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PROBLEMATISING TEENAGE PREGNANCY AS A HUMAN RIGHTS ISSUE IN SOUTH AFRICA

By

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Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

2023

Supervisor: Prof Lilian Chenwi

Declaration

I, Light Maluleke (student number: 452798), declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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Abstract

Teenage pregnancy has long been considered a public health and a socio-economic problem globally, and South Africa in particular. A review of literature indicates that teenage pregnancy poses serious breaches to human rights. Consequently, the research report has determined that rights such as right to health, education, equality and life are at the core of teenage pregnancy. The indivisibility, interdependence, and interrelatedness of these rights become apparent once established that teenage pregnancy affects multiple rights. Against this background, this study problematises teenage pregnancy as a human rights issue in South Africa. The study seeks to answer the following questions: What are the effects of teenage pregnancy on the human rights of pregnant girls and teenage mothers? What are the domestic and international human rights law obligations of South Africa in the context of teenage pregnant? What measures have the SA government put in place to comply with its obligations and reduce high rate of teenage pregnancy in the country? Drawing from literature, case law and general comments/ recommendations and concluding observations of United Nations (UN) treaty bodies, such as the Committee on the Elimination of Discrimination against Women, Committee on Economic, Social and Cultural Rights, Human Rights Committee, and Committee on the Rights of the Child, as well as the regional treaty bodies like the African Commission on Human and Peoples' Rights, and the African Committee of Experts on the Rights and Welfare of the Child, the study found disparities and practical barriers which hampered teenagers from enjoying and accessing sexual and reproductive health information and services, including family planning; knowledge about and use of modern forms of contraception; termination of pregnancy services, antenatal and postnatal care. It also found high incidence of teenage pregnancy was the leading cause of high school dropout rates among girls in the country. Notwithstanding South Africa's progressive legislation and policy measures, effective implementation of both national and international human rights law standards on teenage pregnancy in South Africa remains a challenge. The South African government should strive towards eliminating all practical and social barriers which prevent girls and teenage mothers' from access to sexual and reproductive health services. To tackle the disparities and shortages of health care workers, government must hire and train more qualified people, and adopt proper budgetary measures to ensure availability, accessibility and acceptability of resources and services, to strengthen the capacity of the public health care system.

Keywords: Teenage pregnancy, human rights, sexual and reproductive health, termination of pregnancy, teenage mothers

Dedication

I dedicate this research report to my late mother, Lydia Maluleke, my grandmother; Kubayi Mashibye and to my partner, Mosidi Valentia Lengwasa, with whom I have been blessed with two adorable twins, Khanyisa and Nsovo. I am eternally grateful for all the support they have showed me while I was writing this research report.

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First, I would like to thank my supervisor, Prof Lilian Chenwi. Thank you for your guidance and support in the achievement of not only this research report but for teaching me research skills. I will always be grateful for your assistance and patience. May the Lord Almighty bless you.

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Abbreviations and Acronyms

African Commission	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination against-Women
CESCR	Committee on Economic, Social and Cultural Rights
Constitution	Constitution of the Republic of South Africa, 1996
CC	Constitutional Court
CTPA	Choice on Termination of Pregnancy Act
CGE	Commission for Gender Equality
CSE	Comprehensive Sexuality Education
DBE	Department of Basic Education
GBV	Gender-Based Violence
HCW	Health Care Worker
HRBA	Human Rights-Based Approach
HRBCO	Human Rights-Based Clinic Office
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MPMLP	Measures for the Prevention and Management of Learner Pregnancy
Maputo Protocol	Protocol to the African Charter on Human and Peoples' on the Rights of Women in Africa
NHA	National Health Act
National Policy	National Policy on Prevention and Management of Learner Pregnancy-in Schools
OHCHR	Office of the United Nations High Commissioner for Human Rights
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SA	South Africa
SAMJ	South African Medical Journal
SRH	Sexual and Reproductive Health
Stats SA	Statistics South Africa

TP	Teenage Pregnancy
TOP	Termination of Pregnancy
UN	United Nations
UDHR	Universal Declaration of Human Rights

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I INTRODUCTION

The majority of past studies focused on the social, economic and health effects of Teenage Pregnancy (TP), paying less consideration on its implications on the human rights of girls and teenage mothers in South Africa (SA). The reason for fewer studies on the implication of TP on human rights is unclear. This may, however, be because scholars who write on the subject (TP) in the country, mostly come from public health and social sciences. Despite this, emerging studies are starting to shift their focus towards the impact of TP on human rights.[1] The United Nations (UN) and African Union (AU) treaty bodies, such as the Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Discrimination against Women (CEDAW Committee), and African Commission on Human and Peoples' Rights (African Commission), have recognised the ramifications of TP on human rights.[2]

Significantly, the Constitution of the Republic of South Africa, 1996 (Constitution) guarantees the rights to health[3], equality, life and education for all people including teenagers. To give effect to these rights and buttress its commitment to control TP, SA government has adopted TP related legislations and policies, such as the Choice on Termination of Pregnancy Act 92 of 1996 (CTPA), National Health Act 61 of 2003 (NHA), Children's Act 38 of 2005 (Children's Act), South Africa Schools Act 84 of 1996 (Schools Act) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), as well as National Policy on Prevention and Management of Learner Pregnancy in Schools of 2021 (National Policy). Notwithstanding, the country still falls short on implementation of such legislative and policy framework.[4] It is also not clear whether the most acclaimed recently adopted National Policy will be effective in reducing TP in schools.

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[1] Ching Yuen Luk 'A human rights-based approach to teenage pregnancy prevention in China' in Devi Akella (ed) *Socio-Cultural Influences on Teenage Pregnancy and Contemporary Prevention measures* (2019) 95. See Peter Masibinyane Dimo, 'Evaluation of Environmental and Social Factors that Contribute to Teenage Pregnancy' (2019) 17 (2) *Gender & Behaviour*, 13040, 13040.

[2] The Committee on Economic, Social and Cultural Rights (CESCR), Concluding observations on the initial report of South Africa, UN Doc. E/C.12/ZAF/CO/1 (2018) para 65; Committee on the Convention on the Elimination of All Forms of Discrimination against Women's (CEDAW Committee), Concluding observations on the fifth periodic report of South Africa, UN Doc CEDAW/C/ZAF/CO/5 (2021) para 43; and African Commission on the African Charter on Human and Peoples' Rights (African Commission), Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa (2016) para 33.

[3] See sections 27(2) and (3) and 29(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution).

[4] See CEDAW Committee supra note 2, para 9, the Committee confirmed 'the systematic failures of government to implementing its legislations and policies particularly in relation to gender-based violence cases'.

In fact, statistic suggests this. Previously, Statistics South Africa (Stats SA) had reported that approximately 130 000 girls aged 10-19 were pregnant between the period 2019 and 2020.[5] This was an increase from the 114 329 pregnancies recorded during the 2017-2018 period. These pregnancies obviously affect minors and teenage girls who are of school-going age.

As such, the World Health Organization (WHO) defines a teenager as a person between the ages of 13 to 19 years and an adolescent as a person between the ages of 10 to 19 years.[6] This description of a teenager by WHO is adopted as a working definition for this research report. It is necessary though to conscientize against describing a child who is 10 years old but below 12 years as an adolescent, as it may give rise to some practical considerations or create inappropriate impressions about the child. For instance, labelling a pregnancy of a child aged below 12 years as teenage or adolescent pregnancy, may create a wall covering rape or sexual offences committed against the minor. Not only is such a description disastrous, but also conflict with the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act), which recognises a child below 12 years cannot give informed consent to engage in sexual activities.[7] Though this is beyond the scope of this research report, future research should investigate the impact of use of language, especially for child pregnancies, on prosecution and convictions for sexual offences against such minors.

This research report aims to demonstrate that TP is a human rights issue, as much as it is a health and socio-economic issue, which requires urgent interventions, by answering the following questions: what are the effects of TP on the human rights of pregnant girls and teenage mothers? What are the domestic and international human rights law obligations of SA in the context of TP? What measures have the SA government put in place to comply with its obligations and reduce the high rate of teenage pregnancy in the country?

Following this introduction section, which sets out the research objectives and provides working definition of key term(s), section II provides an overview on factors contributing to TP in SA. Section III considers the consequences of TP on the rights of adolescent mothers, using rights to equality, life, education and health, as illustrative examples. It draws from the general comments/recommendations and concluding observations of relevant treaty bodies, as well as case law and literature to determine how TP affects human rights of pregnant girls and

[5] Department of Statistics South Africa 'Profiling health challenges faced by adolescents (10–19 years) in South Africa' 2022 Pretoria: Statistics South Africa. See the World Health Organization (WH0) 'Adolescent Pregnancy' available at *https://www.who.int/news-room/fact-sheets/detail/adolescent-pregnancy*, accessed on 10 October 2022.
[6] Ibid.
[7] See Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act).

teenage mothers.[8] Section IV considers SA's constitutional and international human rights law obligations. Section V provides an assessment of the interventions (legislative and other measures) put in place by the government to fight the rise of TP. This section also highlights additional obligations stemming from these measures. This section will focus on the enforcement of legislative and other measures. Recommendations and conclusion are contained in section VI.

II FACTORS CONTRIBUTING TO TP IN SA

The lack of a single study claiming to understand the underlying or primary cause of TP is not surprising. One such explanation for this is that TP is a complex issue with numerous contributing factors in SA. Poverty, education, inappropriate family structure, cultural norms, and gender-based violence, and issues with health care including shortages of health care workers (HCWs) and facilities, deficiencies of medicine, barriers to access sexual and reproductive health (SRH) information and services such as termination of pregnancy (TOP) and family planning services, and negative attitudes of HCWs towards teenagers seeking SRH services, are some of the factors reported as driving the high rates of TP in the country.[9] The lockdowns imposed by the government in 2020 to control the spread of coronavirus (COVID-19) is instructive. According to Barron et al., lockdowns during COVID-19 had an impact on access to SRH services, which led to an increase in teenage birth rates; however, termination rates suddenly decreased in the years 2020 and 2021 when compared to the previous two years.[10] This clearly demonstrate how lack of access can hinder teenagers from seeking health services and thus contribute to high rates of TP.

Nevertheless, teenagers themselves can occasionally be predisposed to engaging in high-risk behaviours, such as early sex debut, inconsistent condom usage, multiple partners, transactional relationships (or sex), and alcohol and drug misuse, which puts them at risk of

[8] Ebenezer Durojaye, Gladys Mirugi-Mukundi and Charles Ngwena *Advancing Sexual and Reproductive Health and Rights in Africa: Constraints and Opportunities* (Routledge, 2021) at 4.

[9] R T Lebese et al 'Factors influencing the uptake of contraception services by Vatsonga adolescents in rural communities of Vhembe District in Limpopo Province, South Africa', (2013) 18 *Health SA Gesondheid*, 1 at 1. See also D Govender, S Naidoo and M Taylor, '"My partner was not fond of using condoms and I was not on contraception": understanding adolescent mothers' perspectives of sexual risk behaviour in KwaZulu-Natal, South Africa' (2020) 20 *BMC Public Health*, 13.

[10] P Barron et al, 'Teenage births and pregnancies in South Africa,2017 - 2021 – a reflection of a troubled country: Analysis of public sector data' (2022) 112 *SAMJ*, 256. See also Kim Jonas 'Teenage pregnancy during COVID-19 in South Africa: a double pandemic' available at *https://theconversation.com/teenage-pregnancy-during-covid-19-in-south-africa-a-double-pandemic-166987*, accessed on 12 December 2022.

unintended pregnancies and sexual transmitted infections (STIs) like HIV/AIDS.[11] Certain risky behaviours, such as transactional relationships, are motivated by peer pressure and poverty. The 'blesser' and 'sugar daddy' phenomena, which are at the centre of this transactional sex, is important. Blessers and sugar daddies are often affluent elderly men, possibly with wives and kids the same age as the girls they have sex with. These elderly men use gifts to entice young girls and teenagers into sleeping with them or entering relationships with them.[12]

Transactional sex and blesser relationship is linked to an increase in TP rates.[13] According to De Wet, sexually transmitted infections (STIs) such as HIV/AIDS, as well as unintended pregnancies are some of the risks associated with transactional sex.[14] Even if poverty was the main reason fostering these transactional relationships[15], 'social media peer pressure' has a role in young women becoming prey to these men and is often overlooked.[16] Many young people are exposed to these opulent lifestyles through social media sites like Instagram and Twitter, where people post pictures of themselves dining in posh restaurants, flaunting their expensive cars or other possessions, or even girls displaying gifts that their rich elderly partners bought for them.[17] These actions may put pressure on their peers, especially girls coming from vulnerable, and disadvantaged families. This is not, however, definitive; further studies are required to confirm the relationship between social media pressure, transactional sex, and the rise in TP rates in SA.

Lastly, research also reveals that girls with low levels of education as a result of their first early pregnancy are more likely to have another TP resulting in fewer employment

[11] Kim Jonas et al, 'Teenage pregnancy rates and associations with other health risk behaviours: a three-wave cross-sectional study among South African school-going adolescents' (2016) 13 *Reproductive Health* 50.
[12] See Govender, Naidoo & Taylor op cit note 9.
[13] Nicole De Wet et al, 'Extra mouths to feed: The odds of young mothers engaging in transactional sexual relationships in South Africa (2018) 4 *Cogent Social Sciences*, 2.
[14] Ibid.
[15] Margaret Nelson, 'Is it really just all about sex and money? A case study of teenage motherhood in the village of KwaXimba in the Valley of a 1,000 Hills' 2012 *Independent Study Project (ISP) Collection*, 27.
[16] Sandra Kegomdicwe Qolesa, 'Factors influencing teenage pregnancy in Heidedal location, Mangaung District' (unpublished dissertation, University of the Western Cape 2017) 24.
[17] Z Duby et al, 'From survival to glamour: Motivations for engaging in transactional sex and relationships among adolescent girls and young women in South Africa' (2021) 20 *AIDS and Behavior*, 3247. See Brent V. Frieslaar and Maake Masango, 'Blessings or curses? The contribution of the blesser phenomenon to gender-based violence and intimate partner violence' (2021) 77 *HTS Teologiese Studies/Theological Studies*, 2. See also Govender, Naidoo & Taylor op cit note 9.

opportunities and lessen the prospects of earning a decent income, and therefore more likely to be trapped in an endless cycle of poverty.[18]

III TP AND HUMAN RIGHTS

The causes of TP reveal, albeit implicitly, a chain of sectors affected by TP and its likely effects on human rights. These rights are intrinsic to all living persons and should be enjoyed by all without discrimination. Chapter 2 of the Constitution of South Africa contains a Bill of Rights which is a cornerstone of democracy in SA. This Bill of Rights enshrines the human rights (civil, political, economic, social and cultural) of every person, including pregnant teenagers and mothers in the country and it 'upholds the democratic values of human dignity, equality and freedom'.[19] The rights guaranteed include rights to dignity, life, equality, access health care services, education, social security. At the global level, the Universal Declaration of Human Rights of 1948 (UDHR) is the first overarching international instrument recognising human rights. Since then, these rights have been incorporated in several international and regional human rights treaties such as the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR), International Covenant on Civil and Political Rights of 1966 (ICCPR), Convention on the Elimination of Discrimination against Women of 1979 (CEDAW) and the Convention on the Rights of Children of 1989 (CRC), as well as the African Charter on Human and Peoples' Rights of 1990 (African Charter), Protocol to the African Charter on Human and Peoples' on the Rights of Women in Africa[20] of 2003 (the Maputo Protocol) and African Charter on the Rights and Welfare of the Child of 1990 (ACERWC). These treaties apply to SA as it is has ratified them.[21] The rights may only be limited in terms of applicable requirements contained in the Constitution and the treaties.

The rights to equality, life, health, and education have been employed to illustrate how TP implicates human rights. These rights were selected because, relative to other rights, TP has

[18] Networking HIV & AIDs Community of Southern Africa 'The truth about teen pregnancy' available at *https://www.nacosa.org.za/2018/11/26/the-truth-about-teen-pregnancy/*, accessed on 12 December 2022.
[19] See section 7(1) of the Constitution.
[20] The Protocol to the African Charter on Human and Peoples' on the Rights of Women in Africa of 2003 (the Maputo Protocol) is the primary legal instrument for the protection of the rights of women (including girls) in Africa. This protocol has been described as one of the most radical instrument in the context of advancing sexual and reproductive health and rights of women and girls.
[21] SA ratified the Convention on the Elimination of Discrimination against Women of 1979 (CEDAW) on 15 December 1995; International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) was ratified 12 January 2015, the International Covenant on Civil and Political Rights of 1966 (ICCPR) on 10 December 1998; the Convention on the Rights of Children of 1989 (CRC) on 16 June 1995.

a greater effect on them.[22] Earlier studies on subjects like TP and its effect on public health and education was equally informative. Accordingly, the subsequent discussion considers how each of these rights is affected by TP.

(a) Right to Health

The right to health guarantees to everyone 'the highest attainable standard of physical and mental health' and encompasses not only timely and appropriate health care but also the fundamental factors that influence health, such as access to health-related education and information, including information on sexual and reproductive health.[23] The South African Human Rights Commission (SAHRC) opines that the 'right to health is fundamental to the physical and mental well-being of all individuals and is a necessary condition for the exercise of other human rights including the pursuit of an adequate standard of living'.[24] This interpretation suggests that health is more than receiving treatment and services in the narrow sense, but also the need to be provided with education and information about such services to ensure that individuals make informed decision about treatment and use of such.[25] This is particularly accurate in the context of TP where barriers in accessing SRH services may be related to other rights such as equality and education.[26]

The Constitution affords every person the right to health. In section 12(2), it guarantees 'the right to bodily and psychological integrity'. This section provides everyone the right 'to make decisions concerning reproduction' and 'to security in and control over their body' – which is a significant aspect of the right to health.[27] Even so, section 12(2) ought to be explained in the context of prevention or termination of pregnancy. This provision bestow power to a woman of any age to decide over issues affecting their reproduction, including the power to decide whether to engage or abstain from sexual intercourse; to be pregnant or

[22] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (2000) para 3. See ACERWC, South Africa's Third Periodic Country Report on the implementation of the African Charter on the Rights and Welfare of the Child (Reporting period: June 2016 – March 2021) 53. Also, African Commission, General Comment No. 2 on Article 14 (1) (a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Protocol to the African Charter on Human and Peoples' on the Rights of Women in Africa (2014) para 27, confirms that TP affects human rights such as life, health and non-discrimination.
[23] CESCR, General Comment No. 14 para 2. See Committee on the Rights of the Child, General Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health (art. 24), UN Doc CRC/C/GC/15 (2013) para 63.
[24] South African Human Rights Commission Report: on the Right to Health period 2000 – 2002, at 1.
[25] CESCR, General Comment No. 14 para 3.
[26] Ibid at para 3.
[27] K Moult and A Müller 'Navigating conflicting laws in sexual and reproductive health service provision for teenagers', (2016) 39 *Curationis* 1, 2.

terminate her pregnancy; or access and use any pregnancy prevention device, on their own time and space.[28] Importantly, the power to exercise this right lies solely on the woman, unless in certain circumstances, where for example the woman cannot give informed consent for the reason of her incapacity or understand the nature of the treatment, the consent of a parent or legal guardian may be sought.[29] In contrast to section 12(2), sections 27(1)(a) and 28(1)(c) of the Constitution guarantees the right to have access to health care services (including reproductive health care) to everyone. Though section 28(1)(c) on children does not explicitly refer to SRH, it is generally phrased; hence, does not exclude SRH.[30] Notwithstanding, children are also covered under section 27(1)(a)'s explicit SRH protection, as it is guaranteed to everyone.

Even so, a significant proportion of girls and teenage mothers face challenges in enjoying the highest attainable standard of physical and mental health. In particular, accessing timely and effective health care, including access to SRH services and information, perpetuated largely due to practical and socio-cultural barriers imbedded in the health care system.[31] Challenges affecting girls and teenage mothers' right to access to health care services are well documented. Sewpaul et al., for example, observed that the manner in which maternal HCWs treat pregnant teenagers affect how they seek timely health care services.[32] They contend further that barriers accessing SRH services include the fear of being censured and HCWs' perceptions that pregnant teenagers indulge in promiscuity.[33] The CEDAW Committee has also voiced its concerns regarding women not having adequate access to SRH services, particularly during the COVID-19 pandemic. It also expressed worry about the high rate of early pregnancies, the low access of women and girls to information on sexual and reproductive health rights (SRHR), contemporary methods of contraception, and safe abortion services.[34] Without these health care services young girls and teenage mothers remain the group in greater

[28] C Pickles 'Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996' (2016) 15 *PER*, 403-408. See also, Article 14 of the Maputo Protocol which makes provision for the right to decide the number of children and the spacing of birth and the right to choose any method of contraception.

[29] The CTPA was enacted to give effect to section 12(2) of the Constitutional right. See further discussion of the CTPA in section V of this research report. See also sections 129 and 134 of the Children 's Act.

[30] D J McQuoid-Mason 'Termination of pregnancy: Cultural practices, the Choice on Termination of Pregnancy Act and the constitutional rights of children' (2018) 108 *South African Medical Journal*, 721-721.

[31] African Commission, General Comment No. 2 supra note 22 at 2, expressed concern on limited access by women and girls to family planning and difficulties faced by them in accessing safe and available abortion services.

[32] Ronel Sewpaul et al., 'A mixed reception: perception of pregnant adolescents' experiences with health care workers in Cape Town, South Africa' (2021) 18 *Reproductive Health*, 2.

[33] Ibid.

[34] CEDAW Committee, Concluding Observation supra note 2 para 43. See also, African Commission, General Comment No. 2 supra note 22, para 19.

danger of suffering serious injuries or dying in pregnancy and childbirth as opposed to adult women.[35] This aspect will be expanded when discussing the right to life later on in this section.

If the right to health is interpreted as implying enjoyment of a range of services required for the realization of the highest attainable standard of physical health [36] – then it must also be accepted that TP, as a physical state that perpetuates institutional and socio-cultural barriers to access health care by teenagers, not only limits but also violates the enjoyment of such right. The Committee on the Rights of the Child (CRC Committee), in its General Comment No. 15, noted that 'preventable maternal mortality and morbidity constitute grave violations of the human rights of women and girls and pose serious threats to their own and their children's right to health'.[37] The CESCR stated, in its General Comments No. 14 and 22, that a lack of information on issues related to SRH of girls prevents them from fully enjoying their human rights.[38]

(b) Right to Education

The right to education is enshrined in section 29(1)(a) of the Constitution, as well as in international and regional human rights treaties mentioned above. The CESCR has articulated the right to education as an indispensable means of realising other human rights.[39] It affirmed that the right is an empowering right which has the potential to empower and pull adolescent women and girls out of poverty, as well as inspire them to participate meaningfully in society and prevent unplanned pregnancies.[40] This understanding of the right to education suggests education is vital not only for the development but also to the emancipation of the individuals.[41]

Nevertheless, in reality, the education sector and the Department of Basic Education (DBE) in particular is failing to ensure that every learner enjoys undisrupted education. It is important to remark that the education sector is one of the key sectors afflicted by TP. This

[35] CEDAW Committee, Concluding Observation supra note 2 para 43.
[36] CESCR, General Comment No.14, para 9.
[37] CRC Committee, General Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health (art. 24), UN Doc CRC/C/GC/1 (2013) para 51.
[38] CESCR, General Comment No. 14, para 47. CESCR, General comment No. 22: On the right to sexual and reproductive health (article 12), UN Doc E/C.12/GC/22 (2016) para 10.
[39] CESCR, General Comment No. 13, The right to education (Art. 13), UN Doc E/C.12/1999/10 (1999) para 1. Committee on the Elimination of Discrimination against Women, General recommendation No. 36: On the right of girls and women to education, UN Doc CEDAW/C/GC/36 (2017), para 1.
[40] Ibid.
[41] Chiedza Simbo, 'The right to basic education, the South African constitution and the Juma Musjid case: An unqualified human right and a minimum core standard' (2013) 17 *Law, Democracy & Development*, 484. See CRC Committee, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/4 (2003), para 17.

assertion assumes that these pregnancies occur to school-going aged girls and teenagers.[42] Evidence presents an alarming picture on the prevalence of TP in SA's public schools. Regrettably, it does not sufficiently capture the impacts of TP on education of pregnant learners. Instead, pregnant learners have to often balance between parenthood, pregnancy, and education simultaneously which proves to be insuperable to them, at times. These learners are required to frequent local clinics or health facilities for ante-and post-natal care services. Additionally, the learner, who has just become a mother, must cope with the difficulties of motherhood, which can be very challenging for first-time mothers. Some of the challenges include caring for the baby and taking the baby for health check-ups etc.[43] These can be daunting for a teenage mother if there is no proper support system in place.[44]

Such frequent health care appointments further presupposes the association between TP and inconsistent school attendance by pregnant and mothering learners.[45] Especially, school absenteeism may exacerbate their academic performance.[46] Furthermore, studies observed that girls who delay returning to school after delivery or giving birth are most likely to underperform in their academics or even achieve lower grades.[47] This denotes that delaying returning to school decreases the prospect of learners performing well in their studies, as they will have to catch up on most of the work missed while absent. This, however, is not the case in all circumstances, some mothering learners do perform well upon their return and continue to further their studies.

Regrettably, for some learners, pregnancy means the end of schooling. The World Bank opines that teenage mothers are less likely to continue their education.[48] Although Nkosi and

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[42] Human Rights Watch 'Submission to the United Nations Committee on the Elimination of Discrimination Against Women on the fifth periodic report of South Africa 80th Session' available at *https://www.hrw.org/sites/default/files/media_2021/09/CEDAW%20submission%20South%20Africa_final.pdf,* accessed 20 December 2022.

[43] Mamadika Motlagomang Allettah Molukanelethe, 'Impact of teenage pregnancy on the educational aspirations of female learners' (unpublished dissertation, North-West University 2009) 141, the author asserts that 'guidance counsellors also indicated that teenage mothers were absent from school more than those who do not have children. This might be ascribed to the fact that teenage mothers sometimes have to take their babies to health care centres for various health purposes.'

[44] Mausley Barbara Sikhumbuzo Molefe, 'Implementing the policy on learner pregnancy in rural schools: Perspectives from schools in Uthukela District' (unpublished dissertation, University of KwaZulu-Natal 2016) 39.

[45] Anoinette Du Preez et al, 'Secondary school teachers' experiences related to learner teenage pregnancies and unexpected deliveries at school' (2019) 24 *Health SA Gesondheid*, 4.

[46] Moyagabo Kate Malahlela & Regis Chireshe, 'Educators' perceptions of the effects of teenage pregnancy on the behaviour of the learners in South African Secondary Schools: Implications for teacher training' (2013) 37 Journal of Social Sciences, 137. See Molukanelethe op cit note 43 at 131. Molefe op cit note 44 at 23.

[47] Nokuthula Nokuphiwe Nkosi & Edmarie Pretorius, 'The influence of teenage pregnancy on education: perceptions of educators at a secondary school in Tembisa, Gauteng' (2019) 55 *Social Work*, 108, 111.

[48] World Bank 'The social and educational consequences of adolescent childbearing' available at *https://genderdata.worldbank.org/data-stories/adolescent-fertility*, accessed 05 August 2022. See CRC

Pretorius accept that girls do delay returning to school after giving birth, they nonetheless claim that teenage mothers in SA continue their education, in contrast to other African countries where girls drop out of school entirely.[49] This assertion is contestable and Panday et al, rightly puts it, only a small percentage of learners return to finish their education after giving birth, albeit SA's liberal policy permitting them to continue attending school while pregnant and after giving birth.[50]

There is no conclusive data to explain why this occurs, however it is possible that a lack of parental support, discrimination and stigmatization of these learners by their peers, teachers, principals, and School Governing Bodies (SGBs), as well as fear to repeat a grade push them to drop out of school.[51] This view finds support in the judgment of the Constitutional Court of South Africa in *Welkom High School*[52], wherein two female learners were expelled from school following their pregnancies. The policies adopted by the schools advocated for learners who fell pregnant to be excluded from school.[53] Khampepe J found the policies to violate the right to education.[54]

Similarly, in *Tanzanian girls*,[55] it was alleged that primary and secondary school girls were 'subjected to forced pregnancy testing and expulsion from school' if found to be pregnant. The ACERWC concluded 'that the policies and practices that Tanzania has put in place to expel pregnant and married girls from schools go against the rights protected under article 11 of the ACRWC, hence amounts to a violation of the right to education of Tanzania girls'.[56]

Committee, General Comment No. 20: On the implementation of the rights of the child during adolescence, UN Doc CRC/C/GC/20 (2016), para 71.

[49] Nkosi & Pretorius op cit note 47 at 109.

[50] S Panday et al, 'Teenage pregnancy in South Africa - with a specific focus on school-going learners' 2009 *Child, Youth, Family and Social Development, Human Sciences Research Council. Pretoria: Department of Basic Education*, 107.

[51] Mashudu R. Ramulumo & Victor J. Pitsoe, 'Teenage pregnancy in South African schools: challenges, trends and policy issues' (2013) 4 *Mediterranean Journal of Social Sciences*, 758. R N Mathebula, 'School-based interventions into effect of school girl pregnancy on teaching and learning in Mopani District, Limpopo Province, South Africa' (unpublished dissertation, University of Venda 2018) 66. See Janina Jochim, Lucie D. Cluver & Franziska Meinck, 'Learner pregnancy in South Africa's Eastern Cape: The factors affecting adolescent girls' school withdrawal during pregnancy' (2021) 87 *International Journal of Educational Development*, 2.

[52] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) para 114.

[53] Ibid at para 6.

[54] Ibid at para 7.

[55] Decision on Communication No: 0012/Com/001/2019, *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania* (*Tanzanian girls*) paras 2, 3 & 38-49.

[56] Ibid para 42.

Again, these findings confirm that girls and teenage mothers suffer violations to their constitutional right to education due to pregnancy.[57]

(c) Right to Equality

In addition to pregnant learners voluntarily dropping out of school, they also face stigma and discrimination from teachers, fellow learners and SGBs on the basis of pregnancy, gender, and sex which push them out of school.[58] This occurs despite the constitutional safeguard of the right of every person to equality in section 9. The Constitution does not define the right to equality. A distinction is often drawn between formal equality and substantive equality.[59] Formal equality accepts that individuals be afforded the same treatment, especially in law or policies, regardless of their status or sex. Whereas substantive equality goes beyond the recognising that all person should be equally treated and accepts that in some circumstances individuals, particularly those previously advantaged, may have to be treated differently to empower those who have been previously marginalised to achieve the same equality.[60] While this may constitute a differential treatment and otherwise discrimination, will however, be justified as it seeks to redress the discrimination arising from formal equality. The differentiation is legitimate as long as it is terminated after achieving substantive equality.[61] Central to the right to equality is the principle of the right of non-discrimination which prohibit differential treatment on any ground, including pregnancy, sex, gender, age, race or other status.[62]

Many female learners continue to endure discrimination and stigma in schools as a result of pregnancy and sex. In this regard, the *Welkom High School* case is instructive. In this case, two learners in grades 9 and 10 had fallen pregnant and were ordered to remain absent from school until a certain period of time had lapsed. In terms of the policies, pregnant learners were prohibited from returning to school the same year they had given birth. The Constitutional

[57] Ramulumo & Pitsoe op cit note 51 at 755. See *Welkom High School* supra note 52 para 14. See CRC Committee, Concluding observations on the second periodic report of South Africa, UN Doc CRC/C/ZAF/CO/2 (2016), para 59.e. The Committee noted with concern the 'continuing high dropout rate of pregnant students and their exclusion from schools, which still occur in practice'.
[58] See CRC Committee, General Comment No. 15 supra note 37 para 56 and General Comment No. 20, supra note 48 para 26.
[59] CESCR, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), UN Doc E/C.12/2005/4 (2005) paras 2 and 7.
[60] CESCR, General Comment No. 14, para 18.
[61] CESCR, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2.2), UN Doc E/C.12/GC/20 (2009) para 9.
[62] Human Rights Committee, General Comment No. 28: The equality of rights between men and women (art. 3), UN Doc HRI/GEN/1/Rev.9 (2000) para 4.

Court correctly held that the policies differentiated between learners on the ground of pregnancy, a prohibited ground under section 9(3) of the Constitution, it is both discrimination and unfair. The policies thus differentiated between female and male learners. In this regard, the policy from one school could give 'leave of absence' to male learner if paternity was established; however, the other school's policy did not contain a comparable clause, and the male learner was permitted to continue his education uninterrupted, while only the female learner was suspended.[63] The court viewed this approach as unfair discrimination on the basis of sex.[64]

Moreover, the court reasoned that the policies had the impact of stigmatizing pregnant learners for being pregnant and fostering an environment in which pregnant learners feel the need to conceal their pregnancies rather than seek medical, emotional, and other care from school authorities.[65] This explanation was based on the fact that the policies required learners who suspected they were pregnant or who had knowledge of another learner's pregnancy to notify it to the authorities.

This point of view cannot be accepted without criticism. While it is acknowledged that the policies may increase already existing instances of stigma, the reporting obligation may be in the best interests of the pregnant learner considering the complications associated with pregnancy. Concealing a pregnancy may have unintended repercussions for the learner, such as a lack of school support or even endangering her life.

In the case of *Tanzanian girls*, the ACERWC stated that dismissing pregnant girls from school with no chance of re-entry violates article 3 of the ACRWC and reinforces gender-based discrimination.[66] Furthermore, the ACERWC ruled that mandatory pregnancy testing for schoolgirls amounted to discrimination based on sex, with the expulsion targeting only girls.[67] This reasoning is similar to that provided by the Constitutional Court in *Welkom High School*. Both the regulations and policies generally targeted only girls who became pregnant at school, paying less attention to boys who may have impregnated those girls. There is no doubt that this amounted to and perpetuated gender-based discrimination and stigmatization of pregnant learners. In *L.C. v Peru*, an 11-year-old girl became pregnant after being raped repeatedly by a 34-year-old male. The CEDAW Committee determined that the refusal to terminate L.C.'s

[63] *Welkom High School* supra note 52 para 113.
[64] Ibid at para 113.
[65] *Welkom High School* supra note 52 para 115.
[66] *Tanzanian girls* supra note 55 para 55.
[67] Ibid para 56.

pregnancy and other SRH-related services violated L.C.'s rights under Article 12 of the Convention.[68]

Teenagers are further differentiated on the basis of age. In the health care sector, for instance, these cohorts are often treated harshly and are more likely to be deprived of services compared to adult women. Sewpaul et al, adds that adolescents view HCWs as having prejudicial and stigmatizing attitudes about them being pregnant and having sex at a young age.[69] The authors further noted the negative treatment faced by teenagers seeking access to SRH services:

> … they saw the differences in the attitudes and behaviours of the HCWs towards older pregnant women and themselves as younger women and did not understand why there was differentiation in treatment, or the harsh, judgmental attitude that they had to endure just because they were younger.[70]

This treatment not only deny them autonomy over their bodies but also violates their right to be treated equally as adults seeking same services. The distinction is analogous to that explicitly stated in section 9(3) of the Constitution and amounts to unfair discrimination.

(d) Right to Life

The Bill of Rights guarantees to everyone the right to life, which cannot be derogated even during a state of emergency.[71] In its General Comment No. 36, the Human Rights Committee reaffirmed this when interpreting the right to life under article 6 of the ICCPR.[72] The Committee further stated that actions or omissions 'that are intended or may be expected to cause' the deprivation of life would be considered a violation of the right to life.[73]

The right to life, as described by O'Regan J in *S v Makwanyane and Others*, is not the right to existence, but rather the right to human life, which the Constitution cherishes.[74] This implies that human life is a requirement for the attachment and enjoyment of all human rights. The acknowledgment that a human being's existence initiates the attachment of human rights is the essence of this. Hence, this is consistent with the usage of the word 'human' in the phrase 'human rights' to emphasise the fundamental notion that these human rights are meant to be

[68] Communication No. 22/2009, *L.C. v Peru* CEDAW/C/50/D/22/2009 para 8.15.
[69] Sewpaul et al., op cit note 32.
[70] Ibid.
[71] See section 11 of the Constitution. See also, section 37(5) of the Constitution.
[72] Human Rights Committee, General Comment No. 36: right to life (Article 6), UN Doc CCPR/C/GC/36 (2019) para 2.
[73] Ibid at paras 3 & 6.
[74] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 326.

enjoyed by all human beings.[75] The right to life must be understood as an indispensable right which takes precedence over other human rights, albeit interdependent to such other rights.[76]

It is, however, unfortunate that TP and early childbearing endangers the lives of young girls and women globally, and SA is no exception.[77] Studies indicate that TP is associated with maternal mortality and morbidity.[78] Girls, particularly those between the ages of 10 and 14, are at greater risk than older women of pregnancy-related problems and death, according to the WHO.[79] Also, WHO note women die from preventable causes related to pregnancy and childbirth.[80] The United Nations Population Fund (UNFPA) observed that early childbearing and complications during the pregnancy and childbirth were the leading cause of high maternal mortality rates among teenagers and girls – with girls aged 15 to 19 years at higher risk of dying during childbirth compared to women 20 years and above.[81] Although there has been a decline in maternal mortality rates in South Africa over the past ten years, the number of adolescent mothers dying from pregnancy-related causes is still high and primarily caused by diseases that can be treated or prevented with quality antenatal care.[82]

The explanation provided for why teenagers are more likely to experience maternal mortality and morbidity has generally focused on their bodies' immaturity, which is said to make it impossible for them to carry a child or pregnancy to term. The risks associated with pregnancy, however, include hypertension, eclampsia, haemorrhage, and other conditions. As such, regardless of age, women may die from severe bleeding during childbirth.

Consequently, it should not be difficult to comprehend the reason why maternal mortality and morbidity are high in SA if girls and teenage mothers die from preventable causes related to pregnancy and childbirth. First, teenagers face challenges accessing SRH services and information, including family planning, mostly because of how they are treated by HCWs.[83] This aggravates their health seeking behaviour like timely seeking antenatal care, which

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[75] Ibid.
[76] S Sinjari & S Balla, 'The right to life' (2013) 3 *ILIRIA International Review* 237.
[77] The Committee on the CRC, General Comment No. 4 supra note 41 para 20.
[78] T Govendera, P Reddya & S Ghumana, 'Obstetric outcomes and antenatal access among adolescent pregnancies in KwaZulu-Natal, South Africa' (2018) 60 *South African Family Practice* , 1. See also: CRC Committee, General Comment No. 15 supra note 37 para 56; CRC Committee, Concluding observations on the second periodic report of South Africa, supra note 57 para 49(d).
[79] WHO, 'Adolescent Pregnancy' available at *https://www.who.int/news-room/fact-sheets/detail/adolescent-pregnancy*, accessed 04 August 2022. See also IMR Goonewardene and RPK Deeyagaha Waduge, 'Adverse effects of teenage pregnancy' (2005) 50 *Ceylon Medical Journal* 116, 116.
[80] Ibid.
[81] United Nations Population Fund 'Adolescent pregnancy' available at *https://esaro.unfpa.org/en/topics/adolescent-pregnancy*, accessed 04 August 2022.
[82] N de Wet, 'Pregnancy and death: An examination of pregnancy related deaths among adolescents in South Africa' (2016) 10 *SAJCH*, 151, 153.
[83] Sewpaul et al, op cit note 32.

increases the potential of experiencing pregnancy related complications. Secondly, inadequate and shortages of health care services in some health facilities, especially in the rural areas, influence how teenagers seek health care. For example, studies indicate that standing long queues for services and consistent shortages of modern forms of contraception (i.e. injectable contraceptives) contributes to the reluctancy to seek such health services in the future. Final, in certain cases teenagers are denied access to SRH services and information by HCWs due to their status or age.

This drives teenagers to look for alternative solutions or abstain from seeking assistance.[84] Take for instance, a teenager who has been denied abortion services to terminate her pregnancy, resorts to unsafe and illegal abortion services which are normally performed by unqualified individuals and in unsafe environment without proper equipment.[85] In addition to this, teenagers may induce the abortion on their own which could be fatal if not safely and effectively managed outside of a health care facility by a professional.[86] The African Commission, in its General Comment No.2, affirms that 'maternal mortality from abortion performed in unhealthy conditions is a high risks, particularly for adolescent girls who seek to terminate pregnancies through unqualified or unspecialized service providers, or through abortions that are induced using dangerous procedures, products and objects'.[87]

These evidently demonstrates TP implicates the right to life and thus limit young girls and teenage mothers' entitlement and full enjoyment of the right. The risk associated with pregnancy constitute a breach of the right to life. The Human Rights Committee noted that restrictions on the ability of women and girls to seek safe abortions constituted a violation to the right to life.[88]

[84] Amnesty International 'key facts on abortion' available at *https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts/*, accessed 04 August 2022. The African Commission, in its General Comment No. 2, highlight the dangers of no access to legal security procedures which drives women ang girls to resort to unsafe and illegal abortions.

[85] Ibrahim Obadina 'Addressing maternal mortality through decriminalizing abortion in Nigeria Asking the 'woman question' In Durojaye Ebenezer, Mirugi-Mukundi Gladys and Ngwena Charles Advancing Sexual and Reproductive Health and Rights in Africa: Constraints and Opportunities (2021) 36-37. The Human Right Committee has also stated that the health risks due to illegal abortion implicate a woman's right to life - see General Comment No. 36, para 8.

[86] WHO, 'Abortion' available at *https://www.who.int/news-room/fact-sheets/detail/abortion*, accessed 04 August 2022. Sewpaul et al., op cit note 32.

[87] African Commission, General Comment No. 2 supra note 22 para 39.

[88] Human Rights Committee, General Comment No. 36, para 8. See also, CESCR, General Comment No. 22, para 10.

IV SA's CONSTITUTIONAL AND INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS IN THE CONTEXT OF TP

Human rights impose obligations on the State. It is such obligations which ensures the State fulfils its undertaking to safeguard human rights. Specially, considering the grave violations of human rights throughout history, notably during apartheid in SA, the commitments to safeguarding human rights is necessary to prevent repetition of the past injustices. Hence, international human rights law place upon the State obligations to respect, protect, and fulfil human rights.[89] Similarly, section 7(2) of the Constitution requires the State to respect, protect, promote and fulfil the rights entrenched therein. The interpretation of these obligations in SA's constitutional jurisprudence is similar to that in international human rights law.[90]

The 'duty to respect', is a negative obligation, requiring the State to desist from law or conduct that directly or indirectly interferes with peoples enjoyment of the rights in the Bill of Rights.[91] For example, the State has to refrain from enacting laws, policies or conduct that prohibit teenage girls and mothers from accessing SRH services and information; or discriminatory practices against pregnant learners and mothers which prevent them from remaining in school on the basis of their pregnancy and sex.

The 'duty to protect', is a positive obligation, requiring the State to take active steps, including legislative and policy measures, to prevent third parties from interfering with and violating peoples human rights entrenched in the Constitution.[92] Here, for example, the State may take active steps prohibiting a private health care provider from refusing emergency TOP services or prevent other persons and third parties from interfering with teenage mothers and pregnant girls' access to and use of SRH services, such as contraceptives.[93]

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[89] Office of the United Nations High Commissioner for Human Rights 'International human rights law' available at *https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law*, accessed 23 November 2022. See also CESCR, General Comment 14, para 33. African Commission, General Comment No. 2, similarly interpreted article 14 of the Maputo Protocol as placing general obligations of respect, protect, promote and fulfil on the State, paras 41-45. See also, CRC Committee, General Comments No. 15 and 20 supra note 37, paras 71-74.

[90] The obligation entrenched in section 7(2) of the Constitution were adopted from international human rights law, hence there is no reason to believe that the interpretation of such obligation in SA constitutional jurisprudence would somewhat differ from the interpretation provided in international human rights law.

[91] Sandra Liebenberg *Chapter 33: The interpretation socio-economic rights* available at *https://africanlii.org/book/chapter-33-interpretation-socio-economic-rights,* accessed 16 December 2022. See *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 47.

[92] Liebenberg op cit note 91; Geoffrey Allsop *Chapter seven: introduction to the Bill of rights* available at *https://openbooks.uct.ac.za/uct/catalog/download/30/44/1484?inline=1*, accessed 16 December 2022. See also Human Rights Committee, General Comment No. 36, para 18-22; CRC Committee, General Comment No. 4 supra note 41 para 31.

[93] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 13 (2004), para 6.

The ‘duty to promote’, is a positive obligation, requiring the State to establish a culture of and conditions that will encourage awareness raising and education about human rights and put mechanisms in place to meaningfully assert those rights.[94] For example, the State should adopt educational programmes and hosts community-based seminars to raise awareness and disseminate information about SRHR and SRH services available to youth.[95]

The ‘duty to fulfil’, is also a positive obligation, requiring the State to take positive measures to ensure the full realisation of the rights in the Bill of Rights. The State ought to adopt appropriate legislative, policy, administrative, budgetary and other measures, as well as ensure effective implementation and monitoring mechanisms are put in place to realise peoples constitutional rights.[96] This, for example, means the State should ensure availability, accessibility and acceptability of SRH services for teenagers; or adopting policies allowing pregnant learners to remain in school during pregnancy and after childbirth.

Also of relevance is the State’s general obligation to adopt legislative and other measures aimed at realisation of rights, contained in international human rights treaties and the Constitution. Article 2(1) of the ICESCR, for example, requires the State ‘to take steps … to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the [ICESCR]’.[97] In similar vein, the Constitution has adopted this obligation in, for example, section 27(2).[98] The Constitutional Court has, in a number of its judgments, interpreted the content and meaning of this obligation.[99] This general obligation recognises that the realisation of these rights may not happen immediately due to unavailability of resources, thus may be achieved progressively. The obligation engrained in article 2(1) of the ICESCR and section 27(2) of the Constitution encompasses three defining aspects, namely progressive realisation, available resources and appropriate legislative measures, for the full realisation of the relevant rights. The duty of ‘‘progressive realisation’

[94] Ibid.
[95] Liebenberg op cit note 91, the ‘‘duty to promote’ is often viewed as an extension of the duty to fulfil human rights’. See also CESCR, General Comment No. 14, para 33. See also: African Commission, General Comment No. 2 supra note 22, para 51; CRC Committee, General Comment No. 4 supra note 41 para 28.
[96] Human Rights Committee, General Comment No. 31, para 47.
[97] Article 2(1). The ICESCR guarantees socio-economic rights like the rights to health and education that are significant in the context of TP. These rights are also guaranteed in sections 27(1)(a), 28(1)(c) and 29(1)(a) of the Constitution, discussed in Section III above.
[98] Section 27(2) of the Constitution requires that ‘the state take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of’ the rights to have access to health care services, sufficient food, water and social security.
[99] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* (Grootboom) 2001 (1) SA 46 (CC) para 38; *Minister of Health and Others v Treatment Action Campaign and Others* (No. 2) 2002 (5) SA 721 (CC*)*; *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC). *Mazibuko* supra note 85.

contemplated that the full realisation of the socio-economic rights will not be achieved in a short period of time'.[100] Instead, the State Party is to move as ''expeditiously and effectively' as possible towards the full realisation of the socio-economic rights'.[101] This means that the State must immediately or within a reasonably short period of time take actions to achieve the realisation over time.[102] Progressive realisation implies that deliberate retrogressive measures are discouraged, especially if such measures are not reasonable and justifiable.[103] For example, the State may not pass law or policy criminalising abortion or preventing pregnant learners from schools.

While progressive realisation acknowledges that in some circumstances availability of resources may be a problem making it difficult for a duty-bearer to facilitate immediate enjoyment of rights, it does not negate that other aspects of the rights impose immediate obligations on a State. The CESCR has noted that various rights impose on the State negative duties which are of immediate effect.[104] The Committee has cited the obligation 'to take steps' as an example – though it is qualified by resource availability, it is an immediate obligation not subject to progressive realisation.[105] Hence, the State has an immediate duty to take steps towards ensuring access SRH services and information. To this, the CESCR adds that a State Party is required to repeal or reform laws and policies that nullify or impair the ability of teenagers and teenage mothers to exercise their rights to access SRH services and information.[106]

Similarly, sections 28(1)(c) and 29(1)(a) affords children with direct and immediate claim on the State for the realisation of their right to health care and basic education.[107] Thus, the State may not delay providing children with health care services including SRH services, neither exclude them from school on the basis of pregnancy.[108]

The CESCR has also stated that 'States parties have a core obligation to ensure, at the very least, minimum essential levels of satisfaction of the right to sexual and reproductive

[100] *Grootboom* supra note 99 para 45.
[101] CESCR, General Comment No. 3, para 9.
[102] *Grootboom* supra note 99 para 45. See also Marius Olivier & Linda Jansen Van Rensburg, 'Protection and enforcement of the right to social security' available at http://www.saflii.org/za/journals/LDD/2000/8.pdf, 91.
[103] CESCR, General Comment No. 14, para 32. CRC, General Comment No. 15, para 71.
[104] CESCR, General Comment No. 14, para 30.
[105] CESCR, General Comment No. 3, para 3.
[106] CESCR, General Comment No. 3, para 9.
[107] *Governing Body of the Juma Musjid Primary School and Others v Ahmed Asruff Essay N.O. and Others* 2011 (8) BCLR 761 (CC) para 37. See also Centre for *Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG).
[108] Ibid.

health'.[109] The minimum core obligation acknowledges that while a State works towards progressive realisation of the rights in the ICESCR, some rights requires a State to immediately facilitate access to minimum essential levels of the rights.[110] As, Chenwi puts it, 'such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties'.[111] Therefore, a State has the burden of proving that it has made every effort, including adopting programmes and plan of action, within its available resources to ensure minimum essential services to individuals and that vulnerable groups are prioritised.[112]

The legislative and other measures considered in section V below also impose additional obligations on the State, which are highlighted when considering the measures.

V LEGISLATIVE AND OTHER MEASURES PERTAINING TO TP AND THEIR IMPLEMENTATION

The SA government has, in line with its constitutional and international human rights law obligations, adopted legislations and policies pertaining to TP. As seen from the preceding section, the Constitution is the overarching national law protecting the rights of girls and teenage mothers and places obligations on the government to respect, protect, promote and fulfil their rights. In some instances, it requires that government enacts national legislation to give effect to the constitutionally entrenched human rights.[113]

Accordingly, the government has made health care services available for free in public facilities.[114] It continues to offer a wide range of SRH services, including the provision of the most cutting-edge methods of contraception, which are accessible in public clinics and hospitals around the country.[115] Similarly, emergency contraceptives and maternal and child

[109] CESCR, General Comments No. 14, para 43.
[110] Ibid.
[111] Lilian Chenwi, 'Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court' 2010 *Studies in Poverty and Inequality Institute* 29.
[112] Liebenberg op cit note 91.
[113] For example 9(4) calls for national legislation to be enacted (such as the PEPUDA). The CTPA had been enacted to give effect to section 12(2) of the Constitution.
[114] T M Miriri, D U Ramathuba & M L Mangena-Netshikweta 'Social factors contributing to teenage pregnancy at Makhado municipality, Limpopo province, South Africa' (2014) 1 *African Journal for Physical, Health Education, Recreation and Dance*, 130 at 134.
[115] Jonas et al, op cit note 11. See ACERWC, South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child (Reporting period: January 2000 – April 2013) para 69. See also Integrated School Health Policy, 2012.

health care services are free of charge while TOP is legal and provided free of charge. This has been made possible through the enactment of the CTPA.[116]

The CTPA gives effect to section 12(2) of the Constitution. Specially, the preamble recognises 'that the decision to have or not have children remains fundamental to women's physical health and that universal access to reproductive health care services, includes family planning and contraception, termination of pregnancy, as well as sexuality education and counselling programmes and services'.[117] Section 2 of the CTPA provides circumstances in which and conditions under which pregnancy may be terminated. In line with the CTPA, the government adopted and continues to revise the National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act (Clinical Guideline). This Clinical Guideline set out strategies to provide safe and quality TOP services. It requires that, among other things, HCWs be trained to provide quality TOP services.[118]

Interestingly, even with this permissive law, TOP services are still underutilised, and women often turn to unsafe and illegal abortion services. According to Stats SA's 2022 report, the rate of TOP was around 12 per cent in all the reporting years (2017, 2018 and 2019), with a very slight increase of 12,9 per cent in 2019 from 12,1 and 12,4 per cent in 2017 and 2018 respectively.[119] If this statistic is something to go by, it is concerning that less women have access to and use of safe abortion services in the country. These raises questions as to where do all other abortions take place? Are those abortions performed in safe facilities by qualified medical practitioners? Unfortunately not; evidence reveals that most abortions occur in unsafe environments and are performed by unqualified people.[120]

Nonetheless, what is more imperative is establishing what influence girls and teenage women to seeking such unsafe TOP services. The CESCR noted that only 7 per cent of health care centres in SA provide abortion services and that this was perpetuated in practice by medical practitioners refusing to provide TOP services due to personal beliefs (so called conscientious objection) and the limited accessibility of facilities offering such services, particularly in rural areas.[121] Likewise, the Commission for Gender Equality (CGE) report on

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[116] Ibid.
[117] The preamble to the CTPA.
[118] The National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act, 2019 (Clinical Guideline) at 27.
[119] Department of Statistics South Africa 'Profiling health challenges faced by adolescents (10–19 years) in South Africa' 2022 Pretoria: Statistics South Africa, 38.
[120] Henri Sulistiyanto, Ismi Dwi Astuti Nurhaeni & An Nisa Fithri, 'Unwanted adolescent pregnancy from a gender perspective' 2022 *in 2021 Annual Conference of Indonesian Association for Public Administration, KnE Social Sciences*, 600, 609. The Clinical Guidelines at 1.
[121] CESCR, Concluding Observation supra note 2, para 65. See also Pickles op cit note 28 at 411.

the Investigation into Choice of Termination of Pregnancies, found that access to TOP services was still a major concern for the country, particularly in the rural areas.[122]

Moreover, the government has introduced and integrated comprehensive sexuality education (CSE) in the schooling curriculum to teach learners about SRH services and rights. CSE has been part of the Life Orientations subject for the last two decades. However, this CSE has not yielded much positive or desired results as rates of TP and HIV continue to rise among teenagers.[123] Instead, CSE has received public backlash from parents, religious or faith-based organisations. Some of the criticisms levelled against CSE in schools include, inter alia, that it seeks to teach children sex; runs counter to SA cultural values; and violates parental rights as their involvement and guidance or approval was not sought.

The Schools Act, which permits pregnant learners to remain in school and further bar their exclusion from schooling on the basis of pregnancy. Further support is found in sections 6 and 8 of PEPUDA prohibiting the State or any person from unfairly discriminating against anyone on the ground of pregnancy. Furthermore, in 2007 the DBE adopted the Measures for the Prevention and Management of Learner Pregnancy (MPMLP). This policy[124] created an atmosphere for pregnant learners to remain in school during the pregnancy and to return after giving birth. However, it was critiqued of being discriminatory for having included conditions for the retention of teenage mothers back into the schooling system after delivery. This is because the MPMLP had conditions that a learner who had just given birth should wait at least two years before returning to school in the interest of the child.[125] Whereas this approach affected a female learner as the mother, the boy would continue with his education undisturbed though he is the father and the cause of the pregnancy.[126] Obviously, the MPMLP fashioned justifications for school officials who were still deeply-rooted into cultural practices and regarded TP as a taboo as well as in contradiction of community mores, to suspend or even expel those pregnant learners from schools.[127]

Acknowledging learner pregnancies and school dropouts continue to rise at alarming rates among school-going girls despite the policy making environment for pregnant learner to

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[122] Commission for Gender Equality (CGE) Report on the Investigation into Choice of Termination of Pregnancies.
[123] Ronel Koch & Welma Wehmeyer, 'A systematic review of comprehensive sexuality education for South African adolescents' (2021) 17 *Journal for Transdisciplinary Research in Southern Africa*, 1.
[124] Strode A & Essack Z, 'Facilitating access to adolescent sexual and reproductive health services through legislative reform: Lessons from the South African experience' (2017) 107 *SAMJ*, 744.
[125] Samantha Willan, 'A review of teenage pregnancy in South Africa – experiences of schooling, and knowledge and access to sexual & reproductive health services' 2013 *Partners in Sexual Health*, 13.
[126] Ibid.
[127] *Welkom High School* supra note 52.

remain at school, the DBE recently adopted a revised National Policy. Unlike the MPMLP, this policy offers a promising framework for preventing learner pregnancy in schools. The DBE's flawed approach on its predecessor provides a starting point for the National Policy. The policy adopts language similar to the MPMLP in relation to keeping learners in school throughout pregnancy and allowing them to re-join after giving birth but differ in that the latter does not impose unnecessarily long waiting periods and delays before a young mother can resume her education.[128]

This policy should be lauded for its enabling spirit and for seeking to create an environment free from all forms of stigmatisation and discrimination for all learners, which include pregnant learners. Another thing is that this policy is very extensive and couched in permissive language; hence, it stresses the need for supportive rather than accommodative environment unlike its predecessor. The National Policy further recognises the importance of providing CSE and access to SRH services and information in the prevention of learner pregnancies than forcing teenagers to abstain from sexual intercourse completely until they reach certain age. Nonetheless, the National Policy is yet to suffer the same fate as its predecessor. It is not surprising that over ten-months since it was launched the implementation plan is still missing.

Notwithstanding, the obligation created in section 54 of the Sexual Offences Act, cases of TP related sexual offences remain under-reported and information pertaining cases that were prosecuted is hard to come by. Iyer and Ndlovu argues that despite a low conviction rate for those responsible, the number of children who experience sexual abuse every day keeps rising.[129] The CEDAW Committee has noted with concern the low prosecution and conviction rates in cases of sexual offences.[130] The social and cultural practices embedded in the criminal justice system plays a significant role on reporting rape cases by victims.[131] Smythe contends that interaction between rape complaints and the police were reflective of seriously flawed attitudes and procedures, raising questions regarding the integrity of the evidence gathered as well as secondary victimisation.[132] This suggests that implementation of the Sexual Offences

[128] National Policy at 24.
[129] Desan Iyer & Lonias Ndlovu, 'Protecting the Child victim in sexual offences: is there a need for separate legal representation?' (2012) 33 *Obiter* 72-73.
[130] CEDAW Committee, Concluding Observation supra note 2, para 22.
[131] Dee Smythe *Rape Unresolved: Policing Sexual Offences in South Africa* (UCT Press, 2015) 11.
[132] Ibid.

Act is still lacking and those that are responsible for ensuring that such application happens are also not held responsible for their failures.[133]

VI CONCLUSION AND RECOMMENDATIONS

The aim of this research report was to demonstrate TP is a human rights issue as much as it is a health and socio-economic problem. Despite SA's progressive legislation and policy on pregnancy related rights, TP remain unacceptably high. Evidence presented confirms that lack of a framework and adequate mechanism to effectively implement and monitor adopted legislations and policies impact the full realisation of the human rights of young girls and teenager mothers. As a result, SA is in constant breach not only of its legal obligations but also of the rights of teenage mothers and girls' to equality, life, health and education.

A human-rights based approach (HRBA) is, thus, recommended to address the upsurge of TP in SA. The HRBA is directed at encouraging and safeguarding human rights through the adoption of international human rights standards and principles.[134] It aims to address discriminatory practices and unfair power distributions that limit development progress and frequently leave certain groups of people behind by analysing the inequalities at the core of development issues.[135] The HRBA is informed by the principles of equality, non-discrimination, participation and inclusion, accountability, rule of law and universality and indivisibility, interdependence and inter-relatedness of human rights.[136] These principles guide all development programmes in all phases of the health and education. For example, they guide 'programming process such as the assessment and analysis, priority setting, programme planning and design, implementation, and monitoring and evaluation' of legislations or policies.[137]

This means that when the HRBA is applied to the fields of education and health, for example, health and education policies and other development programs should be guided by human rights standards and principles with the aim of strengthening duty bearers' capacity to fulfil their obligations and enabling right holders to successfully assert their rights to education and health. The principles of indivisibility, interdependence and inter-relatedness of human

[133] ACERWC, Concluding Recommendations on the Republic of South Africa Report on the status of implementation of the African Charter on the Rights And Welfare of the Child, para 7.
[134] Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation' available at *http://www.ohchr.org/Documents/Publications/FAQen.pdf*, accessed on 20 August 2022.
[135] Ibid.
[136] Ibid.
[137] OHCHR, supra 134 note 128.

rights[138] implies that the full realisation of the right to health, for example, will be largely dependent upon the realisation of other rights such as the rights to education and equality. Thus, the government should put more effort to educating girls and teenage mothers about not just their SRHR but other related rights as well as ensure they know how and where to assert those rights.[139] The principles of participation and inclusiveness require recognition of teenagers' right to have a voice in decisions that affects them and to have their opinions respected.[140] It is therefore recommended that the government revise its current CSE programme, in accordance with its obligations in national and international human rights law. The revised CSE must be responsive to the needs of teenagers. Teenagers' ideas should inform the redesigned CSE programme.[141] Thus, the government should make it easier for them to participate in the design process by conducting community and school-based seminars and online platforms to connect with them. This should be done with the intention of increasing their participation in decisions-making processes affecting them.

Access to information is key to ensuring effective participation. Hence, it is further recommended that the government improves information dissemination, especially about SRH services and rights, among girls and teenagers. As such, community-based seminars, educational institutions, radio and television stations, online social media platforms, and print media, can be utilised to reach out to teenagers in the country. Government should also reintroduce awareness-raising programmes and initiatives like Soul Buddyz, Shuga, LoveLife, SoulCity, and others, with a specific focus on CSE and SRHR and services.[142] In cases where such programmes cannot be reinstated for the reasons of resource constraints, the government is recommended to seek international assistance and cooperation in line with international human rights obligations to ensure the full realisation of the human rights of girls and teenage mothers.[143]

Even though the SA government has done well to eliminate discrimination from laws, in applying a HRBA, it should strive towards eliminating stigma and discrimination that are still

[138] Office of the United Nations High Commissioner for Human Rights 'What are human rights?' available at *https://www.ohchr.org/en/what-are-human-rights,* accessed 01 February 2023.
[139] See CRC Committee, General Comment No. 4 supra note 41, para 31.
[140] United Nations Children's Fund (UNICEF) and United Nations Educational, Scientific and Cultural Organization (UNESCO), 'A human rights-based approach to education for all' 2007. See CRC Committee, General Comment No. 4 supra note 41, paras 39(b), 40 and 41.
[141] See also, CRC Committee, General Comment No. 20, supra note 48, para 61.
[142] Lebohang Letsela et al, 'The role and effectiveness of school-based extra-curricular interventions on children's health and HIV related behaviour: The case study of Soul Buddyz Clubs programme in South Africa' (2021) 21 *BMC Public Health*, 1.
[143] CESCR, General Comment No. 22, para 50; CRC Committee, General Comment No. 4 supra note 41, para 43.

pervasive in policies and practices and prevent young girls and teenage mothers from accessing SRH services and information, as well as cause them to be suspended or expelled from school.[144] The government should be guided by general recommendations as well as concluding observations on SA made by relevant human rights treaty bodies. Additionally, the government should teach and train teachers, principals, school administrators and SGB about human rights targeted on eliminating discrimination and inequities in schools.

It is recommended that the government train HCWs to offer respectable SRH services and information to teenagers, in response to discrimination in health care facilities. It is also recommended that the government hire more HCWs to increase the capacity of public clinics and hospitals to deliver timely, efficient, and high-quality health care services.[145] Along with this, the government should seek to address the shortages of medication, particularly in rural areas. The establishment of school-based clinics is another way to increase capacity, especially by providing learners easier access to SRH services and information. Since the services would be given in a trusted environment with familiar people, this may also make them more user-friendly for young people and encourage health-seeking behaviours amongst them.

The HRBA accentuate the need for adherence to the rule of law, especially the protection of human rights against violations by government and private parties. As such, the State needs to strengthen the capacity of law enforcement agencies to work swiftly on sexual related crimes against young women and girls. Given the nature and sensitivity of rape and the age of the victims – police, prosecutors, and judicial officers need proper training to handle cases of this nature with a view to avoid secondary victimisation.[146] The government should also establish a working system to collect data on cases reported, investigated and successfully prosecuted and the convictions rates, broken down by age, ethnicity, disability, socio-economic status and the connection between the victim and the offender.

Lastly, a Human Rights Clinic-Based Office (HRCBO) is also proposed to deal with patients' complaints, especially SRH services related complaints. This office may be founded either as a standalone institution, similar to the Chapter 9 Institution, or as a division of the SAHRC. One of the tasks and responsibilities of the HRCBO should be to investigate instances of neglect or denial of SRH services and information to girls and teenage mothers by HCWs.

[144] CRC Committee, Concluding observations on the second periodic report of South Africa supra note 57, para 59(e).
[145] Ibid, para 50.
[146] CEDAW Committee, Concluding Observation supra note 2, paras 10.b and 22.

This needs to be done in order to combat the stigmatisation and discrimination of this group. Such an office would ensure that HCWs are held accountable for their actions.

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