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# AN INVESTIGATION INTO MENSTRUATION AND THE RIGHT TO EDUCATION: THE SPECIFIC CHALLENGES PUBERTY PRESENTS FOR ADOLESCENTS GIRLS.

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# ABSTRACT

The relationship between the onset of menses and young women's experience of education has, in recent years, been at the forefront of addressing what has become known as 'period poverty'. The specific challenges created by menstruation, particularly those created by a lack of access to menstrual products, are discussed with the intention of motivating for free products within the school environment. This is done from a constitutional rights-based perspective. The right to education, to equality, to dignity, and the principle of the best interest of the child are considered. In addition, the Human Capital Theory and Capabilities Theory are used to understand the immense benefits of education. As menstruation primarily affects women and girls, the importance of educating this demographic is explored and the consequences of under educating them investigated. The Sanitary Dignity Framework, which was published by the Department of Women, Youth, and Persons with Disabilities in 2019, is evaluated and shown to be a step in the right direction as far as addressing the puberty related issues faced by South African women and girls. Although primarily heuristic, this research did initially contemplate a small pilot study which intended to look at both the quantitative and qualitative experiences of girls at three schools in Gauteng. Sadly, the global COVID19 pandemic made this unfeasible, but the questionnaire and interview schedule developed for this purpose are included as they could potentially shape future research.

# I INTRODUCTION

'Period poverty' is a worldwide phenomenon. The situation where women and girls are unable to afford menstrual products, such as sanitary pads or tampons, is experienced globally. This is not merely an inconvenience that vaguely inhibits the day to day activities of these women and girls, but has the potential to profoundly affect their lives. What they can do, where they can be and for the purposes of this dissertation, whether they attend school is affected by menstrually related issues. Although the most obvious of these issues is access to menstrual products, this is a multifaceted problem that also includes pain management (and therefore access to analgesics) as well as access to sanitation and clean water. These problems are interrelated and often exacerbated by the cross-cultural stigma associated with menstruation, and a lack of menstruation specific puberty related education/information. This ultimately means that the lived experience and life opportunities of women and girls are shaped, amongst other things, by the onset of menarche in ways that men and boys do not experience or suffer. This carries the potential to create a sex based inequality in schooling, in gender roles and in society on a broad scale.

## *(a) Aims and Intentions*

The intention of this dissertation is to explore all these factors in an attempt to establish if this is true of South Africa, as it is of other countries. It is also the intention of this dissertation to motivate for the free provision of menstrual products for school girls, particularly those from impoverished backgrounds. This will be done primarily from a legal and rights perspective, but in setting the context for this, other important aspects of gender inequality will also be investigated to establish whether there is a relationship between education, economic opportunities and development, with particular reference to the education of girls and their individual well-being and participation in society.

Overall, therefore, this dissertation explores three main research questions, each of which has its own subsidiary questions. First, what is the relationship between education, individual well-being and economic development? What are the various theories that explain this relationship and their criticisms? How do these theories look at or understand the education of women? Why

does education improve the lives of women? With particular reference to South Africa, is the education of women of special importance and if so, why?

Secondly, this dissertation will ascertain whether menstruation negatively affects school attendance amongst girls. What does the research say regarding the unique challenges faced by adolescent girls concerning their education? Within the international sphere, what is the research on the subject of education and menstruation? What is the research on this topic within South Africa? Is their evidence of stigmatization and/or harm stemming from menstruation and therefore also from a lack of access to menstrual products in South Africa?

Finally, and perhaps most pertinent to an LLM, what are the legal ramifications and remedies concerning this stigmatization/harm, should it be shown to exist? What are the international and regional obligations to facilitate education, in particular the education of women? What are the constitutional and legal obligations of the Republic of South Africa to facilitate education, particularly that of girls and women? How could these legal obligations be achieved/facilitated and what are the limitations of the above legal obligations?

The economic motivation for the importance of education will be the first topic to be explored. This will be done from both the perspectives of the Human Capital Theory and the Capabilities Theory. The intention of addressing both of these two approaches is to consider the economic ramifications of education not only from a purely utilitarian standpoint but also from a more humanistic angle. The great importance of education, particularly for women will be explored with the intention of motivating for the provision of free menstrual products for the betterment of society as a whole and for women individually. This is of especial importance considering that the world is on the brink of the Fourth Industrial Revolution[1], meaning that now perhaps more than at any other time in history, education will radically affect the live time outcomes of people globally. Particularly women. Particularly in the global South and developing countries.

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[1] Schwab, Klaus *The Fourth Industrial Revolution* (2016) ch 3.

Once this is achieved, this dissertation will take an in-depth look at the specific challenges facing the Republic of South Africa regarding education, gender and adolescence. The contradictory information from the South African government and various NGOs regarding access to menstrual products will be investigated, as will school outcomes from a gender parity point of view. Moving on from here, education as a human right will be evaluated. The UN provisions on this matter will be addressed, as will the African Union's Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. This will lead to a brief look at the provision of free menstrual products to women and girls globally, not only in developed nations, but also closer to home. Why this is being done, how this is being done and how much money is being dedicated to these projects, will be analysed.

From there, South African law and legislation will be thoroughly explored. To begin with, the constitutional right to education will be addressed, as well as other relevant socio-economic rights and the duties that they might impose on the state to provide menstrual products. It will be shown that the education right imposes duties upon the state that require positive action, thus establishing a basis to argue for the free provision of menstrual products to school girls. This same argument could also be made for water and sanitation to facilitate overall sanitary dignity, but more on that later. This dissertation will then proceed to the right to equality, contained in the South African Constitution and also in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) which would likely regulate equality claims for access to menstrual products. It will then be argued that, because menstruation and therefore period poverty is only experienced by females, there is the potential for a sex-based inequality to arise because men and boys do not have to overcome this challenge in seeking an education. While this is not the fault of the "patriarchy" or a result of male discrimination, at least not directly, it is none-the-less a problem. If girls are missing school because of menstruation and their male counterparts are not, there is potential for women (on average) to access and receive less education, thus creating a sex based inequality. It should also be mentioned that a male orientated system might not necessarily be geared towards or accommodating of women's needs and bodies. The issue here is not that there is discrimination *by* men (although that is certainly possible), but rather that there is an inequality that affects women. Whether the discrimination in question is at the hands of men or women is secondary to the point.

The penultimate legal argument put forward here is that of the best interests of the child. This pertains specifically to girls and their needs. Although in an ideal society, all women would have free and easy access to menstrual products, the primary focus of this dissertation is to facilitate education and therefore the demographic it deals with is (for the most part) girls[2]: that is to say, human females aged under 18 years. For this reason, it seems logical that the best interests of the girl child should be considered when dealing with period poverty in this context. If a child's best interests should be of paramount importance in all matters relating to that child, it seems probable that having free access to menstrual products could be motivated by this constitutional principal, at least in part.

The last, and probably most important, legal argument to be made has to do with dignity. For a number of reasons this constitutional value and legal right is principal in motivating the need for free menstrual products in schools. The value of and legal right that is dignity underpins all of the other legal rights already mentioned, and will be a key issue going forward. The right to education, to equality, to the best interest of the child are all underpinned and significantly driven/motivated by the right to and value of dignity. Education is a key factor in actualising personal dignity. Without proper dignity one cannot say that they have true equality. The reason why society prioritises the best interests of the child is because children require a greater duty of care to protect and promote their dignity. This is because they do not have the capacity to do so for themselves. The value of the concept of dignity, quite literally, lies at the heart of all other rights. For this reason, it is of paramount importance when dealing with period poverty. Even if it could be shown that menstruation does not significantly contribute to school absenteeism, it is likely that the provision of free menstrual products would still be necessary for the dignity of women and girls. This theory will be discussed in full.

### *(b) A Sanitary Dignity Framework*

When this research was initially started in February of 2019, the most that had been committed to by government was a promise from the then President of South Africa, Jacob Zuma, to make

[2] Although it acknowledged that not all women menstruate, and that some non-binary and transgender men may, utilising the term 'people who menstruate' dehumanises the lived experience of roughly half the population of the world to little more than a biological function. For this reason, that term will not be utilised in this research.

sanitary pads available for poor women and girls.[3] This promise had been made during the ANC's 99th anniversary celebrations in 2011.[4] Eight years on very little had been done to realise this commitment, and so it appeared to be yet another empty promise. However, come June of 2019, the Department of Women, Youth and Persons with Disabilities published a very interesting document titled 'The Sanitary Dignity Framework',[5] hereto referred to as the Framework. Contained within this document is an extensive mandate to make sanitary dignity for women and girls progressively realisable. The exact details of this document and whether they address the issues faced by adolescent girl sufficiently, will be discussed at the end of this dissertation, suffice to say it is a model solution to period poverty and menarche related school absenteeism in South Africa. It covers everything from the provision of products to menstrual related education. It also acknowledges the importance of what it calls 'sanitary dignity'. That is to say, dignity associated with all things menstrual, including sanitation and access to water. The Framework also goes into detail regarding the importance of facilitating this sanitary dignity amongst impoverished girls, providing a rubric for how best to deploy these menstrual products starting at the schools most in need. It remains to be seem how well this Framework will be actualised, and how best to hold government to account if it fails to implement the suggestions put forward by the Department of Women, Youth and Persons with Disabilities, but if the Framework does half the things it intends to it will revolutionise how menarche is dealt with in South Africa, particularly how it is dealt with in schools.

### *(c) Methods and Methodology*

As with the majority of legal research, this dissertation is primarily heuristic in nature. That is to say, predominantly concerned with the analysis of documents. Be they academic articles, case law or journalism, the vast majority of the research contained here focuses on the written word and its analysis. A wide range of legal and social documents have been analysed and consulted over a year and a half research period (research proposal and dissertation), as well as case law focusing on equality and dignity, not to mention the right to education. In particular, relevant sections of

[3] Ground Up 'Seven years on, Zuma's promise of free sanitary pads has not been kept' available at https://www.thesouthafrican.com/zumas-promise-of-free-sanitary-pads-not-kept/ accessed on 22 September 2020.
[4] ibid.
[5] Department of Women, Youth and Persons with Disabilities 'The Sanitary Dignity Framework' 2019.

the Promotion of Equality and Prevention of Discrimination Act 4 of 2000 (PEPUDA) will be explored with the intention of showing an infringement on the grounds of sex/gender. Various databases, including JSTOR and JUTA were utilised, usually accessed through the Wits Library intranet.

In addition to this, the initial scope of this dissertation proposed some original research and had the Covid19 pandemic of 2020 not occurred, this would have been included. The intention was to do a small study, whereby the subjective and objective experiences of a limited number of South African school-girls in Gauteng could be gathered. Three socio-economically distinct schools were to be visited with the aim of administering a small questionnaire and conducting a few interviews with several female learners at each location. The questionnaire would be given to a larger group[6] than the interviews, with the goal of ascertaining self-reported school absenteeism as a result of menstruation, how often this occurred and the specific reasons for it. The free-form interviews[7] would be utilised to find a more contextual understanding of the experience of menstruation from the perspective of adolescent girls themselves.

It was hypothesized that school absenteeism would be worst amongst those girls in quintile 1, 2 and 3 schools in rural areas. The reason for this is that these particular girls would be doubly affected by not only being indigent (on a balance of probability), but also by the scarcity of menstrual products in those areas. The intention was to test this hypothesis by including one former model C or 'formerly white' school, one school located in or near to a township community, and one rural school. Had absenteeism been worst at the rural school and best (or least frequent) in the former model C, it would have lent credence to the hypothesis of this dissertation. Namely, that school absenteeism as a result of lack of access to menstrual products is worst amongst rural school girls, who on top of this, are those most likely to experience poverty and as such, be those in most need of assistance. Their education therefore would be of paramount importance and most worthy of government intervention.

[6] This larger group was to comprise of the female learners from one class in Grade 10, one class in Grade 11 and one class from Grade 12 at each school. A total of 9 classes.
[7] Conducted with two girls from each class, one who didn't report missing any school (a control) and one learner who did.

Sadly, this was not to be. The global pandemic that hit South Africa in March 2020 ultimately resulted in schools across the country being closed for the better part of three months.[8] Even when certain grades returned temporarily in June, I decided not to attempt the research study. Even if the schools had granted their permission for this research to take place, the risk of acting as a source of cross contamination seemed too high, particularly since the girls who I wished to interview seemed those most likely to be living with elderly high-risk relatives. A study of this nature would still be of value in my opinion, perhaps done at a later stage, and not for this purposes of this dissertation.

*(d) Chapter Outline*

Having broadly introduced the topic at hand here in chapter one, chapter two will look at two theories that explain the benefits of education. These are the Human Capital Theory and the Capabilities Approach, respectively. Chapter three explores the importance of educating women specifically. This is done with the intention of illustrating why the provision of free menstrual products is so important, the hypothesis being that if period poverty hinders the education of girls and women this has the potential to severely harm, not just the individual girl or woman, but also the society in which she finds herself. Following on from this chapter four locates this topic within the South African context. A lack of menstrual products, stigma associated with menses, the conflicting information regarding this issue available and the correlation between poverty and education in South Africa will all be addressed in the chapter. Moving on from this background information, the rights analysis portion of this dissertation will be undertaken. Chapter five will look at international and regional rights to education and South Africa's obligations to them. Chapter six will look at South Africa's constitutionally guaranteed rights, namely the right to education, the right to equality, the best interests of the child, the concept and right to dignity (and how it underlies and influences all other rights), and finally PEPUDA. The final chapter will address the Sanitary Dignity Framework and its potential implementation.

[8] South African Government 'School Calendar 2020' available at https://www.gov.za/about-sa/school-calendar, accessed on 22 September 2020.

## II HOW EDUCATION SHAPES ECONOMIC DEVELOPEMENT.

'education:

*noun*

1. The process of receiving or giving systematic instruction, especially at a school or university.
2. An enlightening experience.'[9]

We set great store by education. The manner and nature of this education has taken numerous forms over the course of history; our ancestors taught each other to hunt, in time to farm, and eventually to write. With each technological development the transmission of this knowledge has become more complex, more systematic and arguably more crucial. Gone are the days where a rudimentary understanding of the written word would suffice for most. Gone are the days where the majority of humankind's endeavours are fashioned purely by physical labour. We find ourselves at the beginning of the Fourth Industrial Revolution (4IR) and now more than ever the way in which we educate future generations will shape, not only how these individuals navigate and self-actualize their own lives, but how societies as a whole survive and thrive in this brave new world. Before moving on, it is perhaps worthwhile explaining the cumulative argument that this chapter is building.

In order to justify the provision of free menstrual products from a legal standpoint (the ultimate goal of this dissertation) several things must first be shown if not proved. First, that there is merit in being educated and having an educated population. Secondly, that there is particular benefit in educating the female population of any country. Thirdly, that period poverty exists in South Africa and that this period poverty causes school absenteeism and/or an infringement of dignity. Once these this background and context is shown to exist, a legal argument can then commence for the provision of free menstrual products. The intention of providing these free products is to promote the dignity and education of girls who experience period poverty, thus facilitating their education which will have been established as 'good' not just for them, but for society as a whole. The leg of the argument contained in this chapter focuses on explaining why

[9] Oxford Dictionary available at https://www.lexico.com/en/definition/education accessed on 10 May 2020.

education is advantageous, not only on an individual level (the Capabilities Approach), but also beneficial on a collective/economy based level (the Human Capital Theory). Having said this, the benefits of education will now be explored with the intention of explaining why education is something that any society should consider important.

The value inherent in education, generally speaking, falls into three broad categories: those of economic development, fostering 'capabilities' and promoting dignity. This chapter will primarily focus on the economic and capabilities arguments, but before that is delved into in any detail it might be worthwhile, first, to explain why these particular theories have been chosen. The Human Capital Theory (HCT) is a useful way in which to both understand and rationalise the cost benefits of education. South Africa, like many other countries around the world, works using a primarily capitalist system. In such systems is if often expedient to justify one or other course of action based on its potential to be financially beneficial. That is to say, motivation to take a course of action based on whether it makes money. Although this is perhaps a slightly crude way of putting it, the HCT, is of course, also concerned with economic growth and development not simply profit, but a course of action needs to be profitable (as opposed to running at a loss) in order to be justifiable. The course of action suggested in this dissertation is going to be the provision of free menstrual products (amongst other things) to school girls.

In order to justify this, the first argument that is going to be made here is that, simply put, it is going to make more money for South Africa than it is going to cost to have to do this. This does not necessarily mean it will do so today, or tomorrow, or even in five years. Simply, that the net benefit for South Africans in general will outstrip any individual costs of such a project. In order for this to happen, education and the importance thereof, needs to be understood. The HCT is an excellent means by which to do this. It highlights the importance of education and it shows that investing in it outweighs any individual cost of doing so.

However, it should be noted that societies do not educate their children simply to make money out of them and therefore the HCT is an imperfect way in which to fully justify the aforementioned course of action. For this reason, the Capabilities Theory will also be investigated. It is a far better way to evaluate education holistically and has the added benefit of taking an intersectional approach in doing so. This does not render the HCT, and it application, worthless

but rather should be seen to enhances it. With this in mind, the group and individual benefits of education will now be addressed through each conceptual framework.

### *(a) The Human Capital Theory*

While individual well-being is at the heart of this conversation, it is worthwhile first examining the macro implications of education for a society. For our purposes that society is South Africa. That we locate ourselves specifically in South Africa is relevant because not all countries are created equal, or rather; not all countries by virtue of their history find themselves equal on the global stage in the first quarter of the 21st Century. We are, like the rest of Africa, what is often referred to as a developing country. Although as a medium income country South Africa is not exactly the same as the rest of Africa, this indicates that amongst other issues we are a) generally low and sometimes medium income, b) not as socially, economically, and therefore technologically, advanced as many *developed* nations and c) that we would quite like to change this state of affairs.[10] The relevance of economic development, or lack thereof, is of particular importance because the economy of a country is inextricably linked to its education system.[11] Education is the key to economic development on a macro-level because it is presumed to be a crucial determinant in predicting individual productivity which then, in turn, eventually becomes that macro-level development itself.[12] Although the primary focus of this research is a legal discussion, it is helpful at this point to take a slight sojourn into the economic hypothesis that is the HCT. The reason why this economic theory is relevant has to do with how it explains the benefits of education and how it then, in turn, measures these benefits. For example, if the reason why children should be educated is to make them happy, how does one then measure the happiness? Because the HCT utilises the economy and how education affects it (and vice versa), the success of that economy can be used as a means to measure the success of the education. Although legislation should not be solely motivated by financial expediency, or lack thereof, it would be foolish to pretend that money is not a significant factor in the success of actualising any

[10] David Bloom, David Canning & Kevin Chan *Higher Education and Economic Development in Africa* (2006) i-iv.
[11] Emrullah Tan 'Human Capital Theory: A Holistic Criticism' (2014) 84 *Review of Educational Research* 411; Ilhan Ozturk 'The Role of Education in Economic Development: A Theoretical Perspective' (2001) 33 *Journal of Rural Development and Administration* 39.
[12] Ozturk op cit note 10 39; Tan op cit note 10 at 411-2.

legal rights. A legal right that a country cannot afford to enforce/protect/realise is a right in name only.

Baring this in mind, the HCT was initially developed in the period after the Second World War by Gary Becker, Jacob Mincer and Milton Friedman. At its most basic, it is a means to understand how education benefits individuals and society.[13] The tenets of HCT prescribe that knowledge and skills will increase the productivity of the individual in his or her workplace, that productivity will then increase GDP and in turn promote economic growth.[14] As such, human capital or *productive wealth* is 'embodied in labour, skills and knowledge'.[15] The *skills* and *knowledge* of that formula derive primarily from education.

The mechanism by which this takes place is multi-faceted but relatively straight forward. Theoretically, the greater the level of education an individual has attained, the greater the efficiency and innovation they will bring to their work in whatever field that work might be.[16] This increased productivity will also be facilitated, again through education, by enabling individuals to better adapt to and use new technology as it arises.[17] As already mentioned, this is of particular importance in reference to the 4IR. Jobs that rely solely on physical labour for their execution are growing increasingly scarce globally, and although sub-Saharan Africa lags behind much of the developed world in phasing these sorts of occupations out, this is not necessarily something to be lauded or complacent about.[18] Although South Africa is not designated as one of the Least Developed Countries (LDCs) by the United Nations, our education system is one of the poorest in terms of quality and outcomes, and this creates an interesting dichotomy.[19] On the one hand, one does not want make large swathes of any industry redundant by adopting wholescale automation (amongst many inevitable outcomes of the 4IR), at the same time attempting to stop the march of progress is an exercise in futility. While this point might seem overstated, it is simply meant to draw attention to the fact that as technology develops the gulf between the *haves* and *have nots*,

[13] Op cit note 9 at1.
[14] Op cit note 10 at 413; op cit note 9 at 21; op cite note 11 at 41.
[15] Op cit note 10 at 412.
[16] Op cit note 11 at 41; op cit note 10 at 412.
[17] Op cit note 9 at 15; op cit note11 at 40.
[18] Ratnakar Adhikari 'Fourth Industrial Revolution: From Least Developed Countries to Knowledge Societies' in Sara S. Aneel, Uzma T Haroon & Imrana Niazi (eds) *Corridors of Knowledge for Peace and Development* (2020) 43-7.
[19] Milfred Tonheim & Frank Matose 'South Africa: social mobility for a few?' 2013 *Norwegian Peacebuilding Resource Centre* 2. Op cit note 11 at 41-3.

will increasingly become a gulf between *those that have and can operate a computer* and *those who do not have and cannot operate a computer*. Education will play a huge role on deciding which side of this divide people find themselves on.

An interesting real life example of this conundrum is that of the American self-driving truck debate. A few years ago Silicon Valley, having made inroads in industries such as retail, manufacturing, and journalism, turned its attention to 'trucking' or rather the development of self-driving trucks.[20] On paper this seemed like an excellent idea. Automated trucks would be more efficient, the computers responsible for driving them would not get tired, would not drink and drive, nor take drugs, they would not get distracted by fellow drivers nor get road rage nor any other number of human behaviours that compromise driving safety.[21] Over 40 000 highway deaths happen every year in America and human error is largely attributed as responsible, making the development of a safer alternative tempting.[22] Though the technology is still not at the point where you would likely see 30 tons of truck barrelling down the road without a human behind the wheel, this is a tentative step in that direction. The problem? About 1.8 million Americans make their living driving trucks.[23] It is the single most common occupation amongst men in many states and the industry as a whole is worth about $700 billion.[24] A third of this goes towards compensating drivers themselves, the rest goes to the various industries supporting them.

When the issue was raised of what these drivers were supposed to do instead of 'trucking', it led in part to the creation of the now derisive hashtag #learntocode. The suggestion was, that instead of driving heavy weight vehicles cross-country, these truckers should simply 'learn to code'.[25] If the absurdity of this is not immediately apparent, realise that the implications here are that blue-collar workers, many of whom are middle aged, should address losing their jobs by *re-training themselves* to programme software.[26] Not only is this a rather unsympathetic approach to a genuine concern amongst predominantly working class people, it verges on being delusional. At

[20] Dominic Rushe 'End of the Road: Will automation put an end to the American Trucker?' available at https://www.theguardian.com/technology/2017/oct/10/american-trucker-automation-jobs, accessed on 10 May 2020.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ashe Schow 'Here's Where The 'Learn To Code' Meme Originated. Hint: Not 4Chan' available at https://www.dailywire.com/news/heres-where-learn-code-meme-originated-hint-not-ashe-schow accessed on 13 May 2020.
[26] Ibid.

a pinch, most individuals living in the developed world (many middle class individuals living in the developing world as well) could probably figure out how to add a printer to their home network, teaching oneself how to code on the other hand is a qualitatively different enterprise. Most, especially those without the prerequisite foundational information and infrastructure, would find this near impossible. Even those who are relatively well versed in computer technology, by virtue of perhaps using it on a daily basis, find programming difficult. Compound that with the fact that, in this example, we are talking about one of the most technologically developed countries in the world and the true nature of the problem becomes apparent. Now, the hashtag in question was a social media phenomenon, not a genuine policy suggestion, and as such it does not carry much in the way of value. However, this is a perfect example of what happens when you have a labour heavy occupation that stands on the brink (relatively speaking) of being automated. If the people doing this job cannot develop new skills, how will they make a living?

If this appears somewhat off topic for a dissertation concerning period poverty in Africa, consider the implication of this from a specifically South African perspective. Consider the plight of the South African domestic worker. This is a more pertinent example for our purposes than that of the American trucker, because in South Africa this occupation is overwhelmingly female.[27] Of the 1 029 000 domestic workers in South Africa, as of the end of 2019, only 3% were men.[28] If a technological development were to arise that had the potential to displace these almost 1 million women from the workforce would society (or social media) honestly suggest they 'learn to code'? Obviously it would be rather nice if this was a genuine option. A desk job in an air-conditioned office would undoubtedly, for many, be preferable to repetitive and often backbreaking domestic labour. However, the demographic of which we speak, probably almost to a woman, is unlikely to be in a position to attain these skills even if women are aware of them as a career path. This is conjecture, of course, but it stands to reason that without an education heavily focused on computer science, it is unlikely that a person would have the know-how to pursue such a career. This is without even considering how many South Africans actually have access to a computer to begin with.

[27] Statistics SA *Quarterly Labour Force Survey. Quarter 4: 2019* (2020) 62.

[28] Ibid.

What does this have to do with education and economic development? Well, as it turns out, quite a lot. Today's technological progress cannot be halted in an attempt to protect industries that may well find themselves obsolete as a result of it. To do so would be the equivalent of, and probably about as successful as, Morse code operators trying to prevent the invention and adoption of the telephone, or fax machine repairmen prohibiting the internet. This means that the global community, but more specifically South Africans, have to adapt and innovate, in particular the education system.

As already stated, education is positively correlated with personal development and therefore economic growth. It is important to further investigate the theoretical underpinnings of why this might be the case, and also why it is important not simply to see people as isolated economic units even when the primary objective of better educating them may well be to enhance economic growth.

The transformative qualities of education identified by the HCT generally falls into three main categories. Transformation by increased technological adoption, innovation, transformation by raising of the GDP through increased productivity, and what the HCT calls 'positive externalities'.[29] These positive externalities will be discussed in much more detail shortly, but for now productivity and innovation will be concentrated upon. These primary benefits are well understood to be transformative on both micro and macro levels, and because of this, there is generally a correlation between education and what we refer to as 'white-collar jobs'.[30] That is, those jobs that are primarily performed in an office and not generally requiring much in the way of physical labour. By no means should this imply that having a 'blue-collar' job automatically designates one as poorly educated, merely that individuals recognise the correlation between education and more lucrative occupations and, as such, they invest in education as a means of securing a higher income in the future.[31] Because of this, education is often viewed by individuals, and therefore society as a whole, as an investment. This is one of the reasons why the HCT hypothesises that there is a correlation between earnings and education.[32] There is certainly evidence to back this up. A topical example of this is that of the national COVID19 lockdown of

[29]Op cit note 9 at 21; op cit note 10 at 413.
[30] Op cit note 10 at 430. James J. Heckman 'The Economics of Inequality, the Value of Early Childhood Education.' (2011) *American Educator* 33.
[31] Op cit note 10 at 413.
[32] Op cit note 10 at 413.

2020. Almost 9 out of 10 graduates continued to receive their full income despite many working from home.[33] This is further illustrated by the fact that in the same year, 53.2% of those who were unemployed had less than matric, with graduates making up just 2% of those unemployed.[34] While correlation is certainly not proof of causation, in this case it is fair to assume the link between education and earnings is a positive causal correlation. As an aside, and to link back to a few earlier points, it seems quite likely that the reason most graduates continued to receive their full salaries is because they were able to work remotely as a result of the computer-heavy nature of many graduate occupations. This is speculative of course, many other graduates may have been essential workers (doctors, nurses, lawyers and the like), the point is that you cannot do a labour heavy or services occupation from home.

Returning to the example of the South African domestic worker, many women attribute their lack of access to education as the main reason for deciding on this occupation as a means of making a living.[35] It is also worth noting that poor treatment and exploitation by employers was, in part, attributed to the domestic workers' own lack of education.[36] This was an observation of the women themselves and while proving this would be hard, it seems that it is more a question of feeling empowered in interpersonal situations with someone who has authority over you rather than poorly educated people being deliberately victimised by their better educated employers.[37] Many of them also stated that it is through this occupation that they mean to provide a 'better education for their [own] children'.[38] The inference is clear: a better education than *they* themselves received. This is evidence that the connection between education and the ability to seek out economic opportunities, as well as exercise agency in them, is well understood on a practical and personal level.[39] Viewed from this prism, education is most certainly an investment, if not in their own personal future, then in that of their children or at the very least it is perceived to be.

[33] Statistics SA Quarterly Labour Force Survey. Quarter 3 (2020) 11.
[34] Ibid at 13.
[35] Op cit note 26 at 28-30.
[36] Op cit note 26 at 3 and 28.
[37] Op cit note 26 at 28.
[38] Op cite note 26 at 27.
[39] Op cit note 11 at 41.

This is however a rather clinical approach to facilitating education. People, after all, are not economy farms, simply put on this earth to be productive producers; the smallest economic unit from which the economy operates. Surely people deserve an education because it is fair and equitable that they should receive one? There is certainly merit to this argument, however, 'what is fair is not [always] economically efficient'.[40] This is of particular relevance when the economy one finds oneself in is of the *developing* kind. If money is scarce, or at least scarcer than desirable, it is not unreasonable for taxpayers to expect something in return for their investment into society as a whole.[41] In fact, when one considers that paying tax is not a voluntary activity, one might argue that publicaly visible dividends from their personal investment into society are not only reasonable, but crucial if public satisfaction and therefore public order is to be maintained. South Africans are not shy about voicing their disappointment at service delivery failures.[42] A government that takes and takes without giving back will eventually see its comeuppance.

The point of mentioning this is to reiterate why theories such as the HCT are useful. They provide a means of economically justifying an investment in education. It should be noted however, that this is an overly utilitarian means by which to justify something. The flip side of which would suggest a course of action may be avoided if it is not financially sound. For this reason, the Capabilities Approach will also be analysed, but more on that later. For now, it is enough to say that the above is something of a straw-man argument when it comes to the suggested economic benefits of investing in education.

Primary and secondary education are well documented and researched, as one of the most beneficial ventures on which a government can utilise its public spending.[43] Not only is the investment in education economically expedient, the benefits are both far reaching and tend to outweigh any individual investment into the system.[44] Now, it should be noted that this is chiefly associated with primary education, and that the public rate of returns (measured as a percentage of the initial investment cost) on advanced education are substantially lower.[45] More recent studies

[40] James J. Heckman 'The Economics of Inequality, the Value of Early Childhood Education.' (2011) *American Educator* 31
[41] ibid at32.
[42] Mail and Guardian 'Service Delivery Protests Archive' available at https://mg.co.za/tag/service-delivery-protests/, accessed on 24 June 2020.
[43] Op cit note 39 at 31-2; op cit note 9 at 15-7.
[44] Op cit note 39 at 31; op cit note 10 at 424.
[45] Op cit note 9 at 17.

have shown that this may no longer be the case, but this assumption is still widely used when developing international policy and so it bears mentioning.[46] This is important because when one talks about the benefits of education on fostering technological innovation, one is usually referring to *tertiary* education and not foundational. Tertiary education is more commonly associated with innovation, although a key point to make when noting this distinction is that only with a good educational foundation do most people gain access to tertiary education.[47] The better the quality of primary schooling, the more people per capita tend to attend university.[48] Primary schooling is therefore inextricably linked with tertiary education, and therefore technological innovation.

Before moving on it would be remiss not to mention that there are some valid criticisms of the above described hypothetical model put forward by the HCT. First, focusing entirely on education as a means for individual upliftment has a tendency to distract one from the need for social and economic reform of any kind within a society.[49] For example, if one is focused solely on trying to create (through education) as many billionaires as possible because it is a) nice to be a billionaire and b) you can the tax them accordingly, you might never consider whether having billionaires in a society is in fact desirable to begin with. Should, for example, any one individual have that much personal wealth? Does one person having that much wealth actually contribute to society as a whole? Does a person's capacity to contribute to society matter? Is any of this our business to begin with? These sorts of questions might not occur if one's sole purpose is simply to create more billionaires.

The second criticism of the HCT is that it over simplifies how you go about initiating social and economic reform, if that is indeed a problem that you acknowledge needs solving.[50] How do we ensure that those born into poverty do not remain there? Educate children so that they can have better economic opportunities. What do we do about gender based violence? Educate men to understand that this is not a reasonable means of conflict resolution. Is Foetal Alcohol Syndrome a problem in your society? Education will fix that! How do we create a society where women are better able to self-actualise their own futures? Give them more education? The problem here is

[46] Op cite note 9 at 17.
[47] Op cit note 9 at 21.
[48] Op cit note 9 at 17.
[49] Op cit note 10 at 430.
[50] Op cit note 10 at 430.

that you can effectively manipulate almost any societal ill to the point where quality education will become the most obvious solution. This criticism is valid, but possibly less so than the first.

If a problem, any problem, can be reduced to the point where a sound education is the remedy, you are faced with two possibilities. Either it is an over simplified solution, or maybe the solution is actually that simple. The HCT comes to the latter of those answers by way of increased productivity and innovation through education. While the destination the HCT arrives at is correct, the route it takes to get there is not. Or at least not entirely. Productivity is important of course, but so are what the HCT calls 'positive externalities'.[51] These secondary benefits are basically the individual knock-on secondary benefits of education.[52] Those things that are seen to benefit the individual rather than the society in which he or she exists. These include, but are not limited to: greater social mobility, lower personal unemployment, a greater ability to save and invest, a higher salary, better health, and an overall higher quality of life.[53] Now, granted, the HCT has a tendency to devolve into attributing the merits of a long life as primarily beneficial because that gives you a longer time to be productive and pay tax, and thus the argument becomes somewhat circular. This notwithstanding, there is still something to be said for positive externalities being beneficial in and of themselves.

The merits, for example, of a long life are in having a long life. Enjoying good health during that long life is beneficial for its own sake, it does not need to benefit society as a whole much less *make money* for that society. If one did want to put a positive economic spin on it though, you could point out that healthy people cost the tax payer less, but be that as it may.[54] The point to make here is that the *added extras* that flow from education may be in and of themselves the point, rather than merely an economic imperative.[55] If one is going to view them as such, and in part this dissertation intends to do so, a broader theoretical framework will need to be utilised. The HCT has its utility, but treating people purely as tax farms so as to facilitate the creation of further and more productive tax farms, over-commodifies the human experience to the point of

[51] Op cit note 10 at 424.
[52] Op cite note 9 at 15.
[53] Op cite note 10 at 424; op cit note 9 at 1 and 15; op cit note 11 at 42.
[54] Op cite note 9 at 15.
[55] Op cite note 39 at 31.

abstraction. It is of course important because we do in fact live in a capitalistic world, whether we like that or not, but this is not the whole picture. Nor should it be treated as such.

*(b) The Capabilities Approach*

A better theory for understanding the value of education may well be that of the Capabilities Approach/Theory (CA). Amartya Sen, a pioneer of this particular theory, suggests that rather than concentrating on the betterment of society as a whole, we should rather:

> '…focus on what people are able to do and be, on the quality of their life, and on removing obstacles in their lives so that they have more freedom to live the kind of life that, upon reflection, they have reason to value.'[56]

As already pointed out, the HCT is a useful, but perhaps excessively utilitarian approach to looking at the benefits of education. The reason this is a problem is because things that are very utilitarian do not account for the full human experience and therefore have unexpected and, in some cases, negative consequences. This is relevant to this discussion particularly as it pertains to gender. If, for example, women in a particular society are responsible for the overwhelming majority of kin-care, that is to say the care of children and the elderly predominantly within the domestic realm, those responsible for their education as children might not consider it much of an individual investment.[57] To further elucidate this point, imagine a family in a part of the world were women spend the majority of their adult lives in the domestic sphere doing important, but unpaid, labour. If this family has a son *and* a daughter it is quite possibly they may decide to invest more in the education of their son than on that of their daughter because their investment in her has uncertain returns.[58] This would be further exacerbated in developing countries with widespread poverty because of a scarcity of resources.[59] This is a primary criticism of the HCT because if one is only motivated to facilitate education because of its perceived financial dividends, particularly on an individual level, the above circumstance is entirely understandable. Prioritising

[56] Ingrid Robeyns 'The Capabilities Approach: A Theoretical Survey' (2005) 6 *Journal of Human Development* 94.
[57] Ingrid Robeyns 'Three models of education: Rights, capabilities and human capital.' (2006) 4 *Theory and Research in Education* 74.
[58] Ibid at 74.
[59] Ibid at 74.

the education of ones' male children is a better investment for a family because the relative chances of that investment paying back are greater. In most developing countries daughters become part of their husband's families. Your son will care for you in your twilight years making him a better financial investment as his own wealth creation will ultimately benefit you. Even in first world countries this would be the case because of the gender pay gap, irrespective of what actually causes that gap.[60] This creates obvious problems. For one, it reinforces gender based discrimination. For another, it makes that discrimination, if not encouraged, certainly permissible.

This point may seem to be over argued, but it is very important. In 2002 there was an Oxfam initiative to teach Muslim woman to read in Pakistan.[61] Now, from a cost benefit analysis this project was not a resounding success because there was not much in the way of a demand for female labour in this area.[62] However, that is not to say these women took nothing away from this initiative, they 'learned that they are equal to men, that they do not need to suffer abuse, and that literate women can solve their own problems'.[63] The HCT does not account for these less tangible *side effects* of educating women, much less does it provide a means to promote them. The CA, however, does.

The CA provides a means for understanding how to promote, through education, a person's capacity to function. Capabilities, in this theory, are effectively a means of functioning within life.[64] They are the 'constituent elements of living'.[65] The above example results in a women knowing she is equal to men, that she need not suffer abuse, that literacy empowers her. These are capabilities. The 'functionings' they promote are what can be achieved by utilising one's capabilities.[66] These capabilities are therefore units of analysis, in much the same way that the HCT uses money (and therefore the economy at a macro level) as its unit of analysis. This means that the CA takes account of the inequalities a person may face in a way the HCT does not.[67]

[60] Ibid at 73.
[61] Ibid at 74.
[62] Ibis at 74.
[63] Ibid at 74.
[64] Ibid at 78.
[65] Ibid at 78.
[66] Ibid at 78.
[67] Ibid at 79.

This is relevant because education, or rather a lack thereof, could be seen as one of these obstacles. This theory is also relevant because, unlike the HCT, it provides us with a paradigm by which we might conceptualise inequality, which is arguably a bigger problem in South Africa than poverty per se. The HCT provides a means by which education can alleviate poverty, but does not provide a framework for dealing with inequality, whereas the CA does so. This is because it acknowledges that substantive opportunities (otherwise known as capabilities) vary from person to person and that therefore what a person can effectively be and do will likewise vary depending on their circumstances.[68] As an aside, the CA also provides a basis for motivating rights claims.[69] For example, a child can be said to have the fundamental right to education because it enables that child to better her life. The *capability* to have a better life is what motivates this fundamental right. If education did not give children the *capability* to do anything, it could not be said to be a fundamental right.

No conversation about the CA is complete without mentioning Martha Nussbaum's contributions to this theory. This is particularly relevant because her research has developed capabilities to include gender and gender/sex is at the heart of period poverty. It is also of particular interest because she focuses on women in developing countries which for the purposes of this dissertation is especially relevant.[70] Part of the reason for her focus on the developing world is because poverty and gender inequality are strongly correlated.[71] This intersection between poverty and gender inequality results in a profound failure of central human capabilities.[72] For this reason you can see lower literacy rates, lower school enrolment, lower wages and poorer nutrition amongst women globally.[73] These are all capabilities and they are all effected negatively when they intersect with gender/sex.

Most interestingly in Nussbaum's approach is how her framing of the CA can be used to influence governmental policy, which is ultimately what this research is intended to help motivate. Nussbaum sees capabilities as 'a foundation for basic political principles that should underwrite

[68] Op cit note 55 at 94-5.
[69] Op cit note 56 at 82.
[70] Martha C. Nussbaum 'Feminism and International Development' in Martha C. Nussbaum *Women and Human Development: The Capabilities Approach* (2000) 3.
[71] Ibid at 3.
[72] Ibid at 3.
[73] Ibid at 3.

constitutional guarantees'.[74] This is a fascinating way in which to utilise the CA, because it creates a means of using it in a very practical sense. To break this concept down, one can ask a series of questions, for example: why have the right to education contained in the Constitution? Using Nussbaum's formulation of the CA, the answer would be: because education is a *capability* that maximises wellbeing. Therefore, the value of education can be seen as the foundation of a basic political principle that guarantees the constitutional *right* to education contained in the South African Constitution.

This highlights the power dynamics between the educated and the uneducated (for example) and their relative capacity to self-actualise. Although this might be a slightly oversimplified way of viewing the world, it does provide an interesting means by which to conceptualise gender using the CA.[75] The underlying issue here, however is not conceptualised in the same way as the example of education presented above. The formulation should rather be that gender/sex based equality is the foundation of a basic political principle that guarantees the constitutional *right* to equality (specifically gender/sex based equality in this case) and that this is because there is a power imbalance between men and women in much the same way that there is between the educated and the uneducated. This means that gender, albeit in an indirect way, is a capability with regards to the CA.[76] To further break this down, gender/sex based equality is a capability because this equality maximises wellbeing for women. If this is so, then the value of this type of equality can be seen as the foundation of a basic political principle. That principle will then in turn underlie and assure the constitutional right to sex and gender based equality. There will be considerably more discussed regarding equality and the value of and right to it later on. It is however useful to bare this in mind going forward even if, for the moment, the CA's approach to understanding the value of education is the topic at hand.

### *(c) Conclusion*

[74] Martha C. Nussbaum 'In Defence of Universal Values' in Martha C. Nussbaum *Women and Human Development: The Capabilities Approach* (2000) 70.
[75] Ibid at 70.
[76] Ibid at 72-5.

Irrespective of whether one prefers the HCT, the CA, or a combination of both, education is certainly valued for its capacity to alleviate poverty the world over, and South Africa is no exception to this. Our educational attainment at upper secondary level is among the best in sub-Saharan Africa, and is widely understood to be crucial in obtaining economic security through economic opportunities.[77] This is not just the case on an individual level, it is also recognised by the South African government and this is borne out in the National Development Plan (NDP). The link between a good education and economic success is well developed and understood in the NDP.[78] Furthermore it also follows the CA in its formation of a plan for greater equality and prosperity by 2030.[79] Contained in the NDP is a focus on the various critical capabilities that are required to properly transform both society and the economy.[80] This is because redressing historical injustices is not sufficient in and of itself when talking about transformation.[81] One must also facilitate the capacity of individuals to help themselves. In order to do this one does have to facilitate what the CA would refer to as *capabilities*. These capabilities include social opportunities that stem from public services that include, amongst other things, education.[82] While things like access to quality health care are also important, nothing enables an individual to help themselves in quite the same way as a good education. This is especially true when it comes to alleviating poverty, something that is still a major problem within the South African context.

The inverse relationship between the amount of education one receives and experiencing poverty is borne out by the statistics. Those least likely to experience poverty are those who have attained a higher qualification, while those with 'none' or 'some primary' education rank the highest in poverty measures.[83] The difference is so stark, in fact, that those with no or some primary education account for 23.2% of the poverty share, whilst those with higher education account for only 2.1%.[84] While primary school enrolment has improved, since 1994, to include approximately 98% of all children in South Africa, the prognosis for the completion of secondary

[77] Carol E. Kaufman, Thea de Wet, and Jonathan Stadler 'Adolescent Pregnancy and Parenthood in South Africa' (2001) 32 *Studies in Family Planning* 155.
[78] National Planning Commission 'National Development Plan: 2030' (2013) 25-29.
[79] Ibid at 26.
[80] Ibid at 27.
[81] Ibid at 27.
[82] Ibid at 27.
[83] Statistics SA *Poverty Trends in South Africa. An Examination of Absolute Poverty between 2006 and 2015* (2017) 61-4.
[84] Ibid at 64.

and tertiary education is not as optimistic.[85] For the 1 122 114 pupils enrolled in Grade 1 in 2002, there were only 640 714 pupils enrolled in Grade 12 last year.[86] While we do not know exactly how many students have repeated grades, how often this happens, and the exact nature of student attrition for other reasons, from the above figures it appears that only about 57% of this particular cohort had completed Grades 1 through 12. A small study from 2013 even suggests that, of people aged 20 or older, as few as 27.4% had completed secondary education, and even fewer tertiary education (11.5%).[87] Whatever the exact statistics, the prognosis is dire, particularly when one realises that this disproportionately affects black South Africans.[88] As most black children do not have access to quality education, their chances of finding jobs and increasing their earning potential is stymied, not to mention their social mobility hindered.[89] This would be a travesty in any country, but has particularly negative implications when one considers our not so distant history. Colonialism and the apartheid regime fundamentally inhibited the advancement of black South Africans, and we now have an education system that might not be adequately equipped to facilitate their potential for self-actualisation in a democratic era. This is potentially a huge problem in and of itself, but what happens when the intersection between education and race collides with gender?

[85]Milfred Tonheim & Frank Matose 'South Africa: social mobility for a few?' 2013 *Norwegian Peacebuilding Resource Centre* at 1.
[86] DoE *Education Statistics in South Africa 2008* (2010) 11; School Realities 2019, EMIS19/2/015, 3.
[87] Op cit note 84 at 1.
[88] National Planning Commission 'National Development Plan 2030. Executive Summary' 38.
[89] Ibid.

## III WHY EDUCATING WOMEN MATTERS.

> 'If we educate a boy, we educate one person. If we educate a girl, we educate a family—and a whole nation.'[90]

When it comes to the education of women and its effect on the economy and society, there are few more apt statements. This section will look broadly at the benefits, both collective and individual, of educating women. As already stated education is important for all, but an argument for why it is especially important for women needs to be made. Women have very specific reproductive challenges as a result of being able to become pregnant. This interrelates with menstruation of course (and therefore obviously menarche related school absenteeism), but there are a variety of other matters that are influenced by access to education. Contraceptive usage, age of marriage, number of children and infant mortality rates are all positively affected by educating women. This will be unpacked in detail, as will the gendered barriers created by the capacity to bear children. Although some of this might come across as Eurocentric in nature, it is important to emphasize that this is mostly about maximising choice and thus maximising the capacity for women to choose how they wish to live their lives. This is not a Eurocentric value. Furthermore, educated women are good for the economy of a country, they are good for their own children, but at the end of the day it is arguably more important that that education is simply good for women in and of themselves. This viewpoint is heavily influenced by the CA, particularly Nussbaum's formation of it. This will be examined, as will the HCT and how it understands the importance of educating women from a purely economic standpoint.

First off, a look at the established research on this topic should be undertaken. The literature is almost unanimous in its agreement that the positive externalities, both intrinsic and economic, of educating women are immense. Simply put, the third party benefits created by educating women outweigh any individual costs attributed to that education. Increased education amongst women is also positively linked with having fewer children, lower infant mortality rates, and the children of educated mothers receiving more education themselves.[91] These in turn have

[90] Stephan Knowles, Paula K. Lorgelly and Dorian Owen 'Are educational gender gaps a brake on economic development? Some cross-country empirical evidence.' (2002) 54 *Oxford Economic Papers* 118.
[91] Marcel Fafchamps and Forhad Shilpi 'Education and Household Welfare' (2014) 63 *Economic Development and Cultural Change* 74-6; Stephan Klasen 'Low Schooling for Girls, Slower Growth for All? Cross-Country Evidence on the Effect of Gender Inequality in Education on Economic Growth' (2002) 16 *The World Bank Economic Review*

a positive net effect on the next generation and have been shown to facilitate economic growth.[92] It stands to reason that, if resources are scarce, having fewer children amongst which to distribute them can only be advantageous. Those children will then, theoretically, have more access to better quality education for longer periods of time, and so it is hoped the cycle would repeat itself.[93] The benefits of a lower infant mortality rate hardly need to be unpacked, but it is worth noting why education seems to have this positive effect.

Women who are better educated tend to have greater access to choice, for themselves and for their families. This in turn, translates into well-being because choice and the ability to self-actualise one's future are interconnected. This relates back to the CA as the capacity to self-actualise one's future is a supreme example of having 'choice'. For women this has very specific implications. There is a positive correlation between a higher number of years of education attained for women and a later average age of marriage, there is also a positive relationship between years of education and contraception usage.[94] Simply put, women who have more years of education get married later in life and use more contraception than their less educated peers. This lowers overall fertility, but also lowers infant mortality as women are more able to plan their families and understand their own reproductive health.[95] This is not to suggest that only uneducated women, or women with minimal education, seek to have large families or marry at a young age, but rather to emphasize the element of choice in these matters and how the conditions of one's life, in this case less access to education, might influence this. Education is immensely important in facilitating choice and therefore important for the intrinsic subjective well-being of young women.

### *(a) Women and Education Globally*

Now, this is probably beginning to sound stereotypically 'western'. Fewer children? Marrying at a latter age? More contraceptive usage? Surely these are the values of a middle class white woman

346; Stephan Klasen & Francesca Lamanna 'The Impact of Gender Inequality in Education and Employment on Economic Growth: New Evidence for a Panel of Countries.' (2009) 15 *Feminist Economics* 92-4.

[92] Klasen op cit note 90 at 350-2; Klasen & Lamanna op cit note 90 at 92.

[93] Klasen op cit note 90 at 352.

[94] T. Paul Schultz 'Chapter 2: A Return to Women's Education' in Elizabeth M. King & M. Anne King (eds) Women's Education in Developing Countries. Barriers, Benefits and Policy (1991) 58-60.

[95] Ibid at 60. Op cit note 11 at 41.

in a First World country? Perhaps it is not fair or right to superimpose them on to other cultures and in other countries? The problem is that this is not in fact the case. Japan's mean age of marriage for women is 31, the average number of children a Japanese woman has is 1,46.[96] Women in South Korea, on average, only marry at 32 and have even fewer children at 1,30.[97] Suggesting that these woman have somehow been indoctrinated by the West gives those nations far too much credit, and deprives the women in the afore-mentioned countries of far too much agency. Going back to the CA, Nussbaum's hypothesis on why we see this cross-culturally has a lot to do with what she would refer to as universal values.[98] That is to say that there are certain things that are true irrespective of one's socio-cultural and temporal location. For example, while it is impossible to know for certain, it is highly unlikely that there has ever lived a woman who wished to die in childbirth at the age of 14, irrespective of her culture, society or the time at which she lived. This links to what the CA would consider certain fundamental values. These are life, bodily integrity, bodily health, and being able to use your senses, imagination and thought.[99] These are not exclusively Western values and so it is possible that are some things, like education, which are universally *good*.

For the above reasons, a better explanation for the statistics concerning Japan and South Korea may be education. In both countries educational attainment is very high, the percentage of women between the ages of 25 and 54 in Japan who have completed secondary school is 99.9%.[100] As pointed out, economic possibilities and choice (or the ability to self-actualise) are not exclusively Western values.[101] Interestingly, Japan and South Korea rank 19th and 22nd in the Human Development Index respectively.[102] Both countries score very highly on the Gender Development Index and very low on the Gender Inequality Index as well.[103] Nigeria, conversely, where only 48.5% of females complete secondary education[104] has a score of 0.801 on the Gender

[96] The Global Gender Gap Report 2018 ISBN-13: 978-2-940631-00-1, 140.
[97] Ibid at 148
[98] Op cite note 73 at 78
[99] Op cite not 73 at 78.
[100]Op cit note 95 at 140 and 148.
[101] Martha Nussbaum 'Women & Equality: The Capabilities Approach' in Martha Fetherolf Loutfi (eds) *Women, Gender and Work: What is Equality and How do We Get There?* (2001) 48.
[102] UN Development Programme 'Gender Development Index' available at http://hdr.undp.org/en/content/gender-development-index-gdi accessed on 28 November 2020.
[103] Ibid.
[104] Op cit note 95 at 210.

Inequality Index which is very high. [105] South Africa on the other hand, has a Gender Inequality Index score of 0.422[106] and 65.6% of females between the ages of 25 and 54 have secondary education.[107] It would be over simplistic to attribute the Gender Inequality Index ratings entirely to education, and as such further empirical studies would be needed to investigate the correlation between educational attainment and gender equality.

It is also perhaps worthwhile noting at this point that *causal*, *correlation* and *positive correlation*[108] are not terms used interchangeably for the purposes of this work. The term causal refers to a situation where one thing literally causes another thing to happen. Correlation means that there is a link or relationship between two or more things. A positive correlation, on the other hand, can be said to exist where there is a linear relationship between variables or "things". For example, there is causal relationship between smoking and lung damage. There is a correlation between exercise and obesity, and there is a plausible positive causal correlation between being well educated and finding employment. This is worth bearing in mind, because many of the conclusions drawn going forward clearly show correlations, but this is not to say they are definitively causal in nature.

In conjunction with this, and in part because of it, the consequences of education for the overall workforce of a country (and therefore, the economy) should also be addressed. As has already been pointed out, education appears to be interrelated with various measures of success. Certainly a correlation between tertiary education and finding employment exists, even if that job does not automatically facilitate professional or financial success.[109] Worth noting however, are the consequences of gender unequal employment stemming from gender unequal education in developing countries. Not only do fewer girls get access to economic opportunities, but the exclusion of girls from the education system results in the inclusion of less able or qualified boys, and this has the subsequent effect of less able or qualified men being in the workforce.[110] While this may seem a little harsh, the theory is reasonably straight-forward. Boys and girls have

[105] Op cite note 101.
[106] Op cit note 101.
[107] Op cit note 95 at 252.
[108] Babbie, Earl 'The Practice of Social Research' (1995) 64, 68-9.
[109] Arianne De Lannoy et al, *What Drives Youth Unemployment and What Interventions Help? A Systematic Overview of the Evidence and a Theory of Change.* (2018) 31-2.
[110] Klaren op cit note 90 at 351; Klaren & Lamanna op cit note 90 at 93.

relatively similar aptitude when it comes to most innate abilities, including intelligence.[111] If we work on the assumption that intellectually gifted individuals will gravitate towards seeking out more education, then the distribution of highly educated people should be fairly gender equal.[112] If however, girls are excluded on any basis other than their aptitude (societal gender norms or a preference for education boys, for example) then the 'pool of talent from which to draw' has been artificially restricted and 'less qualified boys' will have greater access to education.[113] This tends to have negative consequences for the economy of a country as a whole, and is detrimental to the well-being of girls who are then potentially "left behind". This argument is more heavily influenced by the HCT than the CA, which as has been pointed out tends towards focusing on the economic wellbeing of a country rather than individual wellbeing.

Now, economic development is facilitated by having access to the best workforce possible, and the best possible workforce is generally supposed to be the best educated. This is based on the HCT and is a valid point, but it fails to take into consideration issues of gender bias and sexism. This is of particular importance because if the pool of talent has been artificially restricted, then employees are forced to draw from a labour source that has less average ability than it might otherwise.[114] That artificial restriction can and does take the form of gender biases and sexism. In this way, gender gaps in education are believed to cause gender gaps in employment, and this in turn hinders economic development. While this gender gap has slowly been closing in more developed countries, it remains a significant problem within the developing world, where female literacy, secondary school attendance, employment and wages still lag behind those of men.[115] In Nepal, for example, only 38% of girl's enrolled in secondary education, in comparison to 48% of their male peers.[116] In Tanzania a meagre 17% of girls enrolled in secondary school as of a 2004 study.[117] By contrast, Norway, Sweden and Finland (3 of the 4 countries with the lowest gender

[111] Klaren op cit note 90 at 351-2; Klaren & Lamanna op cit note 90 at 93.
[112] Klaren op cit note 90 at 352.
[113] Klaren & Lamanna op cit note 90 at 93.
[114] Klaren & Lamanna op cit note 90 at 94.
[115] Marni Sommer 'where the education system and women's bodies collide: the social and health impact of girl's experiences of menstruationand schooling in Tanzania' (2010) 33 *Journal of Adolescence* 521; Anna Mugambi & Thomas Georgas 'Menstruation as an education and gender indicator affecting girl's dropping out of school' (2016) 5 *International Journal of Education Research and Development* 004; Emily Oster and Rebecca Thornton *Menstruation and Education in Nepal* (working paper, National Bureau of Economic Research, 2009) 2; Fafchamps & Shilpi op cit note 90 at 85; Klasen op cit note 90 at 345, 351; op cit note 51 at 1-3.
[116] Oster and Thornton op cit note 113 at 2.
[117] Sommer op cit note 113 at 521.

gaps worldwide) have an average secondary school attainment amongst females of 75.1%.[118] Their female unemployment rate is 3.9%, 6.6% and 8.6% respectively.[119] In the same year, female unemployment in South Africa was 27.5%.[120] Based on the above figures, a positive correlation between education and employment certainly seems plausible. Furthermore, the relationship between employment and economic development within a country likewise looks interrelated.

*(b) Gendered Barriers and Menstruation*

As pointed out already, some of the reasons that boys attain more schooling than girls have to do with societal gender norms and a preference for educating boys. Both of these are more prevalent in developing countries, where feminism and female emancipation are still burgeoning ideologies, and where traditional female socio-cultural behaviours are still strongly encouraged.[121] One of the other issues is that in situations where resources are scarce (for example where families are fiscally constrained) families may choose to educate their sons rather than their daughters because of the perceived returns on that education. This was discussed in the previous section but it is worth repeating. Compound that with the fact that in many developing countries (and to be honest in First World countries as well, but to a lesser extent) young women and girls are often encouraged to partake in unpaid domestic duties, while their male counterparts are encouraged to find paid work outside the home. This likely increases dropout rates amongst females even before one considers the impact of menstruation on schooling. Another problem to contend with is that of teenage pregnancy. Although there are no legal barriers in South Africa preventing girls from completing their education while pregnant or afterwards, it is likely that the social taboos around this issue create barriers for these young women.[122] Although there are certainly challenges specific to boys and young men (how many teenage boys drop out of school to help support their families, for example?), the many challenges for girls and women are primarily rooted in their biology. Specifically, they are rooted in their reproductive potential and following from that, the

[118] Op cit note 95 at 100, 212, 260.
[119] Op cit note 95 at 100, 212, 260.
[120] Op cit note 95 at 252.
[121] Marni Sommer et al 'A comparison of the menstruation and education experiences of girls in Tanzania, Ghana, Cambodia and Ethiopia' (2015) 45 *Compare* 592; Sommer op cit note 72 at 525.
[122] Mchunu, G., Petlzer, K., Tutshana, B. & Seutlwadi, L. 'Adolescent pregnancy and associated factors in South African youth' (2012) *African Health Sciences* 426.

taboos and stigma associated with their reproductive systems. This is not intended to be overly deterministic, simply being female and having the capacity to bare children (and everything that goes with this including menstruation) does not automatically mean one will or should face challenges. However, in a world that has historically been shaped by and for men, it is understandable that the socio-cultural systems we have inherited might be at logger-heads with the female body.

While the link between educational attainment and poverty is often researched through the lens of culture or reproductive health, the specific challenges poverty creates for girls dealing with menses has often fallen by the wayside.[123] Indeed, menstruation and its effect on education in developing countries, has only really started to be investigated. Even in South Africa, which has a relatively equal female to male student ratio, studies have rather focused on teenage pregnancy, knowledge of reproductive biology and contraceptive usage, not to mention HIV/AIDS.[124] This creates an interesting conundrum when looking at the way girls experience puberty in our country. Information about sexually transmitted diseases, teenage pregnancy and gender based violence abound, but not much has been researched regarding menstruation and education within the specific context of the Republic of South Africa.

This becomes of significance when one considers the impact menarche has on the lives of young women. A lack of access to menstrual products is a significant part of what this research is focused on, but is just one facet of a much larger picture. The social stigma associated with menstrual cycles is potentially as great a barrier to education as a lack of sanitary products. Discussed later and in more detail, is a Nepalese study where girls were given menstrual cups in the hope that this would decrease menstrual related school absenteeism. It did not achieve this, because social taboos existed that restricted certain activities while menstruating which meant that a lack of access to products was not to blame.[125] For now, the focus of this dissertation will be absenteeism as a direct result of a lack of access to products, but it is important to remember that stigma may be playing a greater role than previously realised. That said, there may be a great

[123] Sommer et al op cit note 98 at 590; Sommer op cit note 113 at 522.
[124] Op cit note 48 at 147; Sommer et al op cit note 98 at 590.
[125] Oster & Thornton op cit note 113 at 60.

many school age girls in our country who, for lack of financial resources, are missing significant periods of school because they do not have access to the aforementioned products.

## IV EDUCATION, GENDER AND ADOLESCENCE IN THE REPUBLIC OF SOUTH AFRICA.

The problem with managing menses for young women and girls does not simply concern access to menstrual products. This is important, of course, but the issue is broader. A lack of access to products may indeed result in school absenteeism, but the stigma associated with menses and the potential for harassment (as a result of menstrual leakage, for example) are also pressing concerns. Any solution proposed for addressing period poverty in South Africa would have to encompass these issues as well. Access to proper sanitation and analgesics are also a priority, as are the social taboos and stigma which are probably at the heart of most menses related harassment. The issue with sanitation is that the management of menses does require access to clean water and a hygienic means to dispose of non-reusable menstrual products. Lack of access to these in the school environment may be contributing to school absenteeism as much as lack of access to the products themselves. Analgesics are also of importance because pain management cannot categorically be ruled out as at least a contributing factor in managing menses and preventing school absenteeism. Unfortunately, unlike the provision of free menstrual products, the provision of free painkillers is more complicated, but this will be discussed later in the section dealing with the Sanitary Dignity Framework.

### *(a) Menstruation and School Absenteeism*

Before addressing any other issues, such as the Sanitary Dignity Framework, it is important to first locate where South Africa fits into the topic at hand. Specifically, where South Africa stands regarding menstrually related school absenteeism. To do this, whether or not girls are in fact missing school will have to be discussed. There is contradictory information on this. Government has suggested that most girls have access to menstrual products, but various NGOs, such as the Imbumba Foundation and Equal Education, disagree. On top of that, absenteeism is a reason in and of itself, meaning one cannot assume girls missing school are necessarily doing so as a result of menses, or menstrually related issues, whatever those may be. Other African countries appear to have a marked difference between primary school attendance among girls and secondary school attendance when compared to their male counterparts. South Africa, on the other hand, has almost perfect gender parity when it comes to this matter, which suggest there may not be much in the

way of a problem. All this will be discussed in detail later. Also examined, is the fact that those who are most likely to experience poverty in South Africa are the exact demographic that probably have the least access to menstrual products. While speculative, the material information available on education, gender and adolescence in South Africa must be dealt with first.

Exact data that investigates the correlation between menstruation, lack of sanitary products and absenteeism are hard to find within the South African context. There have been improvements in recent years, but quality research is still needed on this topic. That being said, as of 2019, the number of female learners in schools countrywide was 6 431 086.[126] Although girls reaching menarche as young as nine years of age have been documented, the average age tends to be closer to thirteen years.[127] As such this research will only be looking at girls in secondary education (Grades 8 to Grades 12). This is not to suggest that a lack of menstrual pads does not affect primary school going girls, but it helps to narrow down the statistics pertinent to this investigation. The number of female learners in secondary education as of 2019 was 2 291 476[128] and while we cannot definitively state that all these girls would have reached menarche, one may speculate that the number who have is a significant proportion.

Of these girls, the exact number who cannot afford menstrual products (and as a direct result miss school) is difficult to ascertain. The Imbumba Foundation's Caring4Girls program, an NGO with national reach, estimates 'that underprivileged girls can miss up to 50 days of school per year due to lack of access to adequate feminine hygiene', but does not provide information on how many girls in the school system qualify as 'underprivileged' for the purposes of their programme, nor how they reach this number.[129] A spokesperson for another non-profit organization, Equal Education, goes so far as to suggest that "88% of girls have no access…" to sanitary products, and that this leads to one in three missing school.[130] In 2013, it launched a

[126] School Realities op cit note 66 at 3.
[127] Karen Jeynes ' Do 7 Million SA girls miss school every month due to lack of sanitary pads?' available at https://africacheck.org/reports/do-7-million-sa-girls-miss-school-every-month-due-to-lack-of-sanitary-pads/ accessed on 11 April 2019.
[128] School Realities op cit note 66 at 3.
[129] Imbumba Foundation 'Caring 4 Girls' available at https://imbumbafoundation.org/caring-4-girls/ accessed on 11 April 2019.
[130] ENCA 'INFOGRAPHIC: Schoolgirl Sanitary Towels by Numbers' available at https://www.enca.com/south-africa/infographic-school-girl-sanitary-towels-by-numbers accessed on 11 April 2019.

campaign aimed at addressing the sanitation crisis faced by South African school children.[131] Over a two year period 200 schools in Gauteng were audited and it was discovered that sanitary hygiene products were 'limited if not non-existent'.[132] This was further compounded by the fact that 70% of learners had no access to sanitary bins or soap.[133] This is unacceptable for all learners, but particularly problematic for girls because without the capacity to wash their hands or dispose of used menstrual products they open themselves up to further stigmatisation, not to mention increased health risks. On top of this, it was also found that, although 93% of female learners surveyed had been educated about menstruation at school, 81% indicated that this had only taken place after they had reached menarche.[134] While this is better than nothing, it is not by much. Equal Education reports experiences of fear amongst girls who started menstruating before having received any information on the topic.[135] If nothing else, this is a terrible infringement of their right to dignity.

There has also been some very interesting research published as of December 2019. The study in question, conducted by Stellenbosch University, looked at absenteeism as a result of menstruation amongst school girls in Limpopo. It was found that menstruation caused absenteeism amongst '12-13 year olds in quintile 1-3 and 10-11 year olds in quintile 4-5'[136] schools. It also found that absenteeism was not more prevalent amongst older girls, suggesting that they had developed coping mechanisms such as homemade sanitary pads.[137] This data would imply that menstruation caused absenteeism is more of an issue at the onset of menarche than throughout the duration of school attendance.[138] It also seems to suggest that there is not a huge problem with menarche related school absenteeism. There was only a '4.2 percentage point increase in the probability of being absent when menstruating'[139], and although this is not good, it hardly lends credence to the notion that period poverty is a crisis within South Africa. It should be noted

[131] Equal Education 'Gauteng Demands a Coherent and Sustainable Response to the need for Sanitary pads' available at https://equaleducation.org.za/2016/10/25/equal-education-gauteng-demands-a-coherent-and-sustainable-response-to-the-need-for-sanitary-pads/ accessed on 20 February 2021.
[132] Ibid.
[133] Ibid.
[134] ibid
[135] Ibid.
[136] Chloé van Biljon & Cobus Burger The Period Effect: The Effect Of Menstruation On Absenteeism Of School Girls In Limpopo (working paper of the department of economics and the bureau for economic research at the university of Stellenbosch, 2019) 28.
[137] Ibid at 28.
[138] Ibid at 29.
[139] Ibid at 25

however, that this research points out that girls are over represented in secondary school in South Africa and that this might be play a part in these findings.[140] It also mentions that, because of the limitations of the study, there was no way to establish how the subjective experience of menstruation was affecting the learners' educational outcomes or mental health.[141] Whatever the case, this study did show that the quintile of the school correlated with absenteeism and this does correlate with the general poverty statistics available for South Africa, lending credence to the suggestion that sanitary products are not easily accessible, at least for girls from impoverished backgrounds.

*(b) Education and Poverty.*

Statistics SA, in its latest poverty related report, highlights several worrying trends. Those most likely to experience poverty in South Africa are black females aged less than seventeen, from rural backgrounds.[142] This suggests that this group would be the most likely to suffer from a lack of readily available menstrual products, and seems to lend credence to the figures provided by the Imbumba Foundation and Equal Education respectively. Whether this correlates with school absenteeism is far more difficult to establish, and will be discussed further at a later stage. A worthwhile correlation to note, and one that has been mentioned above, is between education and poverty. The exact statistics need not be repeated, suffice to say that education is inversely correlated with the experience of poverty.[143] The implication therefore, if there is a positive correlation between a lack of sanitary products and absenteeism (which of course would hinder one's education if experienced frequently), is both problematic and worrisome.

If black schoolgirls from rural areas are those least likely to have the economic means to access menstrual products, and this does in fact affect school attendance negatively, then it stands to reason that this group probably misses the most school days annually. This, in turn, could result in black schoolgirls from rural areas being less likely to attain a matric, and therefore being ineligible for higher education. This is further compounded by the fact that school girls from rural

[140] Ibid at 28.
[141] Ibis at 29.
[142] Op cit note 81 at 56-61, 68.
[143] Op cit note 81 at 61-4.

areas are likely those with the least access to clean water and sanitation within the school environment. Part of this relates to the unequal special planning associated with the apartheid regime, and is almost certainly further exacerbating the capacity of black school girls from rural areas to manage their menstrual cycles. Ultimately, this could mean that those who are in the worst position in terms of poverty, are also those in the worst position to extricate themselves from it.

As research showing proof positive of the above causal relationships is lacking in the South African context, this is merely conjecture. However, a look at other developing nations could provide some insight. Recent research in Kenya has suggested that, on a monthly basis, adolescent girls collectively lose 3.5 million school days as a result of menstruation.[144] In Nepal, girls' enrolment for secondary school decreases in comparison to that of primary school, which coincides with the onset of puberty and menarche.[145] These findings are consistent with the available studies in sub-Saharan Africa. Of the 57% of girls who register for primary school in Tanzania, only 17% attend secondary school.[146] A lack of access to appropriate menstrual hygiene is largely attributed as the reason for this. It should, however, be noted that in a study in Ghana the provision of free menstrual pads *in conjunction* with puberty education meaningfully increased school attendance levels.[147] Emphasis was placed on the educational side of this intervention, suggesting sanitary products, or a lack there of, is not the only obstacle pubescent girls face in relation to menstruation.

Bearing this in mind, one might suppose that it is well past time that the South African government implemented a large-scale, free sanitary product program to ameliorate the situation of impoverished schoolgirls. In recent years, several privately run initiatives have developed with this express intention. The Dis-Chem Foundation's One Million Comforts[148] campaign is but one of these. Unfortunately governmental support has not been forthcoming until very recently.[149] Although a sanitary dignity program was launched in the Eastern Cape in 2019 by the Department of Women in partnership with the Eastern Cape Provincial Government, it was only intended to

[144] Mugambi & Georgas op cit note 113 at 001.
[145] Oster & Thornton op cit note 113 at 2.
[146] Sommer op cit note 119 at 521
[147] Sommer et al op cit note 119 at 591.
[148] Nelson Mandela Foundation 'One Million Comforts campaign Launch' available at https://www.nelsonmandela.org/news/entry/independent-media-and-dis-chem-launch-one-million-comforts-campaign accessed on 11 April 2019.
[149] Ground Up 'Seven years on, Zuma's promise of free sanitary pads has not been kept' available at https://www.thesouthafrican.com/zumas-promise-of-free-sanitary-pads-not-kept/, accessed on 5 June 2019.

rollout in the financial year 2019/2020.[150] How successful this has been remains to be seen particularly as COVID19 will have negatively impacted school attendance across the board, and not just for girls who have reached puberty. Be that as it may, considering that several constitutional rights are potentially being violated, not least of which are the rights to education and equality, one would hope that this would be at the forefront of government policy. There is certainly precedent for this, the introduction and distribution of free Choice™ condoms as a response to the HIV crisis has been documented as highly effective,[151] and although menstruation is not life threatening, it does appear to be a health and education concern for school going girls.

*(c) Policy Developments.*

It is perhaps for this reason that the Department of Women, Youth and Persons with Disabilities published the Sanitary Dignity Framework in 2019. This will be discussed in detail in its own section later on, but for now it might be worthwhile considering why it was only published two years ago, especially considering the comments made by then president Jacob Zuma in 2011. The answer appears to be two-fold. Firstly, according to media reports the Department of Education has stated that there is no credible evidence to suggest a lack of sanitary products impacts negatively on the schooling of girl learners.[152] Secondly, the Department's Youth Risk Behaviour Survey of 2011 estimated that an average of 72.9% South African schoolgirls have ready access to menstrual towels.[153] This is in stark contrast to the figures put forward by Equal Education's spokesperson Nombulelo Nyathela,[154] and calls into question the validity of both parties' data. On the one hand, Equal Education's figures are consistent with those of international studies. On the other hand, the Department of Education's numbers are consistent with the statistics provided for gender parity and secondary education in South Africa. As of 2019, 49.2% of learners in Grade 7 were female, while in the same year 54.1% of Grade 12 learners were also female.[155] This is

[150] Department of Women launches Sanitary Dignity Programme in Eastern Cape available at https://www.gov.za/speeches/department-women-launch-sanitary-dignity-programme-eastern-cape-%C2%A0-11-apr-2019-0000 accessed on 1 March 2021.
[151] John Ashmore & Ruth Henwood 'Choice or no choice? The need for better branded public sector condoms in South Africa.' (2015) 16 *South African Journal of HIV Medicine* 1.
[152] Op cit note 127.
[153] Op cit note 127.
[154] Op cit note 127.
[155] School Realities op cit note 66 at 4.

certainly not indicative of a high drop-out/failure rate for schoolgirls as a result of menstruation (or for any other reason), in fact, the data shows quite the opposite. That is not to suggest that young South Africans do not drop out of school, but rather that there does not appear to be a gender bias among those that do. To further complicate the matter, the study conducted in Nepal showed that school attendance amongst girls provided with free sanitary products only improved by 0.021%, which is statistically negligible.[156] All of these considerations make it difficult to establish how best to assist impoverished schoolgirls, and also call into question whether there is anything *to assist,* and if so, *what?* The reason this is a problem has to do with how one formulates a rights based claim for free menstrual products, if that is indeed what one decides to argue for. If the reason girls are missing school has to do with menstrual cramps or pain, for example, then the rights based claim would not be for free sanitary products, it might be for free analgesics. If they are missing school as a result of stigma or a lack of understanding around the topic, then perhaps a program for improving reproductive education/knowledge would be a better fit. If school is being missed because the schools in question lack proper sanitation and clean water for the management of menses, then an argument would be made for improved infrastructure. If it is because of a complex interrelationship of all the above, then a wide-ranging policy development might be needed that addresses all of these problems.

Whatever the case, it is difficult to compel a government to take action when they perhaps do not see any reason to do so. The figures provided by the Youth Risk Behaviour Survey and the Department of Education appear to suggest that there are no significant issues regarding menstruation and school attendance, much less access to sanitary products.[157] One could even go so far as to say that in South Africa, based on these statistics, there is no correlation between menstruation and absenteeism. This is further complicated by the statistics reported for school absenteeism as a whole. The Department of Education only began collating these numbers in 2015, meaning that a conclusive picture is difficult to ascertain, but the initial findings suggest that, on average, South African learners (in the Western Cape) only miss one day per term.[158] Furthermore, absenteeism in this province is more common amongst boys.[159] This certainly does not support the hypothesis that a lack of menstrual products inhibits school attendance amongst schoolgirls,

[156] Oster & Thornton op cit note 113 at 13.
[157] Op cit note 127.
[158] Op cit note 124.
[159] Op cit note 124.

and would lend credence to the idea that this is a non-issue undeserving of immediate attention from the Department.

When looking at these figures it is important to bear a few points in mind. First, absenteeism is an explanation in and of itself, the reason for it is not provided on attendance registers.[160] This means that if girls *are* missing school because of menstruation this would not be recorded. Second, the reliability of these attendance registers is highly problematic. A recent study recounts a situation where a learner continued to be marked as present in class despite having died sometime prior.[161] In addition to this, issues relating to the poor manner in which attendance registers are designed, and therefore their vulnerability to unscrupulous educators, were also quoted as being responsible for inaccurate data.[162] While we cannot speculate to what degree these circumstances skew statistics regarding actual school attendance of learners, it is clear that this creates a problem in ascertaining accurate information. Without credible evidence to show the actual impact a lack of menstrual products has on school going girls, it becomes near impossible to force governmental policy change if there simply is no proof that a problem exists.

[160] Op cit note 124.
[161] Lawrence Mboweni *Challenges and factors contributing to learner absenteeism in selected primary schools in Acornhoek* (an unpublished MEd thesis, University of South Africa (2014) 69.
[162] Ibid.

## V PART I: EDUCATION AS A HUMAN RIGHT ON THE GLOBAL STAGE.

This section will look at the right to education from an international and also regional point of view. Before this dissertation looks at the South African constitutional right to education, it is a good idea to have an understanding of this right on the global stage. This is relevant because it provides context, but also because these international conventions, charters, covenants and committees have shaped the formulation and interpretation of the right to education in South Africa. As such, they provide a crucial backdrop for how menstruation and its effect on education should be approached, even if none of these institutions specifically make reference to this matter.

First it is worthwhile exploring the way in which South Africa interprets its Bill of Rights, which includes the right to an education.[163] It is important to note that there is a constitutional obligation to consider international law. As per s 39(1)(b) and (c) of the Constitution a court, tribunal, or forum *must* consider international law and *may* consider foreign law when interpreting the Bill of Rights. This is interesting when considering documents like the United Nations Charter, for example, which is considered an international treaty and as such is bindings for member states.[164] This is usually done through a process of ratification, that is to say, it is an international act that indicates a state's willingness or consent to be bound by a treaty.[165] This process also creates a time-frame for the state to get the treaty approved at a domestic level and to 'enact the necessary legislation to give domestic effect to that treaty'[166]. While not *all* international law is binding it can nevertheless be used as a powerful interpretive tool when giving effect to the Constitution's Bill of Rights.

### *(a) International Rights.*

Previous sections have hinted at the possible correlation between school absenteeism and the onset of menarche.[167] While the degree of severity with which it effects school attendance varies

[163] Constitution of the Republic of South Africa, 1996 s 29.
[164] United Nations 'Uphold International Law' available at https://www.un.org/en/sections/what-we-do/uphold-international-law/ accessed on 5 March 2021.
[165] United Nation 'The difference between Signing, Ratification and Accession of UN Treaties' available at https://ask.un.org/faq/14594 accessed on 5 March 2021.
[166] Ibid.
[167] op cit note 115; op cit note 121; op cit note 129; op cit note 131.

depending on the source of the information, there is definitely a positive causal connection and the role played by stigmatisation is acknowledged. As this is a gendered problem experienced by women and the girl child, a variety of treaties and conventions become significant, and because of this there is a legal framework at hand that could be used to compel (or at least encourage) government action on this matter. The United Nations, of which we have been a member state since 1945,[168] made the Universal Declaration of Human Rights in 1948.[169] Included in article 26 of this document is the affirmation that 'Everyone has the right to education'.[170] Furthermore, it acknowledges that this right is for both intrinsic and societal betterment[171] and, while not legally binding it has a significant moral and political influence.[172] More relevant and binding, however, are the human rights treaties that follow, especially the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child.

We are party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which is an enforceable treaty, and likewise recognises education as a human right.[173] "The Government will give progressive effect to the right to education, as provided for in Article 13(2)(a) and Article 14, within the framework of it National Education Policy and available resources".[174] The committee responsible for the implementation of ICESCR, CESCR, states that 'Education…is an indispensable means of realising other human rights' and that it '…has a vital role in empowering women'.[175] Furthermore, General Comment No. 20 of CESCR promotes the principles of non-discrimination and equality.[176] It even goes so far as to explicitly prohibit discrimination in the area of education which is pertinent to this dissertation because of the sex/gender specific nature

[168] United Nations 'Member States' available at https://www.un.org/en/member-states/index.html accessed on 19 April 2019.
[169] Universal Declaration of Human Rights, 1948 (217 [III] A). Paris.
[170] Ibid.
[171] Ibid article 26 (2).
[172] Right to Education 'United Nations Instruments' available at https://www.right-to-education.org/page/united-nations-instruments accessed on 19 April 2019.
[173] UN 'International Covenant on Economic, Social and Cultural Rights' (1966) art 13(2)(a).
[174] 'South Africa Ratifies the International Covenant on Economic, Social and Cultural Rights' available at https://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights accessed on 23 November 2021
[175] CESCR 'Implementation of the International Covenant on Economic, Social and Cultural Rights' (1999) General Comment No. 13(1).
[176] CESCR 'Non-Discrimination in Economic, Social and Cultural Rights' (2009) General Comment No, 20.

of menstruation.[177] Although it is unlikely that any member states of ICESCR would enact legislation that prevented girls from attending school during menses, it is important for them to actively promote and facilitate school attendance amongst girls during their menstrual cycle. Failing to do so would amount to failing to promote equality in the sphere of education.

Also of interest are the committees' comments on recommendation 124.138 which deals with the sexual education of adolescents and says that South Africa has shown a positive trajectory with regards to achieving Millennium Development Goals (MDGs) 4, 5 and 6.[178] These relate to reducing child mortality, improving maternal health and combating HIV/AIDS, malaria and other diseases, respectively.[179] This links back to several points made earlier: a lot of emphasis is placed on pregnancy and HIV/AIDS related education, but not much in the way of specifically menstrual education. With regards to general basic education, the committee notes that South Africa's problem is not so much access (98% of children have access to primary education, MDG:2), but rather access to *quality* education.[180]

In addition, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) made specific recommendations regarding the education of women in line with IESCR.[181] Its basic premise is that all State Parties must condemn the discrimination of women, and move towards policies that deliberately attempt to eliminate this type of prejudice.[182] Although we as a country only ratified this Convention in 1995,[183] included in our obligations is a duty to ensure that women have 'equal rights with men in the field of education', that we commit to reducing drop-out rates amongst female students and promote advice and education on female reproductive health.[184] These responsibilities quite clearly relate to the conversation regarding

[177] ibid
[178] CESCR 'Annex A. Recommendations Acceptable to South Africa' available at https://lib.ohchr.org/HRBodies/UPR/_layouts/15/WopiFrame.aspx?sourcedoc=/HRBodies/UPR/Documents/session13/ZA/A_HRC_21_16_Add.1_South%20Africa_E_Annex.doc&action=default&DefaultItemOpen=1 accessed on 26 March 2021.
[179] WHO 'Millennium Development Goals' available at https://www.who.int/news-room/fact-sheets/detail/millennium-development-goals-(mdgs) accessed on 1 December 2020.
[180] Op cit note 173 recommendations 124.142-3.
[181] UN General Assembly 'Convention on the Elimination of All Forms of Discrimination against Women' (1979) art 10.
[182] Ibid art 2.
[183] United Nations Treaty Collection 'Depositary Chapter IV: 8' available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en accessed on 19 April 2019.
[184] Op cit note 176 art 10.

menstruation and education that has been presented here. It should however be mentioned that, while these sources openly discuss gender, they do not specifically delve into how menstruation affects education. Nor do they in fact mention menstruation at all. The closest CEDAW get to this matter is its reference to sexual and reproductive education in General Recommendations 28.[185] This contains some excellent points on the matter, but stops short of providing specifically menarche related education, although one could well make a logical inference from the language that is present. The importance of providing girls specifically with education on sexual and reproductive health is mentioned and even though this is geared towards the prevention of HIV/AIDS, teenage pregnancy and sexual exploitation, fundamental to understanding these issues is an understanding of menstruation.[186] That is to say, menarche related education would be necessary to promote these goals even if that is not said verbatim in the General Recommendation 28.

As mentioned already, there is a social stigma or taboo around menses throughout the world. This plays a part in its lack of recognition as a significant problem hindering the education of girls, but is not the only reason. Of equal importance is the fact that discriminatory policies can be both direct and indirect in nature. CEDAW's General Recommendation No 28, which was published in 2010 acknowledge this, and require that

> '…States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights.'[187]

This is significant because it requires member states not only to refrain from deliberately creating sex discriminatory situations, but also to actively work at preventing them. The distinction is important. It is not enough to say no laws, policies, regulations, administrative processes, programmes and institutional structures that discriminate against women (and therefore girls) have been created, whilst leaving any that already exist in place.

[185] CEDAW 'General Recommendation 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010).
[186] Ibid para 21.
[187] ibid art 9.

Moving on from this and more relevant, although only for its advisory or informational purposes, is the United Nations Educational, Scientific and Cultural Organization's (UNESCO) Puberty Education and Menstrual Hygiene Management Booklet 9 published in 2014. Although the content of this document is advisory rather than binding, it lays out both the context and the rationale behind instituting high quality puberty orientated education regarding menses and menstruation. Contained in this document is what are referred to as good practices in menstrual hygiene management.[188] These include accurate and timely knowledge regarding menstruation, informed and comfortable professionals for imparting this knowledge, sanitation and washing facilities for the management of menses, safe and hygienic disposal facilities for menstrual products, safe and affordable menstrual hygiene materials, referral and access to health services, positive social norms to tackle the stigma associated with menstruation and advocacy/policies to improve the lives of women and girls regarding these issues.[189] As South Africa re-joined UNESCO in 1994, and established the South African National Commission for UNESCO in 1998, their recommendations on the management of menses should certainly be taken into consideration.[190] As it stands the Sanitary Dignity Framework developed by the Department of Women, Youth and Persons with Disabilities relies on this document heavily, but more on that later.

In addition to this, article 28 of the Convention on the Rights of the Child guarantees children the right to be educated.[191] As article 28(1) states that this is a right applicable to *all* children, and read in conjunction with the afore mentioned conventions and obligations, one could make an argument that the commitment to educate the girl child is therefore doubly important.

*(b) Regional Rights*

The UDHR, CESCR, OHCHR, UNESCO and CEDAW are not the only obligations we have to young women. Closer to home, South Africa also has commitments to the African Union. South

[188] UNESCO Puberty Education and Menstrual Hygiene Management Booklet 9 (2014) 31.
[189] Ibid at 31-5.
[190] SA NATCOM 'About South African Commission for UNESCO' available at https://www.education.gov.za/unescoza/AboutSANatCom.aspx accessed on 6 March 2021.
[191] UN 'Convention on the Rights of the Child', 1989 art 28

Africa is party to the Banjul Charter. More generally known as the African Charter on Human and People's Rights (ACHPR), this was adopted in 1981 and ratified by South Africa in 1996.[192] Article 17 of the ACHRP contains the right to education, but perhaps more interestingly article 16 states that 'every individual shall have the right to enjoy the best attainable state of physical and mental health'. The ACHPR, like CESCR and CEDAW, does not make reference to menstruation and its effects on education or the need for specifically menarche related education, but once again inferences can be made. Article 16 could certainly be used to justify the need for a greater duty of care when it comes to the education of girls and young women, not to mention the need for reproductive education that focuses on menstruation. It could also be used to bolster the right to dignity which is hindered by social stigma and taboos. This is given further content by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol).[193]

In 2004 South Africa ratified the Protocol.[194] Unsurprisingly, this document also includes a section dedicated to the specific rights of women to education and training. Article 12 (1)(a) guarantees that women in Africa should have equal opportunities, as well as access, to these spheres.[195] That the right to education is included in this document is not especially noteworthy, however its acknowledgment of the unique vulnerability of the 'girl-child'[196] is important. The recognition, that as a subset of *women* as a whole, adolescent females are more vulnerable than their adult counterparts is well worth examining. Particularly within the context of the Protocol, a very specific (and relevant for our purposes) vulnerability is identified. Article 12(1)(c) states that all women should be protected 'especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions'.[197] As briefly stated in the section prior to this, one of the reasons put forward for school absenteeism amongst girls who did not have access to menstrual products, was the potential this created for sexual harassment from male

[192] ACHPR 'Ratification Table' available at https://www.achpr.org/ratificationtable?id=49 accessed on 1 December 2020.
[193] African Union 'Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa', 2003 available at: https://www.refworld.org/docid/3f4b139d4.html accessed 29 April 2021
[194] African Commission on Human and Peoples' Rights 'Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' available at http://www.achpr.org/instruments/women-protocol/ratification/ accessed on 19 April 2019.
[195] African Union 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', 2003.
[196] Ibid art 12 (1)(c).
[197] Ibid.

students and educators.[198] Particularly in sub-Saharan Africa NGOs have reported that the possibility of a menstrual 'leak' increases the likelihood of girls being targeted for sexual abuse.[199] Although this was self-reported by the girls themselves and may well be a subjective perception rather than an objective reality, it none-the-less results in school absenteeism.[200] This alone links the right of women to education with a need for easily accessible sanitary products, and calls into question why this issue remains under addressed in developing countries.

The point to take from this section is that the international and regional framework pre-empts and inform all the relevant national rights that will now be discussed. Although the primary focus of this dissertation is facilitating girl's education through the provision of free menstrual products, as noted earlier, this is a multi-faceted issue. It could potentially also include the provision of water and sanitation as these are inextricably interlinked with menstrual management. For this reason, simply relying on the right to education is insufficient to motivate governmental policy. The right to equality, the best interests of the child, the right to equality and the underlying value and right to dignity all play a significant part and assist in building a cumulative argument for better policies regarding the management of female puberty within the school environment.

[198] Sommer op cit note 113 at 522; Sommer et al op cit note 119 at 604.
[199] Sommer op cit note 113 at 522.
[200] Sommer op cit note 113 at 522.

## V PART II: THE DIFFICULTIES IN FORMULATING A RIGHTS CLAIM BASED ON ABSENTEEISM.

In order to motivate for the provision of free menstrual products using the right to education, the right to equality, the principle of the best interests of the child and the right to dignity, one must first show that these rights/principles have in fact been infringed. Unfortunately, this brings us back full-circle to the problem of credible data showing a causal relationship between a lack of sanitary products and absenteeism. As mentioned, an infringement of a human right only exists if it can conclusively be proven to exist.[201] That other developing countries, many in Africa itself, are experiencing a negative correlation between the onset of menarche and school attendance amongst girls is insufficient evidence to show that the same is definitely happening in South Africa.

### *(a) Absence of Evidence is not Evidence of Absence*

In addition to this, the fact that menstruation remains largely taboo in just about every society makes dealing with the problem even harder because there is a reluctance to initiate debate concerning it. Coupled with wildly divergent statistics as to how much school is actually being missed by school girls as a result of menstruation; whether this is a result of a lack of sanitary products, an absence of water and sanitation facilities at schools, a lack of puberty related education, a symptom of cultural taboos/norms/beliefs relating to menses, or a multi-dimensional combination of all of these factors is unknown. While any of these may well found a rights claim, the issue of stigma and menses raises some interesting questions above and beyond simply having access to menstrual products. It is likely that conclusive proof would be needed to support a claim for menstrual products under the rights to education and equality, specifically because one would need to show that there is a causal relationship between access to menstrual products and absenteeism. However, what we would need to succeed with a claim based on the rights to equality and dignity[202] from the perspective of menstrually associated stigmatization is less obvious. As stigma is at the heart of discrimination this is also a discrimination based claim and potentially

[201] *MEC for Health and Social Development, Gauteng v DZ* 2017 (1) SA 335 (CC) para 57-8.
[202] Op cit note 160 at s 10.

more so than any other issue if the correlation between menstrual and absenteeism is either unproven or insignificant. Girls experience stigma as a result of menstruation regardless of whether or not it causes them to miss school. This may also mean that more nuanced remedies are in order; remedies that address education around menstruation and not simply facilitate easier access to sanitary products.

Part of challenge here is that the problem remains largely invisible. We are located in a country where poverty, and its alleviation, is at the forefront of the public zeitgeist. This is appropriate of course, but when the main issue at hand is the gap between white and black South Africans (as will always be the case when discussing poverty within the South African context), the gap between male and female tends to take a back seat, perhaps not in the public eye, but in a practical sense. This is not to suggest that society is unaware of the plight of the impoverished black woman. Rather, it is that the struggle to eradicate systemic racial inequality somewhat overshadows the need to address structural gender inequality in our society. As such, enabling social justice is as much a political incentive as it is human rights initiative. Because of this, problems concerning human rights are often only addressed by governments when it is politically expedient to do so.

Having said this, what constitutes *expedient* varies from country to country and government to government. As of 2018, the Scottish government earmarked £5.2 million towards making menstrual products free for roughly 395 000 students each month.[203] The Welsh government followed suit in 2019, and in England the same policy was adopted at the beginning of last year.[204] This has been done despite only one in ten British girls struggling to get access to menstrual products such as pads and tampons.[205] Also last year, New Zealand rolled out a program to provide fifteen 'in need' schools with free products, with plans for the program to become nationwide in 2021.[206] Similarly to the United Kingdom, only about 12% of girls in New Zealand find accessing

[203] Ceylan Yeginsu 'Scotland to Provide Free Sanitary Products to Students' available at https://www.nytimes.com/2018/08/29/world/europe/uk-scotland-free-sanitary-products.html accessed on 13 July 2020.
[204] Richard Adams 'Free period products to be available in schools and colleges in England.' Available at https://www.theguardian.com/education/2020/jan/18/free-period-products-to-be-available-in-schools-and-colleges-in-england accessed on 13 July 2020.
[205] Op cite note 194.
[206] Eleanor Ainge Roy 'New Zealand tackles 'period poverty' with free sanitary products for all schoolgirls' available at https://www.theguardian.com/world/2020/jun/03/new-zealand-tackles-period-poverty-with-free-sanitary-products-for-all-schoolgirls accessed on 13 July 2020.

these products difficult.[207] This is not to diminish the effect this has on these young women, but rather to show that the problem is on a relatively minor scale. Despite this, these governments have seen fit to do their bit to alleviate, if not eradicate, period poverty. As pointed out in the article concerning Scotland, it is unacceptable that any girl should struggle to have access to these basic products in a wealthy First World nation.[208] However, what then is the recourse in a less developed, less wealth country? One that might find itself with a bigger problem, but fewer resources to allocate?

Two examples from closer to home may lend some insight into potential solutions. In Zambia, girls are provided with free sanitary napkins in rural and peri-urban areas.[209] In Kenya to, school girls are provided with free sanitary pads.[210] In both examples the government had committed to allocating money from the national budget because of the severity of the problem.[211] In Zambia, girls can miss up to 39 days of school per year, in Kenya it is estimates that 20% of their education can be lost as a result of not having access to menstrual products.[212] It is perhaps because of this that these two countries emphasize the need for free menstrual products as an aid to *education*, whereas the governments of New Zealand and the United Kingdom motivate the provision of free products as an issue relating more to *dignity*.[213] Be this as it may, making sanitary products free is not the only means to help women and girls with the menstrual burden.

An alternative to making menstrual hygiene products "free" is to make them more affordable. In response to months of campaigning, India scrapped its 12% tax on menstrual products.[214] As approximately four out of five women and girls have no access to these products to begin with, activists argued that the 12% duty (introduced in 2017) was a further barrier to accessibility.[215] Emphasis was again placed on periods being the main reason girls dropout of

[207] Ibid.
[208] Op cite note 194.
[209] Lusaka Times 'Govt praised for its plan to provide free sanitary napkins to rural girls' available at https://www.lusakatimes.com/2016/11/13/govt-praised-plan-provide-free-sanitary-napkins-rural-girls/ accessed on 13 July 2020.
[210] BBC News Africa 'Kenya's schoolgirls to get free sanitary pads from government' available at https://www.bbc.com/news/world-africa-40365691 accessed on 13 July 2020.
[211] Op cit note 200; op cite note 201.
[212] Ibid.
[213] Op cite note 200; op cite note 201; op cit note 194; op cit note 195; op cit note 197.
[214] BBC News India 'India scraps tampon tax after campaign' available at https://www.bbc.com/news/world-asia-india-44912742 accessed on 17 July 2020.
[215] Ibid.

school, thus highlighting the connection between menstrual hygiene products and education.[216] Colombia, likewise, also dropped their 5% tax on these products.[217] Interestingly, the impetus to do so came from the legal system itself and not specifically from activism and campaigning.[218] Like South Africa, Colombia has a progressive rights based Constitution, and in 2018 the Colombian Constitutional Court held that '…a provision imposing 5% VAT on tampons and sanitary pads violated women's rights to equality, autonomy, and access to a minimum core standard of life'.[219] This is particularly relevant to this dissertation because the Court found that substantive equality with regards to tax law had been breached, and that the provision of menstrual hygiene products was an issue falling 'within the scope of sexual and reproductive rights'.[220] Thus, the Courts decision did not have to rely solely on the right to education, or even equality for that matter.

This will be important going forward, because as already stated, there is no incontrovertible evidence that there is a positive causal connection between school absenteeism and lack of access to menstrual products in South Africa. This means that when it comes to enforcing some sort of policy reform, all our government need do is rely upon absence of proof positive and claim plausible deniability. Therefore, the legal argument for the provision of free menstrual hygiene products in schools will need to rely on more than simply the right to education or equality. These rights will form part of it, but the argument will have to be far more multi-faceted if it is to be cogent.

[216] Ibid.
[217] Mónica Arango Olaya 'Blood, Taxes and Equality: Colombia's Constitutional Court advances women's sexual and reproductive rights' available at https://www.dailymaverick.co.za/article/2020-01-15-blood-taxes-and-equality-colombias-constitutional-court-advances-womens-sexual-and-reproductive-rights/#gsc.tab=0 accessed on 17 July 2020.
[218] Ibid.
[219] Ibid.
[220] Ibid.

## VI THE RIGHT TO EDUCATION

> 'Everyone has the right—
>
> (a) to a basic education, including adult basic education; and
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.'[221]

The Republic of South Africa is one of the few countries in the world with a truly transformative Constitution.[222] Not only does South Africa guarantee the usual human rights found in many Constitutions and legal systems globally, but enshrined also are a plethora of socio-economic rights.[223] These socio-economic rights are effectively entitlements granted by the state to services and goods presumed necessary for a decent quality of life.[224] What qualifies as 'decent' is somewhat subjective and has a good deal in common with what might qualify as 'dignified', but this will be discussed in more detail later. Suffice to say that all who live in South Africa have constitutionally guaranteed rights that are meant to facilitate a certain standard of living. The right to education is amongst these and is indispensable with regards to the promotion of human fulfilment, a concept deeply rooted in the Constitution of the Republic of South Africa as a whole

As per s 29 of this Constitution, everyone has the right to a basic education. If this dissertation is to make sense of this right, it is important to first unpack who *everyone* is, and what exactly qualifies as a *basic* education. Within the South African context, everyone really does mean *everyone.* Or at least, everyone within the borders of the Republic, who the state can reasonably be relied upon to have an ability to govern. Simply put, this right extends to citizens and non-citizens alike.[225] The reasoning behind this is pertinent to this work because of the

[221] Op cit note 160 at s (29)(1).
[222] Klare, Karl 'Legal Culture and Transformative Constitutionalism' (1998) *SAJHR* 146-9; but see Sanele Sibanda 'Not purpose-made! transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 Stellenbosch Law Review 482-500; Tshepo Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: critiquing the antiblack economy of recognition, incorporation and distribution' (2017) 28 Stellenbosch Law Review 123-47; Joel Modiri, 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34 South African Journal on Human Rights 300-25.
[223] Chris McConnachie, Ann Skelton & Cameron McConnachie 'Chapter 1: The Constitution and The Right to a Basic Education' in Faranaaz Veriava, Anso Thom & Tim Hodgson (eds) Basic Education Rights Handbook – Education Rights in South Africa (2017) 15.
[224] Ibid.
[225] Ibid at 22.

importance placed on education as a means of actualising a life with dignity.[226] The value of and right to dignity underpins almost all other rights, as discussed further below.

*(a) A Basic Education*

For now, the next term that requires clarification is that of "basic". Or rather, what is a *basic education?* For the purposes of our Constitution *basic* does not mean the opposite of *elite*. There is an argument to be made that basic education refers to duration of the education, but based solely on the wording of s (29)(1)(a) it is far more likely that basic refers to adequacy.[227] That the right to education includes basic 'adult' education makes this abundantly clear. It is highly unlikely that a person having to repeat Grade 11 would be denied access to Grade 12, simply because they had already received their allocated twelve years of schooling. Part of the reason for this, is once again, because our Constitution recognises the immense benefit of education to the individual. Nkabinde, J in *Governing Body of the Juma Musjid Primary School v Essay*[228] perfectly encapsulates this:

> '…basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.'[229]

That this refers specifically to 'a child's' development and potential does not diminish its applicability to an adult, but rather that we emphasise the rights of children. The point here is that we do not place a time limit on the acquisition of this *basic education* because of how vitally important it is in fostering human growth and potential. Again, as with the provision of 'everyone', this right is not determined by how fiscally useful an individual with a basic education will ultimately be to society. Again, it is motivated by its value to the individual in and of themselves, irrespective of whether they utilise it for a greater good. It might also be worthwhile at this point

[226] Ibid at 22.
[227] ibid at 21-23
[228] 2011 (8) BCLR 761 (CC).
[229] Ibid para 43.

to reference back to previous sections. As pointed out by CESCR, South Africa's problems with the right to education are not primarily concerned with *access*.[230] Roughly 98% of children have access to education, which is laudable for a developing nation particularly since it appears South Africa has relative gender parity in this matter, the problems faced here are that the education lacks in quality.[231] And that, in itself, is causing problems.

Another point to take from s 29(1)(a), read in conjunction with *Juma Musjid*, is the qualifying language of the right to a basic education, or rather the lack thereof. Unlike s 29(1)(b) which states that further education be made 'progressively available' through 'reasonable measures, s 29(1)(a) contains none of this additional qualifying language.[232] This is important for two reasons. First, this means that the state has a positive duty when it comes to the right to a basic education, and secondly, this right is immediately realisable.[233] These two points are relevant because many of our other constitutionally guaranteed socio-economic rights tend to be qualified and therefore the state is only required to make them *progressively realisable.*

To unpack this further, look at the right to a further education. The state does not have a positive duty to provide everyone with a university education. This is because the state only has to provide further education through 'reasonable measures'.[234] This qualifier absolves the state of an immediate positive duty to provide further education and replaces it with a lesser, but still an immediate positive duty to make the right 'progressively realisable and accessible'.[235] Simply put, the state must facilitate this right over time in accordance with available resources.[236] It is *progressively* realisable, not *immediately* so. The right to basic education has neither of these provisos, and is therefore unqualified *and* immediately realisable.

The unqualified and immediate nature of the right to a basic education was further elucidated in *Juma Musjid*:

> 'There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a

[230] Op cite note 173.
[231] Op cit note 197.
[232] Op cit note 213 at 26.
[233] Op cit note 213 at 26-7.
[234] Op cit note 160 s (29)(1)(b)
[235] Op cit note 160 s 29(1)(b).
[236] Op cit note 213 at 26.

basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".'[237]

In other words, the state can only argue that it lacks the fiscus to provide basic education under the limitations clause, s 36(1). Two important points can be drawn from this. First, the Constitutional Court of South Africa made this judgement. As such it is hardly a theoretical matter; though we can draw inference from wording in the Constitution with regards to many other socio-economic rights, in this case with regards to the right to a basic education its lack of internal limitations is settled. While *Juma Musjid* does acknowledge that resources can still be an issue and therefore budget may be taken into consideration, this can only be done under s 36. Second, the values of human dignity and equality are mentioned once again.

### *(b) A Positive Duty to Provide Resources*

While *Juma Musjid* sets the parameters for interpretation, it was ultimately about the negative duty of private persons not to hinder learners access to basic education. More relevant to the provision of free menstrual products (amongst other things), both in interpreting the right and in developing a remedy for period poverty, are cases concerning positive state duties, such as *Madzodzo and Others v Minister of Basic Education.*[238] Being giving a brief outline of this case, there should be a clear explanation of what is expected of the State regarding the topic of this dissertation. Because of the immense value of education and the potential negative effects period poverty may be having on accessing this education, the ideal solution would be for the State to provide free menstrual products (and probably also access to sanitation and water) to school girls and young women. This is not a negative obligation on the part of the State *not* to stand in their way, but rather requires courts both to *interpret* the right to education broadly to include a right of access to such products, and to act positively to provide a resource or resources by way of remedy. Several cases have begun to grapple with this, such as *Supreme Court of Appeal in Minister of Basic Education v Basic Education*[239], *Western Cape Forum for Intellectual Disability v Government of the Republic*

[237] Supra note 218 para 37.
[238] And Others 2014 (3) SA 441 (ECM)
[239] 2016 (4) SA 63 (SCA)

*of South Africa*[240], *Basic Education For All & Others v Minister of Basic Education & Others,*[241] *SECTION27 and Others v Minister of Basic Education and Another*[242] and *SECTION27 and Others v Minister of Basic Education and Another*[243].

*Madzodzo and Others v Minister of Basic Education* is one example of that and deals with a situation where the State had consistently failed to provide learners in the Eastern Cape with age and grade appropriate furniture.[244] Goosen, J found that the State was in breach of their s 29 constitutional duty to provide leaners with a basic education.[245] Thus he interpreted the right to a basic education to include school furniture. This is interesting because, not only furniture, but also textbooks are foundational to the right to a basic education because of the ways in which they facilitate learning. In *Supreme Court of Appeal in Minister of Basic Education v Basic Education*, Navsa JA made it absolutely clear that a lack of text books adversely affected students capacity to learn, particularly those from impoverished backgrounds.[246] That the lack of sufficient writing surfaces was causing learners to share over crowded desk space making it hard for them to concentrate and creating an environment unconducive the learning was likewise one of the main points in *Madzodzo and Others v Minister of Basic Education*.[247] This is relevant concerning period poverty because even if a lack of access to menstrual products is not strongly correlated with school absenteeism, that their absence creates a distracting and unconducive learning environment might be sufficient to compel the State to provide them regardless. This could, in part, be further motivated by pointing out that the unconducive learning environment created by period poverty it is an infringement of female learners right to be treated with dignity. Something that was also mentioned in *Supreme Court of Appeal in Minister of Basic Education v Basic Education.* It was pointed out that textbooks, or rather a lack thereof, caused learners the indignity of having to make alternative arrangements in order to access their education.[248] Again, this has

[240] 2011 (5) SA 87 (WCC)
[241] 2014 (4) SA 274 (GP)
[242] 2013 (2) SA 40 (GNP)
[243] Case No 24565/12, 4 October 2012.
[244] Ibid para 14.
[245] Ibid para 41(1)
[246] Op cite 229 para 49.
[247] Op cit note 228 para 20.
[248] Op cite note 229 para 49.

parallels with period poverty where girls may have to resort to DIY menstrual products in order to manage their menses.

The issue at hand is that a basic education is not a basic or simple process. It requires a myriad of supporting and interconnected external resources such as textbooks, school furniture and facilities. The State has acknowledged this in the above cases. It can be compelled to act and provide considerable resources if they are deemed essential to the learning process. The argument at hand is that it should also be compelled to provide free menstrual products and potentially sanitation and clean water because these *necessities* are crucial to the education of school girls.

As a last comment a more recent and topical case that highlights the intersection of the right to education with the right to dignity, but also to equality and the best interests of the child. In *Equal Education v Minister of Basic Education* it was also found that the state has a positive duty to provide resources, which in this case were school nutrition programmes.[249] The COVID19 lockdown of 2020 resulted in school closures that left roughly nine million children without access to at least one meal a day.[250] The Minister of Basic Education was found to have a positive duty to ensure that the National School Nutrition Program (NSNP) provide all qualifying children with at least one meal per day.[251] The legal basis of this application concerned nutrition but also the right to education because quality nutrition, just like school furniture, is integral to facilitating a child's capacity to learn and thus to the right to education.[252] It was underpinned not only by the rights of children, but also the right to dignity and equality which, as already mentioned, are of significant importance.[253] The importance of the value and right to dignity will be discussed in far more detail later, for now it may be prudent to look at the right to equality. Specifically, the right to equality as it pertains to sex and gender.

[249] 2021 (1) SA 198 (GP) para 103.2-3.
[250] Ibid para 20.
[251] Ibid para 103.3
[252] Ibid para 78.
[253] Ibid para 53-5.

**THE RIGHT TO EQUALITY.**

Equality is arguably South Africa's most foundational principle. Enshrined as a fundamental value in s 1 and entrenched as a right in s 9 of the Constitution, this guiding value is at the heart of South Africa's young democracy. Of course, the most obvious *equality* that this right pertains to, is that of equality *irrespective of race*. This stems from South Africa's recent history, a significant feature of which was apartheid and prior to that, colonialism. It makes sense therefore, that many of our socio-economic rights focus on breaching the divide between white and black South Africans. The right to education, already addressed, is certainly geared towards this very fissure within our society, but it is important to realise that this is not the only sort of equality the Constitution guarantees. Gender inequality is also powerfully recognised in the Constitution. The intersectionality of these issues should also not be underestimated. The manner in which sex, race and class intersect has profound implications for the lived experiences of individuals, none more so than impoverished black women. This is especially true when dealing with the topic of this dissertation.

Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth are all grounds on which anyone finding themselves within the borders of South Africa may not be discriminated against, directly or indirectly.[254] For the purposes of this dissertation, the state's obligation to refrain from discrimination based on sex is most relevant. Irrespective of what a person identifies as with regards to gender, we can safely say that menstruation is a concern for the female of the species, that this becomes an issue during puberty, continues to be so until menopause, and that this is cross cultural; unaffected by race, class or creed.[255] This places menstruation, and any negative affect it may have on girls, their best interests and their right to dignity, squarely within the ambit of the right to equality *irrespective of sex or gender*.

[254] Op cit note 160 s 9(3).
[255] Op cit note 113.

*(a) Why is the Right to Equality Applicable?*

The relationship between menstruation and sex inequality is complex. The management of menses provides its own challenges but so do people's conceptions and misconceptions around this issue. The female reproductive system in general creates challenges for women - pregnancy, maternity leave, miscarriage, access to safe abortions, access to contraception to name but a few -that contribute to their unequal treatment within society. Menstruation, however is especially tricky because while not all women and girls get pregnant, or need an abortion, almost all women and girls menstruate for a significant proportion of their lives. The management of menarche is therefore a significant issue.

The reason for this from a practical standpoint is twofold, first women need access to toilet facilities (preferably with running water) secondly, they need access to menstrual products. If neither of these things are available, the capacity for women to live their lives outside of the home is severely hindered. This is true with regards to education and work. The reason sex segregated toilets are so necessary is optimised by India's *rani mistri* initiative.[256] Part of the reason girls were missing school, when boys were not, was because they had nowhere to manage their menstrual cycle (or relieve themselves for that matter) that was not also used by men or boys.[257] This created the potential for assault, but also embarrassment, leading to girls avoiding school and public areas specifically during their menses.[258] This is further compounded by the fact that if you are using disposable menstrual products (as opposed to the reusable kind such as menstrual cups or fabric pads) you require a place to dispose of them safely and discretely. A solution to this would be to provide girls and women with reusable products, but this creates its own problems that will be discussed later. Be this as it may, the reason menstrual products are necessary is fairly self-explanatory. A lack of access to them in conjunction with a lack of facilities, has the potential to create a sex based inequality in social life, work places and education.

The other contributing factor to this, is of course the stigma associated with menstruation. Stigmatisation is defined as 'the action of describing or regarding someone or something as worthy

[256]'How female toilet builders are taking on menstrual hygiene management in India' available at https://www.unicef.org/stories/how-female-toilet-builders-are-taking-menstrual-hygiene-management-india accessed on 28 February 2021.
[257] ibid
[258] ibid

of disgrace or great disapproval'.[259] This is a particularly helpful description when dealing with menstruation because there is considerable evidence that menstruation is perceived with great disapproval cross culturally.[260] Part of this may stem from the complications already stated with having to deal with menstrual blood. It may also be that because menstruating indicates a woman is not pregnant or may have miscarried a pregnancy, societies around the world view it as taboo. It is also entirely possible that because today (as well as for most of history) men tend to be in positions of power, and as men do not menstruate, a complex process of othering has taken place. To quote a line from the satirical cartoon South Park, "I just don't trust something that bleeds for 5 days and doesn't die?".[261] This is an over simplistic and frivolous example, but if one were to attempt to exemplify why men have negative misconceptions around menstruation and do so in a nutshell, it is apt. It may well be a complex interconnection of all the above, whatever the case, stigma associated with menstruation does exist.[262]

It is important to mention this because this stigmatisation goes in only one direction. That is to say, it is only experienced by females. However, it may be perpetrated by both men and women. The evidence from the afore-mentioned Indian example states that 'A 2013 UNICEF study found that the majority of girls reported that their mothers imposed restrictions on them when they were menstruating'[263] and so women do not necessarily get off the hook as far as perpetuating negative practices or misconceptions are concerned. However, those on the receiving end are overwhelmingly girls and women. This is relevant because it further exacerbates the sex based inequality already mentioned. All of the above have the potential to effect the dignity of girls and women and this is important because the concept of, and right that is dignity is arguably the most important underlying principle in the Constitution. It is at the heart of all other constitutional rights and because of this it will have a section of its own within this dissertation.

[259] Oxford University Press available at https://dictionary.cambridge.org/dictionary/english/stigmatization accessed on 28 February 2021.
[260] Oster & Thornton op cit note 113 at 60.
[261] Youtube 'South Park' available at https://www.youtube.com/watch?v=ZTuzDt-dGxA accessed on 21 March 2020
[262] Oster & Thornton op cite note 113 at 60-5.
[263] Op cite note 205 accessed on 1 March 2021.

*(b) Differentiation or Discrimination?*

Moving on from this, the link between discrimination and differentiation is important. There are two types of differentiation: that which involves unfair discrimination and that which does not.[264] Mere differentiation does not raise the question of discrimination, unfair or otherwise, because it does not implicate a 'prohibited ground' such as race or gender. As such it is governed by rationality.[265] That is to say, in a modern state, there are many circumstances where the differential treatment of a person or people is permissible as long as it has a rational connection to a legitimate purpose.[266]

However, if the differentiation occurs on a 'prohibited ground' (that is to say, one of the grounds set out in s 9(3)), then it most likely amounts to discrimination. This involves a two pronged analysis. First, is there discrimination? As noted, if the differentiation is on a prohibited ground, there is discrimination. Secondly, is the discrimination unfair? This recognises that discrimination may be permissible under certain circumstances, and not under others.[267] To ascertain if it is unfair one needs to understand that fairness interconnects with the concept of dignity. Dignity is a central underlying consideration when determining if something is fair or otherwise, and the equality provision is thus an important means of protecting against the impairment of human dignity.[268] To establish if this impairment has happened one need ask three questions. First, have the group experiencing this discrimination historically suffered?[269] This is an important because of the systemic disadvantage that has been so prevalent in South Africa's history. Countering and correcting for it, is therefore an important imperative of any legislation intended to promote equality. Secondly, is this impairment intended to achieve a worthy goal, for example equality for all?[270] Lastly, taking into account the invasion of rights and interests overall, to what extent has this discrimination led to an impairment of this group's fundamental human dignity or a comparably serious impairment?[271]

[264] Harksen v Lane NO and Others 1997 (11) BCLR 1489 para 43.
[265] Ibid para 44.
[266] Ibid para 44.
[267] Ibid para 44-5.
[268] Ibid para 50
[269] Ibid para 51(a)
[270] Ibid para 51(b)
[271] Ibid para 46 and 51(c)

This analysis is highly dependent on context and impact. The socio-economic circumstances of the harmed party, and to what extent they have experienced this harm, are crucial in determining whether unfair discrimination has taken place. This dissertation deals with the equality of women and girls (particularly those of school-going age) and ultimately the impact or effect this differential treatment has on them will be the deciding factor.[272] What should be mentioned however, is that this is not differentiation, but rather a lack of it that is causing the impairment concerned. A failure to acknowledge that women and young girls should be granted differential treatment to their male counterparts. The disparate impact of this lack of differential treatment amounts to discrimination.

The applicability of s 9 of the Constitution will only briefly be reviewed as the governing law is the Equality Act (which will be considered in detail below) in addition to the right to dignity and the manner in which period poverty hinders it. For now, the first two questions will be discussed. The group concerned here are girls (or technically females) who have historically been discriminated against and disadvantaged. In other words, they have been, and are, subject to systemic disadvantage. The impairment they face with regards to a lack of menstrual products as well as menstrually related stigma and taboos is not intended for any greater good. As such, the first two legs of the test are passed. In addition, women and girls experience a severe invasion of their interests and rights, suggesting overall an invasion of dignity as explicated below.

This becomes even more worrisome when one looks at this issue through the prism of intersectionality. It has already been mentioned that those most likely to experience poverty in South Africa are black, are young (<17yoa), live rurally, and are female.[273] This further correlates with education, as of 2015 79.2% of those without any formal education were poor, whereas a mere 8.4% with some form of post-matric education found themselves in a similar predicament.[274] This is interesting for a number of reasons. If there is a positive causal correlation between the onset of menses and school absenteeism the above factors can only be said to exacerbate the situation. Being female speaks for itself, but being young, living in a rural area and being black within the South African context are not going to help the situation if menstruation is clashing with one's capacity to attain an education. This in turn will hinder the ability to extricate oneself from

[272] Ibid para 50.
[273] Op cit note 81 at 56-67.
[274] Op cit note 81 at 69.

that poverty, if indeed the hypothesis that poverty is negatively correlated with education proves correct. The above statistics certainly lend credence to this.

For clarity, the intersectional argument would go something like this; those most likely to experience poverty are under the age of 17, those most likely to experience difficulty accessing menstrual products, and this in turn affecting their education, are also under the age of 17. Those most likely to experience poverty live rurally, those most likely to experience difficulty in obtaining menstrual products also live rurally. This is speculative, but it makes sense that the fewer retailers in close proximity to an individual will negatively affect their ability to access resources, menstrual products included. Those most likely to experience poverty are black South Africans, those most likely to experience difficulty in obtaining menstrual products are therefore also black South Africans. The correlation between being female and experiencing menstruation does not need to be unpacked, but from the above scenario it makes sense that those most affected by the onset of menses are probably going to be those least able to deal with it in an effectual and dignified manner. This is without even considering the negative implications a lack of access to clean water and sanitation, again most often concerns of the poor in rural areas, may have. This is relevant because it suggests that the duty of care the State has with regards to this demographic is actually rather high. The people in question are not a fringe group, (of course fringe groups should not be denigrated to the side lines merely for being a minority) but in this scenario roughly half the population of the country and in all likelihood a majority of that half. Be that as it may, the intersectional approach is something allowed and accounted for in and by the Equality Act, and that is what now shall be addressed.

### *(c) The Equality Act*

One of the ways in which the systemic disadvantage, stigmatisation and impaired dignity might be addressed in the South African context is through the Promotion of Equality and Prevention of Unfair & Discrimination Act, No. 4 of 2000 henceforth referred to as the Equality Act. The intention of the Equality Act is to:

> '…give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination

and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.'[275]

The principle of subsidiarity requires that the Act be used in preference to s 9 of the Constitution, if the Act so applies.[276] That will be established at the end of this section, but for the moment presume that it does.

Section 6 states that '[n]either the State nor any person may unfairly discriminate against any person'. Similar to s 9, the Equality Act requires a two stage analysis. First, is there discrimination based on sex/gender? That is to say a differentiation in treatment based on the sex or gender of the complainant. The second step is to establish whether the discrimination is unfair should it be found to exist. To unpack the first step, reference must first be made to chapter 3, s 13 and the definitions in s 1 of the Equality Act. Although s 8, which amplifies on the meaning of discrimination (based on gender) provides useful guides to interpretation, it is not the operational provision.

Chapter three of the Act deals with the burden of proof in determining discrimination, as well as the determination of unfairness regarding that discrimination. The burden of proof is important because if the complainant makes a *prima facie* case for discrimination, the respondent (for the purposes of this dissertation that would be the state) must show that either the discrimination was not based on a prohibited ground, that it was fair or that it did not take place at all.[277] The second part of chapter three deals with the determination of fairness, but this will be discussed in detail momentarily. Firstly, whether the topic at hand qualifies as sex/gender based discrimination as per the Act needs to be established.

### *(i) Is there Discrimination?*

Step one proceeds from the definition of discrimination in s 1 of the Act:

[275] Promotion of Equality and Prevention of Unfair & Discrimination Act, No. 4 of 2000 at 10.
[276] Catherine Albertyn 'Getting It Right In Equality Cases. The Evaluation of Positive Measures, Groups and Subsidiarity in *Solidariteit V Minister Of Basic Education'* (2018) 135 *SALJ* 414-5.
[277] Op cit note 265 at s 13(1) and (2)

> '…any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly…imposes burdens, obligations or disadvantage on; or…withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds'[278]

The prohibited grounds are defined in the definition section. These include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, as well as any ground that perpetuates systemic disadvantage or impairs human dignity.[279] This facilitates the possibility of an intersectional approach based on one or more of the prohibited grounds. Section 8 further illuminates the ground of sex and or gender, providing the prohibited ground which is most relevant for this dissertation: discrimination based on gender. The Act does not contain a specific section dealing with discrimination based on sex which suggests the two terms are being used interchangeably in it, but be that as it may. Referring back to s 1, it is important to investigate which aspects of discrimination are being addressed here. The hypothesis of this dissertation in that there is likely an omission on behalf of the state resulting in a policy that directly imposes a burden and disadvantage on school girls which in turn results in the benefits and opportunities of education being withheld from them, albeit indirectly, as a result of menstruation. Simply put, the state has failed to provide menstrual products and failed to protect against the stigma arising from a lack of access to those products. In order to prove this, the first stage in this analysis has to establish if there is indeed discrimination.

The crucial information here is that an act or *omission* has taken place and that that can have occurred by imposing a *burden* or withholding a *benefit*. If one now looks at the situation at hand, where the State's *omission* in failing to provide menstrual products is imposing a *burden* on girls (many of whom are amongst the most vulnerable and impoverished in South Africa) to provide their own menstrual products and this is in turn is hindering their capacity to access the *benefits* of an education, then the State is obligated to act. If an NGO or other concerned party, for example, can show that this omission on behalf of the state exists and that it is causing harm (school absenteeism, harassment, stigma…) then 'discrimination has been established'[280] and it is

[278] Op cit note 265 s 1.
[279] Op cit note 265 at s1(a) and (b).
[280] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 138.

the State's duty to prove that this discrimination is fair. Considering everything that has already been discussed in this dissertation, and which is still to be discussed, this is *highly* unlikely.

Moving on, Section 8(d), read in conjunction with s 6, states that:

> '…no person may unfairly discriminate against any person on the ground of gender, including — any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child'

This is useful for two reasons. First, it means that if there are stigmatising elements in any South African practices, such as traditional, customary or religious practices that discriminates against girls and women as a result of menstruation (which is a sex based discrimination for the already argued reasons) that this would indeed be discrimination based on gender/sex according to the Act. This subsection also prioritises the well-being and dignity of the girl child, which again for the purposes of this dissertation, is very important for obvious reasons. It could also mean that the practice of failing to provide toilet facilities for girls and women to manage their menses could be discrimination based on gender/sex. This, however, is somewhat tenuous because this is more of an omission to institute a practice rather than a practice in and of its self. Here, however, s 8(g) of the Equality Act becomes useful.

Section 8*(g)* prohibits against unfair discrimination based on gender including '…limiting women's access to social services or benefits, such as health, education and social security…'. If you accept the argument that menstruation inhibits the capacity of women and girls to access social services/benefits like health, education and social securities then this criterion is met. Based on these two subsections it is highly plausible that the failure to provide toilet facilities and menstrual products would qualify as discrimination based on sex/gender. However even without the assistance of these two sub-sections the failure on behalf of the state to provide free menstrual products to school girls amounts to sex/gender based discrimination. This is because it is an omission that places a burden on these girls to provide their own menstrual products potentially withholding, or at the very least failing to facilitate, their access to the benefits of education and as per s 1(a) and (b) of the Act, this is in and of itself discrimination.

*(ii) Is the Discrimination Unfair?*

What next needs to be established is whether this is fair or not under the provisions of the Act. Since 'unfair discrimination' rather than simply 'discrimination' is the prohibited action contained in the Equality Act, this needs to be established. Section 14 of the Act guides the determination of what exactly is and is not fair. The criteria that needs to be taken into consideration in establishing this are extensive and includes, but are not limited to, the following: context, whether the discrimination reasonably and justifiably differentiates between people concerning the activity at hand, whether the discrimination impairs human dignity, the impact on the people or person involved, the position in society of the people involved and whether they have suffered from patterns of disadvantage (or belongs to a group that does), the nature and extent of the discrimination, whether it is systemic in nature, has a legitimate purpose, achieves a legitimate goal (and whether there is are less disadvantageous means to achieve that goal), and finally, whether the respondent has attempted to take reasonable steps under the circumstances.[281] These will now be addressed in a sequential manner.

*(iii) Contextual Analysis s 14(2)(a)*

With regards to this section, not much needs to be unpacked, suffice to say that the context of the situation at hand needs to be taken into account. The social and economic circumstances of women and girls in school profoundly affects their lived experience. That the majority of women and girls in South Africa are black, and that young (<17 years of age) black women are statistically those most likely to live in poverty, and therefore most likely to experience period poverty as a result, has already been discussed. But, baring this in mind, it is highly improbable that any discrimination against this demographic would be found to be *fair,* even in a circumstance where it is a failure to provide them with differentiated treatment (provision of free menstrual products), rather that protecting them from it.

[281] Op cit note 265 ss 2(a)(b)&(c), ss 3(a)-(i).

*(iv) The Impact on the Complainant ss 14(3)(a)-(e)*

The first question that needs to be asked, is whether a lack of access to menstrual products (and at a broader level toilet facilities) is an infringement of girls' and women's dignity? Now, if a correlation between period poverty and school absenteeism can be established, and that correlation is positive and causal in nature, an infringement of dignity can certainly be said to exist. Education is foundational to achieving dignity as has already been discussed, but the concept of dignity is broader still than that. A lack of access to menstrual products has the potential to impair a girls or woman's self-esteem regardless of whether it negatively impacts school attendance. The exact wording of s 14(3)(a) is 'whether the discrimination impairs or is likely to impair human dignity'? Not being able to manage one's menstrual cycle is inherently undignified, particularly since this will inhibit one's capacity to live a full and complete life in general but particularly as it pertains to education. Since one's future is dependant, to a certain extent, on that education a lack of access to menstrual products will not only impair human dignity in the moment, but will likely also impair human dignity in the future. As already established this is a sex based issue and therefore it is highly likely that the discrimination will lead to an impairment of human dignity based on sex (referred to as gender in the Equality Act). For these reasons, as far as s 14(3)(a) is concerned, this weighs in favour of a finding of unfair discrimination.

Moving on, and addressing s 14(3)(b), the next consideration to take into account is the impact of the discrimination in question. This impact is focused on and largely determined by the concept of dignity and disadvantage. This follows on from the last paragraph because the question that now needs to be asked is, what is the impact of not having access to menstrual products? Although not specifically stated, the issue here appears to be the severity of the impact. Are the consequences of the discrimination so severe that they could be deemed unfair and therefore an infringement of the dignity of a disadvantaged person or group? For example, if the consequence of not having access to menstrual products is simply that girls and women do not have access to menstrual products and that is all, one might be able to argue that the impact is minimal. However, if this dissertation has shown anything by now, the consequences of this are not only broad ranging but also potentially dire. If this discussion moves away from a generalised understanding of dignity, and focuses rather on the specific impact a lack of education can have on the dignity of an individual, as well as how it reinforces gendered disadvantage, this becomes clear. School

absenteeism, a greater risk of sexual harassment as a result of menstrual leak, and girls using unsanitary items in lieu of menstrual products (potentially leading to infections), are just some of the possible disadvantageous consequences of a lack of access to menstrual products. Of particular concern, is the school absenteeism because of its potential negative knock-on effects in later life for an already systemically disadvantaged demographic. For these reasons, it is highly likely that the 'impact' element of this test will also mitigate towards a finding of unfair.

Next, and something that will not require much in the way of explanation is 'the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage'.[282] The short answer to that is yes *she* does. Both on an individual and group level, women and girls are systematically disadvantaged globally. Now this varies from country to country and probably varies within each country further still, unfortunately South Africa has a particularly bad reputation when it comes to the well-being of women/girls. This is especially true when it comes to impoverished, usually black, women and girls. We have severe problems with Gender Based Violence, women earn less (irrespective of race) than men, they are more often unemployed and they also have a greater burden of the poverty share.[283] This is of particular concern with regards to the potential positive causal correlation between period poverty and education because it appears that women have lower levels of literacy than men in South Africa.[284] Whether this is as a result of school absenteeism is unknown, however if there is widespread absenteeism it is not going to *help* the literacy rate among women. Whatever the case, for the purposes of s 14(3)(c) the discrimination in question is most certainly unfair.

The next consideration is the nature and extent of the discrimination. Section 14(3)(d) is concerned with is what kind of discrimination is affecting people by virtue of their gender, and to what degree. That is to say, is it serious and is it widespread? With regards to period poverty the answer is probably yes and again yes. As has already been pointed out the implications, both long and short term, of period poverty are serious and as roughly 51.2% of the population are female[285] (and therefore probably menstruate for a significant proportion of their lives) it is most certainly

[282] Op cite note 265 s 8(3)(c).
[283] Stats SA *Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality* (2019) 6, 59.
[284] Ibid at 125.
[285] Ibid at 124.

widespread. It will be necessary to show that these things are in fact happening in South Africa, but this will be discussed later in more detail.

Moving on, s 14(3)(e) looks into the systemic nature of the discrimination in question. In order to establish whether this criterion is met, it is perhaps worthwhile discussing what is meant by systemic. A systemic issue is an issue due to problems that are intrinsic or built into the system itself. This is as opposed to problems that might be isolated, or as a result of a *once-off* mistake. Now when dealing with period poverty, as mentioned before, the lack of access to menstrual products is not a goal or a step in the process of achieving a goal. Period poverty is not intentional, but it does not need to be so in order to be a systemic problem. One might be able to say that not providing school girls with free menstrual products is an isolated or *once-off* oversight and therefore not systemic in nature, but that seems over simplified. Is it not more likely that the absence of menstrual products within the school environment is a failure of the education system itself to factor in the needs of female students? Therefore, making it a systemic failure by its very definition? This seems more plausible. The education system treats male bodies as the default or *norm*, and as men do not menstruate, the system does not create an environment that caters to or *centres* women/girls. While it is not the intention of this dissertation to suggest that the entire school system become completely gynocentric, that is to say exclusively centred on women, it would be nice if it was not quite so exclusionary to the female experience. Based on the above argument it seems highly probable that the sex based discrimination that is period poverty is systemic in nature and therefore unfair based on the provisions contained in the Equality Act s 14(3)(e).

### *(v) State Justifications ss 14(3)(f)-(i)*

As already mentioned ss 14(3)(f) through (h) are not really applicable when talking about period poverty and an access to toilet facilities. The reason for this being that neither of the afore-mentioned problems are intentional or with a specific purpose in mind. In other words, there is no legitimate purpose. Since the discrimination at hand is an omission rather than a positive act on behalf of the state, some of these subsections can be dispensed with. They include whether the discrimination is reasonable and justifiable considering the activity at hand, whether it has a legitimate purpose and whether it achieves a legitimate goal. Failing to provide facilities and

menstrual products, although egregious, can hardly be considered a 'goal' or a 'step in' achieving a goal. Unless that goal is sex based inequality of course. This would qualify as unfair discrimination in and of its self and although one can credit the patriarchy with a lot, it would truly have to be insidious if failing to provide women and girls with a means for managing their menses was in fact a deliberate attempt to keep women down. This is possible but highly implausible. It is conceivable, however that the state might say that the 'legitimate purpose' can be seen to be the lack of evidence of a problem. That there is no reason to act. This is unlikely to be successful for two main reasons. Firstly, absence of evidence is not evidence of absence. That there does not, on the face of it, appear to be a significant correlation between the onset of menses and school absenteeism in South Africa, does not prove that girls are not struggling with their menses. Secondly, stigmatisation and impaired dignity can take place without being immediately observable, particularly when talking about something that roughly only half of any population experiences. For the above reasons, the legitimate purpose argument is highly unlikely to be successful.

Subsections 14(3)(*i*)(i) and (ii) now need to be addressed. These subsections deal with whether the respondent has taken reasonable steps under the circumstances and/or taken into account both diversity and the disadvantage rising from or related to any of the prohibited grounds.[286] At the commencement of this research there were no meaningful steps that had been taken to ameliorate the disadvantages arising from period poverty and so for the purposes of this subsection the discrimination can be said to be unfair. However, it should be mentioned, the development of the Sanitary Dignity Framework is a tentative step in the right direction on the part of the state, and should be evaluated in terms of whether or not it is a *reasonable* step that addresses 'the disadvantage which arises from or is related to one or more of the prohibited grounds'[287], namely gender based discrimination. This will ultimately come down to how much leeway the court is prepared to give the state and the steps taken towards implementation, thus implicating the state's capacity to enact what they have put on paper. Of course this will be dependent on what, if anything, has been done since the policy was adopted. And that in turn will also be dependent

[286] Op cite note 265 ss 8(3)(i) and (ii)
[287] Op cite note 265 s 8(3)(i)

on how much time elapsing a court would consider reasonable between the adoption of the policy and its implementation.

Section 14(3)(i)(ii) concerns the accommodation of diversity. In evaluating this subsection, the case of *MEC for Education: Kwazulu-Natal and Others v Pillay*[288] is particularly interesting. This case revolves around a school's refusal to allow the respondent's daughter to wear a nose stud.[289] This was problematic because the respondent and her daughter were Hindu and the wearing of a nose stud is a core element of their culture and religion.[290] This is particularly interesting for the purposes of this dissertation because the wearing of the nose stud is indicative of having reached menarche, as stated in the case: 'when a girl comes of age, a stage marked by the onset of her menstrual cycle, the family honours the fact of her becoming a young woman. As part of the ritual, a prayer is performed and her nose is pierced on the left side for the insertion of the nose stud'[291] The implications of this will be discussed in more detail momentarily, first we must establish why the Constitutional Court found this to be discriminatory. The issue at hand is that the school had discriminated against the respondent's culture and religion.[292] Both of which are protected characteristics as per s 9 (equality), s 15 (freedom of religion, belief and opinion), s16 (freedom of expression) and s 31 (cultural, religious and linguistic communities) of the Constitution. As such the school's behaviour was, by definition, unconstitutional.

What is more interesting concerning the matter at hand, is how the Constitutional Court dealt with the Equality Act in *MEC for Education: Kwazulu-Natal and Others v Pillay.* At the heart of the case is the concept of reasonable accommodation. Langa CJ points out that there is specific mention to this concept within the Equality Act and that it recognises that in failing to take reasonable steps to accommodate people on the basis of gender, disability or race, unfair discrimination will have taken place.[293] Furthermore, Langa CJ makes reference to the fact that under the afore mentioned circumstances the state has a duty to promote codes of practice that facilitate equality.[294] This is almost word for word what is contained in s 25(1)(c)(iii) of the

[288] 2008 (1) SA 474 (CC).
[289] Ibid para 4-10.
[290] Ibid para 13.
[291] Ibid para 11.
[292] Ibid para 11 and 13.
[293] Ibid para 72.
[294] Ibid para 72.

Equality Act. With regards to period poverty, unfair discrimination based on gender is the important issue. If the state has a duty to put in place practices that promote equality, and one of the most important types of equality is gender based, and period poverty is a serious obstacle to gender (read sex) based equality, then surely the state needs to tackle the problem that is period poverty. It is the assertion of the research that this would best be done (at least primarily or to start with) by providing school girls with free menstrual products.

### *(vi) Conclusion: Fair or Unfair Discrimination?*

This brings the analysis of unfair discrimination under the Equality Act to an end. In balance, I would suggest the impact outweighs the justifications. This would suggest that the gender/sex based discrimination arising from the phenomenon that is period poverty is unfair discrimination and therefore the state has an obligation to act. What remains is to establish the best course of action in tackling this unfair discrimination

### *(vii) Remedies*

In circumstances where unfair discrimination has been found to have taken place on one or more of the prohibited grounds, the Act provides an extensive list of actions that can be taken by the equality court. It would be pointless to simply list them all, and so this section will only address those that seem most pertinent to the issue at hand. Section 21(2)(b) states the Equality Court has the power to issue a declaratory order. This would be helpful, as it would define the rights and obligations of the state with regards to the amelioration of period poverty, which it could declare as a form of unfair discrimination. The implementation of special measures to address the unfair discrimination declared by s 21(2)(b) could also be helpful. [295] These would include the provision of free menstrual products as well as puberty orientated education, and the necessary infrastructure upgrades contemplated to provide sanitation and clean water. Finally, 'a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order'[296] would be necessary. The consequences of a

[295] Op cit note 265 s 21(2)(h).
[296] Op cit note 265 s 21(2)(m).

lack of supervision will be discussed in a later section dealing with the Sanitary Dignity Framework, suffice to say that a lack of monitoring processes tends not to produce the best results, particularly when tax payer's money is involved. Be that as it may, for the purposes of this matter, the Commission for Gender Equality would probably be the best option.

*(viii) Chapter 5 of the Equality Act.*

As a last note, chapter 5 of the Equality Act contains some very interesting possibilities when tackling what has now been established as unfair discrimination. This chapter is not promulgated and is therefore not a remedy *per se*, however the state's proposed duty to promote equality is none-the-less useful. The list provided in s 25(1) follows a multifaceted approach by dealing with, not only the legal consequences of discrimination, but also with raising awareness in order to lessen it in general. Almost all of the 'remedies' proposed in this section of the Act are pertinent when dealing with the phenomenon of period poverty.

Aside from enacting legislation that promotes equality, the Act also deals with education intended to diminish discrimination. Section 25(1)(a), s 25(1)(c)(iv) and s 25(1)(c)(vi) refer to the development of awareness, training and information campaigns respectively, while s 251(b) and s 251(c)(i) deal with the development and deployment of programmes and action plans aimed at promoting equality. Section 25 1(c)(iii) and 25(1)(c)(v) address the need for appropriate internal mechanisms to deal with complaints of unfair discrimination, as well as developing codes of practice 'to promote equality, and develop guidelines, including codes in respect of reasonable accommodation'. Only s 25 (1)(c)(ii) in fact mentions legislation and its role in promoting equality.

Almost all of the above could be utilised in tackling period poverty and its associated issues. The provision of free menstrual products is only part of the solution. As discussed there is stigmatisation associated with menstruation and in order to minimise this, a programme of education will also be needed. Raising awareness, information campaigns and puberty specific training would all aid in diminishing the stigma associated with menses and would be helpful, not only for girls, but also for educators and male students. Action plans and programmes for

deploying this information are necessary, and would certainly facilitate the infrastructural improvements needed to provide all schools with sanitation and clean water.

Interestingly the Sanitary Dignity Framework actually echoes the Equality Act and its chapter 5 in formulating its solution to menarche related problems. It is quite possible that the Department of Women, Youths and Disabled Persons actually utilised the Equality Act when compiling the Framework, so pronounced is the similarity. This will be addressed at the end of this dissertation, first the principle of the best interests of the child needs to be considered, as does the concept of and right to dignity that so importantly underlies all other right and principles contained here within.

## THE BEST INTERESTS OF THE CHILD

> 'Children…
>
> (2) a child's best interests are of paramount importance in every matter concerning the child.
>
> (3) in this section "child" means a person under the age of 18 years.'[297]

Section 28(2) of the Constitution suggests that a child's best interests are a critical deciding factor in all issues concerning the child. This, at least, is this import of a cursory reading of this constitutional principle, but what exactly does it mean? Although the principle is ostensibly expansive, it does run the risk of being so expansive as to become vague. This much has been pointed out in *S v M* (Centre for Child Law as Amicus Curiae),[298] which is arguably South Africa's seminal case when it comes to setting out the constitutional approach to section 28(2). Sachs, J pointed out that if simply taken as it stands, this principle could potentially run the risk of overriding '…all other legitimate interests…'.[299] This is an interesting point to make. A child's best interests as the primary and *overriding* concern regarding that child seems an appropriate, if not essential, prerogative for any forward looking society, however one could run into problems if it were a value completely unhindered by circumstance and situation. To make an example: if we work from the premise that children are best served by being raised by one or both of their parents, you could potentially say that no parent should ever find themselves facing a custodial sentence because that very sentence might deprive their child of a parent. This was the substance of *S v M* and would of course not work in any practical sense if applied without discretion.

### *(a) A Balancing Act*

With regards to this dissertation we are not dealing with the rights of third parties. The state would potentially need to provide free menstrual products to school girls, not desist in a course of action that might inhibit *someone else* providing them with free menstrual products. The difference here is that in the second scenario the school girls would be a third party. It should also be noted that

[297] Op cit note 160 at s 28.
[298] *S v M* 2008 (3) SA 232 (CC).
[299] Ibid para 13.

while one should be mindful of limitations, when it comes to facilitating a child's access to education, those limitations would be minimal. After all, what possible justification could be found for failing to assist a child in their schooling? Before going into that however, it might be prudent to address why this principle is relevant to the topic at hand. As already stated, the main focus of this work is the potential absenteeism from school, and therefore potential damage to overall education, caused by the onset of menses. Not all girls start menstruation at the same time, it is however highly likely that by seventeen years of age this has happened.[300] The is relevant for two reasons. Although we acknowledge that adult education, as a right, is important within South Africa, the vast majority of learners in school are eighteen years of age or younger.[301] This means that the majority of females who may be negatively affected by the onset of menses and who are learners *are* children, at least by the definition set out in s 28(3) of the Constitution. This means that by definition, the state is bound to a special duty of care when dealing with their needs as per s 28(2). A second consideration to make note of is the expanded rights and capacities of adults. Although speculative, one of the main reasons the under 17 year old bracket may be disproportionately experiencing poverty is because child labour is frowned upon. Make no mistake, no one is suggesting this should be amended, legally or otherwise, however it does make sense that those who cannot work will experience poverty more acutely if their care givers are already struggling with this problem, and they are unable to assist with household income. This is relevant here because girls who may be missing school because of a lack of access to menstrual products (or analgesics) are exactly the group who cannot get paid work (and should not have to) to afford them, namely children. It is also worth mentioning that part of the rationale behind the *Juma Musjid* case already discussed, was the best interests of the child.[302] It was emphasized that this creates an obligation on all who make decisions on behalf of children to give their best interests paramount importance.[303]

Be that as it may, Sachs, J had this to say with regards to balancing the best interests of the child and their possible limitations:

[300] Op cit note 124.
[301] School Realities op cit note 66 at 1-3.
[302] Supra note 218 para 65.
[303] Supra note 218 para 67.

> 'The word "paramount" is emphatic. Coupled with the far-reaching phrase "in every matter concerning the child", and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them…This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2).'[304]

Taken in conjunction with the premise of this dissertation, how would the best interests of the child be balanced? If the NGOs working in this area are to be believed, a substantial proportion of female children are missing a substantial proportion of their schooling as a direct result of limited access to menstrual products.[305] This is an indirect infringement on their right to a basic education, an direct infringement on their right to (sex based) equality and since the majority of them are legally children, it is also an infringement of the duty to take into account the best interests of the child as set forth in s 28(2). There are of course limitations on this principle to prevent it from subsuming all other rights and obligations, but if read with the right to education and equality, it should surely carry some weight. If it does not, then s 28(2) is indeed an 'empty rhetorical phrase of weak application'.[306] In conclusion therefore, s 28(2), if not actionable on its own in this matter, certainly strengthens the arguments about education and equality to render them more powerful.

This is not all, however. In all the cases dealing with the right to education, the right to equality and the best interests of the child, reference is always made to how these rights promote the right to and value of human dignity. In fact, this principle complements and underlies all the other rights discussed in this dissertation. It is the lynchpin that lies at the heart of the South African Constitution. This above all else, may be the prevailing principle whose infringement is most concerning with regards to menses and their onset.

[304] Supra note 288 para 25.
[305] Op cit note 124; op cit note 126.
[306] supra note 288 para 25.

**THE RIGHT TO DIGNITY AND ITS CENTRAL RELATIONSHIP WITH OTHER RIGHTS.**

> 'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does…'[307]

Although a quotation from a legal case dealing with the death penalty may seem a strange addition to a dissertation concerning menses and education, there are few statements that highlight the importance of dignity better. Few other rights are as foundational to the existence of human life as that of dignity. It 'lies at the heart of the South African Bill of Rights'[308] and reference to it can be found in almost all seminal South African court cases, even if only mentioned briefly. This is certainly the situation with all the legal cases already mentioned here, and for that reason this is perhaps the lynchpin value and right that should inform not only any remedies concerning the issue at hand, but also the interpretation of all other rights discussed. As already mentioned, the right to education, the right to equality and the best interests of the child are all underpinned specifically by the value and right to dignity,[309] and more generally by the concept of dignity. This is an interesting triumvirate because these three ideas intersect to such a significant degree. While rights are actionable claims, whereas values and concepts are not, the courts have a tendency to blur them. Much in the same way that the terms sex and gender are used interchangeably in a lot of legal cases, differentiating between the value, concept and the right to dignity is somewhat of a chicken-and-egg discussion. At the heart of each is the notion that human beings be treated as such. The other rights contained in this dissertation tend to be underpinned by this idea. Inherent in which is the idea that dignity facilitates ones' capabilities, or one's capacity to strive for a life that gives the individual a sense of dignity, whatever that may be. This is actually a primary tenant of feminism as well, which seeks to maximise a woman's ability to choose for herself the path that

[307] *S v Makwanyane and Another* 1995 (3) SA 391 para 144.
[308] Stu Woolman 'The Architecture of Dignity' in Drucilla Cornell, Stu Woolman, Sam Fuller, Jason Brickhill, Michael Bishop and Diana Dunbar (eds) *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials, Volumes I & II* (2013) 112-5.
[309] Op cit note 160 s 10.

her life takes. This ability to choose, both from the point of view of feminism and also dignity, is facilitated by the rights already explored, none more so than the principle of the best interests of the child.

### *(a) Dignity and the Best Interests of the Child*

Although the connection between the best interests of the child and the right to dignity might not seem immediately obvious, there are numerous ways in which they are interlinked. At the heart of this, and the other rights to be discussed, is the concept that human beings have dignity and a right to it, merely by being human.[310] There is no further qualifier. One does not need to be a clever human, an attractive human, a tall human or a rich human. One simply needs to be alive and human. Working from this standpoint, one acknowledges that children must have dignity. In *S v M* Sachs, J pointed out that children are not simply extensions of their parents or primary caregivers 'destined to sink or swim with them'.[311] They are worthy of the right to dignity simply by virtue of existing. That dignity is distinct from their parents/caregivers, in part because society does not consider children to be the possessions of their parents/caregivers, but also because 'the sins and traumas of fathers and mothers should not be visited on their children'.[312] This is an acknowledgement that children should have the right to strive beyond the achievements of their parents and shape their own destinies unencumbered by the challenges their parents may or may not have experienced. This formulation of the right to dignity for children is even more important because their very nature means they are deserving of an additional duty of care.[313] This is the concept that lies at the heart of the best interests of the child encompassed in s 28(2) of the Constitution.

### *(b) Dignity and Education*

To bring this home, one of the most significant ways in which to *unencumber* ones' destiny from the circumstances of one's caregivers, is through education. This connection is not a speculative

[310] Op cit note 191 at 77.
[311] Op cit note 288 para 18.
[312] Op cit note 288 para 18.
[313] Op cit note 288 para 17.

one. The right to education is informed by the right to dignity because we, as a society, acknowledge the immense benefits of education, as does our jurisprudence. In *Minister of Home Affairs v Watchenuka*[314] this was specified. 'The freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfilment'.[315] Of course *Minister of Home Affairs v Watchenuka* did not concern a child and therefore is not a good example regarding the principle of the best interests of the child, however what is interesting is the connection made between human fulfilment and dignity in this case. It is a means to self-actualise a future one finds value in, whatever that may be. Having said this, the right to education is not the only means by which human fulfilment and dignity are linked.

*(c) Dignity and Equality*

The most obvious impediment to dignity and therefore human fulfilment, is that of inequality. It stands to reason therefor that equality, or rather the right to it, is probably the greatest means of fulfilling human potential and promoting dignity. For our purposes the right to sex based equality and how this promotes dignity is most pertinent. *Bhe v Khayelitsha Magistrate and Others* makes it clear that the unequal treatment of women is an affront to their dignity.[316] Unequal treatments conveys unequal worth, and the unequal treatment of women within our society suggests that they are of lesser value than that of men.[317] For obvious reasons this should not be condoned, however what is meant by *unequal treatment*? Women are not subjected to menstruation as a result of male oppression, it is a natural biological function. As has already been pointed out, the only *party* who could be said to treat women unequally in this sphere is that of nature or possibly evolution. Neither of these could be held to account by any legal system. Society does however, have some control over the management and stigma associated with menses.

The stigma, or rather the shame or aversion, associated with menstruation is a cross-cultural phenomenon. Whether it be Kenya, Nepal, Nigeria, Tanzania, Uganda, Ethiopia, Cambodia, India

[314] 2004 (1) SA 21 (SCA).

[315] ibid para 36.
[316] 2005 (1) SA 580 (CC) para 92.
[317] Ibid para 187.

or Ghana, varying degrees of stigma are associated with menstruation and its onset.[318] Shame, fear, negative societal attitudes and restrictions are just some of the issues facing girls in the afore mentioned countries.[319] The manner in which this stigma and the right to dignity intersect are interesting. In *Bhe v Khayelitsha Magistrate and Others* the connection between social stigma and the impairment of dignity is made clear.[320] Section 9(3) of the Constitution prohibits unfair discrimination on a number of grounds including, but not limited to, sex and this has been done in part to eliminate 'patterns of stigma from our society'.[321] *Bhe v Khayelitsha Magistrate and Others* was specifically dealing with the stigma associated with children born out of wedlock, but many of the motivations of this judgement hold true for the topic at hand. This stigma associated with children born out of wedlock, and the legal consequences thereof, are deeply hurtful.[322] Although these stem from social and religious origins, and not necessarily legal ones, Langa DCJ pointed out that because of the equality clause and our commitment to dignity, as set forth in the Constitution, we have a duty to mitigate against this stigma.[323] The negative connotations associated with menstruation, likewise, stem from social norms and in many cases religion, and although these may never have been meant to have long reaching legal affects, the right to dignity means that they ultimately do have legal implications. If the dignity of girls is being impaired by either a lack of access to menstrual products or societies' (potentially outdated) repugnance for menses, surely then, if the state can assist, it has a duty to do so. No government can fundamentally alter the biological reality of being female, however, how society as a whole reacts to and accommodates menstruation may well fall under the ambit of a legal intervention.

### *(d) Conclusion*

Having addressed the most pertinent rights that are affected by period poverty and its implications for women and girls it is perhaps worthwhile taking a macro view of them and how they interconnect before moving on. It has already been said that dignity is the core value, if not

[318] Mugambi & Georgas op cit note 113 at 003; Oster & Thornton op cit note 113 at 2; Sommer op cit note 113 at 522; Sommer et al op cit note 119 at 596.
[319] Ibid.
[320] Op cit note 170 para 59.
[321] Op cit note 170 para 59.
[322] Op cit note 170 para 57.
[323] Op cit note 170 para 57-9.

necessarily the right, that underpins all other rights specifically those discussed here. With regards to period poverty and its broader consequences, this is especially true. The stigma associated with menstruation and menstrual blood and its management is one of the few things that can be said to be almost universal when it comes to the numerous different cultures we find on this planet. Be that as it may, stigma is antithetical to the concept of dignity, particularly when it hinders other foundational rights. The importance of education as a transformational mechanism cannot and should not be underestimated. It is, in the opinion of this researcher, the single greatest way in which to change people's lives for the better. This is especially true for women and absolutely crucial for black women in South Africa who continue to be disproportionately affected by poverty.

Couple this with the fact that period poverty has the potential to cause school absenteeism and therefore affects the girl child's ability to access education and this is made all the worse. It is not sufficient to simply not have any laws or legislation that *actively* discriminate against women and girls. This is particularly relevant because of the long lasting affects period poverty can have on gender/sex based inequality. If the right to equality, and the right to the best interests of the child, and the right to education, and the right to dignity are all potentially being negatively affected by the onset of menarche it seems logical that something needs to be done. Policies that proactively intervene in this matter are required in order to address these problems because simply ignoring them is not going to help. This is relevant because it is not simply a matter of educating young women and providing them with access to menstrual products and toilet facilities. If young women are worried about the increased risk of sexual assault as a result of menstrual leak, then unless this is at the hands of other women and girls, young men are going to have to be educated on these matters as well. The same goes regarding the stigma associated with menstruation. As a general rule people stigmatise what they do not understand. This means that combating this stigmatization will *require* education in order to facilitate *access* to education.

The same can be said for facilitating dignity. If young women and girls are educated to understand their menstrual cycles and female specific reproduction it seems likely that the shame associated with these things will be diminished. This cannot be done with free pads alone. Stigma is one of the burdens of being female but it does not have to be. It is with this in mind that the next section will address the Sanitary Dignity Framework. This policy was published by the

Department of Women, Youth and Persons with Disabilities mid-2019 and is an ambitious scheme aimed at tackling period poverty as well as the stigma associated with menstruation. Much of what has been discussed in the previous sections of this dissertation is actually addressed in the Framework and while this is tentative step in the right direction it remains to be seen how well it will be implemented if at all.

## THE SANITARY DIGNITY FRAMEWORK.

While it may seem peculiar to only be addressing this document now, there are a number of good reasons for this. Firstly, this document had not been published when the research proposal for this dissertation was compiled, meaning that the research questions contained there within were formulated independently of this document. Secondly, the importance of education, the right to it, to dignity, the best interests of the child, and to equality are relevant irrespective of the Framework. It is also important to examine whether the Framework adequately addresses these concerns, and should this policy fail to be properly implemented could these rights and values be used to force action on the part of the State.

In 2017, the Minister in the Presidency responsible for Women, Minister Susan Shabangu, mentioned that as free contraceptives and treatment for sexually transmitted diseases were covered by the South African health system, what remained was to provide menstrual products to the 'indigent girl child'.[324] The Minister acknowledged that menstruation was an inconvenient reality and that its management continued to be unaffordable for the ordinary woman.[325] As the responsibility for promoting gender equality and the empowerment of women fell on the then Department of Women, this Framework was commissioned.[326]

### *(a) Content of the Framework.*

Almost immediately the Framework acknowledges the connection between menstruation, its onset and the right to dignity. The specific intersection between dignity and the management of menses are stated to be integral to the human rights of women and girls.[327] Furthermore, the Framework acknowledges that dignity cannot be realised without access to menstrual products and various 'other requirements to achieve sanitary dignity'.[328] What these various 'other requirements' entail will be discussed momentarily, but it is very encouraging to see that from the onset *access* to

[324] Ibid s1.3.
[325] Ibid s1.3.
[326] Ibid s 1.4.
[327] Ibid s3.1.1.
[328] Ibid s3.1.4.

menstrual products is prioritized specifically, whilst at the same time drawing attention the negative consequences of a *lack of access* to menstrual products.

The very first negative consequence referenced in the Framework is school absenteeism.[329] Although the hindrance to participating in social and community activities is mentioned as well, including sporting, political and cultural events, first and foremost schooling is cited.[330] While it is of course important that all women have their access to menstrual products facilitated, the fact that the Framework prioritises school girls acknowledges not only their heightened vulnerability as children, but also the importance of education in and of itself. Furthermore, the needs of 'indigent' school girls are prioritised. Section 9.1.5(a) of the framework specifically indicates quintile 1, 2 and 3 schools as those most in need of free sanitary products, with the option of expanding this to quintile 4 and 5 schools based on 'assessment and availability of resources'.[331] This certainly seems to lend credibility to the hypothesis put forward in this dissertation; that girls from poorer and rural schools would be those with least access to products and therefore those most in need of assistance. Interestingly, the Framework makes note of the fact that it does not wish to discourage the promotion of sanitary dignity amongst girls who are not especially vulnerable, rather it wishes to help those most in need *first*.[332] Part of the motivation behind this is surely the Framework's emphasis on sanitary dignity.

The right to dignity, as set forth in the South African Constitution, has already been discussed, however its influence on the concept of 'sanitary dignity' as contained in the Framework is noticeable. The motivation behind making menstruation manageable is intrinsically interconnected with the promotion of women and girls' dignity. For example, when the taboos and myths associated with menstruation are mentioned in the Framework, they are seen as problematic because they stigmatise women and girls.[333] This stigmatisation and the resultant social exclusion is causes (specifically to women and girls in rural communities), seen through the prism of the Constitution, is an obvious infringement on their dignity.[334] Likewise, when the Framework mentions the self-esteem of women and girls being impaired by a lack of access to

[329] Ibid s3.1.4.
[330] Ibid s3.1.4.
[331] Ibid s9.1.4-5.
[332] Ibid s9.1.6.
[333] Ibid s3.1.6.
[334] Ibid s3.1.6.

menstrual products it is done with specific reference to their dignity.[335] The right to a life unencumbered by social stigmatization is paramount in the Framework, and is given as much attention as the suggested programmes for the provision of sanitary products. The overarching emphasis is for all women and girls to be able to handle their menstrual cycle 'with normalcy and dignity'.[336] This is very promising because it shows the Framework understand the multifaceted nature of reaching menarche.

It is also encouraging to see that when the problems associated with menstrual 'leakage' are addressed in the Framework that this understanding continues. One of the justifications for providing sanitary products to school girls is that menstrual leakage (and the fear thereof) can cause girls and young women to lose focus on their academic work.[337] This shows an acknowledgement of the stigma associated with menstruation and the impact it has on the lived experience of girls and women. While it would be preferable to completely eradicate this stigma so that menstrual 'leak' is no longer considered taboo, this will take considerable time and effort and so, in the interim, the provision of free products is a good solution. Particularly for school girls. This is recognised because the connection between facilitating girls' education, those girls being better able to finish school, then potentially able to pursue tertiary education and therefore better able to find employment is made in the Framework.[338] Of course not everyone who completes matric goes on to study further, but everyone who does has completed matric or a corresponding qualification.

Also encouraging, is the Framework's incorporation of United Nations recommendations for the promotion of sanitary dignity. The United Nations Educational, Scientific and Cultural Organization puts forward a variety of measures for what it calls menstrual health management. As already mentioned, these include, but are not limited to; accurate and timely knowledge regarding menstruation, available, safe and affordable material for the management of menstruation, sanitation and washing facilities and positive social norms.[339] Broadly speaking this means that the Framework is committed to managing, not only the biological process of menstruation, but also the 'preservation and maintenance of a girl or woman's self-esteem during

[335] Ibid ss 3.1.4, 3.1.7; 4.4(c) and 6.1.
[336] Ibid s3.2.4.
[337]Ibid s6.4.
[338] Ibid s6.4.
[339] Ibid s6.1.

menstruation'.[340] This is a good step in the right direction. It acknowledges that providing free menstrual products is not necessarily a solution by itself, but rather that it should be part of a multifaceted scheme that also provides education about menstruation designed to tackle the stigma associated with it. It also recognises that sanitation and safe spaces in which to wash are of paramount importance, as are a means of disposing of products that are not reusable. The Framework even goes so far as to say that all the above should fall 'within or would support the DBE package of non-negotiable minimum services that should be provided to South African schools'[341] as part of their Care and Support for Teaching and Learning Programme (CSLT).

The framework puts forth ten main objectives which it seeks to achieve. First and foremost it wishes to promote and protect sanitary dignity as a human right.[342] It wishes to establish an integrated and responsive government program aimed at providing free sanitary products to all women and girls attending government schools and in doing so promote inter-departmental and government co-operation.[343] The Framework also wishes to empower women by broadening their economic participation.[344] Although not specified, this probably means that whenever possible women owned companies and suppliers should be used in realising the objectives of the Framework. It may also mean economically empowering women in a more general fashion by facilitating their education and therefore their economic prospects. Be that as it may, the fifth objective contained in the framework is to improve learning by indigent women and girls.[345] The empowerment of indigent people is also an objective.[346] This is intended to be on both a societal and economic level.[347] This is an interesting inclusion, which most likely just means that the Framework promotes the empowerment of the poor in general. However, harking back to some of the discussions made earlier, societies benefit as a whole from educating their women so the promotion of free sanitary products would likely empower more people than actually use them anyway.

[340] Ibid s6.1.
[341] Ibid s6.4.
[342] Ibid para 8.1a.
[343] Ibid para 8.1b-c.
[344] Ibid para 8.1d.
[345] Ibid para 8.1e.
[346] Ibid para 8.1f.
[347] Ibid para 8.1f.

The seventh objective in the Framework is geared towards changing the way society thinks about menstruation. The development of 'national norms and standards'[348] around menstruation and the use of menstrual products is most likely meant to assist in promoting sanitary dignity aa well as the correct use of the products themselves. Subsection 8.1(h) deals with menstrual awareness campaigns. These are intended to educate people as to their duties, rights, responsibilities, functions and roles regarding the Framework.[349] The penultimate objective in the Framework is to prevent these free sanitary products from being commodified through resale.[350] Exactly how this would be done is somewhat of a mystery. It seems unlikely that a 'black market' trade in free menstrual products could be prevented from arising, considering the economic realities of South Africa. However, if free products are readily available perhaps there will not be much of a market for the illicit resale of them. The last objective in the Framework has to do with the health. The intention is to advance the menstrual hygiene and health of women and girls so as to improve the quality of their lives, particularly those women and girls who are indigent.[351] This harks back to section 6.3 of the Framework which motivates the needs for free products by pointing out that without them girls and women may resort to using things such as dirty rags that can cause infection, not to mention discomfort. Based on these objectives, it is clear to see that the Framework is not simply interested in the free provision of menstrual products, but also the amelioration of unemployment through education and eventually 'economic self-sustainability'[352]. As a whole this is a model framework for dealing with the problem of menstrual related school absenteeism, not to mention a great deal more. Many of the issues raised prior to this chapter are borne out in this document. The hypothesis that poor girls (<17 years of age) from rural backgrounds would be disproportionally affected by this appears to be well founded, or at least also held by the Department of Women, Youth and Persons with Disabilities.

If one criticism of the Framework had to be made, it is the complete absence of any provision for pain management. The study in Nepal showed that menstrual cramping was, although not a primary concern, certainly something that girls reported as troubling them while

[348] Ibid para 8.1g.
[349] Ibid para 8.1h.
[350] Ibid para 8.1i.
[351] Ibid para 8.1j.
[352] Ibid para 8.2.

menstruating and at school.[353] It seems likely that this might be a problem in South Africa as well, however the provision of free analgesics creates problems that the provision of free menstrual products does not. If a black market of, for example, menstrual pads was to arise as a result of making them free this would have limited implications. Pads do not really have any secondary uses, they are for the management of menstruation alone, and if they were readily available it is unlikely there would be much demand for them on the black market. Analgesics, however, have a multitude of different applications and depending on the type of pain killer distributed there is the potential for addiction based problems. Be this as it may, these are probably the reasons why the Framework does not address the issue of pain management, so whilst still a criticism of it, it is an understandable omission.

### *(b) Conclusion*

Overall the Framework is a brilliant means of promoting what it calls sanitary dignity. It covers all the basics, including menarche related education, de-stigmatization, sanitation and most importantly the provision of free products. It also states that these products should be locally sourced and procured in alignment with the Preferential Procurement Framework Act, 2000 and the Preferential Procurement Regulations, 2017.[354] Special preference is intended to be given to businesses owned and operated by black females, young people and people with disabilities.[355] This is encouraging, particularly because this same section requires any businesses participating in the scheme also to be staffed by at least 50% women.[356] The Framework also requires the creation of a Sanitary Dignity Oversight Committee.[357] And as far as funding is concerned, both national and provincial government are required to step up to the challenge.[358] On the face of it, this document is a carefully thought out and thorough solution to the phenomenon of period poverty in South Africa. Had it been published six months earlier it may well have made this dissertation unnecessary.

[353] Oster & Thornton op cit note 113 at 14.
[354] Ibid para 9.4.1, 9.4.2.
[355] Ibid para 9.4.2.
[356] Ibid para 9.4.2.a.
[357] Ibid para 10.2.1.
[358] Ibid para 11.1.1.a.

If the Framework is followed to the letter, it will be tremendously helpful for women and girls in South Africa, particularly those still in school. It thoroughly explores the problems faced by women and girls around menstruation, whilst also providing a comprehensive set of solutions. It is very heartening to see that the South African government, at least on paper, is aware of these problems and committed to doing something about them. Unfortunately, as of April 2021, the application of the Framework is somewhat behind track, Cabinet having only approved it in September of 2020.[359] During Quarter Two of 2020/2021 distribution to quintile 1 through 3 schools had begun in the Western Cape, Gauteng, Free State and KwaZulu-Natal.[360] The Eastern Cape, Limpopo and Mpumalanga are only projected to take delivery of products in Quarter Three as a result of problems in the procurement process.[361] Worrying, the North West province had only used 25% of their allocated budget and the Northern Cape had used none, neither having provided valid reasons for this delay.[362] The primary explanation for these deficiencies are a lack of monitoring processes and Covid19 related issues.[363] While the former of these two issues should have been foreseen and addressed before the national rollout of the Framework began, the latter is understandable.

Only time will tell how effectively the Framework is ultimately deployed. The last 13 months have been a tumultuous time, not only for South Africa, but globally, so it is understandable that the implementation of the Framework has been delayed. It is good however, to see that it is being adopted and not simply put on a shelf somewhere and forgotten.

[359] PMG 'Sanitary Dignity Programme Implementation' available at https://pmg.org.za/committee-meeting/31175/ accessed on 15 April 2021.
[360] Ibid.
[361] Ibid.
[362] Ibid.
[363] Ibid.

## CONCLUSION

Chapter one introduced the topic of period poverty and school absenteeism. The following chapter hopes to have shown both the individual benefits of education (Capabilities Approach) as well as its collective benefit (Human Capital Theory) with the intention of illustrating the significant importance of education in general. Following on from this, chapter three investigates the specific benefits of educating women. This is necessitated by the gendered nature of period poverty, because while education is of benefit to everyone, the education of women is of especial importance because of the nature of female reproduction, its consequences and the unequal division of labour when it comes to child rearing. Having discussed this, chapter four locates this issue within the South African context. This chapter looked not only at the stigma associated with menstruation, but also the lack of products to deal with menses, at how education intersects with poverty, and also at the conflicting information around menstrually caused school absenteeism. One of the areas of particular interest was that the information provided by several well respected NGOs (i.e. that period poverty is a problem within the South African context) differs markedly from that information provided by government. This suggests that there is indeed need for further empirical studies on this topic. Having provided the necessary background information, chapter five addresses the right to education in both the international and regional spheres. It is shown that at both levels South Africa does have an obligation to provide it citizenry with an education and that this extends to the girl child, who because of her relative vulnerability, is of special importance. The penultimate chapter of this dissertation deals with South African constitutional rights. The right to education, the right to equality, the best interests of the child and the right and concept of dignity are all utilised to show that there is a constitutional duty on the state the facilitate the education of the girl child. PEPUDA is also thoroughly investigated to make an argument that a failure to provide free menstrual products in school is, in fact, discrimination based on sex/gender. The final chapter engages with the Sanitary Dignity Framework, a document published in 2019 aimed at addressing this very issue on a local and national level within South Africa. The framework acknowledges many of the arguments made in this dissertation, and does come to the conclusion that free and easily accessible menstrual products must be provided to schools within the country, starting with those most in need.

When this research was first started in 2019 the notion that the world would experience a pandemic forcing countries around the globe into a series of lockdowns would have been laughable. That

children, both girls and boys, around the world would miss months of school in an attempt to slow the transmission of COVID19 would simply not have occurred to anyone. This however, is exactly what took place in 2020, roughly one hundred years after the Spanish Flu pandemic. A lot has changed since then which may have ameliorated the negative effects on children's education during this more recent pandemic. This is probably particularly true for children who have ready access to computer technology and the internet. However, it will not have escaped anyone with a child, or who knows one, that missing a large chunk of their education has been extremely detrimental. Although anecdotal, it is likely that this will be borne out in future academic research focusing on this peculiar period of history. In Scotland, GCSEs (roughly equivalent to Grade 10) were cancelled in part because of lost time and the fact that there is really no substitute for face to face learning.[364] The ramifications of this and other school closures globally will, in all likelihood, be experienced for years to come.

This is not the topic of this dissertation, nor do I claim any special authority on that topic, but there are parallels. Period poverty is a global phenomenon. Although it is likely experienced less significantly (in terms of numbers) in wealthier developed nations it is still present there. Were this not the case, countries like Scotland, New Zealand and Wales would not have felt it necessary to provide women and girls with free menstrual products, especially considering this is not an inexpensive endeavour. This is particularly important as it pertains to school going girls and women because of the afore mentioned importance of education. As with the COVID19 lockdowns, the negative effects of menarche related school absenteeism are difficult to calculate., specifically, if you are looking at the lifetime consequences this phenomenon has on the lives of women.

Although the Department of Education claimed that most South African school girls had access to menstrual towels in 2011, the Department of Women, Youth and Persons with Disabilities seems to have felt otherwise. That or they decided the various NGOs working on this were a more reliable source of information. Whatever their motivation, they commissioned the creation of the Sanitary Dignity Framework which, if it is followed, will foundationally change the way that school girls and women manage their menses in South Africa. It also confirms much

[364] Katie Russell 'What's happening with GCSEs and will they be cancelled in England and N Ireland?' available at https://www.telegraph.co.uk/education-and-careers/2020/11/11/happening-gcses-could-cancelled-england-n-ireland/ accessed on 16 December 2020.

of what has been speculated in this dissertation; that young black women from rural areas are those most likely to experience period poverty. That menstruation related education as well as free products are necessary to properly help these women achieve what the framework calls sanitary dignity. Not to mention, meaningfully realising their right to an education, irrespective of what they choose to do with it. To my knowledge this is the most holistic approach to managing menarche and menstruation in Africa. Hopefully the obligations contained in it will be progressively realised in the coming years. If not, it will be interesting to see what the various NGOs and activists choose to do. A possible recommendation would be for the Department of Basic Education (DBE) to adopt the Sanitary Dignity Framework. While it follows that the Department of Women, Youth and Persons with Disabilities would have commissioned the Framework, the DBE seems to be best positioned regarding its implementation. The DBE would likely be better at organising the roll-out of products and also with creating age appropriate menstrual healthcare and reproductive information programmes and literature.

Whatever the case, there certainly seems to be a legal argument for holding the government to account in this matter. Not one, but four constitutionally enshrined rights and principles are potentially infringed if it reneges on its commitment, and although money does not grow on trees it would be hard to argue that this would be a sufficient excuse. Overall, it looks like indigent young women and girls may be catching a well-deserved break with regards to period poverty, and with any luck, once they are helped, the Framework will roll out assistance to all school going girls and women. This does not mean that further research into this matter is unnecessary. If the South African government is to be held to account, a baseline level of deprivation needs to be established. That is to say, research detailing how much school is being missing, how many girls are missing school, what areas this is happening in predominantly, and which girls? This information is necessary because without it measuring the quantitative improvement brought on by the Framework, will be difficult. How can one show improvement or make suggestions for improvement, if the scale of the problem is not truly known? Be that as it may, there is still reason for hope regarding this problem.

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