

**THE CORE CONTENT OF PUBLIC SCHOOL
LEARNERS' RIGHT TO A BASIC EDUCATION
IN TERMS OF SECTION 29 (1)(A) OF THE
CONSTITUTION**

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DECLARATION

I, **Maisa Jeremiah Merabe**, affirm that the dissertation, *The Core Content of Public School Learners' Right to a Basic Education in terms of Section 29 (1)(a) of the Constitution*, for the degree Magister Legum in the Department of Mercantile Law, at the University of the Free State, hereby submitted, has not previously been submitted by me for a degree at this or any other university, and that it is my own work in design and execution, and that all the material contained herein is recognised. I furthermore cede copyright of the dissertation in favour of the University of the Free State.

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This piece of work is dedicated to my family - Mpho, my spouse, and my children, Thapelo and Mosa. May they one day understand why their father failed to give them attention, and instead spent many hours on end in the study writing this dissertation.

“It always seem impossible until it is done”

President Nelson Rolihlahla Mandela

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CHAPTER 1

INTRODUCTION AND PURPOSE STATEMENT

1. INTRODUCTION

As the title suggests, the main purpose of this study is to attempt to explore the ‘core content’ of a right to basic education that every learner at any public school is entitled to, as provided for by the State under Section 29 (1)(a) of the Constitution of the Republic of South Africa. When South Africa became a democratic state during 1994, and as a sequel to that, the current Constitution¹ replaced an old order system of parliamentary supremacy with that of a constitutional supremacy.² This brought about a paradigm shift and the right to ‘a basic education’³ was entrenched as one of the most important human rights.⁴ The importance of this right has been confirmed by the Constitutional Court, where it indicated that ‘a basic education’ as one of the socio-economic rights is directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential.⁵ Basic education also provides a foundation for a child’s lifetime learning and employment opportunities.⁶

This study attempts to address a complex question: What is the content of the right to ‘a basic education’?⁷

The right to ‘a basic education’, which is often referred to as an empowerment right, is a highly contested terrain.⁸ When one consults any form of media nowadays one is confronted by and

¹ Constitution of the Republic of South Africa of 1996, hereafter referred to as the Constitution.

² Constitution 1996:s 2.

³ Constitution 1996:s 29 (1)(a).

⁴ Woolman & Bishop 2009: 57-7 & 57-8. See also Arendse 2011a: 344.

⁵ *Governing Body of the Juma Masjid Primary School v Essay N.O* [2011] ZACC13 par 43 [hereafter “Juma Masjid”].

⁶ *Juma Masjid* par 43.

⁷ *Basic Education For All and Others v Minister of Basic Education and Others* [2014] ZAGPPHC 566 par 44 [hereafter “BEFA”]. See also *Section 27a v Minister of Basic Education* [2012] ZAGPPHC114 par 23 [hereafter “Section 27”].

⁸ Arendse 2011a: 344.

reminded of the poor state of education in South Africa. This is so because of the well-known phenomenon that the right to ‘a basic education’ is a constitutionally protected right that is unequivocally guaranteed to all public schools learners in this new constitutional dispensation.⁹ In this contested milieu, there is an emergence of litigation, which is increasingly being used by parents, education activists and other interest groups¹⁰ to ensure that the majority of learners from previously and currently disadvantaged backgrounds receive a better standard of education, which the State is obliged to provide in terms of Section 29 (1)(a) of the Constitution.

To date, there have been a number of reported court judgements pertaining to a failure by the State to perform one of its constitutional obligations of providing a basic education. The basics needed in public schools, which the State has failed to provide, include, *inter alia*, the following: (i) learner and teacher support materials such as textbooks, stationery and school furniture, that in certain cases were not provided at all, or if provided, were procured belatedly and fell short in catering for all learners,¹¹ (ii) provision of educators and failing to appoint on time in vacant substantive and temporary posts by the moving and placement of excess educators,¹² (iii) adequate schooling facilities in cases where schools have been built with steel or mud, learners are taught under trees, and dilapidated prefabricated classrooms without water, electricity and toilets,¹³ (iv) a safe and orderly learning environment where some schools are places of drugs¹⁴ and alcohol, gangsterism, assaults and murder,¹⁵ and (v) quality, adequate and equal education where efforts to raise the quality of education for poor children has largely failed.¹⁶ Learners in historically white schools [former model C schools]¹⁷ perform better and their scores improve

⁹ *Juma Masjid* par 37. See also South African Human Rights Commission [SAHRC] 2012: 3.

¹⁰ See, for example, Federation of Governing Bodies for South African Schools, Equal Education, Centre for Child Law, Governing Body Foundation, Freedom of Expression Institute, Section 27, Centre for Applied Legal Studies, Western Cape Forum for Intellectual Disability and Legal Resources Centre, etc.

¹¹ Section 27. See also *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMCHC5 [hereafter “Madzodzo”] and *BEFA*.

¹² *The Centre for Child Law v The Minister of Basic Education* [2012] ZAECGHC 60 [hereafter “Centre for Child Law”] and *FEDSAS v MEC for the Department of Basic Education*. Eastern Cape [2 March 2011] ZAECB [Case no. 60/11].

¹³ *Equal Education v Minister of Education*. Eastern Cape High Court, Bisho, Case no. 81/2012 [hereafter “Equal Education”].

¹⁴ *Mose v Minister of Education in the Provincial Government of Western Cape* [2008] ZAWCHC 56 par 22.

¹⁵ SAHRC 2006: 16.

¹⁶ National Planning Commission 2011: 14.

¹⁷ Politicsweb 2014: 1. “Former ‘Model C’ schools are those schools that were reserved for white pupils under

with successive years of schooling.¹⁸ In contrast, in the majority of schools with black learners, the learners' scores start off lower, and show relatively little improvement.¹⁹

What is highlighted above appears to be the opposite if compared to what the Constitution requires. However, despite the Constitution's progressive values, many South African schools remain inadequate.²⁰ Nowhere are the inadequacies more evident than in predominantly black areas; apartheid's impact on the education of African children, particularly in the rural "homelands", remains severe.²¹ The majority of learners at public schools continue to perform poorly in comparative studies, particularly at domestic, regional and international levels. It should be recognised that South Africa has made a remarkable transition from the old order system of an apartheid government to a democratic government, which in terms of its various education policies, legislation and programmes is committed to ameliorate the current situation.²²

It is perspicuous from the attitude displayed by the State to quickly acknowledge that the quality of education for most black learners is poor.²³ It also recognises that although as a country we are two decades into democracy, South Africa remains a highly unequal society where too many people live in poverty and too few are employed.²⁴ It goes even further by accepting that improved education will lead to higher employment rates and better earnings, while more rapid economic growth will broaden opportunities for all South Africans and generate the resources required to improve education.²⁵

It is against this backdrop that this study will endeavour to examine the 'core content' of the

apartheid. The term is not officially used by the Department of Basic Education, but is widely used to refer to former whites-only schools."

¹⁸ National Planning Commission 2011: 14.

¹⁹ National Planning Commission 2011: 14.

²⁰ Berger 2003: 614.

²¹ Berger 2003: 617.

²² National Planning Commission 2011: 24.

²³ National Planning Commission 2011: 14.

²⁴ National Planning Commission 2012: 24.

²⁵ National Planning Commission 2012: 26.

right to ‘a basic education’ that every learner at any public school is entitled to, which is to be provided by the State under the Constitution. At the heart of this study is Section 29 (1)(a) of the Constitution which provides the right to ‘a basic education’, which is unqualified and immediately realisable when compared to some of the other socio-economic rights.²⁶

In Chapter two of this study, a discussion will be outlined in order to understand and appreciate the ‘core content’ of the right to ‘a basic education’ within the context of South Africa’s domestic law; international law will also be considered within the confines of our supreme law in the country. An aid will be sought from Section 39 (1)(b) of the Constitution which enjoins a court, tribunal or forum to consider international law when interpreting the Bill of Rights. The right to education is recognised as a human right by a variety of regional²⁷ and international instruments.²⁸ Specifically, the Universal Declaration of Human Rights,²⁹ and the International Covenant on Economic, Social and Cultural Rights³⁰ recognise the right to education without qualification.³¹

This study will in the main contend that the international instrument, being the *General Comment No. 13 to the International Covenant on Economic, Social and Cultural Rights (ICESCR)* is the most useful and appropriate device for the establishment of the core content of the right to a basic education and minimum standards for measuring any system of education and any matter related to that.

In Chapter three, Section 29 (1)(a) of the Constitution will be discussed in order to lay a good foundation for a proper understanding of the ‘core content’ and meaning of the right to ‘a basic

²⁶ *Juma Masjid* par 37.

²⁷ The Organisation of African Unity (OAU) and now African Union (AU) African Charter on Human and People’s Rights [Banjul Charter] and the Organisation of African Unity [OAU] African Charter on the Rights and Welfare of the Child [Child Charter].

²⁸ The Universal Declaration of Human Rights [UDHR], the United Nations Convention on the Rights of the Child [Child Rights Convention], the International Covenant on Economic, Social and Cultural Rights [ICESCR], the Committee on Economic, Social and Cultural Rights [CESCR] General Comments No. 13: The Right to Education [Art. 13], the United Nations Education, Scientific and Cultural Organization’s [UNESCO] World Declaration on Education For All and Framework to Meet Basic Learning Needs, and the United Nations Education, Scientific and Cultural Organisation [UNESCO]: Expert Consultation on the Operational Definition of Basic Education.

²⁹ UDHR1948.

³⁰ United Nations 1966 (ICESCR).

³¹ *Juma Masjid* par 40.

education'. This study only focuses on 'a basic education' right guaranteed by Section 29 (1)(a) of the Constitution. Some other socio-economic rights encapsulated in Section 26, 27 and 28 of the Constitution which relate to the right of access to land, to adequate housing, and to health care, food, water and social security will be analysed so as to compare them with Section 29 (1)(a) of the Constitution. However, in the course of the discussion of Section 29 (1)(a), reference will be made to the other pertinent constitutional rights supporting the enjoyment of the right to 'a basic education'.

In Chapter four, the primary policy framework and statutes that give effect to the 'core content' of the right to 'a basic education' will be briefly discussed. The policy framework is the White Paper on Education and Training [hereafter "White Paper 1"],³² and Education White Paper 2: The Organisation, Governance and Funding of Schools [hereafter "White Paper 2"],³³ and main pieces of legislation, namely, the National Education Policy Act [NEPA],³⁴ the South African Schools Act [SASA],³⁵ and the Employment of Educators Act [EEA]³⁶ that seek to safeguard this constitutional right.

In Chapter five of this study, an evaluation will be made on the content of the "Four A Scheme" to be in a position to determine South Africa's compliance thereof. To lay a basis for this, a brief examination of the jurisprudence of foreign jurisdictions on the question of having regard to the minimum core content of the socio-economic right, as interpreted by the Committee on Economic Social and Cultural Rights [CESCR], will be made herein in line with Section 39 (1) (c) of the Constitution. The examination will be on the extent to which courts in those jurisdictions have been willing to give content to rights. A number of national constitutions have included justiciable socio-economic rights and in other countries, civil and political rights have been interpreted so as to encompass within their ambit, certain socio-economic rights. However, it is the case law that will be examined in the chapter.

³² Department of Education 1995 [hereafter "DoE"]

³³ DoE 1996.

³⁴ 27/1996.

³⁵ 84/1996.

³⁶ 76/1998.

It will be argued in the main that the legislative measures and all policies of the executive arm of the State are relevant to the determination of the content of a constitutional right to ‘a basic education’.³⁷

The “Four A Scheme”, as in *General Comment 13 to the International Covenant on Economic, Social and Cultural Rights (CESCR)*³⁸ will be used to analyse the ‘core content’ of the right to ‘a basic education’ in terms of Section 29(1)(a) of the Constitution, and the reciprocal obligations deriving from this unqualified right.³⁹ It states that while the exact standard secured by the right to basic education may vary according to conditions within a particular State, education must exhibit the following features: availability, accessibility, acceptability and adaptability.⁴⁰ These features are often referred to as the “Four A Scheme”. The extent to which these criteria are being met by the State through the existing policy framework, that is the South African Schools Act,⁴¹ the National Education Policy Act,⁴² the Employment of Educators Act,⁴³ and their accompanying regulations, as well as case law, will be analysed and assessed.⁴⁴

At the end of this study, in Chapter six, clear recommendations will be made on how the ‘core content’ of the right to ‘a basic education’ may be determined, using the Constitutional Court’s endorsed methodology of understanding the right’s textual setting and its social and historical context,⁴⁵ as well as the doctrine of separation of powers which limits the Court’s authority to not interfere in the processes of other branches of government.⁴⁶ This will assist everyone claiming that right to know its contents and that the State should also understand its obligations relating to this right and devise all other means to deliver and protect it.

³⁷ BEFA par 46. See also Section 27 par 23 – 25.

³⁸ Refworld.

³⁹ Veriava & Coomans 2005: 65.

⁴⁰ Veriava & Coomans 2005: 65.

⁴¹ 84/1996.

⁴² 27/1996.

⁴³ 76/1998.

⁴⁴ Veriava & Coomans 2005: 65.

⁴⁵ *Grootboom* par 22.

⁴⁶ *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11 par 199 [hereafter “Doctors for Life International”]. See also *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* [2009] ZACC 8 par 181 [hereafter “Director of Public Prosecutions”].

2. PROBLEM STATEMENT

The study will explore the problematic concept of the ‘core content’ of the right to ‘a basic education’ that every learner at any public school is entitled to be provided with by the State under the Constitution. The study on the ‘core content’ of the right to ‘a basic education’ in South Africa is necessary due to the fact that limited research has been conducted on this transformative imperative.⁴⁷ Although education activists, academics, human rights lawyers and other role players have written much on issues linked to a right to ‘a basic education’ in South Africa, a methodical, systematic analysis on the ‘core content’ of the right to ‘a basic education’ has thus far not yet been put under the spotlight. Therefore, there appears to be no consensus amongst all the relevant role players on what is required practically when we deliberate and claim the right to ‘a basic education’.⁴⁸

In 20 years of democracy the Constitutional Court has been unwilling to determine the minimum core content of the socio-economic rights in the context of the Constitution. Some of the main arguments for the Court’s unwillingness to make such a determination were that there was not sufficient, comparable information before it, and that the courts are institutionally inappropriate and ill-equipped to make wide-ranging factual and political enquiries.⁴⁹

This study will explore the scholarly debate and case law from the year 2009 up to and including 2014 where courts have started to determine the content of a right to a basic education.⁵⁰

Even in the *Grootboom* matter, the door was not closed to determine the content of the right, as the Court had the following to say:

⁴⁷ Veriava & Coomans 2005: 61 – 62.

⁴⁸ Veriava & Coomans 2005: 63.

⁴⁹ *Government of the Republic of South Africa and others v. Grootboom and Others* [2000] ZACC 19 par 32 – 33 [hereafter “Grootboom”].

Minister of Health and Others v Treatment Action Campaign and Others (No 2) [2002] ZACC 15 par 37 [hereafter “TAC No. 2”].

Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28 par 61 [hereafter “Mazibuko”].

⁵⁰ Section 27: par 23.1 – 25. See also *Madzodzo* par 17 – 20, BEFA par 46, and The Centre for Child Law par 16.

*There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.*⁵¹

In the recent cases referred to earlier,⁵² the High Courts have indicated that amongst others the legislative measures and all policies of the executive arm of the State are relevant to the determination of the content of a constitutional right to ‘a basic education’.

There are a number of questions that may be sharply raised with regard to the ‘core content’ of the right. Section 29 (1)(a) of the Constitution explicitly refers to a particular or specific type of education, namely, ‘a basic education’. The questions that may be posed are: What does the Constitution mean with ‘a basic education’?⁵³; What is it that must be contained in this type of education?⁵⁴; Does it encapsulate an early childhood, primary and/or secondary education?⁵⁵; Is it compulsory attendance from the first school day of the year in which a learner reaches the age of seven until the last school day of the year in which such learner reaches the age of 15 or the ninth grade, whichever comes first?⁵⁶; What are the minimum standards that have to be met to qualify as ‘a basic education’?⁵⁷; Does it include the provision of textbooks and stationery?⁵⁸; What type of basic infrastructure is meant and what about educators who are supposed to be at school?⁵⁹; Is the State obliged to feed, accommodate and transport learners to schools?⁶⁰; The list could be endless and one may go on without restriction in attempting to grasp the ‘core content’ of the right to ‘a basic education’.

It has been observed on numerous occasions through media platforms⁶¹ and litigations against the State that its interpretation appears to be inconsistent and sometimes paradoxical in nature on

⁵¹ *Grootboom* par 33.

⁵² See cases referred to in footnote 37 above.

⁵³ *Calderhead* 2011: 3.

⁵⁴ *Calderhead* 2011: 4.

⁵⁵ *Calderhead* 2011: 3.

⁵⁶ *Simbo* 2012: 173. See also South African Schools Act 84/1998: s 3(1).

⁵⁷ *Calderhead* 2011: 4.

⁵⁸ *Calderhead* 2011: 4.

⁵⁹ *Calderhead* 2011: 4.

⁶⁰ *Calderhead* 2011: 3.

⁶¹ For example, *Mail & Guardian* 2012-08-23 and 2012-08-03.

its obligations in respect of the right to ‘a basic education’, which is a constitutionally protected right that is unequivocally guaranteed for all learners and not qualified by expression such as ‘available resources’, ‘progressive realisation’ or ‘reasonable legislative measures’, which are applicable to some of the other socio-economic rights enshrined in the Constitution.⁶²

The scope of the study will be on the investigation of the suitability of the “Four A Scheme” as in *General Comment 13 to the CESCR*,⁶³ which has been proffered as a potentially useful device for the establishment of minimum standards for measuring any system of education, and related to that, to determine the ‘core content’ of a basic education and obligations arising out of Section 29 (1)(a) of the Constitution. *General Comment No. 13*, published by the CESCR, provides the most comprehensive description of the content of the right to basic education in international law.⁶⁴

The aim of the study is to show that certain aspects of the South African policy and legislative framework on the right to a basic education ensure compliance with the aforesaid “Four A Scheme”.

3. METHODOLOGY

The main methodology of the study is compilatory in nature, with an analytical review of literature pertaining to the right to ‘a basic education’ as one of the other socio-economic rights and accompanied by the South African legal position with international instruments.

⁶² *Juma Musjid* par 37. See also SAHRC 2012: 7 and the case of *Equal Education*: par 6.4 and 44 where it was averred on behalf of the Minister of Department of Basic Education [DBE] in the answering affidavit before court that account has to be taken of, amongst others, limitation of available resources, as well as the need progressively over time to improve school standards and facilities that are inadequate, and that it was not necessary nor desirable for the Minister to be compelled to issue regulations relating to minimum uniform norms and standards for Public School Infrastructure in substitution of the guidelines on school infrastructure. In BEFA: par 44, it was “suggested in the case presented by the DBE in its affidavit that the failure to supply textbooks did not constitute a violation of the right to a basic education... because the failure to provide each learner with a textbook did no more than cause an inconvenience to teachers and those learners not in possession of their own textbooks”.

⁶³ Refworld.

⁶⁴ Arendse 2011b: 100/217.

CHAPTER 2

RIGHT TO A BASIC EDUCATION: AN INTERNATIONAL LAW PERSPECTIVE IN SOUTH AFRICA

1. INTRODUCTION

Since the advent of a constitutional democracy in the country, South Africa has reclaimed its position in the international arena. In order to understand and appreciate the ‘core content’ of the right to ‘a basic education’ within the context of our domestic law, international law will be considered within the confines of our supreme law in the country.

2. BRIEF KEY CHALLENGES OF SOUTH AFRICA’S DOMESTIC BASIC EDUCATION

Compared to its global peers, South Africa consistently performs below par on basic education matters. This is evident from, amongst others, the second South African Consortium for Monitoring Educational Quality (SACMEQ) II Project, which was conducted between 2000 and 2002, and assessed the reading and Mathematics competencies of Grade 6 learners in 14 countries in East and Southern Africa, including South Africa.⁶⁵ Reported learners’ test scores for both reading and Mathematics were based on a scale with a predetermined mean score of 500 and a standard deviation of 100 across all countries.⁶⁶ South Africa’s achievement in these areas was poor. South Africa achieved just under the mean SACMEQ score in both reading and Mathematics and was ranked eighth in reading and ninth in Mathematics.⁶⁷

According to the DoE (2009: 85),

The Trends in the International Mathematics and Science Study (TIMSS) measured grade 8 learning achievement in Mathematics and science in 41 countries in 1995, in 38

⁶⁵ Department of Education 2009: 85 [hereafter “DoE”].

⁶⁶ DoE 2009: 85.

⁶⁷ DoE 2009: 85.

*countries in 1999 and 50 countries in 2003. In both the 1999 and 2003 TIMSS studies, South Africa's performance was disappointing. In both years South Africa's mean scores for Mathematics and science were significantly lower than the international average scores for those two subjects.*⁶⁸

The DoE (2009: 85) further states:

*The 2006 Progress in the International Reading Literacy Study (PIRLS) was the first study that South Africa participated in. In South Africa, the assessment was carried out on Grade 4 and 5 learners [although the assessment was aimed at a Grade 4 level] in more than 400 schools in all 11 official languages. Learners in Grades 1 to 3 were assessed in their language of tuition. As was the case with other international achievement studies South Africa had participated in, South Africa's performance in the study was very poor.*⁶⁹

The DoE (2009: 85) elaborates:

*In 2011, approximately 19 000 learners in Grades 4 and 5 in more than 430 schools across the country participated in PIRLS, and were tested in all 11 and 2 other official languages respectively. South Africa participated along 48 countries and 9 benchmarking participants.*⁷⁰

The following findings were revealed by the PIRLS 2011 survey of the reading literacy of South African Grade 4 and 5 learners:⁷¹

- Forty-three percent of South African Grade 5 learners have not developed the basic reading skills required for reading at an equivalent international Grade 4 level. Fewer learners attained the highest international benchmarks than in 2006.

⁶⁸ DoE 2009: 85.

⁶⁹ DoE 2009: 85.

⁷⁰ University of Pretoria 2011: 1.

⁷¹ University of Pretoria 2011: 1-2.

- Twenty-nine percent of Grade 4 learners do not have the rudimentary reading skills required for reading at an equivalent international Grade 2 level.
- Girls out-perform boys in Grade 4 and Grade 5 in South Africa and in Grade 4 internationally.
- More South African Grade 5 learners tested in Afrikaans or English reached the highest international benchmark in contrast to Grade 4 children in 13 other countries (including Morocco, Indonesia, Oman, Norway, Belgium and Colombia).
- More than half of learners tested in Sepedi and Tshivenda are at risk, with 57% of Sepedi learners not reaching the lowest international benchmarks.
- Rural and township learners are, on average, two to two-and-a-half years behind urban children in reading ability.
- More than half (59%) of South African schools have no libraries, which is the second highest percentage internationally after Morocco.
- More than half (55%) of Grade 4 learners report frequent bullying at primary school - the highest internationally".⁷²

In her observation with regard to the aforesaid situation, *Howie* remarks that in South Africa, only 4% of Grade 5 learners reached the highest international benchmark, compared to 8% of Grade 4 learners internationally.⁷³ A major concern is that there are fewer learners at the top end of the scale attaining the highest benchmarks, when compared to 2006.⁷⁴ The good news is that more learners at the bottom end of the scale are achieving the international benchmarks than was previously the case.⁷⁵

⁷² University of Pretoria 2011: 1-2.

⁷³ University of Pretoria 2011: 2.

⁷⁴ University of Pretoria 2011: 2.

⁷⁵ University of Pretoria 2011: 2.

3. THE RELEVANCY OF INTERNATIONAL LAW AND ITS IMPACT ON DOMESTIC LAW

For over 40 years, from 1948 to 1990, South Africa was in conflict with both the international community and international law about race segregation.⁷⁶ Apartheid, premised on race discrimination and the denial of human rights, was contrary both to the law of the UN Charter and to the norms of human rights, generated by the post-World War 11 order.⁷⁷ All this has changed; South Africa is now a democratic State, with a constitutionally elected parliament.⁷⁸ Whereas international law was previously seen as a threat to the State, it is now viewed as one of the pillars of the new democracy.⁷⁹

Since the establishment of the new constitutional order in 1994, courts have shown a great willingness to be guided by international human rights law.⁸⁰ Decisions of the European Commission and Court of Human Rights have provided the greatest assistance, but courts have on occasion also considered the ‘views’ of the United Nations Human Rights Committee, and United Nations reports on human rights matters.⁸¹ The texts of the principal human rights conventions and the leading international human rights treaties have already become recognised constitutional source materials.⁸²

International human rights law has been employed in a wide range of cases, of which the following are probably the most important:⁸³ *S v. Makwanyane* [constitutionality of the death penalty for murder],⁸⁴ *S v. Williams* [constitutionality of corporal punishment],⁸⁵ *Coetzee v. Government of the Republic of South Africa* [constitutionality of imprisonment for judgment

⁷⁶ Dugard 1997: 77.

⁷⁷ Dugard 1997: 77.

⁷⁸ Dugard 1997: 77.

⁷⁹ Dugard 1997: 77.

⁸⁰ Dugard 1997: 85.

⁸¹ Dugard 1997: 85.

⁸² Dugard 1997: 85.

⁸³ Dugard 1997: 85.

⁸⁴ Dugard 1997: 85.

⁸⁵ Dugard 1997: 85.

debts],⁸⁶ *Ferreira v. Levin N.O.* [rule against self-incrimination and right to a fair trial],⁸⁷ *S v. Rens* [right of appeal],⁸⁸ *Bernstein v. Bester* [right to privacy and fair trial],⁸⁹ and *Ex Parte Gauteng v. Provincial Legislature in re Dispute concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [language and religions rights of minorities].⁹⁰

It was also employed in other leading socio-economic rights cases such as *Grootboom* [provision of adequate basic shelter or housing],⁹¹ *Christian Education South Africa v. Minister of Education* [constitutionality of the prohibition of corporal punishment to independent school's learners whose parents had consented to it in line with their religious convictions],⁹² and more recently in the case of *Juma Masjid* [access to education where a public school on private property was evicted].⁹³

International law is a combination of treaties and customs that regulate the conduct of states among themselves.⁹⁴ International law has three main sources which are:

(i) customary international law, (ii) treaties and conventions, and (iii) soft law [guidelines and non-binding judgements].⁹⁵

Customary international law comes from the customs practised over a long period of time by various states and is often not written in treaties or legislation, but have become an international standard that governments must follow.⁹⁶ Whereas treaties, charters, conventions or covenants become part of the domestic law after they have been ratified and then a particular State is bound

⁸⁶ Dugard 1997: 86.

⁸⁷ Dugard 1997: 86.

⁸⁸ Dugard 1997: 86.

⁸⁹ Dugard 1997: 86.

⁹⁰ Dugard 1997: 86.

⁹¹ [2000] ZACC 19.

⁹² [2000] ZACC 11.

⁹³ [2011] ZACC 13.

⁹⁴ Health & Democracy 2010: 131.

⁹⁵ Dugard 1994: 23-24. See also Health & Democracy 2010: 131.

⁹⁶ Health & Democracy 2010: 131.

under such international law.⁹⁷ In contrast, soft law refers to all sources of non-binding international law that can provide guidance on the interpretation of international treaties.⁹⁸

Examples of sources of soft law are: (i) guidelines produced by international organisations such as WHO that can be helpful to courts that do not have expertise in a particular field, (ii) respected experts in their field, who can provide guidance in interpreting particular rights, and (iii) declarations, as non-binding international instruments, that can be made by any international organisation or body of experts.⁹⁹

All the above sources of international law are internationally recognised instruments which are useful in guiding States pertaining to their conduct and provide sizeable guidance in interpreting Section 29 (1)(a) in this study.¹⁰⁰

The clearest evidence of the desire to achieve harmony between South African and international human right jurisprudence is provided by Section 39 (1) of the Constitution which declares that:¹⁰¹

When interpreting the Bill of Rights, a court, tribunal or forum-

- a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom,
- b) must consider international law, and
- c) may consider foreign law.¹⁰²

This provision can be viewed as the most pivotal point of entry when deliberating on the relevance and impact of international law, and consequently the right to ‘a basic education’. In one of the first heard cases and hallmark decisions of the Constitutional Court when the death

⁹⁷ Health & Democracy 2010: 132.

⁹⁸ Health & Democracy 2010: 132.

⁹⁹ Health & Democracy 2010: 132.

¹⁰⁰ Simbo 2012: 175.

¹⁰¹ Dugard 1997: 84.

¹⁰² Dugard 1997: 85.

penalty was declared unconstitutional in *Makwanyane*, Chief Justice Chaskalson (as he then was) ruled that:

In the context of section 35(1) [of the Interim Constitution and now section 39(1) of the final Constitution], public international law would include non-binding as well binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provides a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Courts of Human Rights, and in appropriate cases, reports of specialised agencies such as International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.¹⁰³ [own emphasis]

The “Chapter Three” that the Court referred to in terms of the Interim Constitution of 1993, is now Chapter Two, being the Bill of Rights in our current Constitution. Further, Section 233 of the Constitution provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.¹⁰⁴

In one of the celebrated decisions by the Constitutional Court on the right to access to housing, Justice Yacoob went even further to rule that:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.¹⁰⁵

¹⁰³ *Makwanyane* par 35.

¹⁰⁴ Constitution 1996:s 233.

¹⁰⁵ *Grootboom* par 26.

The Court, more specifically, in the aforesaid case of *Makwanyane*,¹⁰⁶ emphasised that customary international law and international agreements are important and should be considered in interpreting the Bill of Rights since they make available a framework in which we understand the Bill of Rights.¹⁰⁷

Furthermore, the Court made it clear that South Africa has a principle of recognising international law; the weight of international law and principles recognised will vary on a case by case basis. In other words, although the courts must take into account international law when interpreting constitutional provisions, they need not follow the international law rules if they believe they are not applicable to South Africa. International law [binding and non-binding] is therefore useful to make clear our understanding of Section 29 (1)(a).¹⁰⁸

It is against this background that regional and international law instruments, which will be discussed immediately after this contention, must be understood as the pivotal tools to assist in the exploration of the ‘core content’ of the right to ‘a basic education’. Moreover, the application of these instruments will be done when the right to ‘a basic education’ under the South African Constitution is discussed in the chapters that will follow this one.

4. INTERNATIONAL LAW RECOGNITION OF THE RIGHT TO A BASIC EDUCATION

4.1 THE REGIONAL AND INTERNATIONAL INSTRUMENTS

The right to education enjoys more protection all over the globe.¹⁰⁹ This was, as recently as 2011, reaffirmed by the Constitutional Court in the case of *Juma Musjid*, where it found that:

The right to education is recognised in both regional and international instruments. Specifically, the Universal Declaration of Human Rights (UDHR) and the International Covenant on

¹⁰⁶ *Makwanyane* par 35.

¹⁰⁷ Simbo 2012: 176.

¹⁰⁸ Simbo 2012: 176.

¹⁰⁹ Arendse 2011b: 98/217.

Economic, Social and Cultural Rights (ICESCR) recognise the right to education without qualification. The United Nations Convention on the Rights of the Child [Child Rights Convention] also recognises the right to the child to education. In General Comment no.3 on the national implementation of the International Covenant on Civil and Political Rights (ICCPR), the United Nations Human Rights (UNHRC) extends obligations of the state under the ICCPR to include undertaking specific activities to realise their rights.¹¹⁰

It is against this foundation that regional and international instruments, giving effect to the right to ‘a basic education’, are discussed in some detail hereunder.

4.1.1 REGIONAL INSTRUMENTS

4.1.1 (a) Organisation of African Unity (OAU) and now the African Union (AU) African Charter on Human and Peoples’ Rights [Banjul Charter]¹¹¹

At a regional level, this Charter is one of only two important and relevant charters that has laid a solid foundation in the promotion and protection of human rights in Africa. South Africa since signed and ratified it on 9 July 1996.¹¹² The Banjul Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. Of particular importance and relevance in this matter is Article 17(1) of the Charter which provides that:

“[E]very individual shall have the right to education”.

Further, in terms of Article 1 of the Charter, member states are obliged to recognise the rights, duties and freedoms enshrined in the Charter, and to undertake to adopt legislative or other measures to give effect to the Charter’s rights.

4.1.1 (b) Organisation of African Union [OAU] African Charter on the Rights and Welfare of the Child [Child Charter]¹¹³

This is another key and relevant instrument under the African human rights system. The

¹¹⁰ *Juma Masjid* par 40.

¹¹¹ African Commission on Human and People’s Rights 1981: 1.

¹¹² African Commission on Human and People’s Rights 1981: 1.

¹¹³ African Union: 1990.

Child Welfare Charter was adopted on 11 July 1990 and entered into force on 29 November 1999. South Africa signed this Charter on 10 October 1997 and ratified it on 7 January 2000.¹¹⁴

Of particular relevance and importance is Article 11, which makes a provision for Education. Article 11(1), (2) and (3) provides:

1. Every child shall have the right to an education.
2. The education of the child shall be directed to:
 - (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and people's rights and international human rights declarations and conventions;
 - (c) the preservation and strengthening of positive African morals, traditional values and cultures; and
 - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all people's ethnic, tribal and religious groups.
3. State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:
 - (a) Provide free and compulsory basic education.
 - (b) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
 - (c) Take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

The Banjul Charter in its preamble provides, among others, that all the member states reaffirm the pledge they solemnly made to intensify their cooperation and efforts to achieve a better life

¹¹⁴ African Union: 1990.

for the people of Africa and to promote international cooperation having due regard to the Charter of the United Nations, and the Universal Declaration of Human Rights.¹¹⁵

From the aforesaid pledge, it is clear that from the continent's point of view, regional instruments that promote and protect a right to basic education are aimed at complementing instruments that are already in force and applicable at the international level.

4.1.2 INTERNATIONAL INSTRUMENTS

(a) Universal Declaration of Human Rights [UDHR]¹¹⁶

The Universal Declaration of Human Rights [UDHR] was the first international instrument to give expression to the right to education.¹¹⁷ The UDHR was adopted and proclaimed by General Assembly Resolution 217 A(iii) on 10 December 1948.¹¹⁸ Of particular relevance, Article 26 provides:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Since the adoption of the UDHR in 1948, the elements of “free” and “compulsory” have in the subsequent international instruments been attributed to the right to a primary education.¹¹⁹

4.1.2 (b) United Nations Convention on the Rights of the Child [Child Rights Convention]

This key instrument on the rights of the child was adopted and opened for signature, ratification and accession by the General Assembly of the United Nations on 20 November 1989; it entered

¹¹⁵ African Commission on Human and People's Rights 1981: 1.

¹¹⁶ United Nations 1948.

¹¹⁷ Arendse 2011b: 98/217.

¹¹⁸ Arendse 2011b: 98/217.

¹¹⁹ Arendse 2011b: 98/217.

into force on 2 September 1990.¹²⁰ The Child Rights Convention was signed on 29 January 1993 and ratified on 16 June 1995 by South Africa.¹²¹ Of particular relevance and importance of this Child Rights Convention is Articles 28 and 29.

Article 28 (1)(a) and (d) provides:

1. The State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all; and
 - (d) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

Further, Article 29 (1)(a) to (b) provides:

1. The State Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; and
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations.

4.1.2 (c) International Covenant on Economic, Social and Cultural Rights [ICESCR]

The ICESCR is undoubtedly the most significant treaty which entrenches the right to education.¹²² It was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January 1976. South Africa signed the ICESCR on 3 October 1994, and by doing so, indicated its intention to become a party to, and thus be bound by, the ICESCR.¹²³ However, on 10 October 2012, Cabinet approved that South Africa accede to the United Nations

¹²⁰ United Nations Rights 1989.

¹²¹ Department of International Relations and Cooperation 2005.

¹²² Arendse 2011b: 100/217.

¹²³ Petherbridge 2012.

ICESCR,¹²⁴ and on 12 January 2015, the South African Government ratified the ICESCR, more than 20 years after signing it.¹²⁵ The ratification entered into force on 12 April 2015.

The International Covenant on Economic, Social and Cultural Rights¹²⁶ devotes two articles to the right to education, Articles 13 and 14. Article 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education in international human rights law.¹²⁷

Article 13(1) provides:

1. The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all.

4.1.2 (d) Committee on Economic, Social and Cultural Rights [CESCR] General

Comments No. 13: The Right to Education [Art. 13]

General Comment No. 13, published by the Committee on Social, Economic and Cultural Rights [CESCR],¹²⁸ provides the most comprehensive description of the content of the right to basic education in international law.¹²⁹ This General Comment entrenches the so-called “Four A

¹²⁴ Department of Government Communication and System 2012.

¹²⁵ Section 27, Equal Education, Centre for Child Law, Legal Resources Centre, Equal Education Law Centre.

¹²⁶ United Nations Human Rights.

¹²⁷ Refworld.

¹²⁸ Refworld.

¹²⁹ Arendse 2011b: 100/217.

Scheme”, developed by the late Professor Katarina Tomasevski and the former United Nations Special Rapporteur on the Right to Education. This scheme gives concrete content to the right to basic education.¹³⁰

The content of a right determines the nature of state obligations and the CESCR has qualified core obligations as non-derogables.¹³¹ Core obligations may be negative as well as positive.¹³² The CESCR states that, while the exact standard secured by the right to basic education may vary according to conditions prevailing in a particular state, education must exhibit the following interrelated and essential features:

- (a) Availability – functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State Party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer laboratory and information technology.

- (b) Accessibility – educational institution and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:
 - Non-discrimination – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds;
 - Physical accessibility – education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a ‘distance learning’ programme);
 - Economic accessibility – education has to be affordable to all. This dimension of accessibility is subject to the differential wording of Article 13(2) in relation to primary, secondary and higher

¹³⁰ Arendse 2011b: 100/217.

¹³¹ Coomans 2007: 2.

¹³² Coomans 2007: 2.

education: whereas primary education shall be available ‘free to all’, State Parties are required to progressively introduce free secondary and higher education.

- (c) Acceptability – the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to educational objectives required by Article 13(1) and such minimum educational standards as may be approved by the State.
- (d) Adaptability – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.¹³³

4.1.2 (e) United Nations Education, Scientific and Cultural Organization’s [UNESCO] World Declaration on Education For All and Framework to Meet Basic Learning Needs¹³⁴

The term ‘basic education’ is used often nowadays, for example within the framework of international conferences on education, such as the World Declaration on Education for All [Jomtien, Thailand 1990 and Dakar 2000].¹³⁵ The Committee on the Covenant on Economic, Social and Cultural Rights in its General Comment No. 13 [Article 5 of it, specifically] recorded that it took the view that States Parties are required to ensure that education conforms to the aims and objectives identified in Article 13 (i), as interpreted in the World Declaration on Education for All [Jomtien, Thailand, 1990] (Art. 1). Of particular relevance is Article 1 of the Declaration which provides:

“Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs”.

These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to

¹³³ Refworld.

¹³⁴ Unesco 1994.

¹³⁵ Coomans 2007: 4.

continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.¹³⁶

4.1.2 (f) United Nations Education, Scientific and Cultural Organisation [UNESCO]: Expert Consultation on the Operational Definition of Basic Education

The Experts' Consultation on the Operational Definition of Basic Education,¹³⁷ held on 17 and 18 December 2007 at UNESCO HQ1 brought together eminent experts from different regions to further discuss a preliminary draft operational definition of basic education that was initially proposed during the Experts' Workshop on *Challenges and Perspectives of Law and Education* organised in Sao Paulo in December 2006.

This Consultation was part of UNESCO's efforts to address the request by the Joint Expert Group UNESCO [CR]/ ECOSOC [CESCR] on the monitoring of the Right to Education and by Experts during the *International Conference on the Right to Education as a Fundamental Human Rights* [Jakarta, 2005] to initiate a reflection and dialogue process for the elaboration of an operational definition of basic education and to elaborate a definition that will be universally accepted and recognised.¹³⁸

The rich and fruitful discussions by the experts during the two days of the Consultation resulted in the definition, produced below:

For the purposes of this definition, basic education covers notions such as fundamental, elementary and primary/secondary education. It is guaranteed to everyone without any discrimination or exclusion based notably on gender, ethnicity, nationality or origin, social, economic or physical condition, language, religion, political or other opinion, or belonging to a minority.

¹³⁶ Unesco 1994: 3.

¹³⁷ Unesco 2007: 1.

¹³⁸ Unesco 2007: 1.

Beyond pre-school education, the duration of which can be fixed by the State, basic education consists of at least 9 years and progressively extends to 12 years. Basic education is free and compulsory without any discrimination or exclusion.

Equivalent basic education is offered for youth and adults who did not have the opportunity or possibility to receive and complete basic education at the appropriate age.

Basic education prepares the learner for further education, for an active life and citizenship. It meets basic learning needs, including learning to learn, the acquisition of numeracy, literacies, and scientific and technological knowledge as applied to daily life.

Basic education is directed to the full development of the human personality. It develops the capability for comprehension and critical thinking, and it inculcates the respect for human rights and values, notably, human dignity, solidarity, tolerance, democratic citizenship and a sense of justice and equity.

The State guarantees the right to basic education of good quality based on minimum standards, applicable to all forms of education, and provided by qualified teachers, as well as effective management along with a system of implementation and assessment.

Basic education is provided in the mother tongue, at least in its initial stages, while respecting the requirements/ needs of multilingualism.

In those States where basic education is also provided by private schools, the State ensures that such schools respectfully the objectives and content as mentioned in the present definition.¹³⁹

5. SUMMARY AND CONCLUSION

The right to ‘a basic education’ appears to enjoy a certain degree of protection at the Regional, and more at the International level. In all these instruments detailed above what features more in common on the content and definition of the right to ‘a basic education’ is the following:

- exhibition of interrelated and essential features or pillars of availability, accessibility, acceptability and adaptability,

¹³⁹ Unesco 2007:2.

- promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential,
 - meeting basic learning needs of learners, which comprise of both essential learning tools [such as literacy, oral expression, numeracy and problem-solving and the basic learning content - such as knowledge, skills, values and attitudes], scientific and technical knowledge,
 - covering notions such as fundamental, elementary and primary/secondary education,
 - the State's duty to provide basic education free, encourage regular attendance, make it compulsory and in an affordable manner,
 - development of respect for human rights and fundamental freedoms, tolerance, friendship among all nations, all racial, ethnic or religious groups,
 - guaranteed without any form of discrimination or exclusion,
 - duration of which must be fixed by the State for a period of at least nine years and progressively extends to 12 years,
 - prepares the learner for further education, and for an active life and citizenship,
 - it must be of good quality based on minimum standards, provided by suitably qualified educators, as well as effective management along with a system of implementation and assessment, and
 - is provided in the mother tongue, at least in its initial stages, while respecting the requirements/needs of multilingualism.
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CHAPTER 3

THE RIGHT TO A BASIC EDUCATION UNDER THE SOUTH AFRICAN CONSTITUTION

1. INTRODUCTION

In this chapter, Section 29 (1)(a) of the Constitution will be discussed in order to lay a good foundation for a proper understanding of the ‘core content’ of the right to ‘a basic education’. This study only focuses on ‘a basic education’ right guaranteed by Section 29 (1)(a) of the Constitution. Some other socio-economic rights encapsulated in Section 26, 27 and 28 of the Constitution which relate to the right of access to land, to adequate housing, and to health care, food, water and social security will be analysed so as to compare them with Section 29 (1)(a) of the Constitution. However, in the course of discussion of Section 29 (1)(a), reference will also be made to the other pertinent constitutional rights supporting the enjoyment of the right to ‘a basic education’.

It is against this backdrop that the right to ‘a basic education’ will be discussed and understood in the broad terms.

2. THE SOCIAL AND HISTORICAL CONTEXT OF THE RIGHT TO A BASIC EDUCATION

This study requires an interpretation and application of constitutional provisions, as well as to construe legislation that gives content to the constitutional guarantee. In order to perform this task, the Constitutional Court gave a direction that the rights must be interpreted in their proper context. This was made clear in one of its landmark decisions, in the *Grootboom* case, where the Court ruled that:

Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual settings. This will require a consideration of

*Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.*¹⁴⁰

There is an old dictum which says that “*a nation that does not know its history has no future*”.¹⁴¹ It is only through understanding of our history that we will truly understand our challenges, the solutions we need, and how not to repeat mistakes from the past.¹⁴² Much has been written about the history of education in South Africa.¹⁴³

On the other hand, and for the purposes of this work, this history has been concisely captured by the Constitutional Court on a variety of socio-economic rights cases that it adjudicated upon. The first of these cases is that of *Soobramoney v Minister of Health: KwaZulu-Natal* [hereafter “Soobramoney”],¹⁴⁴ where the Court had the following to say:

*We live in a society in which there are great disparities, in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.*¹⁴⁵

What the Court is emphasising above is that when interpreting and applying any socio-economic right such as the right to ‘a basic education’, the past and present prevailing living standards for the majority of South Africans must first be examined. Our country is a highly unequal one where most of those who were oppressed during the apartheid era still suffer the social and economic exclusions, which are demonstrated by widespread poverty levels and extreme inequality.¹⁴⁶

¹⁴⁰ *Grootboom* par 22.

¹⁴¹ Meditation Works 2010: 1.

¹⁴² Department of Basic Education 2011a: 16. [hereafter “DBE”]

¹⁴³ DBE 2011a: 16.

¹⁴⁴ [1997] ZACC 17.

¹⁴⁵ *Soobramoney* par 8.

¹⁴⁶ National Planning Commission 2011:14.

The Court is sounding a warning to the effect that when the State proclaims constitutional ideals such as the right to ‘a basic education’ and announces standards that cannot be met, it will ultimately cheapen the Constitution, even though the Court can preach whatever message it wants, that message and the Constitution itself will ring hollow once people realise that its rulings do not improve their everyday lives.¹⁴⁷ Therefore, in order to have a good understanding of the right to ‘a basic education’ in its textual setting in the form of Section 29 (1)(a) of the Constitution, a current social and historical background of this right must first be considered. In other words, the textual setting or form in which the right to ‘a basic education’ is couched in the Constitution, current social and previous background that led to its entrenchment in the Constitution are inextricably linked important aids to the interpretation of the right to ‘a basic education’ and other constitutional rights.

To be specific about the history relating to ‘a basic education’, the Constitutional Court has made a number of important rulings in the cases that served before it.

In the case of *MEC for Education: KZN and Others v Pillay and Others* [hereafter “Pillay”],¹⁴⁸ the Court indicated that:

[e]ducation is the engine of equal opportunity. Education in South Africa under apartheid was both separate and deeply unequal. Notoriously, HF Verwoerd proclaimed in 1953 that: “Native education should be controlled in such a way that it should be in accord with the policy of the State.... If the native in South African today in any kind of school in existence is being taught to expect that he will live his adult life under a policy of equal rights, he is making a big mistake... There is no place for him in the European community above the level of certain forms of labour....

And the apartheid state implemented this vision. Spending on Black schoolchildren in 1976 was a fraction of spending on White schoolchildren. It is not surprising then that education was the trigger for the Soweto revolt by Black schoolchildren. Throughout the 1970s and 1980s, the issue of unequal education mobilised thousands of South Africans of all ages to oppose the apartheid state.¹⁴⁹

¹⁴⁷ Berger 2003: 642.

¹⁴⁸ [2007] ZACC 21.

¹⁴⁹ *Pillay* par 121.

In the case of the *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-aided Schools: Eastern Transvaal, Province of Mpumalanga* [hereafter “Premier of Mpumalanga”],¹⁵⁰ the Court said the following:

*[u]nder the former apartheid government, schools were generally racially divided with separate government schools for African, coloured, Indian and white children. Different ministries were responsible for the administration of these separate schools. In line with government policy, significantly more government funds were expended for each white child who attended school than were expended for each black pupil. As a result, schools for white children were generally well-equipped with classrooms, sports facilities and qualified teachers. Schools for black children were often dilapidated, with poor facilities and under-qualified teachers.*¹⁵¹

In *Bel Porto Governing Body and Others v Premier of the Province Western Cape and Another* [hereafter “Bel Porto”],¹⁵² the Court stated that:

*Before the Interim Constitution came into force, education in South Africa was conducted at racially segregated schools managed by different departments of education. In the Western Cape there were four education departments reflecting these divisions. They were the departments of the House of Assembly (HOA), the House of Delegates (HD), the House of Representatives (HR) and the Department of Education and Training (DET). There were great disparities in the system. The HOA schools had better buildings, better grounds, better equipment, and better pupil-teacher ratios than schools in the other departments had. There were also disparities between the other departments and conditions in the DET schools were the worst of all.*¹⁵³

In the *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* [hereafter “Ermelo”],¹⁵⁴ the Constitutional Court went on to say:

Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to

¹⁵⁰ [1998] ZACC 20.

¹⁵¹ *Premier, Province of Mpumalanga* par 7.

¹⁵² [2002] ZACC 2.

¹⁵³ *Bel Porto* par 8.

¹⁵⁴ [2009] ZACC 32.

opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us.¹⁵⁵ It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they serve in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.¹⁵⁶

As recent as 2011, the Court still emphasised the history of our past. In *Juma Masjid*, it had the following to say:

The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks, was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.¹⁵⁷

On 10 July and 3 October 2013, the Constitutional Court reminded South Africans of the unfortunate reality of the country's education system in the cases of *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* [hereafter "Welkom & Harmony"],¹⁵⁸ and *Member of Executive Council for Education*

¹⁵⁵ *Ermelo* par 45.

¹⁵⁶ *Ermelo* par 46.

¹⁵⁷ *Juma Masjid* par 42.

¹⁵⁸ [2013] ZACC 25 par 34, where Justice Khampepe stated -

"The entrenchment of the right to education as a fundamental right of all people in South Africa represents a remarkable and ambitious break with the past, occurring as it does in the wake of the apartheid regime's policy of racially-segregated, disproportionately-resourced schooling and the very real legacy of that noxious system with which we are still faced today."

in Gauteng Province and Others v Governing Body of the Rivonia Primary School and Others [hereafter “Rivonia”]¹⁵⁹ by reciting our past, as previously captured in *Ermelo*.

The social and historical context of the right to ‘a basic education’ can be understood as one of apartheid’s greatest crimes, which was the provision of substandard education to black people.¹⁶⁰ Access to public education was limited and quality was poor.¹⁶¹

In sum, the Court in *Ermelo*, as indicated above, recognised that even though the State has done much in implementing constitutional provisions such as the right to ‘a basic education’ aimed at providing a quality and equal basic education, undoing the lasting and debilitating effects of racial segregation, those entrenched social disparities and inequities were still visible to the majority of the learners at South African public schools.¹⁶²

3. THE TEXTUAL SETTING CONTEXT OF THE RIGHT TO A BASIC EDUCATION

3.1 The meaning of the term ‘core content’ of a right

The concept of a ‘core content’ of human rights is a tool for identifying those elements of the normative content of a human right that contain minimum entitlements.¹⁶³ In other words, the term ‘core content’ is to be regarded as a useful means or instrument in helping to analyse and clarify the normative content of economic, social and cultural rights, which are often described as vague and open ended, with a view to assessing the conduct of states in this field in general, and to identify violations in particular.¹⁶⁴ The use of the term ‘core content’ postulates that each

¹⁵⁹ [2013] ZACC 34 par 2, where Acting Justice Mhlantla stated -

“Continuing disparities in accessing resources and quality education perpetuate socio-economic disadvantage, thereby reinforcing and entrenching historical inequity. The question we face as a society is not whether, but how, to address this problem of uneven access to education”.

¹⁶⁰ National Planning Commission 2011:10.

¹⁶¹ National Planning Commission 2011:10.

¹⁶² *Ermelo* par 45 and 46 above.

¹⁶³ Coomans 2007: 1.

¹⁶⁴ Coomans 2007: 1.

right must give rise to an absolute minimum entitlement, in the absence of which a State Party is to be considered to be in violation of its obligations.¹⁶⁵

The core content of a right must be understood as meaning its essence, i.e. that essential element without which a right loses its substantive significance as human right. The core of a right is to be considered as an expanding floor [not a fixed ceiling], or bottom from which governments should endeavour to go up, trying to reach higher levels of realisation.¹⁶⁶

In case the core of a right has been realised in a rich state without much difficulty, it would not mean that such a state may lean back and argue that it is complying with its treaty obligations.¹⁶⁷ Complying with obligations which relate to the core of a right should not be dependent upon the availability of resources.¹⁶⁸ In other words, when a government is facing policy dilemmas as a result of limited or insufficient financial resources, priority should be given to the realisation of the core of a right.¹⁶⁹

3.2 The meaning of the term “basic education”

The Constitution embodies a transformative model of constitutionalism.¹⁷⁰ The right to ‘a basic education’ is located in Section 29 (1)(a) of the Constitution. It provides that:

- (1) Everyone has the right-
 - (a) to a basic education, [own emphasis]

¹⁶⁵ Coomans 2007: 1-2.

¹⁶⁶ Coomans 2007: 2.

¹⁶⁷ Coomans 2007: 2.

¹⁶⁸ Coomans 2007: 2.

¹⁶⁹ Coomans 2007: 2.

¹⁷⁰ Arendse 2011b: 341. Where the transformative model of constitutionalism is described as the one which:

“[d]iffers from traditional liberal constitutions which only place restraints on the exercise of state power. Besides providing measures to curb an abuse of state power, the transformative Constitution requires of government to take steps ‘to advance the ideals of freedom, equality, dignity and social justice’. In this regard, transformation *inter alia* involves the fulfilment of socio-economic rights.”

However, the other rights contained in the entire Section 29 of the Constitution will in some way or another be implicated on the understanding of the ‘core content’ of a right to ‘a basic education’. It is on this basis that the other remaining parts of the text be provided herein.

Section 29 (1) of the Constitution goes on to provide:

Everyone has the right-

- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public education institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-
- (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that
- (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

For one to understand the ‘core content’ of the right to ‘a basic education’, the understanding of the meaning of ‘a basic education’ can be considered as the most valuable point of departure. As this study indicated earlier, Section 29 (1)(a) of the Constitution refers to a particular or specific type of education, namely, ‘a basic education’. The question that follows immediately is: What does the Constitution mean with ‘a basic education’?

The lack of a concrete and precise definition of basic education means that no one knows what the term exactly means in South Africa and compliance with Section 29 (1)(a) by the government is therefore difficult.¹⁷¹

What worsens matters is that “the courts have yet to interpret the meaning of the term ‘basic education’”.¹⁷² Two possible constructions appear plausible. Firstly, ‘basic education’ could refer to a specific period of schooling, namely, primary school.¹⁷³ In terms of Section 3(1) of SASA, every parent must ensure that his or her child or learner for whom he or she is responsible for attends school from the first school day of the year in which a learner reaches the age of seven until the last school day of the year in which such learner reaches the age of 15 or the ninth grade - whichever comes first. Secondly, ‘basic education’ could refer to “a standard of education: its quality or its adequacy.”¹⁷⁴ If one’s education is adequate, it is because one has adequate infrastructure, teachers, equipment, and it faces no access barriers.¹⁷⁵ As *Berger* argues, the Constitution already promises some level of education; that level, though, is not so easy to discern.¹⁷⁶ *Berger* also asks: Does Section 29 promise merely a place to go to school, or does it provide for an “adequate” education?¹⁷⁷

In order to understand the exact meaning of the term basic education, it is submitted that the pivotal tool that defines it is the international law, as there is no such description or definition of ‘a basic education’ in our domestic law. The meaning of ‘a basic education’ is derived from *UNESCO’s World Declaration for Education for All*,¹⁷⁸ which declares that basic education refers to basic learning needs appropriate to the age and experience of the learners. The *Declaration for Education for All* meaning of the term ‘basic education’ has been endorsed or accepted by the Committee on the Covenant on Economic, Social and Cultural Rights [CESCR]

¹⁷¹ Simbo 2012: 164.

¹⁷² Veriava & Coomans 2005: 63. See also Woolman & Bishop 2009: 57-15.

¹⁷³ Woolman & Bishop 2009: 57-15.

¹⁷⁴ Woolman & Bishop 2009: 57-15 to 57-16.

¹⁷⁵ Calderhead 2011: 4.

¹⁷⁶ Berger 2003: 624.

¹⁷⁷ Berger 2003: 625.

¹⁷⁸ Unesco 1994: 3.

in its General Comment No.13 which focuses on the right to education.¹⁷⁹ And furthermore, that its elaborate definition is the one which has been produced by *UNESCO and the CESCR's Experts' Consultation Workshop on the Operational Definition of Basic Education* on 17 and 18 December 2007.¹⁸⁰

The aforesaid argument is not far-fetched. The term 'basic' does have determinate content in international law.¹⁸¹ The World Declaration on Education for All at Jomtien Conference in 1990 stressed the acquisition of that level of learning necessary for an individual to realise his or her full potential.¹⁸² The World Declaration states:

*Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools [such as literacy, oral expression, numeracy, and problem solving] and basic learning content (such as knowledge, skills, values and attitudes) required by human beings to survive, to develop to their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.*¹⁸³

In 1999, the UN Special Rapporteur on the right to education noted an evolution in the terminology used by education specialists:

*The language of international educational strategies shifted from primary to basic education, different from the continued use of primary education in human rights. The term basic education was introduced by the 1990 Jomtien Conference and influenced the subsequent international and domestic strategies and statistical categories.*¹⁸⁴

When it came to the inclusion of education rights in the Constitution of South Africa, the seminal World Declaration and the proliferation of subsequent international authorities which contained

¹⁷⁹ Office of the High Commissioner for Human Rights 1999: 2.

¹⁸⁰ Unesco 2007: 1.

¹⁸¹ Woolman & Bishop 2009: 57-16.

¹⁸² Woolman & Bishop 2009: 57-16.

¹⁸³ Unesco 1994: 3.

¹⁸⁴ Calderhead 2011: 6.

commitments in relation to “basic education” found expression in Section 32 (a) of the Interim Constitution, which was proclaimed after successful elections in May 1994:

Every person shall have the right... (a) to basic education and to equal access to educational institutions.

The final text of the provision is as follows:

29. Education – (1) Everyone has the right-

(a) To a basic education, including adult basic education¹⁸⁵

To support the argument of this study in reaching a conclusion that the meaning of the term ‘basic education’ is derived from UNESCO’s World Declaration for Education for All, by declaring that basic education refers to basic learning needs appropriate to the age and experience of the learner, a resort to background material to provide a context for the interpretation of Section 29 (1)(a) will be of the utmost importance. The background material that is referred to here is the *travaux préparatoires*,¹⁸⁶ in the form of the *White Paper on Education and Training*.¹⁸⁷ The White Paper is a document which was written by the Department of Education, describing the first steps in policy formulation by the Ministry of Education in the Government of National Unity.¹⁸⁸ Among others, the White Paper discussed the implication of the new Constitution for the education system, especially in respect of Fundamental Rights.¹⁸⁹

The importance of this background material was settled by the Constitutional Court in the case of *Makwanyane*, where the Court ruled that:

¹⁸⁵ Calderhead 2011: 7.

¹⁸⁶ The term is used with reference to the Constitution of the Republic of South Africa, 1996 and all basic education laws mentioned in this study.

“The literary meaning of this French term is ‘preparatory works’. It constitutes the materials used in preparing the ultimate form of an agreement or statute, especially of an international treaty. The materials constitute a legislative history. *Travaux préparatoires* contain the various documents, including reports of discussions, hearings and floor debates that were produced during the drafting of a Convention, treaty or an agreement. *Travaux préparatoires* of a statute or treaty are usually recorded so that it can be used later in order to interpret that particular statute or treaty. This is a secondary form of interpretation and is used to clarify the intent of the makers of the statute.”

¹⁸⁷ DoE 1995: ch 1, par 1.

¹⁸⁸ DoE 1995: ch 1, par 1.

¹⁸⁹ The Supreme Court of Appeal in the case of *Governing Body of the Rivonia Primary School v MEC for Education: Gauteng Province and Others* [2012] ZASCA 194 [hereafter referred to as “Rivonia (SCA’s decision)”] referred to Education White Paper 2 in par 27 of its judgement.

*Our Constitution was the product of negotiations conducted at the Multi-Party Negotiating Process. The final draft adopted by the forum of the Multi-Party Negotiation Process was, with few changes, adopted by Parliament. The Multi-Party Negotiating Process was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the travaux preparatoires, relied upon by the international tribunals. Such background material can provide a context for the interpretation of the constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it.*¹⁹⁰

In 30 November 2012, the Supreme Court of Appeal in *Rivonia (SCA's decision)* referred to the Education White Paper, in order to assist it with the interpretation of the South African Schools Act to arrive at the decision on whether the power to determine admission policy goes together with the so-called an incident power to determine the capacity of the school's classes.¹⁹¹

Thus, it is clear that the White Paper on various policy issues is persuasive and has been consulted by judges and scholars alike to understand issues of socio-economic rights.¹⁹²

To confirm the argument and view of this study that the definition or meaning of 'a basic education' is the one that has been declared by the World Declaration for Education for All, the White Paper on Education and Training (Chapter 7,¹⁹³) is provided:

12. Since the term "basic education" is not defined in the Constitution, it must be settled by policy in such a way that the intention of the Constitution is affirmed. An important question is whether basic education should be defined in terms of learning needs and outcomes, or qualification levels, or school grades, and whether the content of basic education needs to be the same for children, youth and adults.

13. The World Conference on Education for All, sponsored by the United Nations in 1990 addressed such questions in its authoritative World Declaration on Education for All. Article 1 of the

¹⁹⁰ *Makwanyane* par 17.

¹⁹¹ *Rivonia (SCA's decision)* par 27.

¹⁹² Berger 2003: 624.

¹⁹³ DoE 1995.

Declaration makes the following statements on ‘basic learning needs’:

Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools [such as literacy, oral expression, numeracy, and problem solving] and basic learning content (such as knowledge, skills, values and attitudes) required by human beings to survive, to develop to their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.

The scope of basic learning needs and how they should continue to be met varies with individual countries and cultures, and inevitably, changes with the passage of time.

14. The Ministry of Education associates itself with this statement. Basic education must be defined in terms of learning needs appropriate to the age and experience of the learner, whether child, youth or adult, men or women, workers, work seekers or self-employed. Basic education programmes should therefore be flexible, developmental, and targeted at the specific requirements of the particular learning audience or groups, and should provide access to a nationally recognized qualification or qualifications.

As Berger bluntly puts it: “The White Paper on Education defines ‘basic education’ as compulsory schooling - pre-school through ninth grade - and ‘further’ education as ‘post-compulsory’ education - tenth grade and beyond”.¹⁹⁴

However, one commentator, *Simbo*, disagrees with *Berger’s* view that ‘basic education’ is defined as “compulsory schooling”. His view is that it would be an absurd conclusion to say that compulsory attendance of school, connoted by the Schools Act, is the definition of ‘basic education’ alluded to by Section 29 (1)(a). *Simbo* argues that the provision of compulsory schooling, whilst not being the definition of basic education, is important as it ensures that all children have an opportunity to acquire basic education.¹⁹⁵

Simbo contends in detail hereunder that after breaking down the components of the definition of basic education, as defined by the World Declaration on Education for All, one can conclude that

¹⁹⁴ Berger 2003: 624-625.

¹⁹⁵ *Simbo* 2012: 173.

basic education is the acquisition of basic learning needs which comprise of essential learning tools and the basic learning content.¹⁹⁶ Such a definition means that the term basic education is quality orientated.¹⁹⁷ For a more clear understanding of the term ‘basic learning needs’, Simbo suggests the breakdown of the components and the terms ‘essential learning tools’ and ‘basic learning content’, which are defined separately as follows:

Firstly, essential learning tools include “literacy, oral expression, numeracy, and problem solving”.¹⁹⁸ Simbo argues that words like “literacy, oral expression, numeracy, and problem solving” are broad and contested words that do not have an exact definition.¹⁹⁹ However, Condy *et al.* argue that the term ‘literacy’ is defined as an evolving, developing and complex concept, not only because it describes a set of practices, but also because it is context-driven.²⁰⁰

Simbo further explains that there is not one concrete definition for *literacy*, but a more simplified one would be “an individual’s ability to read, write, speak in English, compute and solve problems at levels of proficiency necessary to function on the job, in the family of the individual and in society”.²⁰¹

The Department of Basic Education’s understanding of ‘literacy’ refers to the ability to process and use information for a variety of purposes and contexts and write for different purposes; the ability to decode texts, allowing one to make sense of one’s world, which would include the capacity to read and write.²⁰²

At first glance, ‘literacy’ would seem to be a term that everyone understands. But at the same time, literacy as a concept has proved to be both complex and dynamic, continuing to be interpreted and defined in a multiplicity of ways.²⁰³

¹⁹⁶ Simbo 2012: 173.

¹⁹⁷ Simbo 2012: 173.

¹⁹⁸ Simbo 2012: 176.

¹⁹⁹ Simbo 2012: 177.

²⁰⁰ Condy *et al.* 2010: 261

²⁰¹ Simbo 2012: 177.

²⁰² DBE 2011b: 109.

²⁰³ Unesco 2005: 147.

People's notions of what it means to be literate or illiterate are influenced by academic research, institutional agendas, national context, cultural values and personal experiences. In the academic community, theories of literacy have evolved from those focused solely on changes in individuals to more complex views encompassing the broader social contexts (the 'literate environment' and the 'literate society') that encourage and enable literacy activities and practices to occur.²⁰⁴

However, another view on literacy is that it goes beyond the mere ability to read and write. In the world of information and technology, a child who has been taught literacy as part of basic education should have acquired skills that will enable him/her to grow, function and integrate successfully in the family and the national and global society.²⁰⁵

The other view held by Condy *et al.* is that the National Curriculum Statement of 2002's understanding of the word 'literacy' refers to a 'balanced approach' to literacy development as it begins with children's emergent literacy, thereafter involving them in reading real books, and writing for genuine purposes while also giving attention to phonics.²⁰⁶

According to Mullis *et al.*, literacy can be defined as "[t]he ability to understand and use those written language forms required by society and/or valued by the individual. Young readers can construct meaning from a variety of texts. They read to learn, to participate in communities of readers in school and everyday life, and for enjoyment".²⁰⁷

Furthermore, different kinds of literacy would include critical, visual, graphic, computer, media, and socio-cultural literacy.²⁰⁸

What could also be read includes traditional written forms such as books, magazines, documents and newspapers.²⁰⁹ It also encompasses information and communication technologies, such as

²⁰⁴ Unesco 2005: 147.

²⁰⁵ Simbo 2012: 177.

²⁰⁶ Condy *et al.* 2010: 263

²⁰⁷ Mullis *et al.* 2006: 3. See also Mullis *et al.* 2011: 11.

²⁰⁸ DBE 2011c: 108.

²⁰⁹ Mullis *et al.* 2011: 12.

the Internet, email and text messaging, as well as text integrated with various video and television media.²¹⁰

The most common understanding of ‘literacy’ is that it is a set of tangible skills – particularly the cognitive skills of reading and writing – that are independent of the context in which they are acquired and the background of the person who acquires them.²¹¹

In terms of the 2011 Department of Basic Education’s National Curriculum Statement’s Curriculum and Assessment Policy Statement [CAPS] for the Foundation Phase (i.e. from Grade Reception to Grade three) in what is called the shared reading and/or writing process, learners must be introduced to a range of stories, poems, rhymes and plays, as well as information and graphical texts.²¹²

Each shared reading session must have a learning focus from the following: concepts of print, text features, phonics, language patterns, word identification strategies and comprehension at a range of levels (e.g. literal, reorganisation, inferential, evaluation and appreciation questions).²¹³

What is further envisaged by CAPS is that paired and independent reading provides learners with reading practice and encourages reading for enjoyment.²¹⁴

Furthermore, learners can reread their class or group readers, or they can read simple ‘fun’ books or supplementary readers, and if they do this on their own they can also develop fluency, provided that the books are easy enough for the children to read without help.²¹⁵

The term *oral expression* connotes the ability of the learner to articulate ideas and to speak with clarity in a way that intellectually and socially empowers him/her.²¹⁶ Orally articulating an idea

²¹⁰ Mullis *et al.* 2011: 12.

²¹¹ Unesco 2005: 149.

²¹² DBE 2011b: 11.

²¹³ DBE 2011b: 12.

²¹⁴ DBE 2011b: 14.

²¹⁵ DBE 2011b: 14.

²¹⁶ Simbo 2012: 177.

influences “the development of critical thinking, problem-solving abilities and general learning outcomes.”²¹⁷ Oral expression is about learners’ ability to express ideas, explain thinking [critical in math], retell stories and contrast and compare concepts or ideas. In addition, opportunities to practice oral expression will help students become [communicators that are more competent]”.²¹⁸ The CAPS in Foundation Phase requires that learners be engaged in activities in all areas of language and other subjects such as oral presentation, telling of news or talks about an experience logically and in sequence.²¹⁹

The above definition means that after being taught oral expression as part of basic education a child should be able to participate fully in the development of the self and of the society due to an enhanced ability to communicate his/her views.²²⁰

Another view is that the word ‘oral expression’ pertains to the use of words and includes the ability to formulate and produce words and sentences with appropriate vocabulary, grammar and application of conversational rules.²²¹ Children’s oral expression skills are essential to their learning and academic success as well as their ability to express ideas, explain thinking [critical in mathematics], retell stories, and contrast and compare concepts or ideas.²²²

Numeracy is a term coined to explain mathematical skills when used in the classroom.²²³ A more simplified definition of numeracy would be:

*[A]n individual’s capacity to identify and understand the role mathematics plays in the world, to make well-founded judgments, and to use and engage with mathematics in ways that meet the needs of that individual’s life as a constructive, concerned and reflective citizen.*²²⁴

²¹⁷ Simbo 2012: 177.

²¹⁸ Simbo 2012: 177.

²¹⁹ DBE 2011b: 118.

²²⁰ Simbo 2012: 177.

²²¹ Special Education Overview.

²²² Special Education Overview.

²²³ Simbo 2012: 177.

²²⁴ Simbo 2012: 177.

After being taught numeracy, and at the completion of basic education, a child should have a minimum level of proficiency with mathematics and the ability to reason and to think logically when confronted with the role to make judgements individually or within a society.²²⁵

Numeracy on the other hand is the ability to reason and to apply simple numerical concepts. Basic numeracy consists of comprehending fundamental mathematics like addition, subtraction, multiplication and division.²²⁶

The term *problem solving* can be defined simply as a process of clarifying a description of the problem, analysing causes, identifying alternatives, assessing each alternative, choosing one, implementing it, and evaluating whether the problem was solved or not.²²⁷ Solving mathematics in the classroom is usually part of the process of problem solving.²²⁸ After being taught problem solving and at the completion of a basic education a child is capable of finding ways to manoeuvre difficult situations and is creative enough to think of new methods to adapt to new challenges.²²⁹

The above discussion shows us a picture of the content of essential learning tools.²³⁰ Without teaching South African children literacy, oral expression, numeracy and problem solving, an education cannot qualify to be ‘a basic education’.²³¹ Furthermore, it is apparent from the above discussion that children who have not received a basic education will find it difficult to proceed successfully to further education and they cannot be agents in the development of themselves and others.²³²

²²⁵ Simbo 2012: 177.

²²⁶ Wikipedia.

²²⁷ Simbo 2012: 177.

²²⁸ Simbo 2012: 177-178.

²²⁹ Simbo 2012: 178.

²³⁰ Simbo 2012: 178.

²³¹ Simbo 2012: 178.

²³² Simbo 2012: 178.

The basic learning needs also comprise of a basic learning content.²³³ The basic learning content includes “knowledge, skills, values and attitudes” essential for human beings to “be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions and to continue learning”.²³⁴

Skills are part of acquiring a basic learning content.²³⁵ A skill can be defined as “the ability, coming from one’s knowledge, practice and aptitude”.²³⁶ The above definition of skill seems to mean that for a child to be able to do a job or perform a task with excellence in future they need to have acquired the knowledge and the practice to give them the ability to perform the task.²³⁷ There is therefore a link between skill as an essential tool and knowledge as an essential tool.²³⁸

The word *knowledge* does not have a concrete definition but it has been defined as “a fluid mix of framed experience, contextual information, values and expert insight that provides a framework for evaluating and incorporating new experiences and information”.²³⁹ The definition above means that for learners to obtain knowledge as part of their basic education they need to learn through experiment.²⁴⁰ They should learn to contextualise information and teachers as education experts ought to construct and teach ways of understanding that will enable learners to have a structure to evaluate and incorporate new information.²⁴¹

Simbo’s argument is that the definition of knowledge above also shows that understanding values as an aspect of the basic learning content is part of the teaching process that will make the learner obtain knowledge.²⁴²

²³³ Simbo 2012: 178.

²³⁴ Simbo 2012: 178.

²³⁵ Simbo 2012: 178.

²³⁶ Simbo 2012: 178.

²³⁷ Simbo 2012: 178.

²³⁸ Simbo 2012: 178.

²³⁹ Simbo 2012: 178.

²⁴⁰ Simbo 2012: 178.

²⁴¹ Simbo 2012: 178.

²⁴² Simbo 2012: 178.

Values are difficult to define, but one can define them as beliefs or ideas that humans safeguard as special.²⁴³ Values influence the attitudes of individuals and groups about what are good and bad habits.²⁴⁴ Cultural values which include language, human rights values, national values and family values are examples of values that a child should be taught.²⁴⁵ Teaching values as part of a basic education is especially important because it is a step towards reconciling “diverse values through dialogue and respect for differences”.²⁴⁶ The definition of values as an essential learning tool shows us that values influence attitudes of people and can act as one way of bridging the racial divide that characterised the apartheid regime.²⁴⁷

Attitude(s) is an essential learning tool and difficult to define but one can generally define an attitude as “one’s feelings or mood toward things, circumstances or people”. The aforementioned definition shows us that teaching children the importance of positive attitudes, the impact of negative attitudes, and the kind of attitudes to foster in different situations is an important aspect of a basic education as the knowledge of attitudes contributes to individual development and the developments of nations.²⁴⁸

A conglomeration of the essential learning tools and the basic learning content leads to an analysis that the term ‘basic education’ alludes to an education that teaches the learner knowledge about numeracy, literacy and life skills.²⁴⁹

Simbo suggests strongly that the State ought to measure its compliance with Section 29 (1)(a) by reflecting on the following benchmarks:

- A learner who has received basic education is a very important indicator that the State can use to measure whether it is fulfilling its obligations to provide basic education. A learner who has received basic education should be tested using national tests.²⁵⁰

²⁴³ Simbo 2012: 178.

²⁴⁴ Simbo 2012: 179.

²⁴⁵ Simbo 2012: 179.

²⁴⁶ Simbo 2012: 179.

²⁴⁷ Simbo 2012: 179.

²⁴⁸ Simbo 2012: 179.

²⁴⁹ Simbo 2012: 179.

²⁵⁰ Simbo 2012: 179.

- The results of the tests ought to show that he/she possesses basic learning needs as required by the World Declaration. Tests should target learners who finished primary education coupled with two years of secondary education since they are the compulsory schooling years in South Africa.²⁵¹
- In line with the World Declaration, the results of the tests should show that the learners possess basic learning needs that enable them to live a life characterised by a “balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalisation, new technologies and related phenomena”.²⁵²

Following the World Declaration’s definition of basic education tests that will show that a learner has received a basic education ought to also show that during his/her primary school years a learner developed individual skills enough to enable his/her individual participation in the society in which he/she lives.²⁵³ The learner’s abilities ought to reflect that he/she values diversity and accepts differences.²⁵⁴ The learner should show that he/she has knowledge about gender diversity, female health, protection against HIV/Aids, and family planning.²⁵⁵ A learner who has received basic education should be a person who values peace, responsibility and the need to “promote understanding, tolerance and friendship among all nations, racial or religious groups”, which is part of the basic learning content.²⁵⁶ Tests that successfully state that a learner has received basic education should conclude that the learner is useful, morally and socially responsible, and has the ability to exercise individual judgements, which is part of the essential learning tools discussed above.²⁵⁷

However, *Veriava* and *Coomans* clearly state that what constitutes basic education in the South African context cannot be arbitrarily defined in terms of age or the completion of a particular

²⁵¹ Simbo 2012: 179.

²⁵² Simbo 2012: 179.

²⁵³ Simbo 2012: 179-180.

²⁵⁴ Simbo 2012: 180.

²⁵⁵ Simbo 2012: 180.

²⁵⁶ Simbo 2012: 180.

²⁵⁷ Simbo 2012: 180.

level of schooling, but should be determined in accordance with the educational interest to be achieved by the guarantee of the right.²⁵⁸

The meaning should therefore be wider than that of primary education, or compulsory education in terms of the Schools Act, and should include secondary education, without which an individual's access to the full enjoyment of other rights, such as the freedom to choose a trade, occupation or profession, will not be possible.²⁵⁹ Such a purposive understanding of the term is also strengthened by the inclusion in the right of the guarantee to provide adult basic education so as to ensure the development of all individuals in society.²⁶⁰

Indeed, it is the view of this study that compulsory attendance within the meaning of Section 3 of the Schools Act cannot be the determinate definition of basic education. The compulsory attendance of school is the vehicle which is used by the State to deliver 'a basic education'. The actual meaning of 'basic education' is the one which has been declared by *UNESCO's World Declaration on Education for All*, endorsed by the Committee on the *Covenant on Economic, Social and Cultural Rights in its General Comment No. 13* in Article 5, which focuses on the right to education,²⁶¹ and which the State through the Ministry of Education in the White Paper on Education and Training,²⁶² which came before the Final Constitution and South African Schools Act, associated itself with. The meaning of it was elaborated by UNESCO's and the CESCR's Experts Consultation Workshop on the Operational Definitions of Basic Education.²⁶³

3.3 The nature and purpose of the right to 'a basic education'

Section 29 is consequently made up of a bundle of education rights that are divided into subsections.²⁶⁴ Each of the subsections confer specific and separate entitlements on right-holders

²⁵⁸ Veriava & Coomans 2005: 63.

²⁵⁹ Veriava & Coomans 2005: 63.

²⁶⁰ Veriava & Coomans 2005: 63.

²⁶¹ Unesco 1994.

²⁶² DoE:1995, ch 7, par 12 – 15.

²⁶³ Unesco 2007:1.

²⁶⁴ Veriava & Coomans 2005: 59.

and the different subsections place concomitant obligations on the State that vary in nature and degree.²⁶⁵

The socio-economic entitlements under Section 29 are also distinguishable from each other; that is, Section 29 (1)(a) has been described as a “strong positive right” and Section 29 (1)(b) has been described as “a weak positive right”.²⁶⁶

The aforesaid proposition was first laid down by the Constitutional Court in one of its first cases on basic education in the matter of the *Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [hereafter “Gauteng Provincial Legislature”].²⁶⁷ The Court held:

*Section 32 (a) [of the Interim Constitution and precursor to section 29 (1)(a) of the Final Constitution] creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education. [own emphasis]*²⁶⁸

Thus, the state is not only required not interfere with an individual’s enjoyment of the right, but the state is also obliged to provide basic education.²⁶⁹ The exact nature of this empowerment right has been characterised by the Constitutional Court. The right to ‘a basic education’ enshrined in Section 29 (1)(a) is a major one and unique from other socio-economic rights. In this regard, the Constitutional Court in *Juma Musjid* held as follows:

It is important, for the purpose of this judgment, to understand the nature of the right to “a basic education” under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application

²⁶⁵ Veriava & Coomans 2005: 59.

²⁶⁶ Veriava & Coomans 2005: 59.

²⁶⁷ 1996 ZACC 4.

²⁶⁸ *Gauteng Provincial Legislature* par 9.

²⁶⁹ Veriava & Coomans 2005: 61.

*which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”*²⁷⁰

Under the Constitution, basic education is a “strong positive right”; a right that can be asserted regardless of the State’s other budgetary imperatives.²⁷¹ The obligations engendered by Section 29 (1)(a) are distinguishable from other socio-economic rights in the Constitution.²⁷² These rights, such as the rights of access to housing and health care services and the right to food, water and social security are qualified to the extent that they are made subject to the adoption of “reasonable legislative and other measures” and “progressive realization within [the State’s] available resources”.²⁷³ The right to basic education is by contrast unqualified and is therefore an absolute right,²⁷⁴ which can only be limited by the law of general application. Basic education is not a right that can be made gradually available to more people over time.²⁷⁵

The Court went on by considering the international law and applying it - notably General Comment No. 13 published by the Committee on Economic, Social and Cultural Rights [CESCR],²⁷⁶ by stating the following:

*Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.*²⁷⁷

²⁷⁰ *Juma Masjid* par 37.

²⁷¹ Berger 625.

²⁷² Veriava & Coomans 2005: 62.

²⁷³ Veriava & Coomans 2005: 62.

²⁷⁴ Veriava & Coomans 2005: 62.

²⁷⁵ Woolman & Bishop 2009: 57-10.

²⁷⁶ Refworld.

²⁷⁷ *Juma Masjid* par 41.

Empowerment rights,²⁷⁸ such as education, serve two purposes that are not fulfilled by the majority of other rights in Chapter 2.²⁷⁹ First, they ensure that citizens are able “to set the rules of the game, and not merely be assured that the rules are applied as written”.²⁸⁰ Secondly, “they allow the individuals to determine the shape and direction of his or her life”.²⁸¹ Empowerment rights also facilitate the enjoyment of other constitutional rights.²⁸²

Furthermore, the Court stated:

*Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities.*²⁸³

Most societies, ours included, place a high premium on education.²⁸⁴ Not only is it the means by which individuals are able to fulfill their potential, it also provides in a wider sense the basis for development and upliftment.²⁸⁵ Education is critical in both freeing and unlocking the potential of each person.²⁸⁶ The right to education, however, is not a stand-alone right, but it is a means through which other rights are realised.²⁸⁷

Berger takes a step further by submitting that education is then not only a right, but also a social foundation for other goals, a starting point for a host of necessary social changes. In this way, promoting education, while possibly constricting the State’s ability to address other problems in the short term, may foster the kind of social, political and economic growth that

²⁷⁸ Veriava & Coomans 2005: 57.

²⁷⁹ Woolman & Bishop 2009: 57-7.

²⁸⁰ Woolman & Bishop 2009: 57-7.

²⁸¹ Woolman & Bishop 2009: 57-7.

²⁸² Woolman & Bishop 2009: 57-7.

²⁸³ *Juma Masjid* par 43.

²⁸⁴ Section 27 par 1.

²⁸⁵ Section 27 par 1.

²⁸⁶ Section 27 par 3.

²⁸⁷ Section 27 par 4.

ultimately will allow the government to address many other problems more successfully.²⁸⁸ Woolman & Bishop further refer to Beiter's identified four ways in which the right to education serves as an empowerment right.²⁸⁹

*First, education possesses the potential to liberate people from oppression. An educated populace is, allegedly, more willing to oppose political domination than an uneducated citizenry. Second, education permits people to participate in political life. Third, education is deemed essential for socio-economic development; only educated individuals possess the ability to secure both the basic necessities for survival and the other material goods required for flourishing. Finally, education enhances a person's ability to participate in the life of a given linguistic cultural or religious community- and that ability, in turn, enables the community to maintain its preferred way of being in the world.*²⁹⁰

In conclusion, the revered and forever remembered statesman, the icon and the father of the great Rainbow Nation, the late former President Nelson Mandela once said:

*Education is the most powerful weapon which you can use to change the world.*²⁹¹

He reflected on the nature and power of education as follows:

*Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine, that a child of a farm worker can become the president of a great nation....*²⁹²

What is said above is that even a learner from a poor background will be able to have a better standard of living only if provided with a quality basic education.

²⁸⁸ Berger 651.

²⁸⁹ Woolman & Bishop 2009: 57-7.

²⁹⁰ Woolman & Bishop 2009: 57-7 to 57-8.

²⁹¹ Sowetan Live 2013.

²⁹² Education 'Nelson Mandela quotes'.

3.4 The nature and purpose of Sections 26, 27 and 28's socio-economic rights as compared to a right to 'a basic education'

Some other socio-economic rights that the Court referred to in the *Juma Masjid* case²⁹³ are related to the right of access to land,²⁹⁴ to adequate housing,²⁹⁵ and to health care, food, water and social security.²⁹⁶ They also protect the rights of the child²⁹⁷ and the right to education.

²⁹³ See *Juma Masjid* par 37 at Fn 270 above.

²⁹⁴ Section 25(5) provides:

"The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

²⁹⁵ Section 26 provides:

"(1) Everyone has the right to have access to adequate housing.

(2) The state must take ssive realisation of this right.

(3) No one may be evicted reasonable legislative and other measures, within its available resources, to achieve the progred from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

²⁹⁶ Section 27 provides:

"(1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment."

²⁹⁷ Section 28 provides:

"(1) Every child has the right—

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that—

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a matter of last resort, in which case, in addition to the rights the child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be

(i) kept separately from detained person over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

These rights are by nature “weak positive rights”, because they are qualified and already limited internally from the constitutional provisions that introduced them by terms such as “progressively realisable”, within “available resources” subject to “reasonable legislative measures”.

“Progressive realization” of the right, then, means that the state must take steps to provide on those affected rights, which “must be made more accessible not only to a larger number of people, but to a wider range of people as time progresses”.²⁹⁸

The term which refers to within “available resources” suggests that the State has to manage its limited resources in order to address all these claims. There will be times when this requires the State to adopt a holistic approach to the larger needs of society, rather than to focus on the specific needs of particular individuals within society.²⁹⁹

Whereas measures do not mean that “[m]ere legislation is enough.... An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.” Reasonable measures, therefore, cannot ignore “vulnerable groups”, the people who most need the Constitution's protection. The state, despite its limited resources, needs to do more.³⁰⁰

A few leading cases relating to how other socio-economic rights in Sections 26, 27 and 28 of the Constitution are dealt with will now be discussed. The cases are *Soobramoney*, *Grootboom*, *Mazibuko* and *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [hereafter “TAC”].³⁰¹ The first three cases will be discussed in some detail, while TAC only be

(3) In this section “child” means a person under the age of 18 years.”

²⁹⁸ Berger 2003: 362. See also *Grootboom* par 45.

²⁹⁹ *Soobramoney* par 31. See also Berger 2003: 634.

³⁰⁰ Berger 2003: 361 quoting from *Grootboom* par 42.

³⁰¹ [2002] ZACC 15. Berger 2003: 634 summarises the facts and principle of TAC as follows:

‘The governmental program at issue provided voluntary HIV counseling and testing to pregnant women, and Nevirapine and formula feed for HIV-positive mothers. The question in this case, the first to challenge a policy designed exclusively by the ANC regime, was whether it was reasonable for the government to confine the administration of Nevirapine to research and training sites located in an urban and rural community in each province, as opposed to in hospitals throughout the nation. The Court, relying on *Grootboom*, insisted that the state had a “negative obligation” to desist from impairing the right of access to health care services and that confining the

referred to.

Soobramoney is the Court's first socio-economic rights case struggling to balance rights and resources.³⁰²

The case concerned an unemployed man, who was diabetic and suffered from ischaemic heart disease and cerebro-vascular disease which caused him to have a stroke and kidney failure. His life could be prolonged by means of regular dialysis. He sought such treatment from the State hospital in Durban. Because of the limited facilities that were available for dialysis, the hospital was unable to provide him the treatment he had requested. The reasons for the State not providing the medical treatment were, amongst others, that:

- (i) the hospital did not have enough dialysis machines, trained nursing staff and resources to provide dialysis for all patients suffering from chronic renal failure,
- (ii) in terms of hospital policy, only patients who suffered from acute renal failure, which would have been treated and remedied by renal dialysis were given automatic access to renal dialysis at the hospital.

Those patients who, like Mr Soobramoney, suffered from chronic renal failure which was irreversible were not admitted automatically to the renal programme. Mr Soobramoney then claimed that in terms of the Constitution, the Addington Hospital was obliged to make dialysis treatment available to him. He based his claim on Section 27 (3) of the Constitution which provides:

“no one may be refused emergency medical treatment”

and Section 11 which stipulates:

“Everyone has the right to life.”

Mr Soobramoney urged the Court to hold that patients who suffered from terminal illnesses and required treatment such as renal dialysis to prolong their lives were entitled in terms of Section

use of Nevirapine to certain hospitals breached the government's Section 27 obligations. “Emphasizing the state's constitutional obligations to provide citizens with certain socio-economic rights, it held that the government must make every effort to include in the programme everybody for whom the treatment could combat mother-to-child transmission of HIV.”

³⁰² Berger 2003: 629.

27(3) to be provided with such treatment by the State, and that the State was required to provide funding and resources necessary for the discharge of this obligation.

In adjudicating this matter the Court held:

- Section 27(3) itself is couched in negative terms but it is a right not to be refused emergency treatment. What the Section requires is that remedial treatment that is necessary and available be given immediately to avert that harm,³⁰³
- Soobramoney's demand to receive dialysis treatment at a State hospital must be determined in accordance with the provisions of Sections 27(1) and (2) and not Section 27(3). These Sections entitle everyone to have access to health care services provided by the state "within its available resources".³⁰⁴
- If treatment had to be provided to Mr Soobramoney, it would also have to be provided to all other persons similarly placed. If this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have had to be dramatically increased to the prejudice of other needs which the State had to meet.³⁰⁵
- These choices involved difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it was to deal with such matters.
- There are also those who need access to housing, food and water, employment opportunities, and social security.
- The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society, rather than to focus on the specific needs of particular individuals within society.³⁰⁶

³⁰³ Soobramoney par 20.

³⁰⁴ Soobramoney par 22.

³⁰⁵ Soobramoney par 28.

³⁰⁶ Soobramoney par 31.

- The Court concluded the matter by pronouncing that the State has a constitutional duty to comply with the obligations imposed on it by Section 27 of the Constitution. However, it had not been shown by Mr Soobramoney that the State's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constituted a breach of those obligations and consequently his appeal failed.³⁰⁷

The second leading case on this matter is that of *Grootboom*. The *Grootboom* case relates to the consent group of extremely poor people consisting of 510 children and 390 adults and Mrs Irene Grootboom, who first brought the High Court application on behalf of this group who decided to move out of a certain informal settlement and illegally occupied someone else's land situated on a private property earmarked for low-cost housing. Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years.

They applied to the Cape of Good Hope High Court (the High Court) for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief.³

Their claim was based on two constitutional provisions. First, on Section 26 of the Constitution, which provides that everyone have the right of access to adequate housing. Section 26(2) imposes an obligation upon the State to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources. The second basis for their claim was Section 28(1)(c) of the Constitution which provides that children have the right to shelter.

The Appellants [State Departments and the Municipality], who represent all spheres of government responsible for housing, were ordered by the High Court to provide the Respondents, who were children and their parents, with shelter. The judgement provisionally concluded that "tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum". The Appellants challenged the correctness of that order before the Constitutional Court.

³⁰⁷ *Soobramoney* par 36.

The argument submitted on behalf of the Appellants and the Respondents concentrated on the meaning and import of the shelter component and the obligations imposed upon the State by Section 28(1)(c).

The written argument filed on behalf of the *amici* [friends of the Court, being the South African Human Rights Commission and the University of the Western Cape's Community Law Centre] sought to broaden the issues by contending that all the respondents, including those of the adult respondents without children, were entitled to shelter by reason of the minimum core obligation incurred by the State in terms of Section 26 of the Constitution. It was further contended on behalf of the *amici* that the children's right to shelter had been included in Section 28 (1)(c) to place the right of children to this minimum core beyond doubt.

During the argument, considerable weight was attached to the value of international law in interpreting Section 26 of the Constitution.

The *amici* submitted that the *International Covenant on Economic, Social and Cultural Rights (the Covenant)* was of significance in understanding the positive obligations created by the socio-economic rights in the Constitution.

In adjudicating this matter, the Constitutional Court had a regard to the meaning and scope of Section 26 in its context and held, amongst others, that:

- A right to housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself.
- For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in Section 26. A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our

society, including individuals themselves, must be enabled by legislative and other measures to provide housing.

- The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.³⁰⁸

Reasonable legislative and other measures:

- What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government, and local government.³⁰⁹
- A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.³¹⁰

Progressive realisation of the right:

- The term “progressive realisation” shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal.³¹¹

Within available resources:

³⁰⁸ *Grootboom* par 35.

³⁰⁹ *Grootboom* par 39.

³¹⁰ *Grootboom* par 41.

³¹¹ *Grootboom* par 45.

- The obligation to take the requisite measures is that the obligation does not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved, as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the State than is achievable within its available resources.³¹²

Section 28 (1)(c) and the right to shelter:

- The Constitution does not draw any real distinction between housing on the one hand and shelter on the other, and that shelter is a rudimentary form of housing. Housing and shelter are related concepts and one of the aims of housing is to provide physical shelter. But shelter is not a commodity separate from housing. There is no doubt that all shelter represents protection from the elements and possibly even from danger. There are a range of ways in which shelter may be constituted: shelter may be ineffective or rudimentary at the one extreme and very effective and even ideal at the other.³¹³
- The Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in Subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the State.³¹⁴

In conclusion, the Court summed up by pronouncing that [n]either Section 26 nor Section 28 entitles the evicted group of children and parents to claim shelter or housing immediately upon demand.³¹⁵

Be that as it may, as the Honourable Court has pronounced above, in moving away from the question of whether the minimum core in the context of the “right to have access to adequate

³¹² *Grootboom* par 46.

³¹³ *Grootboom* par 73.

³¹⁴ *Grootboom* par 77.

³¹⁵ *Grootboom* par 95.

housing” should be defined generally or with regard to specific groups of people, Justice Yacoob characterised the issue before the Court by indicating that the real question in terms of the Constitution is whether the measures taken by the State to realise the right afforded by Section 26 are reasonable.³¹⁶

The Judge went further to express the following:

*There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution.*³¹⁷

One needs to pause here and emphasise that this is the focal point of departure on this study on the content of the public school learner’s right to ‘a basic education’ in terms of Section 29 (1)(a) of the Constitution.

The aforesaid passage by Justice Yacoob left the door open to determine the content of any socio-economic right in future, particularly when that right is in issue. This argument finds support from the exploration of the scholarly debate and examination of certain case law from the year 2009 to 2014 where the High Courts have indicated that, amongst others, the legislative measures and all policies of the executive arm of the State are relevant to the determination of the content of a constitutional right to ‘a basic education’.³¹⁸

Bilchitz makes it clear that in his judgement Judge Yacoob did not reject the minimum core approach outright (and thus left room for its adoption in future), however, Judge Yacoob leveled several criticisms against the approach and concluded that it was not “necessary to decide

³¹⁶ *Grootboom* par 33.

³¹⁷ *Grootboom* par 33.

³¹⁸ Section 27 par 23.1- 25, *Madzodzo* par 17 – 20, *BEFA* par 46 and *Centre for Child Law* par 16.

whether it was appropriate for a Court to determine in the first instance the minimum core content of a right”.³¹⁹

Bilchitz continues by expressing the following opinion:

*The Constitutional Court’s decision in ...Grootboom... has generally been received favourably within the academic community thus far. Grootboom was the first case in which it became evident that socio-economic rights have an enormous potential to affect the lives of those most economically disadvantaged and vulnerable within our society. It was also the first case to pronounce fairly extensively on the meaning of socio-economic rights in the Bill of Rights. However, it seems to me that the decision in Grootboom is disappointing. The judgement errs in its failure to interpret the right of access to adequate housing as including the idea of a minimum core obligation to provide for basic needs.*³²⁰

Berger also raises this point, indicating that, interestingly, the Court chose not to determine the minimum “core content” of the constitutional right to housing, focusing instead on whether the government's programme was “reasonable” in light of the poor's particular vulnerability. In doing so, the Court emphasised the government's failed efforts to provide the right to the vulnerable, thus setting for the other governmental branches a high standard it ultimately found they had failed to meet.³²¹

In the case of *Mazibuko*, the Applicants, who were five residents from Phiri in Soweto township, argued before the Constitutional Court [Con Court] amongst others, that the Supreme Court of Appeal [SCA] erred in determining that the sufficient amount of water required by section 27 is 42 litres per person per day, rather than 50 litres per person. Further, that the SCA should have made an order declaring that the City of Johannesburg was obliged to provide this amount of water free of charge to all the residents of Phiri who could not afford to pay for their own water.

The first and second Respondents who were the City of Johannesburg and Johannesburg Water (Pty.) Ltd. cross-appealed, amongst others, against the SCA’s decision that declared the

³¹⁹ Bilchitz 2002: 485.

³²⁰ Bilchitz 2002:484.

³²¹ Berger 2003: 632.

Respondent's Free Basic Water policy as unlawful, which made provision that the 42 litres of water per person per day would constitute "sufficient water" within the meaning of section 27(1) of the Constitution.

In pronouncing on the role of Courts in determining the content of social and economic rights³²², the Con Court held that the proper interpretation of section 27(1)(b) and 27(2) of the Constitution is as follows:

*[a]pplying this approach to section 27(1)(b), the right of access to sufficient water, coupled with section 27(2), it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.*³²³

The approach followed in *Mazibuko* is the one which was laid down by Con Court in its previous decisions in *Soobramoney*, *Grootboom* and *TAC* that sections 26, 27 and 28 socio-economic rights are not immediately realisable, but are subject to internal limitation requiring that the right be "progressively realized" within "available resources" subject to "reasonable legislative measures".

Yang takes the view that the Constitutional Court seems to be more comfortable enforcing positive Constitutional duties that have been given greater content through statutes and regulations, rather than defining the contours of certain socio-economic rights.³²⁴

3.5 Other rights impacting on the right to a basic education

In order to understand the right to a basic education, the case of *Grootboom* directs us, amongst others, to consider Chapter 2, being the Bill of Rights and the Constitution, as a whole. It is against this background that other constitutional rights implicated in the provision of 'a basic education' will be reflected. The right to basic education cannot be seen in isolation. There is a

³²² *Mazibuko* par 46.

³²³ *Mazibuko* par 50.

³²⁴ Yang 2014: 30.

close relationship between it and other socio-economic rights.³²⁵ As we have grasped the social and historical context of the right to ‘a basic education’ by reflecting on the many scars apartheid has left, such as deep social disparities and resultant social inequalities,³²⁶ the Constitutional Court in *Ermelo*,³²⁷ has provided a way on how this should be ameliorated. It indicated that:

*[i]n an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular. The Constitution does it in a cluster of warranties.*³²⁸

This study will also cite only a handful of those warranties. The Preamble to the Constitution contains a commitment to improve the quality of life of all citizens and free the potential of each person.³²⁹

Section 1 of the Constitution states:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedom
- (b)
- (c) Supremacy of the constitution and the rule of law.

In the matter of *Welkom & Harmony High Schools*,³³⁰ the Provincial Head of Department’s [HOD] instruction to the principals of the two schools to rescind and ignore the pregnancy policies that he believed to be unconstitutional was found to have amounted to an imposition of different policies on the two schools in circumstances where the HOD was not entitled to make such imposition or superimpose his own policies and countermand those of the school by fiat,

³²⁵ *Grootboom* par 25.

³²⁶ *Ermelo* par 47.

³²⁷ *Ermelo* par 47.

³²⁸ *Ermelo* par 47.

³²⁹ Preamble of the Constitution.

³³⁰ [2013] ZACC 25.

simply because he was of the opinion that the policies are unconstitutional. The Court held:

*State functionaries, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law.*³³¹

The Court further said:

*The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome. On the contrary the rule of law obliges an organ of state to use the correct legal process.*³³²

Section 7 of the Constitution states:

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

In the case of *Pillay*, where a learner who was wearing a nose stud in terms of a long-standing family tradition and for cultural reasons was prohibited to do as this was in contravention of the school's Code of Conduct, the Constitutional Court had the following to say:

*A necessary element of freedom and of dignity of any individual is an "entitlement to respect for the unique set of ends that the individual pursues." One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.*³³³

(2) The state must respect, protect, promote and fulfill the rights in the Bill of Rights.

In the case of *Welkom & Harmony High Schools* referred to above, with regard to the argument

³³¹ *Welkom & Harmony* par 1.

³³² *Welkom & Harmony* par 86.

³³³ *Pillay* par 64.

that the HOD was empowered to instruct the principals to ignore the pregnancy policies in order to counteract what he believed to be their unconstitutional content, particularly in the light of his obligations under Section 7(2) of the Constitution, the Court ruled that:

*Accordingly, section 7(2) and the rule of law demand that where clear internal remedies are available, an organ of state is obliged to use them, and may not simply resort to self-help. I pause to emphasise that this Court has consistently and unanimously held that the rule of law does not authorise self-help.*³³⁴

In the case of *Juma Musjid* the Court, in relation to the application of Section 7(2) of the Constitution, held:

*Our government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its example. Although these remarks were made in the context of crime, they apply equally here. The MEC has failed to teach by example.*³³⁵

In this matter, the Court was not persuaded by the reasoning that the State gave for failing to deliver on its positive obligation of providing a basic right to education in the form of public school facilities. The State is seen as having resourced to deliver on this right and therefore, failed to lead by example as it is the one that must protect, promote and fulfil all the rights afforded by the Constitution.

On failing to fulfil its constitutional obligation, the Court remarked as follows:

*By not providing a public school and failing to ensure that there are enough school places available in the affected areas, as required under section 3(3) of the Act, and simply informing the High Court that there are no other schools in which to absorb all the learners, the MEC failed to discharge her constitutional obligation, to “respect, protect, promote and fulfil” the learners’ right to a basic education.*³³⁶

³³⁴ *Welkom & Harmony* par 86.

³³⁵ *Juma Musjid* par 50.

³³⁶ *Juma Musjid* par 51.

When coming to the question on whether the Member of the Executive Council responsible for Education in the Province had taken cognisance of the application of the Bill of Rights, as provided by Section 8 of the Constitution, the Court in *Juma Masjid* had to ask itself the question whether the MEC had fulfilled his/her constitutional obligation, and immediately answered it in the negative by stating the following:

The answer is clearly in the negative. The MEC has a positive obligation in terms of the Constitution to “respect, protect, promote and fulfil the rights in the Bill of Rights”. More specifically, for the purpose of this judgement, the MEC must “respect, protect, promote and fulfil” the learners’ right to a basic education. The source of this positive obligation is section 8(1) of the Constitution which states that “[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state”. The MEC also has a duty in terms of section 12 of the Act to provide public schools for the education of the learners.³³⁷

It is important to mention that private parties also owe learners a duty not to infringe their right to a basic education. However, the Court was quick to sound a caveat that private parties should not be saddled with the obligation of the state on delivering on its mandate in terms of the Bill of Rights. In this regard, the Court said the following:

It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the “intensity of the constitutional right in question”, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State.³³⁸ Accordingly, I conclude that the Trust does have a negative constitutional obligation not to impair the learners’ right to a basic education.³³⁹

The High Court which granted the provisional order of eviction of the public school with its learners on private property was also not spared by the Constitutional Court. As the Bill of Rights also applies to the judiciary in terms of Section 8(1) of the Constitution, the Constitutional

³³⁷ *Juma Masjid* par 45.

³³⁸ *Juma Masjid* 58.

³³⁹ *Juma Masjid* 60.

Court ruled that the High Court misdirected itself in finding that the Trustees had no obligation in relation to the learners' right to a basic education.³⁴⁰

Section 9 of the Constitution states:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Section 9(3) of the Constitution provides:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

In the case of *Welkom and Harmony High School*, which was in its entirety decided on the principle of legality, the bedrock of our constitutional dispensation, the Constitutional Court was not precluded and inhibited from using its discretionary power in terms of Section 172 (1)(b) of the Constitution to consider the constitutionality of the pregnancy policies that the Provincial Head of Department was complaining about and order any just and equitable remedy that would place substance above mere form by identifying the actual underlying dispute between the parties.³⁴¹ The Court acknowledged and appreciated that even though the Free State Head of Department's conduct in ignoring the respondent schools' pregnancy policies was entirely inappropriate and undermined the carefully structured scheme of powers of the Schools Act, a finding solely in that regard was not going to address the underlying dispute. It was mindful of the fact that the respondent schools' contention that the constitutionality of the pregnancy policies was not properly before it and have therefore declined or made no submissions in

³⁴⁰ *Juma Masjid* 60.

³⁴¹ *Welkom & Harmony* par 107.

respect thereof. It went on further to indicate that there were serious objective concerns regarding policies, and that the Court would have been “remiss if it failed to deal with those concerns”.³⁴² It recorded that it was ill-placed at that moment to make a conclusive determination on the substantive content of the policies, but to invoke Section 172 (1)(b) of the Constitution to issue a just and equitable order.³⁴³ After invoking Section 172 (1)(b) and engaging in the analysis of the pregnancy policies that the Head of Department and friends of the Court were asserting that they violated the learners’ constitutional rights to equality, basic education, human dignity, privacy and bodily and psychological integrity.³⁴⁴ Judge Khampepe then held as follows:

*On the basis of what is before us, I am of the opinion that the policies prima facie violate the fore-mentioned rights, for the reasons set out below.*³⁴⁵

With regard to the injunction of Section 9(3) and (5) of the Constitution, the Court held that:

*First, the policies differentiate between learners on the basis of pregnancy. Because the differentiation is made on the basis of a ground listed in section 9(3) of the Constitution, it is both discrimination and presumptively unfair. Furthermore, the policies differentiate between male learners and female learners. For similar reasons, therefore, the policies lead to presumptively unfair discrimination on the basis of sex.*³⁴⁶

Section 10 of the Constitution states:

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 12 of the Constitution states:

(2) Everyone has the right to bodily and psychological integrity.

Section 14 of the Constitution states:

Everyone has the right to privacy....

On *Welkom and Harmony High Schools*, the Court went on to say:

³⁴² *Welkom & Harmony* par 107.

³⁴³ *Welkom & Harmony* par 110.

³⁴⁴ *Welkom & Harmony* par 111.

³⁴⁵ *Welkom & Harmony* par 112.

³⁴⁶ *Welkom & Harmony* par 113.

*[T]he policies thus have the effect of stigmatising pregnant learners for being pregnant and creating an atmosphere in which pregnant learners feel the need to hide their pregnancies rather than seek help from school authorities for medical, emotional and other support.*³⁴⁷

Section 15 of the Constitution states:

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that-
 - (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.

In the case of *Pillay*, referred to above, the Court remarked as follows:

*Teaching the constitutional values of equality and diversity forms an important part of education.*³⁴⁸

The Court went on to say:

The other argument raised by the School took the form of a “parade of horrors” or slippery slope scenario that the necessary consequence of a judgment in favour of Ms Pillay is that many more learners will come to school with dreadlocks, body piercings, tattoos and loincloths. This argument has no merit. Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a “parade of horrors” but a pageant of diversity which will enrich our schools and in turn our country. Thirdly, acceptance of

³⁴⁷ *Welkom & Harmony* par 115.

³⁴⁸ *Pillay* par 104.

*one practice does not require the School to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the School, it may refuse to permit it.*³⁴⁹

The Court took a step further by qualifying the aforesaid proposition as follows:

*Granting exemptions will also have the added benefit of inducting the learners into a multi-cultural South Africa where vastly different cultures exist side-by-side.*³⁵⁰

Section 28(2) of the Constitution states:

A child's best interests are of paramount importance in every matter concerning the child.

In the application of the aforesaid provisions, the Constitutional Court in *Welkom and Harmony High Schools* ruled that:

*[B]y operating inflexibly, the policies may violate Section 28(2) of the Constitution, which provides that a child's best interests are of paramount importance in every matter concerning the child. The policies require that pregnant learners must leave school for the remainder of the year in which they give birth without regard to the health of the learner, the point in the school year at which she gives birth, arrangements she has made for appropriate care for her newborn, the wishes of the learner and her parents or her capacity to remain in school. The policies are designed in such a way as to give the school governing bodies and principals no opportunity to consider the best interests of pregnant learners.*³⁵¹

³⁴⁹ *Pillay* par 107.

³⁵⁰ *Pillay* par 102.

³⁵¹ *Welkom & Harmony* par 116.

In the case of *Juma Masjid*, the Constitutional Court had to analyse the attitude of the High Court on whether the latter did properly consider the best interests of the learners. The Court was elaborate and jealously guarded the learners' best interest, being 'a basic education' which is immediately realisable. On this aspect, Judge Nkabinde ruled as follows:

In my view, the High Court failed to give efficacy to guaranteed rights in sections 29(1) and 28(2) of the Constitution. Section 28(2) provides that "[a] child's best interests are of paramount importance in every matter concerning the child."³⁵²

Here, the High Court privileged the right to property over the learners' right to a basic education. In doing so, the Court failed to accord sufficient weight to the entrenched rights of the learners and to the paramount importance of their best interests.³⁵³

Section 29 (2) of the Constitution states:

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.

In the case of *Ermelo*, the court indicated that a proper understanding of language rights as an incident of the rights to 'a basic education' is self-evidently a matter of considerable private and public interest.³⁵⁴

³⁵² *Juma Masjid* par 66.

³⁵³ *Juma Masjid* par 71.

³⁵⁴ *Ermelo* par 44.

It made a detailed analysis of the entitlement in right as follows:

*The provision is made up of two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a language of choice. That right, however, is internally modified because the choice is available only when it is “reasonably practicable”. When it is reasonably practicable to receive tuition in a language of one’s choice will depend on all the relevant circumstances of each particular case. They would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school its governing body has adopted, the language choices learners and their parents make and the curriculum options offered. In short, the reasonableness standard built into section 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be whether the state has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification.*³⁵⁵

Section 31 (1) of the Constitution states:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community—

- (a) to enjoy their culture, practise their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

In the case of *Christian Education South Africa v Minister of Education* [hereafter “Christian Education”],³⁵⁶ where a court had to adjudicate on the constitutionality of the prohibition of corporal punishment to independent schools’ learners whose parents had consented to it in line with their religious and cultural convictions, the following was held:

The answer cannot be found by seeking to categorise all practices as religious, and hence governed by the factors relied upon by the appellant, or secular, and therefore controlled by the

³⁵⁵ *Ermelo* par 52.

³⁵⁶ *Christian Education* par 35.

factors advanced by the respondent. They are often simultaneously both. Nor can it always be secured by defining it either as private or else as public, when here, too, it is frequently both. The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.³⁵⁷

Be that as it may, it is clear from what has been discussed above that the right to ‘a basic education’ is not a standalone right, but a means to which other constitutional rights are realised and enjoyed.

4. SUMMARY AND CONCLUSION

The right to ‘a basic education’ under the South African Constitution enjoys a great amount of recognition and protection. What is to be learnt from this chapter about a right to ‘a basic education’ is the following:

- (i) In order to understand properly the right to ‘a basic education’, one should first analyse the right in its textual setting considering the entire Bill of Rights in the Constitution; particularly on the other rights supporting and impacting on the right to ‘a basic education’, as well as the social and historical context of the right.
- (ii) It has a positive and negative dimension nature. The positive dimension nature refers to the positive obligation on the part of the State to respect, protect, promote and fulfil all its obligations in delivering on the provision of basic education. The negative dimension nature refers to the negative obligation on the part of private parties not to

³⁵⁷ Christian Education par 35.

impair the learners' constitutional right to a basic education.

- (iii) Unlike other socio-economic rights, a right to a basic education is neither qualified nor internally limited from the constitutional provision that introduced it by terms such as “progressively realisable”, within “available resources” subject to “reasonable legislative measures”. It is an immediately realisable right without qualification and can only be limited by the law of general application in terms of Section 36 of the Constitution.
- (iv) Its meaning and/or definition is the same as that of the international law derived from UNESCO's World Declaration for All, endorsed by the Committee on the Covenant on Economic, Social and Cultural Rights [CESCR] in its General Comment No. 13. Furthermore, its elaborate definition is the one which has been produced by UNESCO's and the CESCR's Experts Consultation Workshop on the Operational Definition of Basic Education. The aforesaid definition and/or meaning summary has already been provided in Chapter 2, heading 5 of this study.
- (v) The aforesaid meaning has been endorsed by the State in the White Paper on Education and Training Notice 196 of 1995 through the Ministry of Education by associating itself with the meaning of ‘a basic education’. Therefore, ‘a basic education’ within the context of the South African education milieu covers pre-schooling through ninth grade – and “further” education as “post-compulsory” education tenth grade and beyond. The word ‘beyond’ here will mean progressive extension to 12 years, as elaborated by the Experts' Consultation on the Operational Definition of Basic Education.
- (vi) When one reflects on the educational interest to be achieved by the guarantee of the right, purpose and benefits that should accrue from when an individual has acquired basic education, benefits of which are being able to survive, develop one's full capacities, lift oneself out of poverty, obtain the means to participate fully in the community, live and work in dignity, improve quality of life, able to wander freely and widely, make informed decisions, and continue learning. Therefore, this affirms the view that basic education cannot be arbitrarily defined in terms of the age or the completion of a particular level of schooling, but is determined in accordance with the conglomeration of the basic learning needs which comprise of both essential learning tools and basic learning content, as well as its duration, which is of a period of at least nine years and progressively extending to 12 years of schooling.

- (vii) The National Development Plan³⁵⁸ also directs that the level of compulsory education should be extended to successful completion of Grade 12 in basic education, or the equivalent in the post-school sector.
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³⁵⁸ National Planning Commission 2012: 306.

CHAPTER 4

THE CURRENT STRUCTURE FOR PROVIDING A BASIC EDUCATION

1. INTRODUCTION

In this chapter the primary policy framework and statutes that give effect to the ‘core content’ of the right to ‘a basic education’ will be briefly discussed. The policy framework is the White Paper on Education and Training [hereafter “White Paper 1”],³⁵⁹ and the Education White Paper 2: The Organisation, Governance and Funding of Schools [hereafter “White Paper 2”],³⁶⁰ and main pieces of legislation, namely, the National Education Policy Act [NEPA],³⁶¹ the South African Schools Act [SASA],³⁶² and the Employment of Educators Act [EEA]³⁶³ that seek to safeguard this constitutional right.

It is on this basis that a consideration is required of the aforesaid relevant policy and statutory framework, which is where this analysis begins.

2. POLICY AND LEGISLATIVE FRAMEWORK

2.1 White Paper 1

A White Paper is a document which describes the first steps in policy formation by the Ministry of Education in the Government of National Unity.³⁶⁴ It, amongst others, discusses in detail two significant policy initiatives for the school system: the organisation, governance and funding of schools, and the approach to the provision of free and compulsory general education.³⁶⁵

³⁵⁹ DoE 1995.

³⁶⁰ DoE 1996.

³⁶¹ 27/1996.

³⁶² 84/1996.

³⁶³ 76/1998.

³⁶⁴ DoE 1995: ch 1, par 1.

³⁶⁵ DoE 1995: ch 1, par 1.

It provides that basic education is thus a legal entitlement to which every person has a claim.³⁶⁶ For children, the right would be satisfied by the availability of schooling facilities sufficient to enable every child to begin and complete a basic education programme of acceptable quality.³⁶⁷

Attaining this level of availability of opportunity for basic education will be an immense achievement in the reconstruction and development of the country.³⁶⁸

It further acknowledges that since the term "basic education" is not defined in the Constitution, it must be settled by policy in such a way that the intention of the Constitution is affirmed.³⁶⁹

It poses an important question on whether basic education should be defined in terms of learning needs and outcomes, or qualification levels, or school grades, and whether the content of basic education needs to be the same for children, youth and adults.³⁷⁰

It then answers it by saying that the World Conference on Education for All, sponsored by the United Nations in 1990, addressed such questions in its authoritative World Declaration on Education for All. Article 1 of the Declaration makes the following statement on "basic learning needs":

Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their

³⁶⁶ DoE 1995: ch 6, par 11.

³⁶⁷ DoE 1995: ch 6, par 11.

³⁶⁸ DoE 1995: ch 6, par 11.

³⁶⁹ DoE 1995: ch 7, par 12.

³⁷⁰ DoE 1995: ch 6, par 12

*lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should continue to be met varies with individual countries and cultures, and inevitably, changes with the passage of time.*³⁷¹

The Ministry of Education associated itself with the above-mentioned statement on the definition of basic education.³⁷² The White Paper provides that basic education must be defined in terms of learning needs appropriate to the age and experience of the learner, whether child, youth or adult, men or women, workers, work seekers or self-employed.³⁷³ Basic education programmes should therefore be flexible, developmental, and targeted at the specific requirements of particular learning audiences or groups, and should provide access to a nationally recognised qualification or qualifications.³⁷⁴

It further provides that the Department of Education will commission a thorough examination of these instruments and their implications for South African education.³⁷⁵ It will examine the implications of other important international documents such as the World Declaration on Education for All (World Conference on Education for All, 1990), and the Charter on the Rights and Welfare of the African Child (OAU, 1992).³⁷⁶

It finally recognises that the Constitution requires the government to make adequate provision to satisfy the fundamental right of all persons to basic education and to equal access to educational institutions.³⁷⁷ It also acknowledges that a better educated and skilled workforce is a prerequisite for enhanced productivity in the domestic economy and competitiveness in international markets, and significant growth in entrepreneurship and small business development.³⁷⁸

³⁷¹ DoE 1995: ch 6, par 13

³⁷² DoE 1995: ch 7, par 14.

³⁷³ DoE 1995: ch 7, par 14.

³⁷⁴ DoE 1995: ch 7, par 14.

³⁷⁵ DoE 1995: ch 7, par 4.

³⁷⁶ DoE 1995: ch 7, par 4.

³⁷⁷ DoE 1995: ch 11, par 7.

³⁷⁸ DoE 1995: ch 11, par 7.

A better educated and skilled child, youth and adult population is the only sure guarantor of democratic freedoms, environmental protection, public health, and reduced crime and violence.³⁷⁹

2.2 White Paper 2

Education White Paper 2³⁸⁰ came up with the important broad principles on how schools should be organised, governed and funded. The Paper provides that the Ministry of Education has strongly endorsed parental rights in their children's education. Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by the state authorities with respect to the form that education should take and to take part in its governance.³⁸¹ Parents will also have the inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the state or not, subject to reasonable safeguards which may be required by law.³⁸² The parents' right to choose includes choice of the language, cultural or religious basis of the child's education, with due regard to the rights of others and the rights of choice of the growing child.³⁸³

It further provides that each public school will represent a partnership between the provincial education department and the local community.³⁸⁴ This concept is of fundamental value in reconciling the respective responsibilities of the government and

³⁷⁹ DoE 1995: ch 11, par 8.

³⁸⁰ DoE 1996.

³⁸¹ DoE 1996: par 1.10. See *Ermelo* par 79 where it was held that the effective power to run schools is indeed placed in the hands of the parents and guardians of learners through the school governing body.

³⁸² DoE 1996: par 1.10.

³⁸³ DoE 1996: par 1.10. See *Ermelo* par 99 where it was indicated that a school is obliged to exercise its power to select a language policy in a manner that takes on board the provisions of Section 29 (2) of the Constitution, 6 (2) of SASA, and Norms and Standards prescribed by the Minister. In the case of *Pillay* par 102, the Court said granting exemption for practicing or observing a particular religion or culture will have the added benefit of inducting the learners into a multi-cultural South Africa where vastly different cultures exist side-by-side.

³⁸⁴ DoE 1996: par 2.7.

the community.³⁸⁵ It is the basis for reconstructing the system of public education.³⁸⁶ Once the concept has been given legislative form, the terms of the partnership between the State and the community will be negotiable between the provincial education departments and the schools.³⁸⁷ In this way, public schools serving South Africans will progressively enjoy common characteristics based on an evolutionary model of local school governance.³⁸⁸ This is not to say that all public schools will be the same.³⁸⁹

The White Paper 2 further envisages that public schools will have at least the following features in common:³⁹⁰

- (1) Each public school will represent a partnership between the provincial education department and the local community;³⁹¹
- (2) Public schools will be funded totally or largely from public resources, that is, from provincial education department budgets, and with few exceptions their property will be owned by the state;³⁹²
- (3) The admission policies of public schools will be determined by governing bodies in consultation with provincial education departments, in terms of national norms and provincial regulations, and will uphold constitutionally guaranteed rights and freedoms;³⁹³

³⁸⁵ DoE 1996: par 2.7.

³⁸⁶ DoE 1996: par 2.7.

³⁸⁷ DoE 1996: par 2.7. See *Ermelo* par 56, where it was held that public schools are run by three crucial partners, being the Minister of Basic Education, the Member of the Provincial Executive Council at the Provincial level who is responsible for education, together with the Head of the Department, and parents of the learners and members of the community in which the school is located.

³⁸⁸ DoE 1996: par 2.7.

³⁸⁹ DoE 1996: par 2.7.

³⁹⁰ DoE 1996: par 2.9.

³⁹¹ DoE 1996: par 2.9.

³⁹² DoE 1996: par 2.9.

³⁹³ DoE 1996: par 2.9.

(4) The mission, policy, and character or ethos of each public school will be determined within national and provincial frameworks by a governing body comprising elected representatives of the main stakeholders of the school;³⁹⁴

(5) The salaries of teachers in each public school will be paid by the provincial education department according to a staff provisioning scale, and such teachers will be appointed in each public school by the provincial education department on the recommendation of, and in consultation with, the school's governing body.³⁹⁵

2.3 The National Policy Act 27 of 1996

The National Policy Act was one of the two [the South African Schools Act included]³⁹⁶ statutes that were introduced to transform the system of what had formerly been apartheid education in South Africa.³⁹⁷ The National Education Policy Act, as its name indicates, was introduced to complement the Schools Act by empowering the Minister to determine national policy for education.³⁹⁸ Education is classified as a functional area of concurrent national and provincial legislative competence. National legislation prevails over provincial legislation where, amongst other things,

“[t]he national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

- (i) norms and standards;
- (ii) frameworks; or
- (iii) national policies.”³⁹⁹

The Minister has promulgated a number of policies providing uniformity in education,

³⁹⁴ DoE 1996: par 2.9.

³⁹⁵ DoE 1996: par 2.9.

³⁹⁶ *Minister of Education v Harris* [2001] ZACC 25 at par 7 [hereafter “Harris”].

³⁹⁷ *Harris* par 7.

³⁹⁸ *Harris* par 8.

³⁹⁹ *Harris* par 8. See also Schedule 4 part A and Section 146 (2)(b) of the Constitution.

such as the National Policy on Religion and Education⁴⁰⁰, which recognises the rich and diverse religious heritage of South Africa, and protects learners from religious discrimination or coercion; the Norms and Standards for Educators,⁴⁰¹ describing educators' roles, their associated set of applied competencies and qualifications for the purposes of the recognition and evaluation of qualification for employment as an educator; Approval For the Conduct of a Pilot Study in Selected Schools in All Provinces with the Aim of Promoting and Developing Previously Marginalised African Languages in South Africa;⁴⁰² the Policy on Learner Attendance⁴⁰³ which is aimed at promoting punctual and regular attendance at public schools; as well as the Admission Policy on Ordinary Public Schools,⁴⁰⁴ aimed at providing a framework to all provincial departments of education and governing bodies of public schools for developing the admission policy of the school.⁴⁰⁵

Of importance is Section 2 of the Act which spells out the objectives of NEPA, where the Minister is bestowed with certain powers to determine national education policy in accordance with certain principles;⁴⁰⁶ which must be in line with the Constitution and NEPA itself, undertake consultation before the determination of any policy, and establish certain bodies for the purpose of consultation;⁴⁰⁷ publicise and implement national education policy;⁴⁰⁸ and monitor and evaluate basic education.⁴⁰⁹

What the Minister of Basic Education is entitled to perform in connection with policy formulation is only what the law empowers him or her to do,⁴¹⁰ as contained in Section 3 of NEPA, which contains a whole range of policy issues.

⁴⁰⁰ GN 1307/2003.

⁴⁰¹ GN 82/2000 par 1.

⁴⁰² GN 1098/2013.

⁴⁰³ GN 361/2010.

⁴⁰⁴ GN 2432/1998.

⁴⁰⁵ GN 2432/1998: par 4.

⁴⁰⁶ NEPA: s 2 (a).

⁴⁰⁷ NEPA: s 2 (b).

⁴⁰⁸ NEPA: s 2 (c).

⁴⁰⁹ NEPA: s 2 (d).

⁴¹⁰ *Welkom & Harmony* par 1.

In the case of *Harris*, the Minister of Education had published a notice, namely the Draft Age Requirements for Admission to an Independent School Policy under Section 3 (4) of the National Education Policy Act stating that a learner may not be enrolled in Grade one in an independent school if the learner had not reached the age of seven in the same calendar year. A certain learner was part of a group of children who had enrolled at the age of three at a certain independent school, and had already spent three years being prepared for entry to the primary school in 2001. Her sixth birthday was due on 11 January 2001, a short while before the school year would have started. In terms of the aforesaid notice, she would have had to wait another academic year to turn seven before she could be allowed to be enrolled in Grade one. Her parents challenged the validity of the notice and sought an order of court permitting her to be enrolled in Grade one in the year she turned six.

The Constitutional Court, in the unanimous judgement penned by former Justice Albie Sachs remarked as follows about the aforesaid Act:

Policy made by the Minister in terms of the National Policy Act does not create obligations of law that bind provinces, or for that matter parents or independent schools. The effect of such policy on schools and teachers within the public sector is a different matter. For the purposes of this case, it is necessary only to determine the extent to which policy formulated by the Minister may be binding upon independent schools. There is nothing in the Act which suggests that the power to determine policy in this regard confers a power to impose binding obligations. In the light of the division of powers contemplated by the Constitution and the relationship between the Schools Act and the National Policy Act, the Minister's powers under section 3(4) are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners. Yet the manifest purpose of the notice is to do just that.⁴¹¹

The Court ruled that the notice issued by the Minister intended to impose legally binding obligations upon independent schools and upon MECs; as a result the Minister exceeded the powers conferred upon him by Section 3 of the National Policy Act,⁴¹² and accordingly infringed the Constitutional principle of legality, which is the bedrock of our constitutional dispensation, and has long been enshrined in our law.⁴¹³

⁴¹¹ *Harris* par 11.

⁴¹² *Harris* par 13.

⁴¹³ *Welkom & Harmony* par 1.

The aforesaid legal position on the status of the policy promulgated by the Minister was echoed and resonated in *Welkom and Harmony High School*. In this regard, the Court pronounced that any policy promulgated by the Minister could only be general in nature and would have to be particularised by school governing bodies in order to provide a systematic set of rules and norms that are accommodating of a particular school's circumstances.⁴¹⁴

The following are some of the examples published under the South African Schools Act: Regulations for Safety Measures at Public Schools⁴¹⁵ to provide for safety, violence and drug-free public schools; Regulations to Prohibit Initiation Practices in Schools⁴¹⁶ to not allow any practice which involves initiation practices or may cause or contribute to the humiliation or maltreatment of learners; and Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure,⁴¹⁷ which ensure that there is compliance with the minimum uniform norms and standards in the design and construction of new schools, additions and improvements, as well as providing for time frames within which school infrastructure backlogs must be eradicated.

2.4 South African Schools Act 84 of 1996

As indicated above, the South African Schools Act is one of the two statutes that were introduced in 1996 to transform the education system.⁴¹⁸ The sweep of the proposed transformation can be gauged from the Preamble to the Schools Act.

The Preamble provides the spirit and purport of the Act by indicating that whereas South Africa has achieved democracy, the country needed a new educational system for schools which would redress the wrongs of the past in the provision of education and would provide education of a progressively high quality for all learners.

⁴¹⁴ *Welkom & Harmony* par 67.

⁴¹⁵ GN 1040/2001.

⁴¹⁶ GN 1589/2002.

⁴¹⁷ GN R920/2013.

⁴¹⁸ Harris par 7.

The Preamble provides further that a new education system must lay a foundation for the development of all people's talents and capabilities and advance the democratic transformation of society and combat racism, sexism, unfair discrimination and the eradication of poverty.⁴¹⁹ The Preamble also expresses the intent to advance diverse cultures and languages and to uphold the rights of learners, parents and educators.⁴²⁰ It also states plainly that the statute aims at making parents and educators accept the responsibility for the organisation, governance and funding of schools, in partnership with the state.⁴²¹

In order to locate the 'core content' of the right to 'a basic education', the Schools Act is one of the relevant instruments to be consulted. The avowed purpose of the Schools Act is to give effect to the constitutional right to education.⁴²² Taking into account where South Africa comes from, it would be a travesty to overlook the gains made by the State to deliver on the 'core content' of the right to a basic education: In the words of Justice Khampepe in *Welkom and Harmony High Schools*, the following was said:

*[g]iven this legacy, the state's obligations to ensure that the right to education is meaningfully realised for the people of South Africa are great indeed. The primary statute setting out these obligations is the Schools Act.*⁴²³

In fact, what the Court indicated is that each school must be flexible when formulating any policy in line with any determination made by the Minister to suit their prevailing circumstances; as what may be practicable at a certain school, will not necessarily be feasible at another school. If schools were to be expected to strictly adhere to exactly the same forms of assistance, it would be unfair, unreasonable and impractical.⁴²⁴

⁴¹⁹ *Ermelo* par 55.

⁴²⁰ *Ermelo* par 55. See also Harris par 7.

⁴²¹ *Ermelo* par 55.

⁴²² *Ermelo* par 55.

⁴²³ *Welkom & Harmony* par 36.

⁴²⁴ *Welkom & Harmony* par 67.

2.5 The Employment of Educators Act 76 of 1998

The other statute which is relevant to the determination of the ‘core content’ of the right to ‘a basic education’ is the Employment of Educators Act. The Schools Act must, of course, be read in conjunction with other applicable legislation. In this regard, the Employment of Educators Act is relevant.⁴²⁵ The purpose of the Act is to provide for the employment of educators by the State, for the regulations of service, discipline, retirement and discharge of educators, and for matters therewith.

In order to convey the main sources of subject content, educators play a significant role therein. [H]aving a teacher in the classroom is an important aspect of giving substance to a child’s right to education.⁴²⁶

Section 29(1) of the Constitution guarantees the right to a basic and further education. The government’s statutory obligations to determine educators’ needs of schools must therefore be exercised with due regard to this right and the provisions of Section 7(2), which enjoins the State to respect, protect, promote and fulfil the rights in the Bill of Rights.⁴²⁷

Deacon puts the role of the educators in proper context by indicating that [e]ducation is concerned with the pedagogy of teaching and learning. An educator is a person trained in teaching, a specialist in the theory and practice of education.⁴²⁸ As will be reflected in this study, the provision of educators forms part and parcel of the ‘core content’ of the right to ‘a basic education’. It is clear that if this right is to be properly realised the following will be incumbent upon the State: quality educator education, and the development and the establishment of conditions in which the professionalisation of the teaching profession is possible. However, *Deacon* goes further to contend that “[w]e do not need more legislation, more rules or more codes of conduct. We need courageous leaders. We need committed educators with a passion for teaching, who will be respected as role models by the school community. We do not need more

⁴²⁵ *Welkom & Harmony* par 50.

⁴²⁶ *Phenithi v Minister of Education and Others* [2005] ZASCA 130 at par 25.

⁴²⁷ *South African Democratic Teachers’ Union (SADTU) and others v Member of Executive Council, Department of Basic Education: Eastern Cape Province and Others* [2013] ZAECBH 2 par 11.

⁴²⁸ *Deacon* 2012a: 4.

employees, we need professional teachers”⁴²⁹.

2.6 Partnership model to provide ‘a basic education’

It is a well-known phenomenon that education is a societal issue.⁴³⁰ Schools are centres of community life. This means that each community should regard a school as its asset: to be protected, guided and nurtured. By doing that, communities will play a vital role in helping all children succeed in school and later in life. When parents, teachers, students and the community view one another as partners in education, a caring community forms around learners that produces positive results.⁴³¹

The issue of the partnership arrangement of all relevant stakeholders was first recognised in, among others, the White Paper on Education and Training,⁴³² as well as the Education White Paper 2.⁴³³ The latter paper sets out the policy of the Government of National Unity on the Organisation and Governance of schools, and the development of capacity for school leadership and governance throughout the country. This is also in line with the values of South Africa’s Constitutional Supremacy, which makes provision for a participatory democracy to be seen working at our public schools.

It is clear in terms of White Paper 1 and White Paper 2, as well as SASA, that in order to deliver on the ‘core content’ of the right to ‘a basic education’, our education system requires that it must be driven by the people, for the benefit of their children, and with the sole purpose of delivering it to them in the form of a viable partnership.⁴³⁴ One commentator, *Smit*, argues that “in education, democratisation has been formalised with the redistribution and extension of power to local school governing bodies with the removal of centralised control over certain aspects of educational decision-making. The directive principle in Section 4(m) of the National Education Policy Act contains the democratic requirements that the National Minister of

⁴²⁹ Deacon 2012a: 16.

⁴³⁰ DBE 2011d:1.

⁴³¹ DBE 2011d:1.

⁴³² DoE 1995.

⁴³³ DoE 1996.

⁴³⁴ *Ermelo* par 56.

Education must ensure broad public participation in the development of education by including stakeholders in the policy making and governance of the education system”.⁴³⁵

The South African Schools Act gave formal effect to the establishment of democratic structures of school governance which provide the basis for cooperative governance between education authorities and the school to establish a democratic power sharing and cooperative partnership among the state, parents and educators.⁴³⁶

The idea of decentralisation is vested in the principle that the State alone cannot control schools, but that schools should be governed by collaborating with all stakeholders.⁴³⁷ The idea is that when schools and communities work in partnership, a true mutual responsibility will grow.⁴³⁸

However, in practice one has observed that since the advent of democracy in the country and the promulgation of education laws, there have been a number of disputes that centred around the administrative and governance terrain.⁴³⁹ There is always a tussle about powers between the relevant key partners in the provision of ‘a basic education’. The study will only cite a handful of these cases⁴⁴⁰ where the partners engaged in a power struggle in the school environment and in the process lost sight of their core business and clients - being a provider of ‘a basic education’ to learners, who are children. It is often said that when *two elephants fight, it is usually the grass that suffers*. The Constitutional Court in *Rivonia* recently said the following:

There are various stakeholders, a diversity of interests and competing visions. Tensions are inevitable. But disagreement is not a bad thing. It is how we manage those competing interests and the spectrum of views that is pivotal to developing a way forward. The Constitution provides us with a reference point – the best interests of our children. The trouble begins when we lose

⁴³⁵ Smit 2008: 73.

⁴³⁶ Smit 2008: 73.

⁴³⁷ Du Plessis 2012: 4.

⁴³⁸ Du Plessis 2012: 4.

⁴³⁹ *Welkom & Harmony* par 165.

⁴⁴⁰ *Welkom & Harmony, Ermelo, Rivonia*.

*sight of that reference point. When we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships to meet the educational needs of children.*⁴⁴¹

Now we take a few steps backward to reflect on a number of bureaucratic actions and incorrect administrative decisions by partners that have led to legal disputes that indicated a disregard for, or misunderstanding of the democratic values and principles that are necessary to promote effectiveness and efficiency in education,⁴⁴² in order to deliver on the ‘core content’ of a right to ‘a basic education’. In the case of *Schoonbie and others v MEC for Education, Mpumalanga* [hereafter “Schoonbie”],⁴⁴³ where the learned *Judge Moseneke* [as he then was] and *Judge Mynhardt* had the following to say:

- *that the governing body is, as far as the finances of the schools are concerned, the entity saddled with the liability and obligations to deal with the funds of the school in the manner provided for by the Schools Act,*
- *the Provincial HOD cannot hold the Principal and the Deputy Principal accountable for statutory responsibilities of the SGB,*
- *the mere fact that the two sat as members of the SGB, had not made them the SGB,*
- *the contention that the Principal should be held accountable as the accounting officer of a public school and its funding was an absurd proposition; the Department had barked up the wrong tree when it tried to hold the Principal accountable,*

In *Pillay*, the Court concluded that it needs to be emphasised that the strength of public schools will be enhanced only if parents, learners and teachers accept that all South Africans own our public schools and that we should take responsibility for their continued growth and success.⁴⁴⁴ Where possible, processes should be available in schools for the resolution of disputes, and all engaged in such conflict should do so with civility and courtesy.⁴⁴⁵

The nature of this statutory partnership was first in South Africa’s legal jurisprudence, outlined

⁴⁴¹ *Rivonia* par 2.

⁴⁴² Smit 2008: 74.

⁴⁴³ *Schoonbie* TPD, 2002 (4) SA 877.

⁴⁴⁴ *Pillay* par 185.

⁴⁴⁵ *Pillay* par 185.

as follows in the above-mentioned matter:

Having read the Act again it seems to me that the new education regime introduced by the Schools Act, which came into operation on 1 January 1996, contemplates an education system in which all the stakeholders, and there are four major stakeholders – the State, the parents, educators and learners – enter into a partnership in order to advance specified objectives around schooling and education. It was intended, it appears, to be a migration from a system where schools are entirely dependent on the largesse of the State to a system where a greater responsibility and accountability is assumed, not just by the learners and teachers, but also by parents.⁴⁴⁶

In the recent case of *Welkom and Harmony High Schools*, Justice Khampepe in the majority judgement had to emphasise the importance of partnership within the school environment for the benefit of all partners as follows:

Under the Schools Act, two things are perspicuous. First, public schools are run by a partnership involving the state, parents of learners and members of the community in which the school is located. Each partner represents a particular set of relevant interests and bears corresponding rights and obligations in the provision of education services to learners. Second, the interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by the Act. Parliament has elected to legislate on this issue in a fair amount of detail in order to ensure the democratic and equitable realisation of the right to education. That detail must be respected by the Executive and the Judiciary.⁴⁴⁷

The courts, particularly the highest Court in the land, has now realised that the partners in the provision of ‘a basic education’ to our children do not respect this sacrosanct relationship. It has become aware that the relevant partners have the propensity of taking their eyes off the ball and wasting time by tackling each other before the various courts in the land. It has made it clear by inference that it is aware of this unfortunate situation in the recent case of *Rivonia Primary School* that it had to decide on. On this aspect it remarked as follows:

⁴⁴⁶ *Schoonbie* par 883E-G. See also *Bastian Financial Services Pty Ltd v General Hendrik Schoeman Primary School* [2008] ZASCA 70 at par 23.

⁴⁴⁷ *Welkom & Harmony* par 49.

*This matter is the latest instalment in a trilogy of school-related cases in this Court which, at their heart, concern the powers of a provincial department in relation to policies adopted by school governing bodies. The question that keeps coming back to this Court is whether a head of department is entitled to override or depart from a policy adopted by a school governing body.*⁴⁴⁸

The trilogy of school-related cases the Court is referring to here is *Ermelo Hoërskool, Welkom and Harmony High Schools* and *Rivonia Primary School* referred to above.

In order to set the record straight for all the relevant partners to follow so that the ‘core content’ of a right to ‘a basic education’, which must be of a high quality and be given to all South African children in order to develop their talents and capabilities, the Court in *Welkom and Harmony High Schools* had to pronounce the following with authority and in details for all partners to understand the importance of this partnership:⁴⁴⁹ *Justice Khampepe* stated that:

*The importance of cooperative governance cannot be underestimated. It is a fundamentally important norm of our democratic dispensation, one that underlies the constitutional framework generally and that has been concretised in the Schools Act as an organising principle for the provision of access to education. Neither can we ignore the vital role played by school governing bodies, which function as a “beacon of grassroots democracy” in ensuring a democratically run school and allowing for input from all interested parties.*⁴⁵⁰

The Court went on further, as per *Justice Froneman and Skweyiya*, to pronounce that:

*Instead, the parties lost patience with each other and rushed to court. The focus then turned into a power play: who has the final say over the conduct of the principals of the schools? Lost in translation was that the best interests of the children at the schools were of paramount importance and that the powers of the school governing bodies and HOD were subservient to the children’s needs.*⁴⁵¹

⁴⁴⁸ *Rivonia* par 46.

⁴⁴⁹ *Welkom & Harmony* par 121.

⁴⁵⁰ *Welkom & Harmony* par 123.

⁴⁵¹ *Welkom & Harmony* par 132.

*The Constitution and applicable legislation thus require the partners in the governance and management of schools to engage with one another in mutual trust and good faith on all material matters relating to that endeavour.*⁴⁵²

In this instance, the principle of cooperative governance and partnership require that all the partners in the position of basic education must strive to resolve their disputes; what should first dictate their engagements, should be the best interest of all learners affected as their point of departure.

The Court finally remarked as follows:

*What must be emphasised is that timeous planning and sustained communication between the parties are the most powerful barriers against these types of disputes arising and the learners' interests being compromised in the process. Where a crisis requiring immediate redress arises, the duty to engage, co-operate and communicate in good faith does not dissolve. Any short-term remedial action taken in the interim to secure the learners' rights must, however, be done in a lawful manner.*⁴⁵³

The aforesaid emphasis on the relevant stakeholders' constitutional and statutory obligation to engage in good faith before turning to the courts was reiterated by the Constitutional Court in *Rivonia Primary School* as follows:

*This case illustrates the damage that results when some functionaries fail to take the general obligation to act in partnership and cooperation seriously.*⁴⁵⁴

The heavy-handed approach he used when making his decision raised the spectre that the Department would use its powers to deal with systemic capacity problems in the province without any regard for the role of school governing bodies in the Schools Act's carefully crafted

⁴⁵² *Welkom & Harmony* par 152.

⁴⁵³ *Welkom & Harmony* par 166.

⁴⁵⁴ *Rivonia* par 74.

*partnership model. It created antagonism and mistrust, causing the Rivonia Governing Body to recoil.*⁴⁵⁵

*Equally problematic was the Rivonia Governing Body's reaction. Desiring to safeguard its own authority, the school failed to place the interests of the learner first. Instead, it resorted to litigation.*⁴⁵⁶

*In this case there is particular reason to emphasise the duties of co-operative governance and the impact they might have on the children concerned. The duty on the parties to cooperate and attempt to reach an amicable solution is intimately connected to the best interests of the child. The failure of the Gauteng HOD and the Rivonia Governing Body adequately to engage had a direct effect on the learner. I would imagine that starting Grade 1 is a stressful and scary time for any child.*⁴⁵⁷

*Both parties could and should have done more to prevent the need for litigation. As stated earlier, disagreement is not necessarily a bad thing, and we must expect that in trying to determine what the best interests of learners are there may be differing visions. But one organ of state cannot use its entrusted powers to strong-arm others. All sides are required to work together in partnership to find workable solutions to persistent and complex difficulties – and resorting to court in every skirmish is not going to help in that process.*⁴⁵⁸

Van der Merwe puts this in a proper context by contending that shareholders in this partnership must be treated as partners, not as employees, subordinates, servants, or even property.⁴⁵⁹

Indeed, in the best interests of South African learners and their basic education, partners in education should embrace the partnership model and work together to impart quality education to all affected children. If partners work together, they can do more.

⁴⁵⁵ Rivonia par 75.

⁴⁵⁶ Rivonia par 76.

⁴⁵⁷ Rivonia par 77.

⁴⁵⁸ Rivonia par 78.

⁴⁵⁹ Van Der Merwe 2012: 10.

3. SUMMARY AND CONCLUSION

In the current legislative milieu, the right to ‘a basic education’ is given effect by three important statutes, namely the South African Schools Act, the National Education Policy Act, as well as the the Employment of Educators Act. These are the primary legislation that was introduced by the State to transform the current education system.

One model embedded in South Africa’s education system is the partnership relationship which conforms to the notion which says that education is a societal issue. This accords well with one of the cornerstones of our democracy, being a participatory democracy at grassroots level, and where in a decentralised State like ours, that the State alone cannot control schools, but that schools should be governed by collaborating with all stakeholders. Having discussed in detail how the partnership model should be jealously guarded in order to be effective and efficient, even though it is conceded that there will always be some sort of tension, diversity of interests and competing visions between the relevant stakeholders, they should meaningfully engage each other through consultation and cooperate in mutual trust and good faith as required by the principle of corporative governance on any issue before resorting to the courts, which must be the last resort.

In doing this, there will be due respect by partners of the separation between governance and professional management powers so as to strive for effective functioning of public schools, and consequently, achieve goals of providing high quality education to all learners and develop their talents and capabilities, which is connected to the organisation and governance of the education system.

CHAPTER 5

THE FEATURES OF THE CORE CONTENT OF THE RIGHT TO A BASIC EDUCATION

1. INTRODUCTION

It has been the submission of this study that the General Comment No. 13 published by the Committee on Social, Economic and Cultural Rights [CESCR] provides for the comprehensive description of the ‘core content’ of the right to ‘a basic education’.

The International Committee for Economic, Social and Cultural Rights has accepted the so-called ‘Four A’ as an appropriate standard by which to measure a state’s compliance with its obligation to provide a basic education: (a) availability/adequacy, (b) accessibility, (c) adaptability, and (d) acceptability. While there may be more to a basic education than is captured by these terms, they do provide a valuable departure point for thinking about what, practically speaking, a basic education requires.⁴⁶⁰

The commitment by the State to deliver on the ‘core content’ of the right to ‘a basic education’ is clear from what *President Jacob Zuma* once declared in his first State of the Nation address on 3 June 2009, where he called for critical “non-negotiables” aimed at ensuring quality education by pronouncing the following:

Education will be a key priority for the next five years. We reiterate our non-negotiables. Teachers should be in class, on time, teaching, with no neglect of duty and no abuse of pupils! The children should be in class, on time, learning, be respectful of their teachers and each other, and do their homework. Other sectors, including officials and parents, are also expected to play their respective roles in reaching this goal.⁴⁶¹

Further, the National Development Plan provides a clear vision which suggests that:

⁴⁶⁰ Woolman & Bishop 2009: 57–18 to 57–19.

⁴⁶¹ The Presidency Republic of South Africa: 2009.

*By 2030, South Africa should have education and training of the highest quality, leading to significantly improved learning outcomes. The performance of South African learners in international standardised tests should be comparable to the performance of learners from countries at a similar level of development and with similar levels of access. Education should be compulsory up to Grade 12 or equivalent levels in vocational education and training.*⁴⁶²

Before the ‘Four A’ scheme is analysed and in line with Section 39 (1)(c) of the Constitution, a brief examination of the jurisprudence of foreign jurisdictions on the question of having regard to the minimum core content of the socio-economic right, as interpreted by the Committee on Economic Social and Cultural Rights [CESCR]⁴⁶³, will be made herein. The examination will be on the extent to which courts from other jurisdictions have been willing to give content to rights. A number of national constitutions have included justiciable socio-economic rights and in other countries, civil and political rights have been interpreted so as to encompass within their ambit, certain socio-economic rights. However, it is the case law⁴⁶⁴ that will be examined in the chapter, which is where my analysis begins.

2. FOREIGN LAW

Broadly, two approaches to minimum core can be identified in the case law - a wholehearted acceptance of the minimum core approach with reference to the international discourse on socio-economic rights, as is the case with the Colombian Constitutional Court, an acceptance of the minimum core approach which is a more domesticated understanding of the concept, as is the case with the Indian Supreme Court and the State of New York.⁴⁶⁷

State of New York (NY):

The United States Constitution does not include socio-economic rights, but some of the State Constitutions do.⁴⁶⁸

⁴⁶² National Planning Commission 2012: 296.

⁴⁶³ Chowdhury 2009: 7.

⁴⁶⁴ Chowdhury 2009: 7

⁴⁶⁷ Chowdhury 2009: 7.

⁴⁶⁸ Chowdhury 2009:10

The State of New York's Constitution requires the State "to offer all children the opportunity of a sound basic education".⁴⁶⁹

In the case of *Campaign for Fiscal Equity, Inc. v State of New York* [hereafter Campaign for Fiscal Equity], the Plaintiffs had sought a declaratory judgement against the State, claiming that students in New York City's public schools were not receiving a basic education and that the State's public school financing system was unconstitutional. Mindful of the fundamental value of education in the United States, the State Supreme Court agreed with the Plaintiffs' interpretation of the Education Article. The Court in giving effect to the "core content" of the right to "a sound basic education", made the following determinations:

- The State must ensure that New York's public schools are able to teach "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury";
- In assessing adequacy of education, this standard is the constitutional minimum or floor that the Court itself had acknowledged earlier, in *Board of Educ., Levittown Union Free School Dist. v Nyquist* (57 NY2d 27, 47-48 [1982])⁴⁷⁰ where in that case the Court had interpreted and gave content of the right to "a sound basic education" to include reference to the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers and certain non-teaching personnel, pupil transportation and other matters for the State to provide its maintenance and support of free schools in order that an education might be available to all the State's children;
- That because of inadequate funding for their public schools, children in New York City were not receiving the constitutionally-mandated opportunity for a sound basic education;
- That a sound basic education should be understood as teaching skills that enable students to undertake civil responsibilities meaningfully;
- That "sound basic education" should be defined more exactly, as the "opportunity for a meaningful *high school* education, one which prepares [children] to function productively as civic participants":

⁴⁶⁹ Campaign for Fiscal Equity, 29 AD3d 175, modified. Decided November 20, 2006 p 1.

⁴⁷⁰ Leagle.com page 4

- That New York City public schools provided inadequate teaching, because they were unable to attract and retain qualified teachers:
- That they were deficient in at least two instrumentalities of learning: libraries and computers:
- That large class sizes negatively affect student performance in New York City public schools;
- That whether measured by "inputs" or by "outputs," i.e. school completion rates and test results, New York City schoolchildren, were not receiving the opportunity for a sound basic education, and
- That increased funding can provide better teachers, facilities and instrumentalities of learning, and that such improved inputs in turn yield better student performance.⁴⁷¹

Having said the above, the State's Supreme Court then directed the State to:

- ensure, by means of "[r]eforms to the system of financing school funding and managing schools . . . that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education,
- to ascertain the actual cost of providing a sound basic education in New York City, rather than the state as a whole,
- ensure that the new scheme should make a provision for a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education,
- implement the necessary measures with a deadline of 30 July 2014, and
- for the State to come back to Supreme Court for further proceedings in compliance with the Court's order.⁴⁷²

Having shown how other courts of certain states, such as the State of New York, assist in determining the content of the right to a basic education as this study explores, Chowdhury argues that [t]he case does not use the precise term, minimum core, or reference the minimum

⁴⁷¹ Campaign for Fiscal Equity p 2-3

⁴⁷² Campaign for Fiscal Equity p 3.

core interpretations of the UN Committee on Economic and Social Rights, but the case does use terms such as constitutional minimum repeatedly.⁴⁷³

India

In Indian case law, there is no explicit mention per se of “minimum core”; nevertheless the concept appears to be used on a regular basis, couched in language such as the essential minimum of the right and what is minimally required.⁴⁷⁴

In the case of *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal & Another* (1996) AIR SC 2426/ (1996) 4 SCC 37 [hereafter *Paschim Banga*] the petitioner sustained serious injuries after falling off a train. He was refused treatment at six successive State hospitals, because the hospitals either had inadequate medical facilities or did not have a vacant bed.⁴⁷⁵

The Court declared that the right to life enshrined in the Indian Constitution (Article 21) imposes an obligation on the State to safeguard the right to life of every person and that preservation of human life is of paramount importance. This obligation on the State stands irrespective of constraints in financial resources. The Court stated that denial of timely medical treatment necessary to preserve human life in government-owned hospitals is a violation of this right. The Court asked the Government of West Bengal to pay the petitioner compensation for the loss suffered. It also directed the Government to formulate a blueprint for primary health care with particular reference to treatment of patients during an emergency.⁴⁷⁶

The Order by the Court in formulating a blueprint for primary health care is an indication that the Court constructed the right to emergency medical care for accident victims as a “core content” to the right to health as one of the socio-economic rights by prescribing remedial measures to rule out the recurrence of such incidents in future and to ensure immediate attention and treatment to

⁴⁷³ Chowdhury 2009:10.

⁴⁷⁴ Chowdhury 2009: 9.

⁴⁷⁵ International Network for Economic Social & Cultural Rights (ESCR-Net) 2015:1 Writ. Petn. Civil No. 796 of 1992 Also cited as (1996) AIR SC 2426/ (1996) 4 SCC 37

⁴⁷⁶ ESCR-Net 2015:1

a person in real need. Those remedial measures giving content to the right include, amongst others, that:

- Adequate facilities are available at the Primary Health Centres where the patient can be given immediate primary treatment so as to stabilise his condition;
- Hospitals at the District level and Sub-Division level are upgraded so that serious cases can be treated there;
- Facilities for giving Specialist treatment are increased and are available at the hospitals at District level and Sub-Division level having regard to the growing needs;
- In order to ensure availability of a bed in an emergency unit at a State level hospitals there is a centralised communication system so that the patient can be sent immediately to the hospital where the bed is available in respect of the treatment which is required;
- The proper arrangement of an ambulance is made for the transport of a patient from the Primary Health Centre to the District Hospital or Sub-Division Hospital and from the District Hospital or Sub-Division Hospital to the State Hospital.
- The ambulance is adequately provided with necessary equipment and medical personnel.⁴⁷⁷

The Court, with regard to the above, remarked that [i]t is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people.

Whatever is necessary for this purpose has to be done.⁴⁷⁸

Most telling is the Court's insistence that this obligation on the State stands irrespective of constraints in financial resources. This indicates that the Court considers the delineated minimum to be a non-negotiable.⁴⁷⁹

⁴⁷⁷ *Paschim Banga* par 15.1-6

⁴⁷⁸ *Paschim Banga* par 16.

⁴⁷⁹ Chowdhury 2009: 9.

Columbia

Chowdhury summarises the facts and principles of the Constitutional Court of Colombia, which explicitly embraces the minimum core approach in socio-economic rights adjudication.⁴⁸⁰ He stated that:

In July 2008, the Constitutional Court handed down a decision in which it ordered a dramatic restructuring of the country's health system. The Court demonstrated its commitment to the minimum core approach by giving very specific content to the right to health through its mandate that the right is immediately enforceable for certain categories (which it defines in detail) of plaintiffs even though they are unable to afford health care. For these categories, the Court has ordered the provision of a wide range of goods and services, including viral load tests for HIV/AIDS, as well as anti-retrovirals, costly cancer medication, and even the financing of treatment of patients from abroad when appropriate treatment was unavailable in Colombia, all of which are considerably resource intensive measures. The Court's decision is particularly relevant for the discussion herein because of its explicit adoption of the right to health framework set out by the United Nations Committee on Economic, Social and Cultural Rights (UN ESC Rights Committee). Further, when pronouncing on the right to health, the Court distinguished an essential minimum core of the right to health based on the POS (mandatory health plan) / POSS (subsidized mandatory health plan), which was to be immediately enforceable, and other elements that are subject to progressive realization taking into account resource constraints.

The first pillar of the 'core content' of the right to 'a basic education' is availability of that education.⁴⁸¹ It will be analysed to ascertain its relevance in the South African basic education context in order to determine the content of the right. This pillar of the 'Four A' Scheme is part of this useful benchmark against which to measure government's performance towards the realisation of the right to education.⁴⁸²

⁴⁸⁰ Chowdhury 2009: 8.

⁴⁸¹ Availability – functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State Party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer laboratory and information technology.

⁴⁸² Skelton 2013: 4-5.

3. AVAILABLE EDUCATION

3.1 Adequate Physical Infrastructure

According to *Tomasêvski*:

Availability embodies two different government obligations: the right to education as a civil and political right requires the government to permit the establishment of educational institutions by non-state actors, while the right to education as a social and economic right requires the government to establish them, or fund them, or use a combination of these and other means so as to ensure that education is available.⁴⁸³

The ability to develop the child's full potential depends on the 'availability' of education and on equality of opportunity. The child's ability to develop to his or her full potential is also dependent on the education system's ability to inspire and motivate children.⁴⁸⁴

Woolman and *Bishop* suggest that what the General Comment appears to envisage is the availability and the adequacy of educational infrastructure. The quality of education depends not only on the content of the curriculum, but on the material circumstances in which learners receive their education.⁴⁸⁵ These authors contend that there are three identified categories of inputs to determine the adequacy of a school system:

- (a) teaching,
- (b) school facilities and classrooms, and
- (c) the instrumentalities of learning.

'Teaching' encompasses the quality of teaching staff and the number of teachers per learner. 'School facilities and classrooms' require structures that protect learners from the elements. This category also requires desks, chairs, water, electricity and sanitation. As for the 'instrumentalities of learning', they embrace textbooks, blackboards, stationery and possibly computers.⁴⁸⁶ A

⁴⁸³ Tomasêvski 2001: 13

⁴⁸⁴ Reyneke 2013: 311.

⁴⁸⁵ Woolman & Bishop 2009: 57-19.

⁴⁸⁶ Woolman & Bishop 2009: 57-19.

clearer position is that the availability of education refers to what must physically be in place before the right to education is accessed. Availability thus refers to the necessary resources that must be available in order that the right to basic education can be accessed. Features that are considered include:

- Legislative provisions ensuring compulsory education.
- Physical infrastructure of schools.
- The provisioning of teachers.
- The supply of teaching materials.⁴⁸⁷

However, both McConnachie's viewpoint is that:

*This non-exhaustive list highlights five key elements of resource provision: school buildings that, at the bare minimum protect educators and learners from the elements, sufficient sanitation facilities that are also gender-sensitive, safe drinking water, adequate teaching materials, and access to facilities that enhance the quality of education, including libraries and computer facilities.*⁴⁸⁸

According to the previous statistics, the Department of Basic Education at national level has acknowledged that significant numbers of schools lack the most basic resources: water, sanitation and electricity. Large numbers of schools face serious problems with class size, the quality of educators, and the availability of learning materials.⁴⁸⁹ These statistics are well documented in the National Education Infrastructure Management System Reports [NEIMS] of May 2011.⁴⁹⁰ NEIMS is a database of public schools derived from the first survey [School Register of Needs – SRN] conducted in 1996 and updated in 2000.

According to the National Education Infrastructure Management Systems [NEIMS] study released by the Department of Basic Education in 2011, there were 24 793 Ordinary Public schools and 359 Special Needs schools. The 2011 Report made the following findings:

⁴⁸⁷ SAHR 2006: 10.

⁴⁸⁸ McConnachie C & C 2012: 573.

⁴⁸⁹ Woolman & Bishop 2009: 57 – 20.

⁴⁹⁰ DBE 2011e.

- (a) 3 544 schools had no electricity, while a further 804 schools had an unreliable electricity source;
- (b) 2 402 schools had no water supply, while a further 2611 schools had an unreliable water supply;
- (c) 913 schools did not have any ablution facilities, while 11 450 schools were using pit latrine toilets;
- (d) 19 541 schools did not have a space for a library;
- (e) 21 021 schools did not have any laboratory facilities, while only 1 231 schools had stocked laboratories;
- (f) 2 730 schools had no fencing at all; and
- (g) 19 037 schools did not have a computer centre.⁴⁹¹

However, the latest report which was released in October 2014 provides the following statistics about the infrastructure at various schools nationwide:

- (a) 1 131 have no electricity supply,
- (b) 2 773 have unreliable electricity supply,
- (c) 604 have no water supply,
- (d) 4 681 have unreliable water supply,
- (e) 474 have no ablution facilities [toilets],
- (f) 16 146 have no computer centres, and
- (g) 20 463 have no science laboratories.⁴⁹²

Twenty years after democracy, this ugly scar, deep social disparities and the resultant social inequity apartheid has left and the vast discrepancies in the availability of adequate public schools, *Veriava* argues that urgent steps are needed to address poor school infrastructure that

⁴⁹¹ DBE 2011e: Tables 1, 3, 4, 5, 6, 7, 8 & 9.

⁴⁹² *Mail & Guardian* 2014: 28 November.

leads to below-par results.⁴⁹³ He laments that the juxtaposition of “tree schools” [schools without classrooms or basic services] against the former Model C [historically white] schools, with their Olympic-sized pools, multiple sports fields and well-equipped laboratories and libraries, highlights the enduring infrastructure disparity in South Africa’s public schools.⁴⁹⁴ Between these extremes there exists a wide spectrum of schools, from traditional mud structures and township schools, to urban and suburban schools. Many of the latter also function in states of disrepair, but receive lower State allocations than they should. This is because such schools are incorrectly perceived as serving middle class communities, when in reality they accommodate poor pupils who sometimes undertake a considerable daily commute from township to suburb.⁴⁹⁵

One commentator, *Victoria John*, narrates a story on how their visiting group to the Eastern Cape witnessed the travesty of school infrastructure in the province. She indicates that the most disturbing part of the run-down, overcrowded classrooms in the Eastern Cape was not the sight of pupils sitting on concrete blocks or the long-drop toilets, it was discovering that the pupils did not know how wronged they were.⁴⁹⁶

In summary, they found dilapidated school buildings abandoned by teachers to educate learners in mud huts with no electricity, no running water at certain schools, sometimes classes were conducted outside under the sky because of the lack of classroom space; where there were toilets, they did not offer privacy, some of the pupils were squashed into benches and the desktops they wrote on were uneven or not attached to their steel frames, and children sat on each other’s laps in overcrowded classrooms with no furniture. As the year progressed, many schools applied to the Education Department to have vacant teacher posts filled with temporary teachers; at the end of the year the Department, in an “attempt to cut the costs, terminated the contracts of many of those teachers”.⁴⁹⁷

The case of *Equal Education and Others v Minister of Basic Education and Others* [hereafter “Equal Education”]⁴⁹⁸ is one of the classic examples of inadequate and often dangerous school

⁴⁹³ *Mail & Guardian* 2012: 28 September – 04 October.

⁴⁹⁴ *Mail & Guardian* 2012: 28 September – 04 October.

⁴⁹⁵ *Mail & Guardian* 2012: 28 September – 04 October.

⁴⁹⁶ *Mail & Guardian* 2013: 8 March – 14 March.

⁴⁹⁷ *Mail & Guardian* 2013: 8 March – 14 March.

⁴⁹⁸ Eastern Cape High Court, Bisho, case no: 81/2012, unreported case.

infrastructure⁴⁹⁹ that is found in a number of schools, as mentioned above in NEIMS and by the visiting group reports. One of the parts of the relief claimed in *Equal Education* was a declaratory order that there had been a failure by the State to deal adequately with the problematic conditions of seriously damaged structures as a result of heavy rains and fire during 2009 and 2011 respectively at Mwezeni Senior Primary School and Mkanzini Junior Secondary School in the Eastern Cape and that the State be ordered to provide emergency relief.

However, the State, through the Minister of Basic Education, conceded in court that urgent action was needed to remedy these problems, and regrettably, the Eastern Cape Provincial Department of Education failed to take the necessary immediate action. Because of this and related problems, the national government undertook a national intervention in terms of Section 100 (1)(b) of the Constitution to take over the administration of the Eastern Cape Provincial Department of Education.

Taking the national and provincial governments to court over their failure to provide the schools with adequate facilities resulted in a far-reaching settlement where the Department of Basic Education pledged R8,2-billion toward a programme for nationwide priority infrastructural upgrades and development to provide school buildings, facilities and services at schools experiencing unsafe and other emergency conditions.⁵⁰⁰ The fact that the national and provincial departments were so quick to settle is indicative of the power of the argument raised in both cases: that Section 29 (1)(a) affords an entitlement to adequate facilities.⁵⁰¹

As this study grapples with the ‘core content’ of the right to ‘a basic education’ that every learner at any public school is entitled to be provided with by the State under our Constitution, *Justice Yacoob* in *Grootboom* delivered a caveat about this continuing deep inequality in the educational system, a painful legacy of the apartheid history:

The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in

⁴⁹⁹ McConnachie C & C 2012: 556 provide that in the cases of Centre for Child Law and Amasango, both cases involved severely under-resourced schools in the Eastern Cape Province, the applicants argued that the lack of adequate facilities in their schools was a violation of the learners’ right to a basic education.

⁵⁰⁰ McConnachie C & C 2012: 558. See also Minister’s Answering Affidavit in *Equal Education* par 26.

⁵⁰¹ McConnachie C & C 2012: 560.

*order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream.*⁵⁰²

Berger submits that 'vulnerable groups' are the people who most need the protection of the Constitution. Drawing lesson from the *Grootboom* case, he argues that:

*[t]he poor are particularly vulnerable and their needs require special attention.... Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril ... must not be ignored by the measures aimed at achieving realization of the right.... If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.*⁵⁰³

During 2007, the State, in acknowledging the nexus between dysfunctional educational institutions' [infrastructural] conditions and the poor academic performance of the learners, the then *Minister of Education Naledi Pandor* amended certain parts of the South African Schools Act through the Education Laws Amendment Act 31 of 2007. Among others, was the insertion of Section 5A titled "*Norms and Standards for Basic Infrastructure and Capacity in Public Schools*". The part of the relevant section states:

- (1) The *Minister* may, after consultation with the Minister of Finance and the *Council of Education Ministers*, by regulation prescribe minimum uniform norms and standards for—
 - (a) *school* infrastructure;
 - (b) capacity of a *school* in respect of the number of *learners* a *school* can admit; and
 - (c) the provision of learning and teaching support material.

Of importance on the aforesaid section is that it gives effect to the 'availability' pillar of the General Comment, which refers to necessary resources that must be available in order that the right to a basic education can be accessed. These resources are adequate infrastructure such as

⁵⁰² *Grootboom* par 2.

⁵⁰³ Berger 631. See also *Grootboom* par 36, 44.

complete school buildings and teaching materials. This strongly suggests that ‘a basic education’ requires an education with a substantive content.⁵⁰⁴

Taking into account the inadequate school infrastructure that South Africa is faced with, the *Equal Education* case on the other part of the substantive relief it sought was to compel the Minister of Basic Education to publish the minimum standards for infrastructure at schools that would enable the public to hold the government accountable on the basis that everyone would “*know what they are entitled to require of the government*”.⁵⁰⁵ It was optimistic to presume that the Court’s decision on this matter was going to establish the duty of the national government to direct the implementation of the Constitution throughout the country and help ordinary people understand what a school is supposed to be.⁵⁰⁶

It contended that the result of inadequate infrastructure is preventing learners from achieving the right to a basic education.⁵⁰⁷ Furthermore, adequate basic education requires that a child be provided with an environment that is safe and conducive to learning.⁵⁰⁸

The failure to determine the aforesaid Norms and Standards brought about unintended adverse implications and created a legal uncertainty in the country, particularly amongst the crucial partners in the provision of ‘a basic education’. This is clear from the court case that was initiated in the High Court up to the level of the Constitutional Court. This case is the matter of *The Governing Body of Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* [hereafter ‘Rivonia court a quo’],⁵⁰⁹ where Judge *Mbha* directed that his judgement, specifically the contents of paragraphs [60 – 62], be brought to the attention of the National Minister of Basic Education. In his view that would provide significant guidance to school governing bodies and provincial governments on the issues raised in the matter if the

⁵⁰⁴ McConnachie C & C 2012: 556.

⁵⁰⁵ *Mail & Guardian* 2012: 3 August.

⁵⁰⁶ *Mail & Guardian* 2012: 3 August.

⁵⁰⁷ *Mail & Guardian* 2012: 3 August.

⁵⁰⁸ *Mail & Guardian* 2012: 3 August.

⁵⁰⁹ [2011] ZAGPJHC 182.

National Minister of Basic Education were to act in terms of Section 5A, read together with section 58C, and promulgate norms and standards on capacity.⁵¹⁰

In submitting further that the CESR's General Comment No. 13's '*availability*' pillar on the 'core content' of the right to 'a basic education' suggests that functional education institutions have to be '*available*' in sufficient quantity, *Deputy Chief Justice Moseneke* remarked at length in Ermelo that he had earlier during arguments by the parties expressed dismay at the fact that the Department has not taken adequate steps to ensure that there were enough places in schools so that every child in the Ermelo circuit can attend school as required by Section 3(1) and (2) of the Schools Act. He indicated that procuring enough places in schools implies proactive and timely steps by the Department. The steps should be taken well ahead of the beginning of an academic year. On all accounts, he stated that it was highly probable by then that there would be an increased demand for Grade 8 school places at the beginning of 2010. Judge Moseneke had already alluded to the fact that there were unacceptably high levels of overcrowding in high schools in Ermelo, other than at Hoërskool Ermelo. Additional places at Hoërskool Ermelo would afford only partial alleviation.⁵¹¹

Before the Norms and Standards for Infrastructure could be determined, the *National Development Plan* had acknowledged that the Department of Basic Education had guidelines for planning public school infrastructure and it directed that those guidelines are sound and should be legislated to ensure that they are adhered to.⁵¹² Legislated guidelines will help to ensure they are not deliberately ignored by officials involved in planning, constructing and improving school infrastructure.⁵¹³

⁵¹⁰ *Rivonia's "SCA decision"* par 105. Paragraphs 60 – 62 are the ones that make reference to ss 5A (1) (b), 5 A (2), 58 C (2) and 58 C (b) of SASA that bestows on the Minister the power after consulting with the Council of Provincial Education Ministers [MECs] to determine the Norms and Standards for MECs to ensure compliance, governing bodies policy compliance with them, Heads of Departments' determination of minimum and maximum capacities of public schools, and communication of such determination to the Chairpersons of the governing bodies.

⁵¹¹ *Ermelo* par 103.

⁵¹² National Planning Commission 2012: 313.

⁵¹³ National Planning Commission 2012: 313.

*The Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure*⁵¹⁴ were signed off by the Minister of Basic Education on 26 November 2013 and gazetted into law on 29 November 2013.

These Regulations may be summarised as follows:

The objectives of the Regulations are to provide minimum norms and standards for school infrastructure, to ensure that there is compliance with minimum uniform norms and standards in the design and construction of new schools and additions, alterations and improvements to schools which exist when these regulations were published, and provide time frames within which school infrastructure backlogs must be eradicated.⁵¹⁵

They provide that all mud schools, those built with material such as asbestos, metal and wood which exist when these regulations are published, must as far as reasonably practicable be completed within a period of three years from the date of publication of these regulations in order to comply with the Norms and Standards.⁵¹⁶

For norms and standards relating to the availability of classrooms, electricity, water, sanitation, electronic connectivity and perimeter security, planning and prioritisation of such schools must be phased in over a period of seven years from the date of publication of these regulations.⁵¹⁷ For libraries and laboratories of science, technology and life sciences, norms and standards must be phased in over a period of ten years from the date of publication of these regulations.

All other norms and standards contained in these regulations must be planned, prioritised and phased in before 31 December 2030, namely types of schools, universal access, site and identification of the school, categories of key school areas and their sizes, classroom, electricity, water, sanitation, sports and recreation facilities, electronic connectivity, perimeter security and school safety, and design consideration for all education areas.⁵¹⁸

⁵¹⁴ GN R920/2013.

⁵¹⁵ GN R920/2013: reg 2 (a) – (c).

⁵¹⁶ GN R920/2013: reg 4 (1)(b) and 4 (2)(a).

⁵¹⁷ GN R920/2013: reg 4 (1)(b)(ii) and 4(2)(c).

⁵¹⁸ GN R920/2013: reg 4 (b) (iv).

They also provide for a new type of school, together with their capacities, being Primary Schools from Grade Reception to Seven, or within that range, classified as micro, small, medium, large and mega primaries and Secondary Schools from Grade Eight to Twelve, or within that range, and classified as small, medium, large and mega secondary schools.⁵¹⁹

For other necessities, the schools must have some form of power supply, sufficient water supply, a sufficient number of sanitation facilities, a library or media centre, a laboratory and necessary apparatus and consumables in accordance with the specific curriculum needs of a particular school, an area for physical education, sporting and recreational activities, wired or wireless connectivity for communication, and surrounded by appropriate fencing to a minimum height of at least 1.8 metres.⁵²⁰

The classrooms' capacities are determined as acceptable if in Grade R there are a maximum of 30 learners, and for all other classes, there is a maximum of 40 learners in the classroom.⁵²¹ These Norms and Standards on Infrastructure apply to all new schools and additions, alterations and improvements to schools to be designed and constructed on 29 November 2013, being the date on which these Regulations were published.⁵²²

Furthermore, they must, and as far as reasonably practicable, be applied to all new schools and additions, alterations and improvements to schools,⁵²³ with the exception of new schools and additions, alterations and improvements to schools whose planning and prioritisation have been completed within the 2013-2014, 2014-2015 and 2015-2016 Medium Term Expenditure (MTEF) cycle.⁵²⁴

However, the plans and prioritisation of the above-mentioned schools must, where possible and reasonably practicable be revised and brought in line with these regulations.⁵²⁵

⁵¹⁹ GN R920/2013: reg 5.

⁵²⁰ GN R920/2013 reg 10 – 17.

⁵²¹ GN R920/2013: reg 9 (2) (a) & (b).

⁵²² GN R920/2013: reg 2 (b).

⁵²³ GN R920/2013: reg 4 (1) (a).

⁵²⁴ GN R920/2013: reg 4 (2) (a).

⁵²⁵ GN R920/2013: reg 4 (1) (b).

The general implication with regard to old schools that are not doing any additions, alterations and improvements is that the status quo will be maintained. However, once they do any of the above, they will be required to comply as far as reasonably practicable with the Regulations.

With these Norms and Standards, one of the requirements of the right to a basic education being ‘availability’ of education through functioning educational institutions has been determined by the legislature, as provided for in the Regulations. These Regulations have now set a standard upon which to measure the State’s performance towards its obligation of providing basic education by having functioning educational institutions. In the absence of the infrastructure at schools, which is discussed above, or even a small deviation thereof, would constitute a limitation of the right. Woolman and Fleisch argue that, for example, if maximum class sizes are set at 30 learners, then any school that has classes with more than 30 learners has limited the right.⁵²⁶ These authors go further to pose a question on whether is it possible to learn with electricity, but no water, with small classes, but no textbooks, or with qualified teachers, but no blackboards⁵²⁷; arguing that when standards are set, this approach saves courts from having to make difficult assessments of the educational impact of various kinds of deficiencies.⁵²⁸

3.2 Availability of trained teachers receiving domestically competitive salaries

The pillar of ‘*availability*’ of education also refers to trained teachers receiving domestically competitive salaries.

The *Education Labour Relations Council’s [ELRC] Collective Agreement No. 1 of 2008* made provision for the *Occupation Specific Dispensation [OSD]*, which is the development and implementation of the customised remuneration dispensation for educators.⁵²⁹ The OSD ensures a fair, equitable and competitive remuneration structure for identified categories of employees. The remuneration structure provides for longer salary bands and substantial overlaps between

⁵²⁶ Woolman & Fleisch 2009: 136.

⁵²⁷ Woolman & Fleisch 2009: 136.

⁵²⁸ Woolman & Fleisch 2009: 136.

⁵²⁹ Boshoff *et al* 1999: 3C – XXXIII par 3.6, p1.

salary levels to facilitate adequate salary progression to employees who choose to remain in the classroom instead of aspiring to move into supervisory or management posts.⁵³⁰

Of course, a good salary is not necessarily the main or only motivation for teaching. Most people who enter the teaching profession do so for a range of reasons; the foremost of which is the desire to help the new generation succeed in a world where skills and knowledge are crucial for success.⁵³¹

The education process involves two important parties: the learner and the educator. One receives education, and the other provides it. One pays to be provided with education [through parents, in the form of school fees or through tax), and the other is paid to provide it.⁵³² Deacon takes it further, from McKinsey and Company, by contending that if one should remove all equipment (computers, interactive boards, chairs and tables) from a classroom and is left with nothing but a dedicated educator, education will still take place. Education, therefore, is not possible without the educator.⁵³³

The South African Human Rights Commission [SAHRC] argues that “all learners must have a qualified teacher present and teaching in class for seven hours per day every school day; the curriculum for each grade is completed in the teaching year; and that teachers must deliver on the pledge they made to be punctual, enthusiastic, well prepared for lessons and of sober mind and body”, and that principals be committed to “monitor teacher attendance”.⁵³⁴

On the other hand, Reyneke argues that an adequate number of educators should be available to provide education:⁵³⁵

In Federation of School Governing Bodies of SA and Others v MEC for the Department of Basic Education, Eastern Cape, and Others, the court granted an order setting aside the decision of the provincial department in the Eastern Cape not to fill any vacant positions, including temporary positions. This decision of the Department resulted in 6 282 vacancies in the province, which had severe consequences for many schools. The failure of the Department to comply with its statutory

⁵³⁰ Boshoff *et al* 1999: 3C – XXXIII par 3.6, p1.

⁵³¹ McKinsey 2007: 27.

⁵³² Deacon 2012a: 1 quoted from McKinsey & Company 2007.

⁵³³ Deacon 2012a: 1.

⁵³⁴ SAHRC 2012: 27-28.

⁵³⁵ Reyneke 2013:315.

*obligations to declare post establishments implied that children would have had no educators or that there would have been a dramatic increase in class size, both of which would have impacted negatively on discipline and on learners' best interests.*⁵³⁶

The aforesaid decision was also applied in the case of *The Centre for Child Law and Others v The Minister of Basic Education and Others*,⁵³⁷ where a pillar of 'availability' of educators was protected in the best interests of the learners. In this matter, the Department of Basic Education that placed the Provincial Education Department of Eastern Cape under the administration of the national government in terms of Section 100 (1)(b) of the Constitution failed, amongst others, to declare the 2013 educator post establishment, which would include non-teaching staff, and to make appointments to all vacant established posts, in respect of teachers and non-teaching staff and by placing moratoriums on all these posts.⁵³⁸ The Court remarked that the right of scholars to basic education is threatened if the State has failed to effect proper post provisioning for teaching staff.⁵³⁹

The Court held:

*As the posts that are part of the establishment have been budgeted for, there can logically be no moratorium on filling them. That can only arise, assuming that some or other functionary has the power to impose a moratorium, if a fiscal crisis befell the provincial department at a later stage. In any event, the imposition of a moratorium in such circumstances would, assuming it could otherwise validly be imposed, place the respondents in breach of their constitutional obligations to respect, protect, promote and fulfill the fundamental right to basic education, in terms of s 7(2) of the Constitution.*⁵⁴⁰

The National Norms and Standards for School Funding [NNSSF],⁵⁴¹ promulgated in terms of the Schools Act, indicates as follows:

⁵³⁶ *Reyneke* 2013:316.

⁵³⁷ *The Centre for Child Law* [2012] ZAECGHC 60.

⁵³⁸ *The Centre for Child Law* par 2.

⁵³⁹ *The Centre for Child Law* par 16.

⁵⁴⁰ *The Centre for Child Law* par 33.

⁵⁴¹ GN 869/2006.

- (a) schools must be supplied with an adequate number of educator and non-educator personnel;
- (b) such staff members must be equitably distributed according to the pedagogical requirements of the schools; and
- (c) the cost of personnel establishments must also be sustainable within provincial budgets.⁵⁴²

The SAHRC argues that availability of basic education obliges the State to take legislative, administrative and other steps to ensure a national education system that:

1. Is founded on an overarching national recognition of the right to education.
2. Provides early childhood education.
3. Makes primary education universal and compulsory for all children.
4. Makes different forms of secondary education generally available to all children.
5. Ensures the provision of functional educational institutions in sufficient quantity.
6. Ensures the provision of sufficient, qualified and available teachers.
7. Ensures the provision of teaching and learning support materials and equipment.
8. Ensures the availability of sufficient funds to sustain the availability of schooling.⁵⁴³

3.3 Educational Institutions and Programmes

3.3.1 The National recognition of the right to basic education

National and provincial policies and laws should be enacted by the State to guarantee, respect, protect and fulfil the right to basic education of all children.⁵⁴⁴

⁵⁴² GN 869/2006: par 3.

⁵⁴³ SAHRC 2012:15.

⁵⁴⁴ SAHRC 2015:15.

Section 29(1) of the Constitution provides that “[e]veryone has the right to a basic education”. This right is given effect to in terms of the South African Schools Act and its Regulations, the National Education Policy Act, and the Employment of Educators Act, together with its Regulations.

3.3.2 The provision of an early childhood education [ECD]

The *Action Plan to 2014* provides that the State has to improve the access of children to quality Early Childhood Development (ECD) below Grade 1. This goal is one of five priority goals for the period 2009 to 2014, reflecting the emphasis in the Minister’s Delivery Agreement.

Studies from South Africa showed that good pre-primary schooling below Grade 1 made it easier for a child to learn at primary school level. Yet, not all South African children get to attend pre-primary classes. Between 2003 and 2008, the percentage of Grade 1 learners, who had received some pre-primary schooling, increased from 60% to 80%, according to both the Annual Survey of Schools and data from the 2008 National Income Dynamics Study (NIDS). The General Household Survey indicates that, by 2009, a total of 85% of children were going through a year of Grade R. The number of Grade R learners enrolled in schools (public and independent) has increased dramatically from approximately 490,000 in 2007 to 710,000 in 2010, which is an increase of 45%. By far the majority of this growth took place in public schools. Evidence on grade repetition indicates that, unlike Grade 1, which has high levels of repetition, Grade R has virtually no repetition, meaning that enrolment figures can be taken as a fairly reliable indication of the number of children who get to participate in Grade R.⁵⁴⁵

The National Development Plan makes two years of quality pre-school enrolment for four and five year olds compulsory before Grade 1.⁵⁴⁶

3.3.3 The provision of primary education that is available and compulsory

Section 3(1) of SASA makes primary and lower secondary schooling compulsory for all children between the ages of seven and 15 years (or until the completion of Grade 9, whichever occurs

⁵⁴⁵ DBE 2011a: 79 – 80.

⁵⁴⁶ National Planning Commission 2012: 300.

first). It obliges every parent to ensure that every learner for whom he or she is responsible attends school every day during the compulsory phase.

The ages stipulated in Section 3(1) do not apply to children with disabilities. Section 3(2) of SASA provides that the Minister must, by notice, determine the ages of compulsory attendance for learners with special educational needs.⁵⁴⁷ In 2011, 99% of seven to 13 year old children attended primary schooling. The Adjusted Net Enrolment Rate [ANER] increased from 96.7% in 2002 to 99% in 2011. The difference in the ANER of males and females has decreased since 2002 and currently are less than 0.5 percentage points.⁵⁴⁸

The Millennium Development Goals [MDG] target of universal access for children of primary school age has been achieved and the focus has now expanded to include access to *ECD* based on the assertion that quality *ECD* can potentially improve learning outcomes throughout the school system.⁵⁴⁹

3.3.4 The provision of secondary education that is generally available to all children

The current system makes secondary education available through schools and colleges. The senior phase (Grades 7-9) of the General Education and Training (GET) band is provided at schools and is the responsibility of the Department of Basic Education. The Further Education and Training (FET) band includes Grades 10-12 at schools (the senior secondary phase) and vocational programmes at further education and training (FET) colleges. Responsibility for the FET band is shared by the Department of Basic Education (Grades 10-12 at schools) and the Department of Higher Education and Training (DHET).⁵⁵⁰

3.3.5 The provision of sufficient, safe, functional educational institutions

The ‘availability’ pillar requires that all children from Grades R to 12 are accommodated in a school from the start of the school year.

⁵⁴⁷ SAHRC 2012: 16 – 17.

⁵⁴⁸ Statistics South Africa 2013: 41.

⁵⁴⁹ Statistics South Africa 2013: 41.

⁵⁵⁰ SAHRC 2012: 18.

The *National Policy for the Equitable Provision of an Enabling School Physical Teaching and Learning Environment*⁵⁵¹ specifically seeks to transform the environment into an enabler for the effective implementation of sector policies, effective curricula delivery, and effective teaching and learning. It provides that these norms will explicitly define what constitutes minimum and optimum provisioning, and obliges all provinces to comply with the minimum norms.⁵⁵² These *Norms and Standards for Public School and Infrastructure* were gazetted into law on 29 November 2013.

The SAHRC had the following to say on this matter:

*The National Department of Basic Education is keenly aware of the backlogs in the provisioning of basic services at schools, and announced an implementation of Accelerated Schools Infrastructure Delivery Initiative (ASIDI) in its 2011 - 2014 Strategic Plan. ASIDI is supported by two dedicated infrastructure grants. The first is the Education Infrastructure Grant of R5.498 billion in 2011/12, increasing to R6.207 billion in 2013/14. The second is the School Infrastructure Backlogs Indirect Grant of R700 million for 2011/12, increasing to R5.189 billion in 2013/14.*⁵⁵³

*In addition, an improvement in the planning and equitable delivery of infrastructure has received national priority attention in the Presidential Infrastructure Coordinating Committee's National School Build Programme. The nationally coordinated programme will be driven by uniformity in planning, procurement, contract management, provision of basic services, replacement of inappropriate school structures, and addressing basic service backlogs. In addition, it will address national backlogs in classrooms, libraries, computer labs and admin buildings.*⁵⁵⁴

3.3.6 The provision of learning and teaching support material

Adequacy can be summed up as 'the actual cost of providing a sound basic education' - teachers,

⁵⁵¹ GN 515/2010.

⁵⁵² SAHRC 2012: 18.

⁵⁵³ SAHRC 2012: 22.

⁵⁵⁴ SAHRC 2012: 21 – 23.

materials, facilities and provision of the fiscal and governance structure necessary to deliver it.⁵⁵⁵

One of the most visible manifestations of the ongoing crisis in South African education is the severe shortage of desks and chairs in schools.⁵⁵⁶ The State must provide basic learning and teaching support materials (LTSM) and equipment such as stationery and textbooks in a timely fashion to all learners, including appropriate materials for learners with disabilities.⁵⁵⁷ Textbooks are classified as an essential classroom resource on the basis that effective teaching and learning cannot take place without them.⁵⁵⁸

Spaull emphasises the adverse situation that learners find themselves in by not having textbooks:

Given that the reading of textbooks are only evident when students either have their own textbook or share with not more than one other, policy should focus on ensuring that no student needs to share with more than one student. Given the well-defined and relatively low costs of this policy option, it would seem that providing reading textbooks where they are in short supply – particularly in poor schools – is the low hanging fruit of the South African primary education system.⁵⁵⁹

The State has also made a commitment that it will ensure that every learner has access to the minimum set of textbooks and workbooks required according to National Policy. This goal is one of the five priority goals for the period 2014 reflecting the emphasis in the Minister's Delivery Agreement.⁵⁶⁰

The Department Action Plan provides that in 2025 learning and teaching materials should be in abundance and of a high quality and that computers in schools are valued as an important medium through which learners and teachers access information.⁵⁶¹

⁵⁵⁵ Woolman & Fleisch 2009: 135.

⁵⁵⁶ Oxford Human Rights Hub 2014.

⁵⁵⁷ SAHRC 2012: 29.

⁵⁵⁸ Section 27b 2013: 5

⁵⁵⁹ Spaull 2011: 19.

⁵⁶⁰ DBE 2011a:124.

⁵⁶¹ DBE 2011a: 47.

In the case of *Section 27 and Others*⁵⁶² the issue was a failure by the Limpopo Education Department to order textbooks on time for schools in the Province. This issue was brought to the attention of the Department as early as December 2011 by the Publishers Association of South Africa in no less than three communications. There was no response to these communications. There were approximately 1.7-million learners who were affected by the non-procurement and delivery of textbooks. It is well known that textbooks are important to educators and learners for access to information, homework tests and examinations. They are their main source of subject content.

The Court held that:

- (i) *failure by the Department to provide textbooks, constitutes a violation of learners' right to basic education; and*
- (ii) *the measures taken by the Department were not reasonable in regards to the urgency of the situation and the targets and indicators set for the delivery of textbooks.*

In the case of *Basic Education For All and Others v Minister of Basic Education and Others*, [hereafter *BEFA*], by 27 March 2014 about 39 schools in Limpopo Province had not yet received all of their textbooks for the school year 2014 from the Department of Basic Education, which was administering the Limpopo Department of Education. The schools that were affected were those involved in the above-mentioned *Section 27* case on a judgement which was handed down by Judge Kollapen on 17 May 2012, directing the Department of Basic Education to provide textbooks to the relevant schools by not later than 15 June 2012. In the *BEFA* matter, the Department of Basic Education contended in Court that it had used every resource at its disposal to deliver textbooks to the learners, but that through circumstances beyond its control, it had not yet been able to do so completely.

It was agreed by the State that the content of the right to basic education is not unrelated to the resources available to the State. The State must manifestly budget for basic education as well as for all other resources which the State provides.

⁵⁶² [2012] ZAGPPHC 114.

However, before Court, the issue as characterised by Judge Tuchten was “what is the content of the right to a basic education?”⁵⁶³ In its court papers, the case presented by the DBE suggested that the failure to supply textbooks did not constitute a violation of the right. This was said to be because most of the textbooks had been delivered, because the late deliveries were caused by budgetary constraints and the failures by the principals of certain schools to submit returns identifying needs not initially anticipated, and because the failure to provide each learner with a textbook did no more than cause an inconvenience to teachers and those learners not in possession of their own textbooks.⁵⁶⁴ In this regard, the court indicated that the question whether the provision of textbooks is a component of basic education, was squarely before it.

The Court held that:

- 2) *While it wish to guard itself against the proposition that the content of a right may be determined without more by reference to the policies of the executive, that is indeed the legal position,*
- 3) *that the policies of the executive are relevant to the determination of the content of a constitutional right, when that content is in issue, and that the nature of the books and the part they play in the education process are highly relevant to the enquiry,*
- 4) *what a teacher tells her class is ephemeral and subject to perceptions, preconceptions and the world view of the individual teacher. An inattentive pupil may miss entirely what the teacher is saying. Textbooks are therefore essential to all forms of education, are therefore components of basic education,⁵⁶⁵ and*
- 5) *the content of the right to a basic education in Section 29 (1)(a) of the Constitution includes the right of every learner at a public school, as contemplated in SASA, in Limpopo to be provided with every textbook prescribed for that learner’s grade.⁵⁶⁶*

The decision in *Madzodzo and Others v Minister of Basic Education and Others*⁵⁶⁷ is one of the highlighted cases where the conduct of the State in its failure to provide teacher and learner materials was found to have been in breach of, amongst others, learners’ rights to basic

⁵⁶³ BEFA par 44.

⁵⁶⁴ BEFA par 44.

⁵⁶⁵ BEFA par 50.

⁵⁶⁶ BEFA par 82.

⁵⁶⁷ [2014] ZAECMCH 5.

education. In this matter, the State failed to provide adequate, age and grade-appropriate furniture at certain schools in the Eastern Cape on or before 16 January 2013 as a result of the initial settlement agreement entered into by the parties and later made an order of the Court. In this matter, the Court indicated that the State's obligation to provide basic education is not confined to making places available at schools.⁵⁶⁸ It requires the provision of a range of educational resources - schools, classrooms, teachers, teaching materials and appropriate facilities for learners. The Court ruled that inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermine the right of access to basic education.⁵⁶⁹ The Court went on to remark:

Many learners bring their own plastic chairs to the school, while others use empty beer crates and furniture cobbled together with broken frames and loose planks of wood. This helps children to have somewhere to sit, but almost none of the students have a desk to write on. This is completely unacceptable. Teachers are unable to give students any writing exercises. The learners' dignity is seriously impaired when they are forced to sit on the floor or squashed into desks like animals.

Accordingly, the Court declared that the Minister of Basic Education was in breach of the constitutional right of learners in public schools in the Eastern Cape to basic education as provided by Section 29 of the Constitution by failing to provide adequate, age and grade appropriate furniture, which will enable each child to have his or her own reading and writing space on or by 31 May 2014.

In conclusion, the courts have thus demonstrated that included in the right to a basic education being available to children are the core components, such as buildings, water, sanitation, furniture, textbooks, teachers and non-educator staff.⁵⁷⁰

⁵⁶⁸ *Madzodzo* par 20.

⁵⁶⁹ *Madzodzo* par 20.

⁵⁷⁰ Skelton 2013: 11.

4. ACCESSIBLE EDUCATION

The second pillar of the ‘core content’ of the right to ‘a basic education’ is the ‘*accessibility*’ of that education. This will now be analysed.

4.1 Enrolment, attendance and compulsory education

First, the essence of the right to education means that no one shall be denied a right to education.⁵⁷¹ In practice, this means an individual right of access to the education available, or in more concrete terms, the right of access to the existing public educational institutions on a non-discriminatory basis.⁵⁷² An example of a violation of this right is restricting access of people belonging to a specific ethnic, linguistic or religious group to the existing public educational institutions.⁵⁷³

Accessibility requires that once the schools have been built, and stocked with teachers and textbooks, learners must be able to make use of them.⁵⁷⁴ Woolman and Fleisch elaborate on accessibility as follows:

*Accessibility takes account of three discrete factors: non-discrimination; financial accessibility; physical accessibility. Accessibility engages both negative dimensions and positive dimensions of the right to basic education. Accessibility requires (1) that people are not (unjustifiably) turned away; and (2) that appropriate steps are taken to make access easier for persons from groups that were either consigned to inferior institutions or excluded from certain educational institutions altogether.*⁵⁷⁵

Coomans and Veriava offer this definition of accessibility:

⁵⁷¹ Coomans 2007: 3.

⁵⁷² Coomans 2007: 3.

⁵⁷³ Coomans 2007: 3.

⁵⁷⁴ Woolman & Fleisch 2009: 131.

⁵⁷⁵ Woolman & Fleisch 2009: 131-132.

It relates to education being available to all on the basis of the principle of non-discrimination, economic accessibility, as well as physical accessibility. In terms of the latter, where learners continue to walk distances of up to eight kilometres a day to get to school, whether the State is providing schools that are physically accessible, is questionable.⁵⁷⁶

Accessibility refers to the child's ability to enroll and attend school. A case about learner transport, which was ultimately settled out of court, links to this theme.⁵⁷⁷

The application was brought to the North West Court in Mafikeng by applicants,⁵⁷⁸ and the Centre for Child Law, represented by the Legal Resources Centre. The 36 applicants were the parents or caregivers of children who attend the Rakoko High School in Mabeskraal, North West. The families all live in Siga Village, which is 25 km from Mabeskraal. The children previously attended a local school within walking distance of their homes in Siga Village until it was closed down by the government in 2009, as part of the rural "rationalisation" process. Since transport was not provided, some of the learners' families could not afford the bus fare and they had dropped out of school, whilst others struggled to eke out the transport costs from their meagre income, mostly from pensions or grants. The relief sought in the application was the provision of adequate learner transport to learners, free of charge. The Centre for Child Law asked for the plans and programmes in the North West province for the provision of learner transport to be produced and for the details to be made public, so that learners and their parents could be made aware of their rights. The matter was settled, and a settlement agreement was made an order of court on 10 August 2011. The agreement contained certain urgent interim measures, namely that the Department of Public Works and Transport, in conjunction with the Department of Education, were to provide learner transport for the children from Siga Village to their places of learning at Mabeskraal from 8 August 2011 for 3 months or until longer term measures are put in place, whichever occurred later. The transport was to be fully subsidized by the two departments and scheduled appropriately to the needs of the children.⁵⁷⁹

According to the SAHRC, accessibility implies the following:

The right to basic education being accessible refers to three overlapping dimensions. Firstly, no child can be denied access to education on the basis of discrimination. Secondly, educational

⁵⁷⁶ Coomans & Veriava 2005: 67.

⁵⁷⁷ Skelton 2012: 11.

⁵⁷⁸ *Adam Legoale v MEC for Education, North West*, North West High Court, Mafikeng, case no 499/11, unreported.

⁵⁷⁹ Skelton 2012: 11-12.

*institutions must be geographically accessible. This refers to both geographic distances that must be covered to access the school, as well as the physical safety of the learner when travelling to school. Thirdly, education must be economically accessible and affordable to all. International instruments specifically state that primary education should be free to all.*⁵⁸⁰

The National Planning Commission recommends a more systemic solution to improving the rate of access to, and completion of, secondary education. It recommends that “compulsory education should be extended to successful completion of Grade 12 in basic education or the equivalent level in the post-school sector”.⁵⁸¹

In *Antonie v Governing Body, Settlers High School & Others*⁵⁸² a learner had been found guilty of ‘serious misconduct’ for attending school with dreadlocks and a cap – essential parts of the practice of her Rastafarian religion. In the High Court, *Van Zyl J* held that codes of conduct should not be assessed in a rigid manner, but rather in ‘a spirit of mutual respect, reconciliation and tolerance’. The mutual respect, in turn, must be directed at understanding and protecting, rather than rejecting and infringing, the inherent dignity, convictions and traditions of the offender. *Van Zyl J* also emphasised the need to read any code of conduct in light of a learner’s Final Constitution’s 16 rights to freedom of expression. The conduct was held to fall well short of the definition of ‘serious misconduct’, and the High Court set aside the School Governing Body’s decision.⁵⁸³

In *KwaZulu-Natal MEC for Education v Pillay*⁵⁸⁴ the Constitutional Court had to consider whether a Hindu learner, Sunali, should be entitled to wear a nose stud to school as an expression of her South Indian, Tamil and Hindu culture, and as a part of the practice in her Hindu religion. The school had refused to permit her to wear the stud on the grounds that the wearing of a stud was not a religious obligation. The Court found that both religious and cultural practices should be protected and that voluntary practices could be entitled to the same protection as obligatory practices. While recognising the importance of codes of conduct and the need to ensure

⁵⁸⁰ SAHRC 2006: 12.

⁵⁸¹ National Planning Commission 2012: 306.

⁵⁸² 2002 (4) SA 738 (C).

⁵⁸³ *Antonie*’s case.

⁵⁸⁴ [2007] ZACC 21.

discipline, *Chief Justice Langa* held that a mere appeal to uniformity would not be sufficient to refuse an exemption from a code. Instead, a school would have to show that a particular exemption was likely to cause a real disruption to school activities. In this case, no such evidence was presented and the Court found that Sunali should have been granted an exemption.⁵⁸⁵

Numerous policies prohibit discrimination of learners on the prescribed ground within the education system. For example, Section 5 (1) of the Schools Act and paragraph 9 of the *Admission Policy for Ordinary Public Schools*⁵⁸⁶ prohibit discrimination in school admission policies. In addition, they guarantee admission to lawfully resident non-South Africans residents, as well as learners with special education needs.⁵⁸⁷

5. ACCEPTABLE EDUCATION

The third pillar of the ‘core content’ of the right to ‘a basic education’ is ‘*acceptability*’⁵⁸⁸ of that education, which is hereunder discussed in some detail.

5.1 The provision of sufficient curricula and quality teaching methods

The right to education “by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals”.⁵⁸⁹ The state is obliged to ensure that all schools conform to the minimum criteria which it has developed, thus ensuring one component of making education acceptable.⁵⁹⁰

Veriava and Coomans explain the concept of acceptability as follows:

⁵⁸⁵ Woolman & Bishop 2009 57 – 23 to 57 – 24.

⁵⁸⁶ GN 2432/ 1998.

⁵⁸⁷ GN 2432/ 1998.

⁵⁸⁸ Acceptability – the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to educational objectives required by Article 13 (1) and such minimum educational standards as may be approved by the State.

⁵⁸⁹ Tomashevski 2001: 29.

⁵⁹⁰ Tomashevski 2001: 29.

*Acceptability in basic education relates to whether or not curricula and teaching methods are sufficient to meet basic learning needs such as literacy, oral expression or numeracy. The scope of the acceptability of basic education has been broadened in international human rights jurisprudence to include a system of education that seeks to protect the individual rights of learners on issues such as language rights, parental choice and discipline of learners.*⁵⁹¹

Woolman and Bishop argue that “[a]cceptability also requires that learners are not treated in a manner that violates their dignity”. In South Africa, corporal punishment and initiation practices are banned in all schools.⁵⁹² They further contend that “[e]ducation can just as easily be manipulated to perpetuate human rights abuses as it can to end them”. International law requires that education be “directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. The Constitutional Court has reinforced the view that teaching children the value of human rights – and in particular the values of equality and diversity – is essential if they are to become adults who fully participate in the governance of our society”.⁵⁹³

Reyneke makes a valid point by arguing that “[a]cceptability of education has an explicit quality dimension. If learners do not receive education of an acceptable academic standard, this would constitute an infringement of their right to education”.⁵⁹⁴ *Coomans* however argues that “another core element of the right to education, which is less concrete and consequently more difficult to assess, is a certain quality of education for each separate educational level. In fact, the right to education implies the right to quality education: that is education that is available, accessible, acceptable and adaptable to the needs of learners. A State Party is under an obligation to provide and maintain this quality level, otherwise attending classes would be meaningless”.

According to *Coomans*, when assessing this quality,

⁵⁹¹ Veriava & Coomans 2005: 71.

⁵⁹² Woolman & Bishop 2009: 57 – 32.

⁵⁹³ Woolman & Bishop 2009: 57 – 30.

⁵⁹⁴ Reyneke 2013: 327.

*a State should take into account various factors, such as measurable learning outcomes of pupils and students, the efforts and training-level of teachers, the availability and quality of teaching materials, the condition of school buildings, a sound and safe school environment, including one that is free from corporal punishment, school health, preventive education against HIV/Aids and drug abuse, and science and technology education, etc.*⁵⁹⁵

The duty to provide relevant, culturally appropriate and quality education in a diverse society such as South Africa is an enormous challenge.⁵⁹⁶ Examples of these issues include:

- The prohibition of corporal punishment.
- Responding to teenage pregnancy.
- Respect for religious convictions.
- The language of instruction.
- Teaching of and teaching in indigenous minorities.⁵⁹⁷

Any language can be used for any function, including the teaching of mathematics and science – but like muscles in our bodies, languages grow when used, and shrink when neglected.

5.2 Teaching methods and curriculum are adequate to cultivate basic knowledge and skills

A more controversial question is whether the right to be educated in the language of one's own choice is part of the core content of the right to education.⁵⁹⁸ On the other hand, it is submitted that a State must respect the freedom of individuals to teach, for instance, a minority language in schools established and directed by members of that minority. This does not imply, however, that

⁵⁹⁵ Coomans 2007: 7.

⁵⁹⁶ SAHRC 2006: 14.

⁵⁹⁷ SAHRC 2006: 14.

⁵⁹⁸ Coomans 2007: 8.

a State must allow the use of this language as the only medium of instruction; this would be dependent on the educational policy of the State.⁵⁹⁹

This finds resonance in the *Norms and Standards for Language Policy in Public Schools*⁶⁰⁰ in the following paragraph:

A Preamble

1. *In terms of the new Constitution of the Republic of South Africa, the government, and thus the Department of Education, recognises that our cultural diversity is a valuable national asset and hence is tasked, amongst other things, to promote multilingualism, the development of the official languages, and respect of all languages used in the country, including South African Sign.*

The issue of mother tongue teaching has been widely debated by various commentators on education. The National Development Plan, as others did, attempts to bring finality on this issue by directing that learners' home language should be used as a medium of instruction for longer, and English introduced much earlier in the Foundation Phase.⁶⁰¹ Training and effective support materials should be available for teachers and learners to facilitate the transition to English as the language of learning and teaching.⁶⁰²

Language in education is a sensitive, highly emotive and contested issue in the South African context among all the role players. This may be inferred from various cases, such as *Matukane and Ermelo*, which were previously discussed in this study. This might be so when one refers to an observation made by *Kwa Prah* who contends that:

It is in language and through language that all social transactions are enacted; it is through language that all social negotiations and exchanges of messages are transmitted. Language is the historical register of the collective memory of its users and it bears an imprint of the history and the records of its users and creators. It defines the entirety of the world as we know it and the world we conjecture it to be. Language therefore defines the limits of our perceptual world; it

⁵⁹⁹ Coomans 2007: 8.

⁶⁰⁰ Government Notice R1701 of 19 December 1997.

⁶⁰¹ National Planning Commission 2012: 304.

⁶⁰² National Planning Commission 2012: 304.

*sets the ultimate boundaries of the world we know as objective or ideational representations. The development and progress of language marks clearly the progress of society. When a language grows and differentiates in meaning and structure, the society which uses the language also develops and grows. When languages die, in other words, go into extinction, the people who used the language may continue to exist, but become other people. They acquire the languages or language of more dominant peoples and cultures.*⁶⁰³

A universal principle of language development is that language develops in use. Therefore, every language can be used for any purpose. Each is as flexible as its speakers. Thus, African languages can be used as languages of education right through to the end of tertiary education.⁶⁰⁴ An ideal language model for education should reflect the different dimensions of the linguistic reality of a country in order to link all societal levels and facilitate communication knowledge, per and wealth sharing, and democratic and participatory governance.⁶⁰⁵

The Constitutional Court in *Ermelo* had the following to say on the subject of mother tongue teaching:

*Learners whose mother tongue is not English but rather one of our indigenous languages, together with their parents have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now well settled that, especially in the early years of formal teaching, mother tongue instruction is the foremost and the most effective medium of imparting education.*⁶⁰⁶

It is indeed confirmed in the global world that mother tongue instruction is the foremost and the most effective medium of imparting education. The issue of mother tongue instruction as a right is complex, as other commentators would argue that it is difficult to even concretise it in primary education.

On 29 January 2010, at the Tenth Meeting of the Joint Expert Group of the United Nations

⁶⁰³ Prah 2012: 5-6.

⁶⁰⁴ Unesco Institute for Lifelong Learning 2010: 22.

⁶⁰⁵ Unesco Institute for Lifelong Learning 2010: 25.

⁶⁰⁶ *Ermelo* par 50.

Education, Scientific and Cultural Organisation [UNESCO] and the Committee on Economic Social and Cultural Rights [CESCR] on the Monitoring of the Right to Education, the issue of mother tongue teaching was raised pertinently in their agenda, namely, *Mother Tongue, Multilingualism and the Right to Education*.⁶⁰⁷ The Joint Expert Group considered that the recognition of the right to education in the mother tongue for the formative years of a child's education at least, is important, while at the same time enabling the child to learn the official/national language.

Of utmost importance is UNESCO's Education Position Paper: *Education in a multilingualism world* of 2003, which enumerated, in particular, three basic principles which provide that:

- (i) UNESCO supports mother tongue instruction as a means of improving educational quality by building upon the knowledge and experience of the learners and teachers.
- (ii) UNESCO supports bilingual and/or multilingual education at all levels of education as a means of promoting both social and gender equality and as a key element of linguistically diverse societies.
- (iii) UNESCO supports language as an essential component of inter-cultural education in order to encourage understanding between different population groups and ensure respect for fundamental rights.⁶⁰⁸

The Court went even further in *Ermelo* to rule that:

*A governing body is democratically composed and is intended to function in a democratic manner. Its primary function is to look after the interest of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that come with it.*⁶⁰⁹

The aforesaid passage indicates that the governing body of the school is in a better position to

⁶⁰⁷ UNESCO 2003:20.

⁶⁰⁸ UNESCO 2003:21.

⁶⁰⁹ *Ermelo* par 57

determine the language of learning and teaching at a particular school, taking into account the broader interests of the community in which that school is located. In doing so, it should not cater for narrow interests, but of a broader nature, in line with what the Constitution requires.

According to the SAHRC:

The State has also taken a number of measures to improve the implementation of the Language in Education Policy (1997) which, together with the Curriculum and Assessment Policy Statement (CAPS), requires that Foundation Phase learners be taught in their home language. The Statements (CAPS) are made available in all languages in this regards. The provisioning of Learning and Teaching Support Materials (LTSM) on the National Catalogue is made available in all languages in the Foundation Phase.⁶¹⁰

The CAPS for the intermediate Phase, Senior Phase and the FET for content subjects is in line with the incremental introduction of African Languages, where African Languages will be used as the language of teaching and learning. The incremental introduction of African Languages will compel all non- African Languages to learn an African Language⁶¹¹.

This is a pilot project at an infancy stage.

5.3 The provision of a learning environment that is not harmful to children

The environment at public schools must ensure that all children are free from exposure to harmful behaviours at schools, such as corporal punishment, bullying and sexual abuse.

The Schools Act prohibits all forms of violence and abuse, including the use of corporal punishment at schools.

6. ADAPTABLE EDUCATION

The fourth and last pillar on the ‘core content’ of the right to ‘a basic education’ is the

⁶¹⁰ SAHRC 2012: 48.

⁶¹¹ SAHRC 2012: 48.

‘adaptability’⁶¹² of education, which will be discussed hereafter.

6.1 Accommodation of diversity and non-discrimination

In terms of a broader focus, adaptability requires that the curriculum and the school environment should adjust to accommodate diversity and also be in line with the requirements of non-discrimination.⁶¹³

Woolman and Fleisch state the following in this regard:

*Education must be flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of learners within their diverse social and cultural settings. Adaptation, like accessibility, speaks to the content of the curriculum and the means used to articulate that content. The advent, and ubiquity, of computer technology should require that learners leave school properly equipped for the modern work environment.*⁶¹⁴

*Adaptation also means that a curriculum and a school environment must adapt to accommodate persons with different capabilities. This obligation dovetails with the right to non-discrimination. The accommodation of disabled learners is a paradigmatic example of the requirement of adaptability. Although some South African schools cater for disabled learners, they are in the minority and are unevenly spread across the provinces.*⁶¹⁵

Antonie v Governing Body, Settlers High School, and Others and MEC for Education, KwaZulu-Natal, and Others v Pillay illustrate how the changed representation of different religious and cultural groups can lead to the need to adapt school policies.

In *Ermelo*, the Constitutional Court ruled that:

However, a school cannot be seen as a static and insular entity. Good leaders recognise that

⁶¹² Adaptability – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

⁶¹³ Reyneke 2013: 330.

⁶¹⁴ Woolman & Fleisch 2009: 134-135.

⁶¹⁵ Woolman & Fleisch 2009: 135.

*institutions must adapt and develop. Their fiduciary duty, then, is to the institution as a dynamic part of an evolving society. The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution.*⁶¹⁶

The governing body of a particular school must be seen to be the agents of change in an evolving society in line with what the interest of all role players and the learners whose best interests are of paramount importance in anything concerning them, the parents, educators and members of the community in which the school is located. All the role players should recognise that what children should learn at school and how the learning process should be organised is the source of a never-ending challenge and change.⁶¹⁷

The way in which children perceive their own community and the world at large is influenced by the presence and absence of particular people and phenomena within the system of education.⁶¹⁸

6.2 Developed and implementable inclusive education

The state must develop and implement an inclusive basic education system. It must offer a learning environment that recognises, welcomes and accommodates diversity through mainstream classes for children with moderate disabilities and special schools for children with severe disabilities.

The Western Cape High Court has in the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*⁶¹⁹ highlighted the State's failure to adequately fund and/or provide equal educational opportunities for severely and profoundly intellectually disabled children. The Court ruled that the State's failure to provide publicly-funded schools, and its failure to provide comparable educational subsidies, amounted to a breach of the right to basic education.

⁶¹⁶ *Ermelo* par 80.

⁶¹⁷ Tomasêvski 2001: 31.

⁶¹⁸ Tomasêvski 2001: 31.

⁶¹⁹ *Western Cape Forum for Intellectual Disability*.

7. DOCTRINE OF SEPARATION OF POWERS

It has been discussed above about how various courts have protected the right to basic education. It is also important to remember that government implementation of any court order needs not happen overnight. Even though Section 29(1) suggests that a basic education needs to be made available immediately (as opposed to further education, which need only be made "progressively available and accessible"), difficult economic realities make immediate vast improvements unrealistic. Indeed, judicial precedent is sensitive to this problem.⁶²⁰

The right to a basic education, on the other hand, is subject to no such limitations. And yet, the content of the right to a basic education, like all other constitutional rights which require the participation of the state for their realisation, must depend to some extent on the availability of state resources, particularly fiscal resources.⁶²¹

The court must recognise that the government cannot make all necessary changes at once, but a decision reaffirming the significance of education in South Africa's Constitution nevertheless would likely prompt some change.⁶²²

In terms of the essence of the principle of separation of powers is that courts should not enter the terrain demarcated for exercise of public power by another. However, the court's very role in the South African system is to protect the most vulnerable by promulgating the ideals that the other government branches need to meet.⁶²³

In the case of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* [hereafter *Director of Public Prosecutions*],⁶²⁴ the Constitutional Court had to deal with the doctrine of separation of powers as follows:

⁶²⁰ Berger 2003: 644.

⁶²¹ BEFA par 67.

⁶²² Berger 2003: 645.

⁶²³ Berger 2003: 661.

⁶²⁴ [2009] ZACC 8.

*Under our constitutional democracy, courts have no power to supervise or interfere with the exercise by the executive or legislature of its functions unless the circumstances amount to a clear disregard by the executive of the powers and duties conferred upon it by the Constitution. Where there is such a disregard, courts are not only entitled but obliged to intervene. But judicial review under our constitutional democracy does not give courts the power to exercise executive or legislative functions. It permits courts to call upon the executive and legislature to observe the limits of their powers but does not permit courts to exercise those powers themselves. Courts therefore have the duty to patrol the constitutional borders defined by the Constitution. They cannot, therefore, cross those borders.*⁶²⁵

What the Court said above is that where another arm of government is entrusted with a particular public and statutory function to perform, but fails to do so in disregard of the constitutional injunctions as a result of ineffective and inefficient public administration, the courts are allowed to intervene and remedy the situation in protection of a particular right.

The Constitutional Court in the case of *Doctors for Life International v Speaker of the National Assembly and Others* [hereafter “Doctors for Life International”]⁶²⁶ made its position clear about how the doctrine should be applied by stating the following:

*This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. But at the same time, it has made it clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government.*⁶²⁷

In the cases that were discussed above, namely *Section 27*, *BEFA* and *Madzodzo*, the Courts have shown a willingness to intervene where the State failed to provide on the right to a basic education by fashioning its orders in order to compel another arm of government to perform its constitutional obligation. In the case of *Section 27*, the Minister of Basic Education and/or the

⁶²⁵ Director of Public Prosecution par 183.

⁶²⁶ [2006] ZACC 11.

⁶²⁷ *Doctors for Life* par 199.

Limpopo Department of Education were directed to, amongst others, provide textbooks to all other schools in Limpopo Province which had not yet received textbooks, immediately develop a catch-up/remedial plan for affected learners, identify gaps in the curriculum, and identify the extent to which quality of teaching in the areas where it occurred was compromised as a result of the non-availability of textbooks, ⁶²⁸

In *BEFA*, the Minister of Basic Education was ordered to ensure delivery as follows:

*those textbooks required for grades 7-9 and 12 by 8 May 2014; and
those textbooks required by the other grades by 6 June 2014;* ⁶²⁹

In the case of *Madzodzo*, where the Minister of Basic Education contended that the failure by the State to provide learners with adequate school furniture was as a result of impossibly short time frames and the serious budgetary constraints the Department found itself in as a result of a shortfall budget given to it by the National Treasury, ⁶³⁰ the Court held that:

In the circumstances,

- (1) It is not good enough to state that inadequate funds have been budgeted to meet the needs and that the Department of Education cannot be placed on terms to deliver the identified needs of schools within a fixed period of time,*
- (2) The Court, in the exercise of its jurisdiction, is obliged to give effect to the fundamental rights enshrined in the Constitution and to make appropriate orders to vindicate those rights where such orders are required. In the circumstances of this matter this court is called upon to exercise its supervisory jurisdiction to ensure that the executive authorities charged with responsibility for ensuring the right of access to basic education act reasonably to fulfil their constitutional obligations.*

In the light of the failure by the Department to provide learners with adequate furniture, the Court was compelled to conclude that a period of 90 days was indeed a reasonable period within which it was expected that the identified furniture needs of public schools in the Eastern Cape

⁶²⁸ *Section 27* par 20. 3, 20.4 & 20.5.

⁶²⁹ *BEFA* par 82.3.

⁶³⁰ *Madzodzo* par 28 & 31.

Province could be met.⁶³¹ The Court went on to rule that securing an appropriate level of budget allocation for the Department from the National Treasury was no doubt going to take some time and require significant commitment by both the Provincial and National Treasury. When the budget funds were available, the process of procurement of the furniture required would also take time.

In the Court's view, the open ended approach urged by the Department was found to be unreasonable as learners in the province were entitled as of right to have immediate access to basic education. Furthermore, they were also entitled as of right to be treated equally and with dignity. The lack of adequate age and grade appropriate furniture in public schools, particularly public schools located in deep rural and impoverished areas, undermined the right to basic education, and the persistent failure to deliver such age and grade appropriate furniture to public schools constituted an ongoing violation of the right to basic education.

The Court then, in the exercise of its jurisdiction, was obliged to give effect to the fundamental rights enshrined in the Constitution and to make appropriate orders to vindicate those rights where such orders are required. In the circumstances of the matter, the Court was called upon to exercise its supervisory jurisdiction to ensure that the executive authorities charged with the responsibility for ensuring the right of access to basic education act reasonably to fulfil their constitutional obligations.

In the normal circumstances cases referred to above, the Court would apply a principle of deference and not necessarily dictate on how another arm of government should perform its powers and duties conferred by the Constitution.

Berger contends that notwithstanding serious budgetary concerns, the Constitutional Court should vindicate education rights for the nation's most deprived students.⁶³² A court decision could thus push the government branches to go further. Indeed, to the extent that government corruption and bureaucratic inertia - and not just limited resources - contribute to the problem, a

⁶³¹ *Madzodzo* par 40.

⁶³² *Berger* 2003: 661.

judicial ruling can also put the government's shortcomings in the spotlight.⁶³³

8. SUMMARY AND CONCLUSION

At the nub of this chapter is the exploration of the essential features of the 'core content' of the right to 'a basic education'. A strong solid foundation was first laid down in Chapter 2, heading 4.1.2 (d), of this study before analysing each pillar/feature of the 'core content' of the right to 'a basic education' which has been discussed in summarise7d detail in this Chapter.

The content of a right determines the nature of State obligations and the CESCR has qualified core obligations as non-derogables. Put otherwise, the 'core content' of a right is that essential element without which a right loses its substantive significance as a human right. Furthermore, the concept is used as a tool for identifying those elements of the normative content of a right that contained minimum entitlements, in the absence of which a State is to be considered to be in violation of its obligations.

A brief examination of the jurisprudence of foreign jurisdictions on the question of having regard to the minimum core content of the socio-economic right, as interpreted by the Committee on Economic Social and Cultural Rights [CESCR], was made herein. This section examined the extent to which courts have been willing to give content to rights. A number of national constitutions have included justiciable socio-economic rights and in other countries, civil and political rights have been interpreted so as to encompass within their ambit, certain socio-economic rights. A case law was examined in this regard.

It is on this basis that it has been shown in the discussion of this concept that the South African basic education system is able to exhibit the interrelated and essential features of the right to 'a basic education' as required by CESCR's General Comment No. 13: The Right to Education.

Those essential features, the so-called "Four A Scheme" or the 'core content' of the right to 'a basic education', are that the education system must at least meet the following basic standard, being:

⁶³³ Berger 2003: 645.

- (a) availability – which requires that there should be sufficient availability of functional educational institutions and programmes such as buildings or other protection from the elements, with all other necessities, with trained teachers on domestically competitive salaries.
- (b) accessibility – which requires educational institutions and programmes to be physically and economically accessible to everyone without discrimination.
- (c) acceptability – which requires that the form and substance of education, including curricular and teaching methods, to be acceptable to learners, and, in appropriate cases to parents, and
- (d) adaptability – which requires that education has to be flexible and adapt to the changing needs of the society and the community, and respond to learners’ needs within their diverse social and cultural settings.

Lastly, the discussion has also reflected on various incidents such as inadequate infrastructure issues, failure to provide educators and non-teaching staff, failure to deliver textbooks on time, indirect discrimination and refusal to admit learners at schools, infringement of learners’ rights to inherent dignity, religious and cultural practices, underdevelopment of mother tongue teaching, and failure to adequately fund and/or provide equal educational opportunities for differently-abled learners where the State and relevant partners were found to have violated the ‘core content’ of the right to ‘a basic education’ in one way or another.

CHAPTER 6

FINAL CRITIQUE

6.1 SUMMARY

This study has managed to explore the problematic concept of the ‘core content’ of public school learners’ right to ‘a basic education’ that the State is obliged to provide in terms of Section 29 (1)(a) of the Constitution.

It has been found that under international law, the right to ‘a basic education’ appears to enjoy some protection at the regional level, and more at the international level. At regional level, the *African Charter on Human and Peoples’ Rights [Banjul Charter]* and the *African Charter on the Rights and Welfare of the Child [Child’s Charter]* emerged as the two leading charters aimed at promoting and protecting learners’ right to ‘a basic education’. Furthermore, these instruments are aimed at complementing other instruments that are already in force and applicable at international level and aimed at recognising and protecting a right to education.

At international level, the right to education also enjoys more protection through instruments such as the *Universal Declaration of Human Rights*, the *United Nations Convention on the Rights of the Child*, and the *International Covenant on Economic, Social and Cultural Rights*. The *Committee on Economic, Social and Cultural Rights’ General Comment No. 13: The Right to Education [Art. 13]* was pivotal for the purposes of this study because it was used as a devise that provides the most comprehensive description of the content of the right to basic education in international law, a devise which was employed as the bedrock upon which a right to a basic education in terms of Section 29 (1)(a) of the Constitution was interpreted and applied.

The General Comment entrenches the essential features, the so-called ‘Four-A Scheme’, which gives concrete content to the right to basic education. The ‘Four-A’ includes the most basic features that the education system of any State must meet as the baseline standard. These essential features are:

- (a) Availability – which requires that there should be sufficient availability of functional

educational institutions and programmes, such as buildings or other protection from the elements, with all other necessities with trained teachers on domestically competitive salaries.

- (b) Accessibility – which requires educational institutions and programmes to be physically and economically accessible to everyone without discrimination.
- (c) Acceptability – which requires that the form and substance of education, including curricular and teaching methods, to be acceptable to learners, and, in appropriate cases to parents.
- (d) Adaptability – which requires that education has to be flexible and adapt to the changing needs of the society and the community and respond to learners’ needs within their diverse social and cultural settings.

The aforesaid essential elements are the ‘core content’ of the right to ‘a basic education’. The ‘core content’ of a right must be understood as meaning its essence, i.e. that essential element without which a right loses its significance as a human right. Furthermore, the concept of the ‘core content’ is used as a tool for identifying those essential elements of the normative content of a right that contains minimum entitlement, in the absence of which a State is to be considered to be in a violation of its obligations.

The study managed to define or give the meaning to the term ‘basic education’ as it is nowadays often used within the framework of international conferences on education, such as the *World Declaration on Education for All*. The study showed that the *Committee on the Covenant on Economic, Social and Cultural Rights* in its *General Comment No. 13* recorded that it took the view that State Parties are required to ensure that education conforms to the aims and objectives identified in Article 13(i), as interpreted in the *World Declaration on Education for All*. The meaning of the term ‘basic education’ was further refined by *UNESCO’s Experts’ Consultation on the Operational Definition of Basic Education Workshop*, so that the term ‘basic education’ is universally accepted and recognised.

In all these instruments detailed above, what was explored by this study is what features commonly on the content and definition of the right to ‘a basic education’, being the following:

- (i) exhibition of interrelated and essential features or pillars of availability, accessibility, acceptability and adaptability;

- (ii) promotion and development of the child’s personality, talents, and mental and physical abilities to their fullest potential;
- (iii) meeting basic learning needs of learners, which comprise of both essential learning tools [such as literacy, oral expression, numeracy and problem solving and the basic learning content, such as knowledge, skills, values and attitudes], scientific and technical knowledge;
- (iv) covering notions such as fundamental, elementary and primary/secondary education;
- (v) the State’s duty to provide basic education free, encourage regular attendance, make it compulsory and in an affordable manner;
- (vi) the development of respect for human rights and fundamental freedoms, tolerance, friendship among all nations and all racial, ethnic or religious groups;
- (vii) guaranteed without any form of discrimination or exclusion;
- (viii) duration of which must be fixed by the State for a period of at least nine years and progressively extends to 12 years;
- (ix) it prepares the learner for further education, for an active life and citizenship; and
 - be of good quality based on minimum standards, provided by suitably qualified educators, as well as effective management along with a system of implementation and assessment, and is provided in the mother tongue, at least in its initial stages, while respecting the requirements/needs of multilingualism.

At the domestic level, the right to ‘a basic education’ under Section 29 (1)(a) of the South African Constitution also enjoys much more recognition and protection - the local initial policy frameworks being White Papers 1 and 2, the National Education Policy Act, and the main pieces of legislation, namely the South African Schools Act and its various Regulations and Norms and Standards, as well as the Employment of Educators Act. What has been explored about a right to ‘a basic education’ within the context of our domestic law is the following:

- (i) In order to understand properly the right to ‘a basic education’, one should first analyse the right in its textual setting considering the entire Bill of Rights in the Constitution, particularly the other rights supporting and impacting on the right to ‘a basic education’, as well as the social and historical context of the right;
- (ii) Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within

“available resources” subject to “reasonable legislative measures”. The right to a basic education in Section 29(1)(a) may be limited only in terms of a law of general application, which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”;

- (iii) It has a positive and negative dimension nature. The positive dimension nature refers to the positive obligation on the part of the State to respect, protect, promote and fulfil all its obligations in delivering on the provision of basic education. The negative dimension nature refers to the negative obligation on the part of private parties not to impair the learners’ constitutional right to a basic education;
- (iv) Its meaning and/or definition is the same as one of the international laws derived from *UNESCO’s World Declaration for All*, endorsed by the *Committee on the Covenant on Economic, Social and Cultural Rights [CESCR] in its General Comment No. 13*. And furthermore, its elaborate definition is the one which has been produced by *UNESCO and CESCR’s Experts’ Consultation Workshop on the Operational Definition of Basic Education*;
- (v) The aforesaid meaning has been endorsed by the State in the *White Paper on Education and Training Notice 196 of 1995* through the Ministry of Education by associating itself with the meaning of a basic education. Therefore, ‘a basic education’ within the context of the South African education milieu covers pre-schooling through ninth grade – and “further” education as “post-compulsory” education tenth grade and beyond. The word ‘beyond’ here will mean progressive extension to 12 years as elaborated on by the *Experts’ Consultation on the Operational Definition of Basic Education*;
- (vi) The benefits that one may enjoy flowing from the acquisition of ‘a basic right to education’ are that one will be able to survive, develop one’s full capacities, lift one out of poverty, obtain the means to participate fully in the community, live and work in dignity, improve one’s quality of life, be able to wander freely and widely, make informed decisions, and continue learning;
- (vii) Therefore, this affirms the view that basic education cannot be arbitrarily defined in terms of the age or the completion of a particular level of schooling, but is determined in accordance with the conglomeration of the basic learning needs which comprise of both essential learning tools and basic learning content, as well as its duration, which is of a period of at least nine years and progressively extending to 12 years of schooling;

- (viii) The National Development Plan also directs that the level of compulsory basic education should be extended to successful completion of Grade 12 in basic education, or the equivalent in the post-school sector.

Furthermore, one model embedded in our basic education system is the partnership relationship which conforms to the notion which says that education is a societal issue and that the State alone cannot control schools, but that schools should be governed by collaborating with all stakeholders. If this partnership model can be jealously guarded in order to be effective and efficient, by the relevant stakeholders, in meaningfully engaging each other through consultation, cooperation in mutual trust and good faith as required by the principle of cooperative governance on any issue they may have, our public schools will be centres of excellence in providing high quality of the 'core content' of 'a basic education' to all our learners, and by so doing, develop their talents and capabilities which are connected to the organisation and governance of our education system.

The study has also reflected on various incidents where the State and relevant partners were found to have violated the 'core content' of the right to 'a basic education'. Be that as it may, those are some of the challenges facing our basic education system. One would also be remiss if one was to overlook the obligation performed by the State on the right to 'a basic education'. Much has been shown in this study on how the State has done too much to ameliorate the situation by endeavouring to bring about equality in education within the period of 20 years in government, and realised the right to basic education, and continue to do so for the majority of South African learners who are from impoverished and currently disadvantaged backgrounds. In some of the cases where there was a violation of the right to a basic education, the role of parents, interested parties, such as civil society groups, and relevant stakeholders striving for quality basic education, and various courts' enforcement was discussed in some detail in this study.

6.2 RECOMMENDATIONS

Having explored the ‘core content’ of the right to ‘a basic education’, it is recommended herein that:

- 6.2.1 Based on the discussion on the meaning of the right to a basic education that the term ‘basic education’ be defined in terms of the South African Schools Act, so as to give its scope and content a legal certainty and for learners in the country to acquire the same standard of quality basic education;
- 6.2.2 Basic education must be compulsory and start from Grade one to Grade 12;
- 6.2.3 The core content of the right to a basic education, when that right is in issue, be determined by using all the relevant policies and legislative measures the government has put in place since the new constitutional dispensation in the country in 1994 in order to give effect to the right;
- 6.2.4 The approach to determine the content of the right to a basic education should be flexible to be in line with the developments taking place at international, regional and domestic levels;
- 6.2.5 However, this dialogue over the content of the right to a basic education should not be confined to an exchange between the judiciary and other branches of state. At the very least it should also include school governing bodies, teachers, parents and learners and that the State should meaningfully engage with them to ensure that the content of a right to a basic education is sufficiently tailored to their needs.⁶³⁴
- 6.2.6 Where it has been proven in court that the State has failed to fulfil the learners’ right to a basic education as a result of poor planning, and inefficient and ineffective public administration, that courts should not hesitate to interfere in those circumstances by fashioning orders that give immediate relief to the learners and insist on appropriate actions to be taken against defaulting public functionaries; and
- 6.2.7 The ‘Four A Scheme’ in terms of the *International Committee on Economic, Social and Cultural Rights General Comments No. 13*, which was ratified by the government on 12 January 2015 and entered into force on 12 April 2015, be currently regarded as a useful instrument upon which a foundation is built to understand the content of the right to a basic education within the context of South African Law.

⁶³⁴ McConnachie C & C 2012: 582.

6.3 CONCLUSION

It should be acknowledged that lacklustre schools will not be turned around overnight, and even tangible improvements will not necessarily translate immediately into other social spheres.⁶³⁵

This piece of work has reflected on current South African basic education, where there have been some violations of Section 29 (1)(a), and that the courts should draw on both the Constitution's text and its own precedents to hold that the government needs to do more to improve the country's worst schools.⁶³⁶

Even the Constitutional Court, in the earlier case of *Ermelo*, and more recently in *Welkom High and Harmony High Schools*, where it dealt with cases of basic education, has acknowledged that while much remedial work has been done by the State since the advent of our Constitutional democracy, sadly deep social disparities and resultant social inequity remain with us. And, given the legacy of apartheid, the State's obligations to ensure that the right to education is meaningfully realised for the people of South Africa is great indeed.

In conclusion, during the exploration of the 'core content' of the right to 'a basic education', it was shown in the scrutiny of this concept that the South African basic education system is able to exhibit and comply with the interrelated and essential features of the right to 'a basic education' as required by the *Committee on Economic, Social and Cultural Rights [CESCR] General Comment No. 13: The Right to Education*, the so-called "Four A Scheme", which assisted in determining the 'core content' of South African public school learners' right to a basic education in terms of Section 29 (1)(a) of the Constitution.

“After climbing a great hill, one only finds that there are many more hills to climb”

President Nelson Rolihlahla Mandela

⁶³⁵ Berger 2003: 649.

⁶³⁶ Berger 2003: 650.

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