

To cite: TN Khoza 'The Sen-Nussbaum diagram of article 11(3) of the African Charter on the Rights and Welfare of the Child: Facilitating the relationship between access to education and development' (2021) 21

African Human Rights Law Journal 7-28

<http://dx.doi.org/10.17159/1996-2096/2021/v21n1a2>

The Sen-Nussbaum diagram of article 11(3) of the African Charter on the Rights and Welfare of the Child: Facilitating the relationship between access to education and development

*Thandeka N Khoza**

Law Clerk, Constitutional Court of South Africa; Doctoral Candidate, Dullah Omar Institute, Faculty of law, University of the Western Cape, South Africa
<https://orcid.org/0000-0001-6107-5290>

Summary: *The right to education is an infinitely important right, the benefits of which are boundless. In the case of children, this position is even more emphasised. The right to education has been described as a 'gateway right', which leads to the realisation of a plethora of other rights. Although often done from an economics point of view, many authors have also written about the nexus between education and development. The realisation of the right to education, thus, has been shown to play a positive role in the realisation of developmental goals, both for children, as individuals, and for communities, as a whole. Regarding development, the works of Sen and Nussbaum have helped us to understand development in a marked way, which considers more than the gross national product. These authors, notably, introduced us to the language of 'unfreedoms' and 'capabilities'. With its focus on the rights of the African child, this article begins by tracing some of the notable*

* BA LLB LLM (Pretoria); thandekanokwandakhoza@gmail.com

developments that have occurred since the adoption of the African Charter on the Rights and Welfare of the Child. Thereafter, the article focuses specifically on the realisation of the child's right to education in Africa, as guaranteed in article 11(3) of the African Children's Charter, through the lens of the theories of Sen and Nussbaum.

Key words: *children's rights; right to education; development in Africa; Sen and Nussbaum, African Children's Charter*

1 Introduction

This article proposes a 'Sen-Nussbaum diagram' of article 11(3) of the African Charter on the Rights and Welfare of the Child (African Children's Charter) which, it argues, could contribute to the creation of 'an Africa fit for children'¹ as it focuses on the capabilities with which access to education should equip children. These capabilities are twice beneficial. First, they benefit the individual child who, through education, can develop personally. Second, they benefit the country, because the education of the individual, in most cases, allows that individual to contribute positively, in a number of ways, to the development of the nation. It is further argued that as an added benefit, the individual development of each country will result in the collective development of the African continent. Tomaševski has correctly stated that the government of each country is responsible for the realisation of the right to education of its children.² What is stressed here is that the collective development of our continent depends on each government realising this right for all its children.

According to a report by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) published in 2018, Africa is behind in terms of providing education,³ and that the backlog may be attributed to a number of factors.⁴ Most common among

1 This wording is borrowed directly from African Children's Committee *African Agenda for Children 2040: Fostering an Africa fit for children* (Agenda 2040) (2016).

2 K Tomaševski 'Human rights obligations: Making education available, accessible, acceptable and adaptable' (2003) 3 *Right to Education Primers* 8.

3 See discussion at n 2.

4 UNESCO often reports on these issues. As of 2018, it reported that more than 50% of the world's population of out-of-school children are in sub-Saharan Africa; furthermore, sub-Saharan Africa has the highest number of out-of-school children at the primary, lower secondary, and upper secondary levels. Lastly, in terms of proficiency and actual learning, Africa has the lowest percentages of children achieving minimum proficiency at every level. See UNESCO Institute for Statistics 'New methodology shows that 258 million children, adolescents and youth are out of school' Fact Sheet 56 (September 2019) UIS/2019/ED/FS/56

countries are low retention rates; high drop-out rates; bad quality of education;⁵ and barriers to access to education, such as child marriage.⁶ Additionally, data consistently shows that the enrolment rates, even when they are relatively low, are always higher than the completion rates.⁷ Thus, instead of focusing only or mainly on access, countries need to strengthen their efforts to retain learners in school and decrease drop-out rates. In this regard, they must first realise that 'access' to education is an element of, not tantamount to, the 'right' to education. In other words, providing access to education is not, and has never been, sufficient. Children must be able to access an education of good quality, at a safe and well-equipped institution. Tomaševski, adds that a positive approach to fulfilling a child's rights to access quality education should be futuristic.⁸ At the end of each grade, and at the end of the schooling career, the child must be in a more enriched position, and be a step closer to reaching their full potential. In other words, education must equip each child with the capabilities needed in order to live a full life, which the child has reason to value. It is proposed that ensuring this will yield positive results for the development of African countries and, eventually, hopefully, the African continent as a whole.

This article proposes that the right to education should be viewed through the lens of the Sen-Nussbaum diagram, which would have state parties offering access to an education that equips children with the necessary capabilities. To this end, the article begins by giving a synopsis of the efforts employed and what opportunities have been missed in relation to the realisation of the right to education for children on the continent. Thereafter, the article offers an account of the past and current *status quo* of the right to education, before it moves to considering some efforts that can be employed in the future. Subsequently the developmental theories of 'freedoms' and 'capabilities', as developed by Sen and Nussbaum, are discussed, so as to introduce the reader to these theories before the diagram is drawn. Finally, the article draws the Sen-Nussbaum diagram of article 11(3) of the African Children's Charter by applying the theory of capabilities to the right to education, and showing the benefits of approaching this right in this manner.

7; UNESCO 'Inclusion and education: All means all' *Global Education Monitoring Report 2020* (2020) 204 212.

5 UNESCO Institute for Statistics (n 4) 15.

6 UNESCO 'Inclusion and education' (n 4) 51.

7 See eg UNESCO (n 4) 212-213.

8 Tomaševski has written about 'rights "through" education'. See Tomaševski (n 2) 12. The right achieved through the realisation of the right to education on which this article focuses is the right to development.

2 Thirty years of impact: A synopsis of the developments in the region since the adoption of the African Children's Charter

The 30-year anniversary of the adoption of the African Children's Charter presents a unique opportunity to reflect on past achievements as well as to forecast what can still be achieved, through the implementation of the Children's Charter. This part, then, offers a synopsis of the strides made in terms of children's rights to education since the adoption of the African Children's Charter.⁹

The African Charter on Human and Peoples' Rights (African Charter) does not consider children's rights, except 'as an afterthought in article 18(3)'.¹⁰ It does, however, protect the right to education, which Viljoen describes as the right most 'likely to be more beneficial to children than other members of society'.¹¹ The lack of protection of children's rights and, more specifically, the bare protection of their right to education, then, necessitated the elaborate protection of the right to education that is found in the African Children's Charter.¹²

The need to adopt a region-specific instrument on the rights of the child 'cannot be overemphasised',¹³ and the African Children's Charter is the culmination of the need to develop such a treaty.¹⁴ The contents of the African Children's Charter were informed both by what is contained in the Convention on the Rights of the Child (CRC), as well as what is left out.¹⁵ Regarding the right to education,

9 Of the 50 states that have ratified the African Children's Charter, four have entered reservations. See <https://www.acerwc.africa/ratifications/table/> (accessed 22 June 2021). Only Sudan's reservation is in relation to the right to education. Sudan entered reservations on arts 10, 11(6) and 21(2). See <https://www.acerwc.africa/reservations/> (accessed 22 June 2021). Art 11(6) affords children who become pregnant the right to return and complete their schooling.

10 F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 204-205.

11 Viljoen (n 10) 205.

12 The Convention on the Rights of the Child (CRC) has a total of 14 protection points for the right to education; the African Charter on the Rights and Welfare of the Child (African Children's Charter) has 18.

13 MG Nyarko & HM Ekefre 'Recent advances in children's rights in the African human rights system: A review of the African Committee on the Rights and Welfare of the Child in the *Talibés* case' (2016) 15 *Law and Practice of International Courts and Tribunals* 386.

14 E Durojaye & E Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the *Nubian Children* communication' (2012) 12 *African Human Rights Law Journal* 565.

15 BD Mezmur 'Happy 18th birthday to the African Children's Rights Charter: Not counting its days but making its days count' (2017) 1 *African Human Rights Yearbook* 128.

while CRC contains two articles dealing with the right to education,¹⁶ the African Children's Charter consolidates all aspects under one article.¹⁷ While a number of the provisions in both treaties overlap, the African Children's Charter has six provisions that are not included in CRC.¹⁸ Two important provisions for increased access to and inclusion in education are those pertaining to state parties taking measures in relation to female, gifted and disadvantaged children,¹⁹ and also allowing learners who fall pregnant to return and continue with their education when they are ready.²⁰ Especially given that child marriage, pregnancy and poverty are barriers precluding children from accessing education in Africa, these protections are important for African children.

Another important aspect of the African Children's Charter is the best interests of the child principle. The African Children's Charter states that '[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'.²¹ Boshoff lists this particular provision as one of the 'bedrocks' of the African Children's Charter.²² This means that, even when dealing with the right of the African child to education, all stakeholders must act in a way which is in the best interests of the child. It is argued here that by applying the Sen-Nussbaum diagram to the realisation of article 11(3), the best interests of the child will be protected. This is because it argues for the realisation of an education in which access is granted immediately but the benefits of that education for the child are lifelong.

Because of the African Children's Charter, the continent has certainly come a long way in terms of protecting children and their rights. However, there is still a long way to go, and many more lives to reach.²³ Unfortunately, in terms of the right to education, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) seems not to have made as many strides as it has in other areas.²⁴ This is particularly unfortunate given how Africa

16 Arts 28 & 29 CRC.

17 Art 1 African Children's Charter.

18 Arts 11(2)(c), (e), (f), (h), 11(3)(e), 11(6) African Children's Charter.

19 Art 11(3)(e) African Children's Charter.

20 Art 11(6) African Children's Charter.

21 Art 4(1) African Children's Charter.

22 E Boshoff 'Protecting the African child in a changing climate: Are our existing safeguards adequate?' (2017) 1 *African Human Rights Yearbook* 32.

23 Mezmur (n 15) 147-148.

24 Eg, the African Children's Committee has published six General Comments, none of which deal (exclusively and extensively) with the right to education. However, it is worth noting that the Committee in General Comment 5 has written that '[t]he purpose of this General Comment is not to undertake an exploration of the expansive nature of the state obligation to provide for the right of the child to education, as enshrined in Article 11 of the Charter (which could form the

and, in particular, sub-Saharan Africa, continuously performs poorly in terms of enrolment, progression and quality.²⁵ Nevertheless, it would be incorrect to claim that the African Children's Committee has done absolutely nothing for the right to education. In a selection of the communications that it has heard, the Committee has spent some time contemplating the right to education.²⁶ However, the extensive consideration within communication decisions begs the question as to when, if ever, the Committee would have dealt with the issues related to the right to education, or whether these selected communications had not reached it.²⁷

Thus, this 30-year anniversary presents a special opportunity for the African Children's Committee to (re)consider focusing some of its future efforts, perhaps by way of conducting studies or drafting a General Comment, towards the African child's right to education. The African Children's Committee has also admitted that it has not '[undertaken] an exploration of the expansive nature of state obligations to provide for the right of the child to education, as enshrined in article 11 of the Charter (which could form the basis of a self-standing General Comment)'.²⁸

To this end, the next part of the article will discuss the right to education, particularly in the context of the African Children's Charter and the lived reality of the African child. Thus, a more

basis of a self-standing General Comment'. See African Committee of Experts on the Rights and Welfare of the Child 'General Comment No 5 on "State party obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection"' (2018) 27. The African Children's Committee has undertaken three continental studies, and published 14 statements/Communiqués, none of which dealt (exclusively) with the right to education.

25 UNESCO (n 4).

26 The African Children's Committee has received 16 communications in total, 11 of which were decided on merits. Of those 11, five unpack the right to education. These are Communication 11/2005, *Michelo Hansungule & Others v Government of Uganda*; Communication 2/2009, *Institute for Human Rights and Development in Africa and Open Justice Initiative (on behalf of Children of Nubian Descent in Kenya v Government of Kenya*; Communication 3/Com/001/2012, *Centre for Human rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Government of Senegal*; Communication 55/Com/001/2015, *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v Government of the Republic of Sudan (Sudanese Child)*; and Communication 7/Com/003/2015, *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Government of the Republic of Mauritania (Said and Yarg Ould Salem)*.

27 For a detailed discussion on what the African Children's Committee has said on the right to education, within the received communications, the communications mentioned above may be consulted. To date, the Committee has not yet released a right to education-specific document, such as a General Comment, statement or study.

28 African Children's Committee 'General Comment No 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child (article 1) and Systems Strengthening for Child Protection' (2018) 27.

detailed discussion of the Committee's contribution to the realisation of the right to education for the African child will be offered below.

3 Right of the African child to an education: The past, the present and the future of article 11(3) of the African Children's Charter

This part begins with an outline of the right before it moves to unpacking some of the wording of article 11(3). Thereafter, the part discusses the 'past and the present' of the realisation of the right, through the use of data to highlight the past and the current *status quo*. Finally, the part discusses some tools and considerations that can be used in the 'future'.

The right to education is the Mitochondrial Eve of human rights.²⁹ This is because it is a 'multiplier' right,³⁰ the realisation of which results in the enhanced enjoyment of all other rights.³¹ This right also enjoys protection in a number of instruments, and is 'firmly rooted in an array of international conventions and treaties',³² the African Children's Charter included.³³ It is an independent right,³⁴ which has been characterised as both a civil and political right as well as, and more commonly, a socio-economic right.³⁵ It also is a gateway right,³⁶ through which economic, social, and political benefits accrue to an individual,³⁷ as well as 'an indispensable means of realising other human rights'.³⁸ Onuora-Oguno holds that the right to education is important for both (individual) human development, as well as the development of Africa.³⁹ To this end, the article argues that the

29 The term 'Mitochondrial Eve', also called the 'Eve Gene', refers to 'the most historically recent female from which humans can trace their ancestry ... it is used "only to refer to the most recent female genetic ancestor of a species"'. In other words, the Mitochondrial Even is one female to whom we (current) humans trace their ancestry. See EKF Chan et al 'Human origins in a Southern African palaeo-wetland and first migrations' (2021) 592 *Nature* 185-188. See also S Adamson 'The Eve Gene' 10 August 2020, <https://shadesofnoir.org.uk/the-eve-gene/> (accessed 22 June 2021).

30 Tomaševski (n 2) 10.

31 As above.

32 SJ Klees & N Thapliyal 'The right to education: The work of Katarina Tomasevski' (2007) 51 *Comparative Education Review* 500.

33 Art 11 African Children's Charter; Boshoff (n 22) 35.

34 ESCR Committee General Comment 13: The Right to Education (Art 13) E/C.12/1999/10 (8 December 1999) para 1.

35 Tomaševski (n 2) 8.

36 L Arendse 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) 14 *Potchefstroom Electronic Law Journal* 101.

37 C Simbo 'Defining the term basic education in the South African Constitution: An international law approach' (2012) 16 *Law, Democracy and Development* 163.

38 ESCR Committee (n 34) para 1.

39 AC Onuora-Oguno *Development and the right to education* (2019) vii.

realisation of the right to education for the African child is an integral part of, and positive means for, the development of Africa.

The African Children's Charter protects the right of every child to education,⁴⁰ and reflects the obligations relating to the protection of the right to education. Thus:⁴¹

States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:

- (a) provide free and compulsory basic education;
- (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
- (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
- (d) take measures to encourage regular attendance at schools and the reduction of dropout rates;
- (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

The first aspect that stands out from this provision is the language used. The African Children's Charter refers to 'basic education',⁴² as opposed to 'primary education', as CRC does.⁴³ In this regard, Murungi notes that the meaning of the term 'basic education' is 'not agreed upon amongst stakeholders'.⁴⁴ This indeed is true as the term has been defined in different ways.⁴⁵ For example, Murungi makes reference to the World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs (Jomtein Declaration),⁴⁶ citing it as the 'origins' of the term 'basic education'.⁴⁷ Coomans posits that 'basic education' refers to the content of education.⁴⁸ However, Woolman and Fleisch, on the one hand, have defined basic education with reference to a period of schooling and, on the other hand, defined it with reference to a standard of schooling.⁴⁹

40 Art 11(1) African Children's Charter.

41 Art 11(3) African Children's Charter.

42 Art 11(3)(a) African Children's Charter.

43 Art 28(1)(a) CRC.

44 LM Murungi 'Inclusive basic education in South Africa: Issues in its conceptualisation and implementation' (2015) 18 *Potchefstroom Electronic Law Journal* 3160.

45 C McConnachie & C McConnachie 'Concretising the right to a basic education' (2012) 129 *South African Law Journal* 565-566.

46 UNESCO *World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs* (Jomtein Declaration) (1990).

47 Murungi (n 44) 3161.

48 F Coomans 'In search if the core content of the right to education' in A Chapman & S Russell (eds) *Core obligations: Building a framework for economic, social and cultural rights* (2002) 226; Murungi (n 44) 3161.

49 S Woolman & B Fleisch *Constitution in the classroom: Law and education in South Africa 1994-2004* (2009) 127.

Primary education also is not universally defined, but it is often equated to basic education.⁵⁰ One of the explanations for this can be found in the positions held in the Jomtein Declaration as well as the account given by Ssenyonjo.⁵¹ The Jomtein Declaration defines basic education in relation to primary education by stating that 'the main delivery system for the basic education of children ... is primary schooling'.⁵² Similarly, Ssenyonjo posits that primary education, which UNESCO has defined as 'the first four to seven years, usually six, after pre-primary school (ISCED 1)',⁵³ 'focuses on imparting basic learning skills, including literacy and numeracy'.⁵⁴ When considering the debate on the differences between basic and primary education in light of Ssenyonjo's position, the conflation is understood. Moreover, the fact that the African Children's Charter refers to basic, secondary and higher education⁵⁵ can be used to reasonably deduce that the drafters intended to speak of the primary level of schooling when they wrote the contents of article 11(3)(a). A possible further argument is that, by specifically referring to compulsory and free basic education, the African Children's Charter sets a higher standard in terms of the *quality* of the primary education to which children are entitled, as the provision can be interpreted as referring to both a period and standard of schooling.

The past and present state of affairs in relation to the realisation of the right to education for children in Africa is disappointing.⁵⁶ Consistently, Africa performs worse than the other regions in terms of educating its children. In fact, the UNESCO Institute for Statistics has written that 'of all regions, sub-Saharan Africa has the highest rates of education exclusion'.⁵⁷ At all levels of schooling there are millions of children of school-going age who are out of school. In 2016 sub-Saharan Africa accounted for more than half of the global total of out-of-school children,⁵⁸ which remains the current *status quo*.⁵⁹ Currently, about one-fifth (approximately 19 per cent)

50 Murungi (n 44) 3161.

51 UNESCO (n 46) 6, art 5; M Ssenyonjo *Economic, social and cultural rights in international law* (2009) 377.

52 UNESCO (n 46) 6, art 5.

53 UNESCO Institute for Statistics 'International Standard Classification of Education (ISCED)' (2011) 17 21.

54 Ssenyonjo (n 51) 377; Murungi (n 44) 3161.

55 Arts 11(3)(a)-(c) African Children's Charter.

56 For information on the past situation, see eg UNESCO Institute for Statistics and Education for All Global Monitoring Report 'A growing number of children and adolescents are out of school as aid fails to meet the mark' Policy Paper 22/Fact Sheet 31 (July 2015). The discussion of the current situation is reflected in n 42.

57 UNESCO Institute for Statistics 'Education in Africa' <https://uis.unesco.org/en/topic/africa/education-africa> (accessed 23 June 2020).

58 UNESCO Institute for Statistics 'Leaving no one behind: How far on the way to universal primary and secondary education' Policy Paper 27/ Fact Sheet 37 (2016) 3.

59 UNESCO (n 4) 7.

of children between the ages of six and 11 years, more than one-third (approximately 37 per cent) of children between the ages of 12 and 14 years and more than two-thirds (approximately 68 per cent) of children between the ages of 15 and 17 are out of school in Africa.⁶⁰ It is also estimated that approximately nine million girls and six million boys who are currently out of school in Africa will never attend school.⁶¹

As mentioned above, the African Children's Committee, on its own admission, has not dealt in detail with the right to education for the child.⁶² In General Comment 5, however, the Committee at least mentions that legislation enunciating the right of the child to an education is an important part of state parties' implementation obligation.⁶³ The Committee notes that legislation is an important foundation of the obligation to provide free and compulsory basic education, whereby 'free' also means 'free of collateral charges'.⁶⁴ It is also important for state parties to legislate on learner pregnancy, expulsion, corporal punishment at schools and the accreditation and functioning of private learning institutions.⁶⁵

What is most interesting in its General Comment 5 is that the African Children's Committee reiterates the absence of the qualifiers of 'progressive realisation' and 'to the maximum extent of available resources' in article 1 of the Charter, which the Committee writes was intentional.⁶⁶ The Committee goes further to say that, while it is aware of and notes the 'fiscal realities' in Africa, the Charter standards were 'set intentionally – they do not allow state parties to claim that they do not have any resources for the implementation of social and economic goods for the fulfilment of children's rights'.⁶⁷ Therefore, it urges all countries, whatever their fiscal realities, to spend at least 9 per cent of their gross domestic product (GDP) on education.⁶⁸

The African Children's Committee also noted that the best interests of the child must be considered in the education setting,⁶⁹ and that

60 UNESCO Institute for Statistics (n 57); UNESCO Institute for Statistics (n 4) 7.

61 UNESCO Institute for Statistics (n 57).

62 It is worth noting, however, that the 2014 theme for the Day of the African Child was 'A child-friendly, free and compulsory education for all children in Africa'. See <https://www.acerwc.africa/day-of-the-africa-child-dac>. <https://www.acerwc.africa/Latest%20News/eulogy-to-dr-azza-el-ashmawy/> (accessed 21 June 2021).

63 African Children's Committee (n 28) 28.

64 As above.

65 African Children's Committee (n 28) 28-29.

66 African Children's Committee 6.

67 African Children's Committee 6-7.

68 African Children's Committee 7.

69 African Children's Committee 12.

states must remove barriers to education, through providing free, quality pre-primary and primary education.⁷⁰ These two particular considerations have also come through in the Committee's decisions on the five communications that deal with the right to education. In the *Ugandan Children* decision the Committee held that the drafters of the African Children's Charter, 'being fully aware of the important role of education for creating an Africa fit for children, have crafted a very comprehensive and detailed provision on the right to education'.⁷¹ This is a direct reference to the *African Agenda for Children 2040: Fostering an Africa fit for children* (Agenda 2040).⁷² In the *Nubian* decision the Committee highlighted that article 11(3)(a) 'necessitate[s] the provision of schools, qualified teachers, equipment and the well-recognised corollaries of the fulfilment of this right'.⁷³ Thus, it emphasised the importance of education provisioning. In the *Talibés, Sudan* and *Said Ould Salem and Yarg Ould Salem* communications⁷⁴ the Children's Committee endorses the 4-A scheme of the right to education, which is later discussed in more detail. Furthermore, in the *Sudan* communication the Committee also condemns the violation of the right to higher education.⁷⁵ In the *Said and Yarg Ould Salem* communication the Committee also highlighted that a deprivation or exclusion from education is tantamount to discrimination against the child.⁷⁶

Progressive decisions in communications notwithstanding, the current *status quo* remains concerning, especially because Africa has the youngest and fastest-growing demographic in the world.⁷⁷ As the school-going population grows, so the demand for education grows with it.⁷⁸ That is why the right to education in the context of Africa requires urgent attention. Having the highest out-of-school rates⁷⁹ means that there is much potential we are neither building nor tapping into. Both the high numbers of out-of-school children in Africa, as well as their consistency, present a cause for concern which must be prioritised moving forward.

70 African Children's Committee 41.

71 *Ugandan Children* (n 26) para 63.

72 African Children's Committee.

73 *Nubian Children* (n 26) para 63.

74 *Talibés, Sudanese Child and Said and Yarg Ould Salem* communications (n 26).

75 *Sudanese Child* (n 26) paras 98-99.

76 *Said and Yarg Ould Salem* (n 26) para 74.

77 UNICEF *Generation 2030 Africa 2.0: Prioritising investments in children to reap the demographic dividend* (2017) 6.

78 UNESCO Institute for Statistics (n 57).

79 UNESCO Institute for Statistics (n 4) 7.

As stated earlier, the right to education is both an individual right as well as a gateway right.⁸⁰ To this end, Tomaševski's immortal words are echoed here:⁸¹

The importance of the right to education reaches far beyond itself. Many individual rights are beyond the grasp of those who have been deprived of education, especially rights associated with employment and social security. Education operates as a multiplier, enhancing the enjoyment of all individual rights and freedoms where the right to education is guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated.

Onuora-Oguno describes the right to education as 'one of the most important rights of our lifetime',⁸² and echoes the sentiments of Tomaševski and the Committee on Economic, Social and Cultural Rights (ESCR Committee), that the realisation of the right to education is important for the realisation of other rights.⁸³ Tomaševski correctly notes that 'governments are individually obligated to secure human rights for their own population'.⁸⁴ Furthermore, because of the collective nature of the right and its benefits, each government also plays an important role in ensuring that education is a public good, and schooling is a public service.⁸⁵ The African Children's Committee echoes the same sentiments as it has stated that education is 'a public good, the quality of which should be assured'.⁸⁶ In addition to these considerations, the African Children's Charter also serves the continent through offering a protection of the right to education which 'provides most of the elements which are needed in respect of the children's right to education',⁸⁷ including some considerations directed at the girl child.⁸⁸

When realising the right to education, state parties should adhere to the 4-A scheme, which was developed by Tomaševski,⁸⁹ adopted by the ESCR Committee,⁹⁰ and endorsed by the African Children's Committee.⁹¹ In terms of the 4-A scheme, education must be

80 ESCR Committee (n 34).

81 Tomaševski (n 2) 10.

82 Onuora-Oguno (n 39) vii.

83 As above.

84 Tomaševski (n 2) 8.

85 Tomaševski 9 15.

86 African Children's Committee (n 1) 32.

87 Boshoff (n 22) 35.

88 African Children's Charter art 11(3)(e); Boshoff (n 22) 35.

89 See UN Economic and Social Council 'Preliminary report of the Special Rapporteur on the right to education, Ms Katarina Tomasevski, submitted in accordance with Commission on Human Rights Resolution 1998/33' E/CN.4/1999/49 (13 January 1999) paras 50-74; see also, generally, Tomaševski (n 2).

90 ESCR Committee (n 34) paras 6(a)-(d).

91 The African Children's Committee has endorsed Tomaševski's 4-A scheme in the following communications (n 26): *Talibés* para 46; *Sudanese Child* para 96; *Said*

available, accessible, acceptable and adaptable.⁹² Tomaševski further explains that the elements of availability and accessibility refer to 'rights to education' while acceptability and adaptability refer to 'rights in education'.⁹³ Furthermore, in terms of making education available, the government must establish or allow others to establish institutions of learning. In terms of access, at least primary school must be made free and compulsory. The element of acceptability refers to the quality of the education which governments make available and accessible. Finally, in terms of adaptability, governments must ensure that the established schools offer quality education that is able to adapt to the (changing) needs of children.⁹⁴

The continent is facing issues regarding all four elements of the 4-A scheme.⁹⁵ However, if embraced as an aid, the 4-A scheme can assist state parties in guiding their policies. One of the most important facts which the 4-A scheme reiterates is that 'access' to education is not tantamount to, but a component of, the 'right' to education. Therefore, whereas access to education is created, through the establishment of education institutions and the removal of barriers to access to education, it remains a means, not an end. Access to education is a vessel that must be filled with content that is of a good quality. Thus, state parties also have an obligation to improve the quality of education. Access alone, even if it becomes universal, is insufficient. The African Children's Committee is not blind to this fact. In Agenda 2040, for example, the Committee admits that, while the primary enrolment rates have improved, primary and secondary completion rates have not.⁹⁶ Improvement to enrolment rates notwithstanding, access to education and, more especially, completion of the education cycles remain major challenges in Africa.⁹⁷ Furthermore, the quality of education in Africa currently is not good enough to meet the demands of the labour markets.⁹⁸

It is encouraging that the African Children's Committee dedicated an aspiration to the right to education in Agenda 2040.⁹⁹ Through this aspiration, the Committee envisages an Africa in which every child receives an education.¹⁰⁰ By 2040, the Committee hopes that

and Yarg Ould Salem para 74.

92 UN Economic and Social Council (n 89) para 50; ESCR Committee (n 34) 5 13.

93 Tomaševski (n 2) 12.

94 Tomaševski (n 2) 14-15.

95 Onuora-Oguno (n 39) 2-3.

96 African Children's Committee (n 1) 3.

97 Onuora-Oguno (n 39) 2.

98 African Children's Committee (n 1) 31; Onuora-Oguno (n 39) 3.

99 African Children's Committee (n 1) Aspiration 6.

100 As above.

'every child starts and completes free, quality, primary and secondary education that leads to relevant and effective learning outcomes'.¹⁰¹

In addition to the rights to education and in education, there are also rights 'through' education. Tomaševski mentions the ending of child marriage, child labour and child soldiering.¹⁰² The African Children's Committee mentions that 'education is central to enhancing a child's full potential. The lack of education is a life sentence of poverty and exclusion.'¹⁰³ The Committee has thus highlighted that, through the realisation of the right to education, children can be freed from the cycle of poverty. This particular point of freedom from poverty will be further developed in the subsequent part. It should also be mentioned that, whereas the Committee has been criticised for not taking a gender-sensitive approach to their interpretation of the rights in the African Children's Charter,¹⁰⁴ it is encouraging that they have paid attention to the unbalanced struggles to access education between girls and boys. To this end, the Committee in Aspiration 6 also writes that, going forward, boys and girls should have equal opportunities and access to primary and secondary education.¹⁰⁵

The right to education is the Mitochondrial Eve of human rights and is particularly phenomenal because of its multiple dual statuses. It is both a civil and political right as well as a socio-economic right, an individual as well as collective right, and an independent as well as a gateway right.¹⁰⁶ Although there is a plethora of rights that can be realised through the realisation of the right to education, this article focuses only on (the capabilities aspect of) the right to development. The following part will discuss the topic of development, before delving into a discussion of the nexus between the education of the African child and development in Africa.

101 African Children's Committee (n 1) 32.

102 Tomaševski (n 2) 12.

103 African Children's Committee (n 1) 31.

104 Durojaye & Foley (n 14) 576; Nyarko & Ekefre (n 13) 392.

105 African Children's Committee (n 1) 32.

106 UNESCO et al 'SDG4 – Education 2030: Framework for Action' in Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4 (ED-2016/WS/28) (December 2015) para 10.

4 'WWSAND'; what would Sen and Nussbaum do: Development of African children and the continent through the lens of freedoms and capabilities

The theme of development is on the lips of most, if not all, supra-national and national law and policy bodies. There are a number of goals that have been formulated, so as to ensure (sustainable) development in the future.¹⁰⁷ This part of the article focuses on the idea of development, as developed by Sen and Nussbaum.¹⁰⁸ Their 'capabilities' theories are discussed in detail here so that, in the following part, the nexus between education and development can further be discussed, through the formulation of the Sen-Nussbaum diagram of article 11(3) of the African Children's Charter.

Sen and Nussbaum have argued that deprivations, which manifest as poverty and inequality, indicate conceptual, ethical, scientific, technical and, most importantly, political failures.¹⁰⁹ According to Sen and Nussbaum, 'the concept of development is inherently value laden in that it yields criteria for what counts as good social change, "beneficial alteration", and, most fundamentally, "the achievement of a better life" for human beings'.¹¹⁰

This concept of development is centred around the concept of capabilities.¹¹¹ Importantly, both Sen and Nussbaum have stated from the beginning that the capabilities approach goes hand in hand with rights.¹¹² For Sen, rights are the central goals of public policy¹¹³ and, for Nussbaum, rights play a prominent role in the account of which capabilities are most important.¹¹⁴ Nussbaum notes that the language of rights raises a number of questions, such as who the bearers are; who must provide for them; and whether they are individual or collective.¹¹⁵ For Nussbaum, the language of rights, therefore, 'is not especially informative, despite its uplifting

107 See African Union Commission Agenda 2063; African Children's Committee (n 1).

108 It should be borne in the mind that, while development is a broad field, as mentioned in the introduction, the focus of this article is on the works of Sen and Nussbaum on the developmental theory of 'capabilities'.

109 DA Crocker 'Functioning and capability: The foundations of Sen's and Nussbaum's development ethic' (1992) 20 *Political Theory* 584.

110 Crocker (n 109) 585.

111 MC Nussbaum 'Capabilities and human rights' (1997) 66 *Fordham Law Review* 275.

112 Nussbaum (n 111) 275-277.

113 A Sen 'Rights and capabilities' in T Honderich (ed) *Morality and objectivity: A tribute to JL Mackie* (1985) 130.

114 Nussbaum (n 111) 277.

115 Nussbaum (n 111) 273-275.

character, unless its users link their references to rights to a theory that answers at least some of these questions'.¹¹⁶ This is why this article argues that the child rights and capabilities approaches can be seen as complementing each other and, with specific regard to the right to education, this complementarity manifests as the proposed 'Sen-Nussbaum diagram of article 11(3)'.

Sen and Nussbaum also note that there are other approaches to measure development, such as the gross national product (GNP) per capita approach and the utility approach.¹¹⁷ Nussbaum describes the GNP per capita approach as 'crude', as it may give a country a high score for development, even though there are high rates of inequality; therefore, it does not consider each person.¹¹⁸ Furthermore, it provides no information about the elements of human life that are important for measuring its quality, such as educational opportunities.¹¹⁹ The Benthamite utility approach also presents problems as it measures the quality of life in terms of the satisfaction of desire and preference, but in doing so regards the social total as an aggregate. Therefore, this approach accepts a situation whereby the social total is high, but some individuals still suffer; thus, it is also linear and does not consider the multiple factors on the quality of life,¹²⁰ including access to education.

Arguably, the most notable footprint left by Sen can be found in the Human Development Report of 1990 of the United Nations Development Programme (UNDP),¹²¹ much of which was influenced by Sen.¹²² This particular report for the first time defined 'national development' in relation to 'human development', 'which in turn is conceived in relation to the formation, expansion, and use of "human capabilities"'.¹²³ In 1993 the UNDP further used Sen's work in order to develop the 'human development index' which uses the concept of capabilities to assess people's quality of life within a nation.¹²⁴

116 B Williams 'The standard of living: Interests and capabilities' in G Hawthorn (ed) *The standard of living* (1987) 94 100; Nussbaum (n 111) 275. It is worth noting here that other authors have also discussed (the language of) human rights outside of the legal discipline. Eg, Waltz has written that human rights can be analysed as a philosophical or legal concept. See S Waltz 'Reclaiming and rebuilding the history of the Universal Declaration of Human Rights' (2002) 23 *Third World Quarterly* 438.

117 Crocker (n 109) 585-586; Nussbaum (n 111) 280-281.

118 Nussbaum (n 111) 280.

119 Nussbaum 280-281.

120 Nussbaum (n 111 above) 281.

121 United Nations Development Programme (UNDP) *Human development report* (1990).

122 Crocker (n 109) 587.

123 UNDP (n 121) 10; Crocker (n 109) 587.

124 UNDP *Human development report* (1993) 10. Nussbaum has argued that the consideration of capabilities within the 1993 Report was clearly influenced by Sen. See Nussbaum (n 111) 275.

With regard to Sen's writings, the focus of this article is on his *magnum opus*, *Development as freedom*.¹²⁵ In the opening line of this work Sen describes development as 'a process of expanding the real freedoms that people enjoy'.¹²⁶ He posits that the GNP of any country can contribute to the freedom of its people; however, freedom is also influenced by socio-economic and civil and political arrangements, such as the provision of education facilities.¹²⁷ He further writes that 'development requires the removal of major sources of unfreedom' such as poverty.¹²⁸

According to Sen, 'freedom' involves the processes that allow freedom of action and decision as well as the opportunities that people have; 'unfreedom', then, can arise from inadequate processes or opportunities.¹²⁹ The creation of opportunities, for example, the provision of public education and public health, contributes to the economic development of a country.¹³⁰

Sen holds that many people around the world suffer from a variety of unfreedoms.¹³¹ Particularly in Africa, the unfreedom of poverty is of great concern. Recalling that, 'the lack of education is a life sentence to poverty',¹³² realising the right to education for the African child directly and positively impacts the development of that child, as well as that child's role in the development of their country. Whereas poverty is an unfreedom, and unfreedoms stand in the way of development,¹³³ education is a socio-economic arrangement that will result in the growth of a country's development. In particular, the improvement of the quality of basic education directly improves quality of life and increases the ability to earn an income.¹³⁴

Sen also uses the idea of freedom as a portal to the theory of capabilities. Greater freedom enhances the capability of someone to help themselves as well as influence the world.¹³⁵ He posits that basic freedoms, such as education, are the 'building blocks for the expansion of capabilities'.¹³⁶ As unfreedoms, poverty and inequality

125 A Sen *Development as freedom* (1999).

126 Sen (n 125) 3.

127 As above.

128 As above; A Sen 'Development as freedom' in JT Roberts et al (eds) *The globalisation and development reader: Perspectives on development and global change* (2014) 526.

129 Sen (n 125) 3; Sen (n 128) 527.

130 Sen (n 128) 533.

131 Sen (n 128) 526.

132 African Children's Committee (n 1) 31.

133 Sen (n 128) 526.

134 Sen 539.

135 Sen 528.

136 Sen 527.

negate the capability of a person to live a meaningful life.¹³⁷ Education, however, as a socio-economic arrangement, can free children from the unfreedoms of poverty and inequality.

Although their ideas on what Crocker terms ‘an innovative and promising “capabilities ethic”’ converge, and have often been viewed as one,¹³⁸ some differences in their constructions are notable.¹³⁹ Most notably, Nussbaum argues that Sen approaches capabilities in a very general sense,¹⁴⁰ while she produced ‘an explicit account of the most central capabilities that should be the goal of public policy’.¹⁴¹ This account will later be discussed in greater detail.

Nussbaum’s work is particularly important for the way in which it developed Sen’s formulation of the capabilities approach to development. Nussbaum’s developments of the theory of capabilities ‘rely heavily on the notions of human dignity and agency’.¹⁴² Furthermore, Nussbaum is also interested in the parts of the theory that Sen left out, namely, what levels of provision should be seen to in order to ensure that rights, such as the rights to education and health, are realised.¹⁴³ Therefore, for Nussbaum, governments have a duty to create opportunities through which people can pursue a life of dignity, which can be achieved through the provision of at least the threshold of a number of listed capabilities.¹⁴⁴ Nussbaum also holds explicitly that human rights and capabilities are very closely linked.¹⁴⁵ Furthermore, as stated above,¹⁴⁶ for Nussbaum the language of rights must answer some questions, pertaining to who bears them, who has the obligation to provide for them, and what the provision should achieve. For Nussbaum, it is the language of capabilities and human functioning that can provide answers to these questions.¹⁴⁷ Therefore, in relation to the right to education, the right can only be said to have been realised if the provision has given the right holder the capabilities to live a life which they have reason to value.

137 Sen (n 125) 74; S van der Berg ‘The need for a capabilities-based standard of review for the adjudication of state resource allocation decisions’ (2015) 31 *South African Journal on Human Rights* 330.

138 Nussbaum (n 111) 275.

139 Crocker (n 109) 585.

140 Nussbaum (n 111) 277-285.

141 Nussbaum 277.

142 Van der Berg (n 137) 333.

143 MC Nussbaum ‘Capabilities and fundamental entitlements: Sen and social justice’ (2003) 9 *Feminist Economics* 35.

144 MC Nussbaum *Creating capabilities* (2011) 70; Van der Berg (n 137) 333.

145 See generally Nussbaum (n 111) 273-300; MC Nussbaum *Women and human development: The capabilities approach* (2000) 1-29; Nussbaum (n 143) 35-37.

146 Nussbaum (n 111) 273-275, 277.

147 Nussbaum (n 111) 275.

Nussbaum lists ten 'central human capabilities'.¹⁴⁸ She also admits that the list she has curated is not the final list of capabilities, but is open-ended and has changed and can be changed over time.¹⁴⁹ Of particular importance to the conversation in this article is the fourth item titled 'Senses, imagination, thought'.¹⁵⁰ Nussbaum defines this central capability as the ability to 'use the senses, to imagine, think, and reason – and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training'.¹⁵¹

This is a recognition by Nussbaum that the right to education is one of the most essential rights to be realised, in order to create and foster capabilities such as economic independence, freedom from poverty, and development of self and country. Furthermore, as Nussbaum admits, while her list is neither exhaustive nor immune to change, it is argued here that the right to education should feature on any list of central human capabilities, because it is so salient. Also, importantly, the capabilities approach is a compelling way to view the subject of the realisation of fundamental rights.¹⁵² This approach looks beyond the first step of creating access to a right because, in terms of this approach, rights can only be said to have been realised where they have placed the subject 'in a position of capability to function in that area'.¹⁵³ Therefore, through this approach, stakeholders have to provide an education of such quality that it will equip the child immediately and in future, ever enhancing the child's capabilities.

5 The Sen-Nussbaum diagram of article 11(3): Linking the right to education to the theory of capabilities for children in Africa

For both Sen and Nussbaum, development ought to be defined in relation to 'what humans can and should be able to do'.¹⁵⁴ In other words, development should be viewed as the enhancement of certain human functionings as well as the expansion of their

148 These central human capabilities are life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment. For the full discussion on this list of capabilities, refer to Nussbaum (n 111) 287-288; Nussbaum (n 143) 41-42.

149 Nussbaum (n 111) 277; Nussbaum (n 143) 41-42.

150 Nussbaum (n 143) 41.

151 As above.

152 Nussbaum (n 143) 37.

153 As above.

154 Crocker (n 109) 586.

capabilities.¹⁵⁵ This makes for a good point of reflection because, is this not what the right to education aims to achieve?¹⁵⁶ Through a quality education, unfreedoms such as inequality are stripped away. Where the playing field is levelled, and children have equal access to equal education, the opportunities borne from the education are also equal. Furthermore, where the quality of the education made accessible is such that it positively contributes to the child's development, it will build on what the child can and should be able to do, thus expanding the child's capabilities. Therefore, the realisation of the right to education for all children is a doorway to the development for all of Africa.

In applying this approach to development to the right to education as encapsulated in article 11(3) of the African Children's Charter, we have to look at both what the Charter is doing, as well as what it should and can do in the future. Granted, the Charter only applies to children; however, the right to education is one of those rights that can be realised in childhood, but the benefits can be seen until death. Therefore, countries have to look at the right of the child to receive an education, through the lens of creating and fostering capabilities. In creating 'an Africa fit for children', (sustainable) development must be a prominent consideration.

Accordingly, the education system must grow children's capabilities now, so that in the future they can be placed in a position to also positively contribute to the development of their countries, and Africa as a whole.¹⁵⁷ Referencing the current *status quo*, Onuora-Oguno explains that Africa's underdevelopment is due to the lack of access to education.¹⁵⁸ Similarly, the African Children's Committee has also stated that the education of children in Africa is a key component of Africa's development agenda.¹⁵⁹ So too, in *Agenda 2063: The Africa we want* (Agenda 2063) the African Union Commission states that the Africa we want is 'an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children'.¹⁶⁰ Agenda 2040 adds that the

¹⁵⁵ As above.

¹⁵⁶ UNESCO et al recently wrote that the 'evidence of education's unmatched power to improve lives ... continues to accumulate'. See UNESCO et al (n 106) para 8.

¹⁵⁷ The bidirectional relationship between education and development, in the context of human rights, is discussed extensively in TN Khoza 'The end justifies the means: Realising the right to education for the girl child as a means to achieving economic growth and empowerment in Africa' in MN Amutabi (ed) *Africa's new deal* (2019) and is beyond the scope of this article.

¹⁵⁸ Onuora-Oguno (n 39) 1.

¹⁵⁹ African Children's Committee (n 1) 31.

¹⁶⁰ African Union Commission *Agenda 2063: The Africa we want* (Agenda 2063) (2015) 7.

education of children must be directed towards the promotion of sustainable development, through education on sustainable development, human rights and equality.¹⁶¹ As a result, the setting of realising the right to education for children in Africa, in order to develop Africa, is further emphasised.

Education has an important role to play in securing development.¹⁶² Furthermore, the denial of the right to education translates to the denial of the capability to fully enjoy the other rights that would enable an individual to develop to their full potential as well as participate meaningfully in society.¹⁶³ In other words, education is central for the enhancement of an individual's capacity and development, as well as the development of society.¹⁶⁴ As a result of this, education should also be able to adapt to the ever-changing needs of children and society, so that it can meaningfully impact the development of the individual and the collective.¹⁶⁵

It should be borne in the mind once again that the right to education is more than merely access to education. The right needs to place children in a position whereby they have the capabilities to work on their personal development and also contribute to the development of their countries, and continent. In other words, children are entitled to an education the quality of which is such that it equips children with the necessary tools for working life and to live a life they have reason to value. Consequently, the education must be complete and comprehensive.¹⁶⁶

Importantly, if education is to be used as an agent for development,¹⁶⁷ it must be guaranteed for all children, not a chosen or privileged few.¹⁶⁸ Against this backdrop, it is difficult to imagine an Africa where not all of its children are educated as being 'fit for children'. The Sen-Nussbaum diagram of article 11(3) injects the theory of capabilities into the conversation about the right to education for children in Africa. It does this by directing governments to 'think from the start about what obstacles there are to full and

161 African Children's Committee (n 1) 34.

162 Onuora-Oguno (n 39) 2.

163 F Veriava & F Coomans 'The right to education' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 60; Onuora-Oguno (n 39) 5.

164 Onuora-Oguno (n 39) 12.

165 As above.

166 Onuora-Oguno (n 39) 56.

167 Former South African President Thabo Mbeki stated that 'nowhere in the world has sustained development been attained without a well-functioning system of education' in his opening speech at the Conference on Education for African Renaissance in the Twenty-first Century, Johannesburg, South Africa (6 December 1999).

168 Onuora-Oguno (n 39) 56.

effective empowerment of all its [children], and to devise measures that address these obstacles'.¹⁶⁹ This approach to the realisation of the right may assist state parties to reconsider the quality of their education systems and to ensure that it is able to expand capabilities and develop countries.

6 Conclusion

If we are to view the education of children in Africa as a right that opens doors when realised, and shuts doors when denied, then we can begin to fully understand its significance and impact. Particularly in the context of development, the right to education is important on two levels. First, education is a driver of personal development as well as collective development. Where one receives an education, that education can be put to use, for example, in the labour market which will in turn grow the economy and so contribute to the development of the country and, eventually, the continent. Second, where development is viewed as freedom from unfreedoms such as poverty and capabilities and created through drivers such as education, children can use education as a vehicle through which they can live meaningful lives that they have reason to value. Where rights are realised, and their content is ultimately transposed into the realm of capabilities, the personal capacity for development, as well as subsequent development, of an individual child inevitably contributes to the overall development of the country. This is why, looking into the next 30 years and beyond, all stakeholders need to zone in on the provisions of article 11(3) and strengthen efforts to ensure that the children of Africa are able to access an education that is of good quality. The efforts to create a more educated youth must start immediately, as it is already later than we think. At all times, when considering the provision of the right to education, always in light of the best interests of the child, the capabilities that are fostered by that education must be considered. States are thus encouraged to apply the Sen-Nussbaum diagram of article 11(3) of the African Children's Charter.

¹⁶⁹ Nussbaum (n 143) 39.