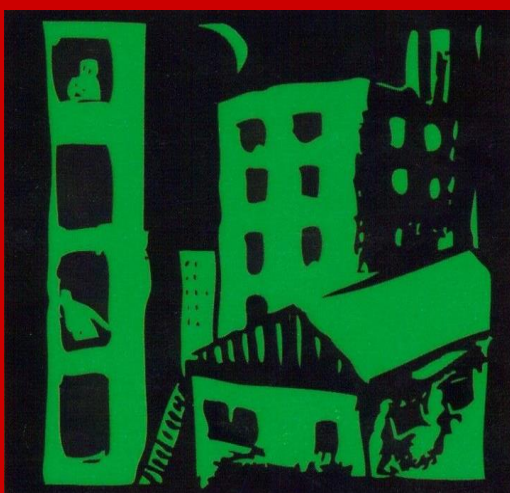


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**Impediments to the
democratic
participation of
foreign nationals in
public-school
governance**

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ABSTRACT

In their efforts to promote the constitutional values of equality, human dignity and freedom, public-school laws and policies emphasise non-discrimination in the admission of learners and democracy in the professional management and governance of public schools. The democratisation of post-apartheid public schools must comply with democratic participation and representativity. Whereas democratic participation can be realised through the exercise of active voting rights, democratic representativity can be achieved through the exercise of passive voting rights. Accordingly, this article explores notions of democracy, non-discrimination, and representativity

so as to examine and highlight factors that may restrict or inhibit the participation of foreign nationals in school governing body elections. The active and passive voting rights of foreign nationals are discussed from constitutional and statutory perspectives.

Keywords: foreign nationals; representativity; democracy; voting rights; school governing bodies.

1 INTRODUCTION

The governance and management of public schools is, in principle, entrusted to the school governing body (SGB), whose members include elected members, co-opted members and the principal.¹ Foreign nationals (that is, migrants, refugees and asylum seekers) can therefore become members of the SGB through election. They can also be nominated as office-bearers of the SGB since those who are eligible to stand for office include members of each of the following groups: parents of learners, educators, members of staff (who are not educators), and learners in the eighth grade or higher at the public school.² At some public schools, parents of learners, learners in the eighth grade or higher, or educators (or employees in other positions) include foreign nationals. In such situations, foreign nationals have the right to engage in the governance and management of public schools through democratic participatory processes.

In the light of the above, this article is concerned with the analysis of factors that may restrict or inhibit the democratic participation of foreign nationals in school governance and management. Accordingly, it deals with two main questions: whether foreign nationals have the legal right to vote (that is, active voting rights or active suffrage) and stand in SGB elections (that is, passive voting rights or passive suffrage); and if so, which factors impede them from becoming members of SGBs.

By definition, the SGB is entrusted with many responsibilities, including improving the quality of education provided to learners attending the school under its jurisdiction. Key responsibilities of the SGB include drafting policies to improve quality of education,³ the adoption of a code of conduct for learners,⁴ the admission of learners,⁵ the preparation of the budget of the school,⁶ raising funds, and monitoring how the school spends its funds.⁷ Foreign nationals can make a positive impact on these responsibilities if they make their way onto a SGB. This possibility rests largely on their eligibility and

¹ Section 23(1)(a)–(c) of the South African Schools Act 84 of 1996 (SASA).

² Section 23(2) of the SASA.

³ Sections 5(5), 5A(3)–(4), 6(2), and 8 of the SASA.

⁴ Section 8 of the SASA.

⁵ Section 5(2) of the SASA.

⁶ Section 38 of the SASA.

⁷ Section 37 of the SASA.

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nomination as candidates for SGB office. Eligibility hinges primarily on the condition that proposers and seconders of nominees (or candidates) and nominees themselves are members of the school community.⁸

This article uses qualitative research to address its research questions. Accordingly, a wide range of literature was reviewed on, first, the legal and policy framework regulating basic education, school admission, and SGB elections, and, secondly, practical factors facilitating or hampering the participation of foreign nationals in SGBs. The literature review was done with due regard to the constitutional principles of democracy and non-discrimination on which the South African Schools Act (SASA) and related policies are based. It was undertaken from the standpoint that the constitutional values of equality, human dignity and freedom inform and permeate basic education laws, policies, and strategies. From a constitutional perspective, education scholars view the SASA as a tool to redress past inequality, discrimination and exclusion and to promote the transformation of public schools through the introduction of the ideals of “democratic representation” and “democratic participation” in their administration.⁹

In view of the above, the article is structured as follows. First, it examines the legal framework of basic education; looks at the significance of the right to basic education and its scope and ambit concerning admission; and conceptualises the notion of democracy and non-discrimination through a statutory and constitutional lens. These issues are examined so as to articulate the meaning of active and passive voting rights at the level of SGB elections. Secondly, the article critically discusses the meaning and scope of democratic participation and representativity in SGBs, with a focus on criteria for qualification or disqualification from SGB elections. Thirdly, it examines the notion of democracy through an immigration and refugee-law lens. The discussion is aimed at illustrating the divergence between a constitutional-law approach and an immigration and refugee-law approach to democratic participation and representativity. Based on this divergence, the impediments to democratic representativity of foreign nationals in the governance of public schools are identified. Fourthly, the article explores further

⁸ Section 10 of the Guidelines Relating to Election of Governing Bodies of Public Schools of 2008.

⁹ See, for example, Brown B & Duku N “Negotiated identities: Dynamics in parents’ participation in school governance in rural Eastern Cape schools and implication for school leadership” (2008) 28(3) *South African Journal of Education* 431 at 432; Heysteks J “School governing bodies in South Africa: Relationships between principals and parent governors – A question of trust?” (2006) 34(4) *Educational Management Administration & Leadership* 473 at 459; Mncube V & Harber C “Learners’ democratic involvement in school governing bodies in South Africa: Making the voice of the voiceless heard” (2013) 10(1) *SA_eDUC Journal* 1 at 2–3; Mansfield-Barry S & Stwayi L “School governance” in Veriava F, Thom A & Hodgson TF (eds) *Basic education rights handbook – Education rights in South Africa* (2017) 75 at 78; and Adams F & Waghid Y “In defence of deliberative democracy: Challenging less democratic school governing body practices” (2005) 25(1) *South African Journal of Education* 25 at 25.

moral, legal and economic obstacles that may hinder foreign nationals' participation in public schools' activities.

The article concludes by noting that foreign nationals have right to exercise active and passive voting rights. However, various factors inhibit the freedom to exercise this right. To address these issues, some factors can be addressed at public-school level, whereas the government can address others. Arguably, this would facilitate the participation of foreign nationals in the SGB. Overall, the aim of this study is to illustrate legal and practical factors that impede the participation of foreign nationals – in particular, refugees, asylum seekers and economic migrants – in the SGB and how these factors can be addressed to promote their participation.

2 LEGAL FRAMEWORK OF BASIC EDUCATION

The South African legal framework is framed in a manner that gives effect to the constitutional right to basic education, which is vested in everyone.¹⁰ It creates a single national system for public schools that redresses past injustices in the basic education system, in particular discrimination.¹¹

2.1 Significance and importance of the right to a basic education

The importance of education in our lives can be appreciated from its definition. The term “education” is defined generally by the United Nations Education, Scientific, and Cultural Organisation (UNESCO) as “the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, national and international communities, the whole of their personal capabilities, attitudes, aptitudes and knowledge”.¹² Education is further described by the United Nations High Commission for Refugees (UNHCR) as “the key to the future, that will help bring peace to [refugee communities]’ countries ... despite not knowing what will happen tomorrow, education brings stability and hope”.¹³

Education is not only – as Nelson Mandela puts it – a weapon to change the world politically, but also something that brings hope to families struggling to put bread on the table or foreign nationals who are struggling to integrate themselves in local economic activities. Education plays important roles in our lives. It assists many of us to learn and develop talents and skills whereby our potentiality can be realised. Indeed, basic education opens the door to dreams and is a foundation for skills, talents and traits

¹⁰ Section 29(1)(a) of the Constitution provides that “everyone has the right to a basic education, including adult basic education”.

¹¹ Preamble of the SASA.

¹² Article 1(a) of the United Nations Educational, Scientific and Cultural Organization (UNESCO)'s Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms of 1974.

¹³ Dryden-Peterson *S Refugee education: Global view* (2011) 8.

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acquired through learning. For a number of reasons, education is, in the legal domain, “both a human right in itself and an indispensable means of realising human rights”.¹⁴ Education as a human right is intrinsically linked to the alleviation of poverty, the remediation of social ills or pathologies, and social development, and is regarded as key to the realisation of notions of a dignified life, self-reliance, sustainable development, economic growth, social cohesion, and a better life.¹⁵ For instance, it is contended that xenophobic violence is rampant in South African communities that have a low level of education, as they do not fully appreciate the presence of foreign nationals in these communities.¹⁶ Education has a greater impact on everyone’s lives and community development only if access to it is well-regulated and well-managed. In South Africa, regulation of the right to basic education is the responsibility of the state; however, access to it and its quality are the responsibility of members of public-school communities. In other words, members of the community have the power to decide on the quality of education their children need, as the article turns to discuss.

2.2 Statutory approach

The right to education, as a basic human right, is entrenched in the Chapter 2 of the Constitution, entitled “the Bill of Rights”, and accrues to everyone.¹⁷ It is given effect to and regulated by the SASA. Fundamentally, the SASA allows every child on South African territory to attend public schools and therefore prohibits discrimination of any form concerning the admission of children into the said schools.¹⁸ Access to basic education is grounded in admission, which is further regulated by the National Education Policy Act,¹⁹ known as the Admission Policy of Ordinary Public Schools (hereafter, Admission Policy).²⁰ In terms of the Admission Policy, conditions are set out in respect of the right of foreign children to be admitted in the public schools.²¹ A foreign child may be refused to be admitted in the public school if he or she²²

¹⁴ General Comment No. 13: The right to education (article 13), (E/C.12/1999/10), 8 December 1999, para 1.

¹⁵ See Dryden-Peterson (2011) at 8.

¹⁶ Poor citizens, mostly uneducated about the role that fellow Africans played in the South African liberation struggle, are active in violent attacks against foreign nationals. See Ukwandu DC “Reflections on xenophobic violence in South Africa: What happens to a dream deferred?” (2017) 9(9) *African Journal of Public Affairs* 43 at 51.

¹⁷ Section 29(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) states that “[e]veryone has the right to a basic education”.

¹⁸ Section 5(1) of the SASA.

¹⁹ National Education Policy Act 27 of 1996.

²⁰ GN No. 2432, GG 19377 of 19 October 1998.

²¹ Clauses 14–21.

²² Buckland S “From policy to practice: The challenges to educational access for non-nationals in South Africa” (2011) 31(4) *International Journal of Educational Development* 367 at 369. Reference to primary source i.e. Admissions Policy?

- (i) is not subscribing to the school's mission statement;²³
- (ii) cannot provide both birth certificate and immunisation records;²⁴
- (iii) cannot provide proof of permission to stay and study in the country;²⁵ and
- (iv) cannot provide a transfer letter.²⁶

Despite these requirements, undocumented foreign children must be admitted on the condition that they supply the required documents within a three-month grace period.²⁷ This is illustrative of the fact that foreign children can still be admitted in public schools pending the submission of the required documents. However, in *Centre for Child Law v Minister of Basic Education*,²⁸ the High Court ruled that it would amount to a breach of the Constitution to deny admission to foreign nationals on the ground that they cannot provide the required documents.²⁹ By virtue of being the parents of learners, foreign nationals become members of the public-school community that has the power to choose who should represent it in the SGB through democratic participation.

Such representation is not based on citizenship: citizenship is not a determinant factor for participation in SGB elections. Pursuant to the SASA, which prescribes how schools should be governed and managed, representativity is based on and guided by two key principles, namely democracy and non-discrimination.³⁰ Whilst professional management is the responsibility of the school principal, along with the professional staff members, the governance of the school is the responsibility of the SGB, whose majority members must be parents of learners.³¹ The principles of democracy and non-discrimination are essential in the promotion of participation of foreign nationals, as the article turns to discuss.

2.3 Impact of democracy and non-discrimination

The ideals of democracy and non-discrimination inform the establishment of the SGB, its decisions and resolutions. These ideals speak to democracy in the contexts of representation and participation in elections, which must be exercised freely and

²³ Clause 10(b).

²⁴ Clause 15.

²⁵ Clauses 20–21.

²⁶ Clause 17.

²⁷ Clause 15. See Buckland (2011) at 369.

²⁸ *Centre for Child Law v Minister of Basic Education* [2020] 1 All SA 711 (ECG).

²⁹ *Centre for Child Law* (2020) at para 93. In essence, the judgment found that clauses 15 and 21 of the Admission Policy constituted severe limitations to other rights that protect children and are thus unconstitutional

³⁰ Preamble of the SASA.

³¹ Section 16 of the SASA provides that governance is the responsibility of the SGB and that management of professional activities falls to the principal and teachers. There is hence a division of powers in the administration of public schools.

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without unfair discrimination. The exercise of democratic participation and representativity at public-school level must aim to promote the rights in the Bill of the Rights, particularly the rights to equality and human dignity.³² The promotion of democratic processes relating to school elections can be limited in terms of section 36 of the Constitution.³³ Voting rights at the SGB can make people feel alienated and discriminated against if they do not participate in the elections of the school of their children or are not made to feel integrated and welcomed if they participate in these elections.

2.3.1 *Constitutional democracy*

The notion of democracy permeates the Constitution and informs the Bill of Rights and legislation as well as policies and guidelines. From the outset, the preamble of the Constitution states that South Africa's people are committed to "establish[ing] a society based on, among other things, democratic values". Full enjoyment of fundamental human rights is regarded as a cornerstone of democracy in South Africa, and cements the democratic values of human dignity, equality and freedom.³⁴ It is within an open and democratic society that rights in the Bill of Rights may be enjoyed, limited or interpreted, based on those three democratic values.³⁵ The Constitution states furthermore that public administration or management must be governed by the said democratic values and other principles enshrined in it.³⁶ As such, the professional management and governance responsibilities of public schools must be discharged based on democratic norms.

The notion of democracy is entrenched in the Constitution as a core ideal on which post-apartheid decision-making must be based. As a constitutional ideal, democracy dictates that the consent of the people must be the defining characteristic of the relationship between the state and ordinary people; accordingly, public governance must reflect, or be based on, the will of the people.³⁷ In terms of this view, the governance of public schools must be based on the will of members of their communities, which include foreign nationals. In particular, constitutional democracy is linked to political rights and administrative rights. In the latter context (administrative rights), individuals must be heard before decisions are taken affecting their rights, whereas in the former context (political rights), individuals must be represented through elections, and the elected

³² The Bill of Rights is premised on the guarantee of equality, human dignity and freedom. Human dignity is an important constitutional guarantee, as no individual should be subjected to humiliation or an act that impairs or undermines his or her dignity.

³³ Section 7(3) of the Constitution provides that all rights in the Bill of Rights can be limited in terms of section 36 of the Constitution.

³⁴ Section 7(1) of the Constitution.

³⁵ Sections 36 and 39 of the Constitution.

³⁶ Section 195(1) of the Constitution.

³⁷ Currie I & de Waal J *The bill of rights handbook* 6th ed. (2017) at 14–15.

representatives must be allowed to participate in decision-making that affects those who elected them.³⁸ Constitutionally, whilst the right to vote (that is, active suffrage) or to be a nominee or a candidate (that is, passive suffrage) in elections is vested solely in citizens, administrative rights accrue to everyone. The constitutionally based active and passive voting rights serve as a basis on which national, provincial and municipal leadership must be established. The same approach does not apply to the leadership of public schools or other non-political institutions or organisations. Exercising constitutionally based political rights is possible through involvement in national, provincial and municipal elections and law-making processes.³⁹ Political rights of this nature are limited to citizens.

Mandal maintains that active and passive voting rights are restricted to citizens, and states that foreign nationals, in particular refugees and asylum seekers, do not participate in any elections of their host countries or countries of origin.⁴⁰ Unlike refugees and asylum seekers, economic migrants may participate in any elections of their countries of origin. The notion that foreign nationals do not participate in the elections of the country in which they live has given rise to questions as to whether foreign nationals can participate in an election or decision-making process concerning any public governance or administration. This matter needs clarification. Section 19 of the Constitution expressly restricts political rights to citizens. However, if an election does not seek to promote a multiparty system, there is no specific provision stopping foreign nationals from engaging in that election. An example is the election of the president of a students representative council (SRC) at a university or other institution of higher learning. SRC elections do not exclude foreign students from participating. This is also the position taken by the SASA, which does not make any distinction between nationals and foreign nationals, as will be discussed in detail later.

The democratic processes provided for by the SASA do not fall within the scope and ambit of the active and passive voting rights of citizens as contemplated by section 19 of the Constitution. In other words, foreign nationals cannot be excluded from public-school elections on the basis that section 19 of the Constitution limits voting rights to citizens. Their participation in elections must rather be understood in terms of the promotion of democratic culture, based on the constitutional values of equality, human dignity and freedom on which the post-apartheid national system for schools operates.⁴¹

³⁸ See Currie & de Waal (2017) at 14–15.

³⁹ See Currie & de Waal (2017) at 15.

⁴⁰ Mandal R “Political rights of refugees: Legal and protection policy research series: Research Policy PPLA/2003/04/ November 2003” United Nations High Commissioner for Refugees (2003) available at <https://www.unhcr.org/africa/media/no-4-political-rights-refugees-ruma-mandal> (accessed 26 December 2023).

⁴¹ Among other things, the objectives of the SASA are to establish a new national system for schools that does not tolerate unfair discrimination, racism, sexism and intolerance. See the preamble of the SASA.

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2.3.2 Constitutional non-discrimination

Like the notion of constitutional democracy, the idea of non-discrimination is pivotal in the protection of the rights in the Bill of Rights. Under the equality clause, unfair discrimination is not allowed, but the prohibition of unfair discrimination does not rule out differentiation in treatment which is designed to remedy past discrimination. In school governance, non-discrimination demands the inclusion of foreign nationals in governing activities. In real situations, the equality clause protects individuals against unfair discrimination that may stem from differentiation based on irrational, unreasonable, illegitimate or unjustifiable grounds.⁴² Sections 9(3) to (4) of the Constitution provide that neither the state nor juristic or natural persons may “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”. Grounds of unfair discrimination specified under section 9(3) are known as “constitutionally-listed grounds”. Constitutionally listed grounds are not a closed or exhaustive list, meaning that other grounds can be analogous to them.⁴³ The Constitutional Court in *Harksen v Lane*⁴⁴ defined an analogous ground as a ground that is “based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner”.⁴⁵ Discrimination based on nationality is prohibited if it amounts to unfair discrimination. According to the test established by the Constitutional Court in *Harksen v Lane NO*, discrimination is considered unfair if it impairs or adversely affects the dignity of those who are discriminated against.⁴⁶ In various cases, the courts have found that discrimination against asylum seekers, refugees or migrants amounted to unfair discrimination because it impaired the dignity of these categories of foreign nationals.⁴⁷

⁴² Currie & de Waal (2017) at 243.

⁴³ Currie & de Waal (2017) at 243–244.

⁴⁴ *Harksen v Lane NO* 1998 1 SA 300 (CC).

⁴⁵ *Harksen* (1998) at para 46.

⁴⁶ *Harksen* (1998) at para 53.

⁴⁷ Unfair discrimination on the ground of refugee status or asylum-seeker status was considered in the case of *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA), dealing with the right to work and education, and in the case of *Union of Refugee Women*, dealing with the right to choose an occupation and trade. In *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services* 2007 4 BCLR 339 (CC), the Constitutional Court took into account the socio-economic status of refugees and asylum seekers and concluded that “discriminating against refugees involves discriminating against a vulnerable group of people such that discrimination against them will often impair their dignity or their rights in a serious manner” (para 113). In *Watchenuka*, the total exclusion of asylum-seekers from employment and education was found by the SCA to be constitutionally unacceptable, as it rendered asylum seekers destitute (paras 32–36). Unfair discrimination on the ground of citizenship was considered in the case of *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC), dealing with recruitment of foreign educators in

It is crucial to note that there are three factors to be considered when determining the unfairness of discrimination arising from analogous grounds. The three factors are: (i) the position of the complainants in society and whether they have suffered from past patterns of discrimination; (ii) the nature and purpose of the provision; (iii) and the impact of the discrimination on the complainants and whether it impairs their human dignity.⁴⁸

Concerning the first factor, certain refugees and asylum seekers were victims of the past patterns of discrimination. This is the category of refugees and asylum seekers who sought sanctuary in South Africa during the apartheid era.⁴⁹ In essence, refugees and asylum seekers are viewed as vulnerable groups in South Africa even though their socio-economic vulnerabilities stem largely from forced displacement in their countries of origin. Socially and economically, refugees and asylum seekers are condemned to poverty and destitution by the fact that they were forced to flee their countries and do not enjoy the freedom to return to their home countries or enjoy diplomatic protection afforded by their home countries.⁵⁰

These factors differentiate them from economic migrants, who can return to their home countries and who are protected by their home countries through diplomatic missions. Politically, migrants, refugees and asylum seekers are powerless and voiceless, as they do not participate in politically democratic processes.⁵¹ The vulnerabilities of refugees and asylum seekers led Mokgoro and O'Regan JJ, in *Union of Refugee Women v The Director: Private Security Industry Regulatory Services* (dealing with the exclusion of refugees from work in the security industry)⁵² to stress that “discriminating against refugees involves discriminating against a vulnerable group of people such that discrimination against them will often impair their dignity or their rights in a serious manner.”⁵³ Exclusion of foreign nationals in the SGB elections will, however, amount to unjustifiable unfair discrimination, given that the SASA does not exclude them from engaging in public-school affairs.

teaching position, and in the case of *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), dealing with foreign nationals' access to social assistance. In *Larbi-Odam*, the ground of citizenship or nationality was found to be based on attributes and characteristics that have the potential to impair the dignity of non-citizens (paras 24–26). In *Khosa*, differentiation on the ground of citizenship was found to have the potential effect of relegating a vulnerable group of non-citizens (that is, permanent residents) to the margins of society (paras 77, 81).

⁴⁸ *Harksen* (1998) at para 51.

⁴⁹ Handmaker J “No easy walk: Advancing refugee protection in South Africa” (2001) 48(3) *Africa Today* 91 at 91–113.

⁵⁰ Refugees and asylum seekers are considered as vulnerable in host communities because their plight calls for compassion and they have limited resources at their disposal. See *Ndikumdavvi v Valkenberg Hospital* [2012] 8 BLLR 795 (LC) at para 17 and *Union of Refugee Women* (2012) at paras 24, 28.

⁵¹ Kavuro C “Exploring the full legal protection of refugees and its limitations with reference to natural and positive law” (2018) 39(1) *Obiter* 17 at 36–37.

⁵² *Union of Refugee Women v The Director: Private Security Industry Regulatory Services* 2007 4 BCLR 339 (CC).

⁵³ *Union of Refugee Women* (2007) at para 113.

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The purpose of the SASA provisions is to promote the participation of all parents of learners, learners, educators and staff members – regardless of their nationality – in public-school elections. The exclusion of foreign nationals from the democratic governance and administration of schools amounts to a violation of the provisions of the SASA and, in that regard, amounts to unfair discrimination. Discriminating against foreign nationals based on citizenship has a deleterious impact on their human dignity. Arbitrary deprivation of the right to participate in elections of the SGB – as voters or nominees – will certainly disadvantage them in terms furthering their sense of belonging in a society in which they live and consolidating their freedom (or individual autonomy) to decide on education matters that shape the future of their children.

2.3.3 Statutory democracy and non-discrimination

Pursuant to the SASA, the commitment to transform past discriminatory and racial practices of public schools and develop a democratic and non-discriminatory system is reflected in the emphasis placed on the promotion of equal participation through democratic engagement. The preamble of the SASA recognises that “the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation”.⁵⁴ South Africa, as a democratic nation, requires a new national system for schools which will ... advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance ... [and] uphold the rights of all learners, parents and educators ...⁵⁵

The inherited education system must be transformed through the promotion of equal and democratic participation of those who were denied the opportunity to participate in the functions of public schools owing to historical segregation policies. All parents have the right to participate in public-school elections and to elect representatives who will then decide on the future of the public school, on the one hand, and the future of their children, on the other. That said, redressing the past cannot be achieved by discriminating against a particular category of persons. An inclusive approach is key to democratic transformation. The ideals of democracy inform all activities at school.

From a democratically designed school-policy perspective, for example, cultural or extramural practices that do not align with democratic values are prohibited at public schools. The SASA states that initiation practices, which impede “the development of a true democratic culture that entitles an individual to be treated as worthy of respect and concern”, are prohibited at public schools.⁵⁶ This approach invokes the right to human dignity, which requires that all human beings be in a position to live their lives in accordance with the ends they freely choose as autonomous agents who define their

⁵⁴ Preamble of the SASA.

⁵⁵ Preamble of the SASA.

⁵⁶ Section 10A of the SASA.

own destiny.⁵⁷ As human beings, foreign nationals should be seen as members of a democratic society who have a say over the right to a basic education or over which activities their children should participate in. With regard to non-discrimination, the SASA stresses that the admission of learners to public schools must be facilitated without unfair discrimination.⁵⁸ Foreign children must also be admitted in schools even if their parents are illegal in the country. It is unclear whether parents who are in the country illegally can also engage in elections.

Discrimination is prohibited too as far as languages are concerned. However, apart from constitutionally recognised African languages, other African languages cannot form part of the language policy of public schools. According to the SASA, non-discrimination must be maintained when determining the language policy of public schools in that the policy cannot be based on racial discrimination;⁵⁹ moreover, the SASA seeks to protect and advance South Africa's diverse cultures and languages.⁶⁰ Language may thus be a factor that impedes the participation of some foreign nationals in school elections, as will be discussed later.

Non-discrimination is further reflected in the manner in which national resources must be distributed. Accordingly, the South African government, through the Department of Basic Education, is obligated to "fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision".⁶¹ The SGB is therefore well-positioned to decide how the budget should be spent.⁶² In situations where foreign nationals are not arbitrarily excluded from SGB elections, they will be able to have a say on the school's budgetary decisions. To participate in decision-making, foreign nationals should also be represented in the SGB through the enjoyment of passive voting rights.

3 FOREIGN NATIONALS' REPRESENTATION AND PARTICIPATION IN SGBS

The inclusion of foreign nationals in SGBs has been justified above on the basis of the principles of democracy and non-discrimination. The criteria for eligibility for participation in public-school elections must hence comply with these principles. There is no better way to explain this than by critically examining the composition of the SGB and the procedure applied to become a member of it.

⁵⁷ Kavuro C *Refugees' access to socio-economic rights: Favourable treatment for the protection of human dignity* (Doctoral thesis, Stellenbosch University, 2018) at 91.

⁵⁸ Sections 5, 46(b) of the SASA.

⁵⁹ Sections 6, 6B of the SASA.

⁶⁰ Preamble of the SASA.

⁶¹ Section 34 of the SASA.

⁶² Section 38 of the SASA.

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3.1 Composition of the SGB

The SASA provides that the SGB consists of elected and non-elected members. Non-elected members are the principal and co-opted members.⁶³ Co-opted members are members of the community “with expertise regarding the special education needs of learners”,⁶⁴ or people who can assist the SGB in discharging its functions.⁶⁵ Where the public school was built on private property, the owner of the property must be a co-opted member.⁶⁶ Co-opted members do not have voting rights on the resolutions of the SGB.

Nothing in the SASA prevents foreign nationals from being appointed or nominated as co-opted members if they are owners of private property on which the school infrastructure was established or if they possess skills that the school needs. The decision to co-opt members rests with the SGB. It is the SGB that decides which members of the community can join as co-opted members.⁶⁷ To enjoy passive voting rights, members of the community must propose nominees.⁶⁸ For instance, when a parent nominates an individual to stand for SGB office, such nomination must be seconded by another parent and the nominee must accept the nomination.⁶⁹ The majority of SGB members must be elected from the parents of learners. Other members must be elected from educators, non-teaching staff, and learners in the eighth grade or higher at the school.⁷⁰

It follows that foreign nationals – as parents, learners, educators, and staff members – enjoy active and passive voting rights, as the SASA does not exclude them from public-school elections. They can be excluded from participation in the elections only if they fall within a category of disqualified persons.

⁶³ Section 23(1)(a)–(c) of the SASA.

⁶⁴ Section 23(5) of the SASA.

⁶⁵ Section 23(6) of the SASA.

⁶⁶ Section 23(7) of the SASA.

⁶⁷ Section 23(5)–(7) of the SASA.

⁶⁸ Section 28 (b) of the SASA states that “[s]ubject to this Act and any applicable provincial law, the Member of the Executive Council must, by notice in the Provincial Gazette, determine the designation of an officer to conduct the process for the nomination and election of members of [SGB]”.

⁶⁹ The election process is as follows. Parents nominate and elect SGB members at a parents' meeting called by the school for the elections. Parents complete a nomination form which they submit to the school. A nomination must be seconded by another parent and the nominee must accept the nomination before the forms are submitted to the school. Parents may seek nomination but may not nominate themselves. Parents must submit nominations at least seven days before the election meeting. Teachers, non-teaching staff, and learners nominate and elect members at similar meetings. Schools provide school communities with all relevant information. See section 10 of the Guidelines Relating to Election of Governing Bodies of Public Schools of 2008.

⁷⁰ Section 23(2) of the SASA.

3.2 Disqualification from participation

Certain categories of people in a school community do not qualify to be members of the SGB. The primary ground for disqualification is where the parent of a learner is employed at the school.⁷¹ However, the employment of a parent does not entirely bar him or her from becoming a member of the SGB, as the phrase “may not represent parents” on the SGB under section 23(3) of the SASA appears not to impose a total disqualification. Section 23 does not prevent employed parents of learners from exercising their active voting right; rather, they have limited passive voting rights.

Absolute disqualifications have been laid down under the Guidelines Relating to Election of Governing Bodies of Public Schools of 2008 (hereafter, 2008 SGB Guidelines). Persons who are disqualified include mentally ill persons, unrehabilitated insolvents, criminals,⁷² and those declared as unsuitable to work with children.⁷³ These categories of people are not eligible to be members of the SGB. The disqualification from becoming members of the SGB can be interpreted as a deprivation of passive voting rights. It is not clear whether the ineligibility or disqualification can be extended to include active voting rights. Other disqualified categories of persons include members of the community who do not fall within one of the categories of members who make up an SGB; who no longer fall within the category of members that they represented at the time of their election; or who have had their membership terminated by the head of department in terms of the SASA. In short, it is not the case that every member of the school community is entitled to participate in the election of members of the SGB; instead, people need to meet criteria in order to qualify to participate – and the first, and essential, requirement is to be a member of the community of the public school in question.

What can be inferred from the qualification and disqualification criteria is that being a foreign national is not, and cannot be used as, a ground of ineligibility for engaging in SGB elections either as voters or as nominees. Except for those who are not eligible, all members of the public-school community must be involved in public-school elections. Section 24 of the SASA emphasises not only the democratic character of such elections, but also the importance of having parents play an active role in the improvement of the quality of education provided by public schools. Once members of the SGB have been elected, they elect the chairperson from parent members, who always must be a

⁷¹ Section 23(3) of the SASA.

⁷² “Criminals” are understood as individuals who have been convicted of an offence and sentenced to imprisonment by a court of law in South Africa or in a foreign country; such a sentence is without the option of a fine and for a period exceeding six months. “Criminals” are also persons who have not yet served their full term of imprisonment.

⁷³ As stipulated in terms of the Children’s Act 38 of 2005. Alternatively, such persons are those listed in the register of people unsuitable to work with children in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

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majority in the SGB.⁷⁴ The question is whether these rights of democratic participation and representativity are consistent with immigration and refugee law.

4 DEMOCRATIC IDEALS SEEN THROUGH THE LENS OF IMMIGRATION LAW

4.1 Immigration law

Immigration law regulates the entry of foreign nationals into a country and requires that every foreign national in the country has authorisation to stay in the country for a specified period of time. In South Africa, permits or visas to stay in the country are issued in terms of the Immigration Act⁷⁵ for migrants, or in terms of the Refugees Act for refugees and asylum seekers.⁷⁶ Foreign nationals without a valid permit or visa are usually referred to as irregular migrants or illegal foreigners. An illegal foreigner is defined under the Immigration Act as a foreign national who is in the country in contravention of the Immigration Act; as such, an illegal foreigner may also be a prohibited person. Prohibited persons include foreign nationals who are criminals, terrorists, racists, persons infected with infectious diseases, or persons who have been previously deported.⁷⁷

Transgression of immigration rules results in a person's being treated as a criminal. Hence, any contravention of the immigration rules is regarded as a crime against the state punishable by a fine or imprisonment.⁷⁸ The Immigration Act therefore gives authorities the power to trace or detect, apprehend, detain and deport illegal foreign nationals.⁷⁹ The category of illegal foreigners includes undocumented migrants or asylum seekers, those foreign nationals who overstayed the period for which they were permitted to stay, or those who violated one or more conditions of their stay. According to the Immigration Act, it is a punishable crime to aid, abet or assist an illegal foreigner, save for providing any necessary humanitarian assistance.⁸⁰

Notwithstanding the prohibition on assisting illegal foreigners, the SASA seeks to relax the approach that prohibits illegal foreigners from having access to any public and private services. In this regard, the SASA allows the children of illegal migrants to be admitted in public schools and by allowing their parents to participate in the governance of these schools. However, since the 2008 SGB Guidelines excludes criminals from becoming members of the SGB, parents who are illegal foreigners or irregular migrants cannot be members of the SGB. It is not clear, though, whether they

⁷⁴ Section 29(2) of the SASA states that only a parent member of an SGB who is not employed at the public school may serve as the chairperson of the SGB.

⁷⁵ Immigration Act 13 of 2002 (as amended).

⁷⁶ Refugees Act 130 of 1998 (as amended).

⁷⁷ Section 29(1) of the Immigration Act.

⁷⁸ Section 49 of the Immigration Act.

⁷⁹ Section 32(1), read with ss 2(1)(c), 2(2)(i), 3(1)(g), 34(1) of the Immigration Act.

⁸⁰ Section 49(2), read with s 42(1)(a) of the Immigration Act.

are prohibited from participating in the public-school elections as voters. Pursuant to the 2018 Guidelines, eligible voters are those parents appearing in the admissions register as parents or who can show proof that they are parents of learners.⁸¹ The issue of illegality is, however, relaxed under the Refugees Act and thus treated differently, as the next section shows.

4.2 Refugee law

Asylum seekers, who are undocumented or refugees whose expired permits are not yet renewed, can be classified as illegal foreigners under immigration law. Section 22(14) of the Refugees Act (as amended by section 18 of the Refugees Amendment Act)⁸² states that asylum seekers who fail to comply with any condition set out in a permit or visa issued in terms of the Refugees Act will be considered as criminals. Non-compliance can lead, on conviction, to liability to a fine or imprisonment.⁸³ However, refugees and asylum seekers are protected by the principle of *non-refoulement*, which prohibits the authorities from deporting a refugee or an asylum seeker to a country he or she has fled.⁸⁴ Being undocumented does not render an asylum seeker or a refugee an illegal foreigner who must be apprehended for deportation, unless he or she cannot, upon arrest, demonstrate that he or she is in the country for asylum reasons. Reasons may include the intention to seek asylum.⁸⁵ Under the 2018 Regulations to the Refugees Act (hereafter, the 2018 Refugees Regulations), refugees and asylum seekers are prohibited from any political engagements or democratic participation: “No refugee or asylum seeker may participate in any political activity or campaign in furtherance of any political party or political interests in the Republic.”⁸⁶

The 2018 Refugees Regulations empower the Standing Committee for Refugee Affairs (SCRA) to withdraw the refugee status or asylum-seeker status of any person who democratically participates in any political activity or campaign to promote any political party or political interests in South Africa.⁸⁷ What these political interests entail is unclear. Because there are no definitions of “political activity” and “political interest” in the 2018 Refugees Regulations, it is unclear whether refugees and asylum seekers may

⁸¹ Section 7(1)(a) of the 2018 Guidelines.

⁸² Refuge Amendment Act 11 of 2017.

⁸³ Section 24(14) of the Refugees Act, as amended by s 18 of the Refugees Amendment Act 11 of 2017.

⁸⁴ See section 2 of the Refugees Act and Art 33 of the 1951 Convention Relating to the Status of Refugees.

⁸⁵ In the extradition case of *Gravic v The Refugee Determination Officer, Cape Town* Case No 3474 of 6 April 2016 (Western Cape Division), Mantame J held that an expression of an intention to apply for asylum is a factor meriting special consideration and treatment. In certain situations, an intention may not be genuine, as applications may be brought with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof (paras 47, 51, 54, and 57). See also *Abore v Minister of Home Affairs* 2022 (4) BCLR 387 (CC) paras 8,13,21; *Ruta v Minister of Home Affairs* 2019 (3) BCLR 383 (CC) paras 4, 6, 18; and *Bula v Minister of Home Affairs* [2012] 2 All SA 1 (SCA) paras 72, 78.

⁸⁶ Section 2 of the Refugees Regulations R1707 in GG 42932 of 27-12-2019 (the 2019 Refugees Regulations).

⁸⁷ Section 3 of the 2019 Refugees Regulations.

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participate in democratic platforms or forums such as the governance of public schools. The main concern is whether refugees and asylum seekers must distance themselves from participating in any democratic activity aimed at advancing the constitutional democratic transformation of South African society.⁸⁸ New regulations may be used to deny refugees and asylum seekers their political voice in matters that concern them, such as the education of their children.⁸⁹ On a strict interpretation, the 2018 Refugees Regulations can be understood to mean that parents of learners, educators, learners and staff members with either refugee or asylum-seeker status should recuse themselves from exercising their active and passive voting rights in SGB elections, as participation in elections is a political activity.

Prohibiting refugees and asylum seekers from participating in any political activity or campaign can result in sustaining the perception that they are undesirable people. In various situations, refugee rights have been understood within the parameters of immigration law. This has resulted in refugees being treated as irregular migrants, thereby denying them their constitutional rights.⁹⁰ Similarly, public schools might not have the necessary legal knowledge to differentiate between immigration law and refugee law, particularly in regard to how they apply to foreign nationals. For example, the transgression of immigration law has the implication of rendering foreign nationals as criminals who must be apprehended, detained and deported, whereas those foreign nationals who are either refugees or asylum seekers are exempt from deportation by the *non-refoulement* principle.

Most crimes committed by refugees and asylum seekers relate to the non-renewal of documents and extension of the stay thereof. A great deal of literature indicates that the non-renewal of documents is no fault of refugees and asylum-seekers, but is linked to administrative backlogs and xenophobic attitudes in the Department of Home Affairs (DHA) that make it difficult for them to renew their documents and extend their stay in the country.⁹¹ These difficulties in turn may affect their active and passive voting rights. However, transgression of immigration law does not per se render refugees and asylum seekers criminals; in other words, the invalidity of documents should not be used as an excuse to exclude refugees and asylum-seekers from SGB elections.

⁸⁸ Associated Press "South Africa to strip refugees' status for any political act" *VOANews*, 14 January 2020 available at <https://www.voanews.com/africa/south-africa-strip-refugees-status-any-political-act> (accessed 23 June 2020).

⁸⁹ Hobden C "South Africa takes fresh steps to restrict rights of refugees" *The Conversation*, 5 February 2020 available at <https://theconversation.com/south-africa-takes-fresh-steps-to-restrict-rights-of-refugees-130606> (accessed 24 June 2020).

⁹⁰ Kavuro C "Refugee rights in South Africa: Addressing social injustices in government financial assistance schemes" (2015) 5(1) *Journal of Sustainable Development Law and Policy* 176 at 192.

⁹¹ Botha H "The rights of foreigners: Dignity, citizenship, and the right to have rights" (2013) 130(4) *The South African Law Journal* 837 at 845.

5 BARRIERS TO PARTICIPATION IN ELECTIONS

5.1 Legal obstacles

There is a strong belief that the right to vote in elections and stand for public office and, if elected, to hold office, is restricted to citizens, as set forth under section 19 of the Constitution. The political rights in section 19 are applicable to the election of members of the national assembly, provincial legislatures, and municipal councils, and imply that foreign nationals do not have the right to be members of political parties or become involved in South Africa's political activities. Based on this premise, the right to vote is, in most cases, interpreted to mean that foreign nationals cannot participate in elections of a leader of the community in which they live, of the church they attend, of the school their children attend, of the neighbourhood watch, or of any other organisation formed to protect the interests of the community.

There is a misconception that refugees, asylum seekers and economic migrants are in the country illegally and therefore cannot be entrusted with important duties. They are treated with suspicion in communities and accused of stealing jobs as well as the wives of citizens. Citizens may not be willing to nominate them for election to the SGB on the ground that they would be assuming positions designated for citizens only. The misconception is reinforced by the fact that there is a lack of refugee-rights awareness at local or municipal government level, which results in refugees' being deprived of the rights accorded to them in terms of laws and policies.⁹² This view was affirmed by the Minister of Home Affairs, Dr Aaron Motsoaledi, who stated that municipalities or cities tend to refrain from reconciling refugee and immigration laws with municipal by-laws (concerning socio-economic rights) on the ground that foreign nationals are not their subjects but the subjects of the DHA.⁹³

The exclusion of foreign nationals from service delivery has contributed to a process of self-isolation in which, for example, they become disengaged from attending local community meetings on matters of safety and security.⁹⁴ In political forums, foreign nationals, as minority groups, thus tend to isolate themselves due to their perception "that they are different and do not belong".⁹⁵ In addition to self-isolation, difficulties in allowing foreign nationals to participate in school elections may arise from the notion that foreign nationals are people who have no rights to stay in the country as many of them face difficulties in renewing their documents. Conversely, the challenges – administrative or otherwise – faced by the DHA in implementing laws and court

⁹² Palmary I "Refugees, safety and xenophobia in South African cities: The role of local government" (2002) *Centre for the Study of Violence and Reconciliation* 1 at 4.

⁹³ Parliamentary Monitoring Group "DHA, IEC & GPW on 2020/21 budgets, with input from National Treasury; with Minister and Deputy Minister" PMG, 03 March 2020 available at <https://pmg.org.za/committee-meeting/29941/> (accessed 24 June 2020).

⁹⁴ Katsaura O "Ethnopolitics, fear and safety in a Johannesburg neighbourhood" in Mathey K & Matuk S (eds) *Community-based urban violence prevention: Innovative approach in Africa, Latin America, Asia, and the Arab region* (2015) 42 at 56.

⁹⁵ Katsaura (2015) at 44.

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judgments could lead to illegal or undocumented presence. This is often used against foreign nationals, resulting in their exclusion from SGBs. Besides, politicians and large segments of the public tend to regard foreign nationals living in local communities and townships as “bogus refugees”, “illegal foreigners”, “criminals” or “economic vultures” regardless of whether or not they are documented.⁹⁶

This may have severe implications for foreign nationals’ democratic participation, as school communities may refrain from engaging them for fear of the criminal sanctions contemplated by the Immigration Act. As Palmary notes, the rights of foreigners, especially documented and undocumented migrants, are in need of clarification – and due to the current lack of clarity, schools often turn away children without documents.⁹⁷ The question of interpretation is not limited to immigration and refugee law. Decisions taken by public schools may be reviewed judicially in terms of section 33 of the Constitution as articulated in the Promotion of Administrative Justice Act and thus be interpreted in a manner that promotes the constitutional values of equality, human dignity, and freedom.⁹⁸ Nonetheless, Buckland argues that the varied interpretations of the SASA and Admission Policy that exist have resulted in foreign children being denied admission to public schools.⁹⁹ The same confusion may apply to the question of whether foreign parents of learners, or foreign learners, are entitled to participate in school governance.

5.2 Moral and economic barriers

It is highly likely that certain perceptions act as barriers to democratic participation by foreign nationals in school elections and governance. Generally, the literature identifies eight main factors that hamper community members’ participation in the governance of schools: illiteracy, expectations, lack of freedom, fear of victimisation, language barriers, availability, self-isolation, and lack of rights-awareness. These factors may prevent foreign nationals, in particular refugees, asylum seekers and other vulnerable migrants, from engaging in school activities, including elections. In addition to these factors, xenophobia and lack of effective social cohesion may be other factors frustrating full participation in these activities.

5.2.1 Illiteracy

Heysteks contends that if members of the community lack sufficient literacy, they may be unable to read, draft, and interpret documents or policies, even if they are trained as

⁹⁶ For further discussion, see Kavuro (2015) at 189; Palmary (2002) at 1–24; Maharaj B “Economic refugee in post-apartheid South Africa – Assets or liabilities: Implications for progressive migration policies” (2001) 56 *GeoJournal* 47 at 47–57 and Landau LB, Ramjathan-Keogh K & Singh G “Xenophobia in South Africa and problems related to it” (2005) FMSP, Forced Migration Paper Working No 13 1 at 1–42.

⁹⁷ Palmary (2002) at 16.

⁹⁸ Section 39 of the Constitution.

⁹⁹ Buckland (2011) at 370.

members of the SGB.¹⁰⁰ Without sufficient literacy levels, members of the community find it difficult to volunteer to join the SGB as members. Where they do become members, they may become inactive in setting policies due to a lack of sufficient interest in the governance of the school.¹⁰¹ It is argued that, due to illiteracy, individuals lack certain desirable skills or traits, such as the knowledge, experience, and motivational level one needs in order to be delegated, nominated or elected as the representatives of others.¹⁰² Similarly, foreign nationals who are not well educated may show little to no interest in involvement in school governance. Lack of adequate education may be one of the reasons that foreign nationals do not come forward and show an interest in representing others or engaging meaningfully in activities that shape the quality of their children's education.

5.2.2 *Expectations*

Heysteks points out that parents who expect that membership of SGBs would amount to gainful employment are unlikely to be willing to represent others upon finding out that participation is based on volunteerism.¹⁰³ Additionally, certain cultural norms may be impediments in particular situations. Some parents of learners, especially single African mothers, are reluctant to participate in SGBs due to traditional gender norms and exclusionary social expectations; in rural areas, for instance, such women face isolation and ostracism in their efforts to negotiate their involvement in the SGB's activities.¹⁰⁴ Foreign nationals may face similar difficulties. They might not be willing to avail themselves for unremunerated volunteer work, given that most of them are poor and need to work full-time in order to survive. African culture and traditions may act as barriers to the free participation of African single mothers, given that cultural norms which exclude women from public debate or participation are widespread across Africa. This could affect single mothers from the Muslim faith too, whose expectations may be that they should be represented by their male counterparts.

5.2.3 *Language barriers*

Foreign nationals come from different countries and speak different languages. Even if they have sufficient literacy, their ability to read, draft and interpret documents and policies may be hampered by language differences. Such language barriers could prevent them from participating in meetings if they do not speak or understand English, Afrikaans, or any other official languages fluently. English is usually the medium of communication in most SGBs. Mncube points out that this adversely affects the democratic participation of those parents who "cannot express themselves fluently in

¹⁰⁰ Heysteks (2006) at 478.

¹⁰¹ Heysteks (2006) at 478, 482 explains that their duties must be performed by the principal and, if there is no trust, conflict arises.

¹⁰² Heysteks (2006) at 478.

¹⁰³ Heysteks (2006) at 474.

¹⁰⁴ Brown & Duku (2008) at 441.

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English”.¹⁰⁵ In meetings and the like, literate parents or parents with a high level of proficiency in English can express themselves freely; by contrast, parents who cannot express themselves in English are usually members of African communities or people who come from non-English-speaking countries.¹⁰⁶

5.2.4 Availability

Mncube states that difficulties in finding time to attend school meetings act as a barrier to participating in SGB democratic processes. Parental participation is impossible for many parents, as meetings are usually scheduled at night.¹⁰⁷ Unavailability is linked not only to the time of meetings but also to the socio-economic conditions of the parents. They may have no means of transportation to the meeting venue, as they depend heavily on public transport. Another problem is the situation where black parents are unwilling to come forward to stand in elections in multicultural schools. Membership of the SGB is left to white parents as the perception is that they have the required skills.¹⁰⁸ Brown and Duku criticise SGB participation as biased in favour of the middle class, who have time and resources to spend on public-school activities.¹⁰⁹ The authors argue that this inadvertently perpetuates the historical legacy of exclusion.¹¹⁰ For the same reasons, foreign nationals may leave participation to active middle-class citizens, as they (foreign nationals) may be more interested in spending time on income-generating activities.

5.2.5 Absence of rights-awareness

Mncube states that members of the community may not be willing to participate in elections and SGB governance structures because they are not aware of their rights set out in the SASA.¹¹¹ It is doubtful whether foreign nationals are aware of their rights as contemplated in the SASA, or whether they can differentiate between the rights afforded to them in terms of the Refugees Act or the Immigration Act.

5.2.6 Self-isolation

Brown and Duku argue that democratisation of public schools should entail that the broad masses of people, regardless of race or socio-economic standing, have a voice in school decisions. They applaud the democratisation approach as a new model of

¹⁰⁵ Mncube V “The perceptions of parents of their role in the democratic governance of schools in South Africa: Are they on board?” (2009) 29(1) *South African Journal of Education* 83 at 96.

¹⁰⁶ Mncube (2009) at 96.

¹⁰⁷ Mncube (2009) at 96.

¹⁰⁸ Heysteks (2006) at 438.

¹⁰⁹ Brown & Duku (2008) at 432.

¹¹⁰ Brown & Duku (2008) at 432.

¹¹¹ Mncube (2009) at 98–99.

“parental empowerment”.¹¹² Yet although parents are empowered to participate in decision-making, various factors may contribute to their self-isolation:

When poor and privileged parent-groups are gathered, the message of insignificance is often communicated. One effect evident in such gatherings is social tension, rejection, domination, and psychological stress, as Brown (2005), in the context of Botswana, and Thacheen (2005), in the context of Thailand, found. These effects often lead to isolation of individuals.¹¹³

The issue of isolation becomes clearer “when affluent and destitute parents gather for school events”.¹¹⁴ A small number of destitute parents attend school events. This is an illustration of how members of the community “negotiate their identities and navigate their way into participating in school governance”.¹¹⁵ Many foreign nationals – especially refugees, asylum seekers and economic migrants – are vulnerable “to economic deprivation, desperateness, distress, diseases, hopelessness, starvation, trauma, uncertainty, and unemployment”.¹¹⁶ They come to South Africa when they are destitute, with little resources to sustain themselves and their dependants. Their socio-economic situation is worsened by political powerlessness: “reduced to passive spectators ... they [thus] cannot engage in the political processes of their host community”.¹¹⁷

Indeed, when citizens and non-citizens gather together, the feeling of unbelonging is keenly felt. Such a feeling reinforces self-isolation, as foreign nationals apprehend the dominance of citizens and, consequently, feel that they are not at liberty to voice their own views and opinions. Foreign nationals usually come to listen to the resolutions of the meetings, and are reluctant to participate because they believe that citizens are well-positioned to chart the future of their communities, whereas they, as foreign nationals, are but visitors or temporary residents.

5.2.7 *Lack of freedom*

Adams and Waghid argue that destitution severely affects the freedom to participate in community engagements.¹¹⁸ They are of the view that people who struggle to feed themselves direct all their energy towards meeting basic needs. Destitution has a direct impact on their capacity to participate freely in structures that will not directly improve their socio-economic condition. In the absence of economic freedom, one cannot expect the destitute to represent others, or to participate meaningfully in public school events such as elections, sports, or parent meetings.

¹¹² Brown & Duku (2008) at 432.

¹¹³ Brown & Duku (2008) at 432.

¹¹⁴ Brown & Duku (2008) at 433.

¹¹⁵ Brown & Duku (2008) at 433.

¹¹⁶ Kavuro (2018) at 151.

¹¹⁷ Kavuro (2028) at 151–152.

¹¹⁸ Adams F & Waghid Y “In defence of deliberative democracy: Challenging less democratic school governing body practices” (2005) 25(1) *South African Journal of Education* 25.

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That being said, participatory democracy should not be interpreted to mean that all members of the community will freely get involved – simply because equal access is not feasible owing to various factors. These may result in the failure of representative democracy to reflect the nuances of equality and freedom.¹¹⁹ As noted, factors such as socio-economic status, employment status, level of education, social class, nationality, race, and ethnicity play a significant role in deciding who represents parents in SGBs.¹²⁰ Parents with cultural or socio-economic capital (that is, education, social class, family background, and other non-economic forces) are usually preferred as they are seen as powerful and knowledgeable members of their communities.¹²¹ Such people gain legitimacy to control all activities at public schools, including speaking on behalf of others.¹²² This problematises the SASA's encouragement of participation, consultation, co-operation and partnership on an equal basis. The aforementioned factors have a severe impact on the participation of poor people or those who are perceived as not belonging to the community.

This raises the question of whether there is rationality, consensus and equality in the decision-making processes of SGBs.¹²³ It is difficult for poor people to be active stakeholders in the public-school community as they lose interest in activities that do not impact positively on their socio-economic freedom. Bush and Heystek use the term “stakeholders” to refer to all people “who have a legitimate interest in the continuing effectiveness and success of an institution”.¹²⁴ Whilst destitute foreign nationals are also stakeholders in public-school communities, their socio-economic status affects their interest in contributing to the improvement of the quality of education offered to their children. What is evident from the literature is that foreign learners experience xenophobic attacks, abuse and discrimination, and that this negatively impacts on their freedom to participate in school activities and their academic performance.¹²⁵ Researchers note that public schools have made basic education a non-free and intolerable space for foreign learners.¹²⁶

5.2.8 *Fear of victimisation*

¹¹⁹ Brown & Duku (2008) at 436.

¹²⁰ Brown & Duku (2008) at 437.

¹²¹ Brown & Duku (2008) at 438.

¹²² Brown & Duku (2008) at 438.

¹²³ Adams & Waghid (2005) at 25 identify constitutive characteristics of the principle of democracy as participation, community engagement, rationality, consensus, equality and freedom.

¹²⁴ Bush T & Heystek J “School governance in the new South Africa” (2003) 33(2) *Journal of Comparative and International Education* 127 at 128.

¹²⁵ Buckland (2011) at 367.

¹²⁶ Mkhondwane GT *Protecting the rights to basic education of immigrants learners in South African public schools* (Master's thesis, University of Pretoria, 2018) at 12 and Buckland (2011) at 368.

The existence of xenophobic behaviour or attitudes towards foreign nationals raises the question of whether the parents of foreign learners feel welcome in SGBs, or whether they face the same negative attitudes as their children if they avail themselves to represent the school community. Foreign parents might be unwilling to participate due to fear of being victimised on the basis of their nationality. The findings of Mncube's research indicate that the majority of parents with lower-class status are unwilling to participate in decision-making or democratic processes because "they are afraid to challenge the *status quo* of the school".¹²⁷ Because they fear that their children may be victimised or, in future, denied admission if they (the parents) challenge the status quo, they merely accept the decisions of the school without questioning them.¹²⁸ In fact, they bend the knee to any rule, regulation or policy adopted by the school; in meetings, they are mere listeners. In poverty-stricken communities or communities with a low level of education, the school principals and educators have no choice but to take over the responsibilities of the SGB and decide on the future of the school.¹²⁹ In the case of foreign nationals, they become passive participants, in the process isolating themselves from the SGB's affairs.

5.2.9 *Absence of social cohesion*

Social cohesion and integration are key to SGB elections. This can be a success if foreign nationals can mingle with their neighbours in the community when attending social functions such as safety and security meetings, sports events, church prayer groups, and other school activities. Attendance at these events may serve to instil awareness of the roles played by foreign nationals. Such social recognition may encourage citizens to nominate a particular foreign national in SGB elections. In terms of the SASA, representivity is achieved through the process of nomination.¹³⁰ This entails that an individual can become a candidate to stand for the SGB office if nominated by a learner, educator, staff member, or parent of a learner. Of concern is that citizens cannot propose foreign nationals for nomination if they are aware of their educational, religious, and social backgrounds. Equally, it may be difficult for a foreign national to nominate another foreign national as, in many cases, they hail from different countries and barely know each other's backgrounds. The absence of social cohesion and integration may thus frustrate the possibility of foreign nationals being nominated as candidates in SGB elections.

6 CONCLUDING REMARKS

South African communities are increasingly diverse, and include foreign nationals whether as employees (in teaching and non-teaching positions), learners, or parents of learners. As members of school communities, foreign nationals should have an equal

¹²⁷ Mncube (2009) at 96.

¹²⁸ Mncube (2009) at 96.

¹²⁹ Mncube (2009) at 95 maintains that, owing to poor parents' unavailability and lack of interest, the SGB's responsibilities are usually delegated to the school principal.

¹³⁰ Section 28(e) of the SASA.

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opportunity to participate in school governance. It is therefore incumbent on existing members to work to establish a conducive environment for inclusive school governance. Foreign nationals should be encouraged to participate in school meetings and events, and assisted in gaining access to the SGB for the sake of the promotion of cultural diversity, human dignity, equality, social cohesion, and, above all, diversity of viewpoint and opinion. They too should be active partners in running the school, in so doing ensuring that it serves the best interests of both national and foreign children.

The promotion of active and passive voting rights is, however, challenging. Challenges to the implementation of the SASA and the realisation of these rights arise due to legal and practical obstacles that frustrate or discourage the democratic participation of foreign nationals. Documentation issues, socio-economic conditions, social division and mistrust, fear of victimisation, lack of freedom, self-isolation, non-availability, absence of rights-awareness, language barriers, gender-based exclusion, illiteracy and xenophobia are all factors that have a pronounced impact on participation and representativity. Whereas some of these issues can be addressed at public-school level, others can be alleviated only by the national and provincial government. The issues are intertwined and can be addressed from socio-economic, political and policy perspectives. The literature on the subject makes it clear that without full integration, documentation, and freedom from xenophobia and economic hardship, the active and passive voting rights of foreign nationals cannot be enjoyed meaningfully. Moreover, most of these problems are not unique to foreign nationals but shared with citizens with low socio-economic status.

The uniqueness of non-participation for foreign nationals can be linked to the misconception of the notion of democracy. Misconception rests on the understanding that foreign nationals should be excluded from democratic participation whereby they are excluded from any political engagements. This misconception is compounded by immigration and refugee laws that exclude foreign nationals from the constitutional right to vote. The misconception has a deleterious impact on democratic participation and representativity for foreign nationals. To rectify this misconception, the article has highlighted the differences between the restriction imposed on the right to vote in terms of section 19 of the Constitution and the right to participate in SGB elections in terms of the SASA. The latter applies to both foreign nationals and citizens, whereas the former is restricted to citizens. It was further argued that there is a divergence between the approach taken to political activities by the SASA and the law governing refugees. In terms of the refugee regime, refugees and asylum seekers are prohibited from engaging in political activities or events furthering political interest. It is therefore not clear whether public-school elections fall within the scope of the political activities or interests prohibited under refugee law.

For the objectives of the SASA to be met, the promotion of the full enjoyment of active and passive voting rights is key to democratic participation and representativity. This would cement the constitutional and statutory principle of non-discrimination in regard to the foreign segment of the public-school community. The voices of foreign nationals would be heard, and their contribution, felt. This would contribute greatly to the

willingness of community members to choose foreign nationals as their representatives as well as custodians of their children's education and future. Last but not least, what is presented in this article suggests that empirical research is desperately needed in order to explore the situation of foreign nationals in greater depth.

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