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

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DECLARATION

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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 tot 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 Konvonsie 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 bekrachtigde 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 uiteingesit, 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 komites geïdentificeer 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 standaarde 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.
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Chapter 1:

Introduction

11 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

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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”). 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. 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. Accordingly, South Africa is bound by the provisions as set out in the CRC.

The South African Constitution (hereafter the “Constitution”) 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 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. 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

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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.


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”) serves as a vital piece of national legislation on basic education. 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. The Schools Act regulates aspects such as: admission, discipline, language policies, compulsory attendance age and religion to name but a few. The Schools Act is further analysed in chapter 5.

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

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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.


18 See section 5 5.


realisation of other human rights and provides the opportunity to rise above one’s circumstances and participate in society.\textsuperscript{22}

Basic education is also, for the most part, aimed specifically at the child.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{26}

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{23} For purposes of the dissertation a distinction is made between basic education and adult basic education.
    \item \textsuperscript{24} See section 2 4 3.
    \item \textsuperscript{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.
\end{itemize}
\end{footnotesize}
Children’s rights should also not be studied as a discipline in isolation but rather in relation to other rights.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{30}

\section{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 compliance\textsuperscript{31} that is based on the CRC and the 4-A scheme is proposed.\textsuperscript{32} Article 28 and 29 of the CRC provides the normative framework for the child’s right to basic education.\textsuperscript{33} In addition to the normative framework, a

\begin{itemize}
\item \textsuperscript{27} Human “The Theory of Children’s Rights” in \textit{Child Law} 243.
\item \textsuperscript{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. Kaimé \textit{The African Charter} 121; R Joubert “Incorporating international standards into national education law in South Africa: the accountability of the state (2014) 29 \textit{SAPL} 1 4; Liebenberg \textit{Socio-economic Rights} 241; \textit{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 G Van Bueren Introduction to Child Law in South Africa (2000) 202.
\item \textsuperscript{30} See section 2.6.
\item \textsuperscript{31} See section 2.6.
\item \textsuperscript{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.
\item \textsuperscript{33} See chapter 2 for a discussion of the CRC.
\end{itemize}
practical framework is provided by the 4-A scheme as established by Katarina Tomaševski. These two frameworks constitute the compliance model.

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. 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. 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. The examination will be centred on the history and the changing societal views of childhood, and an analysis of the legal history of the child’s right to basic education. 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.

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

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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.
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.\textsuperscript{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 India\textsuperscript{43} and Nigeria.\textsuperscript{44} Both of these jurisdictions, like South Africa, are state parties to the CRC and must fulfil the obligations created by the CRC.\textsuperscript{45} Both Nigeria and South Africa are parties to the African Charter on the Rights and Welfare of the Child (“ACRWC”),\textsuperscript{46} which allows Nigeria to provide a regional perspective.\textsuperscript{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.\textsuperscript{48} Based on this examination, South Africa’s fulfilment of its international obligations will be measured by applying the model for compliance.\textsuperscript{49} The examination

\textsuperscript{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.
\textsuperscript{43} See section 4.2.
\textsuperscript{44} See section 4.3.
\textsuperscript{47} See section 3.3.1 for a discussion of African regional law.
\textsuperscript{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.
\textsuperscript{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.

14 A brief history of basic education in South Africa

141 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

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{57} This system of discrimination continued well into the 20\textsuperscript{th} 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.\textsuperscript{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.\textsuperscript{59} It is against this background of racial inequality that the history of basic


\textsuperscript{58} Mncube & Madikizela-Madiya “South Africa: Educational Reform” in Education in Southern Africa 165.

education and the position of the child as a rights-holder will be discussed, as basic education and apartheid are so closely intertwined.\textsuperscript{60} Before the National Party came to power, the state only provided basic education to white learners.\textsuperscript{61} In 1951, the Eisele Commission’s Report\textsuperscript{62} was released.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{60} Booyse “Education Provisioning” in A History of Schooling 217.
\textsuperscript{61} Mncube & Madikizela-Madiya “South Africa: Educational Reform” in Education in Southern Africa 166.
\textsuperscript{63} Booyse “Education Provisioning” in A History of Schooling 240.
\textsuperscript{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.
\textsuperscript{65} Mncube & Madikizela-Madiya “Educational Reform” in Education in Southern Africa 166.
obedience to the apartheid regime. 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. The table below shows the statistics for 1987.

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


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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 16\(^{th}\) 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 weSizwe\(^{81}\) 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

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\(^{71}\) Mncube & Madikizela-Madiya “Educational Reform” in *Education in Southern Africa* 166.

\(^{72}\) Booyse “Education Provisioning” in *A History of Schooling* 216.


\(^{76}\) 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.


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


1994. The ANC won the election with a vast majority and Nelson Mandela became the new President of South Africa.\(^{84}\)

With the ANC\(^{85}\) winning the democratic election in 1994, came necessary radical changes with a new constitution\(^{86}\) 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

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85 The ANC is the current political party that is in power in South Africa. The party was established on the 8\(^{th}\) 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).


89 For further examination see chapter 5.

Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedom of UNESCO (“the Recommendation”), 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.”

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. This understanding bears resemblance to the meaning of education in CRC Committee General Comment No 1. 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.

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. Article 1 of the World Declaration on Education for All on “meeting basic learning needs” states the following:

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


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

"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...
in legislation\textsuperscript{105} or by the judiciary.\textsuperscript{106} It is puzzling that no explicit meaning for basic education exists within the South African legal framework, especially as it is guaranteed as an unqualified human right.\textsuperscript{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.\textsuperscript{108}

Unfortunately, the Schools Act also does not afford specific meaning to basic education. Basic education is for example only referred to \textit{once} in the Schools Act in the definition of the Minister of Basic Education – no other reference can be found.\textsuperscript{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.\textsuperscript{110}

Together, the Schools Act and the National Education Policy Act ("NEPA")\textsuperscript{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

\textsuperscript{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".

\textsuperscript{106} The scope and content of the right to basic education is dealt with in \textit{Governing Body of the Juma Musjid 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.

\textsuperscript{107} See for example \textit{Governing Body of the Juma Musjid Primary School v Essay NO 2011 8 BCLR 761 (CC)}.

\textsuperscript{108} Simbo (2012) \textit{Law, Democracy and Development} 164.


\textsuperscript{110} Liebenberg \textit{Socio-economic Rights} 243.

\textsuperscript{111} 27 of 1996.
principles of national education policy.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{115} The White Paper elaborates on the definition of basic education by relying on the World Declaration on Education for All.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{118} Furthermore, international customary law will form part of South African law – unless it is in contradiction with the Constitution or South African legislation\textsuperscript{119} and when legislation

\textsuperscript{112} See s 4(a)(ii) of the National Education Policy Act.


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

\textsuperscript{115} White Paper on Education and Training para 12.


\textsuperscript{117} White Paper on Education and Training, General Notice para 14.

\textsuperscript{118} S 39 of the Constitution.

\textsuperscript{119} S 232 of the Constitution.
is interpreted, the approach followed in international law is preferable than that which
contradicts it.\textsuperscript{120} In \textit{S v Makwanyane}\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 legislation\textsuperscript{124} this means education up to the seventh grade.\textsuperscript{125} It will be argued
in the dissertation that primary education is not equivalent to basic education.\textsuperscript{126} While
primary education is central to the concept of basic education, basic education
encompasses more than primary education.\textsuperscript{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.\textsuperscript{128} This is sometimes referred to as a
qualitative approach or the adequacy-based approach.\textsuperscript{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.

\textsuperscript{120} S 233 of the Constitution.
\textsuperscript{121} \textit{S v Makwanyane} 1995 3 SA 391 (CC).
\textsuperscript{122} Para 35.
\textsuperscript{123} McConnachie et al “The Constitution and Basic Education” in \textit{Basic Education Rights Handbook} 23.
\textsuperscript{124} The Schools Act; See section 5 5.
\textsuperscript{125} Malherbe “Education Law” in \textit{Child Law} 406.
\textsuperscript{126} Courtis & Tobin “Article 28” in \textit{Commentary} 1086.
\textsuperscript{127} Courtis & Tobin “Article 28” in \textit{Commentary} 1087.
\textsuperscript{128} Malherbe “Education Law” in \textit{Child Law} 406.
\textsuperscript{129} McConnachie et al “The Constitution and Basic Education” in \textit{Basic Education Rights Handbook} 23.
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. 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.

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. 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”. 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. It has been argued that because of this absence, the right to basic education is an unqualified right. The Constitutional Court in Governing Body of the Juma Musjid 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.

This position has been confirmed by the Constitutional Court in Governing Body of the Juma Musjid 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.

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.


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.


NO (hereafter “Juma Musjid”)\textsuperscript{136} has also confirmed this position.\textsuperscript{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.\textsuperscript{138} The right to basic education is consequently an unqualified socio-economic right that is immediately realisable.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{142}

The positive duty on the state to realise the right to basic education has also been confirmed by the Constitutional Court in \textit{Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995}.\textsuperscript{143} The Constitutional Court made the \textit{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”),\textsuperscript{144} does not merely provide for a

\begin{thebibliography}{99}
\bibitem{136} 2011 8 BCLR 761 (CC).
\bibitem{137} Constitutional Court in \textit{Governing Body of the Juma Musjid Primary School v Essay NO} 2011 8 BCLR 761 (CC); \textit{Centre for Child Law v MEC for Education} 2008 1 SA 223 (T); De Waal & Serfontein (2014) \textit{SAPL} 72; Smit (2014) \textit{SAPL} 39; Veriava & Coomans “Right to Education” in \textit{Socio-economic Rights in South Africa} 62; Veriava Realising the Right to Basic Education 1-3
\bibitem{138} Liebenberg Socio-economic Rights 244.
\bibitem{139} This position has been confirmed by the Constitutional Court in \textit{Governing Body of the Juma Musjid Primary School v Essay NO} 2011 8 BCLR 761 (CC); \textit{Centre for Child Law v MEC for Education} 2008 1 SA 223 (T); De Waal & Serfontein (2014) \textit{SAPL} 72; Smit (2014) \textit{SAPL} 39; Veriava & Coomans “Right to Education” in \textit{Socio-economic Rights in South Africa} 62; Veriava Realising the Right to Basic Education 1-3
\bibitem{140} Veriava & Coomans “Right to Education” in \textit{Socio-economic Rights in South Africa} 62.
\bibitem{141} Veriava & Coomans “Right to Education” in \textit{Socio-economic Rights in South Africa} 62.
\bibitem{142} Veriava & Coomans “Right to Education” in \textit{Socio-economic Rights in South Africa} 62.
\bibitem{143} 1996 3 SA 165 (CC).
\bibitem{144} 200 of 1993.
\end{thebibliography}
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 consists of the normative and practical frameworks that will be established in chapter 2.

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146 For an in-depth discussion see section 2.5 of chapter 2.
148 CESC General Comment No 13 para 6; K Tomševski Human rights obligations: Making education available, accessible, acceptable and adaptable (2001); K Tomševski Human rights obligations: The 4-A scheme (2006); Tomševski Primers No. 3 (2001); See section 2.5.
149 Section 2.5.
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 neglect\(^ {158}\) 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 equality\(^ {160}\) 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, the right to further education as well as the right to information, the right to health care and social security, the right to administrative action, and lastly the right to freedom and security of the person.

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.

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 CESC R General Comment No 13 para 1; Governing Body of Juma Musjid 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.\(^\text{168}\) 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.\(^\text{169}\) 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.\(^\text{170}\)

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.\(^\text{171}\) It is generally accepted that the Convention on the Rights of the Child ("CRC")\(^\text{172}\) provides the framework for the recognition and implementation of children’s rights.\(^\text{173}\) Articles 28 and 29 of the CRC therefore provides the normative framework.\(^\text{174}\) 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.\(^\text{175}\)

\(^\text{168}\) See section 2.2.
\(^\text{169}\) See section 2.2.
\(^\text{170}\) Section 2.3.
\(^\text{171}\) See section 2.6.
\(^\text{173}\) Section 2.4.
\(^\text{174}\) See section 2.4.
\(^\text{175}\) See section 2.5. Tomaševski Primers No. 3; Tomaševski Human Rights Obligations (2006); CESC General Comment No 13 (21st session, 1999) “The Right to Education (art 13)” UN Doc E/C.12/1999/10 (hereafter CESC 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. 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. 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.

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

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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.


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. 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 provides some interesting background and arguments relating to childhood. 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. 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.


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). Only from the 17th century and onwards were children no longer dressed as adults but in clothes specific to their age group.

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. It is argued that this change can be linked to education as the education of children became the cornerstone of civilisation during this period. 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. 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. 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. 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; Holzshieter 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.


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.


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

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. This of course is in contrast with the modern position, where the state is the primary duty bearer. 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.

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. 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. The child-centred approach

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


199 Beiter Protection of the Right to Education 3, 18; Kalantry et al (2010) Human Rights Quarterly 262; Courts & 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.


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.

231 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. During this time period, 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, the American Declaration of Independence, and the French Declaration of the Rights of Man and of the Citizen did not make provision for the right to education.

Instead, human rights to health, shelter and food were given priority as they were necessary for survival, especially when resources were limited. A series of treaties 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. As far as the education of children was concerned, the focus was on

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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.


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.

parental rights and responsibilities to ensure that their children’s education was realised. 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.

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. The human rights rationale for compulsory schooling was tied to the prohibition against child labour, as expressed in the International Labour Organization’s conventions. 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.

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"). The Geneva Declaration is however not legally binding and was rather considered as an aspirational document, which sets out moral duties for signatories. 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. It should be noted that even

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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.
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; Holzscheiter 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{225} Another non-binding document however followed, namely the Declaration

\textsuperscript{221}Buck International Child Law 22; Van Bueren Rights of the Child 8.
\textsuperscript{222}Buck International Child Law 22; Van Bueren Rights of the Child 8.
\textsuperscript{223}Beiter Protection of the Right to Education 25; Principles I, II and IV can be read to include a right to education.
\textsuperscript{224}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.
\textsuperscript{225}Beiter Protection of the Right to Education 86.
of the Rights of the Child 1959 ("1959 Declaration").\textsuperscript{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.\textsuperscript{227} The 1959 Declaration also marked the first time that the child’s right to education was recognised.\textsuperscript{228}

The 1959 Declaration consists of 10 principles, with principle 7 focusing on the child’s right to education.\textsuperscript{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 culture\textsuperscript{230} 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.\textsuperscript{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

\begin{itemize}
\item Detrick Commentary on the Convention 28; Van Bueren Rights of the Child 232.
\item 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.”
\item 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.
\item See section 2 4.
\end{itemize}
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
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.\textsuperscript{238} With the principle of consensus at the centre of the drafting process, complicated negotiations ensued.\textsuperscript{239} In order for provisions to be accepted they required language of a more flexible and vague nature.\textsuperscript{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.\textsuperscript{241} During the drafting of the CRC, the changing perspective of the child played a vital role.\textsuperscript{242} The drafters realised that a shift was necessary.\textsuperscript{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.\textsuperscript{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.\textsuperscript{245}
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. 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. 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. The first report is due within two years of the date that the CRC entered into force in that specific state. After the initial report, periodic reports should be submitted to the CRC Committee every five years. 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.

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. States are also required to make their reports available to the public. In 2014, a simplified reporting procedure was adopted in order to strengthen and enhance the effective functioning of the human rights treaty body system. The resolution, 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

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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.


dialogue regarding the implementation of the CRC. Shorter reports and documentation are mandated as the word count has been limited depending on the type of document. The resolution also encourages more focused and shorter concluding observations and recommendations from the CRC Committee. State parties whose reports are due from 1 September 2019, will be able to make use of this more simplified reporting procedure. 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. 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.

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. It is also acknowledged in the

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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. 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. The child-centred approach is strengthened by the four guiding principles of the CRC.

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. This means that they can aid in the development and implementation of policy. The guiding principles are representative of the key themes of the CRC and therefore underpin all other provisions of the CRC. 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. The four guiding principles are: non-discrimination; the best interests of the child; 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.


268 Fottrell “One Step Forward” in Revisiting Children’s Rights 5.


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 2.4.3.

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

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. The guiding principles ultimately represent a litmus test for the implementation of the child’s rights in terms of public policy. They offer a strong outline for a child-friendly focus that should be applied in relation to state obligations. 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.

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, while article 29 sets out the aims of education and the establishment of educational institutions. 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.

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


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.\textsuperscript{282} Progressive realisation of the right to education and equal opportunities are also emphasised in article 28(1).\textsuperscript{283} Courtis 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.\textsuperscript{284} They state that:

\textsuperscript{282} Courtis & Tobin “Article 28” in Commentary 1062.

\textsuperscript{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.

\textsuperscript{284} Courtis & 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.”

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

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

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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 à l'instruction) and “education” (droit à 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 is not a new concept in international law. Compulsory education in this sense relates to the belief that education cannot be denied to the child below a certain level. The relationship between the child, his or her parents and the state becomes relevant when discussing compulsory education. “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. 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. 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.

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

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.

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).


Verheyde A Commentary on the UNCRC Article 28 23.

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).

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.

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.

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.\textsuperscript{303} States are however obligated to provide a minimum age for child labour and ILO-Convention No 138\textsuperscript{304} serves as the reference point for states in making their determination.\textsuperscript{305}

When making education compulsory, states should take into account the accessibility of education.\textsuperscript{306} This includes the abolishment of school registration fees\textsuperscript{307} and the promotion of school attendance.\textsuperscript{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.\textsuperscript{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.\textsuperscript{310}

\textsuperscript{303} Art 32 states the following:
"1. States Parties recognize 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 \textit{A Commentary on the UNCRC Article 28} 25.

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

\textsuperscript{305} Verheyde \textit{A Commentary on the UNCRC Article 28} 25; Holzscheiter \textit{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.

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

\textsuperscript{307} Verheyde \textit{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.

\textsuperscript{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 \textit{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 \textit{Rights of the Child} 238-239.


\textsuperscript{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 \textit{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. In the fulfilment of this obligation, preference should be given to the promotion of education in developing countries. 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. 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.

The right to receive education is viewed as the core of the right to education. This of course does not mean that the right to education is only concerned with the child receiving an education. 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. 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

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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 Mehide 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 realisation 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 Mehedii, 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; Courtis & Tobin “Article 28” in Commentary 1059-1060.
child labour that hinders their education.\textsuperscript{318} Vulnerable children also receive special protection in order to ensure that their right to education is realised.\textsuperscript{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.\textsuperscript{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.

\textbf{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 civilisations different from his or her own;

\textsuperscript{318} Art 28(2) refers to appropriate school discipline; Verheyde \textit{A Commentary on the UNCRC Article 28 9}; CRC Committee \textit{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 recognised 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.”

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

\textsuperscript{320} “States Parties recognise the right of the child to education”; Verheyde \textit{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 empowering\(^\text{321}\) and that educational processes must be based on the principles expressed in the CRC.\(^\text{322}\) 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.\(^\text{323}\)

With specific reference to article 29(1), the CRC Committee issued CRC General Comment No 1 (“CRC Committee General Comment No 1”).\(^\text{324}\) The purpose of the CRC General Comment No 1 is to provide clarity and content to article 29(1).\(^\text{325}\) Even with the CRC Committee focusing its first general comment on the aims of education, article 29 is sometimes overlooked.\(^\text{326}\) Fittingly, the significance of article 29 is emphasised from the very beginning in CRC Committee General Comment No 1.\(^\text{327}\) 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.\(^\text{328}\) 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.\(^\text{329}\) Article 29(1), like article 28, also argues for a wider interpretation of education as the concept of education in article 29

\(^\text{321}\) CRC Committee \textit{General Comment No 1} para 2; Courtis & Tobin “Article 28” in \textit{Commentary} 1059-1060.
\(^\text{322}\) CRC Committee \textit{General Comment No 1} para 2; In this regard the CRC Committee refers to the CESCR \textit{General Comment No 13}.
\(^\text{323}\) CRC Committee \textit{General Comment No 1} para 2.
\(^\text{324}\) CRC Committee \textit{General Comment No 1}.
\(^\text{325}\) 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.
\(^\text{327}\) CRC Committee \textit{General Comment No 1} para 1; “Article 29, paragraph 1, of the Convention on the Rights of the Child is of far-reaching importance.”
\(^\text{328}\) Lundy & Tobin “Article 29” in \textit{Commentary} 1117.
\(^\text{329}\) Lundy & Tobin “Article 29” in \textit{Commentary} 1117.
goes beyond schooling and access to education.\textsuperscript{330} Article 29 therefore elaborates on the content of education.\textsuperscript{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.\textsuperscript{332} This provision builds on the 1959 Declaration, which provides that education must develop the child’s abilities and moral and social responsibility.\textsuperscript{333}

The interrelated nature of the CRC is fittingly illustrated in article 29.\textsuperscript{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.\textsuperscript{335} CRC Committee General Comment No 1 refers not only to the guiding principles\textsuperscript{336} but also to the following rights that can be identified in article 29(1): the rights and responsibilities of parents;\textsuperscript{337} the child’s right to freedom of expression;\textsuperscript{338} the right to freedom of thought, expression and religion;\textsuperscript{339} the right to access to information;\textsuperscript{340} the rights of mentally or physically disabled children;\textsuperscript{341} the right of access to health care services and education relating to health;\textsuperscript{342} and the rights of children belonging to ethnic, linguistic and religious minority groups.\textsuperscript{343}

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

\textsuperscript{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 Musjid Primary School v Essay NO 2011 B 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).

\textsuperscript{331} CRC Committee General Comment No 1 para 3.

\textsuperscript{332} Art 29(1)(a) of the CRC; CRC Committee General Comment No 1 para 2.

\textsuperscript{333} Principle 7 of the 1959 Declaration; See section 2.3.1 for a discussion of the 1959 Declaration.

\textsuperscript{334} CRC Committee General Comment No 1 para 6.

\textsuperscript{335} CRC Committee General Comment No 1 para 6; Courtis & Tobin “Article 28” in Commentary 1059-1060.

\textsuperscript{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.

\textsuperscript{337} Arts 5 and 18 of the CRC; CRC Committee General Comment No 1 para 6.

\textsuperscript{338} Art 16 of the CRC; CRC Committee General Comment No 1 para 6.

\textsuperscript{339} Art 14 of the CRC; CRC Committee General Comment No 1 para 6.

\textsuperscript{340} Art 17 of the CRC; CRC Committee General Comment No 1 para 6.

\textsuperscript{341} Art 23 of the CRC; CRC Committee General Comment No 1 para 6.

\textsuperscript{342} Art 24 of the CRC; CRC Committee General Comment No 1 para 6.

\textsuperscript{343} Art 30 of the CRC; CRC Committee General Comment No 1 para 6.

\textsuperscript{344} CRC Committee General Comment No 1 para 9; Courtis & 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”.

Education in terms of article 29 must be aimed at developing the 
child’s personality, talents, and abilities. It also emphasises a subjective approach 
that embraces the child’s unique characteristics, abilities, learning needs and 
interests. Education should furthermore be contextualised in order to be appropriate 
to the child’s culture, environment and social environment. 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. 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.

Article 29 refers to education that is aimed at developing the child’s respect for 
human rights and respect for other civilisations, and preparing the child for life in 
a free society in accordance with peace, tolerance and equality. These provisions 
share a strong link with the principle of non-discrimination espoused in article 2 of the 
CRC – the right to non-discrimination. By including human rights education that is 
centred on the child’s community, contextualisation once more takes place. 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.

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.\textsuperscript{357} The content of human rights as recognised by international instruments should form part of human rights education.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 Courtis and Tobin describe as a “symbiotic relationship”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{365} For the most part, states

\textsuperscript{357} See specifically art 29(1)(b); CRC Committee \textit{General Comment No 1} para 15.
\textsuperscript{358} CRC Committee \textit{General Comment No 1} para 15.
\textsuperscript{359} CRC Committee \textit{General Comment No 1} para 19.
\textsuperscript{360} CRC Committee \textit{General Comment No 1} para 19.
\textsuperscript{361} CRC Committee \textit{General Comment No 1} para 17.
\textsuperscript{362} CRC Committee \textit{General Comment No 1} para 17.
\textsuperscript{363} Courtis & Tobin “Article 28” in Commentary 1057-1059; Detrick \textit{Commentary on the Convention} 22.
\textsuperscript{364} Arendse (2011) \textit{PELJ} 108; Courtis & 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.
\textsuperscript{365} Verheyde \textit{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. The CRC Committee’s approach is also illustrated in article 29(1)(b), which refers to human rights education.

In terms of the holistic nature of the CRC, articles 28 and 29 should also be read with the other provisions of the CRC. 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. A short discussion of how the four guiding principles are applicable to articles 28 and 29 accordingly follows.

The first guiding principle is found in article 2 of the CRC, which sets out the position regarding non-discrimination. 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.

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. 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.

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; Courtis & 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 3.
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. 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. Article 29(1) thus recognises that children are individuals with unique qualities.

The child’s right to life, survival and development is recognised in article 6 of the CRC. 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. 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. 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 dimensions of the child’s well-being.

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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.


379 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.\textsuperscript{381} The educational process should accordingly make provision for the 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{384} When applying this principle in the context of education, it means that education must enable the child to express his or views as set out in article 12.\textsuperscript{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.\textsuperscript{386}

\textsuperscript{381} CRC Committee General Comment No 5 (2003) para 12.
\textsuperscript{382} Arendse (2011) PELJ 108.
\textsuperscript{383} Detrick Commentary on the Convention 214-215.
\textsuperscript{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).
\textsuperscript{385} CRC Committee General Comment No 1 para 8.
\textsuperscript{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. The scheme was first set out in her report and then in her subsequent publications. It was then applied in CESCR General Comment No 13 and by the CRC Committee in their monitoring of State Parties’ reports. The 4-A scheme includes: availability, accessibility, acceptability and adaptability. 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. The 4-A scheme thereby provides an outline for the minimum essentials required to ensure that states deliver the core obligations that are necessary for the realisation of the right to basic education. 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. 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.

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387 See section 1 1; Courtis & Tobin “Article 28” in Commentary 1067.
390 CESCR General Comment No 13 para 6; Courtis & Tobin “Article 28” in Commentary 1067.
391 Tomaševski Primers No. 3 (2001); CESCR General Comment No 13 (1999) para 6.
392 Courtis & Tobin “Article 28” in Commentary 1067.
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.
25.1 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.\(^\text{397}\) This requires states to provide a sufficient quantity of functioning educational institutions for children.\(^\text{398}\) 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.\(^\text{399}\) States are obliged to ensure that children have drinking water, sanitation facilities, desks and chairs and classrooms in their schools.\(^\text{400}\) 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.\(^\text{401}\)

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.\(^\text{402}\) 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.\(^\text{403}\)

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\(^{397}\) Tomaševski *Preliminary Report of the Special Rapporteur on the Right to Education* para 51.


\(^{399}\) 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); Courtis & Tobin “Article 28” in *Commentary* 1067.

\(^{402}\) CESCR *General Comment No 13* para 6(a); Courtis & Tobin “Article 28” in *Commentary* 1067.

\(^{403}\) CESCR *General Comment No 13* para 6(a); Courtis & 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. Accessible education has three overlapping dimensions. The first is that the accessibility of education is directly related to the principles of non-discrimination and equality. Support for equal education is provided for in article 28 of the CRC. 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. 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. 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. 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. As education should be affordable in order for children to access it, the concept of free education becomes relevant. When
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{415} The accessibility and availability of education is also closely related to the two elements of basic education: free and compulsory.\textsuperscript{416} This centres on the argument that education cannot truly be universally available, accessible and compulsory unless provision is made for free education.\textsuperscript{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.\textsuperscript{418} This element requires that schools conform to the criteria developed by states and that parents and children view the education as acceptable.\textsuperscript{419} The quality of education also forms part of the

\textsuperscript{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).

\textsuperscript{414} Tomaševski \textit{Human Rights Obligations in Education} 45.

\textsuperscript{415} Verheyde \textit{A Commentary on the UNCRC Article} 28 15.

\textsuperscript{416} See section 2.5 of chapter 2.

\textsuperscript{417} Tomaševski \textit{Human Rights Obligations in Education} 24; See section 2.4.

\textsuperscript{418} CESC\textit{R General Comment No 13 para 6(c); See section 1.2 of Chapter 1; Tomaševski Primers No. 3 (2001); Pendlebury et al \textit{South African Child Gauge} 20; Joubert (2014) \textit{SAPL} 6; Kalantry et al (2010) \textit{3 Human Rights Quarterly} 278; Arendse (2011) \textit{PELJ} 111-112; Veriava & Coomans "Right to Education" in Socio-economic Rights in South Africa 71; Courts & Tobin "Article 28" in Commentary 1069.

acceptability of education.\textsuperscript{420} The CRC Committee\textsuperscript{421} has stressed the importance of ensuring that the quality of education must be in line with international instruments, such as the Jomtien Declaration\textsuperscript{422} and the Dakar Framework for Action.\textsuperscript{423} Thus, while the more quantitative elements of education are of course very important,\textsuperscript{424} the quality of education should not be overlooked.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{428} Education should also be adaptable in order to provide for the specific needs of individual children. Flexibility is central to adaptability.\textsuperscript{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.\textsuperscript{430} UNICEF has also identified several factors that should be taken into account when

\textsuperscript{420} Courtis & Tobin “Article 28” in Commentary 1069.

\textsuperscript{421} See section 2 4 2.

\textsuperscript{422} See section 3 3 2 of chapter 3; Note that this is a non-binding international instrument; Courtis & Tobin “Article 28” in Commentary 1069.

\textsuperscript{423} See section 3 3 2 which discusses the Dakar Framework for Action, which is a non-binding international instrument; Courtis & Tobin “Article 28” in Commentary 1069.

\textsuperscript{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; Courtis & Tobin “Article 28” in Commentary 1069.

\textsuperscript{425} Courtis & Tobin “Article 28” in Commentary 1069.

\textsuperscript{426} Tomaševski Preliminary Report of the Special Rapporteur on the Right to Education para 67.

\textsuperscript{427} See section 1 4 of Chapter 1; Tomaševski Primers No. 3 (2001); CESC R General Comment No 13 para 6(d); Kalantr y 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; Courtis & Tobin “Article 28” in Commentary 1070.

\textsuperscript{428} Tomaševski Preliminary Report of the Special Rapporteur on the Right to Education para 71.


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

\textsuperscript{431} Factors include gender, culture, language, mental disabilities, physical disabilities and economic disparities.

\textsuperscript{432} Courtis & Tobin “Article 28” in Commentary 1070.

\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{436}

Physical accessibility requires schools to be within a safe geographic location that can be accessed by children.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{440}

\begin{footnotes}
\item[434] See section 2 5 2; CESCR \textit{General Comment No 13} para 6(b)(i)-(iii).
\item[435] Art 29(1)(a) of the CRC.
\item[436] See section 2 4 4 1; CESCR \textit{General Comment No 13} para 6(b)(iii).
\item[437] CESCR \textit{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.
\item[438] Art 2 of the CRC; section 2 4 4 3.
\item[439] CESCR \textit{General Comment No 13} para 6(a); See section 2 5 1.
\item[440] CESCR \textit{General Comment No 13} para 6(a); See section 2 5 1.
\end{footnotes}
262 The child’s rights in basic education

Rights in basic education includes the right to dignity,\textsuperscript{441} the right to equality;\textsuperscript{442} the right to freedom of expression;\textsuperscript{443} the right to an environment that is not harmful to one’s health;\textsuperscript{444} and with regard to children specifically, the right to protection from abuse and neglect\textsuperscript{445} as well as the right to basic nutrition\textsuperscript{446} 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.\textsuperscript{447} The CRC, for example, refers to dignity several times in its preamble\textsuperscript{448} and specifically in article 28(2) with reference to school discipline.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.

\textsuperscript{441} Preamble to the CRC; article 28(2) of the CRC: s 10 of the Constitution.
\textsuperscript{442} Preamble and arts 2 and 29(1)(d) of the CRC; s 9 of the Constitution.
\textsuperscript{443} Arts 12 and 13 of the CRC; s 16 of the Constitution.
\textsuperscript{444} Preamble and art 29(1)(e) of the CRC; s 24 of the Constitution.
\textsuperscript{445} Arts 19, 34 and 39 of the CRC; s 28(1)(d) of the Constitution.
\textsuperscript{446} Arts 24(c) and (e) and 27 of the CRC; s 28(1)(c) of the Constitution.
\textsuperscript{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.
\textsuperscript{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...”.
\textsuperscript{449} See section 2 4 4 1 of chapter 2.
\textsuperscript{450} CESCR General Comment No 13 para 6(c).
\textsuperscript{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.\footnote{See section 2 4 4 3 below for a discussion of the principle of non-discrimination as set out in the CRC.} 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.\footnote{Detrick Commentary on the Convention 72.} 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.\footnote{CRC Committee General Comment No 1 para 11.} 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.\footnote{CRC Committee General Comment No 1 para 10.} 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.\footnote{CRC Committee General Comment No 1 para 11.}

Equality is not only connected to the principle of non-discrimination but also adaptability.\footnote{Section 2 5 4.} 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.\footnote{See section 1 4.}

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.\footnote{See section 2 4 4 3.}

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.\footnote{See also arts 20 and 21 of the ACRWC.} 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
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. 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. 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. The right to basic nutrition is in most instances related to the child’s right to health. Provision should also be made for educational measures about nutrition.

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. 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. 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. 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

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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.\textsuperscript{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;\textsuperscript{471} human dignity;\textsuperscript{472} the right to further education;\textsuperscript{473} as well as the right to information;\textsuperscript{474} the right to health care and social security;\textsuperscript{475} the right to administrative action;\textsuperscript{476} the right to freedom and security of the person;\textsuperscript{477} the right to freedom of religion, belief and opinion;\textsuperscript{478} and also the right freedom of expression and association.\textsuperscript{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-discrimination\textsuperscript{480} and the concept of adaptability.\textsuperscript{481} Education should therefore be adaptable in order to meet the needs of society and to provide for diverse social and cultural communities.\textsuperscript{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.\textsuperscript{483} This means that the right to dignity is also related to the guiding principle of non-discrimination\textsuperscript{484} and also respect for the

\textsuperscript{470} Art 30 of the CRC.
\textsuperscript{471} Preamble and arts 2 and 29(1)(d) of the CRC; s 9 of the Constitution.
\textsuperscript{472} Preamble of the CRC; art 28(2) of the CRC; s 10 of the Constitution.
\textsuperscript{473} Arts 28(1)(b) and (c); s 28(1)(b) of the South African Constitution.
\textsuperscript{474} Arts 13, 17, 23 and 28(1)(d) of the CRC; s 22 of the Constitution.
\textsuperscript{475} Arts 24, 26 and 32 of the CRC; s 27 of the Constitution.
\textsuperscript{476} Art 12 of the CRC; s 33 of the Constitution.
\textsuperscript{477} Arts 12 and 37 of the CRC; s 12 of the Constitution.
\textsuperscript{478} Art 14 of the CRC; s 15 of the Constitution.
\textsuperscript{479} Art 13 and 15(1) of the CRC; s 16 of the Constitution.
\textsuperscript{480} Art 2 of the CRC; See sections 2 4 4 3.
\textsuperscript{481} Section 2 5 4.
\textsuperscript{482} CESCR General Comment No 13 para 6(d).
\textsuperscript{483} CESCR General Comment No 13 para 6(d).
\textsuperscript{484} Art 2 of the CRC.
child’s views.\textsuperscript{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 information\textsuperscript{486} and the right to receive and impart information and ideas of all kinds.\textsuperscript{487} The education clause provides that educational information should be available and accessible to all children.\textsuperscript{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”\textsuperscript{489} as well as the right to social security.\textsuperscript{490} As discussed above, the child’s health is related to the guiding principle of the child’s right to life, survival and development.\textsuperscript{491}

Another element in this category is the right to administrative actions. In this respect adaptability is applicable.\textsuperscript{492} The CRC\textsuperscript{493} 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 the express his or her opinion and to

\textsuperscript{485} Art 12 of the CRC.
\textsuperscript{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.”
\textsuperscript{487} Art 13(1) of the CRC; This right is also related to freedom of expression.
\textsuperscript{488} Art 28 (1)(d) of the CRC; See sections 2 5 1 and 2 5 2.
\textsuperscript{489} Art 24(1) of the CRC; Art 24(2) refers to specific measures to be implemented to ensure the realisation of this right.
\textsuperscript{490} Art 26 of the CRC.
\textsuperscript{491} Art 6 of the CRC; See section 2 4 4 3.
\textsuperscript{492} CESCR \textit{General Comment No 13} para 6(d).
\textsuperscript{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. Focus is therefore on liberty and the administration of juvenile justice. 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. This element is centred on adaptability as education should be aimed at being inclusive of different religions and beliefs and also adaptable depending on the community. Children should also be afforded the opportunity to express their views if their education is not inclusive.

The last right through basic education, is the right to freedom of expression and association. This right is also linked to the guiding principle of respect for the child’s views. 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. 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.

494 Art 37(b) of the CRC.
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 CESC R General Comment No 13 para 6(d); See section 2 5 4.
499 Sections 2 4 4 3.
500 Arts 13 and 15 of the CRC.
501 Art 12 of the CRC; Gose African Charter 128-135.
502 CESC R General Comment No 13 para 28; Gose African Charter 128; See section 2 4 4 3.
503 CESC R 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 historical\(^{504}\) and legal analysis\(^{505}\) 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.


child’s right to education. 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.

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. While the Convention on the Rights of the Child (“CRC”) 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 instruments as sources of the child’s right to basic education. Building on the child-centred approach founded in the normative framework, 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

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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.
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.\textsuperscript{518} The second part of the chapter is dedicated to international instruments that provide specifically for the child’s right to basic education.\textsuperscript{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.\textsuperscript{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”),\textsuperscript{521} the United Nations Educational, Scientific and Cultural Organization (“UNESCO”),\textsuperscript{522} and the United Nations Children’s Fund (“UNICEF”).\textsuperscript{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.\textsuperscript{524} South Africa has been a member state of the United Nations since the

\textsuperscript{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.

\textsuperscript{519} See section 3.3 for a discussion of the ACRWC and the Education for All movement.

\textsuperscript{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.


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

The second international organisation of importance is UNESCO, which has a wide range of interests that it seeks to promote. UNESCO was founded in 1945 in response to the notion that peace must be established on the foundation of moral and intellectual solidarity. 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.” Central to UNESCO’s mission is the advancement of the right to education, as recognised in the Universal Declaration of Human Rights (“UDHR”), and the provision of free, compulsory and universal primary education. UNESCO is also the lead coordinator of the Education for All movement and aims to act as catalyst for international cooperation.

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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.
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”).
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.
UNICEF is the third prominent body and became a permanent part of the United Nations in 1953. 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. UNICEF advocates for measures to be realised that give children the best possible start in life with education rights identified as a focus area.

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 obligations or serve as guidelines and tools for interpretation and development of rights. The UN, UNESCO and UNICEF have also provided the international community with standard-setting instruments. With the ratification or accession of international

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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.
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 depository 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 depository, 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

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\(^{543}\) 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; Belter 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.


\(^{548}\) 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 Discrimination\textsuperscript{549} and the Convention Against Discrimination in Education ("CDE").\textsuperscript{550}

3.2.1 The International Bill of Human Rights

At international level, the UN Charter\textsuperscript{551} for the first time provided a direct and clear commitment by the international community to protect human rights.\textsuperscript{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.\textsuperscript{553} The International Bill of Human Rights serves as the foundation of international human rights law and consists of three legal instruments: the UDHR,\textsuperscript{554} the International Covenant on Economic, Social and Cultural Rights ("ICESCR")\textsuperscript{555} and lastly the International Covenant on Civil and Political Rights ("ICCPR").\textsuperscript{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.\textsuperscript{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.\textsuperscript{558} The second declaration, the UDHR, is still viewed as a ground-breaking document for the recognition of fundamental human rights.\textsuperscript{559} Unfortunately, the declaration is non-

\begin{flushright}
549 \textsuperscript{See section 3.2.2.} \\
550 \par UNSECO General Conference 11\textsuperscript{th} 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 \par 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 \par Beiter Protection of the Right to Education 89; Arendse (2011) PELJ 98. \\
553 \par Beiter Protection of the Right to Education 89. \\
554 \par Section 3.2.1.1. \\
555 \par 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 \par 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 \par See section 3.2.1.4. \\
\end{flushright}
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


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.

Daudet & Singh Analysis of UNESCO’s Standard-setting Instruments 15.

Beiter Protection of the Right to Education 92.

Beiter Protection of the Right to Education 92.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{569} The dominant view of the UDHR is that some of its provisions form part of customary international law.\textsuperscript{570} Hannum does however note that only a minority support the UDHR as a whole, as part of customary international law.\textsuperscript{571} In order for a rule or right to form part of customary international law, two elements must be present: the practice must

\textsuperscript{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.

\textsuperscript{567} Beiter \textit{Protection of the Right to Education} 93.

\textsuperscript{568} Tiwary \textit{Education, Science and Culture} 69.

\textsuperscript{569} Singh (2005) \textit{IJELP} 105; Daudet & Singh \textit{Analysis of UNESCO’s Standard-setting Instruments} 14; Beiter \textit{Protection of the Right to Education} 44-45.


\textsuperscript{571} Hannum (1998) \textit{Health and Human Rights} 148.
generally be adhered to by states (usuus) and the practice must be regarded as legally binding (opinion iuris). Beiter is also of the opinion that only certain elements of article 26 of the UDHR should form part of customary international law. 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. The 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.

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. The ICESCR and the ICCPR consequently codified the rights in the UDHR in two separate and binding covenants.

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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;
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.
576 Holzscheiter Children’s Rights in International Politics 127; Buck International Child Law 61.
3 2 1 2 The ICESCR

The ICESCR\(^{578}\) 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,
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


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.

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

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.

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

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.\textsuperscript{592}

\textbf{3 2 1 3 The ICCPR}

The ICCPR is the third instrument that forms part of the International Bill of Rights.\textsuperscript{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.\textsuperscript{594} Article 18 deals with the right to freedom of thought, conscience and religion that is afforded to all,\textsuperscript{595} and article 18(4) specifically refers to religious and moral education.\textsuperscript{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.\textsuperscript{597} State parties to the ICCPR must respect the rights of parents when dealing with education rights.\textsuperscript{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.\textsuperscript{599} The influence of the UDHR on the ICCPR is illustrated when comparing article 26(3) of the UDHR\textsuperscript{600} to article 18(4) of the ICCPR.

\begin{footnotesize}
\begin{enumerate}
\item Beiter Protection of the Right to Education 95; Art 26(3) of the UDHR.
\item Beiter Protection of the Right to Education 102.
\item Art 18 of the ICCPR.
\item “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.
\item “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.
\item In such a diverse society as South Africa religious freedom and education has been closely linked; See further chapter 5.
\item Art 18(4) of the ICCPR; Beiter Protection of the Right to Education 103.
\item Beiter Protection of the Right to Education 103.
\item “Parents have a prior right to choose the kind of education that shall be given to their children.”
\end{enumerate}
\end{footnotesize}
the ICCPR 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. This is in contrast to the CRC, which explicitly affords the right to education to the child. 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. 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. The instruments are structured and worded in such a way that emphasises the child as vulnerable and in need of protection. 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. 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.

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 recognise 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. Three instruments are important for the dissertation: CEDAW, the International Convention on the Elimination of All Forms of Racial Discrimination, 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.

The purpose of CEDAW is to promote equality and to ensure that women are provided with access to realise their right to education. CEDAW 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”. Article 10 provides for specific measures that

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610 See section 1.4.


612 Beiter Protection of the Right to Education 110; Viljoen International Human Rights Law 120-124.

613 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. The provision includes for example equality in access to studies, scholarships, further education, elimination of gender stereotyped roles in education, and access to teaching staff and schools of the same standard.

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. Article 7 obligates states to adopt measures in the educational field in order to combat prejudices.

The CDE 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. The concept of free and compulsory education is also highlighted in the CRC. 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. 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.”

See art 10(a)-(h).
Art 10(a).
Art 10(d).
Art 10(e).
Art 10(c).
Art 10(b).
Art 5 refers to race, colour, or national or ethnic origin.
For more on this Convention see Viljoen International Human Rights Law 88-96.
See section 2 4 of chapter two.
Art 5(a) of the Convention against Discrimination in Education.
consistent with personal convictions is not acceptable. The third aim highlights the education rights of minority groups.

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.

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. The CRC as the foundation of the child-centred approach has also been thoroughly discussed with regard to the child’s right to education. 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”) and the Education for All movement.

3.3.1 African regional law

In order to establish South Africa’s international obligations, 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

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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.
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

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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.
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 group\(^{641}\) 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 the African Unity (“OAU”),\(^{645}\) is responsible for the adoption of regional instruments.\(^{646}\) By


\(^{644}\) 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, displacement 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 Union (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
adoption of regional instruments, African states have created a mechanism that
recognises and entrenches African cultural values, events and circumstances that
are central and specific to the African continent, and distinctive African concerns for
collective rights. 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. South Africa became the
53rd member of the AU on the 23rd of May 1994.

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”). Not only was the 1979 Declaration adopted
before the CRC but it also provided for the child’s education. 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. The
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.\textsuperscript{655} For these reasons, the ACRWC will form the focus of the analysis in this section of the dissertation.\textsuperscript{656} The ACRWC is representative of the value that regional law can add to the development of international law that concerns children.\textsuperscript{657} Furthermore, it is indicative of how the region prioritises the importance of children’s rights without affecting the status of the CRC.\textsuperscript{658}

The African counterpart to the CRC Committee, is the African Committee of Experts on the Rights and Welfare of the Child ("ACERWC").\textsuperscript{659} Functions of the ACERWC include promoting and protecting the rights enshrined in the ACRWC;\textsuperscript{660} monitoring the implementation and ensuring the protection of the rights in the ACRWC;\textsuperscript{661} providing interpretation of the provisions in the ACRWC;\textsuperscript{662} and performing tasks entrusted to it by designated groups and bodies.\textsuperscript{663}

With reference to the ACERWC’s function of the promotion and protection of rights, the ACRWC provides examples and guidelines for these duties.\textsuperscript{664} The ACERWC has the power to assess problems in Africa relating to the child and subsequently makes

\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{660} Art 42(a) of the ACRWC.
\textsuperscript{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.
\textsuperscript{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.”
\textsuperscript{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.
\textsuperscript{664} See arts 42(a)(i) – (iii) of the ACRWC.
recommendations to relevant governments and issue General Comments. Although
the ACERWC has issued several General Comments thus far, there is no General
Comment yet dealing specifically with education. Article 43 of the ACRWC provides
for a reporting system, similar to that of the CRC Committee. The ACRWC also
makes provision for two further functions: communications and investigations.
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. 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.

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).
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.
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.  

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.

3312 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 CRC and is regarded as the African counterpart of the education clauses of the CRC. It should be noted that the language used in the provisions of both these instruments are strikingly similar. 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. 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.

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.

675 Beiter Protection of the Right to Education 217.
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, respect for human rights should be promoted, and positive African values, morals and cultures should be preserved and strengthened by education. Article 11 further provides that education must be aimed at preparing the child for a responsible life in a free society; preserving national independence as well as territorial integrity; promoting and realising African unity and solidarity; developing respect for natural resources and the environment; and lastly promoting the child’s understanding of primary health care. 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. 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; promoting respect for fundamental freedoms and human rights; preparing the child for effective participation in society; promoting understanding, friendship and tolerance between different groups and persons; and lastly fostering respect for the natural environment. 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. The ACRWC applies a regional approach by specifically stating that education should be aimed at strengthening and

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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 24 and 3312.
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)(c) of the CRC; Art 11(2)(c) 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)(e) of the ACRWC; Beiter Protection of the Right to Education 217.
693 Art 29(1)(f) of the CRC; Beiter Protection of the Right to Education 217.
preserving positive African morals, traditional values and cultures. 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. They are preserving national independence and territorial integrity, promoting African unity and solidarity, and promoting the child’s understanding of primary health care. 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. 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.

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; developing secondary education and to progressively make it both free and accessible; the accessibility of higher education by all appropriate means on the basis of capacity and ability; employing measures that will reduce drop-out rates and support attendance at schools; and lastly placing emphasis on measures that are targeted at girls, gifted and also disadvantaged children in order to ensure equal

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694 Section 3 3 1 3; Art 11(2)(c) of the ACRWC; Beiter Protection of the Right to Education Law 217.
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. 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. The last provision, article 11(6), is considered significant in that it protects the rights of child-mothers. 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. The momentum for change is greatly served by this provision. 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. 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. The added protection is very important in relation to non-discrimination as highlighted in the CRC.

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. This confirms

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705 Art 11(3)(e) of the ACRWC.
706 Art 11(6) of the ACRWC.
708 Beiter Protection of the Right to Education 219.
709 Beiter Protection of the Right to Education 219.
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.”

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.\textsuperscript{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.\textsuperscript{719} The preamble therefore stresses the importance of the cultural context that must be considered.\textsuperscript{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.\textsuperscript{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.\textsuperscript{722} This once more

\textsuperscript{718} Kaimé (2009) \textit{African Journal of Legal Studies} 134.
\textsuperscript{719} Kaimé (2009) \textit{African Journal of Legal Studies} 121.
\textsuperscript{720} Thompson (1992) \textit{Int & Comp LQ} 434.
\textsuperscript{721} See sections 2 4 and 2 5 .
\textsuperscript{722} Kaimé \textit{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 ACERWC. 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 education and the responsibility of the child. 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. 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.\textsuperscript{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”.\textsuperscript{728} At the beginning of the 1990s more than 100 million children still had no access to primary schooling.\textsuperscript{729} At the 1990 World Conference on Education for All, which was held in Jomtien, Thailand,\textsuperscript{730} the Declaration on Education for All and the Framework for Action to Meet Basic Learning Needs\textsuperscript{731} 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

\textsuperscript{727} Kaimé \textit{The African Charter 4}.
\textsuperscript{728} Beiter \textit{Protection of the Right to Education} 323.
\textsuperscript{729} Of this 100 million, at least 60 million were girls; Beiter \textit{Protection of the Right to Education} 323.
\textsuperscript{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 \textit{Protection of the Right to Education} 323.
education. 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. 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.

In 1996 at the Mid-Decade Meeting of the International Consultative Forum on Education for All participants at the meeting adopted the document titled: Education for All: Achieving the Goal: The Amman Affirmation ("Amman Affirmation"). 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.

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. 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").

The Dakar Framework not only affirmed the vision of the World Declaration on Education for All\textsuperscript{740} 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.\textsuperscript{741} Each state had to assess the progress it had made since the 1990 World Conference on Education for All\textsuperscript{742} and these findings were reported between 1999 and 2000 at six regional conferences.\textsuperscript{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.\textsuperscript{744} The Dakar Framework also sets out how to achieve these goals.\textsuperscript{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.\textsuperscript{746} The Dakar Framework shared this sentiment by stating that: “the heart of [Education for All] activity lies at country level.”\textsuperscript{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

\textsuperscript{740} See above; Daudet & Singh Analysis of UNESCO’s Standard-setting Instruments 16-17.
\textsuperscript{742} In relation to the goals set out in the Declaration on Education for All; Dakar framework for Action (2000) para 4.
\textsuperscript{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.
\textsuperscript{744} Dakar Framework for Action (2000) para 7; Beiter Protection of the Right to Education 326.
\textsuperscript{746} The World Education Forum Drafting Committee Expanded Commentary on the Dakar Framework for Action (23 May 2000, Paris) 17.
the Twenty-first Century. The theme of “Education for African Renaissance in the Globalised Economy, Communication and Culture” the framework acknowledges the specific needs of children in Africa and recognises that the foundation for the development of education in Africa should be African values, languages and knowledge. The emphasis on African values, languages and knowledge is in line with African values as recognised in the ACRWC.751

In 2015 the World Education Forum, that resulted in the adoption of the Incheon Declaration for Education 2030 (“Incheon Declaration”), was held in Incheon, South Korea. 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 Dakar and adopts a new vision for education to be implemented by 2030. 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.” The Incheon Declaration also affirms that the main responsibility of realising the right to education remains with governments.

The Incheon Declaration 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
education;\textsuperscript{758} the elimination of gender disparities in education;\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{763} as well as general international instruments affording the right to basic education to everyone,\textsuperscript{764} has shown that a variety of international instruments include provisions on the right to education. Some of these instruments, like the UDHR\textsuperscript{765} and the ICESCR,\textsuperscript{766} were adopted before the CRC and ultimately influenced its adoption. Other instruments, for example the ACRWC,\textsuperscript{767} have added to the provisions of the CRC. What is however clear, is that other international instruments influenced the

\begin{itemize}
\item Framework for Action for the implementation of Sustainable Development Goal 4 (2015) 20.
\item Framework for Action for the implementation of Sustainable Development Goal 4 (2015) 25 para 5.
\item See section 3.3.
\item See section 3.2.
\item See section 3.2 1.1.
\item See section 3.2 1.2.
\item See section 3.3 1.
\end{itemize}
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.
of omissions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{777} The accessibility of education and its relationship to non-discrimination is also highlighted.

\textsuperscript{775} Kaime (2009) \textit{African Journal of Legal Studies} 132.
\textsuperscript{776} See section 3 2 1 above.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{778} Art 11(2) of the ACRWC; See section 3.3.3 above.
\textsuperscript{779} See section 3.3.3 above.
\textsuperscript{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 fulfillment 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. The purpose of this chapter is to ascertain how two foreign jurisdictions, namely India and Nigeria, fulfil their international obligations to recognize and realize 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 fulfillment of international obligations in respect of the child’s right to education. The South African Constitution (“Constitution”) refers to both international and foreign law as valuable sources of interpretation for the Bill of Rights. 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”). Both jurisdictions became state

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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.
784 See ss 39(1)(b) and (c) of the Constitution.
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”) is the central instrument in the advancement of children’s rights. Like South Africa, Nigeria has ratified the ACRWC. 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.

With international law central to the discussion, a similarity is shared by all three jurisdictions as the dualist approach is favoured in the application of international law. 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. 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

787 See section 3 3 1 of chapter 3 which discusses the right to basic education in terms of the ACRWC.
789 South Africa, India and Nigeria have for example all ratified the CRC, ICESCR and ICCPR. More specifically international treaties such as the CRC.
791 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.\footnote{Examples include the structure and working of the courts.}

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.\footnote{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.} Significantly, provision is made for children in various provisions of the Indian Constitution.\footnote{See for example arts 15(3), 24, 39(f), and 350A of the Indian Constitution.} 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.\footnote{See in this regard Sripati (2007) Tulane Journal of International and Comparative Law 49-116.} 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.\footnote{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.} A new constitution represented a new dawn for all people in both of these jurisdictions.\footnote{Sripati (2007) Tulane Journal of International and Comparative Law 56-57.} 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.\footnote{BO Nwabueze A Constitutional History of Nigera (1982) 50-61; See also for example JJ Stremlau The International Politics of the Nigerian Civil War 1967-1970 (1977)} Thereafter, Nigeria experienced democratic governments as well as military dictatorships.\footnote{Beredugo & Viljoen (2015) CILSA 408.} A democracy is currently in effect in Nigeria. As an African country, Nigeria will provide an important regional comparison.
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. 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.

As in any jurisdiction, possible challenges exist in the realisation of the child’s rights to, in and through basic education. 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. 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.

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

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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.


805 Section 4.4.
will include the ACRWC,\textsuperscript{806} African Charter on Human and People's Rights\textsuperscript{807} (“African Charter”), and the Economic Community of West African States Community Court of Justice\textsuperscript{808} (“hereafter the ECOWAS Court”).\textsuperscript{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.\textsuperscript{810} India became independent on the 15th of August 1947\textsuperscript{811} and in 1950 India became a federal republic.\textsuperscript{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.\textsuperscript{813} Today, the Indian Constitution, which has been in effect since the 26th of January 1950, forms the foundation of the legal system.\textsuperscript{814}

\textsuperscript{806} See section 3.3.1 of chapter 3 for a discussion of the ACRWC.
\textsuperscript{808} See section 4.3.3.3.
\textsuperscript{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.
\textsuperscript{810} BN Srikrishna “The Indian Legal System” (2008) 36 International Journal of Legal Information 242

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 Pillai “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


\(^{816}\) 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.


\(^{819}\) See for example Operation Black Board; The District Primary Education Program; The Mid Day Meal Programme; Balika Samriddhi 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.
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. 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. Provision is made for goals that the NITI Aayog wants the Indian government to achieve in line with the Sustainable Development Goals (“SDG’s”). 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. With regards to its judicial system, the Supreme Court is the highest court and an adversarial system is applied. 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. The

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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.


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, Tshivenda, 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 Constitution. 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. This provision conforms to the normative framework as it respects cultural identity and language. 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. If leave is granted either by the State High Court or special leave by the Supreme Court, the decision of the State High Court can be appealed to the Supreme Court. 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. 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. 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.

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827 S 29(2) of the South African Constitution; See sections 1 4 and 5 4 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 2 4 4.
831 See arts 132 and 133 of the Indian Constitution.
832 See art 136 of the Indian Constitution.
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. Thiruverangadam argues that the Indian Constitution should be seen “as a site for continuing contestations”. 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. 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. 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. The importance of obligations imposed by international law and treaties is recognised in two specific provisions of the Constitution. The primary position is set out in article 51 of the Constitution. Article 51 holds that the state should strive to promote international peace and security, uphold honourable interactions with other nations, and encourage the use of arbitration in the settlement of international disputes. 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. The second provision is article

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837 Compared to the South African Constitution which was adopted in 1994.
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.
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.\textsuperscript{848} In line with this interpretation of article 253, one can identify the dualist approach in the Indian Constitution.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{848}See also Thukral & Asthana “Use of the CRC in Indian Courts” in \textit{Litigating the Rights of the Child} 32.

\textsuperscript{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 \textit{The Constitution of India: A Contextual Analysis} (2017) 114-115; Thukral & Asthana “Use of the CRC in Indian Courts” in \textit{Litigating the Rights of the Child} 32; Heyns & Viljoen \textit{Impact of the UN Human Rights Treaties} 299.

\textsuperscript{850}See section 5.4.4.

\textsuperscript{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 \textit{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. The right to education, as recognised in article 45, previously fell in the category of Directive Principles of State Policy. The directive principles are set out in 15 provisions of the Indian Constitution – articles 36 to 51. 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. Instead, they are viewed as aspirational aims which the state should strive to progressively realise. 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.
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. 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.

Several developments took place in the 1990s, which meant a move away from protectionist policies towards more neoliberal economic policies. 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. 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.

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. 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. With the passing of time, the courts have made changes by adapting and

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.
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. 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* and *Unnikrishnan J P v State of A P*, illustrate this change.

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*") and *Unnikrishnan J P v State of A P* (hereafter "*Unnikrishnan*") 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. 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.

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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.
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. 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.

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. 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 fees and tuition fees which ultimately resulted in a denial of the right to education. 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. 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

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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.”

Section 1 1.

Interestingly, both these cases concerned issues relating to higher education but had an immense impact of primary education; Sripati & 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.

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.”


charged – with some seats much more expensive than others – was challenged.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{886} The court did

\begin{itemize}
\item \textit{Mohini Jain v State of Karnataka} 1992 SCR (3) 658 659.
\item \textit{Mohini Jain v State of Karnataka} 1992 SCR (3) 658 659; Bajpai \textit{Child Rights in India 34}; Pillay “Judicial Activism” in \textit{Reasoning Rights} 344.
\item \textit{Mohini Jain v State of Karnataka} 1992 SCR (3) 658 661; Skelton (2017) \textit{Open Society Justice Initiative 39}.
\item \textit{Mohini Jain v State of Karnataka} 1992 SCR (3) 658 670; Skelton (2017) \textit{Open Society Justice Initiative 39}.
\end{itemize}
however not provide any further information or content as to what the right to education as a fundamental right entails.\textsuperscript{887}

From this judgment, it is clear that the accessibility of education is central to the realisation of the right to education.\textsuperscript{888} The practical framework therefore plays and important role in the application of the law and that states deliver the core obligations as set out in the international obligations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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?”\textsuperscript{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.\textsuperscript{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.\textsuperscript{895} This a clear development that is line with the normative framework that provides for a right to education.

\textsuperscript{887} Skelton (2017) Open Society Justice Initiative 39; Comparisons can be drawn between the Mohini Jain case and the Juma Musjid 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.

\textsuperscript{888} CESC\textsuperscript{R} General Comment No 13 para 6; See section 2 5 2.

\textsuperscript{889} See section 5 4 5 relating to the minimum core principle.


\textsuperscript{893} Unnikrishnan J P v State of A P 1993 SCR (1) 594 656; Bajpai Child Rights in India 337.


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. 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.” 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.

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. 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. 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.

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. Litigation focusing on education rights in India have formed part of a broader political and social struggle.

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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 judgments 904 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

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
Society Justice Initiative 39; Feasley (2014) Pace International Law Review 27; Veriava & Skelton
8448 18; Veriava & Skelton (2019) SAJHR 12.
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.\textsuperscript{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.\textsuperscript{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 (86\textsuperscript{th} Amendment) Act, 2001.\textsuperscript{911} In support of the Bill, the Union Human Resource Development Minister informed the lower house of parliament\textsuperscript{912} that nearly 42 million children between the ages of 6 and 14 did not have access to basic education.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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910 Also referred to as the Shiksha Yatra; Rosser & Joshi Policy Research Working Paper 8448 18.
912 Also referred to as the Indian Lok Sabha or House of the People; Kumar (2004) \textit{Tulane Journal of International & Comparative Law} 271; Heyns & Viljoen \textit{Impact of the UN Human Rights Treaties} 298.
913 Bajpai \textit{Child Rights in India} xiv.
914 See the discussion of accessibility as part of the 4-A scheme in section 252.
\end{flushright}
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

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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.


919 Bajpai Child Rights in India 338.


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. 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”) was assented to and came into operation on the 1st of April 2010 – the Constitution (Eighty-sixth Amendment) Act of 2002 then also came into operation on the same date. 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.” The provision includes both of the elements of basic education as provided for in article 28 of the CRC: free and compulsory education. 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. The current claim is that the Indian government provides free education as fees are not charged. 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. 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.
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,\(^\text{933}\) and the CRC sets out that these institutions should provide for free and compulsory basic education.\(^\text{934}\) In order for education to be accessible, its 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.\(^\text{935}\)

### 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.\(^\text{936}\) 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;\(^\text{937}\) norms and standards applicable to all schools;\(^\text{938}\) teacher qualifications, and it also prohibits certain elements such as physical punishment and mental harassment;\(^\text{939}\) screening for admission; and capitation fees.

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\(^{933}\) 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.


\(^{937}\) 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 education to children between the ages of 6 and 14. Notably, the Right to Education Act also defines the child as “a male or female child of the age of [6] to [14] years.” 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. 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. 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. This

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941 See section 4.2.5 above; Skelton (2017) Open Society Justice Initiative 37.
942 S 2(c) of the Right to Education Act.
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, 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. 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.

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. This section of the Act is regarded by many as controversial. 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.
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

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.
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.
opportunities and discrimination in education thereby improving accessibility of education. The normative and practical frameworks both fulfill important roles. However, since the section is still highly controversial, it faces opposition and challenges with regard to its implementation. 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. 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. 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.

The section 12 cases 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. The right to equality is importantly emphasised directly in relation to the right to education article 29(2). 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

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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." The CRC guiding principle of non-discrimination can therefore be identified in the Indian Constitution. 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. 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. 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. 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. 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 positives 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. 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. If fees, charges or expenses prevent a child

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965 Art 29(2) of the Indian Constitution.
966 Section 2443.
967 See section 25; CESC R General Comment No 13 para 6.
968 CESC R General Comment No 13 para 6(b); See section 252.
969 CESC R General Comment No 13 para 6(b); See section 252.
970 CESC R General Comment No 13 para 6(d); See section 254.
971 CESC R General Comment No 13 para 6(a); See section 251.
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.\textsuperscript{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,\textsuperscript{974} infrastructure such as sanitation and toilets, availability of drinking water and meals, as well as the availability and safety of playgrounds.\textsuperscript{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,\textsuperscript{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.\textsuperscript{977}

In order to be in line with the child’s best interests, student-teacher ratios should be advantageous to the child.\textsuperscript{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.\textsuperscript{979}

\begin{itemize}
\item \textsuperscript{973} S 19 of the Right to Education Act; Schedule to the Right to Education Act: Norms and Standards for a School.
\item \textsuperscript{974} S 25 of the Right to Education Act.
\item \textsuperscript{975} Schedule to the Right to Education Act: Norms and Standards for a School item 2:
  \begin{itemize}
  \item “all-weather building consisting of at least one class-room for every teacher and an office-cum-store-cum-Head teacher’s room;
  \item barrier-free access
  \item separate toilets for boys and girls
  \item safe and adequate drinking water facility to all children
  \item a kitchen where mid-day meal is cooked in the school
  \item playground arrangements for securing the school building by boundary wall of fencing”
  \end{itemize}
\item \textsuperscript{976} See for example \textit{Lalit Kumar v the State of Uttarakhand}, 19 November 2016, Writ Petition (S/S) No. 1576 of 2016; \textit{Avinash Mehrotra v Union of India}, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398; \textit{Environmental & Consumer Protection Foundation v Delhi Administration} [2012] INSC 584; \textit{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.
\item \textsuperscript{977} Art 3 of the CRC; CESCR \textit{General Comment No 13} para 7.

\end{itemize}
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. 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. 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. In Lalit Kumar v the State of Uttarakhand (hereafter “Lalit Kumar”) the state hiring practices were challenged. The court held that teachers must pass a specific test, known as the Teacher Evaluation Test (TET), in order to be hired. 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”) and Environment & Consumer Protection Foundation v Delhi

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980 CESCR General Comment No 13 para 6(a); See section 251.
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.
Administration (hereafter “Environment and Consumer Protection Foundation”). In Avinash Merhotra a school fire resulted in the death of 93 children. It was contended that uniform safety standards were required and should be adopted by all schools. 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. 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. 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. 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

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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.


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 school 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
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.\textsuperscript{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.\textsuperscript{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”).\textsuperscript{1003} In this instance an article published in a newspaper\textsuperscript{1004} led to the Karnataka High Court \textit{suo moto} taking up a public interest petition.\textsuperscript{1005} The part of the article that motivated the court to take action, stated that approximately 50 000 children were out of school

\textsuperscript{1002} See section 4.2.5 above.
\textsuperscript{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.
\textsuperscript{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.\textsuperscript{1006} The High Court ordered a survey which revealed the number of out of school children to be closer to 170 000.\textsuperscript{1007} Several civil society groups were appointed as \textit{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.\textsuperscript{1008}

Following the case of \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1012} This case is also indicative of the effect and success of the government working together with other role-players and stakeholders in education.\textsuperscript{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


\textsuperscript{1009} Skelton \textit{Open Society for Justice Initiative} 64.

\textsuperscript{1010} Skelton (2017) \textit{Open Society Justice Initiative} 64.

\textsuperscript{1011} Skelton (2017) \textit{Open Society Justice Initiative} 64.

\textsuperscript{1012} Skelton (2017) \textit{Open Society Justice Initiative} 59.

\textsuperscript{1013} In this case the High Court emphasised cooperation with the appointment of \textit{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) \textit{Open Society Justice Initiative} 44, 59.
of the litigation.\textsuperscript{1014} Between the period of November 2013\textsuperscript{1015} and March 2015 the numbers have dropped significantly from 170 000 to 15 000 children that are out of school.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Avinash Merhotra} and \textit{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 CRC\textsuperscript{1019} as well as the child’s best interest in article 3 of the CRC.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{1014} Skelton (2017) \textit{Open Society Justice Initiative} 44.
\textsuperscript{1015} When the first comprehensive survey was conducted; Skelton \textit{Open Society Justice Initiative} 59.
\textsuperscript{1016} Skelton \textit{Open Society Justice Initiative} 59.
\textsuperscript{1017} Skelton \textit{Open Society Justice Initiative} 59.
\textsuperscript{1018} Skelton \textit{Open Society Justice Initiative} 59.
\textsuperscript{1019} Section 2 4 4 3.
\textsuperscript{1020} Section 2 4 4 3.
\textsuperscript{1021} Section 2 5 3.
4265 Implementation of the Right to Education Act

Litigation on the right to education in India has proven positive and the rulings have been favourable.\textsuperscript{1022} The implementation of the court orders has been a different matter, as the government has continuously failed in their implementation thereof.\textsuperscript{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.\textsuperscript{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”).\textsuperscript{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.\textsuperscript{1026} This petition was an attempt to deal with all the issues that had surfaced in relation to the Right to Education Act.\textsuperscript{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.\textsuperscript{1028} Since the judgment, the National Coalition for Education has filed the case in 16 states.\textsuperscript{1029} This case highlights the importance of effective implementation of the legal framework in order to realise the child’s right to basic

\textsuperscript{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.
\textsuperscript{1025} WP (C) No. 267 of 2014; Skelton (2017) Open Society Justice Initiative 44.
\textsuperscript{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.
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.\textsuperscript{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.\textsuperscript{1031} Furthermore, the number of girls not attending school is vast.\textsuperscript{1032} A report by the UN\textsuperscript{1033} has estimated that the number of children out of school between the ages of 6 and 13 amounts to a staggering 8.1 million.\textsuperscript{1034} In addition, children do not complete school – with an estimated 41% of children dropping out of school by the 8\textsuperscript{th} grade.\textsuperscript{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.\textsuperscript{1036} Research has however indicated that the Commission has been struggling to be effective in its mandate.\textsuperscript{1037}


\textsuperscript{1032} Skelton (2017) \textit{Open Society Justice Initiative} 40.


\textsuperscript{1036} See in general NCPCR “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) \textit{Open Society Justice Initiative} 40.

\textsuperscript{1037} Skelton (2017) \textit{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.\textsuperscript{1038} Moreover, it has the potential to aid in major educational reforms.\textsuperscript{1039} It has however been made clear that the implementation of the Right to Education Act has been weak.\textsuperscript{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.\textsuperscript{1041} It seems that despite the Supreme Court judgments of \textit{Mohini Jain} and \textit{Unnikrishnan} and the enactment of the Right to Education Act, the child’s right to education is still facing many challenges in India.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1044} India’s first report was submitted in 1997,\textsuperscript{1045} its second in 2001,\textsuperscript{1046} and a combined third and fourth report was submitted in 2008.\textsuperscript{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,
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.\textsuperscript{1048} The declaration centres on the application of article 32, which deals with child labour\textsuperscript{1049} 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.”\textsuperscript{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.\textsuperscript{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


\textsuperscript{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.”


\textsuperscript{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.\textsuperscript{1052}

This declaration is important in light of the fact that child labour and education are inextricably linked.\textsuperscript{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 declaration\textsuperscript{1054} and has urged the withdrawal of the declaration.\textsuperscript{1055} Unfortunately, the declaration still stands\textsuperscript{1056} 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 first\textsuperscript{1057} and second report.\textsuperscript{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

\textsuperscript{1052} UNCRC “Second Periodic reports of State parties due in 2000: India” (2001) UN Doc CRC/C/93/Add.5 para 105.
\textsuperscript{1053} UNCRC “Initial reports of States parties due in 1995: India” (1997) UN Doc CRC/C/28/Add.10 para 39.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{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. The first report also stated that this change is “...aimed at progressive real[i]sation of the rights under the Convention to which India is signatory.” 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. 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. 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. 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, in other words by 2011/2012. This goal has unfortunately not been achieved and the struggle for free and compulsory education continues. This

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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.

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).\textsuperscript{1065} In order to achieve universal elementary education the programme has the aims of the improvement of physical access to schools,\textsuperscript{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.\textsuperscript{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 CRC\textsuperscript{1068} and the four guiding principles,\textsuperscript{1069} but also to comply with the standards set by the 4-A scheme.\textsuperscript{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.\textsuperscript{1071} The establishment of schools in smaller communities, means that children do not have to travel far distances in order to access their education.\textsuperscript{1072} The challenge of reducing drop-out rates also forms part of the physical accessibility of


\textsuperscript{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 kilometre 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-india.org/reports/overview/Sarva-Shiksha-Abhiyan> (accessed 03-05-2019).


\textsuperscript{1068} See section 2 4 4 of chapter 2.

\textsuperscript{1069} See sections 2 4 4 3.

\textsuperscript{1070} See section 2 5.

\textsuperscript{1071} CESC 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.

\textsuperscript{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. 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. The Concluding Observations start with acknowledging the progress that has already been made, such as the adoption of the Right to Education Act. 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. 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. The CRC Committee voiced its concern that children are in many instances not perceived as rights holders. 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. 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.
1083 UNCRC “Concluding Observations: India” (2004) UN Doc CRC/C/15/Add.228 para 37; See. section 2 4 4 3.
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. Children from scheduled castes and scheduled tribes are noted as especially at risk. 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. 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. 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

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programmes that addresses the high drop-out rates. 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. 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. One of the factors that adds to the persistence of child labour, is that the definition of a child differs depending on the circumstances. The Indian Majority Act of 1875 provides that the age of majority is 18 years unless another law states otherwise. In accordance with this position, the Factories Act of 1948 prohibits the employment of persons below the age of 14. Some exceptions are made in relation to factories and mines in terms of specific legislation. For example, children below the age of 14 may not work in a factory. 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

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1094 Majority Act of 1875; Bajpai Child Rights in India 3.
1095 S 67 of the Factories Act 63 of 1948.
year of age.\textsuperscript{1098} This statue 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{1104} While the Amendment Act makes a positive development with regard to the

\textsuperscript{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.

\textsuperscript{1099} S 3 of the Child Labour (Prohibition and Regulation) Act, 1986.

\textsuperscript{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.


\textsuperscript{1102} S 3 of the Child Labour (Prohibition and Regulation) Act, 1986.

\textsuperscript{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.

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. This would not be in the best interest of the child, and therefore not in line with article 3 of the CRC. 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. 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. Historically, access to basic education in India has been heavily influenced by caste, region, wealth and race. The CRC guiding principle of non-discrimination and the emphasis of equality in education as underscored in article 28 of the CRC, are accordingly crucial to ensure equal access to basic education for the child. 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).
1111 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.\textsuperscript{1114} Poverty relates directly to the concept of free and compulsory education as recognised in article 28 of the CRC.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1118} The second obstacle relates to school infrastructure, or rather lack thereof. School infrastructure in India is still a major problem.\textsuperscript{1119} Acceptability and accessibility of schools are a continued challenge, especially in relation to physical access to schools.\textsuperscript{1120} A lack of functioning schools in many neighbourhoods results in non-attendance.\textsuperscript{1121} Not only should provision be made for more schools, but also to improve the quality of schools.\textsuperscript{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.\textsuperscript{1123} India’s position with regard to international law means that the provisions of the CRC can be directly relied upon before a court.\textsuperscript{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

\textsuperscript{1114} Bajpai \textit{Child Rights in India} 332-333.
\textsuperscript{1115} See section 2 4 4 of chapter 2.
\textsuperscript{1116} Section 2 5 2.
\textsuperscript{1117} Bajpai \textit{Child Rights in India} 333.
\textsuperscript{1118} Bajpai \textit{Child Rights in India} 333.
\textsuperscript{1119} Bajpai \textit{Child Rights in India} 333.
\textsuperscript{1120} Section 2 5 3 and 2 5 2.
\textsuperscript{1121} Bajpai \textit{Child Rights in India} 333.
\textsuperscript{1122} Bajpai \textit{Child Rights in India} 333.
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. 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. 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. Nigeria is a Union of States and therefore identified as a federal constitution. Similar to South Africa, Nigeria also

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1125 Bajpai Child Rights in India 31.
has a mixed legal system,\textsuperscript{1129} which consists of customary law, English common law and Islamic law.\textsuperscript{1130} As Nigeria functions as a federation, the court system provides for both state and federal courts.\textsuperscript{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.\textsuperscript{1132} Some states do however have a High Court of Appeal.\textsuperscript{1133} Examples of the federal courts in Nigeria are the Federal High Court and the Supreme Court.\textsuperscript{1134} The Supreme Court is the highest court in Nigeria.\textsuperscript{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.\textsuperscript{1136} Nigeria has faced many obstacles, such as the Boko Haram insurgency,\textsuperscript{1137} political instability and military interventions,\textsuperscript{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


\textsuperscript{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.


\textsuperscript{1133} Ebbe “The Judiciary in Nigeria” in Comparative and International Criminal Justice Systems 206.

\textsuperscript{1134} Ebbe “The Judiciary in Nigeria” in Comparative and International Criminal Justice Systems 206.


\textsuperscript{1136} See section 4 1 above.


obligations in terms of the CRC and ACRWC. 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, the Nigerian Constitution does not specifically mandate the use of international law in the interpretation of rights. 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. Section 12 deals with the implementation of treaties and provides that a treaty will be only be enforceable after the National Assembly has enacted that treaty into law. Section 12(2) states that parliament may enact legislation in order to give effect to international instruments. This means that Nigeria, like South Africa and India, follows the dualist approach in the application and interpretation of international law. Like the Indian

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.

See section 5.3; see s 39(1)(b) of the Constitution.

Taiwo & Govindjee (2012) Obiter 98; see s 39(2) of the Constitution.

Durojaye “Challenges and prospects” in Human Rights Litigation in Africa 160.


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 250; 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, 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, 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.\textsuperscript{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.\textsuperscript{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.

\textbf{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.\textsuperscript{1151} The difference between these two chapters

\begin{footnotesize}
\textsuperscript{1147} See section 4.2.2 above; See arts 51 and 253 of the Indian Constitution.
\textsuperscript{1148} See for example Augustina Chinyelu Ugo v dr Roy Pedro Ugo 2008 5 NWLR (pt 1079); Taiwo & Govindjee (2012) Obiter 98.
\textsuperscript{1149} See for example 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).
\end{footnotesize}
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.\textsuperscript{1152} It merely provides for fundamental objectives and principles which are non-justiciable that the state should look to when developing policy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1156} This means that the right to

\textsuperscript{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) \textit{The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspective} (2016) 512; Taiwo & Govindjee (2012) \textit{Obiter} 229.

\textsuperscript{1153} S 13 of the Nigerian Constitution; Nwauche “Indirect Constitutional Protection” in \textit{The Protection of Economic, Social and Cultural Rights in Africa} 512; Durojay “Challenges and prospects” in \textit{Human Rights Litigation in Africa} 156.


education is deemed to be non-justiciable.\textsuperscript{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.\textsuperscript{1158} In the 1981 case of \textit{Archbishop Okogie v Attorney General of Lagos State} (hereafter “Archbishop Okogie”)\textsuperscript{1159} the court dealt with this distinction specifically with regard to the right to education in terms of the 1979 Nigerian Constitution.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1164} The National Assembly even adopted a bill for the Fourth

\textsuperscript{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) \textit{Obiter} 119; Taiwo & Govindjee (2012) \textit{Obiter} 210.

\textsuperscript{1158} Durojaye “Challenges and prospects” in \textit{Human Rights Litigation in Africa} 156.

\textsuperscript{1159} \textit{Archbishop Okogie v The Attorney-General of Lagos State} (1981) 2 NCLR 350; Durojaye “Challenges and prospects” in \textit{Human Rights Litigation in Africa} 156.


\textsuperscript{1164} Nwauche “Indirect Constitutional Protection” in \textit{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.\textsuperscript{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.\textsuperscript{1166} He argued that the provision was too “open-ended”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1169} In order for education to be accessible and acceptable, it must be accessible to all learners, which means that

\textsuperscript{1165} Nwauche “Indirect Constitutional Protection” in The Protection of Economic, Social and Cultural Rights in Africa 504.


\textsuperscript{1168} Isokpan & Durojaye (2016) PELJ 6.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1174} Promoting science and technology would also be in line with the guiding principle of the best interests of the child.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1177} In order to achieve this goal government must provide the following: free, compulsory and universal primary education,\textsuperscript{1178} free secondary education,\textsuperscript{1179} free university

\textsuperscript{1170} CESC\textit{R General Comment No 13 para 6(b)(i).}
\textsuperscript{1171} Section 2 5 1.
\textsuperscript{1172} CESC\textit{R General Comment No 13 para 6. See section 2 5 4.}
\textsuperscript{1173} Akinbola (2010) \textit{African Human Rights Law Journal 466.}
\textsuperscript{1174} CESC\textit{R General Comment No 13 para 6(d); See in general section 2 5 4.}
\textsuperscript{1175} Art 3 of the CRC; See in general section 2 4 4 3.
\textsuperscript{1176} See section 2 4 4 1 of chapter 2.
\textsuperscript{1177} Akinbola (2010) \textit{African Human Rights Law Journal 466.}
\textsuperscript{1178} S 18(3)(a) of the Nigerian Constitution; Akinbola (2010) \textit{African Human Rights Law Journal 466.}
\textsuperscript{1179} S 18(3)(b) of the Nigerian Constitution.
education,\textsuperscript{1180} and free adult literacy programmes\textsuperscript{1181} — \textit{when practicable}.\textsuperscript{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.\textsuperscript{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 Act\textsuperscript{1184} and the Compulsory, Free Universal Basic Education Act (hereafter the “UBE Act”).\textsuperscript{1185} The manner in which these two statutes comply with the normative and practical frameworks will therefore also be considered.

\textsuperscript{1180} S 18(3)(c) of the Nigerian Constitution.
\textsuperscript{1181} S 18(3)(d) of the Nigerian Constitution.
\textsuperscript{1182} S 18(3) of the Nigerian Constitution; Own emphasis; Akinbola (2010) \textit{African Human Rights Law Journal} 466.
\textsuperscript{1184} Child Rights Act, Act no 26 of 2003.
\textsuperscript{1185} Compulsory, Free Universal Basic Education Act, 2004.
4332 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

law and is consequently effective and binding.\textsuperscript{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.\textsuperscript{1192} However, in the instance of a conflict between the African Charter and the Nigerian Constitution, the Constitution as the supreme law would prevail.\textsuperscript{1193}

\textit{Abacha v Fawehinmi}\textsuperscript{1194} serves as authority for the view that the Nigerian Constitution is superior to the African Charter.\textsuperscript{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.\textsuperscript{1196} As a contentious issue, it is not surprising that this judgment became a topic of debate.\textsuperscript{1197} Egede is of the opinion that the judgment in the \textit{Abacha} case is correct as it respects the supremacy of the Nigerian Constitution as stipulated in sections 1(1) and 1(3).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.


\textsuperscript{1194} Abacha v Fawehinmi (2000) 6 NWLR (Pt 660) 228.

\textsuperscript{1195} Nwauche (2010) \textit{African Human Rights Law Journal} 509.

\textsuperscript{1196} Nwauche (2010) \textit{African Human Rights Law Journal} 512.


\textsuperscript{1198} Durojaye “Challenges and prospects” in \textit{International Law and Human Rights Litigation in Africa} 159.

\textsuperscript{1199} 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 \textit{African Human Rights Law Journal} 449 as cited in Durojaye “Challenges and prospects” in \textit{International Law and Human Rights Litigation in Africa} 159.
With the right to education still not justiciable before a domestic court, a major development took place in 2009. During that year, the ECOWAS Court delivered judgment in Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission (hereafter “SERAP”). This case concerned an action brought by SERAP against the Nigerian government 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. The court dealt with three issues: whether the court did indeed have jurisdiction to adjudicate over the matter; whether or not the right to education was justiciable and could therefore be litigated before the court; and lastly the issue of whether the plaintiff had locus standi to initiate and maintain the matter. The interaction (and to some extent the tension) between the Nigerian Constitution and the African Charter as outlined above was central to this case.

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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/CCJAPP/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/CCJAPP/08/08 para 1.
1209 Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission ECW/CCJAPP/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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”)\textsuperscript{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.\textsuperscript{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.\textsuperscript{1216} The Chief Justice accordingly promulgated the Fundamental Rights Enforcement Procedure


\textsuperscript{1211} Ssenyonjo “Protection of Economic, Social and Cultural Rights” in The Protection of Economic, Social and Cultural Rights in Africa 112.


\textsuperscript{1214} Fundamental Rights (Enforcement Procedure) Rules, 2009; Commenced on the 1\textsuperscript{st} of December 2009.


\textsuperscript{1216} See also Nwauche “Indirect Constitutional Protection” in The Protection of Economic, Social and Cultural Rights in Africa 507.
The 2009 Rules have affected the manner in which human rights are enforced by making substantive as well as procedural changes.\textsuperscript{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.\textsuperscript{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,\textsuperscript{1220} and the African Charter\textsuperscript{1221} shall be “expansively and purposely interpreted and applied”\textsuperscript{1222} in order to advance and realise the rights and freedoms that are recognised in the Nigerian Constitution and the African Charter.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1226}

\textsuperscript{1217} See also Nwauche “Indirect Constitutional Protection” in \textit{The Protection of Economic, Social and Cultural Rights in Africa 507}.

\textsuperscript{1218} Nwauche (2010) \textit{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) \textit{African Human Rights Law Journal} 503-509.

\textsuperscript{1219} Nwauche “Indirect Constitutional Protection” in \textit{The Protection of Economic, Social and Cultural Rights in Africa 507}.

\textsuperscript{1220} Contains the civil and political rights that are justiciable under the Nigerian Constitution.


\textsuperscript{1222} Item 3(a) of the Preamble of the 2009 Rules.

\textsuperscript{1223} See also Nwauche (2010) \textit{African Human Rights Law Journal} 511.

\textsuperscript{1224} Item 3(b)(i) and (ii) of the Preamble of the 2009 Rules.

\textsuperscript{1225} Nwauche “Indirect Constitutional Protection” in \textit{The Protection of Economic, Social and Cultural Rights in Africa 507}.

\textsuperscript{1226} Nwauche “Indirect Constitutional Protection” in \textit{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, one recommendation from the CRC Committee which stood out, was the need for legislation that domesticated the CRC. A first bill on children’s rights was drafted in 1993, but could not be agreed upon – especially on religious grounds. After approximately a decade since the first bill was drafted, the President finally assented to the Child Rights Act in 2003.

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. 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 school as well as junior secondary education. The primary duty to provide education thus lies with the state and the parents or guardians have a secondary obligation.

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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.
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 CRC and article 11 of the ACRWC. 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). 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. This is however conditional on her individual ability. 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. As a counterpart of this right cannot be found in the CRC, 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

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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.”
1238 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.”
1241 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.
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 government\(^ {1243}\) 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

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\(^{1243}\) 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.” Definitions are also provided for “Primary School” and “Junior Secondary School” 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. The UBE Act stipulates that services refer to instructional materials, books, classrooms, furniture and free lunch. A person that receives fees in contravention to section 3(1) commits an offence and can be held liable. Article 3(1) consequently provides valuable content to the right to basic education. 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. Schools must also serve free lunch. In public primary and secondary schools these services must be free of charge. The application of the practical framework can be identified in this instance. The need for education to be

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1246 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.
1247 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.”
1248 S 15(1) of the UBE Act.
1249 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”.
1250 S 3(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.\textsuperscript{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, \textit{compulsory} and universal basic education.\textsuperscript{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 ages of 6 and 15 are required to attend school.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1262} This means that free and compulsory primary

\textsuperscript{1256} CESCR \textit{General Comment No 13} para 6; See sections 2 4 4 and 2 5.
\textsuperscript{1257} Own emphasis.
\textsuperscript{1258} Ss 2(2) and 15(1) of the UBE Act.
\textsuperscript{1259} Art 28(1)(a) of the CRC; See section 2 4 4.
\textsuperscript{1260} S 1 of the UBE Act.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1265} Nigeria submitted its first report in 1995,\textsuperscript{1266} a second report in 2004,\textsuperscript{1267} and a combined third and fourth report in 2008.\textsuperscript{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.\textsuperscript{1269}

As a state party to the ACRWC, Nigeria is further required to submit periodic reports to the ACERWC.\textsuperscript{1270} Nigeria submitted its initial periodic report in July 2006, and it was considered at the 12\textsuperscript{th} Ordinary Session of the ACERWC in 2008.\textsuperscript{1271} In 2015, the next

\textsuperscript{1263} Referring to the Nigerian Constitution, the Child Rights Act and the UBE Act.
\textsuperscript{1264} See section 2.4.2 of chapter 2 for a discussion of art 29 of the CRC.
\textsuperscript{1265} In accordance with article 44 of the CRC; See section 2.4.2.
\textsuperscript{1270} See section 3.3.1 of chapter 3; art 43 of the ACRWC.
periodic report was submitted to the ACERWC. This periodic report has not yet been considered.\footnote{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.\footnote{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.\footnote{1274} In this regard reference is made specifically to provide free, universal basic education to all children and also to reduce drop-out rates.\footnote{1275} This is 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.\footnote{1276} Both reports state that during 2006, the education sector was allocated the

\begin{itemize}
\item \footnote{1272}{ACERWC “Concluding Observations table” <https://www.acerwc.africa/reporting-table/> (accessed 17-09-2019).}
\item \footnote{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; UNCR “Third and fourth periodic report of State parties due in 2008: Nigeria” (2008) UN Doc CRC/C/NGA/3-4 110.}
\end{itemize}
most funds of all the sectors – 8.8% of the total budget. 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. The ultimate aim of these improvements in infrastructure is to aid in the advancement of the quality of education. 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; special and gifted children; even distribution of schools; corporal

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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

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order to ensure that it is relevant for the Nigerian context.\textsuperscript{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.\textsuperscript{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 right 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 Committees’ 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,\textsuperscript{1292} the CRC Committee commended the Nigerian government for the higher resource allocation, improvement of infrastructure and enrolment rates.\textsuperscript{1293} This indicates that positive steps were taken in order to address the acceptability and accessibility of education.


\textsuperscript{1291} See section 4.3.5.


in terms of the practical framework. Nonetheless, the continued increase in the allocation of resources was recommended. 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. 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. 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. 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. 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

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. 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. 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.

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


The judgment in the SERAP case of the ECOWAS Community Court 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. 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. 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. 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.

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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.
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. Legislation should be structured in such a way as to incorporate international obligations. 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.

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 Act regulates basic education in India and the UBE Act 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 child.

1307 Bajpai Child Rights in India 359.
1308 Bajpai Child Rights in India 359.
1310 See section 4 2 6.
1311 See section 4 3 4 2.
child.  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 Act\textsuperscript{1313} and the UBE Act.\textsuperscript{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.\textsuperscript{1315} The UBE Act provides for indirect costs in a separate provision on services that should be free.\textsuperscript{1316} In terms of the definition of services, indirect costs are inclusive of classrooms, furniture, textbooks and materials.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1319} When certain issues or cases receive media attention, it can have a very positive effect on the outcome.\textsuperscript{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.

\textsuperscript{1312} S 2(1) of the UBE Act, See section 4 3 4 2.
\textsuperscript{1313} See section 4 2 6 2.
\textsuperscript{1314} Section 4 3 4 2.
\textsuperscript{1315} S 3(2) of the Right to Education Act; See section 4 2 6 2.
\textsuperscript{1316} S 3(1) of the UBE Act; Section 4 3 4 2.
\textsuperscript{1317} S 15(1) of the UBE Act; Section 4 3 4 2.
\textsuperscript{1318} S 19 of the Right to Education Act; Schedule to the Right to Education Act: Norms and Standards for a School.
\textsuperscript{1319} See section 4 2 6.
\textsuperscript{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


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.


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 provisions\textsuperscript{1329} as well as applicable case law.\textsuperscript{1330} As the history of education in South Africa has already been examined in chapter 1,\textsuperscript{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.\textsuperscript{1332} The examination will include an analysis of sections 28 and 29 of the Constitution in terms of the model for compliance.\textsuperscript{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.\textsuperscript{1334} A brief examination of the minimum core standard, as developed by the Committee on Economic, Social and Cultural Rights ("CESCR")\textsuperscript{1335} and its application in the South African context, will also be set out in relation to the right to basic education.\textsuperscript{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 Act"
The National Education Policy Act (hereafter the “NEPA”) will also be considered as it is applicable to the regulation and provision of the child’s right to basic education. 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. 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”) and the African Charter on the Rights of the Rights and Welfare of the Child (“ACRWC”).

Lastly, the Periodic Reports that South Africa has submitted to the Committee on the Rights of the Child (“CRC Committee”) together with the Concluding Observations from the CRC Committee will be examined in order to determine the steps that South Africa has taken to conform to the standards set by the CRC. 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. Comparisons between the reports to the CRC Committee and the ACERWC will also be drawn. 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.

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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.


1339 See section 5 5.

1340 See section 2 6.

1341 See section 5 4 and 5 5 below.


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.\textsuperscript{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”).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1354} The spirit, purports and the objects of the Bill of Rights must also be promoted in the interpretation of legislation and the development

\textsuperscript{1348} See chapter 1 for a historical examination of the child’s right to basic education in South Africa.
\textsuperscript{1349} See section 5.4.2 below for a discussion of s 29 of the Constitution.
\textsuperscript{1350} S 39 of the Constitution; Currie & De Waal The Bill of Rights Handbook 146-147; Skelton Strategic Litigation Impacts 47.
\textsuperscript{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.
\textsuperscript{1352} S 39(1)(b) of the Constitution.
\textsuperscript{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.
\textsuperscript{1354} S 39(1)(a) of the Constitution; Currie & De Waal Bill of Rights Handbook 146.
of the law. 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. 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. 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. This sentiment was also confirmed by the Constitutional Court in the case of Kaunda v President of the Republic of South Africa 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.”

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. Chaskalson P held in the noteworthy case of S v Makwanyane 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 2005 4 SA 235 (CC).
1359 Kaunda v President of the Republic of South Africa 2005 4 SA 235 (CC) para 222; Liebenberg Socio-economic Rights 101.
1361 As he then was.
1362 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 Organisation 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 Grootboom¹³⁷¹ referred to the approach followed in S v Makwanyane¹³⁷² 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.
¹³⁷¹ 2001 1 SA 46 (CC).
¹³⁷² 1995 3 SA 391 (CC).
to international law in the process of interpretation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1376}

The fact that the Constitution\textsuperscript{1377} as well as the Constitutional Court\textsuperscript{1378} 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.\textsuperscript{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.

\textsuperscript{1373} Ngidi “Role of international law” in International law in Africa 177; Arendse (2011) PELJ 100.
\textsuperscript{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.
\textsuperscript{1375} Ngidi “Role of international law” in International law in Africa 177.
\textsuperscript{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).
\textsuperscript{1377} S 39 of the Constitution.
\textsuperscript{1378} Kaunda v President of the Republic of South Africa 2005 4 SA 235 (CC); S v Makwanyane 1995 3 SA 391 (CC).
\textsuperscript{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 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

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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. 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. Section 29 does however aim to make basic education universally accessible as required by international standards. Accessibility as part of the model for compliance is therefore identifiable.

As noted above, section 29 does not contain internal limitations or qualifiers. This is in contrast to other socio-economic rights such as the right to access to adequate housing, or access to health care services in the Constitution. 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. 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. With such a clear textual

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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.
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.
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; Proudluck “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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1396} This differentiation was also pointed out by the Constitutional Court in the \textit{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.\textsuperscript{1397} The state must in other words must provide basic education to everyone.\textsuperscript{1398}

\begin{thebibliography}{99}
\item Proudlock “Children’s Socio-economic Rights” in \textit{Child Law} 364. This question was also directed at the Panel of Constitutional Experts and they stated the following in Panel of Constitutional Experts \textit{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) \textit{SAPL} 233 233-239; Sloth-Nielsen 1996 \textit{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 \textit{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 \textit{SAJHR} 472 472-494.
\item Panel of Constitutional Experts \textit{Memorandum on Children} (5 February 1996) 2 (CP005026.MEM).
\item Section 2 4 3 and 2 6.
\item Cameron “Judicial Development” in \textit{Reasoning Rights} 323.
\item Cameron “Judicial Development” in \textit{Reasoning Rights} 323.
\item See \textit{Government of the Republic of South Africa v Grootboom} 2001 1 \textit{SA} 46 (CC) para 35; Seleoane (2003) \textit{Law, Democracy & Development} 142.
\item Seleoane (2003) \textit{Law, Democracy & Development} 140-142.
\end{thebibliography}
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. This view was ultimately confirmed by the Constitutional Court in the case of Juma Musjid Primary School v Essay NO and consequently also applied by the High Courts in the cases of Section 27 v Minister of Basic Education, Centre for Child Law v Minister of Basic Education, and Madzodzo v Minister of Basic Education.

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. A limitation of a right can also be referred to as an infringement – or more specifically a justified infringement. 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.

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

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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.


1405 Currie & De Waal Bill of Rights Handbook 151.

plays a central role.\textsuperscript{1407} In this sense, the limitation of a right can be described as the failure or restriction to fulfil a right.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1410} The right to basic education can be limited by failure to fulfil positive duties\textsuperscript{1411} or through negative duties,\textsuperscript{1412} which results in a denial of the child’s right to basic education.\textsuperscript{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

\begin{quote}
\textsuperscript{1408} McConnachie et al “The Constitution and Basic Education” in Basic Education Rights Handbook 27.
\textsuperscript{1409} Woolman & Bishop “Education” in CLOSA 57-14; Woolman & Fleisch Constitution in the Classroom 125.
\textsuperscript{1411} S 36(1) of the Constitution.
\textsuperscript{1412} “(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.”


\textsuperscript{1411} For example, sufficient schools should be available for children to attend and have access to; Liebenberg Socio-economic Rights 244.
\textsuperscript{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.
\textsuperscript{1413} Liebenberg Socio-economic Rights 244.
provided for in section 36 of the Constitution. 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. 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. However, if the limitation is due to government policy or a specific school causing the obstruction, the limitation cannot be justified. 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.

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. 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).

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 by stating that “our flexibility in providing remedies may affect our

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1414 S 36 of the Constitution.
1415 See above at section 5 2 2; Berger (2003) Columbia Law Review 634.
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.\textsuperscript{1422} Flexibility in the shaping of remedies is necessary in order to shape new remedies that ensures effective relief.\textsuperscript{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.\textsuperscript{1424} These subsections set out specific entitlements as well as the state’s corresponding obligations to the rights-holder.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1427} What is however clear, is that

\textsuperscript{1422} Sanderson v Attorney-General, Eastern Cape 1998 2 SA 38 (CC) para 27; Woolman & Bishop “Education” in CLOSA 57-15.
\textsuperscript{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.
\textsuperscript{1424} Veriava & Coomans “Right To Education” in Brand & Heyns Socio-Economic Rights In South Africa 59.
\textsuperscript{1425} Veriava & Coomans “Right to Education” in Socio-economic Rights in South Africa 59.
\textsuperscript{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”.\textsuperscript{1428} This is representative of a right in basic education as an element of the right to basic education.\textsuperscript{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”.\textsuperscript{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,\textsuperscript{1431} practicability,\textsuperscript{1432} and redressing racially discriminatory laws and practices from the past should be taken into account.\textsuperscript{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 Party\textsuperscript{1434} and the ANC.\textsuperscript{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.\textsuperscript{1436} The language policies of schools and specifically the maintenance of single medium Afrikaans schools has also been the cause of a

\textsuperscript{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 19-121997 as corrected by GN 65 in GG 18887 of 15-06-1998.
\textsuperscript{1429} See section 2 6 of chapter 2.
\textsuperscript{1431} S 29(2)(a) of the Constitution.
\textsuperscript{1432} S 29(2)(b) of the Constitution.
\textsuperscript{1433} S 29(2)(c) of the Constitution.
\textsuperscript{1434} The National Party was the leading political party during apartheid in South Africa.
\textsuperscript{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.
\textsuperscript{1436} Liebenberg \textit{Socio-economic Rights} 249; B Fleisch & S Woolman “On the constitutionality of single-medium public schools” (2007) 23 \textit{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.\textsuperscript{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.\textsuperscript{1438}

With the need to take equity and past discriminatory practices into account, the guiding principles of non-discrimination\textsuperscript{1439} and the child’s best interest can be identified.\textsuperscript{1440} The availability, accessibility, adaptability and acceptability of education as part of the 4-A scheme also come into play.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1443}

Accessibility relates to the right to non-discrimination and requires education to be accessible to all learners – including those from marginalised groups.\textsuperscript{1444} In order for education to be regarded as adaptable it necessitates education to meet the changing needs of a society.\textsuperscript{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.\textsuperscript{1446} In order for education of the South African to meet the needs of its diverse society, education must also adapt in order to

\begin{footnotesize}
\textsuperscript{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.

\textsuperscript{1438} Skelton Strategic Litigation Impacts 50.

\textsuperscript{1439} See section 2 4 4 3.

\textsuperscript{1440} See section 2 4 4 3.

\textsuperscript{1441} See section 2 5.

\textsuperscript{1442} CESCR General Comment No 13 para 6; Tomaševski Primers No. 3 (2001) 12-14; See section 2 5 1.

\textsuperscript{1443} S 29(2) of the Constitution.

\textsuperscript{1444} CESCR General Comment No 13 para 6; Tomaševski Primers No. 3 (2001) 12-13; See section 2 5 2.

\textsuperscript{1445} CESCR General Comment No 13 para 6; Tomaševski Primers No. 3 (2001) 12-15; See section 2 5 4.

\textsuperscript{1446} Section 3 3 1 3.
\end{footnotesize}
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. Subsections (a) to (c) restricts this right in order to ensure that these independent institutions are not racially discriminatory, that they are registered with the state, and that specific standards are met. The guiding principle of non-discrimination of the CRC is accordingly emphasised in the establishment of independent educational institutions.

When interpreting section 29 one can identify both socio-economic rights and civil and political rights in the provision. The manner in which section 29 is structured reflects a hybrid nature that acknowledges the interconnectedness and indivisibility of human rights – 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.

543 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

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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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1456}

Section 28 provides for a range of specific children’s rights.\textsuperscript{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.\textsuperscript{1458} The Constitutional Court has also confirmed this approach in a number of cases dealing with different constitutional rights applicable to the child.\textsuperscript{1459} The relationship between section 28 of the Constitution and the CRC has also been emphasised by the Constitutional Court.\textsuperscript{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.\textsuperscript{1461}

\begin{itemize}
\item \textsuperscript{1454} Specifically the CRC and the ACRWC.
\item \textsuperscript{1455} Skelton A “Children” in Currie I & De Waal J The Bill of Rights Handbook (2013) 6 ed 599.
\item \textsuperscript{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.
\item \textsuperscript{1457} Skelton “Children” in Bill of Rights Handbook 599.
\item \textsuperscript{1458} Skelton “Children” in Bill of Rights Handbook 599.
\item \textsuperscript{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 Minsiter 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.
\item \textsuperscript{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.
\end{itemize}
Section 28(1)(c) of the Constitution recognises the child’s right to 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.\textsuperscript{1462} As noted above, the children’s rights contained in section 28(1)(c), similar to the right to basic education, are not qualified.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{1462} Skelton “Children” in \textit{Bill of Rights Handbook} 600.
\textsuperscript{1463} Liebenberg \textit{Socio-economic Rights} 232.
\textsuperscript{1464} See also s 10(1) of the Schools Act and \textit{Christian Education South Africa v Minister of Education} 2000 4 SA 757.
\textsuperscript{1465} Art 37(a) of the CRC.
\textsuperscript{1466} Section 253.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1470} As a right, it can limit others rights, but it can also be limited.\textsuperscript{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.

\textsuperscript{1467} Skelton “Children” in \textit{Bill of Rights Handbook} 619.
\textsuperscript{1468} Skelton “Children” in \textit{Bill of Rights Handbook} 619.
\textsuperscript{1469} See section 2 4 4 3 for further discussion on the best interests of the child principle in terms of the CRC.
\textsuperscript{1470} Skelton “Children” in \textit{Bill of Rights Handbook} 619-620; See in this regard \textit{Minister of Welfare and Population Development v Fitzpatrick} 2000 3 SA 422 (CC).
\textsuperscript{1471} Skelton “Children” in \textit{Bill of Rights Handbook} 621. See \textit{Sonderup v Tondelli} 2001 1 SA 1171 (CC); \textit{De Reuck v Director of Public Prosecutions, Witwatersrand Local Division} 2004 1 SA 406 (CC); \textit{S v M} 2008 3 SA 232 (CC) and \textit{Centre for Child Law v Minister of Justice and Constitutional Development} 2009 6 SA 632 (CC).
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. 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. The state’s duty to respect, protect, promote and fulfil this right comprises both positive and negative duties. These duties originated in international law as set out in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights and have been applied by supervisory bodies such as the Committee on Economic, Social and Cultural Rights (“CESCR”) and more recently by the African Commission of Human and Peoples’ Rights.

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. This means that the state has the duty to

1472 S 29 of the Constitution.
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. The international law typology refers to the duty to respect, protect and fulfil. 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. In accordance with article 2 of the CRC, it must also be applied to article 28. The Constitution adds the duty of also promoting the rights contained in the Bill of Rights. An additional duty is consequently created by the Constitution. What each of these duties entail will be analysed in more detail below.

When comparing section 7(2) of the Constitution to the provisions in the Indian and Nigerian Constitutions, 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. As identified in chapter 4, both the Indian and Nigerian Constitutions do not specifically provide the state with these specific duties. 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.

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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1493}

\textbf{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.\textsuperscript{1494} The duty to protect means that measures should be taken that prevent interference from third parties.\textsuperscript{1495} Protection from human rights abuses is a key part of the duty to protect.\textsuperscript{1496}


\textsuperscript{1491} CESCR General Comment No 13 para 47; 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.

\textsuperscript{1492} Courtis & Tobin “Article 28” in *Commentary* 1072; An example in this instance would be the temporary closure of schools during the COVID-19 pandemic.

\textsuperscript{1493} Courtis & Tobin “Article 28” in *Commentary* 1072.

\textsuperscript{1494} Brand “Introduction” in Brand & Heyns *Socio-economic Rights* 10.

\textsuperscript{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; Courtis & Tobin “Article 28” in *Commentary* 1072.

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.\textsuperscript{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.\textsuperscript{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.

\textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1502} As negative and positive duties are recognised by

\begin{footnotesize}
\begin{enumerate}
\item Brand “Introduction” in Brand & Heyns \textit{Socio-economic Rights} 10.
\item Right to Education “Understanding education as a right” <https://www.right-to-education.org/page/understanding-education-right> (accessed 14-04-2019); Courtis & Tobin “Article 28” in Commentary 1072.
\item This was also noted in CESCR \textit{General Comment} 14 para 33 which included promotion as an element of the obligation to fulfil; Brand “Introduction” in Brand & Heyns \textit{Socio-economic Rights} 10; See also S Liebenberg “The interpretation of socio-economic rights” in M Chaskalson \textit{et al Constitutional Law of South Africa} 2 ed (2003) chapter 33 5 as cited in Brand “Introduction” in Brand & Heyns \textit{Socio-economic Rights} 10.
\item Liebenberg \textit{Socio-economic Rights} 87.
\end{enumerate}
\end{footnotesize}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1505} Facilitation and provisioning are important elements of the duty to fulfil.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{1503} Liebenberg Socio-economic Rights 87.
\textsuperscript{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.
\textsuperscript{1506} CESCR General Comment No 14 para 33; CESCR General Comment No 12; CESCR General Comment No 13.
\textsuperscript{1507} Courtis & Tobin “Article 28” in Commentary 1072.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1512} In order to provide more clarity on the duties of states parties, CESCR General Comment No 3 was issued.\textsuperscript{1513} This General Comment focuses on the nature of states parties’ duties.\textsuperscript{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.”\textsuperscript{1515} The minimum core as determined by the CESCR has thus far not been applied to the right to education by the CRC Committee.\textsuperscript{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.\textsuperscript{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

\begin{footnotesize}
\textsuperscript{1509} See section 5.2.1 of this chapter.
\textsuperscript{1512} CESCR General Comment No 3 (5\textsuperscript{th} 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.
\textsuperscript{1513} CESCR General Comment No 3 para 10.
\textsuperscript{1514} CESCR General Comment No 3 para 10; M Seleoane “The right to education: Lessons from Grootboom” (2003) 7 Law, Democracy & Development 137 152.
\textsuperscript{1515} CESCR General Comment No 3 para 10; Courtis & Tobin “Article 28” in Commentary 1074.
\textsuperscript{1516} Courtis & Tobin “Article 28” in Commentary 1075.
\textsuperscript{1517} Courtis & Tobin “Article 28” in Commentary 1075.
\end{footnotesize}
requires the executive and legislature to provide content to socio-economic rights. The reasonableness review is the current method applied by the Constitutional Court when it interprets socio-economic rights. The means that the courts focus on a justification analysis rather than a comprehensive analysis of the specific socio-economic right. 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.

The Constitutional Court case of Juma Musjid 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. Juma Musjid dealt with an eviction of a public school that was located on private property. 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. 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. Even though the case did not deal with the positive obligations related to the child’s right to basic


1521 Governing Body of the Juma Musjid 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.

education,\textsuperscript{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.”\textsuperscript{1528}

In \textit{Juma Musjid} 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.\textsuperscript{1529} She referred to the UDHR, the ICESCR, the CRC, as well as CESCR General Comment No 13.\textsuperscript{1530} Quoting CESCR General Comment No 13, the court recognised the right to education as an empowerment right.\textsuperscript{1531} The dimensions of the right to basic education as rights to, in and through are thus strengthened by this interpretation in the \textit{Juma Musjid} 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 \textit{Juma Musjid} case is twofold. Firstly, it provides guidance on the interpretation of to 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

\begin{itemize}
  \item \textsuperscript{1527} Veriava & Skelton (2019) \textit{SAJHR} 2.
  \item \textsuperscript{1528} \textit{Governing Body of the Juma Musjid Primary School v Essay NO 2011 8 BCLR 761 (CC) para 37.}
  \item \textsuperscript{1529} Para 40.
  \item \textsuperscript{1530} Paras 40-41.
  \item \textsuperscript{1531} Para 41; CESCR General Comment No 13 para 1.
\end{itemize}
education.\textsuperscript{1532} The judgment thus opened the door for an argument that \textit{basic education} should be seen to form the minimum core of the right to education.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{1537} it nevertheless sets outs the directive principles of national education policy in section...
4. Section 4 provides the state with a long list of elements, rights\(^{1538}\) 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. 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. 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 remediying 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. If basic education is compulsory, schools must be accessible. This means that all three dimensions of accessibility must be present: non-discrimination, physical accessibility and economical accessibility. 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. For compulsory basic education to fulfil the dimension of non-discrimination in relation to accessibility, basic education must be accessible to all – especially leaners from vulnerable groups and those with disabilities. 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. A link can also be established between non-discrimination and economic accessibility.

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1545 Sections 2 5 2 and 2 5 1.
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).
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.\textsuperscript{1555} Physical accessibility means schools must be within a safe physical distance for children.\textsuperscript{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.\textsuperscript{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.

\section*{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 thought\textsuperscript{1558} 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.\textsuperscript{1559} Moreover, other indirect costs are also associated with basic education, as established in chapter two.\textsuperscript{1560} In terms of the South African legislative framework, it will first be considered if

\begin{thebibliography}{99}
\bibitem{1555} CESC\textit{R General Comment No 13 paras 6(b)(ii).}
\bibitem{1556} CESC\textit{R General Comment No 13 paras 6(b)(ii).}
\bibitem{1557} Tripartite Steering Committee v Minister of Basic Education 2015 5 SA 107 (ECG).
\bibitem{1558} Woolman & Bishop “Education” in CLOSA 57-5.
\bibitem{1559} Section 2 5 2.
\bibitem{1560} Examples include school uniforms, transportation and textbooks.
\end{thebibliography}
and how the Schools Act provides for free basic education,\footnote{See section 5.4.1 below.} and then attention will be paid to how the courts have contributed to shaping this right.\footnote{See section 5.4; Examples of cases include: \textit{Governing Body of the Juma Musjid Primary School v Essay NO} 2011 8 BCLR 761 (CC); \textit{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; \textit{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; \textit{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; \textit{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; \textit{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; \textit{Laerskool Middelburg v Departmentshoof, Mpumalanga Departement van Onderwys} 2003 4 SA 160 (T) is another example of a case which revolved around the language policy of a school; \textit{MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School} 2013 6 SA 582 (CC); \textit{MEC for Education, Kwazulu-Natal v Pillay} 2008 1 SA 474 (CC) concerned the protection of cultural and religious practices in public schools; \textit{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; \textit{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; \textit{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; \textit{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; \textit{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.}

The charging of school fees for basic education remains a major question when interpreting the right to basic education in South Africa.\footnote{CESCR General Comment No 13; Tomaševski Primers No. 3 (2001) 12.} 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.\footnote{Liebenberg \textit{Socio-economic Rights} 245; D Roithmayr “Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education” (2003) 19 SAJHR 382.}

\footnote{Veriava & Coomans “Right to Education” in \textit{Socio-economic Rights in South Africa} 70; Roithmayr (2003) SAJHR 382.} Some provisions of the
Schools Act do however allow free basic education for some children depending on their circumstances.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 funding\textsuperscript{1569} in order for the Minister to declare a specific public school as fee free.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1572} Schools in South Africa are

\textsuperscript{1566} See ss 5(3)(a), 39, 40, 41 of the Schools Act; Skelton Strategic Litigation Impacts 47.
\textsuperscript{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;
\textsuperscript{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.
\textsuperscript{1569} S 1 of the Schools Act; National Norms and Standards for School Funding.
\textsuperscript{1570} S 1 of the Schools Act.
\textsuperscript{1571} S 2 of the Schools Act.
\textsuperscript{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). Schools in quintiles 1 to 3 form the lower quintiles and are categorised as no-fee schools. 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.

When studying the quintiles on a national level, roughly 71% of the public schools in the country are in quintiles 1, 2 or 3. 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%. 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

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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 Impacts 49.

1575 Dass & Rinquest “School Fees” in Basic Education Rights Handbook 143; 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.\textsuperscript{1578}

Section 39 regulates school fees at public schools and provides that schools must provide total,\textsuperscript{1579} partial\textsuperscript{1580} or conditional exemption.\textsuperscript{1581} Provision is also made for automatic exemption.\textsuperscript{1582} The Regulations Relating to the Exemption of Parents from the Payment of School Fees\textsuperscript{1583} 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.\textsuperscript{1584}

\begin{itemize}
\item Liebenberg \textit{Socio-economic Rights} 247; Dass & Rinquest “School Fees” in \textit{Basic Education Rights Handbook} 143.
\item 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 \textit{Socio-economic Rights in South Africa} 68.
\item 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 \textit{Socio-economic Rights in South Africa} 68; See specifically reg 6(4).
\item “[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,
\item (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 \textit{Socio-economic Rights in South Africa} 68.
\item “Automatic exemption” is defined by the Regulations as “the total exemption available to:
\item (a) a person who has the responsibility of a parent in respect of a child placed in -
\item (i) a foster home;
\item (ii) a youth care centre;
\item (iii) a place of safety; or
\item (iv) an orphanage;
\item (b) a person who is a kinship caregiver of an orphan or of a child who -
\item (i) has been abandoned by his or her parents; and
\item (ii) is without any visible means of support;
\item (c) a person who receives a social grant on behalf of a child; or
\item (d) a child who heads a household”
\item See also National Norms and Standards for School Funding paras 164-167; Dass & Rinquest “School Fees” in \textit{Basic Education Rights Handbook} 149.
\item GN 1293 in GG 19347 of 12-10-1998.
\item Liebenberg \textit{Socio-economic Rights} 245; Dass & Rinquest “School Fees” in \textit{Basic Education Rights Handbook} 149; Veriava & Coomans “Right to Education” in \textit{Socio-economic Rights in South Africa} 70-71.
\end{itemize}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1588}

Attendance at schools are however not only hindered by the payment of school fees – indirect fees associated with education are another burden.\textsuperscript{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


\textsuperscript{1589} Indirect fees for example refer to textbooks, uniforms and transport; CESCR \textit{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.\textsuperscript{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.\textsuperscript{1591} The Nigerian Child Rights Act provides every child with the right to free, compulsory and universal primary education.\textsuperscript{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.\textsuperscript{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,\textsuperscript{1594} the argument has been made that the current system in South Africa results in a violation of the right to equality.\textsuperscript{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.\textsuperscript{1596} When one unpacks the fact that schools

\begin{itemize}
  \item \textsuperscript{1590} Liebenberg Socio-economic Rights 245; See for example the case of Centre for Applied Legal Studies \textit{v Hunt Secondary School}, Case No 10091/2006, 15 June 2007 (ZAKZNHC).
  \item \textsuperscript{1591} Section 4 2 6 2 of chapter 4; S 3(2) of the Right to Education Act.
  \item \textsuperscript{1592} Section 4 3 4 1 of chapter 4; S 15 of the Child Rights Act.
  \item \textsuperscript{1593} Section 4 3 4 2 of chapter 4; S 2(1) of the UBE Act.
  \item \textsuperscript{1594} Art 2 of the CRC; See section 2 4 4 3.
  \item \textsuperscript{1595} Veriava & Coomans “Right to Education” in Socio-economic Rights in South Africa 70.
  \item \textsuperscript{1596} Veriava & Coomans “Right to Education” in Socio-economic Rights in South Africa 70; Roithmayr (2003) SAJHR 382.
\end{itemize}
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. This ultimately results in reinforcing the racial inequalities in schools that have been left by apartheid. 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. 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. 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. 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 fulfill the obligations of the selected international instruments, legislation must comply with the standards. Then the legislation can be implemented.

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1599 Section 2 5 2; Liebenberg Socio-economic Rights 246.
1600 Woolson & Bishop “Education” in CLOSA 57-27.
5.2 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. 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”). 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.

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. 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.


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.


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.\(^\text{1607}\) 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.\(^\text{1608}\)

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 \textit{without} textbooks.\(^\text{1609}\) 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.\(^\text{1610}\) Policy statements made it clear that textbooks were to be provided by the Department in order to realise the right to basic education.\(^\text{1611}\) He therefore concluded that the state’s failure to provide textbooks resulted in a violation of the right to basic education, the right to dignity\(^\text{1612}\) and the right to equality\(^\text{1613}\) and consequently compelled the state to provide the textbooks by a specific date.\(^\text{1614}\) 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.

\(^\text{1607}\) Stein “Textbooks” in \textit{Basic Education Rights Handbook} 268; See in general Veriava (2016) SAJHR 321-343.

\(^\text{1608}\) \textit{Section 27 v Minister of Basic Education} 2013 2 SA 40 (GNP) paras 6-8; Stein “Textbooks” in \textit{Basic Education Rights Handbook} 268; Skelton \textit{De Jure} (2013) 10; Veriava (2016) SAJHR 326.

\(^\text{1609}\) \textit{Section 27 v Minister of Basic Education} 2013 2 SA 40 (GNP); Stein “Textbooks” in \textit{Basic Education Rights Handbook} 268; Skelton \textit{Strategic Litigation Impacts} 53; Veriava (2016) SAJHR 327; Own emphasis.

\(^\text{1610}\) 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; \textit{Section 27 v Minister of Basic Education} 2013 2 SA 40 (GNP) para 22.

\(^\text{1611}\) \textit{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.

\(^\text{1612}\) S 10 of the Constitution.

\(^\text{1613}\) S 9 of the Constitution.

\(^\text{1614}\) The state was given time until the 15th of June 2012 to deliver the textbooks; \textit{Section 27 v Minister of Basic Education} 2013 2 SA 40 (GNP) para 25, 32; Stein “Textbooks” in \textit{Basic Education Rights Handbook} 268; Skelton \textit{Strategic Litigation Impacts} 53; Skelton \textit{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.\footnote{Section 27 v Minister of Basic Education 2013 2 SA 40 (GNP) para 4; CESCR General Comment No 13 para 1.} 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.\footnote{Section 2 5 1; CESCR General Comment No 13 para 6; Skelton De Jure (2013) 6-10.} 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.\footnote{Sections 2 5 1 and 2 4 4 3.} 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.\footnote{Stein “Textbooks” in Basic Education Rights Handbook 269.} The High Court was approached once more with the applicants seeking the court to compel the delivery of the textbooks.\footnote{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.} In this instance the application was brought by Better Education for All (BEFA)\footnote{Basic Education For All v Minister of Basic Education 2014 4 SA 274 (GP) para 6; Stein “Textbooks” in Basic Education Rights Handbook 269.} and 18 schools that had not yet received all of the textbooks, even though the CAPS curriculum had already been implemented by the government.\footnote{Stein “Textbooks” in Basic Education Rights Handbook 268-269.} The shortages were also present across all grades.\footnote{Stein “Textbooks” in Basic Education Rights Handbook 269.} This meant that the state had failed to deliver the textbooks for a period of three years.\footnote{From 2012 to 2014; Stein “Textbooks” in Basic Education Rights Handbook 269.} The Department raised two defences: insufficient funds and that the principals of the
schools had not reported shortages in terms of the prescribed mechanisms.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{1626} The state was ultimately ordered to ensure the delivery of textbooks for every learner.\textsuperscript{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.\textsuperscript{1628}

The Supreme Court of Appeal\textsuperscript{1629} confirmed that the failure to provide textbooks would result in a violation of the right to basic education.\textsuperscript{1630} Thus meaning that the model for compliance was also not adhered to. Navsa JA (with Lewis, Cachalia, Petse and Dambuza 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.\textsuperscript{1631} The Department was ordered to deliver the outstanding textbooks.\textsuperscript{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

\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{1627}2014 4 SA 274 (GP) para 82; Stein “Textbooks” in Basic Education Rights Handbook 270.
\textsuperscript{1628}Stein “Textbooks” in Basic Education Rights Handbook 270; Veriava (2016) SAJHR 330.
\textsuperscript{1629}Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA).
\textsuperscript{1630}2016 4 SA 63 (SCA) para 46; Stein “Textbooks” in Basic Education Rights Handbook 270; Skelton Strategic Litigation Impacts 53.
\textsuperscript{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.
\textsuperscript{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,\textsuperscript{1633} equality\textsuperscript{1634} 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.\textsuperscript{1635} Moreover, the CRC guiding principle of non-discrimination\textsuperscript{1636} and the acceptability of education in terms of the 4-A scheme are also applicable in this instance.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1639} CESCR General Comment No 13 provides that in order for education to be accessible it must be within safe physical reach.\textsuperscript{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.\textsuperscript{1641} This

\textsuperscript{1633} S 10 of the Constitution; See section 2.6.
\textsuperscript{1634} S 9 of the Constitution; See section 2.6.
\textsuperscript{1635} S 24 of the Constitution. See section 2.6
\textsuperscript{1636} Art 3 of the CRC; See section 2.4.3.
\textsuperscript{1637} See section 2.5.1.
\textsuperscript{1638} See sections 4.2.4 and 4.2.5.
\textsuperscript{1639} CESCR General Comment No 13 para 6; See section 2.5.2.
\textsuperscript{1640} CESCR General Comment No 13 para 6(b)(ii); See section 2.5.2.
understanding would also mean that the absence of transport to schools could be considered a violation of the child’s right to basic education.\textsuperscript{1642}

Learner transport accordingly forms part of the physical accessibility of schools.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”).\textsuperscript{1646} The Policy provides for learner transport for “needy” children to their schools.\textsuperscript{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.\textsuperscript{1648} The Policy was then challenged in the case of \textit{Tripartite Steering Committee v Minister of Basic Education}\textsuperscript{1649} as three schools that were denied scholar transport in terms of the Policy approached the court for help.\textsuperscript{1650} Once more, a civil society group, the Legal Resources Centre, aided the applicants by appearing on their behalf.\textsuperscript{1651} In this instance, the court had to determine whether or not the right to basic education also

\begin{itemize}
  \item[1643] CESCRL General Comment No 13 para 6.
  \item[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.
  \item[1649] Tripartite Steering Committee v Minister of Basic Education 2015 5 SA 107 (ECG); Joseph & Carpenter “Scholar Transport” in Basic Education Rights Handbook 289.
\end{itemize}
comprises of state funded learner transport for those learners that live a distance away from their schools and cannot afford transport.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1657} This flexibility is needed in order to fulfil the element of adaptability as part of the 4-A scheme.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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 Mtwa-Wethemba v Head of the Department of Transport, Province of the Eastern Cape ECG 4 December 2014 (case no. 3611/13) unreported para 12.

\textsuperscript{1655} Tripartite Steering Committee v Minister of Basic Education 2015 5 SA 107 (ECG) para 22, 57.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{1658} Section 2 5 4.
education cannot be realised. The court therefore ordered the Department to provide the learners with the necessary transportation.\textsuperscript{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.\textsuperscript{1660} Further development of the Policy is consequently required.\textsuperscript{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.\textsuperscript{1662} In order for schools to be acceptable, they should have safe infrastructure, water and sanitation, equipment and furniture.\textsuperscript{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.\textsuperscript{1664}

\textsuperscript{1659} Tripartite Steering Committee v Minister of Basic Education 2015 5 SA 107 (ECG) para 66-67.
\textsuperscript{1662} Section 2 5 1; CESC R General Comment No 13 para 6(a); Skelton (2013) De Jure 7.
\textsuperscript{1663} CESC R General Comment No 13 para 6(a); Skelton (2013) De Jure 7.
\textsuperscript{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.”

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. 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. 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. 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.

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. Once again, the province of the Eastern Cape struggled with school
infrastructure. To put it simply, mud schools are literally schools that have been
built using mud. 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.\textsuperscript{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.\textsuperscript{1687} Once more, the LRC represented the aggrieved parties and lodged proceedings in 2010.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1691} Progress has been slow but many schools have already been built, which have also had a noteworthy effect on the accessibility of schools.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{1686} Skelton (2013) De Jure 7.
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{1689} Abdoll & Barberton Mud to Bricks vi; Skelton Strategic Litigation Impacts 53; Skelton (2013) De Jure 7.
\item \textsuperscript{1690} Skelton Strategic Litigation Impacts 53.
\item \textsuperscript{1691} Skelton Strategic Litigation Impacts 53.
\item \textsuperscript{1692} Section 2 5 2; Skelton Strategic Litigation Impacts 59.
\item \textsuperscript{1693} Section 2 5 1; See CESCR General Comment No 13 para 6(a).
\item \textsuperscript{1694} Section 2 5 1; See CESCR General Comment No 13 para 6(a).
\end{itemize}
affected: the right to dignity, the right to equality and the right to an environment that is not harmful to one's health. The guiding principles of the CRC are also relevant here, especially the child’s right to life, survival and development and the child’s best interest. 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. 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, 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. The Norms and Standards for Public School Infrastructure provide that all schools must have electricity, water, sanitation, a library, laboratories, sport and recreational facilities, internet, and security and

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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.
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. 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. 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.

In 2004, Michael Komape, who was only five years old at the time, fell into a pit latrine at his school and tragically died. 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. 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.

1710 S 17 of the Regulations Relating To Minimum Uniform Norms and Standards for Public School Infrastructure.
1713 Komape v Minister of Basic Education 2020 2 SA 347 (SCA) para 1.
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. A claim was also brought for a declaratory order that the Department had breached their constitutional obligations. In this instance, the court dismissed the civil claim for damages and found that a declaratory order would not be the appropriate remedy. Instead Muller J found a structural interdict to be the only appropriate remedy that would be just and equitable and vindicate the Constitution. The judgment led to the plaintiffs (the Komape family) appealing to the SCA. The SCA finally found in favour of the plaintiffs and awarded damages to the amount of R1.4 million.

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. 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 in 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.

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.
5 5 4 Implementation of the legal framework

Similar to the Indian and Nigerian experiences, 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. 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. The courts also play an important role in the interpretation of the right to basic education. The *Juma Musjid* 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. The importance of the courts’

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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. 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. 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. 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 discusses 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.
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.\textsuperscript{1730} With the new constitutional democracy in 1994 came major legislative, policy and practical changes – the most important being the South Africa Constitution.\textsuperscript{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.\textsuperscript{1732} The revision of the Child Care Act was also underscored.\textsuperscript{1733}

A specific section of the report is dedicated to education, sport, leisure and cultural activities.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{1737} The need to bring legislation on education in line with the

\textsuperscript{1730} UNCR C “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2.
\textsuperscript{1731} UNCR C “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. para 1.
\textsuperscript{1732} UNCR C “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. para 9.
\textsuperscript{1733} The Child Care Act 74 of 1983 has since been repealed and replaced by the Children’s Act 38 of 2005; UNCR C “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2 para 9.
\textsuperscript{1734} UNCR C “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. para 381-458.
\textsuperscript{1735} UNCR C “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. para 381-384.
\textsuperscript{1736} UNCR C “Initial reports of State parties due in 1997: South Africa” (1997) UN Doc CRC/C/51/Add.2. para 385.
\textsuperscript{1737} See discussion above on compulsory basic education in section 5.5.1.
CRC was also directly acknowledged by the initial report. 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. 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. 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. 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. The major economic and social disparities, unemployment and poverty were identified as obstacles to the implementation of the CRC. 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. 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.

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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.\textsuperscript{1745} Giving the child the opportunity to participate and express their views in schools should therefore be encouraged.\textsuperscript{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.\textsuperscript{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”).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{1745} UN CRC “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.
\textsuperscript{1746} UN CRC “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.
\textsuperscript{1747} UN CRC “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.
\textsuperscript{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. 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. 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. 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. 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. 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

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 is has not paid enough attention to improving the quality of education. 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. 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. The improvements are attributed to policies and laws aimed at non-discrimination and equal educational opportunities and monitoring learner attendance and addressing absenteeism. 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 as providing transport and uniforms to poorer learners were also initiated in an attempt to provide learners with access to education. 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


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1766} These are positive steps in order to meet the requirements of the practical framework.

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.\textsuperscript{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.\textsuperscript{1768} Rural areas suffered the most in this regard, even though policy provided better pay for teacher in more rural parts of the country.\textsuperscript{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.\textsuperscript{1770}

The importance of cultural and linguistic rights in relation to the child’s education was discussed in the reports.\textsuperscript{1771} Specific references was made to non-discrimination in relation to religion or culture\textsuperscript{1772} and the importance of being taught in one’s home language.\textsuperscript{1773} In order to ensure that children are not discriminated against based on
religion or culture, schools should develop policies that are in line with the Constitution.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1777} The noteworthy case of \textit{Juma Musjid} 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.\textsuperscript{1778}

In response to the CRC Periodic Report, the CRC Committee made a number of Concluding Observations.\textsuperscript{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.\textsuperscript{1780} Important developments were therefore made to align the legal framework with the normative framework. The CRC Committee also recognised the


\textsuperscript{1779} UNCRC “Concluding Observations on the second periodic report of South Africa” (2016) UN Doc CRC/C/ZAF/CO/2.

increase of resources allocated to education.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1785} The reservation means that that the right to basic education is made progressively

\textsuperscript{1781} UNCRC “Concluding Observations on the second periodic report of South Africa” (2016) UN Doc CRC/C/ZAF/CO/2 para 11.
\textsuperscript{1782} UNCRC “Concluding Observations on the second periodic report of South Africa” (2016) UN Doc CRC/C/ZAF/CO/2 para 24(b).
\textsuperscript{1783} UNCRC “Concluding Observations on the second periodic report of South Africa” (2016) UN Doc CRC/C/ZAF/CO/2 para 59.
\textsuperscript{1784} UNCRC “Concluding Observations on the second periodic report of South Africa” (2016) UN Doc CRC/C/ZAF/CO/2 para 59.
realisable, rather than immediately realisable as provided for in the ACRWC. The ACERWC therefore encouraged the withdrawal of the reservation.

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. The Concluding Observations referenced the low quality of education in poorer schools to illustrate this inequality. These poorer schools are not able to provide quality education that enables children to read, write and calculate. The ACERWC noted that the quality of education is directly affected by the lack of qualified teachers, poor infrastructure and lack of transport. 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. 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

before they need to be used. This would ensure that education is 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. Physical accessibility in line with the practical framework was thus highlighted. Equipping schools with relevant and necessary infrastructure was also recommended by the ACRWC.

A specific challenge highlighted by the ACERWC was the negative effect of protest action on the right to education. In some instances children were physically prevented or intimidated from attending schools and the school infrastructure was damaged or destroyed. 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 is does not lead to the interruption of the child’s education or destruction of school facilities and infrastructure. It was also recommended that if the aforementioned occurred, measures be implemented to catch learners up and that damaged infrastructure is addressed. Sensitising the community with regard to the effects that protest action can have on education was

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another measure recommended by the ACERWC.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1802}

Lastly, the ACERWC noted the importance of inclusive education – specifically for children with disabilities.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1805} Transportation of children with disabilities was also deemed problematic as the system did not provide access for those with physical disabilities.\textsuperscript{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.\textsuperscript{1807} In order to ensure


\textsuperscript{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.  

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. 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. 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


Skelton Strategic Litigation Impacts 47.

Skelton Strategic Litigation Impacts 47-48.
uncommon.\textsuperscript{1811} While certain provinces are worse off than others, these challenges are present throughout the entire country.\textsuperscript{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.\textsuperscript{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 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.\textsuperscript{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 the basic education.\textsuperscript{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

\textsuperscript{1811} Skelton Strategic Litigation Impacts 49.
\textsuperscript{1812} Skelton Strategic Litigation Impacts 49.
\textsuperscript{1813} Skelton Strategic Litigation Impacts 47.
\textsuperscript{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.
\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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, the relevant international and regional instruments were identified. When states ratify international and regional instruments, they assume the obligations created by those instruments, including obligations in relation to the child’s rights to, in and through basic education. 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. Part of the value of international instruments and human rights law 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.

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1819 S 39 of the Constitution.
1820 For example the CRC, the ACRWC and the ICESCR.
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.
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. 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. 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

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1825 See sections 2 3, 2 4, 3 2 and 3 3.
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. 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. This is not a new conversation, as many authors have commented on the different issues related to this problem. 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

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1828 Simbo (2011) *PELJ* 127; See sections 15, 54 and 55.
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 the 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.\textsuperscript{1830} The UBE Act provides definitions for several important concepts such as “basic education”, “free”, “primary school” and “secondary school”.\textsuperscript{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

\textsuperscript{1830} S 15 of the UBE Act; See section 4 3 4 2 for a discussion of the UBE Act.

\textsuperscript{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. 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. 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.” Skelton (2013) De Jure 4. The challenges faced by the education system are immense and range from infrastructure backlogs to vast differences in the quality of basic education. Skelton (2013) De Jure 4. 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
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.
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