Guardians or Gatekeepers? A Reflection on the Role of State and Non-State Actors in Advancing the Right of Immigrant Children to Basic Education in South Africa

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SUMMARY

The right to basic education is guaranteed in South Africa under section 29(1)(*a*) of the Constitution and applies to "everyone" without discrimination based on any prohibited ground. This right is universally recognised as foundational to a dignified life. However, immigrant children face significant challenges in accessing this right owing to exclusionary administrative practices, procedural barriers and inadequate policy implementation. This article explores how state and non-state actors affect the realisation of immigrant children's right to education, either as facilitators or obstacles. State actors, such as the Department of Basic Education and school governing bodies, hold key roles in policy development, resource allocation and programming. Yet, these institutions often act as "gatekeepers", implementing exclusionary measures that hinder access to basic education. Conversely, non-state actors often act as "guardians" by driving policy reform, holding the state accountable through advocacy and litigation. Furthermore, the judiciary plays a pivotal role as a protective mechanism, enforcing the right to basic education in multiple contexts, explaining the scope of the State's obligations and declaring unconstitutional exclusionary policies that limit immigrant children's learning opportunities. This is demonstrated by groundbreaking court cases such as the *Centre for Child Law v Minister of Basic Education*. This article argues that while these actors have significant potential to advance immigrant children's educational rights, their actions may also perpetuate barriers. The article argues that achieving equitable access to education requires ongoing vigilance, strong collaboration among actors and across sectors, and robust monitoring and accountability mechanisms to prevent and grant effective remedies for violations of the right to education.

KEYWORDS: immigrant children, basic education, state actors, non-state actors

https://doi.org/10.17159/gajry426

1 INTRODUCTION

The Convention on the Rights of the Child[1] (CRC) and the African Charter on the Rights and Welfare of the Child[2] (ACRWC) require South Africa to make primary education free and compulsory for all children.[3] Read together with the constitutional right to equal protection and benefit of the law, the right to basic education[4] is "immediately realisable", meaning that the State must act without delay in ensuring that all children have access to basic education.[5] The mandate of the Conventions obliges states to take "all appropriate measures" – legal, administrative, and financial – to make this right a tangible reality for all children.[6] However, the effective realisation of this right is contingent upon more than mere legislative pronouncements. It requires a mix of non-legislative measures, administrative actions, financial assistance and judicial oversight to bridge the gap between legal entitlement and practical access.[7] The effective provision of basic education in South Africa involves the active participation of various state and non-state actors (key stakeholders). The Committee on the Rights of the Child (CRC Committee) emphasises that while the State is the primary duty bearer, non-state actors play an essential role in realising education rights.[8] In areas where state mechanisms fall short, cooperation between state and non-state actors becomes vital to closing these gaps.[9] Regarding the State's role, the Department of Basic Education (DBE), provincial departments and school governing bodies (SGBs) hold considerable power in implementing education policies.[10] On the other hand, non-state actors such as civil society organisations and non-governmental organisations (NGOs) play a pivotal role in addressing existing gaps. For instance, organisations such as Equal Education and the Centre for Child Law have been instrumental in mounting legal challenges and launching campaigns to pressure the government into fulfilling its constitutional obligations towards immigrant children.[11]

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1 United Nations General Assembly *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990.

2 Organisation of African Unity (OAU) *African Charter on the Rights and Welfare of the Child* CAB/LEG/24.9/49 (1990). Adopted: 11/07/1990; EIF: 29/11/1999.

3 Art 28 of the CRC.

4 S 29 of Constitution of the Republic of South Africa, 1996 (the Constitution).

5 S 9(1) and (3) of the Constitution and s 3(4) of the South African Schools Act 84 of 1996.

6 Taiwo and Govindjee "The Implementation of the Right to Education in South Africa and Nigeria (Part 2)" 2012 33(2) *Obiter* 204.

7 *Ibid*.

8 UN Committee on the Rights of the Child *General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)* (27 November 2003) CRC/GC/2003/5 par 43.

9 D'Aspremont, Nollkaemper, Plakokefalos and Ryngaert "Sharing Responsibility Between Non-State Actors and States in International Law: Introduction" 2015 62(1) *Netherlands International Law Review* 66.

10 McConnachie, Skelton and McConnachie "The Constitution and the Right to a Basic Education" in Veriava and Kathrada (eds) *Basic Education Rights Handbook: Education Rights in South Africa* (2017) 25.

11 Equal Education and Equal Education Law Centre "Joint Statement: Equal Education and Equal Education Law Centre Strongly Condemn Operation Dudula's Campaign to Remove

Education is essential to individual empowerment and societal progress.[12] Despite constitutional and international guarantees, substantial impediments persist to achieving equitable access to basic education for immigrant children.[13] They are occasionally subjected to exclusion stemming from adverse conduct by state and non-state actors. State and non-state actors can serve as either guardians or gatekeepers of access to education. In *Centre for Child Law v Minister of Basic Education,*[14] the DBE, responsible for implementing education policy, enforced admission requirements that effectively excluded undocumented immigrant children from accessing public schools,[15] thereby acting as "gatekeepers" in respect of access to education. Conversely, stakeholders such as SGBs, the South African Human Rights Commission (SAHRC) and the Centre for Child Law have identified multiple gaps and acted as "guardians" by initiating litigation that has driven effective legal reforms in the education system, ultimately advancing immigrant children's right to basic education.[16] Against this backdrop, this article seeks to elucidate the roles of key stakeholders and their respective contributions, whether facilitative or obstructive, to the realisation of immigrant children's right to education. Accordingly, the analysis commences with an examination of the role of state actors, followed by a discussion of the contributions of non-state actors, culminating in a proposed strategy aimed at advancing immigrant children's right to education.

By identifying systemic barriers, legislative gaps and governance challenges, the article provides a foundation for targeted interventions aimed at improving policy implementation and inclusive school practices. Moreover, the discussion on judicial oversight and institutional mechanisms offers practical insights for policy makers, education authorities, and civil society organisations to enhance accountability and ensure equitable treatment of immigrant learners. Ultimately, this research serves as both a diagnostic tool and a guide for stakeholders committed to upholding immigrant children's constitutional right to basic education, fostering an environment where these children can access high-quality learning without discrimination or exclusion.

For the purposes of this article, the term "immigrant child" refers to any person under the age of 18 who has relocated to South Africa from their country of birth or habitual residence, either accompanied or unaccompanied, with the intention of residing there permanently or for an

Young Migrant Children From Schools" (6 February 2023) https://eelawcentre.org.za/joint-statement-equal-education-and-equal-education-law-centre-strongly-condemn-operation-dudulas-campaign-to-remove-young-migrant-children-from-schools/ (accessed 2024-10-15); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T).

12 McConnachie *et al* in Veriava and Kathrada *Basic Education Rights Handbook* 23.

13 African Committee of Experts on the Rights and Welfare of the Child "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on Its Second Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child" (2023) par 13.

14 2020 (1) All SA 711 (ECG).

15 *Centre for Child Law v Minister of Basic Education supra* par 6–8.

16 Formation of the Basic Education Laws Amendment Act 32 of 2024 and the proposed amended Admission Policy GN 38 in *GG* 44139 of 2021-02-10.

extended period.[17] This broad classification encompasses both documented and undocumented foreign national children, including refugees, asylum seekers and minors fleeing violence, conflict or economic hardship. The term "undocumented children", as used here, is confined to foreign nationals (minors) lacking formal immigration documentation, such as permits or visas.[18] It expressly excludes South-African-born children who, despite lacking identity documents, are citizens by birth or descent. It is also necessary to distinguish immigrant children from migrant children, the latter being used in some literature to describe internal mobility within South Africa (for example, children moving between provinces or cities).[19] For clarity and consistency, references to migrant children or undocumented children in this article pertain exclusively to foreign nationals unless otherwise specified. Where relevant, this article draws distinctions between lawful and unlawful immigrants, recognising that both groups encounter significant, though at times distinct, legal and practical barriers to accessing basic education in South Africa. These distinctions are important, as the constitutional, legislative and policy frameworks governing school admission often apply differently across these categories, a nuance that informs the analysis throughout this article.

2 STATE ACTORS IN THE EDUCATION SECTOR

The South African Schools Act[20] (Schools Act) governs the enrolment of all learners in schools and assigns specific roles and responsibilities to different key stakeholders.[21] One of the most crucial objectives of the Schools Act is the inclusivity and documented decentralisation of the education system.[22] Inclusivity relates to the inclusion and participation of parents, educators, and learners in school governance. Decentralisation entails cooperation among key players in the school system, thus avoiding power struggles.[23] Instead of conferring all powers on the DBE, some duties and responsibilities are shared among the provincial departments of education, district directors, and school governing bodies (SGBs).[24] These various key actors are supposed to work together in mutual trust and good faith to ensure that every learner is admitted to an appropriate school.[25] However,

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17 S 1(xvii) of the Immigration Act 13 of 2002; International Organisation for Migration "2011 'International Migration Law: Glossary on Migration No. 25'" 12, 67 and Article 1 of the CRC for the definition of a child.

18 S 1(xvii) of Immigration Act 13 of 2002; Regulation 37 of the Immigration Regulations GN R 413 in *GG* 37679 of 2014-05-22 and International Organisation for Migration "2011 'International Migration Law: Glossary on Migration No. 25'" 67.

19 International Rescue Committee "Migrants, Asylum-seekers, IDPs, Refugees and Immigrants: What's the Difference?" (2018) https://www.rescue.org/article/migrants-asylum-seekers-refugees-and-immigrants-whats-difference (accessed 2024-11-01).

20 84 of 1996.

21 Ss 16, 17, 18 of the Schools Act.

22 Preamble of the Schools Act.

23 S 41(1) of the Constitution.

24 S 16 of the Schools Act.

25 Ss 40(1) and 41(*h*)(i) of the Constitution.

with the introduction of the Basic Education Law Amendment Act[26] (BELA Act), the decentralisation of authority is now uncertain, as it proposes centralisation of power to the heads of department (HODs) in respect of admission and language policies. This is discussed in more detail in the subsequent sections. Although certain governance disputes, such as those involving school admission, language or management policies, may appear unrelated to immigrant or undocumented learners, they fundamentally shape the legal frameworks and school-level governance structures that determine how access to education is regulated for all learners, including vulnerable groups like immigrant children.

Nevertheless, the education system is designed in such a way that the members of the executive council (MECs) have an obligation to ensure that there are sufficient schools to accommodate learners in the province.[27] The HOD has a mandate to establish a registration process for admissions and, again, the authority to delegate the responsibility for learner admissions to officials within the department.[28] The process of learner admission necessitates open communication and cooperation among all key stakeholders. The daily administration of learner admissions at the national level rests predominantly with school principals and school governing bodies. The ensuing sections provide an in-depth reflection of the respective roles and responsibilities of these actors.

2 1 The role of school principals in ensuring inclusive education

A principal is defined in terms of section 1(xv) of the Schools Act "as an educator appointed or acting as the head of a school". The school principal operates under the authority of the HOD.[29] At times, principals find themselves in a difficult position, torn between their role as an employee of the Department of Education and their role as an *ex officio* member of their public school's governing body. However, the principal is answerable to the SGB for carrying out statutory functions or administering policies related to admission, language, religion and school funds.[30] The principal bears the overall responsibility of guiding and overseeing the school. Besides their essential leadership responsibilities, the principal must stay abreast of current developments in national education policies and global schooling trends.[31] The Constitutional Court in *Moko v Acting Principal of Malusi Secondary School*[32] established that the principal, as an organ of state, has not only a negative obligation not to infringe on a person's right to basic

[26] 32 of 2024.

[27] S 3(3) of the Schools Act.

[28] Cl 5 and 6 of the Admission Policy for Ordinary Public Schools GN 2432 in *GG* 19377 of 1998-10-19.

[29] Ss 16A and 16(3) of the Schools Act.

[30] Prinsloo "The Dual Role of the Principal as Employee of the Department of Education and Ex-Officio Member of the Governing Body" 2016 36(2) *South African Journal on Education* 1.

[31] GN 323 in *GG* 39827 of 2016-03-18 par 8.

[32] 2021 (4) BCLR 420 (CC) par 34.

education but also a positive obligation to ensure that the right is protected and fulfilled. Justice Khampepe elaborated that school principals are key delivery agents in the education system and are the most important partners in education.[33]

In light of their legal and leadership responsibilities, school principals play a pivotal role in fostering an inclusive environment for immigrant children. It is imperative for school principals to remain informed about emerging education policies and legal developments. Notwithstanding a recent High Court ruling affirming the right of undocumented children to be admitted into public schools,[34] it is concerning that certain school principals either exhibit a troubling degree of unawareness of these critical educational reforms or simply ignore such reforms.[35] As highlighted in a recent scholarly interview conducted by Blessed-Sayah, the SAHRC was compelled to intervene following a principal's repeated refusal to admit undocumented children at a school in Gauteng.[36] Similarly, a recent report by SECTION27 highlights the persistent practice by school principals of turning away parents of undocumented immigrant children who seek to apply for admission in person.[37] This issue is compounded by online application portals that lack procedural guidance for applicants without identity numbers, leaving such individuals without a viable alternative for accessing education – a lacuna necessitating urgent redress. The aforementioned practical situations indicate that some school principals view themselves as gatekeepers tasked with the authority to impede access of specific population groups to education. Yet, it is undoubtedly the school principal's responsibility to review school policies and procedures regularly to ensure that they do not discriminate against any learner.[38]

2 2 The responsibilities of school governing bodies

SGBs play the most vital role in the admission and exclusion of learners in public schools and the overall management of the school.[39] Previously, public schools in black communities were governed by school committees that had not been elected through democratic processes.[40] The advent of

33 *Moko v Acting Principal supra* par 34.

34 *Centre for Child Law v Minister of Basic Education supra*.

35 Blessed-Sayah *Children Moving Across Borders: Equitable Access to Education for Undocumented Migrants in South Africa* (doctoral thesis, University of Johannesburg) 2023 182.

36 Blessed-Sayah *Children Moving Across Borders* 182.

37 SECTION27, Centre for Child Law, Children's Institute, Legal Resources Centre, Equal Education Law Centre and Lawyers for Human Rights "Joint Submission to the United Nations Committee on Economic, Social and Cultural Rights on the Occasion of the Review of the Information Received from South Africa on Follow-Up to the Concluding Observations on its Initial Report" (14 May 2021) par 26–31.

38 GN 323 in *GG* 39827 of 2016-03-18 par 13.

39 Ss 17 and 18 of the Schools Act; Sujee "School Governance" in Veriava and Kathrada *Basic Education Rights Handbook: Education Rights in South Africa* (2022) 85.

40 Quan-Baffour *The Role of School Governing Bodies in Improving School Performance in Taung Rural Areas* (master's dissertation, University of South Africa) 2006 9.

democracy created the opportunity to change and develop education.[41] Democracy made it possible for parents, guardians, communities and learners to exercise their rights and responsibilities by involving them in SGBs.[42] This development precipitated the enactment of legislation providing for the establishment of SGBs.[43] SGBs serve as crucial components of school "government" as defined under section 18(1) of the Schools Act. Furthermore, SGBs are empowered to set policies and rules governing the school and to monitor implementation of those rules.[44]

The SGB holds the power to decide on a school's admission policies, which should not be discriminatory.[45] The SGB has the power to decide on the language policy of a school, bearing in mind the need to promote multilingualism.[46] Moreover, the Schools Act requires the SGB to implement a resolution on school fees, as adopted by the majority of parents.[47] Rangongo *et al* assert that the management of school finances is crucial because mismanagement of school funds has a negative impact on the quality of education that learners receive.[48] It even has a detrimental effect on immigrants who are often believed to have come to use resources reserved for citizens.[49] The SGB must adopt a school code of conduct that aims to improve and maintain the quality of learning, after consultation with the school's parents, learners and educators.[50] Engaging different stakeholders in the process through consultations upholds the principle of inclusivity and promotes the progression of democracy. A school's code of conduct must avoid discrimination against learners, including perpetrating xenophobic acts against immigrant children.[51] Mansfield-Barry and Stwayi posit that the SGB is entrusted with the mandate to advance the interests of the school and foster its holistic development, a responsibility that extends to ensuring inclusive access to education for all learners.[52] It is essential to

41 Preamble of the Constitution; Preamble of the Schools Act; GN 195 in *GG* 16312 of 1995-03-15.

42 Mateus and Shange "Broken and Unequal: The South African Education System and the Attainment of the Right to Basic Education Through Litigation" 2021 15(1) *Pretoria Student Law Review* 363.

43 S 18 of the Schools Act.

44 S 15 of the Schools Act.

45 S 5(2) of the Schools Act.

46 S 6(2) of the Schools Act.

47 S 39(1)–(3) of the Schools Act.

48 Rangongo, Mohlakwana and Beckmann "Causes of Financial Mismanagement in South African Public Schools: The Views of Role Players" 2016 36(3) *South African Journal of Education* 8.

49 Times Live "Grayton McKenzie: Children of Illegal Foreigners Shouldn't Be Allowed in SA Schools" (12 January 2023) https://www.timeslive.co.za/politics/2023-01-12-gayton-mckenzie-children-of-illegal-foreigners-shouldnt-be-allowed-in-sa-schools/ (accessed 2024-09-10).

50 S 8(1) of the Schools Act; see Department of Education "Example of a Code of Conduct for a School" (2008).

51 As illustrated in *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC).

52 Mansfield-Barry and Stwayi "School Governance" in Veriava *et al Basic Education Rights Handbook: Education Rights in South Africa* (2017) 85.

recognise the pivotal role played by SGBs as guardians in *Centre for Child Law v Minister of Basic Education,*[53] where the Centre challenged the constitutionality of provisions in the Immigration Act[54] and the Admission Policy for Ordinary Public Schools[55] that restricted the admission of undocumented immigrant children into public schools.[56] This case prompted substantial legislative reforms that introduced provisions specifically addressing the admission of non-citizen children.[57]

Courts have addressed matters pertaining to key stakeholders in the education system,[58] contributing to a clearer understanding of the government's role, on the one hand, and that of the school community, as represented through SGBs, on the other. It is important to understand that either side could promote or stifle the realisation of the constitutional rights of children. Moreover, either side could potentially play a corrective role in relation to the way the other side has acted or failed to act. However, this depends on whether the system envisages or allows such a role. The following section examines the judiciary's role and its involvement in resolving disputes that may arise between key actors, and which ultimately have an impact on the right to education.

2 3 Judicial oversight and its impact

2 3 1 General

The courts perform a pivotal function in the interpretation and application of human rights in a variety of contexts. Liebenberg posits that the fulfilment of the rights protected in the Bill of Rights requires a functionally independent, courageous and vigorous judiciary.[59] It has been observed that courts advance human rights in two ways: first, they interpret legislation and develop the rules of common law in light of the Constitution in general and the Bill of Rights in particular; secondly, they adjudicate constitutional and other challenges to state measures (and, to an extent, also private measures) that impinge on human rights.[60] In addition, the judiciary ensures that everyone has the right to an effective remedy for acts that violate the fundamental rights granted by the Constitution and other laws.[61] Disputes

53 *Supra*.

54 Immigration Act 13 of 2002.

55 *Admission Policy for Ordinary Public Schools* GN 2432 in *GG* 19377 of 1998-10-19.

56 *Centre for Child Law v Minister of Basic Education supra* par 8–14.

57 See cl 23 of proposed amended Admission Policy GN 38 in *GG* 44139 of 2021-02-10 and s 4 of the Basic Education Laws Amendment Act.

58 For e.g., *Minister of Education (Western Cape) v Mikro Primary School Governing Body* [2005] 3 All SA 436 (SCA).

59 Liebenberg "Reflections on Drafting a Bill of Rights: A South African Perspective" in Kersting (ed) *Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe* (2009) 21.

60 Brand "Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale" in Coomans (ed) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006) 38–39.

61 Marie "National Systems for the Protection of Human Rights" in Symonides (ed) *Human Rights: International Protection, Monitoring, Enforcement* (2018) 261.

always arise concerning the content of rights, even if they are clearly formulated, necessitating the involvement of the judiciary in the interpretation and resolution of disputes. However, courts are generally reluctant to make orders that effectively bind the State in cases where a multiplicity of policy issues are at stake and often justify this on the pretext that "the courts may not be completely appraised of all the competing demands on the public purse".[62] This is what is termed judicial restraint,[63] and it is driven by the reality that the courts must not unduly intrude into the exclusive domains of the legislature and the executive.[64] Although there is merit in this view, the reality is that everyone who is affected by a statute or executive conduct in the form of administrative action is entitled to protection by the courts.[65] Courts should therefore make orders that prevent human-rights violations, stop ongoing violations, and mitigate the impact of violations that have occurred or are in the process of occurring. They can do this through interdicts and other orders that secure respect for human rights.[66] Court judgments should transform the public education system by ensuring that every learner in the public school system has an equal opportunity to access education, that learners are educated under the same conditions and that all learners receive the same quality of education.[67] The next section explores the judiciary's response to disputes arising from instances where key stakeholders fail to uphold the rights of learners.

2 3 2 Minister of Education (Western Cape) v Mikro Primary School Governing Body [2005] 3 All SA 436 (SCA)

The case discussed here affirms the dual nature of public schools as organs of state, bound by constitutional principles, yet operating with a degree of autonomy under the Schools Act. Although this case did not concern immigrant children or undocumented children directly, it remains legally significant in understanding school governance structures that influence how access to education is managed for all learners, including vulnerable groups such as those referred to in this article. This governance tension mirrors the challenges faced in ensuring immigrant children's right to basic education. The case of *Minister of Education (Western Cape) v Mikro* discusses critical legal and governance issues concerning language policy in public schools and the extent of SGB autonomy. The DBE approached Mikro Primary School, an Afrikaans-medium public school, requesting that it adopt a

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62 Veriava "Basic Education Provisioning" in Veriava, Thom and Hodgson (eds) *Basic Education Rights Handbook: Education Rights in South Africa* (2017) 220.

63 Ali "Judicial Activism vis-à-vis Judicial Restraint Imperative for Delivering Justice: A Comparative Analysis" 2014 1(1) *SEUJASS* 142; Posner "The Rise and Fall of Judicial Self-Restraint" 2012 100 (3) *Chicago Law Review* 520.

64 Posner 2012 *Chicago Law Review* 521.

65 *Speaker of National Assembly v De Lille MP* [1999] 4 All SA 241 (A) par 14.

66 Prest *The Law and Practice of Interdicts* (1993) 2.

67 Arendse "Beyond Rivonia: Transformative Constitutionalism and the Public Education System" 2014 29(1) *SAPL* 169.

parallel-medium model to accommodate English-speaking learners.[68] The SGB refused, leading the HOD to issue a directive to the school principal to admit a group of English-speaking learners. Although the school contested this directive, the MEC dismissed its appeal, compelling it to admit 21 English-speaking learners.[69] Mikro Primary then appealed to the Cape High Court, which ruled that the DBE and MEC lacked the authority to override the school's governance decisions on admission policy. This decision was later contested by the DBE, MEC and the parents of the English-speaking learners.[70] The Supreme Court of Appeal, to which the case was brought, highlighted that a school governing body is considered an institution that performs public functions in terms of the Schools Act. In agreement with the court *a quo*, the court *in casu* rejected the notion that the language and admission policies determined by the school fall under intergovernmental disputes, as provided by section 41(3) of the Constitution.[71] The court stipulated that public schools, as organs of state, function as institutions that exercise public powers and carry out public functions.[72] Thus, a public school is an "organ of state", and the governing body acts as its functionary and performs its functions in terms of the Schools Act.[73] Although the SGB has no original power to act on its own outside the provisions of the Schools Act, it has the power to perform its functions in terms of the Schools Act. To fulfil its obligations in terms of the Act, the SGB governs the school as an independent institution.[74] The author critiques the court's decision as contestable, emphasising that the SGB, while autonomous in executing its "public domain" education functions, remains subject to constitutional principles of transparency and accountability.[75] In fact, as an organ of state, a public school, while operating independently of governmental spheres, exercises public powers and performs public functions within the broader education framework. However, the court *a quo*'s assertion that the SGB acts entirely free from national or provincial executive oversight in setting language and admission policies extends this autonomy too far. These public functionaries derive their authority from the Constitution and are unequivocally bound by its provisions, including section 195, which governs the conduct of public administration.[76] Even though the Supreme Court recognised the error, it is regrettable that it did not adequately address the error in its judgment, failing to analyse the implications of a public school's non-compliance with its constitutional mandates. It is within this context that the *Mikro* case is instructive: the judgment, while focused on language and admission policies, reinforces the potential for school-level autonomy to be exercised in ways that either facilitate or obstruct access to education. It further reflects how competing interpretations of governance authority can

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68 *Minister of Education (Western Cape) v Mikro Primary School Governing Body supra* par 1.

69 *Minister of Education (Western Cape) v Mikro supra* par 1.

70 *Minister of Education (Western Cape) v Mikro supra* par 2, 22.

71 *Minister of Education (Western Cape) v Mikro supra* par 22.

72 S 239(*b*)(*ii*) of the Constitution.

73 Mansfield-Barry and Stwayi in Veriava *et al Basic Education Rights Handbook* 77.

74 *Ibid*.

75 Ss 41(1)(*c*) and 195(1)(*g*) of the Constitution.

76 Section 195 of the Constitution provides the basic values and principles governing public administration.

affect vulnerable learners. For immigrant and undocumented children, whose educational rights remain contested in practice, this governance structure presents both risks and opportunities, depending on how state and non-state actors fulfil their constitutional obligations.

However, the law has since been modified in the form of the BELA Act, and the government may now exercise its overarching authority to bring these public schools back under its control. The BELA Act includes a provision that grants the HOD the final authority in certain school policy issues, such as admission and language policies.[77] The BELA Act places an obligation on SGBs to present the admission and language policy of a public school, and any changes thereto, to the HOD for endorsement prior to implementation.[78] The approach employed in this context essentially reflects a "centralised model of governance", and it limits the role and involvement of the SGB in school management.[79] The government's inclination toward centralising authority could present considerable challenges. It may be contended, on multiple grounds, that vesting all authority in the HOD could centralise control, thereby transforming community schools into *de facto* state-operated institutions. Although the HODs hold the prerogative to shape and prescribe the content of policy, their ability to oversee the practical implementation of such policies at the grassroots level remains constrained. On the other hand, the significance of this change in cases involving immigrant children lies in establishing checks and balances to prevent any single entity from possessing absolute power that could potentially harm these children.[80] Equal Education and the Equal Education Law Centre argue that the proposed changes strengthen the government's capacity to ensure a more equitable distribution of learners across schools.[81] Merely having rules in place is insufficient to protect learners; there have been instances where the SGB has adopted, applied and interpreted admission, religion, language and pregnancy policies in a discriminatory manner.[82] In such cases, giving SGBs absolute power can foster a culture of exclusion and discrimination within schools. The centralised governance model proposed by the BELA Act must be implemented thoughtfully, considering the contextual differences among schools and communities.[83] For immigrant children, centralised authority may enhance inclusivity by ensuring equitable access and curbing exclusionary practices by SGBs. However, centralisation

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77 S 4(*c*)(*a*) of the BELA Act.

78 S 5(6)(7) of the BELA Act.

79 On centralisation, see generally Brennen "Centralization vs Decentralization" (2002) https://www.soencouragement.org/centralizationvsdecentralization.htm (accessed 2024-09-29).

80 Thabo and Odeku "Separation of Powers, Checks and Balances and Judicial Exercise of Self-Restraint: An Analysis of Case Law" 2021 42(3) *Obiter* 547.

81 Equal Education and Equal Education Law Centre "Comments on the Basic Education Laws Amendment Bill" (10 January 2018) https://equaleducation.org.za/wp-content/uploads/2022/01/EE-EELC-joint-BELA-submission-2018-1.pdf (accessed 2024-09-23).

82 For instance, in *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC); *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC).

83 Ss 4 and 5 of the BELA Act.

risks marginalising communities if governance becomes detached from local contexts. Institutions like the SAHRC are vital for balancing fairness and grassroots involvement.

2 4 Institutional mechanism: South African Human Rights Commission

In most democracies across the globe, specialised human-rights institutions complement traditional government institutions to protect and promote human rights.[84] The SAHRC, established in Chapter 9 of the Constitution, functions as a key institution supporting constitutional democracy. Its main function is to ensure that South Africa becomes a true constitutional democracy, as opposed to an authoritarian regime with a superb but unimplemented constitution.[85] As provided by the Constitution, the SAHRC[86] has a mandate to promote, protect, develop, monitor and assess the observance of human rights.[87] Nonetheless, unlike the Public Protector, the SAHRC cannot issue binding remedial orders because their work is more about promoting than enforcing human rights.[88] The powers of the SAHRC are limited to educating people on human rights, enhancing transformation, and empowering communities and individuals whose rights have been violated.[89] Such empowerment entails assisting marginalised communities with legal representation to secure binding legal orders to prevent, stop and redress human-rights violations.[90] The SAHRC is responsible for advancing human-rights accountability, reporting annually to Parliament, conducting investigations into human-rights violations, and initiating remedial actions.[91] For the purposes of this article, it is essential to derive inferences from significant court cases where the SAHRC has advocated for the rights of immigrant children (a group comprising documented and undocumented migrants, refugees, asylum seekers and both accompanied and unaccompanied minors), all of whom face unique barriers to education access.[92] In *Centre for Child Law v Minister of Basic Education*,[93] the SAHRC acted as an *amicus curiae* and advocated for crucial reforms within the education system. The SAHRC urged the court to interpret sections 39 and 42 of the Immigration Act (which restricted illegal foreigners from

84 Taiwo and Govindjee 2012 *Obiter* 204.

85 *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC) par 1.

86 Ch 9, ss 181(1)(*b*) and 184(1)–(4) of the Constitution.

87 S 184(1)(*a*–*c*) of the Constitution.

88 *South African Human Rights Commission (SAHRC) v Agro Data CC* [2022] ZAMPMBHC 58 par 47.

89 *SAHRC v Agro supra* par 60-61.

90 See, for instance, *South African Human Rights Commission v Msunduzi Local Municipality* [2021] 3 All SA 939 (KZP), in which the court analysed the SAHRC's important role in protecting human rights through litigation and securing counsel for marginalised communities to enforce their rights in court.

91 Ss 181(5) and 184(2) of the Constitution.

92 SAHRC "Position Paper: Access to a Basic Education for Undocumented Learners in South Africa" (2019) 19 (SAHRC Position Paper).

93 *Supra.*

accessing education) in a manner consistent with constitutional protections.[94] In response, the court ordered that these provisions be interpreted in alignment with the Constitution's values.[95] The SAHRC further recommended that the DBE issue a directive (Circular 1 of 2020) outlining the obligation of schools in relation to undocumented learners (including immigrants)[96] and that they specify, among other things, that

> "[n]o learner may be denied admission or access to a school as a result of a lack of documentation or immigration status."[97]

In this case, the SAHRC commendably fulfilled its role as a vigilant guardian of immigrant children's right to education. Nonetheless, the SAHRC has yet to provide reports on its monitoring protocols with a defined feedback timeline, a measure the author strongly recommends be implemented without delay. Regular monitoring is crucial for identifying continued challenges faced by immigrant children, including difficulties with enrolment, fee-related barriers or instances of discrimination. By instituting clear feedback time frames, the SAHRC could gather critical data on both successes and shortcomings within the system, thereby facilitating continuous improvements in addressing these issues. Without such mechanisms, the cycle persists where state actors continue to act as gatekeepers, rather than facilitators.

3 NON-STATE ACTORS IN THE EDUCATION SECTOR

Various organisations, such as the Centre for Child Law, Equal Education, the Equal Education Law Centre, the Centre for Human Rights, the Consortium for Refugees and Migrants, Section27, civil society organisations and many others play a pivotal role in advocating for the educational rights of immigrant children in South Africa.

The Preamble to the Universal Declaration of Human Rights[98] establishes the legal basis for non-state actors' responsibilities and provides that every individual and every organ of state shall strive to secure the universal and effective recognition and observance of all human rights. While non-state actors operating in the education system are not explicitly defined in the Schools Act, the *locus standi* provision in the Constitution facilitates the right to establish and maintain independent educational institutions.[99] In addition, section 8(2) of the Constitution stipulates that the provisions of the Bill of Rights may bind natural and juristic persons to the extent of their applicability, depending on the nature of the duties attached to the specific right. Chirwa holds the view that this provision does not impose upon non-

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94 *Centre for Child Law v Minister of Basic Education supra* par 31.

95 *Centre for Child Law v Minister of Basic Education supra* par 30.

96 SAHRC Position Paper 19.

97 *Ibid*.

98 United Nations General Assembly *The Universal Declaration of Human Rights* A/RES217(III) (10 December 1948).

99 S 29(3) of the Constitution.

state actors the entirety of obligations required for the full realisation of a right.[100] Instead, it recognises that the realisation of rights often necessitates coordinated efforts from multiple actors and implies that some entities may justifiably bear greater obligations relative to others, based on the nature and scope of the right.[101] All individuals and "organs of society" bear a responsibility to promote an environment that supports the full enjoyment of human rights.[102] While the primary responsibility to protect and fulfil human rights lies with the State, which cannot transfer this obligation by "delegating" it to non-state entities, non-state actors are not absolved of their duties.[103] They hold a dual obligation: a negative duty not to infringe human rights and a positive duty actively to support the realisation and enforcement of human-rights standards.[104] Akin to the SAHRC, non-state actors play a critical role in advancing and overseeing the observance of human rights and have been at the forefront of human-rights litigation, particularly in protecting immigrant children's right to basic education.[105]

As was evident in *Centre for Child Law v Minister of Basic Education*, the Centre for Child Law (*amicus curiae*) leveraged its expertise to advocate for systemic legal reforms that extended beyond the immediate applicants.[106] Representing not only its own interests, the Centre acted on behalf of all children without identity numbers, permits or passports, and who were accordingly denied access to public schools.[107] This case, initiated by the Centre, led to significant legal reforms, including stand-alone provisions in education legislation specifically addressing immigrant children's rights.[108] Again, in *Centre for Child Law v Minister of Home Affairs*,[109] the Centre made notable progress in contesting the unlawful deportation of unaccompanied foreign children to their country of origin. The court affirmed that section 28 of the Constitution, which enshrines socio-economic rights (education included), imposes a duty on the State to protect and provide for foreign children who are without guardians, equating their entitlements to those of any other unaccompanied minor under the law.[110] This judgment is legally significant as it imposes a binding obligation on both state and non-state actors to protect the rights of immigrant children in all respects.

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100 Chirwa "Non-State Actors' Responsibility for Socio-Economic Rights: The Nature of Their Obligation Under the South African Constitution" 2002 3(3) *ESR Review* 6.

101 *Ibid*.

102 United Nations Office of the High Commissioner for Human Rights *Human Rights Defenders: Protecting the Right to Defend Human Rights* (Fact Sheet No. 29) (1 April 2004) 2.

103 United Nations Committee on the Elimination of Discrimination Against Women *General Recommendation No. 24: Article 12 of the Convention (Women and Health)* (1999) A/54/38/Rev.1 par 17.

104 *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC).

105 See *Centre for Child Law v Minister of Basic Education supra* and *Centre for Child Law v Minister of Home Affairs supra*, where the Centre for Child Law played a pivotal role.

106 Leading to the BELA Act and the proposed amended Admission Policy.

107 *Centre for Child Law v Minister of Basic Education supra*.

108 Cl 23 of proposed amended Admissions Policy GN 38 in *GG* 44139 of 2021-02-10.

109 *Supra*.

110 *Centre for Child Law v Minister of Home Affairs supra* par 10.

Accordingly, the transformative role of the Centre for Child Law as a guardian rather than a gatekeeper has been affirmed.

Organisations such as Equal Education and the Equal Education Law Centre (Joint Centres) have made commendable contributions in advancing the rights of immigrant children.[111] The recent campaigns by Operation Dudula, a citizen-driven movement aimed at removing migrant children from schools, drew strong criticism from the Joint Centres.[112] These actions came to the attention of the Joint Centres following the circulation of a social-media message with xenophobic undertones, claiming that migrant children were being unfairly prioritised over South African children in public schools.[113] In response, the Joint Centres argued that Operation Dudula's actions had fostered a culture of xenophobia in schools, endorsed discrimination, and created an abusive environment for immigrant students.[114] The Joint Centres urged the DBE to denounce these actions and to affirm immigrant children's right to basic education, regardless of immigration status.[115] Their advocacy pressured the Department to take a clear stance on immigrant children's rights, emphasising that access to education should be universally protected, regardless of nationality.[116] The Joint Centres' efforts reinforced legal and ethical standards within the education system and raised public awareness regarding immigrant children's rights, potentially fostering broader support for their equitable treatment within schools and society. While both state and non-state actors have made significant strides in advancing immigrant children's access to basic education, their efforts are not without shortcomings challenges remain in fully advancing educational rights.

4 CONSIDERING IMPROVED GOVERNANCE IN SCHOOLS

The importance of education to immigrant children was emphatically affirmed in *Minister of Home Affairs v Watchenuka*,[117] where the court articulated that the right to pursue education is intrinsic to the concept of human dignity; without it, an individual is deprived of the potential for human fulfilment.[118] The following section discusses proposed strategies deemed essential for advancing the educational rights of immigrant children through the efforts of state and non-state actors.

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111 Equal Education and Equal Education Law Centre *Equal Education & Equal Education Law Centre's Joint Comment on the Department of Basic Education's Amended National Admission for Public Ordinary Schools* (12 March 2021) par 2.3.

112 Equal Education and Equal Education Law Centre https://eelawcentre.org.za/joint-statement-equal-education-and-equal-education-law-centre-strongly-condemn-operation-dudulas-campaign-to-remove-young-migrant-children-from-schools/.

113 *Ibid*.

114 *Ibid*.

115 *Ibid*.

116 S 4 of the BELA Act and cl 23 of the proposed amended Admissions Policy GN 38 in *GG* 44139 of 2021-02-10.

117 [2004] 1 All SA 21 (SCA).

118 *Minister of Home Affairs v Watchenuka supra par* 36.

4 1 Cooperative governance as an essential element

In *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo,*[119] the court summarised the legal framework of South Africa's education system under the Schools Act as follows:

> "An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school." [120]

All relevant departments and stakeholders share a collective responsibility to advance fully immigrant learners' right to access basic education, with cooperative governance being fundamental to this process.[121] Cooperative governance calls for a comprehensive approach that involves departments beyond education, such as the Department of Home Affairs (for documentation) and the Department of Social Development (for support services), to ensure that immigrant learners' educational needs are fully met. This multisectoral collaboration is especially critical given the complex and intersecting challenges faced by immigrant children. Cooperation is crucial to advancing meaningful transformation.[122] Through the strategic exchange of information, challenges that have an impact on immigrant children (for example, documentation) can be more effectively identified and addressed. In addition, state actors should also eschew perceiving non-state actors as adversaries; instead, they should recognise them as indispensable partners whose contributions can significantly enhance the realisation and progressive advancement of immigrant children's educational rights.[123]

4 2 Elimination of discriminatory practices

The school's code of conduct should explicitly include provisions about immigrant learners. It is crucial to acknowledge that the accommodation of immigrant learners does not imply granting them privileges over other children, as all learners encounter diverse challenges in the school environment. Nonetheless, immigrant learners may face additional or unique obstacles stemming from their foreign national status that often attract

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119 *Supra*.

120 *HOD: Mpumalanga Department of Education v Hoërskool Ermelo supra* par 56.

121 Preamble of the South African Schools Act; Intergovernmental Relations Framework Act 13 of 2005.

122 Strohwald "The Right to Basic Education as a Primary Driver of Transformation in South Africa: Considering Cooperation" 2024 45(3) *Obiter* 600.

123 Looyen *Co-operative Governance: From Policy to Practice* (master's dissertation, University of South Africa) 2000 15.

xenophobic attacks requiring tailored support.[124] To this end, the implementation of a tailored school code of conduct that expressly addresses xenophobic attacks, alongside general anti-discrimination policies, is of the utmost importance. While, for instance, general national frameworks, such as the South African National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance,[125] offer valuable overarching directives, schools operate within distinctive environments where the day-to-day interactions among learners, educators and staff necessitate more targeted measures. The adoption of such a code is not merely reactive; it serves as a proactive mechanism to prevent instances of xenophobic violence and discrimination. Moreover, it equips state and non-state actors with the requisite tools and protocols to manage sensitive situations effectively.

4 3 Establishing effective monitoring and accountability mechanisms

To ensure immigrant children's right to basic education is upheld in South Africa, state and non-state actors must act as guardians of this right, performing their legal obligations with transparency and accountability. Both groups should establish clear, formal mechanisms, processes and institutions with well-defined accountability structures to ensure their commitment to educational rights.[126]

A decentralised oversight system is recommended, but it must be designed with safeguards to prevent corruption.[127] Without robust democratic institutions to ensure transparency and empower citizens, decentralisation could risk becoming an obstacle rather than a facilitator of accountability. Local bodies, such as community-based organisations, should monitor adherence to inclusive policies, making the enforcement process more immediate and responsive. Such a decentralised approach would ensure policies are enforced with sensitivity to local contexts and needs. Given South Africa's resource constraints, regular audits are necessary to identify gaps in policy implementation and ensure that educational practices are aligned with the specific needs of immigrant children. In addition, partnerships with NGOs and international organisations can support under-resourced institutions, ensuring that these schools have access to the resources they need to meet the educational needs of immigrant children.[128] Independent auditing bodies are also critical for

[124] Times Live https://www.timeslive.co.za/politics/2023-01-12-gayton-mckenzie-children-of-illegal-foreigners-shouldnt-be-allowed-in-sa-schools/.

[125] Department of Justice and Constitutional Development *National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2019).

[126] UNESCO and Global Education Monitoring Report *Accountability from a Human Rights Perspective: The Incorporation and Enforcement of the Right to Education in the Domestic Legal Order* (Background paper prepared for the 2017/8 Global Education Monitoring Report) ED/GEMR/MRT/2017/P1/2/REV 2.

[127] UNESCO and GEM Report *Accountability From a Human Rights Perspective* 58.

[128] UNESCO and GEM Report *Accountability From a Human Rights Perspective* 30.

maintaining impartial oversight, free from political interference.[129] State and non-state actors must regularly report on their progress in advancing immigrant children's educational rights, allowing citizens to hold them accountable and engage in informed oversight.

5 CONCLUSION

This article demonstrates that South Africa, in line with its international and domestic legal obligations, may leverage the support and expertise of state and non-state actors to promote the right to basic education for all children. It examines the roles of these actors in advancing educational equity, focusing on both advocacy and implementation. The Minister of Basic Education, as head of the national executive, formulates education policies and oversees the implementation of relevant legislation, especially the Schools Act. Resource allocation for the education sector, including provisions for immigrant children, depends on the Minister's priorities. Provincial education departments monitor and support schools, but may enact policies, such as Circular 6 of 2016,[130] that fail to address the specific needs of undocumented children. These institutions often function as both "guardians" protecting the right to education and "gatekeepers" restricting access, especially for vulnerable groups. Beyond government structures, the SAHRC and non-state actors play pivotal roles in promoting the right to education. Through litigation and oversight, they hold the state accountable, ensuring compliance with constitutional mandates. The judiciary complements these efforts by invalidating policies and actions that undermine access to education. Courts have previously declared exclusionary executive policies unconstitutional.[131] Effective protection and promotion depend on collective action. While government bodies, human-rights institutions and the judiciary can act as "guardians" of immigrant children's rights, the risk of exclusionary practices persists. South Africa's commitment to equality demands vigilance to ensure the universal right to basic education is upheld, regardless of nationality. As noted above, this article highlights ways to improve governance in schools, with a particular focus on the roles of state and non-state actors. However, some recommendations presented (like the provision of support services) require substantial financial resources. The fiscal impact of these recommendations remains uncertain. Future research is needed to assess the cost-effectiveness of these support services as well as the impact of monitoring and accountability mechanisms employed by education departments in ensuring governance improvements and equitable access to education.

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129 UNESCO and GEM Report *Accountability From a Human Rights Perspective* 26.

130 Eastern Cape Department of Education *Circular: Schools to Update SASMS with Identity or Passport Numbers of Learners* (Circular 6 of 2016).

131 *Centre for Child Law v Minister of Basic Education supra*.