

**AN ANALYSIS OF THE LEGAL AND POLICY DEVELOPMENTS OF THE RIGHT TO
BASIC EDUCATION UNDER THE SOUTH AFRICAN CONSTITUTION**

by

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DECLARATION

I, Zukile Christopher Mvalo, declare that this dissertation is my own unaided work. It is hereby submitted for the degree of Master of Laws at the University of South Africa. To the best of my knowledge, it has not been submitted before, for any other degree or examination in any other university.

Zukile Christopher Mvalo

31 July 2022, Pretoria, South Africa

DEDICATION

This dissertation is dedicated to my own hard work, determination and discipline. It is, further, dedicated to all those who are contributing towards free and quality education, especially the working class and the poor in our society.

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ABSTRACT

The purpose of the study was to undertake an analysis of the legal and policy developments of the right to basic education in South Africa as enshrined in section 29 of the Constitution. This included, amongst others, the exploration of aspects of the colonial and apartheid legacy that impacted on the right to basic education for the majority of children in South Africa. Law and policy developments of the pre- and post-1994 periods with an impact on the right to basic education in South Africa were also explored, taking into consideration international policy instruments which influenced the right to basic education, and how the courts have interpreted the right to basic education in South Africa within the context of the final Constitution. The study also considered the notion of access to education as a key to the realisation of the right to basic education under the South African Constitution.

From this study, it has become evidently clear that South Africa under apartheid was characterised by deliberate government policies clearly intended to exclude the majority of the population. One of the key pieces of legislation introduced in this regard was the Bantu Education Act 47 of 1953 (Bantu Education Act). This legislative intervention followed the recommendations of the Eiselen Commission. The governing party of the apartheid regime at the time, the National Party (NP), had targeted education as its weapon to institutionalise white supremacy since it came to power in 1948.

Series of events, including uprisings and protests, forced the apartheid regime into negotiations, especially in the early 1990s. At the heart of these negotiations was a constitutional dispensation that would recognise the rights of all, including the right to basic education. This explains the increased access to basic education by the majority of the population in the subsequent years. The study has shown that the right to basic education has recorded significant progress, which has reached near-universal school enrolment.

The study has concluded that a lot has been achieved in South Africa with regard to legal and policy developments relating to the right to basic education under the 1996 Constitution of South Africa. This was realised through series of policies being introduced since 1994, in compliance with the new constitutional order.

These policy instruments included the White Paper on Education and Training (1995); National Education Policy (1996) and the South African Schools Act (1995). All of them are critical in ensuring that the right to education is realised, as envisaged in section 29 (1) of the Constitution, especially for the Black and African majority.

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CHAPTER 1

INTRODUCTION AND RESEARCH ORIENTATION

1.1 Introduction

This Chapter serves as a general orientation to the study in relation to an analysis of the legal and policy developments of the right to basic education in South Africa under the 1996 Constitution. It covers, amongst others, a motivation for the research; research questions and aim of the study; research methodology; definition of concepts; and the structure of the study. The chapter assists in articulating the context and outlining the content of the study.

1.2 Motivation for the research

Central to the South African Constitution is the right to basic education, which was denied to the majority of South Africans for decades. This right remains critical to the South African society as not all children have free access to education. This challenge is also demonstrated, amongst others, by an array of cases involving the State, particularly, the Department of Basic Education (DBE) and various interested parties.

There is no comprehensive study, to date, which has been conducted regarding the analysis of the legal and policy developments of the right to basic education in South Africa as provided for in section 29 of the Constitution. Such a study would have to include, as demonstrated in this research, the following issues: aspects of the colonial and apartheid legacy which impacted on the right to basic education for the majority of children in South Africa; law and policy developments of the pre- and post-1994 periods with an impact on the right to basic education in South Africa, consideration of international policy instruments which influenced the right to basic education; how the courts have interpreted the right to basic education in South Africa through the prism of the 1996 Constitution; and, finally, access to basic education as a key to the realisation of the right to basic education in South Africa.

1.3 Research question and aim of the study

The study aimed at undertaking an analysis of the legal and policy developments of the right to basic education in South Africa as stipulated in section 29 of the Constitution.

Research questions that were posed in the study included: how the aspects of the colonial and apartheid legacy impacted on the right to basic education for the majority of children in South Africa; what law and policy developments of the pre- and post-1994 periods had an impact on the right to basic education; how the courts have interpreted the right to basic education in South Africa in the context of the final Constitution, access to basic education as a key to the realisation of the right to basic education, as well as how the international policy instruments influenced the right to basic education in South Africa.

1.4 Research Methodology

Since the research focused on the analysis of the legal and policy developments of the right to basic education in South Africa under the 1996 Constitution, it was, therefore, appropriate to adopt a historical educational research approach or methodology. The study was, in the main, desktop research, with analytical and interpretive components of the right to basic education in South Africa. Historical research has been defined as “the systematic and objective location, evaluation and synthesis of evidence in order to establish facts and draw conclusions about past events”.¹

Historical-education research method encapsulates the basic scientific research method and investigates the phenomenon of education by taking the present as a point of departure, traversing into the past with the aim of enlightening the present and finally making recommendations for the future based on the findings and the conclusions.²

This method involves the following four steps:

1. the identification of the research problem;
2. the collection and evaluation of sources of materials;
3. synthesis of information from sources of materials; and the

¹ Cohen, Manion and Morrison *Research Methods in Education* 5th ed 158.

² Ndlovu *Historical – Educational Investigation in South Africa with special reference to the Mission Schools in Bushbuckridge* 10.

4. analysis, classification, integration, interpretation and formulation of conclusions.³

This research methodology becomes relevant to this topic as it relates to an analysis of the legal and policy developments of the right to basic education in South Africa as per section 29 of the Constitution. This is particularly the case as the study broadly relied on sources that entailed reports, books, journals, theses, legislative interpretation, policies, regulations and case analyses. Sources of data in historical research may be classified into two main groups: primary sources which are the life blood of historical research, and secondary sources, which may be used in the absence of, or to supplement, primary data.

Primary sources of data refer to such items “that are original to the problem under study and may be thought of as being in two categories, such as quantitative and qualitative”.⁴ All these are intentionally or unintentionally, capable of transmitting a first-hand account of an event and are therefore considered sources of primary data. For the purposes of this study, important sources that included reports, books, journals, theses, legislative interpretation, policies, regulations, case analyses were relied on.

1.5 Definition of key concepts

Adult basic education and training: In terms of the Adult Education and Training Act 52 of 2000, adult education and training means all learning programmes for adults on level 1 registered on the national qualification’s framework contemplated in the National Qualifications Framework Act 67 of 2008.

Apartheid: Refers to apartness, the state of each race being apart from each other. Apartheid, in its form and practical terms, is similar to any type of racial segregation. This was a racial segregation that was particular to the South African context, engineered specifically to promote White and Afrikaner supremacy and to condemn the indigenous people of the land (i.e., Blacks/Africans).

³ Wiersma *Research methods in education: an introduction* 3rd ed 206.

⁴ Cohen, Manion and Morrison *Research Methods in Education* 5th ed 161.

Lipton cites the following characteristics to define apartheid:⁵

- a. the economic ordering of the economic, political, and social structures on the basis of race, identified by physical characteristics such as skin colour;
- b. discrimination against Africans and, to a lesser extent, Coloureds (people of mixed races), and Indians, who were excluded from many of the civil, political and economic rights enjoyed by whites such as vote, freedom of movement, and the right to do certain jobs or own property in much of the country;
- c. segregation of the races in many spheres of life, they lived in separate areas, went to separate schools and universities, used separate buses and trains, there was little social mixing, sexual relations and intermarriage across the colour line were illegal; and
- d. the legalisation and institutionalisation of this hierarchical, discrimination and segregated system, which was enshrined in law and enforced by the government.

Apartheid is a value system, a form of government, an ideology, and a policy of racial segregation that formally came into being in South Africa in 1948 under the National Party government. The basic principle of apartheid is that “race”, or the classification of a person as belonging to a particular race grouping, determines the role and the function of that person within the State. Apartheid has a clear ideological component as it is reflected in the philosophy and practical application thereof. Legislation ensured segregation of Blacks, Coloured, Indians and Whites with regard to public transport, residential areas, churches, educational institutions, public facilities, and political representation⁶.

Basic education: Basic Education can be understood within the context of the South African Schools Act 84 of 1996. Section 3 of the Act states: “Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such a learner reaches the age of seven years until the last school day of the year in which such a learner reaches the age of fifteen years or the ninth grade whichever occurs first”.

Bantu education: The word “Bantu” in the Nguni group of languages such as IsiZulu, IsiXhosa, IsiNdebele and others means “people”. Africans usually use the word “Bantu” to refer to people or the human race. However, the apartheid government opted to use the term “Bantu” as an official term to refer to Black people. Thus, the phrase, “Bantu Education” refers to the type of education designed for Blacks.

⁵ Nkabinde *An Analysis of Educational Challenges in the New South Africa* 223.

⁶ Khan *Access to Higher Education* 13.

The introduction of Bantu education “was aimed at providing separate and unequal education for different races in South Africa”.⁷

Black: Employment Equity Act 55 of 1998 defines “Black people” as a generic term which means Africans, Coloureds and Indians. In the South African context, especially since the National Party rule, the word “Black” has mainly been associated with Africans.

Education: The basic underlying definition of education used in the collection of Organisation for Economic Cooperation and Development (OECD) international statistics is derived from the International Standard Classification of Education (ISCED 2011): In ISCED, an educational programme is defined “as a coherent set or sequence of educational activities or communication designed and organised to achieve predetermined learning objectives or accomplish a specific set of educational tasks over a sustained period. Objectives encompass improving knowledge, skills and competencies within any personal, civic, social and/or employment –related context. Learning objectives are typically linked to the purpose of preparing for more advanced studies and/or for an occupation, trade or class of occupations or trades but may be related to personal development or leisure. A common characteristic of an education programme is that, upon fulfilment of learning objectives or educational tasks, successful completion is certified”.⁸

Professional education: Refers to “educational programmes that lead to professional registration, for example all professional educators in South Africa are registered with the South African Council of Educators which ensures that all educators conduct themselves professionally and manages a system for the promotion of continuing professional development of all teachers in South Africa”.⁶

⁷ Nkabinde *An Analysis of Educational Challenges in the New South Africa* 5.

⁸ <https://www.oecd.org/publications/oecd-handbook-for-internationally-comparative-education-statistics-9789264279889-en.htm> (Date of use 9 December 2017).

1.6 Structure of the dissertation

Chapter 1: Provides the background to the study and sets out the research questions.

Chapter 2: Explores aspects of the colonial and apartheid legacy which had implications for the majority of children in South Africa.

Chapter 3: Provides an analysis into legislative and policy instruments which had an impact on the right to basic education in South Africa, inclusive of international policy instruments.

Chapter 4: Provides an account on how the South African courts have been approaching the right to basic education since the adoption of the South African Constitution.

Chapter 5: Provides for the conclusion of the overall study and recommendations arising from the research are presented in this chapter.

CHAPTER 2

ASPECTS OF THE COLONIAL AND APARTHEID LEGACY WHICH IMPACTED ON THE RIGHT TO BASIC EDUCATION FOR THE MAJORITY OF CHILDREN IN SOUTH AFRICA

2.1 Introduction

This Chapter explores aspects of the colonial and apartheid legacy which impacted on the right to basic education for the majority of children in South Africa. This is done by way of critically looking into some key policy and legislative instruments with an impact on the right to education under apartheid South Africa. These key policy instruments include the Bantu Education Act No. 47 of 1953, which was the main instrument in institutionalising apartheid across the system and even into the classrooms. It is important to note that these important legislative instruments were preceded by various commissions, including, in the main, the Eiselen Commission.

2.2 The role of the Christian National Education (CNE) in education policies in South Africa

The Christian National Education (CNE) in South Africa was influential in the introduction or giving birth to apartheid education policies. The impact is that even today the country is still haunted by such apartheid education policy scars, “though fundamental pedagogics have distinguished themselves from CNE by claiming to be a "science" of education not tied to any particular philosophy of life, this report tries to show it has developed from CNE and has extremely close affinities with it”.⁹

Professor Cronje claimed, “to have scientific proof that racial fusion led to racial degeneration, whilst the Afrikaner poet, Totius (JD du Toit), arguing from the Calvinist point of view, claimed that separation of races was part of God’s creation plan and that racial mixture was contrary to God’s will”.¹⁰ This tells how especially the White Afrikaners were hell-bent in maintaining their domination through invoking Calvinistic theology.

⁹ <https://www.sahistory.org.za> (date of use 30 April 2018).

¹⁰ Rakometsi *The Transformation of Black School Education in South Africa, 1950-1994* 15.

According to this theological outlook, Black population was created by God to be inferior and to be subordinated to the White Afrikaners, in particular.

Reading from these views, it was clear that the right to education, particularly by the African majority, was never to be realised within the context of apartheid policies. The apartheid policies had a clear intention to discriminate against the majority of South Africans. Under this system of education, no Black child would be allowed to access quality education as race was becoming the main determining factor towards the right to education. Years earlier, 1948 to be precise, CNE principles were accepted by some major Afrikaans-related cultural organisations that were specifically prepared for Afrikaans speaking households. They endorsed the following as some key principles to the CNE concept:¹¹

- the instruction and education of the children of European parents should be based on their parents' life view of the world.
- in turn, the above-mentioned life view should have a Christian foundation based on the Holy Scripture.
- under the 'national' principle it is understood that everything is loved that belongs to the own, such as 'our country, our language, our history, our culture'. Educational instruction should be conducted through the mechanisms of religious instruction, mother tongue instruction, civil educational instruction, geography and history.
- discipline in school is a God-given authority and therefore imposes great responsibility on the Christian teacher.
- no double medium schools – all groupings in South Africa should be separately accommodated.
- schools should carry out their functions independently from the home, the church or the State. The undertaking should rather be a joint effort of all three together.
- educational instruction for adults, especially Europeans and Afrikaans speaking citizens, should be given on a principle of cultural apartheid and on the basis of a Christian National attitude to life.
- education to Coloureds and Black people is regarded as subdivisions of the vocation task of the Afrikaans-speaking Afrikaner to Christianise non-Europeans of the country. Education of Blacks is seen to be based on the European's attitude to life and to the world.

These principles were designed to institutionalise apartheid in South Africa, with the White race superior and the Black one inferior. The fact that these principles were accepted widely by Afrikaans-related cultural groups was an indication that they would be well-served should they be entrenched in the NP legislation and policies, as it later took place. These principles set the tone for a post-1948 apartheid dispensation, especially denying the right to education for the Black majority. However, mother tongue as a basis for instruction, was accepted, and it was further recommended that the two official languages of the country (Afrikaans and English) also be instructed. Thus, "the exponents of CNE believed that God ordained that there should be an

¹¹ [http://www.populareducation.co.za/sites/default/files/No_50\(2005\)_Van_Eden_ES_%26_Vermeulen_LM.pdf](http://www.populareducation.co.za/sites/default/files/No_50(2005)_Van_Eden_ES_%26_Vermeulen_LM.pdf).(date of use 30 April 2018).

Afrikaner nation with a land and language of its own and a religion based on orthodox Protestant-Calvinist principles”.¹² Furthermore, education must ensure that every individual is moulded in the image of God, so that he can become fully equipped for every good work. “National” is seen as love for ones’ own culture and heritage.

Article 15 of the Manifesto of the Institute for CNE stated that:¹³

Native education should be based on the principles of trusteeship, non-equality and segregation, its aim should be to inculcate the White man’s view of life, especially that of the Boer nation, which is senior trustee... Owing to the cultural infancy of the native, the State, in co-operation with the Protestant Churches, should at present provide the Native education. But the native should be fitted to undertake his own education as soon as possible, under the control and guidance of the State.

At the same time, Article 14 of the Manifesto extended to cover the Coloured child too:

The Coloured man...must be educated according to Christian National principles...only when he has been Christianised can he and will he be truly happy and secure against his own heathen and all kinds of foreign ideologies which promise sham happiness, but in the long run make him dissatisfied and unhappy. With regard to the National principle, we believe that a Coloured man can be made race-conscious if the principles of apartheid are strictly applied to education just as in his church life. The task of White South Africa to Christianise the native and to help him on culturally... has already found its closer focus in the principles of trusteeship, non-equality and segregation. Hence, Native education must be grounded in the life and world view of the Whites, more specifically of the Boer nation as the senior trustee of the Native.

These Articles were clearly condescending in nature towards other racial groups, especially Black Africans and Coloureds; placing the White population in a dominant position derived from an assumption that they had some God-given superior logic. The Articles went further and created differences between Black Africans and Coloureds. These scars are still visible today as shown through spatial segregation. It is now over twenty-seven years into democracy in South Africa (1994 to 2021), and the country is still haunted by the legacy of this ideological variance. Black people still do not feature as equal citizens, in relation to White people, in South Africa.

According to the National Party, the education of the Natives was not to be academic as this would make Natives potential Europeans. Education of the Natives had to be geared towards manual labour to ensure subservience. To this extent, a number of legislative pieces were introduced to reflect and promote this vision.

¹² Behr *Education in South Africa, Origins, Issues and Trends: 1652 -1988* 99.

¹³ Rakometsi *The Transformation of Black School Education in South Africa, 1950-1994* 32.

Such discriminatory pieces of legislation transcended the education sphere, and therefore applied to other socio-political areas as evidenced in the list below:

- Bantu Education Act 47 of 1953;
- The Prohibition of Mixed Marriages Act 55 of 1949;
- The Immorality Amendment Act 21 of 1950;
- The Population and Registration Act 30 of 1950; and
- The Group Areas Act 40 of 1950.

2.3 The Eiselen Commission

According to Hartshorne ¹⁴, “all over the world, modern States, whatever their forms of government and underlying constitutions, use the education system as an instrument of general policy and social control, designed to a greater or lesser extent to further their own ends”. The NP government was determined to ensure that the Black majority is taught an inferior type of education, with the aim of preparing them to accept the White supremacy. What was apparent from the onset was that the NP government felt it necessary to institutionalise apartheid system through policies and legislative framework, hence the establishment of the Eiselen Commission which was led by Dr W.W.M. Eiselen. The terms of reference of the Commission were as follows:¹⁵

- the formulation of the principles and aims of education for Natives as an independent race, in which their past and present, their inherent racial qualities, their distinctive characteristics and aptitude and their needs under ever changing social conditions are taken into consideration;
- the extent to which the existing primary, secondary and vocational education system for Natives and the training of Native teachers should be modified in respect of the content and form of syllabuses, in order to conform to the proposed principles and aims, and to prepare Natives more effective for their future occupations;
- the organisation and administration of the various branches of Native Education;
- the basis on which such education should be financed; and
- such other aspects of Native education as may be related to the preceding.

Based on these terms of reference, the outcomes or recommendations of the Eiselen Commission could be anticipated, as meant to continue to exclude the majority of the population to the right to education. It was clear in a country like South Africa, where no constitutional democracy and equality before the law existed, that the outcomes of the Commission were to further the narrow interests of the NP government characterised by inequality and marginalisation through the “divide and rule” strategy.

¹⁴ Hartshorne *K The Making of Education Policy in South Africa* 5.

¹⁵ Behr *Education in South Africa, Origins, Issues and Trends: 1652 -1988* 32.

The main recommendations of the Eiselen Commission can be summarised into the following six salient points: ¹⁶

- i. in order to ensure efficient coordination of planning, the control of Bantu education should be removed from provincial administrations and be vested in a separate department under the *aegis* of Central Government. To ensure the active participation of the adult Bantu population in matters affecting the education of their children, Bantu local authorities had to be created. Such transfer of control should not take place until Bantu local governing bodies achieved '*the threefold test of cash, competence and consent*' i.e., until they were able to collect school fees, were capable of administering schools, and were acceptable to the local inhabitants;
- ii. the proposed Department of Bantu Education should make provision for a measure of decentralisation by establishing six regional divisions, each with its own director and staff of administrative and professional assistants. The division into regions would ensure that homogenous population elements were grouped together;
- iii. elementary schooling should be organised to provide for two types of primary schools, viz : a lower primary school catering for pupils in the age range of 7-10 offering four year course (from Sub-standard A to Standard 2), directed primarily at the acquisition of numeracy and literacy in the mother tongue; and higher primary school for pupils in the age range 11-14, and offering a four year course (from Standard 3 to Standard 6), which would extend the work of the previous years, but include instruction in the official languages and other subjects such as handwork and where possible, agriculture and horticulture. At the end of the first two years of the higher primary school, pupils would be directed for the next two years, i.e., Standards 5 and 6, into their academic or practical direction;
- iv. post primary courses of five years' duration should be provided. These should be in either an academic or a practical direction. The first three years should be devoted to preparing the pupil for the Junior Certificate examination. Thereafter a two (2) year course leading to the Senior Certificate or matriculation examination, should follow. Successful completion of the academic course should open the door to a university or teachers' training course, while the successful completion of the practical course should open the door to a teachers' training course for higher primary school and to technical training of post matriculation standard. Polytechnical schools should be established with a view to training Bantu youth for occupation in the Public Service, commerce and industry;
- v. the teachers' colleges should provide a three-year post-Standard 6 course as a preparation for teaching in the lower primary school and a two-year course after Junior Certificate for teaching in higher primary school; and
- vi. schools of agriculture should be established in collaboration with the Department of Bantu Technical Services in order to train Bantu as demonstrators, supervisors and assistants for service on lands belonging to the Bantu reserves and trusts.

Central to these recommendations was the furtherance of the interests of the NP of racial segregation and discrimination. This meant that the majority of the population would be taught manual and menial types of jobs to serve the minority population; in this instance, the White population. It was therefore not a surprise, arising out of these recommendations, that the Bantu Education Act was introduced with effect from 1 January 1954. These recommendations signaled a period of intensified and sustained apartheid in South Africa up until the process of formal negotiation in the 1990s.

¹⁶ Behr *Education in South Africa, Origins, Issues and Trends: 1652 -1988* 34-35.

The apartheid system, of course, attracted a lot of attention both domestically and internationally to an extent that it was declared a “crime against humanity” by international bodies like United Nations. A clear indication of what the Government was to embark upon, following the passage of the Bantu Education Act, which followed closely the one mapped out by the Eiselen Commission and further refined by the Tomlinson Commission (1955), was given by Dr H. F. Verwoerd before the Senate in 1954 (Senate Debates, 7-11, 1954, cols. 2595- 2622)¹⁷ He said: “ It is the policy of my department that (Bantu) education should have its roots entirely in the Native areas and in the Native environment and Native Community. Bantu education must be able to give itself a complete expression and there it will have to perform its real service. The Bantu must be guided to serve his own community in all respects. There is no place for him in the European community above certain levels of labour”.

The central tenet of the recommendations of the Commission was that there was a need to centrally control the education of the Blacks in South Africa post-NP victory in 1948. It was the Commission’s recommendation that the education of Black and White children must be distinctive from each other, including its administration. From these recommendations, it became clear that the right to education for a Black child on an equal footing with a White child was never an issue to be accommodated by the NP Government. The Minister of Native Affairs declared that there was no place for an African child in the European community above the level of certain forms of labour.

Nkabinde (1990) cited the following objectives of Bantu education:¹⁸

1. to produce a semi-skilled Black labour force to minister to the needs of a capitalist economy at the lowest possible cost and earlier on; especially after the introduction of the Bantu Education Act, it was intended to blunt competition with White workers;
2. to socialise Black students so that they can accept the social relations of apartheid as natural, that is, to accept the supposed superiority of Whites and their own inferiority;
3. to forge a consciousness and identity accompanied by a sense of superiority among Whites;
4. to promote the acceptance of racial or ethnic separation as the natural order of things or as an arrangement better suited for South Africa’s complex problems of national minorities that can only be solved through the separation of the races or ethnic groups; and
5. to promote Black intellectual underdevelopment by minimising the allocation of educational resources for Blacks while maximising them for Whites.

¹⁷ Behr *Education in South Africa, Origins, Issues and Trends: 1652 -1988* 36.

¹⁸ Nkabinde *An Analysis of Educational Challenges in the New South Africa* 8.

Indeed, it was the intention of the NP to introduce Bantu education to prepare the majority of the population for many years of hard labour, so as to serve minority masters. Subsequently, the majority of the population was socialised into believing that anything that is White is superior, hence being subservient to the White minority.

The terms of reference and recommendations of the Commission were widely condemned as evidenced in Levy¹⁹: “It is difficult to believe that the Eiselen Commission, reporting in 1951, could be more retrograde than this. But judging from the Commission’s extraordinary racist terms of reference it based its recommendations on the assumption that Africans were a ‘race’ set apart from the more rational varieties of the human species...Its findings were premised on the understanding that the ‘Bantu’ were ‘an independent race in which their past, [and] inherent racial qualities’ were to be taken into consideration when it came to providing education”.

Both the terms of reference and recommendations were never meant to address the development of competencies, knowledge and skills for the majority of the population to produce goods and services of high quality for all. They were meant to believe that South Africa belonged to the White Afrikaner nation, whilst the rest of the population was meant to serve the White nation, whenever so required.

2.4 The Bantu Education Act 47 of 1953

Subsequent to the report by the Commission in 1951, was the passage of the Bantu Education Act, which strongly agitated for the control of Black education by the NP government. When the contents of the Bantu Education Act became known in 1953, Blacks campaigned against it in 1954. Upon the Act’s implementation, a boycott of government primary schools was organised. The ANC’s Chief Luthuli called the Act “a devil’s piece of legislation”.²⁰ There was a call for African parents to make preparations to withdraw their children from primary schools indefinitely as from 1 April 1955.

¹⁹ Levy *The Final Prize: My life in the anti-apartheid struggle* 180.

²⁰ Levy *The Final Prize: My life in the anti-apartheid struggle* 182.

It was argued that the parents were faced with the choice of having their children fed with “Verwoerd’s poison” or removing them from school for an indefinite period which was a difficult choice to make. The Eiselen Commission Report stressed that a planned, centrally-controlled schooling system for Blacks should be an important element in the overall development of South Africa and, particularly, in ensuring its labour needs.

The Bantu Education Act ensured that Central Government should take over the control of Black education, which initially fell under the control and administration of missionaries. It was noted that when African children “return on 12 April 1955 [they] will return to schools controlled by the Department of Native Affairs”.²¹ This had major implications on most of the missionary schools as some resisted the move to an extent of closing down after the commencement of the Bantu Education Act. The missionary schools, run by the Catholics, Presbyterians, Methodists, Seventh-Day Adventists and Anglicans objected to the principles of this Act, but were divided for reasons of finance, fear and indecision on the desirability of resisting the State on the issue. They lacked the spirit to take a united stand against the provisions of the Bantu Education Act.

The religious community was faced with serious challenges with the genesis of the Bantu Education Act, “ultimately each religious denomination salvaged its troubled conscience in its own way, with the result that only the Roman Catholics and Seventh Day Adventists refused to register their schools with the Native Affairs Department (NAD)”.²² The introduction of the Bantu Education Act meant that the apartheid government would have more control over what the majority of the population was taught. The NP was not that much happy with the missionary schools as they were having some degree of autonomy on how these schools were run. It was now clear that Bantu education was meant to instil values of an apartheid ideology.

As a matter of fact, most leaders of the liberation movement benefited from missionary school education, hence they also were critical of the system of apartheid.

²¹ Levy *The Final Prize: My life in the anti-apartheid struggle* 186.

²² Levy *The Final Prize: My life in the anti-apartheid struggle* 186.

During the 1960s, primary schooling for Black children was marked by the drop-out of pupils. It was noted that “of 607 340 Black pupils who entered Sub-Standard A in 1968, only 49.6 percent completed four years of schooling and were in Standard Three in 1972... of the 515 449 Black pupils who were in Sub-Standard A in 1965, only 31.5 percent reached Standard Six in 1972, and only 22.6 percent passed the Standard Six examination”.²³ This is a clear demonstration that black communities saw less or no value of Bantu education, which was anyway regulated by the apartheid legislation and policies, especially within the framework of the Bantu Education Act.

As part of its system or ideology of apartheid, “from 1963 until 1973, education in rural areas was under the provincial control of the separate education departments of the partially self-governing homelands which controlled and administered Black education beyond 1973”.²⁴ The NP recognised that if it were to prolong its reign of power, it needed to have homelands as part of the apartheid system, where it would be easy to control the Black population as they would have been pushed to the outskirts of the country’s economy. To the advantage of the apartheid regime, was that those who were at the helm or administration of the Bantustans or homelands strongly believed in the system of apartheid. To many South Africans, this meant an extension in the implementation of notorious apartheid policies. The apartheid system of education continued to be consolidated to another level especially “from the 1950s into four main organisationally segregated and unequally financed streams for African, Coloured, Indian and White children, the aims of education were explicitly to maintain White superiority and dominance in the economy and State... this policy of grand apartheid was inaugurated with the Promotion of Bantu Self-Government Act 46 of 1959”.²⁵

With regard to “the Promotion of Bantu Self-Governing Act, six territorial authorities were granted “independence” in 1968 and 1969. In terms of this arrangement, Africans were then to be able to exercise their political rights, including but not limited to the right to education...this development saw teacher training colleges and universities established in these Bantustans to accommodate the African majority.

²³ Ndlovu *A Historical-Education Investigation into Missionary Education in South Africa with special reference to Mission Schools in Bushbuckridge* 26.

²⁴ Kallaway *Apartheid and Education* 172.

²⁵ Chilsholm <http://fupress.net> (date of use, 16 June 2018).

As repression intensified in the 1960s, the proportion of African teachers in secondary and high schools possessing university degrees fell”.²⁶ The Promotion of Bantu Self-Governing Act was an indication that Blacks must govern themselves within the policy and legislative framework of the NP government or with limited autonomy.

It is interesting that even later when the Commission of Inquiry into Education in 1981 was established, changes arising out of the Commission continued to reflect the system of an apartheid ideology as “ the proposed reforms to the education system, but these too were made within the framework of the existing unequal political dispensation”.²⁷ These cosmetic reforms, like the introduction of the Bantu Education Act, attracted massive resistance throughout the 1980s up to the end of the apartheid education system.

Throughout these years, the attempts that were focused on the denial to the African majority of the right to education were intended to engineer control over their social, political and economic aspirations. Pampallis argued, “that the Bantu Education Act aroused strong condemnation from Black people who were virtually unanimous in their opposition, as the majority of Black people believed in integration rather than segregation”.²⁸

The NP government was clearly committed to shutting the doors of learning by denying the right to education to the African majority. It is worth noting that there were White members in South Africa who were also in opposition to these actions of the NP as the Liberal Party gave its unqualified support to the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations in 1948 and adopted the principle that: “everyone has the right to education. Education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit”.

²⁶ Chilsholm <http://fupress.net> (date of use, 16 June 2018).

²⁷ Chilsholm <http://fupress.net> (date of use, 16 June 2018).

²⁸ Pampallis J *Foundations of the New South Africa* 199.

Since the introduction of the Bantu Education Act, the NP saw no turn-back in its core mandate of segregation and denying the majority of the population the right to education. It is worth noting that although there was condemnation against the Bantu Education Act domestically and internationally, this could not alter the ideological outlook of the NP.

2.5 16 June 1976 student uprising and the right to education

Since the Bantu Education Act became effective, 16 June 1976 was the turning point, after the NP government introduced Afrikaans as the language of instruction on an equal basis with English. This “was regarded as an immediate cause of the Soweto uprising, but there are various factors behind the 1976 student unrest”.²⁹ This was confirmed later by the report of Justice P.M. Cillie who was appointed by the Government to investigate the causes of the unrest, which found that “among the Black community, especially Soweto, there was considerable dissatisfaction with Black Education”.³⁰

The Commission found that besides the objection to Afrikaans (as a medium of instruction in some subjects in secondary school), there was dissatisfaction with the standard of education, the quality of teaching, the school buildings and the equipment. The introduction of Afrikaans as the medium of instruction in teaching and learning was the major cause for massive discontent and made resentment boil over into the 1976 uprisings, as this was a decree issued by the Bantu Education Department. Deputy Minister Andries Treurnicht had sent instructions to the School Boards, inspectors and principals to the effect that Afrikaans should be put on an equal basis with English as a medium of instruction in all schools.

The struggle for the right to education was taken to another level. In fact, this became the rallying point as students organised themselves and rejected being taught in Afrikaans, as Afrikaans was also associated with the oppressive regime led by the NP.

²⁹ <https://www.sahistory.org.za/article/june-16-soweto-youth-uprising> (date of use, 15 July 2018).

³⁰ Behr *Education in South Africa, Origins, Issues and Trends: 1652 -1988* 37.

2.6 Conclusion

This Chapter discussed aspects of the colonial and apartheid legacy that impacted on the right to basic education for the majority of children in South Africa. It has been shown herein that the apartheid government had a clear intention, especially after the rise to power of the National Party in 1948, whereupon it introduced the Bantu Education Act 47 of 1953. The appointment of the Eiselen Commission preceded the introduction of the Bantu Education Act. As explained herein, it was this Commission that set the tone for the June 16 Uprisings in South Africa with its recommendations for heightened apartheid education in South Africa. The Bantu Education Act ensured that the Black majority, and Africans in particular, were taught inferior education and forced to accept White supremacy as the order of the apartheid and colonial eras.

The Christian National Education (CNE) was instrumental in influencing the NP policy discourse in the country, reflecting the views of Dutch churches, the teaching profession, Afrikaans Universities and Afrikaans Cultural leaders.

The 16 June 1976 uprisings made a huge impact in changing the education policy landscape under apartheid South Africa. As discussed in this Chapter, the Soweto uprisings broke out when the Nationalist Party regime introduced Afrikaans as the language of instruction in Black schools.

The right to basic education, including the issue of the language of instruction, has become a critical factor in the post-1994 education landscape in South Africa. This is seen especially in the context that the Constitution has entrenched the right for everyone to receive education in the official language of his or her choice in public educational institutions.

Long after the end of the apartheid and colonial periods, the language issue remains a challenge, with the courts intervening from time to time to affirm these rights. This is evidenced in cases such as the *Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2005 (10) BCLR 973 (SCA). This case is discussed in detail in Chapter 4 of this dissertation.

CHAPTER 3

LAW AND POLICY DEVELOPMENTS OF THE PRE- AND POST-1994 PERIODS WITH AN IMPACT ON THE RIGHT TO BASIC EDUCATION IN SOUTH AFRICA

3.1 Introduction

This Chapter covers laws and policy developments of the pre-and post-1994 periods that impacted the right to basic education in South Africa. Importantly, it also outlines the international and regional instruments that were adopted and /or acknowledged by the Constitution. This should be understood in the context that international law is “a body of rules and principles which are binding upon states in their relations with one another”.³¹ The 1994 political settlement was preceded by the formal commencement of negotiations towards a democratic South Africa. These events sought to turn South Africa into a different country, where discrimination on the basis of race, gender, class, background and creed would be things of the past. At the conclusion of the protracted negotiations that heralded the democratic dispensation, many people agreed that South Africa would never be the same almost in all facets of life.

3.2 International policy instruments critical to South Africa’s right to basic education

The pre-1994 South African government made no mention of the international policy instruments and disregarded their incorporation into the South African system. This was especially so when it came to rights such as the right to education. The significance of international law was evident at the time South Africa entered into a new political dispensation, during the negotiations up to, and including, the final Constitution. South Africa now treats international law as part of its domestic law. This is well entrenched in the final Constitution, which as per section 39³² stipulates:

1. when interpreting the Bill of Rights, a court, tribunal or forum-
 - a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b) must consider international law; and
 - c) may consider foreign law.
2. when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

³¹ Durgard *International Law: A South African Perspective* 1.

³² Currie and de Waal, *The Bill of Rights Handbook* 146, Section 39 of the Constitution of South Africa (1996)

3.2.1 The Universal Declaration of Human Rights (1948)

Article 26 of the Universal Declaration of Human Rights (UDHR) states that “everyone has the right to education”. The Article refers to a critical element of the right to education when it states that “Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace”³³.

This declaration provides the foundation for both moral and legal principles in education. Because it was not legally binding “it was necessary that its major principles should also be taken up in an instrument such as a covenant”.³⁴ This was an innovative step to ensure that the declaration became binding. It is in this respect that South Africa’s policy instruments have been enriched by the UDHR Declaration.

3.2.2 The United Nations Declaration on the Rights of the Child (1959)

This declaration is considered a major breakthrough when it comes to the rights of children to education. According to Principle 7 of the United Nations Declaration on the Rights of the Child, “the child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages”.³⁵ This principle also emphasises that the best interests of the child shall be the guiding principle of those responsible for his or her education and guidance. That responsibility lies, in the first place, with the parents. It is important to note as well that this principle is silent when it comes to the quality of the education that is provided for the child.

However, one notes that the right to education must be in the best interest of the child. Another important aspect is that the UNDHR acknowledges the Universal Declaration of Human Rights, which proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³³ De Groof and *Bray Education under the Constitution in South Africa*, 295.

³⁴ Netshitahame *Education Management, Law and Policy* 32.

³⁵ <https://archive.crin.org/en/library/legal-database/un-declaration-rights-child-1959.html> (Date of use, 24 December 2020).

3.2.3 The Convention against Discrimination in Education (1960)

The Convention against Discrimination in Education (CDE) was held in Paris from 14 November to 15 December 1960, under the auspices of the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), which also made a significant impact with regard to the right to education. Article 6 of CDE states clearly that for the purposes of this Convention, “the term ‘discrimination’ includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or another opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: (a) of depriving any person or group of persons of access to education of any type or at any level”.³⁶ The Convention makes it clear that it refers to all types and levels of education, including access to education, the standards and the quality of education. The last-mentioned aspect remains critical in ensuring that education provided by the Member States or countries is of high quality. In the context of South Africa, this becomes more critical, especially considering the discriminatory nature of the provision of education by the apartheid South Africa

3.2.4 The International Covenant on Economic, Social and Cultural Rights (1966)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) seems to be comprehensive when it comes to addressing the right to education. Article 13 thereof states, amongst others, that “the States Parties to the present Covenant recognize the right of everyone to education...that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms”.³⁷

On the other hand, Article 14 deals specifically with primary education and makes the emphasis that such education is compulsory and free and that there should be a detailed plan of action relating to the progressive implementation thereof. The Covenant directed that the plan should be undertaken within two years.

³⁶ <https://portal.unesco.org/en/ev.php> (Date of use, 24 December 2020).

³⁷ <https://www.ohchr.org> (Date of use, 24 December 2020).

South Africa has a series of the achievements it recorded in respect of the implementation of the right to basic education since 1994. These have arguably been achieved despite the challenges emanating from the damage that was caused by the apartheid and colonial periods, which institutionalized discrimination against the majority of the children.

3.2.5 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR) was adopted on 27 June 1981 and became effective on 21 October 1986. Article 17(1) thereof provides that "every individual shall have the right to education".³⁸ In the South African context, as stipulated in section 29(1) of the Constitution, policy instruments introduced since 1994 have sought to ensure that everyone has the right to "basic education including adult basic education"³⁹. In this light, the right to education is, therefore, not applicable to everyone. Indeed, resources would not permit it. However, when it comes to further education, this right may be progressively realisable.

3.2.6 The Convention on the Rights of the Child (1989)

The Convention on the Rights of the Child (CRC) was adopted by the United Nations General Assembly on 20 November 1989, and was set to be implemented on 2 September 1990. It is significant to the right to education. Of huge importance with regard to this Convention is that Article 23 (3) thereof emphasises that: "the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development"⁴⁰.

This is very important, noting that in South Africa persons with disabilities are among the vulnerable, especially young people. In this respect, access to education becomes critical. This further creates an imperative for the state to create conditions conducive to access education. Article 28 directs that primary education be made compulsory and available free to all. The rights of people with disabilities are human rights as well, so

³⁸ De Groof and *Bray Education under the Constitution in South Africa*, 297.

³⁹ Currie and De Waal *The Bill of Rights Handbook* 624.

⁴⁰ <https://www.unicef.org/child-rights-convention> (Date of use, 5 January 2021).

they cannot be held back by semantics or on how people with disabilities should be defined or are defined. Their rights, in terms of the Constitution, must be respected, promoted and fulfilled.

In the South African context, courts once again had to intervene in matters where the right to education of learners with disabilities was at stake. The case in point is the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC). This case is discussed at length in Chapter 4 of the dissertation.

3.2.7 The 1999 United Nations (UN) Committee on Economic, Social and Cultural Rights

In terms of the 1999 United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) General Comment No.13, the right to education provides some guidelines for interpreting the right to education, as it calls for basic education to be available, accessible, acceptable and adaptable, as illustrated below:⁴¹

Table 3.1: Guidelines for interpreting the right to education

Guidelines for interpreting the right to education	
Availability	Educational institutions and programmes have to be available in sufficient quantity, this requires a series of items such as buildings, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, libraries, computers facilities and information technology
Accessibility	Educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions: <ul style="list-style-type: none"> a) Non –discrimination, b) Physical accessibility, and c) Economic accessibility.
Acceptability	The form and substance of education, including curricula and teaching methods, have to be acceptable (e.g., relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives.
Adaptability	Education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

⁴¹ https://www.gov.za/sites/default/files/gcis_document/201409/16312gen1960.pdf (Date of use 19 January 2019).

Rights are interdependent and the right to education should therefore be interpreted in the context of the full Bill of Rights.⁴² This becomes important especially in the context of South Africa, where the Constitution reigns supreme and noting the history of human rights violation especially since the NP came into power.

3.3 Pre-1994 Dispensation

3.3.1 Record of Understanding of 26 September 1992

This was an important step, amongst others, towards a South Africa that is free of race, class and gender discrimination. The Record of Understanding between the ANC and the apartheid government of the day heralded a new dawn towards South Africa's constitutional reforms which made an impact on the right to education. This was a victory against parliamentary sovereignty, which characterised the South African political dispensation for years. Parties to the Record of Understanding understood very well that the time had come for a South Africa that guarantees equal rights for all, irrespective of race, class or gender. The Record of Understanding meant that the involved parties had reached an understanding regarding a number of obstacles and issues.

The parties agreed that there was a need for a democratic constitutional assembly or a constitution-making body and that for such a body to be democratic it must:⁴³

- be democratically elected;
- draft and adopt the new constitution, implying that it should sit as a single chamber;
- be bound only by the agreed constitutional principles;
- have a fixed time frame;
- have adequate deadlock-breaking mechanisms;
- function democratically, i.e., arrive at its decisions democratically with certain agreed majorities; and
- be elected with an agreed predetermined time period.

The NP Government and the ANC agreed that during the interim/transitional period there shall be constitutional continuity and so-called constitutional *hiatus*. In consideration of this principle, it was further agreed that:

- the constitution-making body/constituent assembly shall also act as the interim/transitional Parliament;
- there shall be an interim/transitional government of national unity; and

⁴² <https://www.ci.uct.ac.za/ci/child-gauge/2008-2009> (Date of use, 16 March 2019).

⁴³ <https://www.sahistory.org.za/dated-event/record-understanding-agreed-sa-government-and-anc> (Date of use, 14 July 2018).

- the constitution-making body/constituent assembly, interim/transitional Parliament and the interim/transitional government of national unity shall function within a constitutional framework/transitional constitution which shall provide for national and regional government during the period of transition and shall incorporate guaranteed justiciable fundamental rights and freedoms.

The Record of Understanding was an important milestone for the country as parties to it showed commitment to transitioning from an apartheid South Africa to a non-racial, non-sexist, united and democratic South Africa. It was in this engagement that both parties, especially the ANC and the NP government, showed commitment to negotiations.

3.3.2 Convention of a Democratic South Africa (CODESA)

One would think that in these engagements everything went smoothly, but that was not the case. There were serious divergent policy opinions, as some argued for a minimal State involvement, especially those who held a liberal ideology whilst others, due to the harm caused by the apartheid South Africa, felt that the State intervention was crucial especially if the country was to redress the past imbalances.

It is interesting to note that, with the CODESA negotiations, White parties were very much on less State intervention. As Surty⁴⁴ states, “White parties were happy with this, as it would mean less State intervention regarding tilting the socio–economic benefits in favour of the working class and the poor...what was clear is that the issue of socio-economic rights was so contested at the CODESA to an extent that it was flagged for deliberations after the approval and adoption of civil and political rights by the Constitutional Assembly”.

The CODESA was one of those major milestones towards a new South Africa. This included the advancement of the right to education, which was a “Declaration of Intent” signed by eighteen (18) parties. These parties were divided between those who supported the NP government and those that were on the side of the liberation movements.

⁴⁴ Surty *In Pursuit of Dignity* 183.

Parties to the CODESA made a solemn commitment to bring about an undivided South Africa with one nation sharing a common citizenship, patriotism and loyalty, pursuing amidst their diversity, freedom, equality and security for all irrespective of race, colour, sex or creed; a country free from apartheid or any other form of discrimination or domination. They set in motion the process of drawing up and establishing a constitution that could ensure *inter alia*⁴⁵ :

- that South Africa will be a united, democratic, non-racial and non-sexist State in which sovereign authority is exercised over the whole of its territory;
- that the Constitution will be the supreme law and that it will be guarded over by an independent, non-racial and impartial judiciary;
- that there will be a multi-party democracy with the right to form and join political parties and with regular elections on the basis of universal adult suffrage on a common voter's roll, in general the basic electoral system shall be that of proportional representation;
- that there shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances;
- that diversity of languages, cultures and religion of the people of South Africa shall be acknowledged; and
- that all shall enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly protected by an entrenched and justiciable Bill of Rights and a legal system that guarantees equality of all before the law.

The CODESA was such an occasion for the country as, for the first time, parties, many as they were, agreed on minimum conditions regarding the principles that would inform the Constitution of a post-1994 democratic society. Parties agreed, amongst others, on the supremacy of the Constitution, which was in stark contrast to the parliamentary supremacy of the pre-1994 period when the NP was leading the government.

3.4 Post-1994 Dispensation

3.4.1 The interim Constitution of the Republic of South Africa, 1993

The interim Constitution was a huge milestone. It came into effect on 27 April 1994. The process of drafting it was a battleground for different political parties during the negotiations. As Surty maintains, “when the interim Constitution was negotiated, White parties such as the Democratic Party (DP) and the NP were opposed to the incorporation of socio-economic rights in the chapter on fundamental rights”.

⁴⁵ De Vos Pierre *South African Constitutional Law in Context* 19.

The DP's main argument was that embedding socio-economic rights in the Constitution would create an expectation that the courts would, from time to time, have to execute administrative or execute budgetary functions which would veer them away from their judicial functions, and thus encroach on the executive function of government. In the end, this liberal ideology was defeated in the process of the negotiations, "as they finally withdrew their submission, as the team of negotiators, especially from the ANC made a compelling case, using among others, examples of India, the world's largest democracy that had socio-economic rights embedded in its Constitution".⁴⁶ The interim Constitution was an important step leading to a new South Africa since the unbanning of political parties, the release of political prisoners, the return of political leaders and activists from exile and subsequently the commencement of negotiations.

As it was referred to as the interim Constitution, it simply meant that it was the provisional or transitional Constitution which was meant to serve for the period of transition until the final Constitution was adopted. The Constitution, in the main, contained a set of key principles to guide the process of the development of the final constitution. It is in this sense that "the agreement was described as a satisfactory agreement to allow for the old and the new to govern together and set up national control over the military".⁴⁷

The interim Constitution was a transitional measure towards the final Constitution by the democratically elected Constitutional Assembly. It was basically a compromised Constitution to accommodate, mainly the NP and the ANC, and other political groupings. The interim Constitution came into effect on 27 April 1994 to administer South Africa's first democratic elections, and it was restricted largely to civil and political rights as contained in the Bill of Rights which guarantees the rights protected by international human rights conventions. The interim Constitution was key in the implementation of the right to education for all in South Africa, as it was in it where the right to education was first codified, through section 32 thereof.

⁴⁶ Surty *In Pursuit of Dignity* 185.

⁴⁷ <https://www.gov.za/documents/constitution/constitution-republic-south-africa> (Date of use, 8 August 2018).

This was in stark contrast to the pre-1994 political dispensation or apartheid South Africa, where there was no government commitment in the implementation of the right to education to all. So, other policy instruments, especially in the area of education and training were guided, *inter alia*, by the Universal Declaration of Human Rights (United Nations, 1948), the United Nations Convention on the Rights of the Child (United Nations, 1989), the Standard Rules on the Equalisation of Opportunities for Disabled Persons (United Nations, 1993) and the World Conference on Education for All by the year 2000 (Education for All, 2000).

This demonstrated South Africa's commitment to comply with international policy instruments, which were ignored by the NP Government when it took power in 1948. It is ironic that in the same year, the NP came into power the Universal Declaration of Human Rights was adopted by the United Nations General Assembly on 10 December 1948.

The interim Constitution provided that everyone shall enjoy all universally accepted fundamental rights and liberties by including relatively innovative rights for a national Constitution such as the right of access to information, the right to administrative justice, a qualified right to the free pursuit of economic activity, the right to an environment which is not harmful to health or wellbeing, the right of children to security, basic nutrition, basic health and social services, language and cultural rights and educational rights.⁴⁸

Section 32 of the interim Constitution brought about the right to education for the first time in the history of South Africa:⁴⁹

Every person shall have the right to basic education and to equal access to educational institutions; to instruction in the language of his or her choice where this is reasonably practicable; and to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

The interim Constitution contained 34 Constitutional principles, which included the right to education. The South African Constitution was drafted in terms of Chapter 5 of the interim Constitution and on 8 May 1996, "the Constitutional Assembly completed its two years of work in drafting a final Constitution, which was finally certified by the

⁴⁸ <https://www.gov.za/documents/constitution/constitution-republic-south-africa> (Date of use, 8 August 2018).

⁴⁹ De Groof and *Bray Education under the Constitution in South Africa*, 334.

Constitutional Court on 4 December 1996".⁵⁰ Even though the interim Constitution had a short life span, as it was an interim arrangement between pre-1994 political dispensation and up to the certification of the final Constitution, its principles remained in force, as the final Constitution seamlessly continued with its provisions, especially as embedded in Chapter 2 of the final Constitution. Discussions on the final Constitution will be discussed in the next Chapter as part of how the South African courts have interpreted the right to basic education.

3.4.2 White Paper on Education and Training, 1995

The Department of Education (now the Department of Basic Education) in driving the implementation of the right to education developed the White Paper on Education and Training in 1995. This document made a decisive break with the pre-1994 education system in South Africa. It describes in detail policy initiatives for the education system within the context of constitutional democracy in areas such as (i) the organisation, governance and funding of schools; and (ii) the approach to the provision of free and compulsory general education. It also clearly illustrated information about the division of functions between national and provincial governments in the education and training sector. All these imperatives are critical to the realisation of the right to basic education in post-1994 South Africa, with powers vested in these spheres of government by the legislative and policy framework.

The White Paper makes reference to the interim Constitution. For example, the Preamble to the 1993 Constitution declares the "need to create a new order in which all South Africans shall be entitled to a common South African citizenship in a sovereign and democratic constitutional State in which there is equality between men and women and people of all races so that all citizens shall be able to exercise their fundamental rights and freedoms".⁵¹ There is no difference with regard to the final Constitution, as discussed earlier. Both constitutions complied with the agreed Constitutional Principles.

The White Paper regarding the right to education clearly states that:

The right to basic education accorded in section 32(a) applies to all persons that is to all children, youth and adults. Basic education is thus a legal entitlement to which every person has a claim. For children, the right would be satisfied by the availability of schooling facilities

⁵⁰ Surty *In Pursuit of Dignity* 183.

⁵¹ https://www.gov.za/sites/default/files/gcis_document/201409/16312gen1960.pdf
(Date of use 19 January 2019), Constitution of the Republic of South Africa Act 200 of 1993

sufficient to enable every child to begin and complete a basic education programme of acceptable quality. For youth and adults, the availability of basic education would not necessarily be in the form of schools but in the form of education and training programmes appropriate to their age and personal circumstances. Attaining this level of availability of opportunity for basic education will be an immense achievement in the reconstruction and development of the country.

This was the first White Paper to have been crafted by the post-1994 democratic government in compliance with the interim Constitution, which declared that everyone has the right to basic education. The interim Constitution came into operation on 27 April 1994; hence it guided the subsequent policies and legislation in education. The White Paper made it clear that basic education was a right that was realisable without qualification and set the tone for the Minister of Education and the country's post-1994 democratic elections. The White Paper identified three important categories in addressing the question of access to education within the context of "ten years of free and compulsory education" which will be discussed below.

Ten Years: The White Paper accepts that the General Education level within the school system under the National Qualifications Framework should comprise a reception year and nine school years from Grades 1-9 (Sub A to Standard 7). Since the reception or pre-school year is not, at present, included in the basic education phase, the effect will be to add a year at the bottom end of the demographic pyramid. The implementation of the reception year will take place over a period of years when there is also significant growth in participation rates from Grade 1 upwards.

Compulsory Education: The White Paper states that the basis for the State's commitment to compulsory general education is to be found in the fundamental right of all persons to basic education. The Ministry of Education's policy for compulsory education, therefore, provides one of the necessary elements of the framework within which the constitutional rights of the child can be assured.

Free Education: The White Paper understood that all public education is a service and that the costs must be paid for from the fiscus or public funds via the taxpayers, and other revenues or by the parents and/or the community. In this sense, there is no free education. The Ministry of Education considers the provision of General Education of acceptable quality in the compulsory phase as a public responsibility to be funded by the State at an affordable and sustainable level. This was a firm commitment by the Government of National Unity (GNU) to deliver the right to education in South Africa for

the first time since the onset of democracy.

The White Paper, for the first time in a post -1994 democratic dispensation, gave a clear direction regarding the implementation of the right to education. The White Paper was a clarion call to address the legacy of apartheid education where the majority of the population was excluded from accessing education.

South Africa celebrated its twenty-seven years of democracy in 2021. The reality is that the country is still faced with the challenge of access, quality and success, especially as it relates to the Black majority. It is worth noting that much has been done since the implementation of the White Paper. The State remains responsible for ensuring that it provides all the necessary resources to achieve the right to education, especially basic education, which is immediately realisable whilst further education must be progressively realised.

3.4.3 National Education Policy Act, 1996

The principles on which the South African Schools Act is based, are echoed and reaffirmed in the National Education Policy Act which was passed to “facilitate the democratic transformation of the national system of education into one which serves the needs and interests of all people of South Africa and upholds their fundamental rights”.⁵²

Important to note in this Policy are directive principles as contained in section 4 of the National Education Policy Act. The policy contemplated in section 3 shall be directed towards – (a) the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 2 of the Constitution, and in terms of international conventions ratified by Parliament, and in particular, amongst others, the right –⁵³

- i of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever;
- ii of every person to basic education and equal access to education institutions;
- iii of a parent or guardian in respect of the education of his or her child or ward;
- iv of every child in respect of his or her education;
- v of every student to be instructed in the language of his or her choice where this is reasonably practicable;
- vi of every person to the freedoms of conscience, religion, thought, belief, opinion, expression and association within education institutions;
- vii of every person to establish, where practicable, education institutions based on a common

⁵² Motala and Pampallis *The State, Education and Equity in Post-Apartheid South Africa* 25.

⁵³ Merabe and Deacon *Education Law and Policy Handbook*, 1-4.

viii language, culture or religion, as long as there is no discrimination on the ground of race; and of every person to use the language and participate in the cultural life of his or her choice within an education institution.

This Act was an important intervention in the implementation of the right to education in South Africa, more especially regarding basic education. As a result, the Minister of Basic Education introduced a variety of policy instruments to ensure that the right to basic education is implemented nationally in cooperation with provinces as directed by the Act. These policy instruments included norms and standards for education planning, provisioning, governance, monitoring and evaluation.

The National Department of Education is empowered to develop education policies, whilst provinces are responsible for the implementation of education policies and programmes aligned with the national policies. Clarifying roles and functions in the Act is important in creating certainty in the implementation of the right to education in the country, noting the apartheid past where there were various departments of education, including those from the Bantustan governments.

3.4.4 South African Schools Act, 1996

The South African Schools Act was preceded by the Education White Paper 2, titled '*Organisation, Governance and Funding of Schools*,' which was building on the Education White Paper 1 which dealt, amongst others, with public and independent schools, roles and responsibilities, as well as rights of learners and educators.

The South African Schools Act in its Preamble⁵⁴ :

recognises that the country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of talents of all citizens and their capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all *learners, parents* and *educators*, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State.

This Act plays an important role in ensuring that all learners have the right of access to quality education without discrimination and makes schooling compulsory for all children from the year they turn 7 to the year they turn 15 (or the end of Grade 9).

⁵⁴ Merabe and Deacon *Education Law and Policy Handbook*, 2A-3, South African Schools Act 84 of 1996

It regulates the provision of public schools and education places by provinces, as well as the governance of schools, particularly the establishment and operation of school governing bodies.

This Act was an important legislative intervention to have been introduced in a post-1994 democratic dispensation, as it has strengthened the implementation of the right to basic education in South Africa. At the centre, as discussed above, is how the school must be run and who are important parties or role players in the running of the school. The Act, in ensuring the right to education is realised, makes it compulsory for children from the ages of 7 to 15 to attend schooling. This study has revealed that its introduction has contributed significantly to nearly universal access to basic education by the majority of the population, which is, predominantly, Black Africans.

3.4.5 Education White Paper 5 on Early Childhood Education, 2001

It is important to note that “the White Paper on Education and Training (1995) “accepted that the General Education level within the school system under the National Qualifications Framework should comprise a reception year and nine school years from Grades 1-9 (Sub A to Standard 7)”.⁵⁵ Since the reception or pre-school year is, at present, not included in the basic education phase, the effect will be to add a year at the bottom end of the demographic pyramid. The priority of Education White Paper 5 on Early Childhood Education is the implementation of preschool or the reception year (Grade R) for five-year-old children while acknowledging and recognising the vital importance of investment in early childhood development before the age of three years. Its target was that by 2010 all learners that enter Grade 1 should have participated in an accredited reception-year programme.

However, it did not make participation in the reception year (Grade R) compulsory, despite its critical significance, as it does not form part of the right to basic education as envisaged in section 29(1) of the Constitution. Early childhood development is an important intervention in the implementation of the right to basic education as benefits are higher in the later years of the learner. Government must prioritise early childhood development as it does with other compulsory years such as between 7 to 15 years.

⁵⁵ <https://www.gov.za/documents/education-white-paper-5-early-childhood-education> (Date of use, 19 January 2019).

Should early childhood development be made compulsory for every child, there is no doubt that the country will address problems such as learner performance and poor completion rate, including at grade 12.

However, progress has been recorded regarding the access of 0-4 years children to early childhood facilities. The Department of Basic Education 2017/18 Annual Performance Plan (APP) indicates that in 2002 only about 7% of children were attending early childhood facilities and by 2015 this increased to 45%. The Annual Performance Plan also indicates that by 2015, nationally an estimated 95% of children were receiving grade R before proceeding to grade 1. Early childhood development is a critical element of the right to education, and since 2007 there has been significant progress regarding the attendance of 5 and 6-year-old children.

Table 3.2 shows that the enrolments by the 5-year-olds increased from 60.4% in 2007 to 88% in 2017, whilst those of the 6-year-olds increased from 87.7% in 2007 to 96.6% in 2017, as demonstrated in table below:

Table 3.2: Enrolments over years for Grade 5 and 6.

Age	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
%											
5-year old	60.4	63.9	78.6	83.6	84.9	84.6	85.3	87.2	85.8	88.1	88.0
6-year old	87.7	86.8	95.2	96.2	95.6	95.8	95.5	95.9	98.2	97.3	96.6

Source: Statistics South Africa, General Household Survey (GHS), DBE own calculations

3.4.6 White Paper 6: Inclusive Education, 2001

This White Paper 6 is central in implementing an inclusive education at all levels in the system, facilitating the inclusion of vulnerable learners and reducing barriers to learning.

It defined learners with special education needs as not only those with physical, mental or neurological impairments, but also those experiencing learning difficulties as a result of socio-economic deprivation. The policy envisaged an inclusive education and training system, which provides support within public ordinary schools for learners with mild to moderate disabilities.

The White Paper 6 defined an inclusive education and training as:⁵⁶

- acknowledging that all children and youth can learn and that all children and youth need support;
- enabling education structures, systems and learning methodologies to meet the needs of all learners;
- acknowledging and respecting differences in learners, whether due to age, gender, ethnicity, language, class, disability, HIV or other infectious diseases.
- broader than formal schooling and acknowledging that learning also occurs in the home and community, and within formal and informal settings and structures;
- changing attitudes, behaviour, teaching methods, curricula and environment to meet the needs of all learners; and
- maximising the participation of all learners in the culture and the curriculum of educational institutions and uncovering and minimising barriers to learning.

Access to basic education by learners with disabilities remains a challenge, this has a negative impact on the right to education, as the country is not tapping into this huge talent of people with disabilities. The policy was introduced in 2001 to address inclusivity. It's over twenty-seven (27) years into democracy, but inclusivity remains a challenge. People and learners with disabilities are still confronted with multiple forms of discrimination in every facet of society, not only in the education sector. The country had set itself a target of 2% employment of people with disabilities. Even in education, this target is not achieved. This means that people with disabilities have not yet significantly benefited from the right to basic education or inclusive education.

3.4.7 Adult Education and Training Act, 2000

Section 29(1)(a) of the Constitution provides that everyone has the right to basic education, including adult basic education. This implies that adult basic education is immediately realisable and does not carry limitations as compared to other rights, including the right to further education.

The Adult Education and Training Act (the Act) “regulates adult basic education and training; to provide for the establishment, governance and funding of public adult learning centres; to provide for the registration of private adult learning centres; to provide for quality assurance and quality promotion in adult basic education and training; to provide for transitional arrangements; and to provide for matters connected therewith”.⁵⁷

⁵⁶ https://www.vvob.org/files/publicaties/rsa_education_white_paper_6.pdf (Date of use, 19 January 2019).

⁵⁷ <https://www.gov.za/documents/adult-basic-education-and-training-act>

The Act ensures the establishment of a national coordinated adult basic education and training system which promotes co-operative governance and provides for programme-based adult basic education and training.

At the centre of this Act is the quest to restructure and transform programmes and centres to respond better to the human resources, economic and development needs of South Africa. This Act is important for the effective implementation of the right to education, especially for adult learners.

The government is fortunate that in all cases involving the right to education adjudicated by the courts since the post-1994 democratic order, there seems to be no case related to the right to adult education. The government must address the legacy of apartheid by implementing the right to adult education and ensuring that related programmes have a strong element of employability. The Act already commits to providing optimal opportunities for adult learning and literacy, the creation of knowledge and development of skills in keeping with international standards of academic and technical quality; and to promoting the values which underline an open and democratic society based on human dignity, equality and freedom.

3.4.8 National Development Plan (NDP), 2012

The National Development Plan (NDP) was presented and adopted by the National Assembly and various sectors of South African society in 2012 as the long-term plan for the country, for the set period, up to 2030. The NDP makes the commitment that by 2030, South Africans should have access to education and training of the highest quality, leading to significantly improved learning outcomes. The NDP puts an emphasis that “the performance of South African learners in international standardised tests should be comparable to the performance of learners from countries at a similar level of development and with similar access”.⁵⁸ At the centre of the NDP is the elimination of poverty, and the reduction of poverty and unemployment. Chapter 9 of the NDP sets a range of numerical objectives regarding advancing the right to education in South Africa to be achieved by 2030.

⁵⁸ https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (Date of use, 16 March 2019).

For the first time in a post-1994 democratic South Africa, there is a dedicated chapter for both basic education and post-school education and training. The NDP also regards early childhood as a top priority as it is key in improving the quality of education and the long-term prospects of future generations. This will increase the prospects of South African learners competing with their peers at similar levels of development.

The NDP acknowledges that in 2030, there will be about 4 million children under 3 years, nearly 2 million in the 4-5 years age group and just under 1 million 6-year-old children.

3.5 Impact of these policy instruments regarding access to basic education

In South Africa one cannot discuss the “right to basic education” without “access to education”, owing to the apartheid legacy left by the erstwhile National Party government over many years. Accessibility means that “people are not unjustifiably turned away and that appropriate steps are taken to make access easier for persons from groups that were either consigned to inferior institutions or excluded from certain educational institutions altogether”.⁵⁹ Since the adoption of these policies and legislative instruments, South Africa has observed increased access to basic education for the Black majority, particularly Africans. The increased access to basic education has been more pronounced in early childhood development; compulsory grades enrolment and secondary schooling. This is a demonstration of the attempt by the government since the dawn of the new democracy to make the right to education realised by the majority of South Africans.

In addressing this central tenet in policy instruments of access, Moseneke DCJ, in the *Head of Department, Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010(2) SA 415 (CC), held that⁶⁰:

Apartheid has left us with scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us. It is so that White public schools were hugely better resourced than Black schools. They were lavishly treated by communities. On the other hand, formerly Black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived Black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.

⁵⁹ Woolman and Fleisch *The Constitution in the classroom: Law and Education in South Africa 1994-2008* 132.

⁶⁰ <https://lawlibrary.org.za/za/judgment/constitutional-court-south-africa/2009/32> (Date of use, 27 March 2021).

The increased access to basic education can be attributed to the right to education in South Africa being entrenched in the Constitution’s Bill of Rights as immediately realisable. It is worth noting that in South Africa “while the accessibility to schools as measured by the participation rate of children who fall into basic education age is very high, significant numbers of children do not attend school”.⁶¹

What remains a challenge, however, is still access to learning and teaching tools, such as textbooks and libraries. As illustrated in Table 3.3 below, the basic education sector in South Africa has progressed very well, just by comparing 2009 and 2019 (ten years). It is noted, for example, that in ordinary public schools, there was an increase of learners by about 580 000. Notable is the decrease of educators by 5 193 and schools by 1 817 for the same period. This obviously puts a lot of pressure on educators.

Table 3.3 Ordinary Public Schools

Province	Learners		Educators		Schools	
	2009	2019	2009	2019	2009	2019
Eastern Cape	2 032 198	1 770 289	67 409	60 462	5 668	5 205
Free State	642 234	697 334	23 583	22 978	1 547	1 085
Gauteng	1 720 243	2 151 095	54 586	70 344	1 970	2 071
KwaZulu- Natal	2 773 336	2 784 917	85 901	93 648	5 907	5 821
Limpopo	1 671 672	1 687 376	56 766	50 916	3 988	3 773
Mpumalanga	1 016 479	1 067 583	33 984	35 316	1 844	1 679
Northern Cape	264 857	293 315	8 888	10 185	600	546
Northwest	764 493	829 336	25 762	26 564	1 716	1 451
Western Cape	11 828 747	1 127 510	29 702	36 588	1 453	1 445
South Africa	11 828 747	12 408 755	386 587	381 394	24 893	23 076

Source: Department of Basic Education School Realities (2009 v 2019), Researcher’s Own Tables

The issue of access obviously is broader than enrolment as it entails aiding instruments and resources such as infrastructure, teaching materials, libraries, computer facilities and information technology. This aspect is even more important in the context of the post-COVID-19 global health pandemic. The government has been found wanting on a number of occasions with regard to matters such as procurement of textbooks and timely delivery thereof despite having adopted a progressive constitution and subsequent policies as earlier discussed.

⁶¹ Woolman and Fleisch *The Constitution in the classroom: Law and Education in South Africa 1994-2008* 139.

The right to basic education will be meaningless in a country like South Africa without access to books, which are central to aiding teaching and learning. International obligations, local policy instruments and the South African case law oblige the State to take all reasonable measures to ensure that the right to education is realised.

An important case that dealt with access to books was the *Minister of Basic Education v Basic Education for All and Others*, 2016 (4) SA 63 (SCA), whereupon the court ordered that:

Section 29(1)(a) of the Constitution entitles every learner at public school in Limpopo to be provided with every textbook prescribed for his or her grade before the commencement of the teaching of the course for which the textbook is prescribed. The National Department of Basic Education and the Limpopo Department of Education violated sections 29(1)(a), 9 (equality) and 10(dignity) right of learners in Limpopo in 2014 by failing to provide all of them with every prescribed textbook before the commencement of the teaching of the courses for which they were prescribed.

Cognisant of South Africa’s history and background of colonialism and apartheid, which continue to inflict pain on the majority of black people, the availability of textbooks especially to the rural working class and the poor is essential; otherwise the right to education will remain a deferred dream. Availability of textbooks in this instance should be seen in the context that “all institutions are likely to require buildings or other protection from the elements...teaching materials and so on; whilst some will also require facilities such as a library, computer facilities and information technology”.⁶² This is an instructive observation.

The judgment (in the *Minister of Basic Education* case) confirmed that the implementation of the right to basic education in South Africa since the democratic arrangement of 1994 remains a challenge, hence there are court challenges by various interested parties. Table 3.4 shows access to textbooks in Grades 10 to 12 for the period between 2013 -2017.

Table 3.4: Access to textbooks

Access to textbooks	2013	2014	2015	2016	2017
All his or her subjects	80.7	77.7	78.7	78.9	77.5
Most of his or her subjects	11.8	15.8	15.7	14.0	16.3
Some of his or her subjects	5.4	4.5	4.1	5.2	4.4
None of his or her subjects	1.9	1.8	1.3	1.7	1.5
Total	100.0	100.0	100.0	100.0	100.0

Source: School Monitoring Survey of Basic Education (Technical Report) 2017/2018

⁶² Woolman and Fleisch *The Constitution in the classroom: Law and Education in South Africa 1994-2008* 131.

3.6 Conclusion

This Chapter dealt with the law and policy instruments of the pre-and post-1994 periods with an impact on the right to basic education in South Africa, taking into account the international policy instruments which are critical in ensuring that South Africa implemented its right to basic education as informed by experiences of the international community, especially in a post-1994 democratic South Africa.

The coming into operation of the interim Constitution on 27 April 1994 and later the final Constitution on 8 May 1996 outlawed racist and discriminatory conducts, policies and legislative frameworks, with the Bill of Rights entrenched in the Constitution. Section 32 of the interim Constitution and section 29 of the final Constitution entrenched the right to basic education for the first time since the demise of apartheid and colonial regimes.

Subsequently, legislation and policies regarding the right to basic education were introduced since the interim and final Constitutions came into effect. The relevant pieces of legislation and policies included the White Paper on Education and Training (1995); National Education Policy Act (1996); South African Schools Act (1996); Education White Paper 5 on Early Childhood Education (2001); White Paper 6 (2001); Adult Education and Training Act (2000) and lately, the National Development Plan (2012).

The White Paper on Education and Training (1995), amongst others, directs that the government has an obligation to facilitate equitable access to schooling and benefits.¹¹⁵ The White Paper acknowledges that in order to address the inequalities, affirmative action will be required, especially, as this relates to race and gender equity in our education system. Affirmative action measures would entail, amongst others, the provision of special support measures, whilst at the same time recognising that not everyone would need the same support, as not everybody is at the same level.

It has been made clear, in this Chapter, that these policies have assisted in ensuring that the right to basic education and increased access is being realised, though there are still challenges with regard to their implementation. The latter aspect (that is, challenges in implementation) is discussed in the following two chapters.

CHAPTER 4

HOW THE COURTS HAVE INTERPRETED THE RIGHT TO BASIC EDUCATION

4.1 Introduction

This Chapter explores the approach of the courts in interpreting the right to education when adjudicating legal disputes related to the right to basic education. This will be looked at from legislative and constitutional perspectives. Section 29 of the Constitution entrenches the right to education in South Africa. It stipulates that – “everyone has a right – (a) to a basic education, including adult basic education...”⁶³ The Constitution moves further by including the right for everyone to receive education in the official language or languages of their choice. This is central to supporting the right to basic education, especially in a diverse country like South Africa.

4.2 Constitutional and legislative interpretation with an impact on the right to education

4.2.1 Constitutional interpretation

Constitutional interpretation in South Africa was mainly brought about by the supremacy of the Constitution in a post-1994 democratic dispensation. At the heart of Constitutional interpretation are the values upon which the Constitution was crafted, as informed by consideration for human dignity, democracy, equality and supremacy. Section 39(1) of the Constitution directs that when interpreting the Bill of Rights, a court, tribunal or forum⁶⁴

- a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedoms;
- b) must consider international law; and
- c) may consider foreign law.

Section 39(2) goes further and states that when interpreting any legislation and developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Section 39(2) of the Constitution prescribes the filtering of legislation through the fundamental rights during the ordinary interpretation process.

⁶³ Currie and de Waal, *The Bill of Rights Handbook* 624; Section 29 (1) of the Constitution of South Africa

⁶⁴ Botha *Statutory Interpretation: An Introduction for Students* 5th ed.189; Section 39 (1) of the Constitution of South Africa

Constitutional interpretation refers to the authoritative interpretation of the supreme Constitution by the judiciary during judicial review of the constitutionality of legislation and government action in terms of section 172 of the Constitution.⁶⁵ Since South Africa adopted both the interim and final Constitution, the expectation has been that every conduct or act must be in accordance with the Constitution, unlike the parliamentary sovereignty which characterised the pre-1994 dispensation.

Legislation, whether in pursuit of the right to education or not, must derive its mandate from the Constitution, especially the Bill of Rights; otherwise, such legislation will be declared invalid. Section 39(2) imposes an obligation on the interpreter in his or her interpretation to take the content of the Bill of Rights into account. The difference between constitutional and ordinary interpretation was explained by Froneman J in *Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) 574 G-H⁶⁶:

The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution.

Section 1 of the Constitution makes it clear that South Africa is one, sovereign, democratic State founded on the following values:⁶⁷

- a) human dignity, the achievement of equality and the advancement of human rights and freedoms;
- b) non-racialism and non-sexism;
- c) supremacy of the constitution and the rule of law; and
- d) universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Values ushered in section 1 of the Constitution should be key to any statutory interpretation as they seek to redress gross injustices of the past where there was no respect or regard of Black lives in South Africa for decades, especially since the years of apartheid under the National Party government.

⁶⁵ Bray *Human Rights in Education* 14.

⁶⁶ Botha *Statutory Interpretation, an introduction for students* 5th ed. 183

⁶⁷ Botha *Statutory Interpretation, an introduction for students* 5th ed. 100

A supreme constitution must be given a generous and purposive interpretation (*Shabalala v The Attorney-General of Transvaal* 1996 (1) SA 725 (CC) 740 paragraph 26).⁶⁸ In the *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (B) matter it was held that a purposive interpretation of the Constitution is necessary since it enables the court to take into account more than legal rules:⁶⁹

These are the objectives of the rights contained therein, the circumstances operating at the time when the interpretation has to be determined, the future implications of the construction, the impact of the said construction on future generations, the taking into account of new developments and changes in society.

In *Nortje v Attorney-General of the Cape* 1995 (2) SA 460 (C), it was held that a supreme Constitution⁷⁰:

Is not a finely tuned statute designed *ad hoc* to deal with one particular subject, or to amend or repeal another specifically named statute, or a specifically identified rule of the common law. It is *sui generis*. It provides, in the main, a set of societal values to which other statutes and rules of the common law must conform, and with which government and its agencies must comply, in carrying out their functions- it is short on specifics and long on generalisation.

In *S v Acheson* 1991 (2) SA 805 (NM) 813A-C former Chief Justice Mohamed referred to a supreme constitution as a mirror:⁷¹

[T]he Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.

In *S v Makwanyane* 1995 (3) SA 391(CC) the following was clearly stated, demonstrating, amongst others, the importance and supremacy of the Constitution⁷²:

All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that ethos; and the moral and ethical direction which that nation has identified for its future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break, from and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of a commitment to a democratic, universalistic, caring and aspirational egalitarian ethos, expressly articulated in the Constitution.

⁶⁸ Botha *Statutory Interpretation, an introduction for students* 5th ed 190.

⁶⁹ Botha *Statutory Interpretation, an introduction for students* 5th ed. 114.

⁷⁰ Botha *Statutory Interpretation, an introduction for students* 5th ed 188.

⁷¹ Botha *Statutory Interpretation, an introduction for students* 5th ed 187-188.

⁷² Botha *Statutory Interpretation, an introduction for students* 5th ed 186.

In *Prince v Cape Law Society* 2002 (2) SA 794 (CC) para 155, it was stated that⁷³:

What it requires is the maximum harmonisation of all competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution. In achieving this balance, this court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the Legislature and the Executive and falls squarely to be determined by the Judiciary.

Reading from the text in the cases above, it is evident that since the advent of constitutional supremacy, courts have consistently developed approaches to guide the interpretation of the Constitution, as this is key in advancing the promotion of the spirit, purport and objects of the Bill of Rights in an open and democratic South Africa.

The Constitution remains, in many respects, the hope to the majority of South Africans in enjoying their constitutionally protected rights. The courts are now playing a significant role in ensuring constitutional rights are respected, protected, promoted and fulfilled especially by the State. This is clear, particularly with regard to how the right to education was interpreted, and this will be discussed later in this Chapter.

4.2.2 Legislative interpretation

Legislative interpretation remains important in South Africa's constitutional democracy even though the Constitution is at the top regarding the hierarchy of laws. This simply means that the rest of the legislation is subordinated to it. All legislation of post-1994 democratic South Africa must pass the test of the Bill of Rights, otherwise, such legislation will be invalid.

This is a clear directive to all courts, tribunals or forums that in their interpretation of the diverse pieces of legislation, they must do so within the context of the Bill of Rights as the minimum requirement. This was well articulated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), paragraphs 72, 80 and 90 as follows:⁷⁴

The Constitution is...the starting point in interpreting any legislation.... first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be capable of such interpretation... The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.

⁷³ Botha *Statutory Interpretation, an introduction for students* 5th ed 192.

⁷⁴ Botha *Statutory Interpretation, an introduction for students* 5th ed 101.

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) para 21 Langa DP explained the constitutional foundation of this 'new' interpretation methodology as follows:⁷⁵

Section 39(2) of the Constitution...means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

4.2.3 South African courts' interpretation of the right to basic education

4.2.3.1 *Moko v Member of Executive Council, Limpopo Department of Education* (30) SA 297 (CC)

This case involved learners who were prevented from entering the school premises on the basis that they had not attended certain extra lessons. This action by the school led to them missing their Grade 12 Business Studies Paper 2 examinations. On the day of their arrival, on Wednesday, 25 November 2020, at Malusi Secondary School, they were told that they had to come with their parents or guardians for the purposes of discussing the matter of not having attended the said extra lessons. By the time the applicant returned to school, the examination was already in progress and was informed that he would be able to write the supplementary examination in May 2021. The matter was escalated to the Member of the Executive Council (MEC) who referred it to the District Director to urgently attend to. The District Director confirmed that the learner would only write the examination in May 2021.

The applicant was not happy with this remedial action and launched an urgent application with the High Court of South Africa, Limpopo Division, Polokwane, for an order that he be given the opportunity to write the examination. The High Court struck off the application from the roll for lack of urgency, as the court concluded that the applicant would be given an opportunity during the May 2021 Supplementary Examination.

⁷⁵ Botha *Statutory Interpretation, an introduction for students* 5th ed 101-102.

The applicant then sought a direct access to the Constitutional Court as he argued that being refused entry into the examination was in violation of his right to basic education as enshrined in section 29(1)(a) of the Constitution, as well as his right to further education as provided for in terms of section 29(1)(b). The Constitutional Court granted him leave for direct access on an urgent basis to the Constitutional Court. The relief sought by the applicant was for the conduct of the acting Principal of Malusi Secondary School, Mr Tlou Mokgonyana, to be declared unconstitutional, and for him to be granted substantive relief by, *inter alia*, ordering the second to fifth respondents (Member of Executive Council, Limpopo Department of Education; Head of Department, Limpopo Department of Education; Minister of Basic Education and Umalusi) respectively to afford him an opportunity to write his examination as a matter of urgency.

The respondents did not oppose the application. Instead, they agreed that they could give the applicant an opportunity to write the missed assessment in the first week of January 2021. In addition, they offered the applicant counselling at the state's cost by a counsellor or clinical psychologist of his choice from the Department of Basic Education's data base of service providers. The court declared that the conduct of the acting Principal of Malusi Secondary School, Mr Tlou Mokgonyana, was in violation of section 29(1) of the Constitution, which stipulates that "everyone has the right to (a) basic education". It further ordered the respondents to comply with their offer to give the applicant an opportunity to write the Business Studies Paper 2 examination by 15 January 2021.

The court directed that the applicants' results of examination be released simultaneously with the general release of the 2020 National Senior Certificate examination results.⁷⁶ This case once again confirms that the state must respect, protect, promote and fulfil the rights as enshrined in Chapter 2 of the Constitution.

4.2.3.2 *The Western Cape Minister of Education v The Governing Body of Mikro Primary School 2005 (10) BCLR 973 (SCA)*

Mikro Primary School was an Afrikaans-medium public school in Kuilsriver, Western Cape. The school refused to change its language policy, to convert it into a parallel medium school, as requested by the Western Cape Department of Education.

⁷⁶ <http://www.saflii.org/za/cases/ZACC/2020/30.htm> (Date of use, 5 January 2021).

A subsequent directive by the Head: Education, Western Cape Education Department (the second appellant), to the principal of the school to admit certain learners and to have them taught in English, the dismissal of an appeal against the directive to the Western Cape Minister of Education, and the resultant admission of 21 pupils for instruction in English, had given rise to an urgent application by the respondents (the Governing Body of Mikro Primary School and Mikro Primary School) to the Cape Provincial Division (the court *a quo*) for an order setting aside the directive and the decision on appeal, as well as for ancillary relief.

The application succeeded at the Cape High Court (the court *a quo*), and the court ruled thus: ⁷⁷

- a) set aside the directive of the second appellant (the Head of Education, in the Western Cape Education Department);
- b) set aside decision by the first appellant (the Western Cape Minister of Education in the Western Cape) upholding the directive by the second appellant;
- c) interdicted the first and second appellants from compelling the second respondent (Mikro Primary School) or its principal to admit learners otherwise than in compliance with the second respondent's language policy.
- d) interdicted the first and second appellants from instructing or permitting officials of the department to unlawfully interfere with the government or professional management of the second respondent; and
- e) ordered that 21 learners who had been admitted to the second respondent be placed by the appellant at other suitable schools.

The Minister of Education and the Western Cape Department of Education appealed against the whole of the judgment of the Cape High Court. The parents of the 21 learners referred to were joined as a third respondent. Although they had not appealed against the court *a quo*'s judgement, they made common cause with the appellants rather than with the respondents in this court. Then on the appeal were referred to as the third parties.

The Supreme Court of Appeal of South Africa held that the right of everyone to receive education in the official language or languages of their choice in public educational institutions were that education was reasonably practicable, as provided for in section 29(2) of the Constitution.

⁷⁷ *The Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2005 (10) BCLR 973 (SCA). <http://www.saflii.org.za> (Date of use, 5 January 2021).

It was made clear that the learners in question had a constitutional right to receive education in English at a public educational institution provided by the State if reasonably practicable but, even if it was reasonably practicable, to provide such education at the second respondent. The appeal was dismissed, save for the addition of a provision that the placing of the children at another suitable school was to be done taking into account their best interests. What came across strongly, in this case, was that “it places the state under an obligation to show that its language policy – designed to give learners instruction in their preferred language – is reasonably practicable”.⁷⁸

The Supreme Court of Appeal of South Africa concluded that the court *a quo* exercised discretion and once again it did not commit a misdirection and that there are no grounds for the Supreme Court of Appeal of South Africa to interfere with the Cape High Court decision. The point made, in this case, is that every child has the right to receive education in an official language of his or her choice in a public educational institution.

4.2.3.3 *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC)*

Juma Masjid Primary School was officially established in 1957 as a government-aided school and a Madressa, a place of religious learning for followers of the Islamic faith, which catered for Grades 1 to 9 children. In 1997, Juma Masjid Trust permitted the Department of Education for the Province of KwaZulu-Natal to enlist the school as a public school with an Islamic religious ethos on its property in terms of section 14(1) of South African Schools Education Act 84 of 1996 (the Schools Act).

The permission, according to the Juma Masjid Trust (Trust), was subject to the conclusion of a written agreement between the Trust and the Member of the Executive Council (MEC) in terms of section 14 (1) of the Schools Act. Although the agreement was never concluded, the school was constructed on the Trust’s property as a public school. The dispute arose when the MEC of Education in KwaZulu-Natal failed to conclude an agreement as required in terms of the Schools Act setting out the tenancy terms and conditions.

⁷⁸ Woolman and Fleisch *The Constitution in the classroom: Law and Education in South Africa 1994-2008* 120.

The failure to honour this undertaking led to a successful eviction claim by the Trust in the High Court, followed by an unsuccessful attempt to appeal to the Supreme Court of Appeal of South Africa.

In its first hearing on 31 August 2010, the Constitutional Court provisionally set aside the eviction order made by the High Court holding that the order had an impact on the learners' right to a basic education under section 29(1) of the Constitution and on the learners' best interests under section 28 of the Constitution.

The court was satisfied that:⁷⁹

- a) the Trustees (first to ninth respondents) have a constitutional duty to respect the learners' right to a basic education in terms of section 29(1) of the Constitution;
- b) having regard to all the circumstances of the case, including this obligation, the Trustees acted reasonably in seeking an order for eviction; and
- c) in considering the Trustees' application and in granting the order of eviction, the High Court did not properly consider the best interests of the learners under section 28(2) and their right to a basic education under section 29(1) of the Constitution.

It was emphasised, however, that the finding that the Trustees had acted reasonably in seeking the order for eviction did not entitle the High Court to make an order for eviction, because the order had an impact on the learners' right to a basic education under section 29(1) of the Constitution and on the learners' best interests under Section 28 of the Constitution. Therefore, the High Court ought to have required the MEC to provide it with information regarding the steps she had undertaken to ensure that the learners would have schools at which they would be enrolled for the 2011 academic year.

The court was concerned as the 2010 school year was ending; hence the provisional order directed the MEC to engage meaningfully with the Trustees and the School Governing Body (SGB) to resolve the impasse. If this failed, the court ordered the MEC to take steps to secure alternative placements for the learners. The MEC was required to file a report setting out its efforts. The Trustees were granted leave to apply directly to the court for an order that would be just and equitable, including an eviction order.

⁷⁹ <http://www.saflii.org.za/za/cases/ZACC/2011/13.html> (Date of use, 5 January 2021).

The parties were heard for a second time on 25 November 2010 and the Court received the first report submitted by the MEC. It was clear that the closure of the school had become inevitable. As a result, the court ordered the MEC to submit a further report to indicate that the MEC complied with the obligation to provide alternative schooling.

A second report was then filed by the MEC setting out sufficient information regarding the schools where the learners would continue their schooling. The court was satisfied that alternative arrangements for the placement of the children for the 2011 school year had been made and that the learners' right to a basic education would be protected. The court then considered an eviction application by the Trust and was satisfied that a case for eviction had been established and the learners' rights had been given effect. The final eviction order was granted on 11 December 2010.

This case demonstrates again that the right to education as provided for, in terms of section 29(1), is pivotal in the post-1994 dispensation. Further, the case demonstrates the effect of the Constitutional injunction that the State must respect, protect, promote and fulfil the rights in the Bill of Rights.

4.2.3.4 *Minister of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA*

In 2012, with half of the academic year already completed, textbooks in respect of the introduction of the first phase of the Curriculum and Assessment Policy Statement (CAPS) for grades 1, 2, 3 and 10, had not been delivered in Limpopo. It was undisputed that textbooks only started to be delivered after the application was launched by Section 27, a non-governmental organisation, in the Gauteng Division of the High Court in Pretoria. The order declared that the failure of Limpopo Department of Education and the Department of Basic Education to provide textbooks to those schools was a violation of the learners' rights to basic education, equality, dignity, the Schools Act and section 195 of the Constitution which deals with the basic values and principles governing public administration.

By May 2012, the department had not ensured that each learner had a textbook for each subject, and eventually the High Court (in a separate case) ordered that this be rectified according to a timeline. The department did not comply with that timeline, and also failed to ensure that each learner had a textbook for each subject in 2013 and 2014.

Specifically, since the department had complied with the High Court order in a separate case in every province except Limpopo, the department's conduct thus amounted to unfair discrimination against the affected learners. The court upheld the High Court's order that the department had infringed the affected learners' rights to basic education, equality and dignity. However, it noted that parts of that order had been overtaken by time, and it was thus necessary to re-craft it to deal with the department's obligations in respect of future years, including the 2015 school year.⁸⁰

The court accordingly declared that it is the duty of the State, in terms of section 7(2) of the Constitution, to fulfil the right of every learner to basic education by providing him or her with every textbook prescribed for his or her grade before the commencement of the teaching of the course for which the textbook is prescribed.

4.2.3.5 *R K and Others v Minister of Basic Education and Others (754/2018; 1051/2018) [2019] ZASCA 192; [2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA)*

Michael Komape (Michael) was a resident of Limpopo Province in South Africa. He was in school for three days when his death occurred. On the day in question, Michael went to the outside toilets situated on the school premises during a break at about 10h00. The toilets were pit toilets covered by corrugated iron cubicles erected on a concrete base. The issue at hand is that toilets are one of the challenges facing the schooling system, where in some parts of the country, sanitation and other infrastructure-related services are essentially absent. This is critical for the realisation of the right to education. Courts have intervened on several occasions in instances like these. An important point that needs to be considered in this case is that when Michael visited the outside toilets he was unaccompanied.

At the end of the break, Michael did not return to class, prompting the school principal, Mrs. Malothane, to be concerned and started contacting the family to establish his whereabouts. At about 12h30 Mrs. Malothane was able to reach Rosina Mankone Komape (referred to as the first plaintiff in the Limpopo High Court), whose opinion was that Michael could have gone to his old creche or back home. Out of concern, Rosina also went to the school.

⁸⁰ http://www.justice.gov.za/sca/judgments/sca_2015/sca2015-198.pdf (Date of use, 5 January 2021).

On her arrival, she was informed that the school staff had looked everywhere, including toilets, but still, Michael's whereabouts could not be established. However, Rosina decided to satisfy herself by looking into the toilets, but she did not go close to the cubicles, due to the long grass that had grown in the area.

At Michael's former creche, a small girl who was in Michael's class in school informed Rosina and the principal that Michael has fallen into the toilet at school. Upon their return to school, Michael's body was discovered in one of the pit toilets. It was at that point that Rosina fainted at the sight of the scene. Maloti Jame Komape (referred to as the second plaintiff in the Limpopo High Court) also arrived at the school soon thereafter. He also observed the body of his child in the pit toilet which was filled with water. He was told by the principal that Michael had been in the toilet for a long time already and that they had to wait for the body to be removed by the "first aid." Mr Maloti Jame Komape was accompanied by Mr Malebane who, in the process, also took pictures of the incident.

Mr Malebane was requested by the principal and the circuit manager to delete the photographs. When he refused, the circuit manager took his phone and deleted the photographs. However, after the body was removed, Mr Malebane continued to take photographs of the toilets. These latter photographs were presented as exhibits during the trial. A postmortem examination subsequently showed that Michael died due to aspiration of foreign material which is consistent with drowning.

The matter was heard in the High Court of South Africa, Limpopo Division, Polokwane where the plaintiffs' case was based on the following:⁸¹

- a) claim A, a delictual claim for damages for emotional trauma and shock the family members each experience;
- b) claim B, the plaintiffs claim the amount of R2 million for grief suffered by the plaintiffs as immediate family members. In the alternative constitutional damages are claimed. on the following basis:
 - i. the defendants failed to discharge various duties of care inclusive of their constitutional duties to protect Michael;
 - ii. the plaintiffs were entitled to expect that Michael will be protected from harm whilst in the care of the defendants;
 - iii. the death of Michael was foreseeable given the condition of the toilets on the premises.
- c) claim C, D and E: Claim C relates to past and future medical expenses as a result of their impaired mental health resulting from the shock and trauma they have suffered because of the death of Michael. In claim D the first and second plaintiffs claimed for funeral expenses and in Claim E, the first plaintiff claimed for loss of earnings.

⁸¹ <https://www.supremecourtofappeal.org.za/index.php/component/jdownloads/category/21-judgments-2019?Itemid=-1>(Date of use, 5 January 2021).

The Declaratory Order: In addition to the claims for damages, the plaintiffs also sought a declaratory order that the defendants have breached their constitutional obligations in respect of the rights contained in sections 9, 10, 11, 24, 27, 28 and 29 of the Constitution. The High Court came to the conclusion that a structural interdict was the only appropriate remedy that is just and equitable, which will effectively vindicate the Constitution. The High Court emphasised that the best interests of all learners at schools with pit toilets must take preference. Effective remedial action is to be undertaken to restore the dignity and wellbeing of learners attending government schools in this province. The flagrant violation of their rights cannot be allowed to continue without remedial steps being taken to enforce, protect and prevent future encroachment of the rights of learners protected in the Bill of Rights.

The High Court dismissed Claim A and Claim B. Alternative to Claim B, the Minister of Basic Education and Limpopo Department of Education were ordered to supply and install at each rural school currently equipped with pit latrines in the province with sufficient toilets, which are easily accessible, secure and safe, and with privacy. They were also ordered to furnish the court with specific information related to fulfilling the court order. Claim C related to future medical treatment in respect of the minors M.1 and M2 Komape succeeded. The Minister of Basic Education and Limpopo Department of Education were also ordered to pay the costs of the plaintiffs (first plaintiff: Rosina Mankone Komape, second plaintiff: Maloti Jame Komape, third plaintiff: Mokibelo Lydia Komape and fourth plaintiff: Lucas Khomotso Komape).

The Komape family (appellants) proceeded to apply for leave to appeal against the dismissal of their prayer for a declaratory order relating to the defendants' breach of constitutional obligations. Appellants also sought leave to appeal against the dismissal of Claim A, as well as the dismissal of the claim for grief in Claim B, but not against the award of the structural interdict granted in the alternative to the latter claim. They also sought leave to appeal against the refusal of future medical expenses for B. The court *a quo* granted such leave in respect of the grief claim in Claim B but refused leave in the other respects. This court, however, granted such leave.

In the Supreme Court of Appeal (SCA) of South Africa appellants were referred to as RK (first appellant), MK (second appellant), YK (third appellant), LK (fourth appellant) whilst respondents were Minister of Basic Education (first respondent), Member of Executive

Council, Limpopo Department of Education (second respondent), principal of Mahlodumela Lower Primary School (third respondent), school governing body of Mahlodumela Lower Primary School (fourth respondent), and Equal Education (*amicus curiae*). This case was heard on 2 September 2019 and the judgment was delivered on 18 December 2019.⁸²

In relation to Claims A and B, the SCA acknowledged that the court is called upon to exercise the discretion to determine an amount which it considered to be fair and reasonable to both parties, given the particular circumstances of the case in question.

Taking into account the emotional shock, trauma and grief that has been suffered, the court found it reasonable in respect of Claim A to award Mrs. and Mr K each the sum of R350 000, Y and L K (respectively the third and fourth appellants) each the sum of R200 000 and the minor children O, M and B K each the sum of R100 000. This will be reflected in the order set out below.

On Constitutional damages, the SCA found no reason why the K family should be the beneficiaries of an additional award of constitutional damages in order to vindicate the rights of all scholars to proper sanitation facilities at schools. The SCA's view was that things have not changed so much in the country that the approach set out in the *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997) (Fose case) is no longer appropriate. The SCA concluded that there is no room for an award of constitutional damages.

On the declaratory order, the SCA made it clear that in the present case, the authorities are well aware of the problem and their obligation to overcome it. In this instance, they seem to have lacked the capability to do so, but that will not be overcome by a declaratory order.

Moreover, the declaratory order sought, namely, that the respondents had breached various sections of the Constitution would not identify the conduct which is the subject of the order nor identify the respects in which constitutional obligations were breached. It would thus be inappropriate to issue a declaratory order in such indeterminate terms.

⁸² <https://m.polity.org.za/article/r-k-and-others-v-minister-of-basic-education-and-others-7542018-10512018-2019-zasca-192-2020-01-17> (Date of use, 5 January 2021).

The SCA found that there is no room for the SCA to interfere on appeal.

On future medical expenses, the SCA found that with regards to Claim C, the court *a quo* allowed M and O each R6 000 in respect of future medical expenses; but disallowed any amount in respect of B as there had been no specific claim on his behalf in the particulars of claim. Of course, there should have been such a claim, and it is surprising to say the least that an amendment in that regard was not sought. But it would be unjust to disallow B his due merely because of the straitjacket of the claim as pleaded.

Counsel for the respondents was constrained to concede during an argument that justice demanded that the award be altered to allow B a sum in respect of the loss which appears not to have been claimed due to an oversight. That, too, was a sensible and practical approach to obvious injustice. Based on this reasoning, the SCA concluded that Claim C should be altered to accommodate B. The award in respect of Claim C was therefore altered to include the sum of R6 000 in respect of B' future medical expenses.

The Minister of Basic Education (first respondent), Member of Executive Council, Limpopo Department of Education (second respondent) was directed to pay the appellants' costs of the appeal, jointly and severally, the one paying the other to be absolved. Such costs are to include the disbursements incurred by two counsel who appeared *pro bono* for the appellants in travelling to and being accommodated in Bloemfontein.

4.2.3.6 *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP)

This was one of the recent cases which dealt with the provision of nutrition to all learners, whether at school or not, during the COVID-19 pandemic period lockdown. This case essentially dealt with the suspension of the National School Nutrition Programme (NSNP) during the state of the national disaster affecting millions of school-going learners.

The application was launched by Equal Education (referred to as the first applicant), together with the school governing body of Vhulaudzi Secondary School (referred to as the second applicant) and the school governing body of Mashao High School (referred to as the third applicant). The respondents included the Minister of Basic Education (referred to as the first respondent) and all Members of Executive Councils (MECs) of education in all nine provinces (also referred to as respondents, from second respondent to tenth

respondent), with Children's Institute, admitted as *amicus curiae*.

In South Africa, the National School Nutrition Programme (NSNP) has been the government programme since the dawn of democracy in 1994. It is a programme that flows from the Reconstruction and Development Programme (RDP) of the government with the NSNP's main aim being to improve the quality of education by enhancing learning capacity, school attendance and punctuality, as well as contributing to the general health development by alleviating hunger.⁸³

The NSNP was subsequently expanded to all school-going children under the auspices of the Department of Basic Education across all provinces, targeting all learners at schools from disadvantaged communities. This is a critical programme especially for the working class and poor children by providing them with at least one nutritious meal a day while being educated. It is one of those programmes of government which need to be embraced at all material times, regardless of whether the country is in a state of national disaster or not. This case is instructive in this regard.

The facts of the case were, briefly, that during the state of the national disaster for a period of 12 weeks, of which two weeks were holidays, the children did not receive food over that holiday period. However, they were encouraged during the time of closure to learn remotely through the use of broadcast and online resources made available to them by the Department of Basic Education. As part of mitigating measures, the government announced various measures against loss of employment, income and suffering due to the lockdown. Feeding schemes were implemented, and after two months of lockdown, the Government stated that 788 000 food parcels were delivered. It is undisputed that the NSNP would have on its own provided 45 million meals per week rendering the generous estimate of 788 000 food parcels bleak in comparison.

There is, and was, no viable substitute for the NSNP for the children. About 13 million of nearly 20 million children in the country are enrolled from Grade R to Grade 12. Nine million of these children benefit from the NSNP. These are all learners in quintiles 1-3, which represent the poorest 60% of schools based on community poverty rankings including some quintile 4 schools.

⁸³ "White Paper on Reconstruction and Development" 1994
<https://www.gov.za/sites/default/files/governmentgazetteid16085.pdf> (Date of use, 30 December 2020).

The NSNP delivers micronutrients because it includes protein, vegetables and fruit. This is essential for schoolchildren because it is well-established that well-nourished schoolchildren learn better.

The Department of Basic Education, after the suspension of the NSNP, not before, was to work with the Department of Social Development to target needy learners as part of the Disaster and Social Relief Programme. The suppliers and offers of assistance to the Department were re-directed to the Department of Social Development. The suspension of the NSNP to millions of learners had an aggravating impact.

The applicants, in this case, sought declaratory orders to the effect that the Minister of Basic Education and Members of the Executive Councils of Education of eight provinces in South Africa were in breach of their constitutional and statutory duty to ensure that the National School Nutrition Programme [NSNP] provides a daily meal to all qualifying learners whether they are attending school or studying away from school due to the COVID-19 pandemic.

No relief was sought against the MEC of the Western Cape, the ninth province, because the Western Cape provincial government had publicly committed and directed to immediately provide a daily meal to all qualifying learners, whether they had returned to class as Grade 7 or Grade 12 learners.

The applicants further sought an order against the Minister and the eight MECs that, without delay, they should ensure that the NSNP is implemented in such a manner that it provides a daily meal to all qualifying learners. The applicants further sought a supervisory interdict effectively seeking judicial supervision against the Minister and the MECs with a step-by-step plan as to how the NSNP will be implemented. Such plan had to be submitted to the court within 5 days and that follow-up reports were to be submitted every fifteen days until the order was discharged by the court.

The court accepted that the suspension of the NSNP had a devastating effect on some nine million learners. The applicants also demonstrated that the NSNP has a historical context and was implemented to achieve substantive equality and to protect and advance children disadvantaged by unfair discrimination in terms of section 9(2) of the constitution which states that, "equality includes the full and equal enjoyment of all rights and freedoms...to promote the achievement of equality, legislative and other measures

designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".⁸⁴

The Children's Institute (*amicus*) provided the court with reports of the State to the treaty bodies wherein the State puts the NSNP as one of its greatest successes such as the Committee on Economic, Social and Cultural Rights under article 11 of the International Covenant on Economic, Social and Cultural Rights, and General Comment No.15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art 24) (2013) CRC/C/GC/15. The court found that the Minister and MECs have a constitutional and statutory duty to provide basic nutrition in terms of s29 (1)(a) which states that "everyone has the right to a basic education".

With regards to the State impairing the right of access to basic nutrition, what became clear was that the State is the bearer of positive obligations in respect of the rights contained in the Bill of Rights. But the Constitution also creates a negative obligation not to impair the right of access to the rights in the Constitution, as it was the case in the matter of *Government of RSA v Grootboom* 2000 11 BCLR 1169 (CC) paragraphs 57 and 58.

It was made clear that the Minister and MECs cannot take away the pre-existing right of basic nutrition of at least a meal a day during school terms. The learners have an entitlement to receive basic nutrition which they have always received in terms of the NSNP irrespective of the lockdown that followed the national state of disaster. The only step the Department of Basic Education took after the suspension of the NSNP was to work with the Department of Social Development to target the needy. However, the Minister and MECs could not even provide information as to how many learners in fact received food. The conclusion was that the Minister and the MECs did not comply with their constitutional and statutory duties.

The rolling out of the NSNP was set to be from 8 June 2020 in all instances. It was clear that the NSNP was not rolled out to all learners not yet attending school except those learners who were phased in, in terms of the COVID-19 pandemic protocols and requirements. The implication of the phased re-opening of schools was that other learners would be able to attend schooling later and would consequently not benefit from the

⁸⁴ Currie and de Waal, *The Bill of Rights Handbook* 210.

NSNP. Therefore, they would continue to experience hardship and food insecurity.

Regarding the supervisory interdict, the applicants proved that a right in the Bill of Rights was infringed. The court, therefore, had to grant relief that is just and equitable or appropriate in terms of sections 172 and 38 of the Constitution. The defence by the respondents was declared to be meritless as the court stated that there was administrative chaos and confusion in the provinces requiring the supervision of the Court.

The Court acknowledged that the continued breach by the Minister and MECs would leave millions of children hungry throughout the cold winter for as long as the lockdown lasted, and that hunger is not an issue of charity, but one of justice.⁸⁵

4.2.3.7 *Tripartite Steering Committee and Another v Minister of Basic Education and Others* (1830/2015) [2015] ZAECGHC 67; 2015 (5) SA 107 (ECG); [2015] 3 All SA 718 (ECG)

This case dealt with the denial of scholar transport for learners, which is critical to the realisation of the right to basic education, especially for learners in rural areas. The applicants in this matter were the Tripartite Steering Committee (first applicant) and the governing body of Masivuyiswe Secondary School (second applicant); while the respondents were the Minister of Basic Education (first respondent), Government of the Republic of South Africa (second respondent), MEC for Education in the Eastern Cape (third respondent), MEC for Transport in the Eastern Cape (fourth respondent), MEC for Provincial Planning and Finance in the Eastern Cape (fifth respondent), Government of the Eastern Cape Province (sixth respondent) and acting Superintendent-General of the Eastern Cape Department of Education (seventh respondent).

The learners who were affected by the refusal to provide scholar transport were from Masivuyiswe Secondary School and three Mdantsane schools such as SK Mahlangu Senior Secondary School, Sakhisizwe Senior Secondary School and Mizamo High School. All these schools fell within the jurisdiction of the Eastern Cape Province. Section 29(1)(a) of the Constitution guarantees everyone a fundamental right to basic education. This right has been the subject of much litigation in the Eastern Cape Province over the last few years.

⁸⁵ <https://www.schindlers.co.za/news/equal-education-and-others-v-minister-of-basic-education-and-others-> ((Date of use, 30 December 2020).

What was clear though was that the department took a decision of refusing the applications of all scholars or learners from the referred schools in Mdantsane without verifying any information. In other words, this was a blanket decision to refuse these scholars from Mdantsane schools transport. The court held that the decision to refuse scholar transport fell to be set aside, as it was an arbitrary decision without due consideration of the merits of the individual applications. The court remitted the applications for fresh decisions, or the court would not hesitate to take the necessary decision. The court concluded that the applicants were entitled to scholar transport.

4.2.3.8 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another (2011 (5) SA 87 (WCC)) [2010] ZAWCHC 544; 18678/2007*

The White Paper on Rights of People with Disabilities (2016)⁸⁶ states that:

There are various definitions of disability. However, all the rights-based definitions share certain common elements even if they emphasise or word them differently. Common elements include: the presence of impairment, internal and external limitations or barriers which hinder full and equal participation, a focus on the abilities of the person with a disability, and loss or lack of access to opportunities due to environmental barriers and/or negative perceptions and attitudes of society. Rights of people with disabilities are human rights as well, so they cannot be held back by semantics or on how people with disabilities should be defined or are defined. Their rights must be respected, promoted and fulfilled. People with disabilities continue to be discriminated against in all facets of life, hence the set targets of 2% remain unmet whether on employment or in accessing their entitled right to education. As the 6th political administration takes oath of office, it must prioritise people with disabilities especially in accessing education opportunities.

It was unfortunate that the case, as referred to below, was the case against the State which should be the one protecting, promoting and respecting the rights of people with disabilities as enshrined in the Bill of Rights. In this instance, this was their right to education.

The case referred to in this instance concerning the right to education of learners with severe and profound intellectual disabilities. That is, the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa 2011 5 SA 87 (WCC)*.

The court once again confirmed that the right to education, as stipulated in section 29(1) of the Constitution, must be promoted, protected and fulfilled. The court held that the applicant is entitled to the relief sought and declared that the State failed to take reasonable measures to meet the learning needs of severely and profoundly intellectually

⁸⁶ https://www.gov.za/sites/default/files/gcis_document/201603/39792gon230.pdf (Date of use, 27 March 2019).

disabled children in the Western Cape⁸⁷.

Both the first (Government of the Republic of South Africa) and second (Government of the Province of the Western Cape) respondents, were found to be in breach of the rights of the referred children to basic education, protection from neglect or degradation, equality and human dignity. The respondents were further directed to take reasonable measures in order to give effect to the violated rights. The court decision confirms the role and responsibility of the State to respect, promote and fulfil the rights in the Bill of Rights.

It is in this context that it is argued that the State cannot behave at all times as if South Africa is not a constitutional democracy. It is a matter of serious concern that the State is consistently being reminded by the citizens and the courts about its own responsibilities and roles.

4.3 Conclusion

Since the advent of constitutional democracy (where the constitution reigns supreme) in the post-1994 era, courts have been playing an important role of ensuring that policies and legislation are in accordance with the Bill of Rights. This Chapter has demonstrated the role that has been played by the courts, especially the High Courts, Supreme Court of Appeal and the Constitutional Court in ensuring that the State respects, protects, promotes and fulfils the right to basic education. What is clearly demonstrated in this Chapter is that the South African courts are playing a critical role with regard to the realisation of the right to basic education. As shown in the cases referred to in this Chapter, the courts are more inclined to the text-in-context approach in their interpretation of the cases related to basic education. It is evident that the spirit of the Bill of Rights and the Constitution is considered a critical factor in the interpretation of the law in post-1994 South Africa.

This is well understood, particularly noting the supremacy of the Constitution and, specifically, the Bill of Rights. Notwithstanding this position of the Constitution in the hierarchy; legislation and regulations, including social and policy directions, are still very important.

⁸⁷ <http://www.saflii.org/za/cases/ZAWCHC/2010/544.html> (Date of use, 27 March 2019).

Case law has, for instance, shown that the alignment of the right to education to other rights related to human dignity, valuing human rights and freedoms enshrined in the Constitution will not be avoided.

Any approach short of the text-in-context approach will paralyse the interpreter's statutory interpretation of the right to education. In the groundbreaking cases regarding the right to education such as *Governing Body of the Juma Masjid Primary School and Others v Essay NNO and Others* (Centre for Child Law and Socio-Economic Rights Institute of South Africa as *Amici Curiae*) [2011] ZACC 13; 2011 (8) BCLR 761 (CC), this was well exhibited. As earlier discussed, it became clear that when interpreting the right to basic education, one has to interpret it in a generous, purposive and contextual manner, taking into account that the courts will, as well, follow international law to the extent that it is consistent with the spirit of the Constitution as the supreme law of the country.

What is also interesting is that in most cases the government has been found wanting in implementing the right to basic education. The latest case that was heard by the Constitutional Court in this regard (the case of *Johannes Moko v Member of Executive Council, Limpopo Department of Education* (3) SA 297 (CC) (28 December 2020) shows this unending trend. What is clear is that the courts always protect the right to basic education as entrenched in the Constitution of the Republic of South Africa.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

The study undertook an analysis of the legal and policy developments of the right to basic education in South Africa as enshrined in section 29 of the Constitution, which, amongst others, included the following: (i) aspects of the colonial and apartheid legacy that impacted on the right to basic education for the majority of children in South Africa; (ii) law and policy developments of the pre-and post-1994 periods with an impact on the right to basic education in South Africa and influenced the right to basic education, especially taking into account international policy instruments with a bearing on the right to basic education; (iii) how the courts have interpreted the right to basic education in South Africa, particularly as seen through the prism of the final Constitution; and finally (iv) access to basic education as the key to the realisation of the right to basic education in South Africa.

5.1 Conclusion

The study has revealed that the right to basic education is interlinked with the political system of the time, whether during the colonial period or apartheid era or the post-1994 democratic dispensation. For instance, the National Party government, in the pre-1994 dispensation, used education as a tool to advance apartheid ideology, which denied the Black majority, particularly Africans, the right to basic education.

In this respect, the National Party, amongst other mechanisms, used the apartheid legislative and policy instruments to advance its ideological outlook. A key example in this regard is how the regime introduced the notorious Bantu Education Act 47 of 1953. The National Party government ensured that the Black majority were taught inferior education in order to prepare them for the kind of work that did not require skills. In other words, manual labour. The Bantu Education Act, together with the actions of the apartheid regime, was met with massive resistance from various sectors of society, including students, parents' bodies and society in general from its introduction up to, and including, the Soweto uprisings of 16 June 1976. These uprisings became the turning point of the political and education system in South Africa. To show that the NP was uncompromising with its apartheid education system, it ignored even international instruments such as the Universal Declaration of Human Rights (United Nations, 10 December 1948). Included in this Declaration was the right to basic education.

The post-1994 democratic government was confronted with the task of redressing the imbalances of the apartheid regime in South Africa's education system. The enormity of this task was underlined by the fact that apartheid was institutionalised. The release of political prisoners, the return of exiles and the commencement of the negotiations were the first signs or steps towards ending the apartheid political and education system. For the first time in the history of South Africa, both the interim and the final Constitutions entrenched the right to basic education in the Bill of Rights. Section 7 of the final Constitution of the Republic of South Africa imposes an obligation on the State to respect, protect and fulfil the rights in the Bill of Rights. This itself is an indication that the State could no longer arbitrarily violate the rights of its own people as was the case under the system of parliamentary sovereignty.

Since the dawn of the new democracy, a lot has been achieved when it comes to the implementation of the right to basic education. Some of the milestones in this context included the crafting of a battery of legislation and policy frameworks, such as the White Paper on Education and Training (1995); National Education Policy (1996); South African Schools Act (1996); National Plan for Higher Education (2001); Education White Paper 5 on Early Childhood Education (2001) and the National Development Plan (2012). These legislative and policy frameworks were not only crafted to comply with the right to basic education as stipulated in section 29 of the Constitution, but they are also in consonant with most of the international instruments regarding the right to basic education as extensively discussed in Chapter 3 of this study. The international instruments included, amongst others, the Universal Declaration of Human Rights (1948) and the United Nations Declaration of Human Rights of the Child (1959).

Quantitatively, since 1994, the implementation of the right to education has seen an increase in the enrolment of the majority of learners in order to realise the right to basic education. The study revealed that a nearly universal school enrolment regarding basic education was recorded. This was shown by the 2017 General Household Survey that reflected the reality for compulsory ages between 7 to 15 years, whose school attendance was between 97.6% and 99.2%.

It is worth noting that the right to basic education has been the subject of many court challenges in post-1994 democratic South Africa, adjudicated from the High Courts, the Supreme Court of Appeal to the Constitutional Court. These matters were brought by various interested parties which sought to drive the government to the call made in Chapter 2 of the Constitution, such as the obligation that the State must respect, protect, promote and fulfil rights in the Bill of Rights.

The list of important landmark cases, as discussed in Chapter 4, included *Johannes Moko v Member of the Executive Council, Limpopo Department of Education*; *the Western Cape Minister of Education v The Governing Body of Mikro Primary School*; *Governing Body of Juma Masjid Primary School & Others v Essay N.O. and Others*, as well as *RK and Others v Minister of Basic Education and Others*. These cases are at the heart of the right to basic education in South Africa, where the government has been found wanting. This, once again, indicates that the courts are playing a critical role towards the realisation of the right to basic education in South Africa.

5.2 Recommendations

Against the background of what has been explored in this dissertation, it is clear that there are many critical points that the relevant stakeholders, including the government, should consider to ensure that South Africa is truly a constitutional democracy where human rights are protected as per the Constitution. The following recommendations are therefore made in the area of education to ensure the sustenance of the right to basic education in South Africa:

Improving the mechanism of implementation of the right to basic education: It is strongly recommended that the State must improve its mechanisms of implementing the right to basic education. It cannot be correct that the State is dragged to the courts to discharge its own constitutional obligations. All officials of government and public servants, including those in the basic education sector, must be trained in the areas of the State's Constitutional obligations especially as stipulated in Chapter 2 of the Constitution and, subsequently, the applicable subordinate legislation and policies. This training should include the case law as part of the training manuals.

In a constitutional democracy such as South Africa, training must be prioritised for the implementers of these progressive policies. A country with such policies and legislation should not have institutions of government found violating fundamental principles of the Bill of Rights. The worst example in this regard is when the Department of Basic Education attempted to deny people with disabilities the right to education, as demonstrated in the case of the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 JDR 0373 (WCC). In fact, this was not only a violation of basic education right, but also protection from neglect and degradation, as discussed in Chapter 4 of the dissertation.

Access to Early Childhood Development (ECD): Though progress has been achieved regarding early childhood development (ECD), a strong recommendation from the study is that government must make ECD compulsory and pay a special attention to it through availing the required resources. ECD is key to the child's early development and influence prior to the child entering Grade 1. Investment in early childhood development will have a positive impact in the child's learning ability, health and future job opportunities. There are great possibilities that a child who accessed a quality early childhood development service will do well in his or her schooling years. This is also confirmed by the National Development Plan which states that early childhood development intervention contributes to the retention and academic performance of the children in subsequent years. Government must make early childhood development a requirement for access to Grade 1. This aspect will inevitably require the government to avail the necessary resources. The migration or integration of ECD from the Department of Social Development to the Department of Basic Education is critical, so that ECD can be aligned and receive not only the required attention but also the requisite resources.

Enrolment for compulsory grades (7-15 years): the study revealed that enrolment in these grades has improved significantly up to above 97%. However, much needs to be done as the completion rate remains a challenge, considering that about 50% of the learners are lost in the system or do not progress up to writing their Grade 12 examinations. Government interventions must target especially rural areas through the provision of a battery of student support services, including psychosocial services.

The Department of Basic Education can also conduct country-wide surveys to understand directly from learners and communities their real challenges or problems so that informed interventions can be designed.

Important to note in this regard is that education, “from cradle to grave”, must be a societal matter; hence communities and relevant stakeholders must be actively engaged in almost all phases of education, especially in a country like South Africa, with the history of activism against the apartheid system.

Learners’ access to textbooks: access to textbooks is critical for the realisation of the right to basic education. It is discomfoting that learners who have access to textbooks for all their subjects dropped from 80.7% in 2013 to 77.5% in 2017. Generally, there is a drop as revealed by the study for learners accessing textbooks for the same period as referred to above in other related categories.

This is even despite the courts have declared that it is the duty of the State in terms of section 7(2) of the Constitution to fulfil the right of every learner by providing him or her with every textbook prescribed for his or her grade before the commencement of the teaching of the course for which the textbook is prescribed. This view was pronounced in the case of *RK and Others v Minister of Basic Education and Others* 2016 (4) SA 63 (SCA). The Department of Basic Education has an obligation in terms of the Constitution to ensure that every province has a plan in place to procure and deliver textbooks to each deserving learner prior the commencement of the academic year. Once again, it cannot be that government officials only discharge their statutory obligations in the face of a court order. It is even worse that in the referred case, the Department of Basic Education confirmed to have all other learners having received their textbooks except the learners in Limpopo Province.

It is not sufficient to say that the Department of Basic Education ensures that there are procurement and delivery plans in each province to realise the right to basic education. There is a need for such plans to cover consequence management and indeed ensure that such consequence measures are discharged where there is poor performance or disregard of the State’s Constitutional obligations.

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