

A child's right to basic education during the Covid-19 pandemic:
A comparative analysis and evaluation of the impact of Covid-19 on the South
African education system, and the effectiveness of the nation's legal response in
protecting a child's right to education.

by
Denisha Padachey

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Supervisor:
Professor Sonia Human

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DECLARATION

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DENISHA PADACHEY

MARCH 2023

SUMMARY

It has long been accepted that a child's right to education is of vital importance as it not only enables them to participate and function in society but enables the realisation of their human rights and fundamental freedoms. Since the onset of the Covid-19 pandemic, the education sector faced numerous disruptions and learners were prevented from physically accessing their schools. The Covid-19 pandemic and the ways in which jurisdictions were forced to respond had and continues to have severe impacts in terms of the existing and new forms of inequalities in relation to children and their right to education.

The focus of this thesis is therefore a child's right to basic education in light of the Covid-19 pandemic, with specific reference to the South African situation. This research thus aims to identify whether the legal responses in terms of the legislation, policies, regulations and mechanisms which have been introduced and implemented in South Africa during the Covid-19 pandemic, protected a child's right to education or hindered the realisation a child's right to education.

It is argued that a one-size fits all solution cannot apply in situations of emergency such as the Covid-19 pandemic. This thesis therefore unpacks each respective nations obligations in respect of the right to education, as well as the status of education and educational attainment in each jurisdiction prior to the outbreak of the Covid-19 pandemic.

Moreover, in order to determine how a child's right to education has been impacted and whether the legal responses introduced were effective and protected a child's right to education, this thesis shall make use of a comparative analysis approach wherein the situation in South Africa shall be compared to that of the United States of America, the United Kingdom, Italy and Nigeria. This will be done by analysing the legal responses of each jurisdiction utilising the 4 'A' approach, and taking into consideration their national, regional and international obligations in respect of a child's right to education.

This research further explores whether the legal responses and mechanisms implemented in other jurisdictions are flexible and whether they can be successfully implemented in South Africa. Finally this thesis sets out recommendations in order to respond to the challenges which arose and continue to arise in education due to the Covid-19 pandemic and the subsequent legal responses.

OPSOMMING

Dit word lank reeds aanvaar dat 'n kind se reg op onderwys van sleutelbelang is. Dit is 'n reg wat kinders in staat stel om betrokke te wees en te funksioneer in die gemeenskap maar ook om hul menseregte en fundamentele vryhede te realiseer. Die Covid-19 pandemie het grootskaalse ontwrigting in die onderwyssektor meegebring en leerders is fisies daarvan weerhou om toegang tot hul skole te verkry. Die Covid-19 pandemie en die onderskeie wyses waarop jurisdiksies daarop reageer het, het bestaande ongelykhede ten opsigte van 'n kind se reg op onderwys na vore gebring en selfs nuwe ongelykhede geskep.

Die fokus van hierdie tesis is gevolglik op 'n kind se reg op onderwys in die lig van die Covid-19 pandemie, met spesifieke klem op die posisie in Suid-Afrika. Die oogmerk van die navorsing is om te bepaal of Suid-Afrikaanse wetgewing, asook beleidsdokumente, regulasies en spesifieke meganismes wat in plek gestel is tydens die Covid-19 pandemie 'n kind se reg op onderwys beskerm het of die implementering van die reg belemmer het.

Daar word geargumenteer dat daar nie een oplossing is wat van toepassing op alle noodsituasies kan wees soos in die geval van die Covid-19 pandemie nie. In hierdie verband word elke jurisdiksie se verpligtinge ten opsigte van die reg op onderwys bespreek, asook die status van onderwys en die bereiking daarvan voor die uitbreek van die Covid-19 pandemie.

Daar word van 'n regsvergelende studie gebruik gemaak ten einde te bepaal op watter wyse daar 'n impak op 'n kind se reg op onderwys was tydens die Covid-19 pandemie en om ook te bepaal in watter mate elke jurisdiksie se regsbenadering effektief was in die beskerming van 'n kind se reg op onderwys. In hierdie verband word die regsposisie in Suid-Afrika vergelyk met die regsposisie in die Verenigde State van Amerika, die Verenigde Koninkryk, Italië en Nigerië. Daar word op die vier- A skema gesteun om elke jurisdiksie se regsbenadering te ontleed in die lig van hul onderskeie internasionale, streeks- en nasionale verpligtinge ten opsigte van 'n kind se reg op onderwys.

Daar word ook in die navorsing bepaal of enige van die jurisdiksies se benaderings buigbaar genoeg is om ook suksesvol in Suid-Afrika van toepassing te kan wees. Die aanbevelings wat gemaak word het ten doel om die uitdagings in onderwys aan te spreek wat na vore gekom het tydens die Covid-19 epidemie maar wat steeds voortduur in die nadraai van die pandemie.

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Finally, I want to dedicate this paper to my brother 'by heart' Carlo Rajah, who sadly lost his life fighting Covid-19 on the 22nd of July 2021. Despite having a rare genetic disorder, he influenced me more than any other person I have ever interacted with. He was my other half and my constant motivation. Everything I have achieved, and everything I will ever achieve has and will always be for the both of us brother-bear!

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Chapter 1: Introduction

1 1 Introduction

It has long been accepted that education is fundamental to a well-functioning democracy.¹ Prior to the outbreak of the Covid-19 pandemic, the world had already been confronting an education crisis and was off track to meet Sustainable Development Goal 4, which sought to ensure that all children enjoy free, equitable and quality primary and secondary education.² Bearing this in mind, the Covid-19 pandemic can therefore be viewed as causing further challenges to an already fragile education system, as well as causing the most serious disruptions to education in at least the last century,³ not only in South Africa, but worldwide.

The Covid-19 outbreak originated in Wuhan China and has been labelled by the World Health Organisation (hereafter ‘WHO’) as a “public health emergency of international concern”.⁴ In simple terms, the Covid-19 pandemic has caused and continues to cause many disruptions on a global scale, with ramifications evident across all sectors, including the basic education sector.⁵ At the time of writing, according to the United Nations Educational, Scientific and Cultural Organization (hereafter “UNESCO”), close to half of the world’s learners have been and continue to be affected by partial or full school closures.⁶ While many governments, including that of South Africa, opted to close schools in order to prevent the spread of the disease,⁷ it is crucial to remember that an obligation remains in respect of the right to education.

It has been said that the right to basic education in South Africa enables people to not only participate but to function in society.⁸ As such, the Constitution of the Republic of South Africa, 1996 (hereafter “Constitution”), explicitly recognises the right to

¹ E Berger “The Right to Education Under the South African Constitution” (2003) 103 *Columbia Law Review* 614 614.

² H d’Orville “Covid-19 causes unprecedented educational disruption: Is there a road towards a new normal?” (2020) 49 *Prospects* 11 11 <<https://doi.org/10.1007/s11125-020-09475-0>> (accessed 23-03-2021).

³ FM Reimers “What the Covid-19 pandemic will change in education depends on the thoughtfulness of education responses today” (09-04-2020) *Education International* <<https://www.ei-ie.org/en/item/23302:what-the-covid-19-pandemic-will-change-in-education-depends-on-the-thoughtfulness-of-education-responses-today-by-fernando-m-reimers>> (accessed 03-06-2021).

⁴ C Sohrabi, Z Alsafi, N O’neill, M Khan, A Kerwan, C Al-Jabir, C Iosifidis & R Agha “World Health Organization declares global emergency: A review of the 2019 novel coronavirus (Covid-19)” (2020) 76 *International Journal of Surgery* 71 71.

⁵ UNESCO *Education in a post-Covid world: Nine ideas for public action* (2020) 1 7.

⁶ Anonymous “Education: From Disruption to Recovery” (n.d) UNESCO <<https://en.unesco.org/covid19/educationresponse>> (accessed 31-05-2021).

⁷ Anonymous “Education: From Disruption to Recovery” UNESCO.

⁸ A Pieterse “The Transformative nature of the Right to Education” (2004) 4 *TSAR* 700 714.

education under section 29. While the right to basic education,⁹ may be subject to the limitation clause,¹⁰ it can be viewed as a “strong positive right” under the Constitution,¹¹ and should be viewed as an immediately enforceable right as there are no internal limitations which require the right to be “progressively realised” within “available resources” subject to “reasonable legislative measures”.¹² In line with this section, the South African government is thus obligated to immediately respect, protect, promote and fulfil this right.¹³

Despite the obligation which exists, it must be noted that the Covid-19 pandemic created a range of issues in respect of the right to education,¹⁴ as more than a year after the outbreak, many learners continue to be affected by partial or complete school closures.¹⁵ In addition, the Covid-19 pandemic brought prevailing challenges within the South African education system to the forefront,¹⁶ as wide scale school closures were met with no practical way for learners to shift to remote learning due to a variety of existing issues, including but not limited to a lack of internet access.¹⁷ It can thus be argued that the right to basic education in South Africa, which should be ensured regardless of the state’s other obligations or budgetary imperatives,¹⁸ was compromised during this period.

In light of the above, this thesis will focus on a child’s right to basic education in South Africa, in light of the Covid-19 pandemic. Moreover, this thesis will identify South Africa’s legislative, policy and regulatory responses, including but not limited to directives and circulars which were introduced and the subsequent mechanisms which were implemented in response to the challenges in education, which arose as a direct result of the Covid-19 pandemic. For the purpose of this thesis, the legislative, policy and regulatory responses of each state in response to the education consequences of

⁹ S 29(1)(a) of the Constitution.

¹⁰ S 36 of the Constitution.

¹¹ Berger (2003) *Columbia Law Review* 625.

¹² *Governing Body of the Juma Masjid Primary School v Essay* [2011] ZACC 13 para 37.

¹³ S 7(2) of the Constitution.

¹⁴ See chapter 3 of this thesis for more detail on prevailing challenges.

¹⁵ Anonymous “One Year into Covid-19 education disruption: Where do we stand?” (19-03-2021) UNESCO <<https://en.unesco.org/news/one-year-covid-19-education-disruption-where-do-we-stand>> (accessed 05-10-2021).

¹⁶ For more detail on the topic refer to chapter 3 of this thesis.

¹⁷ FM Reimers, U Amaechi, A Banerji & M Wang (eds) *An Educational Calamity: Learning and teaching during the Covid-19 pandemic* (ebook) (2021) 149 <https://www.researchgate.net/publication/350447171_An_educational_calamity_Learning_and_teaching_during_the_Covid-19_pandemic> (accessed 03-06-2021).

¹⁸ Berger (2003) *Columbia Law Review* 625.

the Covid-19 pandemic, including the mechanisms implemented, will be collectively referred to throughout this thesis as a state's "legal response" to the Covid-19 pandemic.

Furthermore, in conducting a comparative analysis, this research will determine the effectiveness of said responses in protecting a child's right to education. In addition, this research will determine whether certain legal responses, as identified through the comparative analysis, could influence South Africa and assist in improving the realisation of a child's right to basic education within the country or whether South Africa's legal response was sufficient in protecting a child's right to education. Finally, this thesis will explore whether a uniform solution exists in order to address the Covid-19 related challenges in education.

1 2 Limitations of this thesis

The right to education as set out in section 29 of the Constitution is applicable not only to basic education but further education as well.¹⁹ Section 29(1)(a) of the Constitution provides that the right to basic education relates not only to children but adults as well.²⁰ Although the right to education in South Africa clearly extends beyond the parameters of basic education, this thesis limits its focus to a child's right to basic education as per section 29(1)(a). Any reference to a child's right to education or the right to education in this thesis is therefore understood as the right to basic education. Furthermore, although the Covid-19 pandemic remains prevalent and legislative changes continually occur, this thesis will focus on information relating to the 2020 and 2021 academic years. Any reference to the 2021 academic year in relation to South Africa refers to the months preceding schools reopening completely from the 26th of July 2021.²¹ Furthermore, depending on the specific jurisdiction, the 2020/2021 academic year in relation to the United States of America (hereafter "USA"), the United Kingdom (hereafter "UK"), Italy and Nigeria refers to the school year which ended in either June or July 2021.

¹⁹ Ss 29(1)(a) & 29(1)(b) of the Constitution.

²⁰ S 29(1)(a) of the Constitution.

²¹ D Shepard & N Mohohlwane "The impact of Covid-19 in education – more than a year of disruption" (2021) 18(7) *Special Public Health Surveillance Bulletin* 1 18.

1 3 Research aim, research questions and hypotheses

The purpose of this research is to determine whether South Africa's legal response to the Covid-19 pandemic protected a child's right to education within the country. The research further aims to determine whether the legal responses in terms of the legislation, policies, regulations and mechanisms which have been implemented in other countries during the Covid-19 pandemic were and are more effective in furthering the realisation of a child's right to education. Finally, the paper aims to identify whether said legal responses and mechanisms are flexible and whether they can be successfully implemented in South Africa in order to respond to the prevailing challenges in education as well as those which arose and continue to arise during the Covid-19 pandemic.

In order to achieve these aims, specific primary and secondary research questions have been set. The primary research question of this thesis is to determine to what extent South Africa's legislative, policy and regulatory responses have adequately protected a child's right to basic education during the Covid-19 pandemic?

To fully capture the primary research question, there are a number of secondary research questions that will also be considered:-

1. Do these legal responses comply with the standards set in terms of international law, constitutional provisions and domestic legislation?
2. How do these legal responses compare to jurisdictions such as the USA, the UK, Italy and Nigeria?
3. What are the lessons to be learned, if any, in respect of South Africa's legal response to the Covid-19 pandemic in the context of a child's right to education?

Bearing these research questions in mind, the primary and secondary hypotheses must be highlighted. The primary hypothesis underlying this thesis recognises the fundamental importance of the right to basic education and that the Covid-19 pandemic has negatively impacted a child's right to education in South Africa during the 2020 and 2021 academic years. In support of the primary hypothesis, there are three secondary hypotheses. First, South Africa's legal theoretical response, namely the legislation, the policies and the regulations which have been created and introduced in respect of a child's right to education, is sufficient. Second, that the practical implementation of certain legal measures and Covid-19 protocols pose certain challenges, specifically in relation to underprivileged schools and learners

within South Africa. Finally, that the Covid-19 pandemic has highlighted and brought to the forefront prevailing problems within the South African education system.

1 4 Research methodology

This research paper involves a literature overview of domestic, foreign and international primary and secondary resources relating to a child's right to education as well as each jurisdiction's legal response to Covid-19 in the context of a child's right to education. International and regional instruments, foreign and domestic legislation, policies, regulations and case law as well as academic commentary will be used to test the hypotheses and answer the relevant research questions. This thesis centres on a comparative analysis and is evaluative in nature, having said that, it is important to note that ethics approval was not required for the completion of this thesis.

This thesis will provide an in-depth look at South Africa's legal response to the consequences of Covid-19 in relation to a child's right to education. This will be done by means of constitutional, international law, regional law and domestic law analysis. Furthermore, relevant journal articles, books and academic commentary will be utilised in order to conduct the investigation and answer the relevant research questions.

A comparative study will be conducted by comparing South Africa's legal response to Covid-19, in the context of a child's right to education, with those of the USA, the UK, Italy and Nigeria. This will be achieved by analysing international law as well as each nation's internal Covid-19 legal framework, including legislation, policies and regulations which have been introduced in order to protect, promote and ensure a child's right to education during the Covid-19 pandemic along with any relevant case law. The UK, Italy, Nigeria and South Africa have all signed and ratified the CRC which provides for a child's right to education.²² Therefore, with the exception of the USA, each country is thus obligated to provide for a child's right to education, on both an international and domestic level.²³ Despite not having ratified the CRC, the USA has provided symbolic agreement by signing the document.²⁴

²² United Nations Human Rights Office of the High Commissioner "Status of ratification – Interactive Dashboard" (n.d) *United Nations* <<https://indicators.ohchr.org>> (accessed 20-05-2021). See also chapter 2 of this thesis for more detail on the CRC.

²³ See S 29 of the Constitution; Ss 13 & 14 of the Education Act (UK); Article 34 of the Constitution of the Italian Republic; S 18 of the Constitution of the Federal Republic of Nigeria.

²⁴ C Helman "In Favour of United States Ratification of the Convention on the Rights of the Child" (2019) 39(2) *Children's Legal Rights Journal* 191 191. See also K Attiah "Why won't the U.S ratify the U.N's Childs Rights treaty?" (21-09-2014) *The Washington Post*

Despite the obligations in terms of the CRC, each of these countries, South Africa included, have experienced grave consequences in respect of a child's right to education during the 2020 and 2021 academic years.²⁵ Each jurisdiction experienced periods where schools were fully open, partially open and completely closed as a direct result of the Covid-19 pandemic.²⁶ This creates the opportunity to directly compare and contrast the way each jurisdiction gave effect to the right to education during the 2020 and 2021 academic years,²⁷ and how each jurisdiction responded to the consequences which arose during the Covid-19 pandemic in respect of the right to education.

1 5 Significance of the research and background information on the Covid-19 pandemic

1 5 1 Significance of the research

Former president, Nelson Mandela once said, "education is the most powerful weapon you can use to change the world". This quote highlights the fundamental importance of the right to education, a right which was negatively impacted by the Covid-19 pandemic during the years of 2020 and 2021. The Covid-19 pandemic has caused profound disruptions to human life across the planet, including significant interruptions to the education of over a billion learners, whose learning has been affected as a result of Covid-19 related school closures.²⁸ The disruption to schools worldwide, has the potential to cause the greatest setback to education in history, and will not only impact the lives of learners and their future prospects vastly, but could risk increasing the inequality gap in unprecedented ways.²⁹

According to Reimers, "what the Covid-19 pandemic will change in education depends on the thoughtfulness of education responses today",³⁰ a statement which sums up the motivation for this thesis. This thesis is significant due to the fact that

<https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/> (accessed 20-05-2021).

²⁵ See chapters 3-7 of this thesis for jurisdiction specific information.

²⁶ Anonymous "Education: From Disruption to Recovery" *UNESCO*.

²⁷ See chapter 8 for the comparative analysis.

²⁸ *UNESCO Education in a post-Covid world* (2020) 3.

²⁹ FM Reimers "Difficult leadership. Sustaining the Right to Education during a Pandemic" in FM Reimers (ed) *Leading Education Through Covid-19: Upholding the Right to Education* (2020) (ebook) (2020) 1 1 <<https://www.amazon.com/gp/product/B08K4SJM5Z/ref=dbsadefrwthschvapitaftp2i10>> (accessed 03-06-2021).

³⁰ Reimers "What the Covid-19 pandemic will change in education depends on the thoughtfulness of education responses today" *Education International*.

South Africa's legal response in terms of the legislation, policies and regulations which have been introduced in response to the challenges in education which arose, and continue to arise as a result of Covid-19, has the potential to not only save the current generation of learners from the educational crisis they are experiencing,³¹ but could also fundamentally change education within the country.

1 5 2 A brief overview of the Covid-19 pandemic

An overview of the Covid-19 pandemic and the consequences which have arisen is pertinent to this research. The Covid-19 pandemic, at the time of writing, is an ongoing pandemic and involves the spread of the coronavirus disease.³² This disease is caused by severe acute respiratory syndrome coronavirus 2 (hereafter "SARS-CoV-2"), and this causative agent is easily transmissible and can be spread through individuals who are positive for the disease whether they are asymptomatic, minimally symptomatic or fully symptomatic.³³

SARS-CoV-2 is highly infectious and as of 6 September 2021, globally, 220 536 227 confirmed cases, including 4 565 483 deaths have been reported to the WHO.³⁴ In addition to the severe health consequences, the Covid-19 pandemic has led to various governments all over the world having to enforce restrictions to economic and social activities and this in turn has negatively impacted the global population in a variety of ways.³⁵ The pandemic has also negatively impacted children in various ways, including but not limited to anxiety, health issues and the obvious effects on education.³⁶

Since the onset of the Covid-19 health emergency, the education sector has been one of the most affected sectors.³⁷ On a national and international level, in order to ensure that learners are not deprived of the educational and social benefits provided by schools, strategies which have been implemented to allow for the reopening of schools and the realisation of the right to education, have had to consider the difficult

³¹ Reimers "What the Covid-19 pandemic will change in education depends on the thoughtfulness of education responses today" *Education International*.

³² AA Balkhair "Covid-19 Pandemic: A New Chapter in the History of Infectious Diseases" (2020) 35(2) *Oman Medical Journal* 1 1.

³³ 1.

³⁴ WHO "WHO Coronavirus (Covid-19) dashboard" (n.d) *World Health Organisation* <https://covid19.who.int> (accessed 06-09-2021).

³⁵ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 4.

³⁶ S Gupta & MK Jawanda "The impacts of Covid-19 on children" (2020) *Acta Paediatrica* 1 1-2.

³⁷ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 4.

balance between the obvious benefits of education for learners and the health and well-being of not only the learners and teachers, but their families as well.³⁸ Many countries, South Africa included, have therefore had to demonstrate their flexibility and commitment to education when establishing strategies that not only target the challenges presented by Covid-19 but also allow for the continuity of education during this time.³⁹

At the time of writing, South Africa has the highest number of confirmed Covid-19 cases on the African continent.⁴⁰ Moreover, the USA, the UK and Italy all fall within the top ten countries with the highest confirmed Covid-19 cases.⁴¹ As an African comparison, Nigeria, which has the largest population in Africa, is among the top ten countries on the continent with the highest number of Covid-19 cases.⁴² Moreover, while vaccines have been developed, and 5 352 927 296 vaccine doses administered as of the 6th of September 2021,⁴³ there are no safe and specific antiviral drugs for treatment of patients with Covid-19.⁴⁴ As such, the Covid-19 pandemic has had and will most likely continue to have far-reaching and potentially long-term impacts on adults and children alike as well as the global economy. Various research on the subject has indicated that the Covid-19 pandemic has impacted human life vastly, and in the chapters to follow, this thesis shall explore the impact of the Covid-19 pandemic on a child's right to education.

1 6 Overview of chapters

Chapter 2 will introduce and discuss the relevant international and regional instruments which not only set the standards of a child's right to education on an international level, but provide for certain state obligations in terms of the right. In

³⁸ Organisation for Economic Co-operation and Development (hereafter "OECD") *Schooling Disrupted, schooling rethought: How the Covid-19 pandemic is changing education* (2020) 1 3.

³⁹ 3.

⁴⁰ Tumwesigye *et al* "Covid-19 Lockdowns in Africa: Their Effects and Challenges" in *Covid-19 in the Global South* 155 & Anonymous "Number of coronavirus (Covid-19) cases on the African continent" (2021) *Statista* <<https://www.statista.com/statistics/1170463/coronavirus-cases-in-africa/>> (accessed 20-05-2021). See also chapter 3 for more information on the South African situation.

⁴¹ H Pettersson, B Manley & S Hernandez "Tracking Covid-19's Global Spread (10-06-2021) *CNN Health* <<https://edition.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/>> (accessed 15-06-2021). In addition, refer to chapters 4-6 of this thesis.

⁴² Tumwesigye *et al* "Covid-19 Lockdowns in Africa: Their Effects and Challenges" in *Covid-19 in the Global South* 149 & 156. See chapter 7 for more information on the Nigerian situation.

⁴³ WHO "WHO Coronavirus (Covid-19) dashboard" *World Health Organisation*.

⁴⁴ L Xue, J Li, L Wei & C Ma "A quick look at the latest developments in the Covid-19 pandemic" (2020) 48(9) *Journal of International Medical Research* 1 5.

addition thereto, the chapter will introduce the 4 'A' scheme and shall explain its relevance to this thesis as a practical analysis tool. Finally, in order to set the basis for this research, chapter 2 will identify international and regional guidance which was developed in order to assist nations in responding to the consequences in education which were experienced during the Covid-19 pandemic.

Chapter 3 will start with an analysis of the existing legal position in respect of a child's right to education in South Africa. In other words, the chapter will commence by considering how a child's right to education has been interpreted to date in South Africa. As such, relevant international and regional standards and obligations as well as South Africa's national obligations in the context of a child's right to education will be discussed. In addition, the chapter will consider South Africa's internal framework, including the relevant constitutional and legislative provisions as well as any policies which exist to regulate the right to education within the country. Furthermore, the chapter will discuss the state of the South African education system pre-Covid-19 and identify how the Covid-19 pandemic has impacted a child's right to basic education in South Africa. In order to identify the prevailing issues within education in South Africa, and to highlight how the Covid-19 pandemic has accentuated these issues, relevant literature and case law will be discussed. Moreover, chapter 3 will focus on South Africa's legal response in terms of the legislation, policies, regulations, including but not limited to directives and circulars, which were developed and released in order to combat the consequences of Covid-19 as well as the subsequent mechanisms which were introduced. The chapter will identify problems surrounding the practical implementation of certain legal responses and whether or not they did in fact protect and allow for the realisation of a child's right to basic education during the Covid-19 pandemic.

Chapter 4 will discuss the legal position in the USA with regard to a child's right to education. The chapter will analyse the USA's international obligations, national obligations and the varying positions of different states in respect of the right to education. The chapter will further identify the state of the USA's education system pre-pandemic and how the Covid-19 pandemic impacted the right to education. Finally, the chapter will identify the legal consequences of Covid-19 in respect of a child's right to education as well as the legal responses thereto and whether this right was ensured during the 2020 and 2021 school years.

The chapter to follow, namely chapter 5, will contain an analysis of the right to education in the UK. In order to analyse the right, the chapter will identify the UK's national, regional and international obligations in respect of the right to education. The chapter will briefly discuss the state of the UK's education system prior to the Covid-19 pandemic while exploring how the pandemic affected the right during the 2020 and 2021 academic years. Finally, the chapter will identify legislative provisions and policies that have been introduced to ensure the right to education during the pandemic.

Chapter 6 will focus on a child's right to education in Italy and will include an analysis of Italy's relevant international and national obligations in relation to the right. The chapter will utilise academic commentary in order to provide information on the education system in Italy prior to the outbreak of the Covid-19 pandemic. The chapter will further discuss how the right to education was impacted by the Covid-19 pandemic and analyse whether the legal response thereto allowed for the realisation of this right within the country.

The aim of chapter 7 is to analyse a child's right to education in Nigeria as well as Nigeria's international, regional and national obligations in respect of the right to education. The state of the education system prior to the Covid-19 pandemic will also be discussed. The chapter will further identify the effect of Covid-19 on a child's right to education in Nigeria and analyse the country's legal response thereto.

Chapter 8 will compare the situation in South Africa, regarding a child's right to education during the Covid-19 pandemic, with the jurisdictions mentioned in chapters 4, 5, 6 and 7. As such, through utilising the 4 'A' scheme, this chapter will determine where the respective legal responses are similar, where they differ, and whether they protected the right to education during the Covid-19 pandemic. Finally the chapter will explore which jurisdiction, if any, best ensured a child's right to basic education during the pandemic.

Chapter 9, as the concluding chapter, will provide an answer to the primary and secondary research questions. The chapter will discuss the flexibility of certain legal responses identified in chapter 8, and whether they could be successfully implemented in South Africa. The chapter will further pose recommendations that may improve the realisation of a child's right to education in South Africa during the Covid-19 pandemic. Finally, the chapter will discuss whether South Africa's legal response to the Covid-19 pandemic has the potential to influence or improve the education system within the

country in the long term and whether the mechanisms that have been introduced and the infrastructure that has created can assist with future pandemics.

Chapter 2: International Recognition of a Child's Right to Education

2 1 Introduction

The international community has been and remains committed to the realisation of a child's right to basic education.⁴⁵ As such, certain regulations, standards and guidance in respect of the right to education have been provided for in numerous international and regional documents, treaties and conventions.⁴⁶ International and regional law brings to the forefront the importance of progressive development in respect of the right to basic education and highlights why new standards should constantly be set in order to ensure that the right is protected, recognised and realised at all times,⁴⁷ which one can assume includes an emergency such as the Covid-19 pandemic.

In order to conduct an effective comparative analysis in respect of the impact of Covid-19 on a child's right to education, it is crucial to identify the integral role these international and regional instruments play in interpreting a child's right to education and how these documents provide for and protect this right. In order to set the foundation for this research, this chapter will identify and discuss the relevant international and regional law which provides for the right to basic education. In addition thereto, this chapter will introduce the 4 'A' scheme and shall explain its relevance as a practical analysis tool. Finally, this chapter will identify the international and regional guidance which was developed in order to assist nations in responding to the consequences in education which were experienced during the Covid-19 pandemic.

⁴⁵ A Strohwalde *The child's rights to, in and through basic education: An analysis of South Africa's international obligation* Doctor of Laws dissertation Stellenbosch University (2021) 33.

⁴⁶ Urchick *U.S Education Law* 1.

⁴⁷ For more information regarding relevant soft law instruments such as Declarations and Frameworks which highlight the importance of setting new goals and standards continuously in order to ensure that the right to education is recognised and protected, see Strohwalde *The child's rights to, in and through basic education* 99 & 101.

2 2 A child's right to education as developed under International Law

2 2 1 The Universal Declaration of Human Rights

The first international instrument to recognise and articulate the right to education was the Universal Declaration of Human Rights (hereafter "UDHR").⁴⁸ The UDHR provides for the recognition of human rights in general,⁴⁹ and sets out certain obligations and aims in respect of the right to education. Article 26 of the UDHR states that everyone, in other words also children, have the right to education and that education should be directed toward the full development of the human personality while strengthening a person's respect for human rights and fundamental freedoms.⁵⁰ Furthermore, the UDHR provides that elementary education must be compulsory and that at least elementary and the fundamental stages of education should be free.⁵¹

While the UDHR is non-binding, it carries moral force, and in terms of education, each nation is encouraged to establish a free basic education system in order to cater for the majority of learners within their respective jurisdiction.⁵² As such, it can be said that the UDHR set the foundation for the international recognition of a child's right to education.

2 2 2 The International Covenant on Economic, Social and Cultural Rights (hereafter "ICESCR")

The United Nations General Assembly adopted the ICESCR following the adoption of the UDHR.⁵³ The ICESCR is considered to be a significant international instrument and the right to education is enshrined therein.⁵⁴ Article 13 of the ICESCR provides that everyone has the right to an education which allows for the full development of the human personality as well as a person's sense of dignity, and that it should further strengthen a person's respect for human rights and fundamental freedoms.⁵⁵ It has thus been said that article 13 should be considered an open-ended fundamental norm

⁴⁸ Resolution 217 (III) of 10 December 1948, UN doc A/810. See also KD Beiter *The protection of the right to education by international law: including a systematic analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (2006) 90.

⁴⁹ Strohwald *The child's rights to, in and through basic education* 75.

⁵⁰ Article 26 of the UDHR.

⁵¹ Article 26(1) of the UDHR.

⁵² G Adams *The impact of the quantile funding system in reducing apartheid-inherited inequalities in education* Master of Laws thesis, Stellenbosch University (2020) 65.

⁵³ Strohwald *The child's rights to, in and through basic education* 75.

⁵⁴ Article 13 & Article 14 of the ICESCR.

⁵⁵ Article 13 of the ICESCR.

in the sphere of education.⁵⁶ Moreover, article 13 includes certain aims, emphasising the fact that a country's educational system and process should be based on the specific values expressed under the section.⁵⁷ As such, according to this provision, a child not only has a right to an education, but has a right to a specific quality of education.⁵⁸

Article 14 of the ICESCR on the other hand attempts to regulate the obligations of state parties in realising the right to primary education.⁵⁹ It is important to take note of the Committee on Economic, Social and Cultural Rights (hereafter "CESCR"),⁶⁰ General Comment No. 11, "Plans of Action for Primary Education" which interprets and provides clarification of article 14 of the ICESCR.⁶¹ General Comment No. 11 elaborates on certain terms in relation to article 14 of the ICESCR and explains that each State party that had not secured compulsory primary education, free of charge, should in a fixed plan work out and adopt a detailed plan for the progressive implementation thereof within a reasonable period.⁶² In addition to this provision, article 2 of the ICESCR imposes an overarching duty on a State to take steps individually and through international assistance with the view of progressively ensuring the full realisation of the rights recognised in the ICESCR.⁶³ These provisions compel member states to take positive steps to realise the right to education within their respective jurisdiction. Moreover, according to the CESCR General Comment No. 13, "State parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in article 13(1)".⁶⁴

⁵⁶ KD Beiter *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (2006) Netherlands: Koninklijke Brill NV 462.

⁵⁷ 465.

⁵⁸ 465.

⁵⁹ Article 14 of the ICESCR.

⁶⁰ Take note that the Committee on Economic, Social and Cultural Rights was established under the Economic and Social Council Resolution 1985/17 of 28 May 1985 to oversee the implementation and carry out the monitoring of the ICESCR.

⁶¹ CESCR *General Comment No. 11* (1999) UN Doc E/C. 12/1999/4.

⁶² See the CESCR *General Comment No. 11* (1999) UN Doc E/C. 12/1999/4 paras 1 & 6-10.

⁶³ Article 2 of the ICESCR.

⁶⁴ Article 13(1) of the ICESCR reads as follows: "The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace". Take further notice of the CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 para 49.

Furthermore, General Comment No. 13, confirms that states are “obligated to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13(1)”.⁶⁵ Based on the aforementioned, it can be said that in order to fulfil the obligations of the ICESCR, member states are expected to respect, protect and fulfil the right to education which can only be done by ensuring the accessibility, availability, acceptability and adaptability of education for children within the jurisdiction.⁶⁶ This concept is crucial for this thesis as each jurisdiction had to consider these elements when addressing the consequences in education that arose as a result of the Covid-19 pandemic.

2 2 3 The United Nations Convention on the Rights of a Child (hereafter “CRC”)

2 2 3 1 *The CRC*

The CRC essentially followed the approach of the UDHR,⁶⁷ and can be viewed as the international communities response to the need for a binding international instrument which provided exclusively for the rights of the child.⁶⁸ As such, the CRC ultimately changed the way in which society treated children as it encourages a child-centred rights based approach.⁶⁹ Moreover, as the most widely ratified international human rights instrument,⁷⁰ member states are not only bound to provisions in the CRC but are expected to recognise, protect, promote and realise the children’s rights provided therein.⁷¹

As a point of departure, member states are obligated to respect, protect and to fulfil a child’s right to education progressively on the basis of equal opportunity.⁷² Furthermore, member states were and are expected to take positive steps to enable the full realisation of a child’s right to education within the applicable jurisdiction,⁷³ and it essentially compels the member state to make primary education compulsory and

⁶⁵ CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 para 49.

⁶⁶ See Section 2 4 of this chapter.

⁶⁷ Strohwal *The child’s rights to, in and through basic education* 73.

⁶⁸ 33.

⁶⁹ UNICEF “Convention on the Rights of the Child” (n.d) *UNICEF* <<https://www.unicef.org/child-rights-convention>> (accessed 03-04-2022).

⁷⁰ UNICEF “Convention on the Rights of the Child” *UNICEF*.

⁷¹ Article 4 of the CRC. Strohwal *The child’s rights to, in and through basic education* 33.

⁷² See article 28 read in conjunction with article 2 of the CRC & J Tobin *The UN Convention on the Rights of a Child: A Commentary* (2019) 1056 & 1071-1074. Refer to chapter 2 of this thesis as well.

⁷³ Tobin *The UN Convention on the Rights of a Child: A Commentary* 1073.

free for all.⁷⁴ As such, according to the CRC, a child centred, child friendly and empowering approach to education is expected by all member nations.⁷⁵ In addition, article 28 of the CRC creates specific responsibilities for state parties and places a positive obligation on them to recognise a child's right to education.⁷⁶ It is thus important to recognise that article 28 provides for the actual right to education and not merely an interest in education.⁷⁷

Furthermore, article 29 provides for certain educational aims, and states that the education of a child should be directed toward the development of a child's mind, body and talents.⁷⁸ In addition, article 29 provides that education should assist in building respect for not only a child's own rights but also those of the people and the world around them.⁷⁹ Finally it is important to understand that member states are not only obligated to recognise a child's right to education, but according to the CRC, these states are expected to submit regular reports,⁸⁰ with the aim of monitoring each members progress in respect of the realisation of a child's right to education. The initial report should be submitted to the United Nations Committee on the Rights of the Child within 2 years from the date that the CRC is entered into force within that specific jurisdiction and every report thereafter should be submitted every 5 years.⁸¹

In terms of the international obligations contained in the CRC and the fact that the CRC attempts to keep member states accountable, it can be assumed that the realisation of a child's right to education within each member state is viewed as a priority and that this should extend to times of crisis such as the Covid-19 pandemic. Moreover, the reporting mechanisms contained in the CRC will be crucial in the years to come in order to determine and identify the true long term effects of the Covid-19 pandemic on the right to education within each member state.

⁷⁴ Article 28(1)(a) of the CRC.

⁷⁵ United Nations Committee on the Rights of the Child *General Comment No 1* (2001) CRC/GC/2001/1 para 2.

⁷⁶ Article 28 of the CRC.

⁷⁷ Tobin *The UN Convention on the Rights of the Child: A Commentary* 1062.

⁷⁸ Article 29 of the CRC.

⁷⁹ Article 29 of the CRC.

⁸⁰ See article 28 read in conjunction with article 44 of the CRC.

⁸¹ Articles 44(1)(a) & 44(1)(b) of the CRC.

2 2 3 2 *The Committee on the Rights of the Child General Comment No 1: The Aims of Education*

The United Nations Committee on the Rights of the Child issued CRC General Comment No 1: The Aims of Education (hereafter “General Comment No. 1”) which not only elaborates on the aims of education as set out in article 29 of the CRC, but attempts to provide guidance on the interpretation of this provision. General Comment No. 1 makes it clear that article 29 of the CRC places a focus on the child’s individual and subjective right to a certain quality of education and that education should be viewed with a child-centred lens.⁸² Above all, General Comment No. 1 also makes it clear that education must involve a child centred approach.⁸³

Furthermore, according to General Comment No. 1, article 29 shows a strong link between education and other human rights, and that it should prepare a child for life in a society based on equality, tolerance and peace.⁸⁴ The fact that the rights in the CRC are interconnected, as indicated in General Comment No 1,⁸⁵ is relevant for the purpose of this research, as each jurisdictions response to the consequences of the Covid-19 pandemic were and are expected to consider the right to education together with the other provisions in the CRC, as well as other human rights. For example, the right to education should never risk a child’s life or his or her survival,⁸⁶ as provided for in the CRC, and this had to be considered when member states responded to the education consequences which arose and continue to arise as a direct result of the Covid-19 pandemic.⁸⁷

2 2 4 The African Charter on Human and Peoples Rights (hereafter “ACHPR”) and The African Charter on the Rights and Welfare of the Child (hereafter “ACRWC”)

In addition to international law, African regional law must also be identified and considered, specifically in relation to South Africa and Nigeria and their regional

⁸² United Nations Committee on the Rights of the Child General Comment No 1 (2001) CRC/GC/2001/1 para 9.

⁸³ Para 9.

⁸⁴ Article 29 of the CRC and United Nations Committee on the Rights of the Child General Comment No 1 (2001) CRC/GC/2001/1 para 11.

⁸⁵ United Nations Committee on the Rights of the Child General Comment No 1 (2001) CRC/GC/2001/1.

⁸⁶ Article 6 of the CRC.

⁸⁷ See chapters 3-7 for information on the education related consequences of the Covid-19 pandemic and each jurisdictions legal responses.

obligations in respect of the right to education. For the purpose of this research a detailed discussion of the ACHPR, which was adopted on the 27th of June 1981, is not pertinent and only article 17 of the ACHPR is relevant as it confirms that every individual, which includes all children, shall have the right to education.⁸⁸ Importantly, article 11 of the ACRWC reiterates the provisions in the UDHR, the CRC and the ICESCR by confirming that every child has the right to an education.⁸⁹ Moreover, article 11(2)(a) provides that the education of every child should allow for the development of the child's personality, talents as well as their mental and physical abilities.⁹⁰

Furthermore, the ACRWC provides that the right to education should be directed toward, "the preparation of the child for a responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all people's ethnic, tribal and religious groups".⁹¹ This provision thus confirms the importance of the right to education as a foundational right as it not only allows for the development of the child academically, but also allows for the realisation of other rights as well.

The ACRWC further confirms that member states have a regional obligation in respect of the right, as they are expected to take appropriate measures with the view of realising a child's right to education within their respective jurisdiction.⁹² In addition, in terms of the ACRWC, member states must take appropriate measures to encourage regular school attendance,⁹³ which became an area of concern during the Covid-19 related school closures.⁹⁴ The accessibility of adequate education facilities has previously been identified as a problem across various African nations, including South Africa,⁹⁵ and the Covid-19 pandemic simply exacerbated this issue.

⁸⁸ Article 17 of the ACHPR.

⁸⁹ Article 11 of the ACRWC.

⁹⁰ Article 11(2)(a) of the ACRWC.

⁹¹ Article 11(2)(d) of the ACRWC.

⁹² Article 11(3) of the ACRWC.

⁹³ Article 11(3)(d) of the ACRWC.

⁹⁴ See chapters 3-8 for more information and detail.

⁹⁵ Refer to chapter 3 of this thesis for information on South Africa.

2 2 5 The European Social Charter (revised) and The European Convention on Human Rights

The right to education is also enshrined in certain European regional instruments, including the European Social Charter (revised) and the European Convention on Human Rights (hereafter “ECHR”). The ECHR provides that “no person shall be denied the right to education”.⁹⁶ Moreover, the European Social Charter (revised), which was adopted by the Council of Europe must be considered in relation to European jurisdictions’ and their obligations in respect of the right to education.⁹⁷ The European Social Charter (revised) states that children and young people should receive free education at primary and secondary level.⁹⁸ In addition, the importance of the right to education is highlighted as according to article 7, children and young people who are still subject to compulsory education cannot be employed in work which may deprive them of the full benefit of their education.⁹⁹ European countries which have signed and ratified both or even one of these regional documents therefore have obligations with regard to the right to education and this is relevant for the purpose of this thesis.¹⁰⁰

2 2 6 Sustainable Development Goal 4

The 2030 Agenda which is broad and holistic has attempted to cater for a number of goals relating to various issues, including but not limited to hunger, inequality, poverty, and most importantly for the purpose of this thesis, education.¹⁰¹ Sustainable Development Goal 4 of the 2030 Agenda calls for the universal promotion of inclusive and equitable access to quality education.¹⁰² As such, Sustainable Development Goal 4 forms a rights-based approach to education and essentially confirms that a quality education is the foundation of sustainable development.¹⁰³

In recent years, more emphasis has been placed on the rights-based approach to development as concern has arisen in respect of the needs-based as well as the

⁹⁶ Protocol 1, Article 2 of the European Convention on Human Rights.

⁹⁷ Council of Europe “Chart of Signatures and Ratifications of Treaty 163” (05-02-2022) *Council of Europe* <<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty=163>> (accessed 05-02-2022).

⁹⁸ Article 17(2) of the European Social Charter (revised).

⁹⁹ Article 7(3) of the European Social Charter (revised).

¹⁰⁰ See Chapters 5 & 6 of this thesis for information on the UK and Italy.

¹⁰¹ UNESCO *Education 2030 Right to Education Handbook* (2018) 159.

¹⁰² OECD *Education at a Glance* (2021) 28.

¹⁰³ UNESCO *Education 2030 Right to Education Handbook* 159-160.

service-delivery approaches, more specifically that the latter two approaches were and are insufficient in achieving development goals.¹⁰⁴ Moreover, it can be said that as a rights-based approach to education, Sustainable Development Goal 4 seeks to integrate the norms, standards and principles of international human rights law with the development of education, in other words international human rights must be considered in the development of relevant education plans, strategies and policies.¹⁰⁵ A rights-based approach to education thus in simple terms means that every child is entitled to and should be assured a quality education that respects and promotes his or her human rights, including but not limited to his or her right to dignity, and that this approach should ultimately contribute toward a child's optimum development.¹⁰⁶

Furthermore, it is important to note that there are ten targets associated with Sustainable Development Goal 4, which include but are not limited to ensuring universal, free, equitable and quality primary and secondary education and ensuring equal access to all levels of education.¹⁰⁷ It is however crucial to understand that whilst Sustainable Development Goal 4 was and is expected to drive change, it is not legally binding for member states,¹⁰⁸ and is thus in contrast to the provisions in the international instruments mentioned hereabove which are binding upon ratification.

While Sustainable Development Goal 4 is not legally binding, a level of political commitment exists as states are expected to take ownership and establish a national framework, including but not limited to laws and policies regulating education.¹⁰⁹ As such, the importance of Sustainable Development Goal 4 is not diminished. Prior to the Covid-19 pandemic, the world had already been experiencing a learning crisis, and attaining Sustainable Development Goal 4 had been and continues to be a major challenge.¹¹⁰ For the purpose of this research, this is relevant as the Covid-19 pandemic essentially risked weakening an already fragile education system.

2 3 A Practical Framework: 4 'A' Scheme

It is clear from the discussion above that the right to education exists under international law and regional law. It is thus crucial to explore how nations are expected

¹⁰⁴ UNESCO & UNICEF *A Human Rights-Based Approach to Education For All* (2007) 9-10.

¹⁰⁵ 9-10.

¹⁰⁶ UNESCO & UNICEF *A Human Rights-Based Approach to Education For All* 1.

¹⁰⁷ 160.

¹⁰⁸ 162.

¹⁰⁹ 163.

¹¹⁰ d'Orville (2020) *Prospects* 11.

to implement and incorporate the right within their respective jurisdictions. The 4 ‘A’ scheme as established by Katarina Tomaševski, a former “Rapporteur on the Right to Education”,¹¹¹ is a valuable instrument in interpreting and giving substantive content to the right to education.¹¹² The 4 ‘A’ scheme was initially set out in Tomaševski’s report,¹¹³ and further emphasised in the CESCR’s General Comment No. 13.¹¹⁴ According to the 4 ‘A’ scheme, in order to realise the right to education, education must exhibit the following 4 features, namely, accessibility, availability, acceptability and adaptability.¹¹⁵

In terms of accessibility, educational institutions have to be accessible to everyone, both physically and economically, without discrimination and within the jurisdiction of the State party.¹¹⁶ In simple terms, in order for education to be accessible, no child should be denied an education or access to an education based on their race, ethnicity, physical ability or their financial status.¹¹⁷ Bearing the aforementioned definition in mind, it can be said that accessibility presented a challenge during the Covid-19 academic years,¹¹⁸ specifically during the Covid-19 related school closures.

Availability refers to fact that educational institutions and resources should be available in sufficient quantity.¹¹⁹ In simple terms, availability refers to that which the State must physically provide,¹²⁰ including budgetary resources, material resources and any other necessary resources or facilities which should be available in order to fulfil the educational needs of every person identified as a holder of the right to education.¹²¹ Challenges surrounding the availability of education have been highlighted in the past, and remain prevalent in education systems across the world. These issues include, but are not limited to the shortage of schools, the lack of trained

¹¹¹ See K Tomaševski *Preliminary Report of the Special Rapporteur on the Right to Education* (1999) 1-31.

¹¹² F Veriava “Realising the right to basic education” in *Socio-economic rights: Progressive realisation?* (2016) 86.

¹¹³ Tomaševski *Preliminary Report of the Special Rapporteur on the Right to Education* (1999) 1-31.

¹¹⁴ CESCR General Comment No. 13 (1999) UN Doc E/C. 12/1999/10 paras 6(a)-(d) . See also Veriava “Realising the right to basic education” in *Socio-economic rights: Progressive realisation?* (2016) 86.

¹¹⁵ Tomaševski *Preliminary Report of the Special Rapporteur on the Right to Education* (1999) paras 42-74.

¹¹⁶ CESCR General Comment No. 13 (1999) UN Doc E/C. 12/1999/10 paras 6(b). See also Tobin *The UN Convention on the Rights of a Child: A Commentary* 1068.

¹¹⁷ Tobin *The UN Convention on the Rights of a Child: A Commentary* 1068.

¹¹⁸ For more information see chapter 8 of this thesis.

¹¹⁹ CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 paras 6(a).

¹²⁰ Adams *The impact of the quantile funding system in reducing apartheid-inherited inequalities in education* 57.

¹²¹ Tobin *The UN Convention on the Rights of a Child: A Commentary* 1067.

teachers, as well as the lack of appropriate books, equipment and materials, and these availability challenges have been further exacerbated by the Covid-19 pandemic.¹²²

Acceptability relates to the form and substance of education,¹²³ and states that the education methods and the curricula should be relevant, culturally appropriate and of good quality.¹²⁴ While the benefits of quality education have been well documented and researched,¹²⁵ for the purpose of this thesis, the acceptability feature will only be discussed in limited detail as whether the form and substance of education has been or will be permanently altered due to the Covid-19 pandemic is unknown at this stage.

In terms of adaptability, education should be flexible so that it can evolve and adapt to the ever changing needs of society.¹²⁶ The adaptability of education should not only consider the individual needs of the child or children in question, but must also consider the specific societal needs of the area in which the child or children live(s).¹²⁷ In addition, amongst other factors, situations of emergency should be taken into account,¹²⁸ and this included an emergency such as the Covid-19 pandemic.¹²⁹ This is due to the fact that the Covid-19 crisis has shown and continues to show that it is necessary to constantly update and broaden the right to education and that education should be flexible in order to adapt to different contexts and experiences.¹³⁰ As such, adaptability forms a central focus of this research and will be considered throughout.

The 4 'A' scheme in essence provides a practical child-centred framework which facilitates the interpretation of a nations international, regional and domestic obligations in respect of a child's right to basic education.¹³¹ Moreover, it provides a standard against which a jurisdictions performance toward the right to education can be measured.¹³² According to the United Nations General Assembly, the 4 'A' scheme should be integrated as a policy guide throughout the education system at all levels

¹²² See Chapters 3-7 for more information.

¹²³ CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 paras 6(c).

¹²⁴ CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 paras 6(c). See also Tobin *The UN Convention on the Rights of a Child A Commentary* 1069.

¹²⁵ 1069.

¹²⁶ CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 paras 6(d).

¹²⁷ Strohwal *The child's rights to, in and through basic education* 56.

¹²⁸ 56.

¹²⁹ See Chapter 8 for more detail.

¹³⁰ UNESCO *Education in a post-Covid world* (2020) 12.

¹³¹ Tobin *The UN Convention on the Rights of a Child A Commentary* 1067. For a more detailed discussion of the 4 'A' Scheme, see Veriava "Realising the right to basic education" in *Socio-economic rights: Progressive realisation?* (2016) 86-87 or Strohwal *The child's rights to, in and through basic* 52-57.

¹³² Adams *The impact of the quantile funding system in reducing apartheid-inherited inequalities in education* 57.

including at the school level,¹³³ which confirms the value thereof as an analytical tool. For the purpose of this thesis, the 4 'A' scheme will be considered throughout, and will be utilised as an analytical tool in the comparative analysis of the nations' legal responses to the consequences in education as a result of the Covid-19 pandemic.¹³⁴ Specifically, this thesis will focus on whether each jurisdiction considered the accessibility, the availability, the acceptability and the adaptability of education as vital features when developing and implementing their legal responses to the consequences of the Covid-19 pandemic.

2 4 International guidance in addressing the global impact of Covid-19 on a child's right to education

2 4 1 The impact of the Covid-19 pandemic on a child's right to education

The Covid-19 pandemic impacted human life vastly, and it tested each and every nations' resolve and commitment to education as a universal right.¹³⁵ Many of the measures which were adopted across the globe in order to mitigate the spread of the disease saw schools closing, thus immediately impacting the accessibility and availability of education.¹³⁶ It can therefore be assumed that the realisation of a child's right to education was in fact hindered during the Covid-9 pandemic as a child's physical access to their respective educational facility was limited and in most cases prevented during this period.

The loss of learning which was experienced as a result of the Covid-19 related school closures across the globe, reduced the opportunities children had to gain knowledge and skills.¹³⁷ In addition, the Covid-19 related school closures and the subsequent disengagement from face-to-face education had and continues to have the potential to negatively affect learners' future prospects, which is confirmed by the anticipated increased learner dropout rate during this period.¹³⁸ The Covid-19

¹³³ United Nations General Assembly *Special Rapporteur on the right to education: Report on the impact of the Covid-19 crisis on the right to education A/HRC/44/39* (2020) 1 18.

¹³⁴ See Chapter 8 for the comparative analysis utilising the 4-A scheme.

¹³⁵ Reimers "Difficult leadership. Sustaining the Right to Education during a Pandemic" in *Leading Education Through Covid-19: Upholding the Right to Education* 1.

¹³⁶ 2.

¹³⁷ Reimers "Difficult leadership. Sustaining the Right to Education during a Pandemic" in *Leading Education Through Covid-19: Upholding the Right to Education* 8.

¹³⁸ 8. See also Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* & United Nations *Policy Brief: Education During Covid-19 and beyond* (2020) 1 9-10.

pandemic therefore not only revealed existing vulnerabilities in education,¹³⁹ but showed and continues to show that short term decisions have the potential to cause major long term turmoil.¹⁴⁰ Realistically speaking, while learning loss and gaps in education are expected,¹⁴¹ the true effects of the Covid-19 pandemic on learners, their education and their future prospects will only be revealed in the years to come.

In addition to the above consequences, it is important to understand that while numerous measures were developed and implemented during the course of the Covid-19 pandemic in order to allow learners to return to school and to ensure the right to education, there was a global lack of preparedness.¹⁴² As such, it was necessary to develop certain international guidance in order to assist nations in responding to the educational consequences of the Covid-19 pandemic.

2 4 2 International guidance developed to assist nations in responding to the Covid-19 related consequences in education

UNESCO identified that the Covid-19 pandemic not only brought many of the pre-existing problems, patterns and trends in education to the forefront,¹⁴³ but created additional educational challenges.¹⁴⁴ This in turn saw numerous international organisations developing guidance documents in order to assist nations in responding to the crisis,¹⁴⁵ such as the “Covid-19 Education Response: Preparing the Reopening of Schools – Resource Paper” by UNESCO and “Save our Education: Protect every child’s right to learn in the Covid-19 response and recovery” by Save the Children.

From a global perspective, these guidance documents encouraged nations to develop policies that not only mitigate the challenges in education which arose as a result of the Covid-19 pandemic, but support continued learning through either ensuring physical access to educational facilities or introducing effective distance learning mechanisms.¹⁴⁶

¹³⁹ UNESCO *Education in a post-Covid world* (2020) 5.

¹⁴⁰ 8. See also United Nations *Policy Brief* (2020) 2 & World Bank Group (Education) *The Covid-19 Pandemic: Shocks to Education and Policy Responses* (2020) 1 16.

¹⁴¹ United Nations *Policy Brief* (2020) 8.

¹⁴² United Nations General Assembly *Special Rapporteur on the right to education* (2020) 7.

¹⁴³ UNESCO *Education in a post-Covid world* (2020) 2.

¹⁴⁴ 7.

¹⁴⁵ 8.

¹⁴⁶ For more detail consult OECD *A Framework to Guide an Education Response to the Covid-19 Pandemic of 2020* (2020) 1 17-30; United Nations *Policy Brief* (2020) 19-25; Save the Children *Save our Education: Protect every child’s right to learn in the Covid-19 response and recovery* (2020) 1 18-37; UNICEF *Guidance on Distance Learning Modalities: To Reach All Children and Youth During*

During the Covid-19 pandemic and the subsequent school closures, children were expected to suspend their education in order to protect the health of adults and older generations' who were more susceptible to the Covid-19 disease.¹⁴⁷ According to international guidance however, the rights of children should not have been placed on hold during this time, as the school closures not only disrupted a child's learning but compromised learner nutrition and carries risks to learners future prospects.¹⁴⁸ In attempting to safeguard the right to education, international guidance thus encouraged public health authorities and public education authorities to work in a coordinated manner in order to balance health, education and other socio-economic rights accordingly and to ensure the realisation of each right.¹⁴⁹

The Organisation for Economic Co-operation and Development (hereafter "OECD") went on to identify the access to and the availability of educational opportunities as a priority.¹⁵⁰ The message was very clear, namely that access to and the availability of educational opportunities should therefore be prioritised even throughout a time such as the Covid-19 pandemic where the right to health was seemingly prioritised over the right to education.¹⁵¹ International guidance thus identified the importance of developing alternative ways to learn while schools remained closed.¹⁵² In conjunction with this however, international guidance highlighted the inequalities in the accessibility, availability and the adequacy of technology and internet during this period.¹⁵³ As such, from an international perspective, jurisdictions across the globe were encouraged to consider these concerns when attempting to ensure the realisation of a child's right to education during the Covid-19 pandemic and the subsequent school closures.

Moreover, the United Nations Children's Fund (hereafter "UNICEF") encouraged governments to roll out multiple learning modalities, namely high-tech, low-tech and no-tech modalities, which include but are not limited to those where no technology or

School Closures (2020) 1 6-13 & Council of Europe Making the Right to Education a Reality in times of Covid-19: A Roadmap for Action on the Council of Europe education response to Covid-19 (2020) 1 8-9.

¹⁴⁷ Council of Europe *Making the Right to Education a Reality in times of Covid-19 (2020) 14.*

¹⁴⁸ Save the Children *Save our Education (2020) 8.*

¹⁴⁹ UNESCO *Education in a post-Covid world (2020) 10.*

¹⁵⁰ OECD *A Framework to Guide an Education Response to the Covid-19 Pandemic of 2020 (2020) 25.*

¹⁵¹ 25.
¹⁵² Save the Children *Save our Education (2020) 8 & Council of Europe Making the Right to Education a Reality in times of Covid-19 (2020) 18.*

¹⁵³ UNICEF *Guidance on Distance Learning Modalities (2020) 3.*

technology which is more commonly available is utilised for educational purposes.¹⁵⁴ As such, international guidance documents encouraged each jurisdiction to explore various distance learning mechanisms during the school closures, including radio lessons, audio and televisual lessons, printed learning kits and utilising mobile phone platforms such as SMS and WhatsApp.¹⁵⁵ The chapters below will explore this issue in greater detail when discussing the incorporation of distance learning mechanisms in the identified jurisdictions and whether these mechanisms ensured the realisation of a child's right to education during the Covid-19 pandemic.¹⁵⁶

International guidance also identified the importance of reshaping and restructuring the school environment so that learners could resume learning and return to school activities.¹⁵⁷ Nations were thus encouraged to plan thoroughly for the safe reopening of schools,¹⁵⁸ and to utilise an integrated approach when reopening schools.¹⁵⁹ Moreover, international guidance highlighted the importance of ensuring that schools were safe spaces for learners to return to.¹⁶⁰ Therefore, in relation to the safe reopening of schools across the globe, the accessibility to health and hygiene facilities at all schools, the incorporation of public health measures, the use of masks and the development of school specific physical distancing protocols were and are encouraged by various international guidance documents.¹⁶¹ Moreover, international guidance provides that each jurisdiction should consider developing preparedness plans which cater for Covid-19 outbreaks in the school environments.¹⁶² The reality however is that the consequences of the Covid-19 pandemic on education systems throughout the world is unprecedented,¹⁶³ and no single system or schedule for the reopening of schools was provided.¹⁶⁴ As such, the manner in which each nation incorporated these international guidance recommendations and whether each jurisdiction was able to adapt the recommendation to suit their specific education system is relevant to this

¹⁵⁴ 3.

¹⁵⁵ OECD *A Framework to Guide an Education Response to the Covid-19 Pandemic of 2020* (2020) 18-19 & 21.

¹⁵⁶ See Chapters 3-7 of this thesis.

¹⁵⁷ UNESCO *Education in a post-Covid world* (2020) 15.

¹⁵⁸ United Nations *Policy Brief* (2020) 3.

¹⁵⁹ Save the Children *Save our Education* (2020) 39.

¹⁶⁰ 39. See also Council of Europe *Making the Right to Education a Reality in times of Covid-19* (2020) 8; United Nations *Policy Brief* (2020) 3 and 19-20 & World Bank Group (Education) *The Covid-19 Pandemic* (2020) 27-28.

¹⁶¹ Save the Children *Save our Education* (2020) 40-42 & United Nations *Policy Brief* (2020) 19-20.

¹⁶² Save the Children *Save our Education* (2020) 56.

¹⁶³ United Nations *Policy Brief* (2020) 26.

¹⁶⁴ 17.

research, and specifically the primary research question and the first and second secondary research questions. It is however clear from the above that international guidance documents encouraged the accessibility, the availability, the acceptability and the adaptability of education, elements which will be considered throughout this research, specifically in the comparative analysis found in chapter 8 of this thesis.

2 5 Conclusion

The international community has identified the importance of the right to education through numerous instruments as discussed *supra*. Education is therefore not only a fundamental right, but it sets the foundation upon which children are able to understand, realise and enjoy their other human rights.¹⁶⁵ As such, it must be understood that international as well as regional law, standards and guidance play a vital role in each jurisdiction interpreting and giving context to their individual right to education.

While each jurisdiction on a domestic level realises the right to education within their country, it can be assumed that the provision of global standards and guidance can assist in ensuring the provision of quality education across the world. Whether nations abide by these international obligations, standards and guidance is a question in and of itself which must be further investigated.

In the chapters to follow, this thesis aims to identify whether each jurisdiction identified for the purpose of this research considered their international and regional obligations in the context of a child's right to education during the Covid-19 pandemic.¹⁶⁶ Furthermore, through utilising the 4 'A' scheme, this research aims to identify whether a child's right to education was protected and realised during the Covid-19 pandemic.¹⁶⁷ Moreover, this research will identify whether the international and regional guidance documents discussed hereabove were taken into account when each nation responded to the consequences in education which arose a result of the Covid-19 pandemic.¹⁶⁸

¹⁶⁵ K Tomasevski *Human rights obligations in education: The 4-A scheme* (2006) 47.

¹⁶⁶ See Chapters 3, 4, 5, 6 and 7 of this thesis.

¹⁶⁷ See Chapter 8 for more detail.

¹⁶⁸ See Chapters 3-7 for more information.

Chapter 3: The impact of Covid-19 on the right to education in South Africa

3 1 Introduction

In order to fully comprehend the significance of a child's right to basic education, the impact of the Covid-19 pandemic, and why it is necessary to protect the right, the existing legal position in South Africa, as well as the country's standards and obligations in respect of the right to education must be established. Due to the fact that international law has the potential to influence South African domestic law,¹⁶⁹ this chapter will not only set out South Africa's internal legal framework in respect of a child's right to education, but will also identify the relevant international and regional instruments which recognise the right to basic education and which influence South African domestic law. Against this background, the chapter will explore whether South Africa's obligation in respect of the right to education was fulfilled prior to the Covid-19 outbreak.

In addition thereto, an analysis will be conducted in order to determine whether each jurisdictions' obligations were met during the Covid-19 pandemic. The analysis consists of three themes. First, the educational consequences of the Covid-19 pandemic will be discussed as South Africa experienced periods where schools were either open, completely closed or partially closed as a direct result of the pandemic. Second, South Africa's legal responses in the educational context will be discussed. Thirdly, it will be determined whether South Africa was able to circumvent the educational consequences of the Covid-19 pandemic and protect the right to education through the country's legal responses.

3 2 The right to basic education as developed under South African law

3 2 1 International Influence on the South African right to education

According to section 39(1)(b) of the Constitution, a court, tribunal or forum must consider international law when interpreting the Bill of Rights.¹⁷⁰ Section 233 of the Constitution further states that every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation

¹⁶⁹ See ss 39(1)(b) & 233 of the Constitution. See also *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

¹⁷⁰ S 39(1)(b) of the Constitution.

that is inconsistent with international law, when interpreting any legislation.¹⁷¹ Furthermore, where South Africa has not ratified an international or regional instrument, the instrument can still serve as a guide to interpret rights in the Bill of Rights. This concept was confirmed in the case of *S v Makwanyane* where the court stated that both binding and non-binding international law may be taken into account when interpreting rights within the Bill of Rights.¹⁷²

There are numerous international and regional instruments which provide certain standards and obligations in respect of the right to education, and these instruments can be said to have influenced South African domestic law.¹⁷³ The UDHR, which sets out certain obligations and aims in respect of the right to education, has influenced and continues to influence South Africa.¹⁷⁴ In addition, South Africa has signed and ratified numerous international and regional instruments which recognise the right to education. South Africa signed the CRC in 1993, the ICESCR in 1994 and the ACRWC in 1997, with ratification following in 1995, 2015 and 2000 respectively.¹⁷⁵ In addition to the aforementioned, South Africa also ratified the ACHPR in 1996 which also caters for the right.¹⁷⁶ The applicable international and regional instruments are valuable sources of interpretation for a child's right to basic education in South Africa as they set out certain obligations and responsibilities which each jurisdiction must comply with in terms of the right to education.¹⁷⁷ It is however crucial to ensure that when international law is applied as an interpretive or analytical tool, it should be done within the context of the South African legal system.¹⁷⁸

Bearing the above in mind, it is clear that international law should be viewed to play a fundamental role in the interpretation of South African law, regardless of whether the instruments have been ratified by South Africa.¹⁷⁹ In addition, it is important to note

¹⁷¹ S 233 of the Constitution.

¹⁷² *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

¹⁷³ See chapter 2 of this thesis for a discussion of the relevant international and regional instruments.

¹⁷⁴ Refer to chapter 2.

¹⁷⁵ African Union "African Union" (28-06-2019) *African Charter on the Rights and Welfare of the Child* <<https://au.int/en/treaties/african-charter-rights-and-welfare-child>> (accessed 20-05-2021) & United Nations Human Rights Office of the High Commissioner "Status of ratification – Interactive Dashboard *United Nations*."

¹⁷⁶ African Commission on Human and Peoples' Rights "State Parties to the African Charter" (n.d) <<https://www.achpr.org/statepartiestotheafricancharter>> (accessed 04-08-2021).

¹⁷⁷ See chapter 2 of this thesis.

¹⁷⁸ K Ngidi "The role of international law in the development of children's rights in South Africa: A children's rights litigators perspective" in M Kilander (ed) "International Law and Human Rights Litigation in Africa" (2010) 177.

¹⁷⁹ *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

that the South African Human Rights Commission relied on the 4 'A' scheme,¹⁸⁰ as an analysis tool to monitor South Africa's compliance with its international obligations in terms of the right to education.¹⁸¹ As such, international law, regardless of whether it is binding or non-binding should be considered when establishing and interpreting a child's right to basic education in South Africa.

As such, for the purpose of this thesis, it is important to realise that while South Africa is expected to provide children with the right to basic education, the right must be considered in tandem with other constitutional rights.¹⁸² Moreover, when utilising international law as an interpretive tool in relation to the right to education, it must be done within the context of the Constitution.

3 2 2 A child's right to basic education as developed under South Africa domestic law

3 2 2 1 Introduction

In order to comprehend the significance of a child's right to basic education in present day South Africa, one must first understand the historical context of the right, as the right to basic education in South Africa is inextricably intertwined with the country's apartheid past.¹⁸³ Prior to 1994, the concept of 'separate development' was prominent in South Africa and it ultimately caused an unequal distribution of education opportunities within the country.¹⁸⁴ Moreover, with the passing of the Bantu Education Act 47 of 1953, the apartheid state effectively ushered in an era of organised education,¹⁸⁵ and utilised the system of basic education to enforce the racist apartheid regime.¹⁸⁶ Due to the inherent bias toward black learners, and a lack of adequate funding for black schools, no quality education existed for black learners in South Africa during this period,¹⁸⁷ and an unequal standard of education was born within the nation.

¹⁸⁰ See Chapter 2 of this thesis.

¹⁸¹ See South African Human Rights Commission *South African Charter of Children's Basic Education Rights* (2013).

¹⁸² See Ss 10, 11, 12, 21, 27 & 28 of the Constitution.

¹⁸³ C Simbo "Defining the term basic education in the South African Constitution: An international law approach" (2012) 16 *LDD* 162 166.

¹⁸⁴ Simbo (2021) *LDD* 167.

¹⁸⁵ 169.

¹⁸⁶ Strohwald *The child's rights to, in and through basic education* 9-11.

¹⁸⁷ Simbo (2021) *LDD* 169.

A new era in the South African educational system came after the African National Congress, who remain the political party in power, won the democratic elections in 1994.¹⁸⁸ As such, necessary changes thus occurred from this moment onward, and these changes included the introduction of the Constitution and efforts to transform the education system.¹⁸⁹ Moreover, in an attempt to combat the apartheid history in respect of the right to basic education, the post-apartheid legal framework explicitly recognises the right to basic education,¹⁹⁰ and this right is supported and given effect to through other constitutional provisions and certain legislation, which will be discussed in detail below.¹⁹¹

3 2 2 2 Constitution of the Republic of South Africa

As indicated in the introduction of this thesis, a child's right to education is enshrined in the Constitution, as the applicable section, namely section 29, specifically states that, "everyone has the right to a basic education", which obviously includes all children.¹⁹² Furthermore, section 29(1)(a) of the Constitution sets the foundation for a child's right to basic education in South Africa as the State has an immediate obligation to provide basic education within the country without any qualification or justification to take away from this duty.¹⁹³ While no person may be denied the right to education, it must be noted that section 29 does not state that education should be free or compulsory, and domestic legislation must be consulted in relation to these issues. Moreover, it is crucial to note that the right to education as found in section 29 of the Constitution is different from other socio-economic rights, as it does not have any internal limitations or qualifiers.¹⁹⁴

It is however important to remember that rights, inclusive of the right to education, and their accompanying duties are not absolute and can be limited, provided that the limitation is justifiable.¹⁹⁵ When relying on section 36 of the Constitution, it can be said that the right to education can indeed be limited in terms of the law of general application provided that in an open and democratic society, the limitation is

¹⁸⁸ Strohwald *The child's rights to, in and through basic education* 13.

¹⁸⁹ 13.

¹⁹⁰ S 29(1)(a) of the Constitution.

¹⁹¹ The National Education Policy Act 27 of 1996 & The South African Schools Act 84 of 1996. See also Chapter 2.

¹⁹² S 29(1)(a) of the Constitution.

¹⁹³ Simbo (2012) *LDD* 172.

¹⁹⁴ See *Governing Body of the Juma Masjid Primary School v Essay* [2011] ZACC 13 para 37 & A Skelton "How far will courts go in ensuring the right to basic education?" (2012) 27 *SAPL* 396.

¹⁹⁵ I Currie & J De Waal *The Bill of Rights Handbook* 6ed (2013) 150.

reasonable and justifiable based on human dignity, equality and freedom.¹⁹⁶ During the Covid-19 lockdown in South Africa, it can be said that the right to education was limited as schools were closed in order to address prevalent health risks and to prevent the spread of the disease.¹⁹⁷ While certain lockdown regulations were challenged in court,¹⁹⁸ the court has failed to include a section 36(1) analysis in relation to the right to education. As such, whether the limitation to a child's right to basic education in terms of section 36 is valid, is unknown for the purpose of this thesis.

As such, the focus instead shifts to section 7(2) of the Constitution. According to this section, the South African government is obligated to, "respect, protect, promote and fulfil the rights in the Bill of Rights".¹⁹⁹ This means that the State has both positive and negative duties in respect of a child's right to education.²⁰⁰ According section 7(2) read with section 8(1) of the Constitution, the State has a positive obligation in respect of the right to education,²⁰¹ and is obligated to "respect, protect, promote and fulfil" the right at all times in South Africa,²⁰² which is significant for the purpose of this research. The duty to protect the right to education means that the State is required to take measures to prevent certain interference to the right.²⁰³ The duty to fulfil a child's right to basic education requires that the State take positive action to ensure that the right is realised and enjoyed,²⁰⁴ at all times, including during the Covid-19 pandemic.

Furthermore, education should be viewed as a tool to assist in the transformation of society, as the school environment serves to enable learners to grow into responsible citizens while enjoying equality, freedom and dignity,²⁰⁵ which are not only fundamental rights but founding values under the Constitution.²⁰⁶ As such, section 28 of the Constitution is also significant in respect of a child's right to basic education as section 28(2) provides that a child's best interests are of paramount importance in

¹⁹⁶ S 36 of the Constitution.

¹⁹⁷ See section 3.5.2 below for more detail on the Covid-19 related school closures.

¹⁹⁸ For more information on the topic, see *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184; *Esau & Others v Minister of Cooperative Governance and Traditional Affairs & Others* (5807/2020) [2020] ZAWCHC 56 & *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa & Another* (21688/2020) [2020] ZAGPPHC 246.

¹⁹⁹ S 7(2) of the Constitution.

²⁰⁰ S Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) 82-83.

²⁰¹ *Juma Musjid Primary School v Essay* [2011] ZACC 13 para 45.

²⁰² S 7(2) of the Constitution.

²⁰³ Strohwald *The child's rights to, in and through basic education* 203-204.

²⁰⁴ 205.

²⁰⁵ Pieterse (2004) TSAR 714.

²⁰⁶ S 1(a) of the Constitution.

every matter concerning the child.²⁰⁷ It is important to clarify, that under this section, a child according to South African law, refers to a person below the age of 18.²⁰⁸ In addition, education should not only be seen as an end in itself, but also as a means to address prevalent social problems,²⁰⁹ and this relates to why a child's right to education should be prioritised and why a child should not be required or permitted to perform work or provide services which place their education at risk.²¹⁰

Taking into account section 28 of the Constitution and the child-centric approach in interpreting relevant socio-economic rights, it can be said that the government's actions during the Covid-19 pandemic should have been aimed toward protecting and ensuring a child's right to basic education in South Africa rather than limiting, hindering or preventing the right. Moreover, sections 29 and 7(2) of the Constitution, more specifically the States duty to protect and fulfil a child's right to basic education within South Africa is noteworthy in answering the primary research question of this thesis, as the State attempted to ensure the realisation of the right and sought to protect the right to education from the consequences of the Covid-19 pandemic through the legal responses developed, introduced and implemented during this period.²¹¹

Based on the above discussion, the Constitution thus directly and indirectly recognises a child's right to basic education in South Africa, it is however crucial to realise that none of provisions therein elaborate or provide specific content to the right, and domestic legislation and case law thus becomes important in interpreting the right. In understanding a child's right to basic education in South Africa, it is important to realise that the right to basic education is unique and distinguishable from the other socio-economic rights in the Bill of Rights,²¹² a concept which was confirmed in the case of *Governing Body of the Juma Masjid Primary School v Essay*.²¹³ Unlike other socio-economic rights, the word "access" is not mentioned in relation to the right to education, and academics have commented that this should be viewed as deliberate by the drafters of the Constitution, as the state must provide everyone with a basic

²⁰⁷ Ss 28(1)(f)(ii) & 28(2) of the Constitution.

²⁰⁸ S 28(3) of the Constitution.

²⁰⁹ Berger (2003) *Columbia Law Review* 661.

²¹⁰ S 28(1)(f)(ii) of the Constitution.

²¹¹ See section 3 5 of this Chapter.

²¹² 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 71.

²¹³ [2011] ZACC 13.

education and not only access to basic education.²¹⁴ Access to education was thus a crucial consideration during the Covid-19 pandemic specifically during the Covid-19 related school closures.²¹⁵

3 2 2 3 Education specific legislation

Furthermore, in order to provide more content to the constitutional right to education, the right is regulated through specific legislation within the country. The South African Schools Act 84 of 1996 (hereafter “Schools Act”) and the National Education Policy Act 27 of 1996 (hereafter “NEPA”) provide for and regulate certain aspects of the right,²¹⁶ and should be viewed as central pieces of education specific legislation. While NEPA may not lay out specific content to the right to basic education, it has assisted and continues to assist with the transformation of the South African education system as it provides for the determination and regulation of national policy relating to the right to education.²¹⁷ The focus however, in terms of national legislation, is the Schools Act which serves to regulate the organisation, governance and funding of schools while providing a uniform system through which these aspects can be achieved.²¹⁸

More importantly to the above, the Schools Act ultimately gives effect to the constitutional right to basic education,²¹⁹ confirms the transformative nature of the right,²²⁰ and regulates access to schools,²²¹ which contributes toward answering the primary research question of this thesis. Section 5 of the Schools Act ultimately confirms that all children have an equal right to education as it provides for the admission of learners to public schools within South Africa and states that admission should occur without unfair discrimination.²²² Furthermore, section 3 of the Schools Act provides for compulsory basic education, and while certain exceptions exist in relation to compulsory school attendance,²²³ according to the Schools Act, it is compulsory for a child to attend school from the ages of 7 to 15 or up until ninth grade,

²¹⁴ C Simbo “The right to basic education, the South African Constitution and the Juma Masjid case: An unqualified human right and a minimum core standard” (2013) 17 LDD 477 487.

²¹⁵ See section 3 5 of this thesis for more information.

²¹⁶ See chapter 2 for further discussion of the relevant legislative provisions.

²¹⁷ Preamble of the NEPA.

²¹⁸ Preamble of the Schools Act.

²¹⁹ *MEC for Education v Governing Body v Rivonia Primary* 2013 6 SA 582 para 53.

²²⁰ Preamble of the Schools Act.

²²¹ Veriava “Realising the right to basic education” in *Socio-economic rights: Progressive realisation?* (2016) 90.

²²² Section 5(1) of the Schools Act.

²²³ Ss 3 & 4 of the Schools Act.

depending on which comes first.²²⁴ Furthermore, every parent responsible for such a child should cause them to attend school between this period.²²⁵ The Schools Act also recognises the importance of the availability of schools as it states that every Member of the Executive Council should ensure that there are sufficient places available in schools within the province so that each child living in that specific province is able to attend school.²²⁶

Moreover, while not providing for universal free basic education, the Schools Act does allow for free basic education for some children, dependent on certain circumstances.²²⁷ The charging of school fees for basic education does however remain an issue in relation to accessing and interpreting the right in South Africa.²²⁸ In addition, the funding of public schools is also regulated under the Schools Act, and ultimately, the State is responsible for funding public schools from public revenue.²²⁹ The funding of basic education is however a complex issue, and deficiencies in school budgets are made up through the charging of school fees or fund raising efforts.²³⁰ Depending on the funding received, schools are categorised into specific quintiles, with quintiles 1 to 3, which include 'no fee' schools being the poorer quintiles and receiving a higher amount of funding from the State.²³¹

The provisions of the Schools Act must be considered throughout when considering and attempting to answer the primary research question of this thesis. According to the provisions above, it can be assumed that a learner attending school is of paramount importance and it should be viewed as a priority of the State together with parents and/or guardians. As such the legal responses implemented in order to address the consequences of the Covid-19 pandemic, as well as those which serve to protect a child's right to basic education during the Covid-19 pandemic, should be considered in tandem with the concept of compulsory basic education as schools ought to be open, available and accessible in order for learners to attend school, as confirmed in the Schools Act. Moreover, state funding is also relevant in considering

²²⁴ S 3(1) of the Schools Act.

²²⁵ S 3(1) of the Schools Act.

²²⁶ S 3(4) of the Schools Act.

²²⁷ Ss 5(3)(a), 39, 40 & 41 of the Schools Act.

²²⁸ Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) 245.

²²⁹ S 34(1) of the Schools Act.

²³⁰ Veriava "Realising the right to basic education" in *Socio-economic rights: Progressive realisation?* (2016) 91.

²³¹ National Norms and Standards for School Funding: Notice of publication of list of schools that may not charge schools fees GN 1137 in GG 41994 of 24-10-2018 para 87.

the hypotheses set out in this thesis as certain poorer schools face challenges in practically implementing certain legal responses to the Covid-19 pandemic in respect of the right to education due to insufficient funding or infrastructure issues resulting from a lack of funds.

3 2 2 4 Definition of “basic education”

Based on the abovementioned constitutional and legislative provisions, it is clear that the right to basic education is entrenched in South African law. A problem however arises when defining the actual concept of basic education as a variety of potential classifications and interpretations exist.²³² The term ‘basic education’ ultimately has no clear-cut definition in South Africa as it has not been defined in the Constitution, nor has it been defined by the judiciary or in any legislative document within the country.²³³ Without a comprehensive definition, a problem arises in translating the constitutional right to basic education into tangible reality in South Africa.²³⁴ Ultimately, without a clear definition, the duties of the State in respect of the right to basic education remain ambiguous and the level and quality of education which should be provided is not easily determinable.²³⁵

According to Murungi, there are two ways in which the term ‘basic education’, as it is used in certain policies and legislation in South Africa, can be interpreted.²³⁶ As per the first approach, the term ‘basic education’ refers to the adequacy or standard of education,²³⁷ namely the “minimum levels of literacy, numeracy and essential life skills necessary to do more than menial work in a complex society”.²³⁸ This approach however is not necessary for the purpose of this thesis, and the second approach will be utilised and must be considered throughout this research. The second approach in interpreting the term ‘basic education’ essentially relates to the level of education as determined on the basis of time.²³⁹ In other words, the right to basic education

²³² Strohwalde *The child’s rights to, in and through basic education* 13.

²³³ Simbo (2012) *LDD* 162.

²³⁴ 181.

²³⁵ 165.

²³⁶ LN Murungi “Inclusive basic education in South Africa: Issues in its conceptualisation and implementation” (2015) 18 *PELJ* 3160 3162 <
<https://www.ajol.info/index.php/pej/article/view/117022>> (accessed 08-07-2021).

²³⁷ Murungi (2015) *PELJ* 3162.

²³⁸ S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa, 1994-2008* (2009) 113.

²³⁹ Murungi (2015) *PELJ* 3162.

considers the period of time a learner attends school. The White Paper on Education and Training (hereafter “White Paper 1”) sites article 1 of the “Word Declaration on Education for All”, and it in essence indicates that basic education should be defined in relation to the learning needs which are appropriate to the age and experience of a learner.²⁴⁰ According to the White Paper 1, General Education and Training (hereafter “GET”) covers the provision of “10 years free and compulsory general education for all”.²⁴¹ While no concrete definition for basic education exists in the country, in terms of this approach, the Schools Act which takes the view of White Paper 1 provides a starting point,²⁴² as it makes education compulsory for all learners between the age of 7 to 15 or from grade 1 to grade 9, depending on what comes first.²⁴³

A question however arises as to whether children over the age of 15 and above grade 9 are also entitled to enforce and enjoy this right. According to Skelton, the courts have not yet decided on whether a child beyond grade 9 or above the age of 15 is still entitled to enforce and enjoy their right to basic education.²⁴⁴ Section 29(1)(b) of the Constitution however creates an obligation on the State, through reasonable measures, to make further education progressively available and accessible.²⁴⁵ Therefore, while grade 10 to 12 is included under the Further Education and Training (hereafter “FET”) banner, based on the language used in section 29, specifically the reference to “adult basic education”,²⁴⁶ the right to basic education should be seen to include more than just the GET phase of schooling.²⁴⁷ Further, section 29(1)(b) is generally understood to refer to higher or tertiary education, or more specifically, post-matric (post-grade 12) schooling,²⁴⁸ making section 29(1)(a) applicable to GET schooling as well as FET grade 10 to 12 schooling.

3 2 2 5 Conclusion

For the purpose of this thesis as a whole, the right to basic education as developed under South African law should be understood to include all children from grade 1 to

²⁴⁰ *White Paper 1* Chapter 7, para 14.

²⁴¹ *White Paper 1* chapter 13, para 2.

²⁴² Simbo (2012) *LDD* 173.

²⁴³ S 3(1) of the Schools Act.

²⁴⁴ Skelton (2012) *SAPL* 403.

²⁴⁵ S 29(2)(b) of the Constitution.

²⁴⁶ S 29(1)(a) of the Constitution.

²⁴⁷ D Roithmayr “Access, Adequacy and Equality” (2003) 19(3) *South African Journal on Human Rights* 382 393.

²⁴⁸ Adams *The impact of the quantile funding system in reducing apartheid-inherited inequalities in education* 51.

grade 12. Moreover, the discussion above in essence not only confirms the first portion of the primary hypothesis, namely that the right to basic education is of fundamental importance within South Africa but further confirms one of the secondary hypotheses, namely that the legislation and policies which have been created and introduced in respect of a child's right to education is sufficient within South Africa. The problem however arises with the implementation of the relevant legislation and policies which will be discussed further in section 3.3 here below.

3.3 The right to education in South Africa pre-Covid-19

As indicated above, while there are issues surrounding the definition of basic education it should not distract from the sound legal theoretical framework which regulates the right domestically. A child's right to basic education under section 29(1)(a) of the Constitution has been described as an empowerment right and remains an unqualified right in South Africa.²⁴⁹ As an empowerment right, the right to basic education is a way for marginalised adults and children to lift themselves out of poverty while further allowing them to participate meaningfully in society.²⁵⁰ Moreover, it can be said that the right to education is a precondition for the enjoyment and exercise of other rights within the Bill of Rights.²⁵¹

In 2003 Berger pointed out that while a child's right to basic education is found in the Constitution, the right fails to be practically realised within South Africa, as woefully inadequate schools remain prevalent in certain poorer areas of the country.²⁵² As will be pointed out in the discussion, many schools within the country failed to meet constitutional and legislative requirements prior to the Covid-19 pandemic, which in turn limited the true realisation of a child's right to basic education within the country.²⁵³ This is crucial for the purpose of this research as the pre-existing deficiencies in education have the potential to limit the successful implementation of the Covid-19 specific legal responses in South Africa.

²⁴⁹ Veriava "Realising the right to basic education" in *Socio-economic rights: Progressive realisation?* (2016) 89-90.

²⁵⁰ *Governing Body of the Juma Masjid Primary School v Essay* [2011] ZACC 13 para 41.

²⁵¹ Veriava "Realising the right to basic education" in *Socio-economic rights: Progressive realisation?* (2016) 81.

²⁵² Berger (2003) *Columbia Law Review* 614. For more information, see Veriava "Realising the right to basic education in South Africa" in *Socio-economic rights: Progressive realisation?* (2016) 113-132.

²⁵³ Berger (2003) *Columbia Law Review* 661. See also Veriava "Realising the right to basic education in South Africa" in *Socio-economic rights: Progressive realisation?* (2016) for a more detailed discussion.

These pre-existing deficiencies in education have been highlighted through South African jurisprudence and must be considered for the purpose of this research as they hinder the effectiveness of South Africa's response to Covid-19. Furthermore, South African jurisprudence also confirms that challenges in the implementation of the legal framework persist and that this has already and continues to affect the realisation of a child's right to basic education within the country.²⁵⁴

A prevailing issue which is further highlighted by the Covid-19 pandemic relates to school infrastructure. The presence of Mud Schools was brought to the forefront when it became necessary for the courts to be approached in 2009 when the resources allocated to the building of actual schools failed to be utilised for its purpose.²⁵⁵ The judgement in *Centre for Child Law and 7 Others v Government of the Eastern Cape Province*,²⁵⁶ dealt with the fact that Mud Schools still exist within South Africa, and confirmed that certain schools had been battling for more than a decade with poor infrastructure.²⁵⁷

The South African government has further failed to provide necessary resources and equipment for learners, specifically a failure to provide desks and chairs to schools in the Eastern Cape. This particular failure was highlighted in the case of *Madzodzo v Minister of Basic Education*.²⁵⁸ This judgement confirmed that the right to education is not only immediately realisable, but that there are certain entitlements attached to the right, stating that, the state's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools, but requires the provision of a range of educational resources including but not limited to schools, classrooms, teachers, teaching materials and appropriate facilities for learners.²⁵⁹

In *Minister of Basic Education v Basic Education for All* the South African Supreme Court of Appeal (hereafter "SCA") dealt with a textbook shortage issue when learners in Limpopo did not receive the textbooks required in respect of the Curriculum and

²⁵⁴ A Skelton *Strategic Litigation Impacts – Equal Access to Quality Education* (2017) 47.

²⁵⁵ *Centre for Child Law v Government of the Eastern Cape Province Eastern Cape High Court, Bhisho*, case no. 504/10 & Veriava "Realising the right to basic education" in *Socio-economic rights: Progressive realisation?* (2016) 103.

²⁵⁶ Case no 504/10.

²⁵⁷ *Centre for Child Law v Government of the Eastern Cape Province Eastern Cape High Court, Bhisho*, case no. 504/10 & Veriava "Realising the right to basic education" in *Socio-economic rights: Progressive realisation?* (2016) 103.

²⁵⁸ 2014 2 ALL SA 339 (ECM).

²⁵⁹ See *Madzodzo v Minister of Basic Education* 2014 2 ALL SA 339 (ECM) para 20.

Assessment Policy Statements (hereafter “CAPS”) syllabus.²⁶⁰ While the SCA concluded that every learner is entitled to a textbook in every subject at the commencement of the academic year, the fact is that due to funding deficiencies all learners in South Africa did not have equal access to necessary education resources.

Komape v Minister of Basic Education,²⁶¹ highlighted the failures in relation to sanitation facilities in schools as it deals with unsafe and undignified sanitation facilities in schools in Limpopo. The case dealt with the pit latrines within the school environment and a five-year-old learner who died tragically after falling into a pit latrine at his school.²⁶² While the *Komape* case predominantly dealt with delictual damages, the case brought to the forefront the disastrous state of sanitation in certain schools as well as the lack of effort from the Limpopo Department of Education to rectify the issue.²⁶³

It is clear from the above discussion, South Africa has had various issues in realizing a child’s right to education in South Africa, and not all learners have equal access to adequate resources or facilities. These prevailing issues are crucial for the purpose of this thesis as they hinder the effectiveness and the implementation of the Covid-19 legal responses, specifically hand hygiene mechanisms and social distancing mechanisms.²⁶⁴

The discussion contained in this section has introduced a theme, namely that the South African education system had already been facing various issues prior to the Covid-19 outbreak which is an important consideration for the purpose of answering the primary research question and determining whether the third secondary hypotheses is correct.

3 4 The National Development Plan 2030 and the Action Plan 2024

According to Chapter 9 of the National Development Plan 2030: Our Future-make it work (hereafter “National Development Plan”), which is focused on “improving

²⁶⁰ See *Minister of Basic Education v Basic Education for All* [2016] 1 All SA 369 (SCA) & F Veriava “The Limpopo textbook litigation: a case study into the possibilities of a transformative constitutionalism” (2016) 32(2) *SAJHR* 321-343.

²⁶¹ 2020 2 SA 347 (SCA). See section 3 4 4 3 for a more detailed discussion.

²⁶² *Komape v Minister of Basic Education* 2020 2 SA 347 (SCA) para 1.

²⁶³ *Komape v Minister of Basic Education* (1416/2015) 2018 ZALMPPHC 18 para 24 & 25.

²⁶⁴ See section 3 5 below for more detail.

education, training and innovation,”²⁶⁵ and the Action Plan 2024: Towards the realisation of Schooling 2030 (hereafter “Action Plan”), which is the third five-year plan of its kind, the South African government has acknowledged the need to address problems in education.²⁶⁶

A key focal point of the National Development Plan in relation to basic education is to prioritise not only human capacity, school management and district support but also the improvement of school infrastructure.²⁶⁷ While the National Development Plan does not necessarily focus on all the challenges that have arisen or that may arise, it highlights aspects that should be targeted in order to improve the realisation of the right to education, for example with reference to school infrastructure, it states that all schools should meet the minimum infrastructure standards and that no-fee schools should be targeted when committing to upgrading school infrastructure to meet the optimum standards.²⁶⁸

The Action Plan on the other hand does highlight where the problems in education lie, and provides various education specific plans aimed at the improvement of the right to education.²⁶⁹ Furthermore, the Action Plan takes into consideration the historical context of South Africa and identifies the importance of addressing consequences of the countries past.²⁷⁰ Moreover, the Action Plan as of August 2020, noted that the Covid-19 pandemic has accentuated prevailing issues within the South African basic education system, including but not limited to school infrastructure issues and the weakness of information and communication technologies in many schools,²⁷¹ and identifies the need to provide solutions thereto. The Action Plan sets out output goals that look at learning outcomes and coverage in addition to goals dealing with improving schooling.²⁷² These goals include but are not limited to attracting a new group of appropriately trained teachers, avoiding excessively large classes, access to the minimum set of textbooks and workbooks, creating a functional school

²⁶⁵ Department: The Presidency Republic of South Africa *National Development Plan 2030: Our Future-make it work* (2012) 1 1-484.

²⁶⁶ Department of Basic Education *Action Plan to 2024: Towards the realisation of Schooling 2030* (2020) 1 2 & 5.

²⁶⁷ Department: The Presidency Republic of South Africa *National Development Plan 2030* (2012) 295 & 302-315.

²⁶⁸ 303.

²⁶⁹ Department of Basic Education *Action Plan to 2024* (2020) 2 & 5.

²⁷⁰ 5.

²⁷¹ 2. Also see the discussion in section 3.3 of this thesis.

²⁷² 10-18.

environment, improving the physical infrastructure and using schools as vehicles for promoting access to a range of public services.²⁷³ These goals are important to consider in addressing the educational issues identified and highlighted during the Covid-19 pandemic.

It is however important to note that while the Action Plan is aligned toward attaining better learning outcomes, the Action Plan also identifies that educational improvement is complex, and the environment in which basic education must be improved is challenging.²⁷⁴ For example, the Action Plan identifies that funding and education related spending has not kept pace with rising enrolments,²⁷⁵ and while enrolments may have decreased due to the Covid-19 pandemic, other issues such as a loss in instruction time, which may require funding to rectify have arisen.²⁷⁶ As such, despite these attempts at rectifying prevailing challenges, they persist within the South African education system and how they hindered the effectiveness of certain Covid-19 related legal responses will be discussed under section 3.5 here below.

3.5 The consequences of the Covid-19 pandemic and South Africa's legal responses in protecting a child's right to basic education

3.5.1 Introduction

According to *Statista*, South Africa has the highest number of confirmed Covid-19 cases on the African continent.²⁷⁷ In order to curb the spread of the disease, the South African government introduced numerous restrictions to life within the country.²⁷⁸ The first legal response to the challenges presented by Covid-19 was to institute a national lockdown in terms of the *Disaster Management Act 57 of 2002*.²⁷⁹ South Africa thus went into a state of almost complete lockdown on the 26th of March 2020.²⁸⁰ The initial lockdown saw amongst other things, a ban on the sale of alcohol and tobacco and the imposition of a national curfew which prevented movement between 8pm and 5am.²⁸¹

²⁷³ Department of Basic Education *Action Plan to 2024* (2020) 12-18.

²⁷⁴ 7.

²⁷⁵ 8.

²⁷⁶ See section 3.5 of this thesis for more detail pertaining to these issues.

²⁷⁷ Tumwesigye *et al* "Covid-19 Lockdowns in Africa: Their Effects and Challenges" in *Covid-19 in the Global South* 155 & Anonymous "Number of coronavirus (Covid-19) cases on the African continent" *Statista*.

²⁷⁸ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 5.

²⁷⁹ GN 318 in GG 43107 of 18-03-2020.

²⁸⁰ S van der Berg & N Spaul Counting the Cost: Covid-19 school closures in South Africa & its impact on children (2020) 4.

²⁸¹ 4.

In terms of the lockdown schools were closed.²⁸² The purpose of this section is to identify South Africa's legal responses in not only addressing, preventing and combating the spread of the disease within the school environment but in protecting the child's right to education during each of these periods. While a number of legal responses exist, this thesis will focus on a select few and identify whether practical implementation problems were and are present in relation to South Africa's legal responses to the consequences of the Covid-19 pandemic. Furthermore, the section will determine whether practical implementation issues in tandem with prevailing challenges in education hindered the realisation of a child's right to education during the Covid-19 pandemic.

3 5 2 The consequences of the Covid-19 related school closures and the provision of alternative learning mechanisms

3 5 2 1 *Introduction and access to education*

The Covid-19 pandemic ultimately caused various issues for all people across the globe. During the Covid-19 lockdown in South Africa, the right to education was limited, as the national lockdown instituted in South Africa saw schools closing on the 18th of March 2020 in order to curb the spread of the disease.²⁸³ The initial national lockdown, saw schools closed between the 19th of March 2020 and the 31st of May 2020, and according to the amended school calendar this period was ultimately recognised as school holidays,²⁸⁴ as limited or no learning occurred within the country during this period. As such, while the governments legal response to close schools did play a role in reducing the transmission of the disease, despite certain alternative learning mechanisms being introduced,²⁸⁵ it cannot be said to have ensured or protected a child's right to basic education in its entirety within South Africa.

The reason for the above is due to the fact that the South Africa government hindered a child's access to education and the realisation of the basic education right as it not only prevented a learner from accessing their physical school environment, but also certain necessary resources, including but not limited to teachers. School

²⁸² S van der Berg & N Spaul Counting the Cost: Covid-19 school closures in South Africa & its impact on children (2020) 4.

²⁸³ Section 6 of GN 318 in GG 43107 of 18-03-2020.

²⁸⁴ GN. 432 in GG 43609 of 07-08-2020.

²⁸⁵ See section 3 5 2 3 for more detail.

closures also restricted access to certain school related social services.²⁸⁶ Moreover, as previously indicated, at the time of writing, no South African court has confirmed whether the school closures was a justifiable limitation of a child's right to education in terms of section 36 of the Constitution.²⁸⁷ As such, due to the reasons above, and the fact that equal access to education was impacted,²⁸⁸ it can be said that the potential exists for this limitation to a child's right to education to be deemed as an unjustifiable limitation.

3 5 2 2 *Access to education related social services provided by schools*

For learners in South Africa, the physical school closures had a profound effect on vulnerable and disadvantaged learners, specifically those who rely on schools not only for educational benefits, but for a range of social services, including health and nutrition.²⁸⁹ As a consequence of the legal response to close schools, certain social services provided by schools were directly affected. In South Africa, the "National School Nutrition Programme" which feeds approximately 9 million learners within the country, saw an unfortunate four month suspension during the Covid-19 school closures between March and June 2020,²⁹⁰ and as a result, litigation was instituted.²⁹¹

In *Equal Education and others v Minister of Basic Education and others*,²⁹² brought to light the real life ramifications for learners during the programmes suspension. In terms of the structural interdict which was issued, the Department of Basic Education was ordered to report, rather urgently, on their plans to roll out the programme to qualifying students and to further provide progress reports to the Court on a regular basis.²⁹³ It is clear based on the *Equal Education* judgment that the fulfilment of a child's right to basic education in South Africa is inextricably linked with the right to nutrition as found in section 28(1)(c) of the Constitution.²⁹⁴ Furthermore, the judgement highlights that the Constitution creates a negative obligation on the state not to impair

²⁸⁶ See sections 3 5 2 2 & 3 5 2 3 below.

²⁸⁷ Refer to section 3 2 of this chapter.

²⁸⁸ See section 3 5 2 3 of this chapter for more detail.

²⁸⁹ d'Orville (2020) *Prospects* 12.

²⁹⁰ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 32.

²⁹¹ *Equal Education and others v Minister of Basic Education and others (Children's Institute as amicus curiae)* [2020] 4 All SA 102 (GP) para 34.

²⁹² [2020] 4 All SA 102.

²⁹³ para 103.

²⁹⁴ para 40.

the right to access the rights presented in the Bill of Rights,²⁹⁵ an ideal confirmed in *Government of the Republic of South Africa v Grootboom*.²⁹⁶ The closing of schools in South Africa therefore impaired not only a child's right to basic education, but their rights to access and nutrition as well as, and according to Van der Berg and Spaul, it was not in the best interests of the child.²⁹⁷

The Department of Basic Education recognised that the "National School Nutrition Programme" was not equipped to deal with the challenges which arose as a result of the Covid-19 related school closures and further acknowledged that the programme needs to be better prepared in order to ensure that food continues to be available to learners from poor households even during school closures.²⁹⁸ Good nutrition is the backbone of effective learning,²⁹⁹ and if learners were expected to learn at all during the Covid-19 related school closures, the provision of the daily meal received as part of the "National School Nutrition Program" was and remains a crucial element as that meal may be only meal some students from poor households receive. As such, the realisation of a child's right to basic education in South Africa relies on the realisation of a child's right to nutrition and the governments legal response to close schools as a direct result of Covid-19 clearly hindered the realisation of both these rights within the country.

3 5 2 3 *Alternative learning mechanisms during the Covid-19 school closures*

The main focus of this section is the online learning and teaching platform. As indicated in section 3 5 2 1 above, during the Covid-19 related school closures, certain attempts were made to provide for a child's right to basic education, however, these attempts cannot be viewed as a replacement for the normal school curriculum as confirmed in this section as it impacted not only the availability of education, but the acceptability of education in South Africa as well. The Ministry of Communication and Digital Technologies launched a multi-media "Covid-19 Learner Support" initiative on the 9th of April 2020.³⁰⁰ This initiative provided for certain alternative education support

²⁹⁵ *Equal Education and others v Minister of Basic Education and others (Children's Institute as amicus curiae)* [2020] 4 All SA 102 (GP) para 44.

²⁹⁶ 2000 11 BCLR 1169 (CC) and see s 27(1) of the Constitution.

²⁹⁷ S van der Berg & N Spaul Counting the Cost: Covid-19 school closures in South Africa & its impact on children (2020) 23.

²⁹⁸ Department of Basic Education *Action Plan to 2024* (2020) 2.

²⁹⁹ 2.

³⁰⁰ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 20.

mechanisms and included the broadcasting of content across the SABC TV channels as well as certain allocated education channels on DSTV and OpenView and 13 different radio station.³⁰¹ According to Van der Berg and Spaul, however, the instruction received across these platforms would only be equivalent to about 5% of the face to face instruction time a learner would have received had schools been open.³⁰² As such, the curriculum taught across these platforms can be said to have been severely limited, meaning that learners learning through these means were prevented from receiving an adequate and comprehensive education during this period.

A major challenge came to light in relation to online education, as internet connectivity in South Africa is not only expensive, but very limited within the country, specifically in poorer rural areas.³⁰³ The government attempted to address the challenge by issuing a directive on the zero-rating of education websites.³⁰⁴ According to paragraph 3 of the directive, subject to approval, certain education related websites would qualify for zero-rating.³⁰⁵ The zero-rating however did not ensure full access, and many children were still unable to access online learning and teaching platforms due to the lack of appropriate devices as well as limited or no network access, specifically in rural areas within South Africa.³⁰⁶ The zero-rating directive can be viewed as a regulatory response to the Covid-19 related consequences in education, however in reality, it failed to ensure a child's right to basic education as it should have been implemented in tandem with other mechanisms which sought to provide all learners with adequate devices and to improve internet access across the country.

Furthermore, certain other challenges hindered the effectiveness of online learning and teaching as a suitable alternative during the Covid-19 related school closures. These challenges include not only the shortage of devices for online learning specifically for underprivileged learners, but the closures of internet cafés, which rural learners and teachers relied on for their online needs, as well as the lack of adequate computer skills of some rural learners and teachers.³⁰⁷ The General Household Survey

³⁰¹ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 20.

³⁰² S van der Berg & N Spaul Counting the Cost: Covid-19 school closures in South Africa & its impact on children (2020) 16.

³⁰³ B Dube "Rural Online Learning in the Context of Covid-19 in South Africa: Evoking an Inclusive Education Approach" (2020) 10(2) *Multidisciplinary Journal of Education Research* 135 151.

³⁰⁴ GN 651 in GG 43413 of 05-06-2020.

³⁰⁵ Section 3 of GN 651 in GG 43413 of 05-06-2020.

³⁰⁶ Dube (2020) *Multidisciplinary Journal of Education Research* 144 & 145.

³⁰⁷ 145, 146 & 147.

of 2018, proves that the shortage of devices for online learning and teaching is a reality as it reported that only about 22% of households had a computer and further confirmed limited internet connectivity as it was reported that only 10% had an internet connection in their home.³⁰⁸ The right to education depends on sufficient and adequate resources, and it cannot be said that learners were provided with the necessary resources and or equipment to facilitate learning during this period which thus hinders the realisation of a child's right to basic education.

The Covid-19 pandemic and the associated school closures highlighted the weaknesses of information and communication technologies in many schools in South Africa.³⁰⁹ Furthermore, the South African government identified the need for learners and teachers to become more aware and accustomed to online resources and further stated that technology innovation is important regardless of whether a crisis exists or not and should therefore be prioritised in the future.³¹⁰

Learners and teachers alike were ultimately unable to take advantage of the distance and online learning and teaching platforms due to a variety of reasons, and this in turn saw reduced teaching and limited learning during the Covid-19 related school closures. Furthermore, due to the fact that remote learning during the Covid-19 related school closures was largely dependent on a learner possessing the necessary and correct educational resources, including but not limited to the necessary technology required to take advantage of the available services,³¹¹ it can be said that limited or no learning occurred for a large portion of learners, specifically those underprivileged learners within the country.

3 5 2 4 Conclusion

The Covid-19 related school closures as a legal response regulated by certain policy directives, had a profound impact on a child's right to basic education and cannot be deemed to have protected the right within the country. Ultimately, the Covid-19 related school closures impacted the accessibility of education and education related social services by physically preventing learners from accessing their education facilities and the social services provided within the school environment.³¹²

³⁰⁸ Statistics South Africa *General Household Survey 2018* (2019) Pretoria: StatsSA 57 & 63.

³⁰⁹ Department of Basic Education *Action Plan to 2024: Towards the realisation of Schooling 2030* (2020) 2.

³¹⁰ 2. See also Chapter 9 of this thesis.

³¹¹ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 21.

³¹² For a more detailed discussion of the 4-A Scheme, consult chapters 2 and 8 of this thesis.

Furthermore it affected the availability of education as resources and teacher availability was limited, and finally it impacted the acceptability of education as the curriculum taught was affected by the transition to distance learning.³¹³

Moreover, while South Africa attempted to show their commitment toward the adaptability of education, the implementation of distance learning mechanisms, specifically online learning and teaching mechanisms and the regulations linked thereto, it cannot be viewed to have protected a child's right to basic education during the Covid-19 related school closures as limited or no learning occurred, specifically amongst the poorer learners across the nation. In order for distance learning to have been more effective, the jurisdiction should have considered a layered approach to policy or regulatory development as it is necessary to target each challenge identified in relation to the implementation of the alternative learning mechanisms.

In treating a symptom, one cannot be deemed to have cured the entire disease, and despite the efforts of the government to provide for alternative learning mechanisms, one cannot say that the majority of the underprivileged learners across the country had equal access to online learning platforms. As such the second secondary hypothesis of this thesis can be deemed to have merit. In addition, due to the fact that the right to education was not ensured or realised during the Covid-19 related school closures, it became necessary for schools to reopen across the nation.

3 5 3 The phased reopening of schools within South Africa during the Covid-19 pandemic

In an attempt to answer the primary research question of this thesis, it is crucial to identify that on a domestic level, the Covid-19 pandemic provided South Africa with the opportunity to prove its resilience and ingenuity in protecting a child's right to education.³¹⁴ As such, through the phased reopening of schools which began in June 2020,³¹⁵ South Africa attempted to prove its ingenuity and its commitment to education. As a legal response, it is clear that the phased reopening of schools was an attempt by the government to ensure and protect the realisation of a child's right to basic education following the Covid-19 related school closures and the subsequent

³¹³ For a more detailed discussion of the 4-A Scheme, consult chapter 2 & 8 of this thesis.

³¹⁴ Department of Basic Education *Action Plan to 2024: Towards the realisation of Schooling 2030* (2020) 1 iv.

³¹⁵ GN. 302 in GG 43372 of 29-05-2020 & GN. 343 in GG 43465 of 23-06-2020.

consequences. It is thus important to understand that certain consequences and challenges in terms of the phased reopening of schools did in fact exist. The purpose of this section is thus to highlight these consequences and challenges and to determine whether it affected the protection and realisation of a child's right to education in South Africa.

According to directives issued in the Government Gazette, the phased reopening of schools saw learners in grades 7 and 12 returning to school from the 1st of June 2020, learners in grades R, 3, 6, 10 and 11 returning from the 6th of July 2020 and learners in grades 4, 5, 8 and 9 only being permitted to attend school from the 3rd of August 2020.³¹⁶ This phased return was however interrupted as all public schools had a break from the 27th of July 2020 and an additional phased return was required.³¹⁷ As per the second phased reopening of schools, learners returned gradually from the 3rd of August 2020 and learners across all grades were only permitted to attend school from the 31st of August 2020.³¹⁸ The phased reopening shows a level of adaptability in relation to the right to education, but while a child's right to education was recognised and realised during the phased reopening of schools, it can be said that the right was unequally realised as a certain group of learners were able to enjoy the right prior to other groups of learners who were still prevented from attending school. In other words, a certain level of discrimination based on age and grade occurred, and in terms of the country's obligations, schools have to be accessible to everyone, without discrimination and within the jurisdiction of the State party,³¹⁹ and this cannot be deemed to have occurred in the present situation. Bearing this in mind, accessibility is a clear issue in terms of the phased reopening of schools as learners at different points in time were still prevented from physically accessing their schools, and in turn an education.

Moreover, the phased reopening of schools during the 2020 academic year did not prevent further Covid-19 related disruptions from occurring. The reopening of schools for the 2021 academic year was meant to take place on the 27th of January 2021,³²⁰ however due to the second wave and adjusted alert Level 3, which was implemented

³¹⁶ GN. 302 in GG 43372 of 29-05-2020 & GN. 343 in GG 43465 of 23-06-2020.

³¹⁷ GN. 411 in GG 43578 of 02-08-2020.

³¹⁸ GN. 411 in GG 43578 of 02-08-2020.

³¹⁹ Committee on Economic, Social and Cultural Rights (hereafter "CESCR") *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 paras 6(b).

³²⁰ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 7.

on the 29th of December 2020,³²¹ the return of public schools was delayed by 2 weeks, with learners only returning on the 15th of February 2021.³²² It must however be noted that private schools within South Africa were permitted to return to school on the 1st of February 2021,³²³ once again confirming that unequal access to education was promoted during this time. Learners in private schools were thus able to enjoy their right to education prior to learners in public schools across the nation, and disparities such as this serve only to increase the inequality gap between public and private schools within South Africa. This inequity ultimately limited the realisation of all children's right as it is found under section 29(1)(a) of the Constitution.

At time of writing, South Africa has yet to achieve the pre-pandemic state of education,³²⁴ and the Covid-19 disruptions contributed toward significant reductions in school enrolment and an increased learner dropout rate,³²⁵ which is a true cause for concern. Therefore, as a legal response, while the phased reopening of schools did in part allow for the realisation of a child's right to education, clear challenges in respect of the implementation occurred, and not all learners right to education was protected equally during the 2020 and 2021 academic years. Only once all schools across the nation had reopened for all grades, can it be said that every child's right to education was once again ensured and realised within the specific jurisdiction.

3 5 4 Creating a Covid-19 safe school environment in South Africa

3 5 4 1 Introduction

The South African government sought to protect, recognise and realise a child's right to education by reopening all schools across the nation. In order to realise the right to basic education, schools had to reopen safely, meaning that a Covid-19 safe school environment had to be created.³²⁶ The South African government therefore developed and introduced certain legal responses to protect learners within the school environment during the 2020 and 2021 academic years.

Numerous legislative, regulatory and policy responses were introduced in the Government Gazette, the "Department of Basic Education's Guidelines for Schools on

³²¹ GN. R1435 in GG 44051 of 29-12-2020.

³²² GN. 95 in GG 44162 of 16-02-2020.

³²³ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 7.

³²⁴ 38.

³²⁵ 38.

³²⁶ See discussion in chapter 2 of this thesis.

Maintaining Hygiene during the COVID-19 Pandemic” (hereafter “Hygiene Guidelines”) and the “Standard Operating Procedure for the Management and Containment of Covid-19 for Schools and School Communities” (hereafter “Standard Operating Procedure”).

The directives issued in terms of the Disaster Management Act on the 23rd of June 2020, and the 12th of February 2021, as well as the amendments issued on the 27th March 2021, included measures to address, prevent and combat the spread of COVID-19 not only in education departments and offices but most importantly, in all of the schools in South Africa.³²⁷ The Hygiene Guidelines and the Standard Operating Procedure were introduced in support of these regulatory responses.

The purpose of the Hygiene Guidelines was to provide recommendations on hygiene measures to be implemented in the school environment in order to reduce the spread of the disease.³²⁸ Further, the purpose of the Standard Operating Procedure was and is to provide guidelines for all administrators on the steps which must be taken to prevent and contain the spread of the disease, and further caters for mechanisms which can be utilised in order to manage confirmed cases of Covid-19 within the basic education sector.³²⁹

As indicated, numerous mechanisms which aimed to protect children through creating a safe school environment were developed during 2020 and 2021. This section, and the chapters to follow, will however only identify and discuss a select few prevention mechanisms which were also provided for on an international level through various documents.³³⁰ This section will further discuss whether each mechanism was successfully implemented within the South African school environment and whether it adequately protected children attending school or contributed toward the realisation of a child’s right to education in any way in South Africa.

³²⁷ GN. 343 in GG 43465 of 23-06-2020; GN. 42 in GG 44154 of 12-02-2021 & GN. 145 in GG 44339 of 27 March 2021.

³²⁸ Department of Basic Education *Guidelines for Schools on Maintaining Hygiene during the Covid-19 Pandemic* (hereafter “Hygiene Guidelines”) (2020) 1 4.

³²⁹ Section 2 of the Department of Basic Education *Standard Operating Procedure for the Containment and Management of Covid-19 for Schools and School Communities* (2020).

³³⁰ See chapter 2 of this thesis for the relevant international guidance documents.

3 5 4 2 *The provision and wearing of masks within schools*

Wearing a mask has been identified as a sensible precaution to the Covid-19 pandemic,³³¹ and this is confirmed by the Standard Operating Procedure which states that the wearing of a cloth mask or face covering is recommended as a barrier as it can assist in preventing or limiting the inhalation of the respiratory droplets which spread Covid-19.³³² As such, certain legislative, regulatory, policy and guidance documents have catered for this mechanism.

According to directives issued in the Government Gazette, every Provincial Department of Education was and is obligated to provide every learner in public school within their Province with two cloth face masks or face shields.³³³ Budgetary issues already existed in terms of the realisation of education and the provision of education resources,³³⁴ and whether the South African government could provide this and whether they did in fact provide this is unclear and unknown. As such, the directives further stated that a cloth face mask, a homemade item that covers the nose and mouth or any other appropriate item must be worn upon entering the school premises.³³⁵ Meaning that alternative options were provided for in the event where cloth masks were not provided.

According to relevant legal response documents as well as certain academics, the wearing of a mask in the school environment should not be ignored.³³⁶ The Hygiene Guidelines confirm this, as amongst other things, it states that learners should wear their cloth mask at all times in the classroom, and further emphasises the importance of washing ones mask daily.³³⁷ The Standard Operating Procedure recognises the challenges of this legal response and recommends that schools allow learners and staff the opportunity to take a “face mask break” between 5 and 15 minutes every 2 hours during the school day in an outdoor area where they can safely remove their

³³¹ S van der Berg & N Spaul Counting the Cost: Covid-19 school closures in South Africa & its impact on children (2020) 9.

³³² Section 13(1) of the DBE *Standard Operating Procedure* (2020).

³³³ Paragraph 14(4)(a) of GN. 343 in GG 43465 of 23-06-2020 & paragraph 15(4)(a) of GN. 42 in GG 44154 of 12-02-2021.

³³⁴ See section 3 3 above.

³³⁵ Paragraph 14(4)(b) of GN. 343 in GG 43465 of 23-06-2020 & paragraph 15(4)(b) of GN. 42 in GG 44154 of 12-02-2021.

³³⁶ Section D of the DBE *Hygiene Guidelines* (2020), Section 13(3) of the DBE *Standard Operating Procedure* (2020) & S van der Berg & N Spaul Counting the Cost: Covid-19 school closures in South Africa & its impact on children (2020) 9.

³³⁷ Section D of the DBE *Hygiene Guidelines* (2020).

mask and maintain social distancing.³³⁸ While this provision shows a certain level of adaptability, the feasibility thereof is questionable due to a number of issues identified in relation to social distancing within schools.³³⁹

The wearing of a mask or face visors within the school environment and the closing of schools can both be viewed as mechanisms to reduce the transmission of the disease.³⁴⁰ Unlike the closure of schools however, the wearing of a mask at school does not prevent a child's right to education from being realised as learners are permitted to attend school rather than stay at home. As such, the wearing of face masks or coverings as a legal response should continue to be adopted in all schools across South Africa as it plays a role in protecting children within the school environment and supports the realisation of a child's right to education during the Covid-19 academic years.

3 5 4 3 *Hand hygiene and sanitation facilities within South African schools*

Handwashing or hand sanitization is a global intervention which has been adopted to combat the spread of Covid-19.³⁴¹ As such, schools have introduced this intervention through legislative, policy and regulatory means in order to provide an environment which protects children as well as teachers and contributes toward limiting the spread of Covid-19 within schools that are open. The mechanism aims to support the legal response of schools reopening and learners returning to school which in turn allows for the realisation of a child's right to education within the country during the Covid-19 pandemic.

According to directives which have been issued, based on the number of people in the school, including learners, teachers, officials and other people who access the school, a school must provide sufficient quantities of hand sanitizer, and the hand sanitization facilities must be easily accessible.³⁴² The directives further state that every school must ensure that there are facilities for the washing of hands with soap and clean water.³⁴³ These provisions show a level of adaptability as they provide for

³³⁸ Section 13(3) of the DBE *Standard Operating Procedure* (2020).

³³⁹ See section 3 5 4 4 below.

³⁴⁰ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 35.

³⁴¹ Mehtar *et al* (2020) *The Lancet Global Health* (e-journal) 1. See also chapter 2.

³⁴² Paragraph 14(2)(a) of GN. 42 in GG 44154 of 12-02-2021.

³⁴³ GN. 343 in GG 43465 of 23-06-2020; GN. 42 in GG 44154 of 12-02-2021.

two different options which can be implemented simultaneously or interchangeably to ensure hand hygiene.

The Hygiene Guidelines supports and expands on the directives as it not only provides for certain hand hygiene practices, including when to wash ones hands and how to wash and sanitise ones hands,³⁴⁴ but also states that everyone who enters or leaves a school must wash their hands or sanitize them at the entrance or exit.³⁴⁵ The Standard Operating Procedure also supports the directives as it provides that learners should wash their hands frequently with soap and water for at least 20 seconds.³⁴⁶

On paper, this legal response seems sound as it is not only a globally recognised intervention to Covid-19 but numerous legislative, policy, regulatory and guidance documents make reference to the mechanism in respect of combating the spread of the disease within the school environment. An issue however arises in respect of the practical implementation of this legal response, specifically within poorer schools in South Africa, as there are certain schools within the country without access to running water.³⁴⁷ The implementation of this Covid-19 legal response, specifically in relation to hand sanitisation mechanisms can be viewed as a problem due to pre-existing issues, as whether the South African government has the necessary resources or funds to provide sufficient hand sanitizer is uncertain.

In evaluating the effectiveness of hand hygiene and sanitation it must be noted that Mud Schools still exist in South Africa.³⁴⁸ As such, Mud Schools, which are schools that have been built using mud, are a prevailing problem within the South African education system. In relation to the handwashing and sanitisation issue, it must be noted that these Mud Schools do not only lack proper sanitation facilities but have no running water.³⁴⁹ Moreover, the lack of proper sanitation facilities in South Africa was highlighted in the *Komape* case.³⁵⁰ As a result of issues such as the above prevailing in South African schools, hand washing specifically as a prevention mechanism,

³⁴⁴ Section E of the DBE *Hygiene Guidelines* (2020).

³⁴⁵ Section C of the DBE *Hygiene Guidelines* (2020).

³⁴⁶ Section 9(1)(1) of the DBE *Standard Operating Procedure* (2020).

³⁴⁷ S van der Berg & N Spaul *Counting the Cost: Covid-19 school closures in South Africa & its impact on children* (2020) 11-12.

³⁴⁸ See section 3.3 above & Skelton *Strategic Litigation Impacts* 52.

³⁴⁹ Veriava "Realising the right to basic education" in *Socio-economic rights: Progressive realisation?* (2016) 103 & A Skelton "The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law" (2013) 46 *De Jure* 17.

³⁵⁰ *Komape v Minister of Basic Education* 2020 2 SA 347 (SCA) para 1. Also see the discussion in 3.3 of this thesis.

despite having the potential to contribute toward a safe school environment, cannot be deemed as an effective solution as it cannot be implemented in all schools across the nation.

The case of *Madzodzo v Minister of Basic Education*,³⁵¹ further confirmed that the state is obligated to provide basic education as per the constitutional right,³⁵² but that the realization of the right depends on the provision of education resources.³⁵³ Appropriate facilities, including those for sanitation for students and staff are thus part and parcel of the right to education. Bearing this in mind, it must be noted that opposition from certain teacher unions about returning to schools without running water and proper sanitation facilities, did occur, as running water and the provision of appropriate facilities where water can be accessed was and is deemed as a pre-requisite for basic hygiene, specifically during a time such as the Covid-19 pandemic.³⁵⁴

Accordingly, in response to the prevailing lack of running water, the Department of Basic Education provided schools with water tanks so that teachers would return to school during the Covid-19 pandemic.³⁵⁵ Through a contract with Rand Water, three thousand five hundred schools were provided with water tanks, and according to the Minister, 95% of schools had access to running water as of the 7th of June 2020.³⁵⁶ This response is a positive outcome of the Covid-19 pandemic. Through this legal response, the Department of Basic Education ensured that children and teachers alike had access the necessary resources in order to wash their hands within the school environment during the Covid-19 related school years where they may not have had the necessary facilities. In general this can be considered to have contributed toward protecting a child's right to education as it allowed for schools to remain open while combating the Covid-19 pandemic. Moreover, the provision of the hand sanitizer option also provides for an alternative mechanisms where is it not possible to wash ones hands for whatever reasons, the provision and cost involved in relation to the acquisition of hand sanitizer however becomes an issue as it would either fall part of

³⁵¹ 2014 2 ALL SA 339 (ECM).

³⁵² Section 29(1)(a) of the Constitution.

³⁵³ *Madzodzo v Minister of Basic Education* 2014 2 ALL SA 339 (ECM) para 20.

³⁵⁴ S van der Berg & N Spaul Counting the Cost: Covid-19 school closures in South Africa & its impact on children (2020) 12.

³⁵⁵ 12.

³⁵⁶ 12.

the Education Department's budget, or each individual schools' budget and may not be a feasible or affordable alternative.

3 5 4 4 *Social distancing within South African schools*

Social distancing, otherwise known as physical distancing has been adopted globally as a way to combat the spread of Covid-19.³⁵⁷ Initially the directives in the Government Gazette confirmed that schools are expected to comply with the social distancing requirement of at least 1.5 metres as confirmed by the regulations made under the Disaster Management Act. The directive further stated that schools should have operated at either 50% or less than their full capacity in order to ensure compliance with health and social distancing requirements.³⁵⁸ In a later directive it was stated that every school must comply with the social distancing requirements as prescribed in the Regulations made under section 27(2) of the Disaster Management Act,³⁵⁹ and the amendments thereto as well as the Standard Operating Procedure and the Hygiene Guidelines.³⁶⁰

According to the Hygiene Guidelines, social distancing refers to a distance of at least one and a half metres between people and it should be maintained whenever possible.³⁶¹ It further provides that contact activities outside of the classroom, including time on the playground, extra mural activities, certain contact sport, assemblies and queuing at tuck-shops should be avoided.³⁶² This however requires constant monitoring and repeated instruction, specifically in relation to younger learners who, much like learners with disabilities, may struggle to understand what social distancing entails,³⁶³ or why they should follow rules when it comes to time outside the classroom. According to the Standard Operating Procedures schools should work on the practicality of implementing the physical or social distancing requirement of at least one metre in both primary and secondary school classrooms.³⁶⁴ The Standard Operating Procedure further states that where it is not possible to ensure social distancing requirements, appropriate adjustments should be made to enable schools

³⁵⁷ S Mehtar, W Preiser, NA Lakhe, A Bousso, JJM TamFum, O Kallay, M Seydi, A Zumla & JB Nachega "Limiting the spread of COVID-19 in Africa: One size mitigation strategies do not fit all countries" (2020) 8(7) *The Lancet Global Health* > (accessed 12-10-2021).

³⁵⁸ Paragraphs 15(1) & 15(2) of GN. 343 in GG 43465 of 23-06-2020.

³⁵⁹ GN. R480 in GG 43258 of 29-04-2020.

³⁶⁰ Paragraph 16(1) GN. 42 in GG 44154 of 12-02-2021.

³⁶¹ Section B of the DBE *Hygiene Guidelines* (2020).

³⁶² Section B of the DBE *Hygiene Guidelines* (2020).

³⁶³ Section 8(7) of the DBE *Standard Operating Procedure* (2020).

³⁶⁴ Section 11(1) of the DBE *Standard Operating Procedure* (2020).

to adhere to the requirements.³⁶⁵ This brings to light whether social distancing within schools in South Africa is feasible and whether social distancing protects children in the school environment and contributes toward the realisation of a child's right to education is thus questionable.

According to Van der Berg and Spaul the Department of Basic Education should acknowledge that it is not feasible for majority of South Africa's public schools to practice social distancing within the classroom or on the playground due to class sizes.³⁶⁶ The authors point out that 63% of primary school children are in classes of forty or more learners per class, with 16% in classes of sixty or more per class. Further, in respect of secondary schools it shows that 70% of learners are in classes of forty or more while 26% are in classes of more than sixty learners per class.³⁶⁷ The majority of the actual classrooms in South Africa are built to accommodate only about forty learners as per the Department of Basic Education's draft "National Minimum Norms and Standards for School Infrastructure".³⁶⁸ If a classroom only caters for a maximum of forty learners, and there are classes which exceed this size, social distancing is and shall continue to be near impossible.

In response to this issue, the directives make provision for certain timetable models, namely, daily and weekly rotations, bi-weekly rotation, platooning or shifts, traditional and daily attendance or a hybrid of the latter.³⁶⁹ These models however do not ensure an equal realisation of a child's right to education for all learners, as some students are provided with more face to face instruction time than others. Various schools across the country made use of a variety of rotational options, and one of the worst recorded cases was a large school, with severe overcrowding issues which relied on a six-week rotation programme where children only attended school for one out of every six weeks.³⁷⁰ It is thus clear that serious disruptions to education may occur due to these rotation models, and this could in turn hinder a student's ability to receive an education and to learn effectively.

³⁶⁵ Section 11(2) of the DBE *Standard Operating Procedure* (2020).

³⁶⁶ S van der Berg & N Spaul *Counting the Cost: Covid-19 school closures in South Africa & its impact on children* (2020) 14.

³⁶⁷ 14.

³⁶⁸ 14.

³⁶⁹ Paragraphs 15(3) of GN. 343 in GG 43465 of 23-06-2020.paragraph 16(2) GN. 42 in GG 44154 of 12-02-2021.

³⁷⁰ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 14.

Furthermore, the lack of furniture and adequate infrastructure affects the ability of schools to ensure social distancing between learners. Once again, Mud Schools which have been identified as a prevailing issue within South Africa, as they are dilapidated, lack proper furniture and face challenges in respect of overcrowding as there are usually too many learners for the structure.³⁷¹ Due to the poor school conditions in Mud Schools, pre-Covid-19, learners would often get sick which in turn resulted in high rates of absenteeism.³⁷² If this was true prior to the Covid-19 outbreak, it can be assumed that children had continued and will continue to get sick during the Covid-19 pandemic. The poor conditions and close proximity of learners due to overcrowding not only prevents social distancing but could contribute toward the spread of Covid-19.

Moreover, there are numerous public schools, especially in poorer provinces such as the Eastern Province where children are forced to either sit on the floor, bricks or certain recycled goods such as paint cans due to a lack of furniture.³⁷³ The *Madzodzo v Minister of Basic Education*³⁷⁴ judgment confirmed that the provision of desks and chairs form part of the right to basic education in South Africa.³⁷⁵ It can be said that a single desk creates more space between learners within a classroom, and this cannot be replicated in classrooms where learners sit on the floor or other available items. Furthermore, it should be noted that it may be easier to separate learners within a classroom as per social distancing requirements if students are assigned to a specific desk.

Social distancing as a mechanism aims to support the legal response of students returning to school which in turn ensures a child's right to basic education within the specific jurisdiction. Due to the large class sizes, the lack of proper infrastructure and the lack of furniture in schools, social distancing does not seem possible within public schools in South Africa. While schools are encouraged to adhere to social distancing requirements, attempts to ensure social distancing within public schools in South Africa are not always feasible and may disrupt teaching and learning.³⁷⁶ Whether

³⁷¹ Skelton (2013) *De Jure* 7.

³⁷² Veriava "Realising the right to basic education" in *Socio-economic rights: Progressive realisation?* (2016) 103.

³⁷³ Skelton *Strategic Litigation Impacts* 53.

³⁷⁴ 2014 2 ALL SA 339 (ECM).

³⁷⁵ Skelton *Strategic Litigation Impacts* 53.

³⁷⁶ S van der Berg & N Spaul *Counting the Cost: Covid-19 school closures in South Africa & its impact on children* (2020) 14.

social distancing mechanisms as a singular mechanism is in the best interests of learners and contributes toward protecting a child's right to basic education is unclear within South African schools. This however does not mean that the mechanism should be completely ignored when dealing with learners attending school during the Covid-19 pandemic and should be incorporated with the prevention mechanisms discussed above.

3 5 4 5 Conclusion

Regardless of South Africa's national and international obligations, the nation experienced grave consequences in respect of a child's right to basic education during 2020 and 2021. It is however clear based on the discussion above that by reopening schools across the country, the South African government attempted to ensure the realisation of a child's right to education. Moreover, in order to further realise the right, schools were compelled through the introduction of various international and domestic legislation, policies and regulations, to create a Covid-19 safe school environment and to implement the prevention mechanisms within the school environment.

3 6 Legal responses introduced to ensure the completion of the 2020 academic year

Education is expected to be flexible and should evolve and adapt to the needs of society.³⁷⁷ As such, during the Covid-19 pandemic, education was expected to evolve and adapt, and various other legal responses were developed and implemented in order for learners to complete the 2020 academic year.

The South African government provided certain containment and management mechanisms for Covid-19 in schools in Circular E1 of 2020. This document covers a range of issues and attempts to explain the role of the school in responding to Covid-19.³⁷⁸ Some of the issues include that schools should monitor and plan for absenteeism and establish procedures for learners and staff who are sick at school.³⁷⁹ The circular sets out the following, firstly, that the continuity of education should be ensured, secondly, the actions which must be taken when a case of Covid-19 is confirmed in the school, thirdly, the steps which schools should consider when learners are dismissed or schools closed, and finally how to clean education

³⁷⁷ CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 paras 6(d).

³⁷⁸ Department of Basic Education Circular E1 of 2020 2.

³⁷⁹ 2.

establishments.³⁸⁰ All these mechanisms not only protect learners and staff within the school environment as much as possible but play a role in ensuring that schools either remain open or that the continuity of a child's right to education is ensured. These mechanisms ultimately realised the detrimental effect the school closures had for learners across the nation and thus attempts to ensure these consequences are prevented in the future.

Moreover, according to Circular E15 of 2020, due to the national lockdown and subsequent school closures, the Minister of Basic Education took the decision to administer the May/June 2020 National Senior Certificate (hereafter "NSC") examinations concurrently with the October/November 2020 NSC examinations, commencing on the 5th of November 2020 and concluding on the 15th of December 2020.³⁸¹ This legal response ensured a child's right to education as it allowed learners to successfully complete their exams and their 2020 academic year despite the gaps in education created due to the unexpected Covid-19 school closures. The impact of the two examinations over a short period of time on the well-being of learners combined with the deficiency in the quality of education received during the 2020 academic year has not been researched in South Africa. For example, according to a study done in the Hubei Province of China during Covid-19 related school closures, 22.6% of the 1784 children between grade 2 and grade 6 reported symptoms of depressions with a further 18.9% reporting anxiety symptoms.³⁸² While no quantitative evidence exists for South Africa, questions should be asked regarding learners and their education related anxiety as it could impact a learners educational attainment.

An important legal response was also introduced in Circular E31 of 2020 as it allowed for learners who tested positive for Covid-19 to write the combined 2020 November NSC examinations.³⁸³ The "Protocol on the Writing of the 2020 November Examinations in Compliance with the Covid-19 Requirements" (hereafter "Protocol on the Writing of the 2020 November Examinations") thus becomes a relevant policy response to the consequences of Covid-19. This Protocol on the Writing of the 2020 November Examinations confirms that maintaining social distancing, sanitizing hands

³⁸⁰ Department of Basic Education Circular E1 of 2020 3-4.

³⁸¹ Department of Basic Education Circular E15 of 08-08-2020.

³⁸² X Xie, Q Xue, Y Zhou, K Zhu, Q Liu, J Zhang & R Song "Mental health status among children in home confinement during the coronavirus disease 2019 outbreak in Hubei Province, China" (2020) 174(9) *JAMA Paediatrics* 898 898.

³⁸³ Department of Basic Education Circular E31 of 08-11-2020.

and wearing personal protective equipment such as face masks, impacts the process which must be followed during the writing of examinations.³⁸⁴ Furthermore, according to section 10 of the Protocol on the Writing of the 2020 November Examinations, provided that certain steps were followed, candidates who tested positive for Covid-19, were able to write their examinations in isolation venues, provided they were deemed fit to write the examination.³⁸⁵ This legal response not only clearly protected and ensured a child's right to basic education during the 2020 academic year but can be said to have catered for a vulnerable groups of learners during this period.

In addition, the South African government introduced a recovery plan during the 2020 academic year which trimmed and re-organised the curriculum in order to accommodate the impact of Covid-19.³⁸⁶ The interim deviation from the original curriculum only applies to the 2020 academic year and schools are expected to revert back to the original curriculum in 2021.³⁸⁷ This legal responses is cause for concern and may have potential long-term effects for teachers and learners. Due to the fact that the curriculum reverts back to the original curriculum in 2021, one can assume that relevant and valuable information remained untaught in 2020. While learners may have completed their 2020 academic year, gaps in their knowledge may be present and teachers in the grades which they have been promoted to will be expected to fill these gaps or learners will fall further behind in their education which will be detrimental to their future and could result in an increase in the learner dropout rate in the years to come.

3 7 Providing for a disruption free 2021 academic year

As highlighted in the previous section, certain legal responses to the consequences of Covid-19 were implemented in order for learners to complete the 2020 academic year. The majority of those mechanisms however, do not apply to the completion of the 2021 academic year. Shepard and Mohohlwane are of the opinion that "schooling should resume on a daily basis for all learners, with no further disruptions".³⁸⁸ Based

³⁸⁴ Section 2 of the Department of Basic Education *Protocol on the Writing of the 2020 November Examinations in Compliance with the Covid-19 Requirements* (2020).

³⁸⁵ Section 10 of the DBE *Protocol on the Writing of the 2020 November Examinations* (2020).

³⁸⁶ GN. 343 in GG 43465 of 23-06-2020; GN. 42 in GG 44154 of 12-02-2021 & Department of Basic Education "Recovery Plan 2020" (2020) *Department of Basic Education* <<https://www.education.gov.za/Home/RecoveryPlan2020.aspx>> (accessed 08-10-2020).

³⁸⁷ Department of Basic Education "Recovery Plan 2020" *Department of Basic Education*.

³⁸⁸ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 38.

on this recommendation and the significance of a child's right to basic education, it can be assumed that the completion of the 2021 academic year is of great importance for learners across the nation.

It is important to note that a teacher is more likely than people under 19 years of age, to contract and spread Covid-19 within the school environment as a lower infection rate exists amongst younger people. Accordingly, it is estimated that this younger group is 5.5 times less likely to contract Covid-19 than those older than 19 years of age.³⁸⁹ Despite being less likely amongst learners, the possibility of a learner or a teacher contracting Covid-19 remained a reality during the 2021 academic year. Despite this possibility, it is crucial to note that schools within South Africa have not emerged as primary transmission sites,³⁹⁰ and therefore, the complete reopening of schools must be recommended and ensured in 2021 and beyond.

Moreover, the legal responses which address, prevent and combat Covid-19 in the school environment that apply to teachers and students alike should also find application during the 2021 academic year. In addition, at the time of writing, a legal response applicable to teachers only and not students was introduced and should be adhered to. This legal response relates to the provision of the Covid-19 vaccination, as educators were prioritised during the vaccination rollout with 5.4% of teachers falling into the initial vaccination target group of people sixty years and older and the remainder being eligible for vaccination from the 19th of June 2021.³⁹¹ This prioritisation shows that the government values a disruption free school environment,³⁹² and that they are attempting to address the fact that those older than 19 are more susceptible to contracting and spreading the disease within the school environment so that schools can remain reopen across the nation.

3 8 Conclusion

South Africa had prior to the Covid-19 pandemic developed a sound legal theoretical framework in relation to the right to education, however the practical implementation thereof has been found to be lacking. Similarly, during the Covid-19 pandemic, the South African government created numerous legislative, regulatory and

³⁸⁹ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 34.

³⁹⁰ 39.

³⁹¹ 34.

³⁹² 39.

policy responses in respect of the right to education, however certain problems in relation to the implementation and the effectiveness thereof have occurred. This is in part due to the prevailing issues which were brought to the forefront during the Covid-19 pandemic. Furthermore, due to the fact that legal responses failed to cater to the needs of all learners equally, it can be said that underprivileged learners suffered harsher educational consequences.

The South African government ultimately had to respond to the challenges in education which arose within South Africa as a direct result of the Covid-19 pandemic by developing new standards in order to protect, recognise and realise the right during 2020 and 2021. This chapter confirms the primary hypothesis of this thesis, namely that due to South Africa's various obligations in respect of the right to education, it can be said that the right to basic education is of fundamental importance within the nation. During the Covid-19 related school closures, the government failed in their obligations as schools were not only inaccessible, but the alternative learning mechanisms provided were insufficient and highly unequal in relation to underprivileged learners. As such, the primary hypothesis of this thesis was further confirmed as it is clear that the Covid-19 pandemic negatively impacted a child's right to education as it not only prevented learning during portions of the Covid-19 affected years, but also highlighted prevailing issues present within the school environment.

Furthermore, while schools eventually reopened, the adverse long-term effects of school closures on children within the country are a reality,³⁹³ and the true effects shall only be seen in the years to come. Despite the numerous challenges, based on the information presented in this chapter, it is clear that sufficient legal responses were created and introduced and that these legal responses did in fact attempt to protect and ensure a child's right to education during the 2020 and 2021 academic years. The issue is thus not with the legal responses themselves, but is rather related to the practical implementation thereof. Moreover, in respect of the 2021 academic year and the academic years to follow, the South African government has indicated that a child's right to basic education should not be further hindered in South Africa and the return to school on a full-time basis without disruptions should be ensured regardless of the continuance of the Covid-19 pandemic.

³⁹³ Shepard & Mohohlwane (2021) *Special Public Health Surveillance Bulletin* 39.

Chapter 4: The impact of Covid-19 on the right to education in the United States of America

4 1 Introduction

The right to education in the United States of America (hereafter “USA”) has a long and varied history.³⁹⁴ In order to conduct an effective comparative analysis in chapter 8 and to comprehend the impact of Covid-19 on the USA’s education system, it is crucial to understand the development of a child’s right to education within each jurisdictions’ specific context. As such, the focus of this chapter is to identify the significance of a child’s right to education within the USA by discussing not only the relevant international influence in respect of a child’s right to education but the USA’s internal legislative framework. In addition thereto, the chapter will contain a discussion of the state of the USA’s education system prior to as well as during the Covid-19 outbreak. Finally, the chapter will explore the legal responses developed and implemented in the USA in relation to a child’s right to education during the Covid-19 pandemic.

4 2 A child’s right to education as developed under USA law

4 2 1 International influence on the right to education in the USA

The USA has numerous obligations in respect of the right to education, however, on an international level, the USA initially failed to ratify certain conventions, including the CRC and the ICESCR.³⁹⁵ While the USA has failed to ratify these documents, they have signed both the CRC and the ICSECR,³⁹⁶ and as signatory to both documents, it can be assumed that the USA has provided symbolic agreement to these documents.³⁹⁷ Furthermore, it is important to note that the USA was actively involved

³⁹⁴ K Urchick *U.S Education Law: Is the Right to Education in the U.S. in compliance with International Human Rights Standards?* In partial fulfillment of the requirements of the King Scholar Program Michigan State University College of Law (2007) 32.

³⁹⁵ See chapter 2 for details surrounding the education specific provisions of the instruments listed. In addition, take note that the USA is therefore not expected to submit reports and the Committee on the Rights of the Child does not have to monitor the implementation of the CRC nor do they have to provide recommendations and observations regarding the USA’s compliance.

³⁹⁶ United Nations Human Rights Office of the High Commissioner “Status of ratification – Interactive Dashboard” *United Nations*.

³⁹⁷ Helman (2019) *Children’s Legal Rights Journal* 191. See also K Attiah “Why won’t the U.S ratify the U.N’s Childs Rights treaty? *The Washington Post*.

in and did not disagree overtly with the education provisions set out in the CRC.³⁹⁸ The international influence on a child's right to education in the USA is thus unique and differs from other jurisdictions in the international sphere,³⁹⁹ especially the jurisdictions discussed in the chapters here below.

4 2 2 A child's right to education as developed under the USA's domestic law

Within the USA, the right to education is not recognised as a fundamental federal constitutional right,⁴⁰⁰ and the USA Supreme Court has failed to denote it as such.⁴⁰¹ For example, in the 1973 case of *San Antonio Independent School District v. Rodriguez*, the USA Supreme Court essentially confirmed that education is not among the rights afforded explicit protection under the USA Federal Constitution.⁴⁰²

Nevertheless, education law in the USA has developed under both the federal system as well as the state systems.⁴⁰³ In terms of national education law, congress enacted the No Child Left Behind Act (hereafter "NCLB") in 2002 as a federal attempt to improve educational equity.⁴⁰⁴ The NCLB was however replaced by the Every Student Succeeds Act (hereafter "ESSA") which reauthorised the Elementary and Secondary Education Act of 1965 (hereafter "ESEA").⁴⁰⁵ The ESSA and thus the ESEA was signed by former President Obama in 2015 as a commitment to equal opportunity for all learners which sets high standards and contains policies that will help prepare all students for future success.⁴⁰⁶ Furthermore, under the federal system, the federal government is expected to contribute a portion of the national education

³⁹⁸ L Lundy, K Orr & H Shier "Children's Education Rights: Global Perspectives" in MD Ruck, M Peterson-Badali & M Freeman (eds) *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (2017) 364-380 Abingdon: Routledge 366.

³⁹⁹ DV Thattai "A History of Public Education in the United States Editorial Summary" (2017) *ResearchGate* (e-journal) 1 1 <
https://www.researchgate.net/publication/321179948_A_History_of_Public_Education_in_the_United_States_Editorial_Summary> (accessed 20-10-2021).

⁴⁰⁰ Urchick *U.S Education Law* 1.

⁴⁰¹ See *San Antonio Independent School District v Rodriguez* 411 U.S. 1 30 (1973).

⁴⁰² *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 (1973) para 35.

⁴⁰³ Urchick *U.S Education Law* 2.

⁴⁰⁴ United States of America Department of Education "Every Student Succeeds Act (ESSA)" (n.d) *U.S Department of Education* < <https://www.ed.gov/essa?src=rn>> (accessed 26-10-2021).

⁴⁰⁵ United States of America Department of Education "Every Student Succeeds Act (ESSA)" *U.S Department of Education*.

⁴⁰⁶ United States of America Department of Education "Transitioning to the Every Student Succeeds Act (ESSA): Frequently Asked Questions" (18-01-2017) *U.S Department of Education* < <https://www2.ed.gov/policy/elsec/leg/essa/essatransitionfags11817.pdf>> (accessed 26-10-2021).

budget.⁴⁰⁷ It must however be noted that education is primarily the responsibility of each specific state.⁴⁰⁸ This is due to the fact that while certain public opinion polls across the nation have shown concern for the development of national goals and standards in education, the public has remained divided on whether formally defined national standards are in fact necessary within the USA.⁴⁰⁹

Due to the deficiency in the USA's Constitution and the lack of a unified system, states have included provisions for education in their respective state constitutions.⁴¹⁰ Under the purview of the 10th Amendment, every state within the USA has been entrusted with the right to education. Moreover, each state government is responsible for not only establishing its own education policies but to provide every child within the state with the right to public education.⁴¹¹ State constitutions therefore place an obligation on the state to provide children with an education. Two such examples, are the Washington Constitution, which states that "it is the paramount duty of the state to make ample provision for the education of all children residing within its borders" and the New York Constitution, which states that "the legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated".⁴¹²

In addition to the above, it is important to take note of the USA Supreme Court judgement of *Plyler v Doe*,⁴¹³ as it determined that denying undocumented children of illegal immigrants the right to attend public school in Texas constituted discrimination and violated the 14th Amendment. The Court explained in its judgement that education is fundamental in maintaining the fabric of the USA society,⁴¹⁴ and it can thus be inferred from the judgement that no child should be denied access to education within

⁴⁰⁷ A Ziklová *Primary and Secondary education in USA and China: Comparison of approach and purpose* Faculty of Education Bachelor thesis Masaryk University (2014) 34.

⁴⁰⁸ 34.

⁴⁰⁹ R Nerison-Low & MA Ashwill "The Development and Implementation of Education Standards in the United States" in National Institute on Student Achievement, Curriculum, and Assessment Office of Educational Research and Improvement (eds) *The Educational System in the United States: Case Study Findings* (1999) 15 21.

⁴¹⁰ CL Chicosky "Restructuring the Modern System in the United States: A Look at the Value of Compulsory Education Laws" (2015) 1(2) *Brigham Young University Education and Law Journal* 1 & 53-70.

⁴¹¹ Urchick *U.S Education Law* 1 & 10. See also Chicosky (2015) *Brigham Young University Education and Law Journal* 53-70.

⁴¹² Article IX Section 1 of the Washington Constitution and Article XI Section 1 of the New York Constitution.

⁴¹³ 457 U.S 202 (1982) & United States Court "Access to Education - Rule of Law" (n.d) *United States Court* <<https://www.uscourts.gov/educational-resources/educational-activities/access-education-rule-law>> (accessed 24-06-2021).

⁴¹⁴ Consult the *Plyer v Doe* 457 U.S 202 (1982) judgement for more information.

a state. Therefore, the judgement together with the 14th Amendment, which provides for equal protection,⁴¹⁵ ultimately provides authority and sets out that a child should not be denied equal access to public schooling within a state.

Every state therefore has its own department of education, has enacted its own laws regulating certain aspects of education, including finances, the hiring of school personnel, student attendance and curriculum,⁴¹⁶ and is expected to set its own standards for learner performance within the state.⁴¹⁷ In 2009, however, the Council of Chief State School Officers (hereafter “CCSSO”) as well as the National Governors Centre for Best Practices (hereafter “NGA Centre”) recognised the value and need for consistent learning goals across all USA states.⁴¹⁸ As such they developed the “Common Core State Standards Initiative” in order to raise standards across the USA and to create more effective ways to address the specific jurisdiction’s educational issues.⁴¹⁹ States are however not obligated to adopt these standards, and only forty-one out of the fifty USA states have voluntarily adopted them.⁴²⁰ As a result, variations amongst state education systems, education standards and education regulations exists.

The USA education system as a whole is referred to as the K-12 system, as it relates to the years from kindergarten to twelfth grade.⁴²¹ It is however important to note that the compulsory education age group, namely the age at which a child is required to begin school and the age they are allowed to leave school, varies between states.⁴²² For example, the age at which a child is required to begin school ranges between five to seven years of age between states,⁴²³ while the age at which a child is allowed to leave school is sixteen years of age in some states and seventeen or eighteen years of age in others.⁴²⁴

⁴¹⁵ Section 1 of the 14th Amendment.

⁴¹⁶ Thattai (2017) *ResearchGate (e-journal)* 2.

⁴¹⁷ Ziklová *Primary and Secondary education in USA and China* 35.

⁴¹⁸ Anonymous “About the Standards” (n.d) *Common Core State Standards Initiative* <<http://www.corestandards.org/about-the-standards/>> (accessed 29-04-2022).

⁴¹⁹ Anonymous “About the Standards” *Common Core State Standards Initiative* See also U Boser, P Baffour & S Vela *A Look at the Education Crisis: Tests, Standards, and the Future of American Education* (2016) 11.

⁴²⁰ Boser *et al* (2016) *A Look at the Education Crisis: Tests, Standards, and the Future of American Education* 11.

⁴²¹ Anonymous “K-12 Curriculum and pupil assessment” (01-06-2017) *Relocate Global* <<https://www.relocatemagazine.com/articles/education-k-12-curriculum-the-us-education-system>> (accessed 25-10-2021).

⁴²² Chicosky (2015) *Brigham Young University Education and Law* 71-75.

⁴²³ 71-75.

⁴²⁴ Ziklová *Primary and Secondary education in USA and China* 34.

According to the discussion above, while not as clear cut as other nations, regardless of the varying age groups, according to specific state constitutions, it is clear that children within the USA are entitled to compulsory public education and that state obligations do exist in respect of the right. The differentiation between state education laws and standards is however a concern in respect of the legal responses to Covid-19, as states within the USA were not and are not obligated to respond in the same manner.

4 3 K-12 education pre-Covid-19 and associated challenges

According to the landmark decision of *Brown v Board of Education of Topeka*,⁴²⁵ education should be viewed as an important function of state and local governments and it should be made available to all learners on equal terms.⁴²⁶ While private schooling is available to learners within the USA, private schools are not meant to be the universal system of education across the nation due to their limited locations, the expense and their selective admission and retention policies.⁴²⁷ The focus of this section is therefore on public education within the specific jurisdiction as about 90% of learners in the USA are educated in public schools.⁴²⁸

In addition to providing learners with an education, public schools across the USA attempt to provide a range of social services, such as providing breakfast to almost fifteen million learners and lunch to more than twenty-nine million learners every day.⁴²⁹ Other social services which many public schools attempt to provide include but are not limited to the provision of health care through school nurses, before-school and after-school programs as well as access to certain counselling services.⁴³⁰ It is important to note that the state of the USA public education system prior to the Covid-19 outbreak may not have been as impressive or as developed as it has been made out to be by Congress as arguments have been made that the USA education system was and is failing to meet some of its obligations and reasonable expectations

⁴²⁵ 347 U.S. 483 (1954).

⁴²⁶ N Masters "Failing to Educate: How Flaws in the Modern Public School System Have Created a National Crisis and Could Invite Federal Intervention" (2019) 10(1) *Wake Forest Journal of Law and Policy* 111 111. See also *Brown v Board of Education of Topeka* 347 U.S. 483 (1954).

⁴²⁷ Centre on Education Policy *For the Common Good: Recommitting to Public Education in a Time of Crisis* (2020) 1 2.

⁴²⁸ 3.

⁴²⁹ 7.

⁴³⁰ 7.

specifically in relation to the corresponding social services,⁴³¹ due to issues such as underfunding.⁴³²

As mentioned above, while state and local governments do in fact provide for the right to education, the state specific approach in setting the standards for learner performance has the result that variations exist between states and more often than not, the standard levels of a specific school tend to reflect the socio-economic status of the community in which that school is found.⁴³³ Consequently, learners who are already disadvantaged by poverty are left even further behind as a result of the persisting achievement gaps within the public education system.⁴³⁴ In addition thereto, it must be noted that discrimination persists within the public school environment in the USA.⁴³⁵ Furthermore, problems such as classroom size, school overcrowding, the closure of numerous public schools, deficits in government funding, challenges with technology in education and the decline in school safety to name but a few have influenced the success of the public school system in the USA.⁴³⁶

As such, it has been argued that many public schools within the USA are failing their learners.⁴³⁷ The public education system has faced and continues to face clear challenges and it can be said that the Covid-19 pandemic has worsened the educational crisis,⁴³⁸ and placed public schooling into a harsher and more challenging future as teachers and school leaders have struggled and continue to struggle to provide basic education functions during this period.⁴³⁹

⁴³¹ Masters (2019) *Wake Forest Journal of Law and Policy* 127.

⁴³² 113-114.

⁴³³ Nerison-Low & Ashwill "The Development and Implementation of Education Standards in the United States" in *The Educational System in the United States: Case Study Findings* (1999) 15.

⁴³⁴ Boser *et al* (2016) *A Look at the Education Crisis: Tests, Standards, and the Future of American Education* 16.

⁴³⁵ Thattai (2017) *ResearchGate (e-journal)* 2.

⁴³⁶ K Barrington "The 15 Biggest Failures in the American Public Education System" (28-05-2019) *Public School Review* <<https://www.publicschoolreview.com/blog/the-15-biggest-failures-of-the-american-public-education-system>> (accessed 05-11-2021); M Lynch "18 Reasons the U.S. Education System is Failing" (03-04-2017) *The Advocate* <<https://www.theedadvocate.org/10-reasons-the-u-s-education-system-is-failing/>> (accessed 05-11-2021) & Anonymous "Major Issues in Education: 20 Hot Topics (From Grade School to College)" (27-11-2020) *Trade Schools, Colleges and Universities* <<https://www.trade-schools.net/articles/issues-in-education#major-issues>> (accessed 05-11-2021).

⁴³⁷ Centre for American Progress Action Fund *States at Work: Progressive State Policies to Rebuild the Middle Class* (2013) 1 24.

⁴³⁸ Office for Civil Rights, USA Department of Education *Education in a Pandemic: The Disparate Impacts of Covid-19 on America's Students* (2021) 1 1.

⁴³⁹ Centre on Education Policy *For the Common Good* (2020) 1.

4 4 The consequence of the Covid-19 pandemic and the USA's legal responses in protecting the child's right to education

4 4 1 Introduction

According to Statista, the total number of infections to date (11 November 2021) in the USA is 47 647 745, and is the highest infection rate of any country worldwide.⁴⁴⁰ The high number of infections led to numerous consequences and certain state restrictions. The education sector suffered greatly, as the USA experienced periods where schools within certain states were fully open, partially open or completely closed as a direct result of the Covid-19 pandemic.⁴⁴¹ Moreover, the Covid-19 pandemic magnified existing educational inequalities,⁴⁴² which in turn caused grave consequences for learners and their right to education within the applicable jurisdiction.

The purpose of this section is to identify the legal consequences of Covid-19 in respect of the right to education as well as the USA's legal responses thereto. In order to fully comprehend the consequences of the Covid-19 pandemic and the related school closures, it is important to note that the academic year in the USA usually runs from September to June of the following year.⁴⁴³ As such, this section will look at whether the legal responses introduced by the USA allowed for the realisation of a child's right to education during the 2019/2020 and 2020/2021 school years or whether the right was in fact hindered.

4 4 2 The consequences of the Covid-19 related school closures and the provision of alternative learning mechanisms

4 4 2 1 *Introduction and access to education*

The Covid-19 pandemic saw a nearly simultaneous closure of K-12 public schools across the USA due to the rising concern for the health and well-being of learners within the specific jurisdiction.⁴⁴⁴ School closures were mandated in forty-four states

⁴⁴⁰ Anonymous "Number of coronavirus (Covid-19) cases worldwide as of November 11, 2021, by country" (11-11-2021) *Statista* <https://www.statista.com/statistics/1043366/novel-coronavirus-2019ncov-cases-worldwide-by-country/> (accessed 11-11-2021).

⁴⁴¹ Anonymous "Education: From Disruption to Recovery" *UNESCO*.

⁴⁴² Education Commission of the States *Interrupted Instruction* (2021) 1 1.

⁴⁴³ Ziklová *Primary and Secondary education in USA and China* 34.

⁴⁴⁴ N Zviedrite, JD Hodis, F Jahan, H Gao & A Uzicanin "Covid-19 associated school closures and related efforts to sustain education and subsidized meal programs, United States, February 18-June 30, 2020" (2021) 16(9) *Plos One* 1 14.

and was recommended by the remaining six states, these six states being California, Florida, Kentucky, Maine, South Dakota and Tennessee.⁴⁴⁵ Kentucky, Maryland, Michigan and Oregon were the first states to announce school closures on the 12th of March 2020.⁴⁴⁶ By the 24th of March 2020, the final state, namely Idaho, issued a mandate on school closures.⁴⁴⁷ In addition, the social distancing mandates which were introduced in the country saw children across the nation being cut off from face-to-face learning.⁴⁴⁸

The mandates and recommendations ultimately led to a shift from in-person education to at-home education which is unprecedented in recent American history,⁴⁴⁹ and posed major challenges for learners, parents and teachers alike.⁴⁵⁰ The shift from in-person education impacted learners access to education, in that it prevented their physical access to education, including but not limited to the physical accessibility of the facility, teachers and resources alike, and further prevented their access to education related social services as well.

4 4 2 2 *Access to education related social services provided within the school environment*

For learners in the USA, going to school is not merely about learning to read or do mathematics, but it is about developing the social and emotional skills needed to succeed in life.⁴⁵¹ The Covid-19 related school closures across the USA highlighted the important educational, civic and social role of public schools across the nation.⁴⁵²

School closures across the nation caused a steep decline in the social services provided by public schools in the USA. Studies have shown that while certain districts continued to cater for certain social services, such as offering subsidized meals during school closures, others failed to do the same, by either failing to offer the subsidized meals all together during this period or only offering it for a limited period of time.⁴⁵³

⁴⁴⁵ Zviedrite *et al* (2021) *Plos One* 5-8.

⁴⁴⁶ 5.

⁴⁴⁷ 5.

⁴⁴⁸ SJ Lee, KP Ward, OD Chang & KM Downing "Parenting activities and the transition to home-based education during the Covid-19 pandemic" (2021) 122 *Children and Youth Services Review* 1 1.

⁴⁴⁹ 1.

⁴⁵⁰ Zviedrite *et al* (2021) *Plos One* 12.

⁴⁵¹ Economic Policy Institute *Covid-19 and student performance, equity, and U.S. education policy: Lessons from pre-pandemic research to inform relief, recovery and rebuilding* (2020) 1 14.

⁴⁵² Centre on Education *Policy For the Common Good* (2020) 1.

⁴⁵³ Zviedrite *et al* (2021) *Plos One* 9.

Furthermore, it has been said that disadvantaged, abused or neglected learners may have endured further difficulties as a result of the Covid-19 related school closures as they not only lost access to much-needed resources provided by their school, but also faced losing access to caring adults in the form of school personnel who were able to check on said learners welfare and provide support where possible.⁴⁵⁴ It must however be noted that certain school districts and communities in the USA did attempt to introduce alternative feeding and support programs in order to support the continuity of education during school closures,⁴⁵⁵ these programs however did not cater to the needs of all learners within the jurisdiction.

4 4 2 3 *The provision of alternative learning mechanisms*

The suspension of physical classes gave rise to the deployment of distance learning or remote learning modalities,⁴⁵⁶ which varied from district to district and across states.⁴⁵⁷ Schools transitioned to various remote learning mechanisms in March 2020 during the second semester of the 2019/2020 school year,⁴⁵⁸ and continued to operate under either fully remote modalities or hybrid learning systems during the 2020/2021 school year.⁴⁵⁹ During the Covid-19 related school closures, student performance and learning was impeded,⁴⁶⁰ and many parents were rightfully concerned about the negative effects to their child's education and feared that their children were suffering harm due to the lack of in-person classes and the new remote learning mechanisms.⁴⁶¹ Their fears are supported by research which predicted that unfinished learning would be greater during the 2020/2021 academic year than in previous academic years as a direct result of the Covid-19 related school interruptions.⁴⁶²

Moreover, online resources were utilised as a distance learning mechanism in order to ensure that education activities continued while schools were physically closed across the nation.⁴⁶³ Despite being viewed as a developed nation, the USA did not

⁴⁵⁴ Lee *et al* (2021) *Children and Youth Services Review* 8.

⁴⁵⁵ Zviedrite *et al* (2021) *Plos One* 11.

⁴⁵⁶ N Malkus *Reopening in the Shadow of Covid-19: Beginning the First Full Coronavirus School Year* (October 2020) 1 3.

⁴⁵⁷ N Malkus, C Cody & J Schurz *School District Responses to the Covid-19 Pandemic: Round 6, Ending the Year of School Closures* (June 2020) 1 9.

⁴⁵⁸ Zviedrite *et al* (2021) *Plos One* 11.

⁴⁵⁹ Education Commission of the States *Interrupted Instruction* (2021) 1.

⁴⁶⁰ Economic Policy Institute *Covid-19 and student performance, equity, and U.S. education policy* (2020) 1 5.

⁴⁶¹ Zviedrite *et al* (2021) *Plos One* 12.

⁴⁶² Education Commission of the States *Interrupted Instruction* (2021) 1.

⁴⁶³ United States of America Department of Education & Institute of Education Sciences *Report on the Condition of Education 2021* (2021) 4.

have the necessary structures in place to provide adequate remote support to learners or to sustain effective learning and teaching during this period.⁴⁶⁴ Furthermore, numerous barriers were identified in reports and polls from across the USA in respect of the transition from in-person learning to remote online learning.⁴⁶⁵ Barriers include but are not limited to inadequate access to digital devices and reliable internet at home, lack of support from parents or guardians, specifically non-native English speakers and issues in relation to the implementation of new online learning strategies.⁴⁶⁶ As such, it is clear that numerous challenges existed in relation to distance learning education and that learners did not have access to the correct resource tools or support in order to facilitate learning during this period.

In addition to the barriers identified hereabove, concerns were raised as to whether the inequities in accessing online learning programs could further intensify the gaps in learner performance which existed prior to the Covid-19 pandemic.⁴⁶⁷ In a report issued by the Department of Education, 59% of the parents and/or guardians, with a child under eighteen enrolled in a public or private school at the beginning of the 2020/2021 school year, indicated that either the child's school or the school district provided the learner with a computer. According to the report, many learners struggled to access the necessary learning material and/or learning equipment during the school closures.⁴⁶⁸ Moreover, only 4% of these parents and/or guardians reported that they paid for internet access,⁴⁶⁹ which confirms that a large percentage of learners were unable to access the necessary online learning material even where schools or schools districts had provided computers.

Not all learners across the jurisdiction benefitted and not only did unequal access to digital resources persist during this time, but the structural divide increased due to the unequal support from schools.⁴⁷⁰ As such, underprivileged learners, namely those from economically disadvantaged backgrounds, those without access to the internet,

⁴⁶⁴ Economic Policy Institute *Covid-19 and student performance, equity, and U.S. education policy* (2020) 3.

⁴⁶⁵ Zviedrite *et al* (2021) *Plos One* 12.

⁴⁶⁶ 12.

⁴⁶⁷ United States of America Department of Education & Institute of Education Sciences *Report on the Condition of Education 2021* (2021) 4.

⁴⁶⁸ 4.

⁴⁶⁹ 4.

⁴⁷⁰ S Goudeau, C Sanrey, A Stanczak, A Manstead & C Daron "Why lockdown and distance learning during the Covid-19 pandemic are likely to increase the social class achievement gap" (2021) 5 *Nature Human Behaviour* 1273 1274.

abused or neglected children as well as learners with disabilities have been and will continue to be disproportionately impacted by the lack of access to education during school closures within the USA.⁴⁷¹

Furthermore, certain groups of learners can be said to have been more gravely affected by the Covid-19 related school closures than other groups, and this includes but is not limited to the learners who had previously lost instruction time due to recent natural disasters affecting their schools.⁴⁷² An example of this are learners in Sonoma County, California who had previously lost nearly forty days of instruction time due to wildfires, floods and power shutoffs in recent years.⁴⁷³ These learners ultimately experienced learning loss prior to the Covid-19 school closures and thus face being further behind in their education than learners in the same grades in other schools within the jurisdiction, during and post the outbreak.

4 4 2 4 Conclusion

According to the discussion above, learners across the USA experienced a clear break in academic support and opportunities due to the Covid-19 related school closures and the interrupted classroom time during the 2019/2020 and 2020/2021 academic years.⁴⁷⁴ As such, the closing of schools across the nation as a legal response to Covid-19 impacted on the right to education of all children in the USA during 2020 and 2021, with certain groups of learners being more disadvantaged compared to others mainly as a result of socio-economic circumstances.

4 4 3 Reopening schools across the USA and creating a Covid-19 safe school environment

4 4 3 1 Introduction

While the right to education is important, the health, safety and well-being of students, staff and families had to remain a priority for the USA when reopening schools across the nation. The start of the 2020/2021 academic year, saw schools reopening under various models, with the most common reopening model offering learners the option to return to school in person.⁴⁷⁵ As such, by the 1st of October 2020,

⁴⁷¹ Lee *et al* (2021) *Children and Youth Services Review* 8.

⁴⁷² United States of America Government Accountability Office *Disaster Recovery: Covid-19 Pandemic Intensifies Disaster Recovery for K-12 Schools* (14-10-2020) 1 4.

⁴⁷³ 4.

⁴⁷⁴ Education Commission of the States *Interrupted Instruction* (2021) 1.

⁴⁷⁵ Malkus *Reopening in the Shadow of Covid-19* (October 2020) 18 & 19.

one in ten schools made the shift from remote learning to some form of in-person learning.⁴⁷⁶ According to data from the 2021 “National Assessment of Education Progress School Survey” which was released by the Department’s Institute of Education Sciences, despite the increasing number of schools offering full-time in person learning, disparities based on race and ethnicity have been identified among learners in respect of who is actually accessing in-person instruction.⁴⁷⁷

President Biden however confirmed his commitment to education when he spoke of the importance of seeking the necessary resources to support the safe reopening and continued operation of schools within the specific jurisdiction.⁴⁷⁸ This was proven through Executive Order 14000, “Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers”, which states that every learner in the USA deserves a high-quality education in a safe environment.⁴⁷⁹ As such, key prevention strategies were identified, and were implemented through the introduction of numerous policies and guidance documents.

4 4 3 2 *Creating a Covid-19 safe school environment*

In order to mitigate the impact of Covid-19 within the school environment, schools had to implement certain preventative measures when reopening. The Centre for Disease Control and Prevention (hereafter “CDC”) in the USA confirmed this by introducing the “Operational Strategy for K-12 Schools Through Phased Prevention” (hereafter “K-12 Operational Strategy”) as well as the “Guidance for Covid-19 Prevention in K-12 Schools” (hereafter “K-12 Guidance”). It is important to note that the CDC stopped updating the K-12 Operational Strategy on the 15th of May 2021, and continued to update the K-12 Guidance with the latest update at the time of writing being the 5th of November 2021.⁴⁸⁰ Moreover, individual state guidance documents as well as the “Covid-19 Handbooks” released by the USA’s Department of Education provided information to support the education community as schools reopened across the nation.⁴⁸¹

⁴⁷⁶ Malkus *Reopening in the Shadow of Covid-19* (October 2020) 18 & 19.

⁴⁷⁷ United States of America Department of Education *ED COVID-19 Handbook, Volume 2* 14.

⁴⁷⁸ United States of America Department of Education *ED COVID-19 Handbook, Volume 1* 1.

⁴⁷⁹ 1.

⁴⁸⁰ Centre for Disease Control and Prevention *Guidance for Covid-19 Prevention in K-12 Schools* (updated 05-11-2021) (hereafter “K-12 Guidance”) & Centre for Disease Control and Prevention *Operational Strategy for K-12 Schools Through Phased Prevention* (updated 15-05-2021) (hereafter “K-12 Operational Strategy”).

⁴⁸¹ United States of America Department of Education *ED COVID-19 Handbook, Volume 1* & U.S. Department of Education, Office of Planning, Evaluation and Policy Development *ED COVID-19*

The CDC as well as the USA's Department of Education emphasised the importance of utilising layered prevention strategies to avoid COVID-19 transmission in schools.⁴⁸² Ultimately, this means that the various policy and guidance documents, which were introduced, highlighted various strategies, including but not limited to the consistent and correct use of masks, handwashing and respiratory etiquette and physical distancing,⁴⁸³ and indicated that strategies should be incorporated together rather than in an isolated fashion. While numerous strategies were provided, the discussion here below will be limited to the correct use of masks, handwashing and respiratory etiquette and physical distancing,⁴⁸⁴

4 4 3 3 *The consistent and correct use of masks within the USA school environment*

According to the USA's The Department of Education, emphasised the universal and correct wearing of masks.⁴⁸⁵ The K-12 Operational Strategy, required the wearing of masks at all times in schools - with certain exceptions such as when a learner or teacher is eating - by learners, teachers, staff and any other persons in the environment whether it be in a classroom setting or a non-classroom setting.⁴⁸⁶ It was accepted that the wearing of a well-fitting mask with proper filtration, consistently and correctly played a role in the transmission of SARS-Cov-2 through respiratory droplets.⁴⁸⁷ The provision of exceptions ultimately provides for a certain level of adaptability, however, the prioritization of masks as a prevention mechanisms shows a commitment to education and to limiting the spread of the disease.

Furthermore, despite the importance of wearing a mask, to provide a level of flexibility to the situation, it was said that masks should not be worn by children younger

Handbook, Volume 2: Roadmap to Reopening Safely and Meeting All Students' Needs (ebook) (2021) 1 <<https://www2.ed.gov/documents/coronavirus/reopening-2.pdf>> (accessed 04-06-2021).

⁴⁸² United States of America Department of Education, Office of Planning, Evaluation and Policy Development *ED COVID-19 Handbook, Volume 1: Strategies for Safely Reopening Elementary and Secondary Schools* (ebook) (2021) 1 <<https://www2.ed.gov/documents/coronavirus/reopening.pdf>> (accessed 04-06-2021) 2.

⁴⁸³ United States of America Department of Education *ED COVID-19 Handbook, Volume 1* 8-16 & 17-18; United States of America Department of Education *ED COVID-19 Handbook, Volume 2* 16; CDC *K-12 Operational Strategy* (2021) & CDC *K-12 Guidance* (2021).

⁴⁸⁴ United States of America Department of Education *ED COVID-19 Handbook, Volume 1* 8-16 & 17-18; United States of America Department of Education *ED COVID-19 Handbook, Volume 2* 16; CDC *K-12 Operational Strategy* (2021) & CDC *K-12 Guidance* (2021).

⁴⁸⁵ United States of America Department of Education *ED COVID-19 Handbook, Volume 1* 10-16; U.S. Department of Education *ED COVID-19 Handbook, Volume 2* 16; CDC *K-12 Operational Strategy* (2021) & CDC *K-12 Guidance* (2021).

⁴⁸⁶ CDC *K-12 Operational Strategy* (2021).

⁴⁸⁷ CDC *K-12 Operational Strategy* (2021).

than 2 years old or by someone who cannot wear a mask safely, which may include learners with disabilities.⁴⁸⁸ In these circumstances, suitable adaptations or alternatives, including virtual learning or the wearing of face shields instead of masks had to be considered.⁴⁸⁹ As such, despite the provision of this prevention mechanisms, it must be noted that the mechanism was not and cannot be implemented equally or safely for learners of all ages as it may be harmful to certain learners and may hinder rather than protect all children's' right to education.

Moreover, according to volume 1 of the "Covid-19 Handbook", school leaders and educators were required to place signs in classrooms in order to support educators, staff and learners in consistently and effectively wearing masks within the school environment.⁴⁹⁰ These signs had to include instructions such as, 1) wash or sanitise hands before putting on a mask or after taking one off, 2) do not touch masks while wearing them, 3) wear your mask over both your nose and mouth, 4) do not wear masks when they are wet, as it could make it difficult to breathe and 5) do not share masks.⁴⁹¹ While these instructions seem trivial, its purpose was to assist younger children in order to prevent confusion or who needed assistance in the proper use of a mask.

4 4 3 4 *Handwashing and Respiratory etiquette within the classroom and school environment*

According to the *Covid-19 Handbook* handwashing and good respiratory etiquette serve as additional prevention strategies that together with the consistent and correct use of masks and physical distancing can keep learners, teachers and students safe within the school environment.⁴⁹² Respiratory etiquette refers to covering one's coughs or sneezes and which contributes toward limiting the spread of infectious illnesses, including Covid-19 within the school environment.⁴⁹³ In addition, the regular washing of ones hands with water and soap for at least 20 seconds or the use of an alcohol based hand sanitizer when one is unable to wash ones hands can reduce the spread of germs that can cause illness within the school environment.⁴⁹⁴ As such, the "Covid-

⁴⁸⁸ United States of America Department of Education *ED COVID-19 Handbook, Volume 1* 8.

⁴⁸⁹ 8.

⁴⁹⁰ 9.

⁴⁹¹ 9.

⁴⁹² United States of America Department of Education *ED COVID-19 Handbook Volume 1* 17.

⁴⁹³ CDC *K-12 Guidance* (2021).

⁴⁹⁴ United States of America Department of Education *ED COVID-19 Handbook Volume 1* 18.

19 Handbook” states that educators and school leaders should consider how to set up a classroom so that handwashing and respiratory etiquette is supported.⁴⁹⁵

As mentioned in chapter 2, handwashing has been introduced as an intervention and prevention mechanism to combat the spread of Covid-19 on a global scale.⁴⁹⁶ The USA has incorporated this prevention mechanisms across the nation, and the K-12 Operational Strategy provides that proper handwashing techniques should be taught in ongoing health education units and further states that adequate supplies should be provided within the school environment.⁴⁹⁷ Furthermore, while handwashing mechanisms, as they were provided for in the national policy and guidance documents, were incorporated in all states across the USA, for reasons which cannot be confirmed, only certain states took steps to actually incorporate the strategy into State specific guidance documents. The “Best Practice Recommendations for Covid-19 Prevention in Schools for the 2021-22 School Year” by the Minnesota Department of Health serves as an example.⁴⁹⁸ While research on the topic is unclear, an assumption can be made that due to the fact that sufficient national policy and guidance documents exist, states elected to rely solely on these documents rather than develop state specific documents.

Unfortunately certain schools experienced difficulties in relation to the implementation of handwashing as a prevention mechanism as major disasters affected the provision of running water within specific school environments. The USA has experienced more than 260 presidentially declared major disasters since 2017 and the Covid-19 pandemic has contributed toward delays in certain recovery projects within K-12 schools..⁴⁹⁹ For example the Covid-19 pandemic delayed efforts to restore running water to school buildings damaged by wildfires.⁵⁰⁰ Whether the provision of running water is a pre-requisite to schools reopening is not indicated in guidance documents, however the lack of running water clearly has the potential to hinder the effectiveness of handwashing as a preventative measure within the school environment. Fortunately, the national policy and guidance documents do provide for hand sanitization as an alternative to handwashing, as it confirms that alcohol based

⁴⁹⁵ United States of America Department of Education *ED COVID-19 Handbook Volume 1* 17.

⁴⁹⁶ See Chapter 2 of this thesis.

⁴⁹⁷ CDC *K-12 Operational Strategy* (2021).

⁴⁹⁸ Minnesota Department of Health *Best Practice Recommendations for Covid-19 Prevention in Schools for the 2021-22 School Year* (09-03-2021) 1 7.

⁴⁹⁹ United States of America Government Accountability Office *Disaster Recovery* (14-10-2020) 3.

⁵⁰⁰ 3.

sanitizer with at least 60% alcohol should be provided within the school environment.⁵⁰¹ While handwashing and hand sanitization should in general be incorporated together in a school environment, where schools have issues with running water, hand sanitization can be viewed to be an alternative to handwashing.

4 4 3 5 *Social distancing within schools across the USA*

Physical distancing was adopted globally as a way to combat the spread of Covid-19,⁵⁰² as such, policymakers considered this strategy extensively as schools prepared to reopen for the 2020/2021 academic year. Physical distancing as a prevention strategy has been identified in numerous policies and guidance documents within the USA.⁵⁰³ Physical distancing requirements may be three feet, which is equivalent to about 0,9 metres in some situations and six feet, which is equivalent to about 1.8 metres in other situations.⁵⁰⁴

According to the K-12 Operational Strategy, distancing of at least three feet between students in classrooms should occur in respect of elementary school students as well as middle and high school students in areas of low, moderate or substantial community transmission.⁵⁰⁵ In addition, three feet of distancing should also be incorporated between learners in middle school and high school in areas of high community transmission where cohorting is used.⁵⁰⁶ It is important to note that cohorting or podding refers to when learners are placed into small groups that have to stay together throughout an entire school day.⁵⁰⁷ In addition to the above, policy and guidance documents have identified that physical distancing of at least six feet should be maintained across all school types and transmission levels at all times in the school building between teachers and staff or between adults and students, when masks cannot be worn, during activities when increased exhalation occurs and in common areas such as school lobbies and auditoriums.⁵⁰⁸

⁵⁰¹ CDC *K-12 Operational Strategy* (2021), CDC *K-12 Guidance* (2021) & United States of America Department of Education *ED COVID-19 Handbook Volume 1* 18.

⁵⁰² See Chapter 2 of this thesis.

⁵⁰³ United States of America Department of Education *ED COVID-19 Handbook, Volume 1* 8-10; United States of America Department of Education *ED COVID-19 Handbook, Volume 2* 16; CDC *K-12 Operational Strategy* (2021) & CDC *K-12 Guidance* (2021).

⁵⁰⁴ United States of America Department of Education *ED COVID-19 Handbook Volume 1*, CDC *K-12 Operational Strategy* (2021) & CDC *K-12 Guidance* (2021).

⁵⁰⁵ CDC *K-12 Operational Strategy* (2021).

⁵⁰⁶ CDC *K-12 Operational Strategy* (2021).

⁵⁰⁷ United States of America Department of Education *ED COVID-19 Handbook Volume 1* 13.

⁵⁰⁸ CDC *K-12 Operational Strategy* (2021).

Many states within the USA also incorporated physical distancing requirements in their state guidance documents which were released prior to the reopening of schools.⁵⁰⁹ According to Alaska's "Smart Start 2020 Guidance, California's Reopening Guidance" and Pennsylvania's "Preliminary Guidance for Phased Reopening of Pre-K to 12 Schools", to name but a few, six feet of distance in the classroom or between students and staff is recommended.⁵¹⁰

Based on the above, it is clear that physical distancing is encouraged through policy and guidance documents. Physical distancing practices may however be hindered in certain schools within the jurisdiction. This is in part due to certain infrastructure challenges caused by recent natural disasters, as they have effectively rendered certain K-12 facilities unusable for an extended period of time.⁵¹¹ For example, numerous school buildings needed to be repaired after the Super Typhoon Yutu, and some learners were still attending classes in tents as of July 2020. In these circumstances, the successful implementation of physical distancing requirements presents a challenge.

Furthermore, issues surrounding classroom size and overcrowding in schools have been identified in some schools in the USA,⁵¹² and this could in turn hinder the effectiveness of physical distancing within the school environment. Over the years, overcrowding has been identified as a topic of concern for many education policy researcher.⁵¹³ Moreover, overcrowding was identified as a concern between 2002 and 2015 in schools within Kentucky. Specifically, it was noted that Scott County high school in Kentucky had previously experienced enrolment rates that were 56% over capacity.⁵¹⁴ Moreover, according to the 2011 "Too Crowded to Learn" report by Make the Road New York, data had shown that overcrowding in schools was pervasive, and that more than half of the students were attending an overcrowded school within New

⁵⁰⁹ C Francies "Response to information request" (14-07-2020) *Education Commission of the States* <https://www.ecs.org/wp-content/uploads/State_Information_Request_-_Social_Distancing_Protocols.pdf> (accessed 25-10-2021).

⁵¹⁰ Francies "Response to information request" *Education Commission of the States*.

⁵¹¹ United States of America Government Accountability Office *Disaster Recovery* (14-10-2020) 1.

⁵¹² Barrington "The 15 Biggest Failures in the American Public Education System" *Public School Review*; Lynch "18 Reasons the U.S. Education System is Failing" *The Edvocate* & Anonymous "Major Issues in Education: 20 Hot Topics (From Grade School to College)" *Trade Schools, Colleges and Universities*.

⁵¹³ M Shirley *The Effects of Overcrowding on Student Academic Performance in Kentucky High Schools* MPA Capstone University of Kentucky (2017) 4.

⁵¹⁴ 4.

York.⁵¹⁵ Specifically, this report identified that schools in Queens were the most overcrowded in New York, and that while 63% of high schools were overcrowded, 64% of elementary and middle schools were overcrowded.⁵¹⁶ While these are two examples, and overcrowding is not an issue in all schools across the USA, it has the potential to influence learner performance, and could hinder the effectiveness of physical distancing within a classroom.

Where physical distancing may be difficult to maintain or ensure, as an alternative, cohorting or podding has been suggested as it can limit the spread of Covid-19 between cohorts.⁵¹⁷ The Department of Education has however provided certain considerations when establishing cohorts or pods as problems may arise based on how cohorts are chosen.⁵¹⁸ The national policy and guidance documents provided for alternative mechanisms to incorporate physical distancing within the school environment as it ultimately contributes not only toward protecting a child's health but their right to education.

4 4 3 6 Conclusion

The USA ultimately provided a range of prevention mechanism provisions in relevant policy and guidance documents in order to protect a child's right to education through ensuring their safe return to school. The wearing of a mask ultimately allowed for a learner to safely return to school and contributed toward a learner not having to face further interruptions to their education. In relation to handwashing and respiratory etiquette it can be said that the mechanisms attempted to protect learners, teachers and staff within the school environment. As a legal response, it thus contributed toward the successful reopening of schools which in turn supports the realisation of a child's right to education in the USA. Furthermore, regardless of the issues identified which may hinder the effectiveness of physical distancing in some schools, this strategy, as well as the provision of the cohorting or podding alternative, can be viewed to have contributed toward ensuring that schools remain open during the Covid-19 affected academic years.

Moreover, it is important to note that the Covid-19 prevention measures discussed above, namely the wearing of masks, physical distancing and handwashing should be

⁵¹⁵ For more detail see *Make the Road New York Too Crowded to Learn* (2011) 1 1-17.

⁵¹⁶ 17.

⁵¹⁷ United States of America Department of Education *ED COVID-19 Handbook Volume 1* 13-15 & CDC *K-12 Guidance* (2021).

⁵¹⁸ United States of America Department of Education *ED COVID-19 Handbook Volume 1* 14.

used and incorporated in a layered manner.⁵¹⁹ As such, despite the existence of certain challenges, the reopening of schools and the consistent application of the relevant prevention mechanisms within the school environment can therefore be viewed as a legal response which supports and protects the realisation of a child's right to education.

4 5 Legal responses introduced in order to ensure learner success and to prevent further interruptions during the 2020/2021 academic year and beyond

The Covid-19 pandemic disrupted the traditional forms of education across all states within the USA and continues to create challenges for learners as well as their schooling systems.⁵²⁰ As such, education leaders and teachers have had to and are expected to make difficult decisions regarding not only the 2020/2021 academic year but the years to follow.⁵²¹ Numerous measures were introduced in order to address interrupted learning within the USA and legal responses to the Covid-19 pandemic came through federal relief packages, governor's executive orders and state education agency guidance.⁵²²

Congress passed three federal relief packages that provided state and local education agencies with \$190 billion in the elementary and secondary school emergency relief funding for K-12 education within the nation.⁵²³ In addition the "American Rescue Plan" provided that at least 20% of their total budget should be directed toward addressing interrupted learning as well as student's academic, social and emotional needs.⁵²⁴ States were also mandated to allocate 5% of these relief funds to learning recovery interventions.⁵²⁵ Furthermore, the American Academy of Paediatrics recommends that all eligible children who are five years of age or older

⁵¹⁹ CDC *K-12 Guidance* (2021).

⁵²⁰ B Tarasawa & A Samuel "Learning During Covid-19: Initial Findings and 4 Considerations for Policymakers" (13-01-2021) *EdNote* <<https://ednote.ecs.org/learning-during-covid-19-initial-findings-and-4-considerations-for-policymakers/>> (accessed 05-11-2021).

⁵²¹ Tarasawa & Samuel "Learning During Covid-19: Initial Findings and 4 Considerations for Policymakers" *EdNote*.

⁵²² Education Commission of the States *Interrupted Instruction* (2021) 2.

⁵²³ 2.

⁵²⁴ 2.

⁵²⁵ 2.

should be vaccinated with the Covid-19 vaccine.⁵²⁶ This is also supported by the K-12 Guidance which recommends that eligible students, teachers, staff and household members get vaccinated as vaccination is the leading public health prevention strategy to end the Covid-19 pandemic and could play a critical role in all schools resuming full operations.⁵²⁷

Legislation was also enacted in order to address interrupted education, and based on legislation which was either introduced, enacted or vetoed during 2020 and 2021, certain themes emerged in respect of addressing interrupted education which include but are not limited to the extension of learning time and supports, intensive or high-dosage tutoring and mental health programs.⁵²⁸ The programs discussed below attempt to improve the quality of education and learner performance during the Covid-19 affected school years and beyond, and it can be said that these programs support the realisation of a child's right to education in the USA.

Intensive tutoring are lessons which occur in addition to a learners regular instruction, with a tutor in either a one-on-one or two-on-one setting, and has been identified as a cost-effective strategy for boosting learner achievement and mitigating the Covid-19 academic interruptions by numerous states across the nation.⁵²⁹ In California, the California Department of Education is required to administer an opt-in tutoring program with certain requirements to mitigate academic struggles as a result of the Covid-19 pandemic.⁵³⁰ In Texas, learners who are deemed likely not to be promoted are expected to participate in the extended learning program, including but not limited to tutoring, which would occur through the "Texas Tutor Corps" program or the Covid-19 learning loss and student acceleration pilot program that are expected to be created.⁵³¹ As a final example, a state-wide tutoring program will be established in Arkansas to address interrupted learning as a result of the Covid-19 pandemic.⁵³²

⁵²⁶ Anonymous "Staying safe in School During Covid-19" (11-02-2021) *healthychildren.org* <<https://www.healthychildren.org/English/health-issues/conditions/COVID-19/Pages/Return-to-School-During-COVID-19.aspx>> (accessed 10-11-2021).

⁵²⁷ CDC *K-12 Guidance* (2021).

⁵²⁸ Education Commission of the States *Interrupted Instruction* (2021) 2, 3-5 & 7.

⁵²⁹ C Jamieson, T McDole, Z Perez "Response to information request" (13-04-2021) *Education Commission of the States* <<https://www.ecs.org/wp-content/uploads/State-Information-Request-Addressing-Interrupted-Instruction-During-COVID-19.pdf>> (accessed 25-10-2021) 2.

⁵³⁰ Senate Bill 723 (introduced 2021).

⁵³¹ Senate Bill 2023 (introduced 2021).

⁵³² Senate Bill 564 (introduced 2021).

Increasing the instruction time a learner receives has also been identified as an approach to address interrupted learning within the USA.⁵³³ This refers to either extending the school day, extending the school year or to change how time is spent during the existing school calendar.⁵³⁴ In North Carolina, every school district is required to offer a 6 week school extension learning recovery and enrichment program due to the effects of Covid-19.⁵³⁵ Participation in the program may however be limited according to the number of places available within the program, and priority will be given to learners identified as “at-risk” learners.⁵³⁶ Furthermore, in Tennessee, the learning loss remediation and student acceleration program, mandates that local education agencies implement summer learning camps in the summers of the 2020/2021 and 2021/2022 school years.⁵³⁷

Finally, social and emotional wellbeing was also recognised by administrators, teachers and parents across the nation to be a major challenge facing learners, particularly those learning from home during the 2020/2021 academic year.⁵³⁸ Learners as well as school staff were exposed to trauma, disruptions in learning and teaching, and for learners specifically, disengagement from school and peers which in turn could have negatively affected their mental health.⁵³⁹ Mental health is linked with learner performance, and it has been said that schools should be prepared to meet the mental health needs of their students.⁵⁴⁰ As such, in response to this, certain legislation has been enacted in order to cater for student mental health.⁵⁴¹

4 6 Conclusion

As a result of the USA not ratifying the relevant international instruments that cater for a child’s right to education, and due to the fact that the right to education is not explicitly recognised under the USA Federal Constitution, the development of the right to education in the USA, and specifically public education in the USA, differs from many other jurisdictions within the international sector. Based on the discussion

⁵³³ Jamieson *et al* “Response to information request” *Education Commission of the States* 2.

⁵³⁴ 2.

⁵³⁵ House Bill 82 (enacted, 2021).

⁵³⁶ House Bill 82 (enacted, 2021).

⁵³⁷ House Bill 7004 (enacted, 2021).

⁵³⁸ Office for Civil Rights, USA Department of Education *Education in a Pandemic* (2021) 3.

⁵³⁹ United States of America Department of Education Development *ED COVID-19 Handbook, Volume 2* 8.

⁵⁴⁰ 8.

⁵⁴¹ Education Commission of the States *Interrupted Instruction* (2021) 1 2, 3-5 & 7.

above, it is however clear that learners in the USA do have a right to education. Moreover, the discussion above indicates that this right was impacted as all schools and learners in the USA were affected by Covid-19 related consequences in some way.

During the Covid-19 related school closures across the USA, schools were unable to ensure the realisation of a child's right to education as the transition to distance learning was not smooth and failed to cater for all learners equally. Ultimately, despite the efforts of teachers, staff and school leaders, specifically in respect of the development of online lessons, remote learning plans and the development of hybrid strategies,⁵⁴² educational losses during the pandemic are estimated to be substantial within the USA.⁵⁴³

Furthermore, through certain legal responses, specifically those that can be linked to the safe reopening of schools, the USA as a whole, as well as specific states, did in fact attempt to ensure the realisation of a child's right to education within the jurisdiction during the Covid-19 pandemic. While certain challenges have been identified in respect of the implementation of the legal responses, and learning loss is evident, the USA have attempted and are attempting to address these issues in order to protect the realisation of a child's right to education and to fill the gaps which exist due to the Covid-19 pandemic. Finally, it must be noted that this discussion plays an important role in comprehending and setting out the comparative analysis below.

⁵⁴² Office for Civil Rights, USA Department of Education *Education in a Pandemic* (2021) 1.

⁵⁴³ Malkus *Reopening in the Shadow of Covid-19* (October 2020) 9.

Chapter 5: The impact of Covid-19 on the right to education in the United Kingdom

5 1 Introduction

Due to the fact that the United Kingdom (hereafter “UK”) has signed and ratified certain international instruments,⁵⁴⁴ the nation has specific international obligations. Moreover, the UK has introduced and developed an array of legislation, policies and regulations which contribute toward the realisation of a child’s right to education within the specific jurisdiction. As such, this chapter will discuss both the UK’s international obligations and the internal legislative framework in relation to a child’s right to education. In addition, this chapter will set out the condition of the UK education system prior to the Covid-19 outbreak. Moreover, to assist with the comparative analysis in chapter 8 and answering the applicable research questions of this thesis, this chapter will discuss the impact of Covid-19 on a child’s right to education in the UK and identify the UK’s legal responses thereto. Finally, for the purpose of this thesis, it is crucial to understand that where this thesis refers to the UK, it refers solely to Great Britain and not Scotland, Wales, or Northern Ireland.

5 2 A child’s right to education as developed under English law

5 2 1 International influence in respect of the right to education

The UK signed the ICESCR in 1968 and the CRC in 1990 with ratification following in 1976 and 1991 respectively.⁵⁴⁵ While international law still applies on an international level and the UK is bound by obligations it has accepted on an international level, it is important to note that the UK follows a dualist approach to international law.⁵⁴⁶ This means that the UK essentially views international law and domestic law as separate legal systems, and international law should be approved by Parliament, written into or incorporated by legislation domestically in order to have a domestic effect.⁵⁴⁷ As such, in order for the CRC and ICESCR to have full application in the UK, the UK was and is expected to take measures domestically to ensure that

⁵⁴⁴ See chapter 2 for more detail on these instruments.

⁵⁴⁵ United Nations Human Rights Office of the High Commissioner “Status of ratification – Interactive Dashboard” *United Nations*. See Chapter 2 of this thesis for more detail on these instruments.

⁵⁴⁶ P Butchard “Principles of International Law: A Brief Guide” (2020) 9010 *House of Commons Library* 1 3.

⁵⁴⁷ 3.

a child's right to education is fully and effectively realised while avoiding measures that unreasonably interfere with the enjoyment of said right.

The UK's international obligations in relation to international human rights was confirmed through the introduction of the Human Rights Act in 1998 as it is an example of where domestic legislation was enacted in order to give application to the provisions of an international instrument. The Human Rights Act essentially allows UK citizens to rely on rights, including but not limited to the right to education, contained in the European Convention on Human Rights before domestic courts in the UK.⁵⁴⁸ Accordingly, it is thus expected that the UK has an obligation to ensure that a child's right to education is not violated by the state or state agents.⁵⁴⁹ It must however be noted that while the UK has signed the European Social Charter (revised) which also caters for the right to education,⁵⁵⁰ the country has failed to ratify the document.⁵⁵¹ As such, while symbolic agreement may be assumed, the document has not been entered into force within the nation and the UK is not bound to the provisions therein.⁵⁵²

5 2 2 The development of a child's right to education under English law

The development of legislation was and is central to the realisation of a child's right to education as it serves to direct, maintain and control the education system within the UK.⁵⁵³ This understanding is confirmed by the Children's Legal Centre, an independent national charity, who issued a Report in 2008 highlighting the importance of ensuring that every child in the UK enjoys the right to education.⁵⁵⁴ The report further emphasised that the right to education not only contributes toward a child reaching their full potential and participating actively in society, but is also key to unlocking a child's enjoyment of many other rights.⁵⁵⁵ Legislation such as the Education Act of 1944 and the Education Reform Act of 1988 were important in the development of a child's right to education in the UK.⁵⁵⁶ While the Education Act of 1944 essentially set

⁵⁴⁸ See A Horne & L Maer *From the Human Rights Act to a Bill of Rights?* in A Horne, G Drewry & D Oliver (eds) "Parliament and the Law (2013) 251-280 London: Hart Publishing.

⁵⁴⁹ Tobin *The UN Convention on the Rights of a Child: A Commentary* 1071-1072.

⁵⁵⁰ See Chapter 2.

⁵⁵¹ Council of Europe "Chart of Signatures and Ratifications of Treaty 163" *Council of Europe*.

⁵⁵² Part VI, Article K of the European Social Charter (revised).

⁵⁵³ S Gorard & N Harris "Education Policy, Law and Governance in the United Kingdom" (2009) 22 *TiBi* 1 8.

⁵⁵⁴ The Children's Legal Centre *The Right to Education in England – Alternative Report to the Committee on Economic Social and Cultural Rights* (2008) 1 3.

⁵⁵⁵ 3.

⁵⁵⁶ Gorard & Harris (2009) *TiBi* 1.

out a national system of education within the UK and confirmed that it should be locally administered through local education authorities,⁵⁵⁷ the Education Reform Act of 1988 effected change by shifting control away from these local education authorities and moved it upward toward the Secretary of State and central institutions.⁵⁵⁸ These Acts ultimately contributed toward the development of the current primary legislation regulating the right to education in the UK, namely the Education Act of 1996 (hereafter “EA 1996”).⁵⁵⁹

The EA 1996 not only places a general duty on the Secretary of State to promote the education of people in the UK (England and Wales),⁵⁶⁰ but also provides that it is the duty of parents to secure the efficient full-time education of children of compulsory school age.⁵⁶¹ In order for these provisions to be realised, it is important to understand who falls within the compulsory school age category. As such, while it is generally accepted that a child refers to a person eighteen years or younger,⁵⁶² schooling is only compulsory for children until the end of the academic year wherein they turn sixteen.⁵⁶³ Moreover, a person begins to be of schooling age when he or she reaches five years of age.⁵⁶⁴ It must however be noted that the Education and Skills Act of 2008 places a duty to participate in education or training on a child who has ceased to be of compulsory school age but yet to reach the age of 18 where they have not obtained at least a level three qualification.⁵⁶⁵

In line with the above, the EA 1996 places a duty on the relevant authorities to make arrangements to identify children of compulsory school age in their area who are not receiving an education, namely children who are either not registered pupils or who are not receiving suitable education otherwise than at school.⁵⁶⁶ For the purpose of this provision, it is crucial to understand that while education is compulsory, schooling is not necessarily compulsory as children can be educated through home schooling

⁵⁵⁷ T Fisher “The Era of Centralisation: The 1988 Education Reform Act and its consequences” (2008) 50(2) *Forum* 255 255.

⁵⁵⁸ 256.

⁵⁵⁹ Ethos Project (PL Dupont) *The Right to Education for Disabled Persons and Religious Minorities: UK Report* (2019) 1 7.

⁵⁶⁰ Article 10 of the EA 1996.

⁵⁶¹ Article 7 of the EA 1996.

⁵⁶² See Article 1 of the CRC, “a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”.

⁵⁶³ Ethos Project (Dupont) *The Right to Education Report* (2019) 7.

⁵⁶⁴ 7.

⁵⁶⁵ Article 1 & article 2 of the Education and Skills Act 2008.

⁵⁶⁶ Article 436 of the EA 1996 & Ethos Project (Dupont) *The Right to Education Report* (2019) 8.

as well.⁵⁶⁷ The EA 1996 also attempts to ensure a child's right to education as it not only provides that local authorities have the power to serve a written school attendance order on parents,⁵⁶⁸ but further states that failure to comply with such an order would be considered an offence.⁵⁶⁹ In addition, article 444(1) of the EA 1996 states that if a child of compulsory school age fails to regularly attend school, his or her parent would be guilty of an offence.⁵⁷⁰

As indicated above, the importance of a child's right to education was further reiterated in the Human Rights Act of 1998.⁵⁷¹ Specifically, the Act provides that no person shall be denied the right to an education within the specific jurisdiction.⁵⁷² Other supporting legislation which contributes toward the realisation of a child's right to education does exist, and these include but are not limited to, the School Standards and Framework Act of 1998, the Learning and Skills Act of 2000, the Education Act of 2002, the Children's Act of 2004, the Education Act of 2005, the Education and Inspections Act of 2006,⁵⁷³ the Education Act of 2011 and the Education and Adoption Act of 2016.⁵⁷⁴

Furthermore, the UK has identified the importance of inclusive education and more specifically, the fact that a child's right to education should also cater for children with disabilities. The development of the Special Educational Needs and Disability Act of 2001 provides statutory guidance for a practical framework toward inclusive education within the UK.⁵⁷⁵ This Act amongst others, paved the way for the Special Education Needs and Disability Code of Practice which sets out how schools and local authorities should support children and young people who have special educational needs.⁵⁷⁶ Based on the above discussion, it is clear that the right to education has been entrenched domestically within the UK and that certain domestic obligations and

⁵⁶⁷ Article 7 of the EA Act 1996 & House of Commons Library (R Long, D Foster & S Danechi) *Home Education in England 05108* (2021) 1 7.

⁵⁶⁸ Article 437 of the EA 1996 & Ethos Project (Dupont) *The Right to Education Report* (2019) 8.

⁵⁶⁹ Article 443 of the EA 1996.

⁵⁷⁰ Article 444(1) of the EA 1996. See also *Isle of Wight Council v Platt* [2017] UKSC 28.

⁵⁷¹ Article 2 of the First Protocol of the Human Rights Act 1998.

⁵⁷² Article 2 of the First Protocol of the Human Rights Act 1998.

⁵⁷³ Gorard & Harris (2009) 22 *TiBi* 8.

⁵⁷⁴ Anonymous "Education Legislation" (n.d) [legislation.gov.uk](https://www.legislation.gov.uk) <<https://www.legislation.gov.uk/ukpga?title=education>> (accessed 08-01-2022).

⁵⁷⁵ JB Gardiner "Special Educational Needs and Inclusion: How Have the Major Historical Changes to the Language of Special Education and Inclusive Policy Influenced the Provision for Children with SEN/D within English Primary Schools?" (2017) *ResearchGate (e-journal)* 1 5 <<https://www.researchgate.net/publication/318661277>> (accessed 03-01-2022).

⁵⁷⁶ House of Commons Education Committee *Special Educational Needs and Disabilities First Report of Session* (2019) 1 9.

standards exist and should be respected across the nation. Whether this has in fact occurred will be discussed in the section to follow.

5 3 Education in the UK pre-Covid-19

According to the EA 1996, education in the UK consists of 3 progressive stages, these stages being primary education, secondary education and further education.⁵⁷⁷ In addition, there are two types of schools which exist across the nation, namely independent schools, which charge fees instead of receiving funding from the government, and state-funded schools, the most common being maintained schools, academies and free schools.⁵⁷⁸ The focus of this chapter is on primary and secondary education obtained at state-funded schools within the jurisdiction as they cater to majority of the learners in the UK.⁵⁷⁹ Furthermore, while specific school term and holiday dates may vary across the UK,⁵⁸⁰ it is important to note that generally the school year runs from September to July of the following year. This chapter therefore considers the 2019/2020 and the 2020/2021 academic years.

Moreover, education in the UK is ultimately overseen by the UK Government's Department for Education. It must be noted that state-funded schools not only provide education services but provide for certain social services as well, including the provision of free school meals to learners in state-funded schools, who meet the eligibility criteria, as provided for under Article 512 of the EA 1996.⁵⁸¹ According to the Schools Standards and Framework Act of 1998, a duty is placed on local education authorities as well as the governing bodies of schools, to provide free school meals in accordance with the correct nutritional standards.⁵⁸² It therefore becomes important to note that while the funding for school meals is mostly provided through the Dedicated Schools Grant, certain local education authorities also play a role in providing free school meals. Furthermore, through the "Free school meals: Guidance for local authorities, maintained schools, academies and free schools" of 2018, the Department

⁵⁷⁷ Article 1(1) of the EA 1996.

⁵⁷⁸ Gov.UK "Types of schools" (n.d.) *Gov.UK* <<https://www.gov.uk/types-of-school>> (accessed 03-01-2022).

⁵⁷⁹ Gov.UK "Schools, pupils and their characteristics" (17-06-2021) *Gov.UK* <<https://explore-education-statistics.service.gov.uk/find-statistics/school-pupils-and-their-characteristics#dataDownloads-1>> (accessed 03-01-2022).

⁵⁸⁰ Gov.UK "School term and holiday dates" (n.d.) *Gov.UK* <<https://www.gov.uk/school-term-holiday-dates>> (accessed 03-01-2022).

⁵⁸¹ Article 512 of the EA 1996.

⁵⁸² Article 114 & article 116 of the School Standards and Framework Act 1998.

for Education has provided guidance in relation to the provision of free school meals.⁵⁸³ While this guidance is non-statutory and should be considered alongside the applicable legislation, it plays a role in assisting local educational authorities, school leaders, school staff and governing bodies in all maintained schools, academies and free schools with understanding their obligation to provide free school meals to disadvantaged pupils in England.⁵⁸⁴ In addition, this guidance confirms that provision of these free meals is dependent on whether eligibility applications are made,⁵⁸⁵ and checked through the “Eligibility Checking System”.⁵⁸⁶ Based on the abovementioned provisions and the eligibility criteria, it must be noted that as of January 2021 an estimated 20.8% of all state-funded learners were known to be eligible for free school meals across the nation.⁵⁸⁷

While the UK has indeed made significant strides in respect of inclusive education, certain challenges in respect of the right to education remain prevalent. Inequality and social mobility issues,⁵⁸⁸ with specific reference to gaps in education linked to gender, ethnicity, socio-economic status as well as special educational needs or disability status, have been identified in the UK.⁵⁸⁹ Furthermore, due to the wide range of schools within the state-funded bracket, issues surrounding the lack of homogeneity have arisen.⁵⁹⁰ These issues have caused concern in the UK,⁵⁹¹ as an unequal education system threatens to pull society further apart as it enhances the pre-existing inequalities and limits social mobility.⁵⁹² As such, the need for the UK government to make improvements to ensure the right to education for all children without discrimination has been brought to the forefront.⁵⁹³

Other challenges in education have also been identified in the UK and they include but are not limited to a shortage of high-quality teachers, issues surrounding student

⁵⁸³ For more detail on the applicable guidance, see Department for Education *Free school meals: Guidance for local authorities, maintained schools, academies and free schools* (2018) 1 1-22.

⁵⁸⁴ 3.

⁵⁸⁵ House of Commons Library (R Long, S Danechi & N Roberts) *School meals and nutrition standards in England 04195* (2021) 1 13.

⁵⁸⁶ Department for Education *Free school meals: Guidance for local authorities, maintained schools, academies, and free schools* (2018) 7-8.

⁵⁸⁷ House of Commons Library *School meals and nutrition standards in England 04195* (2021) 16.

⁵⁸⁸ D Parry “The challenges facing English schools in the journey to 2030, with specific focus on London” (2019) 17(2) *London Review of Education* 178 185-186.

⁵⁸⁹ See Education Policy Institute *Education in England: Annual Report 2019* (2019) 1 1-50.

⁵⁹⁰ Parry (2019) *London Review of Education* 186-188.

⁵⁹¹ Equality and Human Rights Commission *Children’s Rights in the UK* (2016) 28.

⁵⁹² J Walker et al *The Power of Education to Fight Inequality* (2019) 12.

⁵⁹³ Equality and Human Rights Commission *Children’s Rights in the UK* (2016) 28.

stress and mental health,⁵⁹⁴ as well as inadequate access to technology, which were all accentuated during the Covid-19 pandemic.⁵⁹⁵ Considering the above, challenges do prevail in the UK education system and it can be said that the Covid-19 pandemic further added to these challenges as it ultimately threatens the educational development of the current generation of children within the jurisdiction.⁵⁹⁶

5 4 The consequences of the Covid-19 pandemic and the UK's legal responses in protecting the child's right to education

5 4 1 Introduction

The first identified cases of Covid-19 in the UK were reported in January 2020 and person-to-person transmission was confirmed within the country by late February of the same year.⁵⁹⁷ Cases in the UK gradually increased since then, and the nation has and continues to fall within the top ten countries with the highest amount of confirmed Covid-19 cases worldwide.⁵⁹⁸ As of the 12th of January 2022, there were 14 732 594 confirmed cases in the UK.⁵⁹⁹ In February 2020, the WHO outlined recommendations, which have since been amended, to provide each jurisdiction with guidance on how to respond against the Covid-19 pandemic.⁶⁰⁰ Following the release of said recommendations, the UK prepared a preparedness and response plan for the Covid-19 pandemic,⁶⁰¹ and even went as far as developing the Coronavirus Act of 2020.

The Covid-19 pandemic had a far-reaching and unexpected effect in nearly all sectors of life in the UK,⁶⁰² and the education sector was not left unscathed as

⁵⁹⁴ Parry (2019) *London Review of Education* 181-183 & 185.

⁵⁹⁵ See Cebr *Technology in UK Schools: A report for Lenovo* (2020) 1 1-25.

⁵⁹⁶ Centre for Learning and Life Chances in Knowledge Economies and Societies (F Green) *Schoolwork in lockdown: New evidence on the epidemic of educational poverty* (2020) 1 2.

⁵⁹⁷ D Flynn, E Moloney, N Bhattarai, J Scott, M Breckons, L Avery & N Moy Covid-19 pandemic in the United Kingdom" 9(4) (2020) *Health Policy and Technology* 673 673 <<https://doi.org/10.1016/j.hlpt.2020.08.003>> (accessed 08-01-2022).

⁵⁹⁸ Pettersson *et al* "Tracking Covid-19's Global Spread *CNN Health* & Anonymous "Number of coronavirus (Covid-19) cases worldwide as of 5 January, 2022, by country" (05-01-2022) *Statista* <<https://www.statista.com/statistics/1043366/novel-coronavirus-2019ncov-casesworldwide-by-country/>> (accessed 05-01-2022).

⁵⁹⁹ Anonymous "Number of coronavirus (Covid-19) cases worldwide as of 12 January, 2022, by country" (12-01-2022) *Statista* <https://www.statista.com/statistics/1043366/novel-coronavirus-2019ncov-casesworldwide-by-country/> (accessed 12-01-2022).

⁶⁰⁰ MU Anyanwu, IJ Festus, OC Nwobi, CJI Jaja and JW Oguttu "A Perspective on Nigeria's Preparedness, Response and Challenges to Mitigating the Spread of Covid-19" (2020) 11(22) *Challenges* 1 3.

⁶⁰¹ 3.

⁶⁰² SG Huber & C Helm "Covid-19 and schooling: evaluation, assessment and accountability in times of crises – reacting quickly to explore key issues for policy, practice and research with the school

profound disruptions to education occurred across the nation.⁶⁰³ During the 2019/2020 and 2020/2021 academic years, schools across the UK experienced periods where they were either fully open, partially open or completely closed as a direct result of the Covid-19 pandemic.⁶⁰⁴ The purpose of this section is thus to determine to what degree the realisation of a child's right to education was impacted by the Covid-19 pandemic and the UK's legal responses thereto during the 2019/2020 and 2020/2021 academic years.

5 4 2 School closures and the provision of alternative learning mechanisms

5 4 2 1 *Introduction and access to education*

In March 2020, as an initial legal response to Covid-19, the UK government implemented lockdown measures across the nation.⁶⁰⁵ In an attempt to reduce the spread of the disease, the UK decided to temporarily suspend in-person education.⁶⁰⁶ This is supported by the Coronavirus Act of 2020 which enables the temporary closure of educational institutions and childcare premises within the country.⁶⁰⁷ As a legal response to the consequences of Covid-19, the initial lockdown measures within the UK, saw children being confined to their homes which ultimately impacted them in various ways.⁶⁰⁸ The premature reopening of schools had the potential to not only threaten a child's right to the highest attainable standard of health but their right to life, survival and development as per article 6 of the CRC as well.⁶⁰⁹

barometer" 32 (2020) *Educational Assessment, Evaluation and Accountability* 237 238. See also The Sutton Trust *Social Mobility and Covid-19: Implications of the Covid-19 crisis for educational inequality* (2020) 1 2.

⁶⁰³ Education Policy Institute *Education recovery and resilience in England: Phase one report* (2021) 1 6.

⁶⁰⁴ Anonymous "Education: From Disruption to Recovery" *UNESCO*.

⁶⁰⁵ G Lo Moro, T Sinigaglia, F Bert, A Savatteri, MR Gualano & R Siliquini "Reopening Schools during the COVID-19 Pandemic: Overview and Rapid Systematic Review of Guidelines and Recommendations on Preventive Measures and the Management of Cases" (2020) 17 *International Journal of Environmental Research and Public Health* 1 4.

⁶⁰⁶ Joint Research Centre & European Commission *The likely impact of Covid-19 on education: Reflections based on the existing literature and recent international datasets* (2020) 1 7.

⁶⁰⁷ Article 37 of the Coronavirus Act 2020.

⁶⁰⁸ E Crawley, M Loades, G Feder, S Logan, S Redwood & J Macleod "Wider collateral damage to children in the UK because of the social distancing measures designed to reduce the impact of COVID-19 in adults" (2020) *BMJ Paediatrics Open* 1 1.

⁶⁰⁹ A Nolan "Should Schools Reopen? The Human Rights Risk" (2020) *Independent SAGE* 1 2.

Schools across the nation remained closed to most learners between March and July of 2020 as well as between January to early March of 2021.⁶¹⁰ Certain exceptions however did occur, and this included the fact that vulnerable children as well as children of critical or key workers continued to have the option to attend in person.⁶¹¹ This is due to the fact that schools not only cater for learning and teaching but serve as a safe space for children, especially vulnerable children.⁶¹² Vulnerable children can include children who require the assistance of a social worker, children in local authority care and children with an education, health and/or care plan as they have complex special educational needs.⁶¹³ Despite these exceptions allowing for the realisation of some children's right to education in the UK, school closures affected the majority of learners across the nation, not only in terms of their education and the physical access to their school facilities and school resources, but their mental and physical well-being as well.⁶¹⁴

5 4 2 2 Access to education related social services

It is important to note that schools play a role in detecting signs of abuse or neglect and provide support and certain social services as well.⁶¹⁵ Schools closures affected the provision of free school meals to the 20.8% of eligible learners across the nation, and for some learners, this meal is their only guaranteed meal for the day.⁶¹⁶ Research has shown that there is a strong connection between school meals, health and learning and that increasing the provision of healthy school meals can increase student achievement.⁶¹⁷ As such, during the initial lockdown and phased reopening of schools, even though learners were not always physically present at school, the UK Government expected schools to continue supporting children who were eligible for free school meals.⁶¹⁸ The Department for Education temporarily extended eligibility for

⁶¹⁰ Office for National Statistics *Coronavirus and the impact on measures of UK government education output: March 2020 to February 2021* (2021) 1 2 & 3.

⁶¹¹ House of Commons Library *School meals and nutrition standards in England 04195* (2021) 33 & Crawley *et al* (2020) *BMJ Paediatrics Open* 1.

⁶¹² Crawley *et al* (2020) *BMJ Paediatrics Open* 2.

⁶¹³ House of Commons Library *School meals and nutrition standards in England 04195* (2021) 33 & Crawley *et al* (2020) *BMJ Paediatrics Open* 1.

⁶¹⁴ Crawley *et al* (2020) *BMJ Paediatrics Open* 1 & The Institute for Fiscal Studies *Inequalities in education, skills, and incomes in the UK: The implications of the Covid-19 pandemic* (2021) 1 7.

⁶¹⁵ Crawley *et al* (2020) *BMJ Paediatrics Open* 2.

⁶¹⁶ The Sutton Trust *Social Mobility and Covid-19* (2020) 7.

⁶¹⁷ Child Poverty Action Group & the British Youth Council *Going Hungry? Young People's Experience of Free School Meals* (2012) 1 6 & 8.

⁶¹⁸ House of Commons Library *School meals and nutrition standards in England 04195* (2021) 33.

free school meals to include certain groups who had no recourse to public funds.⁶¹⁹ Schools therefore had to provide meals either through food packages or a voucher scheme,⁶²⁰ which was centrally funded by the Department for Education.⁶²¹ Vouchers were made available to the adult with caring responsibility for the eligible child,⁶²² and the Department for Education announced that children who meet the required criteria would be eligible for weekly £15 vouchers which could be spent at several supermarkets.⁶²³ Although the nutritional needs of learners were addressed, their right to physical attend school was compromised.

5 4 2 3 *The provision of alternative learning mechanisms*

In order to ensure access to education, education in the UK shifted online which enabled children to learn remotely.⁶²⁴ The Coronavirus Act 2020 Provision of Remote Education (England) Temporary Continuity Direction sets out the requirement to provide remote education and to whom remote education must be provided.⁶²⁵ Ultimately, the Direction not only provided legal certainty for those involved in the education sector, but confirmed that schools have a legal duty to provide remote education for children in state-funded schools, who fall within the applicable school-age bracket, as they were unable to attend school due to the Covid-19 public health advice, guidance or law which necessitated their closing.⁶²⁶

In line with the Direction, it must be noted that online learning and teaching platforms as well as other technology-rich activities have the potential to compensate for in-person lessons. The Direction however failed to physically ensure effective remote learning and teaching mechanisms as it did not address the pre-existing problems in relation to educational resource access. In order for any effective online teaching and learning to occur, a learner must have access to a computer, laptop, tablet, or smartphone, as well as a stable internet connection, and according to data

⁶¹⁹ Department for Education *Providing free school meals during the coronavirus (Covid-19) outbreak* (2021).

⁶²⁰ Department for Education *Providing free school meals during the coronavirus (Covid-19) outbreak* (2021).

⁶²¹ House of Commons Library *School meals and nutrition standards in England 04195* (2021) 34.

⁶²² 34.

⁶²³ 34.

⁶²⁴ Office for National Statistics *Coronavirus and the impact on measures of UK government education output: March 2020 to February 2021* (2021) 2.

⁶²⁵ Paragraphs 2, 3 & 4 of the Coronavirus Act 2020 Provision of Remote Education (England) Temporary Continuity Direction.

⁶²⁶ Paragraphs 2, 3 & 4 of the Coronavirus Act 2020 Provision of Remote Education (England) Temporary Continuity Direction.

prior to the Covid-19 pandemic, not all students met these prerequisites.⁶²⁷ Previous research in relation to smartphones and distance education, identified access to necessary equipment as an obstacle,⁶²⁸ while Sutton Trust research showed that 34% of parents with children between 5 and 16 years of age reported that their child did not have access to their own computer, laptop or tablet nor internet access at home.⁶²⁹ In addition, to the issues surrounding device access, slow internet access was also identified as a challenge in relation to distance learning.⁶³⁰ As such, while the Directions are of high importance and relevance, the practical implementation of remote learning is a major concern as the necessary resources required for effective remote learning, such as digital devices and internet access were not and are not equal amongst learners across the nation,⁶³¹ thus hindering the success of online learning and teaching in ensuring a child's right to education.

Moreover, it must be noted that evidence collected during the initial lockdown supports this claim as it showed that schoolwork being carried out at home did not mitigate the loss of learning as much as previously expected.⁶³² According to a study done during the first month of lockdown in the UK, children spent on average only 2.5 hours each day doing schoolwork, whether it be offline or online work.⁶³³ Despite not all of the time being devoted to teaching, an average school day when physically attending school lasts between 6 and 7 hours, which means that learners were spending significantly less time on their schoolwork while at home during the lockdown and remote learning period.⁶³⁴ Furthermore, some teachers at state schools in the UK reported a lower than normal standard of work being returned by learners since the lockdown.⁶³⁵

⁶²⁷ OECD *School Education During Covid-19: Were Teachers and Students Ready?* (2020) 1 5 & The Sutton Trust *Social Mobility and Covid-19* (2020) 5.

⁶²⁸ N Tuncay "Smartphones as tools for distance education" (2016) 6(2) *Journal of Education and Instructional Studies in the World* 20 28.

⁶²⁹ The Sutton Trust *Social Mobility and Covid-19* (2020) 5.

⁶³⁰ Tuncay (2016) *Journal of Education and Instructional Studies in the World* 28.

⁶³¹ OECD *School Education During Covid-19: Were Teachers and Students Ready?* (2020) 5.

⁶³² Centre for Learning and Life Chances in Knowledge Economies and Societies (F Green) *Schoolwork in lockdown* (2020) 10.

⁶³³ 6.

⁶³⁴ 6.

⁶³⁵ The Institute for Fiscal Studies *Inequalities in education, skills, and incomes in the UK* (2021) 7.

5 4 2 4 Conclusion

School closures were necessary according to the public health advice, guidance and laws released by the UK government. Despite schools providing limited spaces for vulnerable learners to access physical education, this was the exception, and many children were prevented from physically accessing their education facility. The closure of schools in the UK, fortunately did not prevent the provision of a meal, as the UK government ensured the roll out of this free meal or provided a voucher to eligible learners. While attempts were made in writing to cater for remote learning, practical challenges arose, and a loss in terms of learning and learning time thus occurred for the many students in the UK during the Covid-19 related school closures, and this in turn had an effect on learners educational outcomes.⁶³⁶ Therefore, as a legal response, lockdown measures and the subsequent school closures cannot be said to have effectively ensured all children's right to education during the Covid-19 pandemic.

5 4 3 Reopening schools across the UK and creating a safe school environment

5 4 3 1 Introduction

While the UK government attempted to ensure a child's right to education during the final months of the 2019/2020 academic year and the subsequent school closures, several educational experts and advisory groups called for the government to give education a greater priority in their response to and management of the Covid-19 pandemic.⁶³⁷ As such, a phased reopening of schools began on the 1st of June 2020 and by the 1st of September 2020, the full reopening of schools took place for the 2020/2021 academic year with certain prevention measures in place.⁶³⁸

Furthermore, it must be noted that the Coronavirus Act 2020 supported the phased reopening of schools as it not only provides for the temporary closure of educational institutions, but also states that the Secretary of State can give directions requiring the provision or continuing provision of education in the UK.⁶³⁹ As a result of this provision,

⁶³⁶ The Institute for Fiscal Studies *Inequalities in education, skills, and incomes in the UK* (2021) 7.

⁶³⁷ Centre for Learning and Life Chances in Knowledge Economies and Societies (F Green) *Schoolwork in lockdown* (2020) 3 & 11.

⁶³⁸ Lo Moro *et al* (2020) *International Journal of Environmental Research and Public* 4.

⁶³⁹ Article 38 of the Coronavirus Act.

and due to high transmission and infection rates there were unfortunately times when schools in the UK faced full or partially closure.⁶⁴⁰ The 2020/2021 academic year was therefore not disruption free and schools once again closed to in-person learning from January 2021,⁶⁴¹ with schools only fully reopening on the 8th of March 2021.⁶⁴²

The UK government had promoted the safeguarding of children through guidance and legislation prior to the Covid-19 pandemic.⁶⁴³ As such, in order to minimise the public health concerns and to allow for schools to reopen and to ensure they remain open, it can be assumed that the safeguarding of children should have been viewed as a priority of the UK government and the Department for Education during the Covid-19 period. In line with this assumption, it is important to identify that certain mechanisms were introduced in order to create a Covid-19 safe school environment, and that these responses were continually adapting to cater for the needs of learners and the risks of Covid-19.

The UK's Department for Education issued non-statutory interim guidance on safeguarding schools during the Covid-19 outbreak.⁶⁴⁴ It is important to note that these guidance documents were non-statutory in nature as they provided for temporary measures, and that at the time of writing, certain guidance documents have been withdrawn as the Department for Education expected all schools to reopen with full availability for the 2021/2022 academic year.⁶⁴⁵ The UK's Department for Education understood that reopening educational institutions came with certain risks, and in order to reduce these risks, certain Covid-19 prevention and containment mechanisms were recommended.⁶⁴⁶

⁶⁴⁰ Education Policy Institute *Phase One Report* (2021) 7.

⁶⁴¹ Office for National Statistics *Coronavirus and the impact on measures of UK government education output: March 2020 to February 2021* (2021) 3.

⁶⁴² Education Policy Institute *Phase One Report* (2021) 7.

⁶⁴³ See HM Government *Working Together to Safeguard Children* (2018) 1 1-116; Article 11 of the Children Act 2004 & Article 175 of the Education Act 2002.

⁶⁴⁴ Department for Education *Keeping children safe in education (2020): Statutory guidance for schools and colleges* (2021) 1 3.

⁶⁴⁵ 3.

⁶⁴⁶ For more information see Department for Education *Covid-19: Actions for out-of-school settings* (2020 – since updated); Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021); Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) & Department for Education *Schools Covid-19 Operational Guidance* (July 2021).

5 4 3 2 *The use of face coverings in the school environment*

According to the Operational Guidance published in February 2021, learners were expected to physically attend school from the 8th of March 2021 and in line with the 2020 Autumn guidance, the use of face coverings was recommended in certain circumstances.⁶⁴⁷ The Operational Guidance confirmed the approach adopted worldwide, namely that the use of face coverings and the covering of one's nose and mouth contributes toward protecting the wearer and minimising the spread of Covid-19.⁶⁴⁸ It was however later stated in the July 2021 version of the Department for Education's *Schools Covid-19 Operational Guidance*, that the universal use of face coverings was no longer advised for learners, staff and visitors either in classrooms or in communal areas,⁶⁴⁹ but added that head teachers could decide to ask staff, visitors and learners, in years seven and above, to wear face coverings in communal areas should distancing not be possible.⁶⁵⁰ It is important to note that while face coverings are a legal requirement in a wide range of indoor public places and on public transport, it is not a legal requirement in education facilities and school transport.⁶⁵¹ With that being said, at the time of writing, in response to the Omicron variant, the UK's Department for Education have reconsidered their stance and as a temporary measure, have recommended that learners in year seven and above once again wear face coverings in the classroom and that staff, learners and adult visitors should utilise face coverings when moving around the school premises.⁶⁵²

5 4 3 3 *Hand hygiene in the classroom*

As previously mentioned, hand hygiene is one of the first lines of defence against the spread of infectious diseases, such as Covid-19.⁶⁵³ According to relevant guidance documents, the frequent and thorough handwashing or hand cleansing, which can be done with either soap and water or hand sanitizer, is expected in the school

⁶⁴⁷ Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 1 5-7. See also Department for Education *Covid-19: Actions for out-of-school settings* (2020 – since updated).

⁶⁴⁸ Department for Education *Schools Covid-19 Operational Guidance* (January 2022) 1 7.

⁶⁴⁹ Department for Education *Schools Covid-19 Operational Guidance* (July 2021) 1 5.

⁶⁵⁰ Lo Moro *et al* (2020) *International Journal of Environmental Research and Public* 7.

⁶⁵¹ Department for Education *Covid-19: Actions for out-of-school settings* (2020 – since updated).

⁶⁵² Department for Education *Schools Covid-19 Operational Guidance* (January 2022) 7-9.

⁶⁵³ See Chapter 2 of this thesis. See also Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 14 & Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) 1 13.

environment.⁶⁵⁴ The relevant Covid-19 guidance documents go on to state that hands should be washed or cleansed when learners arrive at school, when they return from breaks, when they change rooms and before and after eating.⁶⁵⁵ An important recommendation in relation to hand hygiene, specifically for younger children, is to consider how often learners need to wash their hands and incorporate time for it into the learners timetables.⁶⁵⁶ Data in relation to the practical implementation thereof has however not been released and for the purpose of this thesis, it is unclear whether this mechanism was implemented in all schools across the UK and whether it was a definite pre-requisite for the reopening of schools.

According to the revised Education (Independent School Standards) (England) Regulations of 2010, which came into force on the 1st day of January 2013 as well as the School Premises (England) Regulations of 2012, suitable toilet and washing facilities should be provided at each school in the UK for the sole use of learners within the school and that separate toilet facilities for each sex should be provided for children above the age of eight unless the room can be locked from the inside.⁶⁵⁷ In addition, the revised Education (Independent School Standards) (England) Regulations of 2010 also provide that toilets or urinals should have an adequate supply of cold water, washing facilities should have an adequate supply of hot and cold water and that separate drinking water facilities should be provided in schools in the UK.⁶⁵⁸ It can be assumed that these regulations and subsequent facilities, which were mandated through legislation, go a long way in assisting with personal and hand hygiene within the school environment during the Covid-19 academic years and in turn contributes toward reducing the spread of the disease and creating a safer school environment.

⁶⁵⁴ Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 14; Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) 13 & Department for Education *Schools Covid-19 Operational Guidance* (July 2021) 7.

⁶⁵⁵ Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 14 & Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) 13.

⁶⁵⁶ Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 14 & Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) 13.

⁶⁵⁷ Regulation 23A of the Education (Independent School Standards) (England) Regulations 2010 & Regulation 4 of the School Premises (England) Regulations 2012.

⁶⁵⁸ Regulation 23F of the Education (Independent School Standards) (England) Regulations.

5 4 3 4 *Physical distancing within the school environment*

Preventative measures introduced in the UK include but are not limited to a minimum physical distance requirement.⁶⁵⁹ Within the classroom, according to public health advice and relevant guidance documents, staff in secondary schools should maintain distance from their learners, staying at the front of the class wherever possible.⁶⁶⁰ Furthermore, the recommendation from the Department for Education is that adults within the school environment should ensure at least a two metre distance between each other and from children in the environment.⁶⁶¹ In order to ensure distancing between learners, minor changes to the classroom should be considered, specifically in relation to how learners are seated.⁶⁶² The recommendation from the Department for Education is that learners should be seated side by side and facing forwards.⁶⁶³ These distancing mechanisms are however not provided for in the July 2021 guidance nor the relevant 2022 guidance,⁶⁶⁴ and this creates confusion as to whether it is a suitable and practical prevention mechanisms.

Schools were expected to also take measures to keep groups of pupils separate from each other, and at least two metres between staff and learners.⁶⁶⁵ According to relevant guidance documents, consistent groups known as “bubbles” reduced the risk of transmission as they limited the number of learners and staff that come into contact with each other to only those within a specific group.⁶⁶⁶ A problem identified in relation to the use of “bubbles”, is that it had a detrimental impact on the delivery of

⁶⁵⁹ Lo Moro *et al* (2020) *International Journal of Environmental Research and Public* 7.

⁶⁶⁰ Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 17 & Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) 16.

⁶⁶¹ Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 17 & Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) 16.

⁶⁶² Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 17 & Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) 16.

⁶⁶³ Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 17 & Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) 16.

⁶⁶⁴ For more information see Department for Education *Schools Covid-19 Operational Guidance* (July 2021); Department for Education *Schools Covid-19 Operational Guidance* (January 2022) & Department for Education *Covid-19: Actions for out-of-school settings* (2020 – since updated).

⁶⁶⁵ National Foundation for Educational Research *Schools' response to Covid-19: The challenges facing schools and pupils in September 2020* (2020) 1 67.

⁶⁶⁶ Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 16-17 & Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) 15-16.

education.⁶⁶⁷ Due to the fact that schools were used to learners moving to different rooms for lessons,⁶⁶⁸ the flexibility of lesson delivery was hindered. Furthermore, effective mechanisms had to be put into place to prevent mixing between groups and avoid mixing at lunch,⁶⁶⁹ which proved to be a challenge for some school leaders. As such, in later guidance, the use of these consistent groups was no longer recommended.⁶⁷⁰

5 4 3 5 Conclusion

It has been said that a multi-layered approach in prevention and containment can substantially reduce the transmission of Covid-19 in the school environment.⁶⁷¹ As such, the use of face coverings, physical distancing and hand hygiene, which were initially recommended during the Covid-19 affected school years in order to create a safer school environment, should have been implemented in a unified manner. Moreover, where changes arose in respect of certain prevention mechanisms, it is important to note that the other prevention mechanisms remained in place. These mechanisms essentially allowed for learners to return to in-person classes,⁶⁷² which in turn contributed toward the realisation of a child's right to education.

5 5 Covid-19 recovery and legal responses introduced to support the realisation of a child's right to education during the 2020/2021 academic year and beyond

While the UK government realised the importance of keeping schools open, they also realised there would be a risk involved and that they would need to provide some form of protection for parents and children. As such, included in the mechanisms which provide for the realisation of a child's right to education during the Covid-19 school years, is the £500 once-off Test and Trace Support Payment.⁶⁷³ The once-off payment

⁶⁶⁷ Department for Education *Schools Covid-19 Operational Guidance* (July 2021) 4.

⁶⁶⁸ National Foundation for Educational Research *Schools' response to Covid-19* (2020) 67.

⁶⁶⁹ Department for Education *Schools Covid-19 Operational Guidance* (July 2021) 4.

⁶⁷⁰ 4 & Department for Education *Schools Covid-19 Operational Guidance* (January 2022) 5.

⁶⁷¹ D Gurdasani, NA Alwan, T Greenhalgh, Z Hyde, L Johnson, M Mckee *et al* "School reopening without robust Covid-19 mitigation risks accelerating the pandemic" (2021) 397(10280) *The Lancet* 1177 1177 < <https://www.thelancet.com/journals/lancet/article/PIIS0140-67362100622-X/fulltext#back-bib1>> (accessed 17-01-2022).

⁶⁷² See Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (February 2021) 7, 11-14 and 15-17 & Department for Education *Schools coronavirus (Covid-19) Operational Guidance* (May 2021) 6, 10, 12-13 and 14-16.

⁶⁷³ See UK Health Security Agency *Guidance: Claiming Financial support under the Test and Trace Support Payment scheme* (2021).

is available, subject to certain criteria, to parents and guardians who need to care for a child fifteen or under, who is required to self-isolate.⁶⁷⁴ In addition, when a child who is eligible for free school meals is expected to self-isolate, schools should work with their catering team or food provider to ensure that lunch packs are provided to the learner in question while they are temporarily unable to attend school.⁶⁷⁵ Legal responses such as these are valuable as they encourage the realisation of each individual child's right to education as they encourage parents and guardians to send their children to school but consider the fact that infection is still possible and that further support is required when a child tests positive for Covid-19 or is expected to self-isolate.

Certain ideas have been frequently discussed in parliament in order to help students catch up with their education due to school closures as part of 'Covid recovery' and these include extending the school days as well as the shortening of school holidays.⁶⁷⁶ Education Secretary Gavin Williamson stated that the scale of the country's response to Covid-19 had to match the scale of the challenge it experienced and added that the UK could not afford for any of their children to lose out on their education.⁶⁷⁷ Consequently, the Department for Education introduced and funded numerous programmes and activities to support education recovery across the UK.⁶⁷⁸ A £1 billion Covid-19 catch-up package was confirmed by the Prime Minister and the Education Secretary in an attempt to target lost teaching time.⁶⁷⁹ A once-off universal £650 million catch-up premium was also provided by the government to be shared across state primary and secondary schools over the 2020/2021 academic year.⁶⁸⁰

Teachers estimated that about 44% of their learners were in need of intensive catch-up support.⁶⁸¹ In response to this issue, the UK government funds the National Tutoring Programme which is a sector-led initiative that has been designed in order to

⁶⁷⁴ Gov.UK "Apply for Test and Trace Support Payment" (n.d) Gov.UK <<https://www.gov.uk/test-and-trace-support-payment>> (accessed 10-01-2022).

⁶⁷⁵ Department for Education Providing free school meals during the coronavirus(Covid-19) outbreak (2021).

⁶⁷⁶ House of Commons Library (R Long) *The School Day and Year* (2021) 1 12.

⁶⁷⁷ Gov.Uk "Billion pound Covid catch-up plan to tackle impact of lost teaching time" (19-06-2020) Gov.UK <<https://www.gov.uk/government/news/billion-pound-covid-catch-up-plan-to-tackle-impact-of-lost-teaching-time>> (accessed 11-01-2022).

⁶⁷⁸ Department for Education *Education Recovery: Support for early years settings, schools and providers of 16-19 education* (2021) 1 3.

⁶⁷⁹ Gov.Uk "Billion pound Covid catch-up plan to tackle impact of lost teaching time" Gov.UK.

⁶⁸⁰ Department for Education *Education Recovery: Support for early years settings, schools and providers of 16-19 education* (2021) 5.

⁶⁸¹ National Foundation for Educational Research *Schools' response to Covid-19* (2020) 5.

support schools as they attempt to address the impact of Covid-19 on learners progress and attainment.⁶⁸² The funding provided caters for high quality tuition and fifteen hour tutoring packages for learners who require assistance over the 2020/2021 academic year,⁶⁸³ and due to its success, the programme has been extended to the 2021/2022 academic year as well.⁶⁸⁴ Prime Minister Boris Johnson reiterated the fact that young people across the UK suffered due to the Covid-19 pandemic and that the UK must not only build back from the pandemic but ensure that no child is left behind,⁶⁸⁵ thus confirming the UK's commitment to each individual child's right to education. A further £1.4 billion was therefore invested in order to boost education recovery across the UK.⁶⁸⁶

5 6 Conclusion

The UK has binding international obligations in respect of a child's right to education and their internal legislative framework does in fact cater for the realisation of said right across the nation. Since a compulsory school age has been identified in the UK, one can assume that a child is entitled to an education and that state obligations exist in respect of this right. A cause for concern in this chapter is whether certain Covid-19 consequences and legal responses unreasonably interfered with the enjoyment of a child's right to education during the 2019/2020 and 2020/2021 academic years.⁶⁸⁷

As a legal response, the UK's lockdown measures did in fact interfere with a child's right to education as during school closures learners not only experienced a loss in learning time but missed out on part of their curriculum as they spent a significant amount of time out of school.⁶⁸⁸ A child's right to education was thus negatively impacted during Covid-19 and will in turn have far reaching consequences. It is also clear from the discussion above that remote learning mechanisms across the UK were not as effective as was hoped for. Moreover, while children across the UK were

⁶⁸² Department for Education *Education Recovery: Support for early years settings, schools and providers of 16-19 education* (2021) 5-6.

⁶⁸³ Gov.Uk "Billion pound Covid catch-up plan to tackle impact of lost teaching time" *Gov.UK*.

⁶⁸⁴ Anonymous "The National Tutoring Programme" (n.d) *National Tutoring Programme* <<https://nationaltutoring.org.uk/about/>> (accessed 11-01-2022).

⁶⁸⁵ Gov.Uk "Huge expansion of tutoring in next step of education recovery" (02-06-2021) *Gov.UK* <<https://www.gov.uk/government/news/huge-expansion-of-tutoring-in-next-step-of-education-recovery>> (accessed 11-01-2022).

⁶⁸⁶ Gov.Uk "Huge expansion of tutoring in next step of education recovery" *Gov.UK*.

⁶⁸⁷ Tobin *The UN Convention on the Rights of a Child A Commentary* 1071-1072.

⁶⁸⁸ National Foundation for Educational Research *Schools' response to Covid-19* (2020) 14-16.

provided with an education during the Covid-19 related school years, the provision was disproportionate amongst learners of varying socio-economic classes and therefore whether all children had equal access to education during the Covid-19 related school years is thus questionable. Moreover, the UK was and is expected to take measures to ensure a child's right to education and avoid measures which interfere with this right.⁶⁸⁹ As such, the UK government and the Department for Education had to introduce numerous mechanisms to allow for the safe reopening of schools as well as those mechanisms which address to prevalent learning loss which occurred in order to cater for each individual child's right to education to be realisation within the specific jurisdiction.

⁶⁸⁹ Tobin *The UN Convention on the Rights of a Child: A Commentary* 1071-1072.

Chapter 6: The impact of Covid-19 on the right to education in the Italy

6 1 Introduction

There are numerous international instruments which attempt to regulate a child's right to education globally.⁶⁹⁰ Italy have signed and ratified some of these international instruments, and on a national level, the Italian education system is said to have a progressive legislative framework which safeguards the right to education for all learners across the nation.⁶⁹¹ In order to comprehend the significance of a child's right to education in Italy and why it is important to ensure said right at all times, including during a pandemic such as the Covid-19 pandemic, a review of the country's relevant international and national obligations is necessary. A focal point of this chapter is therefore the development of a child's right to education in Italy. In addition, this chapter will also provide information on the Italian education system prior to the Covid-19 outbreak. Finally, this chapter will discuss the Italian education system during the Covid-19 pandemic and identify the legal mechanisms introduced in relation thereto during the Covid-19 affected academic years.

6 2 The development of a child's right to education under Italian law

6 2 1 International Influence on the Italian right to education

On an international level, the right to education is primarily regulated by United Nations documents.⁶⁹² Italy signed and ratified the ICESCR in 1967 and 1978 respectively and further signed the CRC in 1990 with ratification following in 1991.⁶⁹³ These documents recognise education in general as a right and place an obligation on the member states to realise the right to education within their respective nations.⁶⁹⁴ Furthermore, certain legal documents which have been drawn up on a regional level

⁶⁹⁰ B Perložnjak Impact of Covid Crisis on Child's Right to Education (2021) 5 *EU and Comparative Law Issues and Challenges Series* 553 555.

⁶⁹¹ D Ferri "Unveiling the Challenges in the Implementation of Article 24 CRPD on the Right to Inclusive Education: A Case-Study from Italy" (2018) 7(1) *Laws* 1 8.

⁶⁹² See Chapter 2 of this thesis. See also Perložnjak (2021) *ECLIC* 555.

⁶⁹³ United Nations Human Rights Office of the High Commissioner "Status of ratification – Interactive Dashboard" *United Nations*.

⁶⁹⁴ Article 28 of the CRC read in conjunction with article 2 of the CRC & Article 13 of the ICESCR. See also Perložnjak (2021) *ECLIC* 556.

also protect the right to education,⁶⁹⁵ including the European Social Charter (revised) and the European Convention on Human Rights.⁶⁹⁶ As a party to these regional instruments and to numerous international instruments which provide for the right to education, it is clear that Italy is committed to realising a child's right to education and that they have been and continue to be influenced by international and regional thinking and standards on the subject.

6 2 2 The development of a child's right to education under Italian law

On a national level, a child's right to education is provided for in the Italian Constitution of 1947, which is known in Italy as the *Costituzione della Repubblica Italiana*.⁶⁹⁷ In line with the CRC as well as the European Social Charter (revised), the Italian Constitution states that primary education is compulsory, and that these compulsory years should be free.⁶⁹⁸ In addition to this, the Italian Constitution confirms that schools should be open to everyone,⁶⁹⁹ and this in turn supports international and regional standards. It is important to note that compulsory education in Italy usually last for ten years and that it ranges from the age of six to sixteen years of age.⁷⁰⁰

While it may not be relevant for the purpose of this thesis, Italy's willingness to realise equality, eliminate discrimination in education,⁷⁰¹ and to ensure the development of inclusive education should be mentioned.⁷⁰² Furthermore, in terms of regulating education, it must be understood that the education system in Italy is governed by the *Ministero dell'Istruzione, dell'Università e della Ricerca*, which is known in English as the Ministry of Education, University and Research (hereafter "MIUR").⁷⁰³ The MIUR manage national education, have authority over the funding of

⁶⁹⁵ Perložnjak (2021) *ECLIC* 559.

⁶⁹⁶ See Chapter 2 for more detail.

⁶⁹⁷ L Jia *Comparing Inclusive Education Teachers' Struggles in Italy and China* PhD in Scienze Pedagogiche, Dell'Educazione e della Formazione Ciclo XXXII, Università degli Studi di Padova (2019) 55.

⁶⁹⁸ Article 34 of the Italian Constitution.

⁶⁹⁹ Article 34 of the Italian Constitution.

⁷⁰⁰ Jia *Comparing Inclusive Education Teachers' Struggles in Italy and China* 55 & European Commission "Italy Overview: Key features of the education system" (2022) *Eurydice* <https://eacea.ec.europa.eu/national-policies/eurydice/content/italy_en> (accessed 07-02-2022).

⁷⁰¹ Jia *Comparing Inclusive Education Teachers' Struggles in Italy and China* 59.

⁷⁰² 57.

⁷⁰³ OECD *Education Policy Outlook: Italy* (2017) 1 15 & L Bifulco, R Monteleone, C Mozzana & I Rolfini *The institutional mapping of Italy's education system: Europeanization, centralization and regionalization in Final Report of WP 3: Education, Vocational and Policy Landscapes in Europe* (2012) 45 46.

the education system,⁷⁰⁴ and have exclusive legislative competences in relation to the general organisation of the education system.⁷⁰⁵ This means that the MIUR are expected to set certain central education principles including the minimum nationwide standards of education, quality assurance as well as school rules and regulations.⁷⁰⁶ It is however important to note that a shared responsibility exists within Italy between the State and the regions in relation to legislative powers,⁷⁰⁷ which means that provinces and municipalities have certain duties and functions in respect of the right to education as well.⁷⁰⁸

According to the Italian Constitution, education is recognised as a fundamental right for everyone.⁷⁰⁹ Furthermore in line with Italy's national and international obligations and due to the fact that compulsory schooling exists within the jurisdiction, it can be said that all children within the country should have equal access to schools regardless of their socio-economic status, their ethnicity, their gender, their religion or their physical or intellectual capacities.⁷¹⁰ As such, one of the issues dealt with in this chapter is whether the Covid-19 pandemic interfered with this fundamental right to education in Italy and how the Italian government responded thereto. This information is crucial in attempting to answer the secondary research questions of this thesis, with specific reference to the second secondary research question.

6 3 The Italian education system pre-Covid-19

In Italy, a state-born education system has existed since the introduction of *Casati Law* in 1859.⁷¹¹ The Italian school year usually runs from mid-September to June of the following year,⁷¹² and at present, various stages of education exists within the country. The various stages of education include, infant education (three-six years of

⁷⁰⁴ OECD *Education Policy Outlook: Italy* (2017) 17.

⁷⁰⁵ Bifulco *et al* *The institutional mapping of Italy's education system* (2012) 46 & European Commission "Italy Overview: Key features of the education system" *Eurydice*.

⁷⁰⁶ Bifulco *et al* *The institutional mapping of Italy's education system* (2012) 46 & European Commission "Italy Overview: Key features of the education system" *Eurydice*.

⁷⁰⁷ OECD *Education Policy Outlook: Italy* (2017) 4 & Art 117 Para 1 of the Italian Constitution.

⁷⁰⁸ Bifulco *et al* *The institutional mapping of Italy's education system* (2012) 46.

⁷⁰⁹ Article 34 of the Italian Constitution. See also Jia *Comparing Inclusive Education Teachers' Struggles in Italy and China* 58-59.

⁷¹⁰ Article 34 of the Italian Constitution & Jia *Comparing Inclusive Education Teachers' Struggles in Italy and China* 58.

⁷¹¹ M Colombo "Childhood, School and Social Times: The case of Early School Enterers in Italy (2013) 18(2) *Interdisciplinary Journal of Family Studies* 23 26.

⁷¹² European Commission *The Organisation of School Time in Europe: Primary and General Secondary Education 2018/19* (2018) 1 37.

age), primary education (six-eleven years of age), lower secondary education (eleven-fourteen years of age), upper secondary education (fourteen-nineteen years of age) and finally higher education.⁷¹³ The focus of this chapter are the compulsory education years which includes not only the entirety of a learners primary and lower secondary education but also two years of their upper secondary schooling.⁷¹⁴ Compulsory education in Italy can be undertaken at either a state school, a private school or through home education.⁷¹⁵ This chapter will however only focus on state schools, as not only is the Italian education system is predominantly a public state system,⁷¹⁶ but majority of schools in Italy are classed as state schools.⁷¹⁷

Moreover, it has been said that children who are unable to access educational opportunities on an equal level to other children within the nation, are deprived of the possibility to succeed not only in terms of their education but their future labour, civic and social prospects as well.⁷¹⁸ Despite having a progressive legislative framework in respect of inclusive education, previous studies and reports have confirmed that Italy has faced and continues to face certain challenges in education.⁷¹⁹ Challenges experienced in the school environment include considerable inequalities,⁷²⁰ and most seriously, comparatively high dropout rates over the last few years.⁷²¹ These challenges can in fact be linked, and research has shown that early school leaving in Italy can be attributed to the inequalities which persist in state schools as well as other factors such as socio-economic status, immigration status and even previous school failures.⁷²²

In an attempt to improve educational outcomes, Italy undertook a broad-ranging school reform in 2015.⁷²³ The *La Buona Scuola, 2015, Law No. 107/2015* (hereafter

⁷¹³ Jia *Comparing Inclusive Education Teachers' Struggles in Italy and China* 55 & European Commission "Italy Overview: Key features of the education system" *Eurydice*.

⁷¹⁴ Jia *Comparing Inclusive Education Teachers' Struggles in Italy and China* & European Commission "Italy Overview: Key features of the education system" *Eurydice*.

⁷¹⁵ European Commission "Italy Overview: Key features of the education system" *Eurydice*.

⁷¹⁶ European Commission "Italy Overview: Key features of the education system" *Eurydice*.

⁷¹⁷ M Ferraris & D Persico "The Italian School System" in C Bell & D Harris (eds) *World Yearbook of Education 1990 Assessment and Evaluation* (2006) New York: Routledge 162-168 165.

⁷¹⁸ Perložnjak (2021) *ECLIC* 554.

⁷¹⁹ OECD *Education Policy Outlook: Italy* (2017) 4 & 11.

⁷²⁰ M Cordini & G De Angelis "Families between care, education and work: The effects of the pandemic on educational inequalities in Italy and Milan" (2021) 56(4) *European Journal of Education* 578 581.

⁷²¹ OECD *Education Policy Outlook: Italy* (2017) 4 & Bifulco *et al The institutional mapping of Italy's education system* (2012) 52-53. See also L Ribolzi "Challenges of Equitable Access to Education in Italy: The Role of Families" (2019) 11(1) *Italian Journal of Sociology of Education* 228 230-231.

⁷²² Ribolzi (2019) *Italian Journal of Sociology of Education* 229.

⁷²² OECD *Education Policy Outlook: Italy* (2017) 4.

⁷²³ 4.

“Law 107/2015”) started an overall reform of the Italian schooling system and provided for general principles and benchmarks that the Italian government must respect when adopting legislative decrees in relation to the education system.⁷²⁴ Measures under Law 107/2015 include increasing school autonomy, hiring a significant number of new teachers and enhancing digital skills in schools.⁷²⁵ According to Ferri, the reform process should not end with Law 107/2015,⁷²⁶ as inclusive education does not depend on progressive legislation alone but requires continuous development as well as adequate implementation in respect of inclusive educational practices.⁷²⁷ As such, despite the reform attempts, much like the jurisdictions discussed in previous chapters, the Italian education system has faced and continues to face its own set of challenges, challenges which were and are further exacerbated by the Covid-19 pandemic.

6 4 The consequences of the Covid-19 pandemic and the Italy’s legal responses in protecting the child’s right to education

6 4 1 Introduction

Italy was the first country in Europe to experience widespread Covid-19 infections,⁷²⁸ and was listed as one of the countries most affected by the virus within the first few months of the pandemic.⁷²⁹ On the 22nd of January 2020, a national task force was set up by the Italian Minister of Health in an attempt to counter Covid-19.⁷³⁰ Despite this attempt to counter the Covid-19 pandemic, the widespread outbreak in Italy led to certain health, social and economic consequences.⁷³¹

Policy interventions were thus necessary during the early phase of the Covid-19 pandemic, and many of the legal responses to the consequences of Covid-19 came

⁷²⁴ Ferri (2018) *Laws* 10.

⁷²⁵ OECD *Education Policy Outlook: Italy* (2017) 4.

⁷²⁶ Ferri (2018) *Laws* 10 & OECD *Education Policy Outlook: Italy* (2017) 14.

⁷²⁷ Ferri (2018) *Laws* 10 & OECD *Education Policy Outlook: Italy* (2017) 14.

⁷²⁸ S Lindblad, G Warvik, I Brendtsson, E Jodal, A Lindqvist, GM Dahlberg, D Papadopoulos, C Runesdotter, K Samuelsson J Udd & MW Johansson “School lockdown? Comparative analyses of responses to the Covid-19 pandemic in European countries” (2021) 20(5) *European Educational Research Journal* 564 573.

⁷²⁹ D Loconsole, D Caselli, C Francesca, C Morcavallo, S Campanella, M Arico & M Chironna “SARS-CoV-2 Infection in Children in Southern Italy: A Descriptive Case Series” (2020) 17(6080) *International Journal of Environmental Research and Public Health* 1 1.

⁷³⁰ Ministry of Health *Prevention and response to Covid-19: evolution of strategy and planning in the transition phase for the autumn-winter season – English Version* (2020) 1 9.

⁷³¹ C Berardi, M Antonini, MG Genie, G Cotugno, A Lanteri, A Melia & F Paolucci “The Covid-19 pandemic in Italy: Policy and technology impact on health and non-health outcomes” (2020) 9 *Health Policy and Technology* 454 463.

in the form of law decrees. A law decree in Italy is a legitimate coding process which has strong political power and is used primarily as a provisional measure so that new laws and regulations can be made during a time of emergency.⁷³² As such, on the 31st of January 2020, the Italian government declared a state of national health emergency,⁷³³ in terms of section 24 of *Legislative Decree 2 January 2018 No. 1*, and this in turn led to the limitation of fundamental rights granted by the Italian Constitution.⁷³⁴

Following the above law decree, numerous other law decrees were introduced, and the decree issued on or around the 9th of March 2020 saw the Italian government extending lockdown and social distancing interventions throughout the nation.⁷³⁵ These social distancing, isolation and lockdown measures were the only measures available to contain the spread of the disease prior to the development of the Covid-19 vaccination.⁷³⁶ As such, by the 11th of March 2020, the Italian government had instituted a national lockdown which saw schools closing to all learners.⁷³⁷

6 4 2 School closures and the provision of alternative learning mechanisms

6 4 2 1 Introduction

While a gradual resumption of general activities occurred between May and June 2020, education facilities of all levels, from kindergarten to university, were kept closed.⁷³⁸ The closure of Italian schools during the 2019/2020 school year was ultimately one of the ways in which the country implemented social distancing, however, they also resulted in learners across the nation experiencing a loss in terms of in-person learning and teaching.⁷³⁹ During this period, children within Italy were not only deprived of the opportunity to learn but were deprived of the opportunity to

⁷³² Lindblad *et al* (2021) *European Educational Research Journal* 573.

⁷³³ 573. See also Ministry of Health *Prevention and response to Covid-19* (2020) 9.

⁷³⁴ A Pera "The right to education during the Italian pandemic, E-learning and inequality before the law" in A Lavieri & A Pera (eds) *Pandemia in Translation: A Comparative Understanding of European Social Values* (2021) 29-30.

⁷³⁵ Berardi *et al* (2020) *Health Policy and Technology* 459.

⁷³⁶ 456.

⁷³⁷ Ministry of Health *Prevention and response to Covid-19* (2020) 13.

⁷³⁸ G Sebastiani & G Palu "Covid-19 and School Activities in Italy" (2020) 12 *Viruses* 1 2.

⁷³⁹ F Scarpellini, G Segre, M Cartabia, M Zanetti, R Campi, A Clavenna & M Bonati "Distance learning in Italian primary and middle school children during the Covid-19 pandemic: A national survey" (2021) 21(1035) *BMC Public Health* 1 1.

develop their social and emotional skills, which has in the past been prioritised,⁷⁴⁰ and encouraged within the Italian school environment.⁷⁴¹

6.4.2.1 *Alternative learning mechanisms*

In response to the suspension of in-person learning and teaching, learners and teachers across Italy were forced to continue their educational activities by means of distance learning systems and e-learning tools.⁷⁴² Social distancing proved to be a key health intervention in Italy during the 2019/2020 school year, and the activation of distance learning mechanisms was thus crucial in order to contain the spread of the Covid-19 disease.⁷⁴³ The *Decreto del Presidente del Consiglio dei Ministri* (hereafter “DPCM”) of the 25th of February 2020, provided that the heads of schools which had suspended learning and teaching activities as a direct result of the Covid-19 pandemic were able to activate distance learning methods for the duration of the suspension once he/she had consulted with the competent collective bodies.⁷⁴⁴ In addition to this, certain distance learning mechanisms were provided for in the DPCM which came into force on the 10th of March 2020.⁷⁴⁵ These mechanisms were initially only meant to be in effect up until the 4th of April 2020, however, the DPCM ended up being renewed every 15 days by succeeding DPCMs, and this in turn resulted in online learning and teaching occurring for the a large portion of the 2019/2020 year.⁷⁴⁶

According to a nationwide survey conducted in 2017, around 88% of children between the ages of 9 to 16 had internet access within their homes.⁷⁴⁷ While this may seem like a high percentage, there is still a group of children in Italy that do not have

⁷⁴⁰ A Pera “The right to education during the Italian pandemic, E-learning and inequality before the law” in A Lavieri & A Pera (eds) *Pandemia in Translation: A Comparative Understanding of European Social Values* (2021) 35.

⁷⁴¹ P Di Sia “On Distance Learning In Italy During The Covid-19 Emergency” (2020) 7 *e-methodology* <<https://e-methodology.eu/index.php/e-methodology/article/view/1401>> (accessed 14-02-2022) 17 20.

⁷⁴² M Pellegrini & C Maltinti “School Never Stops: Measures and Experience in Italian Schools during the Covid-19 Lockdown” (2020) 5(2) *Best Evid Chin Edu* 649 651 & S Iavicoli, F Boccuni, G Buresti, D Gagliardi, B Persechino, A Valenti & BM Rondinone “Risk assessment at work and prevention strategies on Covid-19 in Italy” (2021) 16(3) *Plos One* 1 2. See also Working Group: ISS, Ministry of Health, Ministry of Education, INAIL, Bruno Kessler Foundation, Region Emilia-Romagna & Region Veneto *Rapporto ISS Covid-19 n. 58/2020 Rev – English version: Operational guidance for the management of SARS-CoV-2 cases and outbreak in schools and kindergartens* (28-08-2020) 1 4.

⁷⁴³ Working Group: ISS *et al Rapporto ISS Covid-19 n. 58/2020 Rev – English version* (28-08-2020) 4.

⁷⁴⁴ A Pera “The right to education during the Italian pandemic, E-learning and inequality before the law” in A Lavieri & A Pera (eds) *Pandemia in Translation: A Comparative Understanding of European Social Values* (2021) 40.

⁷⁴⁵ 40.

⁷⁴⁶ 40.

⁷⁴⁷ 8.

adequate internet access within their homes, and this in turn affects the effectiveness of the proposed distance learning mechanisms within the country. In addition, the availability of digital devices was also identified as an issue. These inequalities in accessing digital devices can be viewed as a hurdle which prevents a child from truly and completely participating in remote learning activities.⁷⁴⁸ One can therefore argue that education was inaccessible to previously disadvantaged learners or learners in poorer households during the distance learning phase,⁷⁴⁹ as they were either unable to access the required digital devices or a stable internet connection within or nearby their households.

The transition to distance learning systems and e-learning was thus challenging, and in addition to learners within the nation being affected, parents, guardians and teachers were also affected by the Covid-19 related school closures and the subsequent consequences.⁷⁵⁰ One of the first issues brought to the forefront in respect of online education was whether teachers were equipped with the necessary computer and digital skills required for effective remote teaching.⁷⁵¹ Teachers across Italy had not received the necessary training in respect of online teaching and were thus unprepared for the incorporation of distance learning and teaching systems.⁷⁵² As such, teachers were forced to adapt and learn new skills within a limited time period, which in turn highlighted the need for the Italian government to invest in digital training for all teachers.⁷⁵³

Furthermore, studies conducted during the pandemic revealed that parents experienced difficulties when dealing with the lockdown as they were not only expected to care for their children but also to help them with their online schooling all while working from home.⁷⁵⁴ Ultimately, families were unprepared for distance

⁷⁴⁸ Pera "The right to education during the Italian pandemic, E-learning and inequality before the law" in *Pandemia in Translation: A Comparative Understanding of European Social Values* (2021) 8.

⁷⁴⁹ Perložnjak (2021) *ECLIC* 572-573.

⁷⁵⁰ Scarpellini *et al* (2021) *BMC Public Health* 6 & 12. See also UNICEF *Learning at a Distance: Children's remote learning experiences in Italy during the Covid-19 pandemic* (2021) 1 19-21 & G Crisci, IC Mammarella, UMM Moscardino, M Roch & LB Thorell "Distance Learning Effects Among Italian Children and Parents During Covid-19 Related School Lockdown" (2021) 12(782353) *Frontiers in Psychiatry* 1 4.

⁷⁵¹ See Pellegrini & Maltinti (2020) *Best Evid Chin Edu* 657-658.

⁷⁵² Cordini & De Angelis (2021) *European Journal of Education* 580.

⁷⁵³ M Gentile, B Vincenza, G Caruso, A Chifari, L Ferlino, G Fulantelli & M Allegra "Italian parents' perception about learning practices and educational effectiveness of remote schooling during the first lockdown" (2021) 16(2) *Qwerty* 92-98 & 106.

⁷⁵⁴ Scarpellini *et al* (2021) *BMC Public Health* 1-2 & Cordini & De Angelis (2021) *European Journal of Education* 580.

learning, and parents and/or guardians were forced to adapt and become more responsible for their children's education.⁷⁵⁵ Due to the diverse socio-economic situations as well as the varying education levels of parents and/or guardians, it can be inferred that disparities in home education arose during the Covid-19 related school closures, specifically in relation to the assistance learners received within their households.

The Covid-19 related school closures which occurred during the national lockdown were in fact contradictory to the ideals set out in the Italian Constitution, as article 34 confirms the idea that education should be open and accessible to everyone.⁷⁵⁶ The decision taken by the Italian government to suspend all teaching activities, starting from March 2020, hindered the realisation of a child's right to education during the 2019/2020 school year. Furthermore, despite the efforts of teachers, learners, and parents alike, distance learning proved to be ineffective as a substitute to in person schooling,⁷⁵⁷ as low levels of learning occurred during the distance learning period.⁷⁵⁸

6 4 2 3 Conclusion

The Covid-19 pandemic and the subsequent school closures prevented a child from accessing education within the country and ultimately hindered the realisation of a child's right to education. The related distance learning mechanisms further hindered equal access to education, as the shift to distance learning, highlighted prevailing inequalities within the system.⁷⁵⁹ Furthermore, due to the prolonged school closures, the associated loss of face-to-face instruction, and the interruptions to learning and teaching, learners, specifically those from more disadvantaged backgrounds,⁷⁶⁰ were harmed and prevented from obtaining an education through normal means. In order for learners to have benefitted on an equal basis from online educational mechanisms, the pre-existing disparities would have had to be addressed so that learners could enjoy equal access to education opportunities.⁷⁶¹

⁷⁵⁵ Cordini & De Angelis (2021) *European Journal of Education* 580.

⁷⁵⁶ A Pera "The right to education during the Italian pandemic, E-learning and inequality before the law" in A Lavieri & A Pera (eds) *Pandemia in Translation: A Comparative Understanding of European Social Values* (2021) 34.

⁷⁵⁷ Scarpellini *et al* (2021) *BMC Public Health* 12.

⁷⁵⁸ 12.

⁷⁵⁹ Perložnjak (2021) *ECLIC* 572-573 & Scarpellini *et al* (2021) *BMC Public Health* 2 & 7. See also Pera "The right to education during the Italian pandemic, E-learning and inequality before the law" (2021) 44-50 & Pellegrini & Maltinti (2020) *Best Evid Chin Edu* 636-367.

⁷⁶⁰ Cordini & De Angelis (2021) *European Journal of Education* 580.

⁷⁶¹ UNICEF *Learning at a Distance* (2021) 9.

6 4 3 The reopening schools across Italy and the development of Covid-19 mitigation mechanisms within the school environment

6 4 3 1 *Introduction*

On the 28th of May 2020, the MIUR published guidance which considered the recommendations made by the WHO and ultimately provided for the reopening of schools in September 2020.⁷⁶² The document essentially proposed that the new school year should commence according to a face-to-face learning model.⁷⁶³ Furthermore, the *Piano Scuola 2020-2021*, as well as the *Dipartimento della Protezione Civile, 2020*, introduced by the Italian government explicitly addressed and directed for the reopening of schools.⁷⁶⁴

The fact that the MIUR only reopened schools in September 2020 was however cause for concern, as places such as restaurants, bars, gyms, and movie theatres had already been reopened, prior to schools reopening, by May 2020.⁷⁶⁵ Parents and learners were essentially kept in the dark regarding school activities until the abovementioned documents were released in June 2020. Despite this, schools in Italy did eventually reopen on the 14th of September 2020 for eight million learners across the nation.⁷⁶⁶

While no direct correlation has been proved, certain research has indicated that the reopening of schools in Italy influenced the Covid-19 infection rate.⁷⁶⁷ The reason this assumption has been made is due to the fact that a clear increase in positive Covid-19 cases was reported two weeks after schools reopened in the Lombardy, Campania and Emilia regions.⁷⁶⁸ In order to reduce the risk of infection, and to limit the spread of the disease within the school environment, it was necessary for prevention measures to be introduced in all schools.⁷⁶⁹

⁷⁶² Pellegrini & Maltinti (2020) *Best Evid Chin Edu* 639.

⁷⁶³ 639.

⁷⁶⁴ Cordini & De Angelis (2021) *European Journal of Education* 579.

⁷⁶⁵ A Pera "The right to education during the Italian pandemic, E-learning and inequality before the law" in A Laveri & A Pera (eds) *Pandemia in Translation: A Comparative Understanding of European Social Values* (2021) 36.

⁷⁶⁶ Lo Moro *et al* (2020) *International Journal of Environmental Research and Public* 4. See also Cordini & De Angelis (2021) *European Journal of Education* 579.

⁷⁶⁷ Sebastiani & Palu (2020) *Viruses* 1.

⁷⁶⁸ D Tosi & AS Campi "How Schools Affected the Covid-19 Pandemic in Italy: Data Analysis for the Lombardy Region, Campania Region, and Emilia Region" (2021) 13 (109) *Future Internet* 1 10.

⁷⁶⁹ Lo Moro *et al* (2020) *International Journal of Environmental Research and Public* 4 & Sebastiani & Palu (2020) *Viruses* 3.

As indicated hereabove, the reopening of schools across Italy posed significant risks in respect of the circulation of the Covid-19 virus.⁷⁷⁰ Moreover, it is important to note that prevention mechanisms had been considered in formal and technical documents of the Scientific Technical Committee, and these documents subsequently indicated that the MIUR should proceed with the reopening of schools and kindergartens across the nation.⁷⁷¹ Despite these recommendation that schools should reopen, it must be understood that the prevention measures which were introduced were aimed solely at reducing the risk of Covid-19 transmission within the school environment and not eliminating the risk entirely.

In preparing for the reopening of schools across the nation, schools were expected to follow the instructions of the MIUR, the Ministry of Health as well as the Scientific Technical Committee.⁷⁷² In addition, the schools were expected to abide by the numerous documents which were introduced in order to prepare schools and the nation for the reopening of schools. These documents include but were not limited to the MIUR's *Document for the planning of school, educational and training activities in all institutions of the national education system for the school year 2020/2021* released on the 26th of June 2020 as well as *Circular no. 18584 of 29 May 2020* which dealt with contact tracing.⁷⁷³ These documents ultimately highlighted prominent prevention mechanisms which should be incorporated in order to ensure the safe reopening of schools within Italy, and a select few will be discussed here below.

6 4 3 2 *The use of face masks within the school environment*

The mandatory wearing of masks for all staff and learners over the age of six, where distancing was not possible, was introduced as a key preventative measure.⁷⁷⁴ In dealing with this preventative measure, it must be noted that the wearing of masks was not mandatory for children in preschools and elementary schools.⁷⁷⁵ This ultimately shows a level of flexibility and adaptability. All other children were required

⁷⁷⁰ Working Group: ISS *et al Rapporto ISS Covid-19 n. 58/2020 Rev – English version* (28-08-2020) 1.

⁷⁷¹ 1.

⁷⁷² 3.

⁷⁷³ 3.

⁷⁷⁴ Lo Moro *et al* (2020) *International Journal of Environmental Research and Public* 6.

⁷⁷⁵ E Larosa, O Djuric, M Cassinadri, S Cilloni, E Bisaccia, M Vincentini, F Venturelli, PG Rossi, P Pezzotti, E Bedeschi & R Emilia "Secondary transmission of Covid-19 in preschool and school settings in northern Italy after their reopening in September 2020: A population-based study" (2020) 25(49) *Euro Surveill* 1 1.

to wear surgical masks at all times within the school environment, except when the learner was seated at their desk.⁷⁷⁶

Moreover, in order to ensure that it was safe for children to take their masks off while at their desks, it was encouraged that only single desks, one metre apart, be utilised within Italian classrooms.⁷⁷⁷ Certain factors however hindered the effectiveness of this mechanism in the safe reopening of schools as some schools did not have the necessary resources to purchase single desks while other schools could not ensure adequate space between the desks due to small classroom sizes.⁷⁷⁸

6 4 3 3 *The use of physical distancing as a prevention mechanisms*

In addition to the nationwide social distancing measures which were adopted, certain physical distancing mechanisms were introduced in all schools across the country.⁷⁷⁹ Furthermore, a minimum physical distance requirement between staff members, between staff and learners and between learners in general was introduced within the school environment.⁷⁸⁰ Moreover, in order to ensure physical distancing within the school environment, Italian guidelines included reducing the number of students per class.⁷⁸¹ One way in which this was achieved was to introduce a rotation system whereby learners were divided into smaller groups who then alternated between in person schooling and virtual schooling.⁷⁸²

Further, it must be noted that physical distancing measures across the nation caused certain problems for learners and teachers alike. The recruitment of teachers had already been a problem in Italy prior to the Covid-19 outbreak, and due to the physical distancing measures, specifically the need to divide classrooms into smaller groupings. The Covid-19 pandemic further exacerbated this problem as further teachers were required in order to ensure effective teaching.⁷⁸³

In addition to the above mechanisms, in order to ensure physical distancing within the school environment, crowding at entrances and exits as well as the mixing of

⁷⁷⁶ Larosa *et al* (2020) *Euro Surveill* 1.

⁷⁷⁷ 1.

⁷⁷⁸ 1.

⁷⁷⁹ 1.

⁷⁸⁰ Lo Moro *et al* (2020) *International Journal of Environmental Research and Public* 6.

⁷⁸¹ D Buonsenso, C De Rose, R Moroni & P Valentini "SARS-CoV-2 Infections in Italian Schools: Preliminary Findings After 1 Month of School Opening During the Second Wave of the Pandemic" (2021) 8(615894) *Frontiers in Paediatrics* 1 2.

⁷⁸² 1.

⁷⁸³ A Pera "The right to education during the Italian pandemic, E-learning and inequality before the law" in A Lavieri & A Pera (eds) *Pandemia in Translation: A Comparative Understanding of European Social Values* (2021) 42.

classes was discouraged, and all extra-curricular activities were suspended.⁷⁸⁴ It must be noted that the physical classroom size of some classes in certain poorer schools as well as certain infrastructure problems prevented the abovementioned physical distancing measures from full implementation,⁷⁸⁵ thus affecting learners disproportionately in terms of their physical educational needs.

6 4 3 4 *Hand hygiene within the classroom and school*

Across the globe, as indicated in previous chapters, hand hygiene was linked with reducing the spread of the disease, as such appropriate hand hygiene techniques were highlighted and prioritised in Italy. The washing of one's hands in Italy was thus identified as a personal precaution mechanism which could assist in mitigating the spread of Covid-19.⁷⁸⁶ As such, frequent handwashing had to become a routine part of the daily lives of learners and teachers alike within the school environment.⁷⁸⁷

6 4 3 5 *Conclusion*

As indicated above, prevention measures introduced within the school environment included the mandatory wearing of masks, certain physical distancing mechanisms and effective hand hygiene measures. While these prevention mechanism should be incorporated alongside one another in order to allow for the safe reopening of schools, the success of these measures are unknown as there is insufficient translated data in respect of whether these measures were in fact physically implemented across all Italian schools and whether they were effective in achieving their purpose.

6 5 Legal responses introduced to support the realisation of a child's right to education

One of the noteworthy mechanisms which allows for the realisation of a child's right to education is the Covid-19 vaccination campaign. This campaign was introduced to reduce the spread of the disease not only within the school environment but across the entire nation.⁷⁸⁸ The Covid-19 vaccination campaign was launched on

⁷⁸⁴ Larosa *et al* (2020) *Euro Surveill* 1.

⁷⁸⁵ 42.

⁷⁸⁶ Pellegrini & Maltinti (2020) *Best Evid Chin Edu* 659.

⁷⁸⁷ A Milner, P Mattei & C Ydesen "Governing education in times of crisis: State Interventions and school accountabilities during the Covid-19 pandemic" (2021) 20(4) *European Educational Research Journal* 520 533.

⁷⁸⁸ Ministry of Health *Impact of Covid-19 vaccination on the risk of the SARS-CoV-2 infection and hospitalization and death in Italy* (2021) 1 3.

the 27th of December 2020, and people were encouraged to get vaccinated with one of the numerous vaccination types authorised for use within the country.⁷⁸⁹

Furthermore, normal cleaning and disinfection regulations had to be introduced within the school environment, however, further sanitisation is required in respect of a Covid-19 outbreak within the school environment, whether it be a learner, teacher or a school worker.⁷⁹⁰ Sanitisation should be prioritised when a positive case arises within the school environment, and it should be carried out within seven days from the time the infected person was present in the facility.⁷⁹¹ In other words, areas which were used by an infected person, including classrooms, the canteen, the bathrooms or any other communal area,⁷⁹² should be properly cleaned and disinfected in order to prevent further infections. Furthermore, the common areas which were utilised by the infected person should be closed off until the sanitisation has occurred.⁷⁹³

The “Operational Guidance for the Management of SARS-CoV-2 Cases and Outbreaks in Schools and Kindergartens” also provides guidance on how schools should respond in certain circumstances where a possible positive case or a Covid-19 outbreak occurs within their school.⁷⁹⁴ A particularly interesting guideline is that a single student testing positive for Covid-19 should not result in the closure of the entire school, especially if the transmission rate within that specific community is low.⁷⁹⁵ In order for a school to close as a direct result of Covid-19 transmissions, the situation must be assessed by the Department of Prevention, who in turn consider numerous factors, including, but not limited to the amount of confirmed cases within the school as well as the transmission rate of the community in which the school is based.⁷⁹⁶

6 6 Conclusion

According to Italy’s external obligations as well as their internal legislative framework, children in Italy have a fundamental right to education. Children should have equal access to adequate educational opportunities, resources, and services,

⁷⁸⁹ Ministry of Health *Impact of Covid-19 vaccination on the risk of the SARS-CoV-2 infection and hospitalization and death in Italy* (2021) 3.

⁷⁹⁰ 11.

⁷⁹¹ 11.

⁷⁹² 12.

⁷⁹³ 11-12.

⁷⁹⁴ Working Group: ISS *et al Rapporto ISS Covid-19 n. 58/2020 Rev – English version* (28-08-2020) 9-13.

⁷⁹⁵ 12.

⁷⁹⁶ 12.

yet the Covid-19 pandemic and the related school closures had a significant negative effect on numerous children in Italy, not only in terms of their academic performance but their socio-emotional learning as well.⁷⁹⁷

It can thus be said that the Covid-19 pandemic and the related school closures did in fact hinder the complete realisation of a child's right to education within Italy during the 2019/2020 academic year. As such, the Italian government is now reluctant to cause further educational disruptions for learners and school closures during the 2020/2021 academic year remains a last resort.

The safe reopening of schools was and is thus prioritised in Italy, and adequate prevention mechanisms were provided in order to address the prevalent health risks within the school environment. While data is unavailable in respect of the actual implementation of these mechanisms, it can be said that the Italian government attempted to cater for and protect the realisation of a child's right to education during the Covid-19 affected school years. The discussion hereabove must be considered in addressing the research questions of this thesis, specifically in relation to the comparative analysis portion of this research.

⁷⁹⁷ Perložnjak (2021) *ECLIC* 569.

Chapter 7: The impact of Covid-19 on the right to education in the Nigeria

7 1 Introduction

Education has been linked to the growth and development of a nation.⁷⁹⁸ As such, numerous countries across the world, Nigeria included, have sought to improve the quality of their respective education systems.⁷⁹⁹ In order to analyse the effect of the Covid-19 pandemic on a child's right to education in Nigeria, and how the country responded thereto, it is crucial to understand the historical background of the right.

This chapter will therefore provide insight into the internal development of a child's right to education within Nigeria, while further discussing the country's international and regional obligations in respect of the right. The chapter will further consider the state of the Nigerian education system prior to the Covid-19 pandemic and identify the challenges which existed and continue to exist in realising a child's right to education. Finally the chapter will identify the consequences of the Covid-19 pandemic, with specific reference to a child's right to education, and shall discuss in detail Nigeria's legal response thereto in order to determine whether a child's right to education was protected during the Covid-19 affected school years.

7 2 A child's right to education as developed under Nigerian law

7 2 1 International and regional influence on the right to education

Nigeria has signed and ratified numerous international instruments, resulting in various international obligations in respect of a child's right to education. In terms of the CRC, which Nigeria signed in 1990 and ratified in 1991,⁸⁰⁰ an obligation has been placed on the country to not only realise the right to education but to respect, protect and fulfil each child's right to education within their specific country.⁸⁰¹ Furthermore,

⁷⁹⁸ BA Tete & OOW Matther "Education in Nigeria: Challenges and Way Forward" (2020) 8(1) *International Journal of Academic Research and Reflection* 42 42.

⁷⁹⁹ 42.

⁸⁰⁰ United Nations Human Rights Office of the High Commissioner "Status of ratification – Interactive Dashboard" *United Nations*.

⁸⁰¹ Article 28 of the CRC.

Nigeria ratified the ICESCR in 1993,⁸⁰² and according to article 2(1) of the ICESCR, the country is obligated to take certain legislative measures to ensure the implementation of the rights provided therein⁸⁰³ In line with these instruments and their applicable education provisions,⁸⁰⁴ it can be said that the international obligations and standards in respect of the right directly influenced the development of the internal legal framework within Nigeria. Moreover, it must be noted that a regional influence also exists in respect of a child's right to education, and the ACHPR and the ACRWC, which have application in Nigeria, have specifically provided for the regional obligations and standards which should be considered in realising the right to education within the country.⁸⁰⁵

7 2 2 The right to education as developed under Nigerian domestic law

On a national level, Nigeria has attempted to ensure the right to education through the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (hereafter "Nigerian Constitution"),⁸⁰⁶ as well as through other legislative and judicial means.⁸⁰⁷ According to section 18 of chapter 2 of the Nigerian Constitution, the government is expected to direct governmental policy toward ensuring equal and adequate educational opportunities at all educational levels.⁸⁰⁸ While this section ultimately sets the foundation of a Nigerian child's right to education, chapter 2 of the Nigerian country has been deemed to be non-justiciable,⁸⁰⁹ meaning that courts cannot adjudicate over the matters therein. This is confirmed through section 6(6)(c) of the Nigerian Constitution, as it sets out that the judicial power vested by the Nigerian Constitution on the Nigerian Court does not extend to any provision in chapter 2 of the Nigerian

⁸⁰² United Nations Human Rights Office of the High Commissioner "Status of ratification – Interactive Dashboard" *United Nations*.

⁸⁰³ Article 2(1) of the ICESCR.

⁸⁰⁴ See chapter 2 for more detail.

⁸⁰⁵ The ACHPR was ratified in 1983 by Nigeria and they have an obligation to report every two years on the status of the legislative and/or other measures taken with the view of giving effect to the rights and freedoms, including the right to education, recognised and guaranteed by the ACHPR. See African Commission on Human and Peoples' Rights "State Parties to the African Charter" (n.d) <<https://www.achpr.org/statepartiestotheafricancharter>> (accessed 04-08-2021). See also Chapter 2 for more detail on the ACRWC which was signed by Nigeria in 1999 and ratified in 2001.

⁸⁰⁶ Section 18 of the Nigerian Constitution.

⁸⁰⁷ See the Child Rights Act of 2003 & the Compulsory, Free and Universal Basic Education Act of 2004.

⁸⁰⁸ Section 18 of the Nigerian Constitution.

⁸⁰⁹ Section 6(6)(c) of the Nigerian Constitution. See also EO Akingbehin "The Justiciability of Right to Free Basic Education Conundrum in Nigeria, South Africa and India: From Obstacle to Miracle" (2021) 17(1) *Acta Universitatis Danubius Juridica* 60 70.

Constitution.⁸¹⁰ As such, section 6(6)(c) thus provides an obstacle to the realisation of a child's right to education as a fundamental right within the specific jurisdiction,⁸¹¹ as the implication is that no citizen has the right to compel the government, through court proceedings, to provide him or her with an education if the government has failed in this duty.⁸¹²

Despite the existence of section 6(6)(c), the justiciability of the right to education was ultimately confirmed through case law.⁸¹³ The decision made by the Economic Community of West African States (hereafter "ECOWAS") Court in *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission*,⁸¹⁴ is important in this regard, as the ECOWAS Court held that the right to free basic education in Nigeria is justiciable.⁸¹⁵ Moreover, the decision of *Legal Defence and Assistance project (LEDAP) Ltd/Gte v Federal Ministry of Education & Anor*,⁸¹⁶ confirmed that the right to education as found under Section 18 of the Nigerian Constitution, is an enforceable right within the country due to the enactment of the Compulsory, Free and Universal Basic Education Act in 2004 (hereafter "UBE Act"),⁸¹⁷ which will be discussed briefly here below.

The right to education has been ultimately been concretized in Nigeria as the Nigerian government enacted specific law relating to and regulating said right.⁸¹⁸ In 2003, in line with their international as well as their regional duties, the Nigerian government enacted the Child Rights Act, 2003.⁸¹⁹ The most significant provision of this Act, is contained in section 15,⁸²⁰ which provides that "every child has the right to free, compulsory and universal basic education, and that it shall be the duty of the

⁸¹⁰ Akingbehin (2021) *Acta Universitatis Danubius Juridica* 76.

⁸¹¹ LO Nwauzi & S George-Ibikiri "An Appraisal of the Right to Education in Nigeria" (2018) 8(1) *African Journal of Law and Criminology* 12 17.

⁸¹² 13.

⁸¹³ Akingbehin (2021) *Acta Universitatis Danubius Juridica* 71.

⁸¹⁴ ECW/CCJ/JUD/07/10.

⁸¹⁵ See *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission* ECW/CCJ/JUD/07/10 para 26.

⁸¹⁶ 978 of 2015 [2018] 2 (17 April 2018).

⁸¹⁷ *Legal Defence and Assistance project (LEDAP) Ltd/Gte v Federal Ministry of Education & Anor* 978 of 2015 [2018] 2 (17 April 2018).

⁸¹⁸ See *Legal Defence and Assistance project (LEDAP) Ltd/Gte v Federal Ministry of Education & Anor* 978 of 2015 [2018] 2 (17 April 2018).

⁸¹⁹ Akingbehin (2021) *Acta Universitatis Danubius Juridica* 70.

⁸²⁰ 70.

government in Nigeria to provide such education”.⁸²¹ Moreover, in support of the realisation of a child’s right to education, the Nigerian National Assembly enacted the UBE Act in 2004.⁸²² As the title indicates, the main objective of the UBE Act is to ensure that the Nigerian government provides compulsory, free and universal education for all children. It is however crucial to understand that this only relates to education up to junior secondary school,⁸²³ meaning that it relates to all children between 6 and 15 years of age.⁸²⁴ Despite certain obstacles in protecting the right to education, as per the information discussed hereabove, it is submitted that a Nigerian child does in fact possess a right to education up to at least junior secondary school and that this right can in fact be enforced by a court of law.⁸²⁵

7 3 The Nigerian education system pre-Covid-19

The Nigerian Education system comprises of four distinct levels, namely, the informal pre-primary stage, the formal primary education stage, the formal secondary education stage and finally the formal tertiary education stage.⁸²⁶ Furthermore, it is crucial to understand that secondary education is made up of two further levels, namely, junior secondary education, which ranges from twelve to fifteen years of age, and senior secondary education, which ranges from fifteen to eighteen years of age.⁸²⁷ Therefore, according to section 2(1) of the UBE Act as discussed above, compulsory education in Nigeria includes primary education and junior secondary education and ranges up to the age of fifteen.

Furthermore, it is important to note that education is provided for through both public and private means. While private schools do in fact exist across Nigeria, they tend to serve learners from a higher socio-economic background who are willing and able to pay more to access private education,⁸²⁸ which thus caters for a limited portion of

⁸²¹ Section 15(1) of the Child Rights Act of 2003.

⁸²² Nwauzi & George-Ibikiri (2018) *AJLC* 13 & FF Fatimayin “Education for all in Nigeria: Reality, Challenges and Way Forward” in *Education for All: Challenges and Prospects* (2015) 1 5. See also Akingbehin (2021) *Acta Universitatis Danubius Juridica* 71.

⁸²³ Section 2(1) of the UBE Act of 2004.

⁸²⁴ ST Birabil & OWM Ogeh “Education in Nigeria: Challenges and Way Forward” (2020) 8(1) *International Journal of Academic Research and Reflection* 42 44 & Akingbehin (2021) *Acta Universitatis Danubius Juridica* 71.

⁸²⁵ Nwauzi & George-Ibikiri (2018) *AJLC* 17.

⁸²⁶ Birabil & Ogeh (2020) *International Journal of Academic Research and Reflection* 44-45.

⁸²⁷ 44.

⁸²⁸ Centre for the Study of the Economies of Africa (T Obiakor & A Adeniran) *Covid-19: Impending Situation Threatens to Deepen Nigeria’s Education Crisis* (2020) 1 2.

learners. Public education on the other hand, is usually free and caters toward learners from a lower socio-economic background and from lower income areas.⁸²⁹ For purposes of this research, any reference to education or the Nigerian education system in this chapter refers to public primary education as well as public secondary education which the Nigerian government is obligated to provide.

Despite this structured system of education, the education provisions in the Nigerian Constitution, the subsequent enacted legislation and the supporting case law, there are a number of factors which have impeded and continue to impede the realisation of a child's right to education in Nigeria.⁸³⁰ While numerous impediments are prevalent within Nigeria, for the purpose of this thesis, only a limited few will be discussed.

Poverty and underfunding have been identified as major factors in the large number of children of school age not attending school in Nigeria.⁸³¹ Financial obstacles, such as underfunding, have been consistently identified as a challenge in the Nigerian education system, as Nigeria has not yet allocated 26% of the country's budget to education, as recommended by UNESCO.⁸³² Furthermore, poverty is prevalent across the nation, and it has had and continues to have a negative impact on education.⁸³³ Research has shown that there is a link between the socio-economic background of a learner and their academic performance at school.⁸³⁴ While certain disadvantaged learners are able to overcome their circumstances, in a poverty inflicted country such as Nigeria, poor or average academic achievement is a far more common occurrence.⁸³⁵

In addition to the financial obstacles, certain teacher related challenges have been brought to the forefront in recent years. The challenges include the shortage of teachers, the lack of adequate teacher training and the poor quality of certain available

⁸²⁹ 2.

⁸³⁰ EA Taiwo & A Govindjee "The Implementation of the Right to Education in South Africa and Nigeria (Part 2)" (2012) 33(2) *Obiter* 203 221. See also Fatimayin "Education for all in Nigeria: Reality, Challenges and Way Forward" in *Education for All: Challenges and Prospects* 5.

⁸³¹ Taiwo & Govindjee (2012) 33(2) *Obiter* 220 & Birabil & Ogeh (2020) *International Journal of Academic Research and Reflection* 45. See also Fatimayin "Education for all in Nigeria: Reality, Challenges and Way Forward" in *Education for All: Challenges and Prospects* 11.

⁸³² Birabil & Ogeh (2020) *International Journal of Academic Research and Reflection* & Fatimayin "Education for all in Nigeria: Reality, Challenges and Way Forward" in *Education for All: Challenges and Prospects* 11 & 14.

⁸³³ Taiwo & Govindjee (2012) 33(2) *Obiter* 223.

⁸³⁴ 223.

⁸³⁵ 223.

teachers.⁸³⁶ The teacher related challenges as well as certain other impediments, including but not limited to the lack of dependable infrastructure, the overcrowding of classrooms, health related problems and gender discrimination,⁸³⁷ have been exacerbated by the Covid-19 pandemic. Authors such as Obiakor and Adeniran have argued that the Covid-19 pandemic has posed and continues to pose further challenges to an already fragile Nigerian education system.⁸³⁸

7 4 The consequences of the Covid-19 pandemic and Nigeria's legal responses in protecting a child's right to education

7 4 1 Introduction

Nigeria, which has the largest population on the Africa continent, recorded the first Covid-19 case for sub-Saharan Africa on the 27th of February 2020,⁸³⁹ and has consistently been among the top 10 countries on the continent with the highest number of Covid-19 cases.⁸⁴⁰ Nigeria has in the past experienced certain human rights related problems,⁸⁴¹ and has experienced outbreaks of Lassa fever, bird flu, monkey pox and the Ebola disease.⁸⁴² Despite having experienced these issues and outbreaks in the past, the Covid-19 pandemic had a far greater impact on the Nigerian socio-economic and educational system.⁸⁴³

During the initial Covid-19 outbreak, the right to health was treated as paramount to other human rights. As such, in order to address the elevated Covid-19 numbers and to reduce the spread of the disease,⁸⁴⁴ the Nigerian government announced

⁸³⁶ Fatimayin "Education for all in Nigeria: Reality, Challenges and Way Forward" in *Education for All: Challenges and Prospects* 13.

⁸³⁷ Birabil & Ogeh (2020) *International Journal of Academic Research and Reflection* 45 & Fatimayin "Education for all in Nigeria: Reality, Challenges and Way Forward" in *Education for All: Challenges and Prospects* 11-15. See also Taiwo & Govindjee (2012) 33(2) *Obiter* 219-228 & Malala Fund *Girls Education and Covid-19 in Nigeria* (2020) 1 7.

⁸³⁸ Centre for the Study of the Economies of Africa (Obiakor & Adeniran) *Covid-19* (2020) 1 & The Education Partnership Centre (hereafter "TEP Centre") *Learning in a Pandemic: Nigeria's response to teaching and learning during the Covid-19 pandemic* (2020) 1 9.

⁸³⁹ DO Sotola, P Pillay & HG Gebrihet "Covid-19 in Africa: A Comparative Analysis of Early Policy Responses" (2020) 55(1) *Brazilian Journal of Public Administration* 229 231.

⁸⁴⁰ Tumwesigye *et al* "Covid-19 Lockdowns in Africa: Their Effects and Challenges" in *Covid-19 in the Global South* 149 & 156.

⁸⁴¹ EA Taiwo & A Govindjee "The Implementation of the Right to Education in South Africa and Nigeria (Part 1)" (2012) 33(1) *Obiter* 93 99.

⁸⁴² IS Adelakun "Coronavirus (Covid-19) and Nigerian Education System: Impacts, Management, Responses and Way Forward" (2020) 3(4) *ITS* 88 92.

⁸⁴³ 92.

⁸⁴⁴ 400.

lockdown measures as early as the 30th of March 2020.⁸⁴⁵ Moreover, on this day, Covid-19 regulations in Nigeria took effect and certain states, namely Abuja, Lagos and Ogun, were not only deemed as epicentres of the Covid-19 but placed into lockdown.⁸⁴⁶ It is important to note that regulation included but were not limited to lockdown measures, also known as the sit/stay at home policy, and ultimately saw people across Nigeria staying at home. Locations where face-to-face contact occurred, including all educational institutions, were closed during this period.⁸⁴⁷

7 4 2 School closures and the provision of alternative learning mechanisms

7 4 2 1 *Introduction and access to education*

During the Covid-19 outbreak across the African continent, governments were expected to close educational institutions in their respective jurisdiction,⁸⁴⁸ and Nigeria was no exception. On the 19th of March 2020, prior to the national lockdown measures being instituted, the Federal Ministry of Education in Nigeria approved the closure of all learning institutions.⁸⁴⁹ A child's right to education was thus impacted as they were unable to physically access their schooling facility or applicable schooling resources. Nigeria had the highest number of learners affected by the Covid-19 related school closures in Africa,⁸⁵⁰ with the Covid-19 related school closures affecting nearly 36 400 000 primary and secondary learners across Nigeria.⁸⁵¹

7 4 2 2 *Access to education related services*

School disruptions as a result of the Covid-19 pandemic not only impacted the social development of learners, but also their physical welfare.⁸⁵² In not having physical access to schools across Nigeria, learners were in fact also losing access to

⁸⁴⁵ RL Ibrahim, KB Ajide & OO Julius "Easing of lockdown measures in Nigeria: Implications for the healthcare system" (2020) 9(4) *Health Policy and Technology* 399 400.

⁸⁴⁶ Anyanwu *et al* (2020) *Challenges* 6.

⁸⁴⁷ 400 & Malala Fund Girls *Education and Covid-19 in Nigeria* (2020) 8.

⁸⁴⁸ See eLearning Africa *The Effect of Covid-19 on Education in Africa and its Implications for the Use of Technology: A Survey of the Experience and Opinions of Educators and Technology Specialists* (2020).

⁸⁴⁹ TEP Centre *Learning in a Pandemic* (2020) 9 & Adelakun (2020) *ITS* 88.

⁸⁵⁰ AO Abari & NO Orunbon "Building bridges and walls: Education and Covid-19 in Nigeria" (2020) 1(1) *Research Journal in Comparative Education* 43 49.

⁸⁵¹ TEP Centre *Learning in a Pandemic* (2020) 9.

⁸⁵² Adelakun (2020) *ITS* 94 & Abari & Orunbon (2020) *Research Journal in Comparative Education* 50. See also EM Onyema, NC Eucheria, FA Obafemi, S Sen, FG Atonye, A Sharma & AO Alsayed "Impact of Coronavirus Pandemic on Education" (2020) 11(13) *Journal of Education and Practice* 108 112.

the daily meals made available by the federally funded school feeding programs.⁸⁵³ Nigeria has one of the largest feeding programs in the world, providing daily meals to over nine million learners in over 40 000 public schools across the nation.⁸⁵⁴ For a country so deeply impacted by poverty,⁸⁵⁵ the loss of these daily meals is monumental, as parents may be unable to subsidise these meals for their children, which could in turn result in the learner underperforming academically during the distance learning period.⁸⁵⁶

7 4 2 3 *Alternative learning mechanisms*

As studies have shown that Covid related school closures would result in poor academic achievement for primary and secondary learners, the Federal Ministry of Education and the Universal Basic Education Commission set up the “Nigeria Education Sector Covid-19 Response Strategy and created the Learn at Home Programme” (hereafter “LHP”) for primary and secondary education learners.⁸⁵⁷ The LHP is essentially a state level programme that provided for not only e-learning, but included the broadcasting of lessons via radio and television as well.⁸⁵⁸ In addition to the “Nigeria Education Sector Covid-19 Response Strategy” and the LHP, further distance learning mechanisms and options were rolled out across Nigeria by July 2020.⁸⁵⁹

In order to bridge potential learning gaps during this period, low tech solutions which did not require internet enabled devices were provided for.⁸⁶⁰ In a press release, released on the 3rd of April 2020, the Federal Ministry of Education confirmed that plans were underway for radio and television educational broadcasts.⁸⁶¹ As such, states across Nigeria began to incorporate television or radio programmes in an attempt to ensure continued learning during the Covid-19 related school closures.⁸⁶²

⁸⁵³ Adelakun (2020) *ITS* 94 & Abari & Orunbon (2020) *Research Journal in Comparative Education* 50.

⁸⁵⁴ Adelakun (2020) *ITS* 94.

⁸⁵⁵ Taiwo & Govindjee (2012) 33(2) *Obiter* 223.

⁸⁵⁶ Adelakun (2020) *ITS* 94.

⁸⁵⁷ TEP Centre *Learning in a Pandemic* (2020) 19 & Malala Fund *Girls Education and Covid-19 in Nigeria* (2020) 8.

⁸⁵⁸ 8.

⁸⁵⁹ United States Agency for International Development *Resilience in return to learning during Covid-19: Nigeria Case Study* (2021) 1 8.

⁸⁶⁰ TEP Centre *Learning in a Pandemic* (2020) 13.

⁸⁶¹ Federal Ministry of Education, Federal Secretariat, Phase III, Abuja, Office of the Director “Press Release: Radio and Television Education Broadcast Underway As Education Sector Ends Second Online Meeting” (03-04-2020) *Federal Ministry of Education* <<https://education.gov.ng/wp-content/uploads/2020/04/RADIO-AND-TELEVISION-EDUCATIONAL-BROADCAST-UNDERWAY-AS-EDUCATION-SECTOR-ENDS-SECOND-ONLINE-MEETING.pdf>> (accessed 07-03-2022).

⁸⁶² TEP Centre *Learning in a Pandemic* (2020) 17.

The use of television as an alternative learning mechanism has certain limitation as the success of the mechanism is dependent on access to a television as well as access to electricity.⁸⁶³ According to a study conducted between April and May 2020, 24% of the respondents identified electricity as the main challenge to distance learning.⁸⁶⁴ While this percentage may seem minimal, it is in fact a large portion of learners who are prevented from accessing equal education opportunities. In respect of the radio programmes, a Nigerian teacher pointed out that in a poverty stricken country like Nigeria, the radio is in fact the best alternative learning mechanism as it is not only the most widespread device in use across the country, but a cheaper option which does not require electricity.⁸⁶⁵ Learning via radio was however limited as the programmes were not only fast and short but there was no room for learners to ask questions where they struggled to comprehend the work.⁸⁶⁶ These issues, amongst others, showed why radio programmes cannot be viewed to be as effective or efficient substitution to face-to-face learning within the classroom.⁸⁶⁷

In terms of high-tech alternative learning mechanisms, 49% of the states in Nigeria reported that internet-based learning platforms were created.⁸⁶⁸ As part of the “Nigeria Education Sector Covid-19 Response Strategy”, virtual learning platforms were setup and certain e-learning resources were provided.⁸⁶⁹ Various platforms were utilised during this e-learning period, including mobile platforms such as WhatsApp, social media platforms such as YouTube and Facebook, and virtual conferencing platforms such as Zoom and Microsoft Teams.⁸⁷⁰ The effectiveness of these platforms is however questionable, as, once again, access to relevant technology was identified as an issue due to the high level of poverty amongst Nigerians.⁸⁷¹ According to the study conducted between April and May 2020, 28% of the respondents reported that

⁸⁶³ 33.

⁸⁶⁴ OB Azubuike, O Adegboye & H Quadri “Who gets to learn in a pandemic? Exploring the digital divide in remote learning during the Covid-19 pandemic in Nigeria” (2021) 2(100022) *International Journal of Educational Research Open* 1 4.

⁸⁶⁵ eLearning Africa *The Effect of Covid-19 on Education in Africa and its Implications for the Use of Technology* (2020) 27.

⁸⁶⁶ TEP Centre *Learning in a Pandemic* (2020) 33.

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⁸⁶⁹ 19.

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⁸⁷¹ AT Agbele & EA Oyelade “Impact of Covid-19 on the Nigerian Educational System: Strengths and Challenges of Online/Virtual Education” (2020) 13(1) *Asian Journal of Education and Social Studies* 26 31.

access to digital devices was the main challenge they faced in respect of e-learning.⁸⁷² One can therefore conclude that digital equality was not achieved as not every teacher and student in Nigeria were able to obtain or access a digital device during this period. Even where they were able to access a device, a large portion of teachers and learners were unable to access internet connectivity or WIFI in order to facilitate the e-learning experience.⁸⁷³ This inequity ultimately prevented the success of e-learning as an effective substitute to physical schooling,⁸⁷⁴ as not all learners were offered the same opportunity to learn.

Furthermore, it is important to note that teachers, parents and learners alike were not adequately prepared for e-learning, specifically in relation to primary and secondary education which had not previously made use of any e-learning platforms.⁸⁷⁵ The existing teacher challenges mentioned above were exacerbated during this period as teachers were not equipped to handle the transition from face-to-face learning to e-learning, such as preparing and presenting online lessons.⁸⁷⁶ Furthermore, personal attention for learners was identified as an issue as teachers were not visible to supervise, monitor or assist said learners.⁸⁷⁷ Parents were therefore expected to balance their work life and their family life while taking on a more technical level of involvement in their children's education.⁸⁷⁸ With this being said, parents were not always able to monitor their children's online learning, and learners were free to do whatever they pleased with their time.⁸⁷⁹ As such, a large majority of learners expressed that they only spent an estimated two hours a day studying as opposed to the regular five or six hours they would have spent on lessons prior to the Covid-19 related school closures,⁸⁸⁰ thus resulting in significant learning loss during the Covid-19 related school closures.

⁸⁷² Azubuikwe *et al* (2021) *International Journal of Educational Research Open* 4.

⁸⁷³ 31.

⁸⁷⁴ Abari & Orunbon (2020) *Research Journal in Comparative Education* 50 & Onyema *et al* (2020) *Journal of Education and Practice* 112 & 114-115 & UN Eze, MM Sefotho, CN Onyishi & C Eseadi "Impact of Covid-19 pandemic on Education in Nigeria: Implications for Policy and Practice" of e-learning" (2021) *Library Philosophy and Practice (e-journal)* 1 20 <https://digitalcommons.unl.edu/libphilprac/?utm_source=digitalcommons.unl.edu%2Flibphilprac%2F5651&utm_medium=PDF&utm_campaign=PDFCoverPages> (accessed 05-03-2022).

⁸⁷⁵ Eze *et al* (2021) *Library Philosophy and Practice (e-journal)* 22.

⁸⁷⁶ TEP Centre *Learning in a Pandemic* (2020) 13 & Agbele & Oyelade (2020) *Asian Journal of Education and Social Studies* 30.

⁸⁷⁷ Agbele & Oyelade (2020) *Asian Journal of Education and Social Studies* 31.

⁸⁷⁸ TEP Centre *Learning in a Pandemic* (2020) 13.

⁸⁷⁹ Agbele & Oyelade (2020) *Asian Journal of Education and Social Studies* 31.

⁸⁸⁰ Malala Fund Girls *Education and Covid-19 in Nigeria* (2020) 14.

7 4 2 4 Conclusion

Based on the above discussion, it is submitted that the Covid-19 related school closures had a significant impact on a child's right to education in Nigeria.⁸⁸¹ Moreover, while various alternative learning interventions were relied upon during the Covid-19 related school closures, there is limited evidence of their effectiveness.⁸⁸² Furthermore, it is clear that pre-existing inequalities had prevented the success of alternate learning mechanisms. As such, the reopening of school became a necessity.

7 4 3 Reopening schools across Nigeria and creating a Covid-19 safe school environment

7 4 3 1 Introduction

Despite the high transmission rate, the unbearable economic consequences of the lockdown measures saw the Nigerian government attempting to gradually ease lockdown measures, which included the reopening of education facilities across the nation.⁸⁸³ The reopening of schools was deemed necessary in order to ensure that the number of Nigerian children out-of-school did not increase permanently as a result of the Covid-19 related school closures.⁸⁸⁴ While examinable classes across Nigeria returned to school during August of 2020,⁸⁸⁵ the Nigerian government only ordered public schools to reopen during October 2020.⁸⁸⁶ Furthermore, following the December holidays, the Nigerian government announced that schools could reopen completely on the 18th of January 2021.⁸⁸⁷

The Federal Ministry of Education implemented certain guidelines and strategies for the safe reopening of schools, including the "Nigeria Education Sector Covid-19 Response Strategy",⁸⁸⁸ and the "Guidelines for Schools and Learning Facilities

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⁸⁸² TEP Centre *Learning in a Pandemic* (2020) 10.

⁸⁸³ Ibrahim *et al* (2020) *Health Policy and Technology* 400.

⁸⁸⁴ TEP Centre *Learning in a Pandemic* (2020) 13.

⁸⁸⁵ CT Ezeonu, CJ Uneke & PO Ezeonu "A Rapid Review of the Reopening of Schools in this Covid-19 Pandemic? How Ready are We in Nigeria?" (2021) 30(1) *Nigerian Journal of Medicine* 8 12.

⁸⁸⁶ Jeminde O "Press Briefing by Minister of Education Adamu Adamu on the Reopening of Schools Nationwide (Video)" (02-10-2020) *Federal Ministry of Education* < <https://education.gov.ng/portfolio-items/press-briefing-by-education-minister-adamu-adamu-on-reopening-of-schools-nationwide/> > (accessed 07-03-2022) & Malala Fund *Girls Education and Covid-19 in Nigeria* (2020) 8.

⁸⁸⁷ United States Agency for International Development *Resilience in return to learning during Covid-19* (2021) 9-10.

⁸⁸⁸ Federal Ministry of Education *Nigeria Education Sector Covid-19 Response Strategy* (2020).

Reopening After Covid-19 Pandemic Closures” (hereafter “Reopening Guidelines”),⁸⁸⁹ which has subsequently been amended.⁸⁹⁰ The objective of the “Nigeria Education Sector Covid-19 Response Strategy” was to mitigate the immediate effect of the Covid-19 pandemic on the Nigerian education sector, and to enhance the education sector’s responsiveness and resilience in providing inclusive quality education at all levels during the Covid-19 period.⁸⁹¹ The purpose of the Reopening Guidelines was however to support and facilitate the prompt and safe achievement of the objectives in the “Nigeria Education Sector Covid-19 Response Strategy”.⁸⁹² In addition, the Reopening Guidelines, prioritised creating a safe school environment in respect of the reopening of schools and therefore provided for certain health and training requirements that education institutions were and are expected to meet in order to reopen.⁸⁹³ Whether all public schools were able to meet these standards is however unknown, but the assumption is that not all public schools across Nigeria met these requirements.⁸⁹⁴

7 4 3 2 *The use of face masks in the school environment*

As indicated in chapter 2, the use of face masks has been accepted globally as a Covid-19 preventative measure and has been recommended across numerous platforms during the Covid-19 pandemic.⁸⁹⁵ The Federal Ministry of Education provided the “Joint Assessment for Safe Reopening of Schools and Learning Facilities, Section C: Compliance Checklist” (hereafter “Section C: Compliance Checklist”) which schools are expected to complete prior to reopening. According to the Section C: Compliance Checklist, learners, teachers, administrators, and any other education personnel are expected to wear face masks at all times while at school.⁸⁹⁶ The reason

⁸⁸⁹ Federal Ministry of Education *Guidelines for Schools and Learning Facilities Reopening After Covid-19 Pandemic Closures of 2020* (2020).

⁸⁹⁰ Federal Ministry of Education *Guidelines for Schools and Learning Facilities Reopening After Covid-19 Pandemic Closures of 2021* (2021).

⁸⁹¹ Section 2 of the Nigeria Education Sector: Covid-19 Response Strategy of 2020.

⁸⁹² Section 3 of the Federal Ministry of Education *Guidelines for Schools and Learning Facilities Reopening After Covid-19 Pandemic Closures of 2020* (2020).

⁸⁹³ Malala Fund *Girls Education and Covid-19 in Nigeria* (2020) 18.

⁸⁹⁴ 18.

⁸⁹⁵ CK Edet, AM Harry, AI Wegbom, O Rami, AF Faagbamigbe & VA Kiri “Face Mask Utilization in the Era of Covid-19: Nigeria Experience” (2020) *ResearchGate (e-journal)* 1 2 <<https://www.researchgate.net/publication/346765011> Face Mask Utilization in the Era of Covid-19 Nigeria Experience> (accessed 17-03-2022).

⁸⁹⁶ Federal Ministry of Education *Joint Assessment for Safe Reopening of Schools and Learning Facilities, Section C: Compliance Checklist* (2020).

therefore is in order to reduce the transmission of Covid-19 from person to person within the school environment.⁸⁹⁷

An important aspect of the Section C: Compliance Checklist is that it caters for vulnerable children as it provides that the school should have available stock of face masks, specifically for the vulnerable students attending the school in question.⁸⁹⁸ There is no available evidence as to whether schools actually provided these masks, or the number of children who were assisted by this service in schools which implemented the mechanism. The use of face masks within the school environment was further highlighted in the “Public Health Guidance for Safe School Re-opening in Nigeria” which was introduced by the Nigeria Centre for Disease Control, as it stated that all staff, visitors and students above the age of six are expected to wear face masks at all times within the school environment.⁸⁹⁹ The fact that this guidance document provides an age restriction on the wearing of a mask shows a certain level of adaptability, as it accommodates younger children who potentially face difficulties in the wearing of masks or who have different levels of understanding of the importance of wearing a mask. . The implementation of the prevention mechanisms is necessary, but it should not in any way confuse a child or risk a child’s health and safety as this could hinder rather than protect the realisation of a child’s right to education.

7 4 3 3 *Social distancing within the school environment*

As schools reopened, they were expected to implement safe distancing measures in order to minimize or isolate the risk of spreading Covid-19 within the school environment.⁹⁰⁰ While certain exceptions are provided for, safe distancing otherwise known as social distancing was expected within the school environment, and learners were encouraged to stay two metres apart at all times.⁹⁰¹ The “Public Health Guidance For Safe School Re-opening in Nigeria” provided a different perspective, as it stated

⁸⁹⁷ Ezeonu *et al* (2021) *Nigerian Journal of Medicine* 11.

⁸⁹⁸ Federal Ministry of Education *Joint Assessment for Safe Reopening of Schools and Learning Facilities, Section C: Compliance Checklist* (2020).

⁸⁹⁹ Nigeria Centre for Disease Control *Public Health Guidance For Safe School Re-opening in Nigeria* (2020) 1 4.

⁹⁰⁰ Section 6(3) of the Federal Ministry of Education *Guidelines for Schools and Learning Facilities Reopening After Covid-19 Pandemic Closures of 2020* (2020).

⁹⁰¹ Section 6(2).

that in a well ventilated classroom, students were only expected to sit a minimum of one metre apart.⁹⁰²

While there may be confusion as to the exact distance required, social distancing within the classroom seems to be an effective preventative measure on paper. The problem however arises in respect of the practical implementation thereof. Prior to the Covid-19 pandemic, one of the problems identified in Nigerian were overcrowded classrooms.⁹⁰³ With classrooms already exceeding the approved one to forty, teacher to student ratio prior to Covid-19,⁹⁰⁴ the limited space availability makes social distancing in the classroom a near impossible task. In addition to the overcrowded classrooms, the lack of dependable infrastructure, further hinders the implementation of social distancing mechanisms as learners were already being crammed into dilapidated school environments prior to the Covid-19 pandemic.⁹⁰⁵

The Reopening Guidelines however provided for a number of social distancing options which schools could adopt in order to ensure safe distancing within the school environment, including outdoor learning, staggered learning, alternate attendance, platooning, decreased interaction within the school environment and the creative delivery of lessons.⁹⁰⁶ As such, it is clear that emphasis was placed on social distancing as an effective preventative measure, and alternative social distancing techniques were provided for and implemented in the classroom in order to ensure the mechanisms regardless of the challenges and or issues experienced.

7 4 3 4 *Hand hygiene*

In order to minimise the risk of infection in schools and the resurgence of Covid-19, the Reopening Guidelines state that teachers and education personnel should be trained on safety and hygiene measures.⁹⁰⁷ The Federal Ministry of Education has shown support for the provision of portable hand hygiene items, as the Section C: Compliance Checklist refers to the availability of adequate hand sanitizer, safe water

⁹⁰² Nigeria Centre for Disease Control *Public Health Guidance For Safe School Re-opening in Nigeria* (2020) 3.

⁹⁰³ Birabil & Ogeh (2020) *International Journal of Academic Research and Reflection* 46.

⁹⁰⁴ Birabil & Ogeh (2020) *International Journal of Academic Research and Reflection* 46.

⁹⁰⁵ 46.

⁹⁰⁶ Section 6(3) of the Federal Ministry of Education *Guidelines for Schools and Learning Facilities Reopening After Covid-19 Pandemic Closures of 2020* (2020). Take note that staggered learning is when learners arrive and depart at different times in order to prevent overcrowding and platooning is when classes are divided into morning and afternoon shifts.

⁹⁰⁷ Section 7 of the Federal Ministry of Education *Guidelines for Schools and Learning Facilities Reopening After Covid-19 Pandemic Closures of 2020* (2020).

and soap at certain locations across the school.⁹⁰⁸ Furthermore, ensuring that there are adequate and sufficient hand washing facilities has been highlighted as a priority within the education community in relation to in the reopening of schools across Nigeria.⁹⁰⁹ A problem however arises in terms of dependable infrastructure, as a number of Nigerian schools lack adequate facilities,⁹¹⁰ including but not limited to poor bathroom and handwashing facilities.⁹¹¹ In addition, there are also school environments where learners do not have access to water.⁹¹² As a response to these issues, it was deemed crucial to ensure the availability of portable water, soap and sanitizers,⁹¹³ as the provision of alternative solutions allowed learners to ensure hand hygiene at all times, which in turn contributed toward limiting the spread of Covid-19 within the school environment.⁹¹⁴ It must be kept in mind that the provision of alternatives relies on increased funding from the government, and whether this was provided has not been indicated in the current data available.

7 4 3 5 Conclusion

Creating a Covid-19 safe school environment for learners to return to is a crucial part of ensuring a child's right to education as the mechanisms introduced contribute toward the successful reopening of schools. It is important to note that each prevention mechanisms has its own challenges when it comes to the actual implementation thereof. As such it is crucial to ensure that the mechanisms are implemented in a layered fashion so that where one mechanisms may be lacking, the other mechanisms can make up for the limitations.

7 5 Legal responses introduced during the 2020 academic year in Nigeria

As previously mentioned, school closures in Nigeria not only disrupted the academic calendar,⁹¹⁵ but further exposed the socio-economic gaps prevalent within

⁹⁰⁸ Section 6(4) & Section 7.

⁹⁰⁹ Section 7 & Nigeria Centre for Disease Control *Public Health Guidance For Safe School Re-opening in Nigeria* (2020) 6.

⁹¹⁰ Birabil & Ogeh (2020) *International Journal of Academic Research and Reflection* 46.

⁹¹¹ Ezeonu *et al* (2021) *Nigerian Journal of Medicine* 12.

⁹¹² Ezeonu *et al* (2021) *Nigerian Journal of Medicine* 12.

⁹¹³ Section 7 of the Federal Ministry of Education *Guidelines for Schools and Learning Facilities Reopening After Covid-19 Pandemic Closures of 2020* (2020).

⁹¹⁴ Federal Ministry of Education *Joint Assessment for Safe Reopening of Schools and Learning Facilities, Section C: Compliance Checklist* (2020).

⁹¹⁵ BH Odalonu & PN Chiazor "Re-focusing Nigerian Education System For Sustainability in the Post Covid-19 Crises: Challenges and Prospects" (2021) 33(1) *Institute of Education Journal* 52 55.

the Nigerian education system.⁹¹⁶ The underlying principle of the *Federal Ministry of Education's Reopening Guidelines* was to implement safe, efficient and equitable plans for the reopening and operation of schools in Nigeria during the Covid-19 pandemic.⁹¹⁷ In addition to the mechanisms mentioned above, the Reopening Guidelines also highlighted the importance of the deep cleaning of schools as well as certain non-pharmaceutical interventions for safe and healthy school activities.⁹¹⁸

Furthermore, guidance provided by the Nigeria Centre for Disease Control stated that staff members who work in or operate the school's sick bay should be adequately trained and provided with the required PPE.⁹¹⁹ In addition, the same guidance provided that schools should develop a response protocol in order to ensure that learners who are ill or test positive are taken safely to the nearest designated hospital facility.⁹²⁰ While these are simply guidelines, and not in fact statutory provisions, they encourage the creation of a safe school environment which is pivotal in ensuring and protecting a child's right to education within Nigeria.

7 6 Conclusion

As confirmed through the discussion above, Nigeria has clear obligations in respect of a child's right to education. In closing schools, a significant loss in learning occurred as learners were unable to access their schooling facilities or relevant education resources. Moreover, distance learning cannot be deemed to have been an effective or appropriate response in catering for a child's right to education as learners from more disadvantaged backgrounds could not equally access the alternative learning mechanisms thus negatively impacting their right to education.

Furthermore, when it comes to the reopening of schools, despite the implementation of numerous prevention mechanisms including but not limited to social distancing, the wearing of masks and hand hygiene measures, clear challenges arose.⁹²¹ Ultimately, while practical implementation issues did and still do exist, it is clear from this chapter that Nigeria had attempted to meet their obligations and the

⁹¹⁶ 58.

⁹¹⁷ Foreword of Federal Ministry of Education *Guidelines for Schools and Learning Facilities Reopening After Covid-19 Pandemic Closures of 2020* (2020).

⁹¹⁸ Foreword.

⁹¹⁹ Nigeria Centre for Disease Control *Public Health Guidance For Safe School Re-opening in Nigeria* (2020) 7.

⁹²⁰ 9.

⁹²¹ Anyanwu *et al* (2020) *Challenges* 11.

applicable international and national standards in order to protect a child's right to education during the Covid-19 pandemic.

Chapter 8: Comparative Analysis

8 1 Introduction

In order to conduct an effective comparative analysis, this research first considered South Africa, the USA, the UK, Italy and Nigeria as individual jurisdictions and explored their respective legal responses to the educational consequences of the Covid-19 pandemic. The aim of this chapter is to conduct a comparative analysis and to attempt to compare each countries legal responses and the arrangements introduced during the Covid-19 pandemic. To compare essentially means to look at the similarities as well as the differences between or among the jurisdictions discussed in the chapters above.⁹²² Moreover, it is important to note that the primary purpose of this legal comparative analysis is to acquire a new understanding regarding the specific topic.⁹²³ For the purpose of this thesis, it is to gain insight into the impact of the Covid-19 pandemic on a child's right to education, and whether the jurisdictions discussed above, more specifically whether South Africa, protected the right to education during the 2020 and 2021 academic years.

When it came to the lockdown measures and the subsequent school closures, certain similarities and differences occurred. While certain jurisdictions turned to lawmakers immediately to revise legislation and develop containment policies as an anticipatory approach to policy making, other jurisdictions took on a more reactive approach to policy development.⁹²⁴ For example, in South Africa, an anticipatory approach to policy making was taken as the Disaster Management Act regulated the lockdown and regulations were released in the Government Gazette pertaining to how the lockdown and the subsequent school closures should unfold within the specific jurisdiction, and these regulations were subsequently amended to suit each stage of lockdown in the country. Furthermore, the UK also took a more anticipatory approach to policy development when introducing the Coronavirus Act of 2020. South Africa and the UK attempted to address the consequences of the Covid-19 pandemic before they become truly problematic, and while Covid-19 still spread within each nation, the primary response to Covid-19 can be deemed to be more anticipatory rather than

⁹²² Taiwo & A Govindjee (2012) 33(1) *Obiter* 96.

⁹²³ 96.

⁹²⁴ AR Migone "The influence of national policy characteristics on Covid-19 containment policies: A comparative analysis" (2020) 3(3) *Policy Design and Practice* 259 272.

reactive. The USA, Italy and Nigeria all took more reactive approaches and attempted to address the problem once the consequences had already realised within each respective jurisdiction.

The similarities and differences in each jurisdictions legal response will be discussed here below through a comparative approach utilising the 4 'A' Scheme. In addition, this chapter will determine whether each jurisdiction met their respective educational obligations when implementing their respective legal responses during the Covid-19 pandemic.⁹²⁵ Finally this chapter will discuss whether one jurisdiction, through their specific legal responses, better ensured a child's right to education during the Covid-19 pandemic.

8 2 The accessibility, adaptability, availability and acceptability during the Covid-19 affected school years

8 2 1 Introduction

Each of the jurisdictions discussed in the chapters above, excluding the USA ratified the CRC,⁹²⁶ and in addition thereto, each nation developed and implemented education specific laws and regulations throughout their respective histories.⁹²⁷ As such, each jurisdiction, South Africa included, was and is obligated to ensure that a child's right to education is accessible, adaptable, available and acceptable at all times within their specific jurisdiction. Despite these inherent obligations, it is however important to note that the enjoyment of certain human rights, specifically in this case, a child's right to education, can be limited under exceptional circumstances.⁹²⁸

The United Nations Committee on the Rights of the Child stated that, "international human rights law exceptionally permits measures that may restrict the enjoyment of certain human rights in order to protect public health".⁹²⁹ Moreover, during a time of crisis, nations tend to experience disruptions to their typical or normal operating procedures and systems,⁹³⁰ and in response to the consequences of the Covid-19

⁹²⁵ CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 paras 6(b) & 6(d).

⁹²⁶ See chapter 2 of this thesis for information on the CRC.

⁹²⁷ Refer to chapters 3-7 of this thesis for jurisdiction specific information.

⁹²⁸ Nolan (2020) *Independent SAGE 2*.

⁹²⁹ 2. See also as a primary source United Nations Committee on the Rights of the Child *CRC Covid-19 Statement* (2020).

⁹³⁰ M Mitescu-Manea, L Safta-Zecheria, E Neuman, V Bodrug-Lungu, V Milenkova & V Lendzhova "Inequities in first education policy responses to the COVID-19 crisis: A comparative analysis in four Central and East European countries" (2021) 20(5) *European Educational Research Journal* 543 544.

pandemic, new policies, directives and/or regulations, albeit mostly temporary in nature, had to be developed.⁹³¹ As such, in the midst of the Covid-19 outbreak, certain legislative, policy and regulatory provisions were introduced in South Africa, the USA, the UK, Italy and Nigeria. Included therein were containment policies which focused on social distancing or physical distancing mechanisms, which subsequently brought about the suspension of in person education.⁹³² While the Covid-19 related school closures may thus be viewed as justifiable under human rights law, it can be said that the forced decision impacted a range of children's rights, with the implications for a child's right to education being most prominent.⁹³³

Due to the unprecedented impact of the Covid-19 pandemic on the right to education, every jurisdiction discussed above eventually came to the realisation that schools had to reopen in order to safeguard a child's right to education during the Covid-19 pandemic. In order for schools to reopen safely appropriate policies had to be developed and the principles of accessibility, adaptability, availability and acceptability should have been considered. As such, the section here below will explore how a child's right to education was impacted during the Covid-19 pandemic by analysing whether each jurisdiction, through their legal responses, met their international, regional and national obligations and ensured that education was accessible, adaptable, available and acceptable during the Covid-19 affected years.

8 2 2 The accessibility of education during the Covid-19 pandemic

8 2 2 1 *Introduction*

As indicated in chapter 2 of this thesis, the right to accessible education is protected under article 26 of the UDHR. In terms of the principle of accessibility, schools should be physically and economically accessible to all children, without discrimination in order to ensure the realisation of a child's right to education within a specific country.⁹³⁴ As previously indicated, South Africa, the USA, the UK, Italy and Nigeria all experienced periods where schools were completely open, partially open and

⁹³¹ Mitescu-Manea *et al* (2021) *European Educational Research Journal* 544.

⁹³² YM Tang, PC Chen, KYM Law, Y Lau, J Guan, D He, GTS Ho "Comparative analysis of Student's live online learning readiness during the coronavirus (Covid-19) pandemic in the higher education sector" (2021) *Computers & Education* 1 2.

⁹³³ Nolan (2020) *Independent SAGE* 1.

⁹³⁴ CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 paras 6(b). See also chapters 3-7.

completely closed during the Covid-19 affected years.⁹³⁵ As such, this section will explore how each jurisdiction hindered and/or attempted to ensure the accessibility of education during the Covid-19 pandemic.

8 2 2 2 *The accessibility of education during the Covid-19 related school closures*

Accessibility issues not only occurred during the Covid-19 related school closures in South Africa but were prominent across all the jurisdictions discussed above.⁹³⁶ Each nation implemented what can be viewed as public health policies during the initial outbreak of the Covid-19 pandemic, and these policies in turn limited certain freedoms.⁹³⁷ While countries like South Africa, the UK and Italy implemented countrywide national lockdowns, countries like Nigeria and the USA implemented regional lockdown measures based on where the infection rates seemed to be higher.⁹³⁸ Despite this disparity among the each jurisdiction, school closures were deemed to be a critical social distancing tool to mitigate the spread of Covid-19 across all the jurisdictions, and each nation discussed above saw schools closing in and around March 2020.⁹³⁹

It is important to note that with the exception of the USA who allowed individual states to make their own decisions, the decision to close schools was taken on a national level in South Africa, the UK, Italy and Nigeria. In South Africa, the school closures formed part of South Africa's 5-stage lockdown system,⁹⁴⁰ and as previously mentioned, was regulated on a national level by the Disaster Management Act.⁹⁴¹ In the UK, the national government relied on lawmakers to develop the Coronavirus Act of 2020 which granted them the power to temporarily close schools across the UK.⁹⁴² In Italy, the school closures were viewed to be part of the Italian strategy to contain the spread of the disease and was framed to be an inevitable decision at government level and was regulated through provisional law decrees.⁹⁴³ Finally, in Nigeria, while it

⁹³⁵ See also chapters 3-7.

⁹³⁶ For more information on this topic, refer to chapters 3-7 of this thesis.

⁹³⁷ SA Zweig, AJ Zapf, C Beyrer, D Duha-Sapir & RJ Haar "Ensuring Rights while Protecting Health: The Importance of Using a Human Rights Approach in Implementing Public Health Responses to Covid-19" (2021) 23(2) *Health and Human Rights Journal* 173 174.

⁹³⁸ See chapters 3-7 for detail surrounding the consequences of the Covid-19 pandemic.

⁹³⁹ Anonymous "Education: From Disruption to Recovery" *UNESCO*. See also Chapters 3-7 for details surrounding school closures in each country.

⁹⁴⁰ Sotola *et al* (2020) *Brazilian Journal of Public Administration* 236.

⁹⁴¹ Refer to chapter 3 for more detail.

⁹⁴² Article 38 of the Coronavirus Act.

⁹⁴³ Lindblad *et al* (2021) *European Educational Research Journal* 573.

was not a direct governmental decision, the Federal Ministry of Education, which is a governmental department, made the final decision to approve the closure of all learning institutions.⁹⁴⁴ Schools in every jurisdiction had thus become physically inaccessible to all children, with the only exception being the UK where vulnerable children as well as children of critical or key workers were still able to attend school in person.⁹⁴⁵

During this period, children in every jurisdiction were prevented from obtaining a normal education through usual means and platforms and this in turn hindered the realisation of their right to education despite the fact that low infection rates among children were more prominent.⁹⁴⁶ Moreover, the physical inaccessibility of schools during the Covid-19 pandemic resulted in children being unable to access certain school services. Children in every nation, barring Italy, were prevented from obtaining school meals during the Covid-19 related school closures.⁹⁴⁷ Children were therefore not only prevented from accessing their right to education during the Covid-19 related school closures, but their right to adequate nutrition as per articles 24 and 27 of the CRC as well. As such it cannot be said that all basic needs of learners were not met during this period, and due to the socio-economic circumstances of certain communities, families and learners, it is uncertain whether communities and/or the home environment were able to fill the gaps created by this loss. Learners thus cannot be expected to have learned efficiently and effectively when their basic nutrition needs were not being met on a daily basis.

Furthermore, while each jurisdiction attempted to provide and regulate alternative learning mechanisms and platforms, effective learning and teaching was not ensured in any of the abovementioned jurisdictions during the Covid-19 related school closures.⁹⁴⁸ The challenges in ensuring quality education were pronounced in jurisdictions such as South Africa and Nigeria where there were already prominent resource shortages prior to the Covid-19 pandemic.

It is thus clear that the children in South Africa, the USA, the UK, Italy and Nigeria suffered greatly in terms of accessing their right to education during the initial Covid-

⁹⁴⁴ TEP Centre *Learning in a Pandemic* (2020) 9 & Adalakun (2020) ITS 88.

⁹⁴⁵ House of Commons Library *School meals and nutrition standards in England 04195* (2021) 33 & Crawley *et al* (2020) *BMJ Paediatrics Open* 1.

⁹⁴⁶ Anonymous "Education: From Disruption to Recovery" *UNESCO*.

⁹⁴⁷ See chapter 3-7 for information pertaining to school closures and the provision of alternative learning mechanisms.

⁹⁴⁸ Refer to chapters 3-7 for more detail on the topic.

19 outbreak. Moreover, the prolonged school closures had and continues to have the potential to cause substantial educational gaps for all children in every jurisdiction regardless of whether they find themselves in a developed or developing nation,⁹⁴⁹ as the loss in instruction time remains prevalent. This shortcoming has been confirmed through modelling simulations which have suggested that a mere three month school closure has the potential to reduce students' long-term learning by a year.⁹⁵⁰ As such, each jurisdiction had to re-evaluate their initial responses as the physical inaccessibility of schools had and continue to have the potential to cause severe societal harm, due to the fact that education in and of itself contributes toward societal growth and development.⁹⁵¹

8 2 2 3 *The accessibility of education during the reopening of schools*

According to a UNESCO resource paper released on the 5th of May 2020, 191 countries, including the five countries discussed hereabove, had implemented country-wide school closures.⁹⁵² This resource paper confirmed that nearly 1.58 billion learners, representing 90% of the enrolled learners worldwide had been impacted in unprecedented ways due to the Covid-19 pandemic and the subsequent school closures.⁹⁵³ Consequently UNESCO stated that the reopening of schools should be prioritised by all nations, and the specific jurisdiction should adopt certain measures in order to ensure the continuity of learning for all children.⁹⁵⁴

While each jurisdiction is not obligated to adopt the suggestions made by UNESCO, it is important to take note of UNESCO's contribution and guidance as it has the potential to influence each jurisdiction. Moreover, it is crucial to identify that each jurisdiction discussed above came to their own conclusion that a child's right to education would only be realised, if the accessibility issues were addressed, and children were allowed to physically return to school.⁹⁵⁵ Each country thus had to consider the status and evolution of the pandemic, the safety and overall health of learners, and the advice from health experts in consultation with all concerned

⁹⁴⁹ Zweig *et al* *Health and Human Rights Journal* 177.

⁹⁵⁰ 177.

⁹⁵¹ Lundy *et al*, "Children's Education Rights: Global Perspectives" (2017) 366.

⁹⁵² UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 1 5.

⁹⁵³ 5.

⁹⁵⁴ 5.

⁹⁵⁵ Lundy *et al*, "Children's Education Rights: Global Perspectives" (2017) 375.

actors,⁹⁵⁶ when developing their subsequent school reopening systems and/or policies. Policy developers in each jurisdiction thus had to consider the timing, the conditions and the processes in order to develop policies and guidance for the successful reopening of schools in their respective jurisdictions.⁹⁵⁷

South Africa implemented a phased reopening approach as provided for in certain directives issued in the Government Gazette, and while the time period between certain grades returning to schools was substantial, ultimately at the end of the process, all children were once again able to physically access their respective schools and obtain an education.⁹⁵⁸ The USA, the UK, Italy and Nigeria did not necessarily adhere to the same or a similar system, but did utilise varied approaches in reopening schools within their respective jurisdiction. In the UK, Italy and Nigeria, the phased reopening was controlled and dealt with on a national level. In the UK, article 38 of the Coronavirus Act was relied upon, while in Italy and Nigeria the phased reopening was provided for through national policy documents as well as a press briefing by the Nigerian Education Minister respectively.⁹⁵⁹ In the USA however, schools reopened under various models and once again, despite President Biden supporting the reopening of schools, each individual State was ultimately able to decide when and how their schools reopened.⁹⁶⁰ The fact however remains that each individual nation determined when and how schools should reopen in their respective jurisdiction and aimed to address the accessibility issues which were brought to the forefront during the Covid-19 pandemic and the subsequent school closures.

8 2 2 4 Conclusion

In respect of the Covid-19 lockdown measures, certain jurisdictions took a reactive approach to policy making while other jurisdictions took an anticipatory approach to policy making. Regardless of the approach taken, each nation ended up closing schools across their respective countries as a direct result of the Covid-19 pandemic. These Covid-19 related school closures in turn caused education facilities and

⁹⁵⁶ UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 14 & 15.

⁹⁵⁷ 26.

⁹⁵⁸ GN. 302 in GG 43372 of 29-05-2020; GN. 343 in GG 43465 of 23-06-2020 & GN. 411 in GG 43578 of 02-08-2020.

⁹⁵⁹ Article 38 of the Coronavirus Act 2020; the Piano Scuola 2020-2021; the Dipartimento della Protezione Civile, 2020; & Jeminde “Press Briefing by Minister of Education Adamu Adamu on the Reopening of Schools Nationwide (Video)” *Federal Ministry of Education*.

⁹⁶⁰ Malkus *Reopening in the Shadow of Covid-19* (October 2020) 18 & 19.

resources to be physically inaccessible for all learners, and this in fact hindered the true realisation of a child's right to education in and among each and every jurisdiction discussed in this thesis.⁹⁶¹

During the school closures which resulted in a loss in instruction time, children were negatively impacted in terms of their learning and educational attainment.⁹⁶² It is thus clear in terms of accessibility, that only once schools reopened to all learners, in every jurisdiction, were learners able to realise their right to education as they were then able to physically access their schools and gain access to quality educational resources. The problem however is that while the reopening of schools solved the accessibility issues that nations were experiencing, certain other issues in relation to the adaptability, availability and acceptability of education were brought to the forefront.

8 2 3 The adaptability of education during the Covid-19 pandemic

8 2 3 1 *Introduction*

The principle of adaptability essentially focuses on the fact that education should be flexible, meaning that education systems and structures should adapt to the needs of society at any given time.⁹⁶³ In line with this concept, the Council of Europe, for example, confirmed that even in a crisis as severe as the Covid-19 pandemic, a child's right to education should be ensured and realised, even if that means the right must be exercised in a modified way.⁹⁶⁴

8 2 3 2 *The adaptability of education during the Covid-19 related school closures*

The physical closure of schools required each jurisdiction to be inventive and to adopt emergency distance learning mechanisms in order to allow learners to receive an education without risking their health by physically attending school. As such, schools and policy makers across all jurisdictions were faced with the challenge of developing adequate technology infrastructures, digital pedagogic contents and distance learning and teaching methods.⁹⁶⁵

⁹⁶¹ Lundy *et al*, "Children's Education Rights: Global Perspectives" (2017) 368.

⁹⁶² 368.

⁹⁶³ CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 paras 6(d). Also see discussion in chapter 2 of this thesis.

⁹⁶⁴ Council of Europe *Making the Right to Education a Reality in the Times of Covid-19* (2020) 8.

⁹⁶⁵ Mitescu-Manea *et al* (2021) *European Educational Research Journal* 544.

For the first time in history, online learning was implemented worldwide as an attempted solution to the educational challenges which arose during the Covid-19 outbreak.⁹⁶⁶ South Africa, the USA, the UK, Italy and Nigeria proved their ingenuity and commitment to education as each jurisdiction attempted to introduce distance learning platforms, specifically virtual learning platforms through certain policy responses. Despite the clear attempts by every nation to adapt the manner in which education was accessed during the Covid-19 related school closures, each jurisdiction discussed above experienced grave inequities when it came to virtual education and distance learning mechanisms.⁹⁶⁷

While distance learning mechanisms can be viewed as an effective alternative to normal face-to-face learning on paper, the mechanism was not feasible nor was it sustainable during the Covid-19 years. While South Africa made provision for the zero-rating of education websites, online learning was not necessarily regulated in an appropriate manner during the Covid-19 pandemic. Moreover, virtual education had limited success rates across all nations, and amongst the jurisdiction discussed, only the UK's policy documents provided detailed information in relation to online learning and teaching. The UK policy documents in fact made provision for subject specific websites as well as web-based resources for parents, teachers and students alike.⁹⁶⁸ While virtual education as an alternative learning mechanism was not implemented in the other four jurisdictions, it must be noted that distance learning mechanisms failed substantially in South Africa and Nigeria due to pre-existing inequalities and resource shortages. As a result these two jurisdictions had to make provision for radio and televisual platforms which were accessible to a larger amount of learners.⁹⁶⁹

While each jurisdiction was able to show their commitment to education by attempting to adapt to the needs of society, distance learning mechanisms had clear downfalls. Children from more disadvantaged and/or poorer backgrounds did not enjoy the same level of access to certain distance or virtual learning platforms as inequalities in respect of the digital access and resources were present not only in the less

⁹⁶⁶ Tang *et al* (2021) *Computers & Education* 13.

⁹⁶⁷ Zweig *et al* *Health and Human Rights Journal* 177. See also chapters 3-7 for information pertaining to school closures and the provision of alternative learning mechanisms.

⁹⁶⁸ 12.

⁹⁶⁹ A Vongalis-Macrow, D De Souza, C Littleton & A Sekhar "Covid-19 Emergency Education Policy and Learning Loss: A Comparative Study" in C Cheong, J Coldwell-Neilson, K MacCallum, T Luo & A Scime (Eds) *Covid-19 and Education: Learning and Teaching in a Pandemic-Constrained Environment* 3-26 California: Informing Science Press 14.

developed countries such as South Africa,⁹⁷⁰ and Nigeria,⁹⁷¹ but was prevalent in the more developed nations such as the USA, the UK and Italy as well.⁹⁷² The effects on historically disadvantaged communities in South Africa, and specifically the children from these communities in respect of their right to education, will be felt long after the Covid-19 pandemic.⁹⁷³ As such, it can be said that the true effects of the Covid-19 related school closures and their impact of learners will not be realised for years to come.

8 2 3 3 *The adaptability of education during the reopening of schools*

While the reopening of schools amongst all the jurisdictions discussed above improved the accessibility of education during the Covid-19 affected years, there was and is a clear concern for the safety and well-being of all children within the school environment.⁹⁷⁴ The prevention or avoidance of certain health hazards within the school environment was at the heart of policy-making during the Covid-19 pandemic,⁹⁷⁵ and this was true across all the nations discussed above. In line with international guidance and standards,⁹⁷⁶ each and every jurisdiction discussed in this thesis at some point during their policy-making attempted to provide prevention and containment mechanisms within the school environment.⁹⁷⁷

The wearing of face masks, social or physical distancing and hand hygiene mechanisms were the most prominent prevention mechanisms provided for amongst all nations when planning for the reopening of schools.⁹⁷⁸ When reopening schools during the Covid-19 pandemic, South Africa, the USA, the UK, Italy and Nigeria realised the importance of ensuring that education was adaptable, as they not only provided for the aforementioned prevention and containment mechanisms which required states to adapt the school environment, but attempted to provide mechanisms which also had suitable alternatives. For example, each jurisdiction in their policy and/or guidance documents provided for handwashing as well as hand sanitisation.⁹⁷⁹

⁹⁷⁰ Madonsela (2020) *S Afr J Sci* 2.

⁹⁷¹ Anyanwu *et al* (2020) *Challenges* 7-9.

⁹⁷² Zweig *et al* *Health and Human Rights Journal* 177.

⁹⁷³ Madonsela (2020) *S Afr J Sci* 2.

⁹⁷⁴ Lundy *et al*, "Children's Education Rights: Global Perspectives" (2017368).

⁹⁷⁵ Mitescu-Manea *et al* (2021) *European Educational Research Journal* 552.

⁹⁷⁶ See chapter 3 for more detail.

⁹⁷⁷ Refer to chapters 3-7 of this thesis for more detail regarding creating a Covid-19 safe school environment.

⁹⁷⁸ See chapters 3-7 of this thesis.

⁹⁷⁹ Refer to chapters 3-7 of this thesis for more information.

Therefore where handwashing was not possible for whatever reason, a suitable alternative was available for learners and teachers alike to ensure that they adhered to the prevention and containment guidelines provided. This once again proves that each jurisdiction discussed above was committed to adapting the educational system and/or environment to suit to the needs of learners and teachers within their respective nation.

Furthermore, each jurisdiction attempted to ensure through their policy making that children and teachers were able to abide by social or physical distancing mechanisms regardless of the amount of children in the school or the classroom sizes.⁹⁸⁰ Much like South Africa, due to the large number of learners per class and within schools, Italy relied upon a rotation system in order to ensure social distancing measures were adhered to within the school environment.⁹⁸¹ A difference between South Africa and Italy in respect of how the rotation system was introduced, is that learners within most schools in Italy were only divided into two groups which alternated between attending school physically and remote learning.⁹⁸² In South Africa, the rotation system did not provide learners with a remote learning alternative,⁹⁸³ and rather provided multiple options for schools to consider, including daily and/or weekly rotation, bi-weekly rotation, platooning or shifts, traditional and daily attendance or a hybrid of the latter.⁹⁸⁴ While these alternative rotation systems made it possible for children to physically return to school, certain rotation options in South Africa may have allowed learners from one school greater access to their education facilities and instruction time than learners of the same grade in another school. With that being said, the true effect of the varying rotation options on educational attainment and dropout rates during the Covid-19 outbreak will only be realised once further quantitative studies are conducted within the country comparing and contrasting the success of each system.

Unfortunately, due to issues relating to school infrastructure, the age of learners and classroom size to name a few, a multilevel approach to prevention was required and the five jurisdictions had to ensure prevention mechanisms were interchangeable within the school environment.⁹⁸⁵ This essentially means that handwashing within the

⁹⁸⁰ Refer to chapters 3-7 for more detail pertaining to social and or physical distancing mechanisms in each jurisdiction.

⁹⁸¹ Buonsenso *et al* (2021) *Frontiers in Paediatrics* 2.

⁹⁸² 1.

⁹⁸³ 1.

⁹⁸⁴ GN. 42 in GG 44154 of 12-02-2021.

⁹⁸⁵ See chapters 3-7 for more detail pertaining to creating a Covid-19 safe school environment.

school environment was not sufficient, but handwashing in conjunction with social distancing and the wearing of masks had to be implemented in order to provide a Covid-19 safe school environment. These were not the only prevention mechanisms implemented and each of the five jurisdictions had the freedom to adapt to changing circumstances as far as prevention was concerned.

8 2 3 4 *Conclusion*

The Covid-19 pandemic highlighted the importance of the principle of adaptability in order for nations to safeguard the right to education and to address the educational challenges which arose during the Covid-19 related school closures. Based on the above discussion, and due to prevalent inequalities in education and certain disparities in digital access, one cannot say that the alternative learning mechanisms provided during the Covid-19 related school closures ensured a child's right to education. Moreover, adaptability was depicted as a crucial element in ensuring a child's right to education during the reopening of schools, as each jurisdiction, their subsequent education departments and the schools alike had to ensure that the school environment was safe for the return of all children. While the mechanisms introduced had varied success rates, each jurisdiction ultimately showed their commitment to adapting their respective education systems and environment in an attempt to ensure and protect a child's right to education during the Covid-19 pandemic.

8 2 4 The availability of education during the Covid-19 pandemic

8 2 4 1 *Introduction*

The provision of education does not depend solely on the physical accessibility of schools but relies on children having access to the necessary resources to assist their learning. The principle of availability essentially refers to the fact that education facilities, resources and teachers should be available in sufficient quantity in order to assist children in attaining an education.⁹⁸⁶ Prior to the Covid-19 pandemic, every country had implemented certain policies and instruments which provide for budgetary allocations to education in general as well as the provision of funding for certain school services.⁹⁸⁷ Prior to the Covid-19 outbreak, there was no country in which every single

⁹⁸⁶ CESCR *General Comment No. 13* (1999) UN Doc E/C. 12/1999/10 paras 6(a).

⁹⁸⁷ ST Tesemma *A Critical Analysis of Law and Policy on the Education of Disabled Children in South Africa* Doctor of Education in the subject Education Management University of South Africa (2012) 119.

child received an adequate level of education with equal access to educational resources.⁹⁸⁸ The section here below will provide more detail in respect resource shortages and whether they were prevalent during the Covid-19 pandemic.

8 2 4 2 *The availability of education during the Covid-19 related school closures*

A socio-economic hierarchy exists among people and communities in and among all the jurisdictions discussed, specifically in South Africa where a large portion of the population live in poverty.⁹⁸⁹ This has essentially filtered through to schools which can be considered as sites of inequality, due to existing disparities in education and education related resources,⁹⁹⁰ It has become clear in this research that the Covid-19 pandemic further affected learners from more vulnerable backgrounds.⁹⁹¹

Many of the inequalities experienced in terms of educational resources, specifically in respect of distance learning platforms, existed prior to the Covid-19 pandemic and were exacerbated further by the Covid-19 pandemic.⁹⁹² For example, in South Africa many learners already had limited or no access to relevant textbooks,⁹⁹³ and the subsequent Covid-19 related school closures caused further issues for learners as their access to relevant resources was further inhibited. This in turn hindered the realisation of their right to education and ultimately impacted their learning in unprecedented ways.

Digital poverty also played a crucial role in the hindering the availability of education during the Covid-19 related school closures amongst each and every jurisdiction discussed above, specifically in South African and Nigeria where portions of the population come from underprivileged backgrounds.⁹⁹⁴ None of the five jurisdictions discussed were able to provide all learners with the necessary devices in order to ensure the accessibility of online learning.⁹⁹⁵ While South Africa attempted to resolve the internet access issue by issuing a zero-rating directive for education websites,⁹⁹⁶ and the USA attempted to provide learners with digital devices for home learning,

⁹⁸⁸ Lundy *et al*, "Children's Education Rights: Global Perspectives" (2017) 375.

⁹⁸⁹ N Amin & P Mahabeer "Curriculum tinkering in situations of crises and inequalities: The case of South Africa" (2021) 51 *Springer* 489 491.

⁹⁹⁰ 491.

⁹⁹¹ UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 21.

⁹⁹² Zweig *et al Health and Human Rights Journal* 177.

⁹⁹³ See chapter 3 for more detail about the pre-existing challenges in education.

⁹⁹⁴ Madonsela (2020) *S Afr J Sci* 2 & Anyanwu *et al* (2020) *Challenges* 7-9.

⁹⁹⁵ See chapters 3-7 for information pertaining to school closures and the provision of alternative learning mechanisms.

⁹⁹⁶ Refer to chapter 3 for more information.

these policies did not take away from the negative effect of the Covid-19 related school closures. Where inequalities and disparities in educational resources were not addressed, educational attainment was minimal. As such, the UK attempted to address the issues of vulnerable students within the country, and policymakers were tasked with developing policies to address how local authorities, parents, social workers and residential care providers could support vulnerable children and assist them in achieving their educational outcomes during the Covid-19 pandemic.⁹⁹⁷ The implementation and success thereof however is unknown at this stage and will only be determined once further quantitative studies are conducted and data is released.

A further issue in respect of the principle of availability is the availability of sufficient teachers.⁹⁹⁸ Moreover, the digital competency of teachers and children alike had the potential to hinder a child's participation in online education,⁹⁹⁹ during the Covid-19 related school closures. In South Africa, teachers were already in short supply, overloaded and adversely affected by fatigue prior to the Covid-19 outbreak,¹⁰⁰⁰ and the Covid-19 pandemic made their jobs more difficult. Teachers in South Africa, the USA, the UK, Italy and Nigeria were forced to develop new teaching skills in a limited period of time and many teachers were unfortunately not equipped for the transition from face-to-face teaching to distance teaching.¹⁰⁰¹ In Nigeria however, teachers were deployed by Nigeria's Education Ministry for home visits to check on students' progress.¹⁰⁰² Moreover, temporary learning sites were developed in Nigeria in order to allow for small groups of children to meet with their teachers on a regular basis during school closures.¹⁰⁰³ It is thus clear that in Nigeria, the role of teachers was prioritised during the Covid-19 pandemic and the Nigerian Education Ministry attempted to ensure teachers were available to learner across the nation even where they were unable to access their schooling facilities. Whether these mechanisms however

⁹⁹⁷ A Vongalis-Macrow, D De Souza, C Littleton & A Sekhar "Covid-19 Emergency Education Policy and Learning Loss: A Comparative Study" in C Cheong, J Coldwell-Neilson, K MacCallum, T Luo & A Scime (Eds) *Covid-19 and Education: Learning and Teaching in a Pandemic-Constrained Environment* 3-26 California: Informing Science Press 15.

⁹⁹⁸ Tesemma A *Critical Analysis of Law and Policy on the Education* 119.

⁹⁹⁹ Mitescu-Manea et al (2021) *European Educational Research Journal* 556.

¹⁰⁰⁰ Tesemma A *Critical Analysis of Law and Policy on the Education* 147.

¹⁰⁰¹ See chapters 3-7 of this thesis.

¹⁰⁰² A Vongalis-Macrow, D De Souza, C Littleton & A Sekhar "Covid-19 Emergency Education Policy and Learning Loss: A Comparative Study" in C Cheong, J Coldwell-Neilson, K MacCallum, T Luo & A Scime (Eds) *Covid-19 and Education: Learning and Teaching in a Pandemic-Constrained Environment* 3-26 California: Informing Science Press 17.

¹⁰⁰³ 17.

materialised is uncertain as teacher shortages were prevalent in Nigeria prior to the Covid-19 outbreak and no data is available to show whether more teachers were employed to fill the gaps and to ensure these aforementioned mechanisms were successfully implemented.

8 2 4 3 *The availability of education during the reopening of schools*

Despite addressing the accessibility issue created by the Covid-19 related school closures, not all educational problems were rectified by simply reopening schools. The Covid-19 pandemic exposed major weaknesses of the education system and the education related resources available, specifically in South Africa.¹⁰⁰⁴ Some schools in South Africa were not conducive to safe and effective learning and teaching prior to the Covid-19 pandemic,¹⁰⁰⁵ and these issues along with the existing budgetary issues were intensified by the Covid-19 pandemic. The Covid-19 pandemic brought with it prominent economic implications,¹⁰⁰⁶ and these economic challenges had to be considered when planning for the reopening of schools in all the jurisdictions discussed above. Moreover, while the financial impact of the pandemic has been and will be felt differently between countries,¹⁰⁰⁷ each and every jurisdiction discussed above had to consider the additional costs involved in implementing the necessary Covid-19 prevention mechanisms and hygiene standards within the school environment once schools began to reopen.¹⁰⁰⁸

Bearing in mind the financial and budgetary implications, it is important to note that resource availability had already been identified as an issue in South Africa prior to the Covid-19 pandemic.¹⁰⁰⁹ Moreover, resource availability whether it linked to physical resources, digital technology or teacher availability was also identified as an issue in the USA, the UK, Italy and Nigeria.¹⁰¹⁰ In South Africa specifically, if the government could not address pre-existing resource issues in education due to funding deficits, it is unlikely that room would exist in the budget to cater for the provision of face masks and/or hand sanitiser as indicated in relevant policy and guidance documents. Availability issues are thus prevalent in respect of education

¹⁰⁰⁴ Amin & Mahabeer (2021) *Springer* 498.

¹⁰⁰⁵ 498.

¹⁰⁰⁶ UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 9.

¹⁰⁰⁷ 10.

¹⁰⁰⁸ 9.

¹⁰⁰⁹ See chapter 3 for information pertaining to the South African situation.

¹⁰¹⁰ Refer to chapters 4-7 for jurisdiction specific information.

related resources, and this has the potential to hinder a child from attaining a quality education during the Covid-19 pandemic. The fact remains that where a shortage of resources is prevalent, teachers and learners alike are unable to perform their respective duties, namely to teach and to learn.

Moreover, teacher availability was also identified as an issue once schools reopened across the jurisdictions discussed above. As previously mentioned, the majority of the nations had already faced challenges in respect of teacher availability prior to the Covid-19 pandemic and due to the budgetary implications of Covid-19, schools were not only forced to let go of teachers but had no room in the budget to employ more teachers, even where it was required, for example where classes were split into smaller groups or where rotation systems were implemented. Furthermore it must be noted that certain teachers in each jurisdiction elected not to return to school due to their own health concerns, and this in turn impacted the availability of teachers within the school environment. Unlike in South Africa, the USA, the UK and Italy, teachers in Nigeria were and are trained in Psychosocial Support Strategies in order to support traumatized students.¹⁰¹¹ In line with this, one should note that school closures impacted children's mental health and caused anxiety and depression among students in each jurisdiction.¹⁰¹² There were and still are limited resources in schools to deal with mental health issues, and the anxiety and depression caused as a direct result of the Covid-19 pandemic has the potential to cause harm to children and further hinder them from obtaining an education once they returned to the school environment. As such the availability of qualified and well trained teachers which is crucial during the reopening of schools can be said to have been lacking during the Covid-19 pandemic.

8 2 4 4 Conclusion

In terms of availability, in order to ensure a child's right to education, each jurisdiction must ensure that children have access to the resources they require in order to facilitate their learning. Resource availability is thus a crucial facet of realising a child's right to education. Moreover, the availability of teachers is important in order for learners to attain a quality education, and during the Covid-19 related school years, not only were teachers in short supply, but of the teachers who were available, a

¹⁰¹¹ See chapter 7 for more information.

¹⁰¹² Zweig *et al* *Health and Human Rights Journal* 177.

number of them were unprepared and untrained to transition to distance teaching and for dealing with learners stress and anxiety when schools reopened. Nations were already behind in terms of achieving Sustainable Development Goal 4, and due to the Covid-19 pandemic and the inequalities and disparities which exist and have arisen due to the lack of resources and adequate teachers, the progress toward Sustainable Development Goal 4 has been further affected.¹⁰¹³ This is true in South Africa as well as the four other jurisdictions discussed.

8 2 5 The acceptability of education during the Covid-19 pandemic

8 2 5 1 *Introduction*

The concept of acceptability was briefly discussed in chapter 2 of this thesis and essentially relates to the form and substance of education. For the purpose of this research, when speaking about acceptability the focus will be on whether education methods and the curricula in each jurisdiction was of a good quality during the Covid-19 pandemic. The concept of acceptability will only be dealt with in limited detail herein as the long term impact of the Covid-19 pandemic on the form and substance of education will only truly be determined in the years to come once the knowledge attainment of learners during the Covid-19 pandemic and the success of applicable recovery plans are researched in greater detail.

8 2 5 2 *The acceptability of education during the Covid-19 pandemic*

A loss in terms of instruction time occurred during the Covid-19 affected school years, and this subsequently negatively impacted the acceptability of education, specifically in South Africa.¹⁰¹⁴ As such, every nation had to consider how to bridge the gaps in education created by the Covid-19 pandemic when developing and implementing their respective recovery plans. This meant that jurisdiction had to consider whether the curriculum utilised in their respective country had to be reduced in order for learners to complete their academic year or whether tutoring programmes should be provided for all learners in order to facilitate additional learning.

On the one hand, jurisdictions such as the USA and the UK who developed and funded education recovery projects which include tutoring programmes to address the

¹⁰¹³ UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 10.

¹⁰¹⁴ See Chapters 3-7. See also Amin & Mahabeer (2021) *Springer* 490.

gaps in education due to the Covid-19 pandemic.¹⁰¹⁵ On the other hand, a jurisdiction such as South Africa who implemented the 2020 education recovery plan which essentially trimmed and re-organised the curriculum of all grades in order to allow learners to complete their 2020 academic year.¹⁰¹⁶ Whether this legal response can be said to have ensured a quality education is questionable, as important learning aspects may have been trimmed from the curriculum in order to ensure learners finished their academic year on time. Moreover, while the Department of Basic Education in South Africa recommended that the discarded content from the 2020 recovery plan be transferred into the following years program,¹⁰¹⁷ the feasibility of this remains an issues as the 2021 curriculum, which was expected to return to normal and include all the original content, would essentially be expanded without a concurrent increase in instruction time.¹⁰¹⁸ During the Covid-19 years, in order for learners to complete their academic year, schools will promote learners to higher grade even though they have less knowledge and fewer skills than that which is expected.¹⁰¹⁹ The long term effects of having trimmed the 2020 curriculum and having promoted learners to grade they may not be prepared for will have a profound impact on learners and their education and will present challenges in the future. Moreover, it is important to note that the damage of the 2020 recovery plan will only be realised once further quantitative research is conducted in the years to follow in respect of learners and their educational outcomes.

Moreover in relation to quality education methods, it is once again crucial to look at distance learning and teaching modalities which each nation attempted to introduce during the Covid-19 related school closures. While it is clear based on the discussions above that distance learning methods were largely unsuccessful during the Covid-19 related school closures, it does not mean that there is no value in implementing distance learning methods in the future as it has the potential to be a successful alternative to in-person learning. It is a state's responsibility to provide conditions and methods for optimal learning within their country,¹⁰²⁰ and while distance learning

¹⁰¹⁵ See Chapter 3, 4 and 5.

¹⁰¹⁶ See Chapter 3 for more information.

¹⁰¹⁷ Amin & Mahabeer (2021) *Springer* 492.

¹⁰¹⁸ 492.

¹⁰¹⁹ 493.

¹⁰²⁰ Amin & Mahabeer (2021) *Springer* 490.

methods may not be permanently required, they can be valuable should a crisis similar to the Covid-19 pandemic occur in the future.

8 2 5 3 Conclusion

Nations ultimately attempted to ensure that learners were able to complete their academic years during the Covid-19 pandemic through whatever means necessary. While certain jurisdictions attempted to provide learners with additional tutoring programmes to ensure that no gaps in their education occurred, South Africa elected to trim the curriculum. Both mechanisms ultimately impacted the acceptability of education and whether these changes will result in permanent changes occurring to the form and substance of education is uncertain, however it cannot be denied that the Covid-19 pandemic has created the opportunity for curriculum makers to reform and recraft the curricula of each respective jurisdiction to ensure greater sustainability and relevance. In relation thereto, it can be said that the Covid-19 pandemic highlighted the value of effective and quality distance learning methods, and every nation should consider developing and implementing distance learning modalities in the future which may in turn impact the acceptability of education in unprecedented ways.

8 3 Did one country better ensure a child's right to education during the Covid-19 pandemic?

The Covid-19 pandemic and its subsequent challenges differed from one country to another, and ultimately, each jurisdiction responded in a manner they deemed fit and proper to deal with their individualised needs. Though certain principles and legal responses remained the same between countries, it is admitted that there is no uniform solution to the challenges experienced in education as a result of the Covid-19 pandemic. As such, any and all decision-making and policy responses in relation to the realisation of a child's right to education during the Covid-19 pandemic not only required a balancing exercise be carried out,¹⁰²¹ but required that the needs of that specific country be prioritised.¹⁰²² Essentially this means that every decision involved in safeguarding a child's right to education during the Covid-19 pandemic had to be

¹⁰²¹ Nolan (2020) *Independent SAGE* 3.

¹⁰²² Migone (2020) *Policy Design and Practice* 260.

made within the correct social context,¹⁰²³ and had to be weighed up against other human rights, including but not limited to the right to life and the right to health.

Based on the above, despite certain consequences and legal responses being the same, it is argued that one cannot determine whether one nation better ensured a child's right to education during the Covid-19 pandemic at present as each jurisdiction experienced its own set of challenges. Every legal response implemented during the Covid-19 pandemic therefore had to be viewed within the specific social context of the nation which developed the legal response.¹⁰²⁴ A successful mechanism from one jurisdiction may not necessarily be successful in another.

Moreover, bearing in mind the unequal wealth distribution in and amongst learners within a nation, it becomes clear that a one-size fits all recovery plan may not be successful as it would further intensify inequality within the jurisdiction.¹⁰²⁵ It can thus be said that a recovery plan which attempts to treat all learners as equal despite their varying socio-economic circumstances, resource availability and access to quality education, would fail in achieving its objective. The legal responses which not only provided for the realisation of a child's right to education, but catered for the marginalized and vulnerable groups within society, should be construed as the legal responses which best ensured a child's right to education during the Covid-19 pandemic. While certain legal responses may have been more valuable, at the time of conducting this research, it is difficult to determine which mechanisms were more successful in ensuring a quality education for all children during the Covid-19 pandemic until further quantitative studies are conducted in terms of children and their respective educational achievements during the Covid-19 affected school years.

8 4 Conclusion

As indicated in this chapter, it can be said that the Covid-19 related school closures were justifiable in terms of human rights law.¹⁰²⁶ The fact however remains, that restrictions such as these should be kept to an absolute minimum, should only be imposed when necessary and should be proportionate to the issue at hand.¹⁰²⁷ Each

¹⁰²³ E Serfontein & E De Waal "Advancing student research in education law" (2014) 28(5) *SAJHE* 1592 1599.

¹⁰²⁴ 1599.

¹⁰²⁵ Amin & Mahabeer (2021) *Springer* 498.

¹⁰²⁶ Nolan (2020) *Independent SAGE* 2.

¹⁰²⁷ 2.

jurisdiction discussed and compared above ultimately realised that the Covid-19 related school closures were not a sustainable solution and attempted to ensure and safeguard a child's right to education through other mechanisms and means, showing their commitment to education through their legal responses and policy-making.

Based on the above information, it can be said that each jurisdiction attempted to adapt the education system to suit the Covid-19 needs of society, however certain issues in relation to the availability and acceptability of education as well as the pre-existing issues in education, with specific reference to South Africa, hindered the true realisation of a child's right to education during the Covid-19 pandemic. This can be contributed to the fact that majority of the jurisdictions discussed above engaged in short-term crisis management policy-making during this period,¹⁰²⁸ which failed to cater for long-term solutions and did not consider the long-term effects these short-term crisis management mechanisms may have on learners and their future educational prospects.

Each jurisdiction ultimately realised that hindering a child's right to education and preventing their access thereto, was not in the best interests of the children as well as the nation as a whole. The concluding chapter will therefore answer the research questions and identify whether any specific legal response adopted in another jurisdiction could be adapted to suit the needs of South Africa. In addition, the chapter below shall provide certain recommendations which could improve the South African situation and contribute toward the realisation of a child's right to education during the Covid-19 pandemic.

¹⁰²⁸ Mitescu-Manea *et al* (2021) *European Educational Research Journal* 559.

Chapter 9: Conclusion and Recommendations

9 1 Introduction

While every jurisdiction discussed above faced similar challenges as a result of the Covid-19 pandemic, and certain responses were and are similar between each jurisdiction, the development and implementation of each jurisdiction's legal response and the challenges experienced in relation thereto varied due to the circumstances and resource availability of each jurisdiction. As such, each nation generally avoided applying a one-size-fits all approach to education, and no unified response was identified and/or regulated on a global level to protect a child's right to education during the Covid-19 pandemic.¹⁰²⁹

The aim of this research is to answer the research questions set out in chapter 1 of this thesis and to determine whether the stated hypotheses are correct. In addition, thereto, this research aims to identify and recommend solutions which could be successfully implemented in South Africa in respect of protecting and ensuring a child's right to education. Based on the above discussion, this chapter attempts to answer the research questions set out in this thesis. Furthermore, this chapter aims to identify whether any specific legal responses implemented in the jurisdictions discussed above could improve the South African situation. It is crucial to understand that these recommendations are made with the aim to address the problems which arose, and which continue to arise from the Covid-19 pandemic while attempting to further strengthen the country's education system. In addition, thereto, these recommendations are made with the intention to assist the South Africa not only for the Covid-19 pandemic and its effects on education, but to prepare the nation for future emergencies which may arise and have an impact on education as well.

9 2 Did the South African government comply with their international, regional and domestic obligations when developing their legal response?

Chapter 3 of this these confirms that South Africa has international, regional and domestic obligations in respect of a child's right to education and that the right is

¹⁰²⁹ Mitescu-Manea *et al* (2021) *European Educational Research Journal* 557.

entrenched in South Africa law.¹⁰³⁰ Accordingly, these obligations as well as the child-centric approach in interpreting relevant socio-economic rights within the country, prove that the government's actions should be aimed toward protecting and ensuring a child's right to basic education in South Africa. As such, this thesis not only acknowledges the fundamental and constitutional importance of a child's right to basic education in South Africa,¹⁰³¹ but recognises that on paper, the legislative, regulatory and policy documents which have been developed in respect of a child's right to education seem to be sufficient within South Africa.¹⁰³² Moreover, according to certain provisions in respect of South Africa's legal theoretical framework, it can be assumed that a learner attending school is of paramount importance and that it should be viewed as a priority of the government together with parents and/or guardians.

While South Africa has sufficiently provided for a child's right to education in terms of their legal theoretical framework, the practical implementation thereof has been and continues to be severely lacking, as inequalities among learners and between public and private schools which were prevalent prior to the Covid-19 pandemic,¹⁰³³ remain prevalent. These ongoing inequalities continue to plague South Africa, and they were further accentuated during the Covid-19 pandemic where South Africa experienced grave consequences in terms of health and education.

While the nation attempted to balance the right to health and the right to education, the right to health was at times during the Covid-19 pandemic prioritised over the right to education. In terms of their legal theoretical response, one cannot doubt that South Africa introduced a wide array of legislation, policy and regulatory documents to reduce the spread of the disease.¹⁰³⁴ On the one hand, certain responses, namely those relating to the national lockdown measures and the subsequent Covid-19 related school closures, while protecting the right to health, limited, hindered and prevented a child's right to education from being realised. On the other hand, other responses, namely those relating to the phased reopening of schools across the jurisdiction and those relating to the completion of the Covid-19 academic years, attempted to protect and ensure a child's right to education. As such, it can be said to that on paper, South

¹⁰³⁰ See chapter 3 for more detail on South Africa's education related obligations.

¹⁰³¹ Section 29 of the Constitution.

¹⁰³² See chapter 3 for more detail on the applicable legislative, regulatory and policy documents.

¹⁰³³ Refer to chapter 3 for information on the state of the education system prior to the Covid-19 pandemic.

¹⁰³⁴ See chapter 3 for South Africa's legal response to the Covid-19 pandemic.

Africa responded with an all-encompassing legal theoretical response to the Covid-19 pandemic.

Practically however, the jurisdiction failed to at all times protect a child's right to education as the practical implementation of said legal responses was lacking.¹⁰³⁵ Pre-existing challenges in education were brought to the forefront during the Covid-19 pandemic, and this contributed toward practical implementation issues in relation to the implementation of distance learning mechanisms as well as the safe reopening of schools across the nation. Certain poorer schools in South Africa faced challenges in practically implementing certain legal responses to the Covid-19 pandemic in respect of the right to education and it was largely due to insufficient funding, resources and/or infrastructure issues resulting from a lack of funds. South Africa's obligations in terms of the right to education were therefore not adhered to at all material times during the Covid-19 pandemic and the right to education was negatively impacted during this time with learning experiencing a prominent loss in instruction time.

9 3 How did South Africa's legal responses compare to the other jurisdictions discussed in this thesis?

The way this thesis has been set out, it would seem that responses were similar in and amongst the jurisdictions discussed, however, while each nation essentially responded by closing and then reopening schools within their respective jurisdiction during the Covid-19 affected school years, the manner in which each nation rolled out these legal responses differed as each respective jurisdiction had to consider their respective needs.¹⁰³⁶ As such, the legislation, policies and regulations which were developed and implemented in other countries during the Covid-19 pandemic cannot be deemed to have been more effective in realising and protecting a child's right to education compared to those that were developed and implemented in South Africa.¹⁰³⁷ What is however important to realise is that each and every jurisdiction through their legal responses emphasised the importance of utilising layered prevention strategies to avoid COVID-19 transmission in schools.¹⁰³⁸

¹⁰³⁵ See chapter 3 for more detail on the topic.

¹⁰³⁶ See chapters 3-7 of this thesis for jurisdiction specific information.

¹⁰³⁷ See chapter 8 of this thesis.

¹⁰³⁸ See chapters 3-7 of this thesis for jurisdiction specific information.

The Covid-19 pandemic ultimately negatively impacted a child's right to education globally during the 2020 and the 2021 academic years. In line with global recommendations at the time, nations were persuaded to close schools within their respective jurisdiction.¹⁰³⁹ These school closures and the shift from in-person education to distance learning during the Covid-19 related school closures across all jurisdictions impacted all learners access to education, in that it limited to the physical accessibility of learning facilities, teachers and resources alike, and further prevented learners access to education related social services.¹⁰⁴⁰ While school closures were deemed a suitable response for all nations to prevent and minimise the health related effects of the Covid-19 pandemic, learners suffered greatly as a result, and learners in South Africa not only experienced a significant loss in instruction time, but the learner dropout rate increased while the learner enrolment rate decreased.

Moreover, while attempts were made in writing to cater for remote/distance learning and teaching, practical implementation challenges arose across all jurisdictions, specifically in relation to marginalised and underprivileged learners who were not afforded the same level of access to the necessary platforms, equipment and/or resources to facilitate and support learning during this time.¹⁰⁴¹ As such, a loss in terms of learning and learning time thus occurred for the many learners, specifically in South Africa where the Covid-19 related school closures were predominantly recognised as school holidays. The closing of schools as a legal response to Covid-19, while prominent in all nations, cannot be viewed to have protected the right to education of all children equally during the 2020 and 2021 academic years.

The jurisdictions discussed above predominantly engaged in short-term crisis management policy-making during the Covid-19 pandemic and failed to cater for and consider the potential long-term effects these short-term crisis management mechanisms may have on learners and their future educational prospects.¹⁰⁴² South Africa ultimately face their own challenges in respect of education, and these challenges vary from those experienced in and among other jurisdictions. As such, the legal responses and mechanisms which were successfully implemented in other nations during the Covid-19 pandemic would not necessarily resolve the challenges in

¹⁰³⁹ Refer to chapter 2 as well as chapters 3-7 of this thesis.

¹⁰⁴⁰ See chapters 3-7 of this thesis.

¹⁰⁴¹ Refer to chapters 3-7 of this thesis for more information.

¹⁰⁴² See chapters 3-7 of this thesis.

education experienced in South Africa regardless of whether they can be deemed as pre-existing challenges or whether they arose during the Covid-19 pandemic.

9 4 Recommendations: How can the South African situation be improved?

9 4 1 Introduction

Through Sustainable Development Goal 4 the global community showed their commitment to realising the right to quality education for all children and adolescents.¹⁰⁴³ It is evident from the discussion in chapter 3 of this thesis that South Africa's legal theoretical response was sufficient as the nation attempted to protect a child's right to education through numerous legislative, policy and regulatory provisions. As depicted in chapter 3, due to pre-existing challenges in education which were brought to the forefront during Covid-19, a lack of funding and the varying socio-economic backgrounds of learners, the practical implementation of said legal responses was problematic. As such, this chapter attempts to make recommendations based on the content hereabove that could improve the South African situation. In order to make recommendations, however, it is important to determine whether said legal responses would ensure and protect a child's right to education in South Africa. In addition thereto, when looking at mechanisms which have been implemented elsewhere, one should bear in mind the authenticity of the source.¹⁰⁴⁴

9 4 2 Policy Developments

Every jurisdiction discussed above came to the realisation that they had to address the accessibility issues which arose during the Covid-19 related school closures, and that the physical reopening of schools was the only way to protect and ensure the right to education for all learners from all backgrounds.¹⁰⁴⁵ The prolonged school closures had and continue to have the potential to lead to severe learning loss, to increase the learner dropout rate and to exacerbate learner inequalities.¹⁰⁴⁶ As such, in response thereto, each jurisdiction developed policies, regulations and/or guidance documents

¹⁰⁴³ Save the Children *Save our Education* (2020) 75.

¹⁰⁴⁴ Serfontein & De Waal (2014) *SAJHE* 1596.

¹⁰⁴⁵ See chapters 3-7 *supra*.

¹⁰⁴⁶ UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 7.

in order to provide for the safe reopening of schools.¹⁰⁴⁷ These legal responses focused on managing the reopening of schools and reintegrating students into the school setting safely in order to allow for the continuity in learning.¹⁰⁴⁸ A crucial aspect of policy development during the Covid-19 pandemic, specifically in South Africa, is to include a social science lens when developing, drafting and implementing any legislative, policy or regulatory documents, as society is a system and all aspects are interconnected and should technically speak to each other.¹⁰⁴⁹ As such when developing education related policies, one must consider all aspects of society as socio-economic conditions of the society, the learner and the learners family have the potential to contribute toward a learner attaining a quality education.

Moreover, it crucial to note that in order to create this Covid-19 safe school environment, the prevention mechanisms developed in legislative, policy or regulatory documents, should be applied in tandem in order to create a multilevel system where one prevention mechanism can cater for the shortfalls of another. Legislative, policy and/or regulatory documents should make provision for this multifaceted approach, as despite existing challenges, the government will be able to protect a child's right to health, limit the spread of the disease and contribute toward realising a child's right to education in South Africa during the Covid-19 pandemic.

As time passes, the goal should be to adapt these legal responses to cater for long term educational needs as opposed to only Covid-19 related educational needs. The policies, regulations and/or guidance documents should be further amended and implemented with the intention of creating an environment capable of handling future health crises, improving education facilities, school infrastructure and the general hygiene and sanitation of all schools, specifically those in the more rural areas of South Africa. In line with above, schools should also put specific health and sanitary measures in place and develop guidelines and protocols to inform students and teachers alike of specific hygiene practices, as this could limit and prevent not only

¹⁰⁴⁷ See chapters 3-7 for information on creating a Covid-19 safe school environment and mitigating Covid-19 in the school environment & World Bank Group (Education) *The Covid-19 Pandemic* (2020) 27.

¹⁰⁴⁸ World Bank Group (Education) *The Covid-19 Pandemic* (2020) 23 & United Nations *Policy Brief* (2020) 19-20.

¹⁰⁴⁹ T Madonsela "More eyes on Covid-19: A legal perspective – The unforeseen social impacts of regulatory interventions" (2020) 116(7/8) *S Afr J Sci* 1 1.

spread of Covid-19 in the school environment, but other transmittable illnesses as well.¹⁰⁵⁰

Moreover, each jurisdiction should incorporate general health prevention and crisis management policies and/or regulations with specific reference to the education sector,¹⁰⁵¹ which should form part of the South Africa national legislative framework. Regardless of the crises South Africa may face, schools should remain physically accessible to all learners, regardless of their socio-economic background, as the potential damage from prolonged school closures will not only negatively impact the future and the development of South African children but has the potential to negatively impact the future and the development of the nation as a whole. These health prevention and crisis management policies and/or regulations should provide guidelines and mechanisms which ensure school and teacher preparedness to deal with not only the Covid-19 pandemic, but any future crisis, health or otherwise, in order to mitigate their impact on a child's right to education from the outset.¹⁰⁵²

9 4 3 School and Teacher Preparedness

As indicated above, school and teacher preparedness is a crucial concept. Teacher preparedness was an issue during the Covid-19 affected school years as the transition from in person teaching to online teaching proved to be challenging for many teachers as they struggled to transition to online learning quickly and effectively.¹⁰⁵³ At present, there are vast differences between teaching in person and teaching online, and in order to successfully implement online learning and teaching of an acceptable quality, it is expected that teachers be adequately trained and supported.¹⁰⁵⁴ In South Africa, there are teachers who do not have access to sufficient broadband and technology within their home environments, and they in turn will be unable to support learners in online learning.¹⁰⁵⁵ If teachers are underqualified, untrained and lack the necessary resources to equip them for online teaching, effective online learning will not become

¹⁰⁵⁰ UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 22.

¹⁰⁵¹ 11.

¹⁰⁵² 11.

¹⁰⁵³ 7. See also World Bank Group Education *The Covid-19 Pandemic* (2020) 30-31 & United Nations *Policy Brief* (2020) 14.

¹⁰⁵⁴ UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 7.

¹⁰⁵⁵ 7.

a reality within the country. Teacher and staff preparedness is thus central in dealing with the Covid-19 pandemic as well as any future emergency which may arise.¹⁰⁵⁶

Moreover, in times of crises, teachers should be able to offer not only academic support, but psychosocial support as well, this however will require additional training wherein teachers are taught how to deal with the after-effects learners may experience as a result of crises such as the Covid-19 pandemic.¹⁰⁵⁷ Where learners suffer psychological or mental health issues, their learning potential may be severely hindered. As such, the onus should rest on schools to either train their teachers, or to provide learners with access to professionals or to social and emotional learning programs and/or classes, to assist learners in dealing with anxieties, stress, and self-esteem issues.¹⁰⁵⁸

Furthermore in terms of school preparedness, the implementation of relevant policies, regulations and/or guidance documents is pivotal. The status of school infrastructure including the availability of adequate space and resources,¹⁰⁵⁹ is crucial in ensuring that schools remain open and that they are prepared for any future health and/or other crisis which may arise. As such, in order to handle any future crises, schools should be continually cleaned and disinfected, should have sufficient health and sanitary measure in place and should have adequate sanitary facilities available for all learners, teachers and staff.¹⁰⁶⁰ It can thus be said that only through addressing the hurdles identified hereabove, can learners improve on their academic achievements and outcomes during and post Covid-19.¹⁰⁶¹

9 4 4 Educational Recovery

In order to rectify and address the acceptability issues in education as identified and discussed in chapter 8 of this thesis, and to ensure that learners do not fall further behind in their learning, South Africa should increase the education budget, or implement an education recovery budget, wherefrom a recovery package similar to the relief package implemented in the USA or the catch-up package implemented in

¹⁰⁵⁶ United Nations *Policy Brief* (2020) 23.

¹⁰⁵⁷ UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 22.

¹⁰⁵⁸ World Bank Group (Education) *The Covid-19 Pandemic* (2020) 26.

¹⁰⁵⁹ UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 23.

¹⁰⁶⁰ 22.

¹⁰⁶¹ World Bank Group (Education) *The Covid-19 Pandemic* (2020) 26.

the UK can be introduced.¹⁰⁶² South Africa should thus not only implement remedial programs which mitigate learning loss and prevent further inequalities in learning,¹⁰⁶³ but should implement policies which cater for improved and accelerated learning during the Covid-19 pandemic as well as in a post Covid-19 world.¹⁰⁶⁴

Moreover, attempts should be made to address the increased learner dropout rate and the decreased enrolment rate resulting from the Covid-19 pandemic.¹⁰⁶⁵ The World Bank has suggested that both financial and nonfinancial incentives be deployed in order to maximise reenrolment and attendance during and post Covid-19.¹⁰⁶⁶ Suggested incentives include but are not limited to the provision of feeding programs, which fortunately already exists in South Africa as well as the provision of school uniforms, the provision of educational resources and/or the payment of school fees,¹⁰⁶⁷ which could be considered and potentially implemented in South Africa. Furthermore, each jurisdiction should protect and enhance education financing in order to build back and improve the education system following the Covid-19 related school closures and the phased reopening of schools across the globe.¹⁰⁶⁸ South Africa had already been suffering with education funding pre-Covid-19, so the nation would have to re-evaluate their funding systems and mechanisms in order to make further financial provisions in respect of the public education system within the country.

Finally, in order to address the deepening educational crisis that has resulted from the Covid-19 pandemic, the global community, governments and donors alike are called to invest in education and to commit to funding education recovery and action plans.¹⁰⁶⁹ While education funding has been and remains an issue in South Africa, by investing in education recovery, each jurisdiction is not only protecting children and their right to education but is in fact investing in the future of the nation as education plays a crucial role in building an inclusive society.¹⁰⁷⁰ As such, the education budget should be increased in order to improve the situation for learners in South Africa who

¹⁰⁶² See chapters 4 & 5 for more information on the packages.

¹⁰⁶³ World Bank Group (Education) *The Covid-19 Pandemic* (2020) 28.

¹⁰⁶⁴ 32.

¹⁰⁶⁵ United Nations *Policy Brief* (2020) 23. See also Save the Children *Save our Education* (2020) 87.

¹⁰⁶⁶ United Nations *Policy Brief* (2020) 4.

¹⁰⁶⁷ 24.

¹⁰⁶⁸ World Bank Group (Education) *The Covid-19 Pandemic* (2020) 34-35 & United Nations *Policy Brief* (2020) 20.

¹⁰⁶⁹ Save the Children *Save our Education* (2020) 76.

¹⁰⁷⁰ Council of Europe *Making the Right to Education a Reality in times of Covid-19* (2020) 25.

require further resources and assistance in order to address the gaps in learning which were and are present for numerous reasons pre and post Covid-19.

9 4 5 Overall improvements to the education system

Adaptability is a major factor in ensuring and protecting a child's right to education, and the Covid-19 pandemic proved that there is a need to adapt learning modalities so that continuous learning can occur for all learners, regardless of any external factors. Despite the challenges which arose during the Covid-19 pandemic, the situation offered each jurisdiction the opportunity to rethink the overall purpose, role, content and delivery of education in the long term.¹⁰⁷¹ In line with aforementioned statement, researchers have also identified that the Covid-19 pandemic has provided each jurisdiction with the opportunity to focus their efforts on developing policies for educational inclusion.¹⁰⁷²

In addition to addressing pre-existing educational issues, inclusive education should be a priority in responding to the educational challenges which have arisen as a result of the Covid-19 pandemic.¹⁰⁷³ It is however crucial to understand that inclusive education should not only refer to the physical and financial access of schools, but should be part and parcel of accessing quality online education at all levels for all learners, specifically learners with disabilities and those from disadvantaged backgrounds.¹⁰⁷⁴

The Covid-19 pandemic and the attempted transition from physical in person learning to remote learning brought about profound equity concerns in all nations,¹⁰⁷⁵ South Africa included. Ultimately, it can be stated that the move to online learning, specifically during the Covid-19 pandemic, disproportionately benefitted learners, as the more advantaged learners, namely richer learners, high-performing learners or learners from highly educated families, experienced less barriers in online learning

¹⁰⁷¹ UNESCO *Covid-19 Education Response: Preparing the reopening of schools – Resource Paper* (2020) 27.

¹⁰⁷² LML Lorente, AA Arabal & C Pulido-Montes "The Right to Education and ICT during Covid-19: An International Perspective" (2020) 12(9091) *Sustainability* 1 4.

¹⁰⁷³ Council of Europe *Making the Right to Education a Reality in times of Covid-19* (2020) 25.

¹⁰⁷⁴ United Nations *Policy Brief* (2020) 14.

¹⁰⁷⁵ World Bank *Rapid response briefing note: Remote Learning and Covid-19 outbreak* (16 March 2020) 2.

than their counterparts who either had difficulty accessing the online learning platforms or struggled to comprehend said platforms.¹⁰⁷⁶

Online learning platforms can be highly valuable in ensuring a child's right to education, specifically during a time of crisis such as the Covid-19 pandemic, however, the success thereof hangs on addressing pre-existing inequalities. As such, inclusive access to education should be a central factor in addressing educational challenges which have either arisen due to the Covid-19 pandemic or been highlighted as a result thereof.¹⁰⁷⁷

Each jurisdiction should ultimately focus on equity and inclusion in building back following the Covid-19 related school closures.¹⁰⁷⁸ Until South Africa addresses the pre-existing disparities in resource availability,¹⁰⁷⁹ and addresses issues pertaining to vulnerable learners, in-person learning let alone online learning will not achieve its intended results. Bearing this in mind, I am of the view that addressing pre-existing inequalities in education should be prioritised above the development of online learning platforms, and any additional funding should instead go directly toward addressing pre-existing inequalities in education and education related resources.

9 5 Conclusion

While the true impact of the Covid-19 pandemic on a child's education may only be realised once further quantitative studies are conducted in respect of learner dropout rates, learner pass rates and the educational development and attainment of children during the Covid-19 affected school years, it can be said that the Covid-19 pandemic had a profound impact on a child's right to education within South Africa. The Covid-19 pandemic and the ways in which each jurisdiction was forced to respond had and shall continue to have severe impacts in terms of the existing and new forms of inequalities in relation to children and their right to education.

Since every nation has its own distinct education system, and their resource availability cannot be equated, a one size fits all approach cannot be considered for all jurisdictions. Moreover, a one size fits all approach cannot be successful in South Africa, as the country has experienced and continues to experience not only

¹⁰⁷⁶ World Bank *Rapid response briefing note: Remote Learning and Covid-19 outbreak* (16 March 2020) 2-3.

¹⁰⁷⁷ 25.

¹⁰⁷⁸ United Nations *Policy Brief* (2020) 22.

¹⁰⁷⁹ See chapter 3 of this thesis for more detail regarding pre-existing disparities.

educational issues but inclusivity issues as well. Developing appropriate and quality education platforms, be it in-person or online, requires access to resources, the development and implementation of stronger policies and improved training and competences of education professionals and learners alike.¹⁰⁸⁰ Moreover, due to the poor socio-economic status of a large portion of the population, it is clear that South Africa was vulnerable to the effects of Covid-19 and that they remain vulnerable should similar disasters arise.

The closure of schools across each nation should always be viewed as a last resort and should only be imposed when necessary and should be proportionate to the issue at hand so that further interruptions to education can be prevented and avoided. The goal for the South African government should therefore be to ensure that no further educational disruptions occur, not only during the Covid-19 pandemic but any similar crisis in the future. As such, the onus is on the South African government to address not only the issues which arose during the Covid-19 pandemic but more importantly, the pre-existing issues which were exacerbated by the pandemic. Inclusive and accessible education thus remains a concern in South Africa, and only once these issues are addressed in their entirety can we say that a child's right to education has been protected and ensured in its entirety.

Moreover, education rights will only be realised in situations where state parties not only embrace them in law and policy but allocate sufficient expenditure thereto. The Covid-19 pandemic taught us how important it is to protect a child's right to education in all circumstances and provides policy makers with the opportunity to re-evaluate and recraft legislation, policies, and regulations in order to reform the education system,¹⁰⁸¹ and cater for education during times of crisis. In South Africa, prior to the Covid-19 pandemic, budgetary allocations for basic education were minimal at best, and without a clear definition of what basic education entails, the duties of the State in respect of the right to basic education are ambiguous and the level and quality of education which should be provided is not easily determinable. As such, in order to avoid short-term crisis management, the development and implementation of sufficient and all-encompassing legislation, policies, and regulations which cater for the right to education at all times, including during a time of crisis must be prioritised.

¹⁰⁸⁰ Council of Europe *Making the Right to Education a Reality in times of Covid-19* (2020) 25.

¹⁰⁸¹ Amin & Mahabeer (2021) *Springer* 490 & 497-498.

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