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Fulfilling the Right to Water as a Socio-economic Right for the People of Kenya

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**Unequal Pay for Education of Equal Value: A Subtle Discrimination
Against Non-SADC International Undergraduate Students - Lessons
from *Larbi-Odam V MEC For Education (North-West Province) 1998 1
SA 745 (CC), South Africa***

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Abstract

Inequality and unfair discrimination remain among the complex social problems that have taken different forms over the years. This has been confirmed through case law and statutes. While these statutes are complex, they exist to serve a clear intention; the need to accommodate difference, diversity and to break down practices of systemic group disadvantage. South Africa is one of the leading exporters of higher education in the African continent. In the recent past, South African universities have witnessed an increase of international undergraduate student admission both from Southern African Development Community (SADC) and Non-SADC countries. While it must be acknowledged that these universities play a significant role in social and economic development, the same is perhaps riddled with a subtle discriminative practice that singles out only Non-SADC international undergraduate students for different treatment. The practice is that only Non-SADC students are obliged to pay an additional amount classified as 'international levy'. This happens yet both Non-SADC and SADC international undergraduate students enrol for the same courses or programs, attend an equal number of lecture times, receive equal number of study materials, etc. but pay unequal tuition fees. The article reveals that the practice of demanding the payment of the 'international levy' is purely based on the fact that these students are citizens of Non-SADC countries. This

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article criticises this stringent practice with a view to prevent the perpetuation of unfair discrimination. The article draws fundamental legal analogies from the above cited Constitutional Court judgement as well as employment law 'equal pay for work of equal value'. Pursuant to Larbi-Odam v MEC for Education (North-West Province) 1998 1 SA 745 (CC) (the Larbi-Odam case), the continuation of the said practice unfairly discriminates against Non-SADC international undergraduate students based on analogous grounds of citizenship or nationality. It is a practice subject to abuse by universities since it is not regulated by law or government Policy or any Protocol. Currently, universities across the country are at liberty to determine the 'international levy' amount as they deem fit.

This is evident from the conspicuous disparities in the payment of the said fee across all universities in the country. Randomly selected universities have been used to highlight the practice and disparity in terms of the payment of the 'international levy'. As the Constitutional Court held in Larbi-Odam case, "Non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. As a result, they should be protected in terms of the equality clause." The article proposes remedial and other less severe, non-discriminatory practices through which universities may adopt to generate funds.

Keywords

Inequality, unfair discrimination, equal pay, education of equal value, Non-SADC and SADC international undergraduate students, International Tuition Fee.

I. Introduction

South Africa is not only one of the economic powerhouses in the African continent, but it also remains one of the largest exporters of higher education as well. The export forms part and parcel of the pursuit for internationalisation of higher education and global economic integration. Over the last decade, exporting higher education has progressively become

an essential economic activity in most countries around the globe¹ and South Africa has not been left behind.² Whitehead and Sing observe that South African higher education has witnessed an increase in international student enrolment from the rest of the African countries.³ A walk across most universities around the country brings awareness of the presence of international students. The impetus for this is ascribed to the need for the acquisition of internationally recognised educational qualifications along with the mission to promote foreign collaborations amongst universities. Another main reason is the need for universities to improve their financial position for sustainability. In view of that, the enrolment of international students contributes to the South African revenue.⁴ Data from the Department of Higher Education and Training (DHET) shows that the total number of international undergraduate students who enrolled in public higher institutions stood at 42 267 as of 2018.⁵ The table below highlights

¹ E. Du Plessis and J. Fourie, Higher education exports in South Africa: A case study of Stellenbosch University 25 (3) *South African Journal of Higher Education* (2011) 460–475. See also L. Zhang, The use of panel data models in higher education policy studies. Higher Education: (2010) *Handbook of Theory and Research* 307-349 and Guruz *Higher education and international student mobility in the global knowledge economy* 5.

² Since the dawn of democracy, South Africa's higher education has grown by more than 70%. In the past two years alone, the enrolment at public and private stood at about 1.1 million, with public higher institutions enrolling 975 837 students. The National Development Plan aim is to reach 1.6 million enrolments by 2030. See the Department of Higher Education and Training: Statistics on Post-School Education and Training in South Africa, 2016 2.

³ Y. Dominguez-Whitehead and N. Sing, International students in the South African higher education system: a review of pressing challenges 29 (4) *South African Journal of Higher Education* 2015 77-95 points out that "many universities, including the University of the Witwatersrand, the University of Cape Town, the University of the Western Cape, and the University of Pretoria, to name just a few, have embarked on strategic plans to increase the number of international students."

⁴ E. Du Plessis and J. Fourie supra note 1.

⁵ <https://www.statista.com/statistics/1262516/number-of-foreign-students-by-region-in-south-africa/>. See also the Department of Higher Education and Training 2020. Available at <http://www.dhet.gov.za/SiteAssets/Statistics%20on%20Post-School%20Education%20and%20Training%20in%20South%20Africa%20%202017.pdf>

the number of international undergraduate students who enrolled in South African public higher institutions by country and attendance mode as per the

Country	Contact				Distant learning				Total Contact and Distance
	Occasional students	Undergraduates certificates and Diplomas	Undergraduate Degree	Total	Occasional students	Undergraduates certificates and Diplomas	Undergraduate Degree	Total	
Zimbabwe	49	555	5044	5648	476	2266	9401	12143	17791
Namibia	27	218	1106	1351	39	863	621	1523	2874
Nigeria	28	230	339	576	53	116	429	593	1169
Democratic Republic of the Congo	21	1728	731	2480	55	240	302	597	3077
Lesotho	19	495	1200	1714	39	170	400	609	2323
Swaziland	14	416	910	1340	45	196	985	1226	2566
Zambia	10	73	332	415	15	65	384	464	879
Botswana	11	33	360	404	14	86	478	578	982
Kenya	10	20	291	321	12	6	108	126	447
Congo	7	285	196	488	17	81	128	226	714
Other foreign nationalities	1884	1343	2949	6176	136	441	1519	2096	8272
Total	2080	5396	13458	20934	901	4530	14755	20186	41120

HEMIS database.⁶ The total number including post-graduate international students stood at 67 434.⁷

⁶ *Ibid.*

⁷ *Ibid.*

The majority of international undergraduate students who enrol at public universities in South Africa come from the SADC.⁸ According to the Protocol on Cooperation in Higher Education and Training signed in 1997⁹, Member States agreed to reserve five percent of all study places for SADC international students.¹⁰ Contrary to the previous tradition, the Protocol specifies that international students from SADC countries would be treated the same as local students. Universities were given 10 years from the time of signing the Protocol within which to implement the provisions of the Protocol.¹¹ Although most Universities have since then implemented the said provisions, some are yet to implement as below.

Although the majority of international students come to South Africa from SADC countries, a significant number of international students also descend to South African universities from other African countries. Universities have categorised this cohort of students as Non-SADC international students.¹² But, whether or not their enrolment to these universities is purely based on the mission to acquire quality education is questionable. What most universities would agree, is that Non-SADC international students form an integral source of funding or revenue for universities. Besides that, they are valuable to South Africa's economy by way of expenditure on and off campuses.¹³ Also, they not only contribute towards creating diverse institutional culture crucial for the educational experience of all students but also, building the country's long road to transformation and embracing diversity. According to Badat "diversity and difference, whether social,

⁸ SADC countries include: Lesotho, Namibia, Botswana, Swaziland, Tanzania, Angola Zimbabwe and Malawi.

⁹ SADC Protocol 2006. Available at https://www.sadc.int/files/3813/5292/8362/Protocol_on_Education__Training1997.pdf (Accessed 17 December 2021).

¹⁰ Art. 7 of the Protocol on cooperation in Higher Education and Training 1997.

¹¹ Art. 7 (5) of the Protocol on cooperation in Higher Education and Training. As per the 2016 report, a proportion of students were from Kenya representing 2.0% or 1 365.

¹² Department of Higher Education and Training 2019 supra note 5.

¹³ P. Vickers and B. Bekhradnia, *The Economic Costs and Benefits of International Students (2007) United Kingdom Higher Education Policy Institute* 1-27.

geographic, national, cultural or linguistic in nature, are powerful well-springs of institutional vitality and personal, intellectual and institutional development."¹⁴ Above all, the presence of international students contributes towards internationalisation of the academic environment and university life. All these factors prepare all students without distinction for careers within South Africa and beyond.

2. Three Tier Fee Structure

Like any two passengers on a flight who pay different prices for the flight, the amount paid by two international students sitting in the same lecture room pursuing the same course or program is significantly different. Currently, most public universities in South Africa have three tiers of fee structures for undergraduate students as shown below. The consequence of this practice is that students pay different amounts even though the fact that they have all enrolled for the same course or program. This article opines that little is known about this subtle 'discriminatory' practice that derives from the three tiers practice. Firstly, it is common and understandable practice for universities to charge local students lower school fees than international students. For that reason, there exist rates for local South African students who pay lower tuition fees. Secondly, there exist rates for SADC international students who pay (depending on the university enrolled) either the same or sometimes slightly higher than South African students (possibly in contravention to the provisions of the Protocol stated above).

A third higher tier also exists specifically reserved for only Non-SADC international undergraduate students. The main contributing factor that makes this tier extremely high is the practice in most universities that singles out Non-SADC international students and demands that only they must pay an additional amount commonly characterised as 'international levy'. It is this stringent practice that forms the basis for this article. The article notes that the selective requirement for the payment of the additional 'international

¹⁴ S. Badat, *Free Higher Education in South Africa: Why Not?* (63) *International Higher Education* (2011) 1-17. S. Badat *Insight Higher Education South Africa* (2011) p4.

'levy' is not regulated by any law or policy or protocol. Based on the Constitutional Court judgment in *Larbi-Odam case* as will be analysed below, the practice can amount to unfair discrimination on analogous grounds of citizenship or nationality that deserve protection. The article proceeds to argue that the questioned practice has been left at the discretion of universities across the country to the detriment of one category of international students. As discussed below, all randomly selected universities appear at liberty to determine the 'levy' amount as they deem fit. This remains a concern considering our constitutional dispensation. The questioned practice is open to possible abuse and therefore universities currently perpetuating the practice subject themselves to constitutional scrutiny and possible claims of discrimination that may be viewed as unfair, unreasonable, and unjustifiable.

In view of that, this article critiques the above stated institutional practice in the lenses of unfair discrimination. It is anchored by a commitment to shed some light on the need for equal pay for education of equal value for all international students irrespective of their citizenship or nationality. Due to limited research on the topic, the article adopts a qualitative approach, particularly the information available on university websites. It draws fundamental legal analogies from the Constitutional Court judgement in *Larbi-Odam case*. A further legal analogy is drawn from employment law of 'equal pay for work of equal value' in South Africa and international jurisprudence. The article evaluates some of the perceived arguments and justifications and presents reasons why Non-SADC international students should not be treated less favourable than their fellow SADC international students as far as the payment of 'international levy' is concerned. Important is to note that this article does not aim to create any kind of division among the three categories of students, instead, it argues that education knows no nationality, citizenship or boundary restrictions.

3. Legal Framework

This article refers to international, regional and national legal frameworks as underpinned by the notion of equality and prohibition of unfair

discrimination. Noteworthy is that South Africa is a sovereign state founded on the principles entrenched in the Constitution.¹⁵ Accordingly, when considering the scope of the concept of equality and discrimination, the Constitution remains the first point of reference. The Constitution speaks unashamedly of the realization of the right to equality and the development of human rights and freedoms.¹⁶ As the supreme law¹⁷ of the country, it prohibits unfair discrimination by the state¹⁸ and private persons.¹⁹ As far as the right to education is concerned, the Constitution underscores that the State must take progressive steps to ensure that education is available and accessible to all.²⁰ The word '*discrimination*' is widely used. For instance, the term has found application in the employment law in the context of equal pay for work of equal value. It also finds appeal in the institutions of higher learning for the purpose of this article.

International law plays a key role in the development of the South African legal system. In view of that, the country is a party to several international instruments that are concerned with the right to equality and the prohibition of discrimination. Consequently, an obligation emanates from these instruments for South Africa to comply with international rules. Equally, courts must consider these instruments when making a decision.²¹ Examples

¹⁵ The Constitution of the Republic of South Africa, 1996 (Hereinafter referred to as the Constitution). See also B. Hepple, *Equality: The Legal Framework*, Bob Hart Publishing Ltd (2014) 2nd ed and D. Meyerson *Jurisprudence*, OUP Higher Education Division (2011) 303-310.

¹⁶ Section 1(a) of the Constitution.

¹⁷ Section 2 of the Constitution.

¹⁸ The grounds prohibited in terms of section 9 (3) of the Constitution include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹⁹ Section 9 (4) of the Constitution. See also para 7 of General Comment 18 of the UN Human Rights Committee (HRC) and CCPR General Comment No. 18: Non-discrimination of 1989 define the term "discrimination" to mean "any distinction, exclusion, restriction or preference on any ground "which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."

²⁰ Section 29(1)(b) and section 29 (1)(a) of the Constitution.

²¹ Section 232 and section 233 of the Constitution.

of the international instruments advocating for the right to equality and prohibition of unfair discrimination include:

- i. Articles 1 and 7 of the Universal Declaration of Human Rights, 1948
- ii. Article 3 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)
- iii. Article 3 of the International Covenant on Civil and Political Rights, 1966
- iv. Articles 2 and 3 of the International Convention on the Elimination of all forms of Racial Discrimination, 1966.
- v. Articles 2, 5 and 10 of the International Convention on the Elimination of all Forms of Discrimination against Women, 1979 and;
- vi. Articles 2 and 3 of the African Charter on Human and Peoples' Rights, 1981

The values entrenched in the above instruments have gained the status of *ius cogen*²² in international law.²³ The ICESCR for instance states that "education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations" and be "made equally accessible to all".²⁴

4. Payment of 'International Levy' at selected Public Universities

This section picks some examples from selected public universities to highlight the practice regarding the payment of 'international levy'. All the amounts are in South African Rand and are recorded as reflected in the respective university websites in 2019.

²² *Jus cogen* (or *ius cogen*) is a latin phrase that literally means "compelling law." It designates norms from which no derogation is permitted by way of particular agreements. It stems from the idea already known in Roman law that certain legal rules cannot be contracted out, given the fundamental values they uphold. Most states and authors agree that *jus cogen* exists in international law.

²³ UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November (1989).

²⁴ Art. 13(2)(c) of the ICESCR.

4.1 University of Cape Town (UCT)

At UCT, the 'international levy' is classified as "international term fee". UCT opines that "For the purposes of fees payment, citizens and permanent resident permit holders of the SADC countries are treated the same as South African residents."²⁵ Noteworthy is that UCT explicitly uses the term 'citizens' to differentiate. Be that as it may, SADC international students' fees at this institution is calculated for each year of registration²⁶ per course/s selected. Currently, this is about R 57 278. SADC international students pay zero (R0) International Term Fee ('international levy'). However, fees for Non-SADC international students are calculated by adding the "fee per course/s selected (R 57 278) and an additional 'international term fee' of about R44 320 totalling to about R 101 598."²⁷ As a result, SADC international students pay a total of R 57 278, while fellow Non-SADC international students pay about R 101 598 to receive the same education in the first year of an LLB programme. According to the university, the levy plus course-based fees must be paid in full before registration.²⁸

4.2 Nelson Mandela University

At Nelson Mandela University, the position is similar to that of the UCT. At Nelson Mandela University, the 'international levy' is labelled as "Foreign Student Tuition Fee." Only Non-SADC international students are obliged to pay this additional 'international levy' which is currently about R 20 600.²⁹

²⁵ University of Cape Town Student Fees 2022 Available at: http://www.students.uct.ac.za/sites/default/files/image_tool/images/434/fees_funding/fees/downloads/2022_fees_payment_dates.pdf. Accessed 27 January 2022.

²⁶ Available at: <http://www.international.uct.ac.za/international-fees>. See also http://www.students.uct.ac.za/sites/default/files/image_tool/images/434/study/handbooks/2022/UCT_Handbook_12_2022_StudentFees.pdf. Accessed 29 January 2022.

²⁷ International Academic Programmes Office
<http://www.iapo.uct.ac.za/iapo/app/fees>

²⁸ University of Cape Town Student Fees 2022 Available at: http://www.students.uct.ac.za/sites/default/files/image_tool/images/434/fees_funding/fees/downloads/2022_fees_payment_dates.pdf Accessed 27 January 2022.

²⁹ Available at:

So, while SADC students pay about R 59 420 for an LLB programme for example, Non-SADC international students must pay R 59,420 plus an additional R 20 600 'international levy'. Consequently, a SADC international student pays a total of about R 59 520 while a fellow student from a Non-SADC country must pay a total of about R 77 320 to enrol and receive the same education. This is on top of a non-refundable R 6 100 foreign student administrative fee and R 1480 enrolment fee. Important is to note that at Nelson Mandela University, international students are required to pay 100% upfront before registration.³⁰

4.3 University of Stellenbosch

The University of Stellenbosch is one of the leading exporters of higher education in the country.³¹ At this University, all students are required to pay about R 60 000 as tuition fees in first year of undergraduate programme.³² The 'international levy' at the University of Stellenbosch is categorised as ITF (International Tuition Fee). According to the university, the ITF represents an additional amount charged per annum and payable in full at or before registration.³³ Notably, students from the SADC countries at this institution, pay an amount of R 30 025 as 'international levy'. But their

file:///C:/Users/Ann/Downloads/STUDENT-ACCOUNT-GUIDE.pdf. Accessed on 17 January 2022.

³⁰ Available at:

file:///C:/Users/Ann/Downloads/STUDENT-ACCOUNT-GUIDE.pdf. Accessed on 17 January 2022.

³¹ Aloyo 2010 *What is the economic impact of international students on South Africa?* 48. See also Du Plessis and Fourie 2011 *South African Journal of Higher Education* 466.

³² Available at:

<http://www.sun.ac.za/english/SUInternational/Documents/Student%20fees/2022%20Fees%20Information-Degree-Seeking-STELLENBOSCH%20Campus%20as%20on%2015%20Dec%202021.pdf>. Accessed on 17 January 2022.

³³ Available at:

<http://www.sun.ac.za/english/SUInternational/Documents/Student%20fees/2022%20Fees%20Information-Degree-Seeking-STELLENBOSCH%20Campus%20as%20on%2015%20Dec%202021.pdf>. Accessed on 17 January 2022.

classmates from Non-SADC countries are required to pay an additional R 60 050 as an 'international levy'.³⁴ Consequently, while SADC students pay a total of R 90 025 while Non-SADC students are obliged to pay a total of about R 120 050 to enrol for the same programme. Interestingly, a case study conducted by Du Plessis and Fourie found that the total amount collected from the 2 941 international students for the first semester of 2009 amounted to R127.348 million, or R43 300 per student.³⁵

4.4 Rhodes University

At Rhodes University, the 'international levy' is categorised as a "Surcharge for International students (compulsory additional charge for all International students)."³⁶ As per the 2022 undergraduate fee booklet, both SADC and Non-SADC international students pay between R37 577 to R67 923 tuition fee in their first year at undergraduate.³⁷ In addition to the tuition fees, SADC and Non-SADC international students are required to pay an 'international levy' of R11 434 and R14 603 respectively.³⁸ Although this may appear favourable, Non-SADC international students are still required to pay R 3169 more compared to what their fellow classmates from SADC are required to pay.

4.5 University of Pretoria

The position is slightly different at the University of Pretoria. Both SADC and Non-SADC international students are required to pay the same amount

³⁴ Available at:

<http://www.sun.ac.za/english/SUInternational/Documents/Student%20fees/2022%20Fees%20Information-Degree-Seeking-STELLENBOSCH%20Campus%20as%20on%2015%20Dec%202021.pdf>
Accessed on 17 January 2022.

³⁵ Du Plessis and Fourie 2011 *South African Journal of Higher Education* 460 - 475.

³⁶ Available at:

https://www.ru.ac.za/media/rhodesuniversity/content/finance/documents/2022_FEES_BOOKLET.pdf Accessed on 17 January 2022.

³⁷ Student Fees Booklet 2019 <https://www.ru.ac.za/studentfeesandfinancialaid/>.
Available at:

https://www.ru.ac.za/media/rhodesuniversity/content/finance/documents/2022_FEES_BOOKLET.pdf Accessed on 17 January 2022.

of an additional 'international levy' of R3 295 annually. But insofar as tuition fee is concerned, SADC international students at the University of Pretoria "pay the same tuition fee as South African citizens which is currently about R 43 000".³⁹ What is worrying though is that Non-SADC international students are required to pay "double the tuition fee of South African students and indeed that of SADC international students."⁴⁰ This adds up to a total of about R86 000. Therefore, while a SADC international student typically pay a total fee of about (R 43 000 + R 3295) R 46 295 annually, a Non-SADC international student is compelled to pay a total fee of about (R 86 000 + R 3295) R 89 295 annually to receive the same education as a SADC international student. This means a Non-SADC international student at this University must pay an additional R43 000 to attend and receive the same education as a fellow international classmate from a SADC country which perhaps indirectly covers the questioned 'international levy'.

4.6 University of Witwatersrand

The University of Witwatersrand makes it clear that students from the SADC countries are required to pay annual local tuition fees. However, like at the University of Pretoria, Non-SADC students must pay double local tuition. This applies across all faculties in the university.⁴¹

5. Analysis

Evident from the above examples is the fact that universities have adopted a practice of charging Non-SADC international students an additional amount known as 'international levy'. The practice treats two students, SADC and Non-SADC international students differently. Remarkably, the amount paid as 'levy' differs significantly across all universities in the country. For the most part, Non-SADC international students are obliged to pay the additional

³⁹ International Student fees - University of Pretoria 2020 <https://www.up.ac.za/student-fees/article/2746297/international-student-fees>. Accessed 24 November 2021.

⁴⁰ International Student fees - University of Pretoria <https://www.up.ac.za/fees-and-funding/article/2739193/international-students>.

⁴¹ Financial Information: Wits University <https://www.wits.ac.za/internationalstudents/financial-information/>.

'international levy' ranging between R 3000 to almost R 50 000 depending on the institution. SADC international students are exempted purely on the basis that they are citizens or nationals of SADC countries. As noted above, no government policy or law or Protocol exist currently that requires institutions to charge this 'levy'. The consequence is that Universities are at liberty to determine the amount 'international levy' as they wish. In the absence of law or policy regulation, this article questions whether it is constitutionally fair to treat or charge students differently yet they are both temporary residents in the country,⁴² attend the same number of lectures, receive the same number of study materials, receive an equal amount of lecture time and so forth. Besides, is it constitutionally fair or justifiable to treat two international students differently based on their citizenship or nationality?

5.1 *Larbi-Odam v MEC for Education (North-West Province) 1998 1 SA 745 (CC)*

The Constitutional Court judgement in *Larbi-Odam case* remains one of the most important in the development of laws relating to migration in South Africa. *In casu*, the Constitutional Court expanded the rights of equal protection to Non-South African citizens. Amongst other issues, the Court had to evaluate the constitutionality of Regulation 2(2) of Proclamation 138 of 1994 which contained the terms and conditions of employment of teachers.⁴³ Regulation 2(2) stated that subject to certain exceptions, only South African citizens were to be appointed to permanent teaching posts in state schools.

Briefly, eight teachers, citizens of Ghana, Swaziland, Zimbabwe and Uganda were employed in a school in the North-West Province on a temporary basis.

⁴² In *Khosa v Minister of Social Development* (2004) 6 SA 505 (CC), the Constitutional Court was concerned that the exclusion of non-citizens from social welfare grants would stigmatize non-citizens and condemn them to poverty and dependence particularly those who had acquired permanent residence status in the country.

⁴³ GN R1743 of 13 November 1995.

They were given notices of termination of employment in terms of the Educators Act.⁴⁴ The teachers challenged Regulation 2(2) in the Bophuthatswana Provincial Division of the Supreme Court.⁴⁵ They sought for an order declaring Regulation 2(2) invalid because it violated sections 8 (1) and 8(2) of the Interim Constitution which respectively guarantees equality and equal protection of the law and unfair discrimination.⁴⁶ On the one hand, the MEC for Education argument was that Non-citizens generally had a reduced commitment to South Africa because there was another country to which they could go. In view of that, the MEC argued that the Regulation should be upheld. The teachers on the other hand argued that the Regulation was discriminatory and inconsistent with the principles enshrined in the Constitution. After an unsuccessful appeal to the Supreme Court, the teachers approached the Constitutional Court.

The Constitutional Court reiterated the importance of the constitutional right not to be subjected to unfair discrimination in terms of section 8(2) of the Interim Constitution. The Court referred to some of its previous judgments in *President of the Republic of South Africa and Another v Hugo*⁴⁷, *Prinsloo v Van der Linde and Another*⁴⁸ and *Harksen v Lane NO and Others*.⁴⁹ Thus, it is imperative to evaluate the questioned university practice in light of these judgments. The purpose is to test whether the practice unfairly discriminates

⁴⁴ The Employment of Educators Act 76 of 1998.

⁴⁵ *Larbi-Odam case* para 29.

⁴⁶ Interim Constitution of the Republic of South Africa Act 200 of 1993. Hereinafter referred to as the Interim Constitution.

⁴⁷ 1997 (4) SA 1 (CC).

⁴⁸ 1997 (3) SA 1012 (CC).

⁴⁹ 1998 (1) SA 300 (CC). In *Prinsloo v Van der Linde and Harksen v Lane* the Court explained the test for section 9(1) as follows: "A law may differentiate between classes of persons if the differentiation is rationally linked to the achievement of a legitimate government purpose. The question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious."

against Non-SADC international students on the grounds of citizenship or nationality.

5.2 Harksen v Lane NO and Others

In this case, the Constitutional Court laid down the test for equality analysis. The court adopted a two stage-inquiry when challenging the fairness or unfairness of a practice such as the one in question. The first enquiry is to determine whether the questioned practice differentiates between two students or categories of students.⁵⁰ If the practice does differentiate, the next enquiry is to determine whether the differentiation is on a listed or unlisted/ arbitrary ground.⁵¹ If it is on a listed ground, then discrimination would be presumed unfair. However, if the ground is unlisted, then whether or not it amounts to discrimination would depend, objectively,⁵² on whether the ground is based on attributes and characteristics which have the potential when manipulated, to impair the inherent fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.⁵³ And in contrast to discrimination based on listed grounds, there would be no presumption of unfairness.⁵⁴ The court has highlighted that intention to discriminate is irrelevant.⁵⁵ The impact of discriminatory practice is decisive.⁵⁶ The Constitutional Court elaborated further that once

⁵⁰ Important is to distinguish between differentiation in the pejorative on the one hand which means a differentiation made on a based on a ground that is hurtful, bad, arbitrary, unfair or objectionable and in the non-pejorative sense which means differentiation made on a ground that is fair, justifiable, reasonable or non-objectionable.

⁵¹ *Harksen v Lane NO and others* para 54. See also Kruger 2011 SALJ 479.

⁵² *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC) at 278.

⁵³ *IMATU v City of Cape Town*. An analogous ground has been defined as one which is "based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them seriously in a comparably serious manner". See also Van Der Walt *Labour Law in Context* 67.

⁵⁴ Van Der Walt *Labour Law in Context* 67.

⁵⁵ Van Der Walt *Labour Law in Context* at 73. See also *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 3 BLLR 311 (LC) para 19.

⁵⁶ *Association of Teachers and Another v MEC* (1995) 16 ILJ 1048 (IC) 1089-90.

discrimination has been established, the next step is to determine whether the discrimination is fair or unfair.⁵⁷

The court held that if the discrimination is found to be unfair, then a determination would have to be made to find out whether it could be justified in terms of section 33 (1) of the interim Constitution.⁵⁸ In other words, whether the differentiation bears a rational connection to a legitimate governmental purpose. Importantly, the court added that even if a rational connection does exist, it could still amount to discrimination.

After considering the principles laid down in *Harksen's case*, the Constitutional Court examined Regulation 2(2) and concluded that the Regulation differentiated between citizens and non-citizens to the disadvantage of the latter group. The court noted that citizenship was not a ground of discrimination listed under section 8(2) of the Interim Constitution. Hence, the Court had to examine whether the differentiation on the ground of citizenship amounted to unfair discrimination. As it was held in *Harksen's case*, this involved an enquiry as to whether objectively, differentiation on the ground of citizenship was based on attributes and characteristics which potentially impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. On this basis, the Constitutional Court found that indeed the ground of citizenship did discriminate unfairly against foreign citizens because they constitute a minority group in all countries with little political influence. Within the spirit of section 39 (1) of the Constitution⁵⁹, the Constitutional

⁵⁷ De Visser 1999 *Local Government Law Bulletin* 1-5. In *Hugo case* at para 43, the court held that "to determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination." See also the unfairness enquiry is concerned with the impact of the impugned measures on the complainants.

⁵⁸ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁵⁹ The Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution). Section 39(1), which stipulates that "when interpreting the Bill of Rights, a court, tribunal or forum-(a) must promote the values that underlie an open

Court made reference to the Canadian Supreme Court decision where the court held in *Andrews v Law Society of British Columbia* that

*"Relative to citizens, Non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among those groups in society to whose needs and wishes elected officials have no apparent interest in attending."*⁶⁰

Further, the court emphasised that citizenship is a personal attribute that is difficult to change. The court held that the

*"characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs."*⁶¹

Also, the court noted that there were specific threats and intimidations that the Non-citizens faced. On the whole, the court observed all reasons above made Non-citizens a vulnerable group who should be protected in terms of the equality clause.⁶² Cho supports this view by emphasising that "since

and democratic society based on human dignity, equality and freedom, (b) must consider international law and may consider foreign law. Binding international law will be international law ratified and acceded to in terms of section 231 of the interim *Constitution*, which is similar to section 231 in the final *Constitution*. Also see section 232 regarding the position of customary international law and section 233, which obliges courts to give preference to international law when alternative interpretation outcomes exist.

⁶⁰ (1989) 56 DLR (4th) 1 para 32."

⁶¹ *Larbi-Odam and others v MEC for Education* quoting from *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) Id at page 39.

According to Lee and Rice 2007 *Higher Education* 381-409, international students report prejudicial comments and a lack of empathy from professors and fellow

international students by definition come from a country other than the [local students], and the total population of international students will always be significantly less than the population of [local students], international students can be viewed as a minority population."⁶³ For that reason, the Constitutional Court rejected the argument advanced by MEC that Non-citizens had a reduced commitment to South Africa because there was another country to which they could go. The Court held that that argument applied with equal force to thousands of South African citizens who have dual nationality, yet the Regulation did not impose any bar to their eligibility for permanent employment. The court found that the overall attribution appeared to be wholly linked to the fact that the teachers were not citizens of South Africa and that it was on that basis alone that the MEC found them not appointed to fill up the permanent posts. In the end, the Constitutional Court was satisfied that differentiating applicants on the ground of citizenship under Regulation 2(2) was based on attributes and characteristics which have the potential to impair the fundamental human dignity of Non-citizens.

The *Larbi-Odam* judgement is an important application of the Court's equality jurisprudence which has been developed over the years and which draws upon the underlying value of dignity. The judgement shows that the Constitution applies equally to citizens and Non-citizens. Further, the judgment is ground-breaking as it shows that Courts will protect the rights of Non-Citizens against generalised justifications that violate human rights.

6. Equal Pay for Education of Equal Value: Legal analogy from *Larbi-Odam* case to the case of the university practice in question

The Constitutional Court judgement in *Larbi-Odam* also finds application in the case of the university practice under study. Consistent with *Harksen's case*, the practice differentiates between two categories of international students being SADC and Non-SADC international students exclusively for

students, as well as from community members who they encounter in public spaces and the broader host community.

⁶³ Cho *Welcome to America? The Perceptions of Discrimination Experienced by International Students* 918. (Own emphasis added).

the purposes of payment of 'international levy'. The differentiation is on the unlisted ground of citizenship or nationality. Therefore, the question is whether the differentiation is rationally linked to a legitimate government purpose. This article found that there is no such link because the government does not set or determine how much universities should charge as an 'international levy'. It is a practice completely adopted and left at the discretion of each particular university across the country. Besides, there exists no law, policy or even Protocol that requires universities to differentiate between SADC and Non-SADC international students for the purposes of payment of 'international levy'.

The consequence is that the practice singles out only Non-SADC international students and subjects them to differential treatment on grounds linked to their citizenship or nationality yet this is a characteristic not within their control.⁶⁴ Both categories of students are temporary residents in the country, receive the same education and should therefore pay the same. Otherwise such differentiation besides being discriminatory, harms these students' experience by creating unfair divides between them. Possibly, this is the very reason that has led to wild protests by international students studying at overseas universities, who raised banners that read, "We are not cash cows" and "Increase our voice, not our fees."⁶⁵ A few months ago, for instance, international students enrolled at the Free University of Brussels and the Catholic University of Leuven strongly protested and successfully opposed tuition fee increment. Must be remembered that the desire of a student to go to a university in another country is not determined by the wealth of his or her parents. The majority of these students come from different backgrounds with different monetary resources.

Notably, most Non-SADC international students maintain that they depend on their personal or family savings to fund their tuition and living expenses.⁶⁶ Many of them take huge bank loans and also mortgage their parents' homes.

⁶⁴ *Larbi-Odam case* para 23.

⁶⁵ MBA *Cristal Ball* 2017 Why international students pay more tuition.

⁶⁶ Du Plessis and Fourie 2011 *South African Journal of Higher Education* 469.

Marginson observes that international students struggle to make ends meet while some have decided to refrain from asking family and relatives for financial support in fear of burdening them.⁶⁷ Consequently, they have resorted to juggling their full-time studies with part-time jobs, a situation that is further hardened by their visa conditions which restricts them to work for no more than 20 hours per week.⁶⁸ Some university faculties and lecturers have reported awareness of the financial difficulties experienced by some international students.⁶⁹ This article emphasises that education should not be commodified. It is a public good, essential to any civilised society. Otherwise commodifying higher education at the expense of Non-SADC international students only arguably defeats the purpose of internationalisation, cross-cultural, multi-national and social experiences which are key factors for academic excellence.⁷⁰

At present, universities around the country are advocating for internationalisation and therefore, discrimination on the grounds of citizenship or nationality should be discouraged. In fact, it should not have a place in an open democratic society founded on constitutional principles and international law. Or else this would be equivalent to taking universal out of university. Demanding that only one category of international students must pay the 'levy' purely because they come from certain African countries gives an impression that the country is not equal.

7. Unreasonable justification?

Generally, discrimination is not unfair by itself. It is only unfair where it is unjustified. Within the spirit of *Larbi-Odam case*, it appears difficult to make out a justification or persuasive argument in support of the fairness of the

⁶⁷ Marginson, Nyland, Sawir and Forbes-Mewett 2010 *International student security* 135-137.

⁶⁸ Section 13 of the South African Immigration Act 13 of 2002 (as amended) Hereinafter referred to as Immigration Act.

⁶⁹ Bartram 2013 *Journal of Studies in International Education* 5–18.

⁷⁰ Dominguez-Whitehead and Sing 2015 *South African Journal of Higher Education* 82. See also Lee and Rice 2007 *Higher Education* 381-409.

questioned institutional practice. This practice is imposed on Non-SADC international students only purely because of their citizenship or nationality.

The justification advanced by some institutions is that the 'international levy' is earmarked to pay for special academic programs or services that these students use exclusively than others. To provide some insight into the foresaid, a discussion with seven Non-SADC international students drawn from seven different Non-SADC countries was conducted. Common to almost all of the students was the perception that they receive no special services as institutions assert. In fact, six of the interviewees were of the view that the utilisation of resources is distributed equally across the institution without distinction. They felt that the 'international levy' collected goes into the university's general pool of funds for the sake of balancing a budget. Some remarked that this new pot of money is perhaps used to fund a variety of initiatives and positions across campus.

Unquestionably, universities that register international students have monitoring and reporting requirements to the Department of Home Affairs.⁷¹ In some instances, this may impose an additional financial burden. Be that as it may, one would question whether all the 'international levy' collected from these students is directed towards fulfilling this reporting requirement. Actually, in some Universities, these students are expected to pay an additional "foreign student administration fee" which is arguably reserved for such monitoring and reporting purposes. Besides, it must be noted that the onus is always on an individual international student to ensure their stay in the country is legal all the time.

A further argument frequently advanced in favour of charging an additional 'international levy' from Non-SADC international students is that most of them return to their home countries after studies. It is argued that they take what they have acquired in South Africa to develop the economy of their respective countries. Besides the Constitutional Court rebutting this

⁷¹ Section 13 (1)(b)(i - vi) of the Immigration Act.

argument in *Larbi Ordam case*, this article adds that international students pay taxes upon entry into South Africa and on every purchase they make. In fact, this article observes that a significant number of SADC students also return to their respective home countries after completing studies in South Africa. Additionally, some universities advance the argument that it is because of the brand-name and reputation that attract international students to their institution. In view of that, they believe the institution represents an outstanding value and return on investment for international students. But this article argues that an institution's brand name cannot be a rational or reasonable justification to apply unequal pay for equal education?

8. Conclusion

This article has highlighted the need to prevent the perpetuation of discrimination through institutional practice. The broad purpose was to understand the constitutional implication of the practice adopted by some universities demanding that only Non-SADC international students must pay 'international levy'. The article has shown that, even though a majority of Non-SADC international undergraduate students have been successful in their pursuit of higher education in South Africa, the common belief is that they have been singled out for inequitable treatment and practice as far as 'equal pay for the education of equal value is concerned.' This article opines that the overall attribution and persistent practice of imposing an 'international levy' to Non-SADC international students are exclusively linked to the fact that Non-SADC international students are not residents or citizens or nationals of SADC countries. It is on this basis alone that Universities decide to demand the so-called 'international levy'. Like in *Larbi-Odam case*, this article does not rule out the possibility that if challenged in a court of law, the questioned practice may be found wanting.

This article concurs with the Constitutional Court reasoning in *Larbi-Odam case* that foreign citizens, who *in casu* include Non-SADC international students constitute a minority group in all countries with little political muscle. Relative to local citizens, Non-SADC international students are a

group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated.

The lack of access to recourse by Non-SADC international students affected by the application of the questioned university practice serves to emphasise their vulnerability. As a result, they should be protected in terms of the equality clause.⁷² The practice affects them in a comparably serious manner and therefore may amount to discrimination.⁷³ As the court emphasised in *Stojce v UKZN and another*,⁷⁴ foreign nationals are a group deemed worthy of protection. As the court highlighted in *Larbi case*, citizenship is a personal attribute that is difficult to change. It is one typically not within the control of an individual and therefore immutable.⁷⁵ In effect, the more immutable a characteristic is the more likely it is to be regarded as an analogous ground.⁷⁶

The article stresses that commercialising university education at the expense of Non-SADC international students only through unregulated practice

⁷² Their vulnerability must also be viewed in the context of widespread and xenophobia stereotyping. Just recently, on 23-2-2019, a Tanzanian PhD international student at University of Johannesburg was killed in violent xenophobic attack. In fact, research reveals that African students in South Africa routinely face xenophobic sentiment. See Laura Freeman & Jenny Lee Daily Maverick 1. See also *Stojce v UKZN* (2007) 3 BLLR 246 (LC) para 27 where the court observed that a person who relies on an unlisted ground as being discriminatory must establish the difference [SADC and Non-SADC international students], show that it defines a group or class of persons and that the difference is worthy of protection. To warrant protection, the aggrieved person must show that the conduct [practice in this case] complained of impact on them as a class or group of venerable person such as foreign citizenship or nationality.

⁷³ In *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others* (2016) 37 ILJ 2872 (LC) para 22, the court made reference to the above mentioned *Harksen* test when discussing dignity. See also *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 41, *Ndlela and Others and Philani Mega Spar* (2016) 37 ILJ 277 (CCMA) at para 21 and *Govender and Umgungundlovu District Municipality* (2016) 37 ILJ 724 (CCMA) at para 36).

⁷⁴ (2006) 27 ILJ 2696 (LC).

⁷⁵ *Larbi-Odam case*.

⁷⁶ McConnachie Human Dignity 'Unfair Discrimination' and Guidance 2014 *Oxford Journal of Legal Studies* 34 613.

should be revisited and be brought in line with the principles of equality and fairness embedded in our Constitution. In *Woolworths (Pty) Ltd v Whitehead*,⁷⁷ the court rejected the notion that commercial rationale could justify discrimination. In fact, in *Kadiaka v Amalgamated Beverage Industries*⁷⁸ the court held that if profitability was to dictate whether or not discrimination is unfair, then that would negate the very essence of the need for a Bill of Rights. The article contends that universities should not be seen to protect their interests and that of one category of international students only through what is arguably a 'punitive' discriminatory practice connected to grounds of citizenship or nationality. This article maintains that that interest may be protected effectively without applying discriminative practices. There exist less severe, fairer, all-inclusive non-discriminatory means through which universities may effectively achieve their purpose of generating funds. For instance, a more promising means would be to charge international students on an income-based rather than exclusively on citizenship or nationality.

The article hopes that the analysis provided will shed some insight necessary in developing the South African unfair discrimination jurisprudence particularly with regards to equal pay for the education of equal value. It also provides a good starting point for researchers and scholars to debate about possible subtle discrimination practices that exist in our academic institutions. The analysis makes an admirable research project for further studies at postgraduate level. Such research would complement this article. Particularly, the study would examine the level of 'transparency' at the 'information sharing sessions' conducted by international marketing teams deployed in various Non-SADC countries. Clarity as far as the payment of additional 'international levy' is concerned, who pays and who does not pay and reasons associated would certainly assist a Non-SADC international undergraduate student in making an informed decision as to whether or not to apply for studies in the country.

⁷⁷ [2000] LAC para 28.

⁷⁸ (1999) 20 *ILJ* 373 (LC).

Although the market for Non-SADC international students remains a lucrative one, Universities policymakers and relevant representatives from international offices should approach cautiously the efforts of enrolling these students 'solely' as a means of generating money. Universities must take positive measures to eradicate the differences in terms and conditions for the payment of 'international levies' which appear rooted in political, social and economic cleavages. Universities should not be seen to contribute towards the erroneous perception that international students, in particular Non-SADC international students, are well-equipped to fund their studies. Both SADC and Non-SADC international students enrol for the same course or programme, attend and receive the same education and must therefore pay equally. A similar principle has found appeal in the employment law under 'equal pay for work of equal value.' Besides, the principle of fairness, justice, equity and logic dictates that education of equal value should receive equal pay. Education is for all and as far as everyone is concerned, it knows no citizenship or nationality. The Constitution is clear that "everyone" is equal before the law and has a right to equal protection and benefit of the law. Nelson Mandela once said that "Education is the most powerful weapon which you can use to change the world."⁷⁹ He did not say to change South Africa and members of the SADC region only.

On the whole, within the spirit of the Constitutional Court judgement in *Larbi-Odam case*, universities practice of cashing in the so-called 'international levy' only from Non-SADC international undergraduate students, unfairly discriminate against them on the grounds of their citizenship or nationality. Reforms to combat this unregulated practice are urgently required. It is recommended that universities must develop policies designed to address the unfair discrimination practice and to promote equal pay for the education of equal value. This would bring back a sense of

⁷⁹ Available at:

http://teachwithafrica.org/wordpress/wp-content/uploads/2012/12/57306m_TWA_Invite_2.pdf Accessed 23-01-2022. See also http://resdac.net/documentation/pdf/voice_rising_mandela.pdf Accessed 23-01-2022.

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community, a feel of belonging and inclusion that is arguably lower for Non-SADC students if compared to their peers from SADC countries. Perhaps the recent international development in tuition fee reforms could inspire South Africa. The OECD countries for instance have recently implemented reforms in this area and have substantially modified the tuition fees charged by public universities to their international students. It is an opportune time for South African universities to benchmark and perhaps follow suit.

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List of Abbreviations

DHET Department of Higher Education and Training

HEMIS Higher Education Management Information System

ICESCR International Covenant on Economic, Social and Cultural Rights

ITF International Tuition Fee

LLB Legum Baccalaureus

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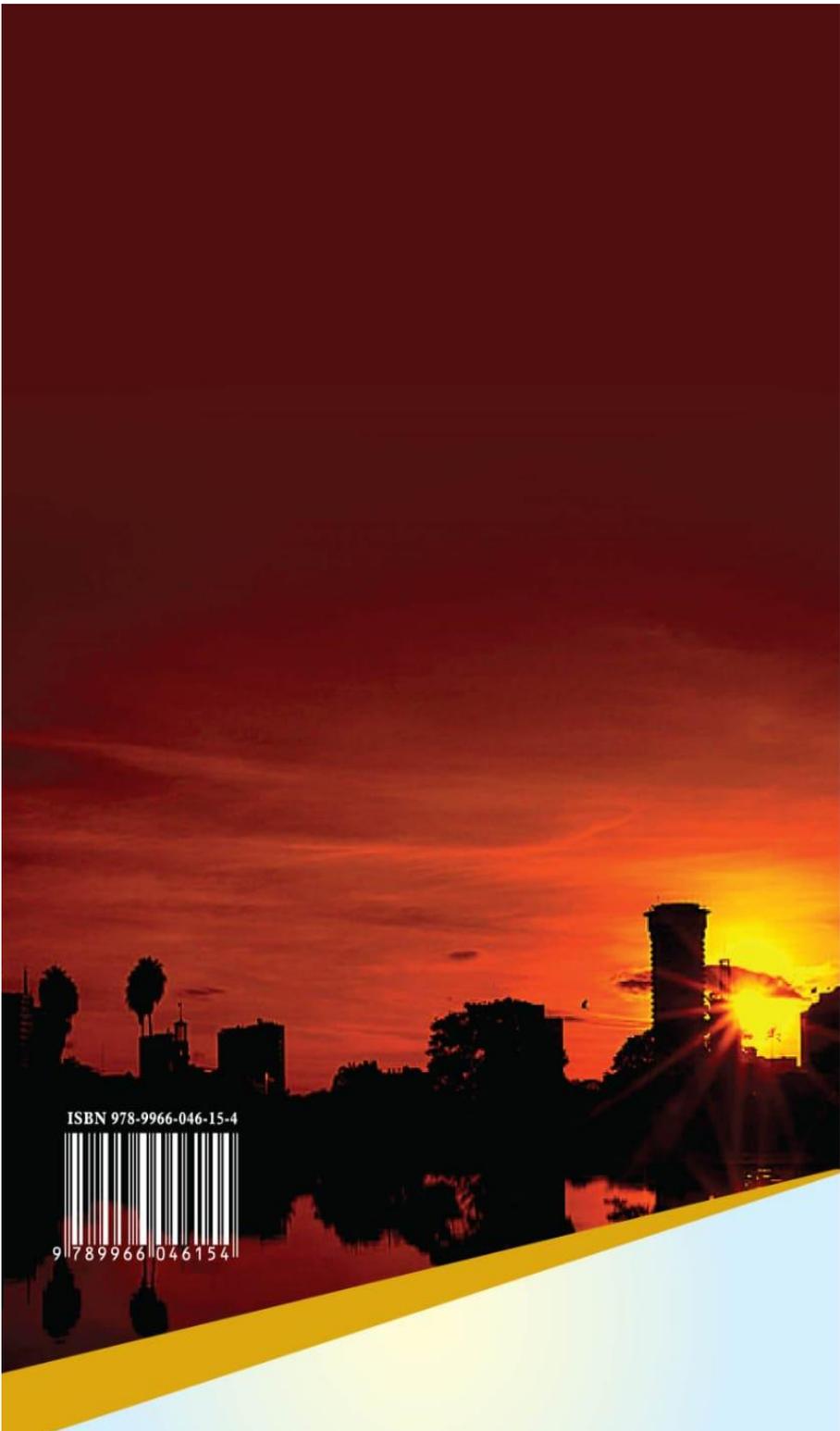
MEC Member of the Executive Council

OECD Organisation for Economic Cooperation and Development.

SADC Southern African Development Community

SAJHE South African Journal of Higher Education

UNHRC UN Human Rights Committee



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