

# The Scope and Content of Section 75(1)(a) of the Zimbabwean Constitution: An International Law Approach

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## Abstract

Despite the recent enactment of the Zimbabwean Constitution which provides for the right to basic education, complaints, reminiscent of a failed basic education system, have marred the education system in Zimbabwe. Notwithstanding glaring violations of the right to basic education by the government, no person has taken the government to court for failure to comply with its section 75(1)(a) constitutional obligations, and neither has the government conceded any failures or wrongdoings. Two ultimate questions arise: Does the state know what compliance with section 75(1)(a) entails? And do the citizens know the scope and content of their rights as provided for by section 75(1)(a) of the Constitution of Zimbabwe? Whilst it is progressive that the Education Act of Zimbabwe as amended in 2020 has addressed some aspects relating to section 75(1)(a) of the Constitution, it has still not provided an international law compliant scope and content of the right to basic education neither have any clarifications been provided by the courts. Using an international law approach, this article suggests what the scope and content of section 75(1)(a) might be.

**Keywords:** Basic education; Basic state-funded education; Education Act; Constitution of Zimbabwe



## Introduction

The provision of the right to basic education by section 75 of the Constitution of Zimbabwe (Constitution)<sup>1</sup> is a testament of the country's acknowledgment of the social, economic and political benefits which accrue to an educated person and from an educated populace. Of particular importance to this article is section 75(1)(a) of the Zimbabwean Constitution which provides that 'every citizen and permanent resident of Zimbabwe has a right to a basic state funded education.'<sup>2</sup> This constitutional provision is in line with the international ideal to make basic education universally accessible.<sup>3</sup> Section 75(1)(a) of the Zimbabwean Constitution is read together with the Education Act of Zimbabwe (the Education Act)<sup>4</sup> as amended by the Education Amendment Act (Amendment Act)<sup>5</sup> which provides for matters that are connected to or incidental to section 75(1)(a) of the Constitution.<sup>6</sup> The Act provides that every child has the right to an education<sup>7</sup> and it regulates the provisions of education in government, non-governmental schools and colleges.<sup>8</sup> The Act now defines basic education as 'education from early childhood education up to the fourth form.'<sup>9</sup> However, despite the enactment of the Constitution and the follow-up amendment of the Education Act, clarifications by the courts and within academia relating to an international law compliant scope and content of the right to basic education are still lacking and necessary. The absence of court clarifications and academic literature clarifying the scope and content of the right to basic education might be a reason why almost a decade after the enactment of the Constitution, Zimbabwean citizens have neither engaged in serious advocacy nor vigorous basic education litigation to force the government to comply with its basic education obligations.

Following an international law approach, this discussion seeks to delineate government's obligations in relation to its section 75(1)(a) obligations.<sup>10</sup> International law will play a key role in the interpretation of obligations imposed by section

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1 Constitution of Zimbabwe Amendment (No 20) Act 2013.

2 *ibid*, s 75(1)(a).

'(1) Every citizen and permanent resident of Zimbabwe has a right to—

(a) a basic State-funded education, including adult basic education; and

(b) further education, which the State, through reasonable legislative and other measures, must make progressively available and accessible.'

3 UNESCO World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs, 1990 (World Declaration).

4 Education Act [Chapter 25:04] 1987.

5 Education Amendment Act No 15 of 2020.

6 *ibid*, preamble.

7 Education Act (n 4) s 4(1).

8 *ibid* long title.

9 *ibid* s 2.

10 *Obediah Makoni v Commissioner of Prisons* [2015] 12 CCZ 6.

75(1)(a).<sup>11</sup> The important position of international law in determining the scope and content of human rights embodied by the Zimbabwean Constitution, was affirmed in the case of *Loveness Mudzuru*, wherein the court stated that the obligations imposed by the Constitution are ‘not ascertainable without regard being had to the context of the obligations undertaken by Zimbabwe under the international treaties and conventions at the time it was enacted on 22 May 2013.’<sup>12</sup> The court further emphasised that the signing of international instruments by Zimbabwe is an expression of commitment to take all measures which are appropriate to enforce and protect human rights.<sup>13</sup>

Whilst clarifying the scope and content of section 75(1)(a) it is noted at the outset that the Zimbabwean Constitution is still relatively new, having been enacted in 2013 and the Act has also been recently amended with amendments relating to section 75(1)(a) becoming effective only in 2020. There is therefore no wealth of jurisprudence to support some of the points made by this article. The Constitution of South Africa, however, provides for a similar right to basic education in section 29(1)(a) and the Constitutional Court of South Africa as well as academic commentators have discussed the scope and content of the right. This article, therefore, makes use of recommendations from South Africa in line with the provisions of the Zimbabwean Constitution which allow for the discretionary use of foreign law when interpreting the rights provided by the Zimbabwean Constitution.<sup>14</sup>

## Basic Education in the Zimbabwean Context

The educational system in Zimbabwe suffers from a ‘decade of economic collapse and political violence, starved of funding, abandoned by teachers, who have left children to fend for themselves without much opportunity for learning.’<sup>15</sup> Zimbabwe lacks basic education resources such as schools. In 2014 and 2015, the Deputy Minister for Education acknowledged that, Zimbabwe needed about 2056 schools in order to have current schools decongested, as children were reported to be walking up to twenty-four kilometres to access schools.<sup>16</sup> The Minister further added that there was inadequate infrastructure in existing schools and about 1500 schools needed to be upgraded to

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11 Constitution (n 1) s 46(c), 34, 326(1), 326(2) and 326(6).

12 *Mudzuru & Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others* CCZ 12/2015, 26.

13 *ibid* 27.

14 Constitution (n 1) s 46(1)(e).

15 Mary Ndlovu, ‘Zimbabwe’s Educational Legacy from the 1980’s: Was it all so Rosy?’ (*Kubatana.net*) <[http://archive.kubatana.net/docs/demgg/sok\\_zim%27s\\_education\\_legacy\\_130521.pdf](http://archive.kubatana.net/docs/demgg/sok_zim%27s_education_legacy_130521.pdf)> accessed 5 November 2020.

16 Staff Reporter, ‘Zimbabwe Needs an Extra 2056 Schools, Minister’ (*All Africa*, 29 September 2014) <<https://allafrica.com/stories/201409300180.html>> accessed 3 November 2020; see also, Linda Mujuru, ‘Zimbabwean Kids Endure Long Walks to Reach Qualified Schools’ (*Global Press Journal*, 2 December 2017) <<https://globalpressjournal.com/africa/zimbabwe/zimbabwean-kids-endure-long-walks-reach-qualified-schools/>> accessed 11 November 2020.

acceptable standards.<sup>17</sup> For example, a school in Bubi established in the year 2000 was reported to have been using structures made of dagga and poles as classrooms and learners were sitting on dusty floors and tree logs.<sup>18</sup> In 2020, it was reported that the lack of basic infrastructure such as toilets with running water in schools was making it impossible to implement basic safety measures against Covid 19 like hand washing and social distancing.<sup>19</sup>

For many years there has been no free state-funded education for all in Zimbabwe. In an attempt to alleviate the plight of the poor, the government in 2001 introduced the Basic Education Assistance Module (BEAM).<sup>20</sup> BEAM is a fund which aims to assist poor and vulnerable children with school and examination fees as well as other levies.<sup>21</sup> It targets children aged between six and nineteen years who either have dropped out of school or have not attended school due to a lack of funds, or those in school but whom are failing to pay levies, examination and school fees.<sup>22</sup> The BEAM project has been funded by the government and supported by other developmental partners, such as the United Kingdom's Department for International Development (DFID).<sup>23</sup> In 2019, 415 000 students benefited from BEAM through their school fees and examination fees being paid and the government explained that USD450 million had been budgeted for the 2020 year and it was projected that one million school-going children would benefit.<sup>24</sup> Whilst BEAM is a brilliant initiative, it has not been without flaws, some of which are:

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- 17 Irwin Chifera, 'Minister says Zimbabwe Public Schools to Enrol Desperate Pupils' (*VOA Zimbabwe*, 29 December 2014) <<https://www.voazimbabwe.com/a/zimbabwe-education-first-term-2015/2577897.html>> accessed 31 October 2020.
  - 18 Conrad Nyamutata, 'The Right to Education Under Threat' (*Nehanda Radio*, 26 June 2014) <<http://nehandaradio.com/2014/06/26/right-education-threat/>> accessed 26 March 2019.
  - 19 Nyasha Chingono, 'Zimbabwean Teachers Refuse to Work Over Low Pay and Lack of Sanitisation' (*The Guardian*, 5 October 2020) <<https://www.theguardian.com/global-development/2020/oct/05/zimbabwe-teachers-refuse-to-return-to-work-over-low-pay-and-lack-of-sanitation-covid-19>> accessed 31 October 2020.
  - 20 Harvey Smith, Patrick Chiroro and Paul Musker, 'Process and Impact of the Basic Education Assistance Module (BEAM) in Zimbabwe' 13 (Ministry of Labour and Social Services, Government of Zimbabwe, 20 March 2012) <[https://www.unicef.org/evaldatabase/files/BEAM\\_Evaluation\\_Final\\_Report.pdf](https://www.unicef.org/evaldatabase/files/BEAM_Evaluation_Final_Report.pdf)> accessed 4 November 2020.
  - 21 *ibid* 13.
  - 22 *ibid* 15.
  - 23 UK Aid, 'Basic Education Assistance Module (BEAM) 2012 in Zimbabwe' (UK Aid, 27 July 2017) <<https://devtracker.dfid.gov.uk/projects/GB-1-203204/>> accessed 4 November 2020.
  - 24 Bwititi Kuda, '1 Million to Benefit Under BEAM, More Cash Better Health Services for the Poor' (*Sunday Mail*, 5 January 2020) <<https://www.sundaymail.co.zw/welfare-scheme-launched-1-million-pupils-to-benefit-under-beam-more-cash-better-health-services-for-poor>> accessed 30 October 2020.

- It is discretionary and does not provide the free basic education required by international law provisions discussed later in this article.<sup>25</sup>
- Some of the practical negative consequences of BEAM are that, when BEAM payments are late, schools have asked for advance payments from parents and guardians of those children who have benefitted.<sup>26</sup> In instances of delayed payments by BEAM and failure to pay by parents, children have been sent home by schools.<sup>27</sup>
- The policy framework for BEAM is not clear and parents have complained that, there is no consistency in the selection of needy children by schools.<sup>28</sup>
- BEAM funding is often inadequate and does not meet all the children's education needs, such as food, travel fees and school uniforms.<sup>29</sup>

In 2014, the then Minister of Education, Lazurus Dokora, mandated parents with no money to pay school fees with farm animals like goats, and sanctioned school authorities to institute civil suits against parents who had not paid school fees.<sup>30</sup> In 2015, the government of Zimbabwe announced that in addition to school fees, Grade 7 examination fees would also be introduced meaning that children in primary school had to pay to write examinations in order to proceed to secondary school.<sup>31</sup> Inevitably, the introduction of further school fees was an obstruction of access to education for children from poor backgrounds. It has been reported that in 2015 more than 13000 learners from both primary and secondary schools dropped out of school mainly due to an inability to pay school fees. Of the drop-outs the majority were female at secondary level.<sup>32</sup> In 2017, Finance Minister Cde Patrick Chinamasa stated that the national non-attendance of

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25 African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49 (1990) art 11(3)(a): 'States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular: (a) provide free and compulsory basic education.'

26 Smith (n 20) 44.

27 *ibid* 44.

28 *ibid* 44.

29 *ibid* 44.

30 Staff Reporter, 'Fees: Schools Seize Defaulters Cows' (*Zimbabwe Situation*, 25 August 2014) <[https://www.zimbabwesituation.com/news/zimsit\\_w\\_fees-school-to-seize-defaulters-cows/](https://www.zimbabwesituation.com/news/zimsit_w_fees-school-to-seize-defaulters-cows/)> accessed 4 November 2020.

31 Tinotenda Samukange, 'Govt Set Grade 7 Exam Fees' (*Newsday*, 14 May 2014) <<https://www.newsday.co.zw/2015/05/govt-sets-grade-7-exam-fees/?cn-reloaded=1>> accessed 31 October 2020.

32 Nyemudzai Kakore, '13000 Drop Out of School' (*Herald*, 17 March 2015) <<https://www.herald.co.zw/13-000-drop-out-of-school/>> accessed 31 October 2020.

school percentage was at thirty-four per cent and non-attendance was mainly due to financial constraints.<sup>33</sup>

In addition to the issue of dropouts, are problems of unqualified teachers and increased failure rates. As at 2015, the number of unqualified teachers employed by the government was estimated to be 2000.<sup>34</sup> The number of students per qualified teacher was pegged at 42:1 at primary school and 31:1 at secondary school.<sup>35</sup> In 2019, Matabeleland South (province) recorded a massive shortage in qualified teachers especially in maths and sciences.<sup>36</sup> Owing to the employment of unqualified teachers Zimbabwe has seen a decrease in pass rates. In the period between 2016 and 2017 the decreasing pass rates affected Grade 7 learners and 'O' level students, with the Mashonaland West province recording less than fifty per cent pass rate for both Grade 7 and O level.<sup>37</sup> The 'O' level pass rate was so dismal in the Mashonaland West province as it dropped from 25,8 per cent in 2016 to 23,8 per cent in 2017.<sup>38</sup> In addition to a lack of qualified teachers and increased failure rates, learners have had to share textbooks, with up to fifteen learners sharing one textbook at times.<sup>39</sup> The above situations persist whilst the Zimbabwean Constitution provides for the right to basic education. At the same time, although the Education Act as amended does not state its aim as the clarification of the scope and content of the right to basic education. It, however, addresses some issues pertaining to section 75(1)(a) of the Constitution and defines the terms basic education and basic state-funded education thereby offering this article a starting point in the determination of the scope and content of the right to basic education in Zimbabwe.<sup>40</sup>

## Is Basic State-Funded Education the same as the Basic Education Protected by International Law?

Section 75(1)(a) of the Zimbabwean Constitution states that, 'every citizen and permanent resident of Zimbabwe has a right to a basic state funded including adult basic

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33 Ruth Butaumocho, 'Life Line for School Drop-outs' (*Herald*, 15 January 2018) <<https://www.herald.co.zw/lifeline-for-school-dropouts/>> accessed 30 October 2020.

34 Nyemudzai Kakore, 'Zim has 20 000 Unqualified Teachers' (*Herald*, 11 March 2015) <<https://www.herald.co.zw/zim-has-20-000-unqualified-teachers/>> accessed 19 October 2020.

35 *ibid.*

36 Sukulwenkosi Dube-Matutu, 'Massive Teacher Shortage in Matabeleland South' (*Zimbabwe Situation*, 4 February 2020) <<https://www.zimbabwesituation.com/news/massive-teacher-shortage-in-matabeleland-south/>> accessed 30 October 2020.

37 Fortunate Gora, 'Teacher Shortage Hits Mashonaland West' (*AllAfrica*, 13 December 2018) <<https://allafrica.com/stories/201812130161.html>> accessed 30 October 2020.

38 *ibid.*

39 John Mokwesi, 'Students Elated After Receiving New Textbooks in Zimbabwe' (*UNICEF Africa*, 20 March 2020) <<https://www.unicef.org/zimbabwe/stories/students-elated-after-receiving-new-textbooks-zimbabwe>> accessed 1 November 2020.

40 Education Act (n 4) s 2, as amended by Education Amendment Act No 15 of 2020.

education.’<sup>41</sup> However, authors have not yet begun to interrogate the scope and content of the right to basic state-funded education. International law therefore offers useful guidance on what the right should include. The starting point is to note that no international law instrument regulating the provision of education for children refers to basic state-funded education. General Comment 13 to the International Covenant on Economic, Social and Cultural Rights (ICESCR) refers to basic education;<sup>42</sup> the African Charter on the Rights and Welfare of the Child (African Charter) provides for ‘the right to free and compulsory basic education’<sup>43</sup> and the World Declaration on Education for All (World Declaration) defines the concept of basic education.<sup>44</sup>

Whilst the differences in the formulation of the right to basic education found in international law and the provision of the right in the Zimbabwean Constitution have not been clarified by the courts or been subjected to interrogation by authors, this article reasons that the right to basic education whose provision is mandated on states by international law<sup>45</sup>, is the same as the right to basic state-funded education protected by section 75(1)(a) of the Zimbabwean Constitution. The above assertion is justified as follows; to begin with, this article reasons that, the words ‘state’ and ‘funded’ stated by section 75(1)(a) which come before the term ‘basic education’ only accord clarity on who bears the responsibility to fund basic education but do not mean that Zimbabwe deviated from the type of education that international law requires states to provide citizens. To bolster the reasoning that the right to basic state-funded education is the same as the international law right to basic education, it is noted that, section 27(1)(a) of the Constitution states that one of the government’s constitutional objectives is the taking of ‘all practical measures to promote free and compulsory basic education for children.’<sup>46</sup> It is submitted that, in compliance with the international law obligation on states to provide the right to basic education, section 27(1)(a) of the Constitution provides free and compulsory basic education as a state obligation whilst section 75(1)(a) of the same Constitution guarantees it as a right funded by the state. It is further noted that the Education Act as amended now refers to the international term ‘basic education’ and describes basic education as education which begins from early childhood and ends at the secondary school level of form four.<sup>47</sup> The approach of

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41 Constitution (n 1) s 75 (1) (a)

42 General Comment No 13, The Right to Education (Article 13) Committee on Economic, Social and Cultural Rights, Twenty-first Session (8 December 1999) UN Doc E/C.12/1999/10 para 22–24. General Comment 13 is a document that was adopted by the Committee on Economic, Social and Cultural Rights to interpret and clarify the provisions of Article 13 of the ICESCR.

43 African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49 (1990) art 11 (3a).

44 World Declaration (n 3) art 1.

45 African Charter (n 43) see also, General Comment No 13 (n 42).

46 Constitution (n 1) s 27(1)(a).

47 Education Act (n 4) s 2, as amended by the Education Amendment Act No 15 of 2020: ‘basic education means education from early childhood education up to the fourth form and any other category as may be declared as such by the Minister by Notice in the Gazette from time to time; basic state-funded

describing basic education as education provided to children from primary schooling levels to secondary schooling levels aligns with the provisions of General Comment 13 (to be discussed later) which clarifies that basic education is education which must be provided at both primary and secondary schooling levels.<sup>48</sup> The Education Act further describes basic state-funded education as education provided for free by the state from the early childhood level to the secondary schooling level of form four.<sup>49</sup> The approach also aligns with the free state-funded provision of basic education desired by the African Charter discussed later.<sup>50</sup> Given the above justifications, the argument is that, a reading of section 75(1)(a) of the Constitution coupled with the description of the terms ‘basic education’ and ‘basic state-funded education’ by the Act makes the persuasive argument that the right to basic state-funded education provided by section 75(1)(a) is the same right to basic education that states are required by international law to provide citizens.

### Who qualifies for Basic Education? The Applicability of Section 75(1)(a)

The Zimbabwean Constitution as the supreme law,<sup>51</sup> binds all organs of the state and places upon them the mandate to fulfil its obligations.<sup>52</sup> Section 75(1)(a) of the Constitution states that, ‘every citizen and permanent resident of Zimbabwe has a right to a basic state-funded education including adult basic education.’<sup>53</sup> The Education Act as amended does not address the nationality of the person who is entitled to basic state-funded education but states that it was enacted to provide for matters which relate to or arise from the enactment of section 75(1)(a) of the Constitution.<sup>54</sup> Section 75(1)(a) points to a right with limited application. Its reading points to a right which is applicable to citizens and permanent residents of Zimbabwe only. Whilst this provision is yet to be interpreted by the courts, this article reads the text of the provision to mean that, constitutionally, any child or adult who is not a citizen or permanent resident of Zimbabwe has no claimable right to basic state-funded education in Zimbabwe. This means that legislation providing for the right to basic education for someone who is not

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education means (a) education from early childhood education up to form four; or (b) adult education up to form four; or (c) any other category as may be declared as such by the Minister by notice in the Gazette from time to time: for which pupils shall not be required to pay fees or levies and the State shall provide them with learning and teaching material, facilities, infrastructure and resources subject to the provisions of section 75 of the Constitution.’

48 General Comment No 13 (n 42) para 22–24.

49 *ibid*.

50 African Charter (n 43) Art 11(3). ‘States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular: (a) provide free and compulsory basic education.’

51 *ibid* s 2.

52 *ibid* s 2 (2).

53 *ibid* s 75(1)(a).

54 Education Act (n 4) preamble, as amended by The Education Amendment Act No 15.



a citizen or permanent resident of Zimbabwe may be ruled unconstitutional by the courts.

The deprivation of the right to basic education to non-citizens or permanent residents is interrogated by this article in view of the provisions of international law and section 86 of the Constitution of Zimbabwe. Section 86 states that all human rights may be limited and any limitation must be fair, justifiable and reasonable in a state that is founded on values, such as human dignity and equality.<sup>55</sup> The limitation of a right will consider all factors which may be relevant, such as the nature of the right, the purpose of limiting it and the connection between the limitation and the purpose of the right.<sup>56</sup> In considering a limitation aimed at promoting equality it is important to note that the international law principle of equality and non-discrimination protected by section 86 of the Constitution of Zimbabwe has been explained to encompass 'equal treatment, equal protection of the law, equal opportunity and substantive equality.'<sup>57</sup> It is embodied in many international instruments particularly the Convention Against Discrimination in Education (CADE) which states, unequivocally, that the deprivation of access to any type of education for a specific group of persons or the establishment of separate education systems for specific persons and groups is discriminatory.<sup>58</sup> State parties to the ICESCR have also undertaken to exercise the rights in the Covenant without any manner of discrimination including one based on social and national origin.<sup>59</sup> In relation to the rights of children, the Convention on the Rights of the Child (CRC) also states that state parties must respect the rights in the CRC without discriminating against the child based on their nationality, social or ethnic origin or that of their parents.<sup>60</sup>

International instruments rest on the foundation that human rights must be of equal universal benefit to everyone.<sup>61</sup> The international law 'all-inclusive approach' extends the enjoyment of the right to basic education beyond the nationality of the recipient.<sup>62</sup> The collective intent of all the international Conventions mentioned above is therefore that the right to education be all-inclusive and its application extends to immigrant

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55 Constitution (n 1) s 86(2)

56 *ibid* s 86(2)(a) and (b).

57 United Nations, *Economic Social and Cultural Rights: Handbook for National Human Rights Institutions* (Professional Training Series 12, 2005) 5  
<<http://www.ohchr.org/Documents/Publications/training12en.pdf>> accessed 04 November 2020.

58 Convention Against Discrimination in Education 1960, Article 1(a)–(d) (CADE).

59 International Covenant on Economic, Social and Cultural Rights (16 December 1966) UNGA Res 2200A (XXI) (ICESCR) Art 2(2).

60 United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25, Art 2(1).

61 Nylon Marishane, 'The Right to Basic Education for All: Addressing the Educational Needs and Barriers of Immigrant Learners in South Africa' (2013) 5 *Intl J of Educational Administration and Policy Studies* 1.

62 *ibid* 1.

learners, as beneficiaries.<sup>63</sup> In relation to promoting equal treatment of all human beings, the Zimbabwean case of *Samuel Nkomo v Minister of Local Government, Rural & Urban Development* also stated that equality envisages a situation where everyone is equally protected by the law and equally benefits from it.<sup>64</sup> The right to equality therefore encompasses the right ‘not to be subjected to treatment to which [children] in a similar position [of needing education] are not subjected to.’<sup>65</sup> The deprivation of the right to basic education to foreign children is therefore regarded by the author as the inability of the law to equally protect non-citizens. The unequal treatment of foreigners by the Zimbabwean Constitution gives the false impression that the human rights-based approach has no capability to protect the rights of migrants. In relation to the need to protect the dignity of every human when interpreting human rights as required by section 86 it must be noted that, education is a right which protects and restores human dignity for everyone including non citizens.<sup>66</sup> The role of education in protecting and preserving human dignity was reiterated by the South African court when it deliberated on a similar right to education. In the case of *Minister of Home Affairs and Others v Muriel Millie Watchenuka* the court was displeased by the unconstitutional limitation of the right to education for asylum seekers and stated that

the Standing Committee’s general prohibition against study is also unlawful. The freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfilment. Furthermore, it is expressly protected by s 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education.<sup>67</sup>

Whilst the purpose of limiting the applicability of the right to basic education is unclear, the nature and purpose of the right to basic education does not warrant such drastic limitation. Unlike the right to vote which can be understandably exclusive to citizens and be enjoyed elsewhere by foreigners,<sup>68</sup> education is logically age-related, hence, time-bound, so the deprivation of education is felt immediately and its effect may become impossible to rectify. This article reasons that, legal barriers which promote discrimination and prevent children and adults from receiving education must be removed. Whilst it is also true that the Constitutional Court of Zimbabwe will have the final determination on the constitutionality of section 75(1)(a) of the Constitution in relation to its deprivation of basic education to non citizens (except permanent

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63 *ibid* 1.

64 *Nkomo v Minister, Local Government, Rural & Urban Development & Others* (CCZ 6/2016 Const Application No CCZ 28/14) [2016] ZWCC 8.

65 *ibid*.

66 Chiedza Simbo, ‘The Right to Basic Education, the South African Constitution and the Juma Musjid Case: Unqualified Human Right and a Minimum Core Standard’ (2013) 17 *Law Democracy and Development* 477, 484.

67 *Minister of Home Affairs v Watchenuka* [2004] 4 SA 326 (SCA) 36.

68 *ibid*.

residents), this article views that totally depriving any group of persons of their right to basic education overlooks the fact that human rights are universal and apply to every human being. Special Rapporteur, Kishor Singh, reporting on the right to education shunned any form of discrimination in the provision of education.<sup>69</sup> He stated that countries must ensure that legislation on education guarantees the right to education for children despite their citizenship, social or legal status.<sup>70</sup> States have an obligation to ensure non-discriminatory enrolments of children in schools.<sup>71</sup> It is the view of the author that legislation and administrative action in Zimbabwe should be harmonised with international law to clarify that the constitutional right to basic education applies also to migrants and refugees and that access to education is universal and must be done on an equal, non-discriminatory basis. The need to desist from totally depriving foreigners of socio-economic rights is also understood in the context of the need to promote the value of ubuntu which

envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.<sup>72</sup>

This article therefore suggests that the right to basic education for immigrant learners in Zimbabwe should be the same as that enjoyed by Zimbabwean citizens and permanent residents. We will now explore and analyse the components of this right to basic education.

## The Six Components of the Right to Basic Education: Scope and Content

It is submitted that the right to basic state-funded education in Zimbabwe has six components or dimensions. These components are interconnected and interrelated and enjoy equal importance and priority. It is advanced by this article that non-compliance with any of the components below amounts to a violation of the right to basic education.

## The Right to Basic Education is Compulsory and Free

The Universal Declaration of Human Rights (Universal Declaration) states that everyone has the right to free education at the elementary and fundamental stages and

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69 UNHRC 'Report of the Special Rapporteur on the Right to Education, Kishore Singh' (11 May 2012) UN Doc A/HRC/20/21/Add.1 para 16–17 <[https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21-Add1\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21-Add1_en.pdf)> accessed 18 November 2020.

70 *ibid* 16–17.

71 *ibid* 16–17.

72 Chuma Himonga, Max Taylor and Anne Pope, 'Reflections of Judicial Views of Ubuntu' (2013) Potchefstroom Electronic LJ 377.

education shall be compulsory only at elementary stages.<sup>73</sup> The ICESCR following the free provision of primary school by the Universal Declaration states that primary education must be free and compulsory.<sup>74</sup> The obligation to provide free and compulsory primary education was so important during the drafting of the ICESCR that state parties to the Covenant who had not made primary education compulsory and free by the time of its ratification, undertook to have a plan of action for its introduction in their territories and jurisdictions.<sup>75</sup> In 1989, nations, through the CRC, also declared that every child has the right to education, and that primary education must be compulsory and free.<sup>76</sup>

Whilst all of the above international instruments provided for free primary education, they did not clarify the type of education children were to be provided free at both primary and secondary school levels. The World Declaration then clarified that the type of education all children had to be provided with is called ‘basic education’.<sup>77</sup> The World Declaration, however, did not state the exact stage at which this basic education was to be provided—whether at primary, secondary or both schooling levels. General Comment 13 to the ICESCR<sup>78</sup> in differentiating the concepts—primary education, secondary education and basic education—pointed out that, the first stage for introducing basic education outside the home is at the primary school level.<sup>79</sup> General Comment 13 clarified that the provision of basic education is not limited to primary school but that secondary education ‘includes the completion of basic education.’<sup>80</sup> The clarification made it clear that primary education and secondary education are terms which allude to schooling levels while ‘basic education’ alludes to the quality of

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73 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Art 26 (1).

74 ICESCR (n 59) Art 13 (1).

75 *ibid* Art 14.

76 CRC (n 60) Art 28(1)(a).

77 World Declaration (n 3) Art 1(1).

78 General Comment No 13 (n 42) para 22–24.

79 *ibid* para 9. ‘The Committee obtains guidance on the proper interpretation of the term primary education from the World Declaration on Education for All which states: The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community (art 5). [B]asic learning needs are defined in article 1 of the World Declaration. While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the Committee endorses the position taken by UNICEF: Primary education is the most important component of basic education.’

80 *ibid* para 12. ‘While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities. Article 13(2)(b) applies to secondary education in its different forms, thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages alternative educational programmes which parallel regular secondary school systems.’

education to be provided at those levels. Following these developments, the African Charter then clarified that state parties must provide ‘free and compulsory basic education.’<sup>81</sup> The African Charter, by stating that basic education is free and compulsory, extended the duty of nations to offer free and compulsory education from the primary school level throughout the basic education years which include secondary schooling.

Within the context of the above international law commitments, the Education Act of Zimbabwe states that every child has the right to education.<sup>82</sup> The Education Act as amended now provides that basic state-funded education is compulsory and offered from primary school to the secondary level of form four.<sup>83</sup> Denying the child their right to basic state-funded education is a criminal offence.<sup>84</sup> Basic state-funded education is described as education for which learners have no obligation to pay school fees or levies and the state is obliged to provide learning materials, resources and facilities for free.<sup>85</sup> For education outside basic education, the Minister still has the obligation to prescribe school fees, including accommodation fees if the school offers such.<sup>86</sup>

Given the above discussion, this article notes that with the enactment of the Constitution and the subsequent amendment of the Education Act, Zimbabwe has progressed in compliance with international law relating to the provision of free and compulsory basic education by clarifying that basic education is compulsory and free. It is commendable that the Education Act now clarifies that education for children is free and compulsory at all levels for which basic education will be offered. It is specifically commendable that free basic education goes beyond just school fees but includes free access to teaching and learning materials, facilities and infrastructure to assist learning.<sup>87</sup> The Education Act’s provision for free basic education is sensible because in a country where millions live in abject poverty, it was useless to mandate compulsory basic education for a fee and impose penalties for parents who cannot afford to pay the fees. It is however noted that the minister can still prescribe tuition fees for education levels outside the stipulated range for basic education and these include the form five and six. It is notable in that regard that in Zimbabwe universities require a form six qualification for entrance into University for many degree programmes.<sup>88</sup> Also, usually children

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81 African Charter (n 43) Art 11(3). ‘States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular: (a) provide free and compulsory basic education.’

82 Education Act (n 4) s 4(1).

83 *ibid*, s 2 and s 5, as amended by the Education Amendment Act No 15.

84 *ibid*, s 5(2).

85 *ibid*, s 2.

86 *ibid*, s 13(1)(a).

87 *ibid*, s 2, as amended by the Education Amendment Act No 15.

88 ZwebFinder, ‘University of Zimbabwe Entry Requirements’ <<https://zwebfinder.net/university-of-zimbabwe-entry-requirements/>> accessed 1 November 2020.

doing form five and six are still minors below the age of eighteen years who rely on parents for the payment of their school fees. Having school fees expenses fall on the parent presents many undesirable realities for the child which international law and Zimbabwe itself already tried to avoid by making basic education free. To begin with, parents may simply find school fees so expensive that they are unable to pay and hence, choose not to send their children to school.<sup>89</sup> Parents who cannot afford the school fees but still want to send their children to school may be embarrassed to send them without money.<sup>90</sup> Parents who have children in school may face humiliation by school authorities and by the threats of legal action for failure to pay school fees.<sup>91</sup> Children whose parents are unable to pay school fees may be teased and looked down upon by other students; they may end up choosing to be absent from school for fear of humiliation or even dropping out.<sup>92</sup> This article suggests that Zimbabwe should consider extending the period for basic education to the form five and six levels as long as those levels are important for the progression of a child to tertiary university levels. Making form five and six state-funded education will also ensure that no costs are imposed on a child which could become a hindrance to their full enjoyment of the right to education.<sup>93</sup>

Other equally important issues to be considered by the state are:

- The Act as amended provides for free state-funded education at basic education level including free infrastructure and resources as already discussed. However, the Act did not specifically mention the provision of free infrastructure for those with disabilities at basic education level opting for a general provision that education infrastructure for the disabled will be provided subject to available resources.<sup>94</sup> It is recommended that Zimbabwe must go a step further and remove the limitation of ‘available resources’ in section 68B(1) of the Education Amendment Act, and rather guarantee the provision of infrastructure even for children with disabilities and special needs who are at basic education level.
- The Act did not provide for free meals for children at basic education level. Children need food and cannot learn when they are hungry. This article

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89 Ilse Vleugels and Ides Nicaise, ‘Financial and Material Assistance for Low-Income Pupils’ in M Douterlungne, I Vleugels, S Riddell and others (eds), *The Right to Learn Educational Strategies for Socially Excluded Youth in Europe* (Bristol University Press 2000) 89.

90 *ibid.*

91 Staff Reporter, ‘Fees: Schools Unleashes Debt Collectors on Defaulters’ Cows’ (*Zimbabwe Situation*, 25 August 2014) <[https://www.zimbabwesituation.com/news/zimsit\\_w\\_fees-school-to-seize-defaulters-cows/](https://www.zimbabwesituation.com/news/zimsit_w_fees-school-to-seize-defaulters-cows/)> accessed 10 March 2018.

92 Vleugels (n 89) 89.

93 Smith (n 20) 44.

94 Education Act (n 4) s 68B(1) as amended by the Education Amendment Act No 15.

recommends that it should be a priority for the state to provide at least one well-balanced and nutritious meal daily.

## The Right to Basic Education is an Unqualified Right

The Constitution of Zimbabwe contains socio-economic rights which do not have the same textual formulation. For example, the right to health and the right to water include words and phrases, such as ‘access to’, ‘progressively realised’ within ‘available resources’, ‘subject to reasonable legislative measures’.<sup>95</sup> These words and phrases have been referred to as ‘internal qualifiers’. These internal qualifiers are missing from the right to basic education found in section 75(1)(a) of the Constitution. Whilst the Constitutional Court of Zimbabwe has not yet clarified the distinction between the formulation of the socio-economic and educational rights it protects, the Constitution borrows a lot from the Constitution of South Africa. Just like Zimbabwe, the right to basic education stands out in the South African Constitution as a right without internal qualifiers.

Writing about a similar right to basic education in South Africa, authors such as Liebenberg,<sup>96</sup> Liebenberg and Pillay,<sup>97</sup> and Berger<sup>98</sup> have already accepted that the right to basic education can be regarded as an unqualified socio-economic right. Woolman and Fleish distinguish an unqualified socio-economic right like section 75(1)(a) in four ways:

- Like section 75(1)(a) its formulation excludes the word access making it different from other socio-economic rights guaranteed in section 76 and section 77 of the Zimbabwean Constitution.<sup>99</sup> Taking into account the recommendations of the South African constitutional court, in relation to human rights qualified by the word ‘access’, the government’s obligation is not to provide the right itself but to ensure that there is a system in place which allows individuals to have ‘access’ to the right.<sup>100</sup> The South African *Grootboom* case interpreting the right to housing qualified by the word ‘access’ stated that in order to provide access, the legislature must not only provide the right but also measures and a legislative framework that

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95 Constitution (n 1) s 76 and s 77.

96 Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010) 242–243.

97 Sandra Liebenberg and Kameshni Pillay (eds), *Socio-Economic Rights in South Africa* (Community Law Centre and the Foundation for Human Rights, University of Western Cape 2000) 351.

98 Eric Berger, ‘The Right to Education Under the South African Constitution’ (2003) 103 *Columbia LR* 625.

99 Stu Woolman and Braam Fleisch, *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Law Press 2009) 121; see also Constitution (n 1) s 76 and s 77.

100 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 para 35–37.

facilitate the acquisition of the right by individuals.<sup>101</sup> The elimination of the word ‘access’ when interpreting section 29(1)(a) of the South African Constitution which is similar to section 75(1)(a) of the Zimbabwean Constitution was regarded in the South African *Juma* case, to mean that the government’s duty is to make sure that basic education is provided immediately not as a measure which is accessible to everyone but as a tangible good.<sup>102</sup> It should be clarified here that the view of this article is that the word ‘access’ as a qualifier of some socio-economic rights in the Zimbabwean Constitution, like in the South African Constitution (right to water and further education) is a constitutional term which pertains to the extent of the duty incumbent upon the state in relation to the provision of the right to basic education. It differs from the General Comment 13 obligation to make any kind of education ‘accessible’. The international law notion of ‘accessible’ is not a qualifier of the right to basic education but creates three different obligations for the states, which will be discussed later in this article.

- The government’s constitutional provision of the right to basic education is not measured by ‘reasonable legislative and other measures’. Other socio-economic rights protected by the Zimbabwean Constitution are contingent to the qualification ‘reasonable legislative and other measures’.<sup>103</sup> The Zimbabwean courts have not explained the meaning of the qualification, although, the Constitution accepts the useful guidance of foreign law when one is interpreting human rights.<sup>104</sup> In explaining this qualification, the South African Constitutional Court stated that the test for compliance is the existence of legislative and other action on the part of the state which can be regarded as reasonable.<sup>105</sup> On the other hand, the view of this article is that an inquiry into the state’s ‘reasonable legislative and other measures’ will not, when one is determining the states’ compliance with the provision of basic education, be a measure of government’s compliance with its obligations.
- Section 75(1)(a) is not dependent on the ‘availability of resources’<sup>106</sup> but rather, clearly and unequivocally, provides for a state-funded education. This means that the state cannot invoke the defence that it does not have adequate resources to provide a basic education. The state is mandated to find the resources to make basic education available.

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101 *ibid*

102 *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* BCLE/61 (CC) para 37.

103 Constitution (n 1) s 76 and s 77.

104 *ibid*, s 46(e)

105 *Lindiwe Mazibuko and Others v City of Johannesburg and Others Case* 2010 (4) SA 1 (CC). In the Mazibuko case, the court stated that ‘section 27(1) does not entitle anyone to claim sufficient water but to reasonable measures by the government which aim to make water accessible’ para 49–50.

106 *Woolman* (n 99) 120.



- Finally, the right to basic education ‘is not subject to progressive realization’.<sup>107</sup> The court, in the South African *Grootboom* case, stated that progressive realisation means the government does not have an immediate obligation to ensure that measures are put in place for citizens to access housing. Rather, the government can have plans in place incrementally which shows a continuous commitment to realise the goal.<sup>108</sup> By excluding the progressive realisation qualifier, the Constitution requires the government to take immediate steps to realise the right to basic education.<sup>109</sup>

Based on the discussion above, which is motivated by recommendations from South Africa, this article submits that the right to basic state-funded education in Zimbabwe is a right with no qualifiers in its formulation, hence it is regarded as an unqualified right. This assertion is further supported by the contrast in wording of section 75(1)(a) which provides for the right to state-funded basic education and section 75(1)(b) which states that the state, ‘through reasonable legislative and other measures, must make [further education] progressively available and accessible.’<sup>110</sup> The latter section is a qualified right to further education. Based on the different wording of these two sections, it is inferred by this article that the unqualified wording of the right to basic education found in section 75(1)(a) was a deliberate and well-considered decision by the drafters of the Constitution to ensure the free provision of basic education.

There is some added complexity to this because section 75(4) states that ‘the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the right set out in subsection (1).’ Subsection 1 incorporates section 75(1)(a) which is the unqualified right to basic education and section 75(1)(b) which is the qualified right to further education. It seems that section 75(4) imposes qualified obligations on a singular right embodied by section 75(1). The question is: Of the two rights embodied by section 75(1), which one is qualified by section 75(4)? The answer to the question proposed by this article is that section 75(4) does not qualify section 75(1)(a) but rather emphasises the unqualified nature of section 75(1)(b). The drafters of the Constitution clearly distinguished

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<sup>107</sup> *ibid.* See also Simbo (n 66) 488.

<sup>108</sup> *Grootboom* (n 100) para 45.

<sup>109</sup> *Juma* (n 102 ) para 37, where the constitutional court said:

‘It is important, for the purpose of this judgment, to understand the nature of the right to “a basic education” under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. This right is therefore distinct from the right to “further education” provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education “progressively available and accessible”.’

<sup>110</sup> Constitution (n 1) s 75 1(a)–(b).

between the qualified and unqualified components of the rights provided by section 75(1). The unqualified nature of section 75(1)(a) is also supported by the fact that, the Education Act as amended also provides for a free basic state funded education as earlier discussed and does not mention anything about it being qualified by available resources, progressive realisation, reasonable measures or other qualifiers. Also in support of this position is the fact that Zimbabwe is a party to the ICESCR which provides that each state party must provide each socio-economic right with a content which is immediately realisable.<sup>111</sup> Even if section 75(4) is deemed to wholly apply to the provisions of section 75(1) in general, the right to education in Zimbabwe is still expected to include content which is immediately realisable in compliance with its ICESCR obligations. Taking this further, the minimum core content of the right to education in Zimbabwe can be argued to be basic education. A court interpreting the obligations imposed by section 75(1) is therefore obligated to distinguish between the obligations imposed by the two rights embodied by section 75(1) and to then reconcile the obligations with the provisions in subsection 75(4). Such reconciliation must be cognisant of the fact that, whilst the broad right to education maybe regarded as qualified, it has within its formulation an unqualified component (basic education) whose purpose is to be immediately claimed for the immediate benefit of individuals in Zimbabwe.

Regarding the implications of an unqualified right, Woolman and Fleish writing on the South African right to basic education provided by section 29(1)(a) state that its unqualified nature means that it is also immediately realisable.<sup>112</sup> This point has been accepted by other authors such as Liebenberg.<sup>113</sup> This article supports the same view in relation to the formulated right to basic education in Zimbabwe. The author submits that the unqualified nature of the right to basic education must lead to the conclusion that it is immediately realisable. Woolman and Fleish, however, note that despite the South African unqualified right to basic education, its provision as an immediate right is a standard which cannot be met by the state.<sup>114</sup> This article submits that compliance with basic education obligations means realising, as McConnachie and McConnachie do, that, the right to basic education is provided by the Constitution as an immediately available good not merely an access to a reasonable measure which must be provided progressively.<sup>115</sup> This article views that the right to basic education in Zimbabwe has already been prioritised by the Constitution and government budgets must reflect such prioritisation and provide for it immediately. It is positively noted that, whilst the Education Act as amended does not specify that basic education is unqualified, it does not qualify its provision with progressive provision, legislative or other measures,

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111 General Comment No 3, The Nature of States Parties' Obligations (Art 2, para 1) Committee on Economic, Social and Cultural Rights, Fifth Session (14 December 1990) UN Doc E/1991/23 para 10.

112 Woolman (n 99) 121.

113 Liebenberg (n 96) 242–243.

114 Woolman (n 99) 123.

115 Cameron McConnachie and Chris McConnachie, 'Concretising the Right to a Basic Education' (2012) 129 (3) South African LJ 554, 564.

resources or other constraints. In addition to the aspect of resources, this article views the right to basic education as unqualified in the sense that, no child can be suspended from getting their right to basic education without first being accorded an opportunity for a hearing.<sup>116</sup> Further, no child can be excluded from enjoying their right to a basic education for the reason that they are pregnant.<sup>117</sup>

## The Right to Basic Education is a Minimum Core Content Required by the ICESCR

The above argument that basic education is an unqualified right is the foundation for the reasoning that it should also be regarded as the minimum core obligation alluded to and required for member states by General Comment 3 to the ICESCR.<sup>118</sup> The minimum core concept originates from the obligations imposed on states by the General Comment 3 to the ICESCR.<sup>119</sup> General Comment 3 states that

The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.<sup>120</sup>

The minimum core approach envisions that all socio-economic rights will include an unqualified and immediately realisable component which must be provided by the state.<sup>121</sup> A state which fails to provide at least the minimum content of the right is in breach of ICESCR obligations.<sup>122</sup> The minimum core is consequently a ‘floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation.’<sup>123</sup> All states which are party to the ICESCR, such as Zimbabwe must comply with the provisions of the ICESCR and clarify the components of the right to education which comprises its minimum core provision.

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116 Education Act (n 4) s 68A(4) as amended by the Education Amendment Act No 15.

117 *ibid*, s 68C, as amended by the Education Amendment Act No 15.

118 Simbo (n 66) 491.

119 Joie Chowdhury, *Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights: A Comparative Perspective* (Cornell Law School Inter-University Graduate Student Conference Papers 27, 2009) 3.

120 General Comment No 3 (n 111) para 10.

121 Murray Wesson, ‘Grootboom and Beyond; Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court’ 2004 20 SAJ Human Rights 284, 298.

122 General Comment No 3 (n 111) para 10.

123 *ibid* para 31.

The obligations imposed by the minimum core obligations are similar to those imposed by section 75(1)(a) in that a minimum core obligation like section 75(1)(a) imposes a duty on the government to provide a certain content of a right without alleging any constraints. The similarity of obligations imposed by the minimum core and the obligations imposed by an unqualified right in section 75(1)(a), leads to an argument that, by virtue of such similarity and by reason of Zimbabwe having ratified the ICESCR, section 75(1)(a) must be read to provide for basic education as both an unqualified right and a minimum core obligation of the right to education in Zimbabwe. Courts in Zimbabwe have not yet clarified the applicability of the minimum core obligations when interpreting socio-economic rights, particularly, the right to education. However, as stated earlier, the courts have affirmed the important position of international law in determining the scope and content of the human rights provisions.<sup>124</sup> Whilst the Education Act as amended does not in any way provide that basic education is the minimum core content of the right to education, it has, as already mentioned provided the right to basic education as a content of the right to education which must be state funded with learning and teaching materials, infrastructure and resources provided by the state without any excuse. It is however notable that when it comes to the provision of basic education for those with disabilities, infrastructure for all disabled learners is provided subject to availability of resources.<sup>125</sup> If the right to basic education is the minimum core content of the right to education qualifying the right to basic education for those with disabilities may mean the essential aspects of the right to basic education for those with disabilities is not being met by the state thereby depriving those with disabilities of their minimum core entitlement.

## Basic Education Points to the Quality of the Education

The term basic education is viewed to have originated from, defined and unpacked by the World Declaration in 1990, which pointed us to the quality of education that learners must receive.<sup>126</sup> It is an important realisation that expanding access to education alone is not sufficient if the quality of education does not meaningfully contribute to the development of the individual and society. Whilst access to education is key to the provision of the right, quality is at the centre of the education goal. The aspect of quality in education was considered by the Universal Declaration,<sup>127</sup> and various other

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124 *Loveness Mudzuru and Another v Minister of Justice Legal and Parliamentary Affairs* [2015] 12 CCZ 26.

125 Education Act (n 4) s 68B as amended by the Education Amendment Act No 15.

126 World Declaration (n 3) Art 1.

127 Universal Declaration (n 73) Art 26(2) 'The aim of education must be the full development of the personality of the human being and the strengthening of their respect of human rights and freedoms.'

international instruments such as the ICESCR<sup>128</sup> and the African Charter.<sup>129</sup> All the instruments pertaining to education have stated that school education should focus on ‘*the substantive attainment of sufficient learning* [which] enables a person to participate as a citizen, to contribute to society and derive self-fulfilment, sufficient to enjoy one’s dignity.’<sup>130</sup> The Universal Declaration states that the aim of education must be the full development of the personality and the strengthening of their respect of human rights and freedoms.<sup>131</sup> Further, education must aim to promote the friendship of nations, tolerance, understanding and must further the maintenance of peace.<sup>132</sup> The ICESCR<sup>133</sup> and the Convention Against Discrimination in Education (CADE) both<sup>134</sup> echo the provisions of the Universal Declaration. The African Charter further states that education must aim at preserving African moral virtues, cultures and traditional values which are progressive.<sup>135</sup> It must prepare the child to live freely and responsibly in the spirit of ‘tolerance, dialogue, mutual respect and friendship around all people ethnic, tribal and religious groups.’<sup>136</sup> Education must particularly aim at directing African children towards the preservation of their national independence and the integrity of their territory.<sup>137</sup> It must aim to promote unity amongst Africans and foster their solidarity, respect for their environment as well as natural resources.<sup>138</sup>

Whilst the above-mentioned international instruments focus on the general quality of education desired by international law, basic education is a specific type of education aiming to give children basic learning needs and whose quality is specifically mentioned in the World Declaration as follows:

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128 ICESCR (n 59) Art 13(1) echoes the provisions of the Universal Declaration by stating that education must be aimed at the full development of the individual, which shall promote human dignity and strengthen the enjoyment of other human rights.

129 African Charter (n 43) Art 11(2)(b) echoes the provisions of the Universal Declaration by stating that education must aim at fostering respect for human rights and fundamental freedoms.

130 Vince Calderhead, ‘The Right to an “Adequate” and “Equal” Education in South Africa: An Analysis of s 29(1)(a) of the South African Constitution and the Right to Equality as Applied to Basic Education’ (Draft Paper prepared for SECTION27 and Equal Education 2011) 9.

131 Universal Declaration (n 73) Art 26(2).

132 *ibid.*

133 ICESCR (n 59) Art 13(1)

134 CADE (n 58) Art 1(5)(a).

135 African Charter (n 43) Art 11(1–7).

136 *ibid* Art 11(2)(d).

137 *ibid* Art 11(1–7).

138 *ibid.*

[Basic learning needs] comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.<sup>139</sup>

Whilst the Education Act as amended addressed the issue of free and compulsory education the aspects of the quality desirable for basic education was not addressed. This article views that serious commitment to investing, understanding and legally unpacking the essential learning tools and a basic learning content in the Education Act is essential for Zimbabwe. The quality of basic education mandated by international law can only be delivered by Zimbabwe if it has the enabling legal framework for basic education which is particularly compliant with the World Declaration. Daudet and Singh noted the special role of the World Declaration as an instrument which broadened and modernised the concept of basic education and reflected on its necessary conditions.<sup>140</sup> They recognised its role of giving generations an ‘expanded vision of, and a renewed commitment to, basic education to address the scale and complexity of the challenge [of ensuring education for all].’<sup>141</sup> The individual aspects of its essential learning tools, as well as basic learning content set the quality for basic education and cannot be unpacked in a single article. It is suggested by the author that such a process should be undertaken by the Zimbabwean government in consultation with stakeholders involved in education such as civil society, education professionals, regional and international education bodies, cultural and religious leaders. Zimbabwe should also consult the Dakar Framework for Action<sup>142</sup> which is intended as a guide for countries who want to design a quality basic education curricula in compliance with the provisions of the World Declaration.<sup>143</sup>

To ensure a quality standard for basic education in each country, the Dakar Framework for Action emphasised that quality is at the heart of the education goal and quality education must satisfy basic learning needs.<sup>144</sup> The Dakar Framework of Action envisages a clear definition of what children are supposed to learn; learners must be

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139 World Declaration (n 3) Art 1(1).

140 Yves Daudet and Kishore Singh, *The Right to Education: An Analysis of UNESCO’s Standard-Setting Instruments* (UNESCO 2001) 16–17 <[https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNESCO\\_RTE\\_Analysis\\_of\\_UNESCO%27s\\_Standard\\_Setting\\_Instruments\\_2001\\_En.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNESCO_RTE_Analysis_of_UNESCO%27s_Standard_Setting_Instruments_2001_En.pdf)> accessed 18 November 2020.

141 *ibid* 17.

142 World Economic Forum, *The Dakar Framework for Action* (UNESCO 2000) <[https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Dakar\\_Framework\\_for\\_Action\\_2000\\_en.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Dakar_Framework_for_Action_2000_en.pdf)> accessed 4 November 2020.

143 Daudet (n 140) 16–17.

144 World Economic Forum (n 142) para 42–43.

well taught and assessment effectively done.<sup>145</sup> The Special Rapporteur on the right to education, Kishore Singh reinforced the interdependence of quality education with all other components of the right to basic education.<sup>146</sup> He identified the following components which will impact the quality of basic education:

- When qualified teachers are underpaid they leave the teaching profession, and government will have to depend on less qualified teachers which affects the quality of education.<sup>147</sup>
- Textbooks must be revised, infrastructure must be improved and there should be clear rules on the development of teaching materials and manuals.<sup>148</sup>
- Establishment of national quality assessment bodies which measure the provision of all other educational inputs, such as qualified teachers, textbooks and teaching to ensure the delivery of quality standards which meet both national and international indicators.<sup>149</sup>

Daudet and Singh add that quality education also includes developing programmes which adapt to specific groups of people including vulnerable and disadvantaged groups, such as women and girls.<sup>150</sup> In another report, Singh stressed that discussions on assessments are very relevant in any conversation relating to the delivery of quality education.<sup>151</sup> While assessment is not the only indicator of quality education, Singh points out that it is an international law obligation upon states ‘to ensure that each child completes a basic education of good quality, as assessed by a national assessment mechanism.’<sup>152</sup> Assessments enable schools to identify learning needs and develop targeted initiatives to provide support to individual learners.<sup>153</sup> Analysis of results enables governments to assess whether they are achieving their educational objectives

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145 *ibid.*

146 UNHRC ‘Report of the Special Rapporteur on the Right to Education, Kishore Singh’ (11 May 2012) UN Doc A/HRC/20/21/Add.1 para 80 <[https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21-Add1\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21-Add1_en.pdf)> accessed 18 November 2020.

147 *ibid* para 81.

148 *ibid* para 82.

149 *ibid* para 83.

150 Daudet (n 140 ) 36.

151 UNHRC ‘Report of the Special Rapporteur on the Right to Education, Kishore Singh: Assessment of the Educational Attainment of Students and the Implementation of the Right to Education’ (2014) UN Doc A/HRC/26/27 para 30 <[https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR\\_Assessment\\_Educational\\_Attainment\\_of\\_Students\\_2014.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR_Assessment_Educational_Attainment_of_Students_2014.pdf)> accessed 18 November 2020.

152 *ibid* para 33.

153 *ibid* para 31.

and to adjust policy and resources accordingly.<sup>154</sup> Dissemination of results is a necessary aspect of accountability and transparency in education and facilitates discussions on the quality of an offered education.<sup>155</sup> National assessments focusing on ‘country specific curricula’<sup>156</sup> may be used to measure the competency of learners in mastering basic learning needs.

In terms of resources which will make the delivery of quality education possible, the Dakar Framework for Action, invites governments to make firm commitments to ensure that sufficient resources are allocated towards basic education.<sup>157</sup> Once resources are allocated they must be efficiently used whilst more resources are mobilised from international development partners.<sup>158</sup> With all the above discussed, this article views that a national plan of action that will complement Zimbabwe’s Education Act should take into account the provisions of the World Declaration, whilst at the same time, taking into account the country’s individual context and specific resources required.

### The Basic Education Provided by Schools must be Available, Accessible, Adaptable and Acceptable

In General Comment 13, the Committee to the ICESCR stated that if schools are to offer appropriate education, such education ‘shall exhibit the following interrelated and essential features – availability, accessibility, acceptability and adaptability.’<sup>159</sup> In accordance with General Comment 13, an education which does not meet the above interrelated elements does not meet the dictates of international law. Following General Comment 13, the four interrelated elements are therefore essential features of a basic education. Arendse elucidates that these elements ‘give concrete content to the right to basic education’<sup>160</sup> and ‘contribute to the successful provision of a basic education.’<sup>161</sup> The Act as amended does not currently make explicit mention that basic education must be available, accessible, adaptable or acceptable. Although not mentioning the four interrelated elements, the Act as amended has now made some important pronouncements which address some but not all aspects relating to the provision of basic education required by international law. A provision of a basic education framework

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<sup>154</sup> *ibid* para 32.

<sup>155</sup> Ajay Das, *Right to Education* Aci-Axis (2010) 41.

<sup>156</sup> Joel Cohen, David Bloom and Martin Malin (eds), *Educating All Children: A Global Agenda* (MIT 2006) 18.

<sup>157</sup> World Economic Forum (n 142) para 46–47.

<sup>158</sup> *ibid* para 46–47.

<sup>159</sup> General Comment No 13 (n 42) para 6.

<sup>160</sup> Lorette Arendse, ‘The Obligation to Provide Free Basic Education in South Africa : An International Law Perspective’ (2011) 14(6) Potchefstroom Electronic LJ 97, 100.

<sup>161</sup> *ibid*.



which ensures the provision of basic education meeting General Comment 13 requirements is still vital.

### Availability

The basic form of availability is the existence of schools.<sup>162</sup> The Committee mandates states to provide educational institutions which are sufficient in quantity.<sup>163</sup> Various factors will determine availability including the level of development of the country.<sup>164</sup> Some factors to consider are the ability of the government to provide the infrastructure required for the schools, such as libraries, buildings, facilities for computers and sanitation services.<sup>165</sup> Schools also need to have safe water to drink, teachers that have been trained and are receiving competitive salaries.<sup>166</sup> Availability is about ensuring that there are physical inputs which make learning possible. Without these considerations, learning will be impossible, a view which was advanced in the American case of *Campaign for Fiscal Equity*.<sup>167</sup> The court in this case stated that whilst basic education is about achieving certain learning goals, it also required adequate physical inputs.<sup>168</sup>

In line with the provisions of General Comment 13, the Act has indicated that basic state-funded education includes the provision of education resources and infrastructure for free.<sup>169</sup> The view of this article is that, the Act must not only state that a school must have free resources and infrastructure rather it needs to go further and provide indicators of a school with adequate resources and infrastructure. This article suggests that indicators could be in the form of the Act specifying the number of classrooms, laboratories, sports facilities, sanitation facilities for males and females, computer infrastructure, as well as well-stocked libraries as a school must-have relative to the number of students. Other considerations may include having well-maintained sporting grounds, clean running water, reliable electricity and materials to assist those who are disabled and those with other special needs.<sup>170</sup> On the aspect of sanitation facilities, this article views that the number of age-appropriate facilities, per number of school enrolments and budget allocations for the maintenance must be mentioned. This article also sees the need for customised functional and available sanitation facilities for the disabled, as well as being specified for members of both genders. On the aspect of libraries, the number of well-stocked libraries per school enrolments and subjects

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162 Tristan McCowan, *Education as Human Right: Principles for a Universal Entitlement to Learning* (Bloomsbury Academic 2013) 39.

163 General Comment No 13 (n 42) para 6(a).

164 *ibid* para 6(a).

165 *ibid* para 6(a).

166 *ibid* para 6(a).

167 *Campaign for Fiscal Equity* 86 NY 2d 307 (NY 1995) see <<https://www.nyclu.org/en/cases/campaign-fiscal-equity-v-state-new-york-challenging-states-failure-provide-nyc-children-sound>>

168 *ibid*.

169 General Comment 13 (n 42) para 6(a).

170 *ibid*, para 6(a).

offered, must be clarified as well as those responsible for activities, such as fundraising and resourcing for libraries. All infrastructure must be built in a way that does not pose a threat to the safety of the child. The crucial nature of safety was highlighted in the Indian case of *Avinash Mehrota v Union of India*<sup>171</sup> where the court stated that ‘education requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school and a quality school certainly should pose no threat to the child’s safety.’<sup>172</sup>

General Comment 13 also states that, availability includes learners having trained teachers who receive competitive salaries.<sup>173</sup> Teachers must be competitively paid according to their qualifications and experience to ensure that the requisite skill to educate children is available.<sup>174</sup> This article also views that qualifications for a teacher per subject must be specified and their continuous training must be provided for. If special considerations or derogations are to be made, the extent of derogations must be specified to ensure that the quality of teaching required for basic education is maintained. Teacher appraisals are also important as they identify learning needs for teachers and also encourage teachers to learn and grow.<sup>175</sup>

### Acceptability

General Comment 13 states that acceptability is about the form and the substance of education.<sup>176</sup> It includes the teaching methods and the curriculum which has to be acceptable to learners in accordance with the standards set by the state.<sup>177</sup> The Dakar Framework of Action has indicated that learners in some countries are taught only a fraction of basic education relative to what they must be taught because what they must learn in the basic education curriculum is often not clearly defined, taught well or correctly assessed.<sup>178</sup> What is needed is a curriculum that satisfies basic learning needs as they are defined by the World Declaration.<sup>179</sup> To ensure acceptable education of the desirable quality, this article suggests that the Education Act must not only set out the type of education it intends for learners but it must go further to unpack the scope and content of a basic education curriculum as it is explained by the World Declaration. An acceptable basic education curriculum must be founded on compliance with the quality of basic education desired by the World Declaration. The content of the curriculum must address specific components of the essential learning tools and a basic learning content

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171 *Avinash Mehrota v Union of India* (2009) 6 SCC 398.

172 *ibid*.

173 General Comment No 13 (n 42) para (6a).

174 UNHRC (n 151) para 81.

175 Ontario Ministry of Education, ‘Teacher Performance Appraisal System’ <<http://www.edu.gov.on.ca/eng/teacher/appraise.html>> accessed 3 November 2020.

176 General Comment No 13 (n 42) para 6(c).

177 *ibid*.

178 World Economic Forum (n 142) para 43.

179 *ibid* para 42.

as identified by the World Declaration.<sup>180</sup> The Act must also address other aspects, such as delivery methods and assessments which must all align with the objectives intended by the World Declaration and various international instruments.<sup>181</sup>

### Accessibility

For accessibility, General Comment 13 states that basic education must be accessible in three ways, that is there should be no discrimination in its provision, education must be physically accessible and it must be economically accessible.<sup>182</sup>

Accessibility means there should be no discrimination in the provision of education in law or in fact.<sup>183</sup> As an immediate state obligation, the CADE is also clear that all manners of discrimination on any ground whether sex, colour or economic status is prohibited.<sup>184</sup> On this leg of accessibility the Act shuns all forms of discrimination and further the Act as amended now states that no child can be refused basic education based on pregnancy as earlier on mentioned.<sup>185</sup>

The next leg of accessibility, is that education should be physically accessible; children must be close to schools.<sup>186</sup> On this leg of accessibility, the Act as amended now provides that children are entitled to enrolment at the nearest school to their home and if the school is full then the child is entitled to be enrolled at the next nearest school.<sup>187</sup>

Finally, education should be economically accessible.<sup>188</sup> The Education Act now provides that basic education is free.<sup>189</sup> The position of the Act now aligns with General Comment 13 which makes it clear that primary schools cannot charge school fees of any kind, be it for examination, entrance fees or otherwise.<sup>190</sup>

Summing it all, accessibility is about the elimination of barriers which make the acquisition of quality basic education possible.<sup>191</sup> Barriers can be economic, legal or

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180 World Declaration (n 3) Art 1 (1)–(4).

181 General Comment 13 (n 42) para 6(c).

182 *ibid*, para 6(b).

183 *ibid* para 6(b)(i).

184 CADE (n 58) Art (1)(a).

185 Education Act (n 4) s 68C, as amended by The Education Amendment Act No 15.

186 General Comment 13 (n 42) para 6(b)(ii).

187 Education Act (n 4) s 10 (1–3), as amended by The Education Amendment Act No 15.

188 General Comment 13 (n 42) para 6(b)(iii).

189 Education Act (n 4) preamble, as amended by The Education Amendment Act No 15.

190 General Comment 13 (n 42) para 6(b) (iii).

191 *ibid* para 6 (b).

administrative.<sup>192</sup> Zimbabwe has now commendably removed legal barriers in relation to the legislated provision of school fees for basic education.<sup>193</sup>

## Adaptability

General Comment 13 states that education should be flexible and adapt to the needs of the diverse society and foster inclusivity, as well as coping with changing times.<sup>194</sup>

Following the General Comment 13 provisions, adaptable education means that the Act should set out a framework of basic education that is flexible and can adapt to the needs of the Zimbabwean society.<sup>195</sup> The Education Act should prescribe education that suits the local needs of the learners and addresses various cultural issues and takes an approach which aligns with General Comment 13.<sup>196</sup>

## Basic Education is provided at Primary and Secondary School Levels

Within the human-rights' framework, a school is viewed as a medium for children to learn, through being able to access learning programmes.<sup>197</sup> In describing the role of the school, the World Declaration states that the school is 'the main delivery system for the basic education.'<sup>198</sup> General Comment 13 to the ICESCR was the first instrument to recognise the close relationship between basic education and school attendance.<sup>199</sup> In accordance with its provisions, the first point of introducing basic education outside the home is at the primary school.<sup>200</sup> General Comment 13 states that the provision of basic education is not limited to the primary school but also includes secondary education.<sup>201</sup> General Comment 13 therefore provides clarity that basic education is provided at both primary and secondary school levels, making the attendance of both levels vital for the acquisition of basic education.<sup>202</sup>

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192 McCowan (n 162) 39.

193 Education Act (n 4) preamble, as amended by The Education Amendment Act No 15.

194 General Comment No 13 (n 42) para 6(d).

195 *ibid.*

196 General Comment 13 (n 42) para 6(d).

197 World Economic Forum (n 142) para 2(3).

198 World Declaration (n 3) Art V.

199 General Comment No 13 (n 42) para 13(9).

200 *ibid.*

201 *ibid* para 12 states: 'While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities. Article 13(2)(b) applies to secondary education "in its different forms", thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages alternative educational programmes which parallel regular secondary school systems.'

202 *ibid.*

McCowan posed a question as follows: universally, the right to education is identified with the school, ‘[b]ut are we justified in seeing the right to basic education as being a right [to attend a school]?’<sup>203</sup> Liebenberg further questioned whether or not schooling could be equated to basic education.<sup>204</sup> The answer considered by the author is that the school is a delivery system of the right to basic education.<sup>205</sup> Following General Comment 13, attendance at both primary and secondary school levels is a component of the right to basic education as reasoned by this article. The acquisition of basic education is enabled by attendance at both primary and secondary schooling. The Education Act as amended is now compliant with the provisions of General Comment 13 in that it now provides for the provision of basic education as offered at primary school level and secondary level up to form four.

## Conclusion

Utilising an international law approach, this article attempted to determine the scope and content of the right to basic education within its contextual, legislative and constitutional framework. The conclusion of this article is that in order to ensure the provision of basic education which meets the obligations imposed by both international law and the Zimbabwean Constitution, the Zimbabwean government has to view the right to basic education as comprising of six components as follows;

- Recognition of ‘basic education’ which is quality-oriented.
- The provision of basic education is only possible if attendance is compulsory for primary and secondary schooling.
- Primary and secondary schooling must be compulsory and free.
- The right to basic education should be regarded as an immediately claimable right which is not qualified by considerations of resources or other constraints.
- The right to basic education must be regarded as the minimum core content of the right to education.
- Any education, including basic education, must exhibit the characteristics of the interrelated elements sanctioned by General Comment 13, that is education must be accessible, acceptable, adaptable and available.

It is noted that in relation to the above six components of the right to basic education, the Education Act has made significant strides in unpacking section 75(1)(a) of the

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203 McCowan (n 162) 1.

204 Liebenberg (n 96) 243.

205 McCowan (n 162) 69.

Constitution and bringing the Education Act in compliance with both the Zimbabwean Constitution and international law. The Education Act however still needs to be further amended to ensure that it does not only provide for free and compulsory education but highlights a full scope and content of the right to basic education. Aspects such as making the Education Act compliant with the World Declaration stipulations in relation to the quality of basic education required, as well as considering basic education as a minimum core obligation of the right to education required by the ICESCR still need to be addressed. The Act should further be compliant with all General Comment stipulations relating to the provision of basic education particularly the availability, adaptability, acceptability and accessibility of the right to basic education.

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