

Monitoring the Realisation of the Right to Basic Education: The South African Jurisprudence and Structural-Process-Outcome Indicators

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Abstract

Under international law, the right to education should be available, accessible, acceptable, and adaptable—or comply with the four As. This right is provided for by the South African Constitution and numerous policies. Yet it remains illusory for thousands of South Africans. Against this backdrop, this article seeks to clarify indicators to monitor the implementation of this right. To this end, unpacking the South African jurisprudence on the right to basic education, it relies on the structural-process-outcome indicators model to unveil what needs to be done to secure a tangible enjoyment of the right to basic education. Based on this approach, it finds that the right to basic education is multidimensional and that its constitutive elements include immediate and non-discriminatory access to school buildings; infrastructure; the right to teachers and non-educational staff; the right to enjoy religion, language, and culture; as well as free transport for learners living far from the school. Ultimately, in light of the South African jurisprudence, the structural-process-outcome indicators explain what is effectively expected to operationalise the four As. Lessons gleaned from this approach will enable all stakeholders in South Africa and other parts of Africa to advance the right to basic education.

Keywords: right to basic education; monitoring; indicators; South African jurisprudence

Introduction

The right to education is instrumental for human development. It is an ‘empowerment right’¹ which enables beneficiaries to enjoy other human rights, hence its characterisation as a ‘multiplier’,² or a right that enables the achievement of other human rights.³ Consequently, this right occupies a significant place in international⁴ and regional human rights instruments.⁵ The standards for its achievement are well defined in terms of ensuring its availability, accessibility, acceptability, and adaptability,⁶ also known as the four As.⁷ As far as basic education is concerned, it is defined in Article 1 of the World Declaration on Education for All as an education in which:

[e]very person—child, youth and adult—shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to survive, to develop to their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.⁸

The focus of this article is on the right to basic education, because it is the basis of all further learning and vital for people’s development, their efficient functioning, and their ability to live a meaningful life.⁹ Although this right is provided for by the South African Constitution in section 29, this provision did not automatically translate into its enjoyment. Consequently, for the past decade, South African courts have been

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- 1 OHCHR Economic, Social and Cultural Rights (ESCR) Committee ‘General Comment 13: The Right to Education (Art 13 of the Covenant)’ (21st session, 1999) UN Doc E/C12/1999/10 para 1.
 - 2 Katarina Tomaševski, *Human Rights Obligations in Education: The 4-A Scheme* (Wolf Legal Publishers 2006).
 - 3 *ibid.*
 - 4 International Covenant on Economic, Social and Cultural Rights (ICESCR) (entered into force 3 January 1976) General Assembly Resolution 2200A (XXI) (16 December 1966) Arts 13(2)(a) and 14; UN Convention on the Rights of the Child Art 28; the 1960 UN Educational, Scientific and Cultural Organisation Convention against Discrimination in Education Art 4(a).
 - 5 African Charter on Human and Peoples’ Rights Art 17 (adopted 27 June 1981 by the Organization of African Unity Assembly) OAU Doc CAB/LEG/67/3 Rev 5.21 ILM 58 (1982) entered into force 21 October 1986; African Charter on the Rights and Welfare of the Child, (entered into force 2 November 1999) OAU Doc CAB/LEG/24.9/49 (1990) Art 11.
 - 6 ‘General Comment 13’ (n 1).
 - 7 For more on the four As, see Katarina Tomaševski, ‘Preliminary Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski, Submitted in Accordance with Commission on Human Rights Resolution 1998/33’ (Commission on Human Rights, 55th Session) UN Doc E/CN4/1999/49 (1999), paras 51–56; Tomaševski (n 2); in addition, the four As will be thoroughly discussed below.
 - 8 World Declaration on Education for All (1990) (adopted by the World Conference on Education for All, Jomtien, Thailand, 5–9 March 1990) Art 1.
 - 9 Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 244.

instrumental in enforcing the right and, in the process, clarifying its content. They have clarified the four As, or the minimum standards, further elucidating the composite character of the right to basic education. This right includes immediate and non-discriminatory access to school buildings; infrastructure; the right to teachers and non-educational staff; the right to enjoy religion, language, and culture; as well as free transport for learners living far from the school.¹⁰ Yet, so many learners and prospective learners still do not enjoy the right to basic education. This could be due to a lack of political will, a lack of resources, or simply a lack of knowhow by the government, who is the duty bearer of the right.¹¹ It is therefore imperative to clarify the relevant indicators with a view to guiding policy makers and monitoring the extent to which the four As are operationalised and the right to basic education is realised across the country. This is the objective of this article.

Human rights indicators are essential in measuring the realisation of human rights. They are important in assessing whether the state in charge of respecting, protecting, and fulfilling human rights is effectively delivering on its promises and can, accordingly, be held accountable. It is against this backdrop that, through relying on the South African jurisprudence on the right to basic education, this article clarifies indicators or international standards to guide policy makers on what is needed to efficiently give effect to and measure the realisation of this important right in South Africa. In other words, the article examines the manner in which the South African courts enforce the right to basic education in order to unveil core elements needed for the implementation of the four As. To this end, the article analyses the notion of indicators and their importance in measuring the implementation of human rights standards such as the four As. In this vein, it relies on the structural-process-outcome indicator model. This model helps to measure the implementation of human rights and proposes comprehensive guidelines to measure compliance with human rights, and specifically the right to basic education, which is the focus of this article. This will be done through an enquiry into South African jurisprudence on the right to basic education, which has interpreted and shed some light on the four As to guide stakeholders on what is to be done to implement the right under discussion. As part of this enquiry, the article also focuses on the right to education in South Africa from both international law and constitutional perspectives to understand what is expected from the duty bearer of the right under discussion.

10 See the section of the article dedicated to the South African jurisprudence and the structural-process-outcome indicators, where the related case law is discussed in detail. For more clarity on the four As in South African courts, see Ann 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) 2 De Jure 1–23.

11 Jody Kollapen, 'Report of the Public Hearing on the Right to Basic Education' (South African Human Rights Commission 2006) 1
 <<https://www.sahrc.org.za/home/21/files/Reports/Right%20to%20basic%20education%202006.pdf>>
 accessed 3 November 2020.

In examining the implementation of the right to basic education from a jurisprudential indicator perspective, the article seeks out a new discursive space to ensure the protection of this vital human right. Human rights indicators can be derived from the treaties themselves or from General Comments or recommendations by treaty monitoring bodies—such as the Committee on Economic, Social and Cultural Rights (ESCR Committee), which provided the four As¹²—or they can be drawn from the reporting guidelines of each treaty body, which can outline some specific norms and standards to guide states in monitoring human rights violations at the national level.¹³ However, human rights indicators are often not respected. Therefore, the role of national courts in shaping indicators cannot be neglected. These courts not only interpret international standards of human rights; they also ensure their incorporation into the local context, which is essential for implementation. In other words, while international standards such as the four As are defined at the international level, they are less significant if the national courts are unable to interpret them and provide indicators and guidance needed for their national implementation. Highlighting the need to consider the local context in the implementation of human rights, Eleanor Roosevelt argued that ‘human rights begin ... in small places, close to homes so close and so small that they cannot be seen on any maps of the world.’¹⁴ This means that in spite of the sanctity of global standards of human rights, the national landscape is the site of their operationalisation, where the decisions of the courts are instrumental in providing guidance and indicators for their effectiveness. Interpreting this principle in light of the right to basic education in the South African context, McConnachie’s ‘South African Judge Lays Down the Law on the Right to a Basic Education’¹⁵ is of significance to this article, which will explore judges’ decisions in order to unveil the indicators of the right to basic education.

In terms of methodology, the article uses a qualitative analysis of case law to unveil whether the activities and processes conducted by the states in question lead to an effective implementation of the four As. It evaluates whether the duty bearer of the right to basic education is effectively operationalising the right on the ground and provides guidance on addressing the missing link to turn the right into reality. Although the examination of case law will not be exhaustive, it will focus on cases that contribute to

12 General Comment 13 (n 1) and OHCHR ESCR Committee ‘General Comment 11’: Plans of Action for Primary Education (Art 14 of the Covenant) (adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights 10 May 1999) Doc E/C.12/1999/4 on the right to education; see also General Comment 12 on the right to food, and 14 and 22 on the right to health.

13 See, for instance, the guidelines provided by the ESCR Committee [on file with author].

14 Serges Djoyou Kamga, ‘The Role of Traditional Leaders in Addressing Women’s Rights in Postcolonial Africa: The Case of FGM and Forced Marriage’ in Abikal Borah, Bisola Falola and Toyin Falola (eds), *Creative Incursions: Cultural Representations of Human Rights in Africa and the Black Diaspora* (Carolina Academic Press 2019) 46.

15 Chris McConnachie, ‘South African Judge Lays Down the Law on the Right to a Basic Education’ (OxHRH Blog, 25 February 2014) <<https://ohrh.law.ox.ac.uk/south-african-judge-lays-down-the-law-on-the-right-to-a-basic-education/>> accessed 1 October 2020.

an understanding of the substance of the four As and that indicate what should be done for their realisation.

The article is divided into five parts, including this introduction. The second part of the article presents the structural-process-outcome indicator model to measure the implementation of human rights and its application to the right to basic education in the South African context. The third part of the article presents the right to education in South Africa from both international law and constitutional perspectives. In this section, the focus is on the minimum standards and the outcome indicators in relation to each of the standards which will ensure the realisation of the right to education. The fourth part of the article provides an analysis of the case law on basic education to identify the outcome indicators. In this part, an analysis will be conducted according to the structural-process-outcome model. Ultimately, this analysis unveils how structural or process indicators relate to the four As. The fifth part summarises the article in the form of concluding remarks.

The Use of the Structural-Process-Outcome Indicator Model to Measure the Implementation of Human Rights

The structural-process-outcome model indicator was originally suggested by Paul Hunt, former UN Special Rapporteur on the right to health, to measure states' compliance with the right to health under international law.¹⁶ This indicator is important for demonstrating steps taken by a state party to a treaty to give effect to the latter. It is therefore necessary to examine the notion of indicator before focusing on the structural-process-outcome indicator model, which is at the centre of this article.

The Notion of Indicator

The Collins English Dictionary defines an indicator as 'a measurement or value which gives you an idea of what something is like.'¹⁷ Generally used in development programming, an indicator is used to monitor and evaluate development projects. In the policy sphere, it is also used to evaluate policy formulation and implementation. Its main function is to furnish 'specific information on the state or condition of an event, activity or outcome.'¹⁸ In view of the foregoing, as far as the relevance of indicators to human

16 OHCHR, 'Report of the Special Rapporteur Paul Hunt on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (Commission on Human Rights, 62nd Session) UN Doc/CN4/2006/48 (2006).

17 Collins English Dictionary, 'Indicator' <<https://www.collinsdictionary.com/dictionary/english/indicator>> accessed 1 November 2020.

18 Asian Sub-regional Workshop, 'Using Indicators to Promote and Monitor the Implementation of Human Rights' (New Delhi, India 26–28 July 2007) 24 <https://www.ohchr.org/Documents/Issues/HRIndicators/Report_New_Delhi_Workshop.pdf> accessed 2 November 2020.

rights is concerned, indicators are significant in measuring states' compliance with their obligation to respect, protect, and fulfil all human rights. According to the Expert Meeting on Human Rights Indicators, held in Turku, Finland, in 2005, indicators can be in the form of statistics to capture information quantitatively in specific circumstances and contexts.¹⁹ Such information may be quantitative (for numerical quantification) or qualitative (non-numerical data used to understand concepts or experiences) and is important to measure compliance with human rights. Moreover, the linkages between indicators and human rights are made clearer by the Office of the UN High Commissioner for Human Rights (OHCHR) in its definition of a human rights indicator as 'specific information on the state of an event, activity or an outcome that can be related to *human rights norms and standards*; that addresses and reflects the *human rights concerns and principles*; and that can be used to assess and monitor the promotion and protection of *human rights*.'²⁰ In a similar vein, Green describes a human right indicator as 'a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation.'²¹

These definitions clearly show that indicators can be used beyond the domain of development programming, where they are vital for the monitoring and evaluation of projects. In the human rights field, indicators are relevant to measuring the implementation of relevant standards. Moreover, they guide government officials and policy makers on how to give effect to human rights and they assist civil society organisations and other stakeholders on what to expect from the state and to hold it accountable.

As far as the indicators of the right to basic education are concerned, while the four As are global norms/standards, the decisions of the courts help to clarify in detail what should be done to comply with them. These indicators enable civil society as well as other stakeholders to collect evidence on the implementation of this right. Therefore, human rights indicators are important for 'monitoring compliance and policy analysis, impact assessment and advocacy.'²² Moreover, well-designed indicators are also important for self-assessment by a state that needs to improve its compliance with its international and national human rights obligations.²³ The significance of human rights indicators is summarised by the World Bank as follows: 'Human rights indicators are important for both assessment and diagnostic purposes: the assessment function of human rights indicators relates to their use in monitoring accountability, effectiveness,

19 Report of Turku, 'Expert Meeting on Human Rights Indicators' (Abo Akademi University, Turku, Finland 10–13 March 2005) 2 [on file with author].

20 Office of the UN High Commissioner for Human Rights, as quoted by the Report of Turku Expert Meeting (n 19) 2 [my emphasis].

21 Maria Green, 'What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement' (2001) 23 Human Rights Quarterly 1062–1097 at 1065.

22 Asian Sub-regional Workshop (n 18) 5–6.

and impact; the diagnostic purpose relates to measuring the current state of human rights implementation and enjoyment in a given context, whether regional, country-specific, or local.’²⁴

The Structural-Process-Outcome Indicator Model to Measure the Implementation of Human Rights

The structural-process-outcome indicator model to measure the implementation of human rights proposes a comprehensive guideline to measure compliance with human rights obligations. It was adopted by the OHCHR through the UN 2006 Report on Indicators for Monitoring Compliance with International Human Rights Instruments (hereinafter 2006 Report on Indicators).²⁵ According to these guidelines, to measure human rights, UN treaty bodies could rely on three types of indicators: structural indicators, process indicators, and outcome indicators.

Structural Indicators

According to the 2006 Report on Indicators, ‘[s]tructural indicators reflect the ratification/adoption of legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating the realization of the human right concerned.’²⁶ These indicators are often relied on to measure a state’s commitment to human rights treaties or instruments. For example, the questions in this indicator could be whether the state has ratified the treaty or a number of treaties and whether it has adopted measures or a national action plan to give effect to the ratified treaty at the domestic level. For instance, in the context of this article, the question would be whether South Africa has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides for the right to basic education, and the answer is a positive one.

Process Indicators

According to the 2006 Report on Indicators, process indicators capture ‘[s]tate policy instruments to milestones that become outcome indicators, which in turn can be more directly related to the realization of human rights.’²⁷ In other words, these indicators measure efforts made by states to transform rights guaranteed in human rights treaties into tangible results for its citizens. They usually measure programmes, laws, and

24 Siobhán McInerney-Lankford and Hans-Otto Sano, *Human Rights Indicators in Development: An Introduction* (World Bank 2010) vi.

25 OHCHR, ‘Report on Indicators for Monitoring Compliance with International Human Rights Instruments’, UN Doc HRI/MC/2006/7 (2006).

26 *ibid* para 17.

27 *ibid* para 18.

policies adopted by states to implement their commitments on the ground.²⁸ The Inter-American Commission on Human Rights sheds more light on process indicators by indicating that they ‘measure the quality and extent of state efforts to implement rights by measuring the scope, coverage, and content of strategies, plans, programs, or policies, or other specific activities and interventions designed to accomplish the goals necessary for the realization of [the right].’²⁹

Some examples of process indicators would include budgetary allocations to realise specific rights, the number of human rights complaints received and addressed within a specific period, the creation of awareness of human rights, and the existence and functioning of specific institutions to realise human rights. In the South African context, process indicators on the right to basic education would include whether the Constitution provides for the right, whether policies exist to implement the right, and whether institutions have been set up to turn the right into reality. For instance, this would include whether the South African Human Rights Commission and the judiciary are approached to enforce the right.

Outcome Indicators

According to the 2006 Report on Indicators, an outcome indicator is ‘a more direct measure of the realisation of a human right.’³⁰ Put differently, it measures the real enjoyment of rights by rights holders in tangible terms. In other words, it assesses the practical effect of government policies.³¹ This means that outcome indicators will assess the result of various processes adopted by the government to realise human rights. In the context of this article, the outcome indicators will include questions on the extent to which legal policy measures adopted have enabled all beneficiaries, without exception, to enjoy the right to basic education. Questions on the enjoyment of the four As would include whether basic education is free of charge, compulsory, and open to all without discrimination based on race, language, or other status. It would also explore whether schools are equipped with the appropriate infrastructure, libraries, water and sanitation, textbooks, trained teachers, and non-teaching staff; whether there is free transport for learners; and so forth. These questions have been at the centre of the debate on the right to basic education and the courts have attended to them, hence the need to rely on the courts’ responses as a source of indicators, as will be shown later in the article.

28 Sital Kalantry, Jocelyn E. Getgen, and Steven Arrigg Koh, ‘Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR’ (2010) 32 Human Rights Quarterly 283.

29 Inter-American Commission on Human Rights, ‘Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights’ OEA/Ser.L/V/II.132 (Doc 14) (2008) Guidelines for Preparation of Progress Indicators [on file with author].

30 ‘Report on Indicators’ (n 25) para 19.

31 Kalantry, Getgen, and Arrigg Koh (n 28) 283.

As indicated by the 2006 Report on Indicators, the other added value of an outcome indicator is that it ‘reflects the importance of the indicator in assessing the enjoyment of the right’³² by capturing all elements needed for such enjoyment. This view is echoed by De Beco, who recognises that although both process and outcome indicators are significant in effectively measuring treaty compliance,³³ outcome indicators are essentially result-orientated.³⁴ In sum, the structure-process-outcome agenda indicators³⁵ are instrumental in measuring state compliance with human rights standards. Their importance cannot be overemphasised, because, as correctly argued by Kalantry, Getgen, and Arrigg Koh, ‘the structural-process-outcome framework divides state duties into obligations of conduct and obligations of result.’³⁶ In other words, it compels states to behave in a certain way in order to achieve a particular tangible result to protect human rights. In this perspective, the OHCHR underlines the importance of the structural-process-outcome indicators framework in observing that it echoes ‘the need to capture a duty-bearer’s commitments, efforts and results, respectively.’³⁷

Overall, human rights indicators—and specifically the structural-process-outcome model—are essential in the monitoring and evaluation of the implementation of human rights. The significance of this tool cannot be overstressed, especially in a context where states have ratified instruments but still do not give effect to them.

The Right to Education in South Africa from International Law and Constitutional Perspectives

This section examines the right to education from international law and constitutional perspectives.

The Right to Education under International Law

Under international law, the right to education should comply with the four As. In other words, it must be made available, accessible, acceptable, and adaptable.³⁸

32 ‘Report on Indicators’ (n 25) para 19.

33 Gauthier de Beco, ‘Human Rights Indicators for Assessing State Compliance with International Human Rights’ (2008) 77(23) *Nordic Journal of International Law* 43.

34 *ibid* 44.

35 For more on this, see Benjamin Mason Meier and Yuna Kim, ‘Human Rights Accountability through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation’ (2015) 26(141) *Duke Journal of Comparative & International Law* 183.

36 Kalantry, Getgen, and Arrigg Koh (n 28) 283.

37 OHCHR, ‘Report on Indicators for Promoting and Monitoring the Implementation of Human Rights’, (6 June 2008) Twentieth meeting of chairpersons of the human rights treaty bodies, Geneva, 26–27 June (HRI/MC/2008/3) 6.

38 See ‘General Comment 13’ (n 1).

- *Availability.* According to the ESCR Committee, the availability of education entails making sure that educational establishments and programmes are available in adequate quantities. Furthermore, the availability of education entails ensuring that schools are equipped with appropriate infrastructure, including well-equipped classrooms, libraries, water and sanitation facilities for all sexes, trained and well-paid teachers, and teaching materials.³⁹ All these key elements should be effectively available and ready to be used. Woolman and Bishop correctly observe that the standard of ‘availability’ is very high, as ‘even [a] small deviation would constitute a limitation of the right.’⁴⁰
- *Accessibility.* Under General Comment 13(b) of the ESCR Committee, accessibility is multidimensional. In this respect, school institutions should be open to all without any form of discrimination whatsoever. These institutions should be physically accessible, or within safe physical reach, or should be accessible via technology or distance learning methods. Finally, education should be economically accessible at secondary and tertiary levels, while completely free at the primary level.
- *Acceptability.* According to General Comment 13, an acceptable education refers to an education of which the ‘form and substance, including curricula and teaching methods, [are] acceptable to learners and in some cases to their parents; it should be relevant, culturally appropriate and of good quality.’⁴¹ Such an education system should advance the child’s other rights in order to ensure his or her full development.⁴²
- *Adaptability.* An adaptable education should be flexible so as to ‘adapt to the needs of changing societies and communities and respond to the needs of learners within their diverse social and cultural settings.’⁴³ This means states should adapt education systems to meet the needs of learners, of society in general, and of the job market. In post-apartheid South Africa, this requires an inclusive education where all learners are given equal opportunities to learn, including having one curriculum for all learners.

As far as the right to primary or basic education is concerned, unlike secondary and tertiary education, which are submitted to progressive realisation with consideration of the availability of resources,⁴⁴ the right to basic education should be achieved immediately. Basic education is compulsory and free of charge. The compulsory feature

39 *ibid* para 6(a).

40 Stu Woolman and Michael Bishop, ‘Education’ in Stu Woolman (ed.), *Constitutional Law of South Africa* (Juta 2012) 57-20.

41 ‘General Comment 13’ (n 1) para 6(d); Tomaševski (n 7) paras 51–56.

42 UNESCO, ‘The Right to Primary Education Free of Charge for All: Ensuring Compliance with International Obligations’ (2008) 3.

43 ‘General Comment 13’ (n 1) para 6(d).

44 ICESCR (n 4) Art 2(1).

of basic education echoes its obligatory character and the fact that it should be offered to the needy without discrimination. In its prescription of this right, the ESCR Committee provides that ‘neither parents, nor guardians, nor the state are entitled to treat as optional the decision as to whether the child should have access to primary education.’⁴⁵ This means that the state is compelled to provide the right to basic education to everyone. Culture, religion, race, disability, or any other status cannot justify the exclusion of an individual from basic education. This is unequivocally stressed by the ICESCR: ‘Primary education shall be compulsory and available free to all.’⁴⁶

The right to basic education should be offered without fees charged to beneficiaries, their parents, or their guardians. This means all fees—including indirect fees such as the cost of uniforms, stationery, and textbooks—are illegal and as such prohibited. This distinguishes the standard of basic education—which is absolute, immediate, and free of charge—from the standards of secondary and tertiary education, which are submitted to progressive realisation with consideration of the availability of resources.⁴⁷

Under the progressive realisation approach, states should take measures to implement the rights provided for in the ICESCR.⁴⁸ In this context, the smallest measure is known as ‘the minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’⁴⁹ in the covenant. Without this minimum core, the covenant would simply become meaningless.⁵⁰ Therefore, in the basic education sphere, the minimum core obligation consists of ensuring the immediacy of education and its provision free of charge.⁵¹

The Right to Education in the South African Constitutional Landscape

The Constitution of the Republic of South Africa of 1996 (hereafter the Constitution) explicitly provides for the right to education in its Bill of Rights, in section 29(1), as follows:

- (1) Everyone has the right—
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

45 ‘General Comment 11’ (n 12) para 6.

46 ICESCR (n 4) Art 13(2)(a).

47 *ibid* Art 2(1).

48 *ibid*.

49 OHCHR ESCR Committee ‘General Comment 3: The Nature of States Parties’ Obligations’ (Art 2, para 1 of the covenant) para 10, UN Doc E/1991/23 (14 December 1990).

50 *ibid*. For more on the minimum core, see Liebenberg (n 9).

51 ‘General Comment 11’ (n 12) paras 6 and 7.

The nature of section 29 of the Constitution on the right to education was clarified by the Constitutional Court in *Gauteng Provincial Legislature in re: Gauteng School Education Bill of 1995* in these terms: ‘Section 32(a) [of the 1993 interim Constitution, now section 29(1) of the 1996 Constitution] creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.’⁵²

In other words, the government has the positive obligation to provide for the right to basic education and not simply a negative obligation not to violate this right. In highlighting its compulsory feature, section 3(1) of the South African Schools Act (SASA) 84 of 1996 provides that it is compulsory for a learner to attend school from the age of seven until the age of 15 years or the ninth grade, whichever comes first. In addition, section 29(1)(a) of the Constitution also provides for the right to ‘adult basic education’. The latter ‘subsumes both literacy and post-literacy as it seeks to connect literacy with basic (general) adult education on the one hand and with training for income generation on the other hand.’⁵³ While Kamga also recognises the sanctity of the right to education for everyone, he notes that ‘any limitation of this right can only be justified under section 36 of the Constitution which clearly provides that the rights in the Bill of Rights can be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society.’⁵⁴ This means that any limitation of the right to education and basic education is subject to very strict conditions.

Nevertheless, although the right to basic education is well provided for by law and policies, this does not automatically translate into reality. Echoing the view of O’Regan J in *MEC for Education: KwaZulu-Natal v Pillay*,⁵⁵ Liebenberg writes: ‘The post-apartheid South Africa, educational landscape is still characterised by deep disparities in the quality of education and schooling, with historically black schools operating under conditions of severe resource and infrastructure backlogs.’⁵⁶ In other words, many learners do not enjoy the right to education. This is in part due to the fact that the policy allows the charging of school fees, depending on a system of full or partial exemption for poor learners.⁵⁷ Furthermore, as correctly argued by Liebenberg, ‘the secondary cost associated with the schooling (uniform, transport, textbooks, cost associated with extracurricular activities) [is a] significant barrier for poor learners to

52 *Gauteng Provincial Legislature in re: Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) para 9 [my emphasis].

53 The Department of Education’s Policy Document on Adult Basic Education and Training (1997) 5.

54 Serges Djoyou Kamga, ‘Inclusion of Learners with Severe Intellectual Disabilities in Basic Education under a Transformative Constitution: A Critical Analysis’ (2016) 49 CILSA 37; s 36 of the South African Constitution.

55 2008 (1) SA 474 (CC).

56 Liebenberg (n 9) 245.

57 Section 39 of SASA.

access education.⁵⁸ In its attempt to address the problem, the Department of Education adopted a revised policy which contains the notion of ‘fee-free’ schools for the poorest two quintiles, the main objective being to extend the proportion of no-fee schools to 60% of schools.⁵⁹ To implement fee-free schools, poor schools are provided with additional budget by the provincial government in compensation for their incapability to charge school fees.⁶⁰ Meanwhile, all other schools are allowed to charge school fees, even though this practice is subject to mechanisms set up to avoid the poorest being excluded from enjoying the right to education.⁶¹ Nonetheless, many learners are still excluded from schools because their parents are unwilling to apply for exemptions, which are seen to confirm their poverty and, hence, are an embarrassment.⁶² In other words, the fee-exemption system does not meet the government’s obligation to provide a basic education for everyone.⁶³

Overall, although under international law basic education should be free, the constitutional perspective is nuanced. This is another justification for this article, which seeks to clarify the substance of the right under enquiry through an interpretation of the courts’ decisions. The following section will examine the jurisprudence of the courts to distil indicators needed to advance the implementation of the four As. This will be done with reliance on the structural-process-outcome indicator model.

South African Jurisprudence and the Structural-Process-Outcome Indicator Model

In light of the South African jurisprudence on the right to basic education, this section of the article applies the structural-process-outcome indicator model.

The Structural and Process Indicators in South Africa

As far as the structural indicator is concerned, it is important to recognise that South Africa is party to the ICESCR,⁶⁴ which provides for the right to basic education; as such, it should comply with the standards of the four As. As for the process indicator, South Africa has explicitly constitutionalised the right to basic education and adopted numerous policies⁶⁵ to give effect to this right. Moreover, the right to basic education is

58 Liebenberg (n 9) 245.

59 *ibid* 246.

60 *ibid* 246.

61 Section 41(5) of SASA.

62 Woolman and Bishop (n 40) 57-25.

63 *ibid*.

64 South Africa ratified the ICESCR on 18 January 2015.

65 SASA, which seeks to ensure universal access to education; SASA 84 of 1996—Amended National Norms and Standards For School Funding 17 January 2014; Interim Policy for Early Childhood Development, 1 July 1997; National Education Policy Act 27 of 1996; Admission Policy For Ordinary Public Schools, October 1998; National Policy on HIV/AIDS, for Learners and Educators in Public

well included in the Bill of Rights and is, as such, justiciable. In addition, when interpreting the Bill of Rights, the courts are empowered to rely on international and foreign law. This is an important process indicator which provides the courts with an avenue to make pronouncements on the right to basic education. Having demonstrated that there is no ambiguity in terms of structural and process indicators, the next section will focus on the courts' decisions to unveil the outcome indicators.

South African Jurisprudence and the Outcome Indicators

At the outset of this section, it is important to recognise that, in general, South Africa complies with the normative implementation of the right to basic education. This is to say that the ratification of related treaties and their incorporation into laws and policies are adequate, hence fulfilling the requirements of structural and process indicators, which are clear and not problematic. As for the outcome indicators, they seek to measure the substantial and tangible enjoyment of this right by learners. Relying on the jurisprudence, this section measures the extent to which the country complies with the

Schools, and Students and Educators in Further Education, 10 August 1998; Constitution of the Education Labour Relations Council (ELRC) Resolution No 3 of 1999, 14 October 1999; Constitution of the ELRC Resolution No 6 of 2000, 5 June 2000; Adult Basic Education and Training (ABET) Act 52 of 2000, which regulates ABET; Education Laws Amendment Act 24 of 2005, which amended SASA of 1996 and turned schools in poverty-stricken areas into 'no-fee schools'; Education Laws Amendment Act 31 of 2007; Employment of Educators Act 76 of 1998, which controls the professional, moral, and ethical responsibilities of educators, as well as teachers' competency requirements; the establishment of the South African Council for Educators (SACE), which regulates the teaching corps; the design of the National Qualifications Framework (NQF); the 2000 Education White Paper, which provides for the expansion and full participation of five-year-olds in pre-school Grade R education by 2010; the 2001 Education White Paper 6 on Inclusive Education; Education Laws Amendment Act 50 of 2002; National Curriculum Statement, 31 May 2002; National Policy on Whole School Evaluation, 1 July 2002; Improving Access to Free and Quality Basic Education to All, 14 June 2003; Policy Document on Adult Basic Education and Training, 12 December 2003; National Education Information Policy, 7 September 2003; ELRC, *Policy Handbook for Educators*, (Universal Print Group 2003); Rights and Responsibilities of Parents, Learners and Public Schools: Public School Policy Guide 2005, 1 September 2006; the Umalusi Council, which establishes and oversees standards for general and technical and vocational education and training (TVET) in South Africa, in accordance with the NQF Act 67 of 2008 and the General and Further Education and Training Quality Assurance Act 58 of 2001; National Policy Framework for Teacher Education and Development in South Africa, 26 April 2007; National Policy on an Equitable Provision of an Enabling School Physical Teaching and Learning Environment, 11 June 2010; Policy on Learner Attendance, 4 May 2010; Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, 29 November 2013; Policy on the Organisation, Roles and Responsibilities of Education Districts, 3 April 2013; Draft Policy: The Incremental Introduction of African Languages in South African Schools 2013; Draft Policy: National Policy for the Provision and Management of Learning and Teaching Support Material, September 2014; National Policy for Determining School Calendars for Public Schools in South Africa, January 2015; the South African Standard for Principalship Policy, which was approved by the Council of Education Ministers (CEM) in 2015; the Action Plan to 2019: Towards the Realisation of Schooling 2030; the setting up of the Council of Education Ministers; Heads of Education Departments Committee; SACE Act 31 of 2000.

four As by assessing their outcomes on the ground. It starts with an enquiry into the Constitutional Court's decision on the immediacy of education, before focusing on the four As.

The Outcome Indicator of the Immediate Feature of the Right to Basic Education

Given that the process indicator characterised by the explicit constitutionalisation of the right to basic education is a reality, the outcome should be the recognition of the immediate feature of this right in the Constitution and its implementation. This was not mentioned by the Constitution. Nevertheless, it was emphasised by the Constitutional Court in the case of *Governing Body of the Juma Masjid Primary School v Essay NO and Others*,⁶⁶ in which the Court boldly underlined the immediate feature of this rights in these terms:

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'.⁶⁷

With this decision, the Constitutional Court clarified the international standard of the right under discussion and provided guidance on its nature. This decision confirms the benchmark established under international human rights law, as a guide for the government on what needs to be done to give effect to the right. At the same time, it also guides civil society on claiming the right, which is to be realised immediately and not progressively with consideration of the availability of resources, as is the case for other socio-economic rights.⁶⁸

The Outcome Indicator of the Availability of Basic Education

Availability is multidimensional. It entails the provision of buildings, sanitation for all, teaching materials, desks, textbooks, chairs, teachers, and other staff members at school. These elements have been clarified by the South African courts, which have ruled that basic education should indeed be tangible or concretely available.

66 2011 (8) BCLR 761 (CC).

67 Paragraph 37 [my emphasis].

68 See ICESCR (n 4) Art 13; 'General Comment 13' (n 1).

Availability and the Right to Buildings

As a result of the government's failure to equip the schools with adequate facilities, in the case of *Centre for Child Law and Seven Others v Government of Eastern Cape Province and Others* (the Mud School case),⁶⁹ the applicants (the Centre for Child Law and the Legal Resources Centre), on behalf of learners' parents at Nomandla Primary School and six other poor 'mud' schools in the Eastern Cape, took the state to court. Interestingly, the respondent recognised the magnitude of the problem and committed to remedy it in all seven schools involved. It subsequently spent R13 billion to meet its obligations⁷⁰ after in the interim providing the seven schools with temporary prefabricated classrooms, water tanks, and sufficient desks and chairs.

The other interesting case which explains the standard of availability of basic education was *School Governing Body of Amasango Career School v MEC for Education, Eastern Cape*.⁷¹ Similar to the previous case, the Eastern Cape Department of Education was taken to court for its failure to refurbish 'mud schools' or provide the schools with adequate facilities. The applicant, the school governing body, made a convincing case which led the respondent to concede and take responsibility to remedy the problem, beginning with a comprehensive plan in which provisional facilities were to be provided in the interim while the schools were waiting for adequate permanent facilities. As pointed out by McConnachie and McConnachie, 'the fact that the national and provincial departments were so quick to settle is indicative of the power of the argument raised in both cases: that the s 29(1)(a) right to a basic education affords an entitlement to adequate facilities.'⁷²

*Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others*⁷³ addressed the eviction of a public school from private property, which would have violated the right to basic education of children. The problem before the court was to determine whether the owner had a negative obligation not to obstruct the learners' right to basic education, the effect of the eviction order on the learners' right to basic education, and whether the best interests of the child was applicable. While the court granted the eviction order, it clarified the obligation of the state to make school buildings available. In this regard, on the one hand, the state has the positive obligation to provide the right as well as the negative obligation not to encroach upon the right to basic education. On the other hand, the owner of private property has only the negative

69 Eastern Cape High Court, Bisho, Case No 504/10.

70 *ibid*; Ann Skelton, 'Leveraging Funds for School Infrastructure: The South African "Mud Schools" Case Study' (paper presented at the UKFIET International Conference on Education and Development—Education & Development Post 2015: Reflecting, Reviewing, Revisioning) (Oxford, 10–12 September 2013) 3 [on file with author].

71 (ECG) unreported case no 3838/2009.

72 Cameron McConnachie and Chris McConnachie, 'Concretising the Right to a Basic Education' (2012) 129 SALJ 567.

73 (CCT 29/10) [2011] ZACC 13.

obligation not to violate the right,⁷⁴ but the Court established that, going forward, the best interests of the child cannot be ignored in dealing with evictions that encroach upon the right to basic education.⁷⁵ In reaching its decision, the Constitutional Court considered international law and the nature of basic education as it pertains to physical buildings.⁷⁶ It recognised that the immediate character of the right to education is not submitted to progressive realisation.⁷⁷ Through these cases, the Court clarified the sanctity of buildings and infrastructure to ensure the availability of the right to basic education. It shows what should be done in practice in terms of buildings and infrastructure to ensure the availability of basic education.

Availability and the Right to Textbooks

The South African courts unequivocally pronounced that the right to basic education cannot become a reality if learners are not provided with textbooks. This was illustrated by the case *Section 27 v Minister for Education*.⁷⁸ The Department of Basic Education had committed itself, through a national policy, to provide textbooks for each subject for all learners. However, as a consequence of budgetary constraints and operational hiccups, it could not deliver on its promises. Further, when some textbooks were finally delivered, only a few learners received copies. In reaction, Section 27, a public-interest litigation organisation, brought the matter to the Pretoria High Court.⁷⁹ The latter found that the failure to provide textbooks was a violation of the right to basic education and ordered the Department to deliver textbooks immediately, with a clear indication of the starting date, as well as a ‘catch-up remedial plan’ containing specific items, such as identifying the gaps in the curriculum, for example.

Nevertheless, as a result of the failure by the respondent to comply with the court order, another organisation, Basic Education for All (BEFA), also represented by Section 27, introduced a follow-up application in the High Court.⁸⁰ The sacredness of textbooks as key to the right to basic education was reiterated by the High Court, which also ordered the respondent to send an affidavit to the applicant stating that the application for funding to purchase the necessary books has been made. Nonetheless, the Department of Basic Education approached the Supreme Court of Appeal with an appeal to consider whether the right to basic education is inclusive of the right to textbooks.⁸¹ The Supreme

74 *ibid* para 60.

75 *ibid* paras 66–68.

76 Section 39(1) of the Constitution empowers the courts to consider international law and foreign law when interpreting the Constitution.

77 *Juma Musjid Primary School* (n 73) para 37.

78 2013 (2) SA 40 (GNP).

79 *Section 27 v Minister for Education; Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) para 101.

80 *Madzodzo v Minister of Basic Education* 2013 (3) SA 40 (GNP) para 16.

81 *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 (2 December 2015).

Court of Appeal upheld the decision of the High Court in holding that section 29(1)(a) of the Constitution includes the right of every learner to a textbook, that it was the duty of the state to provide the textbooks, and that failure to do so amounted to a violation of the right to basic education.⁸² Through the cases *Section 27* and *BEFA*, the courts explain the outcome indicator on the availability of basic education, which cannot be considered available without the enjoyment of the right to textbooks. These indicators guide the executive on how to go about fostering the right in the country, and at the same assist civil society organisations to hold the duty bearers accountable.

Availability and the Right to Furniture and Desks

The right to furniture and desks is another core element of the right to basic education. This was the view of the High Court in the case of *Madzodzo v Minister of Basic Education*.⁸³ In this case, certain Eastern Cape schools were not equipped with desks and chairs. Consequently, in August 2012, the Legal Resources Centre, on behalf of the Centre for Child Law and three affected public schools, went to the High Court. They requested an order to oblige the Eastern Cape Department of Education to carry out an accurate and complete audit of all school furniture essentials in the province and to supply the required furniture by 30 June 2013. On 29 November 2012, the much-needed order was granted by the High Court, and after engagement between the parties, the Eastern Cape Department of Education agreed, inter alia, to:

- (a) ensure that every learner at the three applicant schools is afforded his or her own reading and writing space before the start of the 2013 school year;⁸⁴
- (b) embark on a clear audit of all public schools in the Eastern Cape by 28 February 2013 and present a comprehensive plan to afford each learner with a desk and chair;⁸⁵
- (c) notify schools that they will be provided with furniture as per the audit before 30 April 2013 and clarify which specific furniture will be offered and indicate the date of provision, and ultimately to meet the furniture needs of all schools listed in the audit by 30 June 2013.⁸⁶

The nature of the right to basic education, which includes desks and furniture, was clarified by the Court. Sharing this view, the Open Society Foundation argues that ‘the case was a success in material terms, as the court made an order for the provision and delivery of school furniture.’⁸⁷ The decision of the Court indicates that desks and furniture are to be tangible if the right to education is to be effectively implemented.

82 *ibid* para 53.

83 *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM).

84 *ibid* para 5.

85 *ibid* para 4.

86 *ibid* para 28.

87 Open Society Foundation, ‘Strategic Litigation Impacts: Equal Access to Quality Education’ (Open Society Justice Initiative 2017) 53 <<https://www.justiceinitiative.org/uploads/abbb6aa9-ece2-4b73->

Availability and the Right to Teachers and Other Staff Members

While furniture, desks, and stationery are essential for the enjoyment of the right to basic education, the latter cannot be achieved without teachers and other staff members. This was the position of the court in the case of *Centre for Child Law and Others v Minister for Basic Education and Others*.⁸⁸ This case was caused by the Eastern Cape Department of Education's intention to create and implement education posts in the province. This resulted in substantive posts remaining vacant and huge pressure on schools to appoint teachers at their own cost where possible. This was harmful to the quality of education. In reaction, the Centre for Child Law and several schools, represented by the Legal Resources Centre in Grahamstown, went to court in 2012 for an order to force the Department of Education to completely implement the 2013 post provisioning in the Eastern Cape. The respondent argued that it was not under the obligation to declare the post establishment of non-teaching staff at public schools, nor to fill those posts.⁸⁹ However, the court disagreed and found for the applicants, and highlighted the respondent's obligation to create the posts for both teaching and non-teaching staff in public schools and to fill them. It also underlined the need to make budgetary provision for these posts, without which the right to basic education would not be realised.

The two *Linkside and Others v Minister of Basic Education and Others* cases⁹⁰ are further illustrations of the importance of teachers and other staff for the right to basic education. In these cases, which were the first opt-in class action cases, certain schools in the Eastern Cape had, in January 2012, as many as 8,479 vacant positions. As a result, these schools appointed teachers who relied on school fees for their salaries. This was inadmissible, and the Legal Resources Centre approached the court for the appointment of teachers in these schools. The court found for the applicants and ordered the Minister of Basic Education to refund schools for the money they had paid out to teachers from school-fee reserves. The Minister of Basic Education was also ordered to appoint the teachers permanently and to pay their salaries. The court ordered the employment of all the educators to be registered in the application. In sum, the courts also shed some light on the significance of the right to teachers and other staff members for the right to basic education to be implemented.

a962-6188619ff0db/strategic-litigation-impacts-education-20170322.pdf> accessed 3 November 2020.

88 2013 (3) SA 183 (ECG).

89 See educator post establishments for the Eastern Cape in terms of s 5(1)(b) of the Employment of Educators Act. The defendant was under statutory obligation in respect of the post establishment of teaching staff because s 5(1)(b) of the Employment of Educators Act provides that '[n]otwithstanding anything to the contrary contained in any law but subject to the norms prescribed for the provisioning of posts ... the educator establishment of a provincial department of education shall consist of the posts created by the Member of the Executive Council.'

90 [2014] ZAE CGHC 111 (17 December 2014); [2015] ZAE CGHC 36 (26 January 2015).

The Outcome Indicator of Accessibility of Basic Education

Similar to availability, accessibility is multidimensional. It revolves around universal access without discrimination to basic education, physical or technological accessibility, and education being free of charge.⁹¹

Accessibility and Non-discrimination

In *Minister of Home Affairs v Wathenuka & Another*,⁹² the Supreme Court of Appeal struck down regulations which prohibited asylum seekers from attending school in South Africa. The Court found that it is not reasonable or justifiable to deny education to a child who is lawfully in the country to seek asylum.⁹³ The general prohibition on study by asylum seekers was therefore unjustifiable and violated section 29(1) of the Constitution.⁹⁴

The other matter related to non-discrimination is the case of *Harris v Minister of Education*.⁹⁵ It was triggered by age limits for entry into primary school. Subsequent to the publication of a ministerial notice that prohibited access to school until the year when the child turns seven years old, Mrs Harris, whose child was turning six and was ready for primary schooling, went to court. She claimed that the ministerial notice was discriminatory on the base of age and violated the best interests of the child under section 28 of the Constitution. She also argued that the unnecessary delay was hindering her child's development. The court found for the applicant, claiming that the notice was indeed discriminatory on the basis of age and was likely to damage the child's development.⁹⁶ On appeal at the Constitutional Court, the latter was of the view that the minister did not have the power under the National Education Policy Act 27 of 1996 to issue such a notice. It did not consider the question of age discrimination.⁹⁷

The most recent case of discrimination concerned the rights of learners with disabilities. In the case of *Centre for Child Law v Minister of Basic Education*,⁹⁸ the applicant claimed that during the Covid-19 pandemic, the government's Directions for the phased return to school excluded learners with disabilities; it also required the closure of special schools where it was impossible to comply with social distancing rules. The Pretoria High Court found that, indeed, the Department of Basic Education discriminated against learners with disabilities by failing to accommodate their needs. The Court ordered the respondent to amend the Directions and to ensure that it caters for these learners.⁹⁹ This

91 See 'General Comment 13' (n 1) (2)(b).

92 2004 (4) SA 326 (SCA).

93 *ibid* para 36.

94 *ibid*.

95 2001 (8) BCLR 796 (T).

96 *ibid* 800J–804D.

97 *ibid*.

98 High Court of Pretoria, Case No 3123/2020.

99 *ibid* para 1.

decision was in line with the judgment in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*,¹⁰⁰ where the Western Cape High Court held that the fact that learners with intellectual disabilities were educated by non-governmental organisations partially subsidised by the state did not absolve the state from its obligation as duty bearer of the right to basic education of these learners. The Court ordered the Department to take the necessary measures to ensure that children with severe intellectual disabilities have access to education.¹⁰¹ These decisions related to non-discrimination clarify what should be done to ensure universal access to basic education. They also speak to the adaptability¹⁰² of the right to education, which must be transformed to accommodate learners with disabilities.¹⁰³

Accessibility and the Right to Transport

The right to transport for education arises from the need to secure physical access to education, especially in circumstances where learners reside far away from the school building. It seeks to relieve these learners or their families of the burden of transport costs.¹⁰⁴ The right to transport was at the centre of the case of *Adam Legoale and Others v MEC of the Department of Education, North West and Others*,¹⁰⁵ although it was finally settled out of court. In this case, thirty-seven applicants, of which thirty were the parents or caregivers of learners at Rakoko High School in Mabeskraal, North West, together with the Centre for Child Law, represented by the Legal Resources Centre, went to court to request the provision of transport for children whose school was removed from the vicinity for 'rural rationalisation'.¹⁰⁶ Consequently, these children had to attend class at another school, Rakoko High School in Mabeskraal, located 25 kilometres from their village. This was inappropriate for many learners, who could not afford transport to school and had to drop out. Hence, the applicants went to court to oblige the state to provide free transport to school. Moreover, the Centre for Child Law also requested a clear plan and programmes from the North West province on how learners would be provided with transport in a sustainable manner; it was requested that

100 2011 (5) SA 87 (WCC).

101 For more on this case, see Charles Ngweni, 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A Case Study of Contradictions in Inclusive Education' (2013) African Disability Rights Yearbook 140.

102 Adaptability will be discussed in more detail later in this article.

103 Klaus Beiter, *The Protection of the Right to Education by International Law* (Martinus Nijhoff 2006) 507.

104 Stu Woolman and Brahm Fleisch, *The Constitution in the Classroom: Law and Education in South Africa 1994–2008* (PULP 2009) 114.

105 (NWM) case no 499/11.

106 In the affidavit filed on behalf of the Centre, it was pointed out that the closure of public schools is regulated by s 33 of SASA, which involves a consultative process with the school governing body. Closure of a rural school should be governed by the underlying principles set out in the *Report of the Ministerial Committee on Rural Education: A New Vision for Rural Schooling*, (Republic of South Africa, Department of Education May 2005), which also requires a consultative process.

the plan and programme be made public to inform the beneficiaries and their parents on the way forward.

The parties struck a settlement agreement, which was made an order of court on 10 August 2011. The agreement contains urgent interim measures and long-term measures. Firstly, as an urgent interim measure, the Department of Public Works and Transport, together with the Department of Education, committed to provide learner transport for the children from Siga village to their places of learning at Mabeskraal, for three months or until long-term measures were put in place, whichever occurred later. Furthermore, both departments also committed to cover the cost of the transport, which would be scheduled to meet the need of learners.

Secondly, as far as long-term measures are concerned, both departments undertook to embark on an efficient transformation in respect of providing general subsidised transport for learners in need of such. The inter-departmental committee in charge of developing sustainable transport for learners committed to communicate with designated representatives of the applicants and to share available plans upon their conclusion, as well as to ensure their dissemination in affected communities. In addition, under the agreement, the applicants could reach out to both departments to follow up on measures taken and could approach the court should they have concerns with developments.¹⁰⁷ This case undoubtedly underlined that transport is an important right in the delivery of the right to basic education.

The second case that dealt with the right to transport was *Tripartite Steering Committee and Another v Minister of Basic Education and Others*.¹⁰⁸ In this case, the court was called upon to pronounce whether the right to basic education comprises a 'right to be provided with transport to and from school at state expense for those scholars who live a distance from their schools and who cannot afford the cost of that transport.'¹⁰⁹ Moreover, the court had to provide guidance on whether the refusal to provide scholar transport to and from school by the Eastern Cape Department of Education was unlawful and violated the right to basic education.¹¹⁰ The position of the court was unambiguous. It held that 'in instances where scholars' access to schools is hindered by distance and inability to afford the costs of transport, the state is obliged to provide transport to them in order to meet its obligations, in terms of s 7(2) of the Constitution, to promote and fulfil the right to basic education.'¹¹¹ The court thus found for the applicants and ordered the respondents to provide transport to the learners whose names were on the list. It also set aside the decision to refuse scholar transport to deserving learners and ordered the respondents to report to the court on progress made in adopting a new policy on scholar

107 For more on this case, see Skelton (n 70) 11–13; Skelton (n 10).

108 2015 (5) SA 107 (ECG).

109 *ibid* para 2.

110 *ibid* para 2.

111 *ibid* para 19.

transport, as well as how and when the policy either has been or would be published.¹¹² In fact, the court simply reiterated its previous position, held a year earlier in the case of *Trackstar Trading 256 (Pty) Ltd t/a Mtha-Wethemba v Head of the Department of Transport, Province of the Eastern Cape and Others*.¹¹³ In this case it decided that if the provincial government failed to provide scholar transport, ‘many thousands of scholars would simply not be able to attend school,’¹¹⁴ which would amount to the violation of the right to education.

Overall, the minimum standard of accessibility is that the state should ensure transport to school. Thus, using these indicators as per the court’s judgment can assist the Department of Basic Education and provincial departments of education to address the transport problems that hamper the enjoyment of the right to basic education in the country.

The Outcome Indicators of Acceptability and Adaptability of Basic Education

Elements of acceptability include the need to ensure the relevance of basic education to its environment and to the learners’ culture.¹¹⁵ Adaptability speaks to the need to adapt education to social and environmental contexts. The South African jurisprudence sheds light on the acceptability and adaptability of the right to education with cases related to the right to enjoy one’s language, culture, and religion at school.

Acceptability, Adaptability, and the Prohibition of Discrimination Based on Language

With reference to the process indicator, the language question is provided for by section 29(2) of the Constitution, which reads:

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

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

Early cases dealing with language right were triggered by the exclusion of certain learners from a school as it was important to protect the right of other children to receive education in the language of their choice. In this respect, school governing bodies were

112 *ibid* para 67.

113 2014 JDR 2649 (ECG).

114 *ibid* para 2.

115 ‘General Comment 13’ (n 1) para 6(c); Tomaševski (n 7) paras 51–56.

empowered to define the language of instruction at schools. Consequently, numerous learners who needed to receive education in English were not admitted to Afrikaans-medium schools, where the school governing bodies' decisions were that learning was to be in Afrikaans. It is in this context that any attempts by the provincial department to oblige the school governing bodies to change the language policy to accommodate non-Afrikaans-speaking learners were met with furious resistance. In fact, school governing bodies took legal action against the provincial department of education.

The case of *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*¹¹⁶ is significant. In this case, exclusively Afrikaans-medium institutions were reluctant to transform the schools into dual-medium schools and open them to learners who were to be taught in English. The High Court pronounced on the conflict between the right to a single-medium school and the right to be educated in the official language of one's choice. It held that in circumstances in which the English learners could be accommodated elsewhere, the Department's actions simultaneously violated the rights of Afrikaans-speaking students in single-medium schools and the right of English-speaking students to an education in the official language of their choice in public educational institutions.¹¹⁷ The Court was of the view that the capacity of other schools which offered the desired medium of instruction had to be considered before the status of a single-medium institution could be changed. It also noted that, given the parents' desire to send their children to these schools, to serve the best interests of the children (given the good reputation of the schools), the best decision was to educate the learners in the schools and to order them to take the children and teach them in English.

In *Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School*,¹¹⁸ the Western Cape Department of Education brought an Afrikaans-medium public school before the Court for refusing to change its language policy and convert to a parallel-medium school in order to accommodate twenty-one English-speaking learners. The Supreme Court of Appeal found against the applicant, on the ground that, among other reasons, the regulation¹¹⁹ does not grant either the national minister of education or the provincial member of the executive council (MEC) or head of department the authority to determine the 'language policy of a particular school, nor does it authorize him or her to authorize any other person or body to do so.'¹²⁰ Moreover, only the school governing body is tasked with determining language policy at a school, and this is subject only to the Constitution, SASA, and any applicable provincial law. The contention that section 29(2) could be 'interpreted to mean that everyone had the right to receive education in the official language of his or her choice at each and every public educational institution where this was reasonably practicable' was also rejected

116 2003 (4) SA 160 (T).

117 *ibid* 173 and 175.

118 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA).

119 SASA s 6(1).

120 *Mikro* (n 118) para 33.

by the Court.¹²¹ This proposition was rejected by the Court so as to avoid a situation where ‘any significant cohort of learners could demand instruction in their preferred language,’ which would be impossible to realise.¹²² Interestingly, this decision confirms that although the Constitution provides for language right, the state cannot decide on the language policy without consulting the school governing body. Furthermore, some schools can decide to offer education in a single medium.

However, as the need grew to transform the education system to accommodate all South Africans, including those who required education in English, the courts changed their approach and disempowered school governing bodies by enabling the Department of Education to change the language policy in schools. It is in this context that in *Seodin Primary School v MEC of Education, Northern Cape*,¹²³ the court upheld the decision of the MEC for education in the Northern Cape, who ordered all Afrikaans-medium schools in the Kuruman district to change to dual-medium instruction and, accordingly, admit learners seeking instruction in English. The High Court held that the school governing bodies of three Afrikaans-medium public schools could not use language preference alone to refuse access to black English-speaking learners where the provision of English language education was ‘reasonably practicable’, especially in a context where the single-medium Afrikaans schools were undersubscribed, as in the three cases in *Seodin*. The High Court also held that the call for greater integration in the public school system did not amount to a call to eliminate single-medium Afrikaans public schools. The Court was of the view that it is necessary to foster diversity in the schools. Northern Cape Judge President Frans Kgomo noted in his judgment: ‘It would be a sad day in the South African historical annals that hundreds of children remained illiterate or dropped out of school because they were excluded from under-utilised schools purportedly to protect and preserve the status of certain schools as single-medium Afrikaans schools.’¹²⁴

A similar trend was followed by the Court in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*,¹²⁵ when the provincial government appointed a committee to decide the language policy at the school in the place of the school governing body. This decision was upheld by the Constitutional Court after the approval of the High Court. In reaching its decision, the Constitutional Court was mindful of the need to ensure that language policies at schools do not lead to the exclusion of some learners. It highlighted the necessity to ‘remedy the results of past racially discriminatory laws and practices.’¹²⁶ Ultimately, these decisions seek to ensure

121 *ibid* para 30.

122 Woolman and Bishop (n 40) 57-68-69.

123 2006 (4) BCLR 542 (NC).

124 *ibid* para 56.

125 2010 (2) SA 415 (CC).

126 *ibid* para 53.

that in the post-apartheid context, learners can no longer be excluded on the ground of language.

The significance of these transformative decisions cannot be overstated. They guide the state and civil society on how to ensure the acceptability of education and to adapt the education system to post-apartheid South Africa, where it is imperative to ensure that all learners are given an equal opportunity. These indicators related to language, religion, and culture plainly illustrate where the country wants to be in ensuring that everyone enjoys the right to basic education. Here, the outcome is that everyone enjoys the right to be educated in his/her chosen language, without any discrimination whatsoever.

Acceptability, Adaptability, and the Right to Practise One's Religion at School

As far as the right to practise one's religion is concerned, under section 30 of the Constitution, which provides for the right to language and culture, everyone is free to use their language and culture, provided it is done within the confines of the Bill of Rights. This should be read together with section 15(1) of the Constitution, which enables everyone to enjoy 'the freedom of conscience, religion, thought, belief and opinion.' In other words, freedom of religion and culture are interlinked and should be fully enjoyed in schools.

This was the position of the Court in *Christian Education South Africa v Minister of Education*,¹²⁷ where the Court held that the right under section 15(1) of the Constitution is 'framed broadly to protect religious beliefs and all other systems of thought and belief [including culture]. It is also a right to believe or not to believe, which extends to atheism, agnosticism and other non-theistic beliefs.'¹²⁸ The same Court also had to pronounce on corporate punishment and initiation, which are forbidden in schools. The applicants claimed that under sections 15 and 31 of the Constitution, they were entitled to practise their religious beliefs and practices, which include corporal punishment. The Court found against the applicants on the basis that to be acceptable, an education system should protect learners' dignity and emotional integrity,¹²⁹ which are essential for advancing the acceptability and adaptability of education in post-apartheid South Africa. In this respect, corporate punishment and initiation are forbidden in schools.¹³⁰

Acceptability and adaptability also speak to the freedom to enjoy culture and religion at schools. This was the opinion of the Constitutional Court in *Education, KwaZulu-Natal v Pillay*,¹³¹ where it was held that excluding a learner who wears a nose ring, in line with her South Indian, Tamil, and Hindu culture and religious beliefs, was indirect

127 2000 (4) SA 757 (CC).

128 *ibid* para 36.

129 *ibid* para 50.

130 SASA, ss 10 and 10A.

131 2008 (1) SA 474 (CC) paras 47, 145–146.

discrimination based on religion and culture.¹³² It is important to note that while the *Pillay* case was heard in court, the Minister of Education issued the National Guidelines on School Uniforms in 2006.¹³³ These guidelines explicitly prescribed that school uniform policies should consider ‘religious and cultural diversity within the community served by the school’ and that ‘[m]easures should be included to accommodate learners whose religious beliefs are compromised by a uniform requirement.’¹³⁴

The Court further reiterated the prohibition of discrimination based on religion and culture and gave effect to the 2006 guidelines in *Radebe v Principal of Leseding Technical School*,¹³⁵ where it found that a Free State school’s code of conduct, which prohibited the wearing of dreadlocks, unfairly discriminated against Rastafari learners. Ultimately, the Court, through its decisions on the need to accommodate all religions and cultures at school, guided the state on how to avoid discrimination based on religion and culture and on how to ensure an inclusive education system in the country. It also gives pointers to civil society organisations on how to make sure that no learner is kept away from school on the ground of religion and culture.

In sum, these court decisions speak not only to the acceptability of the right to basic education, but also to its adaptability. In this regard, they seek to ensure that basic education advances the transformative tenets of the Constitution, which are equality, dignity, and equity for all through accommodation of language, cultural, and religious diversities at school. In post-apartheid South Africa, the right to basic education will not be operationalised if it is not inclusive of the country’s diversity. Importantly, these decisions also underline the need to consider local realities while implementing international standards of human rights.

Conclusion

The South African jurisprudence on the right to basic education has ‘captured international attention’¹³⁶ due to its contribution to mapping out the right to basic education. It has been necessary to guide South Africa and the African continent in achieving the right to basic education. It is a critical part of the process of advancing this fundamental right. Although the South African jurisprudence emerged several decades after the adoption of the international standards known as the four As, germane problems facing the implementation of these standards in South Africa and in Africa in general have made the right to education one that is still desperately needed. A careful implementation of the trends set by the South African jurisprudence, as discussed above,

¹³² *ibid* para 68.

¹³³ Department of Education GN 173 (23 February 2006) GG 28538.

¹³⁴ *Pillay* (n 131) para 28.

¹³⁵ [2013] ZAFSHC 111 (30 May 2013).

¹³⁶ Malcolm Longford, ‘2009 Domestic Adjudication and Economic, Social and Cultural Rights: A Socio Legal Review’ (2009) 6(11) *Sur International Journal on Human Rights* 91.

would ensure the enjoyment of the right under study. The outcome indicator unpacked by the courts would engender results which would be translated into a complete enjoyment of the right to basic education. Finally, relying on the structural-process-outcome indicators in light of the South African jurisprudence explains what is effectively expected to operationalise the four As. The lessons that can be learnt from this approach would therefore enable all stakeholders in South Africa and other parts of Africa to advance the right to basic education.

References

- Asian Sub-regional Workshop, 'Using Indicators to Promote and Monitor the Implementation of Human Rights' (New Delhi, India 26–28 July 2007)
<https://www.ohchr.org/Documents/Issues/HRIndicators/Report_New_Delhi_Workshop.pdf> accessed 2 November 2020.
- Beiter K, *The Protection of the Right to Education by International Law* (Martinus Nijhoff 2006).
- Collins English Dictionary, 'Indicator'
<<https://www.collinsdictionary.com/dictionary/english/indicator>> accessed 1 November 2020.
- De Beco G, 'Human Rights Indicators for Assessing State Compliance with International Human Rights' (2008) 77(23) *Nordic Journal of International Law*
<<https://doi.org/10.1163/090273508X290681>>
- Department of Basic Education, 'Action Plan to 2019: Towards the Realisation of Schooling 2030' (2015).
- Department of Education, 'Improving Access to Free and Quality Basic Education for All' (14 June 2003).
- ELRC, *Policy Handbook for Educators* (Universal Print Group 2003).
- Green M, 'What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement' (2001) 23 *Human Rights Quarterly*
<<https://doi.org/10.1353/hrq.2001.0054>>
- Kalantry S, Getgen EJ, and Koh SA, 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 *Human Rights Quarterly* <<https://doi.org/10.1353/hrq.0.0144>>
- Kamga SD, 'Inclusion of Learners with Severe Intellectual Disabilities in Basic Education under a Transformative Constitution: A Critical Analysis' (2016) 49 *Comparative and International Law Journal of Southern Africa*.
- Kamga SD, 'The Role of Traditional Leaders in Addressing Women's Rights in Postcolonial Africa: The Case of FGM and Forced Marriage' in A Borah, B Falola, and Falola (eds), *Creative Incursions Cultural Representations of Human Rights in Africa and the Black Diaspora* (Carolina Academic Press 2019).
- Kollapen J, 'Report of the Public Hearing on the Right to Basic Education' (South African Human Rights Commission 2006)
<<https://www.sahrc.org.za/home/21/files/Reports/Right%20to%20basic%20education%202006.pdf>> accessed 3 November 2020.

- Liebenberg S, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010).
- Longford M, '2009 Domestic Adjudication and Economic, Social and Cultural Rights: A Socio Legal Review' (2009) 6(11) *Sur International Journal on Human Rights*.
- McConnachie C, 'South African Judge Lays Down the Law on the Right to a Basic Education' (OxHRH Blog, 25 February 2014) <<https://ohrh.law.ox.ac.uk/south-african-judge-lays-down-the-law-on-the-right-to-a-basic-education/>> accessed 1 October 2020.
- McConnachie C and McConnachie C, 'Concretising the Right to a Basic Education' (2012) 129 *South African Law Journal*.
- McInerney-Lankford S and Sano H-O, *Human Rights Indicators in Development: An Introduction* (World Bank 2010) <<https://doi.org/10.1596/978-0-8213-8604-0>>
- Meier BM and Kim Y, 'Human Rights Accountability through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation' (2015) 26(141) *Duke Journal of Comparative & International Law*.
- Ngwenya C, 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A Case Study of Contradictions in Inclusive Education' (2013) *African Disability Rights Yearbook*.
- OHCHR, 'Report of the Special Rapporteur Paul Hunt on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (Commission on Human Rights, 62nd Session) UN Doc CN4/2006/48 (2006).
- OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' UN Doc HRI/MC/2006/7 (2006).
- OHCHR, 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights', (6 June 2008) Twentieth meeting of chairpersons of the human rights treaty bodies, Geneva, 26–27 June (HRI/MC/2008/3).
- Open Society Foundation, 'Strategic Litigation Impacts: Equal Access to Quality Education' (Open Society Justice Initiative 2017) <<https://www.justiceinitiative.org/uploads/abbb6aa9-ece2-4b73-a962-6188619ff0db/strategic-litigation-impacts-education-20170322.pdf>> accessed 3 November 2020.
- Report of Turku, 'Expert Meeting on Human Rights Indicators' (Abo Akademi University, Turku, Finland 10–13 March 2005) [on file with author].
- Republic of South Africa, Department of Education, 'Report of the Ministerial Committee on Rural Education: A New Vision for Rural Schooling' (May 2005).

Skelton A, 'Leveraging Funds for School Infrastructure: The South African "Mud Schools" Case Study' (paper presented at the UKFIET International Conference on Education and Development—Education & Development Post 2015: Reflecting, Reviewing, Revisioning) (Oxford, 10–12 September 2013).

Skelton A, 'The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law' (2013) 2 De Jure.

Tomaševski K, *Human Rights Obligations in Education: The 4-A Scheme* (Wolf Legal Publishers 2006).

Tomaševski K, 'Preliminary Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski, Submitted in Accordance with Commission on Human Rights Resolution 1998/33' (Commission on Human Rights, 55th Session) UN Doc E/CN.4/1999/49 (1999).

UNESCO, 'The Right to Primary Education Free of Charge for All: Ensuring Compliance with International Obligations' (2008).

Woolman S and Bishop M, 'Education' in Stu Woolman (ed.), *Constitutional Law of South Africa* (Juta 2012).

Woolman S and Fleisch B, *The Constitution in the Classroom: Law and Education in South Africa 1994–2008* (PULP 2009).

World Declaration on Education for All (1990) (Adopted by the World Conference on Education for All, Jomtien, Thailand, 5–9 March 1990).

Cases

Adam Legoale and Others v MEC of the Department of Education, North West and Others (NWM) case no 499/11.

Centre for Child Law and Others v Minister for Basic Education and Others 2013 (3) SA 183 (ECG).

Centre for Child Law and Seven Others v Government of Eastern Cape Province and Others. Eastern Cape High Court, Bhisho, Case No 504/10.

Centre for Child Law v Minister of Basic Education, High Court of Pretoria, Case No 3123/2020.

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC).

Education, KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC).

Gauteng Provincial Legislature in re: Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC)

Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (CCT 29/10) [2011] ZACC.

Governing Body of the Juma Masjid Primary School v Essay NO and Others 2011 (8) BCLR 761 (CC).

Harris v Minister of Education 2001 (8) BCLR 796 (T).

Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC).

Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys 2003 (4) SA 160 (T).

Linkside and Others v Minister of Basic Education and Others [2014] ZAECGHC 111 (17 December 2014).

Linkside and Others v Minister of Basic Education and Others [2015] ZAECGHC 36 (26 January 2015).

Madzodzo v Minister of Basic Education 2013 (3) SA 40 (GNP).

Madzodzo v Minister of Basic Education 2014 (3) SA 441 (ECM).

MEC for Education: KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC).

Minister of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA 198 (2 December 2015).

Minister of Home Affairs v Wathenuka & Another 2004 (4) SA 326 (SCA).

Radebe v Principal of Leseding Technical School [2013] ZAFSHC 111 (30 May 2013).

School Governing Body of Amasango Career School v MEC for Education, Eastern Cape (ECG) unreported case no 3838/2009.

Section 27 v Minister for Education 2013 (2) SA 40 (GNP).

Section 27 v Minister for Education; Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA).

Seodin Primary School v MEC of Education, Northern Cape 2006 (4) BCLR 542 (NC).

Trackstar Trading 256 (Pty) Ltd t/a Mtha-Wethemba v Head of the Department of Transport, Province of the Eastern Cape and Others 2014 JDR 2649 (ECG).

Tripartite Steering Committee and Another v Minister of Basic Education and Others 2015 (5) SA 107 (ECG).

Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa 2011 (5) SA 87 (WCC).

Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA).

Legislation

Basic Education Laws Amendment Act No 15 of 2011, GG 34620 (19 September 2011).

Department of Basic Education, Draft Policy: The Incremental Introduction of African Languages in South African Schools 2013.

Department of Basic Education, National Policy for Determining School Calendars for Public Schools in South Africa, January 2015.

Department of Basic Education, National Policy on an Equitable Provision of an Enabling School Physical Teaching and Learning Environment GG 540 (11 June 2010) GN 33283.

Department of Basic Education, Policy Document on Adult Basic Education and Training, 12 December 2003.

Department of Basic Education, Policy on Learner Attendance, 4 May 2010, GN 361 of 2010.

Department of Basic Education, Policy on the Organisation, Roles and Responsibilities of Education Districts, GG (3 April 2013) GN 36324.

Department of Basic Education, Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, GG 581 (29 November 2013) GN 37081.

Department of Basic Education, South African Council for Educators Act 31 of 2000.

Department of Basic Education, National Curriculum Statement Grades R – 12, GN 23406 (31 May 2002).

Department of Education, Education White Paper 6 Special Need Education – Building an on Inclusive Education and Training System, July 2001.

Department of Education National Policy on HIV/AIDS, for Learners and Educators in Public Schools, and Students and Educators in Further Education in Training Institutions, 10 August 1998, GN 1926 of 1999.

Department of Education, Admission Policy for Ordinary Public Schools, GG (19 October 1998) GN 2432.

Department of Education, Interim Policy for Early Childhood Development, 1 July 1997.

Department of Education, National Education Information Policy, 7 September 2003, GG 417 (7 September 2004) GN 26766.

Department of Education, National Education Policy Act 27 of 1996, GG 443 (31 May 2002) GN 23406.

Department of Basic Education, National Education Policy Act, Draft Amendment Policy Pertaining to the National Curriculum Statement Grades R-12 as set out in the Policy Document, National Policy Pertaining to the Programme and Promotion Requirement of the National Curriculum Statement Grade R-12, Act No 27 of 1996, GG 36042 (28 December 2012) GN 1115.

Department of Basic Education, National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R-12, GG 36465 (17 May 2013) GN 499 and 500.

Department of Education, National Policy Framework for Teacher Education and Development in South Africa, GG (26 April 2007) GN 29832.

Department of Education, National Policy on Whole School Evaluation, 1 July 2002.

Department of Education, Rights and Responsibilities of Parents, Learners and Public Schools: Public School Policy Guide 2005, 1 September 2006.

Department of Education, South African Schools Act 84 of 1996, National Guidelines on School Uniforms of 23 February 2006. GN 173 (23 February 2006) GG 28538.

Department of Education's Policy Document on Adult Basic Education and Training, 1997.

Draft Policy: National Policy for the Provision and Management of Learning and Teaching Support Material, September 2014.

Education Labour Relations Council Constitution of the ELRC Resolution No 6 of 2000, 5 June 2000.

Education Labour Relations Council, Constitution of the Education Labour Relations Council (ELRC) Resolution No 3 of 1999, 14 October 1999.

Education White Paper 6 on Inclusive Education.

Education Laws Amendment Act 50 of 2002.

General and Further Education and Training Quality Assurance Act 58 of 2001.

Improving Access to Free and Quality Basic Education to All, 14 June 2003.

National Qualifications Framework Act 67 of 2008.

Requirements of the National Curriculum Statement Grades R– 12, GG 34600 (12 September 2011) GN 722 and 723.

South African Council for Educators Act 31 of 2000.

The Constitution of the Republic of South Africa, Act 108 of 1996.

The Department of Education's Policy Document on Adult Basic Education and Training (1997).

The Employment of Educators Act 76 of 1998.

The Presidency, Education Laws Amendment Act 31 of 2007, GG 510 (31 December 2007) GN 30637.

The Presidency, Adult Basic Education and Training (ABET) Act 52 of 2000, GG (13 December 2000) ABET.

The Presidency, Education Laws Amendment Act 24 of 2005, GG 487 (26 January 2006) GN 28426.

The Presidency, Education Laws Amendment Act 50 of 2002, GG 449 (28 November 2002) GN 24113.

The Presidency, Employment of Educators Act 76 of 1998, GG 19320 (2 October 1998) GN 1245.

The Presidency, General and Further Education and Training Quality Assurance Act 58 of 2001, GG 438 (5 December 2001) GN 22896.

The Presidency, National Qualifications Framework Act 67 of 2008, GG 524 (17 February 2009) GN 31909.

The South African Standard for Principalship Policy, 2015.

Department of Basic Education South African Schools Act (SASA) 84 of 1996, GG 583 (17 January 2014) GN 37 230.

International Treaties and Conventions

Convention on the Rights of the Child (adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49).

International Covenant on Economic, Social and Cultural Rights (ICESCR) (entered into force 3 January 1976 in accordance with article 27) General Assembly Resolution 2200A (XXI) (16 December 1966).

OHCHR Economic, Social and Cultural Rights (ESCR) Committee ‘General Comment 3: The Nature of States Parties’ Obligations (Art 2, Para 1 of the Covenant)’ (adopted at the Fifth Session of the Committee on Economic, Resolution 44/25 of 20 November 1989, entered into force 2 September 1990, in accordance with article 49).

OHCHR ESCR Committee ‘General Comment 11’: Plans of Action for Primary Education (Art. 14 of the Covenant), (adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, 10 May 1999) Doc, E/C.12/1999/4.

OHCHR ESCR Committee ‘General Comment 13: The Right to Education (Art 13 of the Covenant)’ (adopted at the Twenty-First Session of the Committee on Economic, Social and Cultural Rights, 8 December 1999) Doc E/C.12/1999/10.

United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention against Discrimination in Education (adopted at General Conference, 11th session, Paris, 1960) Resolutions 11 C/Resolutions, CPG.61/VI.11.

Regional Treaties

African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) (entered into force 2 November 1999).

Inter-American Commission on Human Rights, ‘Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights’ OEA/Ser.L/V/II.132 (Doc 14) (2008) Guidelines for Preparation of Progress Indicators.