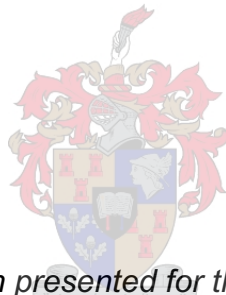


**The child's rights to, in and through basic
education:
An analysis of South Africa's international
obligations**

by
Annemarie Strohwald



*Dissertation presented for the degree of
Doctor of Laws in the Faculty of Law at Stellenbosch University*

Supervisor: Prof Sonia Human

Co-supervisor: Dr Debbie Horsten

March 2021

DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

March 2021

Copyright © 2021 Stellenbosch University

All rights reserved

SUMMARY

The child's right to basic education is of utmost importance as it not only prepares but enables them to participate in society. The child's right to basic education also enables the realisation of other human rights and provides the opportunity to rise above one's circumstances.

This dissertation centres on South Africa's international obligations in relation to the child's rights to, in and through basic education and whether or not these obligations have been fulfilled. Specific focus is placed on the obligations created by the Convention on the Rights of the Child ("CRC") as it is regarded as the foundation of international law on the rights of the child and still remains one of the most widely ratified human rights treaties. Additional obligations created by the International Bill of Human Rights and the African Charter on the Rights and Welfare of the Child are also examined in the dissertation.

In order to measure whether or not these international obligations have been fulfilled, the model for compliance is introduced. The model embraces a child-centred approach in the two frameworks that make up the model: the normative framework and the practical framework. The normative framework is founded on articles 28 and 29 of the CRC and the practical framework is based on the 4-A scheme. The dissertation proves that the value of the normative and practical frameworks is that while they are complementary and form the model for compliance, they are also essential frameworks independently. Both frameworks are essential components in order to measure international obligations as states must be normatively strong in their recognition and protection of the child's right to basic education, but it also requires implementation.

With the model for compliance clearly established, it is then applied in India and Nigeria in order to gain a comparative perspective. Attention is paid to constitutional and legislative frameworks as well as relevant case law in these two jurisdictions. India and Nigeria's periodic reports to the CRC Committee and the ACERWC also form part of the analysis and indicate that the concerns identified by these two committees are not only passing comments but should be dealt with in order to meet international obligations and ultimately result in the realisation of the child's right to education.

With the application of the model for compliance in the South African context, it is quite clear that the constitutional framework is unfortunately not mirrored by our current reality. While positive steps have been taken to align legislation and policy with the international standards of the normative framework, the implementation thereof remains a major challenge.

The dissertation concludes with final reflections and recommendations on South Africa's international obligations. The model for compliance as proposed in the dissertation is valuable as it incorporates a normative and practical framework that provides content to dimensions of the right to basic education. Striking a balance in the realisation and interpretation of children's rights is very important, and the model for compliance attempts to find this balance.

OPSOMMING

Die kind se reg tot basiese onderwys is van uiterste belang, aangesien dit hulle nie net voorberei nie, maar ook in staat stel om aan die samelewing deel te neem. Die kind se reg op basiese onderwys maak ook die verwesenliking van ander menseregte moontlik en bied die geleentheid om bo 'n mens se omstandighede uit te styg.

Die proefskrif handel oor Suid-Afrika se internasionale verpligtinge met betrekking tot die kind se regte op, in en deur basiese onderwys en of hierdie verpligtinge nagekom word, al dan nie. Spesifieke fokus word geplaas op die verpligtinge wat deur die Konvensie oor die Regte van die Kind ("CRC") geskep word, aangesien dit as die grondslag van internasionale reg oor die regte van die kind geag word en steeds een van die mees bekragtigde menseregteverdragte is. Bykomende verpligtinge wat deur die Internasionale Handves van Menseregte en die Afrika-handves oor die Regte en Welsyn van die Kind geskep word, word ook in die proefskrif ondersoek.

Om te bepaal of hierdie internasionale verpligtinge nagekom word, is die model vir voldoening ("model for compliance") bekendgestel. Die model omvat 'n kindgerigte benadering in die twee raamwerke waaruit die model bestaan: die normatiewe raamwerk en die praktiese raamwerk. Die normatiewe raamwerk is gebaseer op artikels 28 en 29 van die CRC en die praktiese raamwerk is gebaseer op die 4-A-skema. Die proefskrif bewys dat die waarde van die normatiewe en praktiese raamwerke is dat, hoewel dit aanvullend is en die model vir voldoening uiteensit, dit onafhanklik ook noodsaaklike raamwerke is. Albei raamwerke is noodsaaklike komponente om internasionale verpligtinge te meet, aangesien state normatief sterk moet wees in hul erkenning en beskerming van die kind se reg op basiese onderwys, maar dit vereis ook implementering.

Met die model vir voldoening duidelik uiteengesit, word dit dan in Indië en Nigerië toegepas om 'n vergelykende perspektief vas te stel. Aandag word geskenk aan grondwetlike en wetgewende raamwerke sowel as relevante regspraak in hierdie twee jurisdiksies. Die periodieke verslae van Indië en Nigerië aan die CRC-komitee en die ACERWC vorm ook deel van die analise en dui aan dat die bekommernisse wat deur hierdie twee komitees geïdentifiseer word, nie net kommentaar is nie, maar dat dit

aangespreek moet word om internasionale verpligtinge na te kom en uiteindelik tot die verwesenliking lei van die kind se reg op onderwys.

Met die toepassing van die model vir nakoming in die Suid-Afrikaanse konteks, is dit duidelik dat die grondwetlike raamwerk ongelukkig nie deur ons huidige werklikheid weerspieël word nie. Alhoewel positiewe stappe geneem is om wetgewing en beleide in lyn te bring met die internasionale standarde van die normatiewe raamwerk, bly die implementering daarvan 'n groot uitdaging.

Die proefskrif sluit af met finale refleksies en aanbevelings rakende Suid-Afrika se internasionale verpligtinge. Die model vir nakoming soos voorgestel in die proefskrif, is waardevol, aangesien dit 'n normatiewe en praktiese raamwerk insluit wat inhoud gee aan die dimensies van die reg op basiese onderwys. Dit is baie belangrik om 'n balans te vind in die verwesenliking en interpretasie van kinderregte, en die model vir nakoming probeer om hierdie balans te vind.

ACKNOWLEDGEMENTS

I would firstly like to thank my two supervisors, Professor Human and Doctor Horsten. Thank you for your continued support, guidance and feedback during the writing of this dissertation. Thank you also for the encouragement and numerous cups of coffee. Lastly, thank you for strengthening my passion for children's rights.

Thank you to the Dean's Bursary Fund of the Law Faculty of Stellenbosch University for the financial assistance that aided in the completion of this study.

Then, thank you to the AALL Foundation, and specifically to Steve Georgala, for providing me with the opportunity and support to undertake research leave at Oxford University for 6 months. Thank you to Professor Sandra Fredman and the members of her research group for their valuable feedback and including me in the activities of the Oxford Human Rights Hub. I especially want to thank Michelle Robb for making my visit to Oxford so memorable.

Thank you also to my friends and colleagues at the Law Faculty, especially Professor CG van der Merwe for his continued support while I was his research assistant. Then, a very special thank you to Gert, Delano and Cecile. For endless amounts of cups of coffee at Hazz, lively discussions, support and laughs. This journey would not have been the same without you.

Lastly, I would like to thank my family. Or at least try to. Thank you to my sisters, Lelani and Marion, for always being there for me and for being my best friends. I am blessed to have you as my sisters. Then to my parents, Heinz and Marianne, thank you for your never-ending and unconditional love, support, guidance and encouragement. Thank you for instilling in me a love of reading and learning and for fuelling my passion for human rights through the example you set for me.

TABLE OF CONTENT

CHAPTER 1: INTRODUCTION

1 1 Introduction	1
1 2 Research question	5
1 3 Sequence of chapters	6
1 4 A brief history of basic education in South Africa	8
1 4 1 The importance of historical context	8
1 4 2 Race and basic education in South Africa	9
1 5 Understanding basic education	13
1 5 1 The right to basic education as both a socio-economic right and a children's right	19
1 5 2 The dimensions of the right to basic education	22

CHAPTER 2: THE CHILD'S RIGHT TO BASIC EDUCATION: A MODEL FOR COMPLIANCE

2 1 Introduction	24
2 2 The history of childhood	25
2 2 1 The invention of childhood	26
2 3 The legal history of the child's education rights	28
2 3 1 International law on the child's right to education	29
2 4 The Convention on the Rights of the Child	33
2 4 1 History and background of the CRC	33
2 4 2 The role of the Committee on the Rights of the Child	35
2 4 3 Defining a child-centred approach	36
2 4 4 A normative framework: The provisions on the right to basic education	38
2 4 4 1 <i>Article 28 of the CRC</i>	39
2 4 4 2 <i>Article 29 of the CRC</i>	44
2 4 4 3 <i>The interrelated nature of the CRC provisions</i>	48
2 5 A practical framework: The 4-A scheme	52

2 5 1 Availability	53
2 5 2 Accessibility	54
2 5 3 Acceptability	55
2 5 4 Adaptability	56
2 6 A holistic perspective: The child's right to basic education and the model for compliance	57
2 6 1 The child's rights to basic education	57
2 6 2 The child's rights in basic education	59
2 6 3 The child's rights through basic education	62
2 7 Conclusion	65

CHAPTER 3: AN INTERNATIONAL LAW PERSPECTIVE OF THE RIGHT TO BASIC EDUCATION

3 1 Introduction	67
3 2 The right to basic education as developed under international law	68
3 2 1 The International Bill of Human Rights	72
3 2 1 1 <i>The UDHR</i>	72
3 2 1 2 <i>The ICESCR</i>	76
3 2 1 3 <i>The ICCPR</i>	78
3 2 1 4 <i>The International Bill of Human Rights and the CRC</i>	79
3 2 2 International instruments providing protection against discrimination	80
3 3 The child's right to basic education as developed under international law	82
3 3 1 African regional law	82
3 3 1 1 <i>Regional background</i>	83
3 3 1 2 <i>The education clauses: the CRC and the ACRWC</i>	88
3 3 1 3 <i>The concept of "African values" in the ACRWC</i>	92
3 3 2 The Education for All movement	95
3 3 3 Concluding comments	99
3 4 Conclusion	99

CHAPTER 4: THE CHILD'S RIGHT TO BASIC EDUCATION IN INDIA AND NIGERIA

4 1 Introduction	103
4 2 The child's right to basic education in India	107
4 2 1 Background on the Indian legal system	107
4 2 2 The Indian Constitution and international law	111
4 2 3 The distinction between Fundamental Rights and the Directive Principles of State Policy	113
4 2 4 The influence of the courts in the development of the right to basic education	115
4 2 5 Amending the Indian Constitution	120
4 2 6 The Right of Children to Free and Compulsory Basic Education Act	124
<i>4 2 6 1 Age in terms of the Right to Education Act</i>	125
<i>4 2 6 2 Free basic education in terms of the Right to Education Act</i>	125
<i>4 2 6 3 Section 12 of the Right to Education Act</i>	126
<i>4 2 6 4 Norms and Standards in terms of the Right to Education Act</i>	130
<i>4 2 6 5 Implementation</i>	137
4 2 7 India's reporting history to the Committee on the Rights of the Child	139
4 2 8 Reflections on the child's right to basic education in India	147
4 3 The child's right to basic education in Nigeria	151
4 3 1 Contextual background on the Nigerian legal system	151
4 3 2 The application of international law in Nigeria	153
4 3 3 The Constitutional framework	154
<i>4 3 3 1 Section 18 of the Constitution</i>	157
<i>4 3 3 2 The role of the African Charter on Human and Peoples' Rights</i>	160
<i>4 3 3 3 The Economic Community of West African States Community Court of Justice</i>	162
<i>4 3 3 4 The Fundamental Rights Enforcement Procedure Rules of 2009</i>	163
4 3 4 Legislative framework for the child's right to basic education	165
<i>4 3 4 1 The Child Rights Act</i>	165

4 3 4 2 <i>The Compulsory, Free Universal Basic Education Act</i>	167
4 3 5 Nigeria's periodic reporting	170
4 3 6 Reflections on the child's right to basic education in Nigeria	176
4 4 Conclusion	178

CHAPTER 5: THE CHILD'S RIGHT TO BASIC EDUCATION IN SOUTH AFRICA

5 1 Introduction	181
5 2 Background on the South African legal system	184
5 3 The Constitutional framework and international law	184
5 4 Constitutional recognition of the child's right to basic education	188
5 4 1 The education clause	188
5 4 1 1 <i>Limitation of the right to basic education</i>	191
5 4 2 Section 29 and the child's rights to, in and through basic education	194
5 4 3 The relationship between sections 28 and 29 of the Constitution	197
5 4 4 The state's duty to respect, protect, promote and fulfil the child's right to basic education	201
5 4 4 1 <i>The state's duty to respect the child's right to basic education</i>	202
5 4 4 2 <i>The state's duty to protect the child's right to basic education</i>	203
5 4 4 3 <i>The state's duty to promote the child's right to education</i>	204
5 4 4 4 <i>The state's duty to fulfil the child's right to basic education</i>	205
5 4 4 5 <i>The link between sections 7(2), 29 and 39</i>	205
5 4 5 The minimum core standard in relation to the right to basic education	206
5 5 Legislative recognition of the right to basic education	209
5 5 1 Applicable ages and compulsory basic education	210
5 5 2 Free basic education	212
5 5 2 1 <i>Textbooks as part of the right to basic education</i>	220
5 5 2 2 <i>Transport as an essential part of the right to basic education</i>	224
5 5 3 Norms and standards relating to basic education	227

5 5 4 Implementation of the legal framework	234
5 6 Periodic reporting	235
5 6 1 Initial report to the CRC	236
5 6 2 Periodic report to the CRC Committee and initial report to the ACERWC	238
5 7 Conclusion	248

CHAPTER 6: CONCLUSION

6 1 Introduction	251
6 2 Recommendations	254
6 3 Conclusion	257
LIST OF SOURCES	259

Chapter 1:

Introduction

1 1 Introduction

The United Nations Convention on the Rights of the Child (hereafter the “CRC”)¹ is regarded as the foundation or core of international law on the rights of the child and still remains one of the most widely ratified human rights treaties.² The CRC not only provides for the protection of children’s rights, but is the first binding international human rights instrument that provides for social, political, civil, economic and cultural rights in one document.³

The CRC explicitly provides for the recognition of the right to education in articles 28 and 29. Article 28 not only declares that state parties must recognise the child’s right to education but it also creates specific responsibilities for state parties in relation to the realisation of the right to education. The article provides for free and compulsory primary education,⁴ the accessibility and availability of secondary and higher education for all,⁵ encouragement of regular attendance at schools and the reduction of the drop-out rate.⁶ The article also refers to school discipline⁷ and international cooperation in all matters relating to education.⁸

Article 29 of the CRC adds a qualitative element to article 28, and it also provides a framework for the direction and focus of education. Article 29(1)(a) highlights the duty of the state to direct education to the development of the child’s personality, talents and mental and physical abilities. Article 29 also directly refers to human rights education and the development of respect for fundamental freedoms. In essence, article 29 captures the developmental aims of education. In order to provide clarity on

¹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Resolution 44/25 of 20 November 1989 (hereafter the “CRC”).

² T Kaime *The African Charter on the Rights and Welfare of the Child: a Socio-legal Perspective* (2009) 15; J Fortin *Children’s Rights and the Developing Law* 3 ed (2009) 45-49.

³ UNICEF *General Comments of the Committee on the Rights of the Child* (2006) vii.

⁴ Art 28(1)(a) of the CRC.

⁵ Art 28(1)(b) and (c).

⁶ Art 28(1)(e).

⁷ Art 28(2).

⁸ Art 28(3).

the content of article 29, the United Nations Committee on the Rights of the Child (hereafter the “CRC Committee”) issued CRC General Comment No 1: the aims of education (“CRC Committee General Comment No 1”).⁹ General Comments are published by the United Nations treaty bodies in order to elaborate on the provisions of the specific human rights treaty, to provide guidance on the interpretation of the provisions and to clarify state responsibilities.¹⁰ CRC Committee General Comment No 1 expands on the aims of education as set out in article 29 and provides state parties with appropriate guidelines for the child’s right to education. Having signed and ratified the CRC, South Africa is a party to the CRC.¹¹ Accordingly, South Africa is bound by the provisions as set out in the CRC.

The South African Constitution (hereafter the “Constitution”)¹² provides expressly for the right to basic education with a specific article dedicated to the right to education. The right to basic education is enshrined in section 29. Section 29(1)(a) states that “Everyone has the right to a basic education”. For the purposes of this dissertation, section 29(1)(a) will play a central a role as the scope of the dissertation will be limited to the child’s right to basic education.

Section 28 of the Constitution is significant as it specifically recognises the rights of the child and makes provision for a variety of rights.¹³ Specific dimensions of the right to basic education can be identified in section 28. For example, section 28(1)(c) recognises the child’s right to basic nutrition, thereby justifying feeding programmes at

⁹ UN Committee on the Rights of the Child General Comment No 1 (26th session, 2001) “Article 29(1): the aims of education” UN Doc CRC/GC/2001/1 (hereafter CRC Committee *General Comment No 1*); For more information on the General Comments see UN Human Rights Office of the High Commissioner “Human Rights Treaties Bodies – General Comments” <<https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>> (accessed 11-07-2018); The argument can be made that by making education the content of the first general comment, the CRC Committee acknowledged that the child’s right to education is not only of significance in general but also important in relation to other rights.

¹⁰ H Keller & L Grover “General Comments of the Human Rights Committee and their legitimacy” in Keller H & Ulfstein G (eds) *UN Human Rights Treaty Bodies* (2012) 117; D Weissbrodt, JC Hansen & NH Nesbitt “The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law” (2011) 24 *Harvard Human Rights Journal* 115 118; See also UN Human Rights Office of the High Commissioner “Human Rights Treaties Bodies – General Comments” <<https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>> (accessed 11-07-2018).

¹¹ South Africa ratified the CRC on 16 June 1995. United Nations Treaty Collection “Convention on the Rights of the Child” <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 13-10-2018).

¹² The Constitution of the Republic of South Africa, 1996.

¹³ R Krüger & C McConnachie “The Impact of the Constitution on Learners’ Rights” in T Boezaart (ed) *Child Law in South Africa* 2 ed (2018) 564.

schools. Section 28(1)(d) protects the child from maltreatment, neglect, abuse or degradation and forms the basis for a code of conduct. Lastly, sections 28(1)(e) and 28(1)(f)(ii) protect the child from exploitative labour practices and require that the child should not be permitted to perform work that places his or her education at risk.

Together with the constitutionally entrenched right to basic education, legislation also regulates the child's right to basic education in South Africa. The South African Schools Act (hereafter the "Schools Act")¹⁴ serves as a vital piece of national legislation on basic education.¹⁵ The main aim of the Schools Act is to provide a unified national school system, which not only redresses the injustices of the past but that also makes provision for high quality basic education to all learners.¹⁶ The Schools Act regulates aspects such as: admission, discipline, language policies, compulsory attendance age and religion to name but a few.¹⁷ The Schools Act is further analysed in chapter 5.¹⁸

While the right to basic education is of importance to all individuals, it has the greatest impact on the child.¹⁹ The child's education is of utmost importance as it not only prepares but also enables them to participate in society.²⁰ The body of law pertaining to children's rights underscores this viewpoint as the right to education is regarded as an empowerment right.²¹ The right to basic education enables the

¹⁴ 84 of 1996; R Joubert & S Prinsloo *The Law of Education in South Africa* (2009) 2; The Schools Act is further explored in chapter 5 see specifically section 5 4; For more information on the Schools Act see R Joubert "The South African Schools Act" in T Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 575-593; The Draft Basic Education Laws Amendment Bill, which aims to amend the South African Schools Act has been published in the Government Gazette and comments were open until November 2017.

¹⁵ Joubert & Prinsloo *Law of Education* 2.

¹⁶ Joubert "South African Schools Act" in *Child Law* 575, 576.

¹⁷ Ss 5, 8, 6, 3, 4, and 7 of the Schools Act; Joubert "South African Schools Act" in *Child Law* 575; See also the preamble to the South African Schools Act; S Mothata "Developments in Policy and Legislation in the Education and Training System" in T Mda & S Mothata (eds) *Critical Issues in South African Education – After 1994* (2000) 10.

¹⁸ See section 5 5.

¹⁹ M Freeman *Understanding family law* (2007) 198; L Lundy & J Tobin "Article 29: The Aims of Education" in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 1119.

²⁰ S Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) 245; For further discussion see F Veriava & F Coomans "The right to education" in D Brand & C Heyns *Socio-economic rights in South Africa* (2005) 57-83.

²¹ CESCR General Comment No 13 (21st session, 1999) "The Right to Education (art 13)" UN Doc E/C.12/1999/10 para 1 (hereafter CESCR *General Comment No 13*); R Malherbe "Education Rights" in T Boezaart (ed) *Child Law in South Africa* 2 ed (2009) 399; art 29(1)(b) of the CRC; *Governing Body of Juma Masjid Primary School v Essa* NO 2011 8 BCLR 761 (CC) para 41.

realisation of other human rights and provides the opportunity to rise above one's circumstances and participate in society.²²

Basic education is also, for the most part, aimed specifically at the child.²³ The focus of the dissertation will accordingly be on the *child's* right to basic education in South Africa; in other words a child-centred approach will be followed.²⁴ This approach means that the child is central to the analysis of the right to basic education and that the specific needs of the child must be taken into account. In order to study the right to basic education as a children's right, an examination of the origin and development of children's rights is necessary. Different views on the establishment and recognition of children's rights have been present throughout history and the notion that children should be entitled to human rights was and still entails a gradual process of acceptance.²⁵ Children's rights involve many different facets that should be balanced, such as protecting the child whilst at the same time acknowledging the autonomy of the child. The differing views between the "child savers" and "kiddie libbers" serve as an appropriate example.²⁶

²² CESCR *General Comment No 13* para 1; UNCHR "Annual Report of the Special Rapporteur on the right to education, Katarina Tomaševski" (2001) UN Doc E/CN.4/2001/52 para 11; S Fredman *Human Rights Transformed: positive rights and positive duties* (2008) 216; A Quennerstedt & M Quennerstedt "Researching children's rights in education: sociology of childhood encountering educational theory" (2014) 35 *British Journal of Sociology of Education* 115-116; L Lundy "Mainstreaming Children's Rights in, to and through Education in a Society emerging from Conflict" (2006) 14 *Int'l J Child Rts* 339-339; KD Beiter *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (2006) 17; See in general S Grover "Why aren't these youngsters in school? Meeting Canada's Charter Obligations to Disadvantaged Adolescents" (2002) 10 *Int'l J Child Rts* 1-37; F Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to its Realization" in Y Donders & V Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 185-186; F Coomans "In Search of the Core Content of the Right to Education" in AR Chapman & S Russel (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 219.

²³ For purposes of the dissertation a distinction is made between basic education and adult basic education.

²⁴ See section 2.4.3.

²⁵ Fortin *Children's rights and the Developing Law* 45; G Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 202.

²⁶ S Human "The Theory of Children's Rights" in T Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 247; The two main streams of the children's rights movement is represented by the protection of children and the liberation of children. The "child savers" emphasised the vulnerability of children and that they should be protected at all times, and in some instances even be protected from themselves. The "kiddie libbers" argued against this protective approach as they were of the opinion that it impairs the child's dignity. They thus argued for more freedom and that children should be afforded with the same rights as adults.

Children's rights should also not be studied as a discipline in isolation but rather in relation to other rights.²⁷ The interdependency and indivisibility of all human rights, including children's rights, becomes clear when the right to education is examined in relation to other human rights.²⁸ In examining the child's right to basic education, three dimensions of the right to basic education will be identified, namely: rights to basic education, rights in basic education and rights through basic education.²⁹ Any reference to the right to basic education in the dissertation must therefore be understood to incorporate the three dimensions, unless the contrary is pointed out.³⁰

1 2 Research question

The purpose of the research is to determine if South Africa fulfils its international obligations with regard to the child's rights to basic education. In order to answer this question a detailed analysis will be conducted of the relevant international obligations created in terms of international law. This will provide the outline against which South Africa's compliance will be measured.

In order to measure whether or not South Africa fulfils its international obligations and thus complies with the standards set by international law, a model is necessary. In the dissertation a model for compliance³¹ that is based on the CRC and the 4-A scheme is proposed.³² Article 28 and 29 of the CRC provides the normative framework for the child's right to basic education.³³ In addition to the normative framework, a

²⁷ Human "The Theory of Children's Rights" in *Child Law* 243.

²⁸ The interdependency is also highlighted in the preamble of the CRC as it refers specifically to other international treaties such as the United Nations Universal Declaration of Human Rights, International Covenants on Human Rights, Geneva Declaration of the Rights of the Child, International Covenant on Civil and Political Rights and also the International Covenant on Economic, Social and Cultural Rights; See section 3 2 1 for a discussion of these instruments. Kaime *The African Charter* 121; R Joubert "Incorporating international standards into national education law in South Africa: the accountability of the state (2014) 29 *SAPL* 1 4; Liebenberg *Socio-economic Rights* 241; *The Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T); See also Van Bueren's discussion on the "evolutionary revolution" in G Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in CJ Davel *Introduction to Child Law in South Africa* (2000) 202.

²⁹ K Tomaševski *Right to Education Primers No 3: Human Rights obligations: making education available, accessible, acceptable and adaptable* (2001), 12-15; S Pendlebury, L Lake & C Smith (eds) *South African Child Gauge* Children's Institute University of Cape Town (2008/2009) 21.

³⁰ See section 2 6.

³¹ See section 2 6.

³² See section 2 4 for a discussion of the CRC and section 2 5 that sets out the elements of the 4-A scheme.

³³ See chapter 2 for a discussion of the CRC.

practical framework is provided by the 4-A scheme as established by Katarina Tomaševski.³⁴ These two frameworks constitute the compliance model.³⁵

1 3 Sequence of chapters

South Africa's education system is closely connected to its political past, consequently the history of basic education will be discussed in relation to its political history.³⁶ With the dissertation focusing specifically on the right to *basic education*, chapter 1 will provide an understanding and meaning for basic education in the dissertation. Chapter 1 will also analyse the difference between the right to basic education as a socio-economic right and as a children's right.³⁷ A child-centred approach will be applied in the dissertation, and therefore the interpretation of the right to basic education as both a socio-economic right and children's right will be highlighted.

After chapter 1 has provided insight on the importance of the right to basic education as a children's right, chapter 2 will provide historical context on the development of the child's right to basic education. Chapter 2 will examine the relationship between the changing views of childhood and the child's education.³⁸ The examination will be centred on the history and the changing societal views of childhood,³⁹ and an analysis of the legal history of the child's right to basic education.⁴⁰ With the focus of the dissertation on the fulfilment of international obligations, chapter 2 will also establish the model for compliance as proposed by the dissertation. This will be done by outlining and evaluating the normative and practical frameworks for the child's right to basic education as established by international law.⁴¹

Following the determination of the model for compliance in chapter 2, chapter 3 will provide an international law perspective on the right to basic education. Binding and non-binding international instruments that provide a general right to basic education

³⁴ See section 2 5 for a discussion of the 4-A scheme.

³⁵ See section 2 6.

³⁶ Section 1 4.

³⁷ Section 1 4.

³⁸ Sections 2 2 and 2 3.

³⁹ Section 2 2.

⁴⁰ This will include a discussion of the legal history of the child's education in terms of international law. Section 2 3.

⁴¹ Sections 2 4 and 2 5.

will be examined. Next, international instruments that specifically provide the child with the right to basic education will be analysed. The analysis will also include a discussion of African regional law on the child's right to basic education.⁴²

Following the determination of the international law on the child's right to basic education, chapter 4 will examine the child's right to basic education in terms of foreign law. Chapter 4 will focus on the child's right to basic education in India⁴³ and Nigeria.⁴⁴ Both of these jurisdictions, like South Africa, are state parties to the CRC and must fulfil the obligations created by the CRC.⁴⁵ Both Nigeria and South Africa are parties to the African Charter on the Rights and Welfare of the Child ("ACRWC"),⁴⁶ which allows Nigeria to provide a regional perspective.⁴⁷ The purpose of the analysis will be to determine to what extent the child's right to basic education is recognised and implemented in these two jurisdictions, in accordance with the relevant international law. In order to measure India and Nigeria's compliance with the relevant international law, the model for compliance as set out in chapter 2 will be applied.

With the international law position established in chapter 3 and the examination of foreign law concluded in chapter 4, chapter 5 will focus on South Africa. Chapter 5 will examine the child's right to basic education in South Africa by establishing the constitutional and legislative frameworks that recognise the child's right to basic education.⁴⁸ Based on this examination, South Africa's fulfilment of its international obligations will be measured by applying the model for compliance.⁴⁹ The examination

⁴² See section 3 2 for a discussion of right to basic education in terms of international law and section 3 3 1 for African regional law.

⁴³ See section 4 2.

⁴⁴ See section 4 3.

⁴⁵ South Africa ratified the CRC on 16 June 1995. Both India and Nigeria ratified the CRC quite early after it was introduced. India acceded to the CRC on 11 December 1992 and Nigeria ratified the CRC on 19 April 1991; United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 13-10-2018); See also EG Thukral & AK Asthana "Children's Rights in Litigation: Use of the CRC in Indian Courts" in T Liefwaard & JE Doek (eds) *Litigating the Rights of the Child* (2015) 31; SK Verma "International Law" in SK Verma & K Kusuk (eds) *Fifty Years of the Supreme Court: Its Grasp and Reach* (2006) 637; N Srivastava "The status of the child in India in the context of The Convention on the Rights of the Child" (2004) 34 *Social Change* 113 113; For an explanation of the difference between signing, ratification, acceptance and accession of UN treaties see United Nations DAG Hammarskjöld Library "What is the difference between signing, ratification and accession of UN treaties?" <<http://ask.un.org/faq/14594>> (accessed 26-03-2020).

⁴⁶ OAU, African Charter on the Rights and Welfare of the Child, Doc. CAB/LEG/24.9/49 (1990).

⁴⁷ See section 3 3 1 for a discussion of African regional law.

⁴⁸ See section 5 4 for a discussion of the constitutional framework and section 5 5 for a discussion of the legislative recognition of the child's right to basic education.

⁴⁹ Section 2 6.

will also include comparisons that will be drawn between the South African, Indian and Nigerian experiences.

After the model for compliance has been applied in India, Nigeria and South Africa, the value of the model by will be made clear in chapter 6 in the determination of whether South Africa fulfils its international obligations in relation to the child's right to basic education. Final reflections and recommendations on South Africa's international obligations will also be made.

1 4 A brief history of basic education in South Africa

1 4 1 The importance of historical context

History can be defined as a truth-conforming reconstitution and interpretation of the past.⁵⁰ The past is viewed and interpreted in order to suit the demands of the research, with the interpretation of important events, patterns and analyses used in order to contribute in a meaningful way to the research.⁵¹ This definition is also applicable when studying the history of basic education. By interpreting past education, a more comprehensive understanding of the evolution of the right to basic education can be achieved.⁵² The rationale for examining the history of South African basic education is two-fold. The first part of the rationale relates to how history can aid in identifying existing issues in basic education;⁵³ and the second assists in the development of new educational policies and systems.⁵⁴ Consequently, the history of the child's right to

⁵⁰ CC Wolhuter "History of Education as a Field of Scholarship and the Historiography of South African Education" in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 1; See also EH Carr *What is History?* (1961) 7-23, 27-28.

⁵¹ Wolhuter "History of Education" in *A History of Schooling in South Africa* 1; See also TP Vanqa *The Approaches to the Understanding and Teaching of History of Education in the Preparation of Teachers in a Developing Country* (1994) Paper presented at the annual conference of Southern African Comparative and History of Education Society 4.

⁵² Wolhuter "History of Education" in *A History of Schooling in South Africa* 1.

⁵³ Wolhuter "History of Education" in *A History of Schooling in South Africa* 2; See also ISJ Venter & SM Van Heerden *The Grounding of History of Education: An Introduction* (1989) 50; ACF Beales "The Place of History of Education in the Training of Teachers" in P Gordon & J Szieter (eds) *History of Education: the Making of a Discipline* (1989) 44; G McCullough "Publicizing the Educational Past" in D Crook & R Aldrich (eds) *History of Education for the 21st Century* (2000) 1; W Robinson "Finding Our Professional Niche. Reinventing Ourselves as 21st Century Historians of Education" in D Crook & R Aldrich (eds) *History of Education for the 21st Century* (2000) 57-62.

⁵⁴ Wolhuter "History of Education" in *A History of Schooling in South Africa* 2; See also JH Coetzee "Toekomsstudie as Opgawe vir die Historiese Opvoedkunde: Regverdiging en Motivering" (1989) 9(1) *Suid-Afrikaanse Tydskrif vir Opvoedkunde* 36-43; M Nkomo *Pedagogy of Domination: Toward a Democratic Education in South Africa* (1990) 291; McCullough "Publicizing the Educational Past" in *History of Education for the 21st Century* 1.

basic education in South Africa will be discussed in order to provide necessary context to the study. Attention will be paid to the right to basic education of children under the apartheid regime and then shift to the changes effected by the new constitutional dispensation.⁵⁵

1 4 2 Race and basic education in South Africa

Since colonial times, formal basic education in South Africa has been clouded by segregation and inequalities on the basis of race.⁵⁶ Separate schools were created for different racial groups, with the Dutch East India Company creating new schools for their (white) children and missionaries establishing schools for black children.⁵⁷ This system of discrimination continued well into the 20th century as separate schools were created for White, Black (African), Indian and Coloured learners as these were the four main ethnic groups defined by the government.⁵⁸

This ideology was followed in 1948 when, after winning the general election, the National Party formally instituted racial segregation in South Africa known as apartheid.⁵⁹ It is against this background of racial inequality that the history of basic

⁵⁵ The scope of the study will be limited to the right to basic education during apartheid and the new constitutional dispensation. See J Seroto “Indigenous Education in the Pre-colonial Era” in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 37-55 for reading on education before colonial rule; For more information on education under Dutch and British colonial rule see CS Le Roux “European Foundations Shaping Schooling in South Africa: Early Dutch and British Colonial Influence at the Cape” in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 57-86; For more on the history of education see CS Le Roux “History of Education Research: a Search for Meaning” in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 17- 36.

⁵⁶ VS Mncube & N Madikizela-Madiya “South Africa: Educational Reform, Curriculum, Governance and Teacher Education” in C Harber (ed) *Education in Southern Africa* (2013) 165; S Badat & Y Sayed “Post-1994 South African Education: The Challenge of Social Justice” (2014) *The Annals of the American Academy of Political and Social Science* 127 128.

⁵⁷ Mncube & Madikizela-Madiya “South Africa: Educational Reform” in *Education in Southern Africa* 165; See further CC Wolhuter “South Africa: Worldwide educational reform programme telescoped into an instant time-space” in CC Wolhuter & HD Herman (eds) *Educational Reform in Southern Africa: Prospects for the New Millennium* (2010) 1-16; P Kallaway (ed) *Apartheid and Education* (1984); P Christie *The Right to Learn* (1992).

⁵⁸ Mncube & Madikizela-Madiya “South Africa: Educational Reform” in *Education in Southern Africa* 165.

⁵⁹ Mncube & Madikizela-Madiya “South Africa: Educational Reform” in *Education in Southern Africa* 166; TV Mda “Integrated Schooling” in TV Mda & MS Mothata (eds) *Critical Issues in South African Education – After 1994* (2000) 44; Segregation was a reality before 1948, but after 1948 apartheid was formally recognised and legalised in South Africa, in this regard see for example Mda’s discussion of the Lovedale Institution in Mda “Integrated Schooling” in *Critical Issues in South African Education – After 1994* 44; See also the Promotion of Bantu Self-governance Act 46 of 1959; JJ Booyse “Education Provisioning During the Period of the National Party” in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 215.

education and the position of the child as a rights-holder will be discussed, as basic education and apartheid are so closely intertwined.⁶⁰ Before the National Party came to power, the state only provided basic education to white learners.⁶¹ In 1951, the Eiselen Commission's Report⁶² was released.⁶³ This report resulted in the government's change in policy in 1953, with the creation of a Ministry of Black Education and the passing of the Bantu Education Act.⁶⁴ The Ministry of Black Education was created with the view to control black education and followed a policy of "centralised control and decentrali(s)ed administration".⁶⁵ The policy was a direct endeavour of the apartheid government to oppress the black population by controlling its basic education, which was characterised by disparities in the availability and distribution of resources, as well as quality and access thereto, when compared to the basic education of white children.⁶⁶ Black education centred on training and educating black children for jobs that were of a lower grade and also lower pay. It was characterised by a lack of focus with regard to comprehension and critical thinking, it was extremely controlling and strict and contained no consideration for African heritage and culture.⁶⁷

Apartheid policies on basic education were used as a tool of oppression as well as to make the basic principles of apartheid more "acceptable" for South Africans. On the surface it might have seemed that the apartheid government was providing formal basic education to everyone. The reality was however that basic education was used in such a manner so as to not only enforce a racist system – but to also reassure

⁶⁰ Booyse "Education Provisioning" in *A History of Schooling* 217.

⁶¹ Mncube & Madikizela-Madiya "South Africa: Educational Reform" in *Education in Southern Africa* 166.

⁶² Report of the Commission on Native Education 1949-1951 (Chairman Dr WWM Eiselen) ("Eiselen Report"); J Seroto "A Revisionist View of the Contribution of Dr Eiselen to South African Education: New Perspectives" (2013) *Yesterday & Today* 91 102-105.

⁶³ Booyse "Education Provisioning" in *A History of Schooling* 240.

⁶⁴ 47 of 1953; Mncube & Madikizela-Madiya "Educational Reform" in *Education in Southern Africa* 166; Booyse "Education Provisioning" in *A History of Schooling* 240; For more on Bantu Education see P Christie & C Collins "Bantu Education: Apartheid Ideology or Labour Reproduction" (1982) 18 *Comparative Education* 59-75.

⁶⁵ Mncube & Madikizela-Madiya "Educational Reform" in *Education in Southern Africa* 166.

⁶⁶ Mncube & Madikizela-Madiya "Educational Reform" in *Education in Southern Africa* 166; See also MP Kgobe *Transformation of the South African Schooling System: A Report from the First Year of Education 2000, Plus a Longitudinal Study to Monitor Education Policy Implementation and Change* (2000) 2.

⁶⁷ Mncube & Madikizela-Madiya "Educational reform" in *Education in Southern Africa* 167; See also MCJ Mphahlele & SPP Mminele *Education Through the Ages: Part 3* (1997); ZP Nkabinde *An Analysis of Educational Challenges in the New South African* (1997); CC Wolhuter "South Africa: Worldwide Education Reform Programme Telescoped into an Instant Time-space" in CC Wolhuter & HD Herman (eds) *Educational Reform in Southern Africa: Prospects for the New Millennium* (2010) 1-16.

obedience to the apartheid regime.⁶⁸ The allocation of resources serves as an excellent illustration of the disparities between the different racial groups. The difference between resources allocated to black and white basic education was stark, to say the least. At some stage during apartheid, a white learner was allocated four times the resources of a black learner. This is of course irrespective of the fact that white people represented only 20% of the South African population.⁶⁹ The table below shows the statistics for 1987.⁷⁰

	White	Indian	Coloured	African
Population size (1000')	4 911	913	3 069	33 580
Population %	11.6%	2.1%	7.2%	79.1%
Per capita expenditure	R2508	R1904	R1021	R476
Per capita ratio	5.3	4	2.1	1
Pupil-teacher ratio	16:1	21:1	25:1	41:1
Standard X pass rate %	95%	93%	69%	56%

[VS Mncube & N Madikizela-Madiya "South Africa: Educational Reform, Curriculum, Governance and Teacher Education" in C Harber (ed) *Education in Southern Africa* (2013) 166 as adapted from P Christie "From Crisis to Transformation: Education in Post-apartheid South Africa" (1992) 36 *Australian Journal of Education* 38-52 and J Hofmeyer "Equalising Educational Opportunities" (1989) 13 *South African Journal of Labour Relations* 21.]

⁶⁸ Mncube & Madikizela-Madiya "Educational Reform" in *Education in Southern Africa* 166; See also C Harber *State of Transition: Post-Apartheid Education Reform in South Africa* (2001) 7; P Kallaway (ed) *Apartheid and Education* (1984); M Nkomo (ed) *Pedagogy of Domination* (1990); P Christie *The Right to Learn* (1991).

⁶⁹ Mncube & Madikizela-Madiya "Educational Reform" in *Education in Southern Africa* 165; See also P Christie *The Right to Learn* (1991); P Christie "From Crisis to Transformation: Education in Post-apartheid South Africa" (1992) 36 *Australian Journal of Education* 38-52.

⁷⁰ Mncube & Madikizela-Madiya "Educational Reform" in *Education in Southern Africa* 166 as adapted from Christie (1992) *Australian Journal of Education* 38-52 and J Hofmeyer "Equalising Educational Opportunities" (1989) 13 *South African Journal of Labour Relations* 21.

The clear differences in resource allocation had a direct result on the access to basic education and an increase in opposition to the regime consequently reached boiling point.⁷¹ Opposition to the apartheid regime also led to a growing resistance and the spreading of black nationalism.⁷² The culmination of opposition to the apartheid education system led to violent protests, including the Soweto Uprising on the 16th of June 1976.⁷³ The Soweto Uprising was a peaceful march by black learners as a means of asserting their education rights and protesting the discriminatory education system.⁷⁴ Violence unfortunately erupted when the apartheid government made the decision to open fire on those taking part in the march.⁷⁵ This resulted in the unfortunate death of many learners.⁷⁶ The government later responded to these uprisings with some minor reforms in order to appease the learners but continued resistance indicated that these reforms were meaningless.⁷⁷ A mere ten days later both the African National Congress (“ANC”)⁷⁸ and Pan Africanist Congress of Azania (“PAC”)⁷⁹ were banned by the apartheid government.⁸⁰ Several leaders of Umkhonto weSizwe⁸¹ were imprisoned after the Rivonia Trial, including Nelson Mandela.⁸² The struggle for a democratic, free and equal South Africa however continued and ultimately led to the ANC being unbanned, with peace talks becoming a reality for the first time.⁸³ Negotiations finally resulted in the first democratic elections held in April

⁷¹ Mncube & Madikizela-Madiya “Educational Reform” in *Education in Southern Africa* 166.

⁷² Booyse “Education Provisioning” in *A History of Schooling* 216.

⁷³ Mncube & Madikizela-Madiya “Educational Reform” in *Education in Southern Africa* 167; W Binford “The Constitutionalisation of Children’s Rights in South Africa” (2015/2016) 60 *New York Law School Law Review* 3333 37; P De Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) 18; See also P Christie *The Right to Learn* (1991); C Harber *State of Transition: Post-Apartheid Education Reform in South Africa* (2001).

⁷⁴ Binford (2015/2016) *New York Law School Law Review* 337.

⁷⁵ Binford (2015/2016) *New York Law School Law Review* 337.

⁷⁶ There are some differences in the number of deaths estimated but 176 casualties is most commonly agreed upon. Further protests also took place in 1980 (“Cape schools boycott”) and 1984; Mncube & Madikizela-Madiya “Educational Reform” in *Education in Southern Africa* 167; Binford (2015/2016) *New York Law School Law Review* 337; P De Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) 18; See also Christie *The Right to Learn*; Harber *State of Transition*.

⁷⁷ Mncube & Madikizela-Madiya “Educational Reform” in *Education in Southern Africa* 166.

⁷⁸ Political party in South Africa: African National Congress.

⁷⁹ South African political party: Pan Africanist Congress of Azania.

⁸⁰ De Vos & Freedman (eds) *South African Constitutional Law in Context* 16; ANC “A brief history of the ANC” <<https://www.anc1912.org.za/brief-history-anc>> (accessed 08-11-2019).

⁸¹ Also known as MK – the military branch of the ANC. De Vos & Freedman (eds) *South African Constitutional Law in Context* 17.

⁸² De Vos & Freedman (eds) *South African Constitutional Law in Context* 17; ANC “A brief history of the ANC” <<https://www.anc1912.org.za/brief-history-anc>> (accessed 08-11-2019).

⁸³ De Vos & Freedman (eds) *South African Constitutional Law in Context* 19; ANC “A brief history of the ANC” <<https://www.anc1912.org.za/brief-history-anc>> (accessed 08-11-2019).

1994. The ANC won the election with a vast majority and Nelson Mandela became the new President of South Africa.⁸⁴

With the ANC⁸⁵ winning the democratic election in 1994, came necessary radical changes with a new constitution⁸⁶ and developments in the educational sphere. In the same year, the ANC produced *A Policy Framework for Education and Training*⁸⁷ in an effort to transform the education system.⁸⁸ In the current legal framework, the right to basic education is recognised in terms of the Constitution and the accompanying legislation.⁸⁹

1 5 Understanding basic education

Defining basic education in a legal context, has proven to be a difficult and controversial endeavour. As a variety of classifications and interpretations exist, it is necessary to provide meaning to basic education within the specific context of South Africa before the examination of the child's right to basic education can be undertaken. As definitions of basic education can differ, its meaning for the purposes of the dissertation will be established in order to provide a general understanding and explanation thereof. The discussion will include international law as well as domestic law.

For the purposes of the dissertation it is argued that education should be viewed as a process. International law, especially soft law, has aided in providing a meaning to these two concepts.⁹⁰ The Recommendation Concerning Education for International

⁸⁴ ANC "A brief history of the ANC" <<https://www.anc1912.org.za/brief-history-anc>> (accessed 08-11-2019).

⁸⁵ The ANC is the current political party that is in power in South Africa. The party was established on the 8th of January 1912 with the aim of bringing Africans together in order to defend their rights and freedoms; For more on the history of the ANC see ANC "A brief history of the ANC" <<https://www.anc1912.org.za/brief-history-anc>> (accessed 08-11-2019); See in general ANC <<https://www.anc1912.org.za/>> (accessed 08-11-2019).

⁸⁶ For more information on the drafting of the Constitution see Seminar Report Aspects of the Debate on the Draft of the New South African Constitution Date 22 April 1996 (1996) 1-160.

⁸⁷ 30 January 1994.

⁸⁸ H Geyser "OBE: A Critical Perspective" in T Mda & S Mothata (eds) *Critical Issues in South African Education – After 1994* (2000) 22.

⁸⁹ For further examination see chapter 5.

⁹⁰ "Soft" international law refers to standards that have not yet been firmly established or recognised in an international treaty, convention or customary international law; C McConnachie, A Skelton & C McConnachie "The Constitution and the Right to Basic Education" in F Veriava with Thom A & T Fish Hodgson (eds) *Basic Education Rights Handbook: Education Rights in South Africa* (e-book) (2017) 18 <<https://section27.org.za/wp-content/uploads/2017/02/Chapter-1.pdf>> (accessed 25-10-2019).

Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedom of UNESCO (“the Recommendation”),⁹¹ that is binding on all United Nations member states, provides some guidance on interpreting the concept of “education”:

“The word education implies the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge. This process is not limited to any specific activities.”⁹²

The meaning provided in the Recommendation refers to education as an ongoing process of learning and development that is beneficial to the individual as well as the community.⁹³ This understanding bears resemblance to the meaning of education in CRC Committee General Comment No 1.⁹⁴ CRC General Comment No 1 holds that education includes more than formal schooling in order to embrace learning and life experiences that enable children to live and contribute positively in their community.⁹⁵

In 1990, the United Nations sponsored the World Conference on Education for All in order to address questions surrounding the right to basic education. The result of this 1990 conference was the adoption of the World Declaration on Education for All and a Framework for Action: Meeting Basic Learning Needs.⁹⁶ Article 1 of the World Declaration on Education for All on “meeting basic learning needs” states the following:

⁹¹ Records of the General Conference, 18th session, Paris, 17 October to 23 November 1974, v. 1: Resolutions. Recommendation adopted on the report of the Commission for Education at the thirty-sixth plenary meeting on 19 November 1974.

⁹² Art 1(1)(a) of the Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedom, 1974.

⁹³ C Simbo “The right to basic education, the South African constitution and the Juma Masjid case: An unqualified human right and a minimum core standard” (2013) 17 *Law, Democracy & Development* 477 482.

⁹⁴ CRC Committee *General Comment No 1*; Simbo (2013) *Law, Democracy & Development* 482; C Courtis & J Tobin “Article 28: the Right to Education” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 1064.

⁹⁵ CRC Committee *General Comment No 1*; Art 29(1)(2) of the CRC.

⁹⁶ World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs. Adopted by the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand (1990).

"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 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."⁹⁷

With some guidance on the meaning of education provided by international law, the manner in which the right to basic education is provided for in the South Africa legal framework can also shed light on the meaning of basic education. The right to basic education as enshrined in section 29 of the Constitution is a cross-sectoral right.⁹⁸ It has been classified as an economic right, a social right and a cultural right.⁹⁹ The right to basic education is all of these.¹⁰⁰ Moreover, it is in many ways also a civil right and a political right.¹⁰¹ Not only can the right to basic education be classified into different categories but it contains different components that need classification.¹⁰² While the Constitution provides everyone with the right to basic education,¹⁰³ it does not set out what the right entails.¹⁰⁴ The concept of basic education is also not specifically defined

⁹⁷ Art 1 of the World Declaration on Education for All (1990).

⁹⁸ Joubert (2014) *SAPL* 18; Courtis & Tobin "Article 28" in *Commentary* 1058; Veriava *Realising the Right to Basic Education* 1.

⁹⁹ CESCR General Comment No 11 (20th session, 1999) "On Plans of Action for Primary Education (Art 14) UN Doc E/C.12/1999/4 (hereafter *CESCR General Comment No 11*) para 2; Joubert (2014) *SAPL* 18; Courtis & Tobin "Article 28" in *Commentary* 1058; Veriava *Realising the Right to Basic Education* 1.

¹⁰⁰ *CESCR General Comment No 11* para 2; Joubert (2014) *SAPL* 18; Courtis & Tobin "Article 28" in *Commentary* 1058; Veriava *Realising the Right to Basic Education* 1.

¹⁰¹ *CESCR General Comment No 11* para 2; Joubert (2014) *SAPL* 18; Courtis & Tobin "Article 28" in *Commentary* 1058; Veriava *Realising the Right to Basic Education* 1.

¹⁰² The companion to the World Declaration on Education for All, the Framework for Action to meet Basic Learning Needs states the following under the heading of "Principles of Action": "Addressing the basic learning needs of all means: early childhood care and development opportunities; relevant, quality primary schooling or equivalent out-of-school education for children; and literacy, basic knowledge and life skills training for youth and adults. It also means capitalizing on the use of traditional and modern information media and technologies to educate the public on matters of social concern and to support basic education activities. These complementary components of basic education need to be designed to ensure equitable access, sustained participation, and effective learning achievement. Meeting basic learning needs also involves action to enhance the family and community environments for learning and to correlate basic education and the larger socio-economic context. The complementarity and synergistic effects of related human resources investments in population, health and nutrition should be recogni(s)ed."

¹⁰³ S 29 of the Constitution; section 5 4.

¹⁰⁴ McConnachie et al "The Constitution and Basic Education" in *Basic Education Rights Handbook* 23.

in legislation¹⁰⁵ or by the judiciary.¹⁰⁶ It is puzzling that no explicit meaning for basic education exists within the South African legal framework, especially as it is a guaranteed as an unqualified human right.¹⁰⁷ The lack of a concrete meaning ascribed to basic education presents several problems. On a basic level it means that there is no clear consensus regarding the duties of the state. Whether or not the state complies with its duties can therefore be difficult to establish.¹⁰⁸

Unfortunately, the Schools Act also does not afford specific meaning to basic education. Basic education is for example only referred to *once* in the Schools Act in the definition of the Minister of Basic Education – no other reference can be found.¹⁰⁹ As a point of departure, other sections of the Schools Act must be interpreted to at least gain an understanding of what the right to basic education comprises. Section 3(1) of the Schools Act provides some guidance on defining basic education in the form of compulsory school attendance. The section provides that all children must attend a school from the first school day in the year in which that learner reaches the age of seven, to the last day of school in the year that the learner turns 15 years old or the ninth grade – whichever of these two occurs first. Compulsory education is accordingly understood to be from grade one to grade nine, or from the age of seven to fifteen. It is however unclear whether or not basic education as stated in section 29(1)(a) of the Constitution can or should be equated to the compulsory stages of schooling as stipulated in section 3(1) of the Schools Act. This has not yet been questioned in the courts and this question remains open to testing in jurisprudence.¹¹⁰

Together, the Schools Act and the National Education Policy Act (“NEPA”)¹¹¹ are viewed as the primary legislative documents providing for and regulating the child’s right to basic education. Basic education as a term is also not commonly used in NEPA. One reference can be found in section 4, which deals with the directive

¹⁰⁵ Examples include the South African Schools Act 84 of 1996; The National Education Policy Act 27 of 1997; The South African Qualifications Authority Act 58 of 1995 and the Constitution. Not one of these Acts or the Constitution provides for an explicit definition of “basic education”.

¹⁰⁶ The scope and content of the right to basic education is dealt with in *Governing Body of the Juma Masjid Primary School v Essay NO 2011 8 BCLR 761 (CC)*, which is discussed in chapter 5; Veriava *Realising the Right to Basic Education* 5-7.

¹⁰⁷ See for example *Governing Body of the Juma Masjid Primary School v Essay NO 2011 8 BCLR 761 (CC)*.

¹⁰⁸ Simbo (2012) *Law, Democracy and Development* 164.

¹⁰⁹ S 1 of the Schools Act: “Minister” means the Minister of Basic Education.”; C Simbo “A Hexagon Right: the Six Dimensions of the Right to Basic Education” (2018) 39 *Obiter* 126 127.

¹¹⁰ Liebenberg *Socio-economic Rights* 243.

¹¹¹ 27 of 1996.

principles of national education policy.¹¹² Section 4(a)(ii) holds that in the determination of national education policy, the policy should be directed towards the right of every person to basic education and equal access to educational institutions.

The obvious consequence of the failure to define basic education is set out succinctly by Simbo:

“Whilst the consequences of the absent legally determinable enforceable scope and content of section 29(1)(a) [may be] evident, without determining the scope and content of the right to basic education, the point at which conclusions must be drawn that the government is in violation of the right to basic education remains unclear”.¹¹³

As the Constitution and Schools Act both fail to provide clarity on the definition of basic education, it falls to policy documents and international conventions to provide guidance on the interpretation and definition of the right to basic education.¹¹⁴ The White Paper on Education and Training holds that the definition of basic education should be interpreted and established by policy which affirms the intention of the Constitution.¹¹⁵ The White Paper elaborates on the definition of basic education by relying on the World Declaration on Education for All.¹¹⁶

In the White Paper, the Ministry of Education of South Africa indicates its support of the definition in the World Declaration on Education for All and states 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. 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.”¹¹⁷

In the instance that a human right in the Constitution requires interpretation, the Bill of Rights dictates that courts must look to international law.¹¹⁸ Furthermore, international customary law will form part of South African law – unless it is in contradiction with the Constitution or South African legislation¹¹⁹ and when legislation

¹¹² See s 4(a)(ii) of the National Education Policy Act.

¹¹³ Simbo (2018) *Obiter* 128; Simbo (2012) *Law Democracy & Development* 164-165.

¹¹⁴ White Paper on Education and Training, General Notice No 196 of 1995 para 12.

¹¹⁵ White Paper on Education and Training para 12.

¹¹⁶ White Paper on Education and Training para 13. First discussed at the World Conference on Education for All, sponsored by the United Nations in 1990. World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs. Adopted at the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand (1990).

¹¹⁷ White Paper on Education and Training, General Notice para 14.

¹¹⁸ S 39 of the Constitution.

¹¹⁹ S 232 of the Constitution.

is interpreted, the approach followed in international law is preferable than that which contradicts it.¹²⁰ In *S v Makwanyane*¹²¹ the South African Constitutional Court held that both binding and non-binding sources of international law must be considered when interpreting the Bill of Rights.¹²² It is therefore accepted that the above-discussed sources can and should be used to provide a definition of the right to basic education.

With the above mentioned sources providing some meaning to basic education, it seems that some meanings for basic education are favoured above others. The first relates to a specific period or years of schooling, referred to as the time-based approach.¹²³ For the purposes of South Africa, some degree of consensus exists that basic education should be understood to mean primary education. In terms of South African legislation¹²⁴ this means education up to the seventh grade.¹²⁵ It will be argued in the dissertation that primary education is not equivalent to basic education.¹²⁶ While primary education is central to the concept of basic education, basic education encompasses more than primary education.¹²⁷

Others contend that the period of schooling should be understood to mean schooling that is compulsory. The argument has however been made that reference should rather be made to the standard or quality of education as well as the content of education in defining basic education.¹²⁸ This is sometimes referred to as a qualitative approach or the adequacy-based approach.¹²⁹ With some clarity provided on the meaning of basic education, the right to basic education as both a socio-economic right and a children's right can be examined.

¹²⁰ S 233 of the Constitution.

¹²¹ *S v Makwanyane* 1995 3 SA 391 (CC).

¹²² Para 35.

¹²³ McConnachie et al "The Constitution and Basic Education" in *Basic Education Rights Handbook* 23.

¹²⁴ The Schools Act; See section 5 5.

¹²⁵ Malherbe "Education Law" in *Child Law* 406.

¹²⁶ Courtis & Tobin "Article 28" in *Commentary* 1086.

¹²⁷ Courtis & Tobin "Article 28" in *Commentary* 1087.

¹²⁸ Malherbe "Education Law" in *Child Law* 406.

¹²⁹ McConnachie et al "The Constitution and Basic Education" in *Basic Education Rights Handbook* 23.

1 5 1 The right to basic education as both a socio-economic right and a children's right

The notion of the right to basic education as a socio-economic right that is immediately realisable and unqualified has been established by the South African judiciary and in academic literature.¹³⁰ Even though the focus and aim of the dissertation will not be on the right to basic education as a socio-economic right, the fact remains that traditionally the right to basic education is viewed and examined as a socio-economic right. The purpose of examining the right to basic education specifically as a children's right is not to detract from the right to basic education as a socio-economic right but rather to build on this and strengthen it by also viewing it as a children's right.¹³¹

The right to basic education as a socio-economic right is quite unique, as it is regarded to be distinguishable from other socio-economic rights in the Bill of Rights.¹³² In most instances when a socio-economic right is afforded, it provides the rights bearer with access to specific services or goods and is generally qualified as it is subject to "progressive realisation" by means of the adoption of "reasonable legislative and other measures" which are "within [the state's] available resources".¹³³ Section 29(1) of the Constitution, in contrast to this, does not simply provide for access to basic education, but guarantees it without internal qualifiers or limitations.¹³⁴ It has been argued that because of this absence, the right to basic education is an unqualified right.¹³⁵ The Constitutional Court in *Governing Body of the Juma Masjid Primary School v Essay*

¹³⁰ This position has been confirmed by the Constitutional Court in *Governing Body of the Juma Masjid Primary School v Essay* NO 2011 8 BCLR 761 (CC) and *Centre for Child Law v MEC for Education* 2008 1 SA 223 (T); Liebenberg *Socio-economic Rights* 242-256; United Nations Convention on the Rights of the Child 1989; E De Waal & E Serfontein "Towards successful schooling: the role of courts and schools in protecting conflicting individual educator and learner rights" (2014) 29 *SAPL* 65 72; M Smit "Ambivalent adjudication of admission and access to schools – striking a reasonable balance between equality, quality and legality" (2014) 29 *SAPL* 37 39; Veriava *Realising the Right to Basic Education* 1.

¹³¹ The view that the right to basic education should be studied as both a socio-economic right and a children's right therefore does not mean that these classifications are in conflict with each other. Rather, they are complementary in nature and serve to strengthen each other. The focus of the dissertation is on the fulfilment of the child's rights to, in and through basic education through the lens of the child-centred approach which is centred on the interpretation of the right to basic education as a children's right in terms of the model for compliance.

¹³² De Waal & Serfontein (2014) *SAPL* 71.

¹³³ Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 62; See for example the rights of access to housing and health care services and the rights to food, water and social security.

¹³⁴ Joubert (2014) *SAPL* 14.

¹³⁵ De Waal & Serfontein (2014) *SAPL* 72.

NO (hereafter “*Juma Masjid*”)¹³⁶ has also confirmed this position.¹³⁷ This means that the right can be violated by non-compliance with negative or positive duties, which would deprive learners of access to this right.¹³⁸ The right to basic education is consequently an unqualified socio-economic right that is immediately realisable.¹³⁹

Following a textual reading of section 29(1)(a) it becomes clear that a higher standard of review is necessary in determining the extent of the state’s obligation in comparison to other qualified socio-economic rights.¹⁴⁰ This higher standard of review is directly linked to the unqualified and absolute nature of the right. The argument has been made that this higher standard of review requires that the state should regard the realisation of the right to basic education as an absolute priority and should prioritise programmes that seek to realise the right to basic education in its policies and also when allocating funds.¹⁴¹ For example, if the state fails to allocate proper resources for the building of a primary school in a specific location, a learner from that specific area may have a direct claim against the state, as it does not provide the learner with primary schooling facilities that are adequate. If such a claim is brought against the state, an inquiry will be lodged to examine whether or not the state made the realisation of the right to basic education a priority.¹⁴²

The positive duty on the state to realise the right to basic education has also been confirmed by the Constitutional Court in *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*.¹⁴³ The Constitutional Court made the *obiter* remark that the right to basic education, as enshrined in section 32(a) of the Interim Constitution of South Africa (hereafter the “Interim Constitution”),¹⁴⁴ does not merely provide for a

¹³⁶ 2011 8 BCLR 761 (CC).

¹³⁷ Constitutional Court in *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 8 BCLR 761 (CC); *Centre for Child Law v MEC for Education* 2008 1 SA 223 (T); De Waal & Serfontein (2014) SAPL 72; Smit (2014) SAPL 39; Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 62; Veriava *Realising the Right to Basic Education* 1-3

¹³⁸ Liebenberg *Socio-economic Rights* 244.

¹³⁹ This position has been confirmed by the Constitutional Court in *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 8 BCLR 761 (CC); *Centre for Child Law v MEC for Education* 2008 1 SA 223 (T); De Waal & Serfontein (2014) SAPL 72; Smit (2014) SAPL 39; Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 62; Veriava *Realising the Right to Basic Education* 1-3

¹⁴⁰ Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 62.

¹⁴¹ Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 62.

¹⁴² Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 62.

¹⁴³ 1996 3 SA 165 (CC).

¹⁴⁴ 200 of 1993.

negative right but in fact creates a positive right. This means that not only should no person be obstructed or hindered from realising their right to basic education, but that the state has a positive duty to ensure that the right to basic education is realised.¹⁴⁵

The importance of the classification as a socio-economic right is also linked to the 4-A scheme.¹⁴⁶ The Committee on Economic, Social and Cultural Rights (hereafter the “CESCR”), as established under the International Covenant on Economic, Social and Cultural Rights (hereafter the “ICESCR”),¹⁴⁷ states that the right to basic education should be based on the following features: availability, accessibility, acceptability and adaptability.¹⁴⁸ The 4-A scheme represents the practical framework that will form part of the model for compliance.¹⁴⁹

Even though the classification of the right to basic education as a socio-economic right has been extremely important in providing scope for the right and contributing to its realisation, the specific interpretation of the right to basic education as a children’s right has been less prominent. It is accordingly argued that the right to basic education should be viewed as a socio-economic right but also as a children’s right. This viewpoint and interpretation will provide an even stronger understanding of the right to basic education that is specifically aimed at the child as the rights bearer. The right to basic education is therefore a justiciable socio-economic right but at the same time also a justiciable children’s right. In order to measure compliance with international obligations of the child’s right to basic education, the model for compliance will be applied as it is inclusive of both norms and practical considerations. The model will accordingly consist of the normative and practical frameworks that will be established in chapter 2.

¹⁴⁵ *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 9.

¹⁴⁶ For an in-depth discussion see section 2.5 of chapter 2.

¹⁴⁷ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, (hereafter the “ICESCR”).

¹⁴⁸ CESCR *General Comment No 13* para 6; K Tomaševski *Human rights obligations: Making education available, accessible, acceptable and adaptable* (2001); K Tomaševski *Human rights obligations: The 4-A scheme* (2006); Tomaševski *Primers No. 3* (2001); See section 2.5.

¹⁴⁹ Section 2.5.

1 5 2 The dimensions of the right to basic education

In order to provide a holistic understanding of the right to basic education, the three dimensions of the child's right to basic education are applied in the dissertation. These dimensions are rights to basic education, rights in basic education and rights through basic education. A short understanding of each dimension is provided, which is founded on the nuanced recognition of the child's right to basic education in terms of the normative framework of articles 28 and 29 the CRC.

The first dimension, *rights to basic education*, centre on rights that provide directly for education. The most important subsections include the right to basic education,¹⁵⁰ the right to further education,¹⁵¹ the right to learn in one's official language of choice,¹⁵² and with specific reference to children, the right to be protected from work that places their education at risk.¹⁵³

The second dimension focuses on *rights in basic education*. Rights in basic education are directly linked to rights to basic education as dimensions of the child's right to basic education as they are exercised in the process of education. Rights in basic education include the following: the right to dignity,¹⁵⁴ the right to equality,¹⁵⁵ the right to freedom of expression,¹⁵⁶ the right to an environment that is not harmful to one's health,¹⁵⁷ and with regard to children specifically, the right to protection from abuse and neglect¹⁵⁸ as well as the right to basic nutrition.¹⁵⁹

The last dimension refers to *rights through basic education*. Rights through basic education are those dimensions of the right to basic education that can be relied on in the process of education, are realised through education and become possible once rights to basic education are realised. Examples include the rights to equality¹⁶⁰ and

¹⁵⁰ Art 28(1)(a) of the CRC; See also s 29(1)(a) of the Constitution.

¹⁵¹ Art 28(1)(b) and (c) of the CRC; See also s 29(1)(b) of the Constitution.

¹⁵² Art 29(1)(c) of the CRC; See also s 29(2) of the Constitution.

¹⁵³ Art 32 of the CRC; See also s 28(1)(f) of the Constitution.

¹⁵⁴ Arts 23 and 28(2) of the CRC; See also s 10 of the Constitution.

¹⁵⁵ Art 28(1), 29(1)(d), 31 of the CRC; See also s 9 of the Constitution.

¹⁵⁶ Arts 2, 12 and 13 of the CRC.

¹⁵⁷ Art 24 of the CRC; See also 24 of the Constitution.

¹⁵⁸ Arts 19, 34 and 39 of the CRC; See also s 28(1)(d) of the Constitution.

¹⁵⁹ Arts 24 and 27 of the CRC; See also 28(1)(c) of the Constitution.

¹⁶⁰ Art 2 of the CRC; See also s 9 of the Constitution.

human dignity,¹⁶¹ the right to further education¹⁶² as well as the right to information,¹⁶³ the right to health care and social security,¹⁶⁴ the right to administrative action,¹⁶⁵ and lastly the right to freedom and security of the person.¹⁶⁶

Rights in basic education and rights through basic education once again emphasise that children's rights should not be studied or examined in isolation and that they are interrelated. It is therefore important to not only study the right to basic education specifically but also other rights *to* basic education as well as rights *in* and *through* basic education as dimensions of the child's right to basic education. This confirms the importance of the right to basic education to realise other constitutional rights and the reference to the right to basic education as an empowerment right.¹⁶⁷

¹⁶¹ Arts 23 and 24 of the CRC; See also s 10 of the Constitution;

¹⁶² Arts 28(1)(b) and (c) of the CRC; See also s 29 of the Constitution.

¹⁶³ Arts 13 and 28(1)(d) of the CRC; See also s 32 of the Constitution.

¹⁶⁴ Art 24 of the CRC; See also s 27 of the Constitution.

¹⁶⁵ Art 12 of the CRC; See also s 33 of the Constitution.

¹⁶⁶ Art 40 of the CRC; See also s 12 of the Constitution.

¹⁶⁷ CESCR *General Comment No 13* para 1; *Governing Body of Juma Masjid Primary School v Essa NO* 2011 8 BCLR 761 (CC) para 41.

Chapter Two

The child's right to basic education: A model for compliance

2 1 Introduction

An emphasis on the right to basic education as a children's right requires a general analysis of the history of children's rights. In order to provide a general understanding of the children's rights movement and the child's educational rights throughout history, the first part of chapter 2 will entail an examination of the relationship between the changing views of childhood and the child's education.¹⁶⁸ This will be done by highlighting two themes. The first theme will entail a brief overview of the history and the changing societal views of childhood.¹⁶⁹ The second theme will entail an analysis of the legal history of the child's right to basic education, with a specific emphasis on the adoption of international instruments that recognise and protect children's rights.¹⁷⁰

Against this background, a model for measuring compliance with international obligations in the context of basic education will be set out in detail. For purposes of the dissertation, a model for compliance consisting of a normative framework and a practical framework will be adopted.¹⁷¹ It is generally accepted that the Convention on the Rights of the Child ("CRC")¹⁷² provides the framework for the recognition and implementation of children's rights.¹⁷³ Articles 28 and 29 of the CRC therefore provides the normative framework.¹⁷⁴ Theory without implementation is meaningless and the inclusion of a child-centred practical framework, namely the 4-A scheme, will be introduced and elaborated upon.¹⁷⁵

¹⁶⁸ See section 2 2.

¹⁶⁹ See section 2 2.

¹⁷⁰ Section 2 3.

¹⁷¹ See section 2 6.

¹⁷² UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Resolution 44/25 of 20 November 1989 (hereafter the "CRC").

¹⁷³ Section 2 4.

¹⁷⁴ See section 2 4.

¹⁷⁵ See section 2 5. Tomaševski *Primers No. 3*; Tomaševski *Human Rights Obligations* (2006); CESCR General Comment No 13 (21st session, 1999) "The Right to Education (art 13)" UN Doc E/C.12/1999/10 (hereafter CESCR *General Comment No 13*); UN Committee on the Rights of the Child General Comment No 1 (26th session, 2001) "Article 29(1): the aims of education" UN Doc CRC/GC/2001/1 para 1 (hereafter CRC Committee *General Comment No 1*).

2.2 The history of childhood

The concept of childhood is surrounded by controversy and contradictions.¹⁷⁶ This can in part be attributed to the fact that the position of the child, both socially and legally, has changed and evolved over time.¹⁷⁷ Childhood as understood today, is a relatively new phenomenon and is generally defined in terms of an age period. In this sense, it is accepted that childhood ends when the age of majority is reached.¹⁷⁸

The age of majority has however changed throughout history and is also context specific.¹⁷⁹ Today, the age of majority depends on the specific jurisdiction.¹⁸⁰ It should also be noted that different branches of the law treat children differently¹⁸¹ and that the age of majority should not be confused with or equated to the permissible age for drinking,¹⁸² sexual consent,¹⁸³ school leaving¹⁸⁴ or consent to marriage.¹⁸⁵ Even

¹⁷⁶ G Van Bueren *International Law on the Rights of the Child* (1998) 5; A Holzschleiter *Children's Rights in International Politics: the Transformative Power of Discourse* (2010) 85; JE Floud "A Right to Education: a Test Case for a Theory of Children's Rights" (1976) 62 *ARSP* 319-320; A Quennerstedt & M Quennerstedt "Researching Children's Rights in Education: Sociology of Childhood Encountering Educational Theory" (2014) 35 *British Journal of Sociology of Education* 115-115.

¹⁷⁷ Van Bueren *Rights of the Child* 5; R Songca "Evaluation of Children's Rights in South African Law: The Dawn of an Emerging Approach to Children's Rights?" (2011) 3 *CILSA* (3) 341; J Fionda "Legal Concepts of Childhood: an Introduction" in J Fionda (ed) *Legal Concepts of Childhood* (2001) 3; Floud (1976) *ARSP* 320; Quennerstedt & Quennerstedt (2014) *British Journal of Sociology of Education* 115.

¹⁷⁸ MDA Freeman *The Rights and Wrongs of Children* (1983) 6; MDA Freeman "The Child in Family Law" in J Fionda (ed) *Legal Concepts of Childhood* (2001) 183; Holzschleiter *Children's Rights in International Politics* 100; Van Bueren *Rights of the Child* 32.

¹⁷⁹ The age of majority is set at different ages in different jurisdictions. The Age of Majority Act 57 of 1972 established that the majority age in South Africa was 21. This position changed in July 2007 when certain sections of the Children's Act 38 of 2005 came into effect. S17 of the Children's Act stipulates that majority age is reached when the child turns 18; See also Songca (2011) *CILSA* 340.

¹⁸⁰ Most jurisdictions, including South Africa, seem to favour 18 years as the age of majority. Other jurisdictions include Germany in terms of section 2 of the Bürgerliches Gesetzbuch (BGB) and India in terms of the Majority Act of 1875. In Nigeria, article 277 of the Child Rights Act of 2003 defines the age of majority as "the age at which a person attains the age of 18 years"; M Grahn-Farley "A Theory of Children's Rights" (2003) 57 *University of Miami Law Review* 888-892; Songca (2011) *CILSA* 340; See also <<https://www.youthpolicy.org/factsheets/>> which sets out the majority age in different jurisdictions.

¹⁸¹ Freeman "The Child in Family Law" in *Legal Concepts of Childhood* 183.

¹⁸² In South Africa, the selling or supplying of alcohol to a person below the age of 18 is prohibited in terms of section 10(1) of the Liquor Act 59 of 2003.

¹⁸³ In South Africa, the law provides for three categories: children able to consent to sex, children that are capable of providing consent but not mature enough to consent, and lastly children that are incapable of consenting to sex. These categories are regulated by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 – specifically sections 15, 16, 56 and 57.

¹⁸⁴ In terms of the Schools Act children can leave school before the age of 18. Section 3(1), read with sub-section 6, provides that children are allowed to leave school on the last day in the year that the child turns 15 or at the end of the ninth grade, whichever takes places first.

¹⁸⁵ Marriage is regulated by three laws in South Africa: the Marriage Act 25 of 1961 for civil marriages, the Civil Union Act 17 of 2006 for civil unions and the Recognition of Customary Marriages Act 120 of 1998 for customary marriages. A civil marriage is possible if one or both of the parties are below the age of 18, but not younger than 12 for girls and 14 for boys. Section 26(1) of the Marriage Act 25 of

though the concept of childhood is associated with age, it must be noted that societal views on the position and treatment of children have changed with the passing of time and the development of modern society.¹⁸⁶ Some background on the “invention” of childhood is necessary to understand the relationship between childhood and children’s rights and the link to education.

2 2 1 The invention of childhood

Historical context is important in order to understand the concept of childhood, as it is indicative of the changing ways in which children have been treated and how they were expected to act. French medievalist and historian, Philippe Ariès, in his *Centuries of Childhood*¹⁸⁷ provides some interesting background and arguments relating to childhood.¹⁸⁸ Ariès contends that the notion of childhood as understood today is a modern invention and that only during the 17th century did attitudes towards children truly shift.¹⁸⁹ In his explanation, he refers to the fact that during the 10th century in Europe, artists depicted children in their paintings merely as men or women on a smaller scale because the idea of childhood did not exist during medieval times. The nature and specific characteristics of childhood that distinguished children from adults were not acknowledged at that time. The position of the child within the social structure

1961 read with sections 17 and 18(3)(c)(i) of the Children’s Act 38 of 2005, and section 12(2) of the Children’s Act read with the common law regulate this position. Section 1 of the Civil Union Act provides that both parties must be 18 years or older. The Civil Union Act does not expressly provide for persons below the age of 18 to conclude a civil union. Minors can enter into customary marriages in terms of section 3 of the Recognition of Customary Marriages Act and section 12(2) of the Children’s Act read with common law. Girls younger than 12 and boys younger than 14 are however prohibited from entering into a customary marriage; See further Songca (2011) *CILSA* 340 and for more examples see P Mahery & P Proudlock *Legal Guide to Age Thresholds for Children and Young People* (2011) 5 ed Children’s Institute, University of Cape Town 1–43.

¹⁸⁶ Freeman *Rights and Wrongs* 6; Freeman “The Child in Family Law” in *Legal Concepts of Childhood* 183.

¹⁸⁷ Translated from his original French work on childhood: *L’Enfant et la Vie Familiale sous l’Ancien Régime* (1960); See P Ariès *Centuries of Childhood: A Social History of Family Life* (1962) (translated from the French by R Baldick); Van Bueren *Rights of the Child* 5.

¹⁸⁸ Regarded by many as a seminal work on childhood; C Heywood *A History of Childhood: Children and Childhood in the West from Medieval to Modern Times* (2001) 11; T Buck *International Child Law* 3 ed (2014) 2.

¹⁸⁹ Ariès *Centuries of Childhood* 33; Fionda “An Introduction” in *Legal Concepts of Childhood* 3; Buck *International Child Law* 2; Holzschietter *Children’s Rights in International Politics* 98; Van Bueren *Rights of the Child* 5; Freeman *Rights and Wrongs* 8-9; J Eekelaar “The Emergence of Children’s Rights” (1986) 2 *Oxford Journal of Legal Studies* 161 161; J Tobin “Justifying Children’s Rights” (2013) 21 *Int’l J Child Rts* 395 399; For critique of Ariès see in general L deMause *The History of Childhood* (1974); A Wilson “The Infancy of the History of Childhood: An Appraisal of Philippe Ariès” (1980) 19 *History and Theory: Studies in the Philosophy of History* 132-153; Heywood *A History of Childhood* 12.

was ignored and children were in many instances merely treated as smaller versions of their parents (Ariès argues that this is also evident when one reflects on the fact that children were even dressed in the same garments as their parents).¹⁹⁰ Only from the 17th century and onwards were children no longer dressed as adults but in clothes specific to their age group.¹⁹¹

With the passing of time, the notion of childhood developed with an emphasis on children's innocence, weakness and their need to be guided and protected.¹⁹² It is argued that this change can be linked to education as the education of children became the cornerstone of civilisation during this period.¹⁹³ Childhood consequently became relevant in order to determine the age period during which the child should be educated and receive some form of schooling.

The true beginnings of the children's rights movement, on the other hand, can be traced back to the middle of the 19th century. It was only during this period that literature on the subject of children's rights was published for the first time.¹⁹⁴ This also occurred during the period of the child-saving movement in which Jean Vallès attempted to establish a league concerned with the protection of the child's rights after the Paris Commune was no longer in power.¹⁹⁵ The changing position of the child within society during this period can be viewed as being in line with the child-saving movement, as the protection of the child became the primary concern. In some instances this led to emphasising the protection of the child, rather than the child's rights.¹⁹⁶ What is notable is that at this stage in history, the child's position was deemed

¹⁹⁰ Ariès *Centuries of Childhood* 50; Freeman *Rights and Wrongs* 8-9; Eekelaar (1986) *Oxford Journal of Legal Studies* 161; Holzschietler *Children's Rights in International Politics* 103; Buck *International Child Law* 2.

¹⁹¹ Ariès *Centuries of Childhood* 50; Van Bueren *Rights of the Child* 5; Buck *International Child Law* 2.

¹⁹² D Reynaert, M Bouverne-de-Bie & S Vandevelde "A Review of Children's Rights Literature since the Adoption of the United Nations Convention on the Rights of the Child" (2009) 16(4) *Childhood* 518 520.

¹⁹³ Freeman *Rights and Wrongs* 10; Buck *International Child Law* 2.

¹⁹⁴ In 1852 an article entitled: "The Rights of Children" was published, which many believe to be the first published article on the topic of children's rights; Freeman *Rights and Wrongs* 18; MDA Freeman "Limits of Children's Rights" in MDA Freeman & PE Veerman (eds) *Ideologies of Children's Rights* (1992) 43 refers to "one Slogvolk" as the possible author by referencing *Knickerbocker* no 36 (1852) 489.

¹⁹⁵ MDA Freeman "Introduction" in MDA Freeman & PE Veerman (eds) *Ideologies of Children's Rights* (1992) 3-4.

¹⁹⁶ Freeman *Rights and Wrongs* 18; Reynaert et al (2009) *Childhood* 521.

to be unique and the child was recognised as having distinct needs that had to be acknowledged and protected.¹⁹⁷

With the concept of “childhood” finding traction and the belief that children had specific needs, educating children became central to the functioning of a society. Historically, the responsibility of educating children was placed on the parents or the church.¹⁹⁸ This of course is in contrast with the modern position, where the state is the primary duty bearer.¹⁹⁹ Due to the French and American Revolutions, western society came to regard education as a public function rather than a private responsibility within the family.²⁰⁰

Upon reflection, the relationship between education and childhood became evident when the unique position of the child, within the family unit and society, was acknowledged. Education of the child began to play a central role in the upbringing of children, but the acknowledgement of the child’s right to education only became a reality through international law and later through recognition in domestic laws and constitutions.

2 3 The legal history of the child’s education rights

Acknowledging the rights of the child seems to be a balancing act and the same rings true when studying the child’s right to basic education.²⁰¹ Not only should the child’s rights (including the child’s right to basic education) be balanced with the rights and responsibilities of the parents or guardians, but there is also a need for balance between the child’s rights to freedom and protection.²⁰² The child-centred approach

¹⁹⁷ Freeman *Rights and Wrongs* 18; The needs of the child can include protection, education and nurturing.

¹⁹⁸ Beiter *Protection of the Right to Education* 21; See further M Nowak “The Right to Education” in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (1995) 189–211; S Kalantray, JE Getgen & SA Koh “Enhancing Enforcement of Economic, Social and Cultural Rights using Indicators: a Focus on the Right to Education in the ICESCR” (2010) 32 *Human Rights Quarterly* 253 262; Curtis & Tobin “Article 28” in *Commentary* 1057.

¹⁹⁹ Beiter *Protection of the Right to Education* 3, 18; Kalantray et al (2010) *Human Rights Quarterly* 262; Curtis & Tobin “Article 28” in *Commentary* 1057; See also *Brown v Board of Education of Topeka* 347 U.S. 483 (1954) 493 that stresses the importance of the state’s duty to provide education.

²⁰⁰ Beiter *Protection of the Right to Education* 21.

²⁰¹ See for example RB Howe “Do Parents have Fundamental Rights?” (2001) 36(3) *Journal of Canadian Studies/Revue d’Etudes Canadiennes* 61–78; GB Melton “The Child’s Right to a Family Environment: Why Children’s Rights and Family Values are Compatible” (1996) 51(12) *American Psychologist* 1234–1238.

²⁰² Van Bueren *Rights of the Child* 256; For further discussion of the topic see HJ Deacon “The Balancing Act Between the Constitutional Right to Strike and the Constitutional Right to Education” (2014) 34(2)

elevates the child to the position of an equal partner in this balancing act in the context of education.

2 3 1 International law on the child's right to education

It has been claimed that the first reference to a law (in the modern western world) requiring children to be educated can be traced to 1642 in the Massachusetts Bay Colony.²⁰³ During this time period,²⁰⁴ education was generally restricted to the upper classes of society. In line with this view, the human rights instruments of the 17th and 18th centuries such as the English Bill of Rights,²⁰⁵ the American Declaration of Independence,²⁰⁶ and the French Declaration of the Rights of Man and of the Citizen,²⁰⁷ did not make provision for the right to education.²⁰⁸

Instead, human rights to health, shelter and food were given priority as they were necessary for survival, especially when resources were limited.²⁰⁹ A series of treaties²¹⁰ adopted by the League of Nations after the First World War sought the recognition and protection of the education rights of minority groups in Europe after the War.²¹¹ As far as the education of children was concerned, the focus was on

South African Journal of Education 1-15; MG Masitsa "Teachers' Right to Strike vis-à-vis Learners' Right to Education – Justice for One is an Injustice for the Other" (2013) 12 *Interim: Interdisciplinary Journal* 19-31; Howe (2001) *Journal of Canadian Studies/Revue d'Etudes Canadiennes* 61-78; Melton (1996) *American Psychologist* 1234-1238; GB Melton "Building Humane Communities Respectful of Children: The Significance of the Convention on the Rights of the Child" (2005) 60(8) *American Psychologist* 918-926; R Roose & M Bouverne-De Bie "Do Children Have Rights or Do Their Rights Have to be Realised? The United Nations Convention on the Rights of the Child as a Frame of Reference for Pedagogical Action" (2007) 41 *Journal of Philosophy of Education* 431-443; N Thomas & C O'Kane "When Children's Wishes and Feelings Clash with Their Best Interests" (1998) 6(2) *Int'l J Child Rts* 137-154; JC Westman "Children's Rights, Parents' Prerogatives, and Society's Obligations" (1999) 29(4) *Child Psychiatry and Human Development* 315-328.

²⁰³ See for example AL Matzat "Massachusetts Education Laws of 1642 and 1647" <<https://www3.nd.edu/~rbarger/www7/masslaws.html>> (accessed 08-11-2019); Mass Moments "Massachusetts passes first education law" <<https://www.massmoments.org/moment-details/massachusetts-passes-first-education-law.html>> (accessed 08-11-2019).

²⁰⁴ More specifically the 17th Century.

²⁰⁵ William & Mary Sess 2 c 2 (1689).

²⁰⁶ US Declaration of Independence (1776).

²⁰⁷ *Déclaration des droits de l'homme et du citoyen de 1789*.

²⁰⁸ Beiter *Protection of the Right to Education* 22.

²⁰⁹ FP Dall "Children's Right to Education: Reaching the Unreached" in JR Himes (ed) *Implementing the Convention on the Rights of the Child* (1995) 143.

²¹⁰ For example the Treaty between the Principal Allied and Associated Powers and Poland that was signed on 28 June 1919; See also Beiter *Protection of the Right to Education* 25, 439-441.

²¹¹ Beiter *Protection of the Right to Education* 25; HJ Heintze "The UN Convention and the Network of the International Human Rights Protection by the UN" in MDA Freeman & PE Veerman *The Ideologies of Children's Rights* (1992) 73.

parental rights and responsibilities to ensure that their children's education was realised.²¹² The focus only shifted from the parent to the child, once the child was recognised as a rights-holder of the right to education in his or her own right.²¹³

The earliest child-specific provisions concerning education were linked to the exploitation of children in relation to labour and to replace their work responsibilities with education.²¹⁴ The human rights rationale for compulsory schooling was tied to the prohibition against child labour, as expressed in the International Labour Organization's conventions.²¹⁵ The first treaty to protect the child was accordingly adopted at the International Labour Conference in 1919 and is known as the Minimum Age (Industry) Convention.²¹⁶

Since then, numerous developments have taken place in relation to the child's rights in general. In 1924 the League of Nations (the predecessor of the United Nations) adopted the Declaration of the Rights of the Child – commonly referred to as the Geneva Declaration of the Rights of the Child (“Geneva Declaration”).²¹⁷ The Geneva Declaration is however not legally binding and was rather considered as an aspirational document, which sets out moral duties for signatories.²¹⁸ The Geneva Declaration echoed an unease that accompanied the aftermath of the war and the effects that it had had on the child and it was the first document to recognise the existence of rights specifically afforded to children.²¹⁹ It should be noted that even

²¹² M Verheyde *A Commentary on the United Nations Convention on the Rights of the Child: Article 28 the Right to Education* (2006) 57; Van Bueren *Rights of the Child* 232.

²¹³ Verheyde *A Commentary on the UNCRC Article 28* 57; See also Van Bueren *Rights of the Child* 232; Reynaert et al (2009) *Childhood* 521.

²¹⁴ Holzschleiter *Children's Rights in International Politics* 118; SJ Klees & N Thapliyal “Review of the Right to Education: the Work of Katarina Tomaševski” (2007) 51 *Comparative Education Review* 497 500; See also K Tomaševski *Education Denied: Costs and Remedies* (2003) 24; L Chen, CP Cohen & TA Johnson “Towards Adoption of the United Nations Convention on the Rights of the Child: a Policy Oriented Overview” (1989) 83 *Proceedings of the Annual Meeting (American Society of International Law)* 157 158.

²¹⁵ Klees & Thapliyal (2007) *Comparative Education Review* 500.

²¹⁶ Minimum Age (Industry) Convention (Revised) (1937). It must be noted that this Convention does not refer to education; Van Bueren *Rights of the Child* 27; See also G Van Bueren *International Documents on Children* (1998); Heintze “UN Convention” in *Ideologies of Children's Rights* 73.

²¹⁷ UN General Assembly, *Declaration of the Rights of the Child*, 20 November 1959, A/RES/1386(XIV) (hereafter the “1959 Declaration”).

²¹⁸ Van Bueren notes that the Declaration was not created with the intention to create binding obligations on state parties; Van Bueren *Rights of the Child* 7, 9; Beiter *Protection of the Right to Education* 25; Heintze “UN Convention” in Freeman & Veerman *Ideologies of Children's Rights* 74; Holzschleiter *Children's Rights in International Politics* 123; T Hammerberg “The United Nations Convention on the Rights of the Child and How to Make it Work” (1990) 12 *Human Rights Quarterly* 97 98.

²¹⁹ Buck *International Child Law* 21-22; S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 13; Holzschleiter *Children's Rights in International Politics* 118, 123; Beiter *Protection of the Right to Education* 25; Heintze “UN Convention” in Freeman & Veerman

though legal terminology is used in the Geneva Declaration, the focus is still on the protection of the child rather than a balanced approach that is inclusive of protection and autonomy. This is illustrated in that the welfare of the child is under the control of his or her parents with the protection of the child as the core objective. No mention is made of the child's autonomy, participation or self-determination.²²⁰ The text of the Geneva Declaration follows a paternalistic outlook and views the child as more of a passive object than a rights-holder actively asserting his or her rights.²²¹

The Geneva Declaration contains five key principles, including the principle that mankind has the responsibility to ensure that the child receives the best that society can give. Even though the Geneva Declaration contains no express provision for the right to education, it can be argued that the right is implied in three of the principles.²²² The first is principle I, which refers to the child's development and that the means must be provided to ensure normal development. A clear link between the content of this principle and the developmental aims of article 29 of the CRC can be drawn.²²³ Principle II mentions "...the child that is backward must be helped..." and can be related to the concept of non-discrimination in education. This means that all children must have access to education, including children with disabilities.²²⁴ Lastly, principle IV states that the child must be put in a position that enables him to earn a living. This principle clearly incorporates the concept of the right to education as an empowerment right as embodied in article 28 of the CRC. It is argued that when interpreting these three principles, a right to education is implied. The value of the Geneva Declaration is that it provides an important foundation for the recognition and protection of the child's right to basic education.

With the Geneva Declaration not being a binding instrument, member states of the United Nations called for an internationally legally binding document on the rights of the child.²²⁵ Another non-binding document however followed, namely the Declaration

Ideologies of Children's Rights 73; Freeman *Rights and Wrongs* 19; C De Graef "Rights of Children in a Changing World" in MDA Freeman & PE Veerman *Ideologies of Children's Rights* (1992) 115.

²²⁰ Buck *International Child Law* 22; Van Bueren *Rights of the Child* 8.

²²¹ Buck *International Child Law* 22; Van Bueren *Rights of the Child* 8.

²²² Beiter *Protection of the Right to Education* 25; Principles I, II and IV can be read to include a right to education.

²²³ See art 29(1)(a) of the CRC that clearly echoes this concept; See section 2 4 4 2 below for further discussion of art 29.

²²⁴ See art 2 of the CRC that provides for non-discrimination, and section 2 4 4 3 for a discussion of the guiding principle of non-discrimination in terms of the CRC.

²²⁵ Beiter *Protection of the Right to Education* 86.

of the Rights of the Child 1959 (“1959 Declaration”).²²⁶ The 1959 Declaration was adopted by the United Nations General Assembly in the hope of not only providing protection to children as a vulnerable group but also to expressly recognise that children should be afforded rights.²²⁷ The 1959 Declaration also marked the first time that the child’s right to education was recognised.²²⁸

The 1959 Declaration consists of 10 principles, with principle 7 focusing on the child’s right to education.²²⁹ Principle 7 holds that the child is entitled to free and compulsory education in the elementary stages. The nature of the education is described by referring to the promotion of the child’s culture²³⁰ and to ensuring that the child’s education enables the development of their abilities, judgement, and sense of moral and social responsibility. Principle 7 makes explicit reference to the child’s best interests as a guiding principle in all matters relating to the child’s education. Similar to the Geneva Declaration, provision is made for the child’s developing abilities. The provisions of the 1959 Declaration are also echoed in articles 28 and 29 of the CRC.²³¹

Upon the examination of the Geneva Declaration and the 1959 Declaration, it becomes clear that both instruments consider the development of the child’s abilities an important aspect of the child’s education. While equal educational opportunities is not referred to in the Geneva Declaration, it is included in the 1959 Declaration. The right to education as set out in the 1959 Declaration is important as it refers specifically to free and compulsory primary education. The 1959 Declaration builds on the

²²⁶ Declaration of the Rights of the Child (adopted 20 November 1959 UNGA Res 1386 (XIV)); Humanium “Declaration of the Rights of the Child, 1959” <<http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/declaration-rights-child/>> (accessed 05-04-2017); Detrick *Commentary on the Convention* 14.

²²⁷ Humanium “Declaration of the Rights of the Child, 1959” <<http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/declaration-rights-child/>> (accessed 05-04-2017); Beiter *Protection of the Right to Education* 113.

²²⁸ Detrick *Commentary on the Convention* 28; Van Bueren *Rights of the Child* 232.

²²⁹ Principle 7 states that: “The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents. The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavor to promote the enjoyment of this right.”

²³⁰ In this instance a link can be established between the child’s culture as espoused in the 1959 Declaration and the importance of African values in terms of the ACRWC; See in this regard section 3 3 1 3 that expands on the notion of African values.

²³¹ See section 2 4.

foundation set by the Geneva Declaration by expanding and adding to the provision on the child's right to education. Both Declarations provide a valuable point of departure for the right to education that is specifically applicable to the child. It is argued that the Geneva Declaration and the 1959 Declaration provided a basis for the formulation of articles 28 and 29 of the CRC.²³²

2 4 The Convention on the Rights of the Child

2 4 1 History and background of the CRC

With the need for a binding international instrument becoming clear, the international community finally responded with the CRC,²³³ which provides specifically and extensively for the rights of the child. The CRC is the first *binding* United Nations treaty dedicated exclusively to the recognition, protection, promotion and realisation of children's rights.²³⁴ The CRC was not only ratified by member states in record time, but is also the most widely ratified international human rights instrument.²³⁵ The unprecedented acceptance and ratification of the CRC is an indication of the international community's commitment to the realisation of the child's rights.²³⁶

The development of the CRC was initiated by the Polish government in 1978 when it submitted a proposal to draft a convention on the rights of the child.²³⁷ Following the

²³² See section 2 4.

²³³ See section 2 4.

²³⁴ D Fottrell "One Step Forward or Two Steps Sideways? Assessing the First Decade of the Children's Convention on the Rights of the Child" in D Fottrell (ed) *Revisiting Children's Rights: 10 Years after the United Nations Convention on the Rights of the Child* (2000) 1.

²³⁵ UNICEF "Convention on the Rights of the Child" <<https://www.unicef.org/child-rights-convention>> (accessed 08-11-2019); Buck *International Child Law* 87; Holzscheiter *Children's Rights in International Politics* 85, 141; M Maurás "Public Policies and Child Rights: Entering the Third Decade of the Convention on the Rights of the Child" (2011) 633 *The Annals of the American Academy of Political and Social Science* 52 53; Fottrell "One Step Forward" in *Revisiting Children's Rights* 1, 13; BC Edmonds "The Convention on the Rights of the Child: a Point of Departure" (1992) 56 *Social Education* 205 206; Detrick *Commentary on the Convention* 1.

²³⁶ UNICEF "Convention on the Rights of the Child" <<https://www.unicef.org/child-rights-convention>> (accessed 08-11-2019); W McCarney "The Globalisation of Child and Family Law" in J Sloth-Nielsen & Z Du Toit (eds) *Trials and Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* (2008) 25; See S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 14-16 for background on the drafting of the CRC.

²³⁷ A Quennerstedt, C Robinson & J l'Anson "The UNCRC: the Voice of Global Consensus on Children's Rights" (2018) 36 *Nordic Journal of Human Rights* 38 38; Holzscheiter *Children's Rights in International Politics* 145; N Cantwell "The Origins, Development and Significance of the United Nations Convention on the Rights of the Child" in S Detrick (ed) *The United Nations Convention on the Rights of the Child: a Guide to the Travaux Préparatoires* (1992) 20 ; Detrick *Commentary on the Convention* 14, 473; DA Balton "The Convention on the Rights of the Child: Prospects for International

Polish proposal, the Commission on Human Rights formed a working group in 1979 to draft a convention. The decision was also made to use the Polish draft as the working document and to draft a convention on the principle of consensus.²³⁸ With the principle of consensus at the centre of the drafting process, complicated negotiations ensued.²³⁹ In order for provisions to be accepted they required language of a more flexible and vague nature.²⁴⁰

The CRC changed the way that society as a whole views and treats children as it provides detailed recognition and protection for the child's particular rights.²⁴¹ During the drafting of the CRC, the changing perspective of the child played a vital role.²⁴² The drafters realised that a shift was necessary.²⁴³ The decision was made to move away from a purely protective view of children's rights towards and in favour of a rights-based approach with an emphasis on empowering the child.²⁴⁴ This resulted in the child being acknowledged as a rights-holder and establishes the reason for the CRC being seen as central to the dissertation.²⁴⁵

Enforcements" (1990) 12 *Human Rights Quarterly* 120 125; Hammerberg (1990) *Human Rights Quarterly* 99; CP Cohen "The Role of Non-governmental Organisations in the Drafting of the Convention on the Rights of the Child" (1990) 12 *Human Rights Quarterly* 137 139; JE Oestreich "UNICEF and the Implementation of the Convention on the Rights of the Child" (1998) 4 *Global Governance* 183 185; Fottrell "One Step Forward" in *Revisiting Children's Rights* 3.

²³⁸ Consensus in this instance refers to decisions that are reflective of an agreement of all members involved. See in this regard B Conforti *The Law and Practice of the United Nations* 3 ed (2005) 81 and F Pascual-Vives *Consensus-Based Interpretation of Regional Human Rights Treaties* (2019) 13-15; UN Economic and Social Council (ECOSOC), Commission on Human Rights (UNCHR), 36th session, *Question of a convention on the rights of the child: Note verbale dated 5 October 1979 addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva* (17 January 1980) E/CN.4/1349 as cited in Quennerstedt et al (2018) *Nordic Journal of Human Rights* 41; Detrick *Commentary on the Convention* 16; Cohen (1990) *Human Rights Quarterly* 139 notes that the Polish government proposed two models to the Commission. The first was based on the 1959 Declaration of the Rights of the Child with the addition of an implementation mechanism. The second model was more extensive and was used as the basis for the drafting of the CRC; See also U.N. ESCOR Supp. (No. 4); U.N. Doc. E/CN.4/1292 (1978) and U.N. ESCOR Supp. (No. 16); U.N. Doc. E/CN.4 as cited in Cohen (1990) *Human Rights Quarterly* 139.

²³⁹ Quennerstedt et al (2018) *Nordic Journal of Human Rights* 41.

²⁴⁰ Quennerstedt et al (2018) *Nordic Journal of Human Rights* 41.

²⁴¹ UNICEF "Convention on the Rights of the Child" <<https://www.unicef.org/child-rights-convention>> (accessed 08-11-2019); Buck *International Child Law* 88; G Van Bueren "The United Nations Convention on the Rights of the Child: An evolutionary revolution" in *Introduction to Child Law in South Africa* (2000) 205.

²⁴² Holzscheiter *Children's Rights in International Politics* 85-86.

²⁴³ Holzscheiter *Children's Rights in International Politics* 85-86.

²⁴⁴ Holzscheiter *Children's Rights in International Politics* 85-86.

²⁴⁵ Holzscheiter *Children's Rights in International Politics* 85-86.

2 4 2 The role of the Committee on the Rights of the Child

The Committee on the Rights of the Child (hereafter the “CRC Committee”) plays an important role in the implementation of the CRC.²⁴⁶ The CRC Committee responds to reports by state parties and provides general comments on various rights contained in the CRC, including general comments that relate directly to the right to education.²⁴⁷ Article 44 of the CRC regulates the reporting procedure for state parties to the CRC Committee. States are required to submit reports detailing the measures that they have adopted in order to give effect to the rights contained in the CRC as well as the progress that they have made thus far.²⁴⁸ The first report is due within two years of the date that the CRC entered into force in that specific state.²⁴⁹ After the initial report, periodic reports should be submitted to the CRC Committee every five years.²⁵⁰ The reports should provide the CRC Committee with a comprehensive view of the state’s implementation of the CRC. Additionally, they should contain factors and difficulties that have had an effect on the fulfilment of the obligations in terms of the CRC.²⁵¹

The CRC Committee may request that states provide it with additional information that it seeks in relation to the state’s implementation of the CRC.²⁵² States are also required to make their reports available to the public.²⁵³ In 2014, a simplified reporting procedure was adopted in order to strengthen and enhance the effective functioning of the human rights treaty body system.²⁵⁴ The resolution,²⁵⁵ as adopted by the United Nations General Assembly, encourages state parties to use the simplified reporting procedure in order to facilitate the preparation of reports and continued constructive

²⁴⁶ The CRC Committee consists of 18 independent experts that monitor the progress made by states in the implementation of the CRC; Art 43 of the CRC; See section 2 4 2 for more information on the CRC Committee; Detrick *Commentary on the Convention* 41-42; UN Human Rights Office of the High Commissioner “Committee on the Rights of the Child” <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>> (accessed 09-11-2019).

²⁴⁷ See the CRC Committee *General Comment No 1*; CRC Committee General Comment No 5 (34th session, 2003) “General Measures of Implementation of the Convention on the Rights of the Child” UN Doc CRC/GC/2003/5 (hereafter “CRC Committee *General Comment No 5*”).

²⁴⁸ Art 44(1) of the CRC.

²⁴⁹ Art 44(1)(a) of the CRC. The CRC was ratified by South Africa on 16 June 1995.

²⁵⁰ Art 44(1)(b) of the CRC. South Africa’s initial report was submitted to the CRC Committee on 4 December 1997; See section 5 6 for a discussion of South Africa’s periodic reporting to the CRC Committee.

²⁵¹ Art 44(2) of the CRC.

²⁵² Art 44(4) of the CRC.

²⁵³ Art 44(6) of the CRC.

²⁵⁴ UNGA *Strengthening and enhancing the effective functioning of the human rights treaty body system* (2014) A/RES/68/268 3.

²⁵⁵ UNGA *Strengthening and enhancing the effective functioning of the human rights treaty body system* (2014) A/RES/68/268.

dialogue regarding the implementation of the CRC.²⁵⁶ Shorter reports and documentation are mandated as the word count has been limited depending on the type of document.²⁵⁷ The resolution also encourages more focused and shorter concluding observations and recommendations from the CRC Committee.²⁵⁸ State parties whose reports are due from 1 September 2019, will be able to make use of this more simplified reporting procedure.²⁵⁹ A List of Issues Prior to Reporting will be requested by the Committee containing up to 30 questions. The answers to the questions will then serve as the state party's report.²⁶⁰ The reporting mechanism serves as a vital means to ensure that states are held accountable in terms of the obligations created by the CRC.

The reporting mechanism of the CRC plays a key role in the context of the dissertation. It is clear from the discussion above that the reports indicate the manner in which State parties comply or attempt to comply with their obligations in terms of the CRC.²⁶¹

2 4 3 Defining a child-centred approach

It is accepted that the notion of the right to basic education has been established as both a human right and a socio-economic right.²⁶² It is also acknowledged in the

²⁵⁶ UNGA *Strengthening and enhancing the effective functioning of the human rights treaty body system* (2014) A/RES/68/268 3 para 1; UN Human Rights Office of the High Commissioner "Committee on the Rights of the Child: Simplified reporting procedure" <<https://www.ohchr.org/EN/HRBodies/CRC/Pages/ReportingProcedure.aspx>> (accessed 09-11-2019).

²⁵⁷ UNGA *Strengthening and enhancing the effective functioning of the human rights treaty body system* (2014) A/RES/68/268 5 paras 15-16.

²⁵⁸ UNGA *Strengthening and enhancing the effective functioning of the human rights treaty body system* (2014) A/RES/68/268 4 para 6.

²⁵⁹ UN Human Rights Office of the High Commissioner "Committee on the Rights of the Child: Simplified reporting procedure" <<https://www.ohchr.org/EN/HRBodies/CRC/Pages/ReportingProcedure.aspx>> (accessed 09-11-2019).

²⁶⁰ UN Human Rights Office of the High Commissioner "Committee on the Rights of the Child: Simplified reporting procedure" <<https://www.ohchr.org/EN/HRBodies/CRC/Pages/ReportingProcedure.aspx>> (accessed 09-11-2019).

²⁶¹ See in this regard section 4 2 7 for a discussion of India's reporting history to the CRC Committee and section 4 3 5 relating to Nigeria's reporting to the CRC Committee. South Africa's reporting history to the CRC Committee is discussed in section 5 5 of chapter 5.

²⁶² CESCR General Comment No 11 (20th session, 1999) "On Plans of Action for Primary Education (Art 14) UN Doc E/C.12/1999/4 para 2 (hereafter CESCR *General Comment No 11*); Specifically arts 28 and 29 of the CRC; ss 28 and 29 of the South African Constitution afford the right to education to everyone; Liebenberg *Socio-economic Rights* 242-247; Chapman "Development of Indicators" in *Human Rights in Education, Science and Culture* 122; Coomans "Content and Scope of the Right to Education" in *Human Rights in Education* 183.

dissertation that the child's rights to basic education is a socio-economic right, but the emphasis is on the manner in which the right to basic education is recognised and protected as a children's right.

The child-centred approach of the CRC promotes a vision of childhood that is founded on human dignity, equality, participation and safety.²⁶³ The child's right to education as recognised in articles 28 and 29 of the CRC justifies a child-centred approach for the interpretation of the right to education as it embraces a balanced approach.²⁶⁴ The child-centred approach is strengthened by the four guiding principles of the CRC.²⁶⁵

With the drafting of the CRC, four core principles were selected by the CRC Committee to serve as "guiding principles" that function as underlying and internal requirements that should be met in order for any and all rights to be fully realised.²⁶⁶ This means that they can aid in the development and implementation of policy.²⁶⁷ The guiding principles are representative of the key themes of the CRC and therefore underpin all other provisions of the CRC.²⁶⁸ Not only do these principles reinforce all other principles and rights guaranteed by the CRC but they are also indicative of the fact that human rights are interrelated.²⁶⁹ The four guiding principles are: non-discrimination;²⁷⁰ the best interests of the child;²⁷¹ the right to life, survival and

²⁶³ UNICEF "Child rights approach" <<http://www.unicef.org.uk/child-rights-partners/child-rights-based-approach/definition/>> (accessed 09-11-2019); The preamble of the CRC states: "Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity."

²⁶⁴ See section 2 4 2.

²⁶⁵ CRC Committee *General Comment No 5* (2003) para 12.

²⁶⁶ UNICEF "How the Convention on the Right of the Child works" <http://unicef.org/crc/index_30177.html> (accessed 08-11-2019); L Arendse "The obligation to provide free basic education in South Africa: an International law perspective" (2011) 14 *PELJ* 92 106; CRC Committee *General Comment 5*; McCarney "Globalisation of child and family law" in *Trials and Tribulations* 25.

²⁶⁷ Maurás (2011) *The Annals of the American Academy of Political and Social Science* 59.

²⁶⁸ Fottrell "One Step Forward" in *Revisiting Children's Rights* 5.

²⁶⁹ UNICEF "How the Convention on the Right of the Child works" <http://unicef.org/crc/index_30177.html> (accessed 08-11-2019).

²⁷⁰ Art 2 of the CRC; For a detailed discussion of art 2 of the CRC see S Besson & E Kleber "Article 2: The Right to Non-Discrimination" in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 41-72; see section 2 4 4 3.

²⁷¹ Art 3 of the CRC; For a detailed discussion of art 3 of the CRC see J Eekelaar & J Tobin "Article 3: The Best Interests of the Child" in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 73-107; See sections 2 4 4 3 and 3 3.

development;²⁷² and respect for the views of the child.²⁷³ It is important to bear in mind that the four core principles are also rights unto themselves.²⁷⁴

The CRC Committee has also stressed the importance of the incorporation and reflection of these four guiding principles in domestic law of state parties to the CRC.²⁷⁵ The guiding principles ultimately represent a litmus test for the implementation of the child's rights in terms of public policy.²⁷⁶ They offer a strong outline for a child-friendly focus that should be applied in relation to state obligations.²⁷⁷ The child is front and centre in terms of this approach. The four guiding principles and their interrelatedness to articles 28 and 29 are discussed below.²⁷⁸

2 4 4 A normative framework: The provisions on the right to basic education

The normative framework of the CRC embraces a child-centred approach that is accepted as such by all the signatories to the CRC. The child-centred approach in respect of the child's right to basic education is extensively provided for in articles 28 and 29 of the CRC. Article 28 relates to the content of the right to education together with the obligations on state parties,²⁷⁹ while article 29 sets out the aims of education and the establishment of educational institutions.²⁸⁰ The child-centred approach is the golden thread in the following discussion of the two provisions. Attention will firstly be paid to the content of article 28 and thereafter to article 29. The relationship between the two provisions will then be discussed.²⁸¹

²⁷² Art 6 of the CRC; For a detailed discussion of art 6 of the CRC see N Peleg & J Tobin "Article 6: The Rights to Life, Survival and Development" in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 186-236; See section 2 4 4 3.

²⁷³ Art 12 of the CRC; UNICEF *General Comments of the Committee on the Rights of the Child* (2006); For a detailed discussion of art 12 of the CRC see L Lundy, J Tobin & A Parkes "Article 12: The Right to Respect the Views of the Child" in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 397-434; See section 2 4 4 3.

²⁷⁴ Maurás (2011) *The Annals of the American Academy of Political and Social Science* 59.

²⁷⁵ CRC Committee *General Comment* 5 para 12; Arendse (2011) *PELJ* 106.

²⁷⁶ Maurás (2011) *The Annals of the American Academy of Political and Social Science* 59.

²⁷⁷ Fottrell "One Step Forward" in *Revisiting Children's Rights* 5.

²⁷⁸ See section 2 4 4 3.

²⁷⁹ See section 2 4 4 1; Verheyde *A Commentary on the UNCRC Article 28* 1.

²⁸⁰ See section 2 4 4 2; Detrick *Commentary on the Convention* 473.

²⁸¹ See section 2 4 4 3 below; Verheyde *A Commentary on the UNCRC Article 28* 1; Detrick *Commentary on the Convention* 473.

2 4 4 1 Article 28 of the CRC

Article 28 of the CRC states the following:

- “1. States Parties recogni[s]e 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;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.”

Article 28 is comparable to other international instruments as it affords a right to education and not merely an interest in education.²⁸² Progressive realisation of the right to education and equal opportunities are also emphasised in article 28(1).²⁸³ Curtis and Tobin claim that even though article 28 provides states with an obligation to progressively realise the right to education, subject to available resources – the right to primary education is unique.²⁸⁴ They state that:

²⁸² Curtis & Tobin “Article 28” in *Commentary* 1062.

²⁸³ Clear reference is made in this section to the notion of non-discrimination in relation to education; See section 2 4 4 3 for a discussion of how article 28 relates to the principles of non-discrimination in article 2 of the CRC. It is important to note that even though the CRC includes a general provision of non-discrimination, the drafters thought it necessary to include this principle in the education clause.

²⁸⁴ Curtis & Tobin “Article 28” in *Commentary* 1061.

“However, with respect to primary education, which holds a special place within international law, it would be difficult, if not impossible, for a state to refute the claim that this level of education must be provided free of charge.”²⁸⁵

This view is also in line with the notion that the right to free and compulsory primary education forms part of customary international law.²⁸⁶

Primary education in terms of article 28 has two components: free and compulsory.²⁸⁷ This position is similar to the 1959 Declaration, which also provided for free and compulsory primary education.²⁸⁸ The inclusion of free education was contested during the drafting of the CRC with different proposals raised regarding the choice of wording.²⁸⁹ Objections to these proposals were raised and free primary education was ultimately included in article 28.²⁹⁰ The concept of free primary education has also been emphasised by the CRC Committee.²⁹¹ It follows that free primary education goes beyond free access to primary education or just schooling.²⁹² States should take into account indirect costs associated with education that can undermine the child’s right to free primary education.²⁹³ States should accordingly also make provision to ensure that learners have, for example, the required textbooks, uniforms and transportation.²⁹⁴

²⁸⁵ Courtis & Tobin “Article 28” in *Commentary* 1061-1062.

²⁸⁶ See section 3 2 1 1 for a discussion of the UDHR and customary international law; Beiter *Protection of the Right to Education* 45. Article 28 also makes provision for the right to secondary education, higher education and vocational information and guidance.

²⁸⁷ It must be noted that the South African Constitution does not provide for “free” education. This theme is further explored in chapter 5 in sections 5 4 and 5 5.

²⁸⁸ See section 2 3 1 above.

²⁸⁹ Several suggestions were made by members to rather make use of one the following phrases in providing free primary education: “as early as the circumstances permit”, “as early as permitted by national resources available” and “as early as possible”; See in this regard *Travaux Préparatoires* (UN Doc. E/CN.4/1985/64, 1985) as reproduced in S Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”* (1992) 384-385; Verheyde *A Commentary on the UNCRC Article 28* 19.

²⁹⁰ Verheyde *A Commentary on the UNCRC Article 28* 20.

²⁹¹ The CRC Committee follows the approach as set out in CESCR *General Comment No 11*; See CESCR *General Comment No 11* para 7; Verheyde *A Commentary on the UNCRC Article 28* 20; M Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2016) 583.

²⁹² Van Bueren *Rights of the Child* 233; Van Bueren illustrates the difference between “schooling” (*droit a l’instruction*) and “education” (*droit a l’éducation*) by examining the justiciability of the right to education. She refers to the decision of *Campbell and Cosans v. United Kingdom*. Judgment of the Eur. Ct. H. R. No. 48 Series A (1982) para 33 provides that: “[T]he education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development.”; Detrick *Commentary on the Convention* 475; Beiter *Protection of the Right to Education* 19; Ssenyonjo *Economic, Social and Cultural* 572.

²⁹³ Coomans “Core Content” in *Core Obligations* 228; Ssenyonjo *Economic, Social and Cultural Rights* 584.

²⁹⁴ Verheyde *A Commentary on the UNCRC Article 28* 20; See also for example *Tripartite Steering Committee v Minister of Basic Education and 2015 3 All SA 718 (ECG)* (25 June 2015); *Section 27 v*

The second aspect relates to compulsory education. This not a new concept in international law.²⁹⁵ Compulsory education in this sense relates to the belief that education cannot be denied to the child below a certain level.²⁹⁶ The relationship between the child, his or her parents and the state becomes relevant when discussing compulsory education.²⁹⁷ “Compulsory” should not be interpreted to mean that the state has monopoly over education or that the child’s family and/or the state are forced to follow a specific type of education – but rather that the child’s right to education is recognised and protected.²⁹⁸ If states fulfil the duty of providing free education, making education compulsory is more easily justified as the barrier of economic constraint does not apply.²⁹⁹ The wording of article 28(1)(a) clearly creates a positive obligation for state parties to take the necessary steps to make education compulsory for children up to a minimum age.³⁰⁰

There is no reference to a minimum age of compulsory education in section 28 but in its concluding observations,³⁰¹ the CRC Committee has indicated that the minimum age should coincide with the minimum age for employment.³⁰² Similarly, while the CRC

Minister of Education 2013 2 SA 40 (GNP); *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA).

²⁹⁵ Verheyde *A Commentary on the UNCRC Article 28* 23; The concept of compulsory education is present in many other international instruments; See for example art 26(1) of the UDHR, art 13(2)(a) of the ICESCR, art 14 of the ICESCR, art 11(3)(a) of the ACRWC; See in this regard sections 3 2 and 3 3 of chapter 3.

²⁹⁶ Verheyde *A Commentary on the UNCRC Article 28* 23-26; Level in this instance refers to the difference between primary, secondary and higher as they are set out in art 28(1). The CRC only provides for compulsory primary education. Compulsory secondary and higher education are not provided for. Many states have however made education compulsory beyond primary education; See in general K Tomaševski *Right to Education Primers No 2: Free and Compulsory Education for All Children: the Gap between Promise and Performance* (2001).

²⁹⁷ See Verheyde *A Commentary on the UNCRC Article 28* 57; Van Bueren *Rights of the Child* 232; Reynaert et al (2009) *Childhood* 524-526; Quennerstedt & Quennerstedt (2014) *British Journal of Sociology of Education*; For more on this topic see: Howe (2001) *Journal of Canadian Studies/Revue d’Etudes Canadiennes* 61–78.

²⁹⁸ Verheyde *A Commentary on the UNCRC Article 28* 23.

²⁹⁹ Verheyde *A Commentary on the UNCRC Article 28* 24; In South Africa, education is not free for all children but the law does address this in two ways. The first is in the form of fee free schools and the second is the exemption of school fees if families cannot afford to pay; See in this regard section 5 5 2 which examines the concept of free basic education in South Africa; s 29 of the Constitution; ss 39-41 of the Schools Act; Department of Basic Education “School fees and exemptions” <<https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolFees.aspx>> (accessed 09-11-2019).

³⁰⁰ The different levels of education are: primary, secondary and higher education. The cost and whether or not it is compulsory is dependent on the level thereof; Verheyde *A Commentary on the UNCRC Article 28* 11, 23.

³⁰¹ The CRC Committee provides a state party with Concluding Observations after it has considered the state’s periodic report. The Concluding Observations provide direction on shortcomings and issues that need to be addressed; Buck *International Child Law* 36.

³⁰² Verheyde *A Commentary on the UNCRC Article 28* 25.

does not provide a minimum age in relation to employment of children, article 32 does however state that child labour should not interfere with the child's education.³⁰³ States are however obligated to provide a minimum age for child labour and ILO-Convention No 138³⁰⁴ serves as the reference point for states in making their determination.³⁰⁵

When making education compulsory, states should take into account the accessibility of education.³⁰⁶ This includes the abolishment of school registration fees³⁰⁷ and the promotion of school attendance.³⁰⁸ The promotion of school attendance is directly emphasised in article 28(1)(e) as it urges states to adopt measures that encourage school attendance. These measures should be of a positive nature and addressing the problem of irregular school attendance should not be done in an oppressive way.³⁰⁹ The CRC Committee has made recommendations depending on the underlying cause of children not attending school or dropping out and indicates a supportive approach to the element of accessibility.³¹⁰

³⁰³ Art 32 states the following:

"1. States Parties recogni[s]e the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
(a) Provide for a minimum age or minimum ages for admission to employment;
(b) Provide for appropriate regulation of the hours and conditions of employment;
(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article."

See also Verheyde *A Commentary on the UNCRC Article 28* 25.

³⁰⁴ See art 2(3) of the ILO-Convention No 138 Convention Concerning Minimum Age for Admission to Employment, adopted 26 June 1973.

³⁰⁵ Verheyde *A Commentary on the UNCRC Article 28* 25; Holzscheiter *Children's Rights in International Politics* 118; See also RA Mavunga "A Critical Assessment of the *Minimum Age Convention* 38 of 1973 and the Worst Forms of Child Labour Convention 182 of 1999" (2013) 16 *PELJ* 122-169.

³⁰⁶ See section 2 5 2 for a discussion of the requirement of accessibility as part of the 4-A scheme.

³⁰⁷ Verheyde *A Commentary on the UNCRC Article 28* 24; See s 39(5) of the Schools Act which states that "No public school may charge any registration, administration or other fee, except school fees as defined in section 1."; See also section 5 5 2 of chapter 5.

³⁰⁸ See also art 28(1)(e) of the CRC and art 11(3)(d) of the ACRWC; In the promotion of school attendance, states should also implement strategies that provide transport for learners and nutritional services; Verheyde *A Commentary on the UNCRC Article 28* 24; See also section 5 5 2 2 of chapter 5 for a discussion of access to education and transport in South Africa in the case of *Tripartite Steering Committee v Minister of Basic Education* 2015 3 All SA 718 (ECG) (25 June 2015); In terms of international law see also CRC Committee *Concluding Observations: Mozambique* (2002) UN Doc. CRC/C/114; Van Bueren *Rights of the Child* 238-239.

³⁰⁹ As argued for by the drafters of the CRC. See *Convention on the Rights of the Child Travaux Préparatoires* (UN Doc. E/CN.4/1989/48, 1989) para 467 as cited in S Detrick *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (1992) 393; Verheyde *A Commentary on the UNCRC Article 28* 34.

³¹⁰ Examples include poverty; violence; sexual abuse; children belonging to minority groups; curriculum that is unadjusted or irrelevant; incapability of teachers; and disciplinary systems that are oppressive or exploitive; Verheyde *A Commentary on the UNCRC Article 28* 34-35.

International cooperation in relation to education is underscored by article 28(3), which obliges states to promote and encourage international cooperation in order to combat illiteracy. International cooperation in this regard can be defined as the endeavours of nations to collaborate with the intention of improving education.³¹¹ In the fulfilment of this obligation, preference should be given to the promotion of education in developing countries.³¹² In accordance with article 28(3), international cooperation should be aimed at eliminating ignorance and illiteracy and the facilitation of access to scientific and technical knowledge and should be supportive of modern teaching methods.³¹³ Article 28(3) consequently contains the most comprehensive call on state parties in a binding human rights instrument in relation to international cooperation and education.³¹⁴

The right to *receive* education is viewed as the core of the right to education.³¹⁵ This of course does not mean that the right to education is only concerned with the child receiving an education.³¹⁶ The value of article 28 is in the new dimension it adds to the child's right to basic education. The provision emphasises that education should be child-centred and child-friendly while being protective and empowering at the same time.³¹⁷ The protective nature of the right to education is reflected in article 28 as it provides that children should not be subjected to an inhumane disciplinary system or

³¹¹ JH Williams "International Cooperation for Education in Developing Countries" in *Oxford Research Encyclopedia of Education* (2017) 7.

³¹² See art 23(4) of the CRC; Detrick *Commentary on the Convention* 493; Van Bueren *Rights of the Child* 255.

³¹³ See also Detrick *Commentary on the Convention* 493.

³¹⁴ International cooperation concerning education includes the following: agreements and international instruments that promote education; development assistance and the institutions related to international organisations such as UNESCO and UNICEF; Verheyde *A Commentary on the UNCRC Article 28* 64; See further Williams "International Cooperation for Education" in *Oxford Research Encyclopedia of Education*.

³¹⁵ Verheyde *A Commentary on the UNCRC Article 28* 9; Nowak "The Right to Education" in *Economic, Social and Cultural Rights* 255.

³¹⁶ Detrick *Commentary on the Convention* 474; CRC Committee *General Comment No 1* para 2: "Education' in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society."; M Mehedi *The Realisation of Economic, Social and Cultural Rights. The Realisation of the Right to Education, including Education in Human Rights – The Content of the Right to Education* (UN Doc. E/CN.4/Sub.2/1990) para 40; UN Sub-Commission on the Promotion and Protection of Human Rights, *The realization of economic, social and cultural rights the realization of the right to education, including education in human rights the content of the right to education Working paper presented by Mr. Mustapha Mehedi*, 8 July 1999, E/CN.4/Sub.2/1999/10; Verheyde *A Commentary on the UNCRC Article 28* 1; Ssenyonjo *Economic, Social and Cultural Rights* 559.

³¹⁷ Verheyde *A Commentary on the UNCRC Article 28* 9. This is confirmed in art 29; CRC Committee *General Comment No 1* para 2; Curtis & Tobin "Article 28" in *Commentary* 1059-1060.

child labour that hinders their education.³¹⁸ Vulnerable children also receive special protection in order to ensure that their right to education is realised.³¹⁹ The empowering nature of education is related to the autonomy of the child. Article 28 is empowering as it creates an impetus for the child's gradual emancipation. The CRC calls for a balanced theory of interpreting the child's right to education that protects the child, while at the same time acknowledging the child's self-determination. The wording of the provision also specifically acknowledges the child as the rights-holder of the right to education.³²⁰ The normative framework for the right to basic education is therefore clearly illustrated in article 28 as it sets out specific norms to be followed in the realisation of the right to basic education.

2 4 4 2 *Article 29 of the CRC*

The second article of importance for the child's right to education is article 29. It stipulates the following:

“Article 29

1. States 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;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civili[s]ations different from his or her own;

³¹⁸ Art 28(2) refers to appropriate school discipline; Verheyde *A Commentary on the UNCRC Article 28 9*; CRC Committee *General Comment No 1* para 8: “Education must also be provided in a way that respects the strict limits on discipline reflected in article 28(2) and promotes non-violence in school. The CRC Committee has repeatedly made clear in its concluding observations that the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline. Compliance with the values recogni[s]ed in article 29(1) clearly requires that schools be child-friendly in the fullest sense of the term and that they be consistent in all respects with the dignity of the child.”

³¹⁹ For example children belonging to minority or indigenous groups; Art 30 of the CRC; Verheyde *A Commentary on the UNCRC Article 28 9*.

³²⁰ “States Parties recogni[s]e the right of the child to education”; Verheyde *A Commentary on the UNCRC Article 28 9*.

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

The provision emphasises the need for education to be child-centred, child-friendly and empowering³²¹ and that educational processes must be based on the principles expressed in the CRC.³²² The importance of article 29 is in the qualitative dimension that it adds to the right to education by recognising the need for education to be centred on the child.³²³

With specific reference to article 29(1), the CRC Committee issued CRC General Comment No 1 (“CRC Committee General Comment No 1”).³²⁴ The purpose of the CRC General Comment No 1 is to provide clarity and content to article 29(1).³²⁵ Even with the CRC Committee focusing its first general comment on the aims of education, article 29 is sometimes overlooked.³²⁶ Fittingly, the significance of article 29 is emphasised from the very beginning in CRC Committee General Comment No 1.³²⁷ The important balance between autonomy and protection is illustrated in article 29(1) in that its aim is to empower the child through education that develops his or her skills and strengthens his or her capacity.³²⁸ Article 29 also takes into account and respects parents; national values; diversity in religion, gender, race, and ethnicity; human rights; and that children should form part of their societies.³²⁹ Article 29(1), like article 28, also argues for a wider interpretation of education as the concept of education in article 29

³²¹ CRC Committee *General Comment No 1* para 2; Curtis & Tobin “Article 28” in *Commentary* 1059-1060.

³²² CRC Committee *General Comment No 1* para 2; In this regard the CRC Committee refers to the CESCR *General Comment No 13*.

³²³ CRC Committee *General Comment No 1* para 2.

³²⁴ CRC Committee *General Comment No 1*.

³²⁵ The argument can be made that by making education the content of the first General Comment, the CRC Committee acknowledged that the child’s right to education is not only of significance in general but also important in relation to other rights.

³²⁶ L Lundy & J Tobin “Article 29: The Aims of Education” in J Tobin (ed) *The UN Convention of the Rights of the Child: A Commentary* (2019) 117.

³²⁷ CRC Committee *General Comment No 1* para 1: “Article 29, paragraph 1, of the Convention on the Rights of the Child is of far-reaching importance.”

³²⁸ CRC Committee *General Comment No 1* para 2.

³²⁹ Lundy & Tobin “Article 29” in *Commentary* 1117.

goes beyond schooling and access to education.³³⁰ Article 29 therefore elaborates on the content of education.³³¹ Education should be cognisant of broad life experiences and learning processes in order to fully develop the child's personality, talents and mental and physical abilities.³³² This provision builds on the 1959 Declaration, which provides that education must develop the child's abilities and moral and social responsibility.³³³

The interrelated nature of the CRC is fittingly illustrated in article 29.³³⁴ Article 29(1) achieves this by integrating and reinforcing other rights into the aims of education – thus strengthening the view of the right to education as an empowerment right and promoting the notion of rights to, in and through basic education.³³⁵ CRC Committee General Comment No 1 refers not only to the guiding principles³³⁶ but also to the following rights that can be identified in article 29(1): the rights and responsibilities of parents;³³⁷ the child's right to freedom of expression;³³⁸ the right to freedom of thought, expression and religion;³³⁹ the right to access to information;³⁴⁰ the rights of mentally or physically disabled children;³⁴¹ the right of access to health care services and education relating to health;³⁴² and the rights of children belonging to ethnic, linguistic and religious minority groups.³⁴³

While article 28 focuses on state obligations, article 29(1) concentrates on the quality of education that must be child-centred.³⁴⁴ CRC Committee General Comment

³³⁰ CRC Committee *General Comment No 1* paras 2-3; Verheyde *A Commentary on the UNCRC Article 28* 1; In the South African context see *Governing Body of the Juma Masjid Primary School v Essay* NO 2011 8 BCLR 761 (CC); *Madzodzo v Minister of Basic Education* 2014 3 SA 441; *Section 27 v Minister of Education* 2013 2 SA 40 (GNP); *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA); *Tripartite Steering Committee v Minister of Basic Education* 2015 3 All SA 718 (ECG) (25 June 2015); for reference and discussion to these cases see section 5 4 of chapter 5; See also Mehedi *The Realisation of Economic, Social and Cultural Rights* (UN Doc. E/CN.4/Sub.2/1990).

³³¹ CRC Committee *General Comment No 1* para 3.

³³² Art 29(1)(a) of the CRC; CRC Committee *General Comment No 1* para 2.

³³³ Principle 7 of the 1959 Declaration; See section 2 3 1 for a discussion of the 1959 Declaration.

³³⁴ CRC Committee *General Comment No 1* para 6.

³³⁵ CRC Committee *General Comment No 1* para 6; Curtis & Tobin "Article 28" in *Commentary* 1059-1060.

³³⁶ Non-discrimination (art 2); best interest of the child (art 3); right to life, survival and development (art 6); right to express views (art 12); CRC Committee *General Comment No 1* para 6.

³³⁷ Arts 5 and 18 of the CRC; CRC Committee *General Comment No 1* para 6.

³³⁸ Art 16 of the CRC; CRC Committee *General Comment No 1* para 6.

³³⁹ Art 14 of the CRC; CRC Committee *General Comment No 1* para 6.

³⁴⁰ Art 17 of the CRC; CRC Committee *General Comment No 1* para 6.

³⁴¹ Art 23 of the CRC; CRC Committee *General Comment No 1* para 6.

³⁴² Art 24 of the CRC; CRC Committee *General Comment No 1* para 6.

³⁴³ Art 30 of the CRC; CRC Committee *General Comment No 1* para 6.

³⁴⁴ CRC Committee *General Comment No 1* para 9; Curtis & Tobin "Article 28" in *Commentary* 1059-1060; Lundy & Tobin "Article 29" in *Commentary* 1118.

No 1 emphasises the need for article 29 to be “child-centred, child friendly and empowering”.³⁴⁵ Education in terms of article 29 must be aimed at developing the child’s personality, talents, and abilities.³⁴⁶ It also emphasises a subjective approach that embraces the child’s unique characteristics, abilities, learning needs and interests.³⁴⁷ Education should furthermore be contextualised in order to be appropriate to the child’s culture, environment and social environment.³⁴⁸ In order for education to develop the child’s personality, talents and abilities, it should not be discriminatory as any discriminatory practices would be in direct contradiction to the provision.³⁴⁹ An example related to the content of education would be if the curriculum does not reflect the principles of gender equality. This is for example demonstrated in the encouragement of traditional gender norms and stereotypes than can inhibit the development of the child’s personality, talent and abilities.³⁵⁰

Article 29 refers to education that is aimed at developing the child’s respect for human rights³⁵¹ and respect for other civilisations,³⁵² and preparing the child for life in a free society in accordance with peace, tolerance and equality.³⁵³ These provisions share a strong link with the principle of non-discrimination espoused in article 2 of the CRC – the right to non-discrimination.³⁵⁴ By including human rights education that is centred on the child’s community, contextualisation once more takes place.³⁵⁵ If these aims are included in the content of education it could lead to the curbing and possibly even eradication of xenophobic attacks, intolerance and racism.³⁵⁶

³⁴⁵ CRC Committee *General Comment No 1* para 2; Lundy & Tobin “Article 29” in *Commentary* 1118.

³⁴⁶ Art 29(1)(a) of the CRC; CRC Committee *General Comment No 1* para 9; Lundy & Tobin “Article 29” in *Commentary* 1118.

³⁴⁷ Art 29(1)(a) of the CRC; CRC Committee *General Comment No 1* para 9; UNESCO *The Salamanca Statement and Framework for Action on Special Needs Education* (1994) viii; *The Salamanca Statement and Framework for Action on Special Needs Education* (E D-94/WS/ 1 8; Adopted 10 June 1994).

³⁴⁸ Art 29(1)(a) of the CRC; CRC Committee *General Comment No 1* para 9; The concept of African values becomes relevant in this instance when contextualisation that takes into account the child’s culture is required. For a discussion of the importance of African values in terms of the ACRWC see section 3 3 1 3.

³⁴⁹ CRC Committee *General Comment No 1* para 9; This is also supported by the principle of non-discrimination in art 2 of the CRC.

³⁵⁰ CRC Committee *General Comment No 1* para 9.

³⁵¹ Art 29(1)(b) of the CRC; CRC Committee *General Comment No 1* para 11.

³⁵² Art 29(1)(c) of the CRC; CRC Committee *General Comment No 1* para 11.

³⁵³ Art 29(1)(d) of the CRC; CRC Committee *General Comment No 1* para 11.

³⁵⁴ See section 2 4 4 3.

³⁵⁵ CRC Committee *General Comment No 1* para 11.

³⁵⁶ CRC Committee *General Comment No 1* para 11; Considering South Africa’s discriminatory past as discussed in section 1 4 of chapter 1, the importance of education that fosters respect for the human rights of everyone and which emphasises the importance of peace, tolerance and equality is evident.

Human rights education is another aim identified by article 29.³⁵⁷ The content of human rights as recognised by international instruments should form part of human rights education.³⁵⁸ Together with formal human rights education, the school environment and curriculum should also advance policies and values that are conducive to the realisation of human rights.³⁵⁹ This is achieved with a school environment that is reflective of the values enshrined in article 29(1)(b) and (d): understanding, peace, tolerance, equality and friendship.³⁶⁰

The aims as set out in article 29 provide much needed content to the right to education in order to inform states of what the child's education should include and to what such education should be directed. These aims are however formulated in general terms, which has led some states to consider them unnecessary.³⁶¹ The CRC Committee has therefore made it very clear in CRC Committee General Comment No 1 that these aims should form part of national education policies and has urged states to take the required steps to incorporate these aims into national law.³⁶²

2 4 4 3 *The interrelated nature of the CRC provisions*

The fact that the rights in the CRC are interdependent, means that they should not be read or interpreted in isolation but rather in relation to other rights. This interdependence is illustrated by the relationship between articles 28 and 29, which Curtis and Tobin describe as a "symbiotic relationship".³⁶³ Their viewpoint is also supportive of the approach followed in the dissertation, namely that the child's right to basic education should be extended to include rights to, in and through basic education as the dimensions of the right to basic education.³⁶⁴

Articles 28 and 29 do not specifically provide for the content of the child's education with reference to the curriculum that states should follow.³⁶⁵ For the most part, states

³⁵⁷ See specifically art 29(1)(b); CRC Committee *General Comment No 1* para 15.

³⁵⁸ CRC Committee *General Comment No 1* para 15.

³⁵⁹ CRC Committee *General Comment No 1* para 19.

³⁶⁰ CRC Committee *General Comment No 1* para 19.

³⁶¹ CRC Committee *General Comment No 1* para 17.

³⁶² CRC Committee *General Comment No 1* para 17.

³⁶³ Curtis & Tobin "Article 28" in *Commentary* 1057-1059; Detrick *Commentary on the Convention* 22.

³⁶⁴ Arendse (2011) *PELJ* 108; Curtis & Tobin "Article 28" in *Commentary* 1058; The right to education as an empowerment right is also advocated for in the UDHR, ICESCR, ICCPR and ACRWC; See sections 3 2 and 3 3 for a discussion of these instruments.

³⁶⁵ Verheyde *A Commentary on the UNCRC Article 28* 26-27.

have the discretion to develop their own curricula. They should however be cognisant of these two provisions by incorporating the aims and principles as set out in the two provisions into the curriculum. The CRC Committee has made some remarks in their concluding observations that education should include teaching about the CRC as well as the inclusion of the aims as set out in article 29.³⁶⁶ The CRC Committee's approach is also illustrated in article 29(1)(b), which refers to human rights education.³⁶⁷

In terms of the holistic nature of the CRC, articles 28 and 29 should also be read with the other provisions of the CRC.³⁶⁸ Article 29(1) emphasises the indispensable and interconnected nature of the CRC by reinforcing, integrating and complementing a variety of other provisions – such as the four guiding principles.³⁶⁹ A short discussion of how the four guiding principles are applicable to articles 28 and 29 accordingly follows.³⁷⁰

The first guiding principle is found in article 2 of the CRC, which sets out the position regarding non-discrimination.³⁷¹ Article 2 stipulates that the CRC applies to all children irrespective of race, religion, abilities, speech or thought, family, language, place of residence, sex and gender, culture, disability, occupation of parents or guardians, or financial circumstances.³⁷²

The principle of non-discrimination in education is emphasised in the CRC in the manner in which it is formulated. Not only is the principle as recognised in article 2 of the CRC applicable to the child's education but article 28 also specifically refers to non-discrimination.³⁷³ The argument is made that the drafters of the CRC viewed discrimination in education as a considerable issue that warranted specific attention and therefore also included it explicitly in the education clause.³⁷⁴

³⁶⁶ Verheyde *A Commentary on the UNCRC Article 28* 27.

³⁶⁷ CRC Committee *General Comment 1* para 2; Lundy & Tobin "Article 29" in *Commentary* 1118; Curtis & Tobin "Article 28" in *Commentary* 1059-1060.

³⁶⁸ Verheyde *A Commentary on the UNCRC Article 28* 2; Examples include the following: art 4 (implementation); art 2 (non-discrimination); art 3 (best interests of the child); art 6 (right to life, security and development); art 12 (views of the child); arts 13 to 17 (participation); art 19(1) (protection from maltreatment); art 23(3) (effective education for disabled children); art 24(2)(e) (health education); art 30 (minorities); art 32 (child labour); art 43 and art 44(6) (human rights education).

³⁶⁹ CRC Committee *General Comment No 1* paras 5-6.

³⁷⁰ See section 2 4 4 3.

³⁷¹ This article is of specific importance in South Africa considering the effect of apartheid; J Sloth-Nielsen & B Mezmer "2+2 = 5? Exploring the domestication of the CRC in South African Courts (2002-2006)" (2008) 16 *Int'l J Child Rts* 1 5.

³⁷² Art 2 of the CRC; Detrick *Commentary on the Convention* 74.

³⁷³ See section 2 4 3 above; Dall "Children's Right to Education" in *Implementing the Convention* 145.

³⁷⁴ Dall "Children's Right to Education" in *Implementing the Convention* 145.

Article 3 of the CRC is the second guiding principle. This article provides for the concept of “the best interests of the child” that is to be considered whenever decisions are made that affect a child. Article 3 states that the child’s best interests should be a primary consideration.³⁷⁵ The article also creates a duty on adults to do what is best for the child and when making decisions, the effect of those decisions on the child should be considered.

The importance of the child’s best interests is also stressed in article 29(1) of the CRC in that child-centred education is envisaged through education that aims at developing the individual child’s talents, abilities and personality.³⁷⁶ Article 29(1) thus recognises that children are individuals with unique qualities.³⁷⁷

The child’s right to life, survival and development is recognised in article 6 of the CRC.³⁷⁸ In comparison to the other guiding principles, this provision is quite short and to the point. The provision does not provide context as to what should be understood when referring to the government’s responsibility in relation to the child’s right to life, survival and development. The right is however considered to be a cross-cutting right as it can be related to other rights enshrined in the CRC. Sloth-Nielsen and Mezmur point out that the child’s right to life must be interpreted in a dynamic manner so as to refer to the developmental processes that accompanies the transition from childhood to adulthood.³⁷⁹ When applying article 6 to the child’s right to basic education, it means that education should not risk the child’s life or his or her survival. This means that schools should be safe spaces for children. An example would be safe and secure infrastructure and the prevention of violence in and around schools.³⁸⁰ The CRC Committee has maintained that states should apply a broad and holistic interpretation of “development” that embraces the physical, moral, spiritual, social and psychological

³⁷⁵ This is in contrast to the ACRWC which holds that the best interest of the child should be *the* primary consideration. See section 3 3 1 2.

³⁷⁶ CRC Committee *General Comment No 1* para 9; In the South African context see *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T); *Bannatyne v Bannatyne* 2003 2 SA 363 (CC); *Ford v Ford* 2006 1 All SA 571 (SCA); Sloth-Nielsen & Mezmur (2008) *Int’l J Child Rts* 5; Arendse (2011) *PELJ* 108.

³⁷⁷ CRC Committee *General Comment No 5* (2003) para 12.

³⁷⁷ CRC Committee *General Comment No 1* (2001) para 9; See further *The Salamanca Statement and Framework for Action on Special Needs Education*; Y Daudet & K Singh *The Right to Education: An Analysis of UNESCO’s Standard-setting Instruments* (2001) 19.

³⁷⁸ Art 6 of the CRC; UNICEF “Guiding principles” <http://www.unicef.org/crc/files/Guiding_Principles.pdf> (accessed 31-10-2019).

³⁷⁹ Sloth-Nielsen & Mezmur (2008) *Int’l J Child Rts* 10.

³⁸⁰ See for example the cases of *Equal Education v Minister of Basic Education* 2019 1 SA 421 (ECB), *Komape v Minister of Basic Education* (1416/2015) 2018 ZALMPPHC 18; See section 5 5.

development of the child.³⁸¹ The educational process should accordingly make provision for these elements of the child's development.

If basic education is inaccessible and poor in quality, it threatens the personal growth of children as well as the development of skilled persons to ensure their survival. The significance of the right to basic education as an empowerment right and the effect that this notion has on the interpretation of the right once again becomes evident.³⁸² The final guiding principle is found in article 12 of the CRC, which provides that the views of the child should be respected. When decisions are made that affect children, they have the right to voice their opinions and to have their opinions considered and taken into account by adults.³⁸³ The article also provides more scope by stating that even though parents are encouraged to involve children in the decision-making process and to listen to their opinions, it does not mean that children should be given authority over their parents or that there should be any interference with parental responsibilities and rights. The child's level of maturity should be a determining factor when establishing the influence and role of the child in the decision making process.³⁸⁴ When applying this principle in the context of education, it means that education must enable the child to express his or her views as set out in article 12.³⁸⁵ This can be done in several different ways in order to promote the process of learning such as involving children in school life, creating student communities and councils, involving children in school disciplinary proceedings and the promotion of peer counselling and peer education.³⁸⁶

³⁸¹ CRC Committee *General Comment No 5* (2003) para 12.

³⁸² Arendse (2011) *PELJ* 108.

³⁸³ Detrick *Commentary on the Convention* 214-215.

³⁸⁴ Art 12 states the following with regard to the role of child's maturity and age in the decision making process: "Children's ability to form and express their opinions develops with age and most adults will naturally give the views of teenagers greater weight than those of a pre-schooler, whether in family, legal or administrative decisions."; UNICEF "Guiding principles" <http://www.unicef.org/crc/files/Guiding_Principles.pdf> (accessed 31-10-2019); *Soller v G* 2003 5 SA 430 (WLD); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *Antonie v Governing Body, Settlers High School* 2002 4 SA 738 (CPD).

³⁸⁵ CRC Committee *General Comment No 1* para 8.

³⁸⁶ CRC Committee *General Comment No 1* para 8.

2 5 A practical framework: The 4-A scheme

The acceptance of the normative framework is meaningless without the acknowledgement and implementation of the content of the CRC. A model for compliance can accordingly not only consist of a normative, child-centred framework but requires a practical child-centred framework. In accordance with this line of thought, the inclusion of the 4-A scheme as part of the model for compliance is justified.

The 4-A scheme was developed by Katarina Tomaševski in her capacity as Special Rapporteur on the Right to Education.³⁸⁷ The scheme was first set out in her report³⁸⁸ and then in her subsequent publications.³⁸⁹ It was then applied in CESCR General Comment No 13³⁹⁰ and by the CRC Committee in their monitoring of State Parties' reports.³⁹¹ The 4-A scheme includes: availability, accessibility, acceptability and adaptability.³⁹² The 4-A scheme indicates the elements that should be present in order to implement the right to education, in other words it represents the practical framework.³⁹³ The 4-A scheme thereby provides an outline for the minimum essentials required to ensure that states deliver the core obligations³⁹⁴ that are necessary for the realisation of the right to basic education.³⁹⁵ Even though article 28 of the CRC only specifically refers to "available" and "accessible", the scheme is justified in the framework in that it provides for mapping out the dimensions of the right to education.³⁹⁶ When the 4-A scheme is read with articles 28 and 29 of the CRC, it provides a sound framework for the child's right to basic education, which ultimately results in the protection of the child's rights to, in and through basic education.

³⁸⁷ See section 1 1; Courtis & Tobin "Article 28" in *Commentary* 1067.

³⁸⁸ K Tomaševski *Preliminary Report of the Special Rapporteur on the Right to Education* (1999) paras 42-74; Courtis & Tobin "Article 28" in *Commentary* 1067.

³⁸⁹ See Tomaševski *Primers No. 3* (2001); Tomaševski *Human Rights Obligations* (2006).

³⁹⁰ CESCR *General Comment No 13* para 6; Courtis & Tobin "Article 28" in *Commentary* 1067.

³⁹¹ Courtis & Tobin "Article 28" in *Commentary* 1067.

³⁹² Tomaševski *Primers No. 3* (2001); CESCR *General Comment No 13* (1999) para 6.

³⁹³ Joubert (2014) *SAPL* 5.

³⁹⁴ See section 5 4 5 relating to the minimum core principle.

³⁹⁵ Joubert (2014) *SAPL* 1; For more on the 4-A scheme see Tomaševski *Primers No. 3* (2001); Tomaševski *Human Rights Obligations* (2006).

³⁹⁶ See section 2 4 4 1 above which discusses article 28 of the CRC; Courtis & Tobin "Article 28" in *Commentary* 1067.

2 5 1 Availability

The first A of the 4-A scheme centres on the *availability* of education. Availability of education is directly linked to the duties and responsibilities of the state. States should therefore ensure that schools are available for all children.³⁹⁷ This requires states to provide a sufficient quantity of functioning educational institutions for children.³⁹⁸ The right to education simply cannot be realised if educational institutions are not available.

Availability of education is also related to the infrastructure and available resources of educational institutions.³⁹⁹ States are obliged to ensure that children have drinking water, sanitation facilities, desks and chairs and classrooms in their schools.⁴⁰⁰ The availability of education consequently entails more than the availability of a school – schools should also have proper infrastructure. This means that schools should have adequate resources in order to employ staff, provide for necessary materials and facilities.⁴⁰¹

The required infrastructure, staff and materials will be dependent on the specific needs of the country and more specifically the relevant community in relation to their level of development.⁴⁰² Certain minimum requirements are however established by the scheme, such as infrastructure that protects against the elements, sanitation amenities for both sexes, drinking water, teaching materials and resources and also trained teachers that receive “domestically competitive” salaries.⁴⁰³

³⁹⁷ Tomaševski *Preliminary Report of the Special Rapporteur on the Right to Education* para 51.

³⁹⁸ CESCR *General Comment No 13* para 6(a); Joubert (2014) *SAPL* 5; Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 66; Pendlebury et al *South African Child Gauge* (2008/2009) 20.

³⁹⁹ CESCR *General Comment No 13* para 6(a); Arendse (2011) *PELJ* 112; Joubert (2014) *SAPL* 5.

⁴⁰⁰ CESCR *General Comment No 13* para 6(a); Pendlebury et al *South African Child Gauge* 20; Arendse (2011) *PELJ* 112.

⁴⁰¹ CESCR *General Comment No 13* para 6(a); Curtis & Tobin “Article 28” in *Commentary* 1067.

⁴⁰² CESCR *General Comment No 13* para 6(a); Curtis & Tobin “Article 28” in *Commentary* 1067.

⁴⁰³ CESCR *General Comment No 13* para 6(a); Curtis & Tobin “Article 28” in *Commentary* 1067.

2 5 2 Accessibility

Accessibility means that education should be accessible to all children and must ensure that they are not discriminated against, and must take additional steps to ensure access for marginalised and minority groups.⁴⁰⁴ Accessible education has three overlapping dimensions.⁴⁰⁵ The first is that the accessibility of education is directly related to the principles of non-discrimination and equality.⁴⁰⁶ Support for equal education is provided for in article 28 of the CRC.⁴⁰⁷ The second dimension relates to physical accessibility of education. This component requires that schools should be located within a safe distance at a convenient location or through modern technology.⁴⁰⁸ The dimension of physical accessibility highlights the fact that even when a school is of a high standard, it will not be sufficient in terms of the 4-A scheme if there are children that cannot reasonably access the school.⁴⁰⁹ Particular attention should be paid to children living in rural areas and ensuring that they have physical access to schools. In order to improve physical accessibility to schools, the CRC Committee has recommended that transportation measures should be implemented for children that live further distances from their schools.⁴¹⁰ The last dimension centres on economic accessibility. This dimension emphasises the affordability of education, while still taking into account the overriding principle that the right is subject to the availability of a state's resources.⁴¹¹ As education should be affordable in order for children to access it, the concept of free education becomes relevant.⁴¹² When

⁴⁰⁴ CESCR *General Comment No 13* para 6(b); Courtis & Tobin "Article 28" in *Commentary* 1068; See section 1 2; Tomaševski *Primers No. 3* (2001); Kalanry, Getgen & Koh (2010) *Human Rights Quarterly* 276; Arendse (2011) *PELJ* 112; Joubert (2014) *SAPL* 5; Pendlebury et al *South African Child Gauge* (2008/2009) 20.

⁴⁰⁵ CESCR *General Comment No 13* para 6(b); Veriava & Coomans "Right to Education" in *Socio-economic rights in South Africa* 67; Courtis & Tobin "Article 28" in *Commentary* 1068.

⁴⁰⁶ Tomaševski *Preliminary Report of the Special Rapporteur on the Right to Education* para 57; Joubert (2014) *SAPL* 5.

⁴⁰⁷ Courtis & Tobin "Article 28" in *Commentary* 1068.

⁴⁰⁸ CESCR *General Comment No 13* para 6(b); Pendlebury et al *South African Child Gauge* (2008/2009) 20; Modern technology in this instance can refer to e-learning or distance learning, which can be described as distance learning through the use of technology such as computers and the internet.

⁴⁰⁹ Courtis & Tobin "Article 28" in *Commentary* 1068.

⁴¹⁰ Courtis & Tobin "Article 28" in *Commentary* 1068.

⁴¹¹ Art 4 of the CRC, which sets out the State Parties' obligations states that: "With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."; CESCR *General Comment No 13* para 6(b); Courtis & Tobin "Article 28" in *Commentary* 1068.

⁴¹² CESCR *General Comment No 13* para 6(b); Pendlebury et al *South African Child Gauge* (2008/2009) 20.

education is free it is more easily accessible than if children must be pay high fees in order to attend school. Additional costs in relation to the child's education, such as textbooks and transportation should also be taken into account by states as it can impede the child's access to education.⁴¹³ Once more, it becomes clear that the child's right to basic education necessitates more than access to schooling.

The relationship between accessibility and non-discrimination is illustrated in the manner in which non-discrimination is generally understood. In most instances the interpretation of non-discrimination is limited to guarantees of equality. However, it is the inherited inequalities that hinder access to education: lower enrolment rates for girls than boys and the exclusion of minorities or migrants.⁴¹⁴

The accessibility of education shares a strong link with availability of education. In the process of making education accessible, it is implied that education should firstly be available.⁴¹⁵ The accessibility and availability of education is also closely related to the two elements of basic education: free and compulsory.⁴¹⁶ This centres on the argument that education cannot truly be universally available, accessible and compulsory unless provision is made for free education.⁴¹⁷

2 5 3 Acceptability

Acceptability relates to the content and quality of education and that it must be relevant, culturally appropriate, non-discriminatory, that schools must be safe and the teachers must be qualified and professional.⁴¹⁸ This element requires that schools conform to the criteria developed by states and that parents and children view the education as acceptable.⁴¹⁹ The quality of education also forms part of the

⁴¹³ See in this regard for example *Tripartite Steering Committee v Minister of Basic Education* 2015 3 All SA 718 (ECG) (25 June 2015); *Section 27 v Minister of Education* 2013 2 SA 40 (GNP); *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA).

⁴¹⁴ Tomaševski *Human Rights Obligations in Education* 45.

⁴¹⁵ Verheyde *A Commentary on the UNCRC Article 28* 15.

⁴¹⁶ See section 2 5 of chapter 2.

⁴¹⁷ Tomaševski *Human Rights Obligations in Education* 24; See section 2 4.

⁴¹⁸ CESCR *General Comment No 13* para 6(c); See section 1 2 of Chapter 1; Tomaševski *Primers No. 3* (2001); Pendlebury et al *South African Child Gauge* 20; Joubert (2014) *SAPL* 6; Kalantry et al (2010) 3 *Human Rights Quarterly* 278; Arendse (2011) *PELJ* 111-112; Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 71; Curtis & Tobin "Article 28" in *Commentary* 1069.

⁴¹⁹ Tomaševski *Preliminary Report of the Special Rapporteur on the Right to Education* para 64; Pendlebury et al *South African Child Gauge* (2008/2009) 20.

acceptability of education.⁴²⁰ The CRC Committee⁴²¹ has stressed the importance of ensuring that the quality of education must be in line with international instruments, such as the Jomtien Declaration⁴²² and the Dakar Framework for Action.⁴²³ Thus, while the more quantitative elements of education are of course very important,⁴²⁴ the quality of education should not be overlooked.⁴²⁵

From a children's rights perspective this entails that education goes beyond parental rights of choice and freedom in relation to the child's education. In order for education to be acceptable it should be child-friendly and child-centred.⁴²⁶

2 5 4 Adaptability

Adaptability relates to the manner in which education should be able to adapt and evolve with the needs of society as well as addressing inequalities that are present in education systems.⁴²⁷ Education should accordingly be receptive to the issues faced by the local community and context of the child as well as providing a global view.⁴²⁸ Education should also be adaptable in order to provide for the specific needs of individual children. Flexibility is central to adaptability.⁴²⁹

In this regard, the United Nations Children's Fund ("UNICEF") has recommended that adaptability should be understood to mean that infrastructure such as the school buildings and furniture should be child-friendly and meet the needs of the child.⁴³⁰ UNICEF has also identified several factors that should be taken into account when

⁴²⁰ Curtis & Tobin "Article 28" in *Commentary* 1069.

⁴²¹ See section 2 4 2.

⁴²² See section 3 3 2 of chapter 3; Note that this is a non-binding international instrument; Curtis & Tobin "Article 28" in *Commentary* 1069.

⁴²³ See section 3 3 2 which discusses the Dakar Framework for Action, which is a non-binding international instrument; Curtis & Tobin "Article 28" in *Commentary* 1069.

⁴²⁴ Such as the number of children attending school, the number of children completing school and the number of children that drop out of school; Curtis & Tobin "Article 28" in *Commentary* 1069.

⁴²⁵ Curtis & Tobin "Article 28" in *Commentary* 1069.

⁴²⁶ Tomaševski *Preliminary Report of the Special Rapporteur on the Right to Education* para 67.

⁴²⁷ See section 1 4 of Chapter 1; Tomaševski *Primers No. 3* (2001); CESCR *General Comment No 13* para 6(d); Kalantry et al (2010) *Human Rights Quarterly* 279; Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 73; Pendlebury et al *South African Child Gauge* 20; Curtis & Tobin "Article 28" in *Commentary* 1070.

⁴²⁸ Tomaševski *Preliminary Report of the Special Rapporteur on the Right to Education* para 71.

⁴²⁹ CESCR *General Comment No 13* para 6(d); Joubert (2014) *SAPL* 5-6; Pendlebury et al *South African Child Gauge* (2008/2009) 20.

⁴³⁰ UNICEF *The State of the World's Children 1999: Education* (1998) 22; Curtis & Tobin "Article 28" in *Commentary* 1070.

teaching and developing a curriculum that should aid in making education more child-friendly and adaptable.⁴³¹

While the adaptability of education must be sensitive to the individual needs of the child, it must also take into account the specific societal needs of the region or jurisdiction of where the child lives. This means taking into account the social and political factors of the region, such as armed conflict, humanitarian crises and situations of emergency.⁴³² The contextualisation of the child's right to education becomes evident.

2 6 A holistic perspective: The child's right to basic education and the model for compliance

Two main concepts emerge from the discussion thus far. First, a model for compliance has been established, consisting of a normative and a practical framework. Second, the child centred approach to the right to basic education acknowledges rights to, and through basic education as dimensions of the right to basic education. In what follows, the value of the model will be discussed, not only as a means to measure compliance with international obligations, but also as a means to engage with the dimensions of the right to basic education in order to measure compliance.

2 6 1 The child's rights to basic education

As has been noted, the right to basic education consists of several dimensions that can be categorised as rights to, in and through basic education. The first category is rights to basic education, which focuses primarily on section 28 and 29 of the CRC.⁴³³ The right to basic education in this category is linked to the accessibility and availability of the 4-A scheme. The purpose of this discussion is to establish how these two components of the 4-A scheme interacts with the normative framework.

⁴³¹ Factors include gender, culture, language, mental disabilities, physical disabilities and economic disparities.

⁴³² Courtis & Tobin "Article 28" in *Commentary* 1070.

⁴³³ See section 2 4.

In order to achieve accessible education all three dimensions of accessible education should be present: equal accessibility (non-discrimination), economic accessibility and physical accessibility.⁴³⁴ In terms of the CRC, education must be aimed at developing the “child’s personality, talents and mental and physical abilities to their fullest abilities”.⁴³⁵ This means that basic education should be accessible for all children, irrespective of their abilities or talents. Equal accessibility of education is also highlighted in article 29(1)(c) of the CRC as it calls for education to be aimed at the development of the child’s cultural identity, language, values and national values. Economic accessibility of basic education is connected to the notion of free and compulsory education as articulated in article 28 of the CRC.⁴³⁶

Physical accessibility requires schools to be within a safe geographic location that can be accessed by children.⁴³⁷ Article 28(1)(e) of the CRC is applicable to economic and physical accessibility as it provides that states must implement measures that encourage regular school attendance and reduce drop-out rates. Economic and physical barriers pose a risk to school attendance and can ultimately result in children dropping out of school. Education must therefore remain accessible to these children, despite economic and physical challenges.

The right to basic education is also closely linked to the availability of education. Article 28 and 29 of the CRC entails that education must be available to all children – once more emphasising the principles of non-discrimination and equality.⁴³⁸ The availability of education is centred on the provision of an adequate amount of schools within a community, and the necessary infrastructure that complements the schools.⁴³⁹ This means that the school buildings must protect children from the elements and must fit the needs of the society. Further examples include the availability of teachers, textbooks, teaching materials, drinking water, and sanitation facilities.⁴⁴⁰

⁴³⁴ See section 2 5 2; CESCR *General Comment No 13* para 6(b)(i)-(iii).

⁴³⁵ Art 29(1)(a) of the CRC.

⁴³⁶ See section 2 4 4 1; CESCR *General Comment No 13* para 6(b)(iii).

⁴³⁷ CESCR *General Comment No 13* para 6(b)(ii); The connection between the guiding principle of the child’s right to life, survival and development and the concept of accessibility is also related to the element of physical accessibility of education; See in this respect Art 6 of the CRC.

⁴³⁸ Art 2 of the CRC; section 2 4 4 3.

⁴³⁹ CESCR *General Comment No 13* para 6(a); See section 2 5 1.

⁴⁴⁰ CESCR *General Comment No 13* para 6(a); See section 2 5 1.

2 6 2 The child's rights in basic education

Rights *in* basic education includes the right to dignity,⁴⁴¹ the right to equality,⁴⁴² the right to freedom of expression;⁴⁴³ the right to an environment that is not harmful to one's health;⁴⁴⁴ and with regard to children specifically, the right to protection from abuse and neglect⁴⁴⁵ as well as the right to basic nutrition⁴⁴⁶ and the right to learn in their official language.

Dignity is in many instances viewed as the cornerstone of education as its centrality is emphasised on numerous occasions in a variety of instruments.⁴⁴⁷ The CRC, for example, refers to dignity several times in its preamble⁴⁴⁸ and specifically in article 28(2) with reference to school discipline.⁴⁴⁹ The acceptability of education, specifically that of the curriculum and teaching methods, in terms of the 4-A scheme can aid in the determination of whether a child's dignity has been infringed.

In order for education to be acceptable, the content and quality of education should be acceptable to children and their parents.⁴⁵⁰ In order to achieve this, children should be afforded the opportunity to express their view on the education that they receive. If their education is not relevant or culturally appropriate,⁴⁵¹ they should be able to express their views. Moreover, they should be heard and in line with the concept of adaptable education as part of the 4-A scheme, education should be adjusted to conform so as to be acceptable.

⁴⁴¹ Preamble to the CRC; article 28(2) of the CRC; s 10 of the Constitution.

⁴⁴² Preamble and arts 2 and 29(1)(d) of the CRC; s 9 of the Constitution.

⁴⁴³ Arts 12 and 13 of the CRC; s 16 of the Constitution.

⁴⁴⁴ Preamble and art 29(1)(e) of the CRC; s 24 of the Constitution.

⁴⁴⁵ Arts 19, 34 and 39 of the CRC; s 28(1)(d) of the Constitution.

⁴⁴⁶ Arts 24(c) and (e) and 27 of the CRC; s 28(1)(c) of the Constitution.

⁴⁴⁷ Human dignity is a central value in the Constitution as stated in the founding provisions: "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 freedoms."; See specifically ss 1, 7 and 10 of the Constitution.

⁴⁴⁸ The preamble states: "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..."; "Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom..."; "Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity...".

⁴⁴⁹ See section 2 4 4 1 of chapter 2.

⁴⁵⁰ CESCR *General Comment No 13* para 6(c).

⁴⁵¹ CESCR *General Comment No 13* para 6(c).

The right to equality is also a right in education. The principle of non-discrimination in relation to the child's education is central to the right to equality.⁴⁵² Article 28 of the CRC is central to an examination if a child is denied access to his or her right to education as it provides for the right to education on the basis of equal opportunity.⁴⁵³ Article 29 also makes a valuable contribution. The struggle against discrimination, especially in relation to race and culture, is addressed in article 29(1) in the fact that education must be directed to promote the values of article 29 – which includes respect for differences.⁴⁵⁴ Article 29(1)(a) also makes it clear that education must be directed to the “development of the child's personality, talents and mental and physical abilities to their fullest potential”. Practices that contradict article 29(1)(a) could result in discrimination.⁴⁵⁵ A child's right to education should not be infringed by discriminating against that child – rather the uniqueness of every child must be celebrated and used to enrich the education process.⁴⁵⁶

Equality is not only connected to the principle of non-discrimination but also adaptability.⁴⁵⁷ This requires that education should be flexible to the needs of a changing society and should take into account the diversity in culture and social settings. Furthermore, education must be adaptable in order to address the inequalities of the past. This is of importance in the South African context as the effects of apartheid education policies can still be seen today.⁴⁵⁸

The right to freedom of expression is also a right in basic education. This right can also be directly be linked to the right to be heard and to participate as provided for in article 12 of the CRC, which recognises the child's right to have his or her views respected.⁴⁵⁹

The right to an environment that is not harmful to health also falls in this category. The child's right to health is recognised in article 24 of the CRC.⁴⁶⁰ This right relates to the guiding principles that protect the child's right to life, survival and development and the concept of acceptability as the school environment must be safe for

⁴⁵² See section 2 4 4 3 below for a discussion of the principle of non-discrimination as set out in the CRC.

⁴⁵³ Detrick *Commentary on the Convention* 72.

⁴⁵⁴ CRC Committee *General Comment No 1* para 11.

⁴⁵⁵ CRC Committee *General Comment No 1* para 10.

⁴⁵⁶ CRC Committee *General Comment No 1* para 11.

⁴⁵⁷ Section 2 5 4.

⁴⁵⁸ See section 1 4.

⁴⁵⁹ See section 2 4 4 3.

⁴⁶⁰ See also arts 20 and 21 of the ACRWC.

children.⁴⁶¹ Proper and safe infrastructure with the necessary sanitation and water are required in order to keep the child healthy and safe. As referred to above, health education should also be included in the education of children in order to not only protect them from harm but also give them the skill to act independently.

The right to protection from abuse and neglect is another right in basic education. Protection from abuse and neglect is referred to in a number of provisions of the CRC.⁴⁶² In relation to education, article 19 provides specifically for educational measures aimed at protecting the child from abuse and neglect. This element is connected to acceptability and adaptability and the guiding principle of the child's right to life, survival and development.⁴⁶³ Schools should be safe spaces for children that are free from abuse and neglect.

The right to basic nutrition is also a right in basic education and is linked to the guiding principle of the child's right to life, survival and development.⁴⁶⁴ The right to basic nutrition is in most instances related to the child's right to health.⁴⁶⁵ Provision should also be made for educational measures about nutrition.⁴⁶⁶

The last example in this category, is the right to learn in your official language. The protection of the child's right to enjoy his or her language is highlighted in several articles of the CRC.⁴⁶⁷ In order for education to be accessible, children should be able to learn in a language that they understand. Of course, there are limits to learn in the official language of your choice, as resources can be limited and practicalities should be considered. The right to learn in a child's official language of choice shares a link with the principle of non-discrimination as recognised in article 2 of the CRC.⁴⁶⁸ Article 29 of the CRC also specifically refers to language in the aims of education as it provides for education to be directed to the development of the child's own language.⁴⁶⁹ The argument can be made that not only should children be afforded the opportunity to learn in their language of choice but that respect for their own language

⁴⁶¹ See sections 2 4 4 3 and 2 5 3.

⁴⁶² See arts 9, 19, 34 and 39 of the CRC.

⁴⁶³ Sections 2 5 3, 2 5 4 and 2 4 4 3.

⁴⁶⁴ Section 2 4 4 3.

⁴⁶⁵ See arts 24(2)(c) and (e) of the CRC and arts 14(2)(c), (d) and (h) of the ACRWC.

⁴⁶⁶ Art 24(2)(e) of the CRC.

⁴⁶⁷ See arts 2, 29 and 30 of the CRC.

⁴⁶⁸ Art 2 of the CRC states: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of ... language"; See section 2 4 4 3 for a discussion of the right to non-discrimination in terms of the CRC.

⁴⁶⁹ Art 29(1)(c) of the CRC.

should also be fostered in schools. The protection of minority rights in article 30 of the CRC also provides for the protection of language. It provides that ethnic and religious minorities should not be denied the right to enjoy his or her own language.⁴⁷⁰

2 6 3 The child's rights through basic education

The last category are rights *through* basic education. Examples include the rights to equality;⁴⁷¹ human dignity;⁴⁷² the right to further education;⁴⁷³ as well as the right to information;⁴⁷⁴ the right to health care and social security;⁴⁷⁵ the right to administrative action;⁴⁷⁶ the right to freedom and security of the person;⁴⁷⁷ the right to freedom of religion, belief and opinion;⁴⁷⁸ and also the right freedom of expression and association.⁴⁷⁹ These rights can be relied on in the process of education, becoming possible once rights to basic education are realised. This category explicitly recognises the nature of education as an empowerment right – the realisation of the right to basic education makes the realisation of other rights possible.

The right to equality is the first example in this category. As a right through basic education, equality relates to the guiding principle of non-discrimination⁴⁸⁰ and the concept of adaptability.⁴⁸¹ Education should therefore be adaptable in order to meet the needs of society and to provide for diverse social and cultural communities.⁴⁸²

The right to dignity is the next example, and shares a strong link to the adaptability of education. Education policies should be flexible so as to adapt to the needs of the child in order to respect their right to dignity.⁴⁸³ This means that the right to dignity is also related to the guiding principle of non-discrimination⁴⁸⁴ and also respect for the

⁴⁷⁰ Art 30 of the CRC.

⁴⁷¹ Preamble and arts 2 and 29(1)(d) of the CRC; s 9 of the Constitution.

⁴⁷² Preamble of the CRC; art 28(2) of the CRC; s 10 of the Constitution.

⁴⁷³ Arts 28(1)(b) and (c); s 28(1)(b) of the South African Constitution.

⁴⁷⁴ Arts 13, 17, 23 and 28(1)(d) of the CRC; s 32 of the Constitution.

⁴⁷⁵ Arts 24, 26 and 32 of the CRC; s 27 of the Constitution.

⁴⁷⁶ Art 12 of the CRC; s 33 of the Constitution.

⁴⁷⁷ Arts 12 and 37 of the CRC; s 12 of the Constitution.

⁴⁷⁸ Art 14 of the CRC; s 15 of the Constitution.

⁴⁷⁹ Arts 13 and 15(1) of the CRC; s 16 of the Constitution.

⁴⁸⁰ Art 2 of the CRC; See sections 2 4 4 3.

⁴⁸¹ Section 2 5 4.

⁴⁸² CESCR *General Comment No 13* para 6(d).

⁴⁸³ CESCR *General Comment No 13* para 6(d).

⁴⁸⁴ Art 2 of the CRC.

child's views.⁴⁸⁵ If there is an infringement of the child's dignity, the child should be afforded the opportunity to voice his or her opinion.

The right to further education is another element to fall in this category. Once the child's right to basic education has been realised, it is then possible to access further education.

The right to information is also a right through basic education. The CRC provides specifically for the child's right to access information⁴⁸⁶ and the right to receive and impart information and ideas of all kinds.⁴⁸⁷ The education clause provides that educational information should be available and accessible to all children.⁴⁸⁸ Not only does the process of education inform the child but it also provides the child with the skills to access other information. Information forming part of the curriculum should be adaptable in order to ensure that the child is informed in light of its specific social and cultural setting.

The right to health care and social security can be classified as rights through basic education. The CRC affords the right to health for the child "of the highest attainable standard"⁴⁸⁹ as well as the right to social security.⁴⁹⁰ As discussed above, the child's health is related to the guiding principle of the child's right to life, survival and development.⁴⁹¹

Another element in this category is the right to administrative actions. In this respect adaptability is applicable.⁴⁹² The CRC⁴⁹³ provides the child with the opportunity to participate and be heard in any administrative proceedings that affect him or her. Education that affords the child the opportunity to express his or her opinion and to

⁴⁸⁵ Art 12 of the CRC.

⁴⁸⁶ Art 17 of the CRC: "States Parties recogni[s]e the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health."

⁴⁸⁷ Art 13(1) of the CRC; This right is also related to freedom of expression.

⁴⁸⁸ Art 28 (1)(d) of the CRC; See sections 2 5 1 and 2 5 2.

⁴⁸⁹ Art 24(1) of the CRC; Art 24(2) refers to specific measures to be implemented to ensure the realisation of this right.

⁴⁹⁰ Art 26 of the CRC.

⁴⁹¹ Art 6 of the CRC; See section 2 4 4 3.

⁴⁹² CESCR *General Comment No 13* para 6(d).

⁴⁹³ See art 12(2) of the CRC: "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

participate will strengthen the child's right through basic education in order to participate in administrative actions.

The right to freedom and security of the person can be linked to the rights of children accused of infringing the penal law.⁴⁹⁴ Focus is therefore on liberty and the administration of juvenile justice.⁴⁹⁵ In relation to education, if the child's right to education is realised, it affords him or her an opportunity to be informed of rights relating to freedom and security of the person, thus ultimately resulting in the protection of the child but also providing them with self-determination to stand up for themselves and to rely on their rights.

The right to freedom of religion, belief and opinion is another example and the CRC recognises the importance of these rights.⁴⁹⁶ This element is centred on adaptability⁴⁹⁷ as education should be aimed at being inclusive of different religions and beliefs and also adaptable depending on the community.⁴⁹⁸ Children should also be afforded the opportunity to express their views if their education is not inclusive.⁴⁹⁹

The last right through basic education, is the right to freedom of expression and association.⁵⁰⁰ This right is also linked to the guiding principle of respect for the child's views.⁵⁰¹ The child's right to express his or her views, and to have those views respected, as a guiding principle is central to the right to freedom of expression and association.⁵⁰² In relation to adaptability as part of the 4-A scheme, education should be flexible in order to provide the child with the opportunity to freely express his or her views.⁵⁰³

⁴⁹⁴ Art 37(b) of the CRC.

⁴⁹⁵ M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 67.

⁴⁹⁶ See art 14 of the CRC and art 9 of the ACRWC; See in general Gose *African Charter* 132-135.

⁴⁹⁷ Section 2 5 4.

⁴⁹⁸ CESCR *General Comment No 13* para 6(d); See section 2 5 4.

⁴⁹⁹ Section 2 4 4 3.

⁵⁰⁰ Arts 13 and 15 of the CRC.

⁵⁰¹ Art 12 of the CRC; Gose *African Charter* 128-135.

⁵⁰² CESCR *General Comment No 13* para 28; Gose *African Charter* 128; See section 2 4 4 3.

⁵⁰³ CESCR *General Comment No 13* para 6(d).

2 7 Conclusion

The concept of childhood and its relationship to the child's right to basic education has been analysed in chapter 2. The historical⁵⁰⁴ and legal analysis⁵⁰⁵ has indicated that childhood is an ongoing process during which a child's capacities develop.⁵⁰⁶ The notion of evolving capacities requires that a balance must be struck between protecting the child but also recognising the child's autonomy as he or she develops. The Geneva Declaration and the 1959 Declaration provides a foundation for the CRC and their provisions influenced and led to the adoption of articles 28 and 29. Further developments that have taken place after the adoption of the CRC with regard to the child's right to basic education will be discussed in chapter 3.⁵⁰⁷

With the Geneva Declaration and the 1959 Declaration providing context to the child's right to basic education in terms of international law, the examination of the CRC followed. The examination focused on the content of articles 28 and 29 of the CRC in order to set out the normative framework that forms the first part of the model for compliance.⁵⁰⁸ Articles 28 and 29 provide the basis for the interpretation of the child's right to basic education in line with a child-centred approach. By acknowledging the special status of children, the CRC rendered children visible and different from adults.⁵⁰⁹ The CRC accordingly changed the way in which children were viewed and treated by not only acknowledging them as rights-holders with unique rights – but also by making this fact the focus of the CRC.⁵¹⁰ The adoption of the CRC means that both notions of childhood (protection and autonomy) are recognised and should also co-exist.⁵¹¹ With specific reference to education, the CRC reconceptualised existing education law by providing for a child-centred approach. The acknowledgement of the child as a holder of the right to education provides an additional dimension to the

⁵⁰⁴ Section 2 2.

⁵⁰⁵ Section 2 3.

⁵⁰⁶ Human "The Theory of Children's Rights" in *Child Law in South Africa* 324.

⁵⁰⁷ See section 3 3 for a discussion of the ACRWC and the Education for All movement.

⁵⁰⁸ See section 2 4 3 for a discussion of article 28 and 29 of the CRC and section 2 6 for the discussion of the model for compliance.

⁵⁰⁹ Holzscheiter *Children's Rights in International Politics* 123; Reynaert et al (2009) *Childhood* 521.

⁵¹⁰ UNICEF "Convention on the Rights of the Child" <<http://www.unicef.org/crc/>> (accessed 05-04-2016); Fottrell "One Step Forward" in *Revisiting Children's Rights* 1; Maurás (2011) *The Annals of the American Academy of Political and Social Science* 52; A Ramesh "United Nations Convention on the Rights of the Child: Inherent Weaknesses" (2001) 36 *Economic and Political Weekly* 1948 1948; Reynaert et al (2009) *Childhood* 520.

⁵¹¹ Reynaert et al (2009) *Childhood* 521.

child's right to education.⁵¹² Articles 28 and 29 of the CRC as the normative framework, form the first part of the model for compliance which will be used to measure compliance with international obligations.

The second part of the model for compliance, the 4-A scheme, was also discussed in this chapter. The 4-A scheme provides a practical framework which sets out the minimum essentials for the right to basic education. The value of the normative and practical frameworks are that while they are complementary to one another, they are also essential frameworks independently. While the normative framework is aimed at ratification, legislation and the role of the courts and the norms and standards created by these instruments and institutions, the practical framework is centred on implementation. Both of these frameworks are essential to the fulfilment of international obligations.

With the practical and the normative frameworks established, the manner in which these two frameworks work together in order to provide content to the model for compliance could finally be set out. The model for compliance established in this chapter has been the culmination of the development of international law on the child's right to education. It combines the practical framework in the form of the 4-A scheme with the normative framework founded in articles 28 and 29 of the CRC. The significance and value of the model for compliance is that it is wholly applicable to the periodic reports of the CRC Committee. State parties to the CRC are required to report on their legislation, policy developments and the role of the courts in order to indicate their practical implementation in the fulfilment of their obligations.

It is by applying this model for compliance that South Africa's compliance with its international obligations can be determined. The manner in which these international instruments, specifically the CRC, has been applied in South Africa will be examined in chapter 5 in order to establish if South Africa meets its international obligations in the realisation of the child's right to basic education.

⁵¹² Verheyde *A Commentary on the UNCRC Article 28* 9; See also arts 28 and 29 of the CRC; Fottrell "One Step Forward" in *Revisiting Children's Rights* 1; Maurás (2011) *The Annals of the American Academy of Political and Social Science* 52; Ramesh (2001) *Economic and Political Weekly* 1948; Reynaert et al (2009) *Childhood* 520.

Chapter 3:

An international law perspective of the right to basic education

3 1 Introduction

In order to establish whether or not South Africa complies with its international obligations, it must be determined what exactly those obligations are. International law must be examined in order to determine these obligations. The model for compliance has already been established in the previous chapter, with the normative and practical frameworks also set out as the two components of the model.⁵¹³ While the Convention on the Rights of the Child (“CRC”)⁵¹⁴ is central to the model for compliance, additional international obligations are created by other international instruments. In order to provide a holistic international perspective of the right to basic education, the CRC cannot be examined in isolation, as numerous other international instruments provide for the recognition and protection of the right to basic education – both in a general sense and specifically for the child. The obligations created by the CRC must therefore be read together with additional obligations created by other international instruments.

The focus of this chapter will accordingly be an examination of international instruments⁵¹⁵ as sources of the child’s right to basic education.⁵¹⁶ Building on the child-centred approach founded in the normative framework,⁵¹⁷ chapter 3 will examine how additional international instruments recognise and protect the right to basic education.

Chapter 3 will be divided into two main parts. The first part is dedicated to the right to basic education as provided for under international law. This discussion will centre on international instruments that provide a general right to basic education to

⁵¹³ See section 2 6 for a discussion of the model for compliance; Sections 2 4 and 2 5 sets out the normative and practical frameworks.

⁵¹⁴ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Resolution 44/25 of 20 November 1989 (hereafter the “CRC”).

⁵¹⁵ When reference is made to international instruments or international obligations, it includes regional law and regional obligations. An example in this instance is the ACRWC which is discussed in section 3 3 1.

⁵¹⁶ See sections 2 3 1 and 3 2 for a more detailed discussion of these instruments.

⁵¹⁷ See section 2 4.

everyone.⁵¹⁸ The second part of the chapter is dedicated to international instruments that provide specifically for the child's right to basic education.⁵¹⁹ By examining the right to basic education in both a general sense and as a children's right, a holistic perspective of the international obligations in relation to the child's right to basic education will be determined.

3 2 The right to basic education as developed under international law

The international community's commitment to the protection and realisation of the right to basic education is evident in the variety of international instruments that include provisions that specifically recognise the right to education.⁵²⁰ With the emphasis on the importance of international law in this chapter, three of the most prominent role players in the international community are highlighted: the United Nations ("UN"),⁵²¹ the United Nations Educational, Scientific and Cultural Organization ("UNESCO"),⁵²² and the United Nations Children's Fund ("UNICEF").⁵²³

The United Nations was established in 1945 with the view to promote cooperation between governments and to solve problems between members of the international community.⁵²⁴ South Africa has been a member state of the United Nations since the

⁵¹⁸ These instruments are directed at "everyone", which will, unless specifically excluded, also include children; see section 3 2 1 which elaborates on the International Bill of Human Rights. This discussion includes reference to the UDHR, ICESCR and ICCPR.

⁵¹⁹ See section 3 3 for a discussion of the ACRWC and the Education for All movement.

⁵²⁰ This is inclusive of binding international and regional law as well as soft law. The following are discussed: the UDHR in section 3 2 1 1, the CRC in section 2 4; the ICESCR in section 3 2 1 2; the ACRWC in section 3 3 1.

⁵²¹ The United Nations was founded in 1945 as an international organisation to promote cooperation between governments and to solve international problems together; See in general United Nations <<http://www.un.org/en/index.html>> (accessed 09-11-2019); For more information on the main organs of the United Nations see United Nations "Main organs" <<http://www.un.org/en/sections/about-un/main-organs/index.html>> (accessed. 09-11-2019).

⁵²² United Nations Education, Scientific and Cultural Organization; See in general UNESCO <www.unesco.org> (accessed 10-11-2019).

⁵²³ United Nations Children's Fund; See in general UNICEF <<http://www.unicef.org/>> (accessed 10-11-2019).

⁵²⁴ United Nations "Charter of the United Nations" <<http://www.un.org/en/charter-united-nations/index.html>> (accessed 09-11-2019).

7th of November 1945.⁵²⁵ The mission, work and objective of the United Nations is contained in the Charter of the United Nations (“UN Charter”)⁵²⁶.

The second international organisation of importance is UNESCO, which has a wide range of interests that it seeks to promote.⁵²⁷ UNESCO was founded in 1945 in response to the notion that peace must be established on the foundation of moral and intellectual solidarity.⁵²⁸ Through mobilising for education, UNESCO strives to promote solidarity “so that every child, boy or girl, has access to quality education as a fundamental human right and as a prerequisite for human development”.⁵²⁹ Central to UNESCO’s mission is the advancement of the right to education, as recognised in the Universal Declaration of Human Rights (“UDHR”),⁵³⁰ and the provision of free, compulsory and universal primary education.⁵³¹ UNESCO is also the lead coordinator of the Education for All movement and aims to act as catalyst for international cooperation.⁵³²

⁵²⁵ United Nations “Member states” <<http://www.un.org/en/member-states/index.html#gotoS>> (accessed 09-11-2019).

⁵²⁶ UN General Assembly, Charter of the United Nations, 1 UNTS XVI (26 June 1945 signed; entered into force on 24 October 1945); South Africa became a member of the United Nations on 7th of November 1945 and the Charter is thus also applicable to South Africa.

⁵²⁷ From teacher training to aiding in the improvement of education worldwide; United Nations “Funds, Programmes, Specialized Agencies and Others” <<https://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/index.html>> (accessed 09-11-2019).

⁵²⁸ UNESCO “UNESCO in brief: Mission and Mandate” <<http://en.unesco.org/about-us/introducing-unesco>> (accessed 09-11-2019); Y Daudet & K Singh *The Right to Education: An Analysis of UNESCO’s Standard-setting Instruments* (2001) 9.

⁵²⁹ UNESCO was created in 1946 by the United Nations after World War II in order to provide health care, food and clothing to children that were facing famine and disease; UNESCO “UNESCO in brief: Mission and Mandate” <<http://en.unesco.org/about-us/introducing-unesco>> (accessed 09-11-2019); Additional means of promoting solidarity have been identified as: building intercultural understanding, pursuing scientific cooperation, and protecting freedom of expression.

⁵³⁰ See section 3 2 1 1 for a discussion on the UDHR; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (hereafter the “UDHR”).

⁵³¹ This responsibility also underlies the objective that was set at the World Education Forum and the Millennium Development Goals wherein both instruments seek the universalisation of primary education in all countries by 2015; For more on the Millennium Development Goals see AR Chapman “Development of Indicators for Economic, Social and Cultural Rights: The Rights to Education, Participation in Cultural Life and Access to the Benefits of Science” in Y Donders & V Volodin *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 119-120; UNESCO’s Medium-term Strategy (2002-2007); K Singh “The Right to Education: International Legal Obligations” (2005) *IJELP* 103 108.

⁵³² K Hüfner “The Human Rights Approach to Education in International Organisations” (2011) 46 *European Journal of Education* 117 118; See section 3 3 2 for more on the Education for All movement.

UNICEF⁵³³ is the third prominent body and became a permanent part of the United Nations in 1953.⁵³⁴ Its main objective is the promotion of the rights and wellbeing of every child and it is the only United Nations development and humanitarian agency, that is exclusively dedicated to children.⁵³⁵ UNICEF advocates for measures to be realised that give children the best possible start in life with education rights identified as a focus area.⁵³⁶

These three international organisations have produced international instruments such as conventions, declarations, recommendations and reports. Depending on the type of instrument, they can either create binding standards and obligations⁵³⁷ or serve as guidelines and tools for interpretation and development of rights.⁵³⁸ The UN, UNESCO and UNICEF have also provided the international community with standard-setting instruments.⁵³⁹ With the ratification⁵⁴⁰ or accession⁵⁴¹ of international

⁵³³ UNICEF “UNICEF: 70 years for every child” <http://www.unicef.org/about/who/index_history.html> (accessed 09-11-2019).

⁵³⁴ UNICEF “UNICEF: 70 years for every child” <http://www.unicef.org/about/who/index_history.html> (accessed 09-11-2019); It should be noted that UNICEF is not an autonomous United Nations specialised agency. UNICEF forms part of the United Nations funds and programmes that are organised by the United Nations General Assembly; Hüfner (2011) *European Journal of Education* 118.

⁵³⁵ UNICEF “About UNICEF” <http://www.unicef.org/about/who/index_introduction.html> (accessed 09-11-2019); Hüfner (2011) *European Journal of Education* 118.

⁵³⁶ UNICEF “About UNICEF” <http://www.unicef.org/about/who/index_introduction.html> (accessed 09-11-2019); For more on UNICEF’s role and initiatives with regard to education see UNICEF “Education” <<http://www.unicef.org/education/>> (accessed 09-11-2019).

⁵³⁷ Such as conventions and treaties, examples include the CRC, ACRWC, CEDAW.

⁵³⁸ Declarations are not binding but do have moral force and provide guidelines for states to follow, for example the UDHR and the Geneva Declaration. Further examples of soft law include General Comments, Recommendations and publications by the various UN institutions.

⁵³⁹ Singh (2005) *IJELP* 108.

⁵⁴⁰ For the purposes of the dissertation “ratification” is defined in terms of articles 2(1)(b), 14(1) and 16 of the Vienna Conventions on the Law of Treaties (23 May 1969). The UN defines ratification in terms of these articles as “...the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.” United Nations Treaty Collection “Glossary” <https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#ratification> (accessed 01-11-2019).

⁵⁴¹ For the purposes of the dissertation “accession” is defined in terms of Articles 2(1)(b) and 15 of the Vienna Conventions on the Law of Treaties (23 May 1969). The UN defines accession in line with these articles as “the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a

instruments, member states have undertaken the realisation of the right to education in accordance with their international obligations.⁵⁴² It is mandated that states should undertake administrative and legislative measures in order ensure that rights are recognised.⁵⁴³ This includes the development of policy measures in order to fully provide for educational opportunities.⁵⁴⁴

Specific international instruments adopted by these organisations have been selected and will subsequently be discussed. The first is the International Bill of Human Rights.⁵⁴⁵ The second category of instruments consists of those that provide protection against discrimination.⁵⁴⁶ International instruments that focus on discrimination and equality are also included in the discussion because the South African education system is still reflective of its discriminatory past.⁵⁴⁷ In this group the following instruments are discussed: the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”),⁵⁴⁸ the Convention on the Elimination of All

limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question.”; United Nations Treaty Collection “Glossary” <https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#accession> (accessed 01-11-2019).

⁵⁴² Singh (2005) *IJELP* 108.

⁵⁴³ Art 4 of the CRC; Singh (2005) *IJELP* 108.

⁵⁴⁴ See art 4 of the CRC; Singh (2005) *IJELP* 108.

⁵⁴⁵ See section 3 2 1; Beiter *Protection of the Right to Education* 89; Daudet & Singh *Analysis of UNESCO’s Standard-setting Instruments* 13-14.

⁵⁴⁶ The Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, The Declaration on the Elimination of All Forms of Racial Discrimination, The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), The Declaration on the Elimination of Discrimination against Women, and lastly the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); See section 3 2 2 for a discussion of these instruments that specifically provide for protection against discrimination. In the context of education in South Africa, these instruments are important due to inequalities in education.

⁵⁴⁷ The history of South African education and the right to basic education is explored in chapter 1 in reference to the link between apartheid, discrimination and equality; See section 1 5; See in general CC Wolhuter “History of Education as a field of scholarship and historiography of South African education” in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa* (2011) 1-16; M Nkomo *Pedagogy of Domination: Toward a Democratic Education in South Africa* (1990) 291; G McCullough “Publicizing the Educational Past” in D Crook & R Aldrich (eds) *History of Education for the 21st century* (2000); VS Mncube & N Madikizela-Madiya “South Africa: Educational Reform - Curriculum, Governance and Teacher Education” in C Harber (ed) *Education in Southern Africa* (2013) 165-188.

⁵⁴⁸ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women (UNGA Resolution 34/180, 18 December 1979, entered into force 3 September 1981); See section 3 2 2.

Forms of Racial Discrimination⁵⁴⁹ and the Convention Against Discrimination in Education (“CDE”).⁵⁵⁰

3 2 1 The International Bill of Human Rights

At international level, the UN Charter⁵⁵¹ for the first time provided a direct and clear commitment by the international community to protect human rights.⁵⁵² The UN Charter itself does not explicitly guarantee a right to education but it does provide a basis for the International Bill of Human Rights and other international instruments.⁵⁵³ The International Bill of Human Rights serves as the foundation of international human rights law and consists of three legal instruments: the UDHR,⁵⁵⁴ the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)⁵⁵⁵ and lastly the International Covenant on Civil and Political Rights (“ICCPR”).⁵⁵⁶ Initial remarks on these three instruments will firstly be made and then the International Bill of Human Rights will be discussed in relation to the CRC.⁵⁵⁷

3 2 1 1 The UDHR

The United Nations, the successor to the League of Nations, adopted a second declaration in 1948 – once again a World War served as the catalyst.⁵⁵⁸ The second declaration, the UDHR, is still viewed as a ground-breaking document for the recognition of fundamental human rights.⁵⁵⁹ Unfortunately, the declaration is non-

⁵⁴⁹ See section 3 2 2.

⁵⁵⁰ UNESCO General Conference 11th Session, Convention against Discrimination in Education (14 December 1960); Sloth-Nielsen & Mezmur (2008) *Int'l J Child Rts* 5; Art 2 of the CRC; See section 3 2 2; The theme of discrimination within education in the South African context is very important and is further discussed in chapter 1 and 5.

⁵⁵¹ Charter of the United Nations (26 June 1945 signed; entered into force on 24 October 1945); South Africa became a member of the United Nations on 7th of November 1945 and the Charter is thus also applicable to South Africa.

⁵⁵² Beiter *Protection of the Right to Education* 89; Arendse (2011) *PELJ* 98.

⁵⁵³ Beiter *Protection of the Right to Education* 89.

⁵⁵⁴ Section 3 2 1 1.

⁵⁵⁵ International Covenant on Economic, Social and Cultural Rights (UNGA Resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976) (hereafter the “ICESCR”); See section 3 2 1 2.

⁵⁵⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereafter the “ICCPR”); See section 3 2 1 3.

⁵⁵⁷ See section 3 2 1 4.

⁵⁵⁸ S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 14.

⁵⁵⁹ UN Human Rights Office of the High Commissioner “The Universal Declaration of Human Rights” <<http://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx>> (accessed 05-04-2017); A Holzschieder *Children's Rights in International Politics: the Transformative Power of Discourse* (2010) 125; Hufner

binding and no specific reference is made to children's rights, except for the social protection of the child and the rights of the parents in relation to the child's education.⁵⁶⁰ The right to education is however recognised for the first time in international law in article 26 of the UDHR.⁵⁶¹

Article 26 of the UDHR holds that everyone has the right to education.⁵⁶² Article 26(1) makes reference to levels of education in a specific order by first mentioning elementary education, then secondary and lastly higher education.⁵⁶³ With regards to the element of "free" education, it must be noted that the article provides that "education shall be free, at least in the elementary and fundamental stages".⁵⁶⁴ Article 26 also states that primary education should be compulsory. The CRC followed the approach of the UDHR by also incorporating these two dimensions of primary education into article 28.⁵⁶⁵

Articles 26(2) and (3) give more content to the right to education by stating that education shall be directed to fully develop the human personality and also to

(2011) *European Journal of Education* 120; S Kalantry, JE Getgen & SA Koh "Enhancing Enforcement of Economic, Social and Cultural Rights using Indicators: a Focus on the Right to Education in the ICESCR" (2010) 32 *Human Rights Quarterly* 253 254; LK McMillan "What's in a Right? Two Variations for Interpreting the Right to Education" (2010) 56 *International Review of Education* 531 535; MO Hinz "Human rights between universalism and cultural relativism? The need for anthropological jurisprudence in the globalising world" in A Bösl & J Diescho (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 14.

⁵⁵⁹ Beiter *Protection of the Right to Education* 86; SS Tiwary *Human Rights in Education, Science and Culture* (2010) 65; Detrick *Commentary on the Convention* 472.

⁵⁶⁰ Art 25(2) of the UDHR: "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." Art 26(3) states: "Parents have a prior right to choose the kind of education that shall be given to their children." Detrick *Commentary on the Convention* 14, 17; Holzscheiter *Children's Rights in International Politics* 127; FP Dall "Children's Right to Education: Reaching the Unreached" in JR Himes (ed) *Implementing the Convention on the Rights of the Child* (1995) 143-144; Hüfner (2011) *European Journal of Education* 120; K Halvorsen "Notes on the Realization of the Human Right to Education" (1990) 12 *Human Rights Quarterly* 341 342; BC Edmonds "The Convention on the Rights of the Child: a Point of Departure" (1992) 56 *Social Education* 205 205; Beiter *Protection of the Right to Education* 34.

⁵⁶¹ Art 26

"1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

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.

3. Parents have a prior right to choose the kind of education that shall be given to their children."

Verheyde *A Commentary on the UNCRC Article 28* 7; Detrick *Commentary on the Convention* 474.

⁵⁶² Daudet & Singh *Analysis of UNESCO's Standard-setting Instruments* 15.

⁵⁶³ Beiter *Protection of the Right to Education* 92.

⁵⁶⁴ Beiter *Protection of the Right to Education* 92.

⁵⁶⁵ See section 2 4 3; Arendse (2011) *PELJ* 98.

strengthen respect for human rights and fundamental freedoms. Furthermore, education 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.” Parental rights in relation to education are stipulated in article 26(3), which gives parents a prior right with regard to choosing the kind of education that shall be given to their child. This provision illustrates the dichotomy between the responsibilities of the parents and the state in relation to the child’s education.⁵⁶⁶ The notion of a “prior right” clarifies that the parents are in a higher position than the state in this regard, as the state’s position is subordinate.⁵⁶⁷ The only reference to the child specifically is in relation to the parents’ rights with regards to their child’s education, rather than to the child’s rights. Article 26 of the UDHR not only recognises the right to education but also provides some scope and content to this right. Article 26 is also supportive of the view that the right to education must be understood as an empowerment right. Article 26(2) specifically refers to the development of the human personality, which can be linked to human dignity, autonomy, liberty rights and other freedoms.⁵⁶⁸ Article 26 consequently strengthens the view that rights to, in and through basic education should be regarded as the dimensions of the right to basic education.

Although the UDHR is non-binding, it still carries moral force.⁵⁶⁹ The dominant view of the UDHR is that some of its provisions form part of customary international law.⁵⁷⁰ Hannum does however note that only a minority support the UDHR as a whole, as part of customary international law.⁵⁷¹ In order for a rule or right to form part of customary international law, two elements must be present: the practice must

⁵⁶⁶ The dissertation will focus on the responsibility of the state in realising the child’s right to education as the dissertation aims to establish South Africa’s international obligations. An in-depth analysis of parental rights will accordingly not form part of the dissertation.

⁵⁶⁷ Beiter *Protection of the Right to Education* 93.

⁵⁶⁸ Tiwary *Education, Science and Culture* 69.

⁵⁶⁹ Singh (2005) *IJELP* 105; Daudet & Singh *Analysis of UNESCO’s Standard-setting Instruments* 14; Beiter *Protection of the Right to Education* 90.

⁵⁷⁰ H Hannum “The Status of the Universal Declaration of Human Rights in National and International Law” (1995/96) 25 *Georgia Journal of International & Comparative Law* 287 323-324; H Hannum “The UDHR in national and international law” (1998) 3 *Health and Human Rights* 144 145-158; Hinz “Human Rights between Universalism” in *Human Rights in Africa* 5; Beiter *Protection of the Right to Education* 44-45; JP Humphrey “The International Bill of Rights: Scope and Implementation” (1976) 17 *William and Mary Law Review* 527 529; RB Lillich “The Growing Importance of Customary International Human Rights Law” (1995/96) 25 *Georgia Journal of International & Comparative Law* 1 2-3; H Waldock “Human Rights in Contemporary International Law and the Significance of the European Convention” (1965) 11 *International and Comparative Law Quarterly Supplementary Publication* 1-2, 14-15.

⁵⁷¹ Hannum (1998) *Health and Human Rights* 148.

generally be adhered to by states (*usus*) and the practice must be regarded as legally binding (*opinion iuris*).⁵⁷² Beiter is also of the opinion that only certain elements of article 26 of the UDHR should form part of customary international law.⁵⁷³ He argues that the following two principles in relation to the right to education *do* form part of customary international law: the right to free and compulsory primary education; and the right to not be discriminated against in the enjoyment of the right to education.⁵⁷⁴ This means that even though the intention of the UDHR was not to create binding obligations, its provisions may reflect customary international law or has consequently gained a binding character.⁵⁷⁵

Even though the UDHR does not reflect a child-centred approach as set out in this dissertation, its value lies in the foundation that it provides for the recognition of human rights in general, and more specifically the right to education. Following the adoption of the UDHR, the United Nations General Assembly adopted the ICESCR and the ICCPR.⁵⁷⁶ The ICESCR and the ICCPR consequently codified the rights in the UDHR in two separate and binding covenants.⁵⁷⁷

⁵⁷² Beiter *Protection of the Right to Education* 44.

⁵⁷³ He bases his argument on many states still being opposed to social, economic and cultural rights; Beiter *Protection of the Right to Education* 45.

⁵⁷⁴ Beiter *Protection of the Right to Education* 45.

⁵⁷⁵ The argument has also been made that the CRC can be very repetitive of other international instruments. The repetition of standards can however have a positive effect as the more frequent a standard is repeated, the more easily it can be justified as forming part of customary international law. UNESCO "Migration and inclusive societies" <<http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/declaration/>> (accessed 10-11-2019); Beiter *Protection of the Right to Education* 50; DA Balton "The Convention on the Rights of the Child: Prospects for International Enforcement" (1990) 12 *Human Rights Quarterly* 110 122; JE Oestreich "UNICEF and the Implementation of the Convention on the Rights of the Child" (1998) 4 *Global Governance* 183 186; Hannum (1998) *Health and Human Rights* 147-148.

⁵⁷⁶ Holzscheiter *Children's Rights in International Politics* 127; Buck *International Child Law* 61.

⁵⁷⁷ Kalantry et al (2010) *Human Rights Quarterly* 265; K Halvorsen *Human Rights Quarterly* 342; "Foreword" in Y Donders & V Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) xv; P Sanè "Introduction" in Y Donders & V Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 1.

3 2 1 2 *The ICESCR*

The ICESCR⁵⁷⁸ is the second international instrument that forms part of the International Bill of Rights.⁵⁷⁹ The ICESCR is considered to be the most significant international instrument to recognise the right to education as it builds on the provisions of the UDHR.⁵⁸⁰ Furthermore, the education rights enshrined in articles 13 and 14 are quite comprehensive, not only in terms of the ICESCR itself but also when comparing it with those of other instruments.⁵⁸¹

Articles 13 and 14 of the ICESCR serve as affirmation of article 26 of the UDHR and also provide a more detailed and content-driven acknowledgement of the right to education under international law.⁵⁸² Article 13 of the ICESCR recognises the right to education and provides the general obligations in the pursuance of the realisation of the right to education that state parties are expected to meet.⁵⁸³ Article 14 of the ICESCR is more specific in its endeavour by regulating the obligation of state parties in realising the right to primary education.⁵⁸⁴ It is because of its detailed and extensive recognition that the argument is made that it serves as the most significant formulation of the general right to education in any international instrument.⁵⁸⁵ Unlike the UDHR,

⁵⁷⁸ Entered into force 3 January 1976; UN Human Rights Office of the High Commissioner “International Covenant on Economic, Social and Cultural Rights” <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>> (accessed 30-10-2019); Signed by South Africa in 1994 and acceded to in 2015; UN Human Rights Office of the High Commissioner “Status of ratification” <<http://indicators.ohchr.org/>> (accessed 10-11-2019).

⁵⁷⁹ Beiter *Protection of the Right to Education* 86; Daudet & Singh *Analysis of UNESCO’s Standard-setting Instruments* 14.

⁵⁸⁰ Beiter *Protection of the Right to Education* 1; Arendse (2011) *PELJ* 100; Daudet & Singh *Analysis of UNESCO’s Standard-setting Instruments* 14; For background information on the ICESCR see F Viljoen *International Human Rights Law in Africa* (2012) 114-119.

⁵⁸¹ The argument has been made by other authors that articles 13 and 14 of the ICESCR can be regarded as a codification under international law of the right to education; Beiter *Protection of the Right to Education* 86.

⁵⁸² Beiter *Protection of the Right to Education* 86; Daudet & Singh *Analysis of UNESCO’s Standard-setting Instruments* 21-22.

⁵⁸³ Beiter *Protection of the Right to Education* 86; Coomans “Content and Scope of Education” in *Human Rights in Education* 187; UN Human Rights Office of the High Commissioner “International Covenant on Economic, Social and Cultural Rights” <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>> (accessed 30-10-2019).

⁵⁸⁴ Beiter *Protection of the Right to Education* 86.
“Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”

⁵⁸⁵ Beiter *Protection of the Right to Education* 94; Hüfner (2011) *European Journal of Education* 121; Kalantry et al (2010) *Human Rights Quarterly* 261; Verheyde *A Commentary on the UNCRC Article 28* 7; Detrick *Commentary on the Convention* 474; Arendse (2011) *PELJ* 100; Chapman

the ICESCR as an international treaty imposes legal obligations on all state parties that are of a binding nature.⁵⁸⁶

Article 13(1) of the ICESCR states that all parties to the Covenant shall recognise the right to education and that it is afforded to everyone. Article 13(1) furthermore sets out the aims of education by repeating the objectives as listed in article 26(2) of the UDHR.⁵⁸⁷ The provision, however, adds two further aims. In the first instance, it is provided that education should be directed at the development “of the human personality and the sense of dignity”.⁵⁸⁸ The UDHR, the ICESCR, and the ICCPR all state in their preambles that the source of human rights is the human dignity of every individual.⁵⁸⁹ The argument can, therefore, be made that the reference to human dignity in article 13 of the ICESCR should be interpreted to require that education should be aimed at every individual as well as the human rights that are afforded to every individual based on this inherent worth.⁵⁹⁰ The second additional aim holds that “education should enable all persons to participate effectively in a free society”.⁵⁹¹ It seems that the article promotes the idea that education should not only be theoretically

“Development of Indicators for Economic, Social and Cultural Rights” in *Human Rights in Education* 123; M Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2016) 570; F Coomans “Content and Scope of the Right to Education as a Human Rights and Obstacles to its Realization” in Y Donders and V Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 186-190.

⁵⁸⁶ This includes South Africa as South Africa ratified the ICESCR in 2015 after having signed it in 1994; See for example Right to Education “South Africa ratifies the International Covenant on Economic, Social and Cultural Rights” <<http://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights>> (accessed 10-11-2019); ESCR-net “The Government of South Africa ratifies the ICESCR” <<https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>> (accessed 10-11-2019); Beiter *Protection of the Right to Education* 94.

⁵⁸⁷ Beiter *Protection of the Right to Education* 95; Both instruments 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. It is further agreed 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.

⁵⁸⁸ Art 13(1); Beiter *Protection of the Right to Education* 95.

⁵⁸⁹ The wording followed in these three instruments are almost identical. The preamble of the UDHR states: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”; Preamble of the ICESCR “...Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”; Preamble of the ICCPR “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”; Beiter *Protection of the Right to Education* 95.

⁵⁹⁰ Art 13 of the ICESCR; Beiter *Protection of the Right to Education* 95.

⁵⁹¹ Art 13 of the ICESCR; Beiter *Protection of the Right to Education* 95.

based but should also have an element of practicality by teaching learners how to fulfil their practical needs.⁵⁹²

3 2 1 3 *The ICCPR*

The ICCPR is the third instrument that forms part of the International Bill of Rights.⁵⁹³ As the ICCPR deals with civil and political rights specifically, there is no explicit article dealing with the right to education. Nonetheless, two articles of the ICCPR are still very important in recognising and giving content to the right to education.⁵⁹⁴ Article 18 deals with the right to freedom of thought, conscience and religion that is afforded to all,⁵⁹⁵ and article 18(4) specifically refers to religious and moral education.⁵⁹⁶ The provision protects the rights of parents and/or guardians in the upbringing of their children, in relation to their religious and moral education that is in line with their convictions and beliefs.⁵⁹⁷ State parties to the ICCPR must respect the rights of parents when dealing with education rights.⁵⁹⁸ Article 18(4) closely resembles article 13(3) of the ICESCR, which also identifies the element of freedom that should form part of the right to education.⁵⁹⁹ The influence of the UDHR on the ICCPR is illustrated when comparing article 26(3) of the UDHR⁶⁰⁰ to article 18(4) of

⁵⁹² Beiter *Protection of the Right to Education* 95; Art 26(3) of the UDHR.

⁵⁹³ ICCPR entered into force on the 23rd of March 1976; UN Human Rights Office of the High Commissioner "International Covenant on Civil and Political Rights" <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> (accessed 28-07-2018); Signed by South Africa in 1994 and acceded to in 1998; Beiter *Protection of the Right to Education* 102; Viljoen *International Human Rights Law in Africa* 96-114.

⁵⁹⁴ Beiter *Protection of the Right to Education* 102.

⁵⁹⁵ Art 18 of the ICCPR.

"1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

Beiter *Protection of the Right to Education* 102.

⁵⁹⁶ "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions"; Beiter *Protection of the Right to Education* 103.

⁵⁹⁷ In such a diverse society as South Africa religious freedom and education has been closely linked; See further chapter 5.

⁵⁹⁸ Art 18(4) of the ICCPR; Beiter *Protection of the Right to Education* 103.

⁵⁹⁹ Beiter *Protection of the Right to Education* 103.

⁶⁰⁰ "Parents have a prior right to choose the kind of education that shall be given to their children."

the ICCPR⁶⁰¹ as they both emphasise the importance of parental responsibilities and rights in relation to the child's education.

3 2 1 4 *The International Bill of Human Rights and the CRC*

When comparing the International Bill of Human Rights to the CRC, the right to education in the International Bill of Human Rights is applicable to “everyone” – thus a more general view of the right to education as a socio-economic right is followed.⁶⁰² This is in contrast to the CRC, which explicitly affords the right to education to the child.⁶⁰³ It should be taken into account that the International Bill of Human Rights affords the right to education to everyone, meaning that it is also applicable to children - but that does not mean that it follows a child-centred approach.⁶⁰⁴ The opposite is in fact true.

This is illustrated in the manner in which the International Bill of Human Rights perpetuates the more traditional notion of childhood.⁶⁰⁵ The instruments are structured and worded in such a way that emphasises the child as vulnerable and in need of protection.⁶⁰⁶ With too much focus on the protection of the child and not enough emphasis on the autonomy of the child, a balanced view is not achieved. This results in a lack of recognition of the *child* as a rights-holder.⁶⁰⁷ It is therefore necessary to not only view the right to education as a socio-economic right but also as a children's right to ensure that the child's right to basic education can be realised through the application of a child-centred approach.⁶⁰⁸

⁶⁰¹ “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

⁶⁰² See article 26(1) of the UDHR: “everyone has the right to education”; article 13(1) of the ICESCR: “The States Parties to the present Covenant recogni(s)e the right of everyone to education.”

⁶⁰³ See arts 28 and 29 of the CRC; See section 2 4 of chapter 2.

⁶⁰⁴ Van Bueren *Rights of the Child* 19.

⁶⁰⁵ Holzscheiter *Children's Rights in International Politics* 127.

⁶⁰⁶ Holzscheiter *Children's Rights in International Politics* 127.

⁶⁰⁷ Holzscheiter *Children's Rights in International Politics* 127.

⁶⁰⁸ See section 2 4 3.

3 2 2 International instruments providing protection against discrimination

Several international instruments are directed towards protection against all forms of discrimination. Some of these instruments also provide protection against discrimination in relation to the right to education.⁶⁰⁹ Three instruments are important for the dissertation: CEDAW, the International Convention on the Elimination of All Forms of Racial Discrimination,⁶¹⁰ and the CDE. In relation to the South African context, anti-discrimination provisions are of importance when one considers that South Africa's history is riddled with inequalities due to apartheid and that many of these inequalities are still visible today.⁶¹¹

The purpose of CEDAW is to promote equality and to ensure that women are provided with access to realise their right to education.⁶¹² CEDAW⁶¹³ provides for the right to education in article 10, which stipulates that: "States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women".⁶¹⁴ Article 10 provides for specific measures that

⁶⁰⁹ Beiter *Protection of the Right to Education* 104; The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (UNGA Resolution 36/55 of 25 November 1981), The Declaration on the Elimination of All Forms of Racial Discrimination (UNGA Resolution 1904 (XVIII) of 20 November 1963); The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") (1965 660 UNTS 195. Entered into force on 4 January 1969), The Declaration on the Elimination of Discrimination against Women (UNGA Resolution 2263 (XXII) of 7 November 1967), the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") (1979 1249 UNTS 13, entered into force on the 3rd of September 1981), and the Convention against Discrimination in Education (UNESCO 14 December 1980.)

⁶¹⁰ UNGA Resolution 2106 (xx) of 21 December 1965, entered into force 4 January 1969.

⁶¹¹ See section 1 4.

⁶¹² Beiter *Protection of the Right to Education* 110; Viljoen *International Human Rights Law* 120-124.

⁶¹³ Signed by South Africa in 1993 and acceded to in 1995; UN Human Rights Office of the High Commissioner "Status of ratification" <<http://indicators.ohchr.org/>> (accessed 10-11-2019).

⁶¹⁴ Art 10

"(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other thesis grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

should be implemented in order to realise article 10.⁶¹⁵ The provision includes for example equality in access to studies,⁶¹⁶ scholarships,⁶¹⁷ further education,⁶¹⁸ elimination of gender stereotyped roles in education,⁶¹⁹ and access to teaching staff and schools of the same standard.⁶²⁰

The International Convention on the Elimination of All Forms of Racial Discrimination provides protection against discrimination in education in articles 5 and 7. With specific reference to economic, social and cultural rights, article 5(e)(v) holds that in compliance with the Convention, state parties must undertake to prohibit and eliminate racial discrimination in all forms and guarantee the right to education to everyone, without distinction.⁶²¹ Article 7 obligates states to adopt measures in the educational field in order to combat prejudices.⁶²²

The CDE⁶²³ provides in article 4(a) that state parties must "promote equality of opportunity and treatment in the matter of education, in particular, to make primary education compulsory and free". The CDE is the first international treaty that provides for an obligation on states to provide primary education that is compulsory and free.⁶²⁴ The concept of free and compulsory education is also highlighted in the CRC.⁶²⁵ Three aims are identified in article 5 of the CDE to specify how education should be structured in order to incorporate the principle of non-discrimination.

The first is that education should be aimed at developing the human personality and promoting human rights, tolerance and peace.⁶²⁶ The second aim identified in the CDE centres on freedom of religion. The article states that religious and moral education should be in line with personal convictions and that compelled religious instruction not

(g) The same opportunities to participate actively in sports and physical education;
(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."

⁶¹⁵ See art 10(a)-(h).

⁶¹⁶ Art 10(a).

⁶¹⁷ Art 10(d).

⁶¹⁸ Art 10(e).

⁶¹⁹ Art 10(c).

⁶²⁰ Art 10(b).

⁶²¹ Art 5 refers to race, colour, or national or ethnic origin.

⁶²² For more on this Convention see Viljoen *International Human Rights Law* 88-96.

⁶²³ UNESCO *Convention against Discrimination in Education* (1960); Arendse (2011) *PELJ* 98-99.

⁶²⁴ Beiter *Protection of the Right to Education* 90; Arendse (2011) *PELJ* 99; Daudet & Singh *Analysis of UNESCO's Standard-setting Instruments* 15-16; See further HG Espiell *Significance of the Convention against Discrimination 1960* (2005).

⁶²⁵ See section 2 4 of chapter two.

⁶²⁶ Art 5(a) of the Convention against Discrimination in Education.

consistent with personal convictions is not acceptable.⁶²⁷ The third aim highlights the education rights of minority groups.⁶²⁸

CEDAW and the International Convention on the Elimination of All Forms of Racial Discrimination provides specifically for the prohibition of racial and gender discrimination. Education should therefore be aimed at addressing these two forms of discrimination. The international instruments that provide protection against discrimination are also closely linked to the principle of non-discrimination as recognised in article 2 of the CRC.⁶²⁹

3 3 The child's right to basic education as developed under international law

As the focus of the dissertation is on the *child's* rights to basic education, the international instruments devoted to the protection of children's rights will form an integral part of the analysis. The way these provisions are structured and how the right to basic education is recognised will consequently be examined. The previous chapter has already referred to the Geneva Declaration and the 1959 Declaration.⁶³⁰ The CRC as the foundation of the child-centred approach has also been thoroughly discussed with regard to the child's right to education.⁶³¹ Additional international obligations are also established by other international instruments centred on the rights of the child. The discussion refers specifically to the African Charter on the Rights and Welfare of the Child ("ACRWC")⁶³² and the Education for All movement.⁶³³

3 3 1 African regional law

In order to establish South Africa's international obligations,⁶³⁴ it is necessary to study not only international law but also regional law as it also forms part of international law for the purposes of the dissertation. Attention will be paid to regional obligations in relation to basic education by establishing the obligations on states in

⁶²⁷ Art 5(b) of the Convention against Discrimination in Education.

⁶²⁸ Art 5(c) of the Convention against Discrimination in Education.

⁶²⁹ See sections 2 4 4 3.

⁶³⁰ See section 2 3 1.

⁶³¹ See section 2 4.

⁶³² Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990); Section 3 3 1.

⁶³³ Section 3 3 2.

⁶³⁴ See further chapter 5 in general.

relation to the right to basic education in terms of the ACRWC. The central analysis will follow a comparative methodology of the ACRWC and the CRC in order to establish the level of protection afforded to the right to basic education in the ACRWC and ascertaining if and how these obligations differ from those in the CRC - which will ultimately be used to establish whether or not South African fulfils its international obligations.⁶³⁵

3 3 1 1 Regional background

The African continent is culturally unique⁶³⁶ and during the drafting period of many international instruments, including the CRC, not many African states were consulted.⁶³⁷ It has therefore been claimed that the ACRWC was born because African member states shared the view that the CRC did not meet the needs of the African community as important social, cultural and economic realities of the African experience were not addressed in the CRC.⁶³⁸ It must be established from the very start that these two international instruments should be viewed in a complementary manner and not as two opposing instruments.⁶³⁹ Both the ACRWC and the CRC provide protection for the rights and welfare of the child, but it is how these two

⁶³⁵ See chapter 5 for further discussion on South Africa's international and regional obligations to rights to, in and through basic education.

⁶³⁶ Customary law is considered in many instances and differs quite vastly from traditional Western law. Principles such as ubuntu are also considered in customary African law.

⁶³⁷ T Kaime "The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account (2009) 3 *African Journal of Legal Studies* 120 131; Oestreich (1998) *Global Governance* 183 184; F Viljoen "Supra-national Human Rights Instruments for the Protection of Children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" (1998) 31 *The Comparative and International Law Journal of Southern Africa* 199 200 provides the following statistics: "African involvement in the drafting process was limited. Only three Africa states participated for at least five of the nine years that the working group took to draft the final proposal. This is the lowest percentage of all continents, contrasting sharply with west European (61% of the continental potential) and even Latin American (29%) participation over a similar period."; Viljoen *International Human Rights Law* 133, 392.

⁶³⁸ Even though the CRC addressed almost every issue of the child's life, it favoured a more far-reaching and universal approach than the context (regional) specific approach favoured by the ACRWC. The voids left by the CRC in relation to African concerns led to the drafting of the ACRWC; D Olowu "Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child" (2002) 10 *Int'l J Child Rts* 127 128; Kaime (2009) *African Journal of Legal Studies* 131-132; For more on reasons behind the drafting of the ACRWC see LG Muthoga "Introducing the African Charter on the Rights and Welfare of the African Child and the Convention on the Rights of the Child" (1992) Paper delivered at the International Conference on the Rights of the Child, Community Law Centre, University of the Western Cape.

⁶³⁹ Olowu (2002) *Int'l J Child Rts* 128; Viljoen *International Human Rights Law* 392.

instruments differ in relation to the child's right to education, that will be central to the discussion of regional law.⁶⁴⁰

Notwithstanding the fact that not many African states formed part of the working group⁶⁴¹ on the drafting of the CRC,⁶⁴² ratification of the CRC by African states is still high.⁶⁴³ It is not the intention to deny the immensely valuable role of the CRC in the realisation of human rights, but it should be noted that the CRC is a universal document and accordingly does not provide a comprehensive appreciation of specific regional interests.⁶⁴⁴ By identifying the differences between the CRC and the ACRWC, the child's right to basic education for the South African perspective can be properly contextualised and South Africa's international obligations can be established.

In the African context the African Union ("AU"), previously the Organization of African Unity ("OAU"),⁶⁴⁵ is responsible for the adoption of regional instruments.⁶⁴⁶ By

⁶⁴⁰ For a broader comparative discussion of the CRC and the ACRWC see Mezmur BD "The African Children's Charter versus the UN Convention on the Rights of the Child: a zero-sum game?" (2008) 1 *SAPL* 1-29.

⁶⁴¹ See in general on the open-ended working group S Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires"* (1992) 644-657.

⁶⁴² With the exception of Algeria, Morocco, Senegal and to a lesser degree Egypt; KJCM Arts "The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare" (1992) 5 *African Journal of International and Comparative Law* 139 141.

⁶⁴³ Arts (1992) *African Journal of International and Comparative Law* 141; See UN Human Rights Office of the High Commissioner "Status of ratification" <<http://indicators.ohchr.org/>> (accessed 10-11-2019) for the ratification status of treaties worldwide.

⁶⁴⁴ Arts (1992) *African Journal of International and Comparative Law* 143; Some African specific interests for children that is not included in the CRC are for example: female genital mutilation, displace of children during times of war and conflict, child marriage, the effects of the AIDS epidemic and child-headed households.

⁶⁴⁵ In order to avoid confusion, the discussion will refer to the AU even when an instrument was adopted by its predecessor the OAU as these instruments are still in place and relevant to the discussion. See in general Viljoen *International Human Rights Law* 156-169 for a discussion on the transition from the OAU to the AU.

⁶⁴⁶ In the African context, two bodies are extremely important for the acceleration of integration and unity, and the provision of guidelines and obligations in relation to the development and recognition of human rights: The Organization of African Unity (OAU) and the African Union (AU). The OAU was established in 1963 by 32 independent African states with the main objectives, as set out in the OAU Charter, to promote unity and solidarity amongst African states; to coordinate and intensify the efforts of member states in order to achieve a better life for all peoples of Africa; to uphold sovereignty of member states; to free the African continent of colonisation and apartheid; to promote international cooperation; and lastly to harmonise members states' policies on a variety of issues. With the passing of time, more states gradually joined the OAU and by 2002, (the time of the creation of the African Union) 53 states had become members – South Africa being the 53rd after becoming a member on the 23rd of May 1994; African Union "About the African Union" <<https://www.au.int/en/about/nutshell>> (accessed 10-11-2019); African Union "OAU Charter" <https://www.au.int/en/sites/default/files/treaties/7759-sl-oau_charter_1963_0.pdf> (accessed 18-12-2018); See in general C Heyns "The African Regional Human Rights System: The African Charter" (2004) 108 *Penn State Law Review* 679-702; African Union "History of the AU" <<http://www.au.int/en/history/oau-and-au>> (accessed 18-12-2018); Department of International

adopting regional instruments, African states have created a mechanism that recognises and entrenches African cultural values,⁶⁴⁷ events and circumstances that are central and specific to the African continent,⁶⁴⁸ and distinctive African concerns for collective rights.⁶⁴⁹ These regional instruments create binding standards that states must adhere to and should be viewed in a complementary manner to the standards set under international law and international instruments.⁶⁵⁰ South Africa became the 53rd member of the AU on the 23rd of May 1994.⁶⁵¹

The AU's dedication to the protection of the child's rights is illustrated in the adoption of the ACRWC's predecessor, the 1979 Declaration on the Rights and Welfare of the African Child ("1979 Declaration").⁶⁵² Not only was the 1979 Declaration adopted before the CRC but it also provided for the child's education.⁶⁵³ The AU is also the first regional body to adopt a regional instrument that recognises all facets of children's rights with binding standards and obligations for member states – the ACRWC.⁶⁵⁴ The

Relations and Cooperation "Organization of African Unity (OAU)/ African Union (AU)" <<http://www.dirco.gov.za/foreign/Multilateral/africa/oau.htm>> (accessed 26-07-2019).

⁶⁴⁷ Preamble to the ACRWC: "Taking into consideration the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child."; T Davel "The African Charter on the rights and welfare of the child, family law and children's rights" (2002) 35 *De Jure* 281 283-284.

⁶⁴⁸ Issues include: children under apartheid; harmful practices against the child, specifically the girl in instances such as female genital mutilation; displacement of children and internal conflicts; the definition of a child; the AIDS epidemic; child-headed households; child marriage; and children of imprisoned mothers; UNICEF "Our mandate" <https://www.unicef.org/esaro/children_youth_5930.html> (accessed 10-11-2019); Arts (1992) *African Journal of International and Comparative Law* 143; Davel (2002) *De Jure* 283.

⁶⁴⁹ Arts (1992) *African Journal of International and Comparative Law* 143-144.

⁶⁵⁰ Arts (1992) *African Journal of International and Comparative Law* 144.

⁶⁵¹ Department of International Relations and Cooperation "Organization of African Unity (OAU)/ African Union (AU)" <<http://www.dirco.gov.za/foreign/Multilateral/africa/oau.htm>> (accessed 26-07-2019); African Union "History of the AU" <<http://www.au.int/en/history/oau-and-au>> (accessed 18-12-2018); South Africa's late accession to the OAU can be attributed to apartheid and its accompanying laws and policies – which was of course opposed by the OAU. The AU currently has 55 member states; African Union "Country profiles" <<https://www.au.int/web/en/countryprofiles>> (accessed 26-07-2019).

⁶⁵² OAU, Declaration of the Rights and Welfare of the African Child, AHG/St. 4 (XVI) Rev. 1 1979. Also referred to as the Monrovia Declaration. Although the Declaration is regarded as soft law it still provides the background for the ACRWC and indicates that the African continent acknowledged the need for a regional instrument of children's rights; Holzscheiter *Children's Rights in International Politics* 129.

⁶⁵³ Art 7 of the Declaration on the Rights and Welfare of the African Child: "Where education services through conventional school system cannot be provided, alternative strategies for establishing educational facilities for African children should be explored and non-formal and out-of-school opportunities be exploited, based on the principal of self-reliance as far as local manpower, skills, resources and materials permit"; Holzscheiter *Children's Rights in International Politics* 129.

⁶⁵⁴ OAU, African Charter on the Rights and Welfare of the Child, Doc. CAB/LEG/24.9/49 (1990). The ACRWC was adopted by the OAU in 1990 and entered into force in November of 1999; Arts (1992) *African Journal of International and Comparative Law* 144; A Lloyd "A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction of the African Charter on the Rights and Welfare

ACRWC is the foremost instrument that protects and promotes children's rights within the African human rights system and sets out the rights that African states must recognise and realise for children.⁶⁵⁵ For these reasons, the ACRWC will form the focus of the analysis in this section of the dissertation.⁶⁵⁶ The ACRWC is representative of the value that regional law can add to the development of international law that concerns children.⁶⁵⁷ Furthermore, it is indicative of how the region prioritises the importance of children's rights without affecting the status of the CRC.⁶⁵⁸

The African counterpart to the CRC Committee, is the African Committee of Experts on the Rights and Welfare of the Child ("ACERWC").⁶⁵⁹ Functions of the ACERWC include promoting and protecting the rights enshrined in the ACRWC;⁶⁶⁰ monitoring the implementation and ensuring the protection of the rights in the ACRWC;⁶⁶¹ providing interpretation of the provisions in the ACRWC;⁶⁶² and performing tasks entrusted to it by designated groups and bodies.⁶⁶³

With reference to the ACERWC's function of the promotion and protection of rights, the ACRWC provides examples and guidelines for these duties.⁶⁶⁴ The ACERWC has the power to assess problems in Africa relating to the child and subsequently makes

of the Child" (2002) 2 *African Human Rights Law Journal* 11 11-13; UNICEF "Our mandate" <https://www.unicef.org/esaro/children_youth_5930.htm> (accessed 10-11-2019).

⁶⁵⁵ UNICEF "Our mandate" <https://www.unicef.org/esaro/children_youth_5930.htm> (accessed 10-11-2019).

⁶⁵⁶ The adoption of the ACRWC was the result of the underrepresentation of African states in the drafting process of the CRC, the need to address specific realities faced by children in the African continent such as child marriages, children in armed conflict, child-headed households and female genital mutilation, to name but a few, that can affect educational opportunities of the child; and also to have a binding regional instrument to complement the application of the CRC. It is thus necessary to view the ACRWC against the realities that African children face; UNICEF "Our mandate" <https://www.unicef.org/esaro/children_youth_5930.html> (accessed 10-11-2019); Arts (1992) *African Journal of International and Comparative Law* 144.

⁶⁵⁷ Arts (1992) *African Journal of International and Comparative Law* 144.

⁶⁵⁸ Arts (1992) *African Journal of International and Comparative Law* 144.

⁶⁵⁹ Established under art 32 of the ACRWC. The ACERWC consists of 11 independent experts with "high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child"; Art 33 of the ACRWC; Beiter *Protection of the Right to Education* 220.

⁶⁶⁰ Art 42(a) of the ACRWC.

⁶⁶¹ Art 42(b) of the ACRWC; See section 4 3 5 for a discussion of Nigeria's periodic reporting to the ACERWC and section 5 6 for a discussion of South Africa's reporting history to the ACERWC.

⁶⁶² Art 42(c) of the ACRWC. The article states that the ACERWC can provide interpretations "at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognised by the Organization of African Unity, or any State Party."

⁶⁶³ Art 42(d); The article provides that "the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations" may entrust tasks to the ACERWC.

⁶⁶⁴ See arts 42(a)(i) – (iii) of the ACRWC.

recommendations to relevant governments and issue General Comments.⁶⁶⁵ Although the ACERWC has issued several General Comments thus far, there is no General Comment yet dealing specifically with education.⁶⁶⁶ Article 43 of the ACRWC provides for a reporting system,⁶⁶⁷ similar to that of the CRC Committee.⁶⁶⁸ The ACRWC also makes provision for two further functions: communications⁶⁶⁹ and investigations.⁶⁷⁰ This means that the ACERWC not only has the power to scrutinise state reports but can receive both individual and interstate communications and can conduct independent investigations.⁶⁷¹ These communications (complaints) play an important role as they provide tangible meaning to the ACRWC through an adjudication process. If not for these communications, the provisions remain abstract and theoretical.⁶⁷² No

⁶⁶⁵ Art 42(a)(i) of the ACRWC; M Hansungule “Regional Mechanisms for Children’s Rights” in *Centre for Child Law Strategic Impact Litigation on Children’s Rights in Easter and Southern African Seminar Report* (2011) 50.

⁶⁶⁶ ACERWC “General Comments” <<https://www.acerwc.org/general-comments/>> (accessed 10-12-2019); The general comments are: a joint general comment on ending child marriage; a general comment on the responsibilities of the child; a general comment on children of imprisoned parents and a general comment on birth registration, name, nationality and the prevention of statelessness. See General Comment No 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on “Children of Incarcerated and Imprisoned Parents and Primary Caregivers” 2013; <http://www.acerwc.org/download/general_comment_on_article_30_of_the_acrwc_english/?wpdmdl=8597> (accessed 16-09-2019).

General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child on “Right to Birth Registration, Name and Nationality”; <http://www.acerwc.org/download/general_comment_article_6_name_and_nationality/?wpdmdl=86> (accessed 16-09-2019).

⁶⁶⁷ States are required to submit an initial report within two years of ratification of the ACERWC, which sets out the measures that have been adopted to give effect to the rights in the ACRWC and the progress that the state has made in the realisation of these rights.

⁶⁶⁸ See section 2 4 of chapter 2; Detrick *Commentary on the Convention* 41-42.

⁶⁶⁹ Art 44 of the ACRWC.

⁶⁷⁰ Art 45 of the ACRWC; Art 45 regulates investigations undertaken by the ACERWC and in the instance that an alleged children’s rights violation is reported, the ACERWC may make the decision to investigate the alleged violation. The ACERWC may utilise “any appropriate method of investigating” which provides a wide scope to the ACERWC when conducting an investigation. No investigation has been made yet in the context of education; The ACERWC has conducted one investigation that took place in Tanzania after an application to investigate was lodged based on alleged human rights violations against children with albinism. The ACERWC has released a report after concluding its investigation; ACERWC “Investigations” <<http://www.acerwc.org/investigation/>> (accessed 16-09-2019); The application was brought by Under the Same Sun, a Non-Governmental Organisation in 2013 and was considered by the ACERWC in 2014 at the 24th Ordinary Session; Report on Investigative Mission on the Situation of Children with Albinism in Temporary Holding Shelters – Tanzania March 2016; ACERWC “Tanzania Report” <<http://www.acerwc.org/download/report-on-the-investigation-mission-on-children-with-albinism-in-tanzania/?wpdmdl=9694>> (accessed 16-09-2019); Guidelines have been produced by the ACERWC that provides a framework when an investigation is conducted; See the Guidelines on the Conduct of Investigations by the African Committee of Experts on the Rights and Welfare of the Child; ACERWC <http://www.acerwc.org/download/acerwc_guidelines_on_the_conduct_of_investigation_missions/?wpdmdl=8668> (accessed 01-11-2019); Beiter *Protection of the Right to Education* 220.

⁶⁷¹ DM Chirwa “The Merits and Demerits of the African Charter on the Rights and Welfare of the Child” (2002) 10 *Int’l J Child Rts* 157 169.

⁶⁷² ACERWC “Communications” <<http://www.acerwc.org/communications/>> (accessed 01-11-2019).

complaints have been brought in relation to the right to education, but the communications procedure indicates that the complaints procedure provides a mechanism in the instance that human rights violations do occur.⁶⁷³

As South Africa is a party to both the CRC and the ACRWC, periodic reports must be submitted to the CRC Committee and the ACERWC. These reports play a valuable role in establishing the manner in which South Africa has fulfilled its international obligations.

3 3 1 2 *The education clauses: the ACRWC and the CRC*

The ACRWC explicitly recognises the child's right to education in article 11(1) by stating that "Every child has the right to an education". Article 11 is considered to be in line with the education provisions of the CRC⁶⁷⁴ and is regarded as the African counterpart of the education clauses of the CRC.⁶⁷⁵ It should be noted that the language used in the provisions of both these instruments are strikingly similar.⁶⁷⁶ It will therefore be attempted to establish points of convergence and divergence in the two instruments so as to establish the value of the ACRWC and the obligations that it creates.⁶⁷⁷ South Africa's obligations in terms of both international and regional law can then be measured in relation to domestic law in chapter 5 in order to determine if South Africa fulfils its obligations.⁶⁷⁸

⁶⁷³ The ACERWC is enabled to receive communications and has thus far received four complaints. The first communication involved displaced children that were living in camps due to the war in Northern Uganda. The second communication dealt with the child's right to nationality as the complaint alleged that children of Nubian descent were being discriminated against by the Kenyan government. The third complaint dealt with child beggars in Senegal. Most recently the fourth communication involved the definition of a child as set out in the Constitution of Malawi; ACERWC "Communications" <<http://www.acerwc.org/communications/>> (accessed 01-11-2019); ACERWC "Uganda" <<http://www.acerwc.org/download/decision-on-the-communication-against-the-republic-of-uganda/?wpdmdl=9749>> (accessed 01-11-2019); ACERWC "Kenya" <<http://www.acerwc.org/download/decision-on-the-communication-against-the-republic-of-kenya/?wpdmdl=9747>> (accessed 01-11-2019); ACERWC "Senegal" <<http://www.acerwc.org/download/decision-on-the-communication-against-the-republic-of-senegal/?wpdmdl=9746>> (accessed 01-11-2019); ACERWC "Settlement" <<http://www.acerwc.org/amicable-settlement-on-communication-no-004/>> (accessed 01-11-2019); Hansungule "Regional Mechanisms" in *Strategic Impact Litigation Report* 50-51.

⁶⁷⁴ Arts (1992) *African Journal of International and Comparative Law* 148; See section 2 4.

⁶⁷⁵ Beiter *Protection of the Right to Education* 217.

⁶⁷⁶ Olowu (2002) *Int'l J Child Rts* 128.

⁶⁷⁷ Olowu (2002) *Int'l J Child Rts* 128.

⁶⁷⁸ See sections 5 3, 5 4 and 5 5.

Article 11 is quite comprehensive in its recognition of education rights and provides content to the right to education in article 11(2) by specifying the aims to which the education of the child should be directed. Article 11 holds that the child's personality, talents and mental and physical abilities must be promoted and developed,⁶⁷⁹ respect for human rights should be promoted,⁶⁸⁰ and positive African values, morals and cultures should be preserved and strengthened by education.⁶⁸¹ Article 11 further provides that education must be aimed at preparing the child for a responsible life in a free society;⁶⁸² preserving national independence as well as territorial integrity;⁶⁸³ promoting and realising African unity and solidarity;⁶⁸⁴ developing respect for natural resources and the environment;⁶⁸⁵ and lastly promoting the child's understanding of primary health care.⁶⁸⁶ The ACRWC does not only provide for the child's right to education but also provides some scope and content to the right in the manner that it envisages how education should be used to achieve specific aims.

Both the CRC and the ACRWC make provision for the aims of the child's education.⁶⁸⁷ When comparing the aims in these two instruments it can be seen that both identify the following aims: fully developing the child's personality, talents and mental and physical abilities;⁶⁸⁸ promoting respect for fundamental freedoms and human rights;⁶⁸⁹ preparing the child for effective participation in society;⁶⁹⁰ promoting understanding, friendship and tolerance between different groups and persons;⁶⁹¹ and lastly fostering respect for the natural environment.⁶⁹² The aim of using education to develop the child's respect for culture is different in the two instruments. The CRC refers to education that must develop the child's respect for his or her parents and also for his or her own culture and that of others.⁶⁹³ The ACRWC applies a regional approach by specifically stating that education should be aimed at strengthening and

⁶⁷⁹ Art 11(2)(a) of the ACRWC.

⁶⁸⁰ Art 11(2)(b) of the ACRWC.

⁶⁸¹ Art 11(2)(c) of the ACRWC.

⁶⁸² Art 11(2)(d) of the ACRWC.

⁶⁸³ Art 11(2)(e) of the ACRWC.

⁶⁸⁴ Art 11(2)(f) of the ACRWC.

⁶⁸⁵ Art 11(2)(g) of the ACRWC.

⁶⁸⁶ Art 11(2)(h) of the ACRWC.

⁶⁸⁷ See art 11(2) of the ACRWC and art 29 of the CRC; See sections 2 4 and 3 3 1 2.

⁶⁸⁸ Art 29(1)(a) of the CRC; Art 11(2)(a) of the ACRWC; Beiter *Protection of the Right to Education* 217.

⁶⁸⁹ Art 29(1)(b) of the CRC; Art 11(2)(b) of the ACRWC; Beiter *Protection of the Right to Education* 217.

⁶⁹⁰ Art 29(1)(d) of the CRC; Art 11(2)(d) of the ACRWC; Beiter *Protection of the Right to Education* 217.

⁶⁹¹ Art 29(1)(d) of the CRC; Art 11(2)(d) of the ACRWC; Beiter *Protection of the Right to Education* 217.

⁶⁹² Art 29(1)(e) of the CRC; Art 11(2)(g) of the ACRWC; Beiter *Protection of the Right to Education* 217.

⁶⁹³ Art 29(1)(c) of the CRC; Beiter *Protection of the Right to Education* 217.

preserving positive African morals, traditional values and cultures.⁶⁹⁴ A more context-specific approach is consequently followed by the ACRWC.

The ACRWC includes three new aims of education that are not listed in the CRC.⁶⁹⁵ They are preserving national independence and territorial integrity;⁶⁹⁶ promoting African unity and solidarity;⁶⁹⁷ and promoting the child's understanding of primary health care.⁶⁹⁸ The fact that a decision was made to include the first two additional aims is indicative that the struggle for independence from foreign powers was a point that required attention and once again signifies the African context that the ACRWC highlights. The manner in which these two aims should be included in terms of education should be seen in the light of the struggle that the African continent experienced under colonial rule and the effect that this has had on the education system.⁶⁹⁹ Fostering African unity and solidarity through education can be linked to the promotion of understanding and appreciating unique African histories and narratives. The third aim relates to the basic standard of health and health care that the child should be afforded in order to further social and economic development in Africa and to advance the realisation of other rights.⁷⁰⁰

Article 11 also establishes the obligations of state parties under the ACRWC. Article 11(3) holds that state parties shall take all appropriate measures in order to fully realise the right to education, with a particular focus on: providing free and compulsory basic education;⁷⁰¹ developing secondary education and to progressively make it both free and accessible;⁷⁰² the accessibility of higher education by all appropriate means on the basis of capacity and ability;⁷⁰³ employing measures that will reduce drop-out rates and support attendance at schools;⁷⁰⁴ and lastly placing emphasis on measures that are targeted at girls, gifted and also disadvantaged children in order to ensure equal

⁶⁹⁴ Section 3 3 1 3; Art 11(2)(c) of the ACRWC; Beiter *Protection of the Right to Education Law* 217.

⁶⁹⁵ Arts 11(2)(e)–(h) of the ACRWC; Beiter *Protection of the Right to Education* 217; B Thompson "Africa's charter on children's rights: A normative break with cultural traditionalism" (1992) *Int & Comp LQ* 432 435; M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 114.

⁶⁹⁶ Art 11(2)(e) of the ACRWC.

⁶⁹⁷ Art 11(2)(f) of the ACRWC.

⁶⁹⁸ Art 11(2)(g) of the ACRWC.

⁶⁹⁹ Beiter *Protection of the Right to Education* 218.

⁷⁰⁰ Beiter *Protection of the Right to Education* 218.

⁷⁰¹ Art 11(3)(a) of the ACRWC.

⁷⁰² Art 11(3)(b) of the ACRWC.

⁷⁰³ Art 11(3)(c) of the ACRWC.

⁷⁰⁴ Art 11(3)(d) of the ACRWC.

access to educational opportunities.⁷⁰⁵ The rights of girls that fall pregnant while in school are also specifically protected by the ACRWC, confirming that state parties must take all appropriate measures to ensure that they are given the opportunity to complete their education based on their individual ability.⁷⁰⁶ The last provision, article 11(6), is considered significant in that it protects the rights of child-mothers.⁷⁰⁷ The inclusion of this provision is very important in the African context as many African schools include pregnancy as a disciplinary offence, often resulting in expulsion.⁷⁰⁸ The momentum for change is greatly served by this provision.⁷⁰⁹ The decision to include provisions that are aimed at the girl child's education is very important, as the education opportunities of girls are in many instances overlooked by human rights bodies.⁷¹⁰ The CRC does not afford the special protections to the girl child with regard to education rights and the ACRWC can therefore be praised on obligating states to focus on gender inequalities in education.⁷¹¹ The added protection is very important in relation to non-discrimination as highlighted in the CRC.⁷¹²

When comparing the education provisions of the ACRWC to the CRC there are many similarities. The ACRWC follows a child-centred approach as identified in the CRC. This is not surprising when one considers that the ACRWC is in many instances founded on the principles of the CRC. The clear difference is in the provision made for circumstances that are specific to the African child. This ultimately results in a child-centred approach that is contextualised for the African continent. The child-centred approach is also strengthened by article 31 of the ACRWC, a unique characteristic of the ACRWC, which provides the child with responsibilities and duties.⁷¹³ This confirms

⁷⁰⁵ Art 11(3)(e) of the ACRWC.

⁷⁰⁶ Art 11(6) of the ACRWC.

⁷⁰⁷ Arts (1992) *African Journal of International and Comparative Law* 148.

⁷⁰⁸ Beiter *Protection of the Right to Education* 219.

⁷⁰⁹ Beiter *Protection of the Right to Education* 219.

⁷¹⁰ Chirwa (2002) *Int'l J Child Rts* 162.

⁷¹¹ Chirwa (2002) *Int'l J Child Rts* 162; See also the discussion in section 3 2 2 which focuses on international instruments that protect against discrimination.

⁷¹² Section 2 4 4 3.

⁷¹³ Mezmur (2008) *SAPL* 24-25;

Article 31 of the ACRWC provides that:

"Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

(a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;

(b) to serve his national community by placing his physical and intellectual abilities at its service;

(c) to preserve and strengthen social and national solidarity;

the child's position not only as an active participant in the realisation of their rights to, in and through basic education, but that the child also has responsibilities in this regard.⁷¹⁴

3 3 1 3 *The concept of "African values" in the ACRWC*

The ACRWC emphasises the importance of African values and traditions in the reflection and interpretation of the child's rights. Considered to be a unique element that illustrates the regionality of the ACRWC in comparison to the CRC, the African values enshrined in the ACRWC add a new dimension to the interpretation of children's rights. The question of how "African values and traditions" must be interpreted however still remains somewhat unclear. Some problems in the interpretation and application of "African values" have arisen due to the lack of an accurate definition, as well as the diversity in values and cultures that are of the African continent.⁷¹⁵ The dissertation will provide some content and scope to this concept in terms of the right to basic education in the ACRWC in order to establish how this affects the child's right to basic education. This is necessary in order to determine the additional obligations that are relevant to the incorporation of African values in the child's right to basic education for the South African context.

In some African communities, children's rights do not yet enjoy sufficient cultural legitimacy, which has led to children's rights not firmly gaining ground in these communities.⁷¹⁶ A context-sensitive approach is required in order to take local factors and circumstances into account. The ACRWC attempts to follow this approach.⁷¹⁷ Kaime argues that it would be an erroneous assumption to view children's rights as a legitimate enterprise within all African societies as this assumption wrongly expects international norms to automatically override conflicting cultural norms. Moreover, it

(d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;

(e) to preserve and strengthen the independence and the integrity of his country;

(f) to contribute to the best of his abilities at all times, and at all levels, to the promotion and achievement of African Unity."

⁷¹⁴ See Mezmur (2008) *SAPL* 1-29.

⁷¹⁵ J Sloth-Nielsen & BD Mezmur "A Dutiful Child: The Implications of Article 31 of the African Children's Charter" (2008) *Journal of African Law* 159 167.

⁷¹⁶ Kaime *The African Charter* 2.

⁷¹⁷ Kaime *The African Charter* 3.

would lead to stifling the development of a conceptual framework that aims to resolve the conflict that exists between African values and children's rights.⁷¹⁸ Even though the implementation of the CRC faces challenges in some African communities, the answer lies in the incorporation of African values as a way of addressing these challenges by contextualising the CRC.

The dissertation will limit the discussion of African values in the context of the child's rights to basic education – a comprehensive discussion of all aspects of African values and culture will consequently not be undertaken. The focus of the examination will be on determining how the concept of African values should be understood in terms of the child's right to basic education in the ACRWC and the effect that this will have on South Africa's obligations.

The notion of "African values" is specifically referred to in the preamble of the ACRWC. The preamble directly acknowledges the central role of African values by asserting that: "the virtues of their cultural heritage, historical background and the values of the African civilisation which should inspire and characterise their reflection on the concept of the rights and welfare of the child" should be taken into consideration. Even though the ACRWC is derived from universal sources, it requires that the rights of the child must be reflective of the realities that the African child faces.⁷¹⁹ The preamble therefore stresses the importance of the cultural context that must be considered.⁷²⁰ This is also in accordance with the child-centred approach, which places the child's rights at the centre of the analysis. Not only should the child's rights be recognised and protected but realisation of these rights should be sensitive to the child's culture and specific circumstances.⁷²¹

The ACRWC also recognises that the child holds "a unique and privileged position in the African society" and that in order for the child to fully develop his or her personality, the child must grow up in a family environment that promotes love, happiness and understanding. The African concept of human rights also enforces the notion that children are a valuable part of society as traditional African culture recognises the worth of children and the need to protect them.⁷²² This once more

⁷¹⁸ Kaime (2009) *African Journal of Legal Studies* 134.

⁷¹⁹ Kaime (2009) *African Journal of Legal Studies* 121.

⁷²⁰ Thompson (1992) *Int & Comp LQ* 434.

⁷²¹ See sections 2 4 and 2 5 .

⁷²² Kaime *The African Charter* 39.

recognises the child-centred approach as the focus is not only on the protection of the child but also on recognising the child's worth, thereby acknowledging the child as an individual and rights-bearer in his or her own right.

The ACRWC does not make many direct references to African values and traditions, save for the preamble and article 46. Article 46 emphasises the importance of international and regional law but also specifically refers to African values and traditions as a source of interpretation for the ACRWC.⁷²³ Two additional articles that deal with specific rights include this concept: articles 11 and 31. These two articles provide for the child's right to education⁷²⁴ and the responsibility of the child.⁷²⁵ Article 11(2)(c) states that the education of the child shall be directed to preserve and strengthen positive African morals, traditional values and cultures. This article is framed in a broader manner than article 46 and the preamble, as it does not only refer to African values and traditions but also includes "cultures" and "morals". The close connection that African values and traditions share with culture is thus confirmed by the ACRWC. What is clear is that the inclusion of this concept in the education clause is indicative of the fact that culture, traditions and customs should not be divorced from the child's education. Education should be inclusive of the child's African values.

The central notions of human dignity and integrity in human rights discourse are acknowledged as fundamental values by African value systems as they are manifested in the community's responsibility to provide for its members. While African concepts of human rights are not necessarily structured according to Western terms, African values still recognise the concept and practice of human rights.⁷²⁶ The notion of human rights is thus not a novel idea in the African community.

The relationship between African values and the realisation of the child's rights is very important. The ACRWC is however only one of the first steps in realising the child's rights. Domestic legislation that is sensitive to the African context and circumstances is a further step. However, formal recognition of children's rights is not

⁷²³ Art 46 of the ACRWC states that: "The Committee shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on human and peoples rights, the charter of the organisation of African unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions."

⁷²⁴ Art 11 of the ACRWC.

⁷²⁵ Art 31 of the ACRWC.

⁷²⁶ Kaime *The African Charter* 39.

enough and it is of importance to ensure that children's rights also enjoy sufficient cultural support from the communities in which the law is applicable and the children that it is ultimately aimed at.⁷²⁷ Engaging with communities and incorporating these values into the education system is necessary in order to find a feasible outcome. African initiatives play a central role, once more emphasising the significance of contextualising international and regional law in the South African context.

Considering and applying African values in the South African context, requires that additional obligations must be fulfilled. This is made very clear in article 11(2) of the ACRWC, which specifically provides for the child's education to be directed to the preservation and strengthening of African values. The incorporation of African values in the child's education entails an emphasis on the child's culture. This means that education must be contextualised in order to meet the needs of different communities. This also strengthens the need for education to be adaptable. The child's education should therefore incorporate and be reflective of the child's cultural heritage, traditions, history and specific African challenges. Only then can the child's right to basic education be considered as truly child centred.

3 3 2 The Education for All movement

During the 1960s the mobilising slogan for education was "Universal Primary Education".⁷²⁸ At the beginning of the 1990s more than 100 million children still had no access to primary schooling.⁷²⁹ At the 1990 World Conference on Education for All, which was held in Jomtien, Thailand,⁷³⁰ the Declaration on Education for All and the Framework for Action to Meet Basic Learning Needs⁷³¹ was adopted as it was acknowledged that the existing provision of education was deficient and that it was necessary to provide a renewed and also expanded commitment to the right to basic

⁷²⁷ Kaime *The African Charter* 4.

⁷²⁸ Beiter *Protection of the Right to Education* 323.

⁷²⁹ Of this 100 million, at least 60 million were girls; Beiter *Protection of the Right to Education* 323.

⁷³⁰ The Conference took place from 5 to 9 March 1990 and was attended by delegates from 155 states as well as representative from different organisations; Beiter *Protection of the Right to Education* 323.

⁷³¹ UNESCO Declaration on Education for All and the Framework for Action to Meet Basic Learning Needs (1990).

education.⁷³² It should be noted that these instruments do not have binding power, but they do carry moral authority.

Article 3 of the Declaration on Education for All states that basic education must be provided to everyone and stresses the importance of education being equitable. Article 4 states that basic education should focus on learning acquisition and not just on enrolment and the completion of school.⁷³³ A Consultative Forum on Education for All was also created at the Jomtien Conference in order to review the progress of states in the realisation of the goals stated in the Declaration.⁷³⁴

In 1996 at the Mid-Decade Meeting of the International Consultative Forum on Education for All⁷³⁵ participants at the meeting adopted the document titled: *Education for All: Achieving the Goal: The Amman Affirmation* (“Amman Affirmation”).⁷³⁶ The Amman Affirmation is a document that reviews the goals set in Jomtien and provides ways of overcoming problems in the achievement of education for all and is a mid-term review of the Jomtien goals.⁷³⁷

With the passing of time, new challenges to the realisation of basic education arose. Ethnic conflicts had increased, which led to a larger number of refugees and displaced persons. Moreover, the consequences of HIV/AIDS on the child, the family and the teaching force had become devastating and, in many countries, the divide between rich and poor had increased to a much higher degree.⁷³⁸ Role-players in the international community decided to adopt a revised plan of action in order to take the new challenges into account. The result was contained in the Education for All: Meeting our Collective Commitments: The Dakar Framework for Action (“Dakar Framework”).⁷³⁹

⁷³² Preamble to the Declaration on Education for All (1990); Beiter *Protection of the Right to Education* 323; Tiwary *Education, Science and Culture* 69; Daudet & Singh *Analysis of UNESCO's Standard-setting Instruments* 16-17.

⁷³³ Beiter *Protection of the Right to Education* 324; Daudet & Singh *Analysis of UNESCO's Standard-setting Instruments* 16-17.

⁷³⁴ Beiter *Protection of the Right to Education* 325; Daudet & Singh *Analysis of UNESCO's Standard-setting Instruments* 16-17.

⁷³⁵ The meeting was held from 16 to 19 June 1996 in Amman, Jordan; Beiter *Protection of the Right to Education* 325.

⁷³⁶ Beiter *Protection of the Right to Education* 325.

⁷³⁷ Discussed in more detail below.

⁷³⁸ Beiter *Protection of the Right to Education* 326.

⁷³⁹ UNESCO, *The Dakar Framework for Action: Education for All: Meeting our Collective Commitments*, (2000) ED-2000/WS/27.

The Dakar Framework not only affirmed the vision of the World Declaration on Education for All⁷⁴⁰ but cemented international commitment to the realisation of the right to education by undertaking an extensive evaluation that assessed the state of basic education around the world.⁷⁴¹ Each state had to assess the progress it had made since the 1990 World Conference on Education for All⁷⁴² and these findings were reported between 1999 and 2000 at six regional conferences.⁷⁴³ The six goals of the Dakar Framework are as follows: to expand and improve early childhood care and education; to provide universal access to free and compulsory primary education of good quality by the year 2015; to implement life skills programmes to ensure that learning needs are met; to increase adult literacy levels with 50% by 2015; to eliminate gender disparities in education and to achieve gender equality in education by 2015; and lastly to improve all aspects relating to the quality of education.⁷⁴⁴ The Dakar Framework also sets out how to achieve these goals.⁷⁴⁵

The goals identified by the Dakar Framework are indicative of the manner in which education should be adapted to align with societal needs. The importance of context and how education differs in different jurisdictions are highlighted. The Declaration on Education for All made it clear that the progress to be made in the provision of basic learning needs will ultimately depend on the steps taken by individual states.⁷⁴⁶ The Dakar Framework shared this sentiment by stating that: “the heart of [Education for All] activity lies at country level.”⁷⁴⁷ Staying true to the notion of contextualisation of the right to education, a brief discussion of the position of Education for All in Sub-Saharan Africa is necessary by considering the Education for African Renaissance in

⁷⁴⁰ See above; Daudet & Singh *Analysis of UNESCO's Standard-setting Instruments* 16-17.

⁷⁴¹ Dakar Framework for Action (2000) para 4.

⁷⁴² In relation to the goals set out in the Declaration on Education for All; Dakar framework for Action (2000) para 4.

⁷⁴³ Sub-Saharan Conference on Education for All in Johannesburg, South Africa 6-10 December 1999; Asia and Pacific Conference on the EFA 2000 Assessment in Bangkok, Thailand 17-20 January 2000; The Arab Regional Conference on Education for All in Cairo, Egypt 24-27 January 2000; The Third Inter-Ministerial Review Meeting of the E-9 Countries in Recife, Brazil 31 January – 2 February 2000; Conference on Education for All in Europe and North America in Warsaw, Poland 6-8 February 2000; and Regional Education for All Conference in the Americas in Santa Domingo, Dominican Republic 10-12 February 2000.

⁷⁴⁴ Dakar Framework for Action (2000) para 7; Beiter *Protection of the Right to Education* 326.

⁷⁴⁵ Dakar Framework for Action (2000) para 8.

⁷⁴⁶ The World Education Forum Drafting Committee *Expanded Commentary on the Dakar Framework for Action* (23 May 2000, Paris) 17.

⁷⁴⁷ Dakar Framework for Action (2000) para 16; Foreword to the Dakar Framework for Action (2000) 3.

the Twenty-first Century.⁷⁴⁸ Under the theme of “Education for African Renaissance in the Globalised Economy, Communication and Culture” the framework acknowledges the specific needs of children in Africa⁷⁴⁹ and recognises that the foundation for the development of education in Africa should be African values, languages and knowledge.⁷⁵⁰ The emphasis on African values, languages and knowledge is in line with African values as recognised in the ACRWC.⁷⁵¹

In 2015⁷⁵² the World Education Forum, that resulted in the adoption of the Incheon Declaration for Education 2030 (“Incheon Declaration”), was held in Incheon, South Korea.⁷⁵³ This Declaration sets out a new vision for education over the next 15 years in its Framework for Action by reaffirming the Education for All movement as developed Jomtien and Dakar⁷⁵⁴ and adopts a new vision for education to be implemented by 2030.⁷⁵⁵ This new vision is described in Sustainable Development Goal 4 which provides that the vision of education should “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.”⁷⁵⁶ The Incheon Declaration also affirms that the main responsibility of realising the right to education remains with governments.

The Incheon Declaration⁷⁵⁷ indicates several targets that must be reached by 2030. In the context of basic education, the following targets are relevant: by 2030 all boys and girls must complete free, equitable and quality primary and secondary

⁷⁴⁸ As part of the Education for All: A Framework for Action in Sub-Saharan Africa; Adopted by the Regional Conference on Education for All for Sub-Saharan Africa in Johannesburg, South Africa 6-10 December 1999.

⁷⁴⁹ For example, that education systems are vulnerable to natural disasters, increased debt burdens of states, poorly used resources, HIV/AIDS, armed conflict, gender inequality, high numbers of learners dropping out of school, outdated education systems; Education for All: A Framework for Action in Sub-Saharan Africa (1999) 26-28; Adopted by the Regional Conference on Education for All for Sub-Saharan Africa in Johannesburg, South Africa 6-10 December 1999.

⁷⁵⁰ Education for All: A Framework for Action in Sub-Saharan Africa (1999) 27.

⁷⁵¹ See section 3.3.1.3.

⁷⁵² The Forum took place from 19-22 May 2015 in Incheon, Korea.

⁷⁵³ UNESCO Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4, (ED-2016/WS/28, adopted 21 May 2015).

⁷⁵⁴ Incheon Declaration (2015) para 2.

⁷⁵⁵ Incheon Declaration (2015) para 4-5.

⁷⁵⁶ Incheon Declaration (2015) para 5; See also the Muscat Agreement that was adopted at the Global Education Meeting for All which took place from 12-14 May 2014 in Muscat, Oman; and The Open Working Group on Sustainable Development Goals in this regard; UN “Sustainable development” <<http://www.sustainabledevelopment.un.org/owg.html>> (accessed 29-09-2018); UN “Sustainable development goals” <<https://sustainabledevelopment.un.org/?menu=1300>> (accessed 29-09-2018).

⁷⁵⁷ Adopted on 4 November 2015 in Paris; As developed in terms of Sustainable Development Goal 4.

education;⁷⁵⁸ the elimination of gender disparities in education;⁷⁵⁹ and by 2030 ensure that all learners acquire the necessary skills and knowledge to promote sustainable development through human rights, gender equality, promotion of culture and global citizenship.⁷⁶⁰ It provides a new view by focusing on access, inclusion, equity, quality and learning outcomes at all levels, which must take place within a lifelong learning approach.⁷⁶¹

The Incheon Declaration centres on the relevance of education for human development and economic, social and environmental sustainability by acknowledging education as an empowerment right – thus strengthening the idea of rights to, in and through education.⁷⁶² It is significant as it sets real targets that the international community hopes to achieve by the year 2030.

The Education for All movement and the soft law instruments that it has created provides valuable guidelines for state parties in the realisation of their international obligations. New frameworks are indicative of a continued need to examine and study the child's right to basic education and how the fulfilment of international obligations result in the realisation of the child's rights.

3 3 3 Concluding comments

The discussion on international instruments that recognise the child's right to basic education,⁷⁶³ as well as general international instruments affording the right to basic education to everyone,⁷⁶⁴ has shown that a variety of international instruments include provisions on the right to education. Some of these instruments, like the UDHR⁷⁶⁵ and the ICESCR,⁷⁶⁶ were adopted before the CRC,⁷⁶⁷ and ultimately influenced its adoption. Other instruments, for example the ACRWC,⁷⁶⁷ have added to the provisions of the CRC. What is however clear, is that other international instruments influenced the

⁷⁵⁸ Framework for Action for the implementation of Sustainable Development Goal 4 (2015) 20.

⁷⁵⁹ Framework for Action for the implementation of Sustainable Development Goal 4 (2015) 21.

⁷⁶⁰ Framework for Action for the implementation of Sustainable Development Goal 4 (2015) 21.

⁷⁶¹ Framework for Action for the implementation of Sustainable Development Goal 4 (2015) 25 para 5.

⁷⁶² Framework for Action for the implementation of Sustainable Development Goal 4 (2015) 26-28 paras 6-10.

⁷⁶³ See section 3 3.

⁷⁶⁴ See section 3 2.

⁷⁶⁵ See section 3 2 1 1.

⁷⁶⁶ See section 3 2 1 2.

⁷⁶⁷ See section 3 3 1.

adoption of the CRC, which ultimately resulted in articles 28 and 29 that specifically provides the child with the right to education.⁷⁶⁸

3 4 Conclusion

Chapter 3 has established that a vast number of international instruments recognise the child's right to basic education and that these instruments indicate a clear commitment by the international community to realise the right to basic education. The first part of the chapter indicated that the right to basic education is afforded in a general sense in several instruments.⁷⁶⁹ Even though these international instruments do not incorporate the child-centred approach in the same way as the CRC, they are still a valuable source of interpretation for the child's right to basic education and also create international obligations that states must comply with.

The role of regional law that specifically recognises the child's right to basic education was also examined in reference to the ACRWC. As South Africa is party to the CRC and the ACRWC, these two instruments should be interpreted in a complementary manner. The ACRWC provides an important regional aspect to the child's right to basic education, especially in relation to the concept of African values. In order for the CRC to be of true value, its provisions should also be contextualised in the specific jurisdiction.

The contributions that the ACRWC has made to the protection of children's rights, and human rights in general, can therefore not be ignored.⁷⁷⁰ The drafters of the ACRWC have succeeded in creating a complementary instrument to the existing international standards, whilst at the same time maintaining its regional context by including provisions that focus on African concerns and concepts.⁷⁷¹ It seems that the need for an instrument that focuses on African issues and values has been met by the ACRWC. The ACRWC not only makes some improvements on the CRC but also includes several provisions that have not been included in other human rights instruments.⁷⁷² Of course, the ACRWC also has its weaknesses - mostly in the form

⁷⁶⁸ See section 2 4 4.

⁷⁶⁹ See section 3 2 above.

⁷⁷⁰ Chirwa (2002) *Int'l J Child Rts* 170.

⁷⁷¹ Arts (1992) *African Journal of International and Comparative Law* 158.

⁷⁷² Chirwa (2002) *Int'l J Child Rts* 170.

of omissions.⁷⁷³ It is important to take into consideration that the weaknesses of the ACRWC can be alleviated by the fact that all parties to the ACRWC are also party to the CRC.⁷⁷⁴ This means that in the instance that the CRC provides more protection, the CRC will trump the provisions of the ACRWC. The most important contribution of the ACRWC in relation to education rights, is the fact that it provides more protection to problems that are specific to the African continent. Not only does the ACRWC incorporate the universalist outlook favoured by the CRC but it is also true to the African cultural context.⁷⁷⁵

The importance of soft law in the form of Declarations and Frameworks has also been highlighted. These instruments are of value as they fill the need of incorporating new challenges and developments in the realisation of the child's right to basic education. They also underscore the importance of continually setting new goals and standards in order to ensure that the child's right to education are recognised, protected and realised.

While the focus of the dissertation is on the model for compliance and the obligations created by the normative and practical frameworks, it has been established that other international instruments create additional obligations in relation to the child's right to basic education. The International Bill of Human Rights provides a valuable foundation for a general right to basic education and the ICESCR extensively recognises the right to education as a socio-economic right.⁷⁷⁶ Ultimately, the additional obligations of the International Bill of Rights strengthen the three dimensions of the child's right to basic education and emphasises the interdependence of human rights.

Additional obligations created by the instruments providing protection against discrimination emphasise the importance of non-discrimination and equality in the education context.⁷⁷⁷ The accessibility of education and its relationship to non-discrimination is also highlighted.

⁷⁷³ Chirwa (2002) *Int'l J Child Rts* 170.

⁷⁷⁴ Chirwa (2002) *Int'l J Child Rts Rights* 170.

⁷⁷⁵ Kaime (2009) *African Journal of Legal Studies* 132.

⁷⁷⁶ See section 3 2 1 above.

⁷⁷⁷ See section 3 2 2.

Furthermore, the ACRWC provides for additional obligations, for example the need for the child's education to be inclusive of African values.⁷⁷⁸ The ACRWC underscores the importance of contextualising the child's rights by stipulating that African values, traditions and cultures should be considered in the realisation of the child's right to basic education.⁷⁷⁹

The Education for All movement highlights the need to reflect on the changing needs and challenges faced in the realisation of the child's right to basic education.⁷⁸⁰ Is it essential that the aims associated with the realisation of the child's right to education must evolve, and in line with the 4-A scheme, also adapt.

The value of the additional obligations identified in this chapter is that they strengthen not only the dimensions of the right to basic education, but also illustrate the applicability of the practical framework in the obligations related to the right to education created by other instruments.

⁷⁷⁸ Art 11(2) of the ACRWC; See section 3 3 1 3 above.

⁷⁷⁹ See section 3 3 1 3 above.

⁷⁸⁰ See section 3 3 2.

Chapter four:

The child's right to basic education in India and Nigeria

4 1 Introduction

Jurisdictions face different challenges in the fulfilment of their international obligations. It is the manner in which these challenges are addressed that is at the centre of the comparative analysis in this chapter.⁷⁸¹ The purpose of this chapter is to ascertain how two foreign jurisdictions, namely India and Nigeria,⁷⁸² fulfil their international obligations to recognise and realise the child's right to basic education. The value of the comparative study lies in the possible lessons that can be learnt from other jurisdictions in their fulfilment of international obligations in respect of the child's right to education. The South African Constitution ("Constitution")⁷⁸³ refers to both international and foreign law as valuable sources of interpretation for the Bill of Rights.⁷⁸⁴ Not only can foreign law aid in the interpretation and development of domestic law, but the manner in which international law is incorporated into domestic law in foreign jurisdictions can also assist in providing valuable lessons for the advancement of the child's right to basic education in South Africa.

In comparing these jurisdictions' positions with regard to international instruments, parallels can be drawn. Firstly, both Nigeria and India are also parties to the Convention on the Rights of the Child ("CRC").⁷⁸⁵ Both jurisdictions became state

⁷⁸¹ See section 4 2 below for a discussion of the challenges faced in India and section 4 3 for a discussion of the challenges in Nigeria.

⁷⁸² See section 4 2 for the discussion on India and section 4 3 for the discussion on Nigeria. The specific circumstances of each jurisdiction will be taken into account when determining if and how their international obligations have been fulfilled, which will ultimately aid in the comparative analysis.

⁷⁸³ Constitution of the Republic of South Africa, 1996.

⁷⁸⁴ See ss 39(1)(b) and (c) of the Constitution.

⁷⁸⁵ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Resolution 44/25 of 20 November 1989 (hereafter the "CRC"); Both India and Nigeria ratified the CRC quite early after it was introduced. India acceded to the CRC on 11 December 1992 and Nigeria ratified the CRC on 19 April 1991; United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 13-10-2018); See also EG Thukral & AK Asthana "Children's Rights in Litigation: Use of the CRC in Indian Courts" in T Liefwaard & JE Doek (eds) *Litigating the Rights of the Child* (2015) 31; SK Verma "International Law" in SK Verma & K Kusuk (eds) *Fifty Years of the Supreme Court: Its Grasp and Reach* (2006) 637; N Srivastava "The status of the child in India in the context of The Convention on the Rights of the Child" (2004) 34 *Social Change* 113 113; For an explanation of the difference between signing, ratification, acceptance and accession of UN treaties see United Nations DAG Hammarskjöld Library "What is the difference between signing, ratification and accession of UN treaties?" <<http://ask.un.org/faq/14594>> (accessed 13-10-2018).

parties to the CRC within the first three years after its adoption in 1989. The way in which they have incorporated the normative and practical frameworks into their domestic law with regard to the child's right to basic education, will be explored in this chapter. On a regional level, the African Charter on the Rights and Welfare of the child ("ACRWC")⁷⁸⁶ is the central instrument in the advancement of children's rights.⁷⁸⁷ Like South Africa, Nigeria has ratified the ACRWC.⁷⁸⁸ Both South Africa and Nigeria are therefore not only obligated to fulfil their obligations in terms on the CRC but also the ACRWC. The ratification of the same international and regional instruments by these jurisdictions will aid in the comparative analysis.⁷⁸⁹

With international law⁷⁹⁰ central to the discussion, a similarity is shared by all three jurisdictions as the dualist approach is favoured in the application of international law.⁷⁹¹ All three jurisdictions must fulfil their international obligations and by following the dualist school of thought it means that after they have ratified an international instrument, it is necessary to implement legislation which gives effect to these international instruments.⁷⁹² Another similarity which will aid in the comparative analysis is the shared legal history of the jurisdictions. At some time all three jurisdictions were British colonies and common law traditions formed part of their

⁷⁸⁶ OAU, African Charter on the Rights and Welfare of the Child, Doc. CAB/LEG/24.9/49 (1990) (hereafter the "ACRWC").

⁷⁸⁷ See section 3 3 1 of chapter 3 which discusses the right to basic education in terms of the ACRWC.

⁷⁸⁸ Nigeria ratified the ACRWC on the 23rd of July 2001 and South Africa signed the ACRWC in 1993 and ratified the instrument in 1995; ACHPR "Ratification" <www.achpr.org/instruments/child/ratification/> (accessed 25-09-2018).

⁷⁸⁹ South Africa, India and Nigeria have for example all ratified the CRC, ICESCR and ICCPR.

⁷⁹⁰ More specifically international treaties such as the CRC.

⁷⁹¹ The dualist school of thought requires that international treaties be domesticated in order to form part of national law. International law is thus viewed as a separate legal system from that of domestic law and the view is that they regulate different subject matter. Further legislation that incorporates international standards are thus required in dualist states, whereas the same is not true of monist states. See in this regard RMM Wallace & O Martin-Ortega *International Law* 7 ed (2013) 38; A Cassese *International Law* 2 ed (2005) 214; JG Starke "Monism and dualism in the theory of international law" (1936) 17 *British Yearbook of International Law* 66 66; Kilander & Adjolohoun "International Law" in *International law and domestic human rights litigation in Africa* 5; J Dugard *International law: A South African perspective* 3 ed (2005) 47; MN Shaw *International Law* 7 ed (2014) 93; TW Bennett & J Strug *Introduction to International Law* (2013) 31; Thukral & Asthana "Children's Rights in Litigation" in *Litigating the Rights of the Child* 32; E Egede "Bringing Human Rights Home: An Examination of the Domestication of Human Rights in Nigeria" (2007) 51 *Journal of African Law* 249 251.

⁷⁹² This is opposite to the monist school of thought. In terms of the monist school of thought, after international treaties have been ratified, they are accepted to form an integral part of the state's domestic law. National and international law form part of a single notion of law; Viljoen *International Human Rights Law in Africa* 158; Wallace & Martin-Ortega *International Law* 38; Kilander & Adjolohoun "International Law" in *International law and domestic human rights litigation in Africa* 5; Dugard *International Law* 47; Shaw *International Law* 93; Bennett & Strug *Introduction to International Law* 31.

domestic legal system. Some of these common law aspects can still be identified in the ways in which their legal systems function.⁷⁹³

All three jurisdictions are recognised as democracies and have written constitutions. India is representative of an older democracy and has a constitution which was adopted in 1950. In this instance, one should note that the drafting of the Constitution of India (hereafter “the Indian Constitution”) took place before the adoption of the UDHR.⁷⁹⁴ Significantly, provision is made for children in various provisions of the Indian Constitution.⁷⁹⁵ While the circumstances surrounding the drafting of the Indian Constitution, as well as the actual constitution-making process were different to the South African experience, the Indian Constitution influenced and aided in the drafting of the South African Constitution.⁷⁹⁶ The reasoning behind this choice can be illustrated by the fact that both India’s and South Africa’s constitution-making processes were grounded in the protection of human rights after many had suffered from human rights violations and discrimination.⁷⁹⁷ A new constitution represented a new dawn for all people in both of these jurisdictions.⁷⁹⁸ The shared struggle in the recognition of human rights will aid in the comparative analysis. In this respect, the chapter will investigate how the challenges from the past have been addressed with regard to the child’s right to education.

In contrast to India, Nigeria is a much younger democracy and in this sense is comparable to the democracy in South Africa. After gaining independence from Britain in 1960, a civil war followed from 1967 to 1970.⁷⁹⁹ Thereafter, Nigeria experienced democratic governments as well as military dictatorships.⁸⁰⁰ A democracy is currently in effect in Nigeria. As an African country, Nigeria will provide an important regional comparison.

⁷⁹³ Examples include the structure and working of the courts.

⁷⁹⁴ V Sripati “Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective” (2007) 16 *Tulane Journal of International and Comparative Law* 49-54.

⁷⁹⁵ See for example arts 15(3), 24, 39(f), and 350A of the Indian Constitution.

⁷⁹⁶ See in this regard Sripati (2007) *Tulane Journal of International and Comparative Law* 49-116.

⁷⁹⁷ Sripati (2007) *Tulane Journal of International and Comparative Law* 56; AJ Beredugo & F Viljoen “Towards a greater role and enhanced effectiveness of National Human Rights Commissions in advancing the domestic implementation of socio-economic rights: Nigeria, South Africa and Uganda as case studies” (2015) XL VIII *CILSA* 401-413.

⁷⁹⁸ Sripati (2007) *Tulane Journal of International and Comparative Law* 56-57.

⁷⁹⁹ BO Nwabueze *A Constitutional History of Nigeria* (1982) 50-61; See also for example JJ Strelau *The International Politics of the Nigerian Civil War 1967-1970* (1977)

⁸⁰⁰ Beredugo & Viljoen (2015) *CILSA* 408.

Not only does South Africa share similarities with both these jurisdictions, but India and Nigeria are also comparable when examining their legal systems. Both of these countries have constitutions which are divided into two parts, the first part containing the justiciable rights and the other, the directive principles of state policy.⁸⁰¹ The different approaches they have used in order to deal with this distinction will be discussed in this chapter. Their different approaches to fulfilling their obligations, even though they have somewhat similar constitutional frameworks, will also be explored.⁸⁰²

As in any jurisdiction, possible challenges exist in the realisation of the child's rights to, in and through basic education.⁸⁰³ Bajpai, Ibe and Ucha have identified possible challenges to the realisation of the right to basic education such as: poverty, child labour, inequality, poor infrastructure and sanitation, lack of school materials, far distances for children to travel to their schools, lack of qualified teachers, poor quality of education, lack of resources or funding, and fees in relation to education.⁸⁰⁴ The challenges in India and Nigeria will be identified and examined in order to establish if and how they affect the child's right to basic education. Whether or not India and Nigeria provide ways in addressing these challenges will be examined in order to establish possible lessons for the South African context.⁸⁰⁵

The comparative analysis will begin with the position in India and will then shift to pay attention to the Nigerian experience. The comparative analysis with regard to India, will pay attention to the specific challenges for the realisation of the child's rights to basic education and how this affects India's obligations in terms of the CRC. The Nigerian comparative analysis will provide a more regional perspective by paying attention to regional law which recognises the child's rights to basic education. This

⁸⁰¹ See section 4 2 3 below for a discussion on the distinction between justiciable rights and directive principles in the Indian Constitution; See also section 4 3 3 below for Nigeria's distinction.

⁸⁰² See section 4 2 3 below for India's constitutional framework and section 4 3 3 for Nigeria's constitutional framework.

⁸⁰³ See E Secker "Barriers to the Effective Implementation of the UN Convention on the Rights of the Child in the Niger Delta of Nigeria" in A Twum-Danso Timoh & N Ansell (eds) *Children's Lives in an Era of Children's Rights: the Progress of the Convention on the Rights of the Child in Africa* (2014) 173; A Skelton "Strategic Litigation Impacts – Equal Access to Quality Education" (2017) *Open Society Justice Initiative* 37-41; A Rosser & A Joshi "Using the Courts to Realize Education Rights: Reflections from India and Indonesia" *Policy Research Working Paper 8448* (2018) 3; A Bajpai *Child Rights in India: Law, Policy and Practice* (2003) xiv.

⁸⁰⁴ Bajpai *Child Rights in India* 332; S Ibe "Beyond justiciability: Realising the promise of socio-economic rights in Nigeria" (2007) 7 *African Human Rights Law Journal* 225 247; C Ucha "Poverty in Nigeria: Some Dimensions and Contributing Factors" (2010) *Global Majority E-Journal* 46 46-56.

⁸⁰⁵ Section 4 4.

will include the ACRWC,⁸⁰⁶ African Charter on Human and People's Rights⁸⁰⁷ ("African Charter"), and the Economic Community of West African States Community Court of Justice⁸⁰⁸ ("hereafter the ECOWAS Court").⁸⁰⁹

4 2 The child's right to basic education in India

4 2 1 Background on the Indian legal system

As a former British colony, the legal system of India is founded in the common law.⁸¹⁰ India became independent on the 15th of August 1947⁸¹¹ and in 1950 India became a federal republic.⁸¹² In accordance with its federal system of government, education is deemed a concurrent system. This means that both the central government and the individual states are responsible for policy and allocation of resources.⁸¹³ Today, the Indian Constitution, which has been in effect since the 26th of January 1950, forms the foundation of the legal system.⁸¹⁴

⁸⁰⁶ See section 3 3 1 of chapter 3 for a discussion of the ACRWC.

⁸⁰⁷ Organization of African Unity *African Charter on Human and Peoples' Rights* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

⁸⁰⁸ See section 4 3 3 3.

⁸⁰⁹ It should be noted that South Africa is not a member of this community and is therefore not directly bound by the decisions of the ECOWAS Court.

⁸¹⁰ BN Srikrishna "The Indian Legal System" (2008) 36 *International Journal of Legal Information* 242 242; G Das "The Supreme Court: An Overview" in BN Kirpal, AH Desai, S Gopal, R Dhavan & R Ramchandran R (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2011) 16; C Heyns & F Viljoen *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) 297.

⁸¹¹ RK Jain "The Emerging Human Rights Situation in India: In the Context of Recent Socio-Political and Economic Changes" in A Alam (ed) *Human Rights in India: Issues and Challenges* (2012) 42; V Sripati & AK Thiruvengadam "Constitutional amendment making the right to education a Fundamental Right" (2004) 2 *International Journal of Constitutional Law* 148 149; Skelton (2017) *Open Society Justice Initiative* 37; S Meer "Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa" (1993) 9 *SAJHR* 358 358; R Abeyratne "Socioeconomic rights in the Indian Constitution: Toward a broader conception of legitimacy" (2014) 39 *Brooklyn Journal of International Law* 1 26.

⁸¹² Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 149; Heyns & Viljoen *Impact of the United Nations Human Rights Treaties* 298; Skelton (2017) *Open Society Justice Initiative* 37.

⁸¹³ Skelton (2017) *Open Society Justice Initiative* 37; Rosser & Joshi *Policy Research Working Paper 8448* (2018) 16.

⁸¹⁴ Even though India has been influenced by British practice, India differs from Britain as it has a codified constitution; Verma "International Law" in *Fifty Years of the Supreme Court of India* 621; Bajpai *Child Rights in India* 6; Thukral & Asthana "Use of the CRC in Indian Courts" in *Litigating the Rights of the Child* 33; Heyns & Viljoen *Impact of the United Nations Human Rights Treaties* 297; A Pillay "Judicial Activism and the Indian Supreme Court: Lessons for Economic and Social Rights Adjudication" in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (2014) 339.

While India's independence signified much needed positive change, the disastrous literacy levels of only 18% were unfortunately inherited from its colonial past.⁸¹⁵ Government spending on education regrettably remained extremely low, with less than 2% of GDP allocated thereto until the 1980's.⁸¹⁶ More recent statistics indicate that government spending has been around 3% for the last number of years – but it does not reach 4% or even close to the government's aim of 6% of GDP.⁸¹⁷ Government spending and resources allocated to the child's education can therefore still be improved upon as the state is not providing enough resources to schools and an increase in resources is necessary.⁸¹⁸ The availability of education is also closely related to the state resources allocated to the educational system. If states do not provide schools with appropriate resources, availability of education is impeded. This in turn also negatively affects the accessibility of education because if schools are not available, education cannot be accessed. Moreover, if funds are not directed at education, the quality of school infrastructure and resources such as textbooks and transportation cannot be maintained or delivered. This ultimately results in education that is not acceptable. The allocation and availability of state resources is therefore closely related to the effective implementation of the child's right to basic education.

The Indian government has taken various steps towards the realisation of the right to education in terms of policy.⁸¹⁹ Until 2017, the realisation of many rights was based on the Five-Year Plans, which were developed by the Planning Commission of the

⁸¹⁵ Rosser & Joshi *Policy Research Working Paper 8448* 16.

⁸¹⁶ GDP refers to the gross domestic product of a specific country. The first Prime Minister of India, Jawaharlal Nehru, followed the path of state-led socialism which meant a dedication of state resources to state-owned manufacturing enterprises and defense; Rosser & Joshi *Policy Research Working Paper 8448* 16, 39.

⁸¹⁷ Worldbank "Government expenditure on education, total (% of GDP)" <<https://data.worldbank.org/indicator/SE.XPD.TOTL.GD.ZS>> (accessed 27-03-2019); Indian Express "Economic Survey: Government spending on education less than 3 per cent of GDP" (27 March 2019) <<https://indianexpress.com/article/education/economic-survey-government-spending-on-education-less-than-3-per-cent-of-gdp-5045498/>> (accessed 27-03-2019).

⁸¹⁸ See section 4 2 1 above; Rosser & Joshi *Policy Research Working Paper 8448* 16, 39; Worldbank "Government expenditure on education, total (% of GDP)" <<https://data.worldbank.org/indicator/SE.XPD.TOTL.GD.ZS>> (accessed 27-03-2019); Indian Express "Economic Survey: Government spending on education less than 3 per cent of GDP" <<https://indianexpress.com/article/education/economic-survey-government-spending-on-education-less-than-3-per-cent-of-gdp-5045498/>> (accessed 27-03-2019).

⁸¹⁹ See for example Operation Black Board; The District Primary Education Program; The Mid Day Meal Programme; *Balika Samridhi Yojna* (The Girl Child Prosperity Scheme) and the *Sarva Shiksha Abhiyan* (SSA) (Education for all Campaign) as referred to by Srivastava (2004) *Social Change* 119-120.

Indian Government.⁸²⁰ These five-year plans were developed in order to provide development strategies for the different sectors of the government – including the realisation of the right to education.⁸²¹ At the end of March 2017, the five-year plans were terminated and the National Institution for Transforming India (“NITI Aayog”) has since taken over the responsibility and is now designing new plans.⁸²² Provision is made for goals that the NITI Aayog wants the Indian government to achieve in line with the Sustainable Development Goals (“SDG’s”).⁸²³ The importance of education that is adaptable is highlighted in this instance as emphasis is placed on developing the legal framework in order to comply with international standards. The relationship between the normative framework and the practical framework is also exemplified as it is clear that norms and practical considerations must be taken into account in order to measure compliance and to ultimately realise the child’s right to basic education.

Similar to South Africa, India also has three branches of State: the executive, judiciary and legislature.⁸²⁴ With regards to its judicial system, the Supreme Court is the highest court and an adversarial system is applied.⁸²⁵ As India is divided into different states, language is one of the key factors that differentiates states from one another. Diversity in language is a similarity shared with South Africa.⁸²⁶ The

⁸²⁰ See in general Planning Commission “Five Year Plans” <<http://www.planningcommission.nic.in/plans/planrel/fiveyr/welcome.html>> (accessed 29-09-2018); Planning Commission, Government of India *Twelfth Five Year Plan: Social Sectors (2012-2017)* Vol III (2013) 47-123; CR Kumar “International Human Rights Perspectives on the Fundamental Right to Education – Integration of Human Rights and Human Development in the Indian Constitution” (2004) 12 *Tulane Journal of International and Comparative Law* 237 241-246.

⁸²¹ Bajpai *Child Rights in India* 239; IK Grewal & NS Singh “Understanding child rights in India” (2011) 22 *Early Education and Development* 863 865; See further example Planning Commission “Five Year Plans” <<http://www.planningcommission.nic.in/plans/planrel/fiveyr/welcome.html>> (accessed 29-09-2018); Other sectors include: economic sectors, social sectors and inclusive growth.

⁸²² See in general NITI Aayog <<http://www.niti.gov.in/>> (accessed 18-08-2018).

⁸²³ NITI Aayog “SDG’s” <<http://niti.gov.in/sdgs/goals>> (accessed 18-08-2018); See also in general United Nations “Take Action for the Sustainable Development Goals” <<https://www.un.org/sustainabledevelopment/sustainable-development-goals/>> (accessed 29-09-2018) and United Nations “Sustainable Development” <<https://sustainabledevelopment.un.org/?menu=1300>> (accessed 29-09-2018); See specifically Goal 4 in relation to the United Nations “Development Goal on Quality Education” <<https://www.un.org/sustainabledevelopment/education/>> (accessed 29-09-2018).

⁸²⁴ Srikrishna (2008) *International Journal of Legal Information* 242.

⁸²⁵ This means that the judge is a neutral arbiter and does not partake in the forensic debate. Srikrishna (2008) *International Journal of Legal Information* 242; Bajpai *Child Rights in India* 6.

⁸²⁶ Hindi and English are regarded as the official languages of the Union Government but the country has 22 official languages, with 100’s more and various dialects spoken throughout the country. The abundance of a variety of languages is a similarity shared with South Africa. South Africa recognises 11 official languages (section 6(1) of the South African Constitution recognises the following as official languages: Sepedi, Sesotho, Setswana, siSwati, Tshivendi, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu); Srikrishna (2008) *International Journal of Legal Information* 243; Skelton (2017) *Open Society Justice Initiative* 35-37; Meer (1993) *SAJHR* 358.

relationship between language and education is important in both India and South Africa as the right to learn in an official language is a constitutionally protected right to education in the South African Constitution⁸²⁷ The Indian Constitution also provides for the importance of language in relation to the child's primary education in terms of a special directive in article 350A.⁸²⁸ This provision conforms to the normative framework as it respects cultural identity and language.⁸²⁹ Accessibility and adaptability of education are also strengthened by acknowledging the importance of language in education. When education is adaptable with regard to language, it ensures that the needs of a specific community are met, and in turn ensures that education is accessible and not hindered by language barriers. This provision can be found in Part XVII of the Indian Constitution – not Part III which provides for fundamental rights.

Every state in India has its own High Court which serves as the final court of appeal in that specific state.⁸³⁰ If leave is granted either by the State High Court⁸³¹ or special leave by the Supreme Court,⁸³² the decision of the State High Court can be appealed to the Supreme Court.⁸³³ The Supreme Court has on many occasions deemed it necessary to refer to or rely on international law and its judgments are of utmost importance as lower courts are automatically bound to them in terms of the principle of *stare decisis*.⁸³⁴ Another similarity shared with South Africa. As the highest court, its judgments are indicative of the Indian approach to international law and how it views its international obligations.⁸³⁵ The connection between the Supreme Court and the Indian Constitution is important as the Supreme Court is a creature of the Constitution and it is subject to those constitutional provisions.⁸³⁶

⁸²⁷ S 29(2) of the South African Constitution; See sections 14 and 54 which sets out the constitutional provisions of the child's rights to basic education in South Africa.

⁸²⁸ Art 350A of the Indian Constitution states: "It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities."

⁸²⁹ Art 350A of the Indian Constitution; art 29(c) of the CRC; See section 24.4.

⁸³⁰ Srikrishna (2008) *International Journal of Legal Information* 243.

⁸³¹ See arts 132 and 133 of the Indian Constitution.

⁸³² See art 136 of the Indian Constitution.

⁸³³ Srikrishna (2008) *International Journal of Legal Information* 243.

⁸³⁴ The principle of *stare decisis* is also applied in South African law; Verma "International Law" *Fifty Years of the Supreme Court of India* 621.

⁸³⁵ Verma "International Law" *Fifty Years of the Supreme Court of India* 621.

⁸³⁶ Verma "International Law" *Fifty Years of the Supreme Court of India* 621.

4 2 2 The Indian Constitution and international law

The Indian Constitution is much older than the South African counterpart as it was adopted in 1950.⁸³⁷ Thiruverangadam argues that the Indian Constitution should be seen “as a site for continuing contestations”.⁸³⁸ This entails viewing the Indian Constitution as a “living text” which sheds light on the ambiguities and gaps of the Constitution, but ultimately also its flexibility.⁸³⁹ This is seen to be a move away from the more traditional notion to present the Indian Constitution as a complete and final product which only requires implementation.⁸⁴⁰ The element of adaptability as part of the practical framework can be recognised in the need for the Indian Constitution to be continually challenged and questioned. It can therefore be argued that the adaptability of the Constitution provides a legal basis for adaptability in the educational context.

The Indian Constitution has several provisions which relate directly to international law and international relations.⁸⁴¹ The importance of obligations imposed by international law and treaties is recognised in two specific provisions of the Constitution.⁸⁴² The primary position is set out in article 51 of the Constitution.⁸⁴³ Article 51 holds that the state should strive to promote international peace and security,⁸⁴⁴ uphold honourable interactions with other nations,⁸⁴⁵ and encourage the use of arbitration in the settlement of international disputes.⁸⁴⁶ International obligations are specifically referred to in article 51(c), which requires the state to foster respect for its obligations in terms of international law and treaties.⁸⁴⁷ The second provision is article

⁸³⁷ Compared to the South African Constitution which was adopted in 1994.

⁸³⁸ AK Thiruverangadam *The Constitution of India: A Contextual Analysis* (2017) 4.

⁸³⁹ Thiruverangadam *Contextual Analysis* 4.

⁸⁴⁰ The trend to write only about the Indian Constitution as a complete product worthy of celebration could be the result of scholars believing that the constitution’s legitimacy was dependent on such writing. The result has however been to describe the constitution as definitive and decisive, more so than what reality reflects; Thiruverangadam *Contextual Analysis* 4.

⁸⁴¹ See arts 51, 53, 73, 77, 246, 253; Verma “International Law” *Fifty Years of the Supreme Court of India* 621.

⁸⁴² See specifically arts 51 and 253 of the Indian Constitution. Thukral & Asthana “Use of the CRC in Indian Courts” in *Litigating the Rights of the Child* 31.

⁸⁴³ Verma “International Law” *Fifty Years of the Supreme Court of India* 621.

⁸⁴⁴ Art 51(a) of the Indian Constitution.

⁸⁴⁵ Art 51(b) of the Indian Constitution.

⁸⁴⁶ Art 51(d) of the Indian Constitution.

⁸⁴⁷ It should however be noted that art 51(c) falls in Part IV of the Constitution – thus a directive principle and courts are not bound to it nor is it enforceable in a court. Art 51(c) is however very general and it is not clear to what extent international will be implemented in the courts. Nonetheless, the Supreme

253, which relates to the implementation of legislation in order to give effect to these obligations. The provision states that parliament has the power to make law in order to implement a treaty, convention or agreement, as well as decisions made at an international conference or by a body or association.⁸⁴⁸ In line with this interpretation of article 253, one can identify the dualist approach in the Indian Constitution.⁸⁴⁹

The wording used in article 253 specifies that parliament has the power, but it does not create a direct duty or obligation to make laws which give effect to international agreements. When examining articles 51 and 253, it does reflect the state's duty to respect, protect and fulfil the child's right to education in terms of international law.⁸⁵⁰ While the duty to respect is specifically included in article 51, reference to the duties to protect and fulfil cannot be found. This omission could be explained by the age of the Indian Constitution which was adopted before the tripartite typology was set out by the CESCR.⁸⁵¹ Having ratified both the CRC and the ICESCR, India should conform to the standards set in these international instruments as well as the General Comments. This means that even though the Indian Constitution does not specifically mandate the duties to respect, protect and fulfil its international obligations, India must be mindful of these duties when fulfilling its international obligations. The model for compliance is accordingly applicable to the Indian experience as it must comply with its international obligations.

Court has not been discouraged and has relied on international law in its decisions. Verma "International Law" in *Fifty Years of the Supreme Court of India* 622; Thukral & Asthana "Use of the CRC in Indian Courts" in *Litigating the Rights of the Child* 31-32.

⁸⁴⁸ See also Thukral & Asthana "Use of the CRC in Indian Courts" in *Litigating the Rights of the Child* 32.

⁸⁴⁹ See art 253 of the Indian Constitution; For more information on the drafting process of the Indian Constitution and the distinction between the fundamental rights and the directive principles see AK Thirvengadam *The Constitution of India: A Contextual Analysis* (2017) 114-115; Thukral & Asthana "Use of the CRC in Indian Courts" in *Litigating the Rights of the Child* 32; Heyns & Viljoen *Impact of the UN Human Rights Treaties* 299.

⁸⁵⁰ See section 5 4 4.

⁸⁵¹ See CESCR General Comment No 13 (21st session, 1999) "The Right to Education (art 13)" UN Doc E/C.12/1999/10 para 1 (hereafter CESCR *General Comment No 13*); See also section 5 4 4 which discusses the tripartite typology in more detail.

4 2 3 The distinction between Fundamental Rights and the Directive Principles of State Policy

The Indian Constitution draws a distinction between human rights in Part III (“Fundamental Rights”) and Part IV (“Directive Principles of State Policy”). Part III for the most part contains civil and political rights while Part IV includes social, economic and cultural rights.⁸⁵² The right to education, as recognised in article 45, previously fell in the category of Directive Principles of State Policy.⁸⁵³ The directive principles are set out in 15 provisions of the Indian Constitution – articles 36 to 51.⁸⁵⁴ Article 37 of the Indian Constitution provides for the application of the directive principles and makes it clear that the directive principles are not enforceable by a court.⁸⁵⁵ Instead, they are viewed as aspirational aims which the state should strive to progressively realise.⁸⁵⁶ The distinction between the two categories means that the fundamental rights are enforceable in a court, while the same cannot be said of the directive principles.⁸⁵⁷

⁸⁵² The Fundamental Rights can be found in Part III of the Indian Constitution and consists of 23 provisions: arts 12 to 35; Thiruverangadam *Contextual Analysis* 104; Pillay “Judicial Activism” in *Reasoning Rights* 340; A Shankar & PB Mehta “Courts and Socioeconomic Rights in India” in V Gauri & DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 148; F Viljoen “The justiciability of socio-economic and cultural rights: experience and problems” in Y Donders & V Volodin *Human Rights in Education, Science and Culture: legal developments and challenges* (2007) 67; Heyns & Viljoen *Impact of the United Nations Human Rights Treaties* 298; L Simon & CJ Nirmal “Fundamental Rights: The Constitutional Context of Human Rights” in CJ Nirmal (ed) *Human Rights in India: Historical, Social and Political Perspectives* (2000) 43; Ibe (2007) *African Human Rights Law Journal* 233; SW Templeman (Lord Templeman) “The Supreme Court and the Constitution” in BN Kirpal, AH Desai, S Gopal, R Dhavan & R Ramchandran (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2011) 50; BL Harsh *Human Rights Law in India: Protection and Implementation of the Human Rights Act, 1993* (2011) 10.

⁸⁵³ Art 45 stated: “The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years; See below for a discussion of article 45 in terms of case law; Rosser & Joshi *Policy Research Working Paper 8448* 18; F Veriava & A Skelton “The right to basic education: a comparative study of the United States, India and Brazil” (2019) *SAJHR* 1 11.

⁸⁵⁴ Thiruverangadam *Contextual Analysis* 106.

⁸⁵⁵ Pillay “Judicial Activism” in *Reasoning Rights* 340; Harsh *Human Rights Law in India* 10; Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 149; Rosser & Joshi *Policy Research Working Paper 8448* 18; Abeyratne (2014) *Brooklyn Journal of International Law* 2.

⁸⁵⁶ Pillay “Judicial Activism” in *Reasoning Rights* 340; Skelton (2017) *Open Society Justice Initiative* 37; Abeyratne (2014) *Brooklyn Journal of International Law* 5.

⁸⁵⁷ Art 37 of the Indian Constitution states the following with regard to the rights in Part IV: “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”; Simon & Nirmal “Fundamental Rights” in *Human Rights in India* 44; Srikrishna (2008) *International Journal of Legal Information* 242; Bajpai *Child Rights in India* 6; Ibe (2007) *African Human Rights Law Journal* 233; Skelton (2017) *Open Society Justice Initiative* 37; Meer (1993) *SAJHR* 358; Harsh *Human Rights Law in India* 8, 10 citing *People’s Union for Civil Liberties v Union of India*, 2005 SCCLCom 328; RJ Vincent *Human Rights and International Relations* (2002) 127; *Kamlaker v State of Maharashtra*, 2004 (1) All India CF.L.R. 122.

As a directive principle, article 45 held that the state should endeavour to provide free education for all children until they complete the age of 14 years, within ten years of the commencement of the Indian Constitution. Despite this aim in article 45, adequate steps were not taken by the state to improve access and standards of education.⁸⁵⁸ Children were not afforded free and compulsory education as stipulated in article 45. During this time, several NGO's, civil society organisations, trusts and private institutions facilitated and aided in the provision of education to children by investing in non-profit organisations. These non-profit organisations were then able to compensate for the government failing to fulfil the Indian Constitution's aim in article 45.⁸⁵⁹

Several developments took place in the 1990s, which meant a move away from protectionist policies towards more neoliberal economic policies.⁸⁶⁰ This meant opening the economy to foreign investment and allowing for the establishment of profit based educational institutions, which resulted in a vast increase in private schools.⁸⁶¹ These new regulations and policies were met with resistance from civil society organisations who were in favour of using a rights based approach to improve equal access to education.⁸⁶²

For the most part, the courts respected the distinction between the fundamental rights and the directive principles, that is until a more activist stance became favoured.⁸⁶³ The emergence of a more activist court resulted in new jurisprudence which focused on human rights and has in turn resulted in a focus on socio-economic rights which eliminates the separation and prioritisation of certain rights above others.⁸⁶⁴ With the passing of time, the courts have made changes by adapting and

⁸⁵⁸ Rosser & Joshi *Policy Research Working Paper 8448* 18.

⁸⁵⁹ Rosser & Joshi *Policy Research Working Paper 8448* 17.

⁸⁶⁰ For the Indian context this meant a reduction in economic regulations and also opening the market to international investors and private institutions. Rosser & Joshi *Policy Research Working Paper 8448* 17.

⁸⁶¹ Rosser & Joshi *Policy Research Working Paper 8448* 17.

⁸⁶² Rosser & Joshi *Policy Research Working Paper 8448* 17.

⁸⁶³ It has been argued that this change was influenced by the state of emergency in India in 1975; Viljoen "Justiciability of socio-economic rights" in *Human Rights in Education* 67; Simon & Nirmal "Fundamental Rights" in *Human Rights in India* 44; Srikrishna (2008) *International Journal of Legal Information* 242; Bajpai *Child Rights in India* 6-7; Harsh *Human Rights Law in India* 141; SP Sathe *Judicial Activism in India* (2002) 6; Srivastava (2004) *Social Change* 113; For more on judicial activism see U Baxi "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [in]justice" in SK Verma & K Kusum *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2006) 155-209.

⁸⁶⁴ Harsh *Human Rights Law in India* 18.

evolving in order to safeguard the fundamental rights and the directive principles enshrined in the Indian Constitution so as to realise socio-economic rights.⁸⁶⁵ The importance of adaptability as part of the practical framework can also be recognised in this context, as the legal framework should be open to development in order to comply with the normative and practical frameworks. The receptiveness and willingness of the courts to adapt has also impacted the right to education. Two Supreme Court cases, *Mohini Jain v State of Karnataka*⁸⁶⁶ and *Unnikrishnan J P v State of A P*,⁸⁶⁷ illustrate this change.⁸⁶⁸

4 2 4 The influence of the courts on the development of the right to education

Both *Mohini Jain v State of Karnataka* (hereafter “*Mohini Jain*”)⁸⁶⁹ and *Unnikrishnan J P v State of A P* (hereafter “*Unnikrishnan*”)⁸⁷⁰ focused on the relationship between fundamental rights and directive principles. At issue was articles 41 and 45 of the Indian Constitution and their relationship to article 21. As stated above, up to this point in time the right to education was provided for in article 45, thereby forming part of the directive principles.⁸⁷¹ Article 45 stipulated that: “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.” Article 41 provides that: “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.” Articles 45 and 41 and their relationship to the fundamental right of the right to life and personal liberty, as provided for in article 21, was at the centre of both these cases.⁸⁷² The right to equality in terms of article 14

⁸⁶⁵ These changes have been attributed to changes in India’s socio-political landscape and a change in interpretative approach followed by the courts; Thiruverangadam *Contextual Analysis* 101.

⁸⁶⁶ *Mohini Jain v State of Karnataka* 1992 SCR (3) 658.

⁸⁶⁷ *Unnikrishnan J P v State of A P* 1993 SCR (1) 594.

⁸⁶⁸ Rosser & Joshi *Policy Research Working Paper 8448* 18.

⁸⁶⁹ 1992 SCR (3) 658.

⁸⁷⁰ 1993 SCR (1) 594.

⁸⁷¹ See section 4 2 3; This was later amended by the Eighty-sixth Amendment Act. This amendment is discussed in more detail in section 4 2 4 and 4 2 5.

⁸⁷² The right to life and personal liberty as set out in art 21 of the Constitution is a fundamental right as it falls in Part III of the Constitution. Art 21 states the following: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”; AM Setalvad “The Supreme Court on Human Rights and Social Justice: Changing Perspectives” in BN Kirpal, AH Desai, S Gopal, R Dhavan & R Ramchandran (eds) *Supreme but not Infallible: Essays in Honour of the Supreme*

of the Indian Constitution also played a significant role.⁸⁷³ This is aptly supportive of the dimensions of the right to education as set out in the dissertation as well as the notion of the right to education as an empowerment right.⁸⁷⁴

As the right to education was non-justiciable, both *Mohini Jain* and *Unnikrishnan* dealt with the issue of making the directive principles “real” and transforming the right to education into a fundamental right.⁸⁷⁵ The cases provided an opportunity to make the right to education a justiciable fundamental right. It should however be noted that the issue in both these cases centred on tertiary education but the Supreme Court felt it was necessary to provide clarity on the right to education in general.

Mohini Jain dealt with tertiary educational institutions and the distinction between capitation fees⁸⁷⁶ and tuition fees which ultimately resulted in a denial of the right to education.⁸⁷⁷ The question of whether the right to education should be an enforceable fundamental right in the Indian Constitution was at the heart of judgment. The judgment noted that the provision of education and establishing educational institutions must be read against the background of the constitutional provisions. The Indian Constitution mandates that the state establish educational institutions in order to realise the right to education – this could be done by state owned or state-recognised institutions.⁸⁷⁸ The availability and accessibility of education as important parts of the practical framework can be recognised here. In *Mohini Jain*, the constitutionality of a private medical college and the manner in which their fees were

Court of India (2011) 248; Ibe (2007) *African Human Rights Law Journal* 235; Sripathi & Thiruvengadam (2004) *International Journal of Constitutional Law* 153; Skelton (2017) *Open Society Justice Initiative* 37; A Feasley “Recognizing Education Rights in India and the United States: All Roads Lead to the Courts” (2014) 26 *Pace International Law Review* 1 3.

⁸⁷³ Art 14 states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

⁸⁷⁴ Section 1 1.

⁸⁷⁵ Interestingly, both these cases concerned issues relating to higher education but had an immense impact of primary education; Sripathi & Thiruvengadam (2004) *International Journal of Constitutional Law* 149; Viljoen “Justiciability of socio-economic rights” in *Human Rights in Education* 67; Kumar (2004) *Tulane Journal of International and Comparative Law* 269; Skelton (2017) *Open Society Justice Initiative* 37, 39; See also Bajpai *Child Rights in India* 26, 346; Simon & Nirmal “Fundamental Rights” in *Human Rights in India* 46; Baxi “The Avatars of Indian Judicial Activism” in *Fifty Years of the Supreme Court of India* 185.

⁸⁷⁶ The Right to Education Act in s 2(b) defines “capitation fees” as: “any kind of donation or contribution or payment other than the fee notified by the school.”

⁸⁷⁷ 1992 SCR (3) 658 661; Viljoen “Justiciability of socio-economic rights” in *Human Rights in Education* 68; BG Ramcharan (ed) *Judicial Protection of Economic, Social and Cultural Rights* (2005) 221-222; Feasley (2014) *Pace International Law Review* 22; Veriava & Skelton (2019) *SAJHR* 11.

⁸⁷⁸ Own emphasis; 1992 SCR (3) 658 660; Feasley (2014) *Pace International Law Review* 22.

charged – with some seats much more expensive than others – was challenged.⁸⁷⁹ The court had to answer the question whether or not the Indian Constitution guaranteed a right to education, and then subsequently if these capitation fees were in violation of the constitutional provisions.⁸⁸⁰

The court found that the institution in question had acted in violation of the right to equality as recognised in article 14 of the Indian Constitution, because the capitation fee resulted in a clear class bias.⁸⁸¹ The relationship between education and other fundamental rights was highlighted by the court: “the right to education is concomitant to the fundamental rights enshrined in Part III of the Constitution. The state is under a constitutional mandate to provide education institutions at all levels for the benefit of the citizen.”⁸⁸² The Supreme Court held that there was an implied fundamental right to education and that the manner in which the fees were structured resulted in a clear and blatant violation of the right to education.⁸⁸³ The argument can be made that the accessibility of education would be impeded due to the capitation fees.

In making its decision, the court came to the conclusion that the right to education formed part of article 21 of the Indian Constitution which recognises the right to life and personal liberty.⁸⁸⁴ The court found that the right to life includes the right to live a life with dignity and education is necessary to achieve this.⁸⁸⁵ The different dimensions of the right to education is also indirectly acknowledged by the emphasising the interrelatedness of human rights. This case serves as the first instance in which the court recognised the right to education as a fundamental right.⁸⁸⁶ The court did

⁸⁷⁹ *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 659; Skelton (2017) *Open Society Justice Initiative* 39; Feasley (2014) *Pace International Law Review* 22.

⁸⁸⁰ *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 659.

⁸⁸¹ *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 659; Bajpai *Child Rights in India* 34; Pillay “Judicial Activism” in *Reasoning Rights* 344.

⁸⁸² *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 670; Setalvad “The Supreme Court on Human Rights and Social Justice *Supreme but not Infallible* 248; Skelton (2017) *Open Society Justice Initiative* 39.

⁸⁸³ *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 661; Skelton (2017) *Open Society Justice Initiative* 39.

⁸⁸⁴ *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 661-666; Kumar (2004) *Tulane Journal of International and Comparative Law* 271; Skelton (2017) *Open Society Justice Initiative* 37; Feasley (2014) *Pace International Law Review* 22.

⁸⁸⁵ *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 660-661; Feasley (2014) *Pace International Law Review* 22; Skelton (2017) *Open Society Justice Initiative* 39.

⁸⁸⁶ *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 670; Skelton (2017) *Open Society Justice Initiative* 39.

however not provide any further information or content as to what the right to education as a fundamental right entails.⁸⁸⁷

From this judgment, it is clear that the accessibility of education is central to the realisation of the right to education.⁸⁸⁸ The practical framework therefore plays an important role in the application of the law and that states deliver the core obligations as set out in the international obligations.⁸⁸⁹

The case of *Unnikrishnan* followed the *Mohini Jain* judgment. Once more the question was whether or not the right to education should be regarded as a fundamental right.⁸⁹⁰ In this instance, a group of medical and engineering students approached the Supreme Court to revisit its judgment in *Mohini Jain* and to clarify the scope of the right to education as a fundamental right.⁸⁹¹ In its interpretation of article 45 of the Indian Constitution, the court emphasised that the article specifically includes a time limit, when no other article in the Indian Constitution does the same.⁸⁹² In reference to the time limit the court asked: “Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution?”⁸⁹³ The court agreed with the decision in *Mohini Jain* that the right to education flows from article 21, but the court did not stop there.⁸⁹⁴ In an exceptional move, the court held that since 44 years had passed, the state’s obligation in terms of article 45 as a directive principle had transformed into a fundamental right.⁸⁹⁵ This is a clear development that is in line with the normative framework that provides for a right to education.

⁸⁸⁷ Skelton (2017) *Open Society Justice Initiative* 39; Comparisons can be drawn between the *Mohini Jain* case and the *Juma Masjid* case of South Africa as both identify the right to education as justiciable and are regarded as notable judgments on the right to education, yet neither provide more clarity on the content of the right to education. Missed opportunities in both instances.

⁸⁸⁸ CESCR *General Comment No 13* para 6; See section 2.5.2.

⁸⁸⁹ See section 5.4.5 relating to the minimum core principle.

⁸⁹⁰ Bajpai *Child Rights in India* 337; Sripathi & Thiruvengadam (2004) *International Journal of Constitutional Law* 152; Kumar (2004) *Tulane Journal of International and Comparative Law* 270.

⁸⁹¹ Feasley (2014) *Pace International Law Review* 23; Skelton (2017) *Open Society Justice Initiative* 39.

⁸⁹² Bajpai *Child Rights in India* 337; Sripathi & Thiruvengadam (2004) *International Journal of Constitutional Law* 152; Kumar (2004) *Tulane Journal of International and Comparative Law* 270; Veriava & Skelton (2019) *SAJHR* 11.

⁸⁹³ *Unnikrishnan J P v State of A P* 1993 SCR (1) 594 656; Bajpai *Child Rights in India* 337.

⁸⁹⁴ *Unnikrishnan J P v State of A P* 1993 SCR (1) 594 656; Kumar (2004) *Tulane Journal of International and Comparative Law* 271; Skelton (2017) *Open Society Justice Initiative* 37; Feasley (2014) *Pace International Law Review* 23; Veriava & Skelton (2019) *SAJHR* 11.

⁸⁹⁵ Ibe (2007) *African Human Rights Law Journal* 235; Sripathi & Thiruvengadam (2004) *International Journal of Constitutional Law* 150; Skelton (2017) *Open Society Justice Initiative* 37; Feasley (2014) *Pace International Law Review* 23.

The court made it clear that its decision was also founded on the basis that the right to education flows from the fundamental right to life and personal liberty as guaranteed by the Indian Constitution.⁸⁹⁶ In this regard the court held that: “the right to education which is implicit in the right to life and personal liberty guaranteed by article 21 must be construed in the light of the directive principles in Part IV of the Constitution.”⁸⁹⁷ In providing scope and content to the right to education, the Supreme Court made it clear that the right to free and compulsory education was applicable to the child until he/she reaches the age of 14. After that age has been reached, the right to any further education is limited within the states’ resources and capacity.⁸⁹⁸

In both these cases, the focus was on higher education and were brought by private litigants. These cases were not brought on the basis of the child’s right to basic education or in collaboration with civil society movements advocating for the child’s right to education.⁸⁹⁹ The importance of both judgments is that they are regarded as ground breaking judgments on school education as the Supreme Court found it fitting to refer to the state’s duty in regard to public schooling as the government had not followed the Indian Constitution’s spirit in allocating resources to education.⁹⁰⁰ Even more significant was the court’s decision that the right to education as set out in article 45 of the directive principles was in fact enforceable by the courts.⁹⁰¹

These two cases are illustrative of the fact that the cases that have only coincidentally referred to the right to basic education, have become central to the constitutional recognition of the right to basic education.⁹⁰² Litigation focusing on education rights in India have formed part of a broader political and social struggle

⁸⁹⁶ *Unnikrishnan J P v State of A P* 1993 SCR (1) 594 603-604, 652; Art 21 of the Indian Constitution; Ibe (2007) *African Human Rights Law Journal* 235; Sathé *Judicial Activism* 13; Bajpai *Child Rights in India* 26; MP Jain “The Supreme Court and Fundamental Rights” in SK Verma & K Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2006) 69; Sripathi & Thiruvengadam (2004) *International Journal of Constitutional Law* 150.

⁸⁹⁷ *Unnikrishnan J P v State of A P* 1993 SCR (1) 594 655; Jain “The Supreme Court and Fundamental Rights” in *Fifty Years of the Supreme Court of India* 69; Bajpai *Child Rights in India* 26; Shankar & Mehta “Courts and Socioeconomic Rights” in *Courting Social Justice* 148; Skelton (2017) *Open Society Justice Initiative* 37.

⁸⁹⁸ Feasley (2014) *Pace International Law Review* 23; Skelton (2017) *Open Society Justice Initiative* 39; Shankar & Mehta “Courts and Socioeconomic Rights” in *Courting Social Justice* 148.

⁸⁹⁹ Skelton (2017) *Open Society Justice Initiative* 39; Rosser & Joshi *Policy Research Working Paper 8448* 18.

⁹⁰⁰ Skelton (2017) *Open Society Justice Initiative* 39.

⁹⁰¹ Skelton (2017) *Open Society Justice Initiative* 39; Rosser & Joshi *Policy Research Working Paper 8448* 18.

⁹⁰² Skelton (2017) *Open Society Justice Initiative* 42; See *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 and *Unnikrishnan J P v State of A P* 1993 SCR (1) 594 as discussed above.

regarding the nature and content of the education. Not only has attention been paid to the policy but also to its implementation. These judgments signify the importance of the judiciary as it was the courts that saw the need to recognise several of the directive principles as fundamental rights.⁹⁰³

The two cases indicate a clear move towards the normative framework that includes a justiciable right to basic education for the child. Moreover, the reliance of the right to education as forming part of article 21, strengthens the dimensions of the right to basic education. The interdependency of rights illustrates rights to, in and through basic education as complementary dimensions of the right to basic education. These cases also illustrate the relevance of both a normative and practical framework as it centres on the development of the legal framework as well as the implementation thereof.

4 2 5 The amendment of the Indian Constitution

The above discussed judgments⁹⁰⁴ served as a catalyst for the need to reform the education system and amend the Indian Constitution to include the right to education in Part III as a fundamental right.⁹⁰⁵ Activist organisations pressured the government to take steps, and they were of the opinion that a movement toward a codified fundamental right to education was crucial to ensure the longevity and legitimacy of the right to education as a fundamental right.⁹⁰⁶ Public debate regarding the right to education was sparked among the broader community and as a result of continuous advocacy campaigns, the government was compelled to act.⁹⁰⁷

Government ultimately responded with the Constitution (Eighty-third Amendment) Bill, 1997 which provided for the inclusion of the right to education as a fundamental right.⁹⁰⁸ Consensus could however not be reached on the Bill, especially in relation to

⁹⁰³ Skelton (2017) *Open Society Justice Initiative* 39.

⁹⁰⁴ See section 4 2 4 above; *Mohini Jain v State of Karnataka* 1992 SCR (3) 658; *Unnikrishnan J P v State of A P* 1993 SCR (1) 594.

⁹⁰⁵ J Heyman, A Raub & A Cassola "Constitutional rights to education and their relationship to national policy and school enrolment" (2014) 39 *International Journal of Educational Development* 131 132; Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 153; Skelton (2017) *Open Society Justice Initiative* 39; Feasley (2014) *Pace International Law Review* 27; Veriava & Skelton (2019) *SAJHR* 12.

⁹⁰⁶ Skelton (2017) *Open Society Justice Initiative* 39; Rosser & Joshi *Policy Research Working Paper 8448* 18; Veriava & Skelton (2019) *SAJHR* 12.

⁹⁰⁷ Rosser & Joshi *Policy Research Working Paper 8448* 18; Bajpai *Children's Rights in India* xiv.

⁹⁰⁸ Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 154; Heyman et al (2014) *International Journal of Educational Development* 132; Bajpai *Child Rights in India* 337; See also P

funding and the obligations of the state. Objections from civil society groups were also raised in relation to the Bill's scope, which only provided for free and compulsory education for children between the ages of 6 and 14. The lack of inclusion of informal and private education was also raised.⁹⁰⁹ With the government dragging its feet, civil society organisations mobilised and several marches were organised throughout the country to campaign for a constitutional amendment.⁹¹⁰

After referral to a parliamentary committee and a change in government, the Bill was reintroduced by the National Democratic Alliance government as the Constitution (86th Amendment) Act, 2001.⁹¹¹ In support of the Bill, the Union Human Resource Development Minister informed the lower house of parliament⁹¹² that nearly 42 million children between the ages of 6 and 14 did not have access to basic education.⁹¹³ This vast number of children not having access to basic education illustrated the need for the Bill to recognise and protect the child's right to basic education.⁹¹⁴

In the end, three amendments were proposed: the inclusion of a new article (21A); amending article 45; and adding a clause to article 51A which incorporates duties of citizens.⁹¹⁵ Even though the proposed amendments were welcomed, as it would have led to the right to education being transformed into a fundamental right, the content and nature of the Bill drew criticism.⁹¹⁶ There four main points of critique were: the limitation of the provision of education to children between the ages of 6 and 14; the lack of proper allocation of resources to ensure successful implementation; the amendment of article 51A which placed the responsibility on parents to provide

Alston & N Bhuta "Human rights and public goods: Education as a fundamental right in India" (2005) *NYU School of Law Public Law & Legal Theory Research Paper series working paper no. 05-18/Center for Human Rights and Global Justice working paper no. 6*. NYU School of Law, New York 1-35; Grewal & Singh (2011) *Early Education and Development* 863–882; S Merhotra "The cost and financing of the right to education in India: can we fill the financing gap?" (2012) 32 *International Journal of Educational Development* 65–71 as cited in Heyman et al (2014) *International Journal of Educational Development* 132.

⁹⁰⁹ Rosser & Joshi *Policy Research Working Paper* 8448 18.

⁹¹⁰ Also referred to as the Shiksha Yatra; Rosser & Joshi *Policy Research Working Paper* 8448 18.

⁹¹¹ Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 154; Bajpai *Child Rights in India* xiv; Rosser & Joshi *Policy Research Working Paper* 8448 18.

⁹¹² Also referred to as the Indian Lok Sabha or House of the People; Kumar (2004) *Tulane Journal of International & Comparative Law* 271; Heyns & Viljoen *Impact of the UN Human Rights Treaties* 298.

⁹¹³ Bajpai *Child Rights in India* xiv.

⁹¹⁴ See the discussion of accessibility as part of the 4-A scheme in section 2 5 2.

⁹¹⁵ Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 154; M Kaushal "Implementation of the Right to Education in India: Issues and Concerns" (2012) 4 *Journal of Management & Public Policy* 42 43.

⁹¹⁶ Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 154, 155.

education for children between the ages of 0 and 5; and failure to provide definitions for “free” and “compulsory”.⁹¹⁷

The proposed limitation of the state’s obligation to only provide free education to children between the ages of 6 and 14, drew the most criticism, especially in light of the jurisprudence which gave rise to the proposed amendments.⁹¹⁸ The Supreme Court in the *Unnikrishnan* case provided that the right to education as a fundamental right should be interpreted to mean the provision of free education up to the age of 14.⁹¹⁹ The proposed amendment consequently weakened the recognition and scope of the right to education as determined in the *Unnikrishnan* case.⁹²⁰ The amended version of article 45 however provides for early childhood care and the education of children below the age of 6 years as it states that: “The State shall endeavor to provide early childhood care and education for all children until they complete the age of 6 years”.⁹²¹ This means that article 21A provides a fundamental right to free and compulsory education to children between the ages of 6 and 14 and article 45 as a directive principle provides for early childhood care for children up to the age of 6. The argument has accordingly been made that if the amended article 45 is read with article 21 of the Constitution, thereby following the *Unnikrishnan* case, a fundamental right to free and compulsory education would be accessible for children between the ages of 0 and 6.⁹²²

In debating the Bill in the lower house of parliament, these criticisms were also raised. Nevertheless, when it came to voting, the lower house unanimously passed the Bill and thereafter the upper house of parliament also voted to pass the bill.⁹²³ In

⁹¹⁷ While The Right to Education Act of 2009 does not provide a definition for “compulsory education” it now provides for an explanation of “compulsory education” in section 8(a)(i) and (ii). The section provides that “compulsory education” means that the government has the obligation to provide free elementary education to all children between the ages of 6 and 14. Government must also ensure compulsory admission, attendance and completion of education of all children between the ages of 6 and 14; Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 155, 156.

⁹¹⁸ See especially *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 and *Unnikrishnan J P v State of A P* 1993 SCR (1) 594 as discussed above; Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 155; Kumar (2004) *Tulane Journal of International and Comparative Law* 273.

⁹¹⁹ Bajpai *Child Rights in India* 338.

⁹²⁰ Kumar (2004) *Tulane Journal of International and Comparative Law* 273; Bajpai *Child Rights in India* 338; M Dubey “The Right of Children to Free and Compulsory Education Act, 2009: The Story of a Missed Opportunity” (2010) 40 *Social Change* 1-13.

⁹²¹ Dubey (2010) *Social Change* 9.

⁹²² Dubey (2010) *Social Change* 9.

⁹²³ The upper house of parliament is also known as the Rajya Sabha or Council of States; Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 156; Kumar (2004) *Tulane Journal*

December 2002, the Bill was signed by the President.⁹²⁴ The Indian Constitution was consequently amended to incorporate the proposals. A number of years however passed before they were enforceable as it was necessary to draft legislation giving effect to article 21A. In 2009, the Right of Children to Free and Compulsory Basic Education Act (hereafter the “Right to Education Act”)⁹²⁵ was assented to and came into operation on the 1st of April 2010⁹²⁶ – the Constitution (Eighty-sixth Amendment) Act of 2002 then also came into operation on the same date.⁹²⁷ The Indian Constitution has therefore been amended to include a justiciable right to free and compulsory education for the child in article 21A that is in line with the normative framework.

Article 21A recognises the right to education as follows: “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”⁹²⁸ The provision includes both of the elements of basic education as provided for in article 28 of the CRC: free and compulsory education.⁹²⁹ Article 21A can however be criticised for a number of reasons. A lack of definition for the concept of “free” in relation to free education is problematic.⁹³⁰ The current claim is that the Indian government provides free education as fees are not charged.⁹³¹ Although article 21A can be criticised, the constitutional amendment to recognise the right to education as a fundamental right, can be viewed as a step toward fulfilling the obligations set by article 28 of the CRC. This means that the CRC is complied with in this instance as the normative framework requires a right to education for the child.⁹³² It is also important to note that article 21A does not only recognise the right to education as a socio-economic right, but also as a children’s right as the right is specifically afforded to the child. A children’s rights centred approach is accordingly favoured.

of International & Comparative Law 271; Heyns & Viljoen *Impact of the UN Human Rights Treaties* 298; Bajpai *Child Rights in India* xiv.

⁹²⁴ Sripati & Thiruvengadam (2004) *International Journal of Constitutional Law* 156.

⁹²⁵ Act no 35 of 2009; See section 4 2 6 below for a discussion of the Act; Dubey (2010) *Social Change* 1.

⁹²⁶ N Thapliyal “Unacknowledged rights and unmet obligations: an analysis of the 2009 Indian Right to Education Act” (2012) 12 *Asia-Pacific Journal on Human Rights and the Law* 65 65.

⁹²⁷ Skelton (2017) *Open Society Justice Initiative* 40.

⁹²⁸ Veriava & Skelton (2019) *SAJHR* 12.

⁹²⁹ See section 2 4 4 1 of chapter 2.

⁹³⁰ See section 1 4.

⁹³¹ Bajpai *Child Rights in India* 338.

⁹³² Article 28 of the CRC; See section 2 4 4 1

In examining the application of the 4-A scheme, the elements of availability and accessibility and its relationship to articles 28 and 29 of the CRC, several observations can be made. Availability means that a sufficient amount of schools must be available for children to attend,⁹³³ and the CRC sets out that these institutions should provide for free and compulsory basic education.⁹³⁴ In order for education to be accessible, it needs to be economically accessible. This element of the practical framework is directly acknowledged in article 21A as it provides for free education. Article 21A also conforms to the normative framework as it provides for free and compulsory education.⁹³⁵

4 2 6 The Right of Children to Free and Compulsory Basic Education Act (The Right to Education Act)

As noted above, in order to give effect to article 21A of the Constitution and to implement the right to basic education, the Right to Education Act was enacted.⁹³⁶ This is in line with articles 51(c) and 253 of the Indian Constitution, which provides for the enactment of legislation to fulfil international obligations. The Right to Education Act provides for free and compulsory education for children in a specific age group;⁹³⁷ norms and standards applicable to all schools,⁹³⁸ teacher qualifications, and it also prohibits certain elements such as physical punishment and mental harassment;⁹³⁹ screening for admission; and capitation fees.

⁹³³ CESCR *General Comment No 13* para 6(a); section 2 5 1.

⁹³⁴ Article 28 of the CRC; See section 2 4 4 1.

⁹³⁵ Article 21A of the Indian Constitution; See sections 4 2 4 and 4 2 5.

⁹³⁶ The Right to Education Act was passed in 2009 and came into effect on 1 April 2010; Feasley (2014) *Pace International Law Review* 29; Dubey *Social Change* (2011) 1; Skelton (2017) *Open Society Justice Initiative* 38; S Khastagir "Universal Elementary Education in India: A Reality Check" (2016) 46 *Social Change* 91 92; Kaushal (2012) *Journal of Management & Public Policy* 43; Veriava & Skelton (2019) *SAJHR* 12.

⁹³⁷ S 3(1) of the Right to Education Act.

⁹³⁸ See discussion below at section 4 2 6 4; s 19 of the Right to Education Act; The Right of Children to Free and Compulsory Education Act No 35 of 2009: The Schedule: Norms and Standards for a School; Veriava & Skelton (2019) *SAJHR* 12.

⁹³⁹ S 17 of the Right to Education Act.

4 2 6 1 Age in terms of the Right to Education Act

Chapter II of the Right to Education Act focuses on the child's right to free and compulsory education. The Right to Education Act in article 3(1) follows the Indian Constitution in limiting the state's obligation to provide free primary education⁹⁴⁰ to children between the ages of 6 and 14.⁹⁴¹ Notably, the Right to Education Act also defines the child as "a male or female child of the age of [6] to [14] years."⁹⁴² Once again, the normative framework can be identified in the legislation as it provides the child with the right to education. Accessibility is also applicable as the Right to Education Act affords the right to free primary education to all children in the specific age group, making it easier for children that fall within this age group to access education.

4 2 6 2 Free basic education in terms of the Right to Education Act

The element of "free" basic education is specified in article 3(2) of the Right to Education Act.⁹⁴³ The provision stipulates that "no child shall be held liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education". With India having one of the largest elementary education systems in the world, the need to make education economically accessible is central to realising the child's right to education.⁹⁴⁴ In an effort to increase attendance and enrolment, article 3(2) has been applied by all state governments. Tuition fees have consequently been abolished in all government schools, as well as local body and aided schools, for the child's primary (elementary) education.⁹⁴⁵ This

⁹⁴⁰ S 2(f) of the Right to Education Act defines elementary education as education from first class to eighth class; Skelton (2017) *Open Society Justice Initiative* 37, 40; R Cheruvalath "Is the right of children to free and compulsory education act really beneficial to the poorer children in India? An analysis with special reference to the admission of poorer children in public unaided schools?" (2015) 43 *International Journal of Primary, Elementary and Early Years Education* 619 619; Kaushal (2012) *Journal of Management & Public Policy* 43; Veriava & Skelton (2019) *SAJHR* 12.

⁹⁴¹ See section 4 2 5 above; Skelton (2017) *Open Society Justice Initiative* 37.

⁹⁴² S 2(c) of the Right to Education Act.

⁹⁴³ Veriava & Skelton (2019) *SAJHR* 12.

⁹⁴⁴ UNCRC "Initial reports of States parties due in 1995: India" (1997) UN Doc CRC/C/28.Add.10 para 232; See section 2 5 2.

⁹⁴⁵ Primary or elementary education in India is divided into lower primary and upper primary which is from class I to VIII; UNCRC "Initial reports of States parties due in 1995: India" (1997) UN Doc CRC/C/28.Add.10 para 232; UNCRC "Second Periodic reports of State parties due in 2000: India" (2001) UN Doc CRC/C/93/Add.5 para 748.

is a major move towards free education in terms of article 28 of the CRC and the normative framework.

As discussed in chapter 2,⁹⁴⁶ free education is not limited to not paying tuition fees. On a simple reading of article 3(2) it is clear that reference is not only made to school fees. The article specifically refers to “charges” or “expenses” which could prevent the child from pursuing their education or the completion thereof. One could argue that “fees” refer to school fees and the “charges” and/or “expenses” could refer to other indirect fees such as textbooks. The article does not provide a blanket prohibition on the charging of fees, charges or expenses - but emphasises that they should not prevent children from being able to pursue or complete their education. The Right to Education Act can consequently be seen as providing scope to free education as recognised in the Indian Constitution.⁹⁴⁷ Economic accessibility as part of the practical framework is central to free education in this regard as provision is not only made for school fees but also other costs that could prevent or inhibit education being accessible. The Right to Education Act is cognisant of the different components of economic accessibility.⁹⁴⁸

4 2 6 3 Section 12 of the Right to Education Act

With education not being free to all learners and educational opportunities not being equal, measures have been implemented by the government in order to provide alternative options to those that cannot afford school fees and charges. Accessibility in terms of the practical framework is highlighted in these instances. In an attempt to provide equal educational opportunities, the Right to Education Act provides in section 12, that 25% of children in private schools should be learners from disadvantaged backgrounds.⁹⁴⁹ This section of the Act is regarded by many as controversial.⁹⁵⁰ Learners forming part of the 25% do not pay school fees but the fees are paid to the

⁹⁴⁶ See section 2 4 4.

⁹⁴⁷ When comparing art 21A of the Indian Constitution to s 3(2) of the Right to Education Act; Grewal & Singh (2011) *Early Education and Development* 873.

⁹⁴⁸ CESCR *General Comment No 13* para 6(b); See section 2 5 2.

⁹⁴⁹ S 12(1)(c) of the Right to Education Act; Skelton (2017) *Open Society Justice Initiative* 40; Feasley (2014) *Pace International Law Review* 29; Cheruvalath (2015) *International Journal of Primary, Elementary and Early Years Education* 619; Veriava & Skelton (2019) *SAJHR* 13.

⁹⁵⁰ Skelton (2017) *Open Society Justice Initiative* 40; Kaushal (2012) *Journal of Management & Public Policy* 44.

schools by the government. However, the amount is set by the state at its cost per child or the fee set by the school per child – whichever is lowest.⁹⁵¹ After the enactment of the Right to Education Act, litigation focusing on education and the Act has substantially been aimed at the application of the Act in relation to private schools – with section 12 at the centre of the litigation.⁹⁵² With equal access to quality education a central issue in these instances, NGO's have stepped in to aid the government in order to safeguard the Act from challenges brought by private schools.⁹⁵³

The application of the Right to Education Act was eventually challenged by private schools in the case of *Society for Un-aided Private Schools of Rajasthan vs Union of India*.⁹⁵⁴ It was argued that section 12 of the Act was not applicable to private schools and that it violated the rights of private schools in terms of articles 19 and 30 of the Constitution.⁹⁵⁵ These two provisions recognise the rights of minorities to establish their own educational institutions (article 30(1)) and the right to practice a profession without the interference of the government (article 19(g)). Eventually, the Supreme Court held that the child's right to free and compulsory education is enforceable against private schools and section 12 was applicable to private schools.⁹⁵⁶ The court deemed section 12 as a reasonable restriction of the rights of private schools by taking the public interest into account.⁹⁵⁷

Free education for these children attending private schools is a way in which the Indian government not only attempts to fulfil its obligations in terms of the CRC and the normative framework, but it also attempts to address the issues of equal

⁹⁵¹ Or the amount charged per child if it is less; Skelton (2017) *Open Society Justice Initiative* 40. Feasley (2014) *Pace International Law Review* 30; Cheruvalath (2015) *International Journal of Primary, Elementary and Early Years Education* 619; Veriava & Skelton (2019) *SAJHR* 13.

⁹⁵² The focus on litigation centred on private schools in India can be compared to the South African position where education litigation has focused on language in schools. Both are indicative of litigation which is not necessarily viewed as strategic litigation, but rather litigation which focuses on the education rights of the more wealthy; Skelton (2017) *Open Society Justice Initiative* 41.

⁹⁵³ Skelton (2017) *Open Society Justice Initiative* 41.

⁹⁵⁴ *Society for Unaided Private Schools of Rajasthan v Union of India & Another* (2012) 6 SCC Writ Petition (C) No. 95 of 2010; Rosser & Joshi *Policy Research Working Paper 8448* 21; Feasley (2014) *Pace International Law Review* 30; Veriava & Skelton (2019) *SAJHR* 13.

⁹⁵⁵ Veriava & Skelton (2019) *SAJHR* 13.

⁹⁵⁶ The Right to Education Act is applicable to schools as defined in s 2(n); The Supreme Court did make an exception to the application of the Act, by excluding unaided minority schools as well as non-minority schools which do not receive aid or grant from the government to cover expenses; *Society for Unaided Private Schools of Rajasthan v Union of India & Another* (2012) 6 SCC para 7; Rosser & Joshi *Policy Research Working Paper 8448* 21; Feasley (2014) *Pace International Law Review* 30; Cheruvalath (2015) *International Journal of Primary, Elementary and Early Years Education* 619-620; Veriava & Skelton (2019) *SAJHR* 13.

⁹⁵⁷ Veriava & Skelton (2019) *SAJHR* 13.

opportunities and discrimination in education thereby improving accessibility of education. The normative and practical frameworks both fulfil important roles. However, since the section is still highly controversial, it faces opposition and challenges with regard to its implementation.⁹⁵⁸ As the practical framework is central to the implementation of the right to education, it can play a valuable role if applied with regard to section 12 cases. Social stigmatisation continues to be a problem, together with schools denying places by arguing that there are no seats available for the disadvantaged learners.⁹⁵⁹ This results in the education not being accessible to disadvantaged learners. The payment of fees is also problematic as the state is responsible for the subsidy as set by them and not the school. This means that in most instances the fee paid by the State falls short of the tuition fee charged by the school.⁹⁶⁰ Although the Act attempts to provide equal educational opportunities, it is silent on who should bear the indirect additional costs associated with the children given the opportunity to attend the private schools. In some instances this has resulted in the schools then charging higher fees in order to make up for the “loss”, which has been resisted by the other parents.⁹⁶¹

The section 12 cases⁹⁶² illustrate the relationship between the right to education and other rights by recognising the right to equality as a right in education as well as a right through basic education. These cases indicate the interrelationship of rights to, in and through education by acknowledging equal educational opportunities. The Indian Constitution recognises the importance of non-discrimination and equality in several articles.⁹⁶³ The right to equality is importantly emphasised directly in relation to the right to education article 29(2).⁹⁶⁴ This fundamental right states that: “No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out State funds on the grounds only of religion, race, caste, language or

⁹⁵⁸ Rosser & Joshi *Policy Research Working Paper 8448* 20-21; Kaushal (2012) *Journal of Management & Public Policy* 44.

⁹⁵⁹ Rosser and Joshi *Policy Research Working Paper 8448* 20; Kaushal (2012) *Journal of Management & Public Policy* 44.

⁹⁶⁰ Rosser & Joshi *Policy Research Working Paper 8448* 20.

⁹⁶¹ Rosser & Joshi *Policy Research Working Paper 8448* 21.

⁹⁶² For example *Society for Unaided Private Schools of Rajasthan v Union of India & Another* (2012) 6 SCC Writ Petition (C) No. 95 of 2010.

⁹⁶³ Art 14 of the Indian Constitution provides for equality before the law and art 15 prohibits discrimination on the grounds of religion, race, caste, sex or place or birth. Art 14 of the Indian Constitution states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

⁹⁶⁴ Forming part of cultural and education rights set out in arts 29 to 31D of the Indian Constitution.

any of them.”⁹⁶⁵ The CRC guiding principle of non-discrimination can therefore be identified in the Indian Constitution.⁹⁶⁶ The dimensions of the right to basic education are consequently reinforced in the section 12 cases.

When analysing free basic education in India in light of the 4-A scheme, it is clear that all four A’s are relevant: accessibility, adaptability, availability and acceptability.⁹⁶⁷ The notion of free basic education highlights the right to non-discrimination and equality. This in turn can be linked to the accessibility of education. Education must be accessible to all – both physically and economically.⁹⁶⁸ Accessibility to education should be non-discriminatory and also inclusive of marginalised groups. Section 12 of the Right to Education Act could be regarded as a way in which education is made more economically accessible.⁹⁶⁹ Accessibility also goes hand in hand with acceptability. Only when education is accessible to all, and thereby also non-discriminatory, can it be acceptable. When education is not accessible due to fees or charges it does not fulfil the requirements of being accessible or acceptable in terms of the practical framework. Education that is adaptable requires that past inequalities be addressed.⁹⁷⁰ Section 12 directly tries to fulfil this requirement as it refers specifically to children from disadvantaged backgrounds being given the opportunity to attend private schools. Section 12 of the Right to Education Act makes positive strides in order to meet the practical framework.

The availability of education is also a core element of the practical framework. The availability of education not only requires a sufficient number of schools in order for all children to be able to receive an education, but also includes the availability of textbooks, transportation and other materials.⁹⁷¹ The availability of education thus not only relates to fees but also indirect costs. The Right to Education Act acknowledges the indirect costs that can be associated with education in that it provides not only for fees but also charges and expenses.⁹⁷² If fees, charges or expenses prevent a child

⁹⁶⁵ Art 29(2) of the Indian Constitution.

⁹⁶⁶ Section 24(4)(3).

⁹⁶⁷ See section 2.5; CESCR *General Comment No 13* para 6.

⁹⁶⁸ CESCR *General Comment No 13* para 6(b); See section 2.5.2.

⁹⁶⁹ CESCR *General Comment No 13* para 6(b); See section 2.5.2.

⁹⁷⁰ CESCR *General Comment No 13* para 6(d); See section 2.5.4.

⁹⁷¹ CESCR *General Comment No 13* para 6(a); See section 2.5.1.

⁹⁷² S 3(2) of the Right to Education Act.

from pursuing their education it threatens the availability, accessibility and acceptability of education.

4 2 6 4 Norms and standards in terms of the Right to Education Act

The Right to Education Act not only regulates education in general, but also establishes norms and standards that apply to schools.⁹⁷³ The application and implementation of these norms and standards are closely related to the practical framework. The norms and standards relate to student-teacher ratios,⁹⁷⁴ infrastructure such as sanitation and toilets, availability of drinking water and meals, as well as the availability and safety of playgrounds.⁹⁷⁵ With this piece of legislation serving as the framework for the child's right to basic education, it is important that it not only provides specifically for the right to basic education as generally understood and recognised,⁹⁷⁶ but also for rights in and through basic education. Some cases have however come before the courts addressing issues related to norms and standards relating to infrastructure, teacher-student ratios and the high number of out-of-school children.⁹⁷⁷

In order to be in line with the child's best interests, student-teacher ratios should be advantageous to the child.⁹⁷⁸ Teacher education and employment remains a major obstacle in India as the high ratio between learners and teachers continues and the number of children not attending school is estimated to be in the tens of thousands.⁹⁷⁹

⁹⁷³ S 19 of the Right to Education Act; Schedule to the Right to Education Act: Norms and Standards for a School.

⁹⁷⁴ S 25 of the Right to Education Act.

⁹⁷⁵ Schedule to the Right to Education Act: Norms and Standards for a School item 2:
 "all-weather building consisting of
 at least one class-room for every teacher and an office-cum-store-cum-Head teacher's room;
 barrier-free access
 separate toilets for boys and girls
 safe and adequate drinking water facility to all children
 a kitchen where mid-day meal is cooked in the school
 playground
 arrangements for securing the school building by boundary wall of fencing"

⁹⁷⁶ Skelton (2017) *Open Society Justice Initiative* 38; Khastagir (2016) *Social Change* 92.

⁹⁷⁶ Skelton (2017) *Open Society Justice Initiative* 28.

⁹⁷⁷ See for example *Lalit Kumar v the State of Uttarakhand*, 19 November 2016, Writ Petition (S/S) No. 1576 of 2016; *Avinash Mehrotra v Union of India*, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398; *Environmental & Consumer Protection Foundation v Delhi Administration* [2012] INSC 584; *Registrar (Judicial) of High Court of Karnataka v State of Karnataka WP 15768 of 2013* (High Court of the State of Karnataka decision) as discussed in this section.

⁹⁷⁸ Art 3 of the CRC; CESCR *General Comment No 13* para 7.

⁹⁷⁹ RTE Forum Report *Status of Implementation of the Right of Children to Free and Compulsory Education Act, 2009: Year 5: 2014–2015* (2015); The Report of the RTE Forum is based on a sample

If student-teacher ratios are not beneficial, it affects the acceptability and the availability of the child's education. Availability does not merely require a sufficient number of schools – but also teachers.⁹⁸⁰ And if the availability of the education is hampered by a lack of teachers, it could also lead to the acceptability of the education being impaired.

The Right to Education Act sets standards in terms of section 25 which regulates teacher qualifications.⁹⁸¹ As noted previously, the child's right to basic education does not merely entail access to schooling. The quality of basic education also plays a role in establishing whether or not the right to basic education has been realised. The qualification of teachers has a direct impact on the quality of education, and in turn the acceptability of education. As the Right to Education Act sets out the standards, one would assume that states would have to comply. Regrettably, in their hiring practices states can create exemptions which enable them to deviate from the Act.⁹⁸² In *Lalit Kumar v the State of Uttarakhand* (hereafter "*Lalit Kumar*")⁹⁸³ the state hiring practices were challenged.⁹⁸⁴ The court held that teachers must pass a specific test, known as the Teacher Evaluation Test (TET), in order to be hired.⁹⁸⁵ This is a positive development for the regulation of teacher qualifications and the need for quality education that is acceptable in terms of the practical framework.

Two cases before the Supreme Court have shed some light on norms and standards on infrastructure of schools: *Avinash Merhotra v Union of India* (hereafter "*Avinash Merhotra*")⁹⁸⁶ and *Environment & Consumer Protection Foundation v Delhi*

study of data collected from 10 Indian states in different parts of the country, spanning about 500 schools; Skelton (2017) *Open Society Justice Initiative* 40.

⁹⁸⁰ CESC General Comment No 13 para 6(a); See section 25 1.

⁹⁸¹ S 25 of the Right to Education Act:

"(1) Within six months from the date of commencement of this Act, the appropriate Government and the local authority shall ensure that the Pupil-Teacher Ratio, as specified in the Schedule, is maintained in the each school.

(2) For the purpose of maintaining the Pupil-Teacher Ratio under sub-section (1), no teacher posted in a school shall be made to serve in any other school or office or deployed for any non-educational purpose, other than those specified in section 27."; Rosser & Joshi *Policy Research Working Paper 8448* 21.

⁹⁸² Rosser & Joshi *Policy Research Working Paper 8448* 21.

⁹⁸³ *Lalit Kumar v the State of Uttarakhand*, 19 November 2016, Writ Petition (S/S) No. 1576 of 2016.

⁹⁸⁴ *Lalit Kumar v the State of Uttarakhand*, 19 November 2016, Writ Petition (S/S) No. 1576 of 2016 para 2; Rosser & Joshi *Policy Research Working Paper 8448* 21.

⁹⁸⁵ *Lalit Kumar v the State of Uttarakhand*, 19 November 2016, Writ Petition (S/S) No. 1576 of 2016 para 3; Rosser & Joshi *Policy Research Working Paper 8448* 21.

⁹⁸⁶ *Avinash Mehrotra v Union of India*, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398.

Administration (hereafter “*Environment and Consumer Protection Foundation*”).⁹⁸⁷ In *Avinash Mehrotra* a school fire resulted in the death of 93 children.⁹⁸⁸ It was contended that uniform safety standards were required and should be adopted by all schools.⁹⁸⁹ In interpreting article 21A of the Indian Constitution, the Supreme Court held that the right to education also included the right to receive education at a school that was safe.⁹⁹⁰ Once more, the interrelatedness of the child’s rights are emphasised as well as the different dimensions of the right to education. In its judgment, the court shed light on the unsafe school building and that the specific school, like so many others in India, did not comply with the safety regulations.⁹⁹¹ The Supreme Court urged the implementation of safety norms and standards in schools, such as the installation of fire extinguishers and inspections to ensure the required safety codes and fire safety training were met and up to date, by means of a notice that required states to file affidavits reporting on the status of their schools.⁹⁹² From this judgment, the importance of the acceptability of education in providing a safe school environment is easily identifiable. If schools are not safe and pose a risk to the child’s safety, the practical framework is not adhered to as the education is clearly not acceptable. This means that not only is the child’s right to basic education threatened but also rights in and through basic education such as the right to life.

Sanitation, and specifically the availability of useable toilets, at schools was at the centre of the *Environment & Consumer Protection Foundation* case.⁹⁹³ The NGO, Environment & Consumer Protection Foundation, filed a petition requesting the installation of basic facilities for all schools. With the petition being filed before the

⁹⁸⁷ *Environmental & Consumer Protection Foundation v Delhi Administration* [2012] INSC 584; Skelton (2017) *Open Society Justice Initiative* 43.

⁹⁸⁸ *Avinash Mehrotra v Union of India*, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398 para 1, 40; Skelton (2017) *Open Society Justice Initiative* 43; Rosser & Joshi *Policy Research Working Paper* 8448 21.

⁹⁸⁹ *Avinash Mehrotra v Union of India*, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398 para 10; Skelton (2017) *Open Society Justice Initiative* 43; Veriava & Skelton (2019) *SAJHR* 14.

⁹⁹⁰ *Avinash Mehrotra v Union of India*, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398 para 37; Skelton (2017) *Open Society Justice Initiative* 43; Rosser & Joshi *Policy Research Working Paper* 8448 21; Veriava & Skelton (2019) *SAJHR* 15.

⁹⁹¹ *Avinash Mehrotra v Union of India*, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398 para 6-7; The judgment refers to the fact that the building had a thatched roof that violated regulations, as well as only one entrance and exit, classrooms without windows, bad ventilation throughout the building and narrow stairs; Veriava & Skelton (2019) *SAJHR* 14.

⁹⁹² *Avinash Mehrotra v Union of India*, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398 para 15, 40; Skelton (2017) *Open Society Justice Initiative* 43; Veriava & Skelton (2019) *SAJHR* 14-15.

⁹⁹³ *Avinash Mehrotra v Union of India*, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398 para 2; Skelton (2017) *Open Society Justice Initiative* 43; Rosser & Joshi *Policy Research Working Paper* 8448 21; Veriava & Skelton (2019) *SAJHR* 15.

Right to Education Act was enacted and the Act coming into operation during the proceedings of this case, the Supreme Court's first step was to request that all state governments file affidavits setting out the compliance of their schools with the norms and standards as set out in the Right to Education Act.⁹⁹⁴ States were then given six months to bring schools in line with the norms and standards of the Act.⁹⁹⁵ Despite the Supreme Court mandating government to take the necessary steps to comply with the Act, a recent study indicated that 13% of all Indian primary schools still do not provide toilet facilities for girls.⁹⁹⁶ This is unfortunate as many girls drop out of school or do not attend school for periods at a time if they do not have access to toilet facilities once they reach puberty.⁹⁹⁷ The right to dignity as a right in and through education is also central to the provision of sanitation facilities, especially for girls.⁹⁹⁸ Accessibility, availability and acceptability in line with the practical framework is applicable in this instance. When schools do not provide for adequate and sufficient toilet facilities for girls, it means that these schools are no longer accessible to girls. This in turn results in the education not being acceptable. Furthermore, availability of education means that provision should not only be made for sufficient schools but also the facilities in the schools. Without the availability of acceptable infrastructure such as sanitation and toilet facilities, the practical framework is not fulfilled.

A lack of proper sanitation and toilet facilities also pose a serious health risk to a child, which could in the worst circumstances lead to their death. This results not only in the right to basic education not being realised, but an infringement of the child's right to life, survival and development⁹⁹⁹ as well as a right in education – the right to an environment that is not harmful to one's health.¹⁰⁰⁰ This means that the normative framework is not adhered to and the dimensions of the right to education is

⁹⁹⁴ See ss 19 and 25 of the Act; See section 4 2 6 4 above for a discussion of the norms and standards in terms of the Right to Education Act; Skelton (2017) *Open Society Justice Initiative* 43; Rosser & Joshi *Policy Research Working Paper 8448* 21; Veriava & Skelton (2019) *SAJHR* 15.

⁹⁹⁵ *Avinash Mehrotra v Union of India*, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398 para 40; Skelton (2017) *Open Society Justice Initiative* 43; Veriava & Skelton (2019) *SAJHR* 15.

⁹⁹⁶ NUEPA (National University of Educational Planning and Administration), "School Education in India: U-DISE 2014-15" <<http://www.dise.in/Downloads/Publications/Documents/U-DISE-SchoolEducationInIndia-2014-15.pdf>> (accessed 05-10-2019); Skelton (2017) *Open Society Justice Initiative* 43.

⁹⁹⁷ Skelton (2017) *Open Society Justice Initiative* 43.

⁹⁹⁸ See also BBC News "Indian court orders toilets to be placed in all schools" (2012) <<https://www.bbc.com/news/world-asia-india-19811468>> (accessed 05-10-2019).

⁹⁹⁹ Art 6 of the CRC and also a guiding principle of the CRC; See section 2 4 4 3.

¹⁰⁰⁰ S of 24 of the Constitution.

undermined. Section 39 of the Indian Constitution highlights the importance of the child's health in its directive principle. Section 39(f) provides that the "State shall, in particular, direct its policy towards securing – that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment." Acceptable sanitation and toilet facilities should therefore be provided in order to comply with the normative and practical frameworks.

Unfortunately, both these cases present somewhat of a missed opportunity. Neither cases drew much media attention, nor were they heavily supported by civil society groups or social movements. In both instances the Supreme Court gave broad orders, which provided the possibility of considerably advancing the right to education. Ultimately, the implementation of the orders in *Avinash Merhotra* and *Environment & Consumer Protection Foundation* have been weak.¹⁰⁰¹ As discussed above with regard to the constitutional amendment to include article 21A in the Indian Constitution, civil society organisations can play a vital role in the advancement of the child's right to education.¹⁰⁰² Journalists and civil society organisations consequently have a very important role in ensuring that the government is held accountable as this form of activism can lead to progress in fulfilling international obligations related to the child's right to basic education.

Even though the previous cases did not receive major media attention, others have. A very interesting case made it to the Karnataka High Court in 2013: *Registrar (Judicial) of High Court of Karnataka v State of Karnataka* (hereafter "*Karnataka*")¹⁰⁰³ In this instance an article published in a newspaper¹⁰⁰⁴ led to the Karnataka High Court *suo moto* taking up a public interest petition.¹⁰⁰⁵ The part of the article that motivated the court to take action, stated that approximately 50 000 children were out of school

¹⁰⁰¹ Skelton (2017) *Open Society Justice Initiative* 43; Veriava & Skelton (2019) *SAJHR* 15-16.

¹⁰⁰² See section 4 2 5 above.

¹⁰⁰³ *Registrar (Judicial) of High Court of Karnataka v State of Karnataka WP 15768 of 2013* (High Court of the State of Karnataka decision); Skelton (2017) *Open Society Justice Initiative* 44; Veriava & Skelton (2019) *SAJHR* 16.

¹⁰⁰⁴ *The Hindu* "Glitches that Dog RTE Implementation" (31 March 2013) <<https://www.thehindu.com/news/national/karnataka/The-glitches-that-dog-RTE-implementation/article12407155.ece>> (accessed 05-10-2019); Skelton (2017) *Open Society Justice Initiative* 44; Veriava & Skelton (2019) *SAJHR* 16.

¹⁰⁰⁵ Meaning that the case was initiated by the judge; Skelton (2017) *Open Society Justice Initiative* 44; Rosser & Joshi *Policy Research Working Paper* 8448 22.

in the State of Karnataka.¹⁰⁰⁶ The High Court ordered a survey which revealed the number of out of school children to be closer to 170 000.¹⁰⁰⁷ Several civil society groups were appointed as *amici curiae* and the High Court proposed the formation of a committee with the responsibility to develop new ways of ensuring that these children attend school.¹⁰⁰⁸

Following the case of *Karnataka*, policy changes were made to promote attendance at schools and to aid in lowering the number of out of school children. A very important change was made with regard to the definition of dropping out of school. The amount of days was changed from 60 consecutive days out of school (absent) to seven consecutive days.¹⁰⁰⁹ A study by Skelton, in which she interviewed education department officials from India as well NGO representatives, indicated that this change in policy is considered a major turning point.¹⁰¹⁰ Notifying the learners and their families of their absence after 7 consecutive school days, rather than the previously mandated 60 consecutive schools, meant that children were more likely to return to school.¹⁰¹¹

This case serves as an excellent example of the material impact that case law can have on the realisation of the right to basic education, especially the accessibility and adaptability of education.¹⁰¹² This case is also indicative of the effect and success of the government working together with other role-players and stakeholders in education.¹⁰¹³ A high degree of success has been achieved in getting some of these out-of-school children back into school due to the work of the committee and the effect

¹⁰⁰⁶ *The Hindu* "Glitches that Dog RTE Implementation" (31 March 2013) <<https://www.thehindu.com/news/national/karnataka/The-glitches-that-dog-RTE-implementation/article12407155.ece>> (accessed 05-10-2019); Skelton (2017) *Open Society Justice Initiative* 44.

¹⁰⁰⁷ *The Hindu* "Glitches that Dog RTE Implementation" (31 March 2013) <<https://www.thehindu.com/news/national/karnataka/The-glitches-that-dog-RTE-implementation/article12407155.ece>> (accessed 05-10-2019); Skelton (2017) *Open Society Justice Initiative* 44; Veriava & Skelton (2019) *SAJHR* 16.

¹⁰⁰⁸ Referred to as the High Powered Committee; Skelton (2017) *Open Society Justice Initiative* 44; Rosser & Joshi *Policy Research Working Paper* 8448 21; Veriava & Skelton (2019) *SAJHR* 16.

¹⁰⁰⁹ Skelton *Open Society for Justice Initiative* 64.

¹⁰¹⁰ Skelton (2017) *Open Society Justice Initiative* 64.

¹⁰¹¹ Skelton (2017) *Open Society Justice Initiative* 64.

¹⁰¹² Skelton (2017) *Open Society Justice Initiative* 59.

¹⁰¹³ In this case the High Court emphasised cooperation with the appointment of *amici curiae* in order for intervention applications to be filed. Furthermore, the formation of a committee consisting of NGO's, different governmental departments, lawyers and civil society movements aided in the process; Skelton (2017) *Open Society Justice Initiative* 44, 59.

of the litigation.¹⁰¹⁴ Between the period of November 2013¹⁰¹⁵ and March 2015 the numbers have dropped significantly from 170 000 to 15 000 children that are out of school.¹⁰¹⁶ Of course, attendance at schools (or access to schooling) does not necessarily result in the right to basic education being fully realised. Paying attention only to the numbers can be dangerous, as pointed out by the NGO's.¹⁰¹⁷ Advancing attendance and access to schooling is a crucial first step in the realisation of the child's right to basic education. Attention can then be paid to monitoring whether or not these children are actually learning, and not just merely attending school.¹⁰¹⁸

The norms and standards as set out in the Right to Education Act provides a very important outline for the child's rights to education. The norms and standards related to school infrastructure is an ideal demonstration of the manner in which the practical framework of the 4-A scheme interacts with the dimensions of the right to basic education. Infrastructure refers in this instance to sanitation, drinking water, playgrounds and school buildings. As illustrated in the cases of *Avinash Merhotra* and *Environment & Consumer Protection Foundation*, safety at schools are central to the child's right to basic education, especially the acceptability thereof. If schools are not safe, they not only infringe on the child's right to education but also the guiding principles of the child's right to life, survival and development as recognised in article 6 of the CRC¹⁰¹⁹ as well as the child's best interest in article 3 of the CRC.¹⁰²⁰ When school infrastructure poses a risk to the child's safety, it could lead to injuries or even death. This would clearly not result in basic education that is considered acceptable in terms of the 4-A scheme.¹⁰²¹ The adherence to the practical framework in relation to norms and standard is crucial, as it ultimately supports and strengthens the different dimensions of the child's right to basic education that results in a holistic interpretation of the right to basic education.

¹⁰¹⁴ Skelton (2017) *Open Society Justice Initiative* 44.

¹⁰¹⁵ When the first comprehensive survey was conducted; Skelton *Open Society Justice Initiative* 59.

¹⁰¹⁶ Skelton *Open Society Justice Initiative* 59.

¹⁰¹⁷ Skelton *Open Society Justice Initiative* 59.

¹⁰¹⁸ Skelton *Open Society Justice Initiative* 59.

¹⁰¹⁹ Section 2 4 4 3.

¹⁰²⁰ Section 2 4 4 3.

¹⁰²¹ Section 2 5 3.

4 2 6 5 Implementation of the Right to Education Act

Litigation on the right to education in India has proven positive and the rulings have been favourable.¹⁰²² The implementation of the court orders has been a different matter, as the government has continuously failed in their implementation thereof.¹⁰²³ With civil societies' and NGO's attention now focused on the implementation of the norms and standards in terms of the Right to Education Act, they have starting taking steps to be proactive and to ensure that government complies with court orders.¹⁰²⁴ One such an example, is the petition that was brought in 2014 in the case of *National Coalition for Education v Union of India* (hereafter "*National Coalition for Education*").¹⁰²⁵ The National Coalition for Education argued that in order for the Right to Education Act to be successfully implemented, directions for all states were necessary. The directions would particularly aid in the implementation of the Right to Education Act in relation to teachers shortages and basic infrastructure needs faced by so many schools.¹⁰²⁶ This petition was an attempt to deal with all the issues that had surfaced in relation to the Right to Education Act.¹⁰²⁷ The Supreme Court eventually decided to dispose the petition based on the reasoning that the relief sought by the National Coalition for Education was too broad. The court held that in this instance it was necessary to approach the High Courts of the various states for implementation directions.¹⁰²⁸ Since the judgment, the National Coalition for Education has filed the case in 16 states.¹⁰²⁹ This case highlights the importance of effective implementation of the legal framework in order to realise the child's right to basic

¹⁰²² Rosser & Joshi *Policy Research Working Paper 8448 22*.

¹⁰²³ This is a problem shared with South Africa as seen in for example *Madzodzo v Minister of Basic Education* 2014 3 SA 441, *Section 27 v Minister of Basic Education* 2014 4 SA 274 (GP); See section 5 5; Rosser & Joshi *Policy Research Working Paper 8448 22*.

¹⁰²⁴ Skelton (2017) *Open Society Justice Initiative* 44; Rosser & Joshi *Policy Research Working Paper 8448 22*.

¹⁰²⁵ WP (C) No. 267 of 2014; Skelton (2017) *Open Society Justice Initiative* 44.

¹⁰²⁶ The following actions were requested: training of teachers; conduct a national survey regarding the out-of school children as well as surveying the schools and their accordance with the Right to Education Act; ensure enrollment of children at schools; upgrading school facilities and infrastructure; to make temporary and contract teachers permanent; ensuring that teachers are not responsible for non-teaching duties; establishing School Management Committees (section 21 of the Right to Education Act); that schools under the national child labour project also comply with the Right to Education Act; private, unaided schools must disclose the number of learners that form part of the 25% quota in terms of section 12(1)(c); Skelton (2017) *Open Society Justice Initiative* 44; Rosser & Joshi *Policy Research Working Paper 23*.

¹⁰²⁷ Rosser & Joshi *Policy Research Working Paper 23*.

¹⁰²⁸ Skelton (2017) *Open Society Justice Initiative* 44; Rosser & Joshi *Policy Research Working Paper 8448 23*.

¹⁰²⁹ Rosser & Joshi *Policy Research Working Paper 8448 23-24*.

education and fulfil obligations. This is also illustrated in the model for compliance, which consists of a normative and practical framework. The model for compliance demonstrates that while both of these frameworks are essential on their own, it is when they are considered and applied simultaneously and in a complementary manner that obligations are fulfilled and the child's right to basic education is ultimately realised.

A 2015 report indicated that governmental figures presented a dire situation for the child's right to education in India.¹⁰³⁰ The report specified that less than 10% of schools were meeting the norms and standards as set by the Right to Education Act. This is clearly not aligned with either the normative or practical frameworks. Clean drinking water and sanitation, specifically separate toilets for boys and girls, has also continued to be a problem.¹⁰³¹ Furthermore, the number of girls not attending school is vast.¹⁰³² A report by the UN¹⁰³³ has estimated that the number of children out of school between the ages of 6 and 13 amounts to a staggering 8.1 million.¹⁰³⁴ In addition, children do not complete school – with an estimated 41% of children dropping out of school by the 8th grade.¹⁰³⁵ This could be due to challenges relating to the accessibility and availability of education. The report also examined the efficacy of the National Commission for the Protection of Child Rights, which was established in 2007. The Commission's mandate is to monitor the implementation of the Right to Education Act.¹⁰³⁶ Research has however indicated that the Commission has been struggling to be effective in its mandate.¹⁰³⁷

¹⁰³⁰ RTE Forum Report *Status of Implementation of the Right of Children to Free and Compulsory Education Act, 2009: Year 5: 2014–2015* (2015) 10; Skelton (2017) *Open Society Justice Initiative* 40.

¹⁰³¹ RTE Forum Report *Status of Implementation of the Right of Children to Free and Compulsory Education Act, 2009: Year 5: 2014–2015* (2015) 13, 40; Skelton (2017) *Open Society Justice Initiative* 40.

¹⁰³² Skelton (2017) *Open Society Justice Initiative* 40.

¹⁰³³ SRI *All India Survey of Out-of-School Children of Age 6-13 Years and Age 5* (2010) 1-149; United Nations in India "UNCT GEFI Task Team Advocacy Campaign 2014" <<https://in.one.un.org/page/unct-gefi-task-team-advocacy-campaign-2014/>> (accessed 06-10-2019).

¹⁰³⁴ SRI *All India Survey of Out-of-School Children of Age 6-13 Years and Age 5* (2010) 45; United Nations in India "UNCT GEFI Task Team Advocacy Campaign 2014" <<https://in.one.un.org/page/unct-gefi-task-team-advocacy-campaign-2014/>> (accessed 06-10-2019); Skelton (2017) *Open Society Justice Initiative* 40.

¹⁰³⁵ SRI *All India Survey of Out-of-School Children of Age 6-13 Years and Age 5* (2010) 45; United Nations in India "UNCT GEFI Task Team Advocacy Campaign 2014" <<https://in.one.un.org/page/unct-gefi-task-team-advocacy-campaign-2014/>> (accessed 06-10-2019); Skelton (2017) *Open Society Justice Initiative* 40.

¹⁰³⁶ See in general NCPDR "Welcome" <<http://ncpcr.gov.in/>> (accessed 12-09-2019); The Commission was set up in terms of the Commissions for Protection of Child Rights Act; Skelton (2017) *Open Society Justice Initiative* 40.

¹⁰³⁷ Skelton (2017) *Open Society Justice Initiative* 40.

It must be acknowledged that the Right to Education Act provides a sound legal framework for the child's right to education.¹⁰³⁸ Moreover, it has the potential to aid in major educational reforms.¹⁰³⁹ It has however been made clear that the implementation of the Right to Education Act has been weak.¹⁰⁴⁰ While the courts have played a positive role, with victories for the child's right to education, the implementation is unfortunately an issue as court orders are not readily implemented.¹⁰⁴¹ It seems that despite the Supreme Court judgments of *Mohini Jain* and *Unnikrishnan* and the enactment of the Right to Education Act, the child's right to education is still facing many challenges in India.¹⁰⁴² This ultimately means that while India's legal framework is normatively strong, the persistent challenge remains implementation. This results in the non-adherence to the practical framework, which then means that one only part of the model for compliance is met. With both frameworks essential to the model for compliance, fulfilling international obligations present a challenge if only one of the two complementary frameworks is adhered to.

4 2 7 India's reporting history to the Committee on the Rights of the Child

As noted above, India was one of the very first states to ratify the CRC.¹⁰⁴³ As a state party to the CRC India must submit regular reports to the CRC Committee, which sets out the ways in which it has fulfilled its obligations.¹⁰⁴⁴ India's first report was submitted in 1997,¹⁰⁴⁵ its second in 2001,¹⁰⁴⁶ and a combined third and fourth report was submitted in 2008.¹⁰⁴⁷ The discussion will focus on the steps India has taken to fulfil its obligations in respect of the child's right to basic education through the lens of the model of compliance. Attention will be paid to the combined third and fourth report,

¹⁰³⁸ Rosser & Joshi *Policy Research Working Paper 8448* 22.

¹⁰³⁹ Veriava & Skelton (2019) *SAJHR* 12.

¹⁰⁴⁰ Rosser & Joshi *Policy Research Working Paper 8448* 22.

¹⁰⁴¹ Rosser & Joshi *Policy Research Working Paper 8448* 22.

¹⁰⁴² Skelton (2017) *Open Society Justice Initiative* 40.

¹⁰⁴³ See section 4 2 1; UNCRC "Third and fourth periodic reports of State parties due in 2008: India" (2011) UN Doc CRC/C/IND/3-4 xxv.

¹⁰⁴⁴ See section 2 4 2 for more information on the CRC Committee and its reporting procedure.

¹⁰⁴⁵ UNCRC "Third and fourth periodic reports of State parties due in 2008: India" (2011) UN Doc CRC/C/IND/3-4 xxv.

¹⁰⁴⁶ UNCRC "Third and fourth periodic reports of State parties due in 2008: India" (2011) UN Doc CRC/C/IND/3-4 xxv.

¹⁰⁴⁷ A combined third and fourth report was submitted on the recommendation of the CRC Committee. UNCRC "Third and fourth periodic reports of State parties due in 2008: India" (2011) UN Doc CRC/C/IND/3-4 xxv.

together with the concluding observations from the CRC Committee. The combined third and fourth report is India's latest country report which sets out the manner in which it has fulfilled its obligations in terms of the CRC.

Before a discussion of India's reports is given, it is important to note that India has made a declaration with regard to the CRC.¹⁰⁴⁸ The declaration centres on the application of article 32, which deals with child labour¹⁰⁴⁹ and the child's social, economic and cultural rights in a more general sense. The declaration reads as follows:

"While fully subscribing to the objectives and purposes of the Convention, realising certain of the rights of the child, namely those pertaining to economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation; recognising that the child has to be protected from exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India – the Government of India undertakes to take measures to progressively implement the provisions of article 32, particularly paragraph 2(a), in accordance with its national legislation and relevant international instruments to which it is a State Party."¹⁰⁵⁰

India has maintained that this reservation does not weaken the state's commitment to the elimination of child labour, but that the reservation is representative of the current realities in India.¹⁰⁵¹ In its reporting to the CRC Committee, India has stated that with regard to their obligations and commitments set out in the CRC, minimum

¹⁰⁴⁸ United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec> (accessed 13-10-2018); UNCRC "Second Periodic reports of State parties due in 2000: India" (2001) UN Doc CRC/C/93/Add.5.

¹⁰⁴⁹ Art 32:

"State Parties recogni[s]e the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

State Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, State Parties shall in particular:

Provide for a minimum age or minimum ages for admission to employment;

Provide for appropriate regulation of the hours and conditions of employment;

Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article."

¹⁰⁵⁰ United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec> (accessed 13-10-2018); See also UNCRC "Second Periodic reports of State parties due in 2000: India" (2001) UN Doc CRC/C/93/Add.5 para 104.

¹⁰⁵¹ UNCRC "Second Periodic reports of State parties due in 2000: India" (2001) UN Doc CRC/C/93/Add.5 para 105.

ages for employment have been set and regular assessment of their position and implementation of article 32 remains an important consideration.¹⁰⁵²

This declaration is important in light of the fact that child labour and education are inextricably linked.¹⁰⁵³ When children start to work at too young an age, their education is put at risk and the accessibility of their education thus becomes a challenge. Children from underprivileged circumstances start to work from an early age in order to contribute to their households. This threatens their education as they either miss or drop out of school. While the obvious choice would be to prohibit child labour, the state is not willing to do this. In line with the adaptability of education as set out in the practical framework, the state should adapt education in order to provide education to those children that work. It must then implement other measures to ensure that these children still receive an education as that is what the needs of the society dictates.

With child labour still a major problem in India, this declaration does not send the right message about India's commitment to the child's rights to, in and through basic education. The CRC Committee has on several occasions criticised the declaration¹⁰⁵⁴ and has urged the withdrawal of the declaration.¹⁰⁵⁵ Unfortunately, the declaration still stands¹⁰⁵⁶ and it is clear the Indian position is not aligned with the practical framework.

The aim of providing free and compulsory education for the child is identified in the first¹⁰⁵⁷ and second report.¹⁰⁵⁸ The first report noted that the state had failed to fulfil its duty of providing free and compulsory education within ten years of the commencement of the Indian Constitution. As discussed above, case law resulted in the Supreme Court declaring the right to education as forming part of the right to

¹⁰⁵² UNCRC "Second Periodic reports of State parties due in 2000: India" (2001) UN Doc CRC/C/93/Add.5 para 105.

¹⁰⁵³ UNCRC "Initial reports of States parties due in 1995: India" (1997) UN Doc CRC/C/28.Add.10 para 39.

¹⁰⁵⁴ UNCRC "Concluding Observations on the combined third and fourth periodic reports of India" (2014) UN Doc CRC/C/IND/CO/3-4 para 9; UNCRC "Concluding Observations of the Committee on the Rights of the Child: India" (2000) UN Doc CRC/C/15/Add.115 para. 66; UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 8.

¹⁰⁵⁵ UNCRC "Concluding Observations on the combined third and fourth periodic reports of India" (2014) UN Doc CRC/C/IND/CO/3-4 para 10.

¹⁰⁵⁶ United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en> (accessed 13-10-2018).

¹⁰⁵⁷ UNCRC "Initial reports of States parties due in 1995: India" (1997) UN Doc CRC/C/28.Add.10 paras 8, 65, 74, 220-221, 239, 292.

¹⁰⁵⁸ UNCRC "Second Periodic reports of State parties due in 2000: India" (2001) UN Doc CRC/C/93/Add.5 paras 10, 13, 81, 120, 741,

personal liberty.¹⁰⁵⁹ The first report also stated that this change is “...aimed at progressive reali[s]ation of the rights under the Convention to which India is signatory.”¹⁰⁶⁰ The reports are therefore indicative of the development of measures taken to fulfil the obligations as set out in the normative framework of articles 28 and 29 of the CRC and recognition of the dimensions of the right to basic education. Once again however, the implementation of the legislation and practical considerations were at issue, highlighting the importance of engaging with the 4A scheme in order to fully realise a child’s right to basic education.

India’s combined third and fourth report provides a good overview of the steps taken by the Indian government in order to fulfil its obligations in terms of the CRC, and consequently the normative framework. From the very beginning, the report identifies the importance of the child’s right to education. The foreword refers specifically to the adoption of the Right to Education Act and the aim of providing free and compulsory education to children between the ages of 6 and 14.¹⁰⁶¹ The need for free and compulsory education as well as the steps that were taken in order to align the domestic legal position with that of article 28 of the CRC were identified.¹⁰⁶² The need to comply with the normative framework is consequently acknowledged. The goal in the report has however not yet been met, with the deadline moving each time.¹⁰⁶³ The combined third and fourth report states that with the adoption of the Right to Education Act, the expectation is to fulfil the obligation of free and compulsory education within three years,¹⁰⁶⁴ in other words by 2011/2012. This goal has unfortunately not been achieved and the struggle for free and compulsory education continues. This

¹⁰⁵⁹ Art 21 of the Indian Constitution; See section 4 2 4 and 4 2 5 above which discusses this change in terms of *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 and *Unnikrishnan J P v State of A P* 1993 SCR (1) 594; UNCRC “Initial reports of States parties due in 1995: India” (1997) UN Doc CRC/C/28.Add.10 paras 75, 292.

¹⁰⁶⁰ UNCRC “Initial reports of States parties due in 1995: India” (1997) UN Doc CRC/C/28.Add.10 paras 75.

¹⁰⁶¹ UNCRC “Initial reports of States parties due in 1995: India” (1997) UN Doc CRC/C/28.Add.10 para 8; See sections 4 2 4 and 4 2 5 for a discussion of the cases of *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 and *Unnikrishnan J P v State of A P* 1993 SCR (1) 594.

¹⁰⁶² See section 2 4 4 1 of chapter 2.

¹⁰⁶³ UNCRC “Initial reports of States parties due in 1995: India” (1997) UN Doc CRC/C/28.Add.10 para 221 refers to the National Education Policy of 1986 which provided that by 1995 children would be provided free and compulsory education up to the age of 14 years. The second report envisages free and compulsory education before the 21st century in box 7.7; See UNCRC “Second Periodic reports of State parties due in 2000: India” (2001) UN Doc CRC/C/93/Add.5 para 860.

¹⁰⁶⁴ UNCRC “Third and fourth periodic reports of State parties due in 2008: India” (2011) UN Doc CRC/C/IND/3-4 Foreword.

development signifies compliance with the normative framework but highlights the continual struggle with implementation.

The report sheds light on an important governmental programme that has been established with the aim of universalising primary education - Sarva Shiksha Abhiyan (SSA).¹⁰⁶⁵ In order to achieve universal elementary education the programme has the aims of the improvement of physical access to schools,¹⁰⁶⁶ the creation of the necessary infrastructure for new schools as well as the reinforcement and updating of infrastructure in schools that have already been established.¹⁰⁶⁷ The different elements of the SSA programme can be regarded as an effort to not only fulfil the obligations set out in article 28 and 29 of the CRC¹⁰⁶⁸ and the four guiding principles,¹⁰⁶⁹ but also to comply with the standards set by the 4-A scheme.¹⁰⁷⁰ Provision is therefore made to not only meet the standards of the normative framework but also the practical framework. Accessibility is highlighted by the SSA in the establishment of new schools for smaller communities. The creation of schools within one kilometre of a “habitation” means that the child’s right to education is safeguarded in that schools are within safe physical reach for children, this in turns also recognises the child’s right to life, survival and development as one of the four guiding principles of the CRC.¹⁰⁷¹ The establishment of schools in smaller communities, means that children do not have to travel far distances in order to access their education.¹⁰⁷² The challenge of reducing drop-out rates also forms part of the physical accessibility of

¹⁰⁶⁵ See in general All India Council for Technical Education “Sarva Shiksha Abhiyan” <<https://www.aicte-india.org/reports/overview/Sarva-Shiksha-Abhiyan>> (accessed 03-05-2019); UNCRC “Third and fourth periodic reports of State parties due in 2008: India” (2011) UN Doc CRC/C/IND/3-4 164.

¹⁰⁶⁶ One of the objectives of the programme is to open new schools in places where facilities are not yet established and also to establish a primary school within 1 kilometer of a habitation, with one upper primary school for every two primary schools in that area; UNCRC “Third and fourth periodic reports of State parties due in 2008: India” (2011) UN Doc CRC/C/IND/3-4 164; All India Council for Technical Education “Sarva Shiksha Abhiyan” <<https://www.aicte-inia.org/reports/overview/Sarva-Shiksha-Abhiyan>> (accessed 03-05-2019).

¹⁰⁶⁷ UNCRC “Third and fourth periodic reports of State parties due in 2008: India” (2011) UN Doc CRC/C/IND/3-4 164; All India Council for Technical Education “Sarva Shiksha Abhiyan” <<https://www.aicte-india.org/reports/overview/Sarva-Shiksha-Abhiyan>> (accessed 03-05-2019).

¹⁰⁶⁸ See section 2 4 4 of chapter 2.

¹⁰⁶⁹ See sections 2 4 4 3.

¹⁰⁷⁰ See section 2 5.

¹⁰⁷¹ CESCR *General Comment No 13* para 6(b)(ii); UNCRC “Third and fourth periodic reports of State parties due in 2008: India” (2011) UN Doc CRC/C/IND/3-4 164; All India Council for Technical Education “Sarva Shiksha Abhiyan” <<https://www.aicte-india.org/reports/overview/Sarva-Shiksha-Abhiyan>> (accessed 03-05-2019); See section 2 5 2 for more on physical accessibility and section 2 4 4 3 for an explanation of the guiding principle of the child’s right to life, survival and development.

¹⁰⁷² See section 4 2 7 for more information on the SSA; See also sections 4 2 4 and 4 2 5.

education because if children cannot travel far distances or if it is unsafe for them to travel to their schools, it results in them dropping out.

When determining the acceptability of education, the programme has made positive contributions, especially with regard to school infrastructure. In order for education to be acceptable, schools must provide a safe environment for learners. This means that the physical infrastructure of schools must have the necessary classrooms and sanitation and water facilities.¹⁰⁷³ The failure to provide such an environment can be seen as an infringement of the child's right to life, survival and development. It could also lead to an infringement of the child's right to dignity if the facilities are not proper or safe. The report indicates that significant progress has been made to improve school infrastructure and facilities such as providing drinking water, toilets and additional classrooms.¹⁰⁷⁴ These improvements have in turn also led to an increase in enrolment of learners.¹⁰⁷⁵ This means that positive steps have been taken to meet the norms and standards as set out in the legislation. Moreover, these steps are also aligned with the practical framework that requires available, accessible, acceptable and adaptable education.

Equal educational opportunities are central to article 28 of the CRC and it stresses not only equality but also non-discrimination.¹⁰⁷⁶ In this regard, the SSA programme also aims to address gender inequalities, which relates to the challenge of ensuring that education is both accessible and adaptable in terms of the practical framework of the 4-A scheme.¹⁰⁷⁷ Education should be accessible to all children, and should be inclusive of girls. By addressing the inequalities of the past, for example girls not being afforded the opportunity to go to school, it safeguards the adaptability of education by providing everyone with equal educational opportunities.¹⁰⁷⁸ Even though the report indicates that significant progress has been made with regards to the realisation of the child's right to education, it also recognises that the education system still faces many

¹⁰⁷³ UNCRC "Third and fourth periodic reports of State parties due in 2008: India" (2011) UN Doc CRC/C/IND/3-4 164.

¹⁰⁷⁴ UNCRC "Third and fourth periodic reports of State parties due in 2008: India" (2011) UN Doc CRC/C/IND/3-4 165.

¹⁰⁷⁵ UNCRC "Third and fourth periodic reports of State parties due in 2008: India" (2011) UN Doc CRC/C/IND/3-4 165.

¹⁰⁷⁶ UNCRC "Third and fourth periodic reports of State parties due in 2008: India" (2011) UN Doc CRC/C/IND/3-4 168; See sections 2 4 4 3.

¹⁰⁷⁷ Section 2 5.

¹⁰⁷⁸ Section 2 5 4.

challenges.¹⁰⁷⁹ It is important that India not only recognises that it has made major improvements but at the same time realises that much can and should still be done in order to ensure the realisation of the child's rights to, in and through basic education. The application of the normative and practical frameworks should therefore not be overlooked as they provide invaluable guidance on fulfilling international obligations and realising the child's right to basic education.

In response to the combined third and fourth report, the CRC Committee provided Concluding Observations.¹⁰⁸⁰ The Concluding Observations start with acknowledging the progress that has already been made, such as the adoption of the Right to Education Act.¹⁰⁸¹ Critique is however also levelled. Inequality in education, especially access to education, is highlighted with the CRC Committee noting the continued discrimination of children from scheduled castes and tribes, children with HIV/AIDS as well as refugee and asylum-seeking children.¹⁰⁸² As the guiding principle of non-discrimination is not achieved, education is neither acceptable, adaptable nor accessible. The argument can therefore be made that the CESCR recognised the developments in order to conform to the normative framework but that compliance with the practical framework is still lacking.

The Concluding Observations also refer to the CRC guiding principle in article 12 – respecting the views of the child.¹⁰⁸³ The CRC Committee voiced its concern that children are in many instances not perceived as rights holders.¹⁰⁸⁴ This ultimately results in the child's voice not being heard with opportunities to participate in the public sphere of schools being far and few between.¹⁰⁸⁵ One of the central features of the child-centred approach of the CRC is that it specifically recognises the child as the holder of rights. This ensures that rights are interpreted from a children's perspective which not only recognises the right to education as a socio-economic right, but specifically as a children's right. The child-centred approach also ensures that the

¹⁰⁷⁹ UNCRC "Third and fourth periodic reports of State parties due in 2008: India" (2011) UN Doc CRC/C/IND/3-4 187; The following challenges are referred to: inflexibility, the pressure of competitive examination, the burden of schooling, migration which has an impact on community support, rapid social change.

¹⁰⁸⁰ UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228.

¹⁰⁸¹ UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 paras 3, 71.

¹⁰⁸² UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 31.

¹⁰⁸³ UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 37; See. section 2 4 4 3.

¹⁰⁸⁴ UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 37.

¹⁰⁸⁵ UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 37.

child's rights to basic education is not studied in isolation but also in relation to the complementary rights in and through basic education. By interpreting not only the right to basic education through the scope of a children's perspective but also in relation to the child's other rights by means of a children's perspective results in the child's rights being regarded as independent rights and not mere rights that are dependent on their parents' rights.

In the Concluding Observations, the adoption of the Right to Education Act and the accompanying near universal enrolment rate is lauded, but high drop-out rates are identified as remain a major concern.¹⁰⁸⁶ Children from scheduled castes and scheduled tribes are noted as especially at risk.¹⁰⁸⁷ Accessibility of education as part of the practical framework is thus still very relevant. In general, the poor numeracy and literacy skills together with the low quality of education are highlighted as serious challenges to the realisation of the child's rights to basic education. Further challenges include the lack of qualified teachers and poor infrastructure at schools – especially the shortage of classrooms.¹⁰⁸⁸ Availability and acceptability of education are indirectly acknowledged in these challenges. The argument can therefore be made that the Concluding Observations denote that if the practical framework is not followed and applied, these challenges will remain.

The concerns identified by the CRC Committee are not mere passing comments but major issues which should be dealt with in order to not only realise the child's rights to basic education but also to ensure that India's international obligations in terms of the CRC are fulfilled. In order to address these challenges, the CRC Committee has made certain recommendations. Firstly, the implementation of the Right to Education Act should be strengthened.¹⁰⁸⁹ Whilst the Right to Education Act provides a strong framework for the recognition and protection of the child's right to basic education without strong implementation thereof it leads to the realisation of the child's rights being put on the backburner. Recommendations by the CRC Committee include the need to improve the quality of education, training teachers, providing for child-rights education, tackling discrimination in schools and to implement policies and

¹⁰⁸⁶ UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 71.

¹⁰⁸⁷ UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 71.

¹⁰⁸⁸ UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 71.

¹⁰⁸⁹ UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 71.

programmes that addresses the high drop-out rates.¹⁰⁹⁰ These recommendations indicate that there are challenges that continue to hinder the realisation of the child's right to education. These are the challenges that should be tackled by the government. The recommendations set out in the Concluding Observations make it very clear that more emphasis should be placed on the implementation of the child's rights. If not, there is a failure to comply with the 4A scheme.

4 2 8 Reflections on the child's right to basic education in India

As with any jurisdiction, India faces challenges with regard to the realisation of the child's right to basic education. One of the most prominent problems in the Indian context is child labour due to poverty.¹⁰⁹¹ The child's right to basic education is severely impeded due to child labour practices. Even more problematic is India's declaration in relation to the CRC, specifically concerning article 32(2)(a) which centres on the minimum age of employment.¹⁰⁹² One of the factors that adds to the persistence of child labour, is that the definition of a child differs depending on the circumstances.¹⁰⁹³ The Indian Majority Act of 1875 provides that the age of majority is 18 years unless another law states otherwise.¹⁰⁹⁴ In accordance with this position, the Factories Act of 1948 prohibits the employment of persons below the age of 14.¹⁰⁹⁵ Some exceptions are made in relation to factories and mines in terms of specific legislation.¹⁰⁹⁶ For example, children below the age of 14 may not work in a factory.¹⁰⁹⁷ In relation to child labour, the Child Labour (Prohibition and Regulation) Act of 1986 ("Child Labour Act") defines a child as a person who has not completed his or her 14th

¹⁰⁹⁰ UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 72.

¹⁰⁹¹ A Chandrasekaran "Human Rights Awareness in Education" in CJ Nirmal *Human Rights in India: Historical, Social and Political Perspectives* (2000) 76.

¹⁰⁹² See section 4 2 7 above; This declaration serves the purpose of a reservation; United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec> (accessed 13-10-2018); Heyns & Viljoen *Impact of the United Nations Human Rights Treaties* 305.

¹⁰⁹³ Bajpai *Child Rights in India* xv; UNCRC "Initial reports of States parties due in 1995: India" (1997) UN Doc CRC/C/28.Add.10 para 65.

¹⁰⁹⁴ Majority Act of 1875; Bajpai *Child Rights in India* 3.

¹⁰⁹⁵ S 67 of the Factories Act 63 of 1948.

¹⁰⁹⁶ See specifically s 67 of the Factories Act of 1948; See also P Diwan *Children and Legal Protection* (1996) 207-210; UNCRC "Initial reports of States parties due in 1995: India" (1997) UN Doc CRC/C/28.Add.10 para 65.

¹⁰⁹⁷ Factories Act of 1948; Mines (Amendment) Act of 1952; Bajpai *Child Rights in India* 4-5; UNCRC "Initial reports of States parties due in 1995: India" (1997) UN Doc CRC/C/28.Add.10 para 65.

year of age.¹⁰⁹⁸ This statute made it possible for child labour to be legal in certain instances in India. For example, children below the age of 14 were allowed to work in non-hazardous industries.¹⁰⁹⁹ With the Child Labour Act only affording protection to children below the age of 14 years, children between the ages of 14 and 18 were not protected and could work in non-hazardous as well as hazardous industries.¹¹⁰⁰ With child labour not prohibited in India, the child's education was clearly impacted and the Act received criticism for many years – as also made clear by the CRC Committee.¹¹⁰¹ In terms of the practical framework, the accessibility of the child's education was undoubtedly negatively impacted by this statute.

Fortunately, in 2016 the Child Labour (Prohibition and Regulation) Amendment Act ("Amendment Act") was adopted. While the Child Labour Act prohibited child labour with regard to hazardous work and therefore only prohibited certain types of work and industries,¹¹⁰² the Amendment Act provides for the near universal prohibition of child labour in India for children below the ages of 14 years. The Amendment Act provides specifically for the amendment of section 3 of the Child Labour Act. This amendment provides that no child is permitted to work except if they help their family enterprise, "which is other than any hazardous occupations or processes" after school and during vacations.¹¹⁰³ While the Amendment Act affords a higher level of protection to the child against exploitation in the labour market, the Amendment Act has still been criticised. UNICEF has expressed concern that the amendment to section 3 could result in further impeding the rights of children from poor families as it in effect legitimises family work.¹¹⁰⁴ While the Amendment Act makes a positive development with regard to the

¹⁰⁹⁸ S 2(c) of Act 61 of 1986; Bajpai *Child Rights in India* 3; For more examples of how the child is defined depending on the circumstances see Bajpai *Child Rights in India* 4-5 which deals with the Indian Penal Code, the Child Marriages Restraint Act, the Apprentices Act and the Juvenile Justice (Care & Protection of Children) Act; UNCRC "Initial reports of States parties due in 1995: India" (1997) UN Doc CRC/C/28/Add.10 para 65.

¹⁰⁹⁹ S 3 of the Child Labour (Prohibition and Regulation) Act, 1986.

¹¹⁰⁰ Except if legislation deems otherwise, for example children below the age of 18 may not work in a factory in terms of the Factories Act of 1948.

¹¹⁰¹ UNCRC "Concluding Observations on the combined third and fourth periodic reports of India" (2014) UN Doc CRC/C/IND/CO/3-4 para 9-10; UNCRC "Concluding Observations of the Committee on the Rights of the Child: India" (2000) UN Doc CRC/C/15/Add.115 para 66; UNCRC "Concluding Observations: India" (2004) UN Doc CRC/C/15/Add.228 para 8.

¹¹⁰² S 3 of the Child Labour (Prohibition and Regulation) Act, 1986.

¹¹⁰³ S 5 of the Child Labour (Prohibition and Regulation) Amendment Act, 2016 amending s 3 of the Child Labour (Prohibition and Regulation) Act, 1986.

¹¹⁰⁴ UNICEF "UNICEF concerned about amendments to India's Child Labour Bill" <https://www.unicef.org/media/media_92021.html> (accessed 13-10-2018).

accessibility of the child's education, the practical framework is unfortunately still not adhered to as many children continue to be exploited.

It has been made clear that child labour ultimately still contributes negatively to the realisation of the child's right to basic education. The persistence of child labour and the negative effect it has on the child's right to basic education can also be identified in the four guiding principles of the CRC and the 4-A scheme of the practical framework. The normative and practical frameworks are thus present and applicable. One can identify that the accessibility of the child's education is impaired when that child has to enter the labour market to the detriment of his or her education.¹¹⁰⁵ This would not be in the best interest of the child, and therefore not in line with article 3 of the CRC.¹¹⁰⁶ The child's right to life, survival and development is also threatened as the child's development is stunted if he or she does not finish school.¹¹⁰⁷ If child labour is not addressed, the child's education will continue to bear the negative consequences and the standards set by the practical framework will not be met.

Non-discrimination and equality also play a significant role in relation to the child's access to basic education in India.¹¹⁰⁸ Historically, access to basic education in India has been heavily influenced by caste,¹¹⁰⁹ region, wealth and race.¹¹¹⁰ The CRC guiding principle of non-discrimination¹¹¹¹ and the emphasis of equality in education as underscored in article 28 of the CRC,¹¹¹² are accordingly crucial to ensure equal access to basic education for the child.¹¹¹³ The accessibility of education as a practical consideration remains a challenge to the realisation of the child's right to basic education.

¹¹⁰⁵ Section 2 5 2.

¹¹⁰⁶ Section 2 4 4 3.

¹¹⁰⁷ Section 2 4 4 3.

¹¹⁰⁸ See section 2 5 2 of chapter three for a discussion of accessibility as well as section 2 4 4 3 relating to non-discrimination as a guiding principle of the CRC.

¹¹⁰⁹ In the Indian context, caste is closely related to the Hindu religion in which society is divided into thousands of castes (groups) based on socio-economic, educational and cultural factors; See also CPS Chauhan "Education and caste in India" (2008) 28 *Asia Pacific Journal of Education* 217-234 and H Thiagaraj *Human Rights from the Dalit Perspective* (2011).

¹¹¹⁰ Grewal & Singh (2011) *Early Education and Development* 871; Skelton (2017) *Open Society Justice Initiative* 39; Veriava & Skelton (2019) *SAJHR* 5.

¹¹¹¹ Art 2 of the CRC; See section 2 4 4 3.

¹¹¹² Art 28 refers specifically to equal opportunities; See section 2 4 4 1 of chapter 2.

¹¹¹³ CESCR *General Comment No 13* para 6(b).

Two further obstacles to the realisation of the child's right to basic education in India are poverty and poor infrastructure.¹¹¹⁴ Poverty relates directly to the concept of free and compulsory education as recognised in article 28 of the CRC.¹¹¹⁵ Once more the connection is made to the accessibility of education and the role that poverty can play in obstructing children from accessing their education.¹¹¹⁶ Poverty and poor infrastructure affects compliance with both the normative and practical frameworks. In India, provision is made for tuition free schools in the form of government schools.¹¹¹⁷ Even if no school fees are charged, the many other costs associated with education and schooling such as uniform, textbooks and stationery still hinder many children from realising their right to basic education as these expenditures can be high for families with low incomes.¹¹¹⁸ The second obstacle relates to school infrastructure, or rather lack thereof. School infrastructure in India is still a major problem.¹¹¹⁹ Acceptability and accessibility of schools are a continued challenge, especially in relation to physical access to schools.¹¹²⁰ A lack of functioning schools in many neighbourhoods results in non-attendance.¹¹²¹ Not only should provision be made for more schools, but also to improve the quality of schools.¹¹²² Only once the challenges have been addressed can the practical framework truly be adhered to.

International law has had a major influence on India's education system.¹¹²³ India's position with regard to international law means that the provisions of the CRC can be directly relied upon before a court.¹¹²⁴ The application of the model for compliance has indicated that positive steps have been taken in order to realise the child's right to basic education. This also results in India moving closer to complying with its international obligations. The normative and practical framework can be identified in several aspects of the child's right to basic education in the Indian legal framework. The challenges in education however persist and not only poses a threat to the realisation of the child's right to basic education, but is also leads to non-compliance

¹¹¹⁴ Bajpai *Child Rights in India* 332-333.

¹¹¹⁵ See section 2 4 4 of chapter 2.

¹¹¹⁶ Section 2 5 2.

¹¹¹⁷ Bajpai *Child Rights in India* 333.

¹¹¹⁸ Bajpai *Child Rights in India* 333.

¹¹¹⁹ Bajpai *Child Rights in India* 333.

¹¹²⁰ Section 2 5 3 and 2 5 2.

¹¹²¹ Bajpai *Child Rights in India* 333.

¹¹²² Bajpai *Child Rights in India* 333.

¹¹²³ S Jayakumar "Human Rights in Primary Education: The Indian Context" in VN Viswanathan (ed) *Human Rights Challenges of 21st Century* (2008) 278.

¹¹²⁴ Srivastava (2004) *Social Change* 116.

with international obligations. More should however be done to bring current legislation in line with the child-centred approach of article 28 and 29 of the CRC.¹¹²⁵ Laws should be interpreted in line with the standards of article 28 and 29 and the CRC as a whole to give effect to the concept of rights to, in and through basic education. Lastly, implementation of the legal framework and court orders should be made a priority by the state otherwise the challenges in relation to the child's education will continue, which ultimately results in the right to basic education not being realised. It has become clear that India's legal framework is normatively sound and in this sense complies with the model. It is therefore argued that the Indian legal framework largely complies with international obligations. However, the major concern lies with the practical implementation of the legal framework. This is evident in the continued inequality rooted in the caste system, the effect of poverty on the child's right to education and the challenge of persistent child labour. While the Indian legal framework is normatively strong, it is practically weak in terms of the model for compliance. If both frameworks of the model for compliance are not followed, it results in the failure to fulfil international obligations.

4 3 The child's right to basic education in Nigeria

4 3 1 Contextual background on the Nigerian legal system

Like South Africa and India, Nigeria was once a British colony and consequently shares in the common law tradition.¹¹²⁶ Nigeria became independent on the 1st of October 1960 and the Constitution of the Federal Republic of Nigeria, (hereafter "the Nigerian Constitution") was adopted in 1999.¹¹²⁷ Nigeria is a Union of States and therefore identified as a federal constitution.¹¹²⁸ Similar to South Africa, Nigeria also

¹¹²⁵ Bajpai *Child Rights in India* 31.

¹¹²⁶ See section 4 1 above; Taiwo & Govindjee (2012) *Obiter* 99; Egede (2007) *Journal of African Law* 251;

¹¹²⁷ Constitution of the Federal Republic of Nigeria, 1999 Act No 24 (the "Nigerian Constitution"); C Mwalimu *The Nigerian Legal System Vol I: Public Law* (2005) 6; CA Odinkalu "The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights" in V Gauri & DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 191; The Nigerian Constitution is currently the longest African constitution; See Mwalimu *The Nigerian Legal System: Public Law* 179.

¹¹²⁸ Templeman "The Supreme Court and the Constitution" in *Supreme but not Infallible* 48, 49; Government of India "Constitution of India" <<https://www.india.gov.in/my-government/constitution-india>> (accessed 03-05-2019).

has a mixed legal system,¹¹²⁹ which consists of customary law, English common law and Islamic law.¹¹³⁰ As Nigeria functions as a federation, the court system provides for both state and federal courts.¹¹³¹ Different types of courts are established in the states, with the state High Court of that specific state as the highest court for the state.¹¹³² Some states do however have a High Court of Appeal.¹¹³³ Examples of the federal courts in Nigeria are the Federal High Court and the Supreme Court.¹¹³⁴ The Supreme Court is the highest court in Nigeria.¹¹³⁵

As stated earlier, a variety of challenges can pose a threat to the realisation of the child's rights to, in and through basic education.¹¹³⁶ Nigeria has faced many obstacles, such as the Boko Haram insurgency,¹¹³⁷ political instability and military interventions,¹¹³⁸ which have affected the realisation of human rights in general. Specific challenges to the realisation of the right to basic education in Nigeria will be identified in order to establish the effect they have had on the fulfilment of international

¹¹²⁹ Mwalimu *The Nigerian Legal System: Public Law* 6; S Williams "Nigeria, its women and international law: Beyond rhetoric" (2004) 4 *Human Rights Law Review* 229 231.

¹¹³⁰ Mwalimu *The Nigerian Legal System: Public Law* 6; South Africa and Nigeria both have a legal system where statutory law and customary law must co-exist; J Sloth-Nielsen & BD Mezmur "Surveying the research landscape to promote children's legal rights in an African context" (2007) & *African Human Rights Law Journal* 330 349.

¹¹³¹ See figure 15.1 in ONI Ebbe "The Judiciary and Criminal Procedure in Nigeria" in ONI Ebbe (ed) *Comparative and International Criminal Justice Systems: Policing, Judiciary, and Corrections* 3 ed (2013) 207 which sets out the structure and organisation of the state and federal courts in Nigeria; Ebbe "The Judiciary in Nigeria" in *Comparative and International Criminal Justice Systems* 206.

¹¹³² Other examples include magistrates' courts, customary courts of appeal, courts of resolution and Sharia courts of appeal; Ebbe "The Judiciary in Nigeria" in *Comparative and International Criminal Justice Systems* 206-207; see in general Commonwealth Governance Nigeria "Judicial System of Nigeria" <www.commonwealthgovernance.org/countries/africa/nigeria/judicial-system> (accessed 03-05-2019).

¹¹³³ Ebbe "The Judiciary in Nigeria" in *Comparative and International Criminal Justice Systems* 206.

¹¹³⁴ Ebbe "The Judiciary in Nigeria" in *Comparative and International Criminal Justice Systems* 206.

¹¹³⁵ Ebbe "The Judiciary in Nigeria" in *Comparative and International Criminal Justice Systems* 206, 215.

¹¹³⁶ See section 4 1 above.

¹¹³⁷ In April 2014, Boko Haram militants kidnapped an estimated 276 girls from a school in Chibok. The kidnapping resulted in international outcry, which led to the well-known #BringBackOurGirls campaign; AJ Isokpan & E Durojaye "Impact of the Boko Haram Insurgency on the Child's Right to Education in Nigeria" (2016) 19 *PELJ* 1 2, 11; See also BBC Minute "Why Nigeria's educational system is in crisis- and how to fix it" <<https://www.bbc.co.uk/programmes/articles/3RbFXDdBw3g0HQQ0fpyD0xF/why-nigerias-educational-system-is-in-crisis-and-how-to-fix-it>> (accessed 24-07-2019); A Holpuch "Stolen daughters: what happened after #BringBackOurGirls?" <<https://www.theguardian.com/tv-and-radio/2018/oct/22/bring-back-our-girls-documentary-stolen-daughters-kidnapped-boko-haram>> (accessed 24-07-2019).

¹¹³⁸ Nigeria has a long history of military regimes including Aguiyi Ironsi (1966); Yakubu Gowon (1966–75); Muritala Mohammed (1975–76); Olusegun Obasanjo (1976–79); Mohammadu Buhari (1983–84); Ibrahim Babaginda (1984–93); Sani Abacha (1993–98) and Abdulsalami Abubakar (1998–99). In 1999 came a stable democracy together with a new constitution; Egede (2007) *Journal of African Law* 250.

obligations in terms of the CRC and ACRWC.¹¹³⁹ The focus of the discussion will be on the African regional perspective that Nigeria provides to the comparative study.

4 3 2 The application of international law in Nigeria

In contrast to the South African Constitution,¹¹⁴⁰ the Nigerian Constitution does not specifically mandate the use of international law in the interpretation of rights.¹¹⁴¹ Even though Nigeria has ratified numerous international instruments which protect and recognise the right to basic education, the courts have been hesitant to invoke these ratified international instruments in their judgments. The reasoning behind this hesitation is founded in section 12 of the Constitution.¹¹⁴² Section 12 deals with the implementation of treaties and provides that a treaty will be only be enforceable after the National Assembly¹¹⁴³ has enacted that treaty into law.¹¹⁴⁴ Section 12(2) states that parliament may enact legislation in order to give effect to international instruments.¹¹⁴⁵ This means that Nigeria, like South Africa and India, follows the dualist approach in the application and interpretation of international law.¹¹⁴⁶ Like the Indian

¹¹³⁹ Possible challenges to the child's right to basic education have been identified in section 4 1 above and include for example poverty, inequality, child labour, poor infrastructure, distance to school, quality of education, and teacher qualifications.

¹¹⁴⁰ See section 5 3; see s 39(1)(b) of the Constitution.

¹¹⁴¹ Taiwo & Govindjee (2012) *Obiter* 98; see s 39(2) of the Constitution.

¹¹⁴² Durojaye "Challenges and prospects" in *Human Rights Litigation in Africa* 160.

¹¹⁴³ The National Assembly forms the federal legislative arm of the Nigerian government; Egede (2007) *Journal of African Law* 250.

¹¹⁴⁴ S 12(1) of the Nigerian Constitution: "No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly; Egede (2007) *Journal of African Law* 250; Ogunniran (2010) *Children's Legal Rights Journal* 62; S Coetzee "Discipline in Nigerian schools within a human rights framework" (2010) 10 *African Human Rights Law Journal* 478 496.

¹¹⁴⁵ S 12(2) states: "The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the he Exclusive Legislative List for the purpose of implementing a treaty."; The Nigerian Constitution contains two lists that divide the legislative power between the federal and the state legislature: the Exclusive Legislative List and the Concurrent Legislative List; Egede (2007) *Journal of African Law* 250; Ogunniran (2010) *Children's Legal Rights Journal* 62; Coetzee (2010) *African Human Rights Law Journal* 496.

¹¹⁴⁶ The practice in Nigeria can be compared to the position in the United Kingdom in the manner that only the executive arm of government can enter into an international instrument; D Ogunniyi "The Challenge of Domesticating Children's Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children" (2018) 62 *Journal of African Law* 447 448-449; Egede (2007) *Journal of African Law* 249, 250; Mwalimu *The Nigerian Legal System: Public Law* 585; Ogunniran (2010) *Children's Legal Rights Journal* 62; Coetzee (2010) *African Human Rights Law Journal* 496; With Nigeria's volatile political history came several military interventions, which resulted in the suspension of fundamental constitutional human rights provisions and the declaration that the constitution was subordinate to military decrees. Military intervention also brought with it several constitutions in a relatively short time, with the dualist approach as set out in section 12 of the 1999 Nigerian Constitution, favoured throughout the different versions. Egede however makes the argument that the

Constitution,¹¹⁴⁷ section 12 of the Nigerian Constitution does not create a duty or obligation to enact legislation to give effect to international treaties but only provides parliament with the power to do so. This could affect the manner in which Nigeria fulfils its international obligations.

Even though the Nigerian Constitution does not mandate the use of international and foreign law by the courts in the interpretation of rights,¹¹⁴⁸ the importance of international and regional law has however been acknowledged by the Nigerian courts in their use of a comparative endeavour when interpreting rights.¹¹⁴⁹ The Nigerian Court of Appeal has accordingly stated that the world has become a global village and that the universality of justice and the rule of law within human rights should not be ignored.¹¹⁵⁰ The use of international and regional law and the value of not being restricted to one's own jurisdiction when doing comparative research, has consequently been acknowledged in the Nigerian context. This means that the normative and practical frameworks, which are rooted in international law, are applicable to the Nigerian context in order to measure compliance with international obligations with regard to the child's right to basic education. The model for compliance should therefore be considered and applied in the Nigerian context of the child's right to basic education.

4 3 3 The Constitutional framework

The Nigerian Constitution, similar to the Indian Constitution, draws a distinction between fundamental rights in chapter IV and Fundamental Objectives and Directive Principles of State Policy in chapter II.¹¹⁵¹ The difference between these two chapters

repetition of section 12 in the various constitutions is a mere historical incidence or colonial relic as the colonial past of Nigeria serves as the main reasoning for following a dualist approach. The influence of Nigeria's past in the application of international law was confirmed in *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Part 498) 124 at 150 which referred to the Nigerian court following the English common law in the application of international law in municipal law; See for example Egede (2007) *Journal of African Law* 249-251.

¹¹⁴⁷ See section 4 2 2 above; See arts 51 and 253 of the Indian Constitution.

¹¹⁴⁸ Taiwo & Govindjee (2012) *Obiter* 98.

¹¹⁴⁹ See for example *Augustina Chinyelu Ugo v dr Roy Pedro Ugo* 2008 5 NWLR (pt 1079); Taiwo & Govindjee (2012) *Obiter* 98.

¹¹⁵⁰ *Augustina Chinyelu Ugo v dr Roy Pedro Ugo* 2008 5 NWLR (pt 1079) 1 at 24; Taiwo & Govindjee (2012) *Obiter* 98; See also MO Adediran *Essays on Tribunals and Inquiries in Nigeria* (2004).

¹¹⁵¹ With the exception of South Africa and Angola, most African States do not provide for socio-economic rights in their constitutions other than in Directive Principles of State Policy; J Sloth-Nielsen "Domestication of Children's Rights in National Legal Systems in African Context: Progress and Prospects" in J Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 59; Isokpan

of the Nigerian Constitution can be significant for economic, social and cultural rights. From a textual perspective, chapter II does not afford individuals with specific entitlements or rights.¹¹⁵² It merely provides for fundamental objectives and principles which are non-justiciable that the state should look to when developing policy.¹¹⁵³ It could be argued that because the right to education is non-justiciable, the normative framework is not strictly adhered to.

This distinction is made clear in section 6(6)(c) of the Nigerian Constitution which proclaims that the Nigerian courts shall not (unless otherwise provided for in the Constitution) "...extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution". A simple reading of section 6(6)(c) would indicate that the courts cannot hear matters in relation to violations of chapter II of the Nigerian Constitution.¹¹⁵⁴ As direct judicial action is not an option, citizens are limited to political actions as the sanctions for not adhering to the principles are constructed in political terms and not in legal terms.¹¹⁵⁵ The responsibility therefore lies with the executive and/or legislative branches of the Nigerian government to effect change.

The Nigerian Constitution recognises the right to education in terms of educational objectives – which are contained in chapter II and thus part of the Fundamental Objectives and Directive Principles of State Policy.¹¹⁵⁶ This means that the right to

& Durojaye (2016) *PELJ* 6; Durojaye "Challenges and prospects" in *Human Rights Litigation in Africa* 156.

¹¹⁵² In most instances the provisions are framed as "the State shall" or "it shall be the duty of" rather than "everyone has the right to"; See ss 13-24 of the Nigerian Constitution; ES Nwauche "Indirect Constitutional Protection of Economic, Social and Cultural Rights in Nigeria" in DM Chirwa & L Chenwo (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspective* (2016) 512; Taiwo & Govindjee (2012) *Obiter* 229.

¹¹⁵³ S 13 of the Nigerian Constitution; Nwauche "Indirect Constitutional Protection" in *The Protection of Economic, Social and Cultural Rights in Africa* 512; Durojaye "Challenges and prospects" in *Human Rights Litigation in Africa* 160; Beredugo & Viljoen (2015) *CILSA* 410.

¹¹⁵⁴ S Ibe "Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities" (2010) 10 *African Human Rights Law Journal* 197 198; Ibe (2007) *African Human Rights Law Journal* 241; Nwauche "Indirect Constitutional Protection" in *The Protection of Economic, Social and Cultural Rights in Africa* 501.

¹¹⁵⁵ Nwauche "Indirect Constitutional Protection" in *The Protection of Economic, Social and Cultural Rights in Africa* 501; Taiwo & Govindjee (2012) *Obiter* 210, 229; Beredugo & Viljoen (2015) *CILSA* 410.

¹¹⁵⁶ S 18 of the Nigerian Constitution; BR Akinbola "The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities" (2010) 10 *African Human Rights Law Journal* 457 466, 477.

education is deemed to be non-justiciable.¹¹⁵⁷ The distinction between fundamental rights and fundamental objectives was also included in the Constitution of the Federal Republic of Nigeria, 1979 (hereafter the “1979 Nigerian Constitution”) – the predecessor to the current Nigerian Constitution.¹¹⁵⁸ In the 1981 case of *Archbishop Okogie v Attorney General of Lagos State* (hereafter “*Archbishop Okogie*”)¹¹⁵⁹ the court dealt with this distinction specifically with regard to the right to education in terms of the 1979 Nigerian Constitution.¹¹⁶⁰ In this instance, the court confirmed the position of the right to education as part of the Fundamental Objectives and Directives of State Policy in chapter II and thus also not enforceable in a court of law.¹¹⁶¹ The court also made it clear that it was not within its power to make a decision on the justiciability of chapter II rights, but that this responsibility lies with the executive and legislative branches of government.¹¹⁶² Even though this case was decided in terms of the 1979 Constitution and before the incorporation of the African Charter, subsequent case law has not yet significantly diverged from the view that it is not the courts’ place to decide on this matter.¹¹⁶³

The fact that this distinction was also included in the (current) Nigerian Constitution is unfortunate as during the constitutional review, arguments were made in favour of making the socio-economic rights as recognised in chapter II of the Nigerian Constitution justiciable.¹¹⁶⁴ The National Assembly even adopted a bill for the Fourth

¹¹⁵⁷ The education clause read with s 6(6)(c) of the Nigerian Constitution which stipulates that: “the judicial powers vested in accordance with the foregoing provisions of this section (c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objective and Directive Principles of State Policy set out in Chapter II of this Constitution.”; Taiwo & Govindjee (2012) *Obiter* 119; Taiwo & Govindjee (2012) *Obiter* 210.

¹¹⁵⁸ Durojaye “Challenges and prospects” in *Human Rights Litigation in Africa* 156.

¹¹⁵⁹ *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350; Durojaye “Challenges and prospects” in *Human Rights Litigation in Africa* 156.

¹¹⁶⁰ Durojaye “Challenges and prospects” in *Human Rights Litigation in Africa* 156; *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350 as cited in Durojaye “Challenges and prospects” in *Human Rights Litigation in Africa* 156.

¹¹⁶¹ Durojaye “Challenges and prospects” in *Human Rights Litigation in Africa* 157; *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350 as cited in Durojaye “Challenges and prospects” in *Human Rights Litigation in Africa* 156.

¹¹⁶² Durojaye “Challenges and prospects” in *Human Rights Litigation in Africa* 157; *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350 as cited in Durojaye “Challenges and prospects” in *Human Rights Litigation in Africa* 156.

¹¹⁶³ See for example *Badejo v Federal Minister of Education* [1990] LRC (Const) 735 as cited in Durojaye “Challenges and prospects” in *Human Rights Litigation in Africa* 157; S Eboobrah “The future of economic, social and cultural rights litigation in Nigeria” (2007) 1 *Review of Nigerian Law and Practice* 109 116.

¹¹⁶⁴ Nwauche “Indirect Constitutional Protection” in *The Protection of Economic, Social and Cultural Rights in Africa* 504.

Alteration of the Constitution which specifically provided for the right to education to be included in chapter II of the Nigerian Constitution.¹¹⁶⁵ The President at the time, President Goodluck Jonathan however declined to assent to the bill with one of his reasons relating directly to the new proposed section 45A, which guaranteed the right to free basic education.¹¹⁶⁶ He argued that the provision was too “open-ended”.¹¹⁶⁷ Ultimately, the fourth amendment to the Nigerian Constitution was passed without the inclusion of the right to education as a justiciable right.

4 3 3 1 Section 18 of the Constitution

Even though the right to education is non-justiciable, the Nigerian Constitution still recognises the importance of educational objectives in section 18. Section 18 provides the following:

“18. Educational objectives

(1) Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.

(2) Government shall promote science and technology.

(3) Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide

(a) free, compulsory and universal primary education;

(b) free secondary education;

(c) free university education; and

(d) free adult literacy program”

Section 18(1) states that government policies must be directed towards ensuring equal and adequate educational opportunities.¹¹⁶⁸ The 4-A scheme of the practical framework is applicable in this instance as the acceptability, accessibility, adaptability and availability of the child’s education are all applicable.¹¹⁶⁹ In order for education to be accessible and acceptable, it must be accessible to all learners, which means that

¹¹⁶⁵ Nwauche “Indirect Constitutional Protection” in *The Protection of Economic, Social and Cultural Rights in Africa* 504.

¹¹⁶⁶ Nwauche “Indirect Constitutional Protection” in *The Protection of Economic, Social and Cultural Rights in Africa* 504; See also AM Jimoh & OB Chiedu “Why I declined assent to constitution review bill, by Jonathan” *The Guardian Nigeria* (2015) <<http://guardian.ng/lead-story/why-i-declined-assent-to-constitution-review-bill-by-jonathan/>> (accessed 26-09-2018).

¹¹⁶⁷ Jimoh & Chiedu “Why I declined assent” (2015) <<http://guardian.ng/lead-story/why-i-declined-assent-to-constitution-review-bill-by-jonathan/>> (accessed 26-09-2018).

¹¹⁶⁸ Isokpan & Durojaye (2016) *PELJ* 6.

¹¹⁶⁹ CESCR *General Comment No 13* para 6; See in general section 2 5.

it must be non-discriminative in its admission policies and inclusive of minorities.¹¹⁷⁰ Section 18(1) provides that education must be directed towards equal educational opportunities. This is clearly in line with ensuring that education is accessible in terms of the practical framework. Availability requires education to be available to all. This means that that discriminatory practices would clearly not be in line with the principle of availability.¹¹⁷¹ Adaptability is also applicable as education should address inequalities of the past and should therefore not be discriminatory towards any child, especially those forming part of any marginalised groups.¹¹⁷² Once again, the provision of equal educational opportunities in terms of section 18(1) incorporates the need for adaptability in terms of the practical framework.

Section 18(2) emphasises the importance of promoting science and technology in and through education.¹¹⁷³ This relates to the adaptability of education, as part of the practical framework. Education should be adapted in order to fulfil the changing needs of a society or community.¹¹⁷⁴ Promoting science and technology would also be in line with the guiding principle of the best interests of the child.¹¹⁷⁵

Section 18(3) is important as it provides content to the right to education. The normative framework can therefore be identified in section 18(3). When comparing section 18(3) of the Nigerian Constitution to article 28 of the CRC, one can clearly see that the two elements of primary education in terms of the CRC are also included in the scope of section 18, namely: free and compulsory.¹¹⁷⁶ This part of the normative framework is therefore easily identifiable within section 18. In the first instance section 18(3) provides that government must strive to eradicate illiteracy.¹¹⁷⁷ In order to achieve this goal government must provide the following: free, compulsory and universal primary education,¹¹⁷⁸ free secondary education,¹¹⁷⁹ free university

¹¹⁷⁰ CESCR *General Comment No 13* para 6(b)(i).

¹¹⁷¹ Section 2 5 1.

¹¹⁷² CESCR *General Comment No 13* para 6. See section 2 5 4.

¹¹⁷³ Akinbola (2010) *African Human Rights Law Journal* 466.

¹¹⁷⁴ CESCR *General Comment No 13* para 6(d); See in general section 2 5 4.

¹¹⁷⁵ Art 3 of the CRC; See in general section 2 4 4 3.

¹¹⁷⁶ See section 2 4 4 1 of chapter 2.

¹¹⁷⁷ Akinbola (2010) *African Human Rights Law Journal* 466.

¹¹⁷⁸ S 18(3)(a) of the Nigerian Constitution; Akinbola (2010) *African Human Rights Law Journal* 466.

¹¹⁷⁹ S 18(3)(b) of the Nigerian Constitution.

education,¹¹⁸⁰ and free adult literacy programmes¹¹⁸¹ – *when practicable*.¹¹⁸² It is clear that even though provision is made for education, it is immediately internally qualified by the term “when practicable”. This can be viewed to mirror the notion of progressive realisation of the right to education.¹¹⁸³ One could however argue that this weakens the obligation of government to provide free basic education. Nonetheless, the accessibility and availability of education is emphasised in section 18(3) as it provides for education that must be free and compulsory.

From this discussion of section 18 of the Nigerian Constitution, it is clear that both the normative and practical frameworks of the model for compliance can to a certain extent be recognised in section 18(3) of the Nigerian Constitution. One of the major concerns in the Nigerian context is that the Nigerian Constitution does not provide the child with a justiciable right to education. In order to address this concern, legislation has been enacted with the aim of transforming the right to education into a justiciable right. Legislation centred on the child’s right to education includes the Child Rights Act¹¹⁸⁴ and the Compulsory, Free Universal Basic Education Act (hereafter the “UBE Act”).¹¹⁸⁵ The manner in which these two statutes comply with the normative and practical frameworks will therefore also be considered.

¹¹⁸⁰ S 18(3)(c) of the Nigerian Constitution.

¹¹⁸¹ S 18(3)(d) of the Nigerian Constitution.

¹¹⁸² S 18(3) of the Nigerian Constitution; Own emphasis; Akinbola (2010) *African Human Rights Law Journal* 466.

¹¹⁸³ Ibe (2007) *African Human Rights Law Journal* 241.

¹¹⁸⁴ Child Rights Act, Act no 26 of 2003.

¹¹⁸⁵ Compulsory, Free Universal Basic Education Act, 2004.

4 3 3 2 *The role of the African Charter on Human and Peoples' Rights*

The African Charter was adopted in 1982 by the Organisation of African Unity (now the African Union) and ratified by Nigeria in 1983. From a regional perspective, Nigeria is significant in the African context, as it is the only common law country that has domesticated the African Charter.¹¹⁸⁶ The African Charter has therefore been directly incorporated in order to form part of Nigerian law.¹¹⁸⁷

With the domestication of the African Charter, issues arose as to how to reconcile the provisions of the African Charter – which explicitly recognises socio-economic rights including the right to education – and the fact that the Nigerian Constitution only recognises civil and political rights as justiciable.¹¹⁸⁸ This distinction and whether the Nigerian Constitution or the African Charter has supremacy has a direct effect on the child's right to education.¹¹⁸⁹ The African Charter recognises the right to education in article 17(1) and provides that "Every individual shall have the right to education." While the right to education in the African Charter does not include explicit reference to the elements of free or compulsory education as set out in the normative framework, the justiciability of the rights in the African Charter could have an impact on the right to education. The justiciability of the right to education with regard to the distinction between the Nigerian Constitution and the African Charter ultimately had to be dealt with by the Supreme Court in the case of *Abacha v Fawehinmi*.¹¹⁹⁰ The court accepted that the African Charter had been enacted into law and thus formed part of the national

¹¹⁸⁶ Kilander & Adjolahoun "International law" in *International law and domestic human rights litigation in Africa* 13; Durojaye "Challenges and prospects" in *Human Rights Litigation in Africa* 153; ACHPR "Instruments" <<http://www.achpr.org/instruments/achpr/impact-on-domestic-human-rights/>> (accessed 08-10-2018); Nwauche "Indirect Constitutional Protection" in *The Protection of Economic, Social and Cultural Rights in Africa* 508; F Viljoen "Application of African Charter on Human and Peoples' Rights by domestic courts in Africa" (1999) 49 *Journal of African Law* 1-18; AO Enabulele "Implementation of treaties in Nigeria and the status question: Whither Nigerian courts?" (2009) 17 *African Journal of International and Comparative Law* 326-341; Odinkalu "Impact of Economic and Social Rights in Nigeria" in *Courting Social Justice* 187; Beredugo & Viljoen (2015) *CILSA* 425.

¹¹⁸⁷ The African Charter (Ratification and Enforcement) Act Cap 10 1983, Laws of the Federation; Durojaye "Challenges and prospects" in *Human Rights Litigation in Africa* 160; Williams (2004) *Human Rights Law Review* 234; Ibe (2007) *African Human Rights Law Journal* 105.

¹¹⁸⁸ S 6(6)(c) of the Nigerian Constitution; E Nwauche "The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?" (2010) 10 *African Human Rights Law Journal* 502 511, 512; Ibe (2007) *African Human Rights Law Journal* 233; Taiwo & Govindjee (2012) *Obiter* 210; Egede (2007) *Journal of African Law* 254, 255.

¹¹⁸⁹ Egede (2007) *Journal of African Law* 255.

¹¹⁹⁰ *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228; Durojaye "Challenges and prospects" in *International Law and Human Rights Litigation in Africa* 153; Egede (2007) *Journal of African Law* 254; Coetzee (2010) *African Human Rights Law Journal* 495; Ogunniyi (2018) *Journal of African Law* 449; See also *Ogugu v State* (1994) 9 NWLR (Pt 366) 1.

law and is consequently effective and binding.¹¹⁹¹ In order to provide clarity on the status of the African Charter, the court made it clear that when a conflict arises between the African Charter and other legislation, the African Charter would prevail.¹¹⁹² However, in the instance of a conflict between the African Charter and the Nigerian Constitution, the Constitution as the supreme law would prevail.¹¹⁹³

*Abacha v Fawehinmi*¹¹⁹⁴ serves as authority for the view that the Nigerian Constitution is superior to the African Charter.¹¹⁹⁵ The implication of this view is that only rights afforded by the Constitution in chapter VI and which are also recognised in the African Charter, are justiciable in a court.¹¹⁹⁶ As a contentious issue, it is not surprising that this judgment became a topic of debate.¹¹⁹⁷ Egede is of the opinion that the judgment in the *Abacha* case is correct as it respects the supremacy of the Nigerian Constitution as stipulated in sections 1(1) and 1(3).¹¹⁹⁸ If the court had come to the conclusion that the African Charter is of higher status, then it would result in direct a contravention of the Nigerian Constitution.¹¹⁹⁹ Onyemelukwe contends that the approach favoured by the court in this instance is restrictive and problematic as it does not provide the African Charter the opportunity of the the full force that it deserves as part of Nigerian law.¹²⁰⁰ The ultimate effect of this judgment on the right to education specifically, is that the right to education is still considered to be non-justiciable.

¹¹⁹¹ *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 288–289; Durojaye “Challenges and prospects” in *International Law and Human Rights Litigation in Africa* 158; Ibe (2007) *African Human Rights Law Journal* 245; Coetzee (2010) *African Human Rights Law Journal* 495; Ogunniyi (2018) *Journal of African Law* 449.

¹¹⁹² See *UAC (NIG) Ltd v Global Transport SA* (1996) 5 NWLR (Pt 448) 291 as cited in Nwauche (2010) *African Human Rights Law Journal* 512; Nwauche “Indirect Constitutional Protection” in *The Protection of Economic, Social and Cultural Rights in Africa* 509; Durojaye “Challenges and prospects” in *International Law and Human Rights Litigation in Africa* 158; Ibe (2007) *African Human Rights Law Journal* 245; Coetzee (2010) *African Human Rights Law Journal* 495.

¹¹⁹³ Ss 1(1) and 1(3) of the Nigerian Constitution, 1999; Durojaye “Challenges and prospects” in *International Law and Human Rights Litigation in Africa* 158; Ibe (2007) *African Human Rights Law Journal* 245; Coetzee (2010) *African Human Rights Law Journal* 495.

¹¹⁹⁴ *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228.

¹¹⁹⁵ Nwauche (2010) *African Human Rights Law Journal* 509.

¹¹⁹⁶ Nwauche (2010) *African Human Rights Law Journal* 512.

¹¹⁹⁷ Durojaye “Challenges and prospects” in *International Law and Human Rights Litigation in Africa* 159.

¹¹⁹⁸ Egede (2007) *Journal of African Law* 254; Durojaye “Challenges and prospects” in *International Law and Human Rights Litigation in Africa* 159.

¹¹⁹⁹ Durojaye “Challenges and prospects” in *International Law and Human Rights Litigation in Africa* 159.

¹²⁰⁰ See C Onyemelukwe “Access to anti-retroviral drugs as a component of the right to health in international law: Examining the application of the right in Nigerian jurisprudence” (2007) 7 *African Human Rights Law Journal* 449 as cited in Durojaye “Challenges and prospects” in *International Law and Human Rights Litigation in Africa* 159.

4 3 3 3 *The Economic Community of West African States Community Court of Justice*

With the right to education still not justiciable before a domestic court, a major development took place in 2009.¹²⁰¹ During that year, the ECOWAS Court¹²⁰² delivered judgment in *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* (hereafter “SERAP”).¹²⁰³ This case concerned an action brought by SERAP¹²⁰⁴ against the Nigerian government¹²⁰⁵ for failing to implement the UBE Act and the Child Rights Act. It was argued that this failure resulted in a violation of the right to education as recognised by the African Charter.¹²⁰⁶ The court dealt with three issues: whether the court did indeed have jurisdiction to adjudicate over the matter;¹²⁰⁷ whether or not the right to education was justiciable and could therefore be litigated before the court;¹²⁰⁸ and lastly the issue of whether the plaintiff had *locus standi* to initiate and maintain the matter.¹²⁰⁹ The interaction (and to some extent the tension) between the Nigerian Constitution and the African Charter as outlined above was central to this case.

¹²⁰¹ Nwauche (2010) *African Human Rights Law Journal* 512.

¹²⁰² See in general Community Court of Justice “ECOWAS” <<http://www.courtecowas.org/site2012/index.php?lang=en>> (accessed 17-09-2019); ECOWAS consists of the following countries: Benin, Burkina Faso, Cabo Verde, Cote d’Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. ECOWAS was established in 1975 with aim of promoting cooperation and integration among countries in West Africa. In 1993 the ECOWAS Community Court of Justice was created which allows persons to bring suits against a member state of ECOWAS; ST Ebobrah “Sub-Regional Judicial Enforcement of Economic, Social and Cultural Rights” in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 281-282; See in general ST Ebobrah *A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice* (2008) The Danish Institute for Human Rights 1-58.

¹²⁰³ ECW/CCJ/APP/08/08; The ruling was delivered on the 27th of October 2009; Nwauche (2010) *African Human Rights Law Journal* 512.

¹²⁰⁴ SERAP is a non-governmental human rights organisation; *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 para 1.

¹²⁰⁵ And the Universal Basic Education Commission as the body responsible for the implementation of the right to education; *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 para 1.

¹²⁰⁶ *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 paras 2, 11; M Ssenyonjo “The Protection of Economic, Social and Cultural Rights under the African Charter” in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa* (2016) 111.

¹²⁰⁷ *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 paras 5-14.

¹²⁰⁸ *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 paras 15-20.

¹²⁰⁹ *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 paras 21-34.

In dealing with the relationship between the African Charter and the Nigerian Constitution, the court ultimately came to the conclusion that the rights recognised in the African Charter are indeed justiciable before the ECOWAS Community Court of Justice.¹²¹⁰ The Nigerian government's contention that the right to education was not a legal right but only directive policy was accordingly dismissed by the ECOWAS Community Court of Justice.¹²¹¹ The result of this judgment is that in accordance with article 17(1) of the African Charter, as well as sections 17 and 18 of the Nigerian Constitution, the right to education is afforded to all Nigerians.¹²¹² The judgment views both chapters II and IV of the Nigerian Constitution as well as the African Charter as enforceable and justiciable before a Nigerian court.¹²¹³ This development aligns with the normative framework of the model for compliance as it creates a justiciable right to education.

4 3 3 4 *The Fundamental Rights Enforcement Procedure Rules of 2009*

In 2009 the Fundamental Rights Enforcement Procedure Rules (hereafter the "2009 Rules")¹²¹⁴ were adopted in an attempt to promote the use of international law so as to address problems that had arisen in Nigeria in relation to the enforcement of human rights.¹²¹⁵ As the enforcement and implementation of human rights are at issue, the value of the practical framework for the enforcement of the child's right to basic education is obvious. Section 46(3) of the Nigerian Constitution provides that the Chief Justice may make procedural and practice rules for the High Court.¹²¹⁶ The Chief Justice accordingly promulgated the Fundamental Rights Enforcement Procedure

¹²¹⁰ *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 paras 13, 19, 33; Ibe (2010) *African Human Rights Law Journal* 200; Ssenyonjo "Protection of Economic, Social and Cultural Rights" in *The Protection of Economic, Social and Cultural Rights in Africa* 112.

¹²¹¹ Ssenyonjo "Protection of Economic, Social and Cultural Rights" in *The Protection of Economic, Social and Cultural Rights in Africa* 112.

¹²¹² Nwauche (2010) *African Human Rights Law Journal* 512; Taiwo & Govindjee (2012) *Obiter* 210.

¹²¹³ Nwauche (2010) *African Human Rights Law Journal* 512; Ssenyonjo "Protection of Economic, Social and Cultural Rights" in *The Protection of Economic, Social and Cultural Rights in Africa* 112.

¹²¹⁴ Fundamental Rights (Enforcement Procedure) Rules, 2009; Commenced on the 1st of December 2009.

¹²¹⁵ Kilander & Adjolohoun "International law" in *International law and domestic human rights litigation in Africa* 16; Nwauche (2010) *African Human Rights Law Journal* 503.

¹²¹⁶ See also Nwauche "Indirect Constitutional Protection" in *The Protection of Economic, Social and Cultural Rights in Africa* 507.

Rules.¹²¹⁷ The 2009 Rules have affected the manner in which human rights are enforced by making substantive as well as procedural changes.¹²¹⁸

The effect of the 2009 Rules is that courts are now obliged to apply both international and regional instruments to which Nigeria is a party.¹²¹⁹ This leaves no doubt that both the normative and the practical frameworks are applicable in the Nigerian legal context. This means that the obligations created by the international instruments to which Nigeria is a party, must be fulfilled.

The 2009 Rules state in item 3(a) of the preamble that the Nigerian Constitution, with emphasis on chapter IV,¹²²⁰ and the African Charter¹²²¹ shall be “expansively and purposely interpreted and applied”¹²²² in order to advance and realise the rights and freedoms that are recognised in the Nigerian Constitution and the African Charter.¹²²³ Furthermore, provision is made for the advancement of the rights and freedoms of an applicant in terms of international and regional law – including instruments of the African regional and the United Nations human rights systems.¹²²⁴ The instruments as discussed in chapter 3, including the CRC and the ACRWC, are thus included. This also means that the normative and practical frameworks created by international law should be followed in order to fulfil the obligations created by international and regional instruments. The ultimate goal is for the 2009 Rules to lead to the irrelevance of the distinction between justiciable and non-justiciable rights.¹²²⁵ To date, the Nigerian courts have not yet confirmed that economic, social and cultural rights are justiciable based on and because of the 2009 Rules.¹²²⁶

¹²¹⁷ See also Nwauche “Indirect Constitutional Protection” in *The Protection of Economic, Social and Cultural Rights in Africa* 507.

¹²¹⁸ Nwauche (2010) *African Human Rights Law Journal* 509; The 2009 Rules can be compared to the 1979 Rules which have been repealed; For example in terms of the 2009 Rules procedure is stressed to a lesser extent in the course of enforcing human rights; For more on the 1979 Rules see Nwauche (2010) *African Human Rights Law Journal* 503-509.

¹²¹⁹ Nwauche “Indirect Constitutional Protection” in *The Protection of Economic, Social and Cultural Rights in Africa* 507.

¹²²⁰ Contains the civil and political rights that are justiciable under the Nigerian Constitution.

¹²²¹ Organization of African Unity *African Charter on Human and Peoples' Rights* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; See section 4 3 3 2.

¹²²² Item 3(a) of the Preamble of the 2009 Rules.

¹²²³ See also Nwauche (2010) *African Human Rights Law Journal* 511.

¹²²⁴ Item 3(b)(i) and (ii) of the Preamble of the 2009 Rules.

¹²²⁵ Nwauche “Indirect Constitutional Protection” in *The Protection of Economic, Social and Cultural Rights in Africa* 507.

¹²²⁶ Nwauche “Indirect Constitutional Protection” in *The Protection of Economic, Social and Cultural Rights in Africa* 507.

4 3 4 Legislative framework for the child's right to basic education

4 3 4 1 *The Child Rights Act*

After Nigeria submitted its first report to the CRC Committee,¹²²⁷ one recommendation from the CRC Committee which stood out, was the need for legislation that domesticated the CRC.¹²²⁸ A first bill on children's rights was drafted in 1993, but could not be agreed upon – especially on religious grounds.¹²²⁹ After approximately a decade since the first bill was drafted, the President finally assented to the Child Rights Act in 2003.¹²³⁰

Section 15 of the Child Rights Act affords every child the right to free, compulsory and universal primary education and places the duty on the Nigerian government to provide such education.¹²³¹ The recognition of the child's right to education is a clear recognition of the normative framework. A duty is also created for the parents or guardians to ensure that their child attends and completes primary school¹²³² as well as junior secondary education.¹²³³ The primary duty to provide education thus lies with the state and the parents or guardians have a secondary obligation.¹²³⁴ These two

¹²²⁷ See section 4 3 5 below for a short discussion of Nigeria's reporting history to the CRC Committee; UNCRC "Initial reports of State parties due in 1993: Nigeria" (1995) UN Doc CRC/C/8/Add.26.

¹²²⁸ UNCRC "Concluding Observations of the Committee on the Rights of the Child: Nigeria" (1996) UN Doc CRC/C/15/Add.61 para 7; OS Akinwumi "Legal Impediments on the Practical Implementation of the Child Right Act 2003" (2009) 37 *International Journal of Legal Information* 385-385; See also UNCRC "Initial reports of State parties due in 1993: Nigeria" (1995) UN Doc CRC/C/8/Add.26.

¹²²⁹ Arguments were made that some of the provisions were not in line with Islamic beliefs, for example the minimum age of marriage; Akinwumi (2009) *International Journal of Legal Information* 385-386; Ogunniyi (2018) *Journal of African Law* 451-452; See also Ogunniyi (2018) *Journal of African Law* 448 which refers to the current opposition to re-enactment of the Act.

¹²³⁰ Chief Olusegun Obasanjo, the President of the Federal Republic of Nigeria, assented to the Act in September; Egede (2007) *Journal of Africa Law* 268; Akinwumi (2009) *International Journal of Legal Information* 386; Ogunniyi (2018) *Journal of African Law* 452; UNICEF "Information Sheet: Child Rights Act" (2007) <https://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf> (accessed 10-08-2018).

¹²³¹ S 15(1) of the Child's Right Act; Isokpan & Durojaye (2016) *PELJ* 6.

¹²³² Primary school age is not defined in the Child Rights Act but s 15(1) of the Compulsory, Free and Universal Basic Education Act of 2004 provides the following definition: "in relationship to any person means any age between the age attained by the commencement of the school year after he attains the age of six years and the age attained by the person at the end of the school year after he attains the age of twelve years and accordingly any person shall be deemed to be of primary school age if at the commencement of any school year he has attained the age of six years and a person shall be deemed to be over primary school age if at the end of the school year he has attained the age of twelve years."

¹²³³ S 15(2) of the Child Rights Act; S 15(1) of the UBE Act defines junior secondary school as: "a school which provides a three year post-primary course off full-time instruction suitable for pupils between the age of twelve years and fifteen years".

¹²³⁴ Compare s 15(1) of the Child Rights Act to ss 15(2) and 15(3).

stakeholders must work together in order to realise the child's right to basic education. Section 15 can be viewed as a domestication of article 28 of the CRC¹²³⁵ and article 11 of the ACRWC.¹²³⁶ The provision refers to both elements of education in terms of article 28 – free and compulsory. The Child Rights Act accordingly incorporates the normative framework. The practical framework, specifically the accessibility of education, is also identifiable in relation to free and compulsory education as set out in section 15. In order for compulsory education to be accessible to all children, the provision for free education in line with the practical framework is essential.

Provision is also made for secondary schooling in sections 15(3) and 15(4).¹²³⁷ It is notable that a specific provision is included for the rights of pregnant learners by stipulating that if a student falls pregnant before having completed her education, she must be provided the opportunity to continue her education after she has given birth.¹²³⁸ This is however conditional on her individual ability.¹²³⁹ This section emphasises the need for education to be accessible and adaptable to ensure that pregnant learners continue to have access to their education and that education should be adaptable in order to take pregnancy into account. The incorporation of the practical framework plays an important role in ensuring access to education for pregnant learners. Section 15 can be compared to article 11(6) of the ACRWC that also protects the pregnant learner's right to education.¹²⁴⁰ As a counterpart of this right cannot be found in the CRC,¹²⁴¹ it seems clear that the Nigerian legislature is in line with its regional obligations in terms of the ACRWC.

The recognition of the child's right to education is extended in legislation which focuses specifically on the child's education – the Compulsory, Free Universal Basic

¹²³⁵ See section 4 3 3 1.

¹²³⁶ See section 3 3 1 2.

¹²³⁷ S 15(3) of the Child Rights Act: "Every parent, guardian or person who has the care and custody of a child who has completed his basic education, shall endeavour to send the child to a senior secondary school, except as provided for in subsection (4) of this section."

S 15(4) of the Child Rights Act: "Where a child to whom subsection (3) of this section applies is not sent to senior secondary school, the child shall be encouraged to learn an appropriate trade and the employer of the child shall provide the necessaries for learning the trade."

¹²³⁸ S 15(5) of the Child Rights Act.

¹²³⁹ S 15(5) of the Child Rights Act.

¹²⁴⁰ S 11(6) states that: "State parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability; See section 3 3 1 2.

¹²⁴¹ O Ekundayo "Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of Child (CRC)'s Provisions? Examining the Similarities and Differences between the ACRWC and the CRC" (2015) 5 *International Journal of Humanities and Social Science* 143 150; See section 2 4.

Education Act (“UBE Act”). While the Child Rights Act provides important recognition and protection for the child’s right to education, the UBE Act provides content to the right to education by providing for other rights in relation to the right to basic education. The different dimensions to the child’s right to education is consequently recognised by the UBE Act.

4 3 4 2 *The Compulsory, Free Universal Basic Education Act*

The second piece of legislation which recognises the child’s right to education is the UBE Act. The aim of the UBE Act is to address issues in education such as access, equality, equity, inclusiveness, affordability and the quality of education.¹²⁴² From the aim of the UBE Act, elements of the practical framework can already be identified, in particular the accessibility and availability of education. A positive element of the UBE Act is the inclusion of a section dedicated to the interpretation of the Act. Section 15 provides definitions for the rights and concepts contained in the Act. These definitions are very helpful in providing scope and content to the child’s right to basic education and will be discussed in relation to other sections below.

Section 2(1) provides that every government¹²⁴³ in Nigeria shall provide all children of primary and junior secondary age with free, compulsory and universal basic education. The normative framework is thus represented in section 2(1) of the UBE Act as education should be free and compulsory. Like the Child Rights Act, the primary duty is on the state to provide the child with basic education and provision is also made for the duties of the parents to ensure that children attend school.¹²⁴⁴ Provision is also made for creating a duty on local stakeholders in education to guarantee that parents and guardians meet their obligations and that parents and guardians can be held accountable if they contravene section 2(2).¹²⁴⁵ The UBE Act defines “Basic

¹²⁴² Isokpan & Durojaye (2016) *PELJ* 6.

¹²⁴³ This relates to the fact that Nigeria is a Federal Residential Republic with 36 states; See in general Federal Republic of Nigeria <<http://www.nigeria.gov.ng/>> (accessed 29-09-2018).

¹²⁴⁴ See ss 2(2) and 4(1) of the UBE Act.

S 2(2): “Every parent shall ensure that his child or ward attends and completes his - primary school education; and junior secondary school education, by endeavouring to send the child to primary and junior secondary schools”

S 4(1): “Every parent shall ensure that his child receives full-time education suitable to his age, ability and aptitude by regular attendance at school.”

¹²⁴⁵ Ss 2(3) and 2(4) of the UBE Act.

Education” as “early childhood care and education and nine years of formal schooling.”¹²⁴⁶ Definitions are also provided for “Primary School”¹²⁴⁷ and “Junior Secondary School”¹²⁴⁸ which together provide for free and compulsory basic education between the ages of 6 and 15. The scope and application of the UBE Act as well as the definition of basic education is clearly provided for in the Act.

The concept of free education is not only emphasised in section 2(1) of the UBE Act, which sets out the right to basic education but also in a separate section dedicated to services.¹²⁴⁹ The UBE Act stipulates that services refer to instructional materials, books, classrooms, furniture and free lunch.¹²⁵⁰ A person that receives fees in contravention to section 3(1) commits an offence and can be held liable.¹²⁵¹ Article 3(1) consequently provides valuable content to the right to basic education.¹²⁵² The right to basic education in terms of the UBE Act should therefore be understood to include schools with classrooms and furniture, as well as instructional material and books.¹²⁵³ Schools must also serve free lunch.¹²⁵⁴ In public primary and secondary schools these services must be free of charge.¹²⁵⁵ The application of the practical framework can be identified in this instance. The need for education to be

S 2(3): “The stake-holders in education in a Local Government Area, shall ensure that every parent or person who has the care and custody of a child performs the duty imposed on him under section 2(2) of this Act.

S 2(4): “A parent who contravenes section 2(2) of this Act commits an offence and is liable-
on first conviction, to be reprimanded;

on second conviction, to a fine of ~~₪~~2,000:00 or imprisonment for a term of 1 month or to both; and
on subsequent conviction, to a fine of ~~₪~~5,000:00 or imprisonment for a term of 2 months or to both.”

¹²⁴⁶ S 15(1) of the UBE Act.

¹²⁴⁷ S 15(1) of the UBE Act defines “Primary School” as “... a school, which provides a six year basic course of full time instruction suitable for pupils between the age of six years and twelve years”. The UBE Act also defines “Primary School Age” in s 15(1) in order to provide clarity on the age of a child attending primary school. The provision states that “...age between the age attained by the commencement of the school year after he attains the age of six years and the age attained by the person at the end of the school year after he attains the age of twelve years and accordingly any person shall be deemed to be of primary school age if at the commencement of any school year he has attained the age of six years and a person shall be deemed to be over primary school age if at the end of the school year he has attained the age of twelve years”.

¹²⁴⁸ S 15(1) of the UBE Act defines “Junior Secondary School” as “...a school which provides a three year post-primary course of full-time instruction suitable for pupils between the age of twelve years and fifteen years”.

¹²⁴⁹ S 3(1) of the UBE Act.

¹²⁵⁰ S 15(1) of the UBE Act.

¹²⁵¹ S 3(2) the UBE Act. If convicted of such an offence they can either be fined up to ~~₪~~10 000 or imprisoned for up to 3 months, or in some instances both.

¹²⁵² See also s 15(1) of the UBE Act.

¹²⁵³ S 15(1) of the UBE Act.

¹²⁵⁴ S 15(1) of the UBE Act.

¹²⁵⁵ S 3(1) of the UBE Act.

economically accessible is specifically considered as the UBE Act provides for more than fee free schools. This ensures that a holistic approach is followed with regards to accessibility in terms of the practical framework. It also leads to the incorporation of acceptability in terms of the practical framework as children must have free access to teaching materials and infrastructure that is acceptable. Other indirect costs associated with education, such as uniforms or transport, are unfortunately not specifically referred to in the UBE Act.¹²⁵⁶

The UBE Act also stipulates that basic education is compulsory – in line with accessibility and availability of education in terms of the practical framework. More content is however not provided to this concept and it is only referred to in the title of the Act and section 2(1) that provides every child with the right to free, *compulsory* and universal basic education.¹²⁵⁷ In interpreting the concept in terms of the provisions of the Act, it becomes clear that compulsory basic education refers to education for children in primary and junior secondary school. This means that children between the between the ages of 6 and 15 are required to attend school.¹²⁵⁸

When comparing the UBE Act to the model for compliance, the two elements of primary education as stipulated in the CRC, “free” and “compulsory” are both clearly included in the UBE Act.¹²⁵⁹ Even though the Act provides for free and compulsory education, the federal nature of Nigeria is highlighted in section 1 of the UBE Act. From this section it appears that the primary obligation to provide education rests with each individual state. The Federal Government will only intervene by providing assistance to the states.¹²⁶⁰

Even though the Child Rights Act does not explicitly specify that the Act serves as a domestication of the ACRWC and the CRC, it is nonetheless commonly regarded as such.¹²⁶¹ This means that the normative framework is plainly acknowledged in terms of the Nigerian legal framework. Both the Child Rights Act and the UBE Act (like the Nigerian Constitution) incorporate the two elements of primary education as stipulated in article 28 of the CRC.¹²⁶² This means that free and compulsory primary

¹²⁵⁶ CESCR *General Comment No 13* para 6; See sections 2 4 4 and 2 5.

¹²⁵⁷ Own emphasis.

¹²⁵⁸ Ss 2(2) and 15(1) of the UBE Act.

¹²⁵⁹ Art 28(1)(a) of the CRC; See section 2 4 4.

¹²⁶⁰ S 1 of the UBE Act.

¹²⁶¹ Egede (2007) *Journal of African Law* 268, 272.

¹²⁶² See s 15(1) of the Child Rights Act and s 2(1) of the UBE Act.

education is underscored three times in terms of national law.¹²⁶³ A commitment to international and regional law is evident in the manner in which the child's right to education is recognised in Nigeria. What is however lacking in both the Child Rights Act and the UBE Act is mention of what the child's education should be aimed at. The aims of education as set out in article 29 of the CRC are therefore not clearly set out in either the Child Rights Act or the UBE Act.¹²⁶⁴ This aspect of the normative framework is consequently lacking in the Nigerian legislation on the child's right to education. This is an unfortunate omission which could have aided in the fulfilment of Nigeria's international obligations.

4 3 5 Nigeria's periodic reporting

As Nigeria has ratified the CRC, it is obligated to submit periodic reports to the CRC Committee that indicate how and to what extent the obligations of the CRC have been fulfilled.¹²⁶⁵ Nigeria submitted its first report in 1995,¹²⁶⁶ a second report in 2004¹²⁶⁷ and a combined third and fourth report in 2008.¹²⁶⁸ The combined third and fourth report, as the latest report submitted by Nigeria will be discussed. Divided into different clusters, cluster 7 of the report is dedicated to the child's education, leisure and cultural activities.¹²⁶⁹

As a state party to the ACRWC, Nigeria is further required to submit periodic reports to the ACERWC.¹²⁷⁰ Nigeria submitted its initial periodic report in July 2006, and it was considered at the 12th Ordinary Session of the ACERWC in 2008.¹²⁷¹ In 2015, the next

¹²⁶³ Referring to the Nigerian Constitution, the Child Rights Act and the UBE Act.

¹²⁶⁴ See section 2 4 4 2 of chapter 2 for a discussion of art 29 of the CRC.

¹²⁶⁵ In accordance with article 44 of the CRC; See section 2 4 2.

¹²⁶⁶ UNCRC "Initial reports of State parties due in 1993: Nigeria" (1995) UN Doc CRC/C/8/Add.26 para 4.

¹²⁶⁷ UNCRC "Second periodic reports of State parties due in 1998: Nigeria" (2003) UN Doc CRC/C/70/Add.24 para 4.

¹²⁶⁸ UNCRC "Third and fourth periodic report of State parties due in 2008: Nigeria" (2008) UN Doc CRC/C/NGA/3-4.

¹²⁶⁹ UNCRC "Third and fourth periodic report of State parties due in 2008: Nigeria" (2008) UN Doc CRC/C/NGA/3-4 110.

¹²⁷⁰ See section 3 3 1 of chapter 3; art 43 of the ACRWC.

¹²⁷¹ ACERWC "Concluding Observations table" <<https://www.acerwc.africa/reporting-table/#>> (accessed 17-09-2019); AU ACERWC "Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Nigeria Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child" (2008) 2.

periodic report was submitted to the ACERWC. This periodic report has not yet been considered.¹²⁷²

As the reporting period for the combined third and fourth report to the CRC Committee and the initial report to the ACERWC are very similar, these two reports will be discussed together. The reports are also very similar in their coverage; in many instances they are exactly the same. In order to avoid confusion, the third and fourth combined report to the CRC Committee will be referred to as the “Nigerian CRC Report” and the initial report to the ACERWC will be referred to as the “Nigerian ACRWC Report”. While the reports will be discussed together, the Concluding Observations from the CRC Committee and the ACERWC will be discussed separately.

The first part of the reports are not the same. In the Nigerian CRC Report, attention is firstly drawn to legislative and administrative measures that were taken during the relevant period of the report to the CRC Committee. Reference is made to policy documents that have been adopted in an effort to ensure the realisation of the right to education.¹²⁷³ The Nigerian ACRWC Report centres on article 11 of the ACRWC and refers specifically to the Nigerian Constitution and the adoption of the UBE Act and how its objectives are in line with article 11 of the ACRWC.¹²⁷⁴ In this regard reference is made specifically to provide free, universal basic education to all children and also to reduce drop-out rates.¹²⁷⁵ This is in line with articles 11(3)(a) and 11(3)(d) of the ACRWC. Here the normative framework as well as the accessibility of education as part of the model for compliance can be identified.

Next, both reports refer to resource and budgetary allocation in the education sector.¹²⁷⁶ Both reports state that during 2006, the education sector was allocated the

¹²⁷² ACERWC “Concluding Observations table” <<https://www.acerwc.africa/reporting-table/#>> (accessed 17-09-2019).

¹²⁷³ Examples include the National Policy on Integrated Early Childhood Development (IECD), Minimum Standards for IECD, School Health Policy, and National Policy on Gender in Basic Education and Policy on School Based Management Committees for improved school management; UNCRC “Third and fourth periodic report of State parties due in 2008: Nigeria” (2008) UN Doc CRC/C/NGA/3-4 110.

¹²⁷⁴ Federal Ministry of Women Affairs “Nigeria’s Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child” (2006).

¹²⁷⁵ Federal Ministry of Women Affairs “Nigeria’s Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child” (2006) 121.

¹²⁷⁶ UNCRC “Third and fourth periodic report of State parties due in 2008: Nigeria” (2008) UN Doc CRC/C/NGA/3-4 110; Federal Ministry of Women Affairs “Nigeria’s Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child” (2006) 122.

most funds of all the sectors – 8.8% of the total budget.¹²⁷⁷ This serves as a clear indication of the state’s recognition of the dire situation of education and the need for resources to address the myriad of problems in the education system. Both of the reports acknowledged the major challenges faced by the education system and refer to the allocation of resources in order to address the challenges. Expenditure was mainly targeted at the renovation of schools and classrooms; building new classroom blocks; and paying teachers.¹²⁷⁸ The ultimate aim of these improvements in infrastructure is to aid in the advancement of the quality of education.¹²⁷⁹ The allocation of resources can have a definite impact on the implementation of the right to basic education and consequently also the fulfilment of international obligations. The practical framework, specifically the acceptability and availability of education is central to this part of the report as it acknowledges the necessity of infrastructure and a sufficient number of teachers.

Short paragraphs providing information on different elements of education are included in the reports with many of them repeated and in the same order. Examples that are discussed in both the reports include the assessment of the quality of education;¹²⁸⁰ special and gifted children;¹²⁸¹ even distribution of schools;¹²⁸² corporal

¹²⁷⁷ UNCRC “Third and fourth periodic report of State parties due in 2008: Nigeria” (2008) UN Doc CRC/C/NGA/3-4 111; Federal Ministry of Women Affairs “Nigeria’s Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child” (2006) 122.

¹²⁷⁸ Federal Ministry of Women Affairs “Nigeria’s Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child” (2006) 122; UNCRC “Third and fourth periodic report of State parties due in 2008: Nigeria” (2008) UN Doc CRC/C/NGA/3-4 110.

¹²⁷⁹ Federal Ministry of Women Affairs “Nigeria’s Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child” (2006) 122.

¹²⁸⁰ UNCRC “Third and fourth periodic report of State parties due in 2008: Nigeria” (2008) UN Doc CRC/C/NGA/3-4 112; Federal Ministry of Women Affairs “Nigeria’s Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child” (2006) 121.

¹²⁸¹ UNCRC “Third and fourth periodic report of State parties due in 2008: Nigeria” (2008) UN Doc CRC/C/NGA/3-4 112; Federal Ministry of Women Affairs “Nigeria’s Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child” (2006) 122.

¹²⁸² UNCRC “Third and fourth periodic report of State parties due in 2008: Nigeria” (2008) UN Doc CRC/C/NGA/3-4 112; Federal Ministry of Women Affairs “Nigeria’s Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child” (2006) 123.

punishment;¹²⁸³ adequacy of teachers and facilities;¹²⁸⁴ same quality of education for boys and girls;¹²⁸⁵ enrolment and completion of primary school;¹²⁸⁶ and exclusion from school.¹²⁸⁷ For the most part, the information provided refers to policies or programmes that have been implemented in order to improve education.

Two very important measures referred to in both reports are in relation to sanitation and gender equality. These measures go hand-in-hand with the acceptability and accessibility of the child's education as part of the practical framework. The first measure focused on the improvement of infrastructure in relation to sanitation. The provision of toilets and hand pumps to schools is an ongoing project which aids in the acceptability of education. This also has a direct effect on the education of girls as they are able to attend school throughout the year.¹²⁸⁸ This is clearly in line with making education safe, acceptable and equitable and fulfilling international obligations.

In order to promote gender equality in and through education, the reports refer to measures undertaken to ensure that boys and girls receive the same quality education.¹²⁸⁹ One of these measures was establishing the Teacher Registration Council which aims to register only qualified teachers and to review the curriculum in

¹²⁸³ UNCRC "Third and fourth periodic report of State parties due in 2008: Nigeria" (2008) UN Doc CRC/C/NGA/3-4 113; Federal Ministry of Women Affairs "Nigeria's Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child" (2006) 124.

¹²⁸⁴ UNCRC "Third and fourth periodic report of State parties due in 2008: Nigeria" (2008) UN Doc CRC/C/NGA/3-4 113; Federal Ministry of Women Affairs "Nigeria's Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child" (2006) 124.

¹²⁸⁵ UNCRC "Third and fourth periodic report of State parties due in 2008: Nigeria" (2008) UN Doc CRC/C/NGA/3-4 113; Federal Ministry of Women Affairs "Nigeria's Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child" (2006) 125.

¹²⁸⁶ UNCRC "Third and fourth periodic report of State parties due in 2008: Nigeria" (2008) UN Doc CRC/C/NGA/3-4 114; Federal Ministry of Women Affairs "Nigeria's Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child" (2006) 126.

¹²⁸⁷ UNCRC "Third and fourth periodic report of State parties due in 2008: Nigeria" (2008) UN Doc CRC/C/NGA/3-4 117.

¹²⁸⁸ Federal Ministry of Women Affairs "Nigeria's Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child" (2006) 123; UNCRC "Third and fourth periodic report of State parties due in 2008: Nigeria" (2008) UN Doc CRC/C/NGA/3-4 112.

¹²⁸⁹ Federal Ministry of Women Affairs "Nigeria's Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child" (2006) 125; UNCRC "Third and fourth periodic report of State parties due in 2008: Nigeria" (2008) UN Doc CRC/C/NGA/3-4 113.

order to ensure that it is relevant for the Nigerian context.¹²⁹⁰ This can be regarded as an attempt to improve the quality of education in line with the acceptability and availability of education in terms of the practical framework. The availability of education includes the availability of qualified teachers and the intention of Teachers Registration Council is to register qualified teachers that can be appointed at schools.¹²⁹¹ The elements of the practical framework are clearly identifiable here.

While the reports indicated the steps that had been taken, a children's rights perspective is unfortunately not easily identifiable. How the child's rights are affected are not referred to nor is the 4-A scheme or the guiding principles of the CRC. Neither case law nor legislation is discussed in relation to the child's rights to education in this section of the report. This is an unfortunate omission.

The Nigerian CRC report indicated that even though the government had taken steps in order to improve the realisation of the child's right to education in line with the CRC, much still needs to be done. This was made clear in the Committee's Concluding Observations. What this reveals is that while the CRC has been domesticated by means of legislation, a legislative framework simply cannot function on its own. Implementation of the legislation plays a crucial role in ensuring that states fulfil their obligations in terms of the CRC. Article 4 of the CRC makes it clear that legislative and administrative measures must be taken in order to *implement* the rights contained in the CRC. Without implementation, the rights of many children will simply not be realised. In terms of the model for compliance, the Nigerian CRC report and the Committee's Concluding Observations signify that both the normative and practical frameworks of the model for compliance must be adhered to in order to fulfil international obligations in terms of the CRC.

In its 2010 Concluding Observations of the Nigerian CRC Report,¹²⁹² the CRC Committee commended the Nigerian government for the higher resource allocation, improvement of infrastructure and enrolment rates.¹²⁹³ This indicates that positive steps were taken in order to address the acceptability and accessibility of education

¹²⁹⁰ Federal Ministry of Women Affairs "Nigeria's Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child" (2006) 125; UNCRC "Third and fourth periodic report of State parties due in 2008: Nigeria" (2008) UN Doc CRC/C/NGA/3-4 113.

¹²⁹¹ See section 4 3 5.

¹²⁹² UNCRC "Concluding Observations: Nigeria" (2010) UN Doc CRC/C/NGA/CO/3-4.

¹²⁹³ UNCRC "Concluding Observations: Nigeria" (2010) UN Doc CRC/C/NGA/CO/3-4 para 71.

in terms of the practical framework. Nonetheless, the continued increase in the allocation of resources was recommended.¹²⁹⁴ Major concerns were still raised by the CRC Committee. Even though enrolment had improved, the large number of children still not enrolled in school was highlighted by the CRC Committee in reference to general enrolment in primary schools, completion rates and the disparities in enrolment and educational facilities depending on the area or state.¹²⁹⁵ While the improved enrolment rates resulted in better access to education, many children still did not have the required access to education as required by the normative framework. The fact that the Nigerian Constitution does not provide the child with a justiciable right to free and compulsory education, together with the existence of school fees was also critiqued.¹²⁹⁶ The CRC Committee accordingly recommended to the Nigerian government that it must ensure that primary education be made free and compulsory for all children by abolishing school fees and incorporating the right to free and compulsory basic education as a right in the Nigerian Constitution.¹²⁹⁷ If these recommendations are not implemented by the Nigerian government, it will lead to the child's education not being accessible as required by the practical framework as well as the failure to comply with the normative framework. If these two frameworks of the model for compliance are not adhered to it could ultimately lead to the non-fulfilment of Nigeria's international obligations in relation to the child's right to basic education.

The ACERWC has also responded to the Nigerian ACRWC Report in its Concluding Recommendations. With regard to the child's education the ACERWC made the following recommendations. Firstly, the link between legislative recognition of the right to education and a strong increase in enrolment is commended.¹²⁹⁸ The normative framework as identified the legislation and the element of accessibility as part of the practical framework can be identified here. However, even though legislative provision is made for free education up to the age of 15, education remains unavailable to many children – especially girls. The accessibility and availability of the education of girls is unfortunately still a challenge. Accordingly, the ACERWC recommended that the state

¹²⁹⁴ UNCRC "Concluding Observations: Nigeria" (2010) UN Doc CRC/C/NGA/CO/3-4 para 72(c).

¹²⁹⁵ UNCRC "Concluding Observations: Nigeria" (2010) UN Doc CRC/C/NGA/CO/3-4 para 71(a)-(c).

¹²⁹⁶ UNCRC "Concluding Observations: Nigeria" (2010) UN Doc CRC/C/NGA/CO/3-4 para 71(e).

¹²⁹⁷ UNCRC "Concluding Observations: Nigeria" (2010) UN Doc CRC/C/NGA/CO/3-4 para 72(a)-(b).

¹²⁹⁸ AU ACERWC "Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Nigeria Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child" (2008) 4.

should include and develop programmes aimed at child retention in school; the removal of gender disparities; improvement of school facilities; and lowering of student-teacher ratios.¹²⁹⁹ The development of new programmes to address challenges relating to the accessibility, availability and acceptability of education highlights the importance of ensuring that education continues to be adaptable. The complementary and interrelated nature of the elements of the 4-A scheme is underscored in this instance. The collaborative and participatory process that was followed in the drafting of the report as well as the high-level participation from the government were commended by the ACERWC.¹³⁰⁰ Mezmur and Sloth-Nielsen also view the report as a good example of the practice and process that should be followed in the preparation of a periodic report to the ACERWC.¹³⁰¹

4 3 6 Reflections on the child's right to basic education in Nigeria

Considering the child's right to education as discussed in the Nigerian context, a notable contribution to the comparative study is the domestication of international treaties into the domestic legal system. This includes the African Charter, the CRC and the ACRWC. With the distinction between Fundamental Rights in chapter IV and the Fundamental Objectives and Directive Principles of State Policy in chapter II, one could argue that international law played a valuable role when parties approached the court to adjudicate on infringements of economic, social and cultural rights, including the right to education.

In terms of the Nigerian experience, arguments have been made that the right to education has been elevated to a justiciable right through the domestication of the African Charter's direct application as well as the incorporation of the CRC and the ACRWC into domestic legislation by means of the Child Rights Act and the UBE

¹²⁹⁹ AU ACERWC "Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Nigeria Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child" (2008) 4.

¹³⁰⁰ AU ACERWC "Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Nigeria Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child" (2008) 2.

¹³⁰¹ BD Mezmur & J Sloth-Nielsen "An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child" (2008) 8 *African Human Rights Law Journal* 596 604.

Act.¹³⁰² The judgment in the *SERAP* case of the ECOWAS Community Court¹³⁰³ has also led to the recognition of the right to education for all. Unfortunately, the right to education still falls under chapter II of the Nigerian Constitution and is thus not constitutionally recognised as a Fundamental Right. This has a negative impact on the application of the normative framework in the Nigerian context.

The Nigerian judiciary has however applied a more expansive interpretation in order to transform the right to basic education.¹³⁰⁴ Even though important international instruments have been domesticated, the failure of the states to adopt the relevant legislation which domesticates these instruments, could undermine the realisation of the child's rights to, in and through basic education.¹³⁰⁵ This means that even though the Nigerian federal legal framework is reasonably strong normatively, it needs to be adopted by the states in order to ensure that it provides the normative foundation for the practical implementation of the child's right to basic education. The instances where legislation which recognises the child's right to basic education has been adopted, in reality unfortunately does not reflect the aims of legislative framework. The implementation of the legislation specifically targeted at realising the child's right to basic education has been challenging, as indicated in Nigeria's reports to the CRC Committee and the ACERWC. The high number of children not attending school as well as the high drop-out rates continue to be areas of concern. The accessibility of the child's education as part of the practical framework is clearly identifiable here and these challenges pose a direct threat to the child accessing his or her education.

On face value, a stark difference can therefore be seen when comparing the constitutional protection and recognition of the right to education in Nigeria and South Africa.¹³⁰⁶ The manner and extent to which international law, like the CRC, has been domesticated by means of appropriate legislation serves as a good example of how South Africa can incorporate international standards in its own legislation.

¹³⁰² Akinbola (2010) *African Human Rights Law Journal* 467.

¹³⁰³ *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission ECW/CCJ/APP/08/08*; See section 4 3 3 3 above.

¹³⁰⁴ Taiwo & Govindjee (2012) *Obiter* 210.

¹³⁰⁵ Coetzee (2010) *African Human Rights Law Journal* 496; Akinwumi (2009) *International Journal of Legal Information* 391; See also UNICEF "Nigerian country programme: Information sheet: The Child Rights Act" (2007) <<http://www.unicef.org/wcaroWCARO-Nigeria-Factsheets-CRA.pdf>> (accessed 10-08-2018).

¹³⁰⁶ The right to education is firmly entrenched in s 29 of the Constitution; See section 5 3.

4 4 Conclusion

This chapter on foreign law has made it clear that both India and Nigeria, still face many challenges before it can be said that they fully comply with the model. Difficult challenges, especially with regard to the application of the practical framework, have been identified and analysed. What has become abundantly clear is that an authoritative legislative framework, which does not merely provide some form of recognition to the right to basic education is necessary.¹³⁰⁷ Legislation should be structured in such a way as to incorporate international obligations.¹³⁰⁸ Nigeria has attempted to do this by domesticating the CRC and the ACRWC into its national legislation. The Nigerian legislative framework also provides specifically for the child as the rights holder and includes clear definitions which aid in providing scope and content to the rights recognised in the legislation. States should not only incorporate the children's right centred approach of article 28 into their policy documents on education – legislation that is in line with the standards of the CRC is also necessary. When examining case law, it becomes evident that judges are progressively widening the scope of sources that are referred to in their interpretation of rights. Judges are therefore no longer merely receiving and applying foreign case law.¹³⁰⁹

Both India and Nigeria have legislation that is targeted specifically at basic education, with the titles and aim of the legislation making this clear. The Right to Education Act¹³¹⁰ regulates basic education in India and the UBE Act¹³¹¹ provides for basic education in Nigeria. These two acts make it clear from the very beginning that they are both concerned with the right to basic education. Moreover, the Right to Education Act makes it evident that the legislation is aimed at the child specifically as the child is included in the title of the act. This means that India has a specific piece of legislation dedicated to the *child's* right to basic education. While the UBE Act does not include the child in the title, the legislation is targeted at the child. This is illustrated in article 2, which provides for free, compulsory and universal basic education for every

¹³⁰⁷ Bajpai *Child Rights in India* 359.

¹³⁰⁸ Bajpai *Child Rights in India* 359.

¹³⁰⁹ C L'Heureux-Dubé "The importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34 *Tulsa Law Journal* 15 17.

¹³¹⁰ See section 4 2 6.

¹³¹¹ See section 4 3 4 2.

child.¹³¹² It is thus clear that the legislation in both India and Nigeria is aimed at the child and thereby also centred on the rights of the child specifically.

Free basic education is also afforded to all children in terms of both the Right to Education Act¹³¹³ and the UBE Act.¹³¹⁴ This means that not only is the right to basic education afforded to all children but both acts provide for *free* basic education. Reference is however not only made to free basic education but also the indirect costs that are associated with education. Both the Right to Education Act and the UBE Act provide for the indirect costs. The Right to Education Act refers to fees, charges and expenses that should not prevent children from accessing or completing their education.¹³¹⁵ The UBE Act provides for indirect costs in a separate provision on services that should be free.¹³¹⁶ In terms of the definition of services, indirect costs are inclusive of classrooms, furniture, textbooks and materials.¹³¹⁷ Scope and content to the concept of free basic education is accordingly provided for in the Indian and Nigerian legislation.

The importance of acceptable school infrastructure is emphasised in the Right to Education Act as it provides norms and standards for schools.¹³¹⁸ Provision is made for sanitation, toilets, drinking water, playgrounds and student-teacher ratios. The inclusion of norms and standards for infrastructure is important as poor infrastructure is a continuous challenge in India.

The Indian experience has also indicated the important role that civil society organisations and the media can play in the advancement of the child's right to basic education.¹³¹⁹ When certain issues or cases receive media attention, it can have a very positive effect on the outcome.¹³²⁰ Civil society organisations that bring important cases to the courts on behalf of learners illustrate just how important their role is in the realisation of the child's right to basic education.

¹³¹² S 2(1) of the UBE Act, See section 4 3 4 2.

¹³¹³ See section 4 2 6 2.

¹³¹⁴ Section 4 3 4 2.

¹³¹⁵ S 3(2) of the Right to Education Act; See section 4 2 6 2.

¹³¹⁶ S 3(1) of the UBE Act; Section 4 3 4 2.

¹³¹⁷ S 15(1) of the UBE Act; Section 4 3 4 2.

¹³¹⁸ S 19 of the Right to Education Act; Schedule to the Right to Education Act: Norms and Standards for a School.

¹³¹⁹ See section 4 2 6.

¹³²⁰ See section 4 2 6 4; *Registrar (Judicial) of High Court of Karnataka v State of Karnataka WP 15768 of 2013* (High Court of the State of Karnataka decision).

While it is evident that many developments have taken place in order to align legislative and constitutional frameworks with the normative framework, the implementation and practical effect of these legal frameworks in both India and Nigeria has proven difficult. The examination of the child's right to education in India and Nigeria has made it very clear that a jurisdiction can be normatively strong while at the same time weak with regard to practical implementation. The importance of the practical framework should therefore not be underestimated. Only once both the normative and practical frameworks are complied with, can states be said to be adhering to the model for compliance and in turn fulfilling their international obligations.

Chapter 5: *The child's right to basic education in South Africa*

5 1 Introduction

The Convention on the Rights of the Child ("CRC")¹³²¹ was ratified by South Africa on 16 June 1995 and was the very first international human rights instrument that the democratic South African government chose to ratify.¹³²² The early ratification by the government together with the constitutional protection afforded to children's rights indicated the prominence of children's rights in the transformation¹³²³ of South African society under the new constitutional democracy.¹³²⁴ South Africa is also a party to the African Charter on the Rights and Welfare of the Child ("ACRWC")¹³²⁵ as it ratified the ACRWC in January 2000.¹³²⁶

Unfortunately, the constitutional framework for the child's right to basic education is not mirrored by reality.¹³²⁷ Similar to India and Nigeria, South Africa also faces specific challenges in the realisation of the child's right to basic education.¹³²⁸ If and how these challenges are addressed in light of South Africa's international obligations will be

¹³²¹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Resolution 44/25 of 20 November 1989 (hereafter the "CRC").

¹³²² Once a state becomes a party to the CRC, it is bound by the obligations set forth in the CRC. This includes the requirement to submit reports on a periodic basis in which it sets out the measures that it has adopted in order to give effect to the rights enshrined in the CRC; J Sloth-Nielsen "The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa" (1996) 4 *Int'l J Child Rts* 323 323; Detrick *Commentary on the Convention* 22; See also C Heyns & F Viljoen *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) 544.

¹³²³ Transformation and transformative constitutionalism are important in the context of education, especially in South Africa, as inequalities are still rife in relation to the child's education. This theme however falls outside of the scope of this dissertation and will thus not be discussed in detail.

¹³²⁴ Sloth-Nielsen (1996) *Int'l J Child Rts* 324; See sections 5 3 and 5 4.

¹³²⁵ OAU, African Charter on the Rights and Welfare of the Child, Doc. CAB/LEG/24.9/49 (1990) (hereafter the "ACRWC").

¹³²⁶ ACERWC "Concluding Observations table" <<https://www.acerwc.africa/ratifications-table/>> (accessed 25-09-2018).

¹³²⁷ E Berger "The right to education under the South African Constitution" (2003) 103 *Columbia Law Review* 614 628; R Krüger & C McConnachie "The Impact of the Constitution on Learners' Rights" in T Boezaart *Child Law in South Africa* 2 ed (2018) 535; C McConnachie & C McConnachie "Concretising the Right to a Basic Education" (2012) 129 *SALJ* 554 555, 590; *Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC) para 42; Liebenberg *Socio-economic Rights* 245; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 123.

¹³²⁸ Challenges identified in chapter 4 include poverty, inequality, child labour, poor infrastructure, distance to school, quality of education, and teacher qualifications. See section 4 1.

examined by applying the model for compliance and subsequently measuring South Africa's compliance.

This chapter starts with establishing the manner in which the South African Constitution ("Constitution") recognises the importance and application of international law in the South African context. The application of international law will be examined in light of specific constitutional provisions¹³²⁹ as well as applicable case law.¹³³⁰ As the history of education in South Africa has already been examined in chapter 1,¹³³¹ the next step will be to determine the manner in which the right to basic education is recognised in terms of the legal framework. An analysis of the constitutional recognition of the child's right to basic education will examine specific provisions of the Constitution.¹³³² The examination will include an analysis of sections 28 and 29 of the Constitution in terms of the model for compliance.¹³³³

With the focus on the application of international law in terms of the constitution, the state's duty to respect, protect, promote and fulfil the child's right to basic education will also be analysed.¹³³⁴ A brief examination of the minimum core standard, as developed by the Committee on Economic, Social and Cultural Rights ("CESCR")¹³³⁵ and its application in the South African context, will also be set out in relation to the right to basic education.¹³³⁶ This examination will shed light on the approach followed by the Constitutional Court in the interpretation of socio-economic rights in general, and the right to basic education specifically.

The focus will then shift to the recognition of the child's right to basic education in terms of legislation, focusing on the South African Schools Act (hereafter "the Schools

¹³²⁹ Ss 39, 231, 232 and 233 of the Constitution; See section 5 3 below.

¹³³⁰ *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC); *S v Makwanyane* 1995 3 SA 391 (CC); See section 5 3 below.

¹³³¹ See section 1 4.

¹³³² The discussion focuses on ss 29 and 28 of the Constitution; See section 5 4 for the discussion of the constitutional recognition of the right to basic education and section 5 5 for the discussion of the child's right basic education in terms of legislation.

¹³³³ See section 5 4.

¹³³⁴ See section 5 4 4 below.

¹³³⁵ Liebenberg *Socio-economic Rights* 84; see for example CESCR General Comment No 13 (21st session, 1999) "The Right to Education (art 13)" UN Doc E/C.12/1999/10 para 1 (hereafter "CESCR General Comment No 13"); CESCR General Comment No 14 (22nd session, 2000) "The Right to the Highest Attainable Standard of Health (art 12)" UN Doc E/C.12/2000/4 paras 33-37 (hereafter CESCR General Comment No 14); Courtis & Tobin "Article 28" in *Commentary* 1071.

¹³³⁶ See section 5 4 5 below.

Act”).¹³³⁷ The National Education Policy Act (hereafter the “NEPA”)¹³³⁸ will also be considered as it is applicable to the regulation and provision of the child’s right to basic education.¹³³⁹ The analysis will again be conducted through the lens of a child-centred approach and the model for compliance (“the model”) as established in chapter 3 in order to determine compliance with international obligations.¹³⁴⁰ Attention will be paid to the international and regional documents relating to South Africa’s international obligations, specifically the Convention on the Rights of the Child (“CRC”)¹³⁴¹ and the African Charter on the Rights on the Rights and Welfare of the Child (“ACRWC”).¹³⁴²

Lastly, the Periodic Reports that South Africa has submitted to the Committee on the Rights of the Child (“CRC Committee”)¹³⁴³ together with the Concluding Observations from the CRC Committee¹³⁴⁴ will be examined in order to determine the steps that South Africa has taken to conform to the standards set by the CRC.¹³⁴⁵ As South Africa is a state party to the ACRWC, its reporting history to the African Committee of Experts on the Rights and Welfare of the Child (“ACERWC”) will also be examined.¹³⁴⁶ Comparisons between the reports to the CRC Committee and the ACERWC will also be drawn.¹³⁴⁷ The examination of periodic reports and concluding observations will highlight the manner in which states have complied with their international obligations. Identifying the model for compliance in the periodic reports and concluding observations will aid in measuring South Africa’s compliance and could lead to pinpointing valuable lessons for South Africa. Throughout the examination of the South African position, contrasts will be made to the Indian and Nigerian position in relation to the examination in chapter 4. This will aid in determining which lessons South Africa can learn from these two foreign jurisdictions.

¹³³⁷ South African Schools Act 84 of 1996; See section 5 5; For example the Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure.

¹³³⁸ National Education Policy Act 27 of 1996.

¹³³⁹ See section 5 5.

¹³⁴⁰ See section 2 6.

¹³⁴¹ See section 5 4 and 5 5 below.

¹³⁴² OAU, African Charter on the Rights and Welfare of the Child, Doc. CAB/LEG/24.9/49 (1990) (hereafter the “ACRWC”); See section 5 4 and 5 5.

¹³⁴³ UNCRC “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. UNCRC “Concluding Observations on the second periodic report of South Africa” (2016) UN Doc CRC/C/ZAF/CO/2; See section 2 4 2.

¹³⁴⁵ See section 5 6.

¹³⁴⁶ See section 5 6.

¹³⁴⁷ See section 5 6.

5 2 Background on the South African legal system

As made clear in chapter 1, South Africa's political history is closely connected to the child's education.¹³⁴⁸ With the new constitutional dispensation came the adoption of a new constitution with an entrenched Bill of Rights which provides explicitly for the right to basic education. The South African constitutional commitment to the child's education is accordingly clear, as the right to education is enshrined in section 29 of the South African Constitution ("Constitution").¹³⁴⁹ Whether or not the constitutional commitment to the child's right to basic education meets the obligations as set by international law will be determined by applying the model for compliance.

5 3 The Constitutional framework and international law

The Constitution directly recognises the importance of international law for the interpretation of the Bill of Rights.¹³⁵⁰ Section 39(1)(b) of the Constitution states that a court, tribunal or forum *must* consider international law when interpreting the Bill of Rights. This is in contrast to the position of foreign law, as expressed in section 39(1)(c) that provides that foreign law *may* be considered.¹³⁵¹ Section 39 accordingly explicitly recognises that international law can and should play a pivotal role in the interpretation of the child's right to basic education.¹³⁵² The applicability of the model for compliance in the South African context is thus clear. By engaging with international law in the adjudication of the rights enshrined in the Bill of Rights, it may lead to further developments and understanding of these rights, which in turn could aid transformative adjudication.¹³⁵³ Moreover, in the process of interpretation "the values that underlie an open and democratic society based on human dignity, equality and freedom" must be promoted.¹³⁵⁴ The spirit, purports and the objects of the Bill of Rights must also be promoted in the interpretation of legislation and the development

¹³⁴⁸ See chapter 1 for a historical examination of the child's right to basic education in South Africa.

¹³⁴⁹ See section 5 4 2 below for a discussion of s 29 of the Constitution.

¹³⁵⁰ S 39 of the Constitution; Currie & De Waal *The Bill of Rights Handbook* 146-147; Skelton *Strategic Litigation Impacts* 47.

¹³⁵¹ This section holds that courts, tribunals and forums may make use of foreign law when interpreting the Bill of Rights; Currie & De Waal "Interpretation of the Bill of Rights" in *Bill of Rights Handbook* 147.

¹³⁵² S 39(1)(b) of the Constitution.

¹³⁵³ Liebenberg *Socio-economic Rights* 102; For more information on the topic of "transformative adjudication" see D Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" (2002) 18 *SAJHR* 309-315.

¹³⁵⁴ S 39(1)(a) of the Constitution; Currie & De Waal *Bill of Rights Handbook* 146.

of the law.¹³⁵⁵ The interrelatedness of human rights and the notion of rights to, in and through basic education is confirmed by section 39 as it shows that in the interpretation of a specific right in the Bill of Rights, other rights should also be taken into account. The dimensions of the right to education are consequently acknowledged.

Section 39(1)(b) indicates the Constitution's receptiveness to take international norms, values and standards into consideration.¹³⁵⁶ This in turn gives effect to the preamble of the Constitution that sets out the constitutional commitment to building a democratic and united South Africa that is able to take its rightful place in the family of nations.¹³⁵⁷ The objective is to form part of the international community and to adhere to the standards set by international law as well as contributing to the development of international law.¹³⁵⁸ This sentiment was also confirmed by the Constitutional Court in the case of *Kaunda v President of the Republic of South Africa*¹³⁵⁹ in which O'Regan J stated the following:

“[O]ur Constitution recognises and asserts that after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law”.¹³⁶⁰

The Constitutional Court has held that when the courts rely on international law in interpreting the Bill of Rights, binding as well as non-binding international law may be taken into consideration.¹³⁶¹ Chaskalson P¹³⁶² held in the noteworthy case of *S v Makwanyane*¹³⁶³ that:

¹³⁵⁵ S 39(2) of the Constitution; With specific reference to the interpretation of legislation and the development of common or customary law; Currie & De Waal *Bill of Rights Handbook* 146.

¹³⁵⁶ Liebenberg *Socio-economic Rights* 101.

¹³⁵⁷ The Preamble of the Constitution states the following: “We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to— Build a united and democratic South Africa able to take its rightful place as a sovereign State in the family of nations.”; Liebenberg *Socio-economic Rights* 101.

¹³⁵⁸ Liebenberg *Socio-economic Rights* 101.

¹³⁵⁹ 2005 4 SA 235 (CC).

¹³⁶⁰ *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) para 222; Liebenberg *Socio-economic Rights* 101.

¹³⁶¹ *S v Makwanyane* 1995 3 SA 391 (CC) para 35; Liebenberg *Socio-economic Rights* 102; Currie & De Waal *Bill of Rights Handbook* 146.

¹³⁶² As he then was.

¹³⁶³ 1995 3 SA 391 (CC).

“International agreements and customary international law accordingly provide 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 Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organi[z]ation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.”¹³⁶⁴

This means that treaties to which South Africa is not a party or those that it is excluded from ratifying¹³⁶⁵ can (and should) also be taken into account.¹³⁶⁶ The argument has been made that “interpretative tools” as referred to by Chaskalson P could be interpreted to include “soft” international law.¹³⁶⁷ This means that resolutions adopted by the international community under the authority of, for example, the United Nations (“UN”) or the African Union (“AU”), will form part of international law, as well as guidelines that have been adopted by international organisations and reports by special rapporteurs.¹³⁶⁸

The fundamental role of international law in the interpretation of the Bill of Rights is further strengthened in terms of section 233 of the Constitution. Section 233 provides that the courts should: “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative that is inconsistent with international law.”¹³⁶⁹ International law clearly holds a fundamental role in the interpretation of South African law and the application of the model for compliance is thus justified.¹³⁷⁰

The Constitutional Court in *Government of the Republic of South Africa v Grootboom*¹³⁷¹ referred to the approach followed in *S v Makwanyane*¹³⁷² with regard

¹³⁶⁴ *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

¹³⁶⁵ Examples of treaties that cannot be ratified by South Africa include for example the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the American Convention on Human Rights (1969); Liebenberg *Socio-economic Rights* 102.

¹³⁶⁶ Liebenberg *Socio-economic Rights* 102; Currie & De Waal “Interpretation of the Bill of Rights” in *The Bill of Rights Handbook* 147.

¹³⁶⁷ “Soft” international law refers to standards that have not yet been firmly established or recognised in an international treaty, convention or customary international law; Liebenberg *Socio-economic Rights* 102.

¹³⁶⁸ Liebenberg *Socio-economic Rights* 102.

¹³⁶⁹ S 233 of the Constitution; Liebenberg *Socio-economic Rights* 105.

¹³⁷⁰ K Ngidi “The role of international law in the development of children’s rights in South Africa: A children’s rights litigators perspective” in M Kilander (ed) *International Law and Human Rights Litigation in Africa* (2010) 177.

¹³⁷¹ 2001 1 SA 46 (CC).

¹³⁷² 1995 3 SA 391 (CC).

to international law in the process of interpretation.¹³⁷³ Yacoob J noted that applicable and relevant international law can be an interpretive guide but that the weight attached to a specific rule or principle of international law will differ depending on the facts and the case at hand. In the instance that the applicable international law is binding on South Africa, it could be directly applicable.¹³⁷⁴ The intrinsic role of international law within South African law is clear but when it is applied as an interpretive tool, it must be done within the specific context of the legal system of South Africa – more specifically the Constitution.¹³⁷⁵ The argument has also been made that for every provision in the Bill of Rights, its international law counterpart exists in an international human rights convention or general principle of international law. It is thus difficult to conceive a situation where public international law would not be relevant and applicable.¹³⁷⁶

The fact that the Constitution¹³⁷⁷ as well as the Constitutional Court¹³⁷⁸ have confirmed the interpretative value of international law, whether it is binding or not, serves as vindication for the view that South African courts should take all international instruments into account when interpreting the Bill of Rights without being limited to only binding sources of international law.¹³⁷⁹ The centrality of the CRC and its accompanying obligations, as set out in the model for compliance, are thus recognised in terms of South African law.

¹³⁷³ Ngidi “Role of international law” in *International law in Africa* 177; Arendse (2011) *PELJ* 100.

¹³⁷⁴ Yacoob J in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26; Ngidi “Role of international law” in *International law in Africa* 177.

¹³⁷⁵ Ngidi “Role of international law” in *International law in Africa* 177.

¹³⁷⁶ J Dugard ‘The role of international law in interpreting the Bill of Rights’ (1994) 10 *SAJHR* 208 212; Ngidi “Role of international law” in *International law in Africa* 176; See also *Azapo v The President of the Republic of South Africa* 1996 4 SA 671 (CC).

¹³⁷⁷ S 39 of the Constitution.

¹³⁷⁸ *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC); *S v Makwanyane* 1995 3 SA 391 (CC).

¹³⁷⁹ Liebenberg *Socio-economic Rights* 102-103; Currie & De Waal “Interpretation of the Bill of Rights” in *Bill of Rights Handbook* 146; For more information on this topic see Dugard *International law*.

5 4 Constitutional recognition of the child’s right to basic education

5 4 1 The education clause

Section 29 of the Constitution stipulates the following:

“29. Education

(1) Everyone has the right—

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make available and accessible.

(2) 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.

(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.”

As a point of departure, it must be noted that that when comparing section 29 of the Constitution to the CRC, there is no reference to “free” or “compulsory” education.¹³⁸⁰ As free basic education is not guaranteed by the Constitution, schools are allowed to charge school fees.¹³⁸¹ What is however clear from reading section 29 is that no one may be denied the right to education due to a lack of financial resources.¹³⁸² The continued existence of fee paying schools, specifically in light of the international obligation to provide free basic education, and whether or not it results in a violation

¹³⁸⁰ See section 2 4 4; Arendse (2011) *PELJ* 218; Kamga “The Right to a Basic Education” in *Child Law* 520; GE Devenish *A Commentary on the South African Constitution* (1998) 76; Skelton *Strategic Litigation Impacts* 47.

¹³⁸¹ More on this below as set out in the Schools Act; Devenish *Commentary on the Constitution* 76.

¹³⁸² Devenish *Commentary on the Constitution* 76; Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 79; Joubert “South African Schools Act” in *Child Law* 579; Skelton *Strategic Litigation Impacts* 47.

of the right to basic education is still unclear.¹³⁸³ Section 29 also does not specifically refer to compulsory basic education. Whether or not the right basic education should be interpreted to be equivalent to compulsory education in terms of the Schools Act is yet to be determined.¹³⁸⁴ Section 29 does however aim to make basic education universally accessible as required by international standards.¹³⁸⁵ Accessibility as part of the model for compliance is therefore identifiable.

As noted above, section 29 does not contain internal limitations or qualifiers.¹³⁸⁶ This is in contrast to other socio-economic rights such as the right to access to adequate housing,¹³⁸⁷ or access to health care services¹³⁸⁸ in the Constitution.¹³⁸⁹ Section 29(1)(a) is formulated in the same manner as the child's rights to basic nutrition, shelter, basic health care services and social services in section 28(1)(c) of the Constitution.¹³⁹⁰ The socio-economic rights of children (section 28(1)(c)) as well as the right to basic education for everyone (section 29(1)(a)) do not have internal limitations as identified in other socio-economic rights.¹³⁹¹ With such a clear textual

¹³⁸³ Simbo (2018) *Obiter* 128.

¹³⁸⁴ This issue has not yet been dealt with in our courts; See section 3(1) of the Schools Act; See also section 5.5 below which discusses compulsory education in terms of the Schools Act; Liebenberg *Socio-economic Rights* 243.

¹³⁸⁵ President Thabo Mbeki, Opening Speech, *Conference on Education for African Renaissance in the Twenty-first Century*, Johannesburg, South Africa, 6 December 1999 as cited in *The Dakar Framework for Action, Education for All: Meeting our Collective Commitments Adopted by the World Education Forum Dakar, Senegal, 26–28 April 2000 Including Six Regional Frameworks for Action*; Simbo (2018) *Obiter* 127.

¹³⁸⁶ A Skelton "How far will the courts go in ensuring the right to basic education?" (2012) *SAPL* 392 396; Devenish *Commentary on the Constitution* 76; Veriava & Skelton (2019) *SAJHR* 2; Kamga "The Right to a Basic Education" in *Child Law in South Africa* 520; Skelton *Strategic Litigation Impacts* 46; Woolman & Bishop "Education" in *CLOSA* 57-5, 57-10; Cameron "Judicial Development" in *Reasoning Rights* 323; M Seleane "The right to education: Lessons from *Grootboom*" (2003) *7 Law, Democracy & Development* 140.

¹³⁸⁷ S 26 of the Constitution; Liebenberg *Socio-economic Rights* 232; Cameron "Judicial Development" in *Reasoning Rights* 322.

¹³⁸⁸ S 27(1)(a) of the Constitution.

¹³⁸⁹ Skelton (2012) *SAPL* 395-396; Kamga "Right to a Basic Education" in *Child Law* 520; Proudlock "Children's Socio-economic Rights" in *Child Law* 360, 364; Liebenberg *Socio-economic Rights* 244; Veriava & Skelton (2019) *SAJHR* 2; Cameron "Judicial Development" in *Reasoning Rights* 322.

¹³⁹⁰ See below for a discussion of these rights in the context of rights to, in and through education; Skelton (2012) *SAPL* 395.

¹³⁹¹ See for example ss 26 and 27(1)(a) of the Constitution; Proudlock "Children's Socio-economic Rights" in *Child Law* 364; Liebenberg *Socio-economic Rights* 244; J Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" (2001) *17 SAJHR* 210 230-231 makes the argument that socio-economic entitlements can also be derived from s 28(1)(d) of the Constitution.

difference emphasising the importance of the child's socio-economic rights, it is clear that the state should prioritise the child's socio-economic rights.¹³⁹²

This view was strengthened by the Panel of Constitutional Experts in their Memorandum on Children when it specifically relied on and referred to international law not limiting the rights of the child with reference to reasonable or progressive steps.¹³⁹³ This approach once again highlights the importance of international instruments in the interpretation of children's rights as well as the child's rights centred approach of the child's rights to, in and through basic education as defined in chapter 2.¹³⁹⁴ The centrality of the model for compliance is thus highlighted.

Cameron states that it is "plain, and accepted in South African jurisprudence" that there is a difference between a right of access to something and a right to something.¹³⁹⁵ While a right of access to something is an entitlement that can be lesser and graduated, a right to something is an immediate entitlement.¹³⁹⁶ This differentiation was also pointed out by the Constitutional Court in the *Grootboom* case in which it was stated that a right of access requires that the state must enable others to provide for themselves. A right to something is more direct. It means that the state must ensure that the content of that right is made physically available.¹³⁹⁷ The state must in other words must provide basic education to everyone.¹³⁹⁸ The need for

¹³⁹² Proudlock "Children's Socio-economic Rights" in *Child Law* 364. This question was also directed at the Panel of Constitutional Experts and they stated the following in Panel of Constitutional Experts *Memorandum on Children* (5 February 1996) 2 (CP005026.MEM): "The international instruments dealing with children's rights do not limit the rights of the children by requiring reasonable or progressive steps. This is so because of the view that it is inappropriate to for children's rights to be so qualified on account of two underlying reasons. The vulnerability, lack of maturity and comparative innocence of children render them deserving of more effective protection. Also children cannot be expected to participate actively in human rights discourse, in defining its scope, or articulating its social dimensions and implications, as adults can be expected to do so. The difference in formulation means that the state would undertake to make a greater effort in order to secure the rights of children. The sub-clause will not permit children to make unreasonable demands on the state."; See also P De Vos "The economic and social rights of children in South Africa's transitional Constitution" 1995 (2) *SAPL* 233 233-259; Sloth-Nielsen 1996 *Int'l J Child Rts* 323-344; K Creamer "The implication of socio-economic rights jurisprudence for government planning and budgeting: the case of children's socio-economic rights" (2004) 8 *Law, Democracy & Development* 221 221-234; L Stewart "Interpreting and limiting basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others" (2008) 24 *SAJHR* 472 472-494.

¹³⁹³ Panel of Constitutional Experts *Memorandum on Children* (5 February 1996) 2 (CP005026.MEM).

¹³⁹⁴ Section 24(3) and 26.

¹³⁹⁵ Cameron "Judicial Development" in *Reasoning Rights* 323.

¹³⁹⁶ Cameron "Judicial Development" in *Reasoning Rights* 323.

¹³⁹⁷ See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35; Seleoane (2003) *Law, Democracy & Development* 142.

¹³⁹⁸ Seleoane (2003) *Law, Democracy & Development* 140-142.

education to be available and accessible as provided for in the 4-A scheme is strengthened by the formulation of section 29 of the Constitution.

Even though the Constitution does not specifically refer to the right to basic education as immediately realisable, authors have argued for this interpretation based on a simple reading of section 29(1)(a), which takes into account the unqualified nature of the right.¹³⁹⁹ This view was ultimately confirmed by the Constitutional Court in the case of *Juma Musjid Primary School v Essay NO*¹⁴⁰⁰ and consequently also applied by the High Courts in the cases of *Section 27 v Minister of Basic Education*,¹⁴⁰¹ *Centre for Child Law v Minister of Basic Education*,¹⁴⁰² and *Madzodzo v Minister of Basic Education*.¹⁴⁰³

5 4 1 1 Limitation of the right to basic education

Rights and their accompanying duties are not absolute and limitation of rights can therefore take place – the limitation should however be justified.¹⁴⁰⁴ A limitation of a right can also be referred to as an infringement – or more specifically a justified infringement.¹⁴⁰⁵ Not all infringements of fundamental rights are considered unconstitutional. In some instances a law, which infringes on a specific right, can be found to be justifiable. The infringement in this instance would then be referred to as a justifiable limitation.¹⁴⁰⁶

In determining if and how the child's right to basic education can be limited, the textually unqualified nature of the right as constitutionally recognised in section 29

¹³⁹⁹ A Skelton "The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law" (2013) *De Jure* 1 3; Veriava & Coomans "Right to Education" in *Socio-economic rights in South Africa* 62; S Woolman & B Fleisch *The Constitution in the classroom: Law and Education in South Africa 1994-2008* (2009) 9; Kamga "The Right to a Basic Education" in *Child Law* 521.

¹⁴⁰⁰ 2011 8 BCLR 761 (CC); See section 5 4 5 below for a discussion of the minimum core standard and how it relates to *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC); Proudlock "Children's Socio-economic Rights" in *Child Law* 360.

¹⁴⁰¹ 2013 2 SA 40 (GNP).

¹⁴⁰² 2013 3 SA 183 (ECG).

¹⁴⁰³ 2014 3 SA 441.

¹⁴⁰⁴ A Skelton "Constitutional Protection of Children's Rights" in T Boezaart *Child Law in South Africa* (2017) 2 ed 337; McConnachie et al "The Constitution and Basic Education" in *Basic Education Rights Handbook* 16; Currie & De Waal *Bill of Rights Handbook* 150.

¹⁴⁰⁵ Currie & De Waal *Bill of Rights Handbook* 151.

¹⁴⁰⁶ Currie & De Waal *Bill of Rights Handbook* 26.

plays a central role.¹⁴⁰⁷ In this sense, the limitation of a right can be described as the failure or restriction to fulfil a right.¹⁴⁰⁸ The first step with regard to the right to basic education is to determine the scope and nature of the right. If the scope and content of the right is not fulfilled then it would lead to an infringement. The next step would then be to determine whether or not the infringement, which constitutes a limitation, is justifiable.

Even though section 29(1)(a) of the Constitution does not contain internal qualifiers, it does not mean that the limitation of the right to education cannot be justified.¹⁴⁰⁹ In order to determine whether or not a right has been limited, section 36 of the Constitution is applied as it provides for the method that will determine whether or not a limitation is reasonable and justifiable.¹⁴¹⁰ The right to basic education can be limited by failure to fulfil positive duties¹⁴¹¹ or through negative duties,¹⁴¹² which results in a denial of the child's right to basic education.¹⁴¹³

This means that the right to basic education can be limited "in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" as

¹⁴⁰⁷ McConnachie et al "The Constitution and Basic Education" in *Basic Education Rights Handbook* 26-27.

¹⁴⁰⁸ McConnachie et al "The Constitution and Basic Education" in *Basic Education Rights Handbook* 27.

¹⁴⁰⁹ Woolman & Bishop "Education" in *CLOSA* 57-14; Woolman & Fleisch *Constitution in the Classroom* 125.

¹⁴¹⁰ Skelton "Constitutional Protection of Children's Rights" in *Child Law* 335; Liebenberg *Socio-economic Rights* 244; See I Currie & J De Waal "Limitation of Rights" in *Currie & De Waal Bill of Rights Handbook* (2016) 150-155; Liebenberg *Socio-economic Rights* 93-97; Woolman & Bishop "Education" in *CLOSA* 57-14.

S 36(1) of the Constitution

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

See Currie & De Waal "Limitation of Rights" in *Bill of Rights Handbook* 150-155; Liebenberg *Socio-economic Rights* 93-97; Woolman & Bishop "Education" in *CLOSA* 57-14.

¹⁴¹¹ For example, sufficient schools should be available for children to attend and have access to; Liebenberg *Socio-economic Rights* 244.

¹⁴¹² Legislation or policy that discriminates and results in the learner not having access to school, for example the prevention of a pregnant learner from attending school is an example of a negative duty; Liebenberg *Socio-economic Rights* 244.

¹⁴¹³ Liebenberg *Socio-economic Rights* 244.

provided for in section 36 of the Constitution.¹⁴¹⁴ As the Bill of Rights specifically provides for the right to basic education, the Constitution is directly implicated if the state fails to fulfil its duties to respect, protect, promote and fulfil this right.¹⁴¹⁵ Thus, even though the right to basic education is immediately realisable it can still be limited in terms of section 36 of the Constitution. The limitation clause could possibly serve as justification for the government's argument that it cannot allocate resources that it does not have.¹⁴¹⁶ However, if the limitation is due to government policy or a specific school causing the obstruction, the limitation cannot be justified.¹⁴¹⁷ This means that even though the right to basic education is immediately realisable, it can still be limited – but that limitation must pass the constitutional test as set out in section 36.¹⁴¹⁸

Seleoane however points out that the limitation of a right in terms of the limitation clause should be a separate question from the meaning of the right. One must first establish the meaning of the right, otherwise one does not know and cannot establish what is being limited.¹⁴¹⁹ If the possible limitation of a right is already introduced during the interpretation stage, it runs the risk of the right being read down *ab initio*. From a reading of the South Africa Constitution, one can argue that if a right were to be subject to the availability of resources, the Constitution would have mandated this. Doing so would defeat the objective of section 29(1)(a).¹⁴²⁰

When the courts deal with cases in which the child's right to basic education has been infringed, they should be cognisant of section 36 in determining whether or not the limitation is justified. The courts should also determine and provide for a relevant remedy that would lead to the best result. The remedy could also provide scope and content to the right. The remedy ultimately helps to define the right, by qualifying the limitation. Kriegler J emphasised this point in *Sanderson v Attorney-General, Eastern Cape*¹⁴²¹ by stating that "our flexibility in providing remedies may affect our

¹⁴¹⁴ S 36 of the Constitution.

¹⁴¹⁵ See above at section 5 2 2; Berger (2003) *Columbia Law Review* 634.

¹⁴¹⁶ Berger (2003) *Columbia Law Review* 637. Woolman & Bishop "Education" in *CLOSA* 57-14; Seleoane (2003) *Law, Democracy & Development* 140; See also Chaskalson et al *CLOSA* 5 ed (1999) 12-47 as cited in Berger (2003) *Columbia Law Review* 637.

¹⁴¹⁷ Woolman & Bishop "Education" in *CLOSA* 57-14.

¹⁴¹⁸ Berger (2003) *Columbia Law Review* 637; Woolman & Bishop "Education" in *CLOSA* 57-14.

¹⁴¹⁹ Seleoane (2003) *Law, Democracy & Development* 140.

¹⁴²⁰ Seleoane (2003) *Law, Democracy & Development* 142.

¹⁴²¹ 1998 2 SA 38 (CC); This case dealt with the right to a fair trial in terms of s 25(3)(a) of the Interim Constitution.

understanding of the right”.¹⁴²² Flexibility in the shaping of remedies is necessary in order to shape new remedies that ensures effective relief.¹⁴²³ In determining an applicable remedy, courts should then also take into account the child-centred approach that not only recognises the child as the rights-holder, but takes into account the interrelatedness of rights by acknowledging that rights to, in and through basic education are complementary.

5 4 2 Section 29 and the child’s rights to, in and through basic education

Section 29 of the Constitution plays an important role as it not only recognises the right to basic education, but also provides some scope to the right as the subsections of the provision refer to other education rights. The different dimensions of the right to basic education can therefore be identified in section 29.¹⁴²⁴ These subsections set out specific entitlements as well as the state’s corresponding obligations to the rights-holder.¹⁴²⁵

For example, section 29(1)(b) provides for a right to further education as an element of the right to education. The state’s obligations with regard to the provision and realisation of further education differs substantially from the right to basic education. An internal qualifier is included in section 29(1)(b), which stipulates that the state must make further education progressively available and accessible, through reasonable measures.¹⁴²⁶ A more limited obligation is placed on the state with regard to further education when comparing the state’s obligation to provide for basic education. For this reason, section 29(1)(b) is sometimes referred to as a weak positive right, whereas section 29(1)(a) is viewed as a strong positive right.¹⁴²⁷ What is however clear, is that

¹⁴²² *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) para 27; Woolman & Bishop “Education” in *CLOSA* 57-15.

¹⁴²³ Woolman & Bishop “Education” in *CLOSA* 57-15; See also *Bel Porto School Governing Body v Premier of the Western Cape* 2002 3 SA 265 para 186 in which the court noted that the remedy must adapt to the right, and not the right to the remedy.

¹⁴²⁴ Veriava & Coomans “Right To Education” in Brand & Heyns *Socio-Economic Rights In South Africa* 59.

¹⁴²⁵ Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 59.

¹⁴²⁶ McConnachie et al “The Constitution and Basic Education” in *Basic Education Rights Handbook* 21; Veriava & Coomans “Right To Education” in *Socio-Economic Rights In South Africa* 59; Cameron “Judicial Development” in *Reasoning Rights* 322; See also R Kriel “Education” in M Chaskalson et al (eds) *Constitutional Law of South Africa* (RS 5 1999) 38-1 as cited in Veriava & Coomans “Right to Education” in *Socio-Economic Rights in South Africa* 59.

¹⁴²⁷ Veriava & Coomans “The Right To Education” in *Socio-Economic Rights In South Africa* 59; See also Kriel “Education” in *Constitutional Law of South Africa* 38-1 as cited in Veriava & Coomans “Right to Education” in *Socio-Economic Rights in South Africa* 59.

the state's duty to provide basic education differs from its obligation to provide further education.

The relationship between language and education is emphasised in section 29(2) of the Constitution as it provides everyone with "the right to receive education in the official language or languages of their choice in public education institutions".¹⁴²⁸ This is representative of a right in basic education as an element of the right to basic education.¹⁴²⁹ The formulation of section 29(2) also considers the need for education to be available and accessible as provided for in the 4-A scheme. Schools should be available and accessible to students with specific language needs as determined by the community. It is clear from the inclusion of this section in the Constitution that the relationship between education and language is significant. This right is however limited as the section includes: "where that education is reasonable practicable".¹⁴³⁰ Furthermore, section 29(2) provides that in the process of realising the right to receive education in the language of one's choosing, equity,¹⁴³¹ practicability,¹⁴³² and redressing racially discriminatory laws and practices from the past should be taken into account.¹⁴³³ The need for education to be adaptable is highlighted here as education should be adaptable in order to address inequality in the education system.

Section 29(2) is the result of a compromise between the National Party¹⁴³⁴ and the ANC.¹⁴³⁵ The National Party wanted to ensure that single medium Afrikaans schools were protected and the ANC wanted to guarantee that these single medium schools were not racially discriminatory.¹⁴³⁶ The language policies of schools and specifically the maintenance of single medium Afrikaans schools has also been the cause of a

¹⁴²⁸ The Constitution should be read together with s 6(1) of the Schools Act and the Norms and Standards Regarding Language Policy in Public Schools GN 1701 in GG 18546 of 19-12-1997 as corrected by GN 65 in GG 18887 of 15-05-1998.

¹⁴²⁹ See section 2.6 of chapter 2.

¹⁴³⁰ I Currie & J De Waal "Culture, Language and Education" in I Currie & J De Waal (eds) *Bill of Rights Handbook* (2013) 638-639.

¹⁴³¹ S 29(2)(a) of the Constitution.

¹⁴³² S 29(2)(b) of the Constitution.

¹⁴³³ S 29(2)(c) of the Constitution.

¹⁴³⁴ The National Party was the leading political party during apartheid in South Africa.

¹⁴³⁵ The ANC is the African National Congress, which has been the political party in power since the end of apartheid. Woolman & Bishop "Education" in *CLOSA* 57-45 – 57-46.

¹⁴³⁶ Liebenberg *Socio-economic Rights* 249; B Fleisch & S Woolman "On the constitutionality of single-medium public schools" (2007) 23 *SAJHR* 34–67; Woolman & Bishop "Education" in *CLOSA* 57-46; For more on the drafting of section 32 of the Interim Constitution and section 29(2) of the Final Constitution see Woolman & Bishop "Education" in *CLOSA* 57-46 and 57-48 to 57-59 which discusses the debate and stalemate between the NP and the ANC.

number of cases before the courts.¹⁴³⁷ In fact, the early litigation on the right to education focused mainly on language and admissions, with the school governing bodies of formerly all-white schools seeking the continuation and safeguarding of smaller classes and use of Afrikaans in schools.¹⁴³⁸

With the need to take equity and past discriminatory practices into account, the guiding principles of non-discrimination¹⁴³⁹ and the child's best interest can be identified.¹⁴⁴⁰ The availability, accessibility, adaptability and acceptability of education as part of the 4-A scheme also come into play.¹⁴⁴¹ Availability means that education must be available to all and this relates to the amount of schools that are available for learners to attend.¹⁴⁴² This includes the availability of schools that provide teaching in different languages in order to accommodate learners. Schools must also adapt its language policies in order to serve the community. Lastly, education will only be acceptable if it is inclusive. This does not mean that all schools must teach in all 11 official languages, as the Constitution clearly provides that this should be done when reasonably practicable.¹⁴⁴³

Accessibility relates to the right to non-discrimination and requires education to be accessible to all learners – including those from marginalised groups.¹⁴⁴⁴ In order for education to be regarded as adaptable it necessitates education to meet the changing needs of a society.¹⁴⁴⁵ Once more non-discrimination and including marginalised groups play an important role. Adaptability has also been highlighted with regard to the incorporation of African values in education.¹⁴⁴⁶ In order for education of the South African to meet the needs of its diverse society, education must also adapt in order to

¹⁴³⁷ Liebenberg *Socio-economic Rights* 249. See for example *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T); *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T); *Seodin Primary School v MEC Education, Northern Cape* 2006 4 BCLR 542 (NC); *High School Ermelo v The Head of Department* 2008 1 All SA 139 (T); *Minister of Education, Western Cape v Governing Body of Mikro Primary School* 2006 1 SA 1 (SCA); For a discussion of these cases see Liebenberg *Socio-economic Rights* 249-253.

¹⁴³⁸ Skelton *Strategic Litigation Impacts* 50.

¹⁴³⁹ See section 2 4 4 3.

¹⁴⁴⁰ See section 2 4 4 3.

¹⁴⁴¹ See section 2 5.

¹⁴⁴² CESCR *General Comment No 13* para 6; Tomaševski *Primers No. 3* (2001) 12-14; See section 2 5 1.

¹⁴⁴³ S 29(2) of the Constitution.

¹⁴⁴⁴ CESCR *General Comment No 13* para 6; Tomaševski *Primers No. 3* (2001) 12-13; See section 2 5 2.

¹⁴⁴⁵ CESCR *General Comment No 13* para 6; Tomaševski *Primers No. 3* (2001) 12-15; See section 2 5 4.

¹⁴⁴⁶ Section 3 3 1 3.

include teaching on African values and traditions. This ensures that education respects the child's culture in line with the normative framework. Inclusivity is also related to African values. Education must be contextualised to meet the needs of society and can only do this if it is inclusive of society's culture and traditions. Adaptability is therefore of utmost importance.

The right to establish and maintain independent educational institutions is another example of a right in basic education as an element of the right to education that section 29 of the Constitution provides for.¹⁴⁴⁷ Subsections (a) to (c) restricts this right in order to ensure that these independent institutions are not racially discriminatory,¹⁴⁴⁸ that they are registered with the state,¹⁴⁴⁹ and that specific standards are met.¹⁴⁵⁰ The guiding principle of non-discrimination of the CRC is accordingly emphasised in the establishment of independent educational institutions.¹⁴⁵¹

When interpreting section 29 one can identify both socio-economic rights and civil and political rights in the provision.¹⁴⁵² The manner in which section 29 is structured reflects a hybrid nature that acknowledges the interconnectedness and indivisibility of human rights¹⁴⁵³ – this in turn also recognises the clear existence of rights to, in and through basic education as dimensions of the right to basic education. It is therefore argued that the Constitution is in favour of this view.

5 4 3 The relationship between sections 28 and 29 of the Constitution

As a children's right centred approach is argued for, the right to basic education will be examined specifically as a children's right in terms of the Constitution. This means

¹⁴⁴⁷ S 29(3) of the Constitution; S 29(4) states that these independent educational institutions are not precluded from state subsidies; Liebenberg *Socio-economic Rights* 255; Currie & De Waal "Culture, Language and Education" in *Bill of Rights Handbook* 641.

¹⁴⁴⁸ S 29(3)(a) of the Constitution; Liebenberg *Socio-economic Rights* 255; Currie & De Waal "Culture, Language and Education" in *Bill of Rights Handbook* 641.

¹⁴⁴⁹ S 29(3)(b) of the Constitution; Liebenberg *Socio-economic Rights* 255; Currie & De Waal "Culture, Language and Education" in *Bill of Rights Handbook* 641.

¹⁴⁵⁰ S 29(3)(c) of the Constitution: "maintain standards that are not inferior to standards at comparable public education institutions." Liebenberg *Socio-economic Rights* 255; Currie & De Waal "Culture, Language and Education" in *Bill of Rights Handbook* 641.

¹⁴⁵¹ See section 2 4 4 3; art 2 of the CRC.

¹⁴⁵² Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 59; The provision of the right to education that is accessible and available can be viewed as a socio-economic right, while the choice of language and the establishment of independent educational institutions can be viewed as civil and political rights due to their strong link to freedom of choice.

¹⁴⁵³ Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 59.

that even though section 29 of the Constitution provides for the right to basic education for all, it will be examined as a children's right in order to determine if the obligations in terms of the selected international instruments have been met.¹⁴⁵⁴ Against this background, it is important to examine the relationship between section 29, which provides for the right to basic education, and section 28 of the Constitution that deals specifically with children's rights.¹⁴⁵⁵ The relationship between sections 28 and 29 of the Constitution also strengthens the dimensions of the right to basic education and the interrelatedness of the child's rights.¹⁴⁵⁶

Section 28 provides for a range of specific children's rights.¹⁴⁵⁷ Section 28 also specifically recognises the child as the rights-holder by stating explicitly "every child has the right to" before it provides a list of the rights afforded to the child. By directly acknowledging the child as the holder of rights, the Constitution recognises a child-centred approach that not only protects the child but also acknowledges the child's autonomy. These rights in section 28 are additional to the rights afforded to children in the rest of the Constitution.¹⁴⁵⁸ The Constitutional Court has also confirmed this approach in a number of cases dealing with different constitutional rights applicable to the child.¹⁴⁵⁹ The relationship between section 28 of the Constitution and the CRC has also been emphasised by the Constitutional Court.¹⁴⁶⁰ Skelton notes that these cases of the Constitutional Court indicate that section 28 of the Constitution should be regarded as fulfilling some international obligations in terms of the CRC in an expansive manner as the CRC should be the standard against which legislation and policy is tested.¹⁴⁶¹

¹⁴⁵⁴ Specifically the CRC and the ACRWC.

¹⁴⁵⁵ Skelton A "Children" in Currie I & De Waal J *The Bill of Rights Handbook* (2013) 6 ed 599.

¹⁴⁵⁶ The focus of the discussion on section 28 will be centred on the relationship between sections 28 and 29 of the Constitution. An in-depth discussion of section 28 therefore does not fall within the scope of the dissertation as section 28 underlies section 29, which is the focus of the dissertation. The focus is accordingly on section 29.

¹⁴⁵⁷ Skelton "Children" in *Bill of Rights Handbook* 599.

¹⁴⁵⁸ Skelton "Children" in *Bill of Rights Handbook* 599.

¹⁴⁵⁹ See for example *Christian Lawyers' Association of South Africa v Minister of Health* 2005 1 SA 509 (T); *MEC for Education v Pillay* 2008 1 SA 474 (CC); *Bhe v Magistrate; Khosa v Minister of Social Development*; *Mahaule v Minister of Social Development* 2004 6 SA 505 (CC); *C v Department of Health and Social Development, Gauteng* 2012 2 SA 208 (CC); Skelton "Children" in *Bill of Rights Handbook* 599.

¹⁴⁶⁰ See specifically *Sonderup v Tondelli* 2001 1 SA 1171 (CC) and *S v M* 2008 3 SA 232 (CC); Skelton "Children" in *Bill of Rights Handbook* 601.

¹⁴⁶¹ Skelton "Children" in *Bill of Rights Handbook* 600-601; *Sonderup v Tondelli* 2001 1 SA 1171 (CC) para 29 and *S v M* 2008 3 SA 232 para 16 as cited in Skelton "Children" in *Bill of Rights Handbook* 601.

Section 28(1)(c) of the Constitution recognises the child's right basic nutrition, shelter, basic health care services and social services. This is of course in addition to the rights in sections 26 and 27 that provides everyone with the right to housing and health care, food, water and social security.¹⁴⁶² As noted above, the children's rights contained in section 28(1)(c), similar to the right to basic education, are not qualified.¹⁴⁶³ The rights in section 28(1)(c) form part of the dimensions of basic education identified as rights through basic education. It is through basic education that these rights become more easily accessible. With education firmly established as an empowerment right, the relationship between the right to basic education and how it affects the realisation of other rights become more apparent. When children are educated and informed of their human rights through education and then in turn empowered by their education, it provides them with the skills and knowledge to access and realise their human rights.

Protection from maltreatment, neglect, abuse or degradation is set out in section 28(1)(d) of the Constitution and represents a right in basic education as a dimension of the right to basic education. The ways in which learners are disciplined in schools should meet these requirements and should in no way amount to abuse or degradation.¹⁴⁶⁴ This is of course also in line with the CRC that provides that no child shall be subjected to treatment or punishment that is inhumane or degrading.¹⁴⁶⁵ The school environment should also protect children from neglect and maltreatment. Therefore, the inherent dignity of the child should always be respected. The principle of acceptability as part of the 4-A scheme plays a vital role in this instance to ensure that schools are safe and that learners are treated in a dignified manner that respects their rights.¹⁴⁶⁶

The child's right to basic education is supported in terms of section 28(1)(f)(ii), which protects the child from work that places their education at risk. This serves as another example of a dimension of the right to basic education. This dimension can also be linked to the child's right to human dignity, which can be identified as the element of a

¹⁴⁶² Skelton "Children" in *Bill of Rights Handbook* 600.

¹⁴⁶³ Liebenberg *Socio-economic Rights* 232.

¹⁴⁶⁴ See also s 10(1) of the Schools Act and *Christian Education South Africa v Minister of Education* 2000 4 SA 757.

¹⁴⁶⁵ Art 37(a) of the CRC.

¹⁴⁶⁶ Section 2 5 3.

right in basic education. The link between labour and education is emphasised in section 28(1)(f)(ii).

Section 28(2) of the Constitution provides specifically for the child's best interest to be taken into account in every matter that concerns the child. This right has formed part of South African law since the 1940s but was previously only applied in relation to family law.¹⁴⁶⁷ The inclusion of the principle in the constitutional provision is clearly indicative of the clear commitment to the international obligation to apply the child's best interest in all matters that concern the child.¹⁴⁶⁸ Not only does it incorporate the international standard set by the CRC but also the ACRWC, which similarly provides for the best interests of the child. The provision stipulates that the child's best interests are of "paramount importance". This guiding principle of the CRC is consequently not only directly acknowledged by the Constitution but also duly incorporated.¹⁴⁶⁹ It is also important to note that this right has not only aided in the interpretation of other rights – but is also a right in itself.¹⁴⁷⁰ As a right, it can limit others rights, but it can also be limited.¹⁴⁷¹

The relationship between sections 28 and 29 of the Constitution is indicative of the child-centred approach and how the interpretation of the right to basic education as a children's right can add another dimension to the child's right to basic education. By identifying the child as the rights-holder, section 28 stresses the importance of interpreting the child's socio-economic rights by means of a child centred approach. The interrelatedness of the child's rights can also be identified when examining the relationship between these two sections. When interpreting and applying section 29, the right to basic education should be consequently be examined in light of rights to, in and through basic education as dimensions of the right to basic education.

¹⁴⁶⁷ Skelton "Children" in *Bill of Rights Handbook* 619.

¹⁴⁶⁸ Skelton "Children" in *Bill of Rights Handbook* 619.

¹⁴⁶⁹ See section 24(4)(3) for further discussion on the best interests of the child principle in terms of the CRC.

¹⁴⁷⁰ Skelton "Children" in *Bill of Rights Handbook* 619-620; See in this regard *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC).

¹⁴⁷¹ Skelton "Children" in *Bill of Rights Handbook* 621. See *Sonderup v Tondelli* 2001 1 SA 1171 (CC); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC); *S v M* 2008 3 SA 232 (CC) and *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC).

5 4 4 The state's duty to respect, protect, promote and fulfil the child's right to basic education

With the right to basic education recognised and protected as a justiciable fundamental right guaranteed by section 29 of the Constitution, specific duties are applicable.¹⁴⁷² In accordance with section 7(2) of the Constitution, this means that the state has the duty to respect, protect, promote and fulfil the child's right to basic education.¹⁴⁷³ The state's duty to respect, protect, promote and fulfil this right comprises both positive and negative duties.¹⁴⁷⁴ These duties originated in international law as set out in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights¹⁴⁷⁵ and have been applied by supervisory bodies such as the Committee on Economic, Social and Cultural Rights ("CESCR")¹⁴⁷⁶ and more recently by the African Commission of Human and Peoples' Rights.¹⁴⁷⁷

The CRC provides in article 2 that: "State Parties shall respect and ensure the rights set forth in the present Convention..." and is viewed as the incorporation of the tripartite typology in terms of the CRC.¹⁴⁷⁸ This means that the state has the duty to

¹⁴⁷² S 29 of the Constitution.

¹⁴⁷³ S 7(2) of the Constitution sets out the duties of the state with regard to the rights enshrined in the Bill of Rights; McConnachie et al "The Constitution and Basic Education" in *Basic Education Rights Handbook* 14; Proudlock "Children's Socio-economic Rights" in *Child Law* 360; Arendse (2011) *PELJ* 103; Liebenberg *Socio-economic Rights* 82; D Brand "Introduction to socio-economic rights in the Constitution" in D Brand & C Heyns (eds) *Socio-economic Rights in South Africa* (2005) 9; Berger (2003) *Columbia Law Review* 626; For more on the origins of state obligations in relation to human rights see H Shue *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (1980) as cited in Liebenberg *Socio-economic rights* 83.

¹⁴⁷⁴ McConnachie et al "The Constitution and Basic Education" in *Basic Education Rights Handbook* 14-15; Proudlock "Children's Socio-economic Rights" in *Child Law* 360; Liebenberg *Socio-economic Rights* 82-83.

¹⁴⁷⁵ International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997 para 6 (hereafter "the Maastricht Guidelines"); For a discussion of the Maastricht Guidelines see V Dankwa, C Flinterman & S Leckie "Commentary to the Maastricht Guidelines of Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 705-730.

¹⁴⁷⁶ Liebenberg *Socio-economic Rights* 84; see for example CESCR *General Comment No 13* para 1; CESCR *General Comment No 14*; Courtis & Tobin "Article 28" in *Commentary* 1071.

¹⁴⁷⁷ *The Social and Economic Rights Action Center and the Center Economic and Social Rights v Nigeria* para 44 in Communication no 155/96 of the ACHPR (2001): "Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights, both civil and political rights and social and economic, generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties."; Liebenberg *Socio-economic Rights* 84.

¹⁴⁷⁸ Courtis & Tobin "Article 28" in *Commentary* 1071.

respect, protect and fulfil the child's right to basic education.¹⁴⁷⁹ The international law typology refers to the duty to respect, protect and fulfil.¹⁴⁸⁰ The CRC Committee has also applied the tripartite typology for the determination of a state's obligations in relation to the realisation of children's rights.¹⁴⁸¹ In accordance with article 2 of the CRC, it must also be applied to article 28.¹⁴⁸² The Constitution adds the duty of also *promoting* the rights contained in the Bill of Rights.¹⁴⁸³ An additional duty is consequently created by the Constitution. What each of these duties entail will be analysed in more detail below.¹⁴⁸⁴

When comparing section 7(2) of the Constitution to the provisions in the Indian and Nigerian Constitutions,¹⁴⁸⁵ the wording used in the Constitution provides a clearer duty. The Constitution provides that the state *must* respect, protect, fulfil and promote the rights in the Bill of the Rights.¹⁴⁸⁶ As identified in chapter 4, both the Indian and Nigerian Constitutions do not specifically provide the state with these specific duties.¹⁴⁸⁷ This therefore means that in South Africa, the state is constitutionally mandated to fulfil the duties created by section 7(2), this includes the enforcement of both negative and positive duties.¹⁴⁸⁸

5 4 4 1 *The state's duty to respect the child's right to basic education*

¹⁴⁷⁹ Courtis & Tobin "Article 28" in *Commentary* 1071.

¹⁴⁸⁰ Often referred to as the "three-level typology"; Dankwa et al (1998) *Human Rights Quarterly* 713; S Russel "Minimum state obligation" in D Brand & S Russel (eds) *Exploring the Core Content of Socio-economic Rights: South African and international perspectives* (2002) 18; See for example CESCR *General Comment No 13* para 46, CESCR *General Comment No 14* para 33 and CRC Committee *General Comment No 5* (34th session, 2013) "General Measures of implementation of the Convention on the Rights of the Child (arts.4, 42 and 44 para 46)" UN Doc CRC/GC/2003/5 para 71 (hereafter "CRC Committee *General Comment No 5*").

¹⁴⁸¹ See for example the CRC Committee *General Comment No 15* (62nd session, 2013) "The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health" UN Doc CRC/C/GC/15 para 71-74 (hereafter "CRC Committee *General Comment No 15*"); See also CRC Committee *General Comment No 5* for further information of state obligations in terms of the CRC; Courtis & Tobin "Article 28" in *Commentary* 1071.

¹⁴⁸² Courtis & Tobin "Article 28" in *Commentary* 1071.

¹⁴⁸³ S 7(2) of the Constitution.

¹⁴⁸⁴ See sections 5 4 4 1, 5 4 4 2 and 5 4 4 3.

¹⁴⁸⁵ See section 4 2 2 which discusses the Indian position and section 4 3 2 which sets out the Nigeria position.

¹⁴⁸⁶ S 7(2) of the Constitution.

¹⁴⁸⁷ See section 4 2 2 and 4 3 2 of chapter 4; Art 51(c) of the Indian Constitution; S 12(2) of the Nigerian Constitution.

¹⁴⁸⁸ Liebenberg *Socio-economic Rights* 87.

The state's duty to respect the child's right to basic education requires of the state to not interfere with the child's enjoyment of this right – either directly or indirectly.¹⁴⁸⁹ Measures that hinder or prevent the child from enjoying the right to basic education should accordingly be avoided in order for the state to fulfil this duty.¹⁴⁹⁰ One example would be that the state must respect the freedom of parents to choose their child's school as also provided for in the CRC.¹⁴⁹¹ This would also mean that discriminatory legislation that hinders the child's access to education should not be adopted nor should schools be closed down without reasonable justification.¹⁴⁹² Accessibility and availability of education as set out in the 4-A scheme is central to the duty to respect the child's right to basic education. The duty to respect the child's right to basic education does not mean that interference may not ever take place. Rather that, in the event that the state deems it necessary to interfere, the interference must be justified.¹⁴⁹³

5 4 4 2 *The state's duty to protect the child's right to basic education*

The duty to protect relates to the enjoyment of rights and their protection – those already in existence and those that can be enhanced and accessed.¹⁴⁹⁴ The duty to protect means that measures should be taken that prevent interference from third parties.¹⁴⁹⁵ Protection from human rights abuses is a key part of the duty to protect.¹⁴⁹⁶

¹⁴⁸⁹ *Maastricht Guidelines* para 6; Brand "Introduction" in Brand & Heyns *Socio-economic Rights* 9; C Fenwick "Minimum obligations with respect to article 8 of the International Covenant on Economic, Social and Cultural Rights" in AR Chapman & S Russell (eds) *Core obligations: building a framework for economic, social and cultural rights* (2002) 69; CESCR *General Comment no 14* para 33; Curtis & Tobin "Article 28" in *Commentary* 1071; UN Human Rights Office of the High Commissioner "International Human Rights Law" <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>> (accessed 28-12-2018).

¹⁴⁹⁰ CESCR *General Comment No 13* para 47.

¹⁴⁹¹ Right to Education "Understanding education as a right" <<https://www.right-to-education.org/page/understanding-education-right>> (accessed 14-04-2019); See art 29(1)(c) of the CRC.

¹⁴⁹² Curtis & Tobin "Article 28" in *Commentary* 1072; An example in this instance would be the temporary closure of schools during the COVID-19 pandemic.

¹⁴⁹³ Curtis & Tobin "Article 28" in *Commentary* 1072.

¹⁴⁹⁴ Brand "Introduction" in Brand & Heyns *Socio-economic Rights* 10.

¹⁴⁹⁵ *Maastricht Guidelines* para 6; Russel "Minimum state obligations" in *Exploring the Core Content* 18; CESCR *General Comment No 13* para 47; CESCR *General Comment No 14* para 33; Fenwick "Minimum obligations" in *Core obligations* 70; Curtis & Tobin "Article 28" in *Commentary* 1072.

¹⁴⁹⁶ UN Human Rights Office of the High Commissioner "International Human Rights Law" <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>> (accessed 28-08-2018).

Regulation in terms of legislation, as well as the role of the courts in interpreting legislation and developing and strengthening remedies to protect the rights are central to the protection of rights.¹⁴⁹⁷ Ensuring that marginalised groups have access to education forms part of the duty to protect the child's right to basic education. An example would be that the state must protect girls in the instance that their parents prevent them from going to school.¹⁴⁹⁸ In this instance, the 4-A scheme is central to the state's duty to protect the child's right to enjoy their rights to, in and through education.

5 4 4 3 *The state's duty to promote the child's right to basic education*

The state's duty to promote and the duty to fulfil are closely related and can be difficult to distinguish from one another.¹⁴⁹⁹ The duty to promote the right to basic education requires the state to promote a culture of human rights, thereby showing support for the right to basic education.¹⁵⁰⁰ Informing and educating children about their right to basic education is central to the duty to promote. Education that includes human rights education and raising awareness of human rights in schools are two examples of how the state can fulfil its duty to promote the child's right to basic education.¹⁵⁰¹ Curriculums should therefore include education on human rights and children's rights. The adaptability of education come into play here as education should be adaptable in order to include human rights education.

Section 7(2) of the Constitution provides a holistic framework for the realisation of the state's duties, which enables a contextual and substantive approach when adjudicating human rights.¹⁵⁰² As negative and positive duties are recognised by

¹⁴⁹⁷ Brand "Introduction" in Brand & Heyns *Socio-economic Rights* 10.

¹⁴⁹⁸ Right to Education "Understanding education as a right" <<https://www.right-to-education.org/page/understanding-education-right>> (accessed 14-04-2019); Curtis & Tobin "Article 28" in *Commentary* 1072.

¹⁴⁹⁹ This was also noted in CESCR *General Comment 14* para 33 which included promotion as an element of the obligation to fulfil; Brand "Introduction" in Brand & Heyns *Socio-economic Rights* 10; See also S Liebenberg "The interpretation of socio-economic rights" in M Chaskalson et al *Constitutional Law of South Africa* 2 ed (2003) chapter 33 5 as cited in Brand "Introduction" in Brand & Heyns *Socio-economic Rights* 10.

¹⁵⁰⁰ ESCR-Net "The Obligation to Promote" <<https://www.escr-net.org/resources/obligation-promote>> (accessed 14-04-2019).

¹⁵⁰¹ ESCR-Net "The Obligation to Promote" <<https://www.escr-net.org/resources/obligation-promote>> (accessed 14-04-2019).

¹⁵⁰² Liebenberg *Socio-economic Rights* 87.

section 7(2), courts are constitutionally mandated to enforce the state's positive and negative duties related to the child's right to basic education.¹⁵⁰³

5 4 4 4 *The state's duty to fulfil the child's right to basic education*

The duty to fulfil requires states to actively participate in the realisation of rights by taking positive action to ensure that the right to basic education is enjoyed.¹⁵⁰⁴ This means that states should take appropriate measures such as adopting legislation, making the necessary budgetary and administrative allocations, and implementing judicial and promotional measures.¹⁵⁰⁵ Facilitation and provisioning are important elements of the duty to fulfil.¹⁵⁰⁶ The duty to fulfil the child's right to basic education means that the state must fulfil the right in the terms of the 4-A scheme.¹⁵⁰⁷ The practical framework of the 4-A framework provides valuable insight and guidelines for the state's duty to fulfil the right to basic education. All four elements of the 4-A scheme as part of the model for compliance should thus be taken into account when the state fulfils the child's right to basic education. The application and value of the model for compliance is clear when one considers the state's duty to fulfil the child's right to basic education: An example of the duty to fulfil would be the implementation of measures that ensure that education is culturally appropriate for minority groups.¹⁵⁰⁸

5 4 4 5 *The link between sections 7(2), 29 and 39*

In analysing the state's duties and the application of international law, the constitutional education clause shares a link with both section 7(2) and section 39 of the Constitution. As discussed above, section 39(1)(b) refers to the application of

¹⁵⁰³ Liebenberg *Socio-economic Rights* 87.

¹⁵⁰⁴ CESCR *General Comment No 13* para 47; UN Human Rights Office of the High Commissioner "International Human Rights Law" <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>> (accessed 28-08-2018).

¹⁵⁰⁵ *Maastricht Guidelines* para 6; Russel "Minimum state obligations" *Exploring the Core Content* 18; CESCR *General Comment 14* para 33; Brand "Introduction" in Brand & Heyns *Socio-economic Rights* 10.

¹⁵⁰⁶ CESCR *General Comment No 14* para 33; CESCR *General Comment No 12*; CESCR *General Comment No 13*.

¹⁵⁰⁷ Courtis & Tobin "Article 28" in *Commentary* 1072.

¹⁵⁰⁸ Right to Education "Understanding education as a right" <<https://www.right-to-education.org/page/understanding-education-right>> (accessed 14-04-2019).

international law in the interpretation of rights.¹⁵⁰⁹ Section 39(1)(a) requires the promotion of the values that underlie “an open and democratic society based on human dignity, equality and freedom”. When reading these sections together, it becomes clear that section 29 cannot merely be interpreted to mean the provision of education, as doing so would result in non-adherence to section 39.¹⁵¹⁰ If sections 29 and 39 are not read together, it could lead to the democratic values that underlie the Constitution not being taken into account in the educational framework. This could ultimately lead to a weaker and ineffective section 29.¹⁵¹¹

5 4 5 The minimum core standard in relation to the right to basic education

The right to basic education as a socio-economic right is illustrated in the context of the minimum core standard. The concept of the minimum core standard is directly related to the duties of state parties of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and its monitoring body, the CESCR.¹⁵¹² In order to provide more clarity on the duties of states parties, CESCR General Comment No 3 was issued.¹⁵¹³ This General Comment focuses on the nature of states parties’ duties.¹⁵¹⁴ CESCR General Comment No 3 states that “the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”¹⁵¹⁵ The minimum core as determined by the CESCR has thus far not been applied to the right to education by the CRC Committee.¹⁵¹⁶ However, Courtis and Tobin contend that it would not be unreasonable to assume that free primary education forms part of the minimum core of the right to education.¹⁵¹⁷

The Constitutional Court has however opted not to incorporate the minimum core standard as established under international law and has instead adopted the view that

¹⁵⁰⁹ See section 5 2 1 of this chapter.

¹⁵¹⁰ Berger (2003) *Columbia Law Review* 626.

¹⁵¹¹ Berger (2003) *Columbia Law Review* 626.

¹⁵¹² CESCR General Comment No 3 (5th session, 1990) “The nature of States parties obligations” UN Doc E/1991/23 para 10 (hereafter “CESCR *General Comment No 3*”); Liebenberg *Socio-economic Rights* 148.

¹⁵¹³ CESCR *General Comment No 3* para 10.

¹⁵¹⁴ CESCR *General Comment No 3* para 10; M Seleokane “The right to education: Lessons from *Grootboom*” (2003) 7 *Law, Democracy & Development* 137 152.

¹⁵¹⁵ CESCR *General Comment No 3* para 10; Courtis & Tobin “Article 28” in *Commentary* 1074.

¹⁵¹⁶ Courtis & Tobin “Article 28” in *Commentary* 1075.

¹⁵¹⁷ Courtis & Tobin “Article 28” in *Commentary* 1075.

requires the executive and legislature to provide content to socio-economic rights.¹⁵¹⁸ The reasonableness review is the current method applied by the Constitutional Court when it interprets socio-economic rights.¹⁵¹⁹ This means that the courts focus on a justification analysis rather than a comprehensive analysis of the specific socio-economic right.¹⁵²⁰ In the determination, the enquiry will accordingly be whether or not the “means chosen are reasonably capable of facilitating the realisation” of the specific socio-economic right in question.¹⁵²¹

The Constitutional Court case of *Juma Masjid*¹⁵²² is not only noteworthy for confirming the right to basic education as an immediately realisable right without internal qualifiers, but also in relation to the minimum core standard. The lack of internal qualifiers means that the right to basic education is for example not subject to available resources, reasonable legislative measures or that it must be progressively realised like other socio-economic rights.¹⁵²³ *Juma Masjid* dealt with an eviction of a public school that was located on private property.¹⁵²⁴ The possible infringement of the eviction order on the child’s right to basic education and his or her best interests as constitutionally recognised rights was at the centre of the judgment.¹⁵²⁵ The Constitutional Court had not yet had the opportunity to deal with a case that requires clarity on the content and scope of the right to basic education.¹⁵²⁶ Even though the case did not deal with the positive obligations related to the child’s right to basic

¹⁵¹⁸ Proudlock “Children’s Socio-economic Rights” in *Child Law* 361; M Wesson “The Emergence and Enforcement of Socio-Economic Rights” in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (2014) 288; S Woolman & M Bishop “Education” in S Woolman (ed) *CLOSA* (2013) 2 ed 57-11; See for example *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41; *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 38.

¹⁵¹⁹ Skelton (2012) *SAPL* 395; Liebenberg *Socio-economic Rights* 133, 151; Proudlock “Children’s Socio-economic Rights” in Boezaart *Child Law* 368; Veriava & Skelton (2019) *SAJHR* 2; E Cameron “A South African Perspective on the Judicial Development of Socio-Economic Rights” in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (2014) 323; See for example *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) 1997, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 2000, *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC), *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC).

¹⁵²⁰ Skelton (2012) *SAPL* 395; Liebenberg *Socio-economic Rights* 133, 151; Proudlock “Children’s Socio-economic Rights” in Boezaart *Child Law* 368; Veriava & Skelton (2019) *SAJHR* 2; Cameron “A South African Perspective on the Judicial Development of Socio-Economic Rights” in *Reasoning Rights* 323. 2001 1 SA 46 (CC) 2000 para 41; Liebenberg *Socio-economic Rights* 151.

¹⁵²¹ *Governing Body of the Juma Masjid Primary School v Essay* NO 2011 8 BCLR 761 (CC).

¹⁵²² Para 37.

¹⁵²³ Para 1.

¹⁵²⁴ Para 2; Simbo (2013) *Law, Democracy & Development* 477; See ss 29 and 28(2) of the Constitution.

¹⁵²⁵ Simbo (2013) *Law, Democracy and Development* 478.

education,¹⁵²⁷ Nkabinde J specified the following in order to provide some guidance on the understanding and interpretation of the right to basic education:

“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 which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. This right is therefore distinct from the right to “further education” provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education “progressively available and accessible.”¹⁵²⁸

In *Juma Masjid* the guidance provided by Nkabinde J on the interpretation of the right to basic education is very important as it sets a legal precedent by confirming the characteristics of the right to basic education as afforded in section 29 of the Constitution. In the judgment, Nkabinde J referred specifically to the manner in which international and regional law protects and recognises the child’s right to education.¹⁵²⁹ She referred to the UDHR, the ICESCR, the CRC, as well as CESCR General Comment No 13.¹⁵³⁰ Quoting CESCR General Comment No 13, the court recognised the right to education as an empowerment right.¹⁵³¹ The dimensions of the right to basic education as rights to, in and through are thus strengthened by this interpretation in the *Juma Masjid* judgment. Article 29(1) of the CRC was also emphasised by the court in relation to the aims and importance of education for the child – thereby recognising the importance of the position in terms of international law and its interpretive value when interpreting the Bill of Rights.

The importance of the *Juma Masjid* case is twofold. Firstly, it provides guidance on the interpretation of the right to basic education by affirming it as an immediately realisable right. Secondly, it serves as authority that the minimum core standard could become relevant once more in an appropriate case relating to the right to basic

¹⁵²⁷ Veriava & Skelton (2019) *SAJHR* 2.

¹⁵²⁸ *Governing Body of the Juma Masjid Primary School v Essay NO 2011 8 BCLR 761 (CC)* para 37.

¹⁵²⁹ Para 40.

¹⁵³⁰ Paras 40-41.

¹⁵³¹ Para 41; CESCR *General Comment No 13* para 1.

education.¹⁵³² The judgment thus opened the door for an argument that *basic education* should be seen to form the minimum core of the right to education.¹⁵³³

5.5 Legislative recognition of the right to basic education

As the right to basic education is directly guaranteed by the Constitution, legislation is necessary to elaborate and provide content to the right as set out in section 29. The two primary legislative documents related to the child's education are the Schools Act and the NEPA. The aim of the Schools Act is to regulate the organisation, governance and funding of schools in one uniform system.¹⁵³⁴ The preamble also strengthens this aim by recognising the need for uniform norms and standards in relation to the education of learners as well as the organisation, governance and funding of schools.¹⁵³⁵ The educational inequalities so deeply embedded in South African society due to apartheid are also recognised in the Schools Act in that it establishes a new national education system, which not only provides for equal educational opportunities but also for redressing past injustices.¹⁵³⁶ From the preamble of the Schools Act, the need for education to be adaptable as required by the 4-A scheme can be identified.

The preamble of the NEPA states that it aids in the adoption of legislation aimed at facilitating the democratic transformation of the national education system. The NEPA, like the Schools Act, acknowledges the need to address the effects of apartheid on the education system. Once again, adaptability as part of the model for compliance is evident here. While the NEPA does not provide specific content to the right to basic education but rather the determination and regulation of national policy,¹⁵³⁷ it nevertheless sets out the directive principles of national education policy in section

¹⁵³² Proudlock "Children's Socio-economic Rights" in *Child Law* 361.

¹⁵³³ Simbo (2013) *Law, Democracy and Development* 489.

¹⁵³⁴ See the aim of the Schools Act as set out just before the Preamble: "To provide for a uniform system for the organisation, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith."; Joubert "South African Schools Act" in *Child Law* 575.

¹⁵³⁵ Preamble of the Schools Act.

¹⁵³⁶ Preamble of the Schools Act; Joubert "South African Schools Act" in *Child Law* 575-576.

¹⁵³⁷ S 2 of the NEPA sets out the objectives of the Act:

"2. The objectives of the Act are to provide for –

(a) the determination of national education policy by the Minister in accordance with certain principles;
 (b) the consultations to be undertaken prior to the determination of policy, and the establishment of certain bodies for the purpose of consultation;
 (c) the publication and implementation of national education policy;
 (d) the monitoring and evaluation of education."

4. Section 4 provides the state with a long list of elements, rights¹⁵³⁸ and policies to which it should direct the development of policy. Examples include protection from discrimination in education,¹⁵³⁹ the right of everyone to basic education,¹⁵⁴⁰ instruction in the language of one's choice,¹⁵⁴¹ and also the right to freedom of religion, conscience, thought, belief, opinion, expression, association and culture.¹⁵⁴² The NEPA thereby confirms the right to basic education as a right that is linked to other rights, which in turn also acknowledges the concept of rights to, in and through basic education in accordance with the child-centred approach of the CRC and the model for compliance.

As the Constitution does not specifically refer to the two elements of basic education as espoused in the CRC, it is up to the legislature to incorporate the principles of “free” and “compulsory” in the provision of basic education. In what follows, attention will firstly be paid to “free” basic education and then to “compulsory” basic education in terms of the Schools Act and it will then be determined whether or not the Act is in line with the international standard set by the CRC.

5 5 1 Applicable ages and compulsory basic education

Compulsory basic education (school attendance) is provided for in two sections of the Schools Act – section 3 regulates compulsory attendance and section 4 provides for exemptions from compulsory attendance. These elements are in line with the normative framework. The Schools Act does however not require children to attend school for the entire duration of their school education, it limits compulsory education to children between the ages of seven and fifteen years.¹⁵⁴³ Section 3 also places a responsibility on the parent to ensure that children attend school during this period.¹⁵⁴⁴

¹⁵³⁸ See ss 2(a)(i) to (viii) of the NEPA.

¹⁵³⁹ S 4(a)(i) of the NEPA.

¹⁵⁴⁰ S 4(a)(ii) of the NEPA.

¹⁵⁴¹ S 4(a)(v) of the NEPA.

¹⁵⁴² Ss 4(a)(vi) and (viii) of the NEPA.

¹⁵⁴³ Or the year in which the child turns seven or the ninth grade. S 3(1) of the South African Schools Act: “Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such a learner reaches the age of fifteen year or the ninth grade, whichever occurs first.”

¹⁵⁴⁴ S 3(1) of the Schools Act.

When interpreting the nature of compulsory basic education, the accessibility and availability of education as part of the practical framework should be central to the analysis.¹⁵⁴⁵ Fortunately, the Schools Act recognises the importance of the availability of schools. In terms of section 3(3) of the Schools Act, every Member of the Executive (“MEC”) is compelled to ensure the availability of enough school places for every child in their province to attend school.¹⁵⁴⁶ Section 3(4) however elaborates on this obligation and provides for the situation in which the MEC cannot comply with section 3(3). Section 3(4) provides that the MEC must comply with the obligation as soon as possible by remedying the lack of capacity and reporting annually to the Minister of Basic Education. Even though the Schools Act recognises the importance of availability of educational institutions, it also acknowledges that this can be a challenge.

The availability of schools is however not enough, they must also be accessible.¹⁵⁴⁷ If basic education is compulsory, schools must be accessible. This means that all three dimensions of accessibility must be present:¹⁵⁴⁸ non-discrimination,¹⁵⁴⁹ physical accessibility¹⁵⁵⁰ and economical accessibility.¹⁵⁵¹ Economic accessibility emphasises the relationship between free basic education and compulsory basic education. If basic education is compulsory, then it must also be economically accessible otherwise compulsory education simply cannot stand.¹⁵⁵² For compulsory basic education to fulfil the dimension of non-discrimination in relation to accessibility, basic education must be accessible to all – especially learners from vulnerable groups and those with disabilities.¹⁵⁵³ Not only is non-discrimination a dimension of accessible basic education but the right to non-discrimination is also a guiding principle of the CRC.¹⁵⁵⁴ A link can also be established between non-discrimination and economic accessibility.

¹⁵⁴⁵ Sections 2 5 2 and 2 5 1.

¹⁵⁴⁶ The National Norms and Standards for School Funding 1998 (as amended in 2006) para 86; C Abdoll & C Barberton *Mud to Bricks: A Review of School Infrastructure Spending and Delivery* (2014) Centre for Child Law 5; See also Liebenberg *Socio-economic Rights* 243.

¹⁵⁴⁷ Section 2 5 2.

¹⁵⁴⁸ Section 2 5 2; CESCR *General Comment No 13* para 6(b)(i)-(iii); Tomaševski *Primers No. 3* (2001) 13.

¹⁵⁴⁹ CESCR *General Comment No 13* para 6(b)(i).

¹⁵⁵⁰ CESCR *General Comment No 13* para 6(b)(ii).

¹⁵⁵¹ CESCR *General Comment No 13* para 6(b)(iii).

¹⁵⁵² Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 70-71; Seleokane (2003) *Law, Democracy & Development* 145.

¹⁵⁵³ CESCR *General Comment No 13* paras 6(b)(i) and (iii); Tomaševski *Primers No. 3* (2001) 13-14.

¹⁵⁵⁴ See section 2 4 4 3; See also art 2 of the CRC.

If school fees and indirect costs associated with basic education obstruct learners from education, it could lead to discrimination and a lack of economic accessibility, which could ultimately result in basic education that is not accessible.

Physical accessibility is the last dimension of accessible compulsory education.¹⁵⁵⁵ Physical accessibility means schools must be within a safe physical distance for children.¹⁵⁵⁶ If education is compulsory, children cannot be required to attend schools that are far distances away from their homes and entail them having to undertake far and unsafe journeys in order to access their education. This relates to learner transport as discussed above.¹⁵⁵⁷

Compulsory basic education highlights the need for education to meet the obligations of the practical framework, especially availability and accessibility. If the legal framework is normatively strong by providing for compulsory basic education in line with the model for compliance, its impact is weakened if the practical framework is not followed. Both frameworks should therefore be applied in a complementary manner in order to fulfil the obligations as set out in the model for compliance.

5 5 2 Free basic education

With a superficial reading of section 29 of the Constitution, the constitutional commitment to basic education seems egalitarian. The right to basic education is afforded to everyone. However, a closer reading of section 29 proves to be less egalitarian than originally thought¹⁵⁵⁸ as there is no indication that basic education can be equated to free basic education when one considers that there is no reference to “free” in section 29. The element of “free” basic education is directly related to the payment of school fees in order to attend a school or educational institution. The charging of school fees and how it relates to free basic education is of importance as fees have a direct impact on the accessibility of the child’s education.¹⁵⁵⁹ Moreover, other indirect costs are also associated with basic education, as established in chapter two.¹⁵⁶⁰ In terms of the South African legislative framework, it will first be considered if

¹⁵⁵⁵ CESCR *General Comment No 13* paras 6(b)(ii).

¹⁵⁵⁶ CESCR *General Comment No 13* paras 6(b)(ii).

¹⁵⁵⁷ *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG).

¹⁵⁵⁸ Woolman & Bishop “Education” in *CLOSA* 57-5.

¹⁵⁵⁹ Section 2 5 2.

¹⁵⁶⁰ Examples include school uniforms, transportation and textbooks.

and how the Schools Act provides for free basic education,¹⁵⁶¹ and then attention will be paid to how the courts have contributed to shaping this right.¹⁵⁶² The provision of transportation, textbooks and uniforms will be considered as they form part of the child's right to basic education and are also representative of the dimensions of rights to, in and through basic education that form part of the right to basic education.¹⁵⁶³

The charging of school fees for basic education remains a major question when interpreting the right to basic education in South Africa.¹⁵⁶⁴ This is a challenge that is shared with both India and Nigeria. With free basic education not being constitutionally mandated, it is up to legislation and policy to ensure that the child has access to basic education, irrespective of school fees. The Schools Act, like the Constitution, also does not provide for free universal basic education for everyone. This has led to arguments that the system discriminates on the grounds of race and class, which results in a violation of the right to equality – a right in basic education.¹⁵⁶⁵ Some provisions of the

¹⁵⁶¹ See section 5 4 1 below.

¹⁵⁶² See section 5 4; Examples of cases include: *Governing Body of the Juma Masjid Primary School v Essay NO 2011 8 BCLR 761 (CC)*; *Christian Education South Africa v Minister of Education 2000 4 SA 757 (CC)* resulted in the confirmation of the prohibition of corporal punishment in schools irrespective of religious views; *Centre for Child Law v Minister of Basic Education 2013 3 SA 183 (ECG)* emphasised the importance of the administrative and support staff necessary for a school to function properly; *Fish Hoek Primary School v GW 2010 2 SA 141 (SCA)* which dealt with the interpretation of the word "parent" in terms of section 40(1) of the South African Schools Act in relation to liability of school fees; *Minister of Education, Western Cape v Governing Body, Mikro Primary School 2006 1 SA 1 (SCA)* which related to a school's language policy and whether or not learners who wanted to be taught in another language to that of the language policy could be admitted; *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 2 SA 415 (CC)* also dealt with a school's language policy and the admittance of learners; *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys 2003 4 SA 160 (T)* is another example of a case which revolved around the language policy of a school; *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School 2013 6 SA 582 (CC)*; *MEC for Education, Kwazulu-Natal v Pillay 2008 1 SA 474 (CC)* concerned the protection of cultural and religious practices in public schools; *Section 27 v Minister of Basic Education 2013 2 SA 40 (GNP)* dealt with the failure of the Department of Basic Education to provide textbooks as part of the right to basic education; *Minister of Basic Education v Basic Education for All 2016 1 All SA 369 (SCA)* also provided that the Department of Basic Education must provide textbooks to learners as it formed part of the national education policy; *Head of Department of Education, Free State Province v Welkom High School 2014 2 SA 228 (CC)* dealt with the policies of schools relating to pregnant learners; *Madzodzo v Minister of Basic Education 2014 3 SA 441 (ECM)* which deals with the provision of furniture in schools as forming part of the right to basic education; *Equal Education v Minister of Basic Education 2018 9 BCLR 1130 (ECB)* which focused on the regulations of the Schools Act focusing on the norms and standards relating to school infrastructure, with some parts of the regulations being found to be unconstitutional. Skelton A "How far will the courts go in ensuring the right to a basic education?" (2012) *SAPL* 392-408.

¹⁵⁶³ CESCR *General Comment No 13*; Tomaševski *Primers No. 3* (2001) 12.

¹⁵⁶⁴ Liebenberg *Socio-economic Rights* 245; D Roithmayr "Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education" (2003) 19 *SAJHR* 382.

¹⁵⁶⁵ Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 70; Roithmayr (2003) *SAJHR* 382.

Schools Act do however allow free basic education for some children depending on their circumstances.¹⁵⁶⁶ In some instances, schools are classified as “no fee” or “fee free” in that no fees are charged at that school or a learner is exempted from the payment of school fees at a school that charges fees.¹⁵⁶⁷ The aim of this dissertation is not to establish whether or not these provisions are constitutional but rather to determine whether or not it complies with the international standard as measured by the model for compliance.¹⁵⁶⁸

The Schools Act provides definitions for “no fee threshold” as well as “school fees” that shed some light on the interpretation of free basic education in terms of the Act. The concept of “no fee threshold” relates to fee free schools and is defined as the level of funding that is required per learner in terms of the norms and standards for school funding¹⁵⁶⁹ in order for the Minister to declare a specific public school as fee free.¹⁵⁷⁰

The Schools Act also provides a definition for “school fees”. Section 2 specifies that school fees refer to any form of contribution that has a monetary nature, which is paid by either a person or a body with regard to a learner’s attendance or participation in a public school.¹⁵⁷¹ From a simple reading and interpretation of the definition, it seems that school fees are mainly concerned with the learner’s ability to attend and participate in school.

In order to provide free basic education and provide for education that is economically accessible, there are two ways in which children can attend school without having to pay school fees. The first is by means of no fee schools. In order to implement and regulate the no fee schools, the Department of Education published the National Norms and Standards for School Funding.¹⁵⁷² Schools in South Africa are

¹⁵⁶⁶ See ss 5(3)(a), 39, 40, 41 of the Schools Act; Skelton *Strategic Litigation Impacts* 47.

¹⁵⁶⁷ See ss 1, 2, 39 of the Schools Act; Education Laws Amendment Act 24 of 2005; Woolman & Fleisch *Constitution in the Classroom* 192; Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 68; Skelton *Strategic Litigation Impacts* 47; Woolman & Bishop “Education” in *CLOSA* 57-29;

¹⁵⁶⁸ See for example Roithmayr (2003) *SAJHR* 382-429 in which Roithmayr argues that the charging of school fees may be unconstitutional; See also S Woolman & B Fleish *Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 213-240 and B Fleisch & S Woolman “On the constitutionality of school fees: a reply to Roithmayr” (2004) 22(1) *Perspectives in Education* 111 in which they demur on the arguments raised by Roithmayr.

¹⁵⁶⁹ S 1 of the Schools Act; National Norms and Standards for School Funding.

¹⁵⁷⁰ S 1 of the Schools Act.

¹⁵⁷¹ S 2 of the Schools Act.

¹⁵⁷² National Norms and Standards for School Funding: Notice of publication of list of schools that may not charge school fees GN 1137 in GG 41994 of 24-10-2018; National Norms and Standards for School Funding.

categorised into quintiles depending on the funding that they receive from the state (in other words based on their financial means).¹⁵⁷³ Schools in quintiles 1 to 3 form the lower quintiles and are categorised as no-fee schools.¹⁵⁷⁴ Schools in quintiles 1 to 3 receive a higher amount of funding from the state compared to those in quintiles 4 and 5. School in quintiles 4 and 5 may accordingly charge school fees as they receive less funding from the state.¹⁵⁷⁵

When studying the quintiles on a national level, roughly 71% of the public schools in the country are in quintiles 1, 2 or 3.¹⁵⁷⁶ A stark difference can also be seen in the different provinces in relation to the percentage of schools in the higher and lower quintiles. Two of the wealthier provinces have much higher percentages of fee paying schools, with the Western Cape with 59.7% of schools as fee paying schools and Gauteng with 53.5%. On the other hand, the province of the Eastern Cape currently has 28.4% of its schools in the higher quintiles and thus fee paying. Limpopo is even lower with a percentage of 22.9%.¹⁵⁷⁷ Provision is accordingly made for those that cannot afford to pay schools fees by attending fee free schools – meaning schools that are in quintiles 1, 2 or 3.

The second way in which provision is made for free basic education is by means of an exemption system that is specifically provided for in the Schools Act. If parents cannot afford the school fees of schools in quintiles 4 and 5, they have the option of applying for an exemption in terms of section 39 of the Schools Act. This means that

¹⁵⁷³ Para 87 of the National Norms and Standards for School Funding defines “National quintiles for public schools” as: “One of five groups into which all South African public ordinary schools are placed, and where the grouping is according to the poverty of the community around the school. Quintile one is the poorest quintiles, quintile two is the second-poorest quintile, and so on. Each national quintile encompasses one-fifth of the learners enrolled in public ordinary schools.”; s 35 of the Schools Act; See specifically s 35(2)(b) of the Schools Act; S Dass & A Rinquest “School Fees” in F Veriava with A Thom & TF Hodgson *Basic Education Rights Handbook: Education Rights in South Africa* (e-book) (2017) 143 <<https://section27.org.za/wp-content/uploads/2017/02/Chapter-7.pdf>> (accessed 25-10-2019; Skelton *Strategic Litigation Impacts* 49; Woolman & Bishop “Education” in *CLOSA* 57-25.

¹⁵⁷⁴ National Norms and Standards for School Funding paras 155-163; Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* 143; Skelton *Strategic Litigation Impact* 49.

¹⁵⁷⁵ Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* 143; Skelton *Strategic Litigation Impacts* 49.

¹⁵⁷⁶ Minister of Basic Education Budget Speech (2016) <<https://www.education.gov.za>> as cited in Skelton *Strategic Litigation Impacts* 49.

¹⁵⁷⁷ Minister of Basic Education Budget Speech (2016) <<https://www.education.gov.za>> as cited in Skelton *Strategic Litigation Impacts* 49.

even though schools in quintiles 4 and 5 may charge school fees, they must also take into account the exemption system in their admission policy.¹⁵⁷⁸

Section 39 regulates school fees at public schools and provides that schools must provide total,¹⁵⁷⁹ partial¹⁵⁸⁰ or conditional exemption.¹⁵⁸¹ Provision is also made for automatic exemption.¹⁵⁸² The Regulations Relating to the Exemption of Parents from the Payment of School Fees¹⁵⁸³ should be read together with section 39. Thus, even though free basic education is not afforded to all children, options are available to those that cannot afford school fees through exemptions from fees on different levels depending on income as well as the existence of no fee schools.¹⁵⁸⁴

¹⁵⁷⁸ Liebenberg *Socio-economic Rights* 247; Dass & Rinquest "School Fees" in *Basic Education Rights Handbook* 143.

¹⁵⁷⁹ The Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools define "total exemption" as meaning the financial concession "(a) granted to a parent in accordance with the calculation result contemplated in regulation 6(3); or (b) available to a parent as a result of his or her qualifying for the automatic exemption contemplated in regulation 4(3)" Full or total exemption refers to a parent whose annual income is less than the annual school fees times ten as set out in Regulation 6; See specifically reg 6(3); Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 68.

¹⁵⁸⁰ The regulations define "partial exemption" as "the financial concession granted to a parent in terms of which he or she is liable for the payment of only a portion of the school fees." Partial exemption is granted to parents who have an income of less than 30 times the annual schools fees, but more than 10 times; Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 68; See specifically reg 6(4).

¹⁵⁸¹ "[C]onditional exemption" is defined by the Regulations as "the exemption granted to a parent who (a) qualifies for partial exemption but, owing to personal circumstances beyond his or her control, cannot pay even the reduced amount; or does not qualify for exemption but supplies information indicating his or her inability to pay school fees owing to personal circumstances beyond his or her control, (b) which exemption the school governing body grants with the proviso that the parent agrees to certain conditions for the payment of the school fees". S 39(2)(b) of the Schools Act; reg 5 of the Regulations Relating to the Exemption Parents from Payment of School Fees in Public Schools 2006 provides for the four categories of exemptions: total, partial, conditional and no exemption. Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 68.

¹⁵⁸² "Automatic exemption" is defined by the Regulations as "the total exemption available to:

(a) a person who has the responsibility of a parent in respect of a child placed in -

(i) a foster home;

(ii) a youth care centre;

(iii) a place of safety; or

(iv) an orphanage;

(b) a person who is a kinship caregiver of an orphan or of a child who -

(i) has been abandoned by his or her parents; and

(ii) is without any visible means of support;

(c) a person who receives a social grant on behalf of a child; or

(d) a child who heads a household"

See also National Norms and Standards for School Funding paras 164-167; Dass & Rinquest "School Fees" in *Basic Education Rights Handbook* 149.

¹⁵⁸³ GN 1293 in GG 19347 of 12-10-1998.

¹⁵⁸⁴ Liebenberg *Socio-economic Rights* 245; Dass & Rinquest "School Fees" in *Basic Education Rights Handbook* 149; Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 70-71.

Section 41 of the Schools Act provides for the enforcement of the payment of school fees and also the exemption from paying school fees. Section 41(2) stipulates that exemption from school fees must be calculated in accordance with the regulations as set out in section 39(4) of the Schools Act, which provides the Minister of Basic Education with the obligation to promulgate these regulations.

Even though the Schools Act specifically makes provision for exemptions from school fees, these exemptions unfortunately pose some obstacles – especially for disadvantaged learners.¹⁵⁸⁵ The application process can be very time-consuming, which has a negative effect on the dignity and time of learners and families applying for exemptions. Discrimination against those who are granted exemptions is also a concern.¹⁵⁸⁶ Many parents do not want to apply for the exemptions as they would have to admit to or make their poverty known to others. For many this then leads to embarrassment and shame – for the parents and learners alike.¹⁵⁸⁷ Not only is the child's right to basic education then affected, but also the right to dignity as an example of a right in basic education as an element of the right to basic education. This ultimately results in many families who qualify for exemptions not applying.¹⁵⁸⁸

Attendance at schools are however not only hindered by the payment of school fees – indirect fees associated with education are another burden.¹⁵⁸⁹ Learners cannot merely be exempted from paying the direct costs associated with school fees if they also cannot afford the indirect costs as this would clearly result in an infringement of their right to basic education. The high costs associated with the indirect costs often

¹⁵⁸⁵ Liebenberg *Socio-economic Rights* 246; Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 68-71; EB Fiske & HF Ladd H "Balancing Public and Private Resources for Basic Education: School Fees in Post-Apartheid Education" (2003) *Terry Sanford Institute of Public Policy Working Paper Series* 3; F Veriava "The Amended Legal Framework for School Fees and School Funding: A Boon or a Barrier?" (2007) 23 *SAJHR* 180; Roithmayr (2003) *SAJHR* 382; See in general Department of Basic Education "School fees and exemptions" <<https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolFees.aspx>> (accessed 09-11-2019).

¹⁵⁸⁶ Liebenberg *Socio-economic Rights* 246; Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 68-71; Veriava (2007) *SAJHR* 180; Roithmayr (2003) *SAJHR* 382.

¹⁵⁸⁷ Roithmayr (2003) *SAJHR* 382; Woolman & Bishop "Education" in *CLOSA* 57-25; Seleane (2003) *Law, Democracy & Development* 148.

¹⁵⁸⁸ Liebenberg *Socio-economic Rights* 246; Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 68-71; Veriava (2007) *SAJHR* 180; Roithmayr (2003) *SAJHR* 382.

¹⁵⁸⁹ Indirect fees for example refer to textbooks, uniforms and transport; CESCR *General Comment No 13* para 6(a); See section 2 4 4 of chapter 2.

result in a major obstacle for poorer learners to access their right to basic education.¹⁵⁹⁰

When comparing the position of “free education” in terms of the Schools Act to the position in India and Nigeria, differences can be identified. In India, the Right to Education Act provides that children must not be liable to pay any fees, charges or expenses in order to pursue or complete their primary education.¹⁵⁹¹ The Nigerian Child Rights Act provides every child with the right to free, compulsory and universal primary education.¹⁵⁹² Furthermore a specific piece of legislation dedicated to basic education, aptly titled the Compulsory, Free Universal Basic Education Act (UBE Act), provides every child with the right to free, compulsory and universal basic education.¹⁵⁹³ It is clear that the Schools Act does not provide free basic education to everyone, while the Nigerian legislation clearly provides every child with the right to free primary education. The Indian legislation does not provide for free basic education in those exact words, but rather states that school are not allowed to charge fees, charges or expenses –which is arguably the same as “free” just expressed in a different manner. It has however been established that even though the Indian and Nigerian legislation in effect provides for free basic or free primary education, it is not yet reflected in reality. Their legislation is however one step closer to fulfilling the international obligation in terms of the CRC to provide free primary education. Normatively, the Indian and Nigerian perspectives are thus very strong in relation to the fees associated with education as the emphasis is on free basic education for all children.

Examining the charging of school fees in light of the CRC principle of non-discrimination,¹⁵⁹⁴ the argument has been made that the current system in South Africa results in a violation of the right to equality.¹⁵⁹⁵ It has been argued that the regulatory framework is discriminatory against poor learners on the grounds of race and class, which then leads to inequality.¹⁵⁹⁶ When one unpacks the fact that schools

¹⁵⁹⁰ Liebenberg *Socio-economic Rights* 245; See for example the case of *Centre for Applied Legal Studies v Hunt Secondary School*, Case No 10091/2006, 15 June 2007 (ZAKZNHC).

¹⁵⁹¹ Section 4 2 6 2 of chapter 4; S 3(2) of the Right to Education Act.

¹⁵⁹² Section 4 3 4 1 of chapter 4; S 15 of the Child Rights Act.

¹⁵⁹³ Section 4 3 4 2 of chapter 4; S 2(1) of the UBE Act.

¹⁵⁹⁴ Art 2 of the CRC; See section 2 4 4 3.

¹⁵⁹⁵ Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 70.

¹⁵⁹⁶ Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 70; Roithmayr (2003) *SAJHR* 382.

are reliant on fees, wealthier communities are able to contribute higher fees, which leads to better facilities and in most instances a higher standard of basic education. In contrast to this, poorer communities in which parents cannot afford to pay fees will not be able to provide the same facilities and infrastructure.¹⁵⁹⁷ This ultimately results in reinforcing the racial inequalities in schools that have been left by apartheid.¹⁵⁹⁸ Moreover, in light of the principle of accessibility as part of the 4-A scheme, it is clear that school fees can lead to making basic education inaccessible – specifically for poor children.¹⁵⁹⁹ Not only are the schools fees a financial obstacle to the right to basic education, the secondary costs associated with education such as textbooks, uniforms, transport and stationary pose an even more serious obstacle to education.¹⁶⁰⁰ While the argument can be made that the legislative framework takes positive steps toward meeting the obligations of the normative framework, the application of the practical framework continues to face a challenges with regard to economic accessibility.

The analysis of section 29 has made it clear that section 29 does not provide for free or compulsory as elements of the right to basic education. The relationship between free basic education and compulsory basic education is central to the obligation imposed by the CRC as the one presupposes the other. The notion of charging school fees is consequently irreconcilable with compulsory basic education.¹⁶⁰¹ As the Constitution does not refer to either “free” or “compulsory” basic education as provided for in the CRC, legislation like the Schools Act must fill the gaps. In order to fulfil the obligations of the selected international instruments, legislation must comply with the standards. Then the legislation can be implemented.

¹⁵⁹⁷ Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 70; Liebenberg *Socio-economic Rights* 246; Roithmayr (2003) *SAJHR* 383.

¹⁵⁹⁸ Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 70; Roithmayr (2003) *SAJHR* 382.

¹⁵⁹⁹ Section 25(2); Liebenberg *Socio-economic Rights* 246.

¹⁶⁰⁰ Woolson & Bishop “Education” in *CLOSA* 57-27.

¹⁶⁰¹ Veriava & Coomans “Right to Education” in *Socio-economic Rights in South Africa* 70-71; Seleane (2003) *Law, Democracy & Development* 145.

5 5 2 1 Textbooks as part of the right to basic education

The South African courts have also dealt with the issues of indirect fees, especially in relation to transport and textbooks.¹⁶⁰² The continued challenges in relation to the economic accessibility of education is underscored in this saga. In 2012, the national curriculum was changed from Revised National Curriculum Statements (“RNCS”), to Curriculum and Assessment Policy Statements (“CAPS”).¹⁶⁰³ With this change came the need for new textbooks, which the state had to provide to public schools. Provision was made to introduce CAPS gradually over a period of time in the different grades in order to avoid providing every learner with new textbooks at the same time.¹⁶⁰⁴

One of the reasons for introducing CAPS, was that it placed textbooks at the centre of the curriculum with the goal of increasing learners’ reliance on textbooks. This would then enable learners to rely less on their teachers in instances of overcrowding, poor school conditions, poor communication and poor content knowledge.¹⁶⁰⁵ Firstly, one would think that with textbooks playing such a central role in the Department’s new curriculum, it would be focused on the procurement and delivery of the textbooks. This was unfortunately not the case and it was necessary to rely on the judicial system to order the government to fulfil this obligation.¹⁶⁰⁶

¹⁶⁰² See for example *Section 27 v Minister of Basic Education*, Case No 24565/12, 4 October 2012; *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP); *Basic Education For All v Minister of Basic Education* 2014 4 SA 274 (GP); *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA). N Stein “Textbooks” in *Basic Education Rights Handbook – Education Rights in South Africa* (e-book) (2017) 268 <<https://section27.org.za/wp-content/uploads/2017/02/Chapter-15.pdf>> (accessed 25-10-2019).

¹⁶⁰³ Stein “Textbooks” in *Basic Education Rights Handbook* 268; F Veriava “The Limpopo textbook litigation: a case study into the possibilities of a transformative constitutionalism” (2016) 32 *SAJHR* 323.

¹⁶⁰⁴ In 2012 CAPS was introduced in Grades R, 1, 2, 3 and 10. In 2013, it was extended to learners in Grades 4, 5, 6 and 11. And then lastly in 2014, CAPS was introduced in Grades 7, 8, 9 and 12. Stein “Textbooks” in *Basic Education Rights Handbook* 268; *Basic Education For All v Minister of Basic Education* 2014 4 SA 274 (GP) para 11; Veriava (2016) *SAJHR* 323.

¹⁶⁰⁵ Stein “Textbooks” in *Basic Education Rights Handbook* 268; Veriava (2016) *SAJHR* 323.

¹⁶⁰⁶ See discussion of relevant case law below; See *Basic Education For All v Minister of Basic Education* 2014 4 SA 274 (GP) and *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP).

After the introduction of the new curriculum and the accompanied necessity of new textbooks, it came to light that there were learners in the province of Limpopo that did not receive the new textbooks required for the CAPS curriculum.¹⁶⁰⁷ After several engagements with the Department and its assurances to urgently provide textbooks to the learners had failed, the decision was made to approach the North Gauteng High Court (as it was known then) to compel the Department to deliver the textbooks.¹⁶⁰⁸

In his judgment, Kollapen J held that textbooks are an essential component of the right to basic education and that it is difficult to comprehend how the right to basic education can be realised *without* textbooks.¹⁶⁰⁹ Kollapen J acknowledged that while there is no broad consensus on the content of the right to basic education in the South African legal context, compelling arguments have been made that it should include textbooks.¹⁶¹⁰ Policy statements made it clear that textbooks were to be provided by the Department in order to realise the right to basic education.¹⁶¹¹ He therefore concluded that the state's failure to provide textbooks resulted in a violation of the right to basic education, the right to dignity¹⁶¹² and the right to equality¹⁶¹³ and consequently compelled the state to provide the textbooks by a specific date.¹⁶¹⁴ The fact that the court not only found a violation of the right to basic education but also the rights to equality and dignity emphasises the dimensions of rights, to in and through education forming part of the right to basic education.

¹⁶⁰⁷ Stein "Textbooks" in *Basic Education Rights Handbook* 268; See in general Veriava (2016) *SAJHR* 321-343.

¹⁶⁰⁸ Section 27, the principal of a secondary school and the mothers of a primary school brought the application. *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP) paras 6-8; Stein "Textbooks" in *Basic Education Rights Handbook* 268; Skelton *De Jure* (2013) 10; Veriava (2016) *SAJHR* 326.

¹⁶⁰⁹ *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP) ; Stein "Textbooks" in *Basic Education Rights Handbook* 268; Skelton *Strategic Litigation Impacts* 53; Veriava (2016) *SAJHR* 327; Own emphasis.

¹⁶¹⁰ Reference is also made to infrastructure, transport, security and nutrition in the judgment. The decision was however made not to elaborate on these issues and to only focus on whether or not the provision of textbooks formed part of the right to basic education; *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP) para 22.

¹⁶¹¹ *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP) para 22; Para 23.1-23.3 refers to the policy relied on by Kollapen J.

¹⁶¹² S 10 of the Constitution.

¹⁶¹³ S 9 of the Constitution.

¹⁶¹⁴ The state was given time until the 15th of June 2012 to deliver the textbooks; *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP) para 25, 32; Stein "Textbooks" in *Basic Education Rights Handbook* 268; Skelton *Strategic Litigation Impacts* 53; Skelton *De Jure* (2013) 10; Veriava (2016) *SAJHR* 327.

In coming to a decision, Kollapen J referred specifically to CESCR General Comment No 13 in acknowledging the right to basic education as an empowerment right.¹⁶¹⁵ The significance of the reference to CESCR General Comment No 13 is that it emphasised the importance of international law in the interpretation of the right to basic education. Moreover, the right to basic education's relationship to other rights is also acknowledged. The principle of availability as part of the 4-A scheme plays a central role here as textbooks should be made available to all learners as they are necessary for schools to function.¹⁶¹⁶ In order for South Africa to fulfil its international obligations it is necessary for the state to ensure that textbooks are made available to all learners thereby ensuring that the obligation to realise the right to basic education is fulfilled, together with the principle of availability and non-discrimination as a guiding principle of the CRC.¹⁶¹⁷ The implementation of the practical framework is therefore very important here.

Despite the above discussed case and the court order that the textbooks be provided to the learners as an essential component of the right to basic education, by 2014 the problems with the delivery of textbooks were still not resolved.¹⁶¹⁸ The High Court was approached once more with the applicants seeking the court to compel the delivery of the textbooks.¹⁶¹⁹ In this instance the application was brought by Better Education for All (BEFA)¹⁶²⁰ and 18 schools that had not yet received all of the textbooks, even though the CAPS curriculum had already been implemented by the government.¹⁶²¹ The shortages were also present across all grades.¹⁶²² This meant that the state had failed to deliver the textbooks for a period of three years.¹⁶²³ The Department raised two defences: insufficient funds and that the principals of the

¹⁶¹⁵ *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP) para 4; CESCR *General Comment No 13* para 1.

¹⁶¹⁶ Section 2 5 1; CESCR *General Comment No 13* para 6; Skelton *De Jure* (2013) 6-10.

¹⁶¹⁷ Sections 2 5 1 and 2 4 4 3.

¹⁶¹⁸ Stein "Textbooks" in *Basic Education Rights Handbook* 269.

¹⁶¹⁹ *Basic Education For All v Minister of Basic Education* 2014 4 SA 274 (GP) para 6; Stein "Textbooks" in *Basic Education Rights Handbook* 269.

¹⁶²⁰ *Basic Education For All v Minister of Basic Education* 2014 4 SA 274 (GP) para 2. This community organisation was formed because of the textbook crisis with the aim of helping the community in their pursuit of receiving textbooks; Stein "Textbooks" in *Basic Education Rights Handbook* 269; Veriava (2016) SAJHR 329.

¹⁶²¹ Stein "Textbooks" in *Basic Education Rights Handbook* 268-269.

¹⁶²² Stein "Textbooks" in *Basic Education Rights Handbook* 269.

¹⁶²³ From 2012 to 2014; Stein "Textbooks" in *Basic Education Rights Handbook* 269.

schools had not reported shortages in terms of the prescribed mechanisms.¹⁶²⁴

Tuchten J made it clear that:

“[t]he delivery of textbooks to certain learners but not others cannot constitute fulfilment of the right. Section 29(1)(a) confers the right of a basic education to everyone. If there is one learner who is not timeously provided with her textbooks, her right has been infringed. It is of no moment at this level of the enquiry that all the other learners have been given their books.”¹⁶²⁵

In short, this means that if the state fails to provide all of the prescribed textbooks to even one learner – it would be in breach of its constitutional obligation to provide the learner with the right to basic education.¹⁶²⁶ The state was ultimately ordered to ensure the delivery of textbooks for every learner.¹⁶²⁷ In response to the judgment, the Department appealed to the Supreme Court of Appeal arguing that the obligation imposed by the court that it provides every learner with their own textbooks, would create an unattainable standard for them to meet.¹⁶²⁸

The Supreme Court of Appeal¹⁶²⁹ confirmed that the failure to provide textbooks would result in a violation of the right to basic education.¹⁶³⁰ Thus meaning that the model for compliance was also not adhered to. Navsa JA (with Lewis, Cachalia, Petse and Dambuzza JJA concurring) declared that the failure of the Department of Basic Education to provide textbooks resulted in a violation of several rights – the right to basic education, human dignity and equality.¹⁶³¹ The Department was ordered to deliver the outstanding textbooks.¹⁶³²

If textbooks are not provided for learners, it results in an infringement of the right to basic education. However requiring learners to rely on their textbooks as a means of addressing issues such as overcrowding, poor content knowledge, poor communication and poor school conditions, as discussed above, could also result in

¹⁶²⁴ *Basic Education For All v Minister of Basic Education* 2014 4 SA 274 (GP) para 44; Stein “Textbooks” in *Basic Education Rights Handbook* 269.

¹⁶²⁵ *Basic Education For All v Minister of Basic Education* 2014 4 SA 274 (GP) para 52; Stein “Textbooks” in *Basic Education Rights Handbook* 270.

¹⁶²⁶ *2 Basic Education For All v Minister of Basic Education* 014 4 SA 274 (GP) para 82; Stein “Textbooks” in *Basic Education Rights Handbook* 270; Veriava (2016) SAJHR 330.

¹⁶²⁷ 2014 4 SA 274 (GP) para 82; Stein “Textbooks” in *Basic Education Rights Handbook* 270.

¹⁶²⁸ Stein “Textbooks” in *Basic Education Rights Handbook* 270; Veriava (2016) SAJHR 330.

¹⁶²⁹ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

¹⁶³⁰ 2016 4 SA 63 (SCA) para 46; Stein “Textbooks” in *Basic Education Rights Handbook* 270; Skelton *Strategic Litigation Impacts* 53.

¹⁶³¹ See ss 29(1)(a), 10 and 9 of the Constitution; 2016 4 SA 63 (SCA) para 53; Stein “Textbooks” in *Basic Education Rights Handbook* 270.

¹⁶³² 2016 4 SA 63 (SCA) para 53; Stein “Textbooks” in *Basic Education Rights Handbook* 270.

an infringement of a right in basic education. These issues can be linked to the child's right to human dignity,¹⁶³³ equality¹⁶³⁴ and the right to an environment that is not harmful to one's health – examples of the child's rights in basic education as dimensions of the right to basic education.¹⁶³⁵ Moreover, the CRC guiding principle of non-discrimination¹⁶³⁶ and the acceptability of education in terms of the 4-A scheme are also applicable in this instance.¹⁶³⁷ If schools are dealing with the above discussed issues, they are clearly not acceptable and also not equitable.

The case law relating to the provision of textbooks is a very good example emphasising the invaluable role of civil society groups in realising the child's right to basic education. The importance of civil society groups in the realisation of the child's right to basic education in South Africa can also be compared to India.¹⁶³⁸ These cases have clearly confirmed that the right to basic education includes the delivery of textbooks as a key component of the right to basic education. If the Department of Basic Education fails to provide learners with textbooks, it not only violates the child's right to basic education but also the right to dignity and equality. Moreover, the model for compliance will not be adhered to and South Africa will not fulfil its international obligations.

5 5 2 2 Transport as an essential component of the right to basic education

Accessibility of basic education in terms of the 4-A scheme, is not only related to economic accessibility such as free and affordable education, but also to physical accessibility.¹⁶³⁹ CESCR General Comment No 13 provides that in order for education to be accessible it must be within safe physical reach.¹⁶⁴⁰ If learners have to walk far distances in order to access education, it results in education not being physically accessible which would result in non-adherence to the practical framework.¹⁶⁴¹ This

¹⁶³³ S 10 of the Constitution; See section 2 6.

¹⁶³⁴ S 9 of the Constitution; See section 2 6.

¹⁶³⁵ S 24 of the Constitution. See section 2 6

¹⁶³⁶ Art 3 of the CRC; See section 2 4 4 3.

¹⁶³⁷ See section 2 5 1.

¹⁶³⁸ See sections 4 2 4 and 4 2 5.

¹⁶³⁹ CESCR *General Comment No 13* para 6; See section 2 5 2.

¹⁶⁴⁰ CESCR *General Comment No 13* para 6(b)(ii); See section 2 5 2.

¹⁶⁴¹ CESCR *General Comment No 13* para 6(b)(ii); S Joseph & J Carpenter "Scholar Transport" in F Veriava, A Thom & TF Hodgson (eds) *Basic Education Rights Handbook – Education Rights in South Africa* (e-book) (2017) 288 <<https://section27.org.za/wp-content/uploads/2017/02/Chapter-16.pdf>> (accessed 25-10-2019).

understanding would also mean that the absence of transport to schools could be considered a violation of the child's right to basic education.¹⁶⁴²

Learner transport accordingly forms part of the physical accessibility of schools.¹⁶⁴³ A 2013 survey indicated that about 11 million of the 17.4 million learners that attend educational institutions in South Africa, walk the entire way in order to attend and access their education rights.¹⁶⁴⁴ Having to walk far distances to school, learners face a variety of challenges such as dangerous roads and weather, violence and long and tiring treks.¹⁶⁴⁵ These challenges do not only pose a risk to the child's right to basic education, but also their rights to life and survival and their right to have their best interests be of paramount importance.

With the aim of addressing this issue, the Department of Basic Education in 2015 promulgated the National Learner Transport Policy (hereafter "the Policy").¹⁶⁴⁶ The Policy provides for learner transport for "needy" children to their schools.¹⁶⁴⁷ The school's principal and SGB's must identify the beneficiaries (the needy learners) and then must also apply on behalf of the beneficiaries for the transport.¹⁶⁴⁸ The Policy was then challenged in the case of *Tripartite Steering Committee v Minister of Basic Education*¹⁶⁴⁹ as three schools that were denied scholar transport in terms of the Policy approached the court for help.¹⁶⁵⁰ Once more, a civil society group, the Legal Resources Centre, aided the applicants by appearing on their behalf.¹⁶⁵¹ In this instance, the court had to determine whether or not the right to basic education also

¹⁶⁴² Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 288.

¹⁶⁴³ CESCR *General Comment No 13* para 6.

¹⁶⁴⁴ Statistics South Africa "General Household Survey 2013" (2014) <<https://www.statssa.gov.za/publications/P0318/P03182013.pdf>> (accessed 15-04-2019); Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 276.

¹⁶⁴⁵ Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 276.

¹⁶⁴⁶ Department of Basic Education & Department of Transport "National Learner Transport Policy" GN 997 in GG 39314 23-10-2015; Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 280.

¹⁶⁴⁷ Department of Basic Education & Department of Transport "National Learner Transport Policy" para 3 3 1; Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 280.

¹⁶⁴⁸ Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 281.

¹⁶⁴⁹ *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG); Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 289.

¹⁶⁵⁰ Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 289.

¹⁶⁵¹ *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG); See in general LRC "Resources" <<http://resources.lrc.org.za/introduction-3/>> (accessed 23-07-2019).

comprises of state funded learner transport for those learners that live a distance away from their schools and cannot afford transport.¹⁶⁵²

Plasket J held that in the instance that learners' access to schools is hindered by the inability to pay for transport or that schools are too far away geographically, the state is obligated to provide transport to these learners. Plasket J also expressly referred to section 7(2) of the Constitution and the state's duty to promote and fulfil the right to basic education and that providing transport falls within the scope of the duties in section 7(2).¹⁶⁵³ Reference was also made to case law that highlighted that, if provincial governments do not provide learners with transport it would result in thousands of learners not being able to attend school.¹⁶⁵⁴ Accessibility as part of the practical framework accordingly plays a central role in the realisation of the child's right to basic education.

The distance requirement as set out in the Provincial Policy was also scrutinised.¹⁶⁵⁵ The Policy stipulated that learners who would have to walk 5km or more one way (10km or more in total) would be eligible for scholar transport.¹⁶⁵⁶ While it was acknowledged that the distance requirement was necessary, it was still arbitrary and because of that a certain level of flexibility was also necessary.¹⁶⁵⁷ This flexibility is needed in order to fulfil the element of adaptability as part of the 4-A scheme.¹⁶⁵⁸ Education and educational policies must provide for some degree in flexibility in their implementation in order to ensure that they are not applied in an arbitrary manner. In order to fulfil the requirements of the practical framework, adaptability is necessary.

The court ultimately found that learner transport forms part of the right to basic education because for learners without the aid of transport, their right to basic

¹⁶⁵² *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) para 2; Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 289; The court also had to determine whether the decisions of the Department of Education to refuse some learners transport and failing to provide transport to other learners was valid.

¹⁶⁵³ *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) para 19; Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 289.

¹⁶⁵⁴ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 19 refers to *Trackstar Trading 256 (Pty) Ltd t/a Mtha-Wethemba v Head of the Department of Transport, Province of the Eastern Cape* ECG 4 December 2014 (case no. 3611/13) unreported para 12.

¹⁶⁵⁵ *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) para 22, 57.

¹⁶⁵⁶ S 4 of the "Determination of Policy Relating to Scholar Transport" PN 67 in PG 1010 of 12-05-2003; *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) para 22.

¹⁶⁵⁷ *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) para 57; Joseph & Carpenter "Scholar Transport" in *Basic Education Rights Handbook* 289.

¹⁶⁵⁸ Section 25 4.

education cannot be realised. The court therefore ordered the Department to provide the learners with the necessary transportation.¹⁶⁵⁹ While the National Policy serves as a good starting point and has many positive objectives, it still has serious gaps that must be filled before the difficulties in the implementation can be overcome.¹⁶⁶⁰ Further development of the Policy is consequently required.¹⁶⁶¹ The Policy also illustrates the close relationship between the legal framework and the implementation thereof – echoing the relationship between the normative and practical frameworks. Both the frameworks need to be applied in a complementary manner in order to ensure that not only does the legal framework comply with the normative framework but that the implementation of the legal framework in line with the practical framework takes place. Once these two frameworks of the model for compliance are applied in a corresponding way, it will lead to South Africa fulfilling its international obligations.

5 5 3 Norms and standards relating to basic education

As discussed above, the right to basic education presupposes the availability and accessibility of educational institutions in line with the practical framework. Availability and acceptability of basic education are extremely important in the context of school infrastructure.¹⁶⁶² In order for schools to be acceptable, they should have safe infrastructure, water and sanitation, equipment and furniture.¹⁶⁶³ Access to an educational institution does not result in realisation of the right to basic education if there is an infringement of the right in relation to another element of the right to basic education. Several instances in relation to school infrastructure that have been ongoing battles in South Africa have led to positive determinations by the court. The following instances will be discussed below: the lack of furniture in many schools,¹⁶⁶⁴

¹⁶⁵⁹ *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) para 66-67.

¹⁶⁶⁰ Joseph & Carpenter “Scholar Transport” in *Basic Education Rights Handbook* 290; Equal Education “National learner transport policy a step in the right direction- but not far enough” <<https://equaleducation.org.za/2016/01/25/national-learner-transport-policy-a-step-in-the-right-direction-but-not-far-enough/>> (accessed 18-07-2019).

¹⁶⁶¹ Equal Education “National learner transport policy a step in the right direction- but not far enough” <<https://equaleducation.org.za/2016/01/25/national-learner-transport-policy-a-step-in-the-right-direction-but-not-far-enough/>> (accessed 18-07-2019).

¹⁶⁶² Section 25 1; CESCR *General Comment No 13* para 6(a); Skelton (2013) *De Jure* 7.

¹⁶⁶³ CESCR *General Comment No 13* para 6(a); Skelton (2013) *De Jure* 7.

¹⁶⁶⁴ *Madzodzo v Minister of Basic Education* 2014 2 All SA 339 (ECM); See in general Skelton *Strategic Litigation Impacts* 52-53.

the continued existence of mud schools,¹⁶⁶⁵ the need for norms and standards that regulate school infrastructure,¹⁶⁶⁶ and the lack of proper sanitation facilities.¹⁶⁶⁷

A lack of furniture in public schools, especially in some of the poorer provinces like the Eastern Cape, results in children having to either sit on the floor or use paint tins and bricks as furniture.¹⁶⁶⁸ Skelton notes that an audit¹⁶⁶⁹ by the Eastern Cape Department of Education found that nearly 600 000 children in the province were affected by lack of furniture in their schools.¹⁶⁷⁰ This means that almost a quarter of the public schools did not have the necessary furniture for their learners.¹⁶⁷¹ This clearly does not conform to the availability or acceptability of education in terms of 4-A scheme.¹⁶⁷² This not only violates the child's right to basic education but also the child's right to dignity and equality, which are categorised as rights in and through basic education.¹⁶⁷³ Moreover, this clearly does not align with the practical framework.

The lack of furniture in schools and the clear impact it has had on the right to basic education came to a head in the case of *Madzodzo v Minister of Basic Education*.¹⁶⁷⁴ This case concerned an application brought by the learners' parents, represented by the Legal Resources Centre ("LRC"), based on the failure of the state to provide essential school furniture such as desks and chairs to the schools in question.¹⁶⁷⁵ The Department of Basic Education argued that budgetary constraints obstructed them from providing furniture to the schools and that the extent of the issue was not yet determined, which they contended resulted in them not being able to make the appropriate and necessary plans in providing the necessary furniture.¹⁶⁷⁶ Goosen J, for good reason, found this viewpoint completely untenable as an audit in 2011 clearly indicated the seriousness of the problem.¹⁶⁷⁷ Goosen J made it clear that "The state's

¹⁶⁶⁵ *Centre for Child Law and 7 Others v Government of the Eastern Cape Province Eastern Cape High Court, Bisho*, case no 504/10; Abdoll & Barberton *Mud to bricks*; Skelton *Strategic Litigation Impacts* 52-53.

¹⁶⁶⁶ See discussion below.

¹⁶⁶⁷ See discussion of the *Komape* case. *Komape v Minister of Basic Education* 2020 2 SA 347 (SCA).

¹⁶⁶⁸ Skelton *Strategic Litigation Impacts* 53.

¹⁶⁶⁹ See *Save our Schools and Communities v President of the Republic of South Africa* case no 50/2012 (Bhisho High Court) as cited in Skelton *Strategic Litigation Impacts* 53.

¹⁶⁷⁰ Skelton *Strategic Litigation Impacts* 53, 60.

¹⁶⁷¹ Skelton *Strategic Litigation Impacts* 53.

¹⁶⁷² Section 2 5 1 and 2 5 3; CESCR *General Comment No 13* paras 6(a), (c).

¹⁶⁷³ *Madzodzo v Minister of Basic Education* 2014 2 All SA 339 (ECM) para 36.

¹⁶⁷⁴ *Madzodzo v Minister of Basic Education* 2014 2 All SA 339 (ECM).

¹⁶⁷⁵ Paras 1-2.

¹⁶⁷⁶ Paras 31-32.

¹⁶⁷⁷ Para 32.

obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: - schools, classrooms, teachers, teaching materials and appropriate facilities for learners.”¹⁶⁷⁸ Goosen J ultimately found that a lack of appropriate furniture undermined the right to basic education and that the continued failure on the part of the state led to an enduring violation of the right to basic education.¹⁶⁷⁹ In this instance, once again the implementation of the legal framework is at issue. This means that the practical framework was clearly not adhered to as the state failed in its obligation. The ultimate result is that if the model for compliance is applied, the South African government would not fulfil and meet its international obligations in this regard.

This case was however materially successful as the state was ordered to provide and deliver the necessary furniture to the schools. Moreover, it provided content to the right to basic education as the court deemed desks and chairs as forming part of the right to basic education.¹⁶⁸⁰ During the period between 2013 and 2016, R300 million was allocated to address the furniture problem in schools. More than 200 000 items of furniture has since been delivered.¹⁶⁸¹ Problems with the state’s compliance with the court orders has unfortunately continued, but major steps have been taken to improve the availability and acceptability of basic education in this instance.¹⁶⁸²

The next issue at hand is the continued existence of mud schools. The availability and accessibility of schools is central to the dilemma of the continued existence of mud schools.¹⁶⁸³ Once again, the province of the Eastern Cape struggled with school infrastructure.¹⁶⁸⁴ To put it simply, mud schools are literally schools that have been built using mud.¹⁶⁸⁵ These mud schools face a variety of issues such as the mud buildings being dilapidated, some buildings are missing roofs, lack of sanitation and

¹⁶⁷⁸ *Madzodzo v Minister of Basic Education* 2014 2 All SA 339 (ECM) para 20.

¹⁶⁷⁹ *Madzodzo v Minister of Basic Education* 2014 2 All SA 339 (ECM) para 20, 36; Skelton *Strategic Litigation Impacts* 53.

¹⁶⁸⁰ Skelton *Strategic Litigation Impacts* 53.

¹⁶⁸¹ Skelton *Strategic Litigation Impacts* 59.

¹⁶⁸² Section 2 51 and 2 5 3; Skelton *Strategic Litigation Impacts* 59.

¹⁶⁸³ Skelton (2013) *De Jure* 7; Skelton *Strategic Litigation Impacts* 52.

¹⁶⁸⁴ The Eastern Cape has also struggled with obtaining textbooks from the state – see discussion above; Abdoll & Barberton *Mud to Bricks* 1; Skelton (2013) *De Jure* 7; Skelton *Strategic Litigation Impacts* 53.

¹⁶⁸⁵ Skelton *Strategic Litigation Impacts* 53.

no running water, lack of furniture and too many learners for the current structure.¹⁶⁸⁶ After it became clear that government action on this issue had been halted and that the resources allocated to the building of schools were not being used, it became necessary to approach the courts for assistance.¹⁶⁸⁷ Once more, the LRC represented the aggrieved parties and lodged proceedings in 2010.¹⁶⁸⁸

In 2011, the case resulted in a momentous settlement between the parties with the Department of Basic Education pledging R8.2 billion to eliminate mud schools and improve the infrastructure of schools in general.¹⁶⁸⁹ As a result of the settlement, the importance of school infrastructure as an element of the right to basic education was not determined by the court in this instance.¹⁶⁹⁰ Nonetheless, the efforts of the LRC led to a significant success whereby the government recognised a major issue and agreed to spend much needed funds to address the issue.¹⁶⁹¹ Progress has been slow but many schools have already been built, which have also had a noteworthy effect on the accessibility of schools.¹⁶⁹²

In relation to the practical framework, the mud schools case emphasises the importance of the availability of schools that are safe and open to providing a space for learning.¹⁶⁹³ The right to basic education also entails quality education and it is abundantly clear that mud schools have an adverse effect on the quality of the child's basic education. If schools do not have appropriate and safe infrastructure - which includes buildings, drinking water and sanitation for both sexes – it does not conform to the element of availability in terms of 4-A scheme.¹⁶⁹⁴ The practical framework will therefore not be adhered to. Moreover, the child's other rights to, in and through basic are affected negatively and possibly also violated. When school infrastructure is not available or acceptable, the following dimensions of the right to basic education are

¹⁶⁸⁶ Skelton (2013) *De Jure* 7.

¹⁶⁸⁷ Skelton *Strategic Litigation Impacts* 53; *Centre for Child Law v Government of the Eastern Cape Province Eastern Cape High Court, Bhisho*, case no. 504/10.

¹⁶⁸⁸ The LRC brought the case on behalf of the Centre for Child Law and the Infrastructure Crisis Committees of seven schools affected. Skelton *Strategic Litigation Impacts* 53; Skelton (2013) *De Jure* 7.

¹⁶⁸⁹ Abdoll & Barberton *Mud to Bricks* vi; Skelton *Strategic Litigation Impacts* 53; Skelton (2013) *De Jure* 7.

¹⁶⁹⁰ Skelton *Strategic Litigation Impacts* 53.

¹⁶⁹¹ Skelton *Strategic Litigation Impacts* 53.

¹⁶⁹² Section 2 5 2; Skelton *Strategic Litigation Impacts* 59.

¹⁶⁹³ Section 2 5 1; See CESCR *General Comment No 13* para 6(a).

¹⁶⁹⁴ Section 2 5 1; See CESCR *General Comment No 13* para 6(a).

affected: the right to dignity,¹⁶⁹⁵ the right to equality¹⁶⁹⁶ and the right to an environment that is not harmful to one's health.¹⁶⁹⁷ The guiding principles of the CRC are also relevant here, especially the child's right to life, survival and development¹⁶⁹⁸ and the child's best interest.¹⁶⁹⁹ The importance of appropriate infrastructure in the realisation of the child's rights to, in and through basic education can therefore not be emphasised enough.

The need for norms and standards relating to infrastructure has been an ongoing battle in order to ensure that the legal framework provides for norms and standards with regard to school infrastructure.¹⁷⁰⁰ After an extensive struggle with the Department of Basic Education and with the unwavering commitment by civil society organisations like Equal Education and the LRC,¹⁷⁰¹ legally binding norms and standards ("Norms and Standards for Public School Infrastructure") were finally published in 2013 to provide regulations on the requirements of school infrastructure.¹⁷⁰² The Norms and Standards for Public School Infrastructure provide that all schools must have electricity,¹⁷⁰³ water,¹⁷⁰⁴ sanitation,¹⁷⁰⁵ a library,¹⁷⁰⁶ laboratories,¹⁷⁰⁷ sport and recreational facilities,¹⁷⁰⁸ internet,¹⁷⁰⁹ and security and

¹⁶⁹⁵ S 10 of the Constitution.

¹⁶⁹⁶ S 9 of the Constitution.

¹⁶⁹⁷ S 24 of the Constitution.

¹⁶⁹⁸ Art 6 of the CRC; See section 2 5 3 of chapter 3.

¹⁶⁹⁹ Art 3 of the CRC; See section 2 5 2 of chapter 3.

¹⁷⁰⁰ See in general Equal Education "School infrastructure" <<https://equaleducation.org.za/campaigns/school-infrastructure/>> (accessed 20-07-2019).

¹⁷⁰¹ See in general LRC "Norms and Standards" <<http://resources.lrc.org.za/norms-and-standards-for-school-infrastructure-2/>> (accessed 20-07-2019) and Equal Education "School infrastructure" <<https://equaleducation.org.za/campaigns/school-infrastructure/>> (accessed 20-07-2019).

¹⁷⁰² South African Schools Act 84 of 1996 Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure, 2013 GN R920 in GG 37081 of 29-11-2013; Equal Education "School infrastructure" <<https://equaleducation.org.za/campaigns/school-infrastructure/>> (accessed 20-07-2019).

¹⁷⁰³ S 10 of the Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure.

¹⁷⁰⁴ S 11 of the Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure.

¹⁷⁰⁵ S 12 of the Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure.

¹⁷⁰⁶ S 13 of the Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure.

¹⁷⁰⁷ S 14 of the Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure.

¹⁷⁰⁸ S 15 of the Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure.

¹⁷⁰⁹ S 16 of the Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure.

safety measures.¹⁷¹⁰ The Norms and Standards for Public School Infrastructure provide in section 4(b)(ii) that within seven years from the publication date of the Norms and Standards, the norms and standards section 4(3)(c) must be fulfilled in all schools that were in existence at the time that the Norms and Standards were published. This means that the Norms and Standards in relation to the availability of classrooms, electricity, water, internet and safety must be fulfilled by 29 November 2020.¹⁷¹¹ Recent events have however indicated that much still needs to be done in order bring schools in line with the norms and standards. The failure on the part of the Department can no longer be excused. The dismal state of toilets at schools and the severely unsafe situation that they create for children ultimately led to the tragic death of Michael Komape.¹⁷¹²

In 2004, Michael Komape, who was only five years old at the time, fell into a pit latrine at his school and tragically died.¹⁷¹³ The decision was ultimately made to approach the court for relief. In the High Court, Section 27 submitted evidence that it had engaged with the Limpopo Department of Basic Education in relation to the poor sanitation facilities in the province and the Department indicated that it had reported the problem to the National Department of Basic Education. Nonetheless, no significant steps were taken to address the identified and reported problems.¹⁷¹⁴ Most frustratingly, it also came to light that funds had been allocated in the budget to provide for sanitation facilities at schools, but were not used as service level agreements could not be signed and attained. It became clear that the Limpopo Department of Education was not committed to address the problems as it demonstrated a clear lack of urgency.¹⁷¹⁵

¹⁷¹⁰ S 17 of the Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure.

¹⁷¹¹ S 4(3)(c) of the Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure; Equal Education “School infrastructure” <<https://equaleducation.org.za/campaigns/school-infrastructure/>> (accessed 20-07-2019); D Meyer “Equal Education to march for safer schools in the Cape” <<https://www.heraldive.co.za/news/2019-10-25-equal-education-to-march-for-safer-schools-in-the-cape/>> (accessed 12-11-2019).

¹⁷¹² *Komape v Minister of Basic Education* 2020 2 SA 347 (SCA); *Komape v Minister of Basic Education* (1416/2015) 2018 ZALMPPHC 18; Equal Education “Media statement” <<https://equaleducation.org.za/2019/08/28/media-statement-equal-education-makes-submissions-to-supreme-court-of-appeal-as-amicus-curiae-in-rosina-komape-and-others-v-minister-of-basic-education/>> (accessed 12-11-2019)

¹⁷¹³ *Komape v Minister of Basic Education* 2020 2 SA 347 (SCA) para 1.

¹⁷¹⁴ *Komape v Minister of Basic Education* (1416/2015) 2018 ZALMPPHC 18 para 24.

¹⁷¹⁵ Para 25.

The case was centred on the civil claim for damages due to the consequent emotional trauma and shock that the family had experienced in relation to Michael's wrongful and negligent death.¹⁷¹⁶ A claim was also brought for a declaratory order that the Department had breached their constitutional obligations.¹⁷¹⁷ In this instance, the court dismissed the civil claim for damages and found that a declaratory order would not be the appropriate remedy.¹⁷¹⁸ Instead Muller J found a structural interdict to be the only appropriate remedy that would be just and equitable and vindicate the Constitution.¹⁷¹⁹ The judgment led to the plaintiffs (the Komape family) appealing to the SCA.¹⁷²⁰ The SCA finally found in favour of the plaintiffs and awarded damages to the amount of R1.4 million.¹⁷²¹

Even though the *Komape* case predominantly dealt with delictual damages due to emotional trauma and shock, it resulted in a victory for the Komape family after their tragic loss. The judgment also shed light on the disastrous state of sanitation in many schools and the complete lack of effort from the Department. Media coverage also led to an outcry from the public.¹⁷²² This judgment is indicative of the important role that NGO's and media can play in bringing these critical issues into the mainstream news. The importance of the practical framework and the valuable role that it can play in the implementation of the legal framework, can also be identified in this instance. Poor school infrastructure, or rather lack of infrastructure, which clearly places the lives of children at risk is certainly not in line with the elements of availability or acceptability forming part of the 4-A scheme.

¹⁷¹⁶ *Komape v Minister of Basic Education* (1416/2015) 2018 ZALMPPHC 18 paras 6-13; See also Section27 "The road to justice in the case of Michael Komape" <<http://section27.org.za/2019/06/the-road-to-justice-in-the-case-of-michael-komape/>> (accessed 28-12-2019).

¹⁷¹⁷ Paras 6-13.

¹⁷¹⁸ Paras 68-69.

¹⁷¹⁹ Para 70.

¹⁷²⁰ *Komape v Minister of Basic Education* (1416/2015) 2018 ZALMPPHC 18.

¹⁷²¹ *Komape v Minister of Basic Education* 2020 2 SA 347 (SCA) para 73.

¹⁷²² See for example E Mabuza "Damages judgment in Komape case will hopefully bring closure: Section27" (18-12-2019) *Times Live* <<https://www.timeslive.co.za/news/south-africa/2019-12-18-damages-judgment-in-komape-case-will-hopefully-bring-closure-for-family-section27/>> (accessed 21-01-2020); F Rabkin "The law and the horror of the death of Michael Komape" (04-09-2019) *Mail and Guardian* <<https://mg.co.za/article/2019-09-04-the-law-and-the-horror-of-the-death-of-michael-komape/>> (accessed 21-01-2020); C Ryan and Groundup "Judge lashes Limpopo education department over Michael Komape's pit toilet death" (03-09-2019) *Times Live* <<https://www.timeslive.co.za/news/south-africa/2019-09-03-judge-lashes-limpopo-education-department-over-michael-komapes-pit-toilet-death/>> (accessed 21-01-2020); M Heywood "Justice (at last) for Michael Komape's horrific pit toilet death" (19-12-2019) *Daily Maverick* <<https://www.dailymaverick.co.za/article/2019-12-19-justice-at-last-for-michael-komapes-horrific-pit-toilet-death/>> (accessed 21-01-2020).

5 5 4 Implementation of the legal framework

Similar to the Indian and Nigerian experiences,¹⁷²³ the implementation of legislation and the constitutional right to basic education has faced some challenges. In the above examined case law the importance of civil society organisations has been established. In the majority of the examined case law, civil society organisations have been invaluable in approaching courts for relief, by providing legal support for the affected individuals, or acting as *amici curiae*. In the context of education the following organisations have made invaluable contributions to basic education: Equal Education, Equal Education Law Centre, the Legal Resources Centre, the Centre for Child Law and Section 27.¹⁷²⁴ With civil society organisations providing support, groups and individuals have been able to approach the courts. This in turn means that the courts have been able to provide relief in many instances.

The importance of the judiciary has been underscored in this chapter, with the examination of case law demonstrating their significance in the realisation of the child's right to basic education. In many instances it has been necessary to approach the courts to ensure that the Department of Basic Education realises the child's right to basic education and fulfils their obligations in terms of the South African legal framework. The link to international obligations as provided for in the model for compliance has also been drawn above. The need to approach the courts was for example clearly illustrated in the case law dealing with the delivery of textbooks.¹⁷²⁵ The courts also play an important role in the interpretation of the right to basic education. The *Juma Masjid* case has demonstrated that the courts can provide clarity and guidance on the interpretation of the right to basic education. The guidance provided by the Constitutional Court in this instance has been described as a watershed moment for the right to basic education.¹⁷²⁶ The importance of the courts'

¹⁷²³ See section 4 2 6 5.

¹⁷²⁴ *Veriava Realising the Right to Basic Education* 133.

¹⁷²⁵ *Basic Education For All v Minister of Basic Education* 2014 4 SA 274 (GP) and *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP).

¹⁷²⁶ *Veriava Realising the Right to Basic Education* 87.

role in the realisation of the child's right to basic education should therefore not be overlooked.

This discussion has also highlighted the importance of the practical framework in the implementation of the legal framework and ultimately the realisation of the child's right to basic education. Even if the constitutional framework provides for a justiciable right to basic education for every child and results in a normatively strong framework, the normative framework must be paired with the practical framework in order to ensure that South Africa meets its international obligations. As has become clear, the South African government faces many challenges in implementing the legal framework. The practical framework provides an invaluable framework and guideline that should be consulted and applied in order to ensure effective implementation.

5 6 Periodic reporting

As a party to both the CRC and the ACRWC, South Africa must submit periodic reports to the CRC Committee and the ACERWC.¹⁷²⁷ These reports should set out the measures that states have adopted in order to give effect to the rights contained in these instruments as well as the progress that they have made thus far.¹⁷²⁸ Attention will accordingly be paid to South Africa's periodic reports to the CRC Committee and the ACERWC as well as the two committees' concluding observations. Specific attention will be paid to the second periodic report to the CRC Committee and the initial report to the ACERWC.¹⁷²⁹ These two reports will be discussed together as their reporting period overlaps and they are consequently very similar. The concluding recommendations from the committees will however be discussed separately. These are the latest periodic reports that have also already been considered by the two committees and for which they have provided concluding observations.

¹⁷²⁷ In accordance with art 44 of the CRC.

¹⁷²⁸ Art 44(1) of the CRC.

¹⁷²⁹ See SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) and SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013).

5 6 1 Initial report to the CRC Committee

After ratifying the CRC in June 1995, South Africa submitted its initial report to the CRC Committee in December 1997.¹⁷³⁰ With the new constitutional democracy in 1994 came major legislative, policy and practical changes – the most important being the South Africa Constitution.¹⁷³¹ Clear changes were made in order to bring South African law in line with international law. The initial report highlighted this fact, as well as the specific legislation aimed at the child that was promulgated by parliament, one of them being the Schools Act.¹⁷³² The revision of the Child Care Act was also underscored.¹⁷³³

A specific section of the report is dedicated to education, sport, leisure and cultural activities.¹⁷³⁴ The report acknowledged the devastating effects of apartheid on the education system and that further efforts were still needed in order to provide for equal opportunities in education.¹⁷³⁵ With regard to access to education, the report referred to the dropout rate and stated that “virtually all children between the ages of 6 and 15 today attend school”.¹⁷³⁶ Accessibility as part of the practical framework was accordingly identified as a challenge. The report drew a distinction between the ages in which education is compulsory and those above the age of 15 for whom education is no longer compulsory.¹⁷³⁷ The need to bring legislation on education in line with the

¹⁷³⁰ UNCRC “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2.

¹⁷³¹ UNCRC “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. para 1.

¹⁷³² UNCRC “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. para 9.

¹⁷³³ The Child Care Act 74 of 1983 has since been repealed and replaced by the Children’s Act 38 of 2005; UNCRC “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc UNCRC “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2 para 9.

¹⁷³⁴ UNCRC “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. para 381-458.

¹⁷³⁵ UNCRC “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. para 381-384.

¹⁷³⁶ UNCRC “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. para 385.

¹⁷³⁷ See discussion above on compulsory basic education in section 5 5 1.

CRC was also directly acknowledged by the initial report.¹⁷³⁸ The applicability of the model for compliance is thus indirectly acknowledged in the initial report.

The CRC Committee responded to South Africa's initial report with its Concluding Observations.¹⁷³⁹ The CRC Committee firstly recognised the efforts to which South Africa had gone in terms of legal reform – especially the new Constitution and article 28 as well as legislation aimed at the child, which harmonises the rights in the CRC with those in domestic legislation.¹⁷⁴⁰ Efforts were thus made to bring the South African legal framework in line with the normative framework. Praise was given for the enactment of the Schools Act, multilingualism in education and the abolition of corporal punishment in schools.¹⁷⁴¹ The elements of adaptability and acceptability as part of the practical framework can be identified with these developments.

One of the difficulties identified by the CRC Committee that hindered the effective implementation of the CRC was the legacy of apartheid.¹⁷⁴² The major economic and social disparities, unemployment and poverty were identified as obstacles to the implementation of the CRC.¹⁷⁴³ Accessibility and availability of education was a clear challenge in this regard. The CRC Committee was specific with a reference made to the general principle of non-discrimination, observing that this principle and right is reflected in both the Constitution and in legislation, but that insufficient measures have been implemented to ensure that all children have access to education.¹⁷⁴⁴ With regard to the model for compliance, the argument is made that normatively the right and principle of non-discrimination is easily identifiable in the South African legal framework, however the implementation thereof in accordance with the practical framework can be regarded as weak during the period of the initial report to the CRC Committee.

¹⁷³⁸ UNCRC "Initial reports of State parties due in 1997: South Africa" (1997) UN Doc CRC/C/51/Add.2. para 389.

¹⁷³⁹ UNCRC "Concluding Observations of the Committee on the Rights of the Child: South Africa" (23rd session, 2000) UN Doc CRC/C/15/Add.122.

¹⁷⁴⁰ UNCRC "Concluding Observations of the Committee on the Rights of the Child: South Africa" (23rd session, 2000) UN Doc CRC/C/15/Add.122 para 3.

¹⁷⁴¹ UNCRC "Concluding Observations of the Committee on the Rights of the Child: South Africa" (23rd session, 2000) UN Doc CRC/C/15/Add.122 para 3.

¹⁷⁴² UNCRC "Concluding Observations of the Committee on the Rights of the Child: South Africa" (23rd session, 2000) UN Doc CRC/C/15/Add.122 para 9.

¹⁷⁴³ UNCRC "Concluding Observations of the Committee on the Rights of the Child: South Africa" (23rd session, 2000) UN Doc CRC/C/15/Add.122 para 9.

¹⁷⁴⁴ UNCRC "Concluding Observations of the Committee on the Rights of the Child: South Africa" (23rd session, 2000) UN Doc CRC/C/15/Add.122 para 18.

Respect for the child's views was also referred to and once more the CRC Committee acknowledged that South Africa had made progress in this regard, but that traditional practices and attitudes limited the child participatory rights.¹⁷⁴⁵ Giving the child the opportunity to participate and express their views in schools should therefore be encouraged.¹⁷⁴⁶

The CRC Committee noted that with regard to the general situation of education there were several issues that needed to be addressed as they hinder the implementation of the CRC. These include overcrowding in schools; lack of basic material; poor infrastructure; shortage of textbooks; insufficient number of teachers; and high drop-out rates.¹⁷⁴⁷ These challenges highlight the importance of the practical framework. Accessibility and acceptability of education thus remain major challenges.

5 6 2 Periodic report to the CRC Committee and initial report to the ACERWC

In 2014 South Africa submitted its combined second, third and fourth report to the CRC Committee (hereafter the "CRC Periodic Report").¹⁷⁴⁸ South Africa also submitted its initial report to the ACERWC (hereafter the "ACRWC Initial Report") in 2013, covering the period between January 2000 and April 2013.¹⁷⁴⁹ The ACRWC Initial Report covers a very long period in time and took quite long to submit seeing that South Africa ratified the ACRWC in 2000.¹⁷⁵⁰ These two reports are basically identical, with only very minor differences. These similarities can be explained by the comparable reporting period.

Both of the reports refer to the reforms have been made to improve the accessibility and availability of education for all children. The practical framework is thus indirectly acknowledged. Reforms included the development of infrastructure, higher budget

¹⁷⁴⁵ UNCRC "Concluding Observations of the Committee on the Rights of the Child: South Africa" (23rd session, 2000) UN Doc CRC/C/15/Add.122 para 19.

¹⁷⁴⁶ UNCRC "Concluding Observations of the Committee on the Rights of the Child: South Africa" (23rd session, 2000) UN Doc CRC/C/15/Add.122 para 19.

¹⁷⁴⁷ UNCRC "Concluding Observations of the Committee on the Rights of the Child: South Africa" (23rd session, 2000) UN Doc CRC/C/15/Add.122 para 34.

¹⁷⁴⁸ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 1.

¹⁷⁴⁹ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 8.

¹⁷⁵⁰ South Africa's initial report was due in 2003 and its first periodic report was due in 2006.

allocation to education, and the inclusion of marginalised children in the education system.¹⁷⁵¹ The state recognised in the report that infrastructure backlogs still obstruct the equitable availability of education. Measures have been implemented to address this issue by giving priority to poorer schools, often in rural areas.¹⁷⁵² The increase in budget allocated to children's rights issues is supported in the reports, which stated that the funds allocated to realise the rights of the child rose annually at an average rate of 23%, with education allocated one of the highest state expenditures in the budget.¹⁷⁵³ The challenge however remains ongoing and implementation in terms of the practical framework continues to prove difficult.

While the reports refer to accessibility and availability of education in relation to the 4-A scheme, the acceptability and adaptability of education does not truly form part of the report. No reference is made to the adaptability of education, and the acceptability of education is only referred to with regard to the infrastructure at schools.¹⁷⁵⁴ The reports do however also identify several enduring challenges, including the poor quality of infrastructure, poor access to schools for children with disabilities and the poor quality of education in general.¹⁷⁵⁵ These challenges share a strong link to the elements of acceptability and adaptability of education. In applying the practical framework, a more meaningful outcome could have been reached in the implementation of the child's right to basic education. It seems that the focus was on the enrolment of children by increasing their access to schooling. While it is acknowledged that access to education is an important aspect of education, mere

¹⁷⁵¹ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 296, 298; South Africa's initial report to the ACERWC (2013) 11.

¹⁷⁵² SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 300; See for example the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010), Guidelines Relating to Planning for Public School Infrastructure (2012) and National Guidelines for School Library and Information Services (2012).

¹⁷⁵³ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 17.

¹⁷⁵⁴ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) para 262.

¹⁷⁵⁵ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 11; SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 301.

access to education is not aligned with the South African legal framework or the model for compliance. After access to education has however been improved, the next appropriate step would be to focus on improving the quality of education. The report acknowledges the importance of quality education and that it has not paid enough attention to improving the quality of education.¹⁷⁵⁶ Reference is made to the measures that the state has prioritised in order to address the quality of education. These included reforming the curriculum, providing learner support and development of teacher skills.¹⁷⁵⁷ The importance of quality education and not mere access to education, ensures that the element of acceptability of the practical framework is also adhered to.

The reports do however refer to improvements in enrolment, retention rates and gender equality.¹⁷⁵⁸ The improvements are attributed to policies and laws aimed at non-discrimination and equal educational opportunities¹⁷⁵⁹ and monitoring learner attendance and addressing absenteeism.¹⁷⁶⁰ Attention was clearly on the accessibility and availability of education in these instances. In order to provide educational opportunities for all children, poorer schools received preferential funding and no-fee schools as well as waivers were introduced. Measures aimed at providing transport and uniforms to poorer learners were also initiated in an attempt to provide learners with access to education.¹⁷⁶¹ These instances can be identified as positive developments to align the legal framework with the normative framework which requires free basic education as well as economic and physical accessibility in terms

¹⁷⁵⁶ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) para 270; SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 301.

¹⁷⁵⁷ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 11.

¹⁷⁵⁸ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 301.

¹⁷⁵⁹ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 303.

¹⁷⁶⁰ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 304.

¹⁷⁶¹ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 305.

of the practical framework. The model for compliance is thus indirectly acknowledged. Other additional measures also undertaken by the government as stated in the reports, included a framework that aims to identify learners with disabilities and ensure that they have the necessary materials and infrastructure in order to fully participate and access their education; measures relating to the pregnancy of young girls including the prevention of early pregnancies and ensuring the return to school of those that do fall pregnant; and ensuring that vulnerable children receive care and support within in the education system.¹⁷⁶²

The reports addressed the issue of free basic education by directly acknowledging that the payment of school fees served as the main reason for exclusion from education across all levels.¹⁷⁶³ Accessibility of education is thus central in this instance. Poverty also remains a major hindrance to the realisation of the right to basic education. In an effort to address this issue, measures have been implemented to prioritise children in poorer communities. The report referred to the adoption of the National Norms and Standards for School Funding, which allocates the most funds to the poorest schools.¹⁷⁶⁴ The establishment of no-fee schools was another measure implemented to increase attendance and access to schools. The reports stated that this specific measure led to an increase in attendance at school that do not charge fees, with statistics indicating a dramatic change from 0.7% attendance in 2002 to 55.6% in 2011.¹⁷⁶⁵ School-fee waivers were also implemented in schools that do charge fees. Transport was addressed in policy by means of subsidised transport to those learners that live further distances from their schools.¹⁷⁶⁶ These are positive steps in order to meet the requirements of the practical framework.

¹⁷⁶² SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 305.

¹⁷⁶³ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 122.

¹⁷⁶⁴ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 122.

¹⁷⁶⁵ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 122.

¹⁷⁶⁶ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 122.

The reports identified the challenges with learner-teacher ratios and teacher qualifications. Availability of education in relation to the practical framework is highlighted with regard to learner-teacher ratios. Improvements in the learner-teacher ratio was however discussed in the reports, with a change indicated from 2008 with a ratio of 30.5:1 to 29:1 in 2011.¹⁷⁶⁷ The reports identified the insufficient amount of qualified teachers as a hindrance to appropriate learner-teacher ratios, even though teacher qualifications had improved between 1994 and 2009.¹⁷⁶⁸ Rural areas suffered the most in this regard, even though policy provided better pay for teacher in more rural parts of the country.¹⁷⁶⁹ The struggles with regard to the acceptability and availability of education in relation to the availability of teachers unfortunately endures.

With the delivery of textbooks being a continued challenge to the right to basic education, the report acknowledged that several provinces faced issues in the delivery of textbooks. It is clear that availability and accessibility of textbooks has been a major issue, as also discussed above. The report however noted that in order to address this problem, a departmental task team was established with the mandate to investigate problems and make recommendations.¹⁷⁷⁰

The importance of cultural and linguistic rights in relation to the child's education was discussed in the reports.¹⁷⁷¹ Specific references was made to non-discrimination in relation to religion or culture¹⁷⁷² and the importance of being taught in one's home language.¹⁷⁷³ In order to ensure that children are not discriminated against based on

¹⁷⁶⁷ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 126.

¹⁷⁶⁸ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 126.

¹⁷⁶⁹ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 126.

¹⁷⁷⁰ SA Department of Women, Children and People with Disabilities "South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013" (2013) 126.

¹⁷⁷¹ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) paras 314-318.

¹⁷⁷² SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) paras 314-315.

¹⁷⁷³ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) paras 316-318.

religion or culture, schools should develop policies that are in line with the Constitution.¹⁷⁷⁴ This requires adaptable education as set out in the practical framework. Language remains a barrier to education as Afrikaans and English were implemented as the official languages of education during apartheid.¹⁷⁷⁵ The right to be taught in an official language of choice, or referred to as home language education, remains at the centre of providing equal educational opportunities.¹⁷⁷⁶ Cultural rights should however also include the incorporation of African values in the child's education. The demand for education to be adaptable in order to include African values should be highlighted so as to comply with the practical framework.

An important observation is that the reports referred to relevant case law when applicable, thereby acknowledging the important role that the judiciary plays in developing the child's rights. The annexure also included a list of case law, with a short description, which has promoted a closer alignment with the CRC.¹⁷⁷⁷ The noteworthy case of *Juma Masjid* is highlighted in regard to the right to basic education and the report noted that in this instance, the Constitutional Court confirmed that the right to basic education is immediately realisable.¹⁷⁷⁸

In response to the CRC Periodic Report, the CRC Committee made a number of Concluding Observations.¹⁷⁷⁹ The CRC Committee noted the developments made with regard to the adoption of legislation and that they are largely in conformity with the CRC.¹⁷⁸⁰ Important developments were therefore made to align the legal framework with the normative framework. The CRC Committee also recognised the

¹⁷⁷⁴ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) paras 314-315.

¹⁷⁷⁵ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) paras 316.

¹⁷⁷⁶ SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) para 316.

¹⁷⁷⁷ Annex II Supplementary information section B SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) 90.

¹⁷⁷⁸ Annex II Supplementary information section B SA Department of Women, Children and People with Disabilities "South Africa's periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013" (2014) (UN Doc CRC/C/ZAF/2) 91.

¹⁷⁷⁹ UNCRC "Concluding Observations on the second periodic report of South Africa" (2016) UN Doc CRC/C/ZAF/CO/2.

¹⁷⁸⁰ UNCRC "Concluding Observations on the second periodic report of South Africa" (2016) UN Doc CRC/C/ZAF/CO/2 para 4.

increase of resources allocated to education.¹⁷⁸¹ This can have a direct influence on the accessibility, availability and acceptability of education. With regard to discrimination, gender equality should be actively promoted in education in order to eradicate this form of discrimination.¹⁷⁸² The CRC Committee recognised that significant progress had been made in order to improve access to basic education, the quality of education and school infrastructure.¹⁷⁸³ Additional issues were however identified. They include the disparities present in access to quality education; uneven distribution of resources; poor infrastructure at schools that continue to persist; shortage of education materials such as textbooks and also a shortage of teachers; lack of safety at schools and high pervasiveness of violence; and the high drop-out rate of pregnant learners and their exclusion from schools.¹⁷⁸⁴ These challenges result in an unfortunate move away from the practical framework.

From South Africa's reports and the CRC Committee's Concluding Observations, the conclusion can clearly be drawn that much has been done to recognise and implement the child's rights and more specifically the child's right to basic education. Legislation and policies have been adopted to bring the child's rights in line with the CRC. Steps have therefore been taken to conform to the normative and practical framework. Some issues however persist and the CRC Committee has identified these to the South African government. The struggle to realise the child's right to basic education for all children therefore continues.

In response to the ACRWC Initial Report, the ACEWRC provided its concluding observations in March 2019. While the ACERWC acknowledged the importance of South Africa ratifying the ICESCR, the fact that a reservation was made with regard to the right to education was still a cause of concern for the ACERWC.¹⁷⁸⁵ The reservation means that that the right to basic education is made progressively

¹⁷⁸¹ UNCRC "Concluding Observations on the second periodic report of South Africa" (2016) UN Doc CRC/C/ZAF/CO/2 para 11.

¹⁷⁸² UNCRC "Concluding Observations on the second periodic report of South Africa" (2016) UN Doc CRC/C/ZAF/CO/2 para 24(b).

¹⁷⁸³ UNCRC "Concluding Observations on the second periodic report of South Africa" (2016) UN Doc CRC/C/ZAF/CO/2 para 59.

¹⁷⁸⁴ UNCRC "Concluding Observations on the second periodic report of South Africa" (2016) UN Doc CRC/C/ZAF/CO/2 para 59.

¹⁷⁸⁵ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 6.

realisable, rather than immediately realisable as provided for in the ACRWC.¹⁷⁸⁶ The ACERWC therefore encouraged the withdrawal of the reservation.¹⁷⁸⁷

The ACERWC recognised the efforts that have been made to improve the quality of education, but it remained concerned about the persistent inequality in the education system.¹⁷⁸⁸ The Concluding Observations referenced the low quality of education in poorer schools to illustrate this inequality.¹⁷⁸⁹ These poorer schools are not able to provide quality education that enables children to read, write and calculate.¹⁷⁹⁰ The ACERWC noted that the quality of education is directly affected by the lack of qualified teachers, poor infrastructure and lack of transport.¹⁷⁹¹ The acceptability of the child's education is consequently undermined by these challenges. This means that the practical framework is also not adhered to. With these challenges in mind, the ACERWC made several recommendations. With regard to the quality of education, the ACERWC recommended that teachers be properly trained and qualified and that they should be equally distributed in schools, with rural schools being paid special attention.¹⁷⁹² This would lead to more acceptable and accessible education. Prioritising the effectiveness of the system providing learner materials and textbooks was also recommended so as to guarantee that textbooks are received

¹⁷⁸⁶ See art 11(3) of the ACRWC; ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 6.

¹⁷⁸⁷ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 6.

¹⁷⁸⁸ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 24.

¹⁷⁸⁹ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 24.

¹⁷⁹⁰ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 24.

¹⁷⁹¹ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 24.

¹⁷⁹² ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 24.

before they need to be used.¹⁷⁹³ This would ensure that education is in line with the element of availability of the practical framework. In order to provide access to education, the ACEWRC recommended that learners that live far distances from schools should be provided learner transport.¹⁷⁹⁴ Physical accessibility in line with the practical framework was thus highlighted. Equipping schools with relevant and necessary infrastructure was also recommended by the ACERWC.¹⁷⁹⁵

A specific challenge highlighted by the ACERWC was the negative effect of protest action on the right to education.¹⁷⁹⁶ In some instances children were physically prevented or intimidated from attending schools and the school infrastructure was damaged or destroyed.¹⁷⁹⁷ Providing children with safe schools was consequently recommended by the ACERWC and it was further suggested that protests should be regulated in such a manner that it does not lead to the interruption of the child's education or destruction of school facilities and infrastructure.¹⁷⁹⁸ It was also recommended that if the aforementioned occurred, measures be implemented to catch learners up and that damaged infrastructure is addressed.¹⁷⁹⁹ Sensitising the community with regard to the effects that protest action can have on education was

¹⁷⁹³ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 24.

¹⁷⁹⁴ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 24.

¹⁷⁹⁵ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 24.

¹⁷⁹⁶ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 25.

¹⁷⁹⁷ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 25.

¹⁷⁹⁸ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 25

¹⁷⁹⁹ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 25.

another measure recommended by the ACERWC.¹⁸⁰⁰ The ACERWC also pointed out the violence that not only accompanied protest action in some instances but also in general with regard to the school environment.¹⁸⁰¹ In order to combat the widespread violence in schools, the ACERWC recommended the following: anti-bullying policies, peer mediation and training on positive disciplining.¹⁸⁰²

Lastly, the ACERWC noted the importance of inclusive education – specifically for children with disabilities.¹⁸⁰³ This is very important in light of creating a school environment that is non-discriminatory. The ACERWC referred to the fact that children with disabilities are still discriminated against when accessing schools, be it ordinary or special school.¹⁸⁰⁴ In this regard specific mention was made of the fact that special schools were not no-fee schools and children with disabilities therefore did not have access to free basic education.¹⁸⁰⁵ Transportation of children with disabilities was also deemed problematic as the system did not provide access for those with physical disabilities.¹⁸⁰⁶ Learners with visual impairments also face challenges as they were only provided with braille workbooks but not with braille textbooks – even though the Department regards textbooks as a key part of the curriculum.¹⁸⁰⁷ In order to ensure

¹⁸⁰⁰ ACERWC “Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child” (2019) para 25.

¹⁸⁰¹ ACERWC “Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child” (2019) para 26.

¹⁸⁰² ACERWC “Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child” (2019) para 26.

¹⁸⁰³ ACERWC “Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child” (2019) para 27.

¹⁸⁰⁴ ACERWC “Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child” (2019) para 27.

¹⁸⁰⁵ ACERWC “Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child” (2019) para 27.

¹⁸⁰⁶ ACERWC “Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child” (2019) para 27.

¹⁸⁰⁷ ACERWC “Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first

that the education is provided to every child is non-discriminatory, the Committee made several recommendations, for example that special schools should be listed as no-fee schools; that children with disabilities should be able to access free basic education in no-fee, mainstream schools; adopt norms and standards on school transportation that includes children with disabilities; and the development of a programme that provides children with disabilities with the necessary learner materials.¹⁸⁰⁸

From the examination of South Africa's periodic reports and the accompanying concluding observations by the CRC Committee and the ACEWRC some inferences can be made. The model for compliance, or in some instances some of its dimensions, can be identified in the periodic reports and concluding observations. While explicit reference is not made to the dimensions of the model for compliance, it can be argued that these documents indirectly support the model for compliance and thus in turn strengthen the model. In many instances, positive steps and developments have taken place that result in a stronger application of the normative framework. The application of the practical framework with regard to the implementation of the child's right to basic education in terms of the legal framework however continues to face challenges and struggles.

5 7 Conclusion

Several challenges and barriers to the child's right to basic education continue to exist in South Africa.¹⁸⁰⁹ The persistent consequences of apartheid in the quality divide between the previously white state schools during apartheid and the formerly black schools are still evident. It is especially in the poorer provinces where rural schools suffer the most.¹⁸¹⁰ Mud schools persist; learners do not have transport to their schools and are placed in dangerous circumstances in order to attend school; schools lack proper furniture, textbooks and materials; and vacant teacher posts are not

periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 27.

¹⁸⁰⁸ ACERWC "Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child" (2019) para 27.

¹⁸⁰⁹ Skelton *Strategic Litigation Impacts* 47.

¹⁸¹⁰ Skelton *Strategic Litigation Impacts* 47-48.

uncommon.¹⁸¹¹ While certain provinces are worse off than others, these challenges are present throughout the entire country.¹⁸¹²

Jurisprudence in South Africa has made it clear that the implementation of the legal framework by the state remains a challenge to the child's right to basic education.¹⁸¹³ The implementation of legislation and court orders are central to the problem. This challenge is not limited to the South African context but is shared with India and Nigeria. This challenge highlights the importance of a legal framework that not only works for children, but that the framework must be enforced to ensure realisation of the right to basic education.

Several developments have taken place to improve the realisation of the child's right to basic education. Whether or not South Africa fulfils its obligation in terms of the CRC is however the question. In the determination of whether South Africa meets its obligations in terms of the CRC, several conclusions can be drawn. The South African courts have established that textbooks are a core component of the child's right to basic education after the Department of Basic Education failed to provide schools with textbooks.¹⁸¹⁴ When considering the discussion above, it can be argued that the South African legal position is not in line with international law when it comes to the element of "free" as part of the right to basic education.¹⁸¹⁵

The CRC explicitly provides for free and universal basic education for all children – this is not the case in South Africa as indicated above. While this right is subject to progressive realisation, the Constitution views the right to basic education as immediately realisable and not subject to internal qualifiers. Furthermore, even though the Schools Act provides for exemption from school fees, it obviously does not equate to free basic education as mandated by the CRC. Of course the developments and steps taken by the government to improve access to basic education despite fees charged by schools should be applauded, but the process related to the exemption of fees can be cumbersome and still limit access to basic education. It is clear that the

¹⁸¹¹ Skelton *Strategic Litigation Impacts* 49.

¹⁸¹² Skelton *Strategic Litigation Impacts* 49.

¹⁸¹³ Skelton *Strategic Litigation Impacts* 47.

¹⁸¹⁴ See for example *Section 27 v Minister of Basic Education* Case No 24565/12, 4 October 2012; *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP); *Basic Education For All v Minister of Basic Education* 2014 4 SA 274 (GP); *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA); Stein "Textbooks" in *Basic Education Rights Handbook* 268.

¹⁸¹⁵ Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 70.

system is unfortunately flawed. While it does offer much needed access to basic education, it cannot be said that it ensures that those most at risk receive free basic education. In this instance it becomes clear that South Africa does not fulfil its obligation in terms of the CRC to provide free and universal basic education to all children.¹⁸¹⁶

While it must be acknowledged that progress and development have taken place, it is also clear that many schools face dire straits due to the government's failure.¹⁸¹⁷ The application of the normative framework indicates that South Africa can be regarded as normatively strong in the sense that the Constitution provides for a justiciable right to basic education. Moreover, the legislative framework aids in addressing the needs of the normative framework. The major challenge lies in the application of the practical framework that is centred on the implementation of the legal framework. Ultimately, the application of the model for compliance has indicated that South Africa has not complied with all of its international obligations. In addressing these challenges, it is argued that the state must take into account its obligations in terms of international and regional law in order to incorporate a child-centred approach. Interpreting the right to basic education in line with rights to, in and through basic education, it could lead to a broader understanding of the right that encapsulates articles 28 and 29 of the CRC.

¹⁸¹⁶ Veriava & Coomans "Right to Education" in *Socio-economic Rights in South Africa* 70.

¹⁸¹⁷ Skelton *Strategic Litigation Impacts* 49.

CHAPTER 6

Conclusion

6 1 Introduction

The focus of this dissertation is on South Africa's obligations with regard to the realisation of a child's right to basic education. In Chapter 1 the history of the child's right to basic education was discussed in order to provide the necessary context to the study.¹⁸¹⁸ It showed that the political history of South Africa and children's education were closely linked with no regard to and no understanding of the right to education as a children's right. The adoption of the Constitution and legislation such as the South African Schools Act, signalled a break from the legacy of apartheid. It also created the possibility of introducing international law as a key source of the child's right to basic education, thereby elevating the status of a child to be recognised as a human being and the bearer of rights. It is based on this understanding that the child centred approach to the right to basic education, including the three dimensions of the right to basic education, were explained.

Against the background of the historical analysis, the development of the child's right to basic education was discussed in chapter 2. Specific attention was paid to the relationship between the changing views of childhood and the child's education as well as the legal history of the child's rights to education. The model for compliance was explained and justified in chapter 2 in order to describe the method for assessing compliance with international obligations. In this regard, the normative framework and the practical framework were set out as the two parts of the model for compliance.

An in-depth discussion of articles 28 and 29 of the CRC was provided in order to establish the centrality of the CRC within the dissertation and to set out the normative framework that forms part of the model for compliance. It was specified that article 28 of the CRC provides content to child's right to basic education and is also concerned with the obligations on states parties in relation to the fulfilment of this right. In contrast, article 29 refers to the aims of education. A very important characteristic of article 29, as identified in chapter 2, is that education must be centred on the child and also child-friendly.

¹⁸¹⁸ See section 1 4.

While articles 28 and 29 of the CRC provide the normative framework, the 4-A scheme fulfils a complementary role as it provides the practical framework for the realisation of the right to basic education. The dissertation clarified the four elements of the 4-A scheme: availability, accessibility, acceptability and adaptability. It is these two frameworks, the normative framework and the practical framework that form the model for compliance. The interdependence of the child's rights was also emphasised in the analysis of the dimensions of the child's right to basic education. Acknowledging the rights to, in and through basic education as the dimensions of the right to basic education affords a more inclusive and holistic understanding to the child's right to basic education.

With a model for compliance established in chapter 2, chapter 3 set out the international obligations as established by the CRC. With the focus on international law and the obligations that it creates for South Africa, the child's right to basic education in terms of various international and regional instruments, with the CRC central to the examination, was analysed. As the Constitution specifies international law as a source of interpretation that must be considered by courts,¹⁸¹⁹ the relevant international and regional instruments were identified. When states ratify international and regional instruments,¹⁸²⁰ they assume the obligations created by those instruments, including obligations in relation to the child's rights to, in and through basic education.¹⁸²¹ With international law central to the research question, it must be acknowledged that mere ratification of an international instrument does not necessarily result in effective implementation thereof.¹⁸²² Part of the value of international instruments and human rights law¹⁸²³ lies in the interpretative function that they can fulfil by aiding domestic courts in the recognition and development of human rights and how they have influenced the development of domestic law.¹⁸²⁴

¹⁸¹⁹ S 39 of the Constitution.

¹⁸²⁰ For example the CRC, the ACRWC and the ICESCR.

¹⁸²¹ EA Taiwo & A Govindjee "The implementation of the right to education in South Africa and Nigeria (part 1) (2012) *Obiter* 93 93.

¹⁸²² E Durojaye "Litigating the right to health in Nigeria: Challenges and prospects" in M Kilander (ed) *International Law and Human Rights Litigation in Africa* (2010) 153.

¹⁸²³ Such as case law, interpretations by supervisory bodies, general comments and recommendations. The dissertation includes regional law, such as the ACRWC, as forming part of international law.

¹⁸²⁴ M Kilander & H Adjolohoun "International law and domestic human rights litigation in Africa: An introduction" in M Kilander (ed) *International law and domestic human rights litigation in Africa* (2010) 3.

It was established that several instruments recognise and protect the right to basic education in general and that some instruments also specifically recognise and protect the child's right to basic education.¹⁸²⁵ The international commitment to the right to basic education is apparent, with some authors asserting that it has even formed part of customary international law. Regional law on the child's right to basic education was also examined by referring to the role of ACRWC in the African context. While the CRC and ACRWC share many similarities, some differences that illustrate the regional African character of the ACRWC were identified. An example is the incorporation of African values.

In order to advance the realisation of the child's right to basic education, the dissertation proposed a children's right centred approach. While the right to basic education is a socio-economic right, interpreting the right to basic education specifically as a children's right can benefit the realisation and fulfilment of international obligations. It was argued that the CRC works for and with children in the advancement of their rights. The advantage of a children's right centred approach is that it firmly establishes the child as the bearer of the right to basic education. It also entails interpreting the right to basic education through a children's rights lens.

An examination of foreign law followed in chapter 4 by determining how the child's right to basic education is recognised in India and Nigeria. Foreign law is recognised by the Constitution as a source of interpretation of the Bill of Rights that may be considered by the courts.¹⁸²⁶ It was established that India and Nigeria also face challenges in the realisation of the child's right to basic education, some similar to South Africa. The dissertation recognised that India and Nigeria have different constitutional frameworks for the recognition of rights to that of South Africa. Nonetheless, the manner in which they incorporate international law in order to fulfil their international obligations is valuable for the South African context. The model for compliance was applied in the Indian and Nigerian contexts in order to examine compliance with international obligations. In both jurisdictions it was clear that steps were taken to realise the child's right to basic education but in several instances compliance with international obligations as set out in the model for compliance was

¹⁸²⁵ See sections 23, 24, 32 and 33.

¹⁸²⁶ S 39 of the Constitution.

not met. Recommendations based on the Indian and Nigerian experiences are set out below.

Chapter 5 provided a discussion on the child's right to basic education in terms of the South African legal framework by examining the constitutional provisions of sections 28 and 29 as well as scrutinising the Schools Act. It was established that the right to education as enshrined in article 29 of the Constitution, guarantees the right to basic education as the provision does not include internal qualifiers. The constitutional right to basic education has therefore been established in chapter 5 as an unqualified and immediately realisable right. Challenges that children face in the realisation of their right to basic education was also identified. The model for compliance was applied to the South African legal framework and it was concluded that although legislative developments have taken place, the implementation of the legal framework continues to be a major challenge in the realisation of the child's right to basic education. How the model for compliance can aid in the realisation of the right to basic education and the fulfilment of international obligations is discussed in the recommendations below.

6 2 Recommendations

In the South African context, it is important to remember that constitutional provisions are not exhaustive and in most instances either legislation or interpretation by courts is required.¹⁸²⁷ This is significant as there is currently no legislative document which provides extensively for the scope and content of the right to basic education as recognised in section 29(1)(a) of the Constitution.¹⁸²⁸ This is not a new conversation, as many authors have commented on the different issues related to this problem.¹⁸²⁹ This leads to the conclusion that the right to basic education is still open to interpretation and it is argued that when the legislature develops new legislation and when the courts interpret the right to basic education, they should look to international law, specifically the normative and practical frameworks, when providing scope and content to the right. Foreign law and how foreign jurisdictions have applied

¹⁸²⁷ Simbo (2018) *Obiter* 127.

¹⁸²⁸ Simbo (2011) *PELJ* 127; See sections 1 5, 5 4 and 5 5.

¹⁸²⁹ Simbo (2011) *PELJ* 127; See for example Liebenberg *Socio-economic Rights* 242; C Chürr "Realisation of a Child's Right to Basic Education in the South African School system: Some lessons from Germany" (2015) 18 *PELJ* 2405-2453.

international law in order to fulfil their international obligations can also be a valuable source for South Africa.

The comparative analysis provides several lessons that could be applicable to the South African context. A key lesson to be learnt from both India and Nigeria is that as they developed the right to education and moved to make the right justiciable, both jurisdictions relied heavily on international and regional law in order to justify their arguments and to shape and give content to socio-economic rights in general, and more specifically to the right to education. This willingness to use and apply international law should also be followed by the South African courts in the interpretation of the child's right to basic education.

There is also a second lesson from India and Nigeria that is applicable to the South African context, namely the importance of legislation specifically targeted at the child's right to basic education. Providing a consolidated piece of legislation centred on the content and aims of the right to basic education, in contrast to the Schools Act and its accompanying Regulations, leads to a more child centred narrative for the right to basic education. A legislative child-centred approach ensures that the child is recognised as the holder of the right. When the legislation is then interpreted it must take into account the child-centred approach, which provides for the child's rights to, in and through basic education. A state's legislative framework that is cognisant of its international obligations, means that there is a clearer guide of what is expected of the state in terms of its duty to respect, protect, promote and fulfil the child's right to basic education. Such a legislative framework empowers children as rights holders as it positions them to understand what their right to basic education entails and to be confident in their claims if the right is not fulfilled.

A possible lesson from Nigeria, is the manner in which concepts are defined in the UBE Act.¹⁸³⁰ The UBE Act provides definitions for several important concepts such as "basic education", "free", "primary school" and "secondary school".¹⁸³¹ Legislation that defines the applicable rights and concepts, provides scope and content to the rights in the legislation. This in turn sets out the duties of the state and that to which learners are entitled in accordance with their rights. As the South African legislation does not provide definitions for important concepts such as "basic education", it could be very

¹⁸³⁰ S 15 of the UBE Act; See section 4 3 4 2 for a discussion of the UBE Act.

¹⁸³¹ S 15 of the UBE Act; See section 4 3 4 2.

useful in the establishment of the state's obligations to respect, protect, promote and fulfil the right to basic education to follow the Nigerian example of the UBE Act. While there are some positive aspects to not having set definitions for these concepts, such as the flexibility that it provides, a basic understanding as to how these rights and concepts should be interpreted provides valuable scope and content to the right to basic education.

The regional perspective adds content to both the normative and practical frameworks of the model for compliance. An excellent example is the incorporation of African values in the child's education. African values form part of rights in and through basic education as dimensions of the right to basic education. African values can furthermore be identified in the normative framework, specifically the acceptability and adaptability of education. The incorporation of African values would therefore ensure that the child's right to education is aligned with the child's specific needs for their context. The model for compliance should therefore serve as the foundation that can and should be adapted for the specific needs of the specific jurisdiction.

The country reports to the CRC Committee and the ACERWC should be seen as far more than compliance with the reporting obligations. In using the model for compliance as a baseline to evaluate the content of the reports, it provides the opportunity to meaningfully engage with legislative and policy reforms and to determine whether they are aligned with the normative framework. In similar fashion, the application of the 4-A framework can be seen as a way to assess the practical challenges as set out in the reports and to provide child centred opportunities to address and overcome the challenges. The conclusions reached in chapters 4 and 5 confirm the important role played by the model for compliance in the study of both the states' reports and the Concluding Observations.

It is therefore contended that when states develop legislation and measures to recognise and realise the child's right to basic education, they do so with their international obligations in mind.¹⁸³² The courts have also acknowledged that the CRC is viewed as the standard against which legislation and policies on children's rights should be measured.¹⁸³³ Of particular importance is that this is done through a child-

¹⁸³² Courtis & Tobin "Article 28" in *Commentary* 1080.

¹⁸³³ See *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) para 29; *S v M* 2008 (3) SA 232 (CC) para 16; Skelton "Children" in *Bill of Rights Handbook* 600.

centred lens which ensures that the child is recognised as the rights holder and that a balance is struck between protection and autonomy. The model for compliance is valuable as it provides for a normative and practical framework that provides content to dimensions of the right to basic education. Striking a balance in the realisation and interpretation of children's rights is very important, and the model for compliance attempts to find this balance.

The application of the model for compliance in all three jurisdictions has made it clear that a jurisdiction needs to apply both the frameworks of the model for compliance. While all three jurisdictions have proven to be generally strong in terms of the normative framework, the major challenge lies in the application of the normative framework. Therefore, the normative framework is not aligned with the practical framework. Only when these two frameworks are applied in a complementary fashion will it result in the fulfilment of international obligations and ultimately further the realisation of the child's right to basic education.

6 3 Conclusion

The significance of education for the development of the child has been made clear. The right to education is crucial to the realisation of other human rights. The concept of rights to, in and through basic education as the dimensions of the child's right to basic education supports the understanding of the right to basic education as an empowerment right and/or multiplier right. When children have access to education that is in line with the proposed model for compliance, they have the possibility of realising their other human rights and becoming valuable members of their society.

It has been specified that the right to basic education as afforded to all children in the Constitution is immediately realisable and enforceable. Skelton however warns that this claim "does not wave a magic wand."¹⁸³⁴ The challenges faced by the education system are immense and range from infrastructure backlogs to vast differences in the quality of basic education.¹⁸³⁵ The state should be honest about the problems that it is facing in realising the child's right to, in and through basic education and form positive relationships with the civil society organisations that are dedicated

¹⁸³⁴ Skelton (2013) *De Jure* 4.

¹⁸³⁵ Skelton (2013) *De Jure* 4.

to ensuring that all children not only have the right to basic education in terms of the South African Constitution, but that this right will transform from a hope to a reality.

As a possible means of identifying and addressing the challenges in the education system, which has been described as in crisis, the model for compliance has been recommended. The importance of international law in the South African legal framework has been underscored throughout the dissertation. The model for compliance, which is framed in terms of international law, is the solution to measuring South Africa's international obligations and providing answers to address the educational crisis. The dissertation has applied the model for compliance and the South African government has been found wanting.

LIST OF SOURCES

Books

Abdollah C & C Barberton *Mud to Bricks: A Review of School Infrastructure Spending and Delivery* (2014), Pretoria: Pretoria University Law Press.

Adediran MO *Essays on Tribunals and Inquiries in Nigeria* (2004), Ibadan, Nigeria: University Press.

Ariès P *Centuries of Childhood: A Social History of Family Life* (1962) (translated from the French by R Baldick), New York: Alfred A Knopf.

Bajpai A *Child Rights in India: Law, Policy and Practice* (2003), New Delhi: Oxford University Press.

Beiter KD *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (2006), Leiden: Martinus Nijhoff Publishers.

Bennett TW & J Strug *Introduction to International Law* (2013), Cape Town: Juta.

Boezaart T (ed) *Child Law in South Africa* 2 ed (2017), Cape Town: Juta.

Brand D & C Heyns (eds) *Socio-economic Rights in South Africa* (2005), Pretoria: Pretoria University Law Press.

Brickhill J (ed) *Public Interest Litigation in South Africa* (2018), Cape Town: Juta.

Buck T *International Child Law* 3 ed (2014), New York: Routledge.

Carr EH *What is History?* (1961), London: Macmillan.

Cassese A *International Law* 2 ed (2005), Oxford: Oxford University Press.

Christie P *The Right to Learn* (1992), Johannesburg: Ravan Publishers.

Conforti B *The Law and Practice of the United Nations* 3 ed (2005), Leiden: Martinus Nijhoff Publishers.

Currie I & J De Waal *The Bill of Rights Handbook* 6 ed (2013), Cape Town: Juta.

Daudet Y & K Singh *The Right to Education: An Analysis of UNESCO's Standard-setting Instruments* (2001), Paris: UNESCO.

De Vos P & W Freedman (eds) *South African Constitutional Law in Context* (2014), Cape Town: Oxford University Press.

deMause L *The History of Childhood* (1974), New York: Psychohistory Press.

Detrick S *A Commentary on the United Nations Convention on the Rights of the Child* (1999), Dordrecht: Martinus Nijhoff Publishers.

Detrick S (ed) *The United Nations Convention on the Rights of the Child: a Guide to the Travaux Préparatoires* (1992), Dordrecht: Martinus Nijhoff Publishers.

Devenish GE *A Commentary on the South African Constitution* (1998), Durban: Butterworths.

Diwan P *Children and Legal Protection* (1996), Dew Delhi: Deep and Deep Publishers.

Dugard J *International Law: A South African Perspective* 4 ed (2011), Cape Town: Juta.

Feinberg J *Social Philosophy* (1973), New Jersey: Prentice Hall.

Fleisch B *Primary Education in Crisis: Why South African School Children Underachieve in Reading and Mathematics* (2009), Cape Town: Juta.

Fortin J *Children's Rights and the Developing Law* 3 ed (2009), Cambridge: Cambridge University Press.

Fredman S *Human Rights Transformed: Positive Rights and Positive Duties* (2008), Oxford: Oxford University Press.

Freeman MDA *The Rights and Wrongs of Children* (1983), London: Pinter.

Freeman MDA *Understanding Family Law* (2007), London: Sweet & Maxwell.

Gose M *The African Charter on the Rights and Welfare of the Child* (2002), Belville: Children's Rights Project, Community Law Centre, University of the Western Cape.

Harber C *State of Transition: Post-Apartheid Education Reform in South Africa* (2001), Oxford: Symposium Books.

Harsh BL *Human Rights Law in India: Protection and Implementation of the Human Rights Act, 1993* (2008), New Delhi: Regal Publications.

Heyns C & F Viljoen *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002), The Hague: Kluwer Law International.

Heywood C *A History of Childhood: Children and Childhood in the West from Medieval to Modern Times* (2001), Cambridge: Polity Press.

Holzscheiter A *Children's Rights in International Politics: the Transformative Power of Discourse* (2010), UK: Palgrave Macmillan.

Joubert R & S Prinsloo *The Law of Education in South Africa* (2009), Pretoria: Van Schaik Publishers.

Kaime T *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* (2009), Pretoria: Pretoria University Law Press.

Kaime T *The Convention on the Rights of the Child: A Cultural Legitimacy Critique* (2011), Amsterdam: Europa Law Publishing.

Kallaway P (ed) *Apartheid and Education: the Education of Black South Africans* (1984), Johannesburg: Ravan Publishers.

Liebenberg S *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) Cape Town: Juta.

Mahery P & P Proudlock *Legal Guide to Age Thresholds for Children and Young People* 5 ed (2011), Cape Town, Children's Institute, University of Cape Town.

Mower GA *The Convention on the Rights of the Child: International Law Support for Children* (1997), London: Greenwood Press.

Mwalimu C *The Nigerian Legal System Volume I: Public Law* (2005), New York: Peter Lang.

Nkabinde NP *An Analysis of Educational Challenges in the New South African* (1997), Lanham: University Press of America.

Nkomo M *Pedagogy of Domination: Toward a Democratic Education in South Africa* (1990), New Jersey: Africa World Press.

Pascual-Vives F *Consensus-Based Interpretation of Regional Human Rights Treaties* (2019), Leiden: Brill Nijhoff.

Pendlebury S, L Lake & C Smith (eds) *South African Child Gauge* (2008/2009), Cape Town: Children's Institute, University of Cape Town.

Ramcharan BG (ed) *Judicial Protection of Economic, Social and Cultural Rights: cases and materials* (2005), Leiden: M Nijhoff Publishers.

Shue H *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (1980), Princeton: Princeton University Press.

Ssenyonjo M *Economic, Social and Cultural Rights in International Law* (2016), Oxford: Hart Publishing.

Thiagaraj H *Human Rights from the Dalit Perspective* (2011), New Delhi: Gyan Publishing House.

Thiruvengadam AK *The Constitution of India: A Contextual Analysis* (2017), Oxford: Hart Publishing.

Tiway SS *Human Rights in Education, Science and Culture* (2010), New Delhi: Kunal Books.

Tobin J (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019), Oxford: Oxford University Press.

Tomaševksi K *Education Denied: Costs and Remedies* (2003), Cape Town: David Philip, New Africa Books.

Tomaševski K *Human Rights Obligations in Education: The 4-A Scheme* (2006), Tilburg: Wolf Legal Publishers.

Tomaševski K *Right to Education Primers No 2: Free and Compulsory Education for All Children: the Gap between Promise and Performance* (2001), Gothenburg: Novum Grafiska.

Tomaševski K *Right to Education Primers No 3: Human Rights obligations: making education available, accessible, acceptable and adaptable* (2001), Gothenburg: Novum Grafiska.

Van Bueren G *International Documents on Children* (1998), The Hague: Martinus Nijhoff Publishers.

Van Bueren G *International Law on the Rights of the Child* (1998), The Hague: Martinus Nijhoff Publishers.

Van der Merwe CG & J Du Plessis (eds) *Introduction to South Africa Law* (2004), The Hague: Kluwer Law International.

Venter ISJ & SM Van Heerden *The Grounding of History of Education: An Introduction* (1989), Pretoria: Euro Publications.

Verheyde M *A Commentary on the United Nations Convention on the Rights of the Child: Article 28 the Right to Education* (2006), Leiden: Martinus Nijhoff Publishers.

Veriava F *Realising the Right to Basic Education: The Role of the Courts and Civil Society* (2019), Cape Town: Juta.

Viljoen F *International Human Rights Law in Africa* 2 ed (2012), Oxford: Oxford University Press.

Vincent RJ *Human Rights and International Relations* (2002), Cambridge: Cambridge University Press.

Wallace RMM & O Martin-Ortega *International Law* 7 ed (2013), London: Sweet & Maxwell.

Woolman S & B Fleish *Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009), Pretoria: Pretoria University Law Press.

Chapters in books

Beales ACF “The Place of History of Education in the Training of Teachers” in P Gordon & J Szieter (eds) *History of Education: the Making of a Discipline* (1989) 131-142, Abingdon: The Woburn Press.

Besson S & E Kleber “Article 2: The Right to Non-Discrimination” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 41-72, Oxford: Oxford University Press.

Booyse JJ “Education Provisioning During the Period of the National Party” in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 215-230, Pretoria: Van Schaik.

Brand D “Introduction to Socio-economic Rights in the South African Constitution” in D Brand & C Heyns (eds) *Socio-economic Rights in South Africa* (2005) 1-56, Pretoria: Pretoria University Law Press.

Cameron E “A South African Perspective on the Judicial Development of Socio-Economic Rights” in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (2014) 319-338, Oxford: Hart Publishing.

Cantwell N “The Origins, Development and Significance of the United Nations Convention on the Rights of the Child” in S Detrick (ed) *The United Nations Convention on the Rights of the Child: a Guide to the Travaux Préparatoires* (1992) 19-30, Dordrecht: Martinus Nijhoff Publishers.

Chandrasekaran A “Human Rights Awareness in Education” in CJ Nirmal *Human Rights in India: Historical, Social and Political Perspectives* (2000) 73-90, New Delhi: Oxford University Press.

Chapman AR “Development of Indicators for Economic, Social and Cultural Rights: The Rights to Education, Participation in Cultural Life and Access to the Benefits of

Science” in Y Donders & V Volodin *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 111-152, Aldershot: Ashgate Publishing.

Chirwa DM & Chenwi L “The Protection of Economic Social and Cultural Rights in Africa” in DM Chirwa & L Chenwi (eds) *The Protection of Economic Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 3-30, Cambridge: Cambridge University Press.

Coomans F “Content and Scope of the Right to Education as a Human Right and Obstacles to its Realization” in Y Donders & V Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 183-229, Aldershot: Ashgate Publishing.

Coomans F “In Search of the Core Content of the Right to Education” in AR Chapman & S Russel (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 217-246, Antwerp: Intersentia.

Courtis C & J Tobin “Article 28: the Right to Education” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 1056-1115, Oxford: Oxford University Press.

Currie I & J De Waal “Culture, Language and Education” in I Currie & J De Waal (eds) *Bill of Rights Handbook* 6 ed (2013) 624-642, Cape Town: Juta.

Currie I & J De Waal “Limitation of Rights” in I Currie & J De Waal (eds) *Bill of Rights Handbook* 6 ed (2013) 150-175, Cape Town: Juta.

Dall FP “Children’s Right to Education: Reaching the Unreached” in JR Himes (ed) *Implementing the Convention on the Rights of the Child* (1995) 143-182, The Hague: Martinus Nijhoff Publishers.

Das G “The Supreme Court: An Overview” in BN Kirpal, AH Desai, S Gopal, R Dhavan & R Ramchandran (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2011) 16-47, New Delhi: Oxford University Press.

Dass S & A Rinquest “School Fees” in F Veriava with A Thom & TF Hodgson *Basic Education Rights Handbook: Education Rights in South Africa* (e-book) (2017) 141-

159, <<https://section27.org.za/wp-content/uploads/2017/02/Chapter-7.pdf>>, Section27.

De Graef C “Rights of Children in a Changing World” in MDA Freeman & PE Veerman *The Ideologies of Children’s Rights* (1992) 115-124, Dordrecht: Martinus Nijhoff Publishers.

Desai AH & S Muralidhar “Public Interest Litigation” Potential and Problems” in BN Kirpal, AH Desai, S Gopal, R Dhavan & R Ramchandran (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2011) 159-192, New Delhi: Oxford University Press.

Durojaye E “Litigating the Right to Health in Nigeria: Challenges and Prospects” in M Kilander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 149-171, Pretoria: Pretoria University Law Press.

Ebbe ONI “The Judiciary and Criminal Procedure in Nigeria” in ONI Ebbe (ed) *Comparative and International Criminal Justice Systems: Policing, Judiciary, and Corrections* 3 ed (2013) 201-216, London: Taylor and Francis.

Ebobrah ST “Sub-Regional Judicial Enforcement of Economic, Social and Cultural Rights” in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 274-302, Cambridge: Cambridge University Press.

Eekelaar J & J Tobin “Article 3: The Best Interests of the Child” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 73-107, Oxford: Oxford University Press.

Fenwick C “Minimum obligations with respect to article 8 of the International Covenant on Economic, Social and Cultural Rights” in AR Chapman & S Russell (eds) *Core obligations: building a framework for economic, social and cultural rights* (2002) 53-86, Antwerp: Intersentia.

Fionda J “Legal Concepts of Childhood: an Introduction” in J Fionda (ed) *Legal Concepts of Childhood* (2001) 3-18, Oxford: Hart Publishing.

Fottrell D “One Step Forward or Two Steps Sideways? Assessing the First Decade of the Children’s Convention on the Rights of the Child” in D Fottrell (ed) *Revisiting Children’s Rights: 10 Years after the United Nations Convention on the Rights of the Child* (2000) 1-14, The Hague: Kluwer Law International.

Freeman MDA “The Child in Family Law” in J Fionda (ed) *Legal Concepts of Childhood* (2001) 183-202, Oxford: Hart Publishing.

Freeman MDA “Introduction: Rights, Ideology and Children” in MDA Freeman & PE Veerman (eds) *Ideologies of Children’s Rights* (1992) 3-6, Dordrecht: Martinus Nijhoff Publishers.

Freeman MDA “Limits of Children’s Rights” in MDA Freeman & PE Veerman (eds) *Ideologies of Children’s Rights* (1992) 29-46, Dordrecht: Martinus Nijhoff Publishers.

Geyser H “OBE: A Critical Perspective” in T Mda & S Mothata (eds) *Critical Issues in South African Education – After 1994* (2000) 21-42, Cape Town: Juta.

Heintze HJ “The UN Convention and the Network of the International Human Rights Protection by the UN” in MDA Freeman & PE Veerman *The Ideologies of Children’s Rights* (1992) 71-78, Dordrecht: Martinus Nijhoff Publishers.

Keller H & L Grover “General Comments of the Human Rights Committee and their legitimacy” in Keller H & Ulfstein G (eds) *UN Human Rights Treaty Bodies* (2012) 116-198, Cambridge: Cambridge University Press.

Hinz MO “Human rights between universalism and cultural relativism? The need for anthropological jurisprudence in the globalising world” in A Bösl & J Diescho (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 3-32, Windhoek: Macmillan Education Namibia

Human S “The Theory of Children’s Rights” in T Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 305-326, Cape Town: Juta.

Jain MP “The Supreme Court and Fundamental Rights” in SK Verma & K Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2004) 1-100, Oxford: Oxford University Press.

Jain RK “The Emerging Human Rights Situation in India: In the Context of Recent Socio-Political and Economic Changes” in A Alam (ed) *Human Rights in India: Issues and Challenges* (2012) 42-50, Delhi: Raj Publications.

Jayakumar S “Human Rights in Primary Education: The Indian Context” in VN Viswanathan (ed) *Human Rights Challenges of 21st Century* (2008) 277-282, Delhi: Kalpaz Publications.

Joseph S & J Carpenter “Scholar Transport” in F Veriava, A Thom & TF Hodgson (eds) *Basic Education Rights Handbook – Education Rights in South Africa* (e-book) (2017) 275-291, <<https://section27.org.za/wp-content/uploads/2017/02/Chapter-16.pdf>>, Section27.

Joubert R “The South African Schools Act” in T Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 575-593, Cape Town: Juta.

Kamga SD “The Right to Basic Education” in T Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 517-533, Cape Town: Juta.

Keller H & L Grover “General Comments of the Human Rights Committee and their legitimacy” in H Keller & Ulfstein G (eds) *UN Human Rights Treaty Bodies* (2012) 116-198, Cambridge: Cambridge University Press.

Kilander M & H Adjolohoun “International law and domestic human rights litigation in Africa: An introduction” in M Kilander (ed) *International law and domestic human rights litigation in Africa* (2010) 3-24, Pretoria: Pretoria University Press.

Krüger R & C McConnachie “The Impact of the Constitution on Learners’ Rights” in T Boezaart *Child Law in South Africa* 2nd ed (2017) 534-574, Cape Town: Juta.

Le Roux CS “European Foundations Shaping Schooling in South Africa: Early Dutch and British Colonial Influence at the Cape” in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 57-86, Pretoria: Van Schaik.

Le Roux CS “History of Education Research: a Search for Meaning” in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 17- 36, Pretoria: Van Schaik.

Liebenberg S “Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa” in DM Chirwa & L Chenwi (eds) *The Protection of Economic Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 305-337, Cambridge: Cambridge University Press.

Lopatka A “The Rights of the Child are Universal: the Perspective of the UN Convention on the Rights of the Child” in MDA Freeman and PE Veerman *The Ideologies of Children’s Rights* (1992) 47-52, Dordrecht: Martinus Nijhoff Publishers

Lundy L & J Tobin “Article 29: The Aims of Education” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 1116-1152, Oxford: Oxford University Press.

Lundy L, J Tobin & A Parkes “Article 12: The Right to Respect the Views of the Child” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 397-434, Oxford: Oxford University Press.

Malherbe R “Education Rights” in T Boezaart (ed) *Child Law in South Africa* 2 ed (2009) 399-419, Claremont: Juta.

McCarney W “The Globalisation of Child and Family Law” in J Sloth-Nielsen & Z Du Toit (eds) *Trials and Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* (2008) 25-34, Cape Town: Juta.

McConnachie C, A Skelton & C McConnachie “The Constitution and the Right to Basic Education” in F Veriava with A Thom & T Fish Hodgson (eds) *Basic Education Rights Handbook: Education Rights in South Africa* (e-book) (2017) 13-35, <<https://section27.org.za/wp-content/uploads/2017/02/Chapter-1.pdf>>, Section27.

McCullough G “Publicizing the Educational Past” in D Crook & R Aldrich (eds) *History of Education for the 21st Century* (2000) 1-16, London: Institute of Education.

Mda TV “Integrated Schooling” in TV Mda & MS Mothata (eds) *Critical Issues in South African Education – After 1994* (2000) 43-62, Cape Town: Juta.

Mncube VS & N Madikizela-Madiya “South Africa: Educational Reform - Curriculum, Governance and Teacher Education” in C Harber (ed) *Education in Southern Africa* (2013) 165-188, London: Bloomsbury.

Mothata S “Developments in Policy and Legislation in the Education and Training System” in T Mda & S Mothata (eds) *Critical Issues in South African Education – After 1994* (2000) 1-20, Cape Town: Juta.

Ngidi K “The role of international law in the development of children’s rights in South Africa: A children’s rights litigators perspective” in in M Kilander (ed) *International Law and Human Rights Litigation in Africa* (2010) 173-192, Pretoria: Pretoria University Law Press.

Nowak M “The Right to Education” in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (1995) 189–211, Dordrecht: Martinus Nijhoff Publishers.

Nwauche ES “Indirect Constitutional Protection of Economic, Social and Cultural Rights in Nigeria” in DM Chirwa & Chenwi L (eds) *The Protection of Economic Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 501-526, Cambridge: Cambridge University Press.

Odinkalu CA “The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights” in V Gauri & DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 183-223, Cambridge: Cambridge University Press.

Peleg N & J Tobin “Article 6: The Rights to Life, Survival and Development” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (2019) 186-236, Oxford: Oxford University Press.

Pillay A “Judicial Activism and the Indian Supreme Court: Lessons for Economic and Social Rights Adjudication” in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (2014) 339-356, Oxford: Hart Publishing

Proudlock P “Children’s Socio-economic Rights” in T Boezaart (ed) *Child Law in South Africa* 2nd ed (2017) 359-402, Cape Town: Juta.

Quennerstedt A “Children’s Rights Research Moving into the Future – Challenges on the Way Forward” in MDA Freeman (ed) *The Future of Children’s Rights* (2014) 106-120, Leiden: Brill Nijhoff.

Ramachandran R “The Supreme Court and the Basic Structure Doctrine” in BN Kirpal, AH Desai, S Gopal, R Dhavan & R Ramchandran (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2000) 107-133, New Delhi: Oxford University Press.

Robinson W “Finding Our Professional Niche. Reinventing Ourselves as 21st Century Historians of Education” in D Crook & R Aldrich (eds) *History of Education for the 21st Century* (2000) 57-62.

Sanè P “Introduction” in Y Donders & V Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 1-10, Aldershot: Ashgate Publishers.

Schwella E “Federalism in South Africa: a Complex Context and Continued Challenges” in H Bühler, S Luther & VL Plän (eds) *Federalism – A Success Story?: International Munich Federalism Days 2016* (2017) 73-102, Munich: Hanss-Seidel-Stiftung.

Secker E “Barriers to the Effective Implementation of the UN Convention on the Rights of the Child in the Niger Delta of Nigeria” in A Twum-Danso Timoh & N Ansell (eds) *Children’s Lives in an Era of Children’s Rights: the Progress of the Convention on the Rights of the Child in Africa* (2014) 173-190, Abingdon: Routledge

Seroto J “Indigenous Education in the Pre-colonial Era” in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 37-55, Pretoria: Van Schaik.

Setalvad AM “The Supreme Court on Human Rights and Social Justice: Changing Perspectives” in BN Kirpal, AH Desai, S Gopal, R Dhavan & R Ramchandran (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2000) 232-255, New Delhi: Oxford University Press.

Shankar A & PB Mehta “Courts and Socioeconomic Rights in India” in V Gauri & DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 146-182, Cambridge: Cambridge University Press.

Simon L & CJ Nirmal “Fundamental Rights: The Constitutional Context of Human Rights” in CJ Nirmal (ed) *Human Rights in India: Historical, Social and Political Perspectives* (2002) 40-42, New Delhi: Oxford University Press.

Skelton A “Children” in I Currie & J De Waal (eds) *Bill of Rights Handbook* 6 ed (2013) 598-623, Cape Town: Juta.

Sloth-Nielsen J “Domestication of Children’s Rights in National Legal Systems in African Context: Progress and Prospects” in J Sloth-Nielsen (ed) *Children’s Rights in Africa: A Legal Perspective* (2008) 53-72, Hampshire: Ashgate.

Sloth-Nielsen J “The Protection of Children’s Economic, Social and Cultural Rights under the African Children’s Charter” in DM Chirwa & L Chenwi (eds) *The Protection of Economic Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 155-179, Cambridge: Cambridge University Press.

Ssenyonjo M “The Protection of Economic, Social and Cultural Rights under the African Charter” in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa* (2016) 91- 120, Cambridge: Cambridge University Press.

Templeman SW (Lord Templeman) “The Supreme Court and the Constitution” in in BN Kirpal, AH Desai, S Gopal, R Dhavan & R Ramchandran (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2001) 48-56, New Delhi: Oxford University Press.

Thukral EG & AK Asthana “Children’s Rights in Litigation: Use of the CRC in Indian Courts” in T Liefaard & JE Doek (eds) *Litigating the Rights of the Child: The UN*

Convention on the Rights of the Child in Domestic and International Jurisprudence (2015) 31-52, Dordrecht: Springer.

Van Bueren G “The United Nations Convention on the Rights of the Child: An Evolutionary Revolution” in CJ Davel *Introduction to Child Law in South Africa* (2000) 202-213, Cape Town: Juta.

Veriava F & F Coomans “The right to education” in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 57-84, Pretoria: Pretoria University Law Press.

Verma SK “International Law” in SK Verma & K Kusuk (eds) *Fifty Years of the Supreme Court: Its Grasp and Reach* (2006) 621-649, Delhi: Oxford University Press.

Viljoen F “The justiciability of socio-economic and cultural rights: experience and problems” in Y Donders & V Volodin *Human Rights in Education, Science and Culture: legal developments and challenges* (2007) 53-110, Aldershot: Ashgate Publishing.

Wesson M “The Emergence and Enforcement of Socio-Economic Right” in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (2014) 281-298; Oxford: Hart Publishing.

Wolfson SA “Children’s Rights: The Theoretical Underpinning of the ‘Best Interest of the Child’” in MDA Freeman & PE Veerman (eds) *Ideologies of Children’s Rights* (1992) 7-28, Dordrecht: Martinus Nijhoff Publishers.

Wolhuter CC “History of Education as a Field of Scholarship and the Historiography of South African Education” in JJ Booyse, CS Le Roux, J Seroto & CC Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 1-16, Pretoria: Van Schaik.

Wolhuter CC “South Africa: Worldwide educational reform programme telescoped into an instant time-space” in CC Wolhuter & HD Herman (eds) *Educational Reform in Southern Africa: Prospects for the New Millennium* (2010) 1-16, Potchefstroom: CC Wolhuter.

Wringe C “The Ideology of Liberal Individualism, Welfare Rights and the Right to Education” in MDA Freeman & PE Veerman (eds) *Ideologies of Children’s Rights* (1992) 191-202, Dordrecht: Martinus Nijhoff Publishers.

Journal articles and papers

Abeyratne R “Socioeconomic rights in the Indian Constitution: Toward a broader conception of legitimacy” (2014) 39 *Brooklyn Journal of International Law* 1-71.

Akinbola BR “The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities” (2010) 10 *African Human Rights Law Journal* 457-477.

Akinwumi OS “Legal Impediments on the Practical Implementation of the Child Right Act 2003” (2009) 37 *International Journal of Legal Information* 385-396.

Alanen L “Editorial: Taking Children’s Rights Seriously” (2012) 17(1) *Childhood* 5-8.

Alston P & N Bhuta “Human rights and public goods: Education as a fundamental right in India” *NYU School of Law Public Law & Legal Theory Research Paper series working paper no. 05-18/Center for Human Rights and Global Justice working paper no. 6. NYU School of Law, New York* (2005) 1-35.

Arce MC “Maturing Children’s Rights Theory: from Children, with Children, of Children” (2015) 23 *International Journal of Children’s Rights* 283-331.

Arendse L “The obligation to provide free basic education in South Africa: an International law perspective” (2011) 14 *Potchefstroom Electronic Law Journal* 92-127.

Arts KCJM “The International Protection of Children’s Rights in Africa: The 1990 OAU Charter on the Rights and Welfare” (1992) 5 *African Journal of International and Comparative Law* 139-162.

Badat S & Y Sayed "Post-1994 South African Education: The Challenge of Social Justice" (2014) *The Annals of the American Academy of Political and Social Science* 127-148.

Balton DA "The Convention on the Rights of the Child: Prospects for International Enforcements" (1990) 12 *Human Rights Quarterly* 120-129.

Baxi U "Judicial Discourse: Dialectics of the face and the mask" (1993) 35 *Journal of the Indian Law Institute* 1-12.

Berger E "The right to education under the South African Constitution" (2003) 103 *Columbia Law Review* 614- 661.

Binford W "The Constitutionalisation of Children's Rights in South Africa" (2015/2016) 60 *New York Law School Law Review* 333-363.

Chauhan CPS "Education and caste in India" (2008) 28 *Asia Pacific Journal of Education* 217-234.

Chen L, CP Cohen & TA Johnson "Towards Adoption of the United Nations Convention on the Rights of the Child: a Policy Oriented Overview" (1989) 83 *Proceedings of the Annual Meeting (American Society of International Law)* 157-172.

Cheruvath R "Is the right of children to free and compulsory education act really beneficial to the poorer children in India? An analysis with special reference to the admission of poorer children in public unaided schools?" (2015) 43 *International Journal of Primary, Elementary and Early Years Education* 619-927.

Chirwa DM "The Merits and Demerits of the African Charter on the Rights and Welfare of the Child" (2002) 10 *International Journal of Children's Rights* 157-177.

Christie P "From Crisis to Transformation: Education in Post-apartheid South Africa" (1992) 36 *Australian Journal of Education* 38-52.

Christie P & C Collins "Bantu Education: Apartheid Ideology or Labour Reproduction" (1982) 18 *Comparative Education* 59-75.

Chürr C “Realisation of a Child’s Right to Basic Education in the South African School system: Some lessons from Germany” (2015) 18 *PELJ* 2405-2453.

Coetzee JH “Toekomsstudie as Opgawe vir die Historiese Opvoedkunde: Regverdiging en Motivering” (1989) 9(1) *Suid-Afrikaanse Tydskrif vir Opvoedkunde* 36-43.

Coetzee S “Discipline in Nigerian schools within a human rights framework” (2010) 10 *African Human Rights Law Journal* 478-501.

Cohen CP “The Role of Non-governmental Organisations in the Drafting of the Convention on the Rights of the Child” (1990) 12 *Human Rights Quarterly* 137-147.

Cohen CP & H Naimark “United-Nations Convention on the Rights of the Child – Individual Rights Concepts and Their Significance for Social-Scientists” (1991) 46(1) *American Psychologist* 60–65.

Creamer K “Implication of socio-economic rights jurisprudence for government planning and budgeting: the case of children’s socio-economic rights” (2004) 8 *Law, Democracy & Development* 221-234.

Dankwa V, C Flinterman & S Leckie “Commentary to the Maastricht Guidelines of Violations of Economic, Social and Cultural Rights” (1998) 20 *Human Rights Quarterly* 705-730.

Davel T “The African Charter on the Rights and Welfare of the Child, Family Law and Children’s Rights” (2002) 35 *De Jure* 281-296.

De Vos P “The economic and social rights of children in South Africa’s transitional Constitution” (1995) 10 *SA Public Law* 233-259.

De Waal E & E Serfontein “Towards successful schooling: the role of courts and schools in protecting conflicting individual educator and learner rights” (2014) 29 *Southern African Public Law* 65-89.

Deacon HJ “The Balancing Act Between the Constitutional Right to Strike and the Constitutional Right to Education” (2014) 34(2) *South African Journal of Education* 1-15.

Du Plessis L “The Status and Role of Legislation in South Africa as a Constitutional Democracy: Some Explanatory Observations” (2011) 14 *Potchefstroom Electronic Law Journal* 91-102.

Dubey M “The Right of Children to Free and Compulsory Education Act, 2009: The Story of a Missed Opportunity” (2010) 40 *Social Change* 1-13.

Dugard J “The role of international law in interpreting the Bill of Rights” (1994) 10 *South African Journal on Human Rights* 208-215.

Ebobrah S “The future of economic, social and cultural rights litigation in Nigeria” (2007) 1 *Review of Nigerian Law and Practice* 109 116.

Edmonds BC “The Convention on the Rights of the Child: a Point of Departure” (1992) 56 *Social Education* 205-207.

Eekelaar J “The Emergence of Children’s Rights” (1986) 6 *Oxford Journal of Legal Studies* 161-182.

Egede E “Bringing Human Rights Home: An Examination of the Domestication of Human Rights in Nigeria” (2007) 51 *Journal of African Law* 249-284.

Ekundayo O “Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of Child (CRC)’s Provisions? Examining the Similarities and Differences between the ACRWC and the CRC” (2015) 5 *International Journal of Humanities and Social Science* 143-158.

Enabulele AO “Implementation of treaties in Nigeria and the status question: Whither Nigerian courts?” (2009) 17 *African Journal of International and Comparative Law* 326-341.

Feasley A “Recognizing education rights in India and the United States: All Roads lead to the Courts” (2014) 1 *Pace International Law Review*. 1-31.

Ferguson L “Not Merely Rights for Children but Children’s Rights: The Theory Gap and the Assumption of the Importance of Children’s Rights” (2013) 2 *International Journal of Children’s Rights* 177-208.

Fiske EB & HF Ladd “Balancing Public and Private Resources for Basic Education: School Fees in Post-Apartheid Education” (2003) *Terry Sanford Institute of Public Policy Working Paper Series* 1-35.

Fleisch B & S Woolman “On the constitutionality of school fees: a reply to Roithmayr” (2004) 22(1) *Perspectives in Education* 111-123.

Fleisch B & S Woolman “On the constitutionality of single-medium public schools” (2007) 23 *South African Journal on Human Rights* 34–67.

Floud JE “A Right to Education: a Test Case for a Theory of Children’s Rights” (1976) 62 *Archiv für Rechts- und Sozialphilosophie* 319-327.

Freeman M “The Sociology of Childhood and Children’s Rights” (1998) 6(4) *International Journal of Children’s Rights* 433–444.

Gauri V “Public interest litigation in India: Overreaching or underachieving” (2009) *Policy Research Working Paper 5109* 1-23.

Grahn-Farley M “A Theory of Children’s Rights” (2003) 57 *U. Miami L. Rev* 888-892.

Grewal IK & NS Singh “Understanding child rights in India” (2011) 22 *Early Education and Development* 863–882.

Grover S “Why aren’t these youngsters in school? Meeting Canada’s Charter Obligations to Disadvantaged Adolescents” (2002) 10 *International Journal of Children’s Rights* 1–37.

Halvorsen K “Notes on the Realization of the Human Right to Education” (1990) 12 *Human Rights Quarterly* 341-364.

Hammarberg T “The UN Convention on the Rights of the Child – and How to Make it Work” (1990) 12(1) *Human Rights Quarterly* 97–105.

Hannum H “The Status of the Universal Declaration of Human Rights in National and International Law” (1995/96) 25 *Georgia Journal of International & Comparative Law* 287-397.

Hannum H “The UDHR in national and international law” (1998) 3 *Health and Human Rights* 144-158.

Hemphill SA & S Schneider “Excluding students from school: A re-examination from a children’s rights perspective” 21 (2013) *International Journal of Children’s Rights* 88-96.

Heyman J, A Raub & A Cassola “Constitutional rights to education and their relationship to national policy and school enrolment” (2014) 39 *International Journal of Educational Development* 131-141.

Heyns C “The African Regional Human Rights System: The African Charter” (2004) 108 *Penn State Law Review* 679-702.

Hofmeyr J “Equalising Educational Opportunities” (1989) 13 *South African Journal of Labour Relations* 20-42.

Howe RB “Do Parents have Fundamental Rights?” (2001) 36(3) *Journal of Canadian Studies/Revue d’Etudes Canadiennes* 61–78.

Hüfner K “The Human Rights Approach to Education in International Organisation” (2011) 46 *European Journal of Education* 117-126.

Humphrey JP “The International Bill of Rights: Scope and Implementation” (1976) 17 *William and Mary Law Review* 527-542.

Huntington C “Rights Myopia in Child Welfare” (2006) 53(3) *UCLA Law Review* 637–699.

Ibe S “Beyond justiciability: Realising the promise of socio-economic rights in Nigeria” (2007) 7 *African Human Rights Law Journal* 225-248.

Ibe S “Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities” (2010) 10 *African Human Rights Law Journal* 197-211.

Isokpan AJ & E Durojaye “Impact of the Boko Haram Insurgency on the Child’s Right to Education in Nigeria” (2016) 19 *Potchefstroom Electronic Law Journal* 2-42.

Joubert R “Incorporating international standards into national education law in South Africa: the accountability of the state” (2014) 29 *Southern African Public Law* 1-18.

Kaime T “The African Children’s Charter: Does it Represent a Relevant Vision of Childhood and Children’s Rights?” (2009) 29 *Children’s Legal Rights Journal* 11-29.

Kaime T “The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account (2009) 3 *African Journal of Legal Studies* 120-136.

Kalantry S, JE Getgen & SA Koh “Enhancing Enforcement of Economic, Social and Cultural Rights using Indicators: a Focus on the Right to Education in the ICESCR” (2010) 32 *Human Rights Quarterly* 253-310.

Kaushal M “Implementation of the Right to Education in India: Issues and Concerns” (2012) 4 *Journal of Management & Public Policy* 42-48.

Khastagir S “Universal Elementary Education in India: A Reality Check” (2016) 46 *Social Change* 91-105.

King M “The Sociology of Childhood as Scientific Communication: Observations from a Social Systems Perspective” (2007) 14 *Childhood* 193–213.

Klees SJ & N Thapliyal “Review of the Right to Education: the Work of Katarina Tomaševski” (2007) 51 *Comparative Education Review* 497-510.

Kumar CR “International Human Rights Perspectives on the Fundamental Right to Education – Integration of Human Rights and Human Development in the Indian Constitution” (2004) 12 *Tulane Journal of International and Comparative Law* 237-285.

Kumar V “Basic structure of the Indian Constitution: Doctrine of constitutionally controlled governance: from *Kesavananda* to *I.R. Coelho* (2007) 49 *Journal of the Indian Law Institute* 365-398.

L’Heureux-Dubé C “The importance of Dialogue: Globalization and the International Impact of the Rehnquist Court” (1998) 34 *Tulsa Law Journal* 15-40.

Lillich RB “The Growing Importance of Customary International Human Rights Law” (1995/96) 25 *Georgia Journal of International & Comparative Law* 1-30.

Lloyd A “A Theoretical Analysis of the Reality of Children’s Rights in Africa: An Introduction of the African Charter on the Rights and Welfare of the Child” (2002) 2 *African Human Rights Law Journal* 11-31.

Lundy L “Mainstreaming Children’s Rights in, to and through Education in a Society emerging from Conflict” (2006) 14 *International Journal of Children’s Rights* 339-362.

Masitsa MG “Teachers’ Right to Strike vis-à-vis Learners’ Right to Education – Justice for One is an Injustice for the Other” (2013) 12(4) *Interim: Interdisciplinary Journal* 19-31.

Matthews H & M Limb “The Right to Say: The Development of Youth Councils/Forums within the UK” (1998) 30(1) *Area* 66–78.

Matthews H, M Limb & M Taylor “Young People’s Participation and Representation in Society” (1999) 30(2) *Geoforum* 135–144.

Maurás M “Public Policies and Child Rights: Entering the Third Decade of the Convention on the Rights of the Child” (2011) 633 *The Annals of the American Academy of Political and Social Science* 52-65.

Mavunga RA “A Critical Assessment of the *Minimum Age Convention* 38 of 1973 and the Worst Forms of Child Labour Convention 182 of 1999” (2013) 16 *Potchefstroom Electronic Law Journal* 122-169.

Mayall B “Sociology Can Further Children’s Rights” (2003) 72 *Education Journal* 7.

Mayall B “The Sociology of Childhood in Relation to Children’s Rights” (2000) 8(3) 14 *International Journal of Children’s Rights* 243–259.

McConnachie C & C McConnachie “Concretising the Right to a Basic Education” (2012) 129 *South African Law Journal* 554-590.

McMillan LK “What’s in a Right? Two Variations for Interpreting the Right to Education” (2010) 56 *International Review of Education* 531-545.

Meer S “Litigation Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa” (1993) 9 *South African Journal on Human Rights* 358-372.

Melton GB “Building Humane Communities Respectful of Children: The Significance of the Convention on the Rights of the Child” (2005) 60(8) *American Psychologist* 918–926.

Melton GB “The Child’s Right to a Family Environment: Why Children’s Rights and Family Values are Compatible” (1996) 51(12) *American Psychologist* 1234–1238.

Merhotra S “The cost and financing of the right to education in India: can we fill the financing gap?” (2012) 32 *International Journal of Educational Development* 65–71.

Mezmur BD “The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?” (2008) 1 *South African Public Law* 1-29.

Mezmur BD & J Sloth-Nielsen “An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child” (2008) 8 *African Human Rights Law Journal* 596-616.

Moseneke D “The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication” 2002 18 *South African Journal on Human Rights* 309-315.

Muthoga LG “Introducing the African Charter on the Rights and Welfare of the African Child and the Convention on the Rights of the Child” (1992) paper delivered at the International Conference on the Rights of the Child, Community Law Centre, University of the Western Cape.

Nwauche E “The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?” (2010) 10 *African Human Rights Law Journal* 502-514.

O’Flaherty M “The Concluding Observations of United Nations Human Rights Treaties Bodies” (2006) 6 *Human Rights Law Review* 27-52.

Odia OL & SI Omofonmwam “Educational System in Nigeria Problems and Prospects” (2007) 14 *Journal of Social Sciences* 81-86.

Oestreich JE "UNICEF and the Implementation of the Convention on the Rights of the Child" (1998) 4 *Global Governance* 183-198.

Ogunniran I "The Child Rights Act Versus Sharia Law in Nigeria: Issues, Challenges & A Way Forward" (2010) 30 *Children's Legal Rights Journal* 62-79.

Ogunniyi D "The Challenge of Domesticating Children's Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children" (2018) 62 *Journal of African Law* 447-470.

Okeke CN "The Use of International Law in the Domestic Courts of Ghana and Nigeria" (2015) 32 *Arizona Journal of International and Comparative Law* 378-386.

Olowu D "Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child" (2002) 10 *International Journal of Children's Rights* 127-136.

Onyemelukwe C "Access to anti-retroviral drugs as a component of the right to health in international law: Examining the application of the right in Nigerian jurisprudence" (2007) 7 *African Human Rights Law Journal* 446-474.

Pieterse A "The Transformative Nature of the Right to Education" (2004) 4 *Journal of South African Law (TSAR)* 700-714.

Quennerstedt A "The Construction of Children's Rights in Education – a Research Synthesis" (2011) 19 *International Journal of Children's Rights* 661-678.

Quennerstedt A & M Quennerstedt "Researching Children's Rights in Education: Sociology of Childhood Encountering Educational Theory" (2014) 35 *British Journal of Sociology of Education* 115-132.

Quennerstedt A, C Robinson & J l'Anson "The UNCRC: the Voice of Global Consensus on Children's Rights" (2018) 36 *Nordic Journal of Human Rights* 38-54.

Reynaert D, M Bouverne-de-Bie & S Vandeveld "A Review of Children's Rights Literature since the Adoption of the United Nations Convention on the Rights of the Child." (2009) 16(4) *Childhood* 518-524.

Roithmayr D “Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education” (2003) 19 *South African Journal on Human Rights* 382-429.

Roose R & M Bouverne-De Bie “Do Children Have Rights or Do Their Rights Have to be Realised? The United Nations Convention on the Rights of the Child as a Frame of Reference for Pedagogical Action” (2007) 41(3) *Journal of Philosophy of Education* 431–443.

Ross H “Children’s Rights & Theories of Rights” (2013) 21 *International Journal of Children’s Rights* 679-704.

Rosser A & A Joshi “Using the Courts to Realize Education Rights: Reflections from India and Indonesia” *Policy Research Working Paper 8448* (2018) 1-32.

Seleoane M “The right to education: Lessons from *Grootboom*” (2003) 7 *Law, Democracy & Development* 137-169.

Seroto J “A Revisionist View of the Contribution of Dr Eiselen to South African Education: New Perspectives” (2013) *Yesterday & Today* 91-108.

Simbo C “A Hexagon Right: the Six Dimensions of the Right to Basic Education” (2018) 39 *Obiter* 126-149.

Simbo C “Defining the right to basic education in the South African Constitution: An international law approach” (2012) 16 *Law, Democracy and Development* 162-184.

Simbo C “The right to basic education, the South African constitution and the Juma Musjid case: An unqualified human right and a minimum core standard” (2013) 17 *Law, Democracy & Development* 477-503.

Singh K “The Right to Education: International Legal Obligations” (2005) *International Journal for Education Law & Policy* 103-118.

Skelton A “How far will the courts go in ensuring the right to a basic education?” (2012) *Southern African Public Law* 392-408.

Skelton A “Strategic Litigation Impacts – Equal Access to Quality Education” (2017) *Open Society Justice Initiative* 1-99.

Skelton A “The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law” (2013) 46 *De Jure* 1-23.

Sloth-Nielsen J “The Child’s Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*” (2001) 17 *South African Journal on Human Rights* 210-231.

Sloth-Nielsen J “The contribution of children’s rights to the reconstruction of society: Some implications of the constitutionalisation of children’s rights in South Africa” (1996) 4 *International Journal of Children’s Rights* 323-344.

Sloth-Nielsen J & B Mezmur “2+2 = 5? Exploring the domestication of the CRC in South African Courts (2002-2006)” (2008) 16(1) *International Journal of Children’s Rights* 1-28.

Sloth-Nielsen J & BD Mezmur “A Dutiful Child: The Implications of Article 31 of the African Children’s Charter” (2008) *Journal of African Law* 159-189.

Sloth-Nielsen J & BD Mezmur “Surveying the research landscape to promote children’s legal rights in an African context” (2007) & *African Human Rights Law Journal* 330-353.

Smit M “Ambivalent adjudication of admission and access to schools – striking a reasonable balance between equality, quality and legality” (2014) 29 *Southern African Public Law* 37-64.

Songca R “Evaluation of Children’s Rights in South African Law: The Dawn of an Emerging Approach to Children’s Rights?” (2011) XLIV *Comparative and International Journal of Southern Africa* 340 – 359.

Srikrishna BN “The Indian Legal System” (2008) 36 *International Journal of Legal Information* 242-244.

Sripati V “Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective” (2007) 16 *Tulane Journal of International and Comparative Law* 49-116.

Sripati V & AK Thiruvengadam “Constitutional amendment making the right to education a Fundamental Right” (2004) 2 *International Journal of Constitutional Law* 148-157.

Srivastava N “The status of the child in India in the context of The Convention on the Rights of the Child” (2004) 9 *Social Change* 113-124.

Starke JG “Monism and dualism in the theory of international law” (1936) 17 *British Yearbook of International Law* 66-81.

Stewart L “Interpreting and limiting basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others” (2008) 24 *South African Journal on Human Rights* 472-494.

Suberu R “The Nigerian federal system: Performance, problems and prospects” (2010) 28 *Journal of Contemporary African Studies* 460-466.

Taiwo EA & A Govindjee “The implementation of the right to education in South Africa and Nigeria (part 1) (2012) *Obiter* 93-120.

Taiwo EA & A Govindjee “The implementation of the right to education in South Africa and Nigeria (part 2) (2012) *Obiter* 203-235.

Thapliyal N “Unacknowledged rights and unmet obligations: an analysis of the 2009 Indian Right to Education Act” (2012) 12 *Asia-Pacific Journal on Human Rights and the Law* 65-90.

Thomas N & C O’Kane “When Children’s Wishes and Feelings Clash with Their Best Interests” (1998) 6(2) *International Journal of Children’s Rights* 137–154.

Thompson B “Africa’s charter on children’s rights: A normative break with cultural traditionalism” (1992) *International & Comparative Law Quarterly* 432- 435.

Tobin J “Justifying Children’s Rights” (2013) 21 *International Journal of Children’s Rights* 395-441.

Ucha C “Poverty in Nigeria: Some Dimensions and Contributing Factors” (2010) *Global Majority E-Journal* 46-56.

Van der Berg S et al “Low quality education as a poverty trap” (2011) *Stellenbosch Economic Working Papers* 1-20.

Vanqa TP *The Approaches to the Understanding and Teaching of History of Education in the Preparation of Teachers in a Developing Country* (1994) Paper presented at the annual conference of Southern African Comparative and History of Education Society.

Veriava F “The Amended Legal Framework for School Fees and School Funding: A Boon or a Barrier?” (2007) 23 *South African Journal on Human Rights* 180-194.

Veriava F “The Limpopo textbook litigation: a case study into the possibilities of a transformative constitutionalism” (2016) 32 *South African Journal on Human Rights* 321-343.

Veriava F & A Skelton “The right to basic education: a comparative study of the United States, India and Brazil” (2019) *South African Journal on Human Rights* 1-24.

Viljoen F “Application of African Charter on Human and Peoples’ Rights by domestic courts in Africa” (1999) 49 *Journal of African Law* 1-18.

Viljoen F “Supra-national Human Rights Instruments for the Protection of Children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child” (1998) 31 *The Comparative and International Law Journal of Southern Africa* 199-212.

AJ Beredugo & F Viljoen “Towards a greater role and enhanced effectiveness of National Human Rights Commissions in advancing the domestic implementation of socio-economic rights: Nigeria, South Africa and Uganda as case studies” (2015) XL VIII *Comparative and International Law Journal of Southern Africa* 401-430.

Wald M “Children’s Rights A Framework for Analysis” (1979) 12 *University of California, Davis Law Review* 255-282.

Waldock H “Human Rights in Contemporary International Law and the Significance of the European Convention” (1965) 11 *International and Comparative Law Quarterly Supplementary Publication* 1-15.

Weissbrodt D, JC Hansen & NH Nesbitt “The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law” (2011) 24 *Harvard Human Rights Journal* 115-154.

Westman JC “Children’s Rights, Parents’ Prerogatives, and Society’s Obligations” (1999) 29(4) *Child Psychiatry and Human Development* 315–328.

Williams JH “International Cooperation for Education in Developing Countries” (2017) *Oxford Research Encyclopedia of Education* (2017).

Williams S “Nigeria, its women and international law: Beyond rhetoric” (2004) 4 *Human Rights Law Review* 229-255.

Wilson A “The Infancy of the History of Childhood: An Appraisal of Philippe Ariès” (1980) 19 *History and Theory: Studies in the Philosophy of History* 132-153

Wilson D “Human Rights: Promoting Gender Equality In and Through Education” (2003) Paper Commissioned for the EFA Global Monitoring Report 2003/4, *The Leap to Equality* 3-4 (2004/EDA/EFA/MRT/PI/78) 1-20.

Case law (per jurisdiction and body)

ECOWAS Community Court

Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission ECW/CCJ/APP/08/08.

India

Apparel Export Promotion Council v A.K. Chopra (1999) 1 SCC 759.

Avinash Mehrotra v Union of India, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398.

Environmental & Consumer Protection Foundation v Delhi Administration [2012] INSC 584.

Kamlaker v State of Mharashtra , 2004 (1) All India CF.L.R. 122.

Kesavananda Bharati v State of Kerala AIR 1973 SC 1461; (1973) 4 SCC 225.

Lalit Kumar v the State of Uttarakhand, 19 November 2016, Writ Petition (S/S) No. 1576 of 2016.

Mohini Jain v State of Karnataka AIR 1992 SC 1858.

Murlidhar Dayandeo Kesekar v Vishwanath Barde (1995) Supp (2) SCC 549.

National Coalition for Education v Union of India & Ors WP (C) No. 267 of 2014.

People's Union for Civil Liberties v Union of India, 2005 SCCLCom 328.

Registrar (Judicial) of High Court of Karnataka v State of Karnataka WP 15768 of 2013 (High Court of the State of Karnataka decision).

Society for Unaided Private Schools of Rajasthan v Union of India & Another (2012) 6 SCC; Writ Petition (C) No. 95 of 2010.

Unnikrishnan J P v State of A P AIR 1993 SC 2178; (1993) 1 SCC 645.

Vishaka v State of Rajasthan (1997) 6 SCC 241.

Nigeria

Archbishop Okogie v The Attorney-General of Lagos State (1981) 2 NCLR 350.

Augustina Chinyelu Ugo v dr Roy Pedro Ugo 2008 5.

Badejo v Federal Minister of Education [1990] LRC (Const) 735.

Ibidapo v Lufthansa Airlines [1997] 4 NWLR (Part 498) 124 at 150.

Ogugu v State (1994) 9 NWLR (Pt 366) 1.

UAC (NIG) Ltd v Global Transport SA (1996) 5 NWLR (Pt 448) 291.

South Africa

Antonie v Governing Body, Settlers High School 2002 4 SA 738 (CPD).

Azapo v The President of the Republic of South Africa 1996 4 SA 671 (CC).

Bannatyne v Bannatyne 2003 2 SA 363 (CC).

Bel Porto School Governing Body v Premier of the Western Cape 2002 3 SA 265.

Bhe v Magistrate; Khosa v Minister of Social Development; Mahaule v Minister of Social Development 2004 6 SA 505 (CC).

C v Department of Health and Social Development, Gauteng 2012 2 SA 208 (CC).

Centre for Applied Legal Studies v Hunt Secondary School, Case No 10091/2006, 15 June 2007 (ZAKZNHC).

Centre for Child Law and 7 Others v Government of the Eastern Cape Province Eastern Cape High Court, Bisho, case no 504/10.

Christian Education South Africa v Minister of Education 2000 4 SA 757.

Christian Lawyers' Association of South Africa v Minister of Health 2005 1 SA 509 (T).

Du Toit v Minister of Welfare and Population Development 2003 2 SA 198 (CC).

Equal Education v Minister of Basic Education 2018 3 All SA 705 (ECB).

Fish Hoek Primary School v GW 2010 2 SA 141 (SCA).

Ford v Ford 2006 1 All SA 571 (SCA).

Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 1996 3 SA 165 (CC).

Governing Body of Juma Masjid Primary School v Essa NO 2011 BCLR 761 (CC).

Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC).

Head of Department of Education, Free State Province v Welkom High School 2014 2 SA 228 (CC).

Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 2 SA 415 (CC).

High School Ermelo v The Head of Department 2008 1 All SA 139 (T).

Kaunda v President of the Republic of South Africa 2005 4 SA 235 (CC).

Khosa v Minister of Social Development, Mahlaule v Minister of Social Development 2004 6 SA 505 (CC).

Komape v Minister of Basic Education (1416/2015) [2018] ZALMPPHC 18.

Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys 2003 4 SA 160 (T).

Madzodzo v Minister of Basic Education 2014 2 All SA 339 (ECM).

Matukane v Laerskool Potgietersrus 1996 3 SA 223 (T).

MEC for Education v Pillay 2008 1 SA 474 (CC).

MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School 2013 6 SA 582 (CC).

Minister of Basic Education v Basic Education for All 2016 1 All SA 369 (SCA).

Minister of Education, Western Cape v Governing Body of Mikro Primary School 2006 1 SA 1 (SCA).

Minister of Education, Western Cape v Governing Body, Mikro Primary School 2006 1 SA 1 (SCA).

Minister of Health v Treatment Action Campaign 2002 5 SA 721 (CC).

Minister of Welfare and Population Development v Fitzpatrick 2000 3 SA 422 (CC).

Nduli v Minister of Justice 1978 1 SA 893 (A).

S v M 2008 3 SA 232 (CC) 261.

S v Makwanyane 1995 3 SA 391 (CC).

Section 27 v Minister of Education 2013 2 SA 40 (GNP).

Seodin Primary School v MEC Education, Northern Cape 2006 4 BCLR 542 (NC).

Soller v G 2003 5 SA 430 (WLD).

Sonderup v Tondelli 2001 1 SA 1171 (CC).

Soobramoney v Minister of Health (KwaZulu-Natal) 1998 1 SA 765 (CC).

The Centre for Child Law v MEC for Education, Gauteng 2008 1 SA 223 (T).

Trackstar Trading 256 (Pty) Ltd t/a Mtha-Wethemba v Head of the Department of Transport, Province of the Eastern Cape ECG 4 December 2014 (case no. 3611/13) unreported.

Tripartite Steering Committee v Minister of Basic Education 2015 3 All SA 718 (ECG) (25 June 2015).

United Kingdom

Campbell and Cosans v United Kingdom. Judgment of the Eur. Ct. H. R. No. 48 Series A (1982).

United States of America

Brown v Board of Education of Topeka 347 U.S. 483 (1954) 493.

Constitutions, National legislation and Policies (per jurisdiction)

France

Déclaration des droits de l'homme et du citoyen de 1789.

Germany

Bürgerliches Gesetzbuch (BGB)

India

Child Labour (Prohibition and Regulation) Act 61 of 1986

Factories Act, 63 of 1948.

Majority Act of 1875

Mines (Amendment) Act of 1952.

Right of Children to Free and Compulsory Basic Education Act, 35 of 2009.

The Constitution of India, 1950.

Nigeria

Child Rights Act, Act no 26 of 2003.

Compulsory, Free Universal Basic Education Act, 2004.

Constitution of the Federal Republic of Nigeria, 1999 Act No 24

Fundamental Rights (Enforcement Procedure) Rules, 2009.

The National Policy on Integrated Early Childhood Development (IECD), Minimum Standards for IECD, School Health Policy, and National Policy on Gender in Basic Education and Policy on School Based Management Committees for improved school management.

South Africa

Age of Majority Act 57 of 1972.

Child Care Act 74 of 1983.

Children's Act 38 of 2005.

Civil Union Act 17 of 2006.

Constitution of the Republic of South Africa, 1996.

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Department of Basic Education & Department of Transport "National Learner Transport Policy", 2015 GG no 39314.

Liquor Act 59 of 2003.

Marriage Act 25 of 1961.

National Education Policy Act 27 of 1996.

National Norms and Standards for School Funding, GN 2362, GG 19347, 12 October 1998; Amended National Norms and Standards for School Funding, GN 869, GG 29179, 31 August 2006.

Promotion of Bantu Self-governance Act 46 of 1959.

Recognition of Customary Marriages Act 120 of 1998

Schools Act and the Norms and Standards Regarding Language Policy in Public Schools GN 1701 in GG 18546 of 19-12-1997 as corrected by GN 65 in GG 18887 of 15-05-1998.

South African Qualifications Authority Act 58 of 1995.

South African Schools Act 84 Of 1996 Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure, 2013 GN R920 in GG 37081 of 29-12-2013.

South African Schools Act 84 of 1996.

United States of America

US Declaration of Independence (1776).

United Kingdom

English Bill of Rights, William & Mary Sess 2 c 2 (1689).

International and regional instruments and declarations

ILO Minimum Age (Industry) Convention (Revised) (1937).

Organization of African Unity, Declaration of the Rights and Welfare of the African Child, AHG/St. 4 (XVI) Rev. 1 1979.

Organization of African Unity, African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

Organization of African Unity, African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

UN General Assembly, Charter of the United Nations, 1 UNTS XVI (26 June 1945 signed; entered into force on 24 October 1945).

UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women (UNGA Resolution 34/180, 18 December 1979, entered into force 3 September 1981)

UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Resolution 44/25 of 20 November 1989.

UN General Assembly, Declaration of the Rights of the Child, 20 November 1959, A/RES/1386(XIV).

UN General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

UN General Assembly, International Covenant on Economic, Social and Cultural Rights (UNGA Resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976).

UN General Assembly, The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (UNGA Resolution 36/55 of 25 November 1981).

UN General Assembly, The Declaration on the Elimination of All Forms of Racial Discrimination (UNGA Resolution 1904 (XVIII) of 20 November 1963).

UN General Assembly, The Declaration on the Elimination of Discrimination against Women (UNGA Resolution 2263 (XXII) of 7 November 1967).

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948 UNGA Res 217 A(III)).

UN, The Convention on the Elimination of All Forms of Discrimination against Women (1979 1249 UNTS 13, entered into force on the 3rd of September 1981), and the Convention against Discrimination in Education (UNESCO 14 December 1980).

UN, The International Convention on the Elimination of All Forms of Racial Discrimination (1965 660 UNTS 195, entered into force on 4 January 1969).

UNESCO “The Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedom of UNESCO” Records of the General Conference, 18th session, Paris, 17 October to 23 November 1974, v. 1: Resolutions.

UNESCO Declaration on Education for All and the Framework for Action to Meet Basic Learning Needs (1990).

UNESCO General Conference 11th Session, Convention against Discrimination in Education (14 December 1960)

UNESCO Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4, (ED-2016/WS/28, adopted 21 May 2015).

UNESCO, Education for All: A Framework for Action in Sub-Saharan Africa (1999).

UNESCO, The Dakar Framework for Action: Education for All: Meeting our Collective Commitments, (2000) ED-2000/WS/27.

UNESCO, The Salamanca Statement and Framework for Action on Special Needs Education (E D-94/WS/ 1 8; Adopted 10 June 1994).

UNESCO, The World Education Forum Drafting Committee *Expanded Commentary on the Dakar Framework for Action* (23 May 2000, Paris).

United Nations, Vienna Conventions on the Law of Treaties (23 May 1969).

World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs. Adopted by the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand (1990).

United Nations Publications and documents

U.N. ESCOR Supp. (No. 4); U.N. Doc. E/CN.4/1292 (1978) and U.N. ESCOR Supp. (No. 16); U.N. Doc. E/CN.4

UN Economic and Social Council (ECOSOC), Commission on Human Rights (UNCHR), 36th session, *Question of a convention on the rights of the child: Note verbale dated 5 October 1979 addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva* (17 January 1980) E/CN.4/1349.

UNCHR "Annual Report of the Special Rapporteur on the right to education, Katarina Tomaševski" (2001) UN Doc E/CN.4/2001/52

UNGA *Strengthening and enhancing the effective functioning of the human rights treaty body system* (2014) A/RES/68/268 3.

UNICEF *General Comments of the Committee on the Rights of the Child* (2006) vii.

General Comments

UN Committee on the Rights of the Child

UN Committee on the Rights of the Child General Comment No 1 (26th session, 2001) "Article 29(1): the aims of education" UN Doc CRC/GC/2001/1.

UN Committee on the Rights of the Child General Comment No 5 (34th session, 2003) "General Measures of Implementation of the Convention on the Rights of the Child" UN Doc CRC/GC/2003/5.

CESCR

CESCR General Comment No 3 (5th session, 1990) "The nature of States parties obligations" UN Doc E/1991/23.

CESCR General Comment No 11 (20th session, 1999) “On Plans of Action for Primary Education (Art 14)” UN Doc E/C.12/1999/4.

CESCR General Comment No 13 (21st session, 1999) “The Right to Education (art 13)” UN Doc E/C.12/1999/10.

CESCR General Comment No 14 (22nd session, 2000) “The Right to the Highest Attainable Standard of Health (art 12)” UN Doc E/C.12/2000/4.

Concluding Observations (per body)

Committee on the Rights of the Child

UNCRC “Concluding Observations of the Committee on the Rights of the Child: India” (2000) UN Doc CRC/C/15/Add.115.

UNCRC “Concluding Observations of the Committee on the Rights of the Child: Nigeria” (1996) UN Doc CRC/C/15/Add.61.

UNCRC “Concluding Observations of the Committee on the Rights of the Child: South Africa” (23rd session, 2000) UN Doc CRC/C/15/Add.122.

UNCRC “Concluding Observations on the combined third and fourth periodic reports of India” (2014) UN Doc CRC/C/IND/CO/3-4.

UNCRC “Concluding Observations on the second periodic report of South Africa” (2016) UN Doc CRC/C/ZAF/CO/2.

UNCRC “Concluding Observations on the second periodic report of South Africa” (2016) UN Doc CRC/C/ZAF/CO/2.

UNCRC “Concluding Observations: India” (2004) UN Doc CRC/C/15/Add.228.

UNCRC “Concluding Observations: Mozambique” (2002) UN Doc. CRC/C/114.

UNCRC “Concluding Observations: Nigeria” (2010) UN Doc CRC/C/NGA/CO/3-4.

ACERWC

AU ACERWC “Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Nigeria Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child” (2008).

ACERWC “Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its first periodic report on the implementation of the African Charter on the Rights and Welfare of the Child” (2019)

Periodic reports (per jurisdiction)

India

UNCRC “Initial reports of States parties due in 1995: India” (1997) UN Doc CRC/C/28/Add.10.

UNCRC “Second Periodic reports of State parties due in 2000: India” (2001) UN Doc CRC/C/93/Add.5.

UNCRC “Third and fourth periodic reports of State parties due in 2008: India” (2011) UN Doc CRC/C/IND/3-4.

Nigeria

UNCRC “Initial reports of State parties due in 1993: Nigeria” (1995) UN Doc CRC/C/8/Add.26.

UNCRC “Second periodic reports of State parties due in 1998: Nigeria” (2003) UN Doc CRC/C/70/Add.24.

UNCRC “Third and fourth periodic report of State parties due in 2008: Nigeria” (2008) UN Doc CRC/C/NGA/3-4.

Federal Ministry of Women Affairs “Nigeria’s Initial & First Country Periodic Report: On the Implementation of the African Union (AU) Charter on the Rights and Welfare of the Child” (2006).

South Africa

UNCRC “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2.

SA Department of Women, Children and People with Disabilities “South Africa’s periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013” (2014) (UN Doc CRC/C/ZAF/2).

SA Department of Women, Children and People with Disabilities “South Africa’s Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting period: January 2000-April 2013” (2013).

Annex II Supplementary information section B SA Department of Women, Children and People with Disabilities “South Africa’s periodic country report on the United Nations Convention on the Rights of the Child: Reporting period: January 1998-April 2013” (2014) (UN Doc CRC/C/ZAF/2) 90.

Internet sources

ACERWC “Communications” <<http://www.acerwc.org/communications/>> (accessed 01-11-2019).

ACERWC “Concluding Observations table” <<https://www.acerwc.africa/reporting-table/#>> (accessed 17-09-2019).

ACERWC “General Comments” <<https://www.acerwc.org/general-comments/>> (accessed 10-12-2019).

ACERWC “Investigations” <<http://www.acerwc.org/investigation/>> (accessed 16-09-2019).

ACERWC “Tanzania report” <<http://www.acerwc.org/download/report-on-the-investigation-mission-on-children-with-albinism-in-tanzania/?wpdmdl=9694>> (accessed 16-09-2019).

ACHPR “Instruments” <<http://www.achpr.org/instruments/achpr/impact-on-domestic-human-rights/>> (accessed 08-10-2018).

ACHPR “Ratification” <www.achpr.org/instruments/child/ratification/> (accessed 25-09-2018).

African Union “About the African Union” <<https://www.au.int/en/about/nutshell>> (accessed 10-11-2019).

African Union “Country profiles” <<https://www.au.int/web/en/countryprofiles>> (accessed 26-07-2019).

African Union “History of the AU” <<http://www.au.int/en/history/oau-and-au>> (accessed 18-12-2018).

African Union “OAU Charter” <https://www.au.int/en/sites/default/files/treaties/7759-sl-oau_charter_1963_0.pdf> (accessed 18-12-2018).

All India Council for Technical Education “Sarva Shiksha Abhiyan” <<https://www.aicte-india.org/reports/overview/Sarva-Shiksha-Abhiyan>> (accessed 03-05-2019).

ANC “A brief history of the ANC” <<https://www.anc1912.org.za/brief-history-anc>> (accessed 08-11-2019).

ANC <<https://www.anc1912.org.za/>> (accessed 08-11-2019).

BBC Minute “Why Nigeria’s educational system is in crisis- and how to fix it” <<https://www.bbc.co.uk/programmes/articles/3RbFXDdBw3g0HQG0fpyD0xF/why-nigerias-educational-system-is-in-crisis-and-how-to-fix-it>> (accessed 24-07-2019).

BBC News “Indian court orders toilets to be placed in all schools” (2012) <<https://www.bbc.com/news/world-asia-india-19811468>> (accessed 05-10-2019).

Commonwealth Governance Nigeria “Judicial System of Nigeria”
<www.commonwealthgovernance.org/countries/africa/nigeria/judicial-system>
(accessed 03-05-2019).

Community Court of Justice “ECOWAS”
<<http://www.courtecowas.org/site2012/index.php?lang=en>> (accessed 17-09-2019).

Department of Basic Education “School fees and exemptions”
<<https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolFees.aspx>> (accessed 09-11-2019).

Department of International Relations and Cooperation “Organization of African Unity (OAU)/ African Union (AU)”
<<http://www.dirco.gov.za/foreign/Multilateral/africa/oau.htm>> (accessed 26-07-2019).

Equal Education “Media statement”
<<https://equaleducation.org.za/2019/08/28/media-statement-equal-education-makes-submissions-to-supreme-court-of-appeal-as-amicus-curiae-in-rosina-komape-and-others-v-minister-of-basic-education/>> (accessed 12-11-2019).

Equal Education “National learner transport policy a step in the right direction- but not far enough”
<<https://equaleducation.org.za/2016/01/25/national-learner-transport-policy-a-step-in-the-right-direction-but-not-far-enough/>> (accessed 18-07-2019).

Equal Education “School infrastructure”
<<https://equaleducation.org.za/campaigns/school-infrastructure/>> (accessed 20-07-2019).

ESCR-net “The Government of South Africa ratifies the ICESCR” <<https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>> (accessed 10-11-2019).

ESCR-Net “The Obligation to Promote” <<https://www.escr-net.org/resources/obligation-promote>> (accessed 14-04-2019).

Federal Republic of Nigeria <<http://www.nigeria.gov.ng/>> (accessed 29-09-2018).

Government of India “Constitution of India” <<https://www.india.gov.in/my-government/constitution-india>> (accessed 03-05-2019).

Heywood H “Justice (at last) for Michael Komape’s horrific pit toilet death” (19-12-2019) *Daily Maverick* <<https://www.dailymaverick.co.za/article/2019-12-19-justice-at-last-for-michael-komapes-horrific-pit-toilet-death/>> (accessed 21-01-2020).

Holpuch A “Stolen daughters: what happened after #BringBackOurGirls?” <<https://www.theguardian.com/tv-and-radio/2018/oct/22/bring-back-our-girls-documentary-stolen-daughters-kidnapped-boko-haram>> (accessed 24-07-2019).

Humanium “Declaration of the Rights of the Child, 1959” <<http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/declaration-rights-child/>> (accessed 05-04-2017).

Indian Express “Economic Survey: Government spending on education less than 3 per cent of GDP” (27 March 2019) <<https://indianexpress.com/article/education/economic-survey-government-spending-on-education-less-than-3-per-cent-of-gdp-5045498/>> (accessed 27-03-2019).

Jimoh AM & OB Chiedu “Why I declined assent to constitution review bill, by Jonathan” *The Guardian Nigeria* (2015) <<http://guardian.ng/lead-story/why-i-declined-assent-to-constitution-review-bill-by-jonathan/>> (accessed 26-09-2018).

LRC “Norms and Standards” <<http://resources.lrc.org.za/norms-and-standards-for-school-infrastructure-2/>> (accessed 23-07-2019).

LRC “Resources” <<http://resources.lrc.org.za/introduction-3/>> (accessed 23-07-2019).

Mabuza E “Damages judgment in Komape case will hopefully bring closure: Section27” (18-12-2019) *Times Live* <<https://www.timeslive.co.za/news/south-africa/2019-12-18-damages-judgment-in-komape-case-will-hopefully-bring-closure-for-family-section27/>> (accessed 21-01-2020).

Mass Moments “Massachusetts passes first education law” <<https://www.massmoments.org/moment-details/massachusetts-passes-first-education-law.html>> (accessed 08-11-2019).

Matzat AL “Massachusetts Education Laws of 1642 and 1647” <<https://www3.nd.edu/~rbarger/www7/masslaws.html>> (accessed 08-11-2019).

Meyer D “Equal Education to march for safer schools in the Cape” <<https://www.heraldive.co.za/news/2019-10-25-equal-education-to-march-for-safer-schools-in-the-cape/>> (accessed 12-11-2019).

NCPCR “Welcome” <<http://ncpcr.gov.in/>> (accessed 12-09-2019).

NITI Aayog “SDG’s” <<http://niti.gov.in/sdgs/goals>> (accessed 18-08-2018).

NITI Aayog <<http://www.niti.gov.in/>> (accessed 18-08-2018).

NUEPA (National University of Educational Planning and Administration), “School Education in India: U-DISE 2014-15” <<http://www.dise.in/Downloads/Publications/Documents/U-DISE-SchoolEducationInIndia-2014-15.pdf>> (accessed 05-10-2019).

Planning Commission “Five Year Plans” <<http://www.planningcommission.nic.in/plans/planrel/fiveyr/welcome.html>> (accessed 29-09-2018).

Rabkin F “The law and the horror of the death of Michael Komape” (04-09-2019) *Mail and Guardian* <<https://mg.co.za/article/2019-09-04-the-law-and-the-horror-of-the-death-of-michael-komape/>> (accessed 21-01-2020).

Right to Education “South Africa ratifies the International Covenant on Economic, Social and Cultural Rights” <<http://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights>> (accessed 10-11-2019).

Right to Education “Understanding education as a right” <<http://www.right-to-education.org/page/understanding-education-right>> (accessed 14-04-2019).

Ryan C and Groundup “Judge lashes Limpopo education department over Michael Komape’s pit toilet death” (03-09-2019) *Times Live* <<https://www.timeslive.co.za/news/south-africa/2019-09-03-judge-lashes-limpopo->

education-department-over-michael-komapes-pit-toilet-death/> (accessed 21-01-2020).

Section27 “The road to justice in the case of Michael Komape” <<http://section27.org.za/2019/06/the-road-to-justice-in-the-case-of-michael-komape/>> (accessed 28-12-2019).

Statistics South Africa “General Household Survey 2013” (2014) <<https://www.statssa.gov.za/publications/P0318/P03182013.pdf>> (accessed 15-04-2019).

The Hindu “Glitches that Dog RTE Implementation” (31 March 2013) <<https://www.thehindu.com/news/national/karnataka/The-glitches-that-dog-RTE-implementation/article12407155.ece>> (accessed 05-10-2019).

UN “Sustainable development goals” <<https://sustainabledevelopment.un.org/?menu=1300>> (accessed 29-09-2018).

UN “Sustainable development” <<http://www.sustainabledevelopment.un.org/owg.html>> (accessed 29-09-2018).

UN Human Rights Office of the High Commissioner “The Universal Declaration of Human Rights” <<http://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx>> (accessed 05-04-2017).

UN Human Rights Office of the High Commissioner “Committee on the Rights of the Child” <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>> (accessed 09-11-2019).

UN Human Rights Office of the High Commissioner “Committee on the Rights of the Child: Simplified reporting procedure” <<https://www.ohchr.org/EN/HRBodies/CRC/Pages/ReportingProcedure.aspx>> (accessed 09-11-2019).

UN Human Rights Office of the High Commissioner “Human Rights Treaties Bodies – General Comments”

<<https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>> (accessed 11-07-2018).

UN Human Rights Office of the High Commissioner “International Covenant on Economic, Social and Cultural Rights” <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> (accessed 30-10-2019).

UN Human Rights Office of the High Commissioner “International Human Rights Law” <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>> (accessed 28-12-2018).

UN Human Rights Office of the High Commissioner “Status of ratification” <<http://indicators.ohchr.org/>> (accessed 10-11-2019).

UNESCO “Migration and inclusive societies” <<http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/declaration/>> (accessed 10-11-2019).

UNESCO “UNESCO in brief: Mission and Mandate” <<http://en.unesco.org/about-us/introducing-unesco>> (accessed 09-11-2019).

UNESCO <www.unesco.org> (accessed 10-11-2019).

UNICEF “About UNICEF” <http://www.unicef.org/about/who/index_introduction.html> (accessed 09-11-2019).

UNICEF “Child rights approach” <<http://www.unicef.org.uk/child-rights-partners/child-rights-based-approach/definition/>> (accessed 09-11-2019).

UNICEF “Convention on the Rights of the Child” <<http://www.unicef.org/crc/>> (accessed 05-04-2016).

UNICEF “Convention on the Rights of the Child” <<http://www.unicef.org/crc/>> (accessed 05-04-2016).

UNICEF “Convention on the Rights of the Child” <<https://www.unicef.org/child-rights-convention>> (accessed 08-11-2019).

UNICEF “Education” <<http://www.unicef.org/education/>> (accessed 09-11-2019).

UNICEF “Guiding principles” <http://www.unicef.org/crc/files/Guiding_Principles.pdf> (accessed 31-10-2019).

UNICEF “How the Convention on the Right of the Child works” <http://unicef.org/crc/index_30177.html> (accessed 08-11-2019).

UNICEF “Information Sheet: Child Rights Act” (2007) <https://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf> (accessed 10-08-2018).

UNICEF “Our mandate” <https://www.unicef.org/esaro/children_youth_5930.html> (accessed 10-11-2019).

UNICEF “UNICEF concerned about amendments to India’s Child Labour Bill” <https://www.unicef.org/media/media_92021.html> (accessed 13-10-2018).

UNICEF “UNICEF: 70 years for every child” <http://www.unicef.org/about/who/index_history.html> (accessed 09-11-2019).

UNICEF <<http://www.unicef.org/>> (accessed 10-11-2019).

United Nations “Charter of the United Nations” <<http://www.un.org/en/charter-united-nations/index.html>> (accessed 09-11-2019).

United Nations “Funds, Programmes, Specialized Agencies and Others” <<https://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/index.html>> (accessed 09-11-2019).

United Nations “Main organs” <<http://www.un.org/en/sections/about-un/main-organs/index.html>> (accessed. 09-11-2019).

United Nations “Member states” <<http://www.un.org/en/member-states/index.html#gotoS>> (accessed 09-11-2019).

United Nations “Sustainable Development” <<https://sustainabledevelopment.un.org/?menu=1300>> (accessed 29-09-2018).

United Nations “Take Action for the Sustainable Development Goals”
<<https://www.un.org/sustainabledevelopment/sustainable-development-goals/>>
(accessed 29-09-2018).

United Nations <<http://www.un.org/en/index.html>> (accessed 09-11-2019).

United Nations DAG Hammarskjöld Library “What is the difference between signing, ratification and accession of UN treaties?” <<http://ask.un.org/faq/14594>> (accessed 26-03-2020).

United Nations in India “UNCT GEFI Task Team Advocacy Campaign 2014”
<<https://in.one.un.org/page/unct-gefi-task-team-advocacy-campaign-2014/>>
(accessed 06-10-2019).

United Nations Treaty Collection “Convention on the Rights of the Child”
<https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 13-10-2018).

United Nations Treaty Collection “Convention on the Rights of the Child”
<https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec> (accessed 13-10-2018).

United Nations Treaty Collection “Glossary”
<https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#ratification> (accessed 01-11-2019).

Worldbank “Government expenditure on education, total (% of GDP)”
<<https://data.worldbank.org/indicator/SE.XPD.TOTL.GD.ZS>> (accessed 27-03-2019).

