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Article 11 - Education

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Chapter 12

Article 11

Education

Ann Skelton and Perekeme Mutu

1. Every child shall have the right to education.
2. The education of the child shall be directed to:
 - (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and convention;
 - (c) the preservation and strengthening of positive African morals, traditional values and cultures;
 - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;
 - (e) the preservation of national independence and territorial integrity;
 - (f) the promotion and achievements of African Unity and Solidarity;
 - (g) the development of respect for the environment and natural resources;
 - (h) the promotion of the child's understanding of primary health care.
3. State parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:
 - (a) provide free and compulsory basic education;
 - (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
 - (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
 - (d) take measures to encourage regular attendance at schools and the reduction of drop-out rate;
 - (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.
4. State parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their' children schools, other than those established by public authorities, which conform to such minimum standards may be approved by the state, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.
5. State parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.
6. State parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.
7. No part of this article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph 1 of this article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the states.

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1 Introduction

Article 11 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) arguably protects the most significant socio-economic right. Article 11 not only affirms education as a fundamental right, but emphasises the need for the holistic development of the child through education, and highlights the cultural importance of education and the need to promote equal educational opportunities for every child. The significance of education has been well articulated. Education not only is a fundamental right but also a right that enhances the enjoyment of other rights of children. Article 11 of the African Children's Charter places certain obligations on state parties that will ensure the enjoyment of the right to education. These obligations include provisions of free and compulsory basic education; the prevention of drop-outs from schools; and support for girls who fall pregnant while in school to complete their studies. However, there are gaps in article 11. It is unclear what is included in the term 'basic education'. There is no mention of early childhood education or pre-primary education, which is a gap also identified in other international instruments.¹ Akkari has pointed out that Africa is the continent where early childhood education and care are the least developed.² He argues for the development of a sustainable, contextualised pre-primary education based on local resources, guided by national and international research. Although the cost of pre-primary education is often considered an impediment, in a 2023 cost-benefit analysis by the United Nations (UN) Children's Fund (UNICEF), the Uganda Ministry of Education and Sports, and G:ENESIS,³ it was estimated that 90 per cent of the costs of scaling up pre-primary education in Uganda could be paid for through savings from children not having to repeat years in primary school.

1 B Sheppard 'It's time to expand the right to education' (2022) 40 *Nordic Journal of Human Rights* 96.

2 A Akkari 'Early childhood education in Africa: Between overambitious global objectives, the need to reflect local interests, and educational choices' (2022) 52 *Prospects* 7.

3 UNICEF, the Uganda Ministry of Education and Sports, and G:ENESIS 'Investing in the future: A cost-benefit analysis of pre-primary education in Uganda' (2023), <https://www.unicef.org/esa/media/13516/file/UNICEF-Uganda-Genesis-Analytics-Cost-Benefit-Analysis-2023.pdf> (accessed 5 May 2024). See also Human Rights Watch and ISER 'Lay a strong foundation for all children: Fees as a discriminatory barrier to pre-primary education in Uganda' (2024), https://www.hrw.org/sites/default/files/media_2024/05/uganda0624web.pdf (accessed 5 May 2024).

Even with regard to basic education at primary and secondary levels, access to education has remained a major challenge for millions of African children. In 2022 a *United Nations Educational, Scientific and Cultural Organisation* (UNESCO) report observed that 98 million children in sub-Saharan Africa are out of school.⁴ There is evidence of unequal access to education for children, with discrimination and exclusion facing children for reasons such as gender,⁵ ethnicity and nationality.⁶ The exclusion of children with disabilities is endemic, with an estimated 6,4 per cent of children below the age of 14 in Africa having moderate or severe disabilities, and less than 10 per cent of all children with disabilities in this age range attending school.⁷

School infrastructure maintenance is often neglected, leaving many children learning in poor-quality environments, lacking crucial services such as running water, sanitation, libraries, and lacking technological equipment.⁸ Furthermore, results from surveys such as Progress in International Reading Literacy Study (PIRLS), Trends in International Mathematics and Science Study (TIMSS), and Programme for International Students Assessment (PISA) indicate that educational outcomes for children are not reflecting their potential, pointing to weaknesses in inputs such as curriculum, teaching and assessment. Finally, children's rights to a safe, enabling and rights-protecting environment is also falling well short of the mark, with many rights violations, including violence, being experienced on a daily basis by children in Africa.⁹ This brings into sharp focus the need to effectively implement the provisions of article 11.

While the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) is currently developing a General Comment on the right to education, at the time of writing this has not yet been finalised. Article 11 is also linked to two notable African Union (AU) programmes, namely, Agenda 2040 and Agenda 2063. Agenda 2063 is a blueprint and master plan to transform Africa into a global powerhouse of the future.¹⁰ This Agenda highlights the need to empower African children through the full implementation of the African Children's Charter.¹¹ One of the priority areas and goals to drive this agenda is Goal 2 requiring well-educated citizens underpinned by science and technology.

4 <https://www.unesco.org/gem-report/en/2022-out-school-social-media> (accessed 5 May 2024).

5 J Kiyanjui 'Promoting gender equality in education in Kenya: A case for innovative programmes to bridge the divide' (2016) 7 *Journal on African Women's Experience* 30.

6 Concluding Observations and recommendations by the African Children's Committee on the initial report of the Kingdom of Eswatini on the status of implementation of the African Charter on the Rights and Welfare of the Child (2019). The African Children's Committee observes that the government policy on free primary education that excludes children that are not citizens is discriminatory on the basis of nationality.

7 World Bank Group 'Disability-inclusive education in Africa programme' (2018), <https://www.worldbank.org/en/topic/disability/brief/disability-inclusive-education-in-africa-program> (accessed 5 May 2024).

8 In the African Children's Committee's Concluding Observations on some of the state parties, it highlighted the infrastructural gaps in the education sector, which affects the quality of education. For example, see Concluding Observations and recommendations by the African Children's Committee on the second periodic report of the Republic of Kenya, on the status of the implementation of the African Charter on the Rights and Welfare of the Child (2020). Also see Concluding Observations and recommendations of the African Children's Committee to the Kingdom of Lesotho on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child (2023).

9 The African Children's Committee sometimes raises concerns in its Concluding Observations and recommendations about the security challenge some of the school face that affects effective learning: eg, Concluding Observations and recommendations of the government of the Federal Republic of Nigeria on its periodic report on the implementation of the African Charter on the Rights and Welfare of the Child (2019). Also see Reliefweb 'Education in Africa: Violent attacks against schools rose 20% in 202' (2024), <https://reliefweb.int/report/world/education-africa-violent-attacks-against-schools-rose-20-2023> (accessed 11 June 2024).

10 African Union Commission 'Agenda 2063: The Africa we want' (2015) para 53, https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf (accessed 5 May 2024).

11 As above.

Agenda 2040 elaborates on Agenda 2063 in respect of children's rights.¹² The document develops Africa's agenda for the next 25 years, based on lessons from the past 25 years.¹³ An important aspect of Agenda 2040 as it relates to article 11 of the African Children's Charter is Aspiration 6, which provides that 'every child benefits fully from quality education'.¹⁴ Agenda 2040 views education as pivotal to the full realisation of a child's potential. The lack of education is articulated as a 'life sentence of poverty and exclusion'.¹⁵ In essence, education is a key component or pillar of both the 2040 and 2063 African Agendas.

The AU selected education as its theme for 2024. This is a boost for the right to education, and indicates an acknowledgment at leadership level that 'Africa weighs heavier than other continents in the gaps towards Achievement of SDG4 objectives'.¹⁶ The concept note promotes teaching profession reform; *science*, technology, engineering and mathematics (STEM) education; technical vocational education and training (TVET); and digital solutions. Although pre-primary education is identified as a weakness in the concept note, the plan that is outlined includes no special measures to enhance it.

2 Links to other Charter articles

The right to education links to several African Children's Charter rights, including, but not limited to, the rights of refugee and displaced children, children with disabilities, and those caught up in armed conflict. The four principles are obviously affected: non-discrimination; best interests; participation; and the right to life survival and development. The responsibility of the child in article 31, discussed further below, is also implicated. The right to education guaranteed under article 11 of the African Children's Charter also enjoys protection in a number of African charters and documents. For example, article 17 of the African Charter on Human and Peoples' Rights (African Charter) guarantees the right to education of everyone in broad terms.¹⁷ Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) not only promotes the enrolment and retention of girls in schools and training institutions, but also ensures that state parties take appropriate measures to eliminate all forms of discrimination against women that could impede their access to education.¹⁸ Article 13 of the Youth Charter also provides for the right of every young person's right, not to just education, but 'education of good quality'.¹⁹ Article 9(2)(b) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa obliges state parties to provide education and other social services to internally displaced persons.²⁰

3 Links to other human rights treaties

Education is a right that enjoys protection in an array of international treaties and conventions. The foundation of education as a human right can be traced to the Universal Declaration of Human Rights (Universal Declaration).²¹ Like the African Children's Charter, the Convention on the Rights of the

12 African Children's Committee 'Africa's Agenda 2040 for Children Fostering an Africa Fit for Children', https://au.int/sites/default/files/newsevents/agendas/africas_agenda_for_children-english.pdf (accessed 5 May 2024).

13 As above.

14 Aspiration 6 of Agenda 2040.

15 Agenda 2040 13.

16 African Union 'Concept note of education as the AU theme of the year for 2024' (2023), https://au.int/sites/default/files/documents/43425-doc-EX_CL_1476_XLIV_Rev_1_-CONCEPT_NOTE_with_Roadmap_AU_Theme_E.pdf (accessed 5 May 2024).

17 Art 17 African Charter on Human and Peoples' Rights 1981.

18 Art 12 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003.

19 Art 13 African Youth Charter 2006.

20 Art 9.2(b) Africa Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009.

21 Art 12 of the Universal Declaration of Human Rights 1948 guarantees everyone rights to education.

Child (CRC) is also a child-specific international human rights instrument that offers broad protection to children's rights, including the right to education.²² Other international human rights instruments that guarantee the right to education include the International Covenant on Economic, Social and Cultural Rights (ICESCR);²³ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);²⁴ the Convention on the Rights of Persons with Disabilities (CRPD);²⁵ the UNESCO Convention on Discrimination in Education;²⁶ the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;²⁷ and the Convention Relating to the Status of Refugees.²⁸

4 Legal interpretation

4.1 Introduction

In considering the interpretation of this article, we consider the jurisprudence of the African Children's Committee. The reflections on the Committee's jurisprudence in this chapter arises from both their recommendations to state parties and from their decisions in communications received under articles 44 of the Charter. Communications are complaints brought by or on behalf of individual children or groups of children, or by others acting collectively on behalf of children.

4.2 Article 11(1) Universality of the right to education

Article 11(1) of the African Children's Charter provides that '[e]very child shall have the right to education'. In *Sudanese Nationality* the African Children's Committee elaborated on article 11(1) of the African Children's Charter.²⁹ The Committee observed that the right to education must be understood in the context of access to schools or educational institutions.³⁰ Drawing on General Comment 13 of the UN Committee on Economic, Social and Cultural Rights (ESCR Committee), the African Children's Committee observed that in realising the right to education, state parties must ensure the availability, accessibility and acceptability of the education provided to children.³¹ The Committee went further to articulate that availability of education is assessed based on quality; accessibility is determined in terms of equal opportunity by reason of non-discrimination, economic and physical accessibility; and acceptability is inferred from the quality of education provided.³² In general, availability is assessed based on availability of educational facilities. Unusually, in this decision, the African Children's Committee connects availability to quality.³³ That said, the right to education as guaranteed in article

22 Arts 28 and 29 of the Convention on the Rights of the Child, 1989 provides for the protection of every child's right to education.

23 Art 13 of the International Covenant on Economic, Social and Cultural Rights, 1966 provides a comprehensive protection of the right to education.

24 Art 10 of the Convention on the Elimination of All Form of Discrimination against Women, 1979 ensures that all women have access to education without any form of discrimination.

25 Art 24 of the Convention on the Rights of Persons with Disabilities, 2006 guarantees the rights to education of persons with disabilities.

26 Art 5 of the Convention on the Elimination of All Forms of Racial Discrimination, 1966 guarantees that everyone has access to education without any form of discrimination.

27 Arts 12(4), 30, 43 and 45 of the Convention on the Protection of the Rights of All Migrant Workers and Members of their families, 1990 protect the right to education of their workers and their families.

28 Art 22 of the Convention Relating to the Status of Refugees, 1951 guarantees the right to education of refugees.

29 *African Centre of Justice and Peace Studies and People's Legal Aid Centre v Sudan* No 5/Com/001/2015 (*Sudanese Nationality*).

30 *Sudanese Nationality* (n 29) para 96.

31 As above.

32 As above.

33 As above.

11(1) places an obligation on state parties to provide education that is available to all, accessible to all, and acceptable to all.

The African Children's Charter requires state parties to ensure that every child within their jurisdiction is entitled to access to education without any form of discrimination, and it therefore is necessary to consider the right to non-discrimination in article 3 of the Charter, alongside article 11 when access to education is assessed.

4.3 Article 11(2) Aim of education

The realisation of the right to basic education is intrinsically linked to the purpose and aim of education. Article 11(2) itemises various purposes that the education provided by the state parties must be directed to achieve.

4.3.1 Article 11(2)(a) Promotion and full development of the child

Education serves a multifaceted purpose in the development of a child. This is well articulated in article 11(2) of the African Children's Charter, which elaborates what education should be directed to achieve. It provides that education shall be directed to promote and develop the child's personality, talent and mental and physical abilities to the fullest potential. In this sense, state parties are required to intentionally develop and implement educational plans that will achieve this purpose. State parties are required to develop meaningful education that will support, enhance and promote the full development of the child. In a changing world, with new opportunities such as technology, and threats such as climate change, the content of a meaningful education needs to be constantly iterated.³⁴ For example, the Children's Committee made the following recommendation to Botswana: 'Invest in safe and innovative technological solutions to improve the accessibility to education at all levels, especially during emergency situations such as the COVID-19 pandemic'.³⁵ Similarly, in its Guidelines on the Safe Return to Schools of Children During the COVID-19 pandemic, the Committee recommended to state parties to consider online learning as an investment priority and collaborate with development partners to mobilise finance to make this a reality.³⁶ This includes investing in computers and internet connectivity for remote learning.³⁷ This is also in line with the roadmap for education as an AU theme for 2024, which includes the goal to 'upscale the implementation of evidence-based innovative, feasible and sustainable digital solutions'.³⁸

4.3.2 Article 11(2)(b) Foster respect for human rights and fundamental freedoms

Article 11(2)(b) provides that education provided by state parties should be directed toward fostering respect for human rights and fundamental freedoms. In its General Comment to article 31, the African Children's Committee highlighted the significance of education in fostering respect for human rights and fundamental freedoms.³⁹ The Committee noted that well-educated children are better able to value

34 UNESCO *Reimagining our future together: A new social contract for education* (2021) United Nations Educational, Scientific and Cultural Organisation 121.

35 Concluding observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Republic of Botswana on its initial report on the implementation of the African Charter on the Rights and Welfare of the Child, para 44.

36 Guidelines on the Safe Return to Schools of Children during the COVID-19 Pandemic (2022) 29.

37 As above.

38 African Union 'Concept note of education as the AU theme of the year for 2024' (2023), https://au.int/sites/default/files/documents/43425-doc-EX_CL_1476_XLIV_Rev_1_-_CONCEPT_NOTE_with_Roadmap_AU_Theme_E.pdf (accessed 5 May 2024).

39 General Comment on article 31 of the African Children's Committee 'Responsibilities of the Child' (2017) para 33.

respect for human rights.⁴⁰ The Committee reiterated that through education children are able to learn about their communities and engage in mutual respect with others.⁴¹

The realisation of the objective of fostering respect for human rights and fundamental freedom through the education provided by state parties requires the integration of human rights education into school curricula. This enables children to learn about their rights and other people's rights, and the instruments that protect these rights. Educators have to be trained on human rights issues to enable them to effectively deliver human rights education and create a school environment that respects and promote human rights principles.

4.3.3 Article 11(2)(c) Strengthening and preserving African morals and positive traditional values and culture

A distinctive aspect of the African Children's Charter in the African context is the inclusion of article 11(2)(c) which ensures that education provided by state parties is directed to the preservation and strengthening of positive African morals, traditional values and culture. Article 31 (discussed in chapter 32 of this volume) of the African Children's Charter imposes certain duties on the African child. These duties include the responsibility to preserve and strengthen African cultural values.⁴² The provision of article 11(2)(c) of the African Charter underscores the importance of how the education provided by state parties enables the African child to effectively discharge this responsibility. The African Children's Committee in General Comment to article 31 highlights the significance of preserving and strengthening values such as tolerance, dialogue and consultation for the well-being of African societies.⁴³ The Committee noted that the concepts of tolerance, dialogue and consultation are not only values themselves, but they also portray a picture of the African values that the child must endeavour to preserve, strengthen and promote in seeking the well-being of society.⁴⁴

The Children's Committee described tolerance as the need to accommodate diversity and heterogeneous members or groups of African society.⁴⁵ In terms of dialogue, the Committee explained it as 'non-confrontational forms of engagement with the aim of mutual understanding as the ultimate goal'.⁴⁶ Consultation referred to the need to apply a participatory and inclusive approach in engaging with others.⁴⁷ The Committee therefore observed that the fulfilment of the responsibility of children to preserve and strengthen positive African cultures and values, such as tolerance, dialogue and consultation, requires children to be taught and encouraged to avoid xenophobic behaviour, discrimination, and disrespectful attitudes and practices in all settings.⁴⁸ The call to preserve positive cultural values and to contribute towards the moral well-being of society requires children to be taught and to understand these values. It places obligations on society, including the family and state, to educate children on those positive values and to prepare them to play a responsible role in society.

In addition, Africa in its diversity is characterised by several traditional and moral values that are regarded as positive and beneficial to society. Such moral values include respect for elders, communal

40 As above.

41 As above.

42 Art 31(d) African Children's Charter.

43 General Comment on art 31 of the African Children's Committee 'Responsibilities of the Child' (2017) para 77.

44 As above.

45 As above.

46 As above.

47 As above.

48 General Comment (n 43) para 78.

responsibility, honesty and integrity.⁴⁹ It also includes values such as family cohesion, community solidarity and cultural heritage.⁵⁰ The African continent is rich with diverse cultures, in the area of history, languages, art, music, dances and customs of various African ethnic cultures. To ensure that these traditional values are preserved, strengthened and passed on from generation to generation, the drafters of the African Children's Charter saw education as a vital tool to achieve these objectives and required state parties to incorporate such values in their curriculum. It is on this basis that Fafunwa describes education as an aggregate of all the processes by which a child or a young adult develops the abilities, attitudes and other forms of behaviour that offer positive value to the society in which they live.⁵¹ It is not surprising that the African Children's Charter directs member states to ensure that the education provided must be directed towards promoting, strengthening and preserving these African values and cultures.

4.3.4 Article 11(2)(d) *Preparing a child for a responsible life in a free society*

Article 11(2)(d) of the African Children's Charter articulates that the education provided by state parties must be an education that prepares the child for a responsible life in a free society. The African Children's Committee in General Comment to article 31 observed that the goal of education entails empowering children with life skills that develop their capacity to grow into 'well-rounded individuals' who bring about positive change in society. The significance of education was also echoed in a judgment delivered in South Africa in a case known as the 'Limpopo textbook case' by Kollapen J who described education as operating on two levels, the 'macro and the micro level'.⁵² At the macro level, education is a necessary tool for societal transformation; at the micro level, 'it enables each person to live a life of dignity and participate fully in the affairs of society'.⁵³ In essence, the education provided by state parties must be an education that enables children to participate fully in society and live a life of dignity. Furthermore, article 31 of the African Children's Charter itemises the responsibility and duties of the child. This provision requires that, subject to limitations such as age and ability, a child shall have the duty to work for the cohesion of the family, have respect for his parents and elders, and assist them when the need arises. Children also have the duty to serve their national communities, deploying their physical and intellectual ability in service of the community. The African child also has the duty to preserve and strengthen the African culture and promote and strengthen social and national solidarity. Children can only participate fully in society and perform these duties when they are equipped with quality education.

One of the goals in the Roadmap for Education as the 2024 AU theme, which is relevant to this article, is 'to strengthen and accelerate teachers' capacity to teach African history, and support the inclusion of the AU Charter on Democracy, Elections and Governance in school curricula'.⁵⁴

4.3.5 Article 11(2)(e) *To preserve national independence and territorial integrity*

Article 11(2)(e) requires that education provided by the state party is capable of equipping the child with the necessary knowledge to enable them to perform the duty of preserving the national independence

49 IN Onwuatuegwu & VS Paul-Mgbeafulike *African traditional educational framework: Unveiling the wisdom beyond Western education* (2023) 6 *Nnadiabube Journal of Philosophy* 49.

50 MB Adeyemi & AA Adeyinka 'Some key issues in Africa traditional educational' (2002) 37 *McGill Journal of Education* 224.

51 AB Fauna *History of education in Nigeria* (1974) 17.

52 *Section 27 and Others v Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP).

53 As above.

54 African Union 'Concept note of education as the AU theme of the year for 2024' (2023), https://au.int/sites/default/files/documents/43425-doc-EX_CL_1476_XLIV_Rev_1_-_CONCEPT_NOTE_with_Roadmap_AU_Theme_E.pdf (accessed 5 May 2024).

and territorial integrity of the continent. Article 11(2)(e) re-echoes the provision of article 29(5) of the African Charter, which affirms that an individual has the duty to preserve and strengthen the national independence and territorial integrity of their country. In essence, education provided by state parties must incorporate in its curriculum teachings of historical aspects of the continent's colonialism and independence. It must be an education that will strengthen the national independence and territorial integrity of the African continent. The African Children's Committee's Concluding Observations do not reveal recommendations to state parties on this sub-article.

The development of respect for the environment and natural resources

Article 11(2)(g) of the African Children's Charter requires that the education of the child must be directed towards the development and respect for the environment and natural resources. The rising concern of climate change and related issues underscores the need for the effective implementation of this provision. In an important resolution issued in 2022, the African Children's Committee has acknowledged the existential threat posed by the issue of climate change and the need to act decisively to mitigate the impact.⁵⁵ It noted that climate-related consequences affect children's most basic rights, which includes rights to life, survival, access to clean water, nutrition, and the right to education.

The Children's Committee also recommended to state parties to incorporate a 'child-rights-based approach' to climate change, which includes enhancing children's meaningful participation in relevant decision-making processes relating to climate adaptation and mitigation policies, and raising awareness campaigns and preparing child-friendly versions on issues relating to climate change.⁵⁶ The adoption of a child rights-based approach to climate change requires the integration of climate change education into school curricula. Educators need to be trained on climate change to enable them to effectively deliver on climate change education and create a society that protects and preserves the environment.

4.4 Article 11(3) Obligation of the states in relation to the right to education

4.4.1 General obligation

The right to education imposes three types of obligations on states parties. These obligations are the obligation to respect, protect and fulfil the right to education. This typology of obligations was introduced by the ESCR Committee in one of its General Comments,⁵⁷ which was subsequently adopted by the African Children's Committee in a decision regarding a communication against Tanzania.⁵⁸

The obligation to respect, in the context of article 11 of the African Children's Charter, obliges state parties to refrain from any action that will impair the enjoyment of the right to education of any child.⁵⁹ The right to education will be violated if the state decides to arbitrarily close down schools or decides to prevent children from going to school without good cause. In Africa, factors that impede the enjoyment of the right to education include gender-based discrimination; school fees; the lack of adequate infrastructures required for effective learning in schools; conflict; and so forth. In its Concluding Observation to the government of Sierra Leone, the African Children's Committee

55 Resolution 18/2022 of the African Children's Committee Working Group on Children's Rights and Climate Change to Integrate a Child Rights-Based Approach Into Climate Change Action.

56 As above.

57 General Comment 13 of the ESCR Committee.

58 *Legal and Human Rights Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania* No 12/Com/001/2019 para 41 (*Tanzanian Girls*).

59 D Brand 'The right to food' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 159.

observed that girls face serious discrimination in the educational sector.⁶⁰ The Committee further noted that even though the government has abolished school fees, primary education still is not completely free, because many schools independently impose a variety of charges on their students, which is unaffordable for most families amidst widespread poverty. The Committee noted that these and other factors have continued to affect the enjoyment of the right to education, and urged the state party to take measures that will eliminate all barriers that impede the enjoyment of the right to education in the country.

The obligation to ‘protect’ means that the state must take steps to protect the right to basic education against any form of interference from a third party in the enjoyment of this right.⁶¹ Thus, the state will be failing in its obligation to protect the right to basic education if it fails to prevent a private party or third party from impeding the enjoyment of this right. In the case of the *Governing Body of Juma Musjid Primary School and Others v Essay and Others*⁶² the South African Constitutional Court articulated the nature of the obligation to protect and respect. The Court observed that a direct violation of this obligation occurs when there is a failure to protect the right, and an indirect violation occurs when the state fails to prevent the direct violation of this right by a third party. In the context of the case, the Court held that the obligation to respect imposes a negative obligation on the owner of the private property (Juma Musjid Trust) where the public school is located not to interfere with or diminish the enjoyment of the right to education of the affected children, whose school was to be closed.

The African Children’s Committee’s Concluding Observations and recommendations to Nigeria raised concerns about the violation of the right to education of children by armed militia (Boko Haram) in the conflict-affected areas of Northern Nigeria, and the need for the state to provide protection for children against third party violations.⁶³ As part of the obligation to protect the right to education from third party interference, the Committee recommended to the government of Nigeria to strengthen the provision of security to students and teachers in schools, especially in states affected by armed conflict.⁶⁴ In addition, in General Comment to article 22, the Children’ Committee observed that the obligation on the state to ensure that every child has access to education applies even in conflict situations.⁶⁵ To ensure fulfilment of their obligations under article 11, state parties are expected to provide adequate protection for learners, teachers and educational facilities.

The obligation to ‘fulfil’ requires the state to take steps⁶⁶ to ensure that the right to education is realised or provided for.⁶⁷ Thus, the failure by the state to provide the basic facilities without which the enjoyment of the right to education will not be possible will amount to a violation.

The obligation to fulfil under article 11(3) of the African Children’s Charter imposes certain specific obligations to realise the right to education, which could be categorised as immediately-realizable obligations and obligations that are to be progressively realised.

60 Concluding Observations by the African Children’s Committee on the initial report of the Republic of Sierra Leone on the status of the implementation of the rights of the child.

61 As above.

62 CCT 29/10 ZACC 13.

63 Concluding Observations and recommendations of the African Children’s Committee to the government of the Federal Republic of Nigeria on its periodic report on the implementation of the African Charter on the Rights and Welfare of the Child (2019).

64 As above.

65 General Comment on article 22 of the African Children’s Committee: Children in situations of conflict (2020) para 72.

66 To ‘take steps’ could involve enacting appropriate legislature, administrative steps, budgetary allocation to basic education, or judicial measures towards the full realisation of the right to basic education.

67 Brand (n 59) 159.

4.4.2 Immediate obligation to fulfil the right to free and compulsory basic education

Article 11(3)(a) of the African Children's Charter obligates state parties to 'provide free and compulsory basic education'. The language used has been interpreted as imposing an immediate obligation on the state party to realise or fulfil this right, because there are no phrases that qualify the right, such as 'progressively realised' or 'within available resources'. Despite the immediately available legal framework and policies declaring basic education to be free in state parties, indirect fees still affect access to education for many of the most vulnerable children who cannot afford these expenses. As part of their immediate obligation, state parties are required to eliminate all such fees and make basic education free for every child. The African Children's Committee, both in General Comment 5 and its various Concluding Observations to state parties, has provided clarification on the meaning of 'free'.

In its General Comment 5⁶⁸ the African Children's Committee provided an interpretation of what free and compulsory basic education means in the context of article 11(3)(a) of the African Children's Charter. The Committee reiterated that free means substantially free without any associated costs (such as donations, additional payments to teachers or levies) being required.⁶⁹ One of the first cases at the national level that examined the immediate realisation of the right to education was *Swaziland National Ex-Miners Workers Association and Another v The Minister of Education and Others*.⁷⁰ The Constitution required that within three years of it coming into operation, every child was entitled to free primary education. That date passed, and a civil society group took the case to court. The High Court declared that the right was immediately realisable. Later, when faced with an application to enforce the declaration with a direction for government to act, the High Court refused to go that far and found the lack of resources to be an impediment.⁷¹ The Supreme Court upheld that approach.⁷² Skelton and Djoyou Kamga have criticised the Court's approach, pointing out that the right is immediately realisable, and that concerns about the availability of funding and capacity is a matter that should be dealt with in the framing of the remedy, rather than in weakening the normative interpretation of the right to free basic education.⁷³

The African Children's Committee has frequently asked states to provide free basic education. Free education requirements must be applied in a non-discriminatory manner. In its Concluding Observations to Eswatini, the African Children's Committee raised concerns about section 4(3) of the Free Primary Education Act of the country, which provides that foreign children enrolled in the country's primary school shall pay for such education.⁷⁴ The Committee further noted that primary education should be universal, compulsory, and free.⁷⁵ It should be granted to all children in the state party regardless of their nationality or migration status, documented or undocumented.⁷⁶ The Committee urged the state party to review its Free Primary Education Act and relevant guidance

68 General Comment 5 on State party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and Systems Strengthening for Child Protection (2018).

69 General Comment 5 (n 68) 28.

70 [2009] Civil Case 335 /09.

71 *Swaziland National Ex-Miners Workers Association v The Minister of Education and Others* [2010] Civil Case 2168/09 (19 January 2010).

72 *Swaziland National Ex-Miners Workers Association v The Minister of Education and Others* [2010] Civil Appeal Case 2/10 (28 May 2010).

73 A Skelton & S Djoyou Kamga 'Broken promises: Constitutional litigation for free primary education in Swaziland' (2017) 61 *Journal of African Law* 419.

74 Concluding Observations and recommendations by the African Children's Committee on the initial report of the Republic of the Kingdom of Eswatini on the status of the implementation of the African Charter on the Rights and Welfare of the Child (2019) para 41.

75 As above.

76 As above.

to enable all children in the country to have equal access to free primary education.⁷⁷ In the case of *Centre for Child Law and Others v Minister of Basic Education and Others*⁷⁸ the South African High Court found that undocumented children, whether South African or foreign nationals, had the right to basic education.

The question about what is included in free basic education has been interrogated in the Kenyan domestic courts. In the case of *Githunguri Residents Association v Cabinet Secretary Ministry of Education and Others*⁷⁹ parents challenged the payment of fees at the basic education level in schools despite both the Constitution and the Act providing for free basic education. The applicants sought an interpretation of article 53 of the Constitution which deals with the right to free and compulsory basic education, as well as clarity on the legal implications of sections 29(1) and 2(b) of the Basic Education Act of 2013.

The Court held that the district school had unlawfully imposed several monetary costs, charges and levies, which parents could not afford for their children.⁸⁰ Consequently, several learners had in practice been excluded from school. Drawing copiously from international law,⁸¹ the Court held that the imposition of monetary fees, levies and costs was illegal. The Court reiterated that ‘free’ means free and not subject to any other cost.⁸²

Even when free education has been achieved, indirect fees still affect access to education for most of the children from poor families who cannot afford such fees. State parties, as part of their immediate obligation, are required to eliminate all such fees and make basic education free for every child. The African Children’s Committee, both in General Comment 5 and its various Concluding Observations⁸³ to state parties, has provided clarification on what ‘free’ means. In the Committee’s Concluding Observations to Sierra Leone, the concern raised was that despite the abolition of fees, indirect fees were being charged, which served as a barrier to access to education for all. It therefore urged the state to eliminate such fees.⁸⁴

4.4.3 *Obligation to progressively fulfil the right to secondary education*

Article 11(3)(b) of the African Children’s Charter encourages the development of secondary education in its different forms and progressively makes it free and accessible to all. The language used in this provision suggests that the obligations of states in relation to basic education and secondary education

77 As above.

78 (2840/2017) [2019] ZAECHGHC 126.

79 Petition 464 of 2013.

80 *Githunguri Residents* (n 79) para 57.

81 The Court referred to art 26 of the Universal Declaration of Human Rights which provides that ‘everyone has the right to education’ and that ‘education shall be free, at least in the elementary and fundamental stages’. It adds that ‘elementary education shall be compulsory’. The Court also relied on the UNESCO Convention Against Discrimination in Education (CDE) which requires that state parties should ‘promote equality of opportunity and treatment in the matter of education and in particular to make primary education compulsory and free’. The International Covenant on Social, Economic and Cultural Rights (ICESCR) obligates state parties to take steps to ensure that primary education is compulsory and free, while secondary education should be ‘generally available and accessible’. The same language is used in the Convention on the Rights of the Child (CRC) and the above background is important in understanding art 53(b) of the Constitution which is borne of the international principles set out in the cited declarations and conventions; paraa 27-29.

82 As above.

83 See Concluding Observations and recommendations of the African Children’s Committee to the government of the Federal Republic of Nigeria on its periodic report on the implementation of the African Charter on the Rights and Welfare of the Child (2019). Also see Concluding Observations and recommendations by the African Children’s Committee on the initial report of the Republic Kingdom of Eswatini on the implementation of the African Charter on the Rights and Welfare of the Child (2019).

84 Concluding Observations and recommendations by the African Children’s Committee on the initial report of the Republic of Sierra Leone on the status of the implementation of the African Charter on the Rights and Welfare of the Child (2022).

are not identical. The use of the language to ‘progressively’ make secondary education accessible for free to all signals some level of flexibility or latitude states have in fulfilling this obligation. The progressive realisation qualification requires states to strive towards fulfilment and improvement in the enjoyment of socio-economic rights such as the right to education to the maximum extent possible, even in the face of resource constraints.⁸⁵

In General Comment 5 the African Children’s Committee elucidates the use of the concept of ‘progressive realisation’ in relation to the obligation of state parties to realise the rights enshrined in the Charter. The Committee noted that the concept of ‘progressive realisation’ as used in the Charter should not be construed as meaning postponement of implementation of provisions of the Charter.⁸⁶ The Committee further stated that progressive realisation must be understood in the context of the urgency required to realise the rights of children. The Committee’s Concluding Observations to Kenya recommended to the government of Kenya to introduce free education at the secondary level so as to provide opportunities for all children to continue their studies.⁸⁷

In South Africa, the question of whether the secondary education also forms part of the right to basic education has come under the spotlight in the Constitutional Court case of *Moko v Acting Principal of Malusi Secondary school and Others*.⁸⁸ In this case, a grade 12 learner was denied the opportunity to write his matriculation examination by the principal on account of not attending extra preparatory classes for the examination. While delivering judgment in the case, the Constitutional Court referred to the distinction of where basic education ends and where further education begins in terms sections 29(1)(a) and (b) of the South African Constitution. This distinction is important in the sense that the rights to basic education and further education impose different degrees of obligations on the state. While the right to basic education requires the government to immediately provide such education, the right to further education requires the government to make such education available progressively, depending on availability of resources. The Constitutional Court made the following statement: ‘In my view, 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.’⁸⁹

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.⁹⁰

The implication of this judgment is that secondary school in South Africa now forms part of basic education, and government cannot subject the fulfilment of its obligation toward this right to progressive realisation.

In summary, the African Children’s Committee recognises that the full realisation of the right to access free secondary education for every child in member states would not be realised in a short time. However, a state must move as fast as possible toward the fulfilment of this obligation.

85 L. Chenwi ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ (2013) 46 *De Jure* 744.

86 General Comment 5 (n 68) 28.

87 Recommendations and Concluding Observations to the government of Kenya by the African Children’s Committee on the initial report on the on the implementation of the African Charter on the Rights and Welfare of the Child.

88 [2020] ZACC 30.

89 *Moko* (n 88) para 31.

90 As above.

4.4.4 *Obligation to progressively fulfil the right to higher education for all*

Article 11(3)(c) of the African Children's Charter obligates state parties to make higher education accessible to all on the basis of capacity and ability by every appropriate means. To achieve this goal of ensuring access to higher education for all, state parties are required to adopt appropriate means that will not only eradicate barriers that impede access to higher education for everyone, but also create an inclusive learning environment. The African Children's Committee in *Sudanese Nationality*⁹¹ has elaborated on what government's obligation entails in ensuring access to higher education for everyone. The communication challenged legislation that, among others, automatically revoked the nationality of Sudanese who become citizens of the Republic of South Sudan. This Act affected the complainant who resided in Sudan, and denied her the opportunity to access university education in that country. In interpreting article 11(3)(c), the African Children's Committee noted that the right to education must be understood in the context of access to higher education. In this communication, the African Children's Committee relied on General Comment 13 of the ESCR Committee and observed that the accessibility obligation is assessed based on equal opportunity, and economic and physical accessibility. The Committee concluded that the revocation of the complainant's nationality denied her the opportunity to access university education, consequently causing a violation of the right to access higher education as guaranteed in article 11.

Domestic implementation of article 11(3)(c) requires states to lay the foundation and conditions that will enable the realisation of the right to access higher education. Such concrete measure includes the establishment of a national legal and policy framework and adequate financial allocation to higher education. Where such concrete measures are not put in place by the state parties to this Charter, it cannot claim to have fulfilled its obligation toward the right to access higher education.

4.4.5 *Obligation to take measures to encourage regular attendance at schools and the reduction of drop-out rates*

Article 11(3)(d) of the African Children's Charter requires states to take measures to encourage regular attendance at schools and to reduce drop-out rates in schools. The fulfilment of this obligation is imperative given the high drop-out rate of children from schools on the continent. The African Children's Committee in General Comment 5 highlighted some measures state parties need to take to mitigate the high drop-out rate.⁹² These include legislative enactment that will specify when a pupil may be expelled. In Concluding Observations to member states, the African Children's Committee has also raised concerns about the high rate of school drop-out in some member states, and made recommendations on measures that need to be taken to address or mitigate the situation. For example, the Committee's Concluding Observations to Burundi raised concerns about the high and increasing rate of drop-out from school, especially for girls from secondary school.⁹³ To encourage school enrolment and mitigate the high drop-out rate, the Committee recommended that the government put in place certain measures. These measures included the full implementation of free and compulsory primary education by removing all kinds of fees, including indirect and informal fees; increasing the accessibility of schools, especially in rural and remote areas with a view to increasing the enrolment rate; providing free learning materials and school feeding programmes to encourage enrolment; and retention of learners in school.⁹⁴ The Committee also recommended that back-to-school campaigns may be used not only to ensure that learners have learning materials but that learners are encouraged to return to school, thereby reducing the drop-out rate. The Committee further recommended that

91 *Sudanese Nationality* (n 29).

92 General Comment 5 (n 68) 28.

93 Concluding Observations and recommendations of the African Children's Committee on the initial report of the Republic of Burundi on the status of the Implementation of the African Charter on the Rights and Welfare of the Child para 34.

94 As above.

the government address factors responsible for the drop-outs, such as poverty and violence, and the promotion of safe learning environments for learners.⁹⁵ The Committee raised similar concerns in its Concluding Observations to Nigeria in relation to the high school drop-out rate, and called on the government to address this situation.⁹⁶

4.4.6 Article 11(4) Right to educational freedom

Article 11(4) of the African Children's Charter guarantees the liberty or the rights and duties of parents to choose schools for their children other than schools established by the government. The significance of this provision is to ensure that the religious and moral education and religious needs of the parent and, by extension, the child are fulfilled. However, the school chosen by parents must conform to minimum standards approved by the state. This obligation also links to article 11(7) of the African Children's Charter, which obligates state parties to respect the liberty of parents and institutions to establish and manage educational institutions. Such educational institutions must conform to the minimum standard that is laid down by the state. Parents' ability to choose an education of choice for their children only becomes possible when different private school providers are free to establish various schools.⁹⁷

The state ultimately is responsible for ensuring that the right to education is upheld regardless of the provider of education. Questions have been raised as to whether states in Africa have effectively discharged their obligation to regulate and monitor private education providers. Some authors have argued that the increasing involvement of private actors in the provision of education has a negative impact on the enjoyment of the right to education, especially as regards the availability of free education, equality of educational opportunity, and quality.⁹⁸ The impact of the increasing involvement of private actors in the right to education necessitated the establishment of the Abidjan Principles.⁹⁹ The Abidjan Principles observed that in adhering to the legal provisions of the freedom to establish private education, states must not allow the freedom to set up or attend private schools to infringe on either the right to free, equitable and inclusive education for all and provide a framework of the reference to resolve the tension that arises as a result of the growing involvement of private actors in the provision of education.¹⁰⁰ The lack of effective monitoring of private education providers has been highlighted by the Court in the Ugandan case of *Initiative of Social and Economic Rights and Rights v Attorney General*.¹⁰¹ In this case the Court noted that the state bears the primary responsibility of ensuring that private entities providing education are efficiently and effectively supervised to ensure compliance with the set minimum education standards. The Court found that, in this case, the state had not effectively discharged this obligation.¹⁰²

95 As above.

96 Concluding Observations and recommendations of the African Children's Committee to the government of Federal Republic of Nigeria on its period report on the implementation of the African Charter on the Rights and Welfare of the Child (2019) para 26.

97 Paper commissioned for the 2021/2022 Global Education Monitoring Report, 'non-state actors in education'.

98 F Shaheed 'Securing the right to education: Advances and critical challenges' (2023) Report of the Special Rapporteur on the Right to Education A/HRC/53/27. Also see K de Feyter & FG Isa (eds) *Privatisation and human rights in the age of globalisation* (2005); Global Initiative for Economic, Social and Cultural Rights 'Summary of events on privatisation in education and the right to education' Geneva, 12 June 2014; A Mitsumi & Z Zondani 'The dangers of corporate power to realisation of girls' rights' (2016) 7 *A Journal of African Women's Experience*. 59.

99 In 2019 a group of 57 eminent international experts adopted the Abidjan Principles following a three-year consultative process involving hundreds of stakeholders.

100 Abidjan Principles on the Right to Education, <https://www.abidjanprinciples.org/> (accessed 2 July 2024).

101 *Initiative for Social and Economic Rights (ISER) and 3 Others v Attorney General* Constitutional Petition 29 of 2017.

102 As above.

In summary, the African Children's Charter guarantees the right of parents to choose education other than that provided by the government for their children, and the right of individuals to establish private education. However, such education must comply with the minimum standards prescribed by the state. The state is under obligation to regulate and monitor the activities of private actors to provide education.

4.4.7 Article 11(6) Obligation to ensure that pregnant learners are given an opportunity to complete their education

In a provision that is unique to the African instrument, article 11(6) of the African Children's Charter obliges the state to ensure that pregnant learners are given the opportunity to complete their education. This provision is meant to address situations where pregnant learners are prohibited or excluded from attending school. This practice has continued in several African countries despite the obligation on the state by the African Children's Charter to ensure that pregnant learners are given the opportunity to complete their education.

This practice has resulted in a legal challenge in a petition brought to the Economic Community of West African States (ECOWAS) Court between *Women Against Violence and Exploitation in Society (WAVES) v The Republic of Sierra Leone*.¹⁰³ In this case a policy of the government of Sierra Leone prohibiting pregnant learners from attending classes was challenged. The Court found that the policy barring pregnant girls from attending mainstream schools amounted to discrimination against pregnant school girls in Sierra Leone, and breached the provisions of the African Children's Charter and other international legal instruments. The Court ordered the policy to be immediately revoked. As a consequence of the outcome of the Court, the government of Sierra Leone not only reversed the policy but replaced it with a policy called 'radical inclusion'.

Similarly, in a communication that was brought before the African Children's Committee on the exclusion of pregnant learners in Tanzania, the Committee found a violation of article 11 and other rights of the affected learners.¹⁰⁴ In this decision the Committee observed that the right to education is an inherent right of all children recognised in the Charter and other human rights instruments.¹⁰⁵ The Committee reiterated that the responsibility of states to realise this right includes the obligation to promote, respect, protect and fulfil this right.¹⁰⁶ The obligation of the state to respect this right means that the state should not interfere with the enjoyment of the right to education of girls, rather, states should provide enabling policies, allocate budgets to fulfil the right to education of girls.¹⁰⁷ The African Children's Committee concluded by stating that the policy violates the right to education that requires states to make education accessible.¹⁰⁸ It is observed that at least 30 countries in Africa now have laws, policies or strategies to protect pregnant learners and adolescent mothers' rights to education.¹⁰⁹

5 Protection of the right to education in national legal systems

The differentiated approach to the implementation and justiciability of civil and political rights and socio-economic rights has affected how states have domesticated socio-economic rights has affected

¹⁰³ Suit ECW/CCJ/APP/22/18.

¹⁰⁴ *Tanzanian Girls* (n 58).

¹⁰⁵ *Tanzanian Girls* (n 58) para 38.

¹⁰⁶ *Tanzanian Girls* (n 58) para 42.

¹⁰⁷ As above.

¹⁰⁸ As above.

¹⁰⁹ Human Rights Watch 'Africa: Rights progress for pregnant students: Five more sub-Saharan countries act to protect girls' education; barrier remain' (2021), <https://www.hrw.org/news/2021/09/29/africa-rights-progress-pregnan> (accessed 24 April 2024).

the way that states have implemented the right to education at the domestic level. It affects the varying degree of domestication in terms of the scope, and the judicial enforceability of the right to education. The differences arise in part from the way in which some legal systems approach socio-economic rights protection. The highest protection a state can afford the right to education within the domestic legal order is its inclusion in the constitution. Fifty-one countries in Africa have ratified the African Children's Charter.¹¹⁰ Of these 51 states, 31 have included the right to education as an enforceable right in their constitutions, and 15 states have it as a directive principle of state policy. In other words, it does not confer enforceable rights on the holder and a corresponding enforceable obligation on the state. Five states do not have education in their constitutions either as enforceable rights or directive principles of state policy.¹¹¹ The following table is extracted from UNESCO and the Right to Education Initiative's Right to Education Handbook. The table provides the status of the right to education in the constitution of countries that have ratified the African Children's Charter.

Table: Status of right to education in Constitutions of African states

Justiciable right to education	Directive Principle/aspiration to education	No right to education
Benin	Algeria	Botswana
Burundi	Angola	Cote de Ivoire
Cabo Verde	Burkina Faso	Djibouti
Central African Republic	Cameroon	Mauritania
Chad	Ethiopia	Mauritius
Comoros	Lesotho	
Congo	Liberia	
Democratic Republic of the Congo	Mali	
Egypt	Morocco	
Equatorial Guinea	Nigeria	
Eritrea	Senegal	
Gabon	Sierra Leone	
Gambia	Swaziland	
Ghana	Tanzania	
Guinea	Togo	

110 <https://www.acerwc.africa/en/member-states/ratifications> (accessed 5 May 2024).

111 As above.

Guinea-Bissau	Zambia	
Libya	Zimbabwe	
Madagascar		
Malawi		
Mozambique		
Namibia		
Niger		
Rwanda		
São Tome and Principe		
Seychelles		
South Africa		
South Sudan		
Sudan		
Uganda		

Source: UNESCO and Right to Education Initiative *Right to Education Handbook* (2019)

The above table shows the status of domestication of the right to education in the constitutions of member states of the African Children's Charter. As shown, the majority of the member states entrenched the right to education in their constitutions as a fundamental human right; others have it as a Directive Principle of State Policy (DPSP), which means that it does confer a legal obligation on the state that can be enforced. The right to education does not appear in any form in a few of the constitutions.

It must also be noted that states that do not have the right to education entrenched in their constitutions as an enforceable right have adopted alternative mechanisms to make the right to education enforceable. This could be either through the enactment of legislation or through court jurisprudence. Almost all state parties to the African Children's Charter have one or other form of legislation to either manage the provision of education or to make the right to education an enforceable right. For example, in Nigeria the right to education is included in the Constitution as a DPSP, which makes it not judicially enforceable. However, Nigeria has enacted the Compulsory, Free Universal Basic Act 2004 (UBE Act), which confers on every child the right to basic education in Nigeria, and a corresponding obligation on the government to provide free and compulsory universal basic education to every child within its jurisdiction.

Despite the enactment of the UBE Act, the justiciability of the right to basic education in Nigeria remained in doubt until the Court's decision in the case of *Legal Defence and Assistance Project (LEDAP)*

GTE and Ltd v Federal Ministry of Education and Another (LEDAP).¹¹² In this case the Court affirmed that on the basis of the enactment of the UBE Act, the right to basic education is justiciable in Nigeria, and it confers legal entitlement on every child in Nigeria, and creates a corresponding legal obligation on the government at all levels to provide basic education to every Nigerian child.¹¹³

While the above table identifies the formal constitutional status regarding the justiciability of the right to education, the practical application or enforcement of the right to education in some of these countries has remained a challenge. The enforcement of the right to education requires the absence of certain impediments. Some of these common barriers include the lack of an independent judiciary to uphold the rule of law, judges competent to adjudicate on the right to education cases, and the prevailing judicial culture amenable to scrutinising socio-economic rights issues, and the legal obligations relating to progressive realisation.

Judicial culture was a concern raised at the initial stage when the South African Constitution was adopted. Prominent among these scholars is Klare, who observed that the conservative judicial culture in South Africa could serve as an impediment to the transformative potential of the Constitution.¹¹⁴ However, over the years the jurisprudential development of the right to education-related cases has laid these concerns to rest. The South African courts have been consistent in interpreting the nature of the right to education as enshrined in section 29 of the Constitution and the nature of the obligation it imposes on the state. The courts have observed that while the right to basic education imposes an immediate obligation on the state to make this education available, further or higher education obligates the state to make this education progressively available. In *Governing Body of Juma Musjid Primary School v Essay NO*¹¹⁵ the Constitutional Court provided the following interpretation:¹¹⁶

It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be progressively realised within 'available resources' subject to 'reasonable legislative measures.

There is unanimity in the scholarly literature that the right to basic education in the South African Constitution imposes an immediate obligation on the state to realise this right, and progressively realise the right to further education.¹¹⁷

The potential impediment of the culture of judicial conservatism in the enforcement of socio-economic rights, such as the right to education, was also a concern raised when the Kenyan 2010 Constitution was adopted. As shown in the table above, the right to education has also been domesticated in the Kenyan legal system as an enforceable right. Article 43(1)(f) provides for everyone's right to education. Article 53(1)(b) provides for every child's right to free and compulsory basic education. Article 56(b)(1) of the Constitution obliges the government to take measures, which include affirmative action programmes, that will ensure that minorities and marginalised groups are given special opportunities to acquire education. An important aspect of the Kenyan Constitution

112 FHC/ABJ/CS/978/15.

113 LEDAP(n 112) para 13.

114 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.

115 CCT29/10 [2011] ZACC 13.

116 *Juma Musjid* (n 115) para 37.

117 F Veriava *Realising the right to basic education: The role of the courts and civil Society* (2019). Also see L Arendse 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) 14 *Potchefstroom Electronic Law Journal* 97; C Churr 'Realisation of a child's right to a basic education in the South African school system: Some lessons from Germany' (2015) 18 *Potchefstroom Electronic Law Journal* 2405; C McConnachie & S Brener 'Litigating the right to basic education' in J Brickhill (ed) *Public interest litigation in South Africa* (2018) 281.

in terms of the domestication of international legal instruments is that the Constitution enforces the direct incorporation of international legal instruments that Kenya has ratified into the domestic legal system. By implication, all the elements of article 11 of the African Children's Charter are now fully domesticated and form part of Kenya's domestic legal system. In a number of cases¹¹⁸ related to the right to education, the courts have affirmed that the right to education is justiciable and confers legal entitlement to every child's right to education and a corresponding obligation on the government to provide such education.

However, as earlier stated, the effective implementation or enforcement of constitutionally-protected socio-economic rights in Kenya has raised some concerns. For example, Arwa examined the adjudication of socio-economic rights in Kenyan domestic courts and identified the conservative judicial culture in the Kenyan judiciary as a potential impediment to the transformative potential of the Kenyan Constitution.¹¹⁹ Arwa observes that the Kenyan judiciary has adopted a more conservative approach when adjudicating socio-economic rights-related cases.¹²⁰ Supporting the concerns raised by Arwa, Thiankolu has observed that the conservative approach adopted by Kenyan courts will have a detrimental impact on the transformative potential of the Constitution.¹²¹ Thiankolu observes that prior to 2010, judges in Kenya 'pandered' to the executive branch.¹²² In his view, they adopted an ultraconservative approach to constitutional and legal interpretation.¹²³

While it is impossible to discuss the domestication of the right to education as provided in article 11 of the African Children's Charter state-by-state in one chapter, the table above provides an idea of the extent of domestication of the right to education in each member state. It gives an idea of where education stands in terms of legal protection and the hierarchy of the legal system of each state.

6 Conclusion

Article 11 provides a comprehensive legal framework that guides states in respecting, protecting and fulfilling children's rights to education. However, there are gaps in the legal framework itself, as the term 'basic education' is open to interpretation. There also is no specific provision for pre-primary education and, while this gap is present in other international law instruments, there is also a lack of attention to pre-primary education General Comments and Concluding Observations.

Beyond the gaps in the legal framework, there are many shortcomings in the delivery of the right to basic education at the primary and secondary levels, with 98 million children out of school in sub-Saharan Africa, and unequal access in many countries, leaving out girls, minorities and children with disabilities, among others. Poor infrastructure in schools is a widespread problem. There are serious concerns about educational outcomes. Safety in schools also is problem.

Nevertheless, on the positive side, there does appear to be recognition at the African leadership level of the importance of education. It features in Agendas 2040 and 2063, and it was selected by the AU as a theme for 2024.

118 See *Githunguri Residents Association v Cabinet Secretary Ministry of Education and Others* Petition 464 of 2013; *Reverend Ndoria Stephen v The Minister of Education and Others* Petition 464 of 2012; and *John Kabui Mwai and others v Kenya National Examinational Council and others* Petition 15 of 2011.

119 JO Arwa 'Economic rights in domestic courts: The Kenyan experience' (2013) 17 *Law, Democracy and Development* 428.

120 As above.

121 M Thiankolu 'Why Kenya's Judge recruiters are sceptical about activism on the bench' (2021), <https://theconversation.com/why-kenyas-judge-recruiters-are-sceptical-about-activism-on-the-bench-160125> (accessed 2 July 2024).

122 As above.

123 As above.

In its decision in *Sudanese Nationality* the African Children's Committee drew from General Comment 13 of the ESCR Committee, which situates the rights and obligations related to article 12 within an international law context, although the Committee's connection of availability to quality in the *Sudanese Nationality* decision is puzzling.

With regard to the aims of education set out in article 11(2), the African Children's Committee's jurisprudence is uneven, with some aims being given more attention than others. The promotion and full development of the child have recently tended towards attention to the use of technology – and this approach seems to have been boosted by the COVID-19 pandemic. The aim of fostering respect for human rights and fundamental freedoms was highlighted in the Committee's General Comment to article 31, but does not give rise to many recommendations in Concluding Observations. General Comment 31 also stressed another aim, namely strengthening African morals and positive traditional values. However, this aim also is not a popular theme in Concluding Observations. Much the same jurisprudential pattern is followed in relation to the aim of preparing a child for responsible life in a free society, and the aim of preserving national independence and territorial integrity. With regard to the aim of developing respect for the environment, the Committee has issued a resolution in 2022, in which it acknowledged the threats posed to children's rights by climate change, and recommended to state parties to apply a rights-based approach, and training for educators.

The obligations of states in relation to the right to education are set out in article 11(3), and the African Children's Committee again draws on the ESCR Committee, by adopting the typology of 'respect, protect and fulfil' in their decision against Tanzania regarding learner pregnancy. This issue has also given rise to Concluding Observations, such as the advice given to Sierra Leone to end discrimination against pregnant girls. The obligation to protect the right to education is highlighted in Concluding Observations to Nigeria regarding Boko Haram, and this is in line with the Committee's General Comment 22 which observed that the right to access to education applies even in times of armed conflict.

The immediate obligation to fulfil the right to free and compulsory basic education has been clarified in the African Children's Committee's General Comment 5 which explains what is meant by 'free and compulsory'. Eswatini is singled out here, because its Constitution promised free primary education within three years after the coming into operation of the Bill of Rights, but that did not materialise. A series of court judgments by the courts of Eswatini ensued, and the issue was also taken up in the Children's Committee's Concluding Observations to the same country, which focused on the issue of non-citizen children receiving education. The South African case of *Centre for Child Law v Minister of Basic Education* also established rights at the domestic level for the education of undocumented children. In Kenya, the case of *Githunguri Residents Association v Cabinet Secretary Ministry of Education and Others* challenged the charging of fees despite the guarantee of free education. Case examples at the domestic level are also cited in relation to the progressive realisation of secondary education and higher education. The issue of the regulation of private education has also received attention in the Ugandan High Court, with the case of *Initiative of Social and Economic Rights and Rights v Attorney General* which, while recognising the right of parents to place their children in private schools, stressed the importance of monitoring by the state.

These cases show that child rights and human rights activists are using the law and the courts to advance the right to education at all levels, which is a positive sign and an indication of the value of the constitutional embedding of the right to education with a strong regional and international legal framework.

The African Children's Charter's unique provision to ensure that pregnant learners are allowed to complete their education has received considerable attention through litigation at the regional and domestic levels. This issue has garnered much attention in law and policy reform, with over 30

countries in Africa now having laws, policies or strategies to protect pregnant learners and adolescent mothers' rights to education.

The constitutionalisation of the right to education also presents a promising picture, with a growing number of constitutions now featuring the right to education among the justiciable rights sections, rather than among directive or aspirational principles.