allowing them to integrate into the broader national society by acquiring proficiency in the state language is of importance. Moreover, encouraging immigrant children to learn the language of the state in which they reside can enhance tolerance and multiculturalism within the nation.²⁴¹ This kind of education, termed "intercultural education," represents an ideal educational approach. However, numerous states hesitate to acknowledge immigrant children's rights. States often fear that granting such rights might lead to increased self-assurance among immigrant children, potentially resulting in demands for autonomy or even threats of secession.²⁴² It is important to note that individuals intended to be protected do not necessarily have to be nationals of the respective state. Mehedi asserts that community cohesiveness depends on having an open-minded approach and the capacity to empathise with others, regardless of racial, linguistic, or religious distinctions.²⁴³ According to Mehedi, education should foster attitudes that promote understanding of and empathy toward others.²⁴⁴ Thornberry and Gibbons argued that fostering cohesiveness in any society requires a significant level of shared learning among its members.²⁴⁵ A proper understanding of language rights in education is essential in this study, as language has historically been employed to establish segregation and foster discrimination within a country. Exploring the role of language in education will provide valuable insights into whether the South African government has made sufficient efforts to uphold language rights in the context of basic education or whether the unenlightened attitudes on the importance of language in education from the past persist.

²⁴⁰ Beiter *The Protection of the Right to Education by International Law* 439-450.

²⁴¹ Stoop 2017 *PELJ* 24.

²⁴² Stoop 2017 *PELJ* 3.

²⁴³ Mehedi *Multicultural and Intercultural Education and Protection of Minorities* (1999a) para 10 see Beiter *The Protection of the Right to Education by International Law* 446.

²⁴⁴ Beiter *The Protection of the Right to Education by International Law* 446.

²⁴⁵ Thornberry and Gibbons 1997 *Journal on Minority and Group Rights* 119.

5.1.4.2 The right to language as guided by the South African law

5.1.4.2.1 Right to receive education in the language of one's choice

In section 29(2), the *Constitution* stipulates as follows:

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.²⁴⁶

The provision shows that the right to education is not simply about having access to public schools but also about rights *in* education, which is ensuring that children can also, in accordance with practicality constraints, learn in their own language, that they are not discriminated against in school on the basis of those languages, and that there is equity in the mediums of instruction.²⁴⁷ This is important in light of the colonial and apartheid past, in which English and Afrikaans were the official languages (also of instruction), while indigenous languages such as isiZulu, Setswana, Tshivenda, and Xitsonga were not recognised.²⁴⁸ While the apartheid government recognised indigenous languages, it did so to the extent that they advanced the separate development agenda, and only so far as these languages nurtured the Bantustan approach in which South Africans of different tribes were grouped into the so-called TBVC states, that is, Transkei, Bophuthatswana, Venda, and Ciskei, and various other self-governing territories.²⁴⁹

²⁴⁶ Section 29(2) (a-c) of the *Constitution*.

²⁴⁷ Stein "Language in Schools" 209.

²⁴⁸ Bostock 2018 *JCT* 27; See also, section 137 of the *Union of South Africa Act* 1909 which established the equality of English and Dutch (Afrikaans) languages.

²⁴⁹ Egerö *South Africa's Bantustans from Dumping Grounds to Battlefronts* 9.

Section 6 of the *Schools Act* is an important provision for concretising language rights. It provides, in part, that the Minister may determine norms and standards for language policy in public schools by notice in the Government Gazette.²⁵⁰ The SGB may also determine the language policy of the school, and there should be no form of discrimination when effecting language policies.²⁵¹

While the issue of language in education is hotly contested among South Africans, very little attention is paid to language barriers facing undocumented immigrant children, many of whom come from countries that do not speak any of South Africa's official languages. There are 12 official languages of South Africa: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, isiZulu and sign language.²⁵² Laws and regulations have been put in place to provide guidance on the implementation of the right to language in the education sector in South Africa.²⁵³ As the discussion of language rights in education is embarked upon, it is crucial to note that the laws and policies in place address language rights in education *insofar as the 11 official languages are concerned*. Hence, it is clear that immigrant languages are not regulated in this context. However, an analysis of this Language in Education Policy is still relevant to understanding the context of education in the multilingual society of South Africa and the general stance of the government towards multilingualism in education. This is indicative of attitudes towards (potential) education in immigrant communities' languages. The importance of such education is clear if one appreciates that languages unlock the learner's diversity and individuality, which eventually facilitates the most crucial objective of unlocking the learner's potential.²⁵⁴ Evidence consistently shows that mother tongue education is the basis for all other developments in cognitive skills.²⁵⁵ The study does not imply that each

²⁵⁰ Section 6(1) of the *Schools Act*.

²⁵¹ Section 6(2-3) of the *Schools Act*.

²⁵² Section 6(1) of the *Constitution*.

²⁵³ Such as *Schools Act*, Languages in Education Policy (1997), *National Education Policy Act*, Norms and Standards for Language Policy in Public Schools GN 1701 in GG 18546 of 19 December 1997.

²⁵⁴ Stein "Languages in Schools" 266.

²⁵⁵ *The Use of Vernacular Languages in Education* (1953) 11.

immigrant should be taught in their mother tongue, rather learners should at least master any of the official languages in South Africa.

The *National Education Policy Act* sets out the principles according to which the Minister of Basic Education must determine the language policy.²⁵⁶ If reasonably practical, every learner should be instructed in the official language of his or her choice.²⁵⁷ Ministers determine the norms and standards for language policy in public schools.²⁵⁸ The governing body of a school, subject to the *Constitution*, determines the school's language policy.²⁵⁹

The aim of the Language in Education Policy, as determined by the Minister, is to develop respect for all the languages used in the Republic.²⁶⁰ The Language in Education Policy states that all learners in grades 1 and 2 should at least learn one approved language.²⁶¹ From grade 3, they should learn in an additional language.²⁶² Essentially, languages in education are categorised differently. There is a language of learning and teaching (LOLT) or a medium of instruction.²⁶³ This is usually the language used in the classroom throughout the day and in all subjects being taught.²⁶⁴ There is also the *home language* or mother tongue, which is the language that the learner is well versed in and is comfortable reading, writing, and speaking.²⁶⁵ In other words, a home language is any language that a learner understands and speaks when entering school.²⁶⁶ Ideally, for the reasons stated above, LOLT coincides with the

²⁵⁶ Clause 3(1), 3(4) (m) of the *National Education Policy Act*.

²⁵⁷ Clause 4 (v) of the *National Education Policy Act*.

²⁵⁸ Section 6 (1-2) of the *Schools Act*.

²⁵⁹ Section 6 (1-2) of the *Schools Act*.

²⁶⁰ Preamble of the Language in Education Policy (1997).

²⁶¹ Clause 6.7 (1) of the Language in Education Policy (1997).

²⁶² Clause 6.7 (2) of the Language in Education Policy (1997).

²⁶³ Clause 2(definitions) of the Approval of the Regulations Pertaining to the National Curriculum Statement Grades R-12 GN 1114 in GG 36041 of 28 December 2012.

²⁶⁴ Clause 2(definitions) of the Approval of the Regulations Pertaining to the National Curriculum Statement Grades R-12 GN 1114 in GG 36041 of 28 December 2012.

²⁶⁵ Clause 2 (definitions) of the Approval of the Regulations Pertaining to the National Curriculum Statement Grades R-12 GN 1114 in GG 36041 of 28 December 2012; Department of Basic Education "The Status of the Language of Learning and Teaching (LOLT) in South African Public Schools: A Quantitative Overview" 3.

²⁶⁶ Stein N "Languages in Schools" 268.

home language. There is *the first additional language*, which is usually the language a learner does not necessarily have knowledge of when they enrol in school, but they have to be taught so that they have a basic knowledge of it, and it is compulsory.²⁶⁷ The *second additional language* is usually taken for communicative purposes; it is a non-official language taken as an elective, and it is not compulsory.²⁶⁸ However, such an additional selective language can be chosen from the official languages. Ferreira-Meyers and Horne highlight that language diversity and multilingualism ensure plurality and enable people to engage in lifelong language learning.²⁶⁹

The Admission Policy does not specifically include the right to one's language in schools, although it provides that admissions at schools should not unfairly discriminate.²⁷⁰ The Proposed Amended Admission Policy explicitly states that no learner may be refused admission to a public school merely because of its language policy of that public school.²⁷¹ This further shows that the values enshrined in sections 6 and 29(2) of the *Constitution* must be taken into account when determining a language policy at school, taking into consideration fairness, practicability, and the need to redress the results of past discriminatory laws and practices.²⁷² First and foremost, it is important to emphasise that language choice is a fundamental right granted to every individual. Consequently, public schools have a responsibility to ensure that parents and learners are well informed about this entitlement.

The condition attached to the right to language is that it is only to be exercised "where that education is reasonably practicable." One could argue that it is only reasonably

²⁶⁷ Clause 2 (definitions) of the Approval of the Regulations Pertaining to the National Curriculum Statement Grades R-12 GN 1114 in GG 36041 of 28 December 2012; Department of Basic Education "The Status of the Language of Learning and Teaching (LOLT) in South African Public Schools: A Quantitative Overview" 3.

²⁶⁸ Clause 2 (definitions) of the Approval of the Regulations Pertaining to the National Curriculum Statement Grades R-12 GN 1114 in GG 36041 of 28 December 2012; Department of Basic Education "The Status of the Language of Learning and Teaching (LOLT) in South African Public Schools: A Quantitative Overview" 3.

²⁶⁹ Ferreira-Meyers and Horne 2017 *Stellenbosch Papers in Linguistics Plus* 33.

²⁷⁰ Clause 9 of the Admission Policy.

²⁷¹ Clause 9(a) of the Proposed Amended Admission Policy.

²⁷² Clause 9(b) of the Proposed Amended Admission Policy.

practical for learners to receive instruction in their own language if the particular school instructs in the language of the learner's choice. On the other hand, it might be reasonably impractical for a learner to enrol in a school that does not already offer their language of choice. What happens if the school offering the language of choice is in a feeder zone for which the said learner does not qualify (feeder zone refers to the area that is closer to that school by any public route than to any other school).²⁷³ This shows that the right to choose a language of instruction is fraught with complications, even in the setting of only the official languages.

The Language in Education Policy states that it is reasonably practical to provide education in a particular language if at least 40 learners in grades 1 to 6 or 35 learners in grades 7 to 12 require education in that particular language at that school.²⁷⁴ Often, schools deny the admission of a learner on the basis that their language of choice is not offered, even though there are a reasonable number of students who want to receive instruction in that language.²⁷⁵ Stein, in agreement with the idea of reasonable practicability, opines that, due to lack of adequate teachers to begin with, it is not practical for a school to teach 500 isiZulu learners, 30 isiXhosa-speaking learners, 17 Tshivenda speakers, and only two Afrikaans children in their respective languages.²⁷⁶ She further points out that another problem is that the government often merely adopts norms such as the above without ensuring that there are sufficient teachers to realise the right.²⁷⁷ She further argues that although there is a condition of reasonable practicability,²⁷⁸ the government has an obligation to ensure that it offers instruction in different languages. It is the responsibility of the state to ensure that the right is

²⁷³ Regulations Relating to the Admission of Learners to Public Schools GN 61 in PG 439 of 7 January of 1998 for definition of feeder zone. Clause 33-35 of the Admissions Policy provides for school zoning and the See also Guidelines Relating to Planning for Public School Infrastructure (2014) para 9 (9.2).

²⁷⁴ Clause V.D.3 of the Norms and Standards for Language Policy in Public Schools GN 1701 in GG 18546 of 19 December 1997 amended by GN 665 in GG 1887 of 15 May 1998.

²⁷⁵ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 1.

²⁷⁶ Stein N "Languages in Schools" 216.

²⁷⁷ Stein N "Languages in Schools" 216.

²⁷⁸ Stein N "Languages in Schools" 216.

realised and impediments are removed.²⁷⁹ In addition, clause 5 of the *BELA Bill* aims to amend section 6 of the *Schools Act*.²⁸⁰ According to the proposed amendment, when approving a school's language policy, the Head of Department must consider several factors, including the best interests of the learner, a declining number of learners proficient in the language, efficient utilisation of school resources, and language requirements of the wider community.²⁸¹ The Head of Department also has the power to adopt multiple languages of instruction.

5.1.4.2.2 Norms and standards for language policy

The adopted Norms and Standards for Language Policy established the rights and duties of all relevant actors in the protection of language rights in education.²⁸² Concrete school language policies are usually determined by the school's governing body after consultation with the school's parental body.²⁸³ Do learners choose the LOLT in school? Yes, a learner can choose a language of instruction to apply for admission to a particular school.²⁸⁴ When choosing a language for learning and teaching, the school governing body should take into account the demographics of the school, the practicability of using the language, and the number of learners who choose the language.²⁸⁵ As mentioned above, if there are at least 40 learners in the same grade (grades 1 to 6) or at least 35 learners in the same grade (grades 7 to 12), they seek education in a particular language of instruction.²⁸⁶ If the learners

²⁷⁹ Stein N "Languages in Schools" 216.

²⁸⁰ Section 5(c) of the *BELA Bill*.

²⁸¹ Section 5(c) of the *BELA Bill*.

²⁸² Norms and Standards for Language Policy in Public Schools GN 1701 in 18546 of 19 December 1997.

²⁸³ Section V.C. (1) of the Norms and Standards for Language Policy in Public Schools GN 1701 in 18546 of 19 December 1997.

²⁸⁴ Section V.B.2 of the Norms and Standards for Language Policy in Public Schools GN 1701 in 18546 of 19 December 1997.

²⁸⁵ Stein N "Language in Schools" 210.

²⁸⁶ Section V.C. (2) of the Norms and Standards for Language Policy in Public Schools GN 1701 in GG 18546 of 19 December 1997 amended by GN 665 in GG 1887 of 15 May 1998 See also Stein "Language in Schools" 210.

constitute too small a group, then it may not be reasonably practical to offer teaching in that language.

5.1.4.2.3 Learning of foreign languages or non-official languages

The Department of Basic Education also seeks to facilitate the learning of non-official languages as selective subjects.²⁸⁷ This is best done on the condition that the countries responsible for those languages accept some responsibility to ensure that support and proper mechanisms are made available.²⁸⁸ There are 13 non-official languages considered in South Africa as per the National Curriculum Statement.²⁸⁹ An immigrant learner is expected to prove proficiency in two official languages, as stipulated in paragraph 12(1) of the Intermediate Phase and 19(1) of the Senior Phase, and adhere to the School-Based Assessment criteria for both official languages chosen.²⁹⁰ An immigrant learner should pass one of the two required official languages.²⁹¹ They can also learn their home language *in lieu* of one official language if it is an officially approved non-official language listed as part of the National Qualifications Framework (NQF).²⁹² The non-official languages recognised are Arabic, French, German, Gujarati, Hebrew, Hindi, Italian, Latin, Modern Greek, Portuguese, Spanish, Tamil, Telegu, and

²⁸⁷ Clause 4 (d) of the Approval of the Regulations Pertaining to the National Curriculum Statement Grades R-12 GN 1114 in GG 36041 of 28 December 2012.

²⁸⁸ Department of Basic education "The Language in Education Policy and National Curriculum Statement" para 3.4.

²⁸⁹ Annexure D: Table B4 of the Approval of the Regulations Pertaining to the National Curriculum Statement Grades R-12 GN 1114 in GG 36041 of 28 December 2012.

²⁹⁰ Clause 4 (1) (b) of the National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R-12 GN 1115 and 1116 in GG 36042 of 28 December 2012.

²⁹¹ Clause 4 (1) (c) of the National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R-12 GN 1115 and 1116 in GG 36042 of 28 December 2012.

²⁹² *National Qualifications Framework Act 67* of 2008; see also Annexure D of the National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R – 12 of GN 1115 and 1116 in GG 36042 of 28 December 2012.

Urdu.²⁹³ This list largely coincides with the languages promoted by the Pan South African Language Board in terms of section 6 of the *Constitution*.²⁹⁴

It is noteworthy that the policy specifically states that for one to be classified as an immigrant learner, he/she must be in possession of relevant official documents issued by the Department of Home Affairs and official documentation issued by the school where the learner entered the South African school system for the first time.²⁹⁵ This literally means that undocumented immigrant children are not really catered for in the National Policy. First, most undocumented immigrants in South Africa, as mentioned in Chapter 1, come from countries such as Zimbabwe, Nigeria, and Malawi, whose languages are not listed as approved non-official languages.²⁹⁶ Steins²⁹⁷ highlighted that most learners are encouraged to learn and be fluent in English because of the belief that it is prominently used in further education and for future employment. Another problem is that teachers need parental support to enable their children to learn adequately. Many immigrant parents are illiterate, speak only their native languages, and, in difficult life circumstances in a foreign country, are not devoted to the education of their children. Moreover, parents expect their children to revert to their languages and cultures at home, which may be difficult for many children as they struggle to "multitask" the needs of the school's culture and languages and those of their families.

There is also the Incremental Introduction of African Languages in Schools: Draft Policy available now, whose main aim is to provide specific protection to African languages so that learners use their home languages proficiently and non-African

²⁹³ Section 6(5)(b) (i-ii) of the *Constitution*; Department of Arts and Culture 2023 <http://www.dac.gov.za/pansalb>.

²⁹⁴ Section 6(5)(b) (i-ii) of the *Constitution* and Department of Arts and Culture 2023 <http://www.dac.gov.za/pansalb>.

²⁹⁵ Clause 4 (1) (e) National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R-12 GN 1115 and 1116 in GG 36042 of 28 December 2012.

²⁹⁶ Annexure D: Table B4 of the Approval of the Regulations Pertaining to the National Curriculum Statement Grades R-12 GN 1114 in GG 36041 of 28 December 2012.

²⁹⁷ Stein N "Language in Schools" 210.

language speakers learn an African language.²⁹⁸ The policy was implemented in 2015 for grade 1 and is expected to continue until 2026 when it will be implemented in grade 12.²⁹⁹ According to this policy, every learner is required to study one approved language at the home language level and two official languages at the first additional language level.³⁰⁰ However, this policy does not address foreign languages as additional languages. This omission disregards immigrants who speak other languages. The National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R – 12 provides a clause for immigrant children who are documented and their right to language in education.³⁰¹ The provision is specifically for immigrants who are documented. Undocumented immigrant learners, in this case, do not receive the same protection as documented learners as they lack documentation.³⁰²

5.1.4.2.4 Limitation of language rights

The right to choose an official language as the language of instruction, as stated in section 29(2), is not an absolute right.³⁰³ It is unlike the right to a basic education as such, which is an unqualified right that is supposed to be fulfilled regardless of the government's other budgetary imperatives.³⁰⁴ The state and in practice, schools are required to consider factors such as equity, practicability, and redress for past discrimination when providing the right to education in one's language.³⁰⁵ Kriel calls section 29(2) a weak positive right, "self-qualifying" in that it is not immediately realisable.³⁰⁶ The enforcement of these rights depends on the reasonable

²⁹⁸ Clause 3 of the *Incremental Introduction of African Languages: Draft Policy* (2013).

²⁹⁹ *Incremental Introduction of African Languages: Draft Policy* (2013).

³⁰⁰ Clause 6 of the *Incremental Introduction of African Languages: Draft Policy* (2013).

³⁰¹ Clause 4 (1) (a-e) National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R-12 of GN 1115 and 1116 in GG 36042 of 28 December 2012.

³⁰² Clause 4 (1) (b-e) National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R-12 of GN 1115 and 1116 in GG 36042 of 28 December 2012.

³⁰³ Seleonane 2008 *Law, Democracy and Development* 151.

³⁰⁴ Simbo 2013 *Law, Democracy and Development* 486.

³⁰⁵ Section 29(2) (a-c) of the *Constitution*.

³⁰⁶ Kriel "Education" 38.

implementation of reasonable policies.³⁰⁷ Section 29(2) is perhaps an example of what Fuo and Du Plessis highlight as "the Constitution does not oblige the state to provide everyone access to the minimum core immediately or on demand."³⁰⁸ Basic education constitutes a minimum core of the right to education, and within this framework, education in one's mother tongue is part of that core.³⁰⁹ According to Coomans, the right to be educated in the language of one's own choice belongs to the core content of the right to education and the state has an obligation to respect that right.³¹⁰ The language aspect, however, might be subject to progressive realisation, as it heavily depends on resources. South African courts have dealt with matters of language in education, and some prominent decisions have been made by the courts as far as language policies in education are concerned.

5.1.4.3 Judicial approach

5.1.4.3.1 Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo 2010 (3) BCLR 177 (CC)

In *Head of Department, Mpumalanga Department of Education v Hoërskool*,³¹¹ the Constitutional Court delivered a judgement concerning the constitutional right to be taught in the official language of one's choice. The court also dealt with relationships between the national Department of Basic Education, provincial education departments, and school governing bodies in determining the school's language policy.³¹² Hoërskool Ermelo is an Afrikaans-medium school, and, as it so happened, in 2007, in the Ermelo area, there was a shortage of space for English-medium instruction. Approximately 113 English learners were out of school.³¹³ Although at

³⁰⁷ As illustrated in these cases *Khosa & Mahlaule v Minister of Social Development; Minister of Health v Treatment Action Campaign; Grootboom; Soobramoney v Minister of Health (KwaZulu Natal)* 1998 1 SA 765 (CC).

³⁰⁸ Fuo and Du Plessis 2015 *Law, Democracy and Development* 9.

³⁰⁹ Beiter *The Protection of the Right to Education by International Law* 385; CESCR "General Comment No. 3" para 10 and CESCR "General Comment No. 13" para 57.

³¹⁰ Coomans 2007 *Persona y Derecho* 8.

³¹¹ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 1.

³¹² *Head of Department: Mpumalanga Department of Education v Hoërskool* para 1.

³¹³ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 11, 16.

Hoërskool Ermelo School, there was space to accommodate more learners, unfortunately, the school was not prepared to accommodate English-speaking learners unless they were willing to be taught in Afrikaans.³¹⁴ The Department of Education approached the school, requesting that they accommodate new grade 8 English-medium learners in their classrooms. The school governing body declined the request, which, in terms of the *Schools Act*, determined the language policy of the school.³¹⁵ The Head of Department chose an interim committee to take over the duties of the school governing body to determine the school's language policy.³¹⁶ It concluded that the language policy should be changed, and schools should provide tuition in English and Afrikaans.³¹⁷ An appeal was made because the school did not accept this decision. The school questioned the validity of the provincial education department's decision to revoke the school governing body's powers to determine its language policy and appoint an interim committee to do so instead.³¹⁸

Against this background, the court held that the head of the provincial education department had the authority to withdraw the governing body's power to determine the school language policy.³¹⁹ The power is derived from section 29(2) of the Constitution, read together with section 22 of the *Schools Act*.³²⁰ On the other hand, the Head of the Department failed to differentiate the power given to him under section 22 from that given in section 25.³²¹ Hence, a committee to decide on the language policy could not have been appointed by the Head of Department. The court expressed the importance of this principle in light of the state's obligation to ensure

³¹⁴ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 18.

³¹⁵ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 15.

³¹⁶ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 22.

³¹⁷ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 26.

³¹⁸ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 28.

³¹⁹ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 34.

³²⁰ Under Section 22 of *Schools Act*, "[t]he Head of Department may on reasonable grounds, withdraw a function of a governing body."

³²¹ Section 25 of *Schools Act* provides that:

(1) If the Head of Department determines on reasonable grounds that a governing body has ceased to perform functions allocated to it in terms of this Act or has failed to perform one or more of such functions, he or she must appoint sufficient persons to perform all such functions or one or more of such functions, as the case may be, for a period not exceeding three months.

that every learner has place at school and the reasonable opportunity to learn in the language of his or her choice.³²² The court stated that the school governing body must review and determine a language policy in terms of section 6(2) of the *Schools Act* and the *Constitution*.³²³ The school argued that it was entitled to determine a language policy with regard to the interest of its learners and the school. The court emphasised, however, that the school governing board also needed to consider the interests of the community in which the school was located and other learners' needs.³²⁴ In addition, Moseneke DCJ emphasised that schools must ensure that the constitutional right to education and language in education is protected.³²⁵ He emphasised that education was the engine for a better life for all.³²⁶ Justice Moseneke, Deputy Chief Justice, expressed concern about the provincial Department of Education's failure to adequately provide and ensure learners' attendance in basic education, as mandated by the *Constitution* and *Schools Act*.³²⁷ Article 13 of the *ICESCR* guarantees the right of parents to choose their children's schools other than those established by public authorities.

School governing bodies need to also consider the languages of immigrant parents, as this is crucial for effective communication and ensuring that children have access to proper education. While recognising the importance of accommodating diverse linguistic backgrounds, there are limits to what school governing boards can and should do. However, school governing bodies can implement initiatives to provide linguistic support to immigrant parents and learners.

³²² *Head of Department: Mpumalanga Department of Education v Hoërskool* para 34.

³²³ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 106.

³²⁴ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 80.

³²⁵ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 51.

³²⁶ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 2.

³²⁷ *Head of Department: Mpumalanga Department of Education v Hoërskool* para 84.

5.1.4.3.2 Minister of Education (Western Cape) v Mikro Primary School Governing Body [2005] 3 All SA 436 (SCA)

In *Minister of Education (Western Cape) v Mikro*, the court examined the contention by the MEC and the Department that everyone has the right to receive education in the official language or language of their choice in a public institution where such education is reasonably practicable.³²⁸ The court explained that the right to receive education in the official language of choice, where it is reasonably practical, does not mean that this right extends to every public educational institution.³²⁹ The right is a right against the state, and the state has to give the best possible effect to this right from various reasonable educational alternatives available.³³⁰ The court highlighted that one option that should be considered to ensure effective implementation of the right to language is the provision of single medium institutions.³³¹ Thus, the right to receive education in one's choice of language is guaranteed, but the challenge is that it cannot be provided at each educational institution.

The court, in this case, held that the Head of the Department may, on reasonable grounds, withdraw a function which the governing body has failed or ceased to perform.³³² The action of the MEC and the Department of Education, substituting a governmental admission policy for that of the school, was therefore unlawful.³³³ Even if the school's language or admission policy was invalid, the department did not, in terms of the *Schools Act*, have the power to determine a language or admission policy for the school, said the court.³³⁴ The *BELA Bill* now provides that the Head of the Department has the final decision-making powers with regard to the language or

³²⁸ *Minister of Education (Western Cape) v Mikro* para 31

³²⁹ *Minister of Education (Western Cape) v Mikro* para 31.

³³⁰ *Minister of Education (Western Cape) v Mikro* para 31.

³³¹ *Minister of Education (Western Cape) v Mikro* para 31.

³³² *Minister of Education (Western Cape) v Mikro* para 42.

³³³ *Minister of Education (Western Cape) v Mikro* para 40.

³³⁴ *Minister of Education (Western Cape) v Mikro* para 43.

admission policies.³³⁵ The pros and cons of this approach have been critically discussed in Chapter 3.³³⁶

5.1.4.4 Analysis and conclusion

Immigrants come from diverse linguistic and cultural backgrounds, and discrimination in schools often originates from differences in their appearance and language.³³⁷ Generally, nobody is keen on promoting "something foreign." Most immigrants end up losing their cultural identity in school and are potentially absorbed into new cultures.³³⁸ Usually, however, new languages are not properly acquired, and cognitive skills remain underdeveloped. This is because native language education generally constitutes the basis for learning other languages and cognitive development. As much as the study advocates for the inclusion of immigrants' native language in the curriculum, the reality is that there are so many challenges associated with that. This may include a lack of qualified teachers to teach foreign languages, the cost of hiring qualified teachers to teach foreign languages, a lack of interest by some teachers to learn or teach a foreign language, the financial implications involved, and a lack of interest by the government of the country of origin to co-operate.

The research may point out that an introduction of an integrative multilingual "narrative approach," especially in the foundation phase (grades 1-3) when children are taught in their mother tongue may be helpful though not so practical in African context.³³⁹ Children learn quickly through narratives; the use of culturally inclusive visuals (pictures and videos) will improve foreign language anxiety.³⁴⁰ For instance, a teacher can ask what the visual is called in the learner's language and use vocabulary to teach reading. This is advantageous, as it adds immigrant learners' cultures and

³³⁵ Preamble and section 4(d)(5a-d) and 5 (2.5.1) of the *BELA Bill*.

³³⁶ See chapter 3 above for intensive discussion of provisions of *BELA Bill*.

³³⁷ Suleiman *Language and Identity in the Middle East and North Africa* 2.

³³⁸ Jibreel *Cultural Identity and the Challenges International Students Encounter* 9.

³³⁹ Murris and Verbeek 2014 *South African Journal of Childhood Education* 12.

³⁴⁰ Adam, Barratt-Pugh and Haig "Portray Cultures Other than Ours": *How Children's Literature is Being Used to Support the Diversity Goals of the Australian Early Years Learning Framework* 557.

languages to local languages.³⁴¹ Moreover, language diversity and multilingualism are essential for sustainable development as they contribute to creative thought.³⁴² Teachers and schools should create a welcoming classroom environment for immigrant children, which includes multilingualism and humour in language teaching, to promote interest in learning South African languages. In countries such as Belgium, there are separate schools for immigrant children to assist them in learning local languages and integrating them into the new community.³⁴³

States are obligated to uphold the educational rights of undocumented immigrants even when their resources are limited.³⁴⁴ When dealing with immigrant populations, states must allocate their scarce funds in a fair and unbiased manner or seek assistance from the international community.³⁴⁵ This issue revolves around the provision of equal access and opportunities. In this context, the challenge of resource scarcity faced by the state should be proportionally shared by all residents, regardless of nationality, to avoid placing an undue burden on a specific group. It is important to note that equal treatment does not mean identical treatment; rather, the goal is to strike an appropriate balance. States should proactively address the educational rights of undocumented immigrants. Language-related aspects can be progressively implemented, meaning that as resources increase, rights can also be strengthened. While some rights must be implemented immediately, states should work towards achieving the full realisation of undocumented immigrant children's language education rights. Undocumented immigrant children, on their part, should make reasonable requests, taking into consideration factors such as their population

³⁴¹ Murris and Verbeek 2014 *South African Journal of Childhood Education* 12.

³⁴² Römer 2020
<https://thelifelonglearningblog.uil.unesco.org/2020/02/21/multilingualism-the-language-of-sustainable-development/>.

³⁴³ European Commission 2022
<https://eurydice.eacea.ec.europa.eu/national-education-systems/belgium-flemish-community/support-measures-learners-early-childhood-and>.

³⁴⁴ ComRC "General Comment No. 6" para 43.

³⁴⁵ ComRC "General Comment No. 6" para 43.

numbers, specific regional population density, and their ability to sustain these services and facilities in the long term.

5.1.5 *The right to free basic education*

5.1.5.1 The right to free primary (and secondary) education guided by international law

International instruments such as the *UDHR*, *ICESCR*, *UNESCO Convention against Discrimination in Education* and the *CRC* call for governments to provide the right to free primary and progressively free secondary education.³⁴⁶ As a State Party, South Africa should ensure that the obligations imposed by the treaties are fulfilled and should take positive action to ensure the enjoyment of the right.³⁴⁷ The issue of free education enjoys extensive protection under international law, and even free primary education is protected under customary international law.³⁴⁸

Considerably, the International Labour Organisation's Minimum Age Convention (No. 138)³⁴⁹ provides that the minimum age of employment is 15 years, which implies that at least lower secondary education must also be immediately provided for free. The *UDHR*, the first international instrument to express the right to education, provides that education should be free and compulsory, at least in the elementary and fundamental stages.³⁵⁰ The *ICESCR* also states that primary education "shall be compulsory and available free to all."³⁵¹ The States Parties are obligated to develop

³⁴⁶ Article 26(1) of the *UDHR*, Article 13(2) (a) of the *ICESCR*, Article 4 of the *UNESCO Convention against Discrimination in Education* and Article 28(1) of the *CRC*.

³⁴⁷ Article 2 (1) and 2(2) of the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (1998).

³⁴⁸ Beiter *The Protection of the Right to Education by International Law* 44-46.

³⁴⁹ *International Labour Organisation's Minimum Age Convention (No. 138)* (1973).

³⁵⁰ Article 26(1) of the *UDHR*. Elementary and Fundamental stages are typically designed to provide students with fundamental skills in reading, writing and mathematics (i.e. literacy and numeracy) and establish a solid foundation for learning and understanding core areas of knowledge, personal and social development, in preparation for lower secondary education. See *International Standard Classification of Education* (2011) para 120-123.

³⁵¹ Article 13(2)(a) of the *ICESCR*.

national policies that promote equality of opportunity for all, and this is to be achieved, amongst other things, by making primary education free and compulsory.³⁵²

The *UNESCO Convention against Discrimination in Education* was the first international treaty to specifically provide a mandate to States Parties to provide free primary education.³⁵³ In the spirit of advancing free education, the *CRC* states that to recognise the right of the child to education, States Parties should make primary education compulsory and available free to everyone.³⁵⁴ Within the regional framework, the *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, in its interpretation of article 17(1) of the *Banjul Charter*, posits that the states are under an obligation to "ensure that all children enjoy their right to free and compulsory primary education."³⁵⁵ It further states that school fees should not be a barrier to receiving education and that the government should ensure that disadvantaged and vulnerable children receive free primary education.³⁵⁶ The emphasis of international law is that primary education should be economically accessible by making it free.³⁵⁷ For compulsory education to be practically realised, the government must implement policies that provide free education, including free uniforms, textbooks, and meals to accommodate disadvantaged and vulnerable children who cannot afford fees.³⁵⁸ It is difficult to make primary (and secondary) education compulsory, as states must under international law, when learners do not have the funds to go to school.

³⁵² Article 4 of the *UNESCO Convention against Discrimination in Education*.

³⁵³ Article 4 of the *Convention against Discrimination in Education*.

³⁵⁴ Article 28(1) of the *CRC*.

³⁵⁵ *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2011) para 17(a).

³⁵⁶ *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2011) para 71(a).

³⁵⁷ CESCR "General Comment No. 13" para 6(b).

³⁵⁸ *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2011) para 71(b).

5.1.5.2 The right to free basic education as guided by the South African law

The *Constitution* grants everyone the right to a basic education.³⁵⁹ Section 9(2) further provides for an equality clause, which can be interpreted as the full and equal enjoyment of all rights and freedoms in education (without any financial barriers, emphasis).³⁶⁰ Education was used as a tool for oppression during apartheid.³⁶¹ The distribution of funding during apartheid was favourable for white learners.³⁶² The *Bantu Education Act* created separate Departments of Education according to race, and it gave less money to black schools and most money to whites.³⁶³ Blacks,³⁶⁴ Indians,³⁶⁵ and Coloured learners³⁶⁶ received less funding during apartheid, and different legislation was enacted to govern each race and the level of education they received.

The *Constitution* ushered in a new era of transformation in the education system based on dignity, equality, and freedom.³⁶⁷ This led to the creation of the *Schools Act*, which sets standards for a uniform education system. The state is obliged to finance public schools equitably using public funds in section 34(1) of the *Schools Act*.³⁶⁸ Section 38(1) mandates that the governing body of a public school create an annual budget and be presented at general meetings of parents before approval.³⁶⁹ If the majority of the parents agree to the fees, then a resolution can be passed, the fees should be specified, and the fee exemption criteria should be met.³⁷⁰ Section 41(1) of the *Schools*

³⁵⁹ Section 29(1) (a) of the *Constitution*.

³⁶⁰ Section 9(2) of the *Constitution*, "equality includes the full and equal enjoyment of all rights and freedoms."

³⁶¹ Subreenduth 2006 *International Journal of Qualitative Studies in Education* 621.

³⁶² Dass and Rinquest "School Fees" 141-159.

³⁶³ *Bantu Education Act* 47 of 1953. The separate development of races was rooted in the ideologies of white superiority and white dominance in society during the apartheid era.

³⁶⁴ *Bantu Education Act* 47 of 1953. The Blacks education was the most inferior because it was governed by the whites.

³⁶⁵ *Indian Education Act* 61 of 1965.

³⁶⁶ *Coloured Persons Act* 47 of 1963.

³⁶⁷ Section 1(a) of the *Constitution*.

³⁶⁸ Section 34(1) of the *Schools Act*.

³⁶⁹ Section 38(1) and (2) of the *Schools Act*.

³⁷⁰ Section 39(1) and (2) of the *Schools Act*.

Act enables public schools to legally enforce payment of fees by parents.³⁷¹ Section 41(7) protects a learner's right to fully participate in school activities, regardless of the non-payment of school fees.³⁷² This ensures that learners cannot face victimisation, such as suspension, abuse, denial of access to school events, or withholding of school records or transfer certificates.

To ensure the proper governance of funding in schools, some policies were adopted, such as the National Norms and Standard for School Funding Policy (NNSF).³⁷³ Arendse emphasises that education is "critical to the transformation of South Africa."³⁷⁴ To reduce past funding inequalities in education, quintile funding systems were developed, which are provided for in the School Fee Exemption Policy (SFEP) and No-Fee School Policy (NFSP).³⁷⁵ The purpose of the policies is to abolish school fees in specified public schools attended by children from the least socio-economically advantaged households and/or to make education affordable for poor children.

One of the objectives of the *Schools Act* is to "uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and *funding* of schools in partnership with the state."³⁷⁶ The quintile funding system is a redistributive strategy related to state resources to cater to the fees of economically disadvantaged learners in public schools.³⁷⁷ The quintiles are

³⁷¹ Section 41(1) of the *Schools Act*.

³⁷² Section 41(7) of the *Schools Act*.

³⁷³ National Norms and Standard for School Funding Policy (NNSF) GN 1089 in GG 31498 of 17 October 2008; Amended National Norms and Standard for School Funding Policy GN 869 in GG 29179 of 31 August 2006.

³⁷⁴ Arendse 2011 *Law, Democracy and Development* 341.

³⁷⁵ Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

³⁷⁶ Preamble of the *Schools Act* "emphasis added."

³⁷⁷ Amended National Norms and Standard for School Funding Policy GN 869 in GG 29179 of 31 August 2006 para 109.

grouped according to the poverty level, the school's geographical location, and the socio-economic factors of the school.³⁷⁸

Quintile schools are determined by the Minister of Basic Education every year.³⁷⁹ The lower quintiles (1 to 3) are no-fee schools, meaning that these schools do not charge fees at all (no-fee school policy).³⁸⁰ The no-fee schools are aimed at improving access to schools for all school-going learners by reducing the burden of compulsory schooling on poor households and improving the adequacy of funding for schools serving poor communities.³⁸¹ Although the no-fee schools do not charge fees, the school governing body may raise additional funds to supplement the schools' financial resources.³⁸² This can be achieved through donations or school activities that do not have a discriminatory effect based on financial ability. This is in accordance with section 36(1) of the *Schools Act*, which provides that the school governing body is authorised to add to the resources supplied by the state in order to improve the quality of education for all learners.³⁸³

Quintiles 4 to 5 receive a smaller amount of funding from the government and are allowed to charge school fees.³⁸⁴ The legal framework envisages funding from two sources: fees payable by parents and state funding. Section 39 of the *Schools Act* provides power to the parental body to determine school fees to be charged at a public school.³⁸⁵ They are expected to make "appropriate and equitable decisions" regarding

³⁷⁸ Amended National Norms and Standard for School Funding Policy GN 869 in GG 29179 of 31 August 2006 para 87; see also para 43 in Chapter 4 for the factors determining a public school's ranking.

³⁷⁹ Section 35 (1) and 39(7) of the *Schools Act*.

³⁸⁰ Amended National Norms and Standard for School Funding Policy GN 869 in GG 29179 of 31 August 2006 para 109.

³⁸¹ Mokoena *Implementation of No fee School Policy: A Case Study in Bolodedu Cluster Circuits of Mopani District* 35.

³⁸² Section 36(1) of *Schools Act*.

³⁸³ Section 36(1) of *Schools Act*.

³⁸⁴ Amended National Norms and Standard for School Funding Policy GN 869 in GG 29179 of 31 August 2006 para 156.

³⁸⁵ School fees at public schools. —

(1) Subject to this Act, school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents

fees to be charged.³⁸⁶ It also provides for school fee exemptions for parents who cannot afford to pay fees for their children at these schools.³⁸⁷ If a parent is unable to pay fees, he or she may approach the school to ask for a fee exemption. The parental body has the mandate to determine the criteria and procedures to be followed for fee exemptions according to the regulations provided by the Minister of Basic Education.³⁸⁸ The *Schools Act* and the Regulations Relating to the Exemption of Parents from the Payment of School Fees provide that there are different types of exemptions granted to parents: total exemption, partial exemption, conditional exemption, or no exemption.³⁸⁹

Automatic exemptions are given to the person overseeing a child such as a responsible parent/guardian for a child in foster care, an orphanage, a youth care centre, or a place of safety.³⁹⁰ In addition, children who head a household, a person who receives a social grant on behalf of a child, an orphan caregiver, or a child abandoned by parents are also considered for automatic exemptions.³⁹¹ To be accepted for the exemption, a parent or guardian of the learner must complete the fee exemption form provided by the school, attaching an affidavit, a confirmation affidavit from a social worker or other competent authority, or a court order.³⁹²

attending the meeting. The resolution must provide for the amount of school fees to be charged.

³⁸⁶ Amended National Norms and Standard for School Funding Policy GN 869 in GG 29179 of 31 August 2006 para 127.

³⁸⁷ Section 39 (2) (b) of the *Schools Act*.

³⁸⁸ Section 39(2) (b) of the *Schools Act*.

³⁸⁹ Section 39(2)(b) of the *Schools Act*, Amended National Norms and Standard for School Funding Policy GN 869 in GG 29179 of 31 August 2006 para 151-170 and Regulation 5(1-4) of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

³⁹⁰ Regulation 1(a) of the of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

³⁹¹ Regulation 1(b-d) of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

³⁹² Regulation 4(3) (a-c) of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

Partial exemption entails that a parent receives a discount on school fees, the discount depending on the income of the parent or guardian.³⁹³ If the school fees as a proportion are equal to 3,5% of the income of the parent's income, they can qualify for partial exemption.³⁹⁴ Annexure B of the Regulations requires that for the parent to qualify for this exemption, they should provide documents such as pay slips or a letter explaining how much they earn.³⁹⁵

Conditional exemptions apply to parents who qualify for partial exemptions; however, because of certain factors, they are unable to pay the reduced amount.³⁹⁶ It also applies to parents who do not qualify for fee exemption but have valid reasons to prove that they cannot afford to pay school fees.³⁹⁷ The exemption comes with certain conditions attached to it for payment of school fees. Lastly, no exemption means that this category does not qualify for any fee exemption; therefore, they need to pay regular school fees.³⁹⁸

The procedure to apply for a school fee exemption is as follows: the parent or guardian of the child must fill in the application form and submit it to the school together with the supporting documents. After submission, the school governing body should decide whether to grant exemptions within 30 days.³⁹⁹ If the decision comes out and the parent is not happy with the outcome, an appeal should be made to the Head of Department within 30 days.⁴⁰⁰ Within 14 days, the Head of Department must either

³⁹³ Regulation 5(1-4) of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

³⁹⁴ Regulation 6(4)(a) of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

³⁹⁵ Annexure B part 3 of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

³⁹⁶ Regulation 1 (definitions) of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

³⁹⁷ Regulation (definitions) of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

³⁹⁸ Annexure C part 3 of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

³⁹⁹ Regulation 6(1) of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

⁴⁰⁰ Regulation 8 (1) of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

uphold or dismiss the appeal.⁴⁰¹ *Schools Act* provides that a learner who is not able to pay fees cannot refuse admission to a public school.⁴⁰² In reality, based on the economic status of their families, most undocumented immigrant children fall within quintiles 1 and 2 schools, which are the poorest communities and no-fee school zones. However, the practical application of this system for undocumented immigrant children is complex. Many undocumented families might not be aware of these provisions, and fear of deportation often prevents them from engaging with formal institutions.⁴⁰³ An analysis of this is conducted in the following section.

5.1.5.3 Judicial approach

Courts have addressed different issues regarding school fee policies in public schools. The discriminatory effects of current fee exemption regulations have been addressed in some cases.

5.1.5.3.1 Saffer v Head of Department, Western Cape Education Department (18775/2013) [2016] ZAWCHC 217

In this case, Ms. Saffer, the biological and custodian parent of ZG, was liable to pay school fees for her child, who was a grade 10 learner at Fish Hoek High School.⁴⁰⁴ However, due to the financial constraints she was facing, she could not afford school fees and wanted to apply for an exemption.⁴⁰⁵ While applying for the exemption, the application form was supposed to be completed by both parents and also provide information about their income.⁴⁰⁶ Ms Saffer could not meet this requirement and informed the school that she was unable to acquire information from her ex-husband, given her difficult history with him.⁴⁰⁷ The school insisted that she provide the required

⁴⁰¹ Regulation 8 (6) of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006.

⁴⁰² Section 5(3) (a) of *Schools Act*.

⁴⁰³ SAHRC "Position Paper" 14.

⁴⁰⁴ *Saffer v Head of Department, Western Cape* para 1.

⁴⁰⁵ *Saffer v Head of Department, Western Cape* para 14.

⁴⁰⁶ *Saffer v Head of Department, Western Cape* para 18.

⁴⁰⁷ *Saffer v Head of Department, Western Cape* para 18.

information or that her application would not be processed.⁴⁰⁸ To qualify for fee exemption, the combined annual income of parents had to be calculated. This was in line with section 40(1) of the *Schools Act*⁴⁰⁹ and regulation 6(2), read together with the definition of the phrase "combined annual gross income of parents" in regulation 1.⁴¹⁰ According to the school, it was a "must" that the non-custodian parent provided his information and completed the application form.⁴¹¹ Ms Saffer lodged an appeal, contending that the school's refusal to provide her with a fee exemption was discriminatory due to her status as a single paren.⁴¹² She sought a declaration that section 40(1) of the *Schools Act* and regulation 6(2), read together with the definition of the phrase "combined annual gross income of parents" in regulation 1 of the Fee Exemption Regulations, was unconstitutional and infringed on her dignity and her right to equality.⁴¹³ She also brought to the attention of the school that, in terms of regulation 9(3), no applicant was supposed to be disqualified because his/her application form was either incomplete or incorrectly completed.⁴¹⁴ The combined annual gross income of both parents was a standard requirement for all applicants, whether married, single, or divorced.⁴¹⁵ There was no exception in circumstances where parents were divorced or separated or where cooperation and communication were non-existent between custodial and non-custodial parents.⁴¹⁶ The main aim of such a requirement and rule was to promote equality between the two parents and ensure that both parents were involved in the child's life. The problem arises in cases

⁴⁰⁸ *Saffer v Head of Department Western Cape* para 21.

⁴⁰⁹ Section 40 of the *Schools Act* provides that a parent is responsible for paying the school fees as specified in section 39, unless exempted.

⁴¹⁰ Regulation 1 of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools GN R1052 in GG 29311 of 18 October 2006 defines combined annual gross income of parents as "the annual gross income of the parents, calculated together, or, if a learner has only one parent, the total annual gross income of such parent." Regulation 6(2) illustrates the formula to be used when considering the application for exemption.

⁴¹¹ *Saffer v Head of Department, Western Cape* para 22.

⁴¹² *Saffer v Head of Department, Western Cape* para 52.

⁴¹³ *Saffer v Head of Department, Western Cape* para 106.

⁴¹⁴ *Saffer v Head of Department, Western Cape* para 23.

⁴¹⁵ *Saffer v Head of Department, Western Cape* para 23.

⁴¹⁶ *Saffer v Head of Department, Western Cape* para 97.

such as this, where information from one parent cannot be obtained and the burden has to be carried by the custodial parent, and the child suffers the most in the process.

The court found sections 40(1) and 6(2) unconstitutional.⁴¹⁷ The reason was that the impugned provisions placed a burden on the custodial mother, putting her in a position of discomfort by requiring her to face the non-custodial parent.⁴¹⁸ They infringed on her right to dignity and her right to equal protection and exposed her to abuse, humiliation, and embarrassment.⁴¹⁹ In addition, the provisions limited the rights of the child to education and did not serve the best interests of the child.⁴²⁰

Denying her fee exemption violated the right to receive basic education.⁴²¹ Despite a court decision being available, it is necessary to modify the provision to elucidate the stance concerning parents who are unable to show their joint annual gross income due to varying circumstances. In situations where custodial parents are unwilling or unable to gather information from the non-custodial parent, it is recommended that the responsibility be placed on the financial officer to obtain necessary information from the non-custodial parent. An alternative approach would be to issue a court order requiring the non-custodial parent to provide necessary documents. Failure to grant an exception would result in continuing the discriminatory impact of apartheid, which the Act seeks to eliminate. Much better, however, would be to abolish the exemption system and provide unconditional access without any duty to pay fees. However, this is the requirement of international law to which South Africa has expressed a reservation.

If approved, the *BELA Bill* would amend section 41 of the *Schools Act*, which requires custodial parents to furnish the gross income of both parents.⁴²² The *BELA Bill* proposes that a parent may submit proof in the form of an affidavit stating that the

⁴¹⁷ *Saffer v Head of Department, Western Cape* para 97.

⁴¹⁸ *Saffer v Head of Department, Western Cape* para 100-104.

⁴¹⁹ *Saffer v Head of Department, Western Cape* para 106.

⁴²⁰ *Saffer v Head of Department, Western Cape* para 99.

⁴²¹ Section 29 (1)(a) of the *Constitution*.

⁴²² Section 32 of the *BELA Bill*.

other parent of the learner is either untraceable, is unwilling to provide the particulars of their total annual gross income, fails to provide within a reasonable time, or has furnished incomplete or inaccurate particulars regarding his or her total annual gross.⁴²³ However, it further requests furnishing the governing body with a court order or any other documentary evidence that would support the affidavit in addition to the affidavit.⁴²⁴

5.1.5.4 Analysis and conclusion

While all learners encounter challenges when applying to no-fee schools or seeking fee exemptions, it is crucial that this study specifically focuses on the obstacles that immigrants experience in accessing basic education. Undocumented people are more prominent in underdeveloped areas, and most of them are socio-economically disadvantaged.⁴²⁵ Most of the learners within this group fall within the no-fee school quintiles or would qualify for exemptions if attending schools in the "affluent" quintiles. However, challenges arise when nationality or immigration status disqualifies them from accessing schools and funding.⁴²⁶ Exemptions from fees are problematic in principle (as they do not work in practice). If they are problematic, they will become even more problematic for undocumented immigrant children. While there are provisions in place, practical application might vary due to a lack of awareness, fear, or bureaucratic hurdles, making it challenging for undocumented migrant children to benefit fully from these schemes. Exemptions from school fees are problematic in principle because they often rely on bureaucratic processes, require extensive documentation, and stigmatise children who receive exemptions.

⁴²³ Section 32 (2A) (a-d) of the *BELA Bill*.

⁴²⁴ Section 32 (2B) of the *BELA Bill*.

⁴²⁵ Mukumbang, Ambe and Adebiyi 2020 *International Journal for Equity in Health* 1; Oksiutycz and Azionya "Informal Settlements: A Manifestation of Internal and Cross-Border Migration"109.

⁴²⁶ The scenarios above mentioned about the documents that need to be submitted when applying for fee exemption. Moreover, a practical example of an asylum seeker who was denying fee exemption based on her immigration status is illustrated below or as above.

The illustration below is a practical experience of the treatment frequently faced by immigrants at public schools. It presents a letter from Parow West Primary School, highlighting the school's refusal to grant a school fee exemption to an asylum-seeking parent, citing her immigration status as the reason.⁴²⁷ The woman in question was an unemployed single mother "asylum seeker" who had three children of school-going age and who had been called upon to pay school fees. Her only source of income at this particular point was the money she received from the refugee centre.⁴²⁸ In addition, she had a chronic condition which hindered her from working.⁴²⁹ Considering her condition, the only way she was able to take her children to school was through a school fee exemption.⁴³⁰ Upon applying for the fee exemption, her application was denied. Some of the reasons for denying her the school fee exemptions were:

- (a) She omitted to provide the child's father on her application form.
- (b) She was an asylum seeker and "did not qualify" for fee exemption.
- (c) She was required to provide a letter from the South African Social Security Agency stating that the children received grants.⁴³¹

⁴²⁷ GroundUp 2016 <https://www.groundup.org.za/article/school-denies-fee-exemption-woman-because-shes-asylum-seeker/>.

⁴²⁸ GroundUp 2016 <https://www.groundup.org.za/article/school-denies-fee-exemption-woman-because-shes-asylum-seeker/>.

⁴²⁹ GroundUp 2016 <https://www.groundup.org.za/article/school-denies-fee-exemption-woman-because-shes-asylum-seeker/>.

⁴³⁰ GroundUp 2016 <https://www.groundup.org.za/article/school-denies-fee-exemption-woman-because-shes-asylum-seeker/>.

⁴³¹ GroundUp 2016 <https://www.groundup.org.za/article/school-denies-fee-exemption-woman-because-shes-asylum-seeker/>.

Dear ...

Beatrice Ingabire

2016.10.2.101.

INCOMPLETE APPLICATION

To be able to process your application we need all the relevant information. Refer to page 2 on your application form for the complete list.

It is of utmost importance that you understand that we need BOTH parents'/guardians' information. Failing to submit this will only delay the process. You will be held liable for the full school amount. Discount will only be afforded from the date that a COMPLETE form is submitted.

Asylum-seekers:

Asylum-seekers do not qualify for school fee discount. As a NON SOUTH AFRICAN, SASA: Act number 84, as an Amended Regulation, 18 October 2006.

REFUGEES:

- Refer to:
1. Government Gazette of South Africa, Vol 402. No 19544. Act No. 130,1798 Refugees Act, 1998.
 2. Immigration Act, 2002. Section 7. (Act 13 of 2002)

SASSA card holders:

Please submit the letter issued by the SASSA office, identifying the applicant, his/her name and ID number and the name of the child/ren. Please submit the SASSA card as well. Failure to comply will result in the rejection of your application.

Greetings

Member: Applications committee.

Ryanstraat / Ryan Street, Parow 7500 ☎ 939 4289, 939 5071 ★ Faks / Fax 939 8861 ★ Epos / Email admin@pwes.co.za

Hoof / Principal - P.Ferreira Adjunkhoof / Deputy Principal - F. v Schalkwyk

2016 Admission Incomplete forms

The *Schools Act* provides that a public school may only enforce the payment of school fees after ascertaining that a parent does not qualify for a fee exemption.⁴³² The

⁴³² Section 41 of the *School Act*.

aforementioned practical example demonstrates that certain parents inherently meet the requirements for school fee exemptions, yet they frequently become ineligible due to the complexities encountered during the application process. Some documents are complex and difficult to acquire, especially for undocumented parents. Acquiring an affidavit poses challenges for an undocumented parent, not because it is unattainable in principle but because of the apprehension of encountering the South African Police Service and potential deportation.⁴³³ Some parents do not qualify for grants unless prescribed by the Minister of Social Development, which is highly unlikely for undocumented immigrants.⁴³⁴ Moreover, most are informally employed; hence, they cannot provide letters of grant or proof of income.⁴³⁵ Citizens also experience this problem.

In *Khosa & Mahlaule v Minister of Social Development* the court had to decide on the constitutional validity of sections 3(c), 4(b(ii)) and 4B(b)(ii) of the *Social Assistance Act*, which limit social grants, child support grants and care dependency grants respectively, to South African citizens.⁴³⁶ The court asserted that the *Constitution* vests the right to social security in "everyone."⁴³⁷ By excluding permanent residents from the scheme for social security, the legislation limited their rights in a manner that affected their dignity and equality in material respects.⁴³⁸ The exclusion of the children from social grants benefits was therefore not reasonable and justifiable in terms of section 36.⁴³⁹ The responsibility for school fees for everyone that cannot pay them, whether citizen, legal non-citizen (e.g., permanent resident) or undocumented immigrant, must effectively be borne by the system; in other words, also procedures should not have the effect of excluding specifically one specific group (undocumented immigrants) from benefiting from social welfare, here basic education. This case stands as a significant legal precedent, affirming the entitlements of undocumented

⁴³³ GroundUp 2022 <https://www.groundup.org.za/article/sa-police-preying-on-immigrants-say-human-rights-organisations/>.

⁴³⁴ Under Section 5 (1) (c) of the *Social Assistance Act* it is at the discretion of the Minister to allocate grants to non-citizens.

⁴³⁵ Zungula 2021 <https://www.youtube.com/watch?v=nmfDzLWbL-U&t=13457s>.

⁴³⁶ *Khosa & Mahlaule v Minister of Social Development* para 99.

⁴³⁷ *Khosa & Mahlaule v Minister of Social Development* para 85.

⁴³⁸ *Khosa & Mahlaule v Minister of Social Development* para 85.

⁴³⁹ *Khosa & Mahlaule v Minister of Social Development* para 136.

children to educational benefits. This implies that any policy or decision denying educational benefits to undocumented immigrant children can be legally challenged based on this ruling. The court established that constitutional rights, including social security benefits, are applicable universally to all individuals in South Africa, not just citizens.

Though the *Schools Act* states that a learner may not be "chased out" of school upon failure to pay fees, the fact is that many children end up dropping out of school due to fee arrears.⁴⁴⁰ Attending school while fully conscious of being in arrears not only impacts the psychological well-being of the learners but also has extensive adverse consequences on their sense of dignity.⁴⁴¹ Reyneke strongly emphasises the significance of one's dignity: "dignity is the keystone of the *Constitution* and plays a crucial role in informing and shaping schools."⁴⁴² Primary (and secondary) education must be free. This is a minimum core obligation under international law. Hence, it must be implemented immediately, and it may not be made dependent on resources. States will have to rearrange their priorities to have the resources for free education. That is why South Africa's reservation is problematic. Furthermore, the exemption schemes in South African schools do not satisfy the criteria of international law standards. Moving towards a system of free primary education for all, regardless of immigration status, could be a more straightforward solution. This aligns with the idea of education as a fundamental human right. The reservation entered by South Africa, in respect of article 13(2) and 14 of ICESCR as discussed in Chapter 1, imply a lack of full commitment to complying with international law regarding free primary education for all.

⁴⁴⁰ Lindeque 2022
<https://ewn.co.za/2022/01/31/school-dropouts-open-up-on-tough-choice-between-survival-and-education>.

⁴⁴¹ Section 28 (3) of the *Constitution*; the rights and well-being of a child should be a priority and best interest of the child should be of paramount importance.

⁴⁴² Reyneke 2011 *PELJ* 130.

The CESCR, in its initial report on South Africa, noted that about 30% of undocumented immigrant children, refugees and asylum seekers were not attending formal schools and some of the reasons related to financial constraints.⁴⁴³ The Committee pointed out that "no-fee schools" should discontinue the practice of imposing additional fees disguised as voluntary contributions. Furthermore, it suggested revising the fee-exemption requirements in fee-paying schools to guarantee that disadvantaged and marginalised children were not subjected to discrimination or stigmatisation.⁴⁴⁴ According to Arendse,⁴⁴⁵ certain financially disadvantaged parents desire to enrol their children in well-resourced schools. However, due to the exorbitant fees imposed on them, they are compelled to opt for schools with poorer resources. Consequently, despite the legal assurance of parental choice, the existing laws continue to perpetuate deep-rooted inequalities within the educational system.⁴⁴⁶

5.1.6 Detention and deportation process for undocumented immigrant children

Including the issue of deportation in research is crucial, particularly considering the study's focus on immigrant children. It is important to highlight this aspect, as some state officials may easily order the deportation of children solely based on their irregular status in the country, often without following proper procedures or considering the rights of these children, such as their right to a basic education.

Deportation is an act of public authority to remove a person or person from the country if the person is illegally in the country.⁴⁴⁷ In South Africa, deportation is the procedure performed by the Department of Home Affairs, causing an "illegal foreigner" to leave the Republic (involuntarily or under detention) in terms of the *Immigration Act*, whereby this person is returned to their country of origin.⁴⁴⁸ International law establishes that no one should return to a country where there is a real risk of torture,

⁴⁴³ CESCR "Concluding Observations on the Initial Report of South Africa" 1.

⁴⁴⁴ CESCR "Concluding Observations on the Initial Report of South Africa" 1.

⁴⁴⁵ Arendse 2011 *Law Democracy and Development* 352.

⁴⁴⁶ Arendse 2011 *Law Democracy and Development* 352.

⁴⁴⁷ Section 1 of the *Immigration Act*.

⁴⁴⁸ As set out in terms of section 32 and 34 of the *Immigration Act*.

cruel, inhuman, or degrading treatment, and this prohibition has been held to be absolute.⁴⁴⁹ Additionally, deportation should sometimes not be enforced if it results in a violation of the right to private and family life of the person concerned, and no one should be expelled in a manner that would put their life or physical integrity at risk.⁴⁵⁰ The international standards require that if the person to be deported is a child, then the states should treat the minor with a sense of dignity and worth, and the age of the child should be considered.⁴⁵¹ Secondly, States Parties are also under a legal obligation not to separate a child from their parents against their will unless such separation is in the best interests of the child.⁴⁵² This obligation reflects the broader recognition that the child should grow up in their family environment, a right that reflects international law's recognition of the family as a fundamental unit in society.⁴⁵³ Thirdly, the importance of the family as an aspect of the rights of the child is underpinned by the recognition of the best interests of the child as a primary consideration in all decisions related to the child.⁴⁵⁴ This means that when a state decides to deport a child for reasons of national security or public interest, it needs to consider the child's rights and best interests.

5.1.6.1 Detention and deportation process as guided by international law

The *Convention on the Rights of Migrants* has a provision for expulsion that applies to migrant workers and members of their families, regardless of their immigration status. Article 22 of the Convention states that no one should be subjected to collective expulsion. In such cases, each should be individually determined.⁴⁵⁵ Expanding a person from the state can only be performed after a decision by a competent

⁴⁴⁹ Article 3 (1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1987); see also <https://www.dailymaverick.co.za/article/2022-10-19-life-in-zim-is-worse-say-migrants-returning-to-south-africa/>.

⁴⁵⁰ OHCHR "Expulsions of Aliens in International Human Rights Law" 19.

⁴⁵¹ Article 37 of the *CRC*.

⁴⁵² Article 9(1) of the *CRC*.

⁴⁵³ Preamble of the *CRC*.

⁴⁵⁴ Article 3(1) of the *CRC*.

⁴⁵⁵ Article 22(1) of the *Convention on the Rights of Migrants*.

authority.⁴⁵⁶ The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that States Parties should take appropriate measures whenever migrant workers or members of their families within their territory are in an irregular situation to ensure that such a situation does not persist.⁴⁵⁷ It is the duty of States Parties to ensure that all migrant workers and members of their families in an irregular situation have non-discriminatory and effective access to regularisation procedures and that these procedures are not applied in an arbitrary manner.⁴⁵⁸ The Committee emphasises that crossing the border of a country in an unauthorised manner or without proper documentation or overstaying a permit of stay may not constitute a crime.⁴⁵⁹ Therefore, criminalising irregular entry into a country exceeds the legitimate interest of States Parties in controlling and regulating irregular migration, leading to unnecessary detention. While irregular entry and stay may constitute administrative offences, they are not crimes against persons, property, or national security.⁴⁶⁰ In *Kindler v. Canada*, it was famously stated that if a State Party removes a person within its jurisdiction and the necessary and foreseeable consequence is a violation of that person's rights under the Covenant in another jurisdiction, the State Party itself may be in violation of the Covenant.⁴⁶¹

To supplement this, the *ICCPR* in article 13 only regulates the expulsion of immigrants lawfully within the territory of the state. In the case of *Francesco Madafferri v Australia*,⁴⁶² the Human Rights Committee to the *ICCPR* (hereafter the Committee) had to consider a decision made by the State Party to deport the father of a family of four minor children and to compel the family to choose whether they would

⁴⁵⁶ Article 22(2) of the *Convention on the Rights of Migrants*.

⁴⁵⁷ Article 69 of the *Convention on the Rights of Migrants* see also ACERWC "General Comment No. 2" para 15.

⁴⁵⁸ Article 7 and 69 of the *Convention on the Rights of Migrants*; ACERWC "General Comment No. 2" para 15.

⁴⁵⁹ ACERWC "General Comment No. 2" para 24.

⁴⁶⁰ ACERWC "General Comment No. 2" para 24.

⁴⁶¹ *Kindler v. Canada* [1991] 2 S.C.R. 779; Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights UN Doc CCPR/C/106/D/1932/2010 (2012) para 13.2.

⁴⁶² *Francesco Madafferri v. Australia* 1011/2001

accompany him or stay in the State Party.⁴⁶³ The Committee pointed out that when removing one member of the family, the State Party should consider the impact it can cause, such as the degree of hardship the family and its members would encounter as a result of such removal.⁴⁶⁴ Mr. Madafferi had committed certain criminal acts in addition to his illegal presence, which justified his removal from the country. However, the Committee also took into account the hardship that would be imposed on a family that had lived together in the territory for 14 years.⁴⁶⁵ The Committee opined that his removal from the territory would potentially infringe on the rights of children because these minors would have to migrate to a new country, foreign to them, where they face language barriers.⁴⁶⁶ It was advocated that he cannot be arbitrarily separated from his family, as it contravenes articles 17(1) and 23(1) of the *ICCPR*.⁴⁶⁷

The jurisprudence of the Committee was reinforced by General Comment 31 of March 29, 2004, on the nature of general legal obligations imposed on States Parties to the Covenant.⁴⁶⁸ Indeed, the Committee highlighted that:

Article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable damage, such as that contemplated by articles 6 and 7 of the Covenant,

⁴⁶³ UN Human Rights Committee "Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights" para 9.8; *Francesco Madafferi v. Australia* 1011/2001.

⁴⁶⁴ UN Human Rights Committee "Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights" para 9.8.

⁴⁶⁵ UN Human Rights Committee "Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights" para 9.8.

⁴⁶⁶ UN Human Rights Committee "Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights" para 9.8.

⁴⁶⁷ Article 17(1) of the *ICCPR*, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation" and Article 23(1), "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

⁴⁶⁸ *General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* UN Doc CCPR/C/21/Rev.1/Add.13 (2004) (hereafter UN Human Rights Committee "General Comment No. 31").

either in the country to which removal is to be effected or in any country to which the person may be subsequently removed.⁴⁶⁹

General Comment No. 15 underscores that aliens are entitled to protection under the Covenant, particularly in cases of non-discrimination, inhuman treatment, and respect for family life.⁴⁷⁰ In line with the provision of General Comment 31 highlighted above, although the concept of education might not directly fall under articles 6(right to life) and 7(no torture), it could be argued that depriving children of education might have severe consequences affecting their future, well-being, and potentially their lives, thus constituting a form of irreparable harm. If the country denies a basic education to undocumented immigrant children and compels them to return to their home country, where they might face a significant lack of access to essential services, it could be contended that such a situation presents a genuine risk of irreparable harm. The denial of education, especially if it results in a lack of access to fundamental necessities and future opportunities, could also be perceived as a form of inhuman treatment.

While the *CRC* does not contain any specific provisions on the deportation of immigrants or undocumented immigrants, General Comment 6 addresses this topic. The ComRC stresses that children should not be deprived of their liberty and that detention cannot be justified solely on the basis of the child being unaccompanied or separated, their migratory or residence status, or lack thereof.⁴⁷¹ ComRC also emphasises that States Parties should not return a child to a country "where there are substantial grounds for believing that there is a real risk of irreparable harm to the child."⁴⁷² It further points out that non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-state actors, whether such violations are directly intended, or are the indirect

⁴⁶⁹ UN Human Rights Committee "General Comment No. 31" para 12.

⁴⁷⁰ UN Human Rights Committee "CCPR General Comment No. 15: The Position of Aliens Under the Covenant" para 5 and 7.

⁴⁷¹ ComRC "General Comment No. 6" para 61.

⁴⁷² ComRC "General Comment No. 6" para 27; Article 6 of the *CRC* protects the right to life and Article 37 of the *CRC* deals mainly with the prohibition of torture and other cruel, inhuman or degrading treatment and the right to liberty and security of the person.

consequence of action or inaction.⁴⁷³ The assessment of the risk of such serious violations should be conducted in an age- and gender-sensitive manner and should, for example, consider the particularly serious consequences of the insufficient provision of food or health services for children.⁴⁷⁴

Of importance, the ComRC states that illegal entry into or stay in a country by an unaccompanied or separated child may also be justified according to general principles of law, where such entry or stay is the only way to prevent violation of the fundamental human rights of the child.⁴⁷⁵ Generally, in developing policies on unaccompanied or separated children, including those who are victims of trafficking and exploitation, states should ensure that such children are not criminalised solely for reasons of illegal entry or presence in the country.⁴⁷⁶ The ComRC also stressed that under exceptional circumstances of detention, the conditions must prioritise the best interests of the child.⁴⁷⁷ In such instances, children have the right to education, ideally conducted outside the detention premises, to enable their continued learning upon release.

Article 37 (b) of the *CRC* provides that detention should be used on a child only as a measure of last resort.⁴⁷⁸ Offences concerning irregular entry or stay cannot be regarded as having the same implications as other crimes in the context of juvenile criminal justice. Hence, detaining a child due to an undocumented status is not acceptable in immigration proceedings, as it conflicts with the principle of the best interests of the child and the right to education.⁴⁷⁹ The Joint General Committee on the Protection of the Rights of All Migrant Workers and ComRC on the State Obligation

⁴⁷³ ComRC "General Comment No. 6" para 27.

⁴⁷⁴ ComRC "General Comment No. 6" para 27.

⁴⁷⁵ ComRC "General Comment No. 6" para 62.

⁴⁷⁶ ComRC "General Comment No. 6" para 62.

⁴⁷⁷ ComRC "General Comment No. 6" para 63.

⁴⁷⁸ Art 37(b) of the of the *CRC*,

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

⁴⁷⁹ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 9.

Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination, and Return⁴⁸⁰ states that children and families in the context of international migration should not be subjected to arbitrary or unlawful interference with their privacy and family life.⁴⁸¹ Separating a family by deporting or removing a family member from a State Party's territory or otherwise refusing to allow a family member to enter or remain in the territory may amount to arbitrary or unlawful interference with family life.⁴⁸²

The Committees are of the view that the rupture of the family unit by the expulsion of one or both parents based on a breach of immigration laws related to entry or stay is disproportionate, as the sacrifice inherent in the restriction of family life and the impact on the life and development of the child are not outweighed by the advantages obtained by forcing the parent to leave the territory because of an immigration-related offence.⁴⁸³ Therefore, in sum, where parents' deportation is based on criminal offences, their children's rights, including the right to have their best interests, be a primary consideration and their right to be heard and have their views taken seriously should be ensured, also taking into account the principle of proportionality and other human rights principles and standards.⁴⁸⁴

The White Paper for Social Welfare posits that,

Because children are vulnerable, they need to grow up in a nurturing and secure family that can ensure their survival, development, protection and participation in family and social life. Not only do families give their members a sense of belonging, they are also responsible for imparting values and life skills. Families create security; they set limits on behaviour; and together with the spiritual foundation they provide, instil notions of discipline. All

⁴⁸⁰ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 27.

⁴⁸¹ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 28.

⁴⁸² Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 28.

⁴⁸³ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 29.

⁴⁸⁴ Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 29.

these factors are essential for the healthy development of the family and of any society.⁴⁸⁵

The Committee on the Elimination of Racial Discrimination, the independent expert body supervising implementation (CERD) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, ratified by South Africa on December 15, 1995,⁴⁸⁶ in its General Recommendation on discrimination against non-citizens, recommended that national laws on expulsion should not discriminate between purpose and effect among foreigners on the basis of race, colour, or ethnic or national origin and that foreigners should have equal access to the right to challenge expulsion orders.⁴⁸⁷ It reiterates that foreigners should not be returned to a country where they are at risk of serious human rights abuse.⁴⁸⁸ Finally, it recommended that States Parties avoid expulsions of foreigners, especially long-term residents, which would result in disproportionate interference with the right to family life.⁴⁸⁹

The crux of this to undocumented immigrant children is that deporting a parent can significantly disturb a child's education, causing emotional turmoil, instability, and potential interruptions to their learning journey.⁴⁹⁰ The removal of a parent due to deportation can result in a child being uprooted from their established educational environment, impeding access to basic education.⁴⁹¹ After a parent's deportation, some children often need to take on jobs to help support the family, which impacts school performance, persistence, and retention.⁴⁹² In this case, authorities should weigh the impact of deportation on a child's education against the perceived benefits of deporting the parent. If the disruption to a child's education and overall well-being outweighs the reasons for deportation, the state should explore alternative solutions

⁴⁸⁵ Chapter 8 section 1 para 15 of the White Paper for Social Welfare: Principles, Guidelines, Recommendations, Proposed Policies and Programmes for Developmental Social Welfare in South Africa (1997).

⁴⁸⁶ *International Convention on the Elimination of All Forms of Racial Discrimination* (1969).

⁴⁸⁷ CERD "Discrimination General Recommendation 30: Discrimination Against Non-citizens" para 25.

⁴⁸⁸ CERD "Discrimination General Recommendation 30: Discrimination Against Non-citizens" para 27.

⁴⁸⁹ CERD "Discrimination General Recommendation 30: Discrimination Against Non-citizens" para 28.

⁴⁹⁰ Langout *et al* 2018 *American Journal of Community Psychology* 5.

⁴⁹¹ Langout *et al* 2018 *American Journal of Community Psychology* 5.

⁴⁹² Langout *et al* 2018 *American Journal of Community Psychology* 5.

that maintain the family unit and support the child's education. CERD, on the other hand, advises on the rights of non-citizens, including undocumented immigrants, to challenge deportation orders, which means having access to legal remedies. Legal avenues can protect children from arbitrary deportations that might disrupt their education, ensuring that their right to learn is upheld.⁴⁹³ South Africa, as a party to these international instruments, is obligated to adhere to these principles.

5.1.6.2 Detention and deportation process as guided by the South African law

The prescribed procedure for detaining or deporting a child involves the children's court, which is responsible for determining suitable placements, such as foster care, children's homes, or schools of industries.⁴⁹⁴ The court protects the rights of foreign children, especially in relation to the departure and removal of children from the country.⁴⁹⁵ The children's court is mandated to oversee the deportation of children and must prioritise the rights and needs of child deportees, adhering to the principle of "the best interest of the child."⁴⁹⁶

As mentioned in the previous section,⁴⁹⁷ the Department of Social Development outlines specific procedures for unaccompanied or separated children. These include identifying the child, conducting assessments, and providing necessary documentation.⁴⁹⁸ The child is then placed in temporary safe care, and efforts are made to trace their families. For undocumented immigrant children, significant emphasis is placed on ensuring access to education throughout these processes.⁴⁹⁹

⁴⁹³ Langout *et al* 2018 *American Journal of Community Psychology* 5.

⁴⁹⁴ As per the section 5(4)(b) of the *Child Justice Act* 75 of 2008.

⁴⁹⁵ Chapter 4 of the *Children's Act* pertaining to children's courts; Regulations Relating to Children's Courts and International Child Abduction in Terms of the Children's Act, 2006 GN R250 in GG 33067 of 01 April 2010 para 31 and 32.

⁴⁹⁶ National Child Care and Protection Policy para 4.7.1.3.1.

⁴⁹⁷ Para 5.1.1.2 above of this Chapter, for a discussion of the Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa (2009).

⁴⁹⁸ Para 5.1.1.2 of this Chapter.

⁴⁹⁹ Para 5.1.1.2 of this Chapter.

Once the family is traced, formal placement and various durable solutions are explored to secure a child's well-being and future.⁵⁰⁰ In *Plyler v Doe*, the court asserted that:

In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would, of course, be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.⁵⁰¹

The *Constitution* is a document of distinctive and supreme status.⁵⁰² Entrenching children's rights in the *Constitution* reflects the country's commitment to the protection and promotion of children's human rights. The *Constitution* clearly differentiates between the procedures for detaining a child and an adult, highlighting its sensitivity towards children's vulnerabilities. In line with the principle of the best interests of the child, the *Constitution* explicitly states that

Every child has the right-

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.⁵⁰³

In this sense, according to the *Constitution*, the police cannot arrest and detain children unless it is a measure of last resort. Another factor is that detention without due process is unlawful (in this circumstance, detention for the purposes of deportation without due process would be unlawful).

⁵⁰⁰ Para 5.1.1.2 of this Chapter.

⁵⁰¹ *Plyler v Doe* 457 US 202 (1982).

⁵⁰² *State v Acheson* 1991(2) SA 805, 813.

⁵⁰³ Section 28(g)(i-ii) and (h) of the *Constitution*.

The *Child Justice Act* establishes a legal framework for children in conflict with the law and facing accusations of offences. The *Act* outlines detailed provisions regarding the release, detention, and placement of children before sentencing.⁵⁰⁴ When deciding whether to detain a child, the preference is for the least restrictive option possible.⁵⁰⁵ Imprisonment is the most restrictive choice and should only be used as a last resort. The presiding officer must carefully consider various factors and all evidence presented before the court before deciding to detain a child.⁵⁰⁶ Additionally, the child must be brought before court every 14 days to reconsider the detention order.⁵⁰⁷ The *Act* further highlights that compulsory educational facilities should be provided.⁵⁰⁸

If detention is used arbitrarily or without clear justification, such as detaining children solely based on their immigration status without assessing individual circumstances or risks, this could reasonably be regarded as unlawful.⁵⁰⁹ Detention conditions, which are inhumane, often result in violation of basic human rights, such as educational rights. The detention of immigrant children should only occur after careful consideration of the child's best interests,⁵¹⁰ thorough risk assessment, exploration of alternatives, and adherence to human rights standards. Detaining children based solely on their immigration status, without considering the impact on family unity and education, cannot be considered a last resort. Moreover, detention facilities frequently lack adequate educational resources, such as textbooks, qualified teachers, and extracurricular programmes, which violate the child's right to a basic education.⁵¹¹

⁵⁰⁴ Objectives of the *Child Justice Act* 75 of 2008.

⁵⁰⁵ Section 26(1) of the *Child Justice Act*.

⁵⁰⁶ Only children 14 years and older may be detained in a prison, section 30(1) *Child Justice Act*.

⁵⁰⁷ Section 30(3) and (4) of the *Child Justice Act*.

⁵⁰⁸ Preamble and section 53(1)(a) and (3)(k) of the *Child Justice Act*.

⁵⁰⁹ Guideline 54 of the *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012).

⁵¹⁰ Guideline 51 and 54 of the *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012).

⁵¹¹ Equal Education Law Centre "Provision of Basic Education in Detention" 12-13.

The *Immigration Act* defines deportation as "the action or procedure aimed at causing an illegal foreigner to leave the Republic involuntarily."⁵¹² In sections 34(1) (a-e) and 34(3-4) the *Immigration Act* provides the following:

Without need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the Department determined by the Director-General, provided that the foreigner concerned.....(3) The Department may order a foreigner subject to deportation to deposit a sum sufficient to cover in whole or in part the expenses related to his or her deportation, detention, maintenance and custody and an officer may in the prescribed manner enforce payment of such deposit.⁵¹³

In 2017, the court in *Lawyers for Human Rights v Minister of Home Affairs* deemed section 34(1)(b) and (d) of the *Immigration Act* allowing the detention of suspected illegal foreigners without a warrant unconstitutional and inconsistent with sections 12(1) and 35(2)(d) of the *Constitution*, and the court instructed the Department of Home Affairs to rectify the said provision of the *Immigration Act*.⁵¹⁴ Upon such court instructions, the officials responsible for rectifying the provisions did not take any action. This led to a judgement in October 2023, where the Constitutional Court declared Minister of Home Affairs, Aaron Motsoaledi and Director-General, Tommy Makhode personally liable for not enacting corrective legislation on certain parts of the *Immigration Act*, thus section 34. The Constitutional Court mandated 10% and 25% personal cost orders against the said two officials.⁵¹⁵ The Parliament was therefore, granted a year to address the shortcomings in particular provisions of the *Immigration Act* regarding the period to which detainees can be confined for the sake of deportation.⁵¹⁶ Under normal circumstances, a detained person for the sake of

⁵¹² Section 1 (xiii) of the *Immigration Act*.

⁵¹³ Section 34(1)(a-e) and 34(3-4) of the *Immigration Act*.

⁵¹⁴ *Lawyers for Human Rights v Minister of Home Affairs* 2017 (5) SA 480 (CC).

⁵¹⁵ *Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT 38/16) [2023] ZACC 34 (30 October 2023) paras 112 and 114 (hereafter *Ex parte Minister of Home Affairs*)

⁵¹⁶ *Ex parte Minister of Home Affairs* para 118 (1).

deportation must be brought before a court within 48 hours of his or her detention in order for the court to confirm the detention, failing which the foreigner shall immediately be released.⁵¹⁷ Contrary to that, in this case, they were detained for 30 days. Justice Theron stated that personal cost orders against public officials who neglect their constitutional duties serve to uphold the *Constitution* and hold officials accountable for failing to fulfil their departmental objectives.⁵¹⁸ This includes addressing the actions and failures of their officials as they are responsible for the executive powers and functions delegated to them.

Contrary to the *Constitution*, the *Immigration Act* fails to distinguish between procedures for deporting a child and an adult. This oversight is concerning, as it disregards the vulnerability of children and further shows a gap in the formulation of the legislation. The provision of the *Immigration Act*, as envisaged above, permits immigration officers to arrest and deport illegal foreigners without a warrant; they can detain them until deportation and an additional fee is required from them. Allowing immigration officers to arrest and detain individuals, including children, without a warrant raises concerns about arbitrary detention and potential violations of due process rights, and it is unconstitutional.⁵¹⁹ This practice can lead to wrongful detention, denying children the opportunity to even challenge their detention legally. This can also result in prolonged periods of confinement, negatively impacting the continuation of children's education. Moreover, requiring a deportation deposit can strain families financially; they end up diverting funds that could otherwise support a child's education.

⁵¹⁷ *Ex parte Minister of Home Affairs* para 1(b) and section 34(1) of the *Immigration Act*.

⁵¹⁸ *Ex parte Minister of Home Affairs* para 94.

⁵¹⁹ Khan 2022 *African Human Mobility Review* 135.

5.1.6.3 Judicial approach

5.1.6.3.1 Raduvha v Minister of Safety and Security 2016 (2) SACR 540 (CC) 24

At this point, it is important to highlight what could qualify as a measure of a last resort and when detention is regarded not as a last resort. Detention should only be considered when there is genuine and justifiable concern regarding the child's safety, security, or potential risk to others. The Constitutional Court addressed the case of *Raduvha v Minister of Safety and Security*,⁵²⁰ which involved the alleged wrongful arrest and unlawful detention of a fifteen-year-old girl by police. This was the first case in which the court had to deal directly with facts involving child arrest against the backdrop of section 28(2) of the *Constitution*.⁵²¹ Recognising the inherent vulnerability of children and the negative impact of arrest on them, the court adopted a progressive interpretation of the constitutional duty of the police, as outlined in section 28(2), when dealing with child arrests.⁵²² The court clarified that the best interests of the child principle do not necessarily prevent children from being arrested or detained (in this study this also includes "deportation") but establish normative standards for the officials involved in the arrest process.⁵²³ Regarding the deportation of a child based on documentation status, the authorities involved must have a child-sensitive criminal justice system that treats children as children, cognisant of their inherent vulnerabilities and frailties, without permitting the hand of the law to fall disproportionately hard on them.

⁵²⁰ *Raduvha v Minister of Safety and Security* 2016 (2) SACR 540 (CC) 24.

⁵²¹ *Raduvha v Minister of Safety and Security* para 32.

⁵²² *Raduvha v Minister of Safety and Security* para 57.

⁵²³ *Raduvha v Minister of Safety and Security* para 57-58.

5.1.6.3.2 Centre for Child Law v Minister for Justice and Constitutional Development^{2009 (6) SA 632 (CC)}

In *Centre for Child Law v Minister for Justice and Constitutional Development*,⁵²⁴ the Centre for Child Law contested the constitutionality of a law that imposed discretionary minimum sentences on minors.⁵²⁵ The majority judgement highlighted that "last resort" means "last resort", not first or intermediate resort, and "shortest appropriate period of time" means that imprisonment should only be considered when it is the only suitable solution.⁵²⁶ The court stressed that the minimum sentencing law was unconstitutional for children because it (1) directed courts away from alternatives to imprisonment right from the start of the sentencing process; (2) depersonalised sentencing by specifying a predetermined period for incarceration; and (3) led to lengthier and more severe sentences by limiting judges' discretion.⁵²⁷ Authorities (such as the police) must explore and exhaust all available alternatives before resorting to detaining or deporting a child based on documentation status. These alternatives could include supervised release, community-based housing, or placement with a guardian or family member who can ensure the child's well-being and appearance during immigration proceedings.⁵²⁸

The *Centre for Child Law v Minister of Home Affairs*, discussed earlier,⁵²⁹ illustrated how deportation processes often infringe on immigrant children's rights. An extensive discussion of this case is not provided here, as has already been done. In this case, the deportation of foreign children violated sections 28(2), 28(1)(c), 28(1)(g), 33(1), and 34 of the *Constitution*.⁵³⁰ As mentioned earlier, the rights in the Bill of Rights are intertwined. Violation of a certain right automatically violates other rights. The

⁵²⁴ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (6) SA 632 (CC) paras 87–90.

⁵²⁵ *Centre for Child Law v Minister for Justice and Constitutional Development* paras 9, 22–27.

⁵²⁶ *Centre for Child Law v Minister for Justice and Constitutional Development* paras 31–32.

⁵²⁷ *Centre for Child Law v Minister for Justice and Constitutional Development* para 45.

⁵²⁸ UNHCR "Beyond Detention: A Global Strategy to Support Government to End the Detention of Asylum-seekers and Refugees" 15.

⁵²⁹ As discussed above on para 5.1.1.3.1 of this Chapter.

⁵³⁰ *Centre for Child Law v Minister of Home Affairs* para 10 and 49.

deportation of undocumented immigrant children not only disturbs their current living arrangements but also denies them the chance to obtain fundamental education, affecting their future well-being and growth. Deportation of a child who is in the country without proper documentation or authorisation can be seen as a way of enforcing immigration laws and maintaining the integrity of the immigration system and serves as a deterrent to irregular migration, sending a message that enters or stays in the country without proper documentation is not permissible.⁵³¹ However, the question remains whether illegal immigration has stopped.

5.1.6.4 Analysis and conclusion

Concerning the detention and deportation of immigrant children, international law offers extensive guidance through its instruments. Committees associated with these instruments have also issued numerous recommendations to South Africa regarding the deportation and detention of children.⁵³² This implies that illegal immigrants should be provided with equal access to legal procedures. They further advise that States Parties should not consider the status of being undocumented as a criminal offence. The section above highlighted the challenges that children may encounter when deporting their families, including educational disruptions.⁵³³ The *Constitution* has incorporated some of the principles set by international law and provides that detention should only be used as a measure of last resort and that all children should have legal practitioners assigned to them by the state and at state expense.⁵³⁴ This literally means that, even in the deportation process, a legal representative should be assigned to a child. In reality, undocumented immigrant children are entitled to appear before the children's court to determine their status, have their views heard, and be granted a safe place to stay.⁵³⁵

⁵³¹ Sampson 2015 *International Detention Coalition* 3-4.

⁵³² Such as the ComRC "General Comment No. 6"; ACERWC "General Comment No. 2" and UN Human Rights Committee "General Comment No. 31."

⁵³³ A case of *Francesco Madafferri v. Australia* as explained.

⁵³⁴ Section 28(1)(h) of the *Constitution*.

⁵³⁵ ComRC "General Comment No. 6" para 21, 25.

The greatest failure in South African law is with respect to not giving due consideration to the basic education of undocumented foreign migrant children during the deportation or detention process.⁵³⁶ At this point, this study raises concerns regarding the lack of protection for the vulnerability of immigrant children in the *Immigration Act*. The *Immigration Act* lacks differentiation in procedures for deporting children and adults, which contradicts international legal standards. This oversight allows immigration officers to arrest and deport undocumented children without warrants. This situation raises serious concerns regarding human rights and child protection. The emphasis on the absence of this provision, despite its inclusion in the *Constitution*, stems from the fact that the *Immigration Act* is designed specifically to protect the rights of immigrants, yet it does not protect children in an age-appropriate manner. The *Immigration Act* must be amended to incorporate specific provisions addressing the deportation and detention of immigrant children, ensuring that their rights (to education) and well-being are protected. Temporary educational solutions, such as catch-up classes or online learning programmes, should be provided to these children until the procedures are completed, ensuring continuous education.⁵³⁷ Training across all departments, including Home Affairs, police, social workers, courts, and legal representatives, needs to be prioritised to ensure that undocumented immigrant children are not unnecessarily deported or detained.

5.2 Conclusion

This Chapter has demonstrated South Africa's response to the obligation to respect, protect, and promote the rights "to, in, and through" basic education. It highlighted that basic education is not a stand-alone right and that the enjoyment of the right to a basic education stem from the fulfilment of other rights. As required by international law, South Africa has incorporated provisions that promote these rights, and courts have made judiciary decisions pertaining to the promotion of each of the rights stated.

⁵³⁶ The *Immigration Act* does not even consider the vulnerability of children during deportation.

⁵³⁷ Guideline 56 of the Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012).

The importance of the specific rights discussed in this Chapter is that they help realise the basic education of undocumented immigrant learners. Undocumented aliens cannot be treated as a suspect class because their presence in the state violates the law.⁵³⁸ The denial of education imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy marks them for the remainder of their lives. By first not realising their legal position, not prioritising their best interests, denying them the right to a name and nationality, disregarding their language preferences, imposing fees on them, and detaining and deporting these children, we deny them the ability to live within the structure of our civic institutions and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of the nation. Given the discussion of the rights "to, in and through" education tasked with the respect, protection, promotion and fulfilment of these rights, the following Chapter examines the practical challenges facing these children from exercising the right to a basic education with a view to identifying statutory, policy and institutional shortcomings that can be addressed to enhance the enjoyment of the right by undocumented immigrant children.

⁵³⁸ *Plyler v Doe* 457 US 202 (1982).

Chapter 6 Assessing Compliance of Implementation in Practice in the Light of International Law

6.1 Introduction

The previous chapters have examined the legal framework and policies governing the right to a basic education. The preceding discussion establishes that the South African government is responsible for its citizens and immigrants, including undocumented immigrant children. In line with this duty, South Africa has committed to making access to basic education a reality for immigrant children by signing, ratifying, and domesticating instruments that protect their right to a basic education. The relevant international instruments aim to respect, protect, promote, and fulfil the right to a basic education for everyone. However, there is a lingering challenge to the clarification, adaptability, and implementation of the right to a basic education for undocumented immigrant children.

This chapter scrutinises formal adherence, evaluations by human rights entities, and the tangible realisation of the right to a basic education in practical terms. Additionally, it delves into indicators of State Party transgressions and delineates factors contributing to the State's failure to meet its obligations. The chapter further outlines specific violations, particularly addressing the practical challenges encountered by undocumented immigrant children within the realm of education. The principal aim of this chapter is to underscore a substantial disparity between legal assurances and actualities, thereby demonstrating that the experiences of undocumented immigrant children deviate from international law standards advocating for the protection, promotion, respect, and fulfilment of basic education to all children. This chapter will address the contention that the non-fulfilment of the right to basic education primarily stems from conflicting legislation enacted by South Africa, either limiting or outright denying access to basic education for undocumented immigrants.

6.2 Implementation: the gap between promise and reality

Although international law and South African law set standards for the realisation of the right to a basic education for all children, irrespective of their immigration status, practice shows that access to education is determined by one's documentation and immigration status in South Africa.¹ Hence, there is a huge gap between promises in law and reality.² This is not peculiar to South Africa, as observed by Tomaševski, who points out the huge gap between the nominal international human rights norms of ensuring the right to education for all children and the reality on the ground.³ To align the stipulations of international law with realities on the ground, Mayer *et al.* posited that government officials need to be educated about the laws and policies regarding immigrants, and the need to ensure that they are enforced correctly and justifiably needs to be impressed upon them.⁴ States have a duty to ensure that the conditions for the admission of learners to school accommodate everyone. Undocumented immigrant children are also legitimate claimants for all rights of children. Hence, there is a need to formulate basic education in law in ways that do not discriminate based on nationality or immigration status.

The foregoing discussion shows that the protection of a person's rights is determined by their legal status, as is the case with children.⁵ Although the law states that the immigration status of a person is irrelevant to their entitlement to human rights,⁶ in practice, undocumented immigrants are barely recognised.⁷ As will be shown in this

¹ Blessed-Sayah and Griffith 2023 *South Africa Educational Review* 1; Chiguvare 2023 <https://www.groundup.org.za/article/undocumented-mothers-struggle-to-register-their-children/>.

² Tomaševski *Right to Education Primers* 28.

³ Tomaševski *Right to Education Primers* 28.

⁴ Mayer *et al.* "Protecting the Most Vulnerable" 186.

⁵ Ngwato and Jinnah "Migration and Mobilisation around Socio-Economic Rights" 393.

⁶ Principle 5 of the Recommended Principles and Guidelines on Human Rights at International Border (2014).

⁷ Blessed-Sayah and Griffith 2023 *South Africa Educational Review* 1.

chapter, the acceptance of undocumented immigrant children and the protection of their legal rights remains a dream in South Africa due to the refusal of the state to assume effective responsibility for these children in practice. Some service providers lack knowledge of the law, while others are ignorant of it.

Mechanisms and implementation strategies provide a better overview of the gap between the stipulations of international law in theory and the practical realities of people who bear the rights in question.⁸ Mazmanian and Sabatier postulated that implementation refers to processes and all activities for administering laws and ensuring that relevant directives are carried out in accordance with the law.⁹ When implementing the right to a basic education, states must ensure effective and transparent monitoring and accountability.¹⁰ This process involves converting the theoretical content of the right to a basic education into practical realities through enforceable laws, norms, standards, targets, and so on.¹¹ Implementation is not only about the promulgation of laws but also extends to procedures used by national governments to put international commitments into practice.¹² Since discrimination is prohibited in theory, the state must ensure that there are no discriminatory practices in schools, and where such practices come to light, they should be addressed. Therefore, implementation strategies must protect undocumented immigrant children's right to a basic education. The state must also move expeditiously towards full implementation and fully use its available resources to achieve this goal.¹³ Failure to meet international obligations can be categorised as one of several indicators of violations of rights, which will now be explored.

⁸ Taiwo and Govindjee 2012 *Obiter* 100.

⁹ Taiwo and Govindjee 2012 *Obiter* 100.

¹⁰ Taiwo and Govindjee 2012 *Obiter* 100.

¹¹ Taiwo and Govindjee 2012 *Obiter* 100.

¹² Taiwo and Govindjee 2012 *Obiter* 100.

¹³ Taiwo and Govindjee 2012 *Obiter* 100.

6.3 Indicators of violations

The main issue concerning implementation is determining the extent to which a state implements its obligations under international law. In the context of the right to a basic education, as is the case with all other rights, it is necessary to identify indicators of violations. The CESCR identifies illustrative acts that constitute violations.¹⁴ The following descriptors are used to identify a violation by a State Party, essentially relying on the Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights and the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, which were drafted by independent international law experts on economic, social, and cultural rights. The indicators include:

- (1) Failure by the State Party to respect and protect the right and remove obstacles to its immediate fulfilment.¹⁵ For example, a state fails if it does not rectify a law that hinders access to basic education.
- (2) Failure to put policies and practices in place that discourage discrimination against certain groups or individuals on impermissible grounds.¹⁶ For example, a State Party fails in this regard if it does not adopt express measures that prohibit or prevent relevant authorities from denying undocumented children access to schools on the basis that they lack documentation or migration status.
- (3) Failure by a state to immediately deliver a minimum core obligation;¹⁷ for instance, failing to prioritise the provision of free and compulsory basic education.
- (4) Failure by a state to take prompt, concrete, and targeted steps towards the full realisation of a right.¹⁸ For example, failing to adopt a specific plan for basic

¹⁴ CESCR "General Comment No. 13" para 58.

¹⁵ Maastricht Guidelines para 15 (h).

¹⁶ Maastricht Guidelines para 15 (b).

¹⁷ Maastricht Guidelines para 15(i).

¹⁸ Maastricht Guidelines para 15(e).

education to be made available to undocumented immigrant children, mentioning immediate and mid-term goals, clear targets, and implementation dates.

(5) Placing limitations on the exercise of the right when such limitations are not recognised in international law.¹⁹ For example, admission will only be granted on the condition that the parents of the learner attach a valid visa.

(6) Depriving a certain group of rights or impeding the realisation of a right as required by international law. Such deprivation often results in violation of economic, social, and cultural rights.²⁰ For instance, restricting access to social grants to citizens and permanent resident children and denying undocumented children and other non-citizens, the same rights in schools as are granted to citizens.

Koh *et al*/stated that when determining the type of indicator for a violation implicated, one must ascertain the legal framework governing the realisation of a right within the state, the processes implemented by the state to achieve the realisation of that right, and the actual implementation and impact of the right on the ground.²¹ When these basics are determined, one can gauge whether the state has violated its obligations under international law. These human rights indicators are used to assess the intensity of the violation of international laws by States Parties.²² Indicators are data or details pertaining to the status or situation of an object, event, activity, or outcome.²³ Human rights indicators are relevant to human rights norms and standards and encompass

¹⁹ Maastricht Guidelines para 15(j); Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural *Rights* (in 1987 HRQ 9, 122-135) para 15(j) (hereafter Limburg Principles).

²⁰ Limburg Principles para 15(h).

²¹ Kalantray, Getgen and Koh 2010 *Cornell Law Review* 253.

²² Kalantray, Getgen and Koh 2010 *Cornell Law Review* 253.

²³ International Human Rights Instruments "Report on Indicators for Monitoring Compliance with International Human Rights Instruments" para 7; *Human Rights Indicators: A Guide to Measurement and Implementation* 2012 [UN Doc HR/PUB/12/5 (hereafter OHCHR "Human Rights Indicators") 16.

human rights principles and considerations. These are tools for evaluating and overseeing the advancement and application of human rights.²⁴

Human rights indicators are based on human rights standards and socio-economic data.²⁵ Factors for consideration when identifying human rights indicators include the content of the right (as provided by the instrument and the General Comments issued in terms of that instrument),²⁶ the efforts of the concerned State Party to meet its obligations,²⁷ and whether the State Party's national laws include basic norms such as non-discrimination, equality, transparency, participation, and accountability.²⁸

The discussion below has recourse to indicators identified in the normative content of human rights that could assist in determining whether there is a violation of international law.²⁹ In this regard, national legislation and policies should reflect the obligation to respect, protect, and fulfil human rights (the right to a basic education in this case).³⁰ Through the lens of this discussion, one can ascertain whether the state is fulfilling its obligation with regard to the right to a basic education for undocumented immigrant children. The key objective for choosing these forms is to reflect on and assess the steps taken by South Africa to meet its obligations to fulfil the rights of undocumented immigrant children to basic education.

6.3.1 Formal compliance

At issue here are the formal steps taken by a State Party following the ratification of treaties. These steps illustrate the State Party's acceptance of international human rights obligations and its commitment to fulfilling them.³¹ The content of national laws

²⁴ International Human Rights Committee "Report on Indicators for Monitoring Compliance with International Human Rights Instruments" para 7; OHCHR "Human Rights Indicators" 16.

²⁵ OHCHR "Human Rights Indicators" 2.

²⁶ OHCHR "Human Rights Indicators" 5; Amnesty International *Human Rights for Human Dignity* 80.

²⁷ Amnesty International *Human Rights for Human Dignity* 80; OHCHR "Human Rights Indicators" 5.

²⁸ Amnesty International *Human Rights for Human Dignity* 80; OHCHR "Human Rights Indicators" 5.

²⁹ International Human Rights Instruments "Report on Indicators for Monitoring Compliance with International Human Rights Instruments" para 13.

³⁰ International Human Rights Instruments "Report on Indicators for Monitoring Compliance with International Human Rights Instruments" para 13.

³¹ Amnesty International *Human Rights for Human Dignity* 82.

with regard to the protection of a right in the *Constitution*, legislation, and policies forms part of formal compliance.³² The adoption of legislation that provides compulsory basic education for everyone, regardless of migration status, is an example. The Maastricht Guidelines state that if a state adopts legislation that violates international law, enacts legislation that is inconsistent with it and fails to amend or repeal existing laws that are inconsistent with international law, it would have failed to comply with international obligations.³³ South Africa adopted the *Immigration Act*, whose sections 39 and 42 restrict illegal immigrants access to a basic education.³⁴ The Admission Policy restricts access to and enjoyment of education for undocumented immigrant children.³⁵ The Proposed Amended Admission Policy and the *BELA Bill* contain certain provisions that are in conflict with and add more difficulties to respecting undocumented immigrants' rights. For instance, one requires passports and parents' visas to be attached to an application for admission.³⁶ The Proposed Amended Admission Policy requires further revision as it contains discriminatory discrepancies. This has been critically discussed earlier.³⁷ In addition, the *BELA Bill* includes unnecessary document requirements that are deemed irrational, as previously discussed.³⁸ Therefore, the irregularities imposed by the legislation deprive these children of the right to a basic education, regardless of its protection in the *Constitution* and its affirmation in *Centre for Child Law & 37 Children*. One could argue that despite ongoing amendments, existing legislation and policies continue to violate the rights of undocumented immigrants. The study is adamant that the *Immigration Act* requires specific amendments to address the situation of undocumented immigrant children, particularly in recognising their heightened vulnerability compared to adults. Currently, the *Immigration Act* provides general protection for all immigrants without specifying measures to protect children. For example, it does not differentiate between adults and children in deportation procedures or address the educational needs of children during the deportation process. While the *Children's Act* and *Constitution* protect the

³² Amnesty International *Human Rights for Human Dignity* 82.

³³ Maastricht Guidelines para 15 (b).

³⁴ Sections 39 and 42 of the *Immigration Act*. As discussed on para 3.2.5 of the thesis Chapter 3.

³⁵ See full discussion in Chapter 3 para 3.2.5 of the thesis.

³⁶ Section 1 (m)(b) (iv-v) and 1 (m)(c)(i) of the *BELA Bill*.

³⁷ See full discussion in Chapter 3 para 3.2.10 of the thesis.

³⁸ See full discussion in the list in Chapter 3 para 3.2.11 of the thesis.

rights of all children, it is important to acknowledge that the *Immigration Act* is a piece of legislation specifically intended to safeguard and address the rights of immigrants. Therefore, it is crucial that the *Immigration Act* also addresses and provides protection for the specific rights of immigrant children. While the state has an immediate obligation to provide access to basic education to everyone, including undocumented immigrant children,³⁹ the current legislation in South Africa and its proposed amendments conflict which may end up infringing on the immediate realisation of this right for undocumented immigrant children.

6.3.2 Assessments by international human rights bodies

The UN Special Rapporteur on the Right to Education noted that there is generally an incomplete realisation of the right to education for migrants, refugees, asylum seekers, and their children worldwide.⁴⁰ In its Concluding Observations on South Africa, the ComRC addressed the issue of migrant children and expressed concern about the increasing numbers of unaccompanied and undocumented migrants in South Africa and the risk of destitution and abuse faced by these children.⁴¹ They noted that there is a lack of accurate and disaggregated data on unaccompanied and undocumented immigrant children and that this is a result of the ineffective implementation of relevant laws and policies.⁴² This could indicate a failure by the state to take prompt, concrete, and targeted steps towards the full realisation of a right.⁴³

The ACERWC said that South Africa should withdraw its reservations made with respect to articles 13(2)(a) and 14 of the *ICESCR*, which means that the government will realise the right to education only progressively, within available resources, contrary to the clear immediacy requirements of international law as a prescribed

³⁹ Article 13(2) of the *ICESCR* and CESCR "General Comment No. 13" para 48.

⁴⁰ Human Rights Council *The Right to Education of Migrants, Refugees and Asylum Seekers* 16 April 2010 [UN Doc A/HRC/14/25] para 29.

⁴¹ *Concluding Observations on the Second Periodic Report of South Africa* [UN Doc CRC/C/ZAF/CO/2] (2016) para 61 (hereafter ComRC "Concluding Observations on the Second Periodic Report of South Africa")

⁴² ComRC "Concluding Observations on the Second Periodic Report of South Africa" para 61.

⁴³ Maastricht Guidelines para 15(e).

minimum core of the right to primary/secondary (basic) education.⁴⁴ The Committee emphasises that the state should ensure that basic education is immediately available and accessible to all children.⁴⁵ The Committee further pointed out that migrant children are barred from accessing schools and denied admission to schools each year because of their immigration status.⁴⁶ It advised the state to take necessary measures to ensure that undocumented immigrants could access basic education without the requirement to produce documents.⁴⁷ The Committee also complained about the lack of a dedicated mechanism for regularising the status of undocumented immigrant children of foreign origin.⁴⁸ In September 2023, the ACERWC also noted with concern the government's failure to offer services to refugees, asylum seekers, and migrants, including unaccompanied minors.⁴⁹ For instance, the failure of the state to even implement the ACERWC's previous comments, such as the Face-to-Face Project, which was launched to provide services to these vulnerable groups, was never initiated.⁵⁰ Amendment of section 32 of the Refugees Act ensures that social workers are assigned to assist unaccompanied children was never done.⁵¹ These are some indicators that highlight the failure of states to implement their obligations as required by international law.

CERD, the expert body supervising the implementation of the *UN Convention on the Elimination of All Forms of Racial Discrimination*, reported that there are still disparities in access to quality education and educational resources among ethnic groups and that apartheid inequalities have not been resolved.⁵² The Committee further noted

⁴⁴ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 6

⁴⁵ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 6.

⁴⁶ ACERWC "Concluding Observations and Recommendations: First Periodic Report " para 9; and see also ACERWC "Concluding Observations and Recommendations: Second Periodic Report" para 13.

⁴⁷ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 9.

⁴⁸ ACERWC "Concluding Observations and Recommendations: First Periodic Report" para 38.

⁴⁹ ACERWC "Concluding Observations and Recommendations: Second Periodic Report" para 45.

⁵⁰ ACERWC "Concluding Observations and Recommendations: Second Periodic Report" para 45.

⁵¹ ACERWC "Concluding Observations and Recommendations: Second Periodic Report" para 45(d).

⁵² *Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa* [UN Doc CERD/C/ZAF/CO/4-8 (2016)] para 18 (hereafter CERD "Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa")

that non-citizens face difficulties in accessing basic services⁵³ and that discrimination, prejudice against foreigners, and racism against non-citizens have affected most foreigners, leading to deaths and injuries.⁵⁴ The practical experiences of undocumented immigrant children in South Africa prove that more effort is required to address these concerns and remove barriers preventing undocumented immigrant children from accessing basic education. Physical violence must also be addressed to ensure that schools are safe.⁵⁵ The study expressed worry over the government's lack of a concrete plan to safeguard undocumented immigrant children. There are no immediate or mid-term goals, clear targets, or implementation deadlines to fulfil their rights.

6.3.3 Outcomes and actual enjoyment in practice

This section looks at the outcomes and contains a discussion of the lived reality and experiences of right-holders,⁵⁶ as measured against "educational attainments, such as youth and adult literacy rates by targeted population group."⁵⁷ The state has set certain goals to look at learning outcomes, which include, among other things, that the physical infrastructure and environment of every school should motivate students to attend and engage in learning.⁵⁸ This means that no learner wants to come to a school where they face xenophobic attacks. Goal 25 seeks to enhance the implementation of an inclusive education policy in schools and provide access to centres that offer specialist services.⁵⁹ This could be interpreted as schools that cater to the special needs of immigrant children and are culturally inclusive. For the specific purposes of this thesis, the outcomes relate to the degree to which undocumented

⁵³ CERD "Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa" para 26.

⁵⁴ CERD "Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa" para 26.

⁵⁵ National Public Radio 2022 <https://www.npr.org/2022/06/07/1103445432/operation-dudula-movement-highlights-xenophobia-in-south-africa>.

⁵⁶ Amnesty International *Human Rights for Human Dignity* 82.

⁵⁷ Amnesty International *Human Rights for Human Dignity* 82.

⁵⁸ Goal 24 of the Action Plan to 2024: Towards the Realisation of Schooling 2030 (2020).

⁵⁹ Goal 25 of the Action Plan to 2024: Towards the Realisation of Schooling 2030 (2020).

immigrant children access basic education, as seen by the number of such children in schools. The ascertainment of whether the state violates its obligations must first discern the type of state obligation involved.⁶⁰ It is necessary to determine whether it is an immediately realisable obligation, potentially even a minimum core obligation, or a progressively realisable obligation.⁶¹ The Limburg Principles state that a State Party can be considered in breach of the Covenant if it fails to promptly implement a right that it is obligated to provide without delay according to the Covenant, among other violations.⁶²

Similarly, the Maastricht Guidelines stipulate that a violation occurs when a state fails to remove obstacles that hinder the immediate fulfilment of a right⁶³ and when it fails to implement a right immediately when doing so is required by the Covenant.⁶⁴ The right to a basic education constitutes the minimum core obligation in international law.⁶⁵ The minimum content of a right refers to its essence, i.e. "that essential element without which a right loses its substantive significance as a human right."⁶⁶ A State Party must urgently fulfil the essential elements of the right.⁶⁷ Omissions and negligence that impact the minimum core obligation of a right result in violation of the state's obligations.⁶⁸ The right to a basic education imposes an immediate obligation on the state to realise it as a point of departure, regardless of the availability of resources.⁶⁹ Therefore, no one should be deprived of basic education. If this happens, it means that the state has failed to fulfil its obligations. Outcome indicators would, therefore, have to reflect that all undocumented immigrant children have access to basic education (attend schools) and substantively enjoy education rights in schools on par with citizens. The human rights bodies mentioned above prove that there are no disaggregated data on the education of undocumented immigrant children.⁷⁰ This

⁶⁰ Kalantry, Getgen and Koh 2010 *Cornell Law Review* 293.

⁶¹ Kalantry, Getgen and Koh 2010 *Cornell Law Review* 293.

⁶² Limburg Principles para 72; Maastricht Guidelines para 15.

⁶³ Maastricht Guidelines para 15 (h).

⁶⁴ Maastricht Guidelines para 15 (g).

⁶⁵ Arendse 2011 *PELJ* 109; See also, CESCR "General Comment No. 13."

⁶⁶ Coomans "The Right to Complain about Economic, Social and Cultural Rights" 7.

⁶⁷ Arendse 2011 *PELJ* 109.

⁶⁸ Arendse 2011 *PELJ* 109.

⁶⁹ Veriava "Realising the Right to Basic Education in South Africa" 98.

⁷⁰ ComRC "Concluding Observations on the Second Periodic Report of South Africa" para 61.

indicates that the state does not have a programme of implementation, no monitoring structures are in place to see whether it meets the benchmarks it has set to provide basic education to undocumented immigrant children, and no monitoring takes place in practice. Therefore, due to a lack of figures, the only way to assess lived reality is to look at incidental or anecdotal evidence that is indicative of a more general situation on the ground.

The outcomes reflect the reality on the ground, they would, in the context of this thesis, confirm whether undocumented immigrant children are actually receiving basic education in South Africa and whether the goals set by the state are being implemented. The state vowed to provide basic education to everyone when it ratified the relevant international instruments.⁷¹ The state must remove discriminatory practices in schools. However, the practical experiences of undocumented immigrant children show that they are denied admission and discriminated against.⁷² The outcomes show that the state needs to address the lack of provision of basic education to undocumented immigrant children. It should not fail to discharge its obligations in this regard due to the devastating consequences of not acquiring education for undocumented children. The state must strive to meet its immediate obligations towards the realisation of its minimum core obligation to undocumented immigrant children by providing them access to basic education. Failure to do so will also be in violation of the best interests of the child principle as guaranteed by international law (and the *Constitution*).⁷³ The following heading illustrates how South Africa has failed to fulfil this right. It does this by examining the obstacles that legislation, policy and administrative action place between undocumented immigrant children and the enjoyment of the right to a basic education in the light of analyses of legislation and policies, human rights body statements, NGO and media reports, and anecdotal evidence.

⁷¹ Section 29 of the *Constitution*.

⁷² Times Live 2023 <https://www.timeslive.co.za/politics/2023-01-12-gayton-mckenzie-children-of-illegal-foreigners-shouldnt-be-allowed-in-sa-schools/>.

⁷³ Article 3(1) of the *CRC*; ComRC "General Comment No. 14" para 53-79; s 28(2) of the *Constitution*.

6.4 Specific violations

The experiences of undocumented immigrant children at South African schools are vital for a constructive discussion on whether South Africa is complying with its international obligations, norms and standards on the right to a basic education. To understand these experiences, it is necessary to explore some of the circumstances which brought undocumented children to South Africa to illustrate their vulnerability. Generally, immigrant children end up in host countries for different reasons. These include push and pull factors such as economic and social conditions in the form of poverty, unemployment, living conditions and work opportunities, wars, political violence and natural disasters as previously discussed in chapter 1.⁷⁴ The realities of most undocumented immigrant children reveal that immigration is propelled by harsh political, economic and social conditions. Given the gravity of the situation, some push factors do not give the concerned person a chance to acquire documents such as passports and visas. For many parents, a crucial goal is for their children to acquire a better education which their countries of origin fail to provide.

The challenges facing undocumented immigrant children in the education system should be understood in the context of the previous chapters, which have shown that all children, regardless of nationality, origin and legal status, have a fundamental right to a basic education.⁷⁵ However, the Department of Basic Education has set as a qualifying requirement the provision of certain documents for the enrolment of children in primary and secondary schools.⁷⁶ The problem with this is that some children do not have any identification documents due to their illegal immigration status. This places them at risk of denial of admission to school, thereby curtailing their access to and enjoyment of a basic education. They face other hindrances, such as the high cost of accessing education, as far as transport arrangements, school

⁷⁴ Rasool 2012 *Journal of Social Sciences* 11 and Kanayo, Anjofui and Stiegler 2019 *Journal of African Union Studies* 220.

⁷⁵ CESCR "General Comment No. 13" para 34; Human Rights Council "The Right to Education of Migrants, Refugees and Asylum Seekers" paras 59 and 62.

⁷⁶ Sections 15, 19 and 20 of the *National Education Policy Act*.

uniforms, and related costs are concerned. Low-income families often characterise illegal immigration, making the children vulnerable to school exclusion because of the unaffordability of fees.⁷⁷ Some schools discriminate against immigrant learners on the basis that they cannot speak local languages and would therefore be unable to learn.⁷⁸ Children who have managed to get admission often complain about discrimination at schools such as name calling.⁷⁹ These obstacles to the enjoyment of the right to a basic education for undocumented immigrant children are further discussed below. It should be noted that certain incidents, committee recommendations, and practices encountered by undocumented immigrants to be discussed in this context occurred before the *Centre for Child Law & 37 Children* case. The aim of discussing this is to provide a background and some insight into the problems and experiences faced by undocumented immigrants prior to the prominent court decision. Additionally, together with that, practical experiences will also be highlighted to shed light on the ongoing challenges faced by undocumented immigrants.

6.4.1 Difficulties in regularising immigration status

The main barrier facing undocumented immigrant children when enrolling in schools is a lack of identification, i.e., passports and study visas. Most schools outline certain documentation that parents and guardians must submit before enrolment. These documents are in line with the Admission Policy.⁸⁰ The Proposed Amended Admission Policy and *BELA Bill* have incorporated the same.⁸¹ These, in effect, restrict undocumented immigrant children from enrolling in schools.⁸² It appears that the problem is not so much related to producing the documents at school but procuring them from the Department of Home Affairs. There is an argument that the stringent

⁷⁷ Blessed-Sayah, Griffiths and Moll 2022 *Journal of Education* 148; Crush and Tawodzera 2014 *JIMI* 686.

⁷⁸ Blessed-Sayah, Griffiths and Moll 2022 *Journal of Education* 152-155.

⁷⁹ Crush and Tawodzera 2014 *JIMI* 686.

⁸⁰ Sections 15, 19 and 20 of the Admission Policy.

⁸¹ See Chapter 3, para 3.2.10 and 3.2.11 of this thesis for the required documents.

⁸² Washinyira 2021 <https://www.groundup.org.za/article/schools-still-turning-away-refugee-children/>.

procedures and requirements to acquire documents legalising status in South Africa are the reasons why some immigrant children end up undocumented and are classified as illegal immigrant (the restrictions in the *Births and Deaths Registration Act* discussed in the previous chapter 5 serve as proof).⁸³

For instance, children born to non-South African citizens face a peculiar situation where they are issued birth certificates without an identity number and are not registered in the national population register as discussed in the previous chapter 5.⁸⁴ While this may not pose an immediate problem, the Proposed Amended Admission Policy, which mandates a birth certificate with an identity number for immigrant children,⁸⁵ lacks coherence. Furthermore, the fact that undocumented immigrant parents are unable to register the birth of their children violates the child's right to a name and goes against the best interests of the child. The requirement of a valid passport and visas from non-South African citizens to register the birth of a child is discriminatory, and the denial of a birth certificate deprives the child of numerous rights.⁸⁶ Regulations 3(3)(f) and 8(1)(c) of the Regulation Regarding the Births and Deaths Registration Act require a valid passport and visa from non-South African citizens in order for them to register their children's birth. If either of the parent does not possess the documents the child cannot be registered nor offered a birth certificate. It should be noted that some children lack documentation due to the barriers imposed by the *Births and Deaths Registration Act*, worse the Act specifically state that it only applies to non-citizen who stay permanently or temporarily legally so.⁸⁷ This literally means that anyone not in possession of documents is not included.

There are backlogs in the issuing of study visas, pointing to inefficiencies and possibly underlying intent to delay and deny these visas.⁸⁸ Even if the Department of Home

⁸³ GroundUp 2022 <https://www.groundup.org.za/article/shambolic-home-affairs-leaves-immigrants-legally-in-country-undocumented>.

⁸⁴ Regulation 8(5) of the Regulations on the Registration of Births and Deaths GN 128 in GG No. 37373 of 26 February 2014. See also para 5.1.3.2 of Chapter 5 above.

⁸⁵ Clause 15 of the Proposed Amended Admission Policy.

⁸⁶ Regulations 3(3)(f) and 8(1)(c) of the Regulation Regarding the Births and Deaths Registration Act.

⁸⁷ Section 2 of the *Births and Deaths Registration Act*.

⁸⁸ GroundUp 2022 <https://www.groundup.org.za/article/shambolic-home-affairs-leaves-immigrants-legally-in-country-undocumented>.

Affairs were to be efficient, unlike some unaccompanied and separated immigrants who can qualify for a refugee status, most immigrant children as "economic" migrants do not qualify for refugee status, and cannot obtain study visas on that basis. The delays in the Department of Home Affairs pose another issue as they inadvertently transform documented children and their families into undocumented immigrants. This challenge was particularly amplified during the COVID-19 pandemic when the Department of Home Affairs paused physical applications and instead launched an online visa renewal system for applications. However, many people reported having difficulties with the online portal.⁸⁹ A PhD foreign student who was enrolled at the University of the Witwatersrand committed suicide after failing to register for the 2022 academic year due to an expired visa.⁹⁰ He had been in regular contact with the Department of Home Affairs in an effort to renew his visa.⁹¹ The university could not register him because, by law, all foreign students must possess valid study visas.⁹² The Department of Home Affairs had rejected his renewal application. His predicament shows the major challenges that face immigrant learners and students when attempting to acquire study visas. This case shows how governmental spheres at times do not prioritise the educational needs of learners. It also proves how, in reality, there is no co-operative governance between the Department of Education and Department of Home Affairs. Instead, the learner should have been registered with a receipt which proves that he has submitted his application as required for instance by the Admission Policy.⁹³

⁸⁹ GroundUp 2022 <https://www.groundup.org.za/article/shambolic-home-affairs-leaves-immigrants-legally-in-country-undocumented>.

⁹⁰ News24 2022 <https://www.news24.com/news24/southafrica/news/phd-student-kills-himself-after-failing-to-register-for-academic-year-after-study-permit-expires-20220506>.

⁹¹ News24 2022 <https://www.news24.com/news24/southafrica/news/phd-student-kills-himself-after-failing-to-register-for-academic-year-after-study-permit-expires-20220506>.

⁹² News24 2022 <https://www.news24.com/news24/southafrica/news/phd-student-kills-himself-after-failing-to-register-for-academic-year-after-study-permit-expires-20220506>.

⁹³ Clause 21 of the Admission Policy.

At the time of writing, the Department of Home Affairs Foreshore office recorded cases where immigrants were referred to their countries of origin by officials to obtain birth certificates for their children, visas and additional documentation.⁹⁴ Many immigrants face the financial impossibility of taking trips to their home countries. This poses risks of delaying the enrolment of their children at schools. In some cases, it results in outright denial of admission.⁹⁵ In 2022, Washinyira and Mutandiro (GroundUp News reporters) recorded cases of dozens of people who were turned away from refugee offices despite a two-year closure of these offices due to the coronavirus pandemic.⁹⁶ Many people could not apply for asylums. Work and study visas also expired due to the pandemic, posing difficulties with renewal.⁹⁷ The United States, in its South Africa Human Rights Report 2022, indicated that, due to various obstacles, such as limited access to birth registration, absence of an administrative process for citizenship application, inaccessible avenues for documentation of unaccompanied or separated migrant children, the government's rejection or invalidation of foreign identity documents, and numerous administrative hurdles for foreign nationals, the country had a population of over 10,000 stateless individuals.⁹⁸

One must note the difficulties faced by the Department of Home Affairs in determining who qualifies to apply for asylum, given the high incidence of economic refugees trying to qualify for asylum when their situation does not place them in the category of persons who can apply for asylum. Also, cross-border travel was closed during the pandemic (or at least the early stages of COVID-19). One may ask how they managed to enter the Republic and what persecution, if any, they were facing in their own countries, when most states were in lockdown, and there was no political activity.

⁹⁴ GroundUp 2022 <https://www.groundup.org.za/article/dozens-were-turned-away-refugee-office-reopens-after-two-years/>.

⁹⁵ GroundUp 2022 <https://www.groundup.org.za/article/dozens-were-turned-away-refugee-office-reopens-after-two-years/>.

⁹⁶ GroundUp 2022 <https://www.groundup.org.za/article/dozens-were-turned-away-refugee-office-reopens-after-two-years/>.

⁹⁷ GroundUp 2022 <https://www.groundup.org.za/article/dozens-were-turned-away-refugee-office-reopens-after-two-years/>.

⁹⁸ Bureau of Democracy, Human Rights and Labor "South Africa Human Rights Report 2022" 13.

Perhaps a special case could be made for Tigrayans from Ethiopia, who were facing fully-fledged armed conflict in the middle of the pandemic.⁹⁹ This conflict arose as a result of the government's refusal not to postpone elections on the pretext of the pandemic.¹⁰⁰ Notwithstanding concerns about migrants masquerading as asylum seekers, the reality is that the Department of Home Affairs seems to be struggling to manage the visa process. Some people applied for visas as far back as 2018 but did not receive any feedback on their applications even after the pandemic.¹⁰¹ The expiry of their visas made them illegal immigrants, with the result that their children could not enrol in schools.¹⁰²

Crush and Tawodzera studied Zimbabwean immigrant children in South Africa and found that schools demand study permits and birth certificates, which are often difficult to get.¹⁰³ Hence, children of these immigrants cannot enrol at schools to access education. This hindrance contradicts the judgement of the court in *Ex parte Gauteng Provincial Legislature* in which it was said that no one should "be obstructed in pursuing his or her basic education."¹⁰⁴ The state is not only prohibited from impairing access to the enjoyment of the right to education, but it is also obliged to take positive steps to provide access to a basic education.¹⁰⁵

In the case of undocumented immigrant children who need documentation to enrol at schools, the state must monitor the procedures at the Department of Home Affairs and ensure that they do not hinder access to documentation.¹⁰⁶ The ComRC emphasises that migration control should not deny children rights even if they breach migration laws and when they lack documents.¹⁰⁷ As a result of troubles with the

⁹⁹ Walsh and Dahir 2020 <https://www.nytimes.com/2020/11/05/world/africa/ethiopia-tigray-conflict-explained.html>.

¹⁰⁰ See Walsh and Dahir 2020 <https://www.nytimes.com/2020/11/05/world/africa/ethiopia-tigray-conflict-explained.html>.

¹⁰¹ GroundUp 2022 <https://www.groundup.org.za/article/dozens-were-turned-away-refugee-office-reopens-after-two-years/>.

¹⁰² GroundUp 2022 <https://www.groundup.org.za/article/dozens-were-turned-away-refugee-office-reopens-after-two-years/>.

¹⁰³ Tawodzera and Crush *Right to the Classroom* 19.

¹⁰⁴ *Ex parte Gauteng Provincial Legislature* para 9.

¹⁰⁵ Section 7(2) of the *Constitution*.

¹⁰⁶ Preamble of the *Immigration Act*.

¹⁰⁷ ComRC "General Comment 6" para 62.

Department of Home Affairs, documented immigrant children become undocumented and become exposed to systematic exclusion from accessing the right to a basic education or from enrolment in schools.

These difficulties facing undocumented immigrant children raise questions about the efficiency and effectiveness of bodies that are supposed to monitor the implementation of policies and laws that might impinge on the rights of immigrants. UNESCO's Global Education Monitoring report found that one Kutenda, a 13-year-old immigrant child in South Africa, was lucky to be at school when he had no documentation because the permit requirements for immigrants kept changing.¹⁰⁸ Kutenda continued with his studies only because of the personal risk which was taken by his school principal to enrol him. The principal risked a fine of R5 000.00 for every undocumented child at his school. These fines are issued in terms of the *Immigration Act*.¹⁰⁹ The school principal remarked that:

The education system is letting immigrants down. If these children are not in school, then where would they be, they would be out in the streets, they would become delinquents. So, having the children in the school educating them, teaching them values and attitudes, they will become better people, and that can one day be beneficial to the country and the economy of the country.¹¹⁰

This illustrates that, whereas some principals may be willing to enrol undocumented immigrant children, they face punishment which may affect them and their families. On the other hand, these principals will find it difficult to refuse to enrol the learners, as such refusal will put the children on the streets, rendering them delinquents and unfit to contribute meaningfully to society. This is not in the best interests of South

¹⁰⁸ Global Education Monitoring Report 2019
<http://www.gemreportunesco.wordpress.com/2019/02/28/undocumented-children-cannot-go-to-school-in-south-africa-the-system-is-letting-them-down>.

¹⁰⁹ Section 42(2) of the *Immigration Act*.

¹¹⁰ Global Education Monitoring Report 2019
<http://www.gemreportunesco.wordpress.com/2019/02/28/undocumented-children-cannot-go-to-school-in-south-africa-the-system-is-letting-them-down>.

Africa, as denial of access to education (through which children learn values and attitudes) does not mean that they will leave the country.

In January 2023, Mutandiro, a reporter for GroundUp News, highlighted the current challenges faced by undocumented immigrant children in securing school placements in South Africa.¹¹¹ The online registration system for schools demands documentation, and many public schools strictly adhere to this requirement. A specific case was highlighted, involving Michael, a nine-year-old undocumented immigrant who could often be found begging at traffic lights.¹¹² Since 2021, Michael has been unable to attend school as the school authorities notified him that he must provide certain documents to continue his education.¹¹³ As provided by Mutandiro, the child expressed his situation and stated:

I want to be in school but my mother says we have no papers. Standing at the robots is boring, but we have no choice, because we need food.¹¹⁴

According to Michael's mother, as reported by GroundUp News, the online registration system for schools requires specific documents for registration. Additionally, she mentioned that when she attempted to visit different schools, her children were denied admission due to their lack of documentation.¹¹⁵ Regrettably, these events are occurring despite the court's ruling that undocumented immigrants should be granted admission.

Further issues for undocumented learners include the move to an online application process in Gauteng and the Western Cape, which makes it difficult for children without documents to apply, as the system does not allow for it.¹¹⁶ There are also reports of undocumented children prevented from registering for and writing their matric

¹¹¹ GroundUp 2023 <https://allafrica.com/stories/202301130095.html>.

¹¹² GroundUp 2023 <https://allafrica.com/stories/202301130095.html>.

¹¹³ GroundUp 2023 <https://allafrica.com/stories/202301130095.html>.

¹¹⁴ GroundUp 2023 <https://allafrica.com/stories/202301130095.html>.

¹¹⁵ GroundUp 2023 <https://allafrica.com/stories/202301130095.html>.

¹¹⁶ Western Cape Education Department 2023 <https://wcedonline.westerncape.gov.za/admissions-2023-24>; Gauteng Provincial Government 2023 <http://www.education.gauteng.gov.za>.

examination if they do not have a birth certificate, passport or permit.¹¹⁷ It should again be pointed out that right to a basic education was recognised to extend up to grade 12 in *Moko v Acting Principal* and also section 1(a) of the *BELA Bill* seeks to provide accordingly.¹¹⁸ The documentation requirements are irrational as they mean that learners cannot complete their education and obtain recognition for it in the form of matric certificates, despite the judiciary's guarantees in this respect.

6.4.2 Failures by government officials

As mentioned in the previous chapter on the issue of deportation, in October 2023 the Constitutional Court declared Home Affairs Minister Aaron Motsoaledi and Director-General Tommy Makhode personally responsible for not enacting corrective legislation for certain parts of the *Immigration Act*.¹¹⁹ In 2017, the court had deemed the legislation allowing the detention of suspected illegal foreigners without a warrant as unconstitutional and instructed the department to rectify it.¹²⁰ The officials responsible to take legislative measures failed to taken any action leading to continuous detention of immigrants without a warrant and for longer periods. So far, the state has been granted yet another year to address the shortcomings in the *Immigration Act*.¹²¹ Such failures and omission by the government officials highlights how both the legislation and the individuals responsible for enforcing laws are failing immigrants.

Corruption is another challenge which hinders access to education for undocumented immigrant children. Hornby describes corruption as "dishonest or illegal behaviour, especially of people in authority."¹²² Officials of the Department of Home Affairs, such as immigration control personnel, are responsible for ensuring and implementing immigration law. However, they have been mired in corrupt activities, such as

¹¹⁷ Van Schalkwyk and Maistry "The Rights of Refugees and Migrant Learners"

¹¹⁸ *Moko v Acting Principal of Malusi Secondary School* para 30.

¹¹⁹ *Ex parte Minister of Home Affairs* para 112 and 114.

¹²⁰ *Lawyers for Human Rights v Minister of Home Affairs* 2017 (5) SA 480 (CC).

¹²¹ *Ex parte Minister of Home Affairs* para 118 (1).

¹²² Hornby *Oxford Advanced Learner's Dictionary* 329.

demanding bribes in exchange for their services.¹²³ Onuora-Oguno holds that corruption in Africa, covering South Africa as well, is a major cause of the underdevelopment of countries.¹²⁴ It leads to various negative consequences, including the provision of poor-quality goods and services.¹²⁵ Corruption of officials may lead to an undocumented status because applicants cannot pay the bribe; they cannot renew their visas and permits, thus rendering them undocumented.¹²⁶ There are also allegations that government funding designed for facilitating the acquisition of documents through the Department of Home Affairs finds its way into the pockets of individual officials.¹²⁷ This lack of accountability affects poor children and increases their vulnerability to a denial of accessing basic and quality education.¹²⁸ The result of corruption is that it places impediments on the renewal of visas and permits and curtails the acquisition of these documents by persons who did not previously qualify for such documents but who qualify at the time of application. Requirements for documentation violate the rights of children to a basic education if the lack of such documents is used as a pretext for their exclusion from schools.

6.4.3 Legal and policy uncertainties

Laws, policies and regulations impose undue restrictions and unfavourable conditions on the fundamental rights of undocumented immigrant children and violate their right to a basic education.¹²⁹ The *Constitution* provides that "everyone has the right to a basic education, including adult basic education,"¹³⁰ whether documented or not, citizen or non-citizen, denial of access to education is a constitutional infringement.¹³¹

¹²³ South African Government News Agency 2020 <https://www.sanews.gov.za/south-africa/home-affairs-officials-arrest-fraud>.

¹²⁴ Onuora-Oguno *Development and the Right to Education in Africa* 83.

¹²⁵ Onuora-Oguno *Development and the Right to Education in Africa* 83.

¹²⁶ Daily Maverick 2019 <https://www.dailymaverick.co.za/article/2019-08-07-no-papers-no-rights-the-plight-of-undocumented-foreign-children-in-sa/>.

¹²⁷ Daily Maverick 2019 <https://www.dailymaverick.co.za/article/2019-08-07-no-papers-no-rights-the-plight-of-undocumented-foreign-children-in-sa/>.

¹²⁸ Onuora-Oguno *Development and the Right to Education in Africa* 55.

¹²⁹ Clause 15, 19 and 20 of the Admission Policy.

¹³⁰ Section 29 of the *Constitution*.

¹³¹ Section 7(1) of the *Constitution*.

Although some legislation may not directly deny education, they restricts practical access to basic education for undocumented immigrant children as highlighted in chapters 3 and 5. The wording of policies and laws affects the admission of undocumented immigrant children in South African schools.¹³² It has been noted in this regard, that the Admission Policy and the *Immigration Act*, as well as the Proposed Amended Admission Policy and the *BELA Bill* poses restrictive conditions for the admission of undocumented immigrant children. The restrictions by the *Births and Deaths Registration Act* adds to that. Some of the policy and statutory uncertainties and inconsistencies surrounding the right to a basic education for undocumented immigrant children have already been explored.¹³³ They exhibit open hostility towards undocumented immigrant children and often seek ways to deny them enrolment.

The inconsistency within the South African legal framework regarding the enrolment of undocumented immigrant children frequently results in the denial of their access to basic education. The main issue is that the policy and legal framework make schools operate with conflicting mandates.¹³⁴ Most legislation and policies should be aimed at improving the right to a basic education of all individuals, including undocumented immigrant children. Therefore some provision of the, for instance, *Immigration Act* should be implemented to address and prioritise the particular needs of undocumented immigrants' children because, at present, it does not satisfactorily protect the rights of undocumented immigrant children or immigrant children in general. The *Immigration Act* is imprecise because it does not explicitly formulate protective measures for these children.

Another example, the *Children's Act* is supposed to address the gaps in the treatment of foreign children, especially undocumented ones. Although it applies equally to all children in the country, it lacks an explicit clause for undocumented immigrant children. This is a flaw when considering their level of vulnerability. It leaves the door open for restrictive and exclusionary interpretations of related legislation. This legal gap opens the door to rights violations and social exclusion and further diminishes

¹³² Clause 15, 19 and 20 of the Admission Policy; Section 39(1) (a) (b) and 2 of the *Immigration Act*.

¹³³ As critically analysed in Chapter 3.

¹³⁴ UNESCO "Migration, Displacement and Education" 7.

migrant contributions to development through the denial of access to a basic education for their children. Hence, there is a need to re-evaluate laws and policies dealing with children in general and the admission laws for undocumented immigrant children. The study at the end wishes to make recommendations on how such issues can be addressed and the concluding chapter will make contributions on what exactly should these legislations say.

The discussion below provides testimonial evidence of discriminatory practices in the school environment and their impact on the ability of immigrant children to enjoy a basic education. The 2023 Report by the ACERWC indicated that despite the decision of the court in *Centre for Child Law & 37 Children*, which affirmed that it is unconstitutional to bar learners who do not have documentation from receiving a basic education, immigrant children and children of migrant parents are still being turned away from receiving the same.¹³⁵

In December 2021, it was reported that migrant and refugee parents were protesting because their children were denied schooling due to lack of birth certificates.¹³⁶ The protest occurred in Pretoria at the offices of the Department of Home Affairs. The parents were demanding the birth certificates of their children from the Department of Home Affairs.¹³⁷ Their main frustration stemmed from the fact that due to the lack of documentation, their children were being denied access to education and healthcare facilities.¹³⁸ Some were even denied food assistance and had to rely on the services provided by non-governmental organisations. The government only provided

¹³⁵ ACERWC "Concluding Observations and Recommendations: Second Periodic Report" para 13.

¹³⁶ Twala 2021 <https://www.iol.co.za/education/schools/primary/migrants-and-refugees-protest-over-their-children-being-denied-schooling-since-they-have-no-birth-certificates-077bb5f7-902b-48a1-b8e9-454eb6a21dff>.

¹³⁷ Twala 2021 <https://www.iol.co.za/education/schools/primary/migrants-and-refugees-protest-over-their-children-being-denied-schooling-since-they-have-no-birth-certificates-077bb5f7-902b-48a1-b8e9-454eb6a21dff>.

¹³⁸ Twala 2021 <https://www.iol.co.za/education/schools/primary/migrants-and-refugees-protest-over-their-children-being-denied-schooling-since-they-have-no-birth-certificates-077bb5f7-902b-48a1-b8e9-454eb6a21dff>.

assistance to immigrants with valid visas and permanent residence status.¹³⁹ The Department of Social Development received many applications for social assistance but refused to grant them.¹⁴⁰ Deprivation of food has long-term implications on children, including poor growth due to poor nutrition. This violates the child's right to develop and survive.¹⁴¹ The eligibility criteria concerning access to social relief grants and special COVID-19 social relief distress grants were restricted to those with documentation.¹⁴² This leaves out all other children who are undocumented, yet they are Constitutionally protected.

Another report in March 2021 brought to light issues facing immigrant children in accessing education.¹⁴³ It stated that, despite the court decision in *Centre for Child Law & 37 Children*, some schools continued to turn away undocumented immigrant children.¹⁴⁴ At least 30 immigrant families battled to find places for their children due to a lack of documentation.¹⁴⁵ It was stated that "the parents made an online application on time at more than three schools in Parow, but the applications were rejected."¹⁴⁶ After parents visited the Western Cape Education Department offices, a few of the children got placed in schools on the Cape Flats. However, these schools were far away from their places of residence and posed transport problems.¹⁴⁷ A Congolese asylum seeker claimed that a primary school had refused to take her child

¹³⁹ GroundUp 2021 <https://www.groundup.org.za/article/save-children-sounds-alarm-over-food-crisis-facing-immigrant-children/>.

¹⁴⁰ GroundUp 2021 <https://www.groundup.org.za/article/save-children-sounds-alarm-over-food-crisis-facing-immigrant-children/>.

¹⁴¹ GroundUp 2021 <https://www.groundup.org.za/article/save-children-sounds-alarm-over-food-crisis-facing-immigrant-children/>.

¹⁴² GroundUp 2021 <https://www.groundup.org.za/article/save-children-sounds-alarm-over-food-crisis-facing-immigrant-children/>.

¹⁴³ GroundUp 2021 <https://www.groundup.org.za/article/schools-still-turning-away-refugee-children/>.

¹⁴⁴ GroundUp 2021 <https://www.groundup.org.za/article/schools-still-turning-away-refugee-children/>.

¹⁴⁵ GroundUp 2021 <https://www.groundup.org.za/article/schools-still-turning-away-refugee-children/>.

¹⁴⁶ GroundUp 2021 <https://www.groundup.org.za/article/schools-still-turning-away-refugee-children/>.

¹⁴⁷ GroundUp 2021 <https://www.groundup.org.za/article/schools-still-turning-away-refugee-children/>.

for grade one because of a lack of documents.¹⁴⁸ A Zimbabwean on a work permit got a rejection for their child's admission to school because the child was undocumented. She only got a place for the child at a school through a refugee organisation, the Scalabrini Centre. Schools around Parow were also refusing to take her, making the child lagging behind by a year.¹⁴⁹ These are experiences faced by children even after a court order was made expecting undocumented immigrants to be enrolled in schools.

In 2023, Gayton McKenzie, the leader of the Patriotic Alliance, made a controversial statement, advocating for the denial of entry to local schools of children of foreign nationals.¹⁵⁰ Influential leaders like McKenzie hold considerable say in the community, particularly through their influence over communities who form the school governing bodies. The implications of such speeches are significant challenges in the implementation of law.

Another concerning issue presented itself in the impending termination of the Zimbabwe Exemption Permits (ZEP), which would have had implications for children who are accompanying parents holding these permits. The Courts have now decided that the decision to terminate the ZEPs is unlawful and unconstitutional.¹⁵¹ Without this decision, many children would have faced the unfortunate consequence of becoming undocumented, leading to the likely discontinuation or termination of their basic education. The situation is, however, only secure for some time (12 months).¹⁵² In the most recent judgment by Goliath DJP in the case of *Scalabrini Centre of Cape Town v Minister of Home Affairs* (2023) 2 All SA 256 (WCC), the court asserted that,

¹⁴⁸ GroundUp 2021 <https://www.groundup.org.za/article/schools-still-turning-away-refugee-children/>.

¹⁴⁹ GroundUp 2021 <https://www.groundup.org.za/article/schools-still-turning-away-refugee-children/>.

¹⁵⁰ Times Live 2023 <https://www.timeslive.co.za/politics/2023-01-12-gayton-mckenzie-children-of-illegal-foreigners-shouldnt-be-allowed-in-sa-schools/>.

¹⁵¹ *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* (32323/2022) [2023] ZAGPPHC 490 (28 June 2023) para 147.1 (hereafter *Helen Suzman Foundation v Minister of Home Affairs*).

¹⁵² *Helen Suzman Foundation v Minister of Home Affairs* para 147.4.1.

Children who are listed as dependants on asylum applications are at the mercy of the bureaucratic processes governing the main applicant's claim. Their asylum seeker visas are also linked to the main applicant's asylum seeker visa. This means that when the main applicant's claim is deemed abandoned, all dependants' applications will also be automatically be deemed abandoned and they will not be entitled to renewal of their asylum seeker visas. This will result in dependent children being left undocumented pending the enquiry by the Standing Committee or indefinitely should the Standing Committee endorse the application as abandoned. Children are therefore exposed to severe consequences of being undocumented and the further risk of *refoulement*, all due to actions and circumstances beyond their control... Children of undocumented asylum seekers are negatively affected as educational opportunities are reserved only for those who can produce a valid permit.¹⁵³

One must not overlook the fact that some of these children are nearing the age of 18. Even if their parents qualify for other critical skill permits, by the time the permits are approved, these children will no longer be seen as dependents, leaving them undocumented.

6.4.4 Language barriers

Again, these aspects have been addressed in detail in Chapter five. The purpose here is to identify the main points of non-compliance. Young children face difficulties when the language of instruction is different from their home language. This barrier is a major challenge for immigrant children who usually arrive in South Africa speaking their home languages, which are not used in South African schools.¹⁵⁴ Most of them are not familiar with South African languages, which are the mediums of instruction for lower grades, but also subsequently frequently (even if "unofficially") used in schools.¹⁵⁵ Hence, they cannot understand their teachers.¹⁵⁶ Research conducted in KwaZulu-Natal using female immigrant learners from grades 8 to 11 found that they faced discriminatory attitudes emanating from their inability to understand their teachers who speak local languages.¹⁵⁷ On the issue of language barrier an interview

¹⁵³ *Scalabrini Centre of Cape Town v Minister of Home Affairs* para 7.5 and 26.

¹⁵⁴ Isseri, Muthukrishna and Philpott 2018 *Educational Research for Social Change* 45.

¹⁵⁵ Blessed-Sayah, Griffiths and Moll 2022 *Journal of Education* 152-155.

¹⁵⁶ Nnadozie *The Geographies of Migrant Learners in Three South African Schools* 159.

¹⁵⁷ Isseri, Muthukrishna and Philpott 2018 *Educational Research for Social Change* 45.

conducted by Isseri with one immigrant child in KwaZulu Natal highlights the difficulties that these children face in schools:

My social science teacher was speaking in Zulu, and I could understand a bit, but then the boy behind me who was a foreigner like me, could not understand, so then he put up his hand and said, "English please Mam," and the teacher asked, "Who said that?" Everyone pointed at him, and the teacher said, "This is South Africa, and Zulu is the first language and if you do not understand, go back to your country. We didn't call you to come here."¹⁵⁸

Academic and socio-economic inclusion in countries such as South Africa requires one to also know the "main" official language, in South Africa "English", which is used in official communication. Without appropriate language training, these children face academic failure.¹⁵⁹ Also, learning a new language takes time, and this results in many children lagging behind in their work.

Additionally, the Draft Policy on the Incremental Introduction of African Languages in Schools does not encompass African languages as non-official languages.¹⁶⁰ Non-official languages in South Africa are categorised as second additional level language, which is not incorporated in the Draft Policy. Consequently, immigrants who wish to preserve their African languages are not catered for.

There is a case to be made that language barriers are temporary, as children have been scientifically shown to learn a new language faster than adults and can converse with their peers and understand adult instructors within relatively short periods of time.¹⁶¹ For practical purposes, in the context of this thesis, language rights in the *ICCPR* and *CRC*, among other instruments, are not explored in-depth because of the obvious impracticality of their full-scale fulfilment for undocumented immigrant children. Yet, it needs to be recalled that learning in one's own language is a human right. The Hague Recommendations discussed in Chapter 5 highlights the importance

¹⁵⁸ Isseri, Muthukrishna and Philpott 2018 *Educational Research for Social Change Journal* 45.

¹⁵⁹ Saneka and De Witt 2019 *SAJCE* 2.

¹⁶⁰ Clause 3 of the Incremental Introduction of African Languages: Draft Policy (2013).

¹⁶¹ Suryantari 2018 *Tell* 30.

of teaching learners in mother tongue.¹⁶² Mother tongue acquisition is so important because research shows that, if the mother tongue has not become firmly rooted in the child's psyche, no other learning, also no learning in another language, can take place.¹⁶³ Hence, there should be efforts to assist mother tongue acquisition for at least larger immigrant communities. The complexities attached to this include whether it is practical to get teachers for every language spoken by different undocumented immigrant children and whether it is reasonable to incur such costs. As highlighted in detail in chapter 5 the State needs to take initiatives and implement an integrative multilingual narrative approach.¹⁶⁴

6.4.5 Fees and exemptions

Despite the international obligation to provide free primary education, fees for education remain a critical challenge for undocumented immigrant children.¹⁶⁵ Some undocumented immigrant children are deprived of the enjoyment of a basic education due to school fees barriers and other educational charges that are beyond the reach of their parents or guardians.¹⁶⁶ This keeps some undocumented immigrant children out of school, leading them to lose years which are essential for achieving basic learning skills.¹⁶⁷ Although there are fee exemption opportunities for some families, some foreign parents are prevented from relying thereon, based on their immigration status. As shown up in chapter 5, where an asylum seeker was denied a school exemption, despite that she fully qualified for the exemption she was found ineligible due to complexities encountered during the application process. Amongst other things, her nationality and migration status restricted her from being considered for school fee exemptions.¹⁶⁸ Moreover, the fee exemption application form, mandates the

¹⁶² See discussion of the instrument in Chapter 5 para 5.1.4.1 of this thesis.

¹⁶³ Beiter *The Protection of the Right to Education by International Law* 448.

¹⁶⁴ See discussion of this in Chapter 5 para 5.1.4.4 of this thesis.

¹⁶⁵ Sobane et al "Migration:Barriers to Access to Education for Migrant Children" 8.

¹⁶⁶ Sobane et al "Migration:Barriers to Access to Education for Migrant Children" 8.

¹⁶⁷ Sobane et al "Migration:Barriers to Access to Education for Migrant Children" 8.

¹⁶⁸ Chapter 5 para 5.1.5.4 of this thesis.

provision of the learner's identity number,¹⁶⁹ but it is uncertain whether the absence of an identity number affects the outcome of the exemption. The United States 2022 Report on South African Human Rights practices indicated that, in violation of the law, fee exemptions for non-citizen children are occasionally denied due to their inability to present identification documents, including birth certificates and immunisation records.¹⁷⁰

Moreover, the *Social Assistance Act*, according to Section 5(1)(c), eligibility for a social grant is limited to South African citizens (and by virtue of the Constitutional Court's *Khosa & Mahlaule v Minister of Social Development* judgement, to permanent citizens). This automatically excludes any other immigrant children. The issue of fees barrier is not confined to primary and secondary education but also universities. One instance demonstrating the challenges non-citizen children encounter in accessing education is the restriction on grants, for instance the National Student Financial Aid Scheme (NSFAS) provides grants exclusively to South African citizens and permanent resident learners.¹⁷¹ Consequently, certain low-income immigrant children are occasionally denied education bursaries,¹⁷² despite holding study permits. The mention of NSFAS restrictions on tertiary education, even though the study focuses on basic education, serves to illustrate the challenges immigrant children encounter from primary education through to higher education, ultimately impacting their future prospects.

¹⁶⁹ Example of how the form looks like: Paul Roos Gimnasium 2022 <https://paulroos.co.za/files/2022/11/Exemption-from-school-fees-2023.pdf> and Noordwyk Primary School 2021 <https://www.noordwykprimary.co.za/wp-content/uploads/2021/02/NEW-EXEMPTION-FORM-2021.docx>.

¹⁷⁰ Bureau of Democracy, Human Rights and Labor "South Africa 2022 Human Rights Report" 23.

¹⁷¹ National Student Financial Aid Scheme: NSFAS Eligibility Criteria and Conditions for Financial Aid Policy Standard (2023) 5.

¹⁷² Daily Maverick 2022 <https://www.dailymaverick.co.za/article/2022-03-15-children-of-low-income-immigrants-excluded-from-tertiary-education-bursaries/>.

6.4.6 Discrimination and other prejudice

Discrimination at school stems, *inter alia*, from statutory and policy prejudice, which results in contradictions in the legal framework.¹⁷³ Discrimination also manifests itself when schools deny access to a basic education to undocumented immigrant children because of their documentation status.¹⁷⁴ Intolerance and prejudices against foreigners play a role in exclusion,¹⁷⁵ often resulting in bullying and physical attacks by other children. This has been going on for a long time and is fuelled by the sentiment that foreigners exploit resources, including educational resources, that should be reserved for South Africans.¹⁷⁶ Tawodzera and Crush provide evidence of physical attacks in the school system,¹⁷⁷ emanating from competition for resources such as computers, it being the view of some teachers that, where there are insufficient computers, South African citizens must be prioritised.¹⁷⁸

At schools, attacks mainly come from other children and teachers who feel justified in using physical and psychological violence against undocumented immigrant children who may not be able to defend themselves for fear of punishment by teachers.¹⁷⁹ Without effective remedies to address such violence, some undocumented immigrant children struggle to find a reason to attend school. Physical and verbal abuse by other children and teachers leaves undocumented immigrant children feeling estranged, inferior and discriminated against.¹⁸⁰ However, physical attacks are only half the problem, as there are many systematic exclusions.¹⁸¹ Hence, some children drop out of school. Those who remain are not enthusiastic about participating in extra-curricular

¹⁷³ Annexure B- Regulation 2 of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public School GN R1052 in GG 29311 of 18 October 2006

¹⁷⁴ *Centre for Child Law & 37 Children*.

¹⁷⁵ Sobane et al "Migration: Barriers to Access to Education for Migrant Children " 8.

¹⁷⁶ Solomon and Kosaka 2013 *Southern African Peace and Security Studies* 12; Mamabolo 2015 *The Journal for Transdisciplinary Research in Southern Africa* 143; International Organisation for Migration "World Migration Report 2020" 63.

¹⁷⁷ Crush and Tawodzera 2014 *JIMI* 687.

¹⁷⁸ Tawodzera and Crush *Right to the Classroom* 16.

¹⁷⁹ Tawodzera and Crush *Right to the Classroom* 17.

¹⁸⁰ Tawodzera and Crush *Right to the Classroom* 17.

¹⁸¹ Blessed-Sayah, Griffiths and Moll 2022 *Journal of Education* 152-155.

school activities.¹⁸² Discrimination and physical/psychological attacks often lead to depression, which affects personality, and inhibit talent and the full development of mental and physical abilities.¹⁸³ Parents or guardians of immigrant children are scared to report such cases to the police. They also do not have the courage to approach school authorities to outline the problems facing their children, as they fear that their children will be victimised even more and that they will be turned away from schools and possibly reported to the Department of Home Affairs for deportation.¹⁸⁴

This shows that the South African education system is failing immigrant children by not creating schools that are safe, welcoming and inclusive spaces where all learners are affirmed and respected, irrespective of their histories and backgrounds.¹⁸⁵ As such, one may conclude that undocumented immigrant children who manage to obtain admission to schools face many challenges that hinder the enjoyment of their right to a basic education.¹⁸⁶ Physical attacks, discrimination and humiliation based on their foreign status, language barriers and unprofessional teacher attitudes toward immigrant learners are some of the challenges.¹⁸⁷ As a result, these pupils suffer psychological and emotional trauma, leading them to drop out of school.¹⁸⁸ Isseri *et al*¹⁸⁹ conducted research in the KwaZulu-Natal province on the experience of immigrant children at school. They found that five out of six immigrant learners reported bullying on the basis of nationality, language, culture, accent and physical appearance.

Our children are abused everyday by other students who call them makwerekwere and pass on negative comments about them and where they come from. We usually ask our children to ignore these comments, but sometimes it just gets too much and really frightening. At one point my child was told by her classmate that she would be

¹⁸² Blessed-Sayah, Griffiths and Moll 2022 *Journal of Education* 152-155.

¹⁸³ Article 11 of the *CRC*.

¹⁸⁴ Tawodzera and Crush *Right to the Classroom* 17.

¹⁸⁵ World Economic Forum "Migration and its Impact on Cities" 119.

¹⁸⁶ UNICEF and UNESCO "A Human Rights - Based Approach to Educational for All" 31.

¹⁸⁷ UNICEF and UNESCO "A Human Rights - Based Approach to Educational for All" 31.

¹⁸⁸ UNICEF and UNESCO "A Human Rights - Based Approach to Educational for All" 31.

¹⁸⁹ Isseri, Muthukrishna and Philpott 2018 *Educational Research for Social Change* 44.

stabbed by a knife if she did not return to her country. I had to spend time persuading her to go to school because she wanted to quit out of fear.¹⁹⁰

To mitigate the challenges facing undocumented immigrant children in schools, Beiter¹⁹¹ opines that school staff should understand the troubling nature of the daily lives of immigrants and refugees and should endeavour to actively provide the children with access to education. They should create hospitable school climates and provide counselling and guidance that is responsive to the conditions of immigrant children, who should not be treated differently from others based on their legal status.¹⁹² Since respect for culture, and attitudes of schools, are key to creating inclusive and welcoming learning environments, schools should be sensitive to these.¹⁹³ School leadership and teachers are critical to the process of building positive school climates in which there is mutual respect for the rights of everyone. Hence, they should value and appreciate diversity.¹⁹⁴

The recent actions of Operation Dudula, a citizen-driven movement, in Diepsloot, Johannesburg, involving campaigns to remove migrant children from schools, have been strongly criticised by the Equal Education (EE) and Equal Education Law Centre (EELC).¹⁹⁵ These actions came to the attention of the EE and EELC after a message with xenophobic undertones had been circulated on social media platforms, suggesting that migrant children are being unjustly prioritised in public schools over South African children.¹⁹⁶ The EE and EELC stated that the actions being undertaken by Operation Dudula created a culture of xenophobia at schools, endorsed

¹⁹⁰ Tawodzera and Crush *Right to the Classroom: Educational Barriers for Zimbabweans in South Africa* 17.

¹⁹¹ Beiter *The Protection of the Right to Education by International Law* 420.

¹⁹² Beiter *The Protection of the Right to Education by International Law* 420.

¹⁹³ Isseri, Muthukrishna and Philpott 2018 *Educational Research for Social Change* 49.

¹⁹⁴ Isseri, Muthukrishna and Philpott 2018 *Educational Research for Social Change* 49.

¹⁹⁵ Equal Education and Equal Education Law Centre 2023

<https://equaleducation.org.za/2023/02/06/joint-statement-equal-education-and-equal-education-law-centre-strongly-condemn-operation-dudulas-campaign-to-remove-young-migrant-children-from-schools/>.

¹⁹⁶ Equal Education and Equal Education Law Centre 2023

<https://equaleducation.org.za/2023/02/06/joint-statement-equal-education-and-equal-education-law-centre-strongly-condemn-operation-dudulas-campaign-to-remove-young-migrant-children-from-schools/>.

discrimination and also fostered an environment of abuse for immigrants at schools.¹⁹⁷ The Joint Centres urged the Department of Basic Education to denounce the actions by Operation Dudula and affirm the right to a basic education for migrant children, irrespective of their documentation status.¹⁹⁸

6.4.7 Exclusion during the COVID-19 pandemic

The COVID-19 pandemic compounded the plight of undocumented immigrant children in accessing basic education in South Africa. It has already been noted that the pandemic caused difficulties with obtaining and renewing visas. However, these were not the only challenges facing undocumented immigrant children. Worldwide, the closure of schools due to the COVID-19 pandemic in 2020 affected education systems and learners.¹⁹⁹ Prior to the pandemic, traditional learning and teaching methods were used in South Africa. The traditional learning model entails physical attendance at school and physical contact with teachers.²⁰⁰ The pandemic entailed a drastic shift in the education system from the brick-and-mortar school setting to online learning.²⁰¹ Due to the total closure of schools, approximately 262.5 million primary and secondary school children were out of school, globally.²⁰² In South Africa, an estimate of 400 to 500 thousand children dropped out of school due to Covid-19, that is, also out of online teaching.²⁰³ In addition to the already outlined problems that undocumented immigrant children were facing in enjoying their right to a basic education, the

¹⁹⁷ Equal Education and Equal Education Law Centre 2023 <https://equaleducation.org.za/2023/02/06/joint-statement-equal-education-and-equal-education-law-centre-strongly-condemn-operation-dudulas-campaign-to-remove-young-migrant-children-from-schools/>.

¹⁹⁸ Equal Education and Equal Education Law Centre 2023 <https://equaleducation.org.za/2023/02/06/joint-statement-equal-education-and-equal-education-law-centre-strongly-condemn-operation-dudulas-campaign-to-remove-young-migrant-children-from-schools/>.

¹⁹⁹ Hamadziri and Chitimira 2021 *Acta Juridica* 27-30.

²⁰⁰ Paul and Jefferson 2019 *Frontiers in Computer Science* 3.

²⁰¹ Paul and Jefferson 2019 *Frontiers in Computer Science* 3.

²⁰² Save the Child "COVID-19 Impacts on African Children" 5.

²⁰³ UNICEF 2021 <https://www.unicef.org/press-releases/learners-south-africa-one-school-year-behind-where-they-should-be>; See also Department of Statistics South Africa 2022 <https://www.statssa.gov.za/?p=15197>.

pandemic ultimately worsened and jeopardised their right to quality and inclusive education.²⁰⁴

Although school closures affected all children, the impact was most severe for those vulnerable groups coming from poor and single-parent families and children with special education needs also suffered,²⁰⁵ (this category is understood to also include vulnerable undocumented immigrant children). Some of the problems were the inaccessibility of online teaching platforms due to data issues, lack of internet connectivity, and lack of social and emotional support. Some children also suffered because they did not get school meals.²⁰⁶ In *Equal Education*,²⁰⁷ it was contended that 77% of undocumented children did not receive meals and were excluded from receiving food parcels from the Child Support Grant. The nationwide lockdown came at a time when some schools were still struggling due to disparities caused by apartheid.²⁰⁸ As a result of the pandemic, the inequalities increased, further disadvantaging poor children, including undocumented immigrant children, from pursuing their studies.²⁰⁹

In a country where a large percentage of (immigrant) learners come from underdeveloped places financial assistance to access food, mobile connections and laptops may not be readily available to all. Hence, the online method of learning was not favourable to everyone.²¹⁰ Notwithstanding all the remedial efforts made by the government and schools, such as the provision of internet access, children living in remote areas, where there is no electricity supply, and network coverage is poor,

²⁰⁴ Save the Child "COVID-19 Impacts on African Children"5.

²⁰⁵ Organisation for Economic Co-operation and Development "The Impact of COVID-19 on Student Equity and Inclusion" 2.

²⁰⁶ Organisation for Economic Co-operation and Development "The Impact of COVID-19 on Student Equity and Inclusion" 2.

²⁰⁷ *Equal Education* para 25.

²⁰⁸ Landa, Zhou and Marongwe 2021 *International Review of Education* 167.

²⁰⁹ Landa, Zhou and Marongwe 2021 *International Review of Education* 167.

²¹⁰ Mohohlwane and Shepherd "The Impact of COVID-19 in Education-More than a Year of Disruption" 2.

continued to suffer.²¹¹ Virtual lessons were only practical to learners who had access to the internet and electronic gadgets. They were unaffordable to learners coming from extreme poverty, such as undocumented immigrant children.²¹² Poor children who had access to effective connectivity often faced challenges because the devices that they used belonged to their parents and had to be shared, making attending online classes difficult.²¹³ Additionally, some of the COVID-19 regulations, such as social distancing, did not take into account crowded settlements.²¹⁴ Some children live in shacks where the dwellings do not permit them to be at least 1.5m apart, making learning from home very difficult.²¹⁵

School closures also meant the halting of supplementary services provided through the schooling system, such as food programmes. For instance, over 9 million learners in need used to receive a meal each day at school through the National School Nutrition Programme (NSNP).²¹⁶ The suspension of this programme during the lockdown period left these children at risk of malnutrition for several months. The NSNP is one of the ongoing safety nets that was introduced in South Africa.²¹⁷ One of the purposes of this programme is to enhance learning capacity and improve access to education for primary and secondary school learners.²¹⁸ However, the suspension of the NSNP for four months in 2020 was the longest break in the provision of daily meals to eligible learners, producing additional emotional strain for caregivers and children.²¹⁹ The government's COVID-19 aid programmes, such as food parcels for the indigent during the national lockdown, overlooked refugees, immigrants and asylum

²¹¹ Mohohlwane and Shepherd "The Impact of COVID-19 in Education-More than a Year of Disruption" 2.

²¹² Mohohlwane and Shepherd "The Impact of COVID-19 in Education-More than a Year of Disruption" 2.

²¹³ Hedding and Greve 2020 *South African Journal of Science* 1.

²¹⁴ Mambo and Agbola 2020 *African Journal of Governance and Development* 340.

²¹⁵ Mambo and Agbola 2020 *African Journal of Governance and Development* 340.

²¹⁶ National School Nutrition Programme (NSNP) 2013/14 Annual Report, 4.

²¹⁷ Mohohlwane and Shepherd "The Impact of COVID-19 in Education-More than a Year of Disruption" 31.

²¹⁸ Mohohlwane and Shepherd "The Impact of COVID-19 in Education-More than a Year of Disruption" 32.

²¹⁹ Mohohlwane and Shepherd "The Impact of COVID-19 in Education-More than a Year of Disruption" 32.

seekers.²²⁰ This made it impossible for some immigrant children to continue schooling.²²¹ The Rapporteur for South Africa at the African Commission on Human and Peoples' Rights sent an urgent appeal to the government to protect the rights of vulnerable groups, including refugees, asylum seekers and migrants, during the lockdown.²²² The COVID-19 rules, regulations and policies and other steps taken by the government during the lockdown further worsened barriers to the enjoyment of basic education by undocumented immigrant children.

6.5 Conclusion

Since international law guarantees the right to a basic education to all children, irrespective of their citizenship and immigration status, and given that the *Constitution* also states that the right to a basic education should be afforded to everyone, there is still a wide gap between theory and reality. Despite South Africa's international obligations to provide basic education to all individuals within its jurisdiction, the current law and practice of undocumented children in the country indicate that their right to a basic education is still far from being fully realised. While these children are theoretically entitled to various socio-economic rights, including the right to basic education, the realities they face reveal numerous barriers that impede their access to a basic education. Access to a basic education is not universally guaranteed in South Africa, particularly not for children who are undocumented. It is not uncommon for these children to be denied access to schools and to be charged fees beyond their means.

There is no denying that South Africa has adopted many laudable initiatives to foster education for everyone. However, the country finds itself in a dilemma in which fully implementing the wide-ranging guarantees of socio-economic rights for undocumented immigrant children might, in the short term, take away scarce resources from the country's citizens, which, some argue, will result in a failure to look

²²⁰ Human Rights Watch 2020 <https://www.hrw.org/world-report/2021/country-chapters/south-africa>.

²²¹ Human Rights Watch 2020 <https://www.hrw.org/world-report/2021/country-chapters/south-africa>.

²²² African Commission on Human and Peoples' Rights 2020 <https://achpr.au.int/en/news/press-releases/2020-05-12/statement-letter-urgent-appeal-republic-south-africa>.

after its own people. This is because of the number of immigrants, but also the additional costs required to cater for financial access to education, language integration, psychological counselling, and other specific needs of undocumented immigrant children, exceeding the comparable cost of needs of "ordinary" citizens. Due to the competition for resources, some citizens regard immigrant children as outsiders who should not be given access to public services. At the same time, failure to provide minimum core protection to immigrants violates obligations under international law. Moreover, in the longer term, every migrant with education is an economic, but also cultural asset to the country. Faced with this conundrum, South Africa seems to have decided to prioritise the needs of its citizens. As such, there is a huge gap between theory and reality on the ground as far as the enjoyment of the right to a basic education by undocumented immigrant children is concerned. Whereas the state is legally responsible for ensuring adherence to international human rights standards, it has not sufficiently carried out its obligations because legislation, regulations and policies result in the discrimination of undocumented immigrant children and obstruct their enrolment in schools. Hence, South Africa should remove practices which hinder undocumented immigrant children from accessing education.

Legal and practical factors violate the right of undocumented immigrant children to access and enjoy basic education. These include addressing physical and verbal abuse by teachers and other learners, harmonising conflicting national laws and policies on education and the treatment of immigrant children, and fighting corruption affecting access to education. In sum, South Africa needs to take active steps to fully comply with its international obligation to respect, protect, promote and fulfil the right to basic education for undocumented immigrant children. Given that South Africa is not the only jurisdiction grappling with the challenge of providing basic education to undocumented immigrant children, the laws of the USA are analysed in the following chapter to determine whether South Africa has something to learn from that country.

Chapter 7 Basic Education for Undocumented Immigrant Children in the USA

7.1 Introduction

The USA faces an influx of immigrants from South America, Turkey, India, Ukraine, and Russia.¹ Between October 2021 and May 2022, US Customs and Border Patrol picked up more than 101 000 unaccompanied minors.² Moreover, a report by the National Association of Secondary School Principals indicated an estimate 1.09 million undocumented children in the country.³ Many of these unaccompanied minors are now, in a way at least, integrated into American society, although they face many economic, social and cultural barriers.⁴ Owing to the attractiveness of the USA to many people across the globe, laws have been developed to cater for these children. The courts have generated a remarkable body of case law. Academic writers have also contributed immensely to the development of immigrants' right to education.

The USA was chosen as a case study for this thesis based on the criteria of relevance and similarity of circumstances in relation to South Africa. Both states have a history of legislated segregation in education and in all areas of life.⁵ Despite the abolition of racial segregation in education, inequality in schools in both countries continues. Minority groups continue to face race-based educational discrimination based on their race.⁶ This notwithstanding, American laws (particularly case law) provide vital guidance for South Africa on the fulfilment of the right to a basic education for undocumented immigrant children. Although the USA is more economically developed

¹ Miroff 2022 <https://www.washingtonpost.com/immigration/2022/06/16/united-states-border-immigration-arrests/>.

² Linge 2022 <https://nypost.com/2022/07/09/us-expects-historic-surge-of-migrant-kids-this-year-report/>.

³ National Association of Secondary School Principals 2022 <https://www.nassp.org/top-issues-in-education/position-statements/undocumented-students/>.

⁴ National Association of Secondary School Principals 2022 <https://www.nassp.org/top-issues-in-education/position-statements/undocumented-students/>.

⁵ Walker and Archung 2003 *Comparative Education Review* 21.

⁶ Walker and Archung 2003 *Comparative Education Review* 21.

than South Africa, it has substantial inequalities that affect the education system, particularly for vulnerable groups such as racial minorities and immigrants.⁷ To mitigate these inequalities, American courts have recognised educational entitlements.⁸ There are potential lessons for South Africa to learn from the USA, particularly the jurisprudence of its courts, which have developed a vigorous understanding of the right to education. The following discussion examines how the USA treats undocumented immigrant children in the education sector. *Plyler v Doe* is one of the globally recognised landmark judgements regarding the treatment of undocumented immigrants. The study wants to draw specific lessons from the USA case law, because the Con Court has done so many times and the Constitution allows for this.⁹

7.2 Initiative by the USA to promote the right to education for undocumented immigrants: A look inside *Plyler v Doe*

7.2.1 The Fourteenth Amendment of the U.S. Constitution

The *Constitution of the United States of America*, 1787,¹⁰ does not provide for the right to education for undocumented immigrant children or for any other persons for that matter. However, the Fourteenth Amendment to the USA *Constitution* contains the Equal Protection Clause, providing that: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."¹¹ In *San Antonio Independent School District v. Rodriguez*, the Supreme Court pointed out that education does not constitute a fundamental right under the federal *Constitution*.¹² However, this remains a legal issue. At the same time, equal provision of education to everyone is a different matter. Although much of the case law in the American context dates back many years, these decisions still hold significant importance today and have influenced the

⁷ Gamoran 2001 *ASA* 135.

⁸ Isaacs 2010 *SAJHR* 364.

⁹ Section 39 of the *Constitution*.

¹⁰ *Constitution of the United States of America*, 1787.

¹¹ Section 1 of the 14th Amendment to the U.S. Constitution: Civil Rights (1868).

¹² *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 (1973) para 138.

decision in *Plyler v. Doe*. This judgement further influenced the laws pertaining to undocumented immigrants in the USA.

7.2.2 *Plyler, Superintendent, Tyler Independent School District v Doe 457 US 202 (1982)*

First, the ruling and principles in *Plyler v Doe* hold universal relevance and serve as a guiding example for countries dealing with the issue of the provision of basic education to undocumented immigrant children. This case established a significant precedent by affirming the right to education for all children, irrespective of immigration status. In 1975, the Texas legislature introduced Texas Education Code §21.031, allowing school districts to withhold funds for the education of children not legally admitted to the USA.¹³ The *Plyler v Doe* revolved around whether the Texas legislature could constitutionally withhold state funds from the school districts to educate children not legally admitted in the USA and whether school districts could deny enrolment to such children.¹⁴ The core issue was the state's obligation to provide free education to undocumented immigrant children. The court concluded that illegal aliens were protected by the Equal Protection Clause and that the Texas statute did not meet the basic level of scrutiny required.¹⁵

In deciding the matter, the District Court found that neither the revised law nor its implementation had "the purpose or effect of keeping illegal aliens out of the State of Texas."¹⁶ The court also found that the increase in enrolment in Texas' public schools was primarily attributable to the admission of children who were legal residents and that, while barring undocumented children would save money in the short term, it would not necessarily improve the quality of education offered by the schools.¹⁷ The court concluded that illegal aliens were entitled to the protection of the Equal Protection Clause and that Texas' legislation violated constitutional rights.¹⁸

¹³ §21.031 of the Texas Education Code, 1975.

¹⁴ *Plyler v Doe* 205

¹⁵ *Plyler v Doe* 245.

¹⁶ *Plyler v Doe* 206.

¹⁷ *Plyler v Doe* 207.

¹⁸ *Plyler v Doe* 208-210.

The Supreme Court observed that the plaintiffs (the undocumented immigrant children) were vulnerable children who deserved special protection and that there was no cogent argument for them to be denied the benefit of education. Although the court reiterated the need to deport illegal immigrants, it did not believe that the children of such immigrants deserved the wrath of the law. Important, the court observed that, any law that punish children for their parents' misconduct do not align with fundamental principles of justice. There is no rational reason to penalise children simply for being in the USA.¹⁹

The Supreme Court confirmed the opinion of the Court of Appeals and further held that the denial to children of access to free public education does not advance any state interest.²⁰ It further observed that

Texas' statutory classification cannot be sustained as furthering its interest in the "preservation of the state's limited resources for the education of its lawful residents." While the State might have an interest in mitigating potentially harsh economic effects from an influx of legal immigrants, the Texas statute does not offer an effective method of dealing with the problem. Even assuming that the net impact of illegal aliens on the economy is negative, charging tuition to undocumented children constitutes an ineffectual attempt to stem the tide of illegal immigration, at least when compared with the alternative of prohibiting employment of illegal aliens. Nor is there any merit to the suggestion that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. The record does not show that exclusion of undocumented children is likely to improve the overall quality of education in the State. Neither is there any merit to the claim that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the State's boundaries and to put their education to productive social or political use within the State.²¹

The court reached this decision on the premise that illegal aliens may claim the benefit of the Equal Protection Clause, which provides that no State shall deny persons under their jurisdiction the equal protection of the law, no matter their immigration status.

¹⁹ *Plyler v Doe* 220.

²⁰ *Plyler v Doe* 221.

²¹ *Plyler v Doe* 240-242.

As such, aliens are also entitled to equal protection of the law.²² This showed that the protection afforded by the Fourteenth Amendment extends to everyone in each State's territory.²³ Although education is not a fundamental right in the US *Constitution*, the deprivation of public education is discriminatory because education has a pivotal role in maintaining the fabric of society and sustaining political and cultural heritage.²⁴ The court held that the government could not deny education to any person within its jurisdiction and that children could not be excluded from public education based on their (illegal) immigration status.²⁵ The Supreme Court ruled that undocumented children had the same right to attend public primary and secondary schools as USA citizens and permanent residents.²⁶ The court said that, like other children, undocumented immigrants are obliged, under state law, to attend school until they reach the mandatory age and that, as a result, public schools may not:

- (a) Deny admission to a student during initial enrolment or at any other time on the basis of undocumented status.
- (b) Require students or parents to disclose or document their immigration status.
- (c) Make inquiries of students or parents that may expose their undocumented status.
- (d) Require social security numbers from all students, as this may expose undocumented status, and that
- (e) Adults without social security numbers who are applying for a free lunch and/or breakfast program on behalf of a student need only indicate on the application that they do not have a social security number.²⁷

This judgement had far-reaching implications for policy and law on access for undocumented immigrant children, in that all subsequent executive orders and legislation focused more on whether such children could claim permanent residence

²² *Plyler v Doe* 210-216.

²³ *Plyler v Doe* 210-216.

²⁴ *Plyler v Doe* 216-224.

²⁵ *Equal Protection Clause of the Fourteenth Amendment to the United States Constitution* (1868).

²⁶ *Plyler v Doe* 206.

²⁷ *Plyler v Doe* 225.

and citizenship and not whether they could attend schools. Thus, the courts gave them permission (and obliged them) to attend school and made it unlawful for any person to deny access to public schools on the pretext that they were illegal aliens. Deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual and poses obstacles to what they can achieve.²⁸ South Africa can learn significantly from the considerable importance placed on education for undocumented immigrant children in the USA, even though education is not considered a fundamental right there. Much is even expected from South Africa where education is indeed recognised as a fundamental right.

7.2.3 Equal Educational Opportunities Act (1974)

The *Equal Educational Opportunities Act* was enacted and signed into law by President Richard Nixon in 1974. It addresses civil rights in education and prohibits states from denying equal educational opportunities to students. In this regard, it outlaws the segregation of schools based on sex, race, skin colour, or national origin.²⁹ Federal law mandates school districts and State Educational Agencies (SEA) to take measures to overcome language barriers that prevent Non-English Language Learners from participating equally in educational programmes.³⁰ School districts and SEAs violate the *Equal Educational Opportunities Act* when they fail to provide adequate resources and when they do not take appropriate action to address the needs of non-English-language learners. § 1703 of the *Equal Educational Opportunities Act* provides that educational opportunities should not be denied to anyone based on race, colour, or national origin.³¹ These prohibitions include but are not limited to, intentionally segregating students and failing to take necessary actions to eliminate the remnants of previously segregated dual-school systems.³² Failure to take necessary measures to overcome language barriers that hinder students' equal participation in schools.³³

²⁸ *Plyle v Doe* 216-224.

²⁹ § 1703 of the *Equal Educational Opportunities Act* 1974.

³⁰ § 1703 (f) of the *Equal Educational Opportunities Act*.

³¹ § 1703 (a) of the *Equal Educational Opportunities Act*.

³² § 1703 (b) of the *Equal Educational Opportunities Act*.

³³ § 1703 (f) of the *Equal Educational Opportunities Act*.

The *Equal Education Act* sets the tone for the non-discrimination of learners at school. All the American states are bound by it. With regard to undocumented immigrant children, this statute is applicable as long as it prohibits discrimination based on national origin. It may be argued that undocumented immigrant children were discriminated against based on the countries from which they came. It followed that they were protected under this statute. However, its wording and implementation do not seem to provide adequate protection for undocumented immigrant children; hence, the endeavour is to develop a new statute that would provide such protection. Before discussing attempts at legislative reform, it is crucial to first analyse the *Flores Settlement Agreement*, which may be considered one of the successes of the *Equal Education Act*.

7.2.4 *Flores Settlement Agreement (1997)*

The *Flores Settlement Agreement*, adopted in 1997, provides protection for immigrant children in USA custody.³⁴ Its origins can be traced to 1985 when a class action filed in the USA District Court for the Central District of California challenged procedures for the detention and release of alien minors by immigration authorities.³⁵ After more than a decade of litigation, the parties negotiated and concluded the *Flores Settlement Agreement* in 1997.³⁶ The Agreement sets a "nationwide policy for the detention, release, and treatment of minors"³⁷ who are in immigration custody, including undocumented immigrant children. This agreement was named after 15-year-old Jenny Lisette Flores, who was one of the plaintiffs in the 1985 class action.

Ms Flores's father was killed during the Salvadoran Civil War. Ms Flores fled to the USA to join her mother in California but was arrested by Immigration and Naturalization Service (INS) officers at the border. They handcuffed and strip-searched her, impairing

³⁴ Occupational Safety and Health Review Commission "Stipulated Settlement Agreement."

³⁵ *Jemmy Lisette Flores v Janet Reno and Attorney General of the United States* 1993 507 U.S. 292 (hereafter *Flores v J Attorney General of the United States*).

³⁶ Occupational Safety and Health Review Commission "Stipulated Settlement Agreement."

³⁷ Occupational Safety and Health Review Commission "Stipulated Settlement Agreement."

her dignity in the process.³⁸ They also kept her in detention because her mother did not agree to questioning by immigration officials. She feared that if she cooperated with the INS, they would both be deported.³⁹ Ms Flores also had a cousin who had legal status in the USA and was willing to take her in. However, the INS refused to release her to someone who was not her legal guardian.⁴⁰ After her arrest, Ms Flores was sent to a ramshackle motel, which was a makeshift detention centre where she shared rooms with strangers. Children at that detention centre were not allowed visitors or access to medical care and educational facilities.⁴¹ They sat there all day and did not receive supervised recreational activities and other educational support to which children are entitled.⁴²

The conditions of detention led to the filing of a lawsuit on behalf of Ms Flores and the other girls. The lawsuit was meant to secure minimum child welfare standards for the minors at the detention centres,⁴³ provision of education for the minors, and less restrictive conditions appropriate to minors of that age, including those who had special needs.⁴⁴ The parties reached a settlement that stipulated, *inter alia*, that the following was to be provided: from Monday to Friday children were to be provided with educational services tailored to their developing fundamental academic skills, communication skills with secondary emphasis on English Language Training (ELT).⁴⁵ Minors were to be provided with suitable reading materials in languages other than English for their leisure activities.⁴⁶

The *Flores Settlement Agreement* provided for appropriated care for undocumented minors in detention and set the standard of educational access for them. It stipulated

³⁸ *Flores v J Attorney General of the United States* 296.

³⁹ *Flores v J Attorney General of the United States* 296.

⁴⁰ *Flores v J Attorney General of the United States* 296.

⁴¹ *Flores v J Attorney General of the United States* 298.

⁴² *Flores v J Attorney General of the United States* 298.

⁴³ *Flores v J Attorney General of the United States* 298.

⁴⁴ *Flores v J Attorney General of the United States* 299.

⁴⁵ Exhibit 1 Clause 4 of the Occupational Safety and Health Review Commission "Stipulated Settlement Agreement."

⁴⁶ Exhibit 1 Clause 4 of the Occupational Safety and Health Review Commission "Stipulated Settlement Agreement."

that an appropriate education for each child's level of development and the acquisition of "communication skills in a structured classroom setting"⁴⁷ were required and that the facilities where children were kept would have to meet minimum requirements for access to healthcare, education, recreation and other childcare services.⁴⁸

Although the *Flores Settlement Agreement* secured some rights for undocumented children, it was mainly about protecting their dignity and humanity while in the USA's custody. Notwithstanding this agreement, the issue of detention and deportation of illegal immigrants remains contested, which led to the introduction of legislation to protect them from removal from the USA. The legislative and executive action will now be analysed in the context of the right of undocumented immigrant children to be protected from detention and deportation while studying in the USA.

7.2.5 Development, Relief, and Education for Alien Minors Act

The *Development, Relief, and Education for Alien Minors Act (DREAM Act)*, first proposed in 2011, was a USA piece of legislation intended to create a legal framework and process through which undocumented immigrant minors (DREAMers) could apply for conditional residency in the USA on the understanding that they would be on the path to permanent residency.⁴⁹ To qualify for conditional residency under this Act, illegal minors would have to prove that they entered the USA before attaining the age of 16, continuously resided in the USA for five years prior to application and graduated with an American high school diploma, obtained a general development certificate, had a good moral character and possessed a clean criminal record.⁵⁰

The *DREAM Act* was built on the *Illegal Immigration Reform and Immigrant Responsibility Act*,⁵¹ which authorised states to pass legislation that would allow undocumented youths to receive state aid. The *DREAM Act* proposed granting undocumented youth who finished high school in the USA and who wanted to attend

⁴⁷ Exhibit 1 Clause 4 of the Occupational Safety and Health Review Commission "Stipulated Settlement Agreement."

⁴⁸ Exhibit 1 Clause 1-14 of the Occupational Safety and Health Review Commission "Stipulated Settlement Agreement."

⁴⁹ Howard University 2018 <https://library.law.howard.edu/civilrightshistory/immigration/daca>.

⁵⁰ Howard University 2018 <https://library.law.howard.edu/civilrightshistory/immigration/daca>.

⁵¹ Howard University 2018 <https://library.law.howard.edu/civilrightshistory/immigration/daca>.

post-secondary institutions in the USA conditional pathways to citizenship. Dreamers who satisfied all the requirements would receive permanent residence on a conditional basis for six years, during which they would complete at least two years in a bachelor's or higher degree program or serve in the military for at least two years. After satisfying these conditions, DREAMers apply to have the conditions removed and be left with permanent resident status. For this reason, education was a major priority for the *DREAM Act*.

However, partisan differences led to the failure of the *DREAM Act* to be passed by the USA lawmaker on numerous occasions, with the result that in 2010, it was revised and re-introduced. It passed the House of Representatives but failed in the Senate, with the result that a 2011 version was introduced.⁵² It also fell flat after having lost more support on the pretext that the way it was designed, it was encouraging illegal immigration by giving assurance to illegal aliens that their status would be legalised.⁵³ As such, some described it as an amnesty for violations of immigration legislation and an encouragement of such illegal immigration, leading to unsustainable growth of the USA population and giving illegal immigrations a huge chunk of American resources such as places in educational institutions.⁵⁴ This is despite the fact that the *DREAM Act* would have protected children whose arrival in the USA without adequate documentation was not their fault.⁵⁵ Some argued that DREAMers were victims of circumstance, not perpetrators, and therefore deserved protection, not vilification.⁵⁶

The failure of the *DREAM Act* to become binding legislation demonstrates a much bigger problem than lawmakers simply refusing to come to the aid of undocumented immigrant children: it illustrates hardened voter attitudes against undocumented immigrant children. Their denial of permanent residency and the path to citizenship,

⁵² Although the *Development Relief and Education for Alien Minors Act* 2010 (hereafter *DREAM Act*) was introduced several times, its essence remained the same – see Barron 2011 *Harv J on Legis* 632.

⁵³ Howard University 2018 <https://library.law.howard.edu/civilrightshistory/immigration/daca>.

⁵⁴ Barron 2011 *Harv J on Legis* 624.

⁵⁵ Barron 2011 *Harv J on Legis* 623.

⁵⁶ Howard University 2018 <https://library.law.howard.edu/civilrightshistory/immigration/daca>.

despite serving the USA in various ways as graduates and workers, inevitably leads to a situation in which they would not qualify for tax credits, state medical insurance and loans offered by the federal government.⁵⁷ In the eyes of many Americans, just as those of their South African counterparts, denying undocumented immigrant children a path to legalise their stay, obtain permanent residency and citizenship is a necessary deterrence to discourage illegal immigration and send a message out that one will not condone violations of immigration legislation.

The main difference between the South African approach and the *DREAM Act* is that the *DREAM Act* seemed to create the impression that undocumented immigrant children who entered the USA illegally would be allowed to obtain primary education, high school education and tertiary education – the only hurdles being employment, and acquisition of permanent residence and citizenship. While the Americans seemed to care less about primary and secondary school resources being availed to undocumented immigrant children, the South African government may probably be concerned that allowing undocumented immigrant children to enrol in schools will put a budgetary strain on schools as far as the provision of meals, learning materials, and other resources are concerned. Although the approaches between the two countries are different, the issue of laws that allegedly encourage illegal immigration by granting amnesty seems to be familiar between both, as is the issue of competition for resources.

7.2.6 Deferred Action for Childhood Arrivals (2012)

After the failure to pass the *DREAM Act*, President Obama issued the Deferred Action for Childhood Arrivals (DACA), which offered eligible DREAMers a two-year respite from the possibility of deportation and made them eligible to apply for employment authorisation.⁵⁸ The eligibility criteria includes:

- Have arrived in the USA prior to age 16

⁵⁷ Barron 2011 *Harv J on Legis* 623-625.

⁵⁸ Pimienta, Morse and Walsh 2020 <https://www.ncls.org/research/immigration/deferred-action.aspx>.

- Have continuously resided in the USA without legal status since June 15, 2007
- Be less than age 31 as of June 15, 2012 and at least age 15 at application (unauthorized immigrants under 15 but in removal proceedings are also eligible to apply)
- Be currently enrolled in school, have graduated from high school or obtained a general development certificate (GED), or be an honorably discharged veteran
- Have not been convicted of a felony or multiple or serious misdemeanors and not pose a threat to national security or public safety.⁵⁹

Under DACA, 16 states and the District of Columbia offer in-state tuition to unauthorised immigrant students, by having taken state legislative action. Seven states offer tuition by state university systems.⁶⁰ The District of Columbia enacted laws to allow in-state tuition benefits for certain unauthorised immigrant children.⁶¹ Before DACA, New Mexico, Utah and Washington issued driver's licences and driving privilege cards to unauthorised immigrants.⁶² After DACA, California was the first to allow deferred action recipients to receive driver's licences. Presently 15 states and the District of Columbia allow unauthorised immigrants to obtain driver's licences.⁶³

Certain observations may be made in reading DACA and the *DREAM Act*. Like the latter, DACA ties eligibility to the US's human capital needs by stipulating that persons intending to apply under DACA must be enrolled in American schools, obtained a high school diploma or acquired an equivalent or higher qualification.⁶⁴ While DACA represents the exercise of executive discretion to defer the prosecution and deportation of illegal aliens, it also reveals the willingness of American authorities to

⁵⁹ Svajlenka and Singer "Immigration Facts" 1-4.

⁶⁰ Pimienta, Morse and Walsh 2020 <https://www.ncls.org/research/immigration/deferred-action.aspx>.

⁶¹ Pimienta, Morse and Walsh 2020 <https://www.ncls.org/research/immigration/deferred-action.aspx>.

⁶² Pimienta, Morse and Walsh 2020 <https://www.ncls.org/research/immigration/deferred-action.aspx>.

⁶³ Pimienta, Morse and Walsh 2020 <https://www.ncls.org/research/immigration/deferred-action.aspx>.

⁶⁴ Batalova *et al* "Deferred Action for Childhood Arrivals at the One-Year Mark" 1.

grant children access to basic education. DACA does not prohibit the giving of tuition to undocumented immigrant children but protects them from deportation while they receive education in the USA and further grant them employment. There have been several attempts to remove DACA, although all of them failed.⁶⁵

7.2.7 Elementary and Secondary Education Act 1965 (amended as Every Student Succeeds Act, 2018)

Elementary and Secondary Education Act (ESEA) of 1965 was amended by *Every Student Succeeds Act (ESSA)* of 2018. The said *ESEA* (amended *ESSA*) introduced funding programs which assist in the creation and execution of innovative language instruction educational programs and academic content instructional initiatives tailored for English learners and immigrant children, who are in elementary schools and secondary education institutions.⁶⁶ The purpose of the Act is to support immigrant children in achieving English proficiency and reaching advanced levels of academic success in the English language.⁶⁷ Under this the each State is required to allocate 15% funds to Local Education Agencies that have high immigrant's student enrolment.⁶⁸ The said funds will be used for purposes such as enhancing teaching methods, offering tutoring and general support to newly arrived immigrant children. In addition, Title I, Part C of the *ESEA* aims to ensure that the unique needs of migratory children are identified and addressed especially those who would have dropped out of school.⁶⁹ There are funds which are provided specifically under Title I, Part C to support and offer high-quality educational programs for migrant children with the aim to lessen educational disruptions and other challenges. These funds are allocated to all migrant children irrespective of migration status as long as they are entitled to free education and of the age of compulsory school attendance.⁷⁰ The

⁶⁵ See *Department of Homeland Security v Regents of the University of California* 591 U.S. 2020, 255.

⁶⁶ § 3115 of the *ESEA*.

⁶⁷ § 3102 of the *ESEA*.

⁶⁸ § 3114(d) of the *ESEA*.

⁶⁹ § 3104 Title I, Part C of the *ESEA*.

⁷⁰ Title I, Part C §§ 1115(b)(1)(A) and 1309(2) of the *ESEA*.

significance of this legislation lies in its explicit mention of the entitlements specifically provided to migrant children.

7.2.8 McKinney-Vento Homeless Assistance Act 1987

The *McKinney-Vento Homeless Assistance Act* promotes educational rights and support to children experiencing homelessness by ensuring prompt access to a free and appropriate public education.⁷¹ This Act aims to eliminate education enrolment barriers; therefore, the Department of Education allocates McKinney-Vento funding annually to states based on the state's shares.⁷² Amongst these children include migrant children who are homeless regardless of their migration status.⁷³ The school district have a mandate to identify these children, immediately enrol these children and make sure they have equal opportunity to thrive in district schools and they receive educational services they are entitled to and other suitable services.⁷⁴

7.3 Appropriate Lessons for South Africa

As highlighted in Chapter 1, this thesis is not primarily comparative due to the unique and distinct educational rights challenges within South Africa. However, it does derive inspiration from and examines lessons learned from best practices in other nations, notably the USA, facing similar issues with undocumented immigrant children seeking access to basic education. The importance of this is to illustrate that South Africa is not the only state dealing with undocumented immigrant children. It is a collective global effort to ensure that undocumented immigrant children have access to a basic education. However, there are also challenges flowing from using the USA as a benchmark for the protection of the right to a basic education for undocumented immigrant children. The USA is a developed state and probably find little challenge in meeting budgetary needs for providing basic education to all children in its territory.⁷⁵ Regardless of this, it may be argued that no state should (ideally) desire to remain "undeveloped." Therefore, there is worth in developing states looking at how

⁷¹ 42 USC § 11431 of the *McKinney-Vento Homeless Assistance Act*

⁷² 42 USC § 11431 of the *McKinney-Vento Homeless Assistance Act*.

⁷³ 42 USC § 11434a (iv) of the *McKinney-Vento Homeless Assistance Act*.

⁷⁴ 42 USC § 11431 of the *McKinney-Vento Homeless Assistance Act*.

⁷⁵ U.S. Department of Education 2021 <https://www2.ed.gov/about/overview/role.html>.

developed states handle human rights issues of mutual concern, such as access to a basic education for undocumented immigrant children. One may also argue that if underdeveloped states compare their fulfilment of human rights among themselves, they will lack vital insights that they may glean from developed states – a classic case of the blind leading the blind.

Both states are constitutional democracies which find value in entrenching human rights and using judicial review to ensure their respect, promotion and protection. In this regard, USA law and initiatives (particularly case law) provides vital guidance for South Africa on protecting the right to a basic education for undocumented immigrant children. Since the USA became a democracy centuries before South Africa and has been dealing with the influx of immigrants, there are vital lessons for South Africa to be learned on how that country has been ensuring that undocumented immigrant children enjoy access to basic education as illustrated above. Excluding undocumented immigrants from schools does not necessarily enhance the quality of education for citizens a lesson the USA derived from the *Plyler v Doe* case. Consequently, the USA initiated efforts to uphold the rights of undocumented immigrant children, providing valuable lessons for South Africa such as:

The *Equal Educational Opportunities Act* emphasises that educational opportunities must not be denied based on race, colour, or national origin. Considering that "national origin" clearly signifies the country of one's birth, South Africa should consider including this term in the *Schools Act* to ensure fair access to education. The *Flores Settlement Agreement* safeguards immigrant children in USA custody, setting educational standards for them. South Africa's *Immigration Act* can glean insights from this agreement, implementing age-appropriate and child-sensitive measures that specifically safeguard immigrant children, acknowledging their distinct needs. The *DREAM Act* proposes granting conditional pathways to permanent residence and citizenship for undocumented youth who complete high school and wish to attend post-secondary institutions in the USA. South Africa can learn from the initiatives undertaken and proposed in this Act even at the discretion of the Minister of Home Affairs. DACA permits certain illegal immigrant children to access in-state tuition benefits and obtain driver's licenses and protects these children from deportation while

they receive education, it further creates employment for these children while in school. South African policy can draw lessons from such initiatives, providing similar protection for undocumented immigrant children. It might not be really feasibly for a developing country like South Africa but it is a lesson that can be progressively implemented. The *Elementary and Secondary Education Act* allocates various funds to support immigrant children, irrespective of their immigration status. This funding extends to enhancing language skills, a vital component of basic education. Support is also provided to homeless immigrant children, ensuring compulsory education. These initiatives by the USA's education system can guide South Africa in protecting, respecting, promoting and fulfilling the enjoyment of basic education for undocumented immigrant children.

7.4 Conclusion

The USA experiences increasing instances of undocumented immigration due to its attractiveness as an economic power. As such, it faces the same problems that South Africa faces in tackling the challenges of providing basic education to undocumented immigrant children. The analysis in this chapter shows that the most crucial constitutional provision for access to basic education for these children is the Equal Protection Clause introduced by the Fourteenth Amendment to the US *Constitution*. This provision was used by the court in *Plyer v Doe* to thwart an attempt by the State of Texas to restrict undocumented immigrant children from obtaining basic education through state-funded schools. After this case, USA lawmakers focused their energies on enacting legislation to secure permanent residence and citizenship to children who entered the USA as illegal immigrants and who subsequently utilised their equal access right to learn in American schools. The legislative history after *Plyer* shows that one judicial judgement essentially changed the course of the discussion from whether undocumented immigrant children should receive basic education to whether they could be legalised and allowed to remain in the USA for the rest of their lives if they so wish. Also, the provision of funds specifically designed for these children to enhance their education. This illustrates the power of the judiciary in defending human rights. After *Plyer*, lawmakers debated the *DREAM Act*, which failed on numerous occasions to pass due to concerns that it would incentivise illegal immigration and

uncontrollably increase the population of the USA. Faced with this conundrum, President Obama introduced DACA, which gave almost all the benefits which the *DREAM Act* would have given, except permanent residence and citizenship. Although there has been considerable litigation against DACA, it is still in force.

Chapter 8 Findings and Recommendations

8.1 Introduction

This thesis aimed to ascertain how and to what extent South African law respects, protects, promotes, and fulfils the right to a basic education for undocumented immigrant children. It did this by examining, how South Africa fulfils its international and national obligations to realise the right to a basic education for these children; the institutions which protect, promote and help to fulfil the right to education; the country's response to its obligation to protect the rights "to, in and through" education and the barriers which impede undocumented immigrant children from enjoying the right to a basic education in South Africa. This thesis also sought to determine how the USA, another jurisdiction, fulfils the right to a basic education for undocumented immigrant children. This was done to draw lessons from the USA's best practices in this respect.

This concluding chapter presents findings and recommendations on how South Africa can enhance the enjoyment of the right to a basic education for undocumented immigrant children. The chapter begins with major findings regarding the challenges faced by undocumented immigrant children, focusing on the obstacles they encounter when trying to enrol in public schools. These obstacles include language challenges, discrimination, and other forms of prejudice. Following an analysis of these hurdles, this chapter provides a condensed overview of the discoveries concerning South Africa's commitments, both internationally and domestically, in ensuring the fulfilment of basic education rights for undocumented immigrant children. It outlines the findings related to institutional frameworks designed to safeguard, advocate for, and meet the educational rights of all children. Several recommendations for removing barriers and enhancing access to basic education for undocumented immigrant children are proffered in this chapter. These include a relook at South Africa's statutory and policy framework governing immigration to make it holistic and proactive to encounter the challenges of migration, as opposed to reactivity. The thesis adopts this view since immigration involves nationals from different countries, governments need to work together to alleviate the suffering of their citizens by finding long-lasting solutions to

economic, social and political challenges that trigger migration and result in statelessness and other forms of lack of documentation. Such an initiative might also require collaboration with global human rights bodies on migration and the protection of children¹ so that where possible, the international community contributes financially to realising the right to a basic education for undocumented immigrant children. The approach in this thesis is that fully providing for undocumented immigrant children to access basic education has a financial cost that South Africa might need help in handling, given its current negative fiscal outlook.

Although the issues that result from illegal immigration may be attributed to poor border management,² and notwithstanding that South Africa has a responsibility to address this issue, there is also the muted possibility for it to fully provide undocumented immigrant children with access to basic education and other needs and then recover those costs from the countries from which these children come. Although this may be a new way of addressing the current challenges, it may remove the argument that immigrants are putting a strain on South Africa's fiscus. Given that undocumented immigrant children continue to face difficulties in enrolling in public schools, where they also face discrimination and other forms of prejudice, this thesis recommends sensitivity training for local teachers and children to make them aware of the plight of immigrant children so that they are not viewed as enemies but people in need. This could be done in the context of avoiding disruptions in these children's lives and ensure that they receive compulsory education.

8.2 Major findings

8.2.1 The plight of undocumented immigrant children

The problems that result in the presence of undocumented immigrant children were introduced in the first chapter, which provides a background of economic, social and political conditions that result in the influx of foreigners into South Africa.³ The relatively better South African economy (despite its current challenges) attracts

¹ Bodies such as International Organisation for Migration and UNICEF.

² International Organisation for Migration 2023 <https://www.iom.int/countries/south-africa>.

³ See Chapter 1 para 1.1.1 of this thesis.

economic refugees from the SADC region, the rest of Africa and beyond. Undocumented persons arrive in South Africa as far afield as Nigeria, Cameroon, Congo, Bangladesh and Pakistan, among other countries facing economic and political strife.⁴ The allure of post-apartheid South Africa's good human rights record has seen more and more people arriving. While some arrive with valid visas and permits, Chapter 1 shows that most of them arrive without documentation and often seek asylum and job opportunities.⁵ As human nature would have it, they bear children in South Africa. However, their children also suffer the consequences of not having documentation.

Some of the immigrants who arrive with valid documentation end up undocumented due to failure to meet renewal requirements, human negligence, corruption and challenges at the Department of Home Affairs.⁶ These challenges emanate from legal and policy uncertainties, which see visa and permit requirements constantly changing such that a person who qualifies for a visa or permit today might not qualify tomorrow.⁷ Given the tough economic conditions in their own countries, most immigrants choose to stay in South Africa without documentation, meaning that their children would also be undocumented.

The introductory chapter also reveals that undocumented immigrant children are more vulnerable to exploitation and discrimination due to their heightened vulnerability as children, foreigners and as "illegals." They face difficulties in accessing and enjoying basic socio-economic rights, which include access to basic education.⁸ Their vulnerability in this regard is caused by the fact that their parents are mostly poor people living from hand to mouth. Therefore, they cannot afford basic human necessities. On the education front, it means that they rely on public schools for their children to access basic education.

⁴ See Chapter 1 para 1.1.1 of this thesis.

⁵ See Chapter 1 para 1.1.1 of this thesis.

⁶ For example see Chapter 5 para 5.1.6.2 above which shows how government official can fail immigrants by their negligence to rectify the legislation.

⁷ An example of Zimbabwe Exemption Permits as discussed in chapter 6.

⁸ Para 1.1.1 and 1.1.4 in Chapter 1 of this thesis.

8.2.2 *The importance of basic education*

The nature and effect of the barriers to access a basic education faced by undocumented immigrant children in South Africa should be understood in the context of the importance of education to children. It was noted in this thesis that education is special for all children in that it enhances their talents so that they can become masters of their own destinies.⁹ Education enables individuals to increase their earning potential and self-sufficiency, thereby making them valuable members of their communities. As such, denying children access to a basic education deprives them of the foundation on which to build knowledge, skills and values. Without basic education, children cannot develop the necessary emotional, psychological, mental and intellectual capabilities that enable them to play meaningful roles in a democracy, conflict resolution, tolerance and respect for themselves and others.¹⁰ It then follows that a society that deprives some of its children of access to a basic education shoots itself in the foot, as it must bear the burden of providing for them in future and misses out on the contribution that they would have made if they were educated.¹¹ For these reasons, education is immensely important for children. In the context of undocumented immigrant children, this is relevant because denying them access to education will not make them leave South Africa. Hence, South Africa might want to consider the long-term impact of its attempts to deprive them of basic education.

A basic education through primary and secondary schooling also serves the purpose of protecting children from exploitative labour, sexual abuse and other forms of encroachment on their persons and rights.¹² Compulsory basic education ensures that children are always in school, where they are ideally protected, grow up among their peers and learn in safe and conducive environments. It is perhaps for these reasons, among others mentioned above, that various international instruments, African

⁹ As discussed extensively in *Plyler v Doe*.

¹⁰ Reasons why the SDG advocates for the protection of education see Chapter 2 para 2.7 of this thesis.

¹¹ Vital lesson from *Plyler v Doe*.

¹² International Labour Organisation "The Role of Education to Eliminate Child Labour Access to Education-Key for Education Child Labour" 1-2.

treaties and South African law enshrine a right to a basic education, as discussed in the second and third chapters of this thesis.

8.2.3 Barriers to access basic education

The study also reveals that undocumented immigrant children face many economic, legal, societal and other barriers that either prevent them from enrolling at public schools altogether or make it difficult for them to learn in safe environments where they have been admitted. These are now considered and summarised, starting with difficulties in regularising immigration status. It was noted in the sixth chapter that the main barrier facing undocumented immigrant children when attempting to enrol at public schools is the lack of documentation, which has in the past been required by schools. Such documentation entails passports, study visas and, where applicable, permanent residence permits. Obviously, undocumented immigrants do not have such documents and would therefore face automatic exclusion. Notwithstanding, the Admission Policy offered a reprieve by stipulating those children could be provisionally enrolled in schools if they furnished their schools with the necessary proof of application to regularise their stay in the country. This had the unintended consequence of resulting in their removal from school, where their parents failed to produce such proof either because the parents were undocumented themselves or where the Department of Home Affairs did not make it possible to submit such applications.

In *Centre for Child Law & 37 Children*, the High Court said that the immigration law injunction against giving undocumented foreigners instruction was capable of an interpretation that excluded basic education.¹³ As a result of this judgement, the national Department of Basic Education issued Circular 1 of 2020, advising school heads that documents were no longer a requirement for the enrolment of children for basic education.¹⁴ While this Circular brought some reprieve for undocumented immigrant children, the judgment not the Circular has not made any significant difference in practically ensuring access to education for undocumented migrant

¹³ See the discussion in Chapter 3 para 3.2.9 of this thesis.

¹⁴ See the discussion in Chapter 3 para 3.2.9 of this thesis.

children. By extension, this top-down approach, although important, is not sufficient to effect change. As indicated in the previous chapters, steps have been taken by the government to amend certain provisions that are discriminatory to undocumented immigrant children by way of repealing the laws and establishment of the Proposed Amended Admission Policy and proposed *BELA Bill*.¹⁵

The second potent barrier facing undocumented immigrant children in exercising the right to a basic education in South Africa concerns legal contradictions and policy uncertainties that exacerbate their vulnerability. It was noted in the sixth chapter that laws and regulations which impose restrictive conditions on undocumented children to enrol at public schools result in their deprivation of access to basic education. The existing policy and legal frameworks, including the Admission Policy, *Immigration Act*, *Schools Act* and *Births and Deaths Registration Act*, contribute to exclusion of undocumented immigrant children and hinder their ability to fully exercise and enjoy their right to a basic education. Moreover, the Proposed Amended Admission Policy and the *BELA Bill* poses more threat to the enjoyment of the right to a basic education if passed. These instruments display inconsistencies among themselves and conflict with the constitutional right to a basic education.¹⁶ Read in their totality, they purport to guarantee the right to a basic education for all children yet impose restrictive conditions that prevent undocumented immigrant children from fully enjoying this right. Their inconsistency is aggravated by the silence of the *Immigration Act* on the need to ensure that undocumented immigrant children are guaranteed the right to access a basic education. As such, there is a need for an alignment of the applicable legislation and policies in regulating access to and enjoyment of basic education for undocumented immigrant children.

The third barrier affecting undocumented immigrant children who have successfully enrolled in public schools is language and other discriminatory behaviours. As noted in the chapter 6, most undocumented immigrant children arrive in South Africa

¹⁵ As critically analysed in Chapter 3 para 3.2.10 and 3.2.11 of this thesis.

¹⁶ As critically analysed in Chapter 3 para 3.2.10 and 3.2.11 of this thesis.

speaking their mother tongues, which makes it very difficult for them to learn at the same level as their local peers.¹⁷ They lose out on the first phase of schooling because they are unable to follow their teachers, who are required by law to provide instruction in vernacular languages from the first to the third grades.¹⁸ For some of these children, learning new languages takes time and may be elongated by the anxiety of a new environment. As noted earlier in this work, there are complex issues around the cost implications of providing undocumented immigrant children with education in their mother tongues. Such issues require detailed analysis in a separate contribution.

Whereas undocumented immigrant children are discriminated against on the basis of their nationalities from enrolling in public schools, discrimination persists in that teacher attitudes and treatment by other learners often border on bullying and contempt.¹⁹ Also, the contempt of other children directed at undocumented immigrants results in physical attacks and other forms of bullying that make the school environment dangerous and unconducive for immigrant children to learn.²⁰ The problem is that issues relating to racial discrimination and xenophobia are accorded very little prominence in the educational curricula. There are several ways of addressing this, as will be shown in the recommendations that follow in this chapter.

There are reported cases in which some schools have been reportedly providing the Department of Home Affairs and the South African Police Service with information on the documentation status of learners, resulting in the school principals being pinned down and paying fine for enrolling undocumented immigrants.²¹ This legal requirement to report undocumented children at school is backed by criminal sanctions, which involve fines and imprisonment in terms of the *Immigration Act*.²² The solution to this is to repeal such laws.

¹⁷ A practical example of the language barrier was discussed in Chapter 6 para 6.4.4 above.

¹⁸ *The Use of Vernacular Languages in Education* (1953) 11.

¹⁹ A practical example of the language barrier was discussed in Chapter 6 para 6.4.4 above.

²⁰ A practical example as discussed in Chapter 6 para 6.4.6 of this thesis.

²¹ A practical example of a school principal who paid a fine see, Chapter 6 para 6.4.1 of this thesis.

²² Section 39 of the *Immigration Act*.

8.2.4 *The state's legal obligations*

It was noted in the introductory chapter that one of the objectives of this study is to ascertain the international, regional and national obligations of South Africa and its government to provide access to a basic education for undocumented immigrant children within its borders. The analysis in the second chapter first took the thesis to international law to examine principal human rights instruments that provide for the right to basic education (framed in the language of primary and basic education) and related rights, such as the right to equality in education and non-discrimination.

8.2.4.1 International obligations

The second chapter illustrates that several international instruments, directly and indirectly, recognise and protect the right to a basic education. These include the constitutive instruments such as the (*UDHR*, *ICCPR* and *ICESCR*), the *Convention against Discrimination in Education* and the *CRC*, among others, which provide for a right to primary and secondary education. They provide that primary and secondary education, which can be viewed as part of basic education, is compulsory. These instruments illustrate that the international body recognises the right to compulsory and free primary education as a right.²³ Regarding freedom in education, these instruments provide that parents and legal guardians of children have a right to have a say and to contribute to the education of their children such that the education given to them is culturally appropriate.²⁴ Hence, education must be available, accessible, acceptable and adaptable so that it can serve the needs of the present generation.

The distinction between primary education and secondary education among instruments that comprise the International Bill of Rights is that primary education must be made available, compulsory and free, while secondary education should be progressively available and accessible.²⁵ The problem here, as noted in the second

²³ For example, Article 13(2)(a) of the *ICESCR*.

²⁴ CESCR "General Comment No. 13" para 6(c).

²⁵ Article 13(2)(b) of the *ICESCR*.

chapter, is that when children leave primary school, they are barely acquainted with basic reading, writing and numeric skills that can make them self-sufficient in future.²⁶ Primary education only makes it possible for children to survive in adult life but does not provide concrete foundations for them to thrive intellectually and professionally. For this reason, this thesis adopts the view that has been adopted by other scholars, such as Beiter (who says that free and compulsory education should be interpreted to at least include the lower levels of secondary education) and Sheppard, who says that the whole of secondary education must be free.²⁷

The *UDHR*, the *CRC* and the *Convention against Discrimination in Education* stipulate another important pillar of international law on the right to basic education (often framed in these instruments as primary and secondary education). They prohibit discrimination in general and in education in particular based on several listed grounds, which include nationality. Hence, States Parties must adopt measures to realise the right to a basic education while also ensuring that they remove all barriers to education, such as discrimination at the state level and also at the school and teacher levels. There are no exclusions for undocumented immigrant children to receive primary and secondary education, meaning that they are also entitled to enjoy the right to a basic education. Since denial of basic education has lifelong consequences that most, if not all, children can never recover from even as adults, and in the light of the fact that a person may be undocumented today and documented tomorrow, it follows that states must act on the side of caution and ensure that they do not jeopardise the future of undocumented children as far as providing them with access to basic education is concerned. In the context of the foregoing, the conclusion here is that South Africa has failed to fully fulfil its international obligations to provide a free and compulsory primary and secondary education.

²⁶ Article 1(1) of the *World Declaration on Education* illustrates the basis of learning needs.

²⁷ Sheppard 2022 *Nordic Journal of Human Rights* 103 and Beiter *The Protection of the Right to Education by International Law* 645.

8.2.4.2 African obligations

At the continental level, the *Banjul Charter* and the *ACRWC* echo the main provisions of the *International Bill of Rights*, the *CRC* and the *Convention against Discrimination in Education*. They reiterate the obligations of African states, including South Africa, to make primary education compulsory, free and accessible to all children and also make secondary education generally available and accessible to all.²⁸ These two instruments do not permit discrimination based on nationality, leading one to conclude that all African states which find themselves with undocumented immigrant children must not prejudice them but must provide them with access to a basic education. Most importantly the Abidjan Principle prohibit discrimination in education system based on "national origin and migration status."²⁹ Given South Africa's attempts to exclude undocumented immigrant children from its school system, it is concluded that South Africa has failed to fulfil its obligations to provide free, accessible and compulsory primary and secondary education to undocumented immigrant children.

8.2.4.3 National obligations

The domestic legal framework governing the right to education in South Africa has been explored in the third chapter. It was noted that section 29(1)(a) of the *Constitution* is applicable to undocumented immigrant children seeking access to a basic education in accordance with international law as examined above. In addition, other fundamental rights as explained in chapter 5 such as language rights, best interest of the child, free education, right to a name and nationality, equality, human dignity, and protection from violence in the education system, are crucial. Hence, the right to a basic education in the *Constitution* does not stand in isolation, as is the case for all other rights in the Bill of Rights that are mutually dependent. As such, violations of the right to a basic education may also violate other rights that are entrenched elsewhere in the *Constitution*. South Africa has however failed to incorporate the important aspects of international law in its domestic law for example the *Schools Act* does not clearly provide for free basic education. Reservation entered by South Africa

²⁸ See Article 11 of the *ACRWC* and a discussion of the *Abidjan Principles* in Chapter 2 of this thesis.

²⁹ Overarching Principle 24 of the *Abidjan Principles*.

with regards to Article 13(2)(a) of *ICESCR* is problematic and violate basic education which calls for immediate realisation.

8.2.4.4 Summary of obligations

In summary, international law requires South Africa to respect, protect, promote and fulfil the right to basic education for undocumented immigrant children. The drafters of the *Constitution* realised the importance of international law and accorded it a special place in the South African legal order to the extent that today, international law plays a crucial role in South Africa's jurisprudence. Section 39 of the *Constitution* stipulates that when courts interpret the Bill of Rights, they must consider international law.³⁰ The use of "must" imposes an obligation, not a discretion, on the courts to consider international law. Since international law is composed of binding and non-binding sources, the courts must consider soft law and treaties which South Africa has ratified.

Section 231 of the *Constitution* binds South Africa to comply with its international treaty obligations arising from treaties that it has ratified, such as, in the context of this thesis, the *ICCPR*, *ICESCR*, the *Convention against Discrimination in Education*, and the *CRC*. Thus, the *Constitution* accords international law an important status in South Africa, meaning that human rights treaties are binding on South Africa and constitute sources to guide interpreting the Bill of Rights.

The obligation to respect the right to education in both international and national law entails a negative obligation for the government to refrain from enacting any laws and adopting any policies that would deny children their right to access education and to enjoy other rights and freedoms to which they are entitled.³¹ Respecting the right to education means refraining from interfering with the enjoyment of the right. The state should avoid all actions that prevent undocumented immigrant children from accessing

³⁰ A thorough discussion of how international instruments are incorporated in domestic law has been done in chapter 2 of the thesis. See para 2.2.1 and 2.2.2 of this thesis.

³¹ Olowu *An Integrative Right-based Approach on Human Development in Africa* 28.

basic education. The state should also guarantee the protection of the personal information of students from parties and entities who may jeopardise access to education.³² Bearing in mind that the right to a basic education is not absolute it can also be limited in terms of section 36 of the *Constitution* and that there should be a balance between the needs of the state and those of undocumented immigrant children.

The obligation to protect undocumented immigrant children is a positive one and refers to the duty of the state to take measures to protect individuals against threats to their security and well-being from private actors. Hence, the state must protect undocumented immigrant children from all forms of discrimination and prejudice. The state must also ensure that legislation protects pupils against interferences by teachers, other students, parents, and employers (child labour) and against xenophobia.³³ The school's code of conduct should be designed to include provisions that address the unique challenges faced by immigrant children. As mentioned earlier, immigrants face specific problems, such as xenophobic attacks, that are not applicable to citizen learners.

The obligation to fulfil the right to education requires the state to take active steps to establish institutions and procedures and provide resources, to enable all children to enjoy fundamental human rights. This requires the state to facilitate the right to a basic education by ensuring that education is linguistically and culturally appropriate for immigrant children, providing funding for education and promoting the right through awareness campaigns that sensitise society to the plight of undocumented immigrant children and the reason why they deserve special protection.³⁴ These detailed obligations are mirrored in the South African legal and policy framework, notwithstanding the inconsistencies and contradictions identified above.

³² Committee on the Protection of the Rights of All Migrant Workers and ComRC "Joint General Comment 4 and No. 23" para 21, 56 and 60.

³³ Equal Education and Equal Education Law Centre 2023
<https://equaleducation.org.za/2023/02/06/joint-statement-equal-education-and-equal-education-law-centre-strongly-condemn-operation-dudulas-campaign-to-remove-young-migrant-children-from-schools/>.

³⁴ See a discussion on the obligation to fulfil on para 2.3.2.13 of this thesis (Chapter 2).

8.2.5 Institutional mechanisms for the realisation of the right to basic education

In accordance with international law, regional instruments and national legislation, several institutional mechanisms have been established for the respect, protection, promotion and fulfilment of the right to a basic education. Their contributions were also explored and the Committees which monitor compliance, include, amongst others, the Human Rights Committee, the CESCR the ComRC, the UNESCO, the African Commission on Human and Peoples' Rights and the AECRWC.

The analysis in the fifth chapter also revealed that international treaty monitoring bodies often use General Comments, Guidelines and Principles to shed light on how treaties must be interpreted. These are not binding but may be used as authoritative sources in the interpretation of treaties. These documents also provide guidelines for domestic legislation, policy and the practice of States Parties. With regard to the right to a basic education, these international bodies affirm that school attendance should not be subject to the legal status of a pupil or the presentation of identity documents, passports or study permits.³⁵ The Special Rapporteur on the Right to Education, who also contributes immensely to the fulfilment of the right to a basic education, stated that such requirements amount to direct discrimination against undocumented migrants.³⁶

In recognition of South Africa's international and national obligations to respect, protect, promote and fulfil the right to a basic education for undocumented immigrant children, South Africa has several state and non-state institutional mechanisms to achieve this. These include the SAHRC, the school principals, the school governing bodies, the judiciary and civil society organisations such as Lawyers for Human Rights.³⁷ The role of the SAHRC and these non-governmental organisations is to educate communities and facilitate the enjoyment of human rights through litigation. This is where the courts come in, as they have rendered several watershed

³⁵ See Chapter 6 on the assessment by international human rights bodies

³⁶ Human Rights Council *The Right to Education of Migrants, Refugees and Asylum Seekers* para 63.

³⁷ See a discussion in Chapter 4.

judgements on the protection of the right to a basic education for undocumented children. One of these judgements was the *Centre for Child Law & 37 Children*, in which the court ruled that requirements for documentation as a condition for children to enrol in public schools were unconstitutional.³⁸

8.2.6 Basic education for undocumented children in the USA jurisdictions

In the research methodology section in chapter 1 of this thesis, it was stated that although this work is not a comparative study, it looks at how the USA, a different jurisdiction, has grappled with the challenges of providing access to a basic education for undocumented immigrant children. This was done to draw lessons and inspiration for South Africa. The discussion in chapter 7 of the thesis reveals that, indeed, South Africa is not the only jurisdiction that is dealing with the plight of undocumented immigrant children and that states such as the USA face similar challenges.

The chapter reveals that the USA recognises the right of undocumented children to the same basic education as is provided to all other children and that, to this end, it has been using executive orders, issued by the President of the USA, to give reprieve to undocumented immigrant children to enable them to stay in the USA, thus opening doors for them to learn without discrimination and to secure employment afterwards, provided that they have not committed any crimes.³⁹ Executive orders such as DACA have greatly assisted undocumented immigrant children in the USA, alongside prominent legislation as mentioned in chapter 7. The American judiciary has also been playing its part in bolstering protection for undocumented immigrant children and paving the way for them to access basic education. Cases such as *Plyler* and the *Regents* case illustrate judicial protection of undocumented children.

There are several lessons for South Africa from the USA with regard to the treatment of undocumented immigrant children. These include strong judicial protection of the rights of undocumented immigrant children. Without *Plyler*, the State of Texas would have started a chain reaction for the removal of undocumented immigrant children

³⁸ *Centre for Child Law & 37 Children* para 135.

³⁹ See Chapter 7 para 7.2.6 of this thesis for a detailed discussion.

from public schools in the USA. This decision showed that although immigrants place some demands on educational systems as far as budgets are concerned, their removal from schools would not advance any meaningful agenda and that it would contradict the demands of justice, which compels states not to punish children for the 'sins' of their parents.⁴⁰ In that case, the court rightly said that whereas parents of children could be deported, it is not in the interests of justice for states to be vindictive on children by removing them from schools and deporting them as a deterrence against illegal immigration.⁴¹

8.3 Recommendations

8.3.1 Need for a holistic approach to immigration that mitigates the plight of undocumented immigrant children

In the previous chapters, the analysis of barriers preventing undocumented immigrant children from enjoying and exercising the right to basic education points to a bigger problem that goes beyond the struggle to enrol and receive education in public schools. As understood in this thesis, the state's handling of immigration is a cause for concern due to inconsistencies in legislation and policies, and also because the government seems to be reacting to immigration challenges instead of being proactive. At the time of writing, South Africa does not have a solid plan for addressing the plight of undocumented immigrant children. It relies on mainstream immigration and school legislation, such as the *Immigration Act* and the *Schools Act*, both of which are supplemented by the Admission Policy.

The absence of a specific policy on education for undocumented immigrant children means that their plight is not on the government's top agenda, and yet they are an increasingly vulnerable group. To cure this, South Africa should consider adopting a holistic approach regarding undocumented children in order to mitigate their plight. Such a policy should outline the short and long-term government strategies on how to alleviate their plight. It must ensure a proactive, rather than reactive, government approach to undocumented immigrant children. In formulating such a policy, the

⁴⁰ *Plyler v Doe* 220.

⁴¹ *Plyler v Doe* 220.

government can consider inviting stakeholders such as international monitoring bodies, civil society, teachers' unions, organised associations of undocumented immigrant parents and children and the generality of the South African population to make representations and contribute to the formulation of such a policy. This will, to some extent, lead to a "social pact" on the issue of undocumented immigration and might enhance their protection. The governments of countries from which undocumented immigrant children come should also be a party to a solution.

8.3.2 Enforcement of immigration legislation

The analysis in this thesis shows that one of the failures of the South African government is its neglect, refusal or inability to enforce its own laws, particularly regarding immigration.⁴² For example as mentioned in chapter 6, the failure by the minister of Home Affairs to rectify certain provisions in the *Immigration Act* on the deportation policies. While this may be viewed as a reprieve for undocumented immigrants, it actually aggravates their situation, as it has the consequence of creating whole generations of undocumented children for whose welfare the state has no plan to protect.⁴³ There also appears to be no known exact figure of how many undocumented adults and children there are in the country.⁴⁴ This can be resolved if the state takes its duty to enforce legislation seriously so that it does not inadvertently incentivise illegal immigration to the detriment of the same immigrants and their children. Arguably, proper enforcement of immigration legislation will see fewer undocumented adults entering the country, resulting in fewer undocumented children coming with them and being born in the country.

⁴² See Moyo 2020 <https://theconversation.com/why-south-africas-new-plan-to-fortify-its-borders-wont-stop-irregular-migration-145072> on mismanagement of immigration in South Africa.

⁴³ Department of Social Development 2020 <https://www.gov.za/speeches/unaccompanied-and-undocumented%C2%A0children%C2%A0-14-dec-2020-0000>.

⁴⁴ Moyo 2020 <https://theconversation.com/why-south-africas-new-plan-to-fortify-its-borders-wont-stop-irregular-migration-145072>.

For many South Africans, who misguidedly think that their problems will be resolved with the enforcement of immigration laws,⁴⁵ hardened attitudes towards immigrants may soften, thereby lessening instances of discrimination and physical attacks against them.⁴⁶ Although reality points otherwise, one of the main contentions has been that people feel that immigrants have it nice in South Africa, totally unbothered by immigration officers and the police.⁴⁷ While appeasing the local population by enforcing immigration legislation may not be what many undocumented immigrants want, it may be in their best interests, given that attacks and other forms of self-help against them by foreigners emanate from concerns that they are breaking the law by coming into the country and no one in authority seems to be interested in dealing with illegal immigration, which many see as a scourge leading to crime, unemployment and competition for scarce resources in poor areas. However, reality points out that immigrants are less likely to commit crimes.⁴⁸ For this reason, the enforcement of immigration law should not be done in a way that would deprive undocumented immigrant children of access to education. Further recommendations on this aspect follow below.

8.3.3 Recovering funds from relevant countries

The argument advanced by the state in *Centre for Child Law & 37 Children* to the effect that admitting undocumented immigrant children to schools and providing them with meals will encourage illegal immigration is bizarre and not supported by any evidence. Anyone who has full knowledge of the precarious situation facing undocumented immigrants will understand that it is implausible to leave one's country to come to South Africa for the mere purpose of getting free education and meals for

⁴⁵ See the discussion in Gordon "Immigration Policy in South Africa: Public Opinion, Xenophobia and the Search for Progress" 57–75.

⁴⁶ See Zondi 2008 *Africa Insight*; Mamabolo 2015 *TD: The Journal for Transdisciplinary Research in Southern Africa* on xenophobic attacks.

⁴⁷ See, for instance, Richter *et al* 2014 *Journal of Immigrant and Minority Health*; Madsen 2004 *African Studies*, on how the police abuse immigrants.

⁴⁸ See the findings in Kaziboni and Machabaphala 2022 *Southern Africa Report* 1-15 on how unlikely immigrants are to commit crimes.

one's child – particularly the low standards in public schools. It appears that what the government failed to do in terms of legislation (managing immigration) would be cured by vindictiveness toward children who had no say in their presence in South Africa. Given the hostilities faced by many of those children in and outside schools, it is conceivable that many of them wish they were in their own countries.⁴⁹ As such, it is also improbable that banning undocumented immigrant children from public schools will alleviate the immigration crisis in any way.⁵⁰ It serves no useful purpose and should be seen as no more than arbitrary regulation, which is not permitted by the rule of law.⁵¹

Nevertheless, the budget issue cannot be overlooked. There is growing sentiment that instead of targeting undocumented immigrants and frustrating them and their children by making it harder for them to enrol in public schools, the state must fully provide for them and seek to recover the expenses from the countries from which such children come.⁵² There is merit in this argument, as no state has an unlimited budget to cater for the educational, health, housing and other needs of undocumented foreigners. The only challenge may be in enforcing such payment, as it will require the co-operation of relevant countries. There is little possibility that such countries will be willing to pay, as they may simply say that the immigrants must return home.⁵³ This issue may also be aggravated by the paucity of applicable international law rules on reimbursement by countries for the help given to their citizens in other countries. As such, an appropriate international legal framework may have to be developed for this.

⁴⁹ See, in general, Mpofu-Chimbga *The Role of Secondary Schools in Averting Xenophobia in South Africa* 168.

⁵⁰ See also Carciotto 2020 <https://issafrica.org/iss-today/anti-foreigner-sentiment-wont-solve-south-africas-labour-woes>.

⁵¹ For a discussion of arbitrary regulation, see Krygier "Rule of Law (and *Rechtstaat*)" 48.

⁵² Ruiters 2022 <https://www.iol.co.za/weekend-argus/news/government-must-charge-countries-for-health-service-rendered-to-foreign-nationals-015afdfa-3fd2-404a-8495-08a6a72c1d38>.

⁵³ The Zimbabwean government has already indicated its willingness to see its citizens return from South Africa – see Maromo 2022 <https://www.iol.co.za/news/politics/zim-minister-says-harare-ready-to-welcome-its-citizens-as-permits-expire-in-sa-5ac9a05c-f42e-464b-979e-a18c57ec32fa>.

8.3.4 Involving the international community and international organisation for migration

The international community is an organised community under the auspices of the United Nations, to which all nations belong. In tackling challenges to global peace and security, the United Nations has adopted several human rights treaties on children and undocumented immigrants. The monitoring of the enforcement of these treaties by United Nations bodies, such as UNICEF and the UNESCO is important and may bring some fruitful results for the welfare of undocumented immigrants. Whereas these children are found on South African territory, there is a case to be made that the problem is not for South Africa alone to solve but is a global one.⁵⁴ This is because undocumented immigrants come from other countries and also because the international community has an interest in ensuring that vulnerable people across the world who need assistance receive it. This is evidenced by the establishment of global agencies like UNESCO.

South Africa may consider engaging the international community through various agencies of the United Nations, SADC and the African Union to find solutions to the financial constraints that arise as a result of accommodating and providing for the welfare and education of undocumented immigrant children. Arguably, this may not only appease the local population by making it aware that the resources expended on undocumented immigrant children are not theirs but emanate from the international community. Also, the involvement of the international community may ultimately safeguard vulnerable undocumented immigrants from neglect by the state. Many have complained that while their situation is irregular, the government takes too long to act to address discrimination and physical attacks against them and that this creates the impression that the government has intelligence on forthcoming attacks against them and that it neglects to act on time.⁵⁵ The involvement of the international community will also ensure that the South African government adheres to international human

⁵⁴ See the list of global challenges (which include immigration) in Shah 2008 <https://www.globalissues.org/article/537/immigration>.

⁵⁵ Daily Maverick 2022 <https://www.dailymaverick.co.za/article/2022-02-01-ringing-the-alarm-we-need-to-act-against-xenophobia-before-lives-are-lost-to-violence/>.

rights obligations on the protection of vulnerable immigrants. Hence, the active involvement of the international community through agencies such as UNICEF and the International Organisation for Migration will benefit both the local population and undocumented immigrants and their children.

8.3.5 Removing statutory barriers

The thesis observes that many barriers to access education for undocumented immigrant children emanate from policy and legislative uncertainties and that some statutes, such as the *Immigration Act* and the Admission Policy, prohibit and restrict the provision of basic education to undocumented immigrants. Further restrictions and irregularities from the Proposed Amended Admission Policy and the *BELA Bill*.⁵⁶ The *Births and Deaths Registration Act* which further accelerates the numbers of undocumented immigrants due to its provision. It has also been observed that these statutes and policies run contrary to South Africa's international obligations. Hence, this study argues that it is necessary for South Africa to amend its laws so that the state is not the main barrier between undocumented immigrant children and access to basic education. The significance of, for example, the *Immigration Act* lies in its focus on addressing the unique needs and rights of immigrants, making it a legislation specifically designed for this purpose. While the other legislation may cater for the needs of all children, it is the *Immigration Act* that directly impacts the rights of immigrants. This is why the research has consistently emphasised the necessity of revising and amending the *Immigration Act*.

At this juncture, the research recommends the need for a revision of these following provisions:

Regarding the *Immigration Act*, sections 39 and 42 should be revised or amended. The Immigration Regulation provides that learning institution includes a "school contemplated in section 1 of the Schools Act" (that's primary and secondary education).⁵⁷ The *Immigration Act* should specifically make a provision which provides

⁵⁶ Full discussed of this is in Chapter 3 and Chapter 6 of this thesis.

⁵⁷ Regulation 1(c) of the Immigration Regulations GN R 413 in GG 37679 of 22 May 2014.

that "basic education" falls outside of the scope of learning institution, and it can be obtained without documentation.

Section 39 of the *Immigration Act* uses a broad term that encompasses all learners, which could potentially be interpreted as inclusive of both basic education and higher education. However, the *Constitution* explicitly distinguishes basic education as a distinct right, devoid of any qualifications. While the court's interpretation of this section has implications for ensuring equitable access to education, unfortunately, the judgment has not significantly translated into practical measures to guarantee education for undocumented migrant children. Consequently, the research asserts that a clear exclusion should be explicitly stated in the *Immigration Act*. Additionally, the *Immigration Act* fails to adequately recognize children's rights and neglects to acknowledge the vulnerability of these children. The Act does not address the unique educational needs of children, and the process of deportation for children should not mirror that of adults. An additional provision for child immigrants should be made in the *Immigration Act*. For example, when it comes to issues of deportation the *Immigration Act* may draw lessons from the Flores Settlement Agreement mentioned in Chapter 7, which explicitly states how "undocumented migrant minors" should be treated during deportation process or detention. The Flores Settlement Agreement established proper care guidelines for "undocumented migrant minors" in detention, including educational access standards. It outlined minimum requirements for facilities where children are detained, ensuring access to healthcare, education, recreation, and other childcare services. The inclusion of children-friendly provisions are essential within the *Immigration Act*, as it serves as the primary legislation governing the immigration rights of non-citizens.

Furthermore, the provisions in the *BELA Bill* such as the ones on "required documents", the section that criminalise parents for keeping children away from school and stopping school activities,⁵⁸ should be entirely removed from the *BELA Bill* as they impede the full realisation and enjoyment of the right to a basic education for undocumented immigrants. The criticism against the said sections has been done

⁵⁸ See section 4 (b)(1A) of the *BELA Bill*.

extensively in Chapter three. For emphasise the inclusion of the South African Police Service and the Department of Home Affairs in Committee could lead to a focus on enforcing immigration laws rather than assisting learners in obtaining necessary documentation. This approach risks contradicting international principles. Moreover, the inclusion of an unreasonably lengthy list of required documents is likely to reinforce the barriers to education which the *Centre for Child Law & 37 Children* and Circular 1 of 2020 has addressed.

Clause 23 in the Proposed Amended Admission Policy should be revised to replace the term "advises" with "instructs/must" with regard to the admission of undocumented children.⁵⁹ Additionally, the purpose of having a list of documents becomes unclear when there is another provision that disregards the need for such documents in their absence. The clause mandating the submission of a birth certificate from the country of origin for asylum seekers and refugees should be completely removed from the Proposed Amended Admission Policy.⁶⁰

Section 2 of the *Births and Deaths Registration Act* applies to South African citizens and non-South African citizens residing permanently or temporarily in the country. The application of this *Act* is inherently discriminatory and conflicts with the protection of children's rights in terms of the *Constitution*, hence it must be amended. The *Births and Deaths Registration Act* currently only safeguards and protects children born to parents with valid documents. Amendments should be made to Regulations 3(3)(f) and 8(1)(c) of the *Births and Deaths Registration Act* to eliminate discrimination against children whose parents are undocumented.

The *Schools Act* or *BELA Bill* should also follow the structure of Overarching Principle 24 of the Abidjan Principle which provides that all forms of discrimination in the enjoyment of education must be eliminated. It explicitly mentions that discrimination based on migration status and nation origin⁶¹ should not be allowed. The *Schools Act*

⁵⁹ The right to education extends to everyone within the boundaries of South Africa, the nationality and immigration status is immaterial. All schools are advised to admit learners and serve their education requirements irrespective of whether the learner or parent of a learner does not produce documents listed in paragraph 15, 17 to 20 of this Admission Policy.

⁶⁰ Clause 20 (c)(i) of the Proposed Amended Admission Policy.

⁶¹ Overarching Principle 24 of the Abidjan Principle.

guides the education system in South Africa and any other policies flow from it therefore an explicit provision in the *Schools Act* clarifies the stance of the education system regarding discrimination. It leaves no room for ambiguity and clearly outlines the prohibition of discrimination based on migration status and national origin.

Section 2(1) of the *Social Assistance Act* states that it applies to all individuals, including non-South African citizens. However, section 5(1)(c) creates a discrepancy by limiting eligibility for grants to South African citizens. Amendments should be made to address this inconsistency. Upon applying for fee-exemption the application form requires that the identity number of the learner be provided. There should be a disclaimer or specific provision indicating the course of action for learners without an identity number. The presence of a section for identity number on the fee-exemption application form may discourage some undocumented children from applying.

The exemption schemes in schools do not even satisfy the criteria of international law standards which advocate for free education. The study recommends South Africa to withdraw its reservation to the *ICESCR* so that basic education is immediately realised. The study also recommends the State to consider ratifying the Third Optional Protocol to the Convention on the Rights of the Child (CRC) on the Communication Procedure.⁶² The importance of this ratification is that it allows children to bring complaints directly to the ComRC if their rights are infringed or violated.

While the state currently focuses on safeguarding "unaccompanied and separated" immigrant children in South Africa, the study suggests extending similar protection to all undocumented immigrant children. Furthermore, it proposes the implementation of a policy containing Guidelines for All Undocumented Children Outside their Country of Origin in South Africa. The study recommends the state to place a strong

⁶² Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (2012) A/RES/66/138

The Optional Protocol on a Communications Procedure recognizes that children have the right to appeal to an international mechanism specific to them, when national mechanisms fail to address violations effectively. Through this treaty, the international community puts children's rights on equal footing with other human rights, allowing for more accountability of states.

commitment in eliminating structural inequalities and discrimination in all legislative, policy and programmatic measures.

8.3.6 Preventing loss of legal status

This thesis has shown that not all undocumented immigrants arrived in South Africa undocumented. On the contrary, many arrived with valid documentation authorising them to be in the country. They settled and started raising their children, only for the Department of Home Affairs to fail to renew their papers on time and refuse to renew some visas at all, citing changes in immigration policy.⁶³ A recent example is during the COVID-19 pandemic when Home Affairs offices were largely closed from receiving new applications for visas. While the Minister of Home Affairs granted a reprieve by extending the validity of visas, this had the unintended consequence of creating a massive backlog that South Africa cannot effectively deal with.⁶⁴

To compound matters, the Minister of Home Affairs removed certain categories of visas from the special skills list and also put an end to the Zimbabwe Exemption Permit.⁶⁵ As a result, many people who were legitimately in the country found themselves suddenly unlawfully here and having no prospect of qualifying for visa renewals.⁶⁶ These sudden and knee-jack reactions to the plight of undocumented immigrants only hurt their children, who suddenly become unlawful and cannot effectively exercise the right to a basic education. The research saw to it that the Minister of Home Affairs and the Director General are consistently taken to court for violating the immigration rules, an example has been demonstrated in Chapter 5. South Africa might want to look into bringing efficiency to the Department of Home Affairs and putting in place a solid immigration policy that is not subject to the whims

⁶³ The announcement to end the Zimbabwe Exemption Permit is an example – see Department of Home Affairs 2021 <http://www.dha.gov.za/index.php/immigration-services/gazetted-extension-of-zep>.

⁶⁴ See Department of Home Affairs 2021 <http://www.dha.gov.za/index.php/statements-speeches/1481-home-affairs-minister-dr-aaron-motsoaledi-approves-the-resumption-of-identity-document-id-applications-and-extends-the-validity-period-of-different-categories-of-temporary-visas>.

⁶⁵ Department of Home Affairs 2021 <http://www.dha.gov.za/index.php/immigration-services/gazetted-extension-of-zep>.

⁶⁶ Mail & Guardian 2022 <https://mg.co.za/editorial/2022-03-31-editorial-theres-a-crisis-coming/>.

and caprices of politicians so that there is certainty in who may obtain visas when and for how long.

8.3.7 Sensitivity training for teachers, citizens and undocumented children

It has been observed in this thesis that the other challenge facing undocumented immigrant children in South African public schools is discrimination by teachers, unconscious bias as well as physical attacks by other children on the basis that they are 'illegal' in the country. These prejudices emanate from discourse in homes, schools and other areas of public gatherings. While many local learners and teachers view immigrant children as 'takers' of opportunity, this image is far from reality, given the plight of these children. Language barriers, bullying and subconscious discrimination psychologically affect children and their parents, causing a sense of loss, despair and resignation. It is not good for proper learning and the enjoyment of the right to a basic education. As such, there is a need for sensitivity programmes to raise awareness to teachers and all children about the plight of undocumented immigrant children and how all of them can live together in harmony in the school environment. This may help to return schools to their intended purpose: centres of learning and intellectual excellence. Sensitise educators and other students about the Policy to prevent discrimination against immigrant children in schools and monitor the overall implementation of the policies and report to the Committee about its successes and challenges. Efforts should be made to integrate immigrants needs in the education curricular. The schools code of conduct should make provision where issues such as admission of undocumented immigrants are addressed, xenophobic issues, teacher and learners conduct towards immigrants, language related issues. On languages make sure the schools implement an integrative multilingual narrative approach as discussed extensively in Chapter 5.

As mentioned earlier in Chapter 4, the school governing bodies should make it mandatory that they contemplate the inclusion of representatives from immigrant parents, immigrant children, experts in the fields of immigration (as much as they mandatorily consider representation of experts of children with special needs).⁶⁷ By

⁶⁷ See Chapter 4 para 4.1.3 on recommendations for improved governance in schools.

involving these people, the SGB promotes inclusivity and knowledge base of its decision-making process, thereby addressing the distinct needs and challenges encountered by immigrant learners.

8.3.8 Enhancing mechanisms to cater for children in distress

In the discourse on providing access to education for undocumented immigrant children, the bigger picture is always lost that some of these children may be abandoned by their parents due to economic hardship, may be unaccompanied and may be orphaned and have no immediate relatives and other people to care for them.⁶⁸ Hence, there is a greater need to make schools safer for these children so that their conditions may be ascertained and also so that they may be assisted when necessary. Doing this will enhance access to education, as no child will be left out of the education system due to personal tragedy.

While enhancing mechanisms to cater for undocumented immigrant children who are in distress, such as those who have been abandoned and orphaned, is important, it is equally important for the government to consider approaching the immigrant situation in a way that will not cause drastic disruptions on the lives of these children. Noteworthy, it is crucial that the government also establish procedures that prevent the detention and deportation of undocumented parents without adequate measures in place to care for their children, especially if the children are attending school at the time of the parents' arrest. Therefore, it is essential to avoid separating children from their parents and guardians. Also, detention of children for immigration purposes should be prohibited. In Ireland, for example the *Immigration Act* 1999 provides that no person under the age of 18 may be detained for immigration purposes, whether accompanied or unaccompanied.⁶⁹ This is an example of how the law should be drafted in South Africa.

⁶⁸ Department of Social Development 2020 <https://www.gov.za/speeches/unaccompanied-and-undocumented%C2%A0children%C2%A0-14-dec-2020-0000>.

⁶⁹ Section 5.4 (a) of the *Ireland Immigration Act*, 1999.

8.3.9 Enforcing compulsory schooling

Another issue that is lost in the discourse on providing access to basic education for undocumented immigrant children is the question of how many such children are out there in South Africa and not receiving education and how they can be assisted.⁷⁰ This is with reference to children staying with their parents in far-off areas and farms that are far from schools. In such cases, parents might not have the money to put their children to school and may not realise the blow to their lives as a result of such denial of access to education. This thesis established that not only does the state have a duty not to interfere with the right to a basic education but also that it must take active steps to promote, fulfil and secure access to this right.

Hence, it falls on the state to take active steps to ascertain children who should be in school and to ensure that they are provided access to basic education. This may be done in several ways, such as providing tax and other incentives to employers of their parents to participate in bringing such children to schools. For instance, farmers may be required by law to register the children of their employees who are under 18 years of age and provided with tax cuts and grants for creating conditions for the children of their employees to go to school. This may be extended to all employers so that children are not denied access to a basic education because putting them in school will interfere with their work.

While the above recommendations and all the ones above are proffered on the basis of the findings of this thesis and deductions made during the study, it is important to note that the study has its own limitations, which may, in turn, affect these recommendations. Every effort has been expended to minimise such an effect. For the sake of completeness, these limitations are discussed below and also proffered as a path for further research.

⁷⁰ See Department of Social Development 2020 <https://www.gov.za/speeches/unaccompanied-and-undocumented%C2%A0children%C2%A0-14-dec-2020-0000>.

8.4 Future research

8.4.1 Fiscal impact of recommendations

As noted above, this thesis offers many ways to enhance access to a basic education for undocumented immigrant children. Most of the recommendations require massive expenditure, such as the enforcement of immigration legislation, statutory amendments, sensitivity training, and tracking mechanisms. The tax incentives proposed will also have a huge impact on the fiscus. For these reasons, it is acknowledged that the fiscal impact of implementing these recommendations is unknown. Feasibility and affordability studies are needed to ascertain the budgetary implications of these recommendations before decisions are made.

8.4.2 Practical experiences of undocumented immigrant children

The studies referenced in this thesis show that undocumented immigrant children face many challenges relating to access to a basic education. Those who have been admitted to public schools face further problems of unconscious bias, outright discrimination and bullying by their peers due to their heightened vulnerability. The COVID-19 pandemic compounded these problems. Since this thesis was undertaken through doctrinal legal research during the COVID-19 pandemic, it was not possible to go to the field to ascertain the practical experiences of these children during the COVID-19 pandemic and to compare and contrast it with experiences during normal times. Insights are necessary to fully understand the plight of these children. Also, the Minister of Home Affairs cancelled the Zimbabwe Exemption Permit at the twilight of this study. The Minister of Home Affairs continues to grant permit extensions, but these extensions are issued as a blanket extension rather than providing actual individual visas. This creates confusion as the passports still bear expired visas. It would have been beneficial to obtain field data on how this decision has impacted documented children who face the prospect of being undocumented and which issues need urgent attention in this regard. Further research will be undertaken on this issue.

8.4.3 Ascertaining the exact figures of undocumented immigrant children

Another shortcoming of this study is that the exact numbers of undocumented immigrant children who are in need of state assistance in securing access to a basic education are unknown. Even the state itself does not appear to have these figures.⁷¹ Ascertaining the numbers of these children, who may be running in the hundreds of thousands, is necessary to understand the magnitude of the problem and to devise intervention strategies. Without solid figures, there is not much that can be done, as resources will probably fall short of the demand. For these reasons, further studies will be taken empirical on this aspect.

8.5 Concluding remarks

All in all, this thesis sought to ascertain to what extent South African law and policy provide access to a basic education for undocumented immigrant children. This issue is important, given that policy uncertainties and statutory contradictions undermine South Africa's compliance with its international, regional and national obligations to protect, respect promote and fulfil the right to a basic education for all children, including undocumented immigrant children. The analysis shows that policy and legislative barriers find fertile ground in society and the learning environment to the extent that the right to a basic education for these children is stifled and severely undermined by the state, society, teachers and even other children. The problem is multifaceted and can be traced to stiff competition for resources, the general anti-immigrant sentiment prevailing in South Africa, language barriers, (un)conscious bias and the heightened vulnerability of undocumented immigrant children.

There is a lot for South Africa to do to enhance access to and enjoyment of basic education for undocumented immigrant children. While the fiscal impact of doing this through the recommendations proffered above is yet to be ascertained, there is no denying that the need to protect, respect, promote and fulfil a basic education for undocumented immigrant children is urgent. Although there may be merit in the

⁷¹ Zama 2022 <https://www.702.co.za/articles/440835/motsoaledi-it-s-not-possible-to-know-how-many-illegal-foreign-nationals-we-have>.

argument that unlawful immigrants must not profit from breaking South African laws, it is also equally true that children are innocent and should not be punished for the transgressions of their parents. The fact that the parents broke national borders and landed in the territory of the Republic without proper authorisation and documentation should not be deterred by punishing children by denying them access to a basic education. Given the many challenges confronting South Africa today, it is not likely that removing undocumented immigrant children will have any considerable impact on the provision of resources for South African children. Hence, the attempts to deny these children access to schools are no more than gimmicks which are playing a sad game with the lives of children.

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