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Equity not equality: the undocumented migrant child's opportunity to access education in South Africa

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ABSTRACT

Access to education for undocumented migrant children in South Africa remains a significant challenge. While the difficulties related to their inability to access education within the country have been highlighted elsewhere, there remains a lack of clarity on an approach to how this basic human right can be achieved. In this conceptual paper, we draw on the distinction between equality and equity, and describe the various ways in which education has been conceptualised in the South African Constitution – which in part contributes to the existing confusion on education for various groups, including undocumented migrant children. In this paper, we critically reflect on the need to develop an integrated approach for creating a platform that allows all undocumented migrant children access to education in South Africa. We argue that an integrated approach – which entails ways through which access to education can be delivered through the lens of equity – will enhance the right to education for undocumented migrant children in South Africa. We conclude that the South African government must urgently consider this integrated approach to enable access to education for undocumented migrant children, so that they can achieve their full educational potential.

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Introduction

Undocumented migrant children in South Africa experience numerous problems, particularly in relation to their education (see for example, Crush & Tawodzera, 2011, 2017; Mathe, 2018; Washinyira, 2021). In this paper, we underscore the need to consider how their basic rights, in this case their access to education, can be ensured. The difficulties stem from a lack of clarity that exists, in policy and in practice, regarding how undocumented migrant children can have *equitable* access to education in South Africa. This lack of clarity is, in part, because of South Africa's nationalist view on migration, which perceives it as a threat to national security and the sovereignty of the State (see Neocosmos, 2010; Palmary & Mahati, 2015; Ruedin, 2019). The nationalist view is opposed to the ethical view on migration that considers valuable whatever action will enable individuals to achieve their rights (Jordan & Düvell, 2003). This ethical view of migration links to the

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capability approach (CA) developed by Amartya Sen (1994, 1999) which calls for equitable opportunities for all humans. Though researchers have discussed various problems associated with undocumented migrant children, these discussions generally do not provide a clear guideline through which the educational rights of these children can be ensured, specifically, from an equity perspective (see, for example Crush & Tawodzera, 2014; Hlatshwayo & Vally, 2014). Thus, to ensure that the basic, constitutional right to education is upheld and achieved in South Africa, in this paper, we argue that education must fundamentally be considered from a position of equity (McCowan, 2016; Unterhalter, 2009). This perspective considers an individual's access to education as just and provides opportunities for children to improve their access to formal learning environments. However, to defend this position it is necessary to distinguish equity from equality, by which the latter focuses on *sameness* in terms of whatever is shared and distributed, and in terms of the treatment of individuals, whereas the former highlights the provision of opportunities in terms of treatment for all, in a fair and just manner. Making this distinction allows for the development of an approach for ensuring that undocumented migrant children can access education without discrimination, and according to their specific needs.

As this is a conceptual paper, we have taken a "problem-focused approach" (Gilson & Goldberg, 2015, p. 128) by drawing on extant literature to explore the distinction between equality and equity. This enabled us to critically reflect on developing an integrated approach based on equity and so, possibilities for ensuring access to education for undocumented migrant children in South Africa. We thus "seek to bridge existing theories in interesting ways, link work across disciplines, provide multi-level insights, and broaden the scope of our thinking" (Gilson & Goldberg, 2015, p. 128). In this respect our methodology was a wide-ranging and extensive literature review using numerous keywords and phrases, to gain an in-depth understanding of the concepts of equality, equity, and access to education for undocumented migrant children in the identified context.

The review helped us to critically reflect on, and defend, the need for an integrated approach to equity and so, possibilities for ensuring access to education for undocumented migrant children in South Africa. Specifically, we searched Google Scholar using keywords and phrases including "equality", "equal opportunity", "equality of opportunity in education", "equity meaning", "equity in education", "access to education in South Africa for migrant children", and "access to education in South Africa for undocumented migrant children", to retrieve articles relevant to gaining an in-depth understanding of these concepts, and to determine the extent of the extant literature. While this was not a systematic review our wide-ranging search allowed us to find articles, published reports, as well as online newspaper and magazine articles. From this review it was apparent that there is an urgent need to conceptually develop an equitable approach to education for undocumented migrant children in South Africa (and elsewhere). Evidently, structural forms of discrimination (among others) are persistent, and these have a significant impact on access to education for these children. While the extant literature highlights the ongoing difficulties of these children, there is no viable approach or framework available that can systematically address them.

In this article we argue that an integrated approach to equitable access to education, which draws together Unterhalter's (2009) three-fold perspective on equity with Sen's (1999) idea on the CA, is vital for enhancing the right to education for undocumented migrant children in South Africa. The paper is divided into five sections. The first

section describes South African policies that relate to immigration and education. This description is drawn from the post-apartheid South African context. The second discusses the need to move beyond equality to equity in terms of explaining access to education. The third section develops the implications of considering access to education for undocumented migrant children from the perspective of equity in South Africa; while the fourth section argues for the integration of the capability approach and equity to ensure equitable access to education for undocumented migrant children. Examples from previous empirical studies are provided as evidence to support the importance of an integrated approach. In the fifth and last section, we conclude that an integrated approach – which considers a three-fold perspective of equity in alignment with the capability approach – creates a platform for ensuring the enhancement of the undocumented migrant children's equitable access to education.

Section 1: South African legislation and policies on immigration and education – factors affecting undocumented migrant children's equitable access to education

1994 marked South Africa's transition from the apartheid regime to a post-apartheid government, adopting a democratic, human rights-based approach to transforming and developing the country. Many apartheid-derived policies were repealed, but some were initially revised. For example, the Aliens Act 96 of 1991 was initially revised and renamed the Aliens Control Amendment Act 76 of 1995[1] by the post-apartheid government, and still contained remnants of apartheid ideology concerning the movement of people (Hicks, 1999). After critics pointed out the contradictory nature of the Act, in relation to the new Constitution, the Act was repealed, and replaced with the Immigration Act 13 of 2002, which became effective from March 2003 (Aliens Control Amendment Act 76 of, 1995, 1995; Republic of South Africa The Presidency, 2002; van der Linde, 2015). Although the Aliens Act was repealed, various reports suggest that the post-apartheid immigration policy continues to substantially restrict population entry, and strengthen enforcement procedures (e.g. Klotz, 2000; Wa Kabwe-Segatti & Landau, 2008). Wa Kabwe-Segatti and Landau (2008) argue that these enforcement procedures have led to problematic outcomes, including "migrants [being] pushed into an irregular and lawless underground where they suffer a variety of forms of unconscionable treatment" (p. 38). This problematic outcome suggests that even though the post-apartheid government sought to follow a human rights-based approach (in law and practice) for the development of the State, international migration was treated as a significant threat to the building of this sovereign State. Supporting this statement, Crush and Mcdonald (2001) argue that the "post-apartheid state has clearly abandoned the racist immigration policies of its predecessors. But rather than replacing that policy with a more universal selection system, there has been little appetite for immigration at all" (p. 4). The statement suggests that post-apartheid laws concerning immigration are not significantly different from the apartheid regime, in terms of their exclusionary practice, though not specifically based on racial categories. An important dimension of post-apartheid South Africa is the emphasis on nation-building, which has promoted nationalism, which, in turn, has led to increasing xenophobia. Unfortunately, this outcome was presciently anticipated by Fanon in 1990 when he wrote of the pitfalls of nationalism, especially concerning post-colonial Africa:

> From nationalism we have passed to ultra-nationalism, to chauvinism, and finally to racism. These foreigners are called on to leave; their shops are burned, their street stalls are wrecked, and in fact the government … commands them to go, thus giving their nationals satisfaction. (p. 155)

Despite Fanon's dire prediction, intra-region migration has increased across African countries. The 2022 World Migration Report indicates that between 2015 and 2020, approximately five million Africans were living in an African country they were not born in (McAuliffe & Triandafyllidou, 2021). Given this ongoing increase the African Union (AU) signalled its intent to implement the objectives of the Global Compact for Migration (GMC), drafted by the United Nations (UN) in 2018. Some of these objectives include ensuring "effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle" and also reaffirming "the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance against migrants and their families" (United Nations [Global Compact for Migration], 2018, p. 4). While these objectives pertain to universal human rights, which would include the right to a basic education, the Economic Community of West African States (ECOWAS) also has specific policies that relate to migration and education in the region. One such policy is the ECOWAS Protocol A/P3/1/03 on Education and Training (2003) which states that "member States shall, as a measure for the eradication of illiteracy, undertake to take individual measures to ensure that every child of school age shall enjoy a minimum of nine years basic education" (p. 11). Nonetheless, despite these objectives and policies the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) reports that ensuring these basic rights, particularly education, remains unrealised on the continent (UNESCO Global Monitoring Report, 2019). The 2022 World Migration Report also highlights that in the sub-Saharan region South Africa continues to be the top destination for other African migrants (McAuliffe & Triandafyllidou, 2021). Indeed, in 2017, South Africa was reported to have the highest number of migrant children on the continent (United Nations Children's Fund [UNICEF], 2019). Thus, it is necessary to carefully consider polices that relate to immigration and education.

We recognise that other numerous educational problems, which are not peculiar to undocumented migrant children, exist in South Africa. These include the availability of resources and underqualified teachers, especially in rural schools (du Plessis & Mestry, 2019), and an ineffective implementation of inclusive educational policies (Engelbrecht, 2020). Some reports and studies show that several of these problems can be traced back to the apartheid regime where black teachers were not well trained and black schools were abandoned by the regime (Amnesty International, 2020; Schäfer & Wilmot, 2012; Villette, 2016). We also note that social issues including crime, poverty and inadequate resources still prevail and have a direct impact on schooling (see Human Rights Watch, 2019). Nonetheless, the fundamental right of all children to access education must be considered and defended, especially given that within South Africa, there seems to be a deliberate, ongoing lack of educational opportunities for illegal or undocumented migrant children (see Blessed-Sayah et al., 2022; Blessed-Sayah, 2020; Palmary, 2009). These missing educational opportunities are structurally embedded and inter-woven within South African social and educational contexts. Ambiguous policies – including the Immigration Act of 2002 (Republic of South Africa The

Presidency, 2002) and the School Admissions Policy (Admission Policy for Ordinary Public Schools, 1998) – maintain the oppression of undocumented migrant children, especially as it relates to their chance of being educated within the country. Here, Bartlett (2015) states that an individual's "legal status matters a great deal. Access to education is not universally guaranteed, especially for children with irregular status" (p. 4). Hence, across various policy documents, the continual discrimination against children who are illegally within the borders of South Africa is perpetuated (Palmary, 2009). Moreover, the possibility of establishing their educational rights, and their chance to access education, becomes increasingly more difficult, because of the structural discrimination they face in South Africa (Blessed-Sayah, 2020; Mathe, 2018).

Structural discrimination has been described as "policies of dominant race/ethnic/gender institutions and the behaviour of the individuals who implement these policies and control these institutions, which are race/ethnic/gender neutral in intent, but which have a differential and/or harmful effect on minority race/ethnic/gender groups" (Pincus, 1996, p. 186). In other words, structural discrimination is embedded within social structures and institutions, in a manner that can make it invisible. Yet, this form of discrimination creates unjust treatment which affects certain, often vulnerable groups of individuals, in this case, undocumented migrant children (Ackermann, 2018; Crush & Tawodzera, 2011, 2013). Although South Africa has well-developed policies on education that are meant to cater for *all* children, some of these policies contradict each other. Thus, while there are policies that structurally discriminate against undocumented migrant children, others openly state that issues of discrimination, in terms of access to education, are prohibited. Some of the policy documents include the Immigration Act of 2002, the South African Schools Act 84 of 1996, the Admissions Policy (Admission Policy for Ordinary Public Schools, 1998), and the Bill of Rights (The Constitution of the Republic of South Africa No. 108, 1996). Table 1 shows the policy documents, their purposes, and what each stipulates in relation to immigration, or accessing education.

Because of the contradictory statements across the legislation and policies (see Table 1), undocumented migrant children are caught within a legal ambiguity which prevents them from accessing education. Additionally, other discriminatory factors compound the problems experienced by undocumented migrant children's access to education in South Africa (Blessed-Sayah, 2020; Crush & Tawodzera, 2014). Bartlett (2015), for example, highlights both school-level and system-level based problems that have an impact on migrant children's education. School level problems include the age at school entry, diversity, and pedagogical responsiveness within the intended, and hidden curricula. The age at school/class entry is one example that forces migrant children out of the education system, regardless of other compounding difficulties that these children experience. Some schools place a cap on the age range for specific classes, which will disadvantage migrant children who have missed out on schooling, due to movement across borders at various times (Lemu, 2015).

System level difficulties, on the other hand, include immigration, deportation, and educational policies, and language policies regarding instruction at schools (Bartlett, 2015). These are inter-linked because the various policies affect the difficulties, or opportunities at the school level. In the South African context, Crush and Tawodzera (2013) argue that schools are compelled to enforce the policies enshrined in the Immigration Act; this unfortunately causes the ill-treatment of undocumented migrant children. Shoba

Table 1. Policy documents & what each stipulates regarding immigration or education.

Legislation / Policy Documents	Framework of Documents	Stipulation in Relation to Immigration and or Education
The South African Constitution, Chapter 2: Bill of Rights (No. 108 of 1996)	Framed within a human rights perspective	Chapter 2, Section 29(1a) Everyone has a right to a basic education …
Immigration Act 2002	Framed from a nationalist viewpoint on migration	**39** (1) No learning institution shall knowingly provide training or instruction to- *(a)* an *illegal* foreigner; *(b)* a foreigner whose *status* does not authorise him or her to receive such training or instruction by such person or *(c)* a foreigner on terms or conditions or in a capacity different from those contemplated in such foreigner's *status*. (2) If an *illegal* foreigner is found on any premises where instruction or training is provided, it shall be presumed that such foreigner was receiving instruction or training from or allowed to receive instruction or training by, the person who has control over such premises unless prima facie evidence to the contrary is adduced.
South African Schools Act 84 of 1996	Framed from a human rights perspective	Chapter 2 (3) Compulsory attendance. – (1) Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.
Admissions Policy (Department of Education, 1998)	Framed from a securitisation/nationalist perspective	*Admission of non-citizens* 19. The South African Schools Act, 1996 and this policy apply equally to learners who are not citizens of the Republic of South Africa and whose parents are in possession of a permit for temporary or permanent residence issued by the Department of Home Affairs. 20. A learner who entered the country on a study permit must present the study permit on admission to the public school. 21. Persons classified as illegal aliens *must*, when they apply for admission for their children or for themselves, show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Aliens Control Act, 1991 (No. 96 of 1991).

(2019) recounts an instance which demonstrates how schools work with the system to ensure compliance to the Act:

> One incident occurred in 2017 at [a] Primary School in Edenvale where a letter was sent to "foreign parents" informing them that their children would be reported to the police if they did not have up-to-date documentation. The letter was described in the media as "xenophobic" and was later withdrawn by the school. (para. 24)

Thus, the question of whether undocumented migrant children have equitable access to education in South Africa, in the face of these difficulties, is pertinent. This is why it is necessary to articulate what equitable access means at the system, policy, and school level (Bartlett, 2015). In the next section, we theorise the notion of equality and draw attention to the implications of the concept in the South African educational context.

Thereafter, an argument defending a move from equality to equity, from the perspective of Unterhalter's (2003) explanation, is developed.

Section 2: equality, and equity beyond equality

In this section, we develop and critique the concept of equality and instead argue for moving beyond the notion of equality towards equity, for ensuring access to education for undocumented migrant children in South Africa.

Equality

In general terms, the concept of equality refers to being equal. The meaning of "equal" emphasises sameness in terms of whatever is shared or distributed. Supporting this Takeuchi et al. (2018) write that the meaning of equality has progressively transformed into "similarity or sameness of treatment" (p. 14). This is referred to as "formal equality" which Fredman (2016) describes as a non-categorising approach to the distribution of whatever is shared. Hence, contextualised differences (gender, race, and individual vulnerabilities) are not considered. In more specific terms, therefore, equality refers to equal treatment, and is explained in terms of existing values within given societies which are embedded in *generalised rules* (see Coleman, 2018). These generalised rules relate to the formation of collective rights and become problematic when individuals are grouped together because they are no longer considered as *different* individuals, who have their own voices and experiences. Thus, rather than considering human beings in their individual circumstances, collective rights are established for a group. Rhodes (2020) explains that a major problem with collectivity, specifically in terms of rights, is that "collective human rights threaten the idea, and enjoyment, of human rights insofar as they empower assertions that the rights of a group, or the state itself, can be of higher value than the rights of the individual" (p. 18).

Collective human rights can therefore, paradoxically, reduce the chance of individuals achieving their rights because collective, group-based rights can overshadow and suppress these individual claims. The overshadowing of individuality reflects a critique of the concept of equality which is "its inability to convey the reality that not all people begin at the same starting point" (Takeuchi et al., 2018, p. 14). Along these lines, Rhodes (2020) argues that,

> Because group identity is arbitrary, culturally specific, and time-bound, the priority of *individual* human rights makes rational sense. And while collective or group rights may be coherent if understood as rights established by groups themselves that apply to members, *all groups are in fact heterogeneous*. (p. 17, emphasis as in original)

Collective human rights create a challenge in the case of access to education because the experiences of children, in this instance, undocumented, vary per case. For instance, while some children are accompanied to South Africa with parents or guardians moving across borders, others are unaccompanied. Anderson et al. (2017) highlight that the number of unaccompanied children who have crossed into South Africa is not certain. Furthermore, the authors (Anderson et al., 2017) note that children who move into South Africa do so for many complex reasons. Other undocumented migrant children are born in South Africa to parents who are undocumented. Thus, considering these children as a

"collective" reduces their individual experiences, without unpacking the specific circumstances and factors that may have contributed to their migration into, or birth in, the host country.

A form of equality that argues for a shift from equality in terms of sameness (formal equality) is "substantive equality". This form of equality focuses on acknowledging human dignity and redressing disadvantage (Fredman, 2016). Although Fredman (2016) indicates that "substantive equality" should not be reduced to notions of "sameness", this is a contestable claim because the basis of "substantive equality" is still "equality." This still implies an idealistic treatment of everyone in the same manner, without consideration for their individualised, and contextualised experiences within particular spaces. Hence, while we recognise the argument for substantive equality in thinking critically about societal disadvantage, we defend the argumentative shift from "equality" to "equity" as a means for ensuring access to education for undocumented migrant children in South Africa.

Clearly, it is problematic to consider equality, in terms of both equal and the *same* treatment, as the way forward for undocumented migrant children in terms of their access to education in South Africa. The experience of undocumented migrant children is reduced and homogenised, and the assumption that the collective right of "sameness" is achieved for all children as a group is maintained. Equality thus presents a limitation in the fulfilment of rights, particularly in situations where complexities exist among a group of individuals. Lumby and Coleman (2016) emphasise that sameness fails to ensure equal opportunities for humans, and particularly for children. While "sameness" remains problematic, unfortunately, in the South African context, the limitation of equality (in terms of rights) extends even beyond the "collectivity of rights" and sameness, and into the lens through which the country views migration.

South Africa's nationalist view on migration is another way "equality" is used to reduce and group the individual struggles and difficulties of migrant children's experiences into a singular case (Neocosmos, 2010). According to Jordan and Düvell (2003), under the nationalist approach, national sovereignty is valued, and the migration of humans is perceived as a threat to social stability and political order (Bader, 2005). This perceived menace often serves as the main justification for border closures and protection (Bader, 2005). This is because uncontrolled migration "can overwhelm collective infrastructures, lay waste to the environment, and destroy cultures [as well as cause] civil disorders" (Jordan & Düvell, 2003, p. 1). Implied here is that the social inclusion of individuals in South Africa is dependent on one's nationality. Ake (1996) notes that the kind of nationalism in Africa targets non-nationals living within the given State. Issues related to the nationalist view thus include xenophobia, and "the exclusion of social groups within the same society [which] defines the nationalism" (Kersting, 2009, p. 10). Here the idea of collectivity is central which, as explained earlier, reduces the chance for individuals to enjoy their individual basic human rights. Specifically, this approach undermines the basic human rights of people who have moved to countries different from their original places. Neocosmos (2010) has also argued that the nationalist view within South Africa systematically excludes foreignness and so, a sense of belonging for non-nationals. Unfortunately, issues concerning the negative view of migration by South Africa escalate, especially as economic troubles become rampant. Alfaro-Velcamp and Shaw (2016) argue that "there is a widespread perception of immigrants as criminals who break the

law by illegally crossing a *sovereign border*" (p. 984, emphasis added). The use of the word "sovereign" implies that a high level of securitisation is implemented against migrants, especially against those who are undocumented (Ilgit & Klotz, 2014). "Securitisation" implies the use of spoken words by politicians and those in authority within a country to disseminate threatful intentions towards a group of people, or another country (Buzan & Wæver, 2003). This is problematic because, automatically, migrants from other African countries are generalised as a homogenous group that are considered troublemakers and that commit all kinds of societal crimes. As a result, black foreign nationals can and do experience xenophobic violence. In 2015, a United Nations High Commissioner for Refugees (UNHCR) report compiled by Misago et al. (2015) indicated that xenophobic actions and attitudes had been woven into the fabric of South African society in terms of social, political, and economic threads. The solution presented by the report expresses the urgent need for addressing these actions and attitudes within government structures, alongside creating social awareness, policy reforms, and judicial responses to oppose ideas of indemnity that continue to allow for, and protect, perpetrators and individuals who sponsor such forms of violence and discrimination (Misago et al., 2015). Without this approach to dealing with xenophobia, it will remain the case that human rights, particularly for those who are undocumented, are ignored.

Recently, Ruedin (2019) found that 34% of South Africans who participated in his study strongly agreed that immigrants take jobs away from South African nationals. Such views are problematic, suggesting nearly a third of South Africans perceive migrants within South Africa as threats to the social order and to public services available for "those who truly belong". This supports the view that in South Africa, institutionally, structurally (Aglotsson & Klaaren, 2018), politically (Crush & Peberdy, 2018) and individually, the sense of a national self-determination and nation building is represented by the "othering" of foreign black nationals (Neocosmos, 2010). At a political level especially, the nationalist view on migration and immigrants is often publicly advocated[2] and this supports the high level of securitisation against migrants in the country. While this may not be the only cause, these statements incite xenophobic attacks (Fanon, 1990; Gordon, 2017) which lead to the denial of the rights of those who are non-nationals of the country, regardless of their legal status (Aglotsson & Klaaren, 2018; Crush, 2014).

Against this background, the rights of undocumented migrant children, especially ensuring their right to education, is politically complex. South African society seems unable or unwilling to ensure equitable access to education for those who are already considered "illegal" and "foreign". Thus, in this paper, we argue that equality does not create the platform for access to education for undocumented migrant children in South Africa, and that another position, that goes beyond the limitations of getting "equal" treatment, must be defended.

Equity: beyond the boundaries of equality

In this section, we develop and defend the concept of *equity* to move beyond the limitations of equality, specifically within the South African context, and in relation to access to education for undocumented migrant children. Developing and applying the notion of equity allows us to reconsider the specific difficulties that undocumented migrant children face, and relevant strategies, from a holistic and integrated viewpoint, for addressing

their access to education. In the general sense, equity refers to the *just* treatment of individuals. This means, for instance, allowing a group of individuals to attend extra classes to assist them in making progress that others have already achieved. Along these lines, the following sections develop equity from the notion of justice developed from Rawls' *Theory of Justice* (1999) and Unterhalter's (2009) work.

Equity

In making an argument for equity from the notion of justice, we first consider the idea of justice developed by Rawls. He writes, "the concept of justice I take to be defined … by the role of its principles in assigning rights and duties and in *defining* the *appropriate division* of *social advantages*" (Rawls, 1999, p. 9, emphasis added). This indicates that justice is expressed, in a given society, by the distribution of what individuals can do or access, which is determined in a manner that does not advantage one person over another. Here Rawls (1999) argues for the need to look beyond equality as sameness and consider a democratic form of equality which speaks to "equality of opportunity," and by extension, equity. In explaining, he states that "the higher expectations of those better situated are *just* if and only if they work as part of a scheme which *improves the expectations of the least advantaged* members of society" (p. 65, emphasis added). Justice is thus viewed from the perspective of fairness because its meaning is based on a set of principles that are fair, and to the advantage of those who are vulnerable (Rawls, 1999). By implication, any consideration made to ensure equitable access to education must be an approach that critically examines policy formulation and implementation from the lens of justice as fairness. There is also a need to ensure that these policies are context-based.

Unterhalter (2009), drawing from Rawls' theory of justice, argues that limiting equity only to mean equality ignores existing diversities in given contexts. Equity and equitable access, in specific contexts, become relevant when the explanation given relates to the happenings within those contexts. This is why McCowan (2016) argues that the notion of equity should be explained in terms of fairness, because in given circumstances, it is acceptable to treat individuals in different ways, depending on their current state or placement within society. These circumstances may include ones which serve as overwhelming barriers that individuals do not have control over; for instance, a child who is born to undocumented parents in South Africa. McCowan (2016) thus suggests "equality of opportunity" (p. 648) as equity. The use of the phrase "equality of opportunity" implies that individuals are treated with due consideration of their specific circumstances. The World Bank (2012) notes that

> an *equitable* society would not allow circumstances over which the individual has no control to influence her or his basic opportunities after birth … Ideally, only the person's effort, innate talent, choices in life, and, to an extent, sheer luck, would be the influencing forces. This is at the core of the *equality of opportunity* principle, which provides a *powerful platform* for the formulation of social and economic policy – one of the rare policy goals on which a political consensus is easier to achieve. (p. xii, emphasis added)

The parameters for measuring equity, and strategies of uprooting inequity, must thus be context specific to reach the most excluded and vulnerable segments of society (UNESCO Global Education Monitoring Report Team, 2010). Here Hutmacher (2001) notes that "education systems should be measured not only in terms of what they recognise as their

products (internal results), but also with respect to the consequences of these outcomes on individuals' life and on society, economy, democracy, etc. (external results)" (p. 18). Therefore, it is important to consider equity in relation to education from a holistic perspective. Unterhalter (2009) explains equity in education as equity from the top, middle, and bottom. This approach covers equity from the micro to the macro level of society. Applying this model of equity to education in South Africa would, we argue, ensure access to education for undocumented migrant children. In this paper, we refer to the model as the "three-fold" view of equity.

Equity from the top, middle, and bottom

"Equity from below" within education entails creating a space for dialogue where the specific concerns of individuals or groups are considered and negotiated through a process of reflection, reasonableness, and resolution. This form of equity ensures the development of individual agency and considers the extent of difference or diversity that is needed for people to be treated as humans with rights. In Unterhalter's words, "equity from below thus takes seriously aspects of personal heterogeneity both in circumstances and in conceptions of a good life" (2009, p. 418). In relation to undocumented migrant children and access to education within South Africa, the diversity of migrant children needs to be considered through dialogue with them and their parents or guardians, to give these children a chance to flourish in society, through being able to obtain an education.

"Equity from the middle" involves social arrangements for the accomplishment of a set goal. Within education, this form of equity is related to the "movement of ideas, time, money, skill, organisation, or artefacts that facilitates 'investments' in the learning of children" (Unterhalter, 2009, p. 421). By implication, equity from the middle ensures the enforcement of regulations or rules and negotiated decisions that ensure fairness in education. In the context of migrant children in South Africa, equity from the middle includes practices that will ensure access for the specific group of children. It also involves the distribution of resources at schools to ensure that children, regardless of their legal status, can access and participate in education, as well as educational opportunities.

"Equity from the top" expresses set rules or frameworks that decide what is reasonable, fair and the "right thing to do" (Unterhalter, 2009). This form of equity is approved through sets of authorities, including documents or agreements provided by supranational organisations, and national jurisdictions. For instance, across the globe, the Universal Declaration of Human Rights (United Nations General Assembly, 1948) decrees that everyone has the right to be educated and, within South Africa, Chapter 2: Bill of Rights in the Constitution (The Constitution of the Republic of South Africa No. 108, 1996) and Schools Act 84 (Republic of South Africa, 1996) also restate the right of *all* to education. These stipulations endorse fair practices in relation to access to education. To make a broader connection to migrant children's access within South Africa, the International Organisation for Migration (at the global level) (International Organisation for Migration [IOM], 2013); the African Union document on migrants within the African continent (see African Union, 2006); the South African Schools Act 84 of 1996 all highlight the access to services for non-nationals, and their rights within society. Significant is that the South African Schools Act 84 of 1996 was driven by a universal notion of human rights, as

opposed to a nationalist one. However, the Immigration Act gives a contradictory view on "equity from the top" regarding the rights of undocumented persons, as expressed in Table 1.[3] Hence, a gap in what equity entails is still left to chance and creates uncertainty and confusion within South Africa. This gap in equity refers to the lack of clarity as to what exactly equity from the top represents. The institutionalising of policy approaches that do not allow for easy access to education for undocumented migrant children in South Africa makes integrating this "three-fold" approach to equity difficult, even impossible. An aporia is evident beneath the supposed provisions for upholding the humanity of heterogenous individuals without South African nationality after South African, whether they are here legally or not. Figure 1 below shows how the three-fold discussion on equity interact. The next section considers equity in relation to the undocumented migrant children's access to education in South Africa.

Section 3: equity from a three-fold perspective – the implication for access to education for undocumented migrant children in South Africa

Evidently in the South African context tensions exist between the macro and micro levels of society in terms of equitable expectations for accessing education. While there are guiding policies that account for the possibility of equity at the macro level (top), others constrain this possibility, as illustrated in Table 1, above. Supporting this claim, in 2019, an article commentary by the director of the Global Education Monitoring

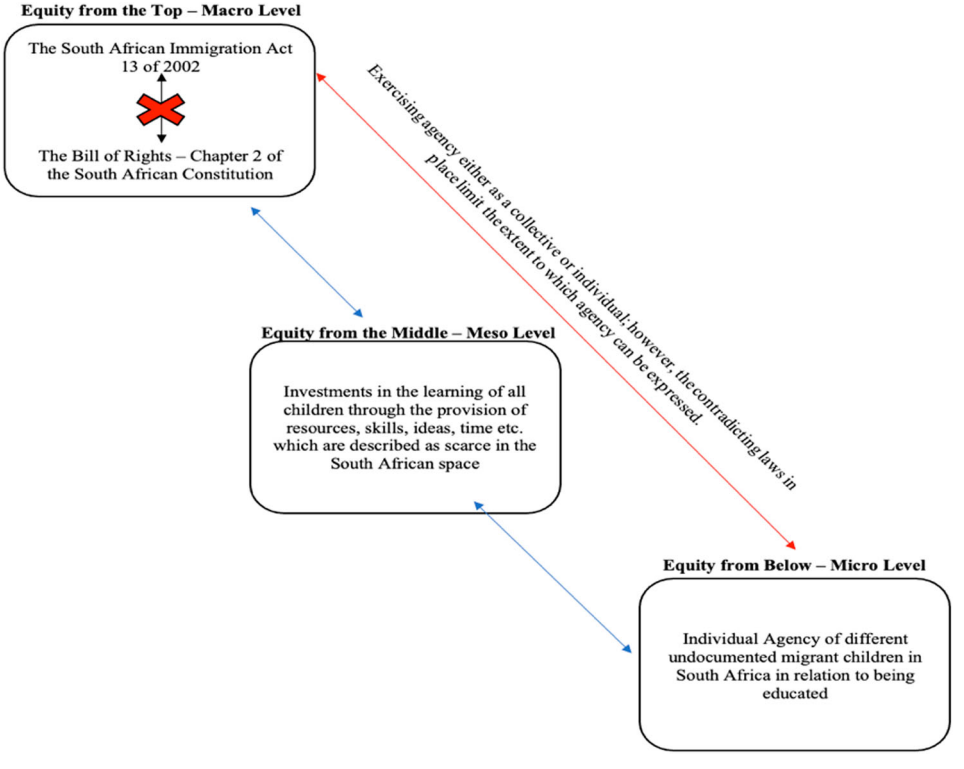

Figure 1. Interaction of the 3-fold concept of equity. Adapted from Unterhalter (2009).

Report, UNESCO – Manos Antoninis – explicitly highlighted the legal contradiction in the Immigration Act and the Bill of Rights in relation to the educational rights of undocumented migrant children (Antoninis, 2019). This reiterates the necessary and pertinent need for clarity on the right of undocumented migrant children to education in South Africa. When the three forms of equity are considered together holistically it becomes more apparent how undocumented migrant children in South Africa are not given the equality of opportunity to be at school (see Figure 1). Again, this equality of opportunity refers to the fair chance given to all, and in this case especially undocumented migrant children, to access education in the South African context.

Thus, we argue that integrating equity from the top, middle, and bottom would create meaningful possibilities for ensuring equitable access to education for undocumented migrant children in South Africa. This three-fold view considers "equality of opportunity" from all levels of the society. Our argument coheres with Green's (2020) notion that "opportunity exists when an agent is *capable by his own action*, of doing or having something if he so chooses, and of not having the same thing if he chooses to abstain from action" (p. 4, emphasis added). This means that for individuals to exercise their rights, there must be platforms available for them to do so. Szekely and Mason (2019) refer to these platforms as "real opportunities" which include "the physical and meaningful provision of the wherewithal through which people might realise their right to education" (p. 676). Realistically this means that policy documents and legal frameworks in South Africa must be amended to cohere, and to be based on a human rights approach to developing laws; organisations and institutions in charge of the distribution of resources must work effectively to attain fair distribution of resources across schools; undocumented migrant children and their guardians must be empowered to exercise their agency, both individually and as a group. To realise this the capability approach offers a powerful theoretical framework that can be integrated conceptually with equity to support these implementations. This is because the capability approach creates a framework to discuss equity on multifaceted levels, as will follow.

Section 4: integration of the capability approach and equity

Integrating the capability approach with equity is necessary because it provides an opportunity for in-depth consideration of the structural limitations that undocumented migrant children face. Furthermore, this combination creates a platform for the establishment of strategies for overcoming the barriers experienced by undocumented migrant children in relation to their education.

Robeyns (2005), as well as Walker and Unterhalter (2007), argue that the capability approach is a value-based framework which is broad and consistent in evaluating and judging how individuals can be human "beings" through established policies. It also creates a platform for societal change that emphasises social and structural change. Robeyns (2005) further states that the main feature of the capability approach is that it considers a multifaceted approach to well-being. In this paper, we express the capability approach in terms of equity from the top, bottom, and the middle (Unterhalter, 2009).

The capability approach linked with education (see Unterhalter, 2003) is used as a lens to understand the migrant children's access to schooling. Unterhalter (2003) notes that schools and the schooling system do not exist in isolation from society but are integral

to societal structures. Refining the way education is understood under the capability approach, Unterhalter (2003) argues that "political and social analyses are crucial to make the capability approach 'real'" and that "the capability approach without an explicit acknowledgement of the salience of social theories of inequality lays itself open to becoming a hollow mantra" (p. 18). This view follows from Sen's (1999) focus on the need to integrate social, political as well as economic activities, to understand the role of each of these structures in the promotion of equality of opportunities.

Drawing from Unterhalter's (2003) stance, there is a dire need to understand, at its roots, the factors that continually affect undocumented migrant children's access to education in South Africa. For Sen (1999), though an individual is capable of being free, public policy can serve as a deterrent to fulfilling their capabilities, or realising what they value, and have reason to value. Here, according to Hart and Brando (2018), the capability approach provides a framework to consider issues of access to schooling. This is plausible because of the capability approach's recognition of individual agency and human diversity, which is repeatedly noted within the targets of the United Nations Sustainable Developmental Goal (SDG) 4 (see United Nations [UN], 2015).

Key concepts from Sen's capability approach are *functionings* (doings and beings; human activities that one has achieved: being educated for instance); *capabilities* (what one is able to do [free to do]: for example, attend school); and *agency* (one's actions). An illustration of the capability approach in relation to undocumented migrant children would be that for undocumented migrant children in South Africa, while they *should* be able to attend school and participate in schooling activities, their freedom to achieve this is almost impossible due to the structural limitations in place within the country. So, their ability to act, and express their agency is limited to the extent the law permits. Thus, to solve this problem of inequitable access to education, a coherent approach, which links the macro, meso, and micro levels of society needs to be considered. Hart and Brando (2018) report that although individuals are able to achieve what they value through their agencies, the functionings of these individuals are dependent on their relative advantages and disadvantages in society. Beyond one's own relative advantage and disadvantage, in terms of one's capability to be educated, the actions of others can serve as a constraint to this capability. Hence, undocumented migrant children require the structures within South Africa to protect their freedom to access education. In quite specific terms, Hart and Brando (2018) express the need for an active fostering of educational conditions in order "to support the development of children's freedoms, competencies and achievements" (p. 303). Supporting this we argue for the integration of the capability approach with an explanation of equity as a three-fold concept. This is because while the capability approach considers education as a means to achieve social change and social justice (see Sen, 1999), the approach is not without contestation. For example, Warner (2018) has argued that the capability approach fails to go beyond an individualistic perspective, and is without an in-depth, critical explanation of the link between individuals and societal structures. Here, as we argue, integrating the capability approach with Unterhalter's three-fold perspective on equity allows an in-depth explanation on how accessing education, not just in terms of individual freedom, but also as a common, societal good, can be ensured. This integration requires a holistic balance across individual agency (micro-level), the level of distribution of resources and the community (meso-level),

and the formulation of policies and legislation (macro-level) (see Gracia-Calandín & Tamarit-López, 2021).

Beginning with functionings (which is considered as "an achievement" (Sen, 1987, p. 48) or what is considered important to take part in), this concept relates to the idea of equity "from the bottom". Integrating "functioning" and "equity from the bottom" allows for the consideration of what individuals (in this case, undocumented migrant children) can achieve through the recognition of personal differences. Significant under the capability approach is the place of human differences (see Sen, 1992). This means that in South Africa, for undocumented migrant children to fulfil their right to education, society must recognise their varying and difficult circumstances. For example, while it is important to take part in basic education, it is also important that in order to partake of this activity, the awareness that undocumented migrant children do not necessarily meet the basic entry requirements to schools needs to be considered. When this happens, discussions can take place around what can be done to ensure that their inability to provide the basic requirements does not have an impact on their access to education.

Next, the intersection between Sen's concept of capability and Unterhalter's explanation of equity from the top and middle is considered. This intersection can be viewed from the fact that the structures within societies are what determine the things an individual can do. At the level of equity from the top, frameworks and policies determine the capabilities of individuals. For equity from the middle, the distribution of needed resources determines the capabilities of individuals to flourish. Hence, the importance of what makes up frameworks, and how resources are distributed, cannot be overemphasised when considering individuals' substantive freedom to pursue the different things they want to do. A good example is that although undocumented migrant children might want to attend schools in the country, policies in place, as well as the distribution of resources in relation to the education sector, would serve as factors which prevent this. This suggests that the meaning of equitable access to education would reconsider the formation of policies from a "justice as fairness" perspective (see Rawls, 1999), rather than from a nationalist, high-level securitisation of migration view, which is currently the case for some of the policies relating to immigration and schooling in South Africa. It would also mean that the Department of Basic Education would distribute resources to schools based on the *actual* number of pupils per school, and not based only on those with documentation.

The final integration hinges on agency and equity from below. For Marginson (2011), equity from the bottom relates to agency within the capability approach. This is reasonable because agency allows individuals themselves to gain satisfaction, based on their values and beliefs (Sen, 1999). It links to what Unterhalter (2009) explains regarding equity from the bottom, when she argues for an opportunity for dialogue through the release of voices based on access to knowledge about their possibilities, and fair negotiations that are indicated by a balanced outcome for those involved. Agency is explained in terms of the microsocial level. Hence, while thinking about the chance to express individual agency, factors such as the opportunity for dialogue and to reach agreements cannot be ignored. From dialogues that take place, platforms for bargaining and making fair agreements in terms of accessing education for undocumented migrant children would be possible (see Rawls, 1999). So, interaction with undocumented migrants at the community and national levels in the form of meaningful engagements would be important. For instance, the South African Human Rights Commission (SAHRC) is committed to ensuring that

human rights are upheld through the creation of awareness about the rights of everyone within the country. In a position paper published by the Commission, it noted that "the Department of Basic Education must develop educational material that outlines the relevant laws and policies, processes, as well as rights and responsibilities for admission to school, including in particular for undocumented learners" (Gaum, 2019, p. 21).

Although the integration of each capability approach concept with certain parts of the three-fold perspective on equity is important, each integrated part, on its own, is not sufficient for the enhancement of the right to access to education for undocumented migrant children in South Africa. This is because, for instance, agency is influenced by the structures within society. Thus, this integrative approach must be considered holistically. A holistic view means the State, organisations and institutions, individuals, and communities must consciously work together to develop and implement strategies that take specific contexts of such children into account. Failure to integrate implementable policies, ideas and practices would leave equitable access to education for undocumented migrant children unsolved, and a persistent reality. Key stakeholders (policy makers, lawmakers, human rights activists, institutions, including their leaders, guardians of undocumented migrant children and the undocumented migrant children themselves) need to exercise their functionings to actualise education as a chance for equality of opportunity. To begin removing the impeding factors creating inequitable access, the discussion needs to start by redefining who, and what, migrants are in the general sense, within the South African context. Then, underlying realities can be clearly analysed in relation to the societal structure which will create opportunities for empirical research and policy revision.

When the capability to attend schooling is made fair through policies and their implementation; through the provision of resources for all; through the working together of community members; there will be an increased chance to bring about equality of opportunity for members of society who are considered vulnerable, and to produce a better, more just education system that is mindful of undocumented migrant children. Moreover, the integration of the capability approach with the three-fold explanation of equity allows us to view undocumented migrant children as potentially capable human beings, in difficult, limiting circumstances. South African society will thus enable a "life context where [undocumented migrant children] become, through [equitable access to] education, truly capable" (Gracia-Calandín & Tamarit-López, 2021, p. 826).

How the integration helps to improve the theoretical understanding of educational equity for undocumented migrant children in South Africa

To provide further clarity on why the integrated approach can improve the theoretical understanding of educational equity for undocumented migrant children, we turn to previously conducted empirical studies and show how our approach can deepen the findings of these studies. In a study conducted by Biggeri (2007), where ad hoc surveys were completed across three countries (India, Italy, and Uganda), education was considered part of what children value and consider important. Having analysed the data the author concludes that "policymakers should put all efforts and a higher priority on children's capabilities and on education. The goal of 'quality' 'education for all' children is an ethical, social, political, and moral imperative" (Biggeri, 2007, p. 210). Although this argument does not

contradict our own regarding the role of policy in ensuring equitable access to education, we note that an in-depth understanding of how "all efforts" can be employed remains unclear, as no suggestions are made for specific, implementable measures at different levels of the society. However, when equity is combined with the knowledge of educational capabilities, platforms will be created for extensively determining the different challenges, and how they might be addressed. For instance, in Biggeri's study (2007), the children in all three countries selected education as a major capability. To expand on what this capability means, equity must be understood from the top (through engagement with policy and politics), in order to determine what the structural limitations are, and how they can be overcome to ensure the proper distribution of, and access to, educational resources. Furthermore, knowing that the children were able to identify the significance of being educated suggests the need for more engagement with equity from the bottom, to determine what real opportunities exist for them to exercise their agency.

Another study that supports the need for an integrated approach is by Trani et al. (2012). This study took place in Afghanistan with a focus on children with disabilities and is based on the capability framework. Using surveys, as well as focus group discussions and individual interviews, the authors found that disabled children lacked equal access to education, among other findings. As we have already argued, the term "equal" is problematic because equal access alone does not necessarily create or ensure educational opportunities for marginalised children. Rather, children with disabilities need to be considered in diverse ways that recognise their personal heterogeneity and impairments. Supporting this, Vygotsky (1993) writes that "cultural forms of behaviour serve as the only path of education for an abnormal child. This path means the creation of *roundabout ways of development* at that point where it *proves impossible* to proceed by direct paths" (p. 168, emphasis added). Hence, while education access must be ensured, further considerations must be made based on the disabled child's specific learning needs, and not just the provision of "equal" access to education. In the article other factors that inhibit the educational capability of the children were also identified, such as gender, type of disability, and ethnic group. While the capability approach allows us to interrogate these difficulties and limiting factors in specific contexts, drawing in equity would significantly expand and enhance the findings. To illustrate this, consider the concluding remarks in the article:

> Finally, there is a general need to focus on children still out of school – the most vulnerable (disabled children in general, children with mental disabilities in particular). The issues to tackle include means of identifying these children, of raising awareness, improving teaching standards, influencing government ministries and donor agencies to put the adequate resources needed to address the challenges to comprehensive and equitable inclusive education. This starts with having those vulnerable children in schools. But it does not stop there. The capability approach, by highlighting the need to develop the conditions for well-being and agency for all children, makes a strong case for questioning and addressing all aspects of the education system simultaneously and promoting social change and a just society. (Trani et al., 2012, p. 362)

Evidently access to education must be achieved for these marginalised children. To do this, the authors recommend the capability approach which, they argue, will provide the platform for engaging with strategies to assist these children. However, we reiterate that on its own, as has been argued, the capability approach is considered limited to individual perspectives, without necessarily developing an in-depth, critical explanation of the link between

individuals and societal structures. Thus, while the strategies and organizations indicated in the quotation correspond to the different levels of equity, framing them explicitly within the integrated approach we propose would significantly enhance how they can be understood and theorised.

Another recent relevant qualitative study is by Molla (2021), involving refugee youth in Australia. The findings argue that the standard for determining the extent of educational disadvantage for African refugee youth should transcend issues of access and also consider the root causes of inequality. Again, the use of "inequality" is problematic, and seemingly conflated with "equity" in the article. However, as we have suggested, ensuring "equality" should not be the intention, but instead being able to receive support in different ways, and from different starting points. Furthermore, the author has also suggested the need to understand the root cause of "inequality". Here we argue that to get to the roots of injustice, in terms of educational disadvantage, (which Molla, 2021 foregrounds), requires engagement with the concept of equity in partnership with the capability approach. So, while the capability approach allows for the interrogation of structural limitations and individual capability, the three-levelled concept of equity sheds light on specific societal limitation. Hence, equitable access to education will be understood beyond only "barriers to access"; it would draw out a contextualised analysis of the nature of a society that continue to perpetuate inequities.

In the South African context, the complexities and ambiguities of the immigration policy (as discussed in section 1), make it difficult for only the identification of structural limitations to provide solutions for the lack of equitable access to education for undocumented migrant children. Hence, there must be critical interrogation of the meaning of equity (beyond policy level) to engage with issues of equitable access to education. Equity cannot be isolated from the context in which it is considered. For instance, what equity means in the South African context is tied to the State's nationalist perspective and this has implications for the extent to which those who are non-citizens are allowed the freedom to participate in and achieve what they value. Unfortunately, because of the deep-rooted nationalist perspective on migration, "equity" in the South African context is in fact not genuine equity, because it seems to deliberately exclude marginalised and vulnerable children.

Section 5: conclusion

In this paper, we have highlighted the structural form of discrimination perpetuated through contradictory policies on immigration and education in South Africa; the distinction between equity and equality; equity from a three-fold perspective and its implication for access to education for undocumented migrant children in South Africa; as well as the integration of the capability approach and equity. Undocumented migrant children in South Africa constantly face the challenge of accessing education, and the way forward to ensure they fulfil their right to education has not been duly considered in relation to equity. In this paper, we address this omission. As already highlighted, each form of equity on its own is not sufficient to ensure equitable access or equal opportunities for *all*. Also, ensuring that individuals gain freedom to achieve what they want cannot be realised through only their own capabilities. Hence, the need to integrate these ideas is necessary to explain equitable access to education. An

integrated approach that draws together the ideas of the capability approach and the three levels of equity offers this complex and holistic conceptual framework. With this approach, further studies (including empirical, qualitative studies) can develop workable strategies to ensuring the equitable access of migrant children to education and consider and revise various levels of structural limitations (including policy and law), as well as ensure available opportunities. We also recognise that empirical studies, using this integrated approach, need to be conducted to test and confirm the workability of the approach for contextual policy and societal reforms. Given the need for empirical studies, further questions arise from this conceptual paper. They include: to what extent will the use of an integrated approach ensure meaningful policy reform in nationalist contexts; how can agency (especially in subtly prejudiced societies) be fully enabled to allow for the achievement of the human rights of historically marginalised populations; and how can the application of the integrated approach ensure the full implementation of revised policies that focus on educational rights? In conclusion, we have argued that an integrated approach to explaining equitable access to education which draws together Unterhalter's (2009) three-fold perspective on equity with Sen's (1999) idea of the capability approach is vital for enhancing the right to education for undocumented migrant children in South Africa. Equitable access to education for undocumented migrant children in South Africa will bring about the realisation of their capabilities, which will significantly enhance their well-being.

Notes

1. The Act was intended to regulate immigration and related issues of the State. See https://www.gov.za/documents/aliens-control-amendment-act
2. See for instance: Johnson (2020) and Isilow (2021).
3. In Table 1, the Immigration Act of 2002 clearly indicates that learning institutions are not permitted to allow undocumented or "illegal" foreign nationals to participate in learning or be found on the premises of such institutions. However, a recent court ruling concluded that reference to *learning institutions* in the Immigration Act was not inclusive of basic education institutions or schools:

   > These terms [learning institutions] ought to be interpreted to refer not to the rights of the children who receive basic education, but adults attending "learning institutions" to obtain something over and above "basic education" and are thereby trained or instructed in furtherance of their pursuits. (*Phakamisa Judgment*, 2019, p. 38)

   While this interpretation has implications for equitable access to education, unfortunately, the Judgment has not made any significant difference in *practically* ensuring access to education for undocumented migrant children. By extension, this top-down approach, although important, is not sufficient to effect change.

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