

# Analysis of the Right to Basic Education in South Africa<sup>1</sup>

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## **Abstract**

*The right to basic education refers to the learning needs appropriate to the experience and age of the learners. It contains primary and secondary educations where learners perform educational activities to achieve learning outcomes. The Constitution provides the right to basic education and states that everyone has the right to basic education as well as adult basic education. Every child must access basic education so that he or she can develop his or her talents, mental and physical abilities. The right to basic education is measured on the four important principles, namely availability, accessibility, acceptability, and adaptability. The right to basic education still experiences some challenges, such as lack of sufficient schools, classrooms, transport of learners, properly trained teachers, delivery of teaching and assessment materials in an environment that is conducive to learning. The choice of language of instruction is also still a challenge in exercising the right to basic education. There is a quest to include children with different disabilities in the learning activities for basic education. The room for improvement is necessary in the education sector to ensure that the right to basic education is adequately available to all learners in South Africa.*

**Keywords:** education, right to basic education, learners, availability, accessibility of education.

**JEL Classification:** K10, K33, K38

## **1. Introduction**

The concept of basic education refers to the learning needs appropriate to the age and experience of the learner, and it also provides access to nationally recognized qualifications.<sup>4</sup> It comprises the “whole range of education activities in different settings that aim to meet basic learning needs.”<sup>5</sup> The basic education contains both primary education and secondary education where learners perform educational activities to satisfy the learning needs for all the people.<sup>6</sup> Section 29 (1) (a) establishes the right to basic education in South Africa and states that everyone has the right to basic education, including adult basic education. The right to further education is also recognized to everyone and the state must take reasonable measures to make it progressively available and accessible.<sup>7</sup> Every child must access basic education in order to develop his/her talents, mental and physical abilities.

The state must provide the right to basic education to the children. In this regard, section 7 (2) of the Constitution creates or imposes an obligation on the state to respect, protect, promote and fulfil the right to basic education. The implementation of this right is strengthened by the fact that in every matter concerning the child, his or her best interests are of paramount importance.<sup>8</sup> The right to basic education can bind a natural or a juristic person considering the nature and the duty that it imposes. In *Governing Body of the Juma Musjid Primary School and Others v. Essay NO and Others*,<sup>9</sup> the Constitutional Court held that there was a negative obligation imposed on the owner of the property (a trust) not to impair the rights of the learners to access basic education. The negative obligation could be breached “directly when there was a failure to respect the right, or indirectly, when there was a failure to prevent the direct infringement of the right by another, or a failure to respect the existing protection of the right by taking measures that diminish that protection.”<sup>10</sup> Every person has

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<sup>1</sup> This journal article is developed from the LLB mini-dissertation submitted in 2021

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<sup>4</sup> C. Churr, Realisation of a child’s right to a basic education in the South African school system, 18 (7) *PER / PELJ*, 2015, p. 2411.

<sup>5</sup> *Ibid*, page 2412.

<sup>6</sup> *Ibid*, page 2412.

<sup>7</sup> Section 29 (1) (b) of the Constitution of the Republic of South Africa, 1996.

<sup>8</sup> *Ibid*, section 28 (2).

<sup>9</sup> *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC).

<sup>10</sup> *Ibid*, page 764.

a duty not to interfere with the right of access to basic education for children. Furthermore, the court held that the Member for the Executive Council for Education (MEC) had a primary positive obligation to implement the right to basic education by allowing learners continued access to schools.<sup>11</sup> The court granted eviction order after ensuring that all the concerned learners would be placed in other alternative schools.

The right to basic education is recognized in international and regional laws and the states have a duty to provide it to children free of charge.<sup>12</sup> It must be available and accessible to all children in every part of the country.<sup>13</sup> In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*,<sup>14</sup> the court held that the state had a duty to provide basic education to learners with severe intellectual disabilities. The United Nations Convention on the Rights of Persons with Disabilities (CRPD) provides for the inclusive education for all levels and life long learning directed to the development of personality, talents and creativity for the persons with disabilities to their fullest potential.<sup>15</sup> It also contains the inclusion of persons with disability in free compulsory primary education and secondary education.<sup>16</sup> Persons with disabilities receive reasonable accommodation based on the individual requirements to access basic education.<sup>17</sup> This article discusses the right to basic education in international and regional laws; furthermore, it also analyses the right to basic education in South African, specifically the principles of availability, accessibility, acceptability and adaptability in the current context.

## 2. Right to basic education in international and African laws

### 2.1. Right to basic education in international laws

The Universal Declaration of Human Rights (UDHR)<sup>18</sup> provides the right to education for everyone. It contains free and compulsory education at the elementary and fundamental stages. The higher education is accessible to all and based on merit, whereas technical and professional educations are generally available.<sup>19</sup> Parents have a right to choose the specific education that is given to their children. Education assists to develop human personality, strengthens respect for human rights and fundamental freedoms. Furthermore, it promotes understanding, tolerance and friendship among different races, religions and nations.<sup>20</sup> The education can also advance the maintenance of peace among people and nations.

The Convention on the Rights of the Child (CRC)<sup>21</sup> asserts that States Parties recognize the right to education for the children which they achieve progressively on the basis of equal opportunity. In this regard, the states have a duty to make compulsory primary education and freely available to

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<sup>11</sup> Ibid, page 763.

<sup>12</sup> Universal Declaration of Human Rights, 1948 (article 16); Convention on the Rights of the Child, 1989 (article 28); African Charter on the Rights and Welfare of the Child, 1990 (article 11); African Charter on Humana and Peoples' Rights, 1981 (article 17); and Convention on the Rights of Peoples with Disabilities, 2007 (article 24).

<sup>13</sup> A. Skelton, "The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: a Critical Evaluation of Recent Education Case Law", 46 (1) *De Jure* (2013), pp. 6 – 17. The author discussed in more details the availability and accessibility of basic education in South Africa.

<sup>14</sup> *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa* 2011 5 SA 87 (WCC), paras 23 and 24.

<sup>15</sup> Convention on the Rights of Persons with Disabilities, 2006, Article 24 (1) (b).

<sup>16</sup> Ibid, Article 24 (2) (a).

<sup>17</sup> Ibid, Article 24 (2) (c).

<sup>18</sup> Universal Declaration of Human Rights, 1948, Article 26 (1). Other international instruments that deal with the right to education include: International Covenant on Economic, Social and Cultural Rights, 1996, Article 13; International Covenant on Civil and Political Rights, 1966, Article 19 (4); Convention Relating to the Status of Refugees, 1951, Article 22; and Convention on the Elimination of all Forms of Discrimination Against Women, 1979, Article 10; L. Arendse, "The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective", (14) 6 *PER / PELJ* 2011, p. 98.

<sup>19</sup> Universal Declaration of Human Rights, 1948, Article 26 (1).

<sup>20</sup> Ibid Article 26 (2).

<sup>21</sup> Convention on the Rights of the Child, 1989, Article 28 (1); World Declaration on Education for All and Framework of Action to Meet Basic Needs, 1990, Article 3 (1); L. Arendse, "The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective", (14) 6 *PER/PELJ* 2011, p. 99.

all the children.<sup>22</sup> They should also “encourage the development of different forms of secondary education, including general and vocational educations”.<sup>23</sup> Secondary education must be available and accessible to every child. States have to take appropriate measures to introduce free education and offer financial assistance to the needy learners. Concerning the higher education, the states must take appropriate means to ensure that it is accessible to all on the basis of capacity.<sup>24</sup> The education and vocational information must be available and accessible to all the children so that they can make an informed choice. The states parties to the CRC have to take measures to promote regular attendance at school and reduce the drop-out rates for learners.<sup>25</sup> These measures ensure that children exercise their right to basic education adequately. The right to human dignity must be respected whenever any disciplinary action is administered or imposed to a learner.<sup>26</sup> Furthermore, international cooperation is necessary and encouraged in matters that relate to education.<sup>27</sup> This can assist to eliminate ignorance and illiteracy across the world and facilitate access to scientific and technical knowledge as well as modern methods of teaching.<sup>28</sup>

The states parties to the CRC undertake to direct the education of the child to the development of his or her “personality, talents and mental and physical abilities to their fullest potential”.<sup>29</sup> The other issues that the basic education has to cover include the development of respect for human rights and fundamental freedoms; respect for the child’s parents, his or her own cultural identity, language and values, national values of his or her country of residence and nationality as well as the civilizations of other countries.<sup>30</sup> The education also should prepare the child to be responsible for his or her life in a free society and tolerate or create friendship with people from different ethnic, national and religious backgrounds, including indigenous people.<sup>31</sup> The child should also respect the natural environment<sup>32</sup> and be in harmony with the nature.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>33</sup> provides the right to basic education for everyone. General Comment No. 13 on the implementation on the ICESCR outlines in much detail the right to receive education. It identifies the essential features of education at all levels, namely availability, accessibility, acceptability and adaptability.<sup>34</sup> These principles are interrelated to ensure the adequacy of the right to education. The principle of availability of education states that educational institutions and programmes must be available in sufficient quantity in each country. They require different factors such as buildings, sanitation facilities, safe drinking water, trained teachers, competitive salaries, teaching materials, libraries, computer facilities and information technology.<sup>35</sup> Accessibility of education means that education is accessible to everyone and contains three dimensions: non-discrimination, physical accessibility, and economic accessibility.<sup>36</sup> The principle of acceptability means that the form and substance of education must be acceptable to students and parents.<sup>37</sup> Adaptability of education refers to its flexibility so that “it can adapt to the needs of the changing societies and communities and respond to the needs of students within their diverse social and cultural settings”.<sup>38</sup> The application of these principles requires the consideration of the best interests of the learners as a paramount importance.

<sup>22</sup> Convention on the Rights of the Child, 1989, Article 28 (1) (a).

<sup>23</sup> Ibid, Article 28 (1) (b).

<sup>24</sup> Ibid, Article 28 (1) (c).

<sup>25</sup> Ibid, Article 28 (1) (e).

<sup>26</sup> Ibid, Article 28 (2).

<sup>27</sup> Ibid, Article 28 (3).

<sup>28</sup> Ibid.

<sup>29</sup> Ibid, Article 29 (1) (a).

<sup>30</sup> Ibid, Articles 29 (1) (b) and (c).

<sup>31</sup> Ibid, Article 29 (1) (d).

<sup>32</sup> Ibid, Article 29 (1) (e).

<sup>33</sup> International Covenant on Economic, Social and Cultural Rights, 1966, Article 13; L. Arendse, “The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective”, (14) 6 *PER / PELJ* 2011, p. 99.

<sup>34</sup> Committee on Economic, Social and Cultural Rights – General Comment No. 13, 1999, paragraph 6.

<sup>35</sup> Ibid paragraph 6 (a).

<sup>36</sup> Ibid paragraph 6 (b).

<sup>37</sup> Ibid paragraph 6 (c).

<sup>38</sup> Ibid paragraph 6 (d).

The Convention on the Rights of the Persons with Disabilities (CRPD)<sup>39</sup> recognizes the right to education for persons with disabilities. It prevents any discrimination in education system and promotes inclusion at all levels of lifelong learning directed to “the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human dignity”.<sup>40</sup> The CRPD encourages the development to the fullest potential of personality, talents, creativity, mental and physical abilities for persons with disabilities. It also enables persons with disabilities to participate effectively in a free society.<sup>41</sup> In realizing the right to education, the CRPD imposes an obligation on states parties to prevent the exclusion from the general education system of people with disabilities and ensure that children with disabilities are included in the primary and secondary educations.<sup>42</sup> Persons with disabilities need to receive the necessary support to facilitate their effective education in the general education system and they must receive education with others in the communities they live in.<sup>43</sup> The CRPD also promotes the provision of reasonable accommodation of the individual’s requirements and ensures the effective individualized support measures for full inclusion in education system.<sup>44</sup>

States parties to the CRPD have a duty to “enable person with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community”.<sup>45</sup> In this regard, they have to take appropriate measures to facilitate the learning of Braille, sign language and promotion of the linguistic identity of the their community.<sup>46</sup> The education of children who are blind, deaf or deafblind must be delivered in the most appropriate languages, modes and means of communication to maximise their academic and social developments.<sup>47</sup> In realizing the right to basic education, the states parties to the CRPD have a duty to employ qualified teachers, including teachers with disabilities, in sign language and or Braille.<sup>48</sup> Furthermore, the states have an obligation to facilitate persons with disabilities to access tertiary education, vocational training, adult education and lifelong learning without any discrimination.<sup>49</sup> In this regard, they have to provide reasonable accommodation of persons with disability in the education system.

## 2.2. The rights to basic education in African laws

The right to basic education in Africa is recognized under different regional instruments.<sup>50</sup> The African Charter on Human and Peoples’ Rights (ACHPR)<sup>51</sup> contains the right to education for every individual. In addition, it also states that every individual may freely choose to participate in the cultural life of his or her community.<sup>52</sup> The state has a duty to promote and protect the morals and

<sup>39</sup> Convention on the Rights of the Persons with Disabilities, 2006, Article 24; C. Ngweni and L. Pretorius, “Substantive Equality for Disabled Learners in State Provision of Basic Education: a Commentary on Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa”, 28 (1) *SAJHR* 2012, pp. 113 – 114; S. Khumalo and TF. Hodgson, The right to Education for Children with Disabilities in South Africa: Section 27”action from National Research and Litigation Strategies to International Advocacy. Mail & Guardian. 14 April 2015. Available at <https://www.right-to-education.org/es/node/412> (accessed on 17 June 2022).

<sup>40</sup> Convention on the Rights of the Persons with Disabilities, 2006, Article 24 (1).

<sup>41</sup> Ibid Article 24 (1) (b) and (c).

<sup>42</sup> Ibid, Article 24 (2) (a).

<sup>43</sup> Ibid Article 24 (2) (d) and (b).

<sup>44</sup> Ibid, Article 24 (c) and (e).

<sup>45</sup> Ibid, Article 24 (3).

<sup>46</sup> Ibid, Article 24 (3) (a) and (b).

<sup>47</sup> Ibid, Article 24 (3) (c).

<sup>48</sup> Ibid, Article 24 (4).

<sup>49</sup> Ibid, Article 24 (5).

<sup>50</sup> African Charter on Human and Peoples’ Rights, 1981, Article 17; African Charter on the Rights and Welfare of the Child, 1990, Article 11; and Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003, Article 12. The rights to education is also recognised in other regions. For instance, in Europe, the right to education is provides in Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1952. In Asia, the right to education is contained in Article 31 of the Asean Human Rights Declaration, 2012. Furthermore, in Arab states the right to education is recognised in Articles 40 (education) and 4s1 (education for disabled persons) of the Arab Charter on Human Rights, 2004.

<sup>51</sup> African Charter on Human and Peoples’ Rights, 1981, Article 17 (1).

<sup>52</sup> Ibid, Article 17 (2).

traditional values of the community.<sup>53</sup> Here the education in the African context is about the culture, morals and traditional values of the community where a person belongs.

The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>54</sup> provides the right to an education for every child. This education aims to promote and develop the child's personality, talents and physical abilities; and fosters respect for human rights and fundamental freedoms that are included in the African and international human rights instruments.<sup>55</sup> It also preserves and strengthens the positive African morals, traditional values and cultures; and prepares the child for responsible life in a free society that tolerates and respects people from different ethnicities, tribes and religions.<sup>56</sup> The African education also preserves the national independence and territorial integrity, promotes and achieves African unity and solidarity, develops respect for environmental and natural resources, and promotes the child's understanding of primary health care.<sup>57</sup> It is a holistic education as it also covers the protection of the environment and natural resources so that people can live in harmony with the nature.

The ACRWC creates an obligation to states parties to take all appropriate measures to achieve the full realization of the right to education, including the provision of free and compulsory basic education, development of free and accessible secondary education, accessible higher education on the basis of capacity and ability, encouragement of regular attendance at schools and the reduction of drop-out rates.<sup>58</sup> States also need to take special measures to promote female, gifted and disadvantaged children, and provides equal access to education for all sections of the community.<sup>59</sup> The parents and legal guardians have a right to choose schools for their children to ensure the religious and moral education in a manner that evolves the capacities of the children.<sup>60</sup> The inherent dignity of the children must be respected at all times in any matter related to them.

States parties to the ACRWC have a duty to take all appropriate measures to protect the children who become pregnant before they complete their education. In this regard, these learners must have an opportunity to continue with and complete their education on the basis of their individual abilities.<sup>61</sup> This is a significant development in the protection of female learners who become pregnant before they complete their basic education. These measures protect female children and contribute to the development of the society as a whole. The next session the right to basic education in the South African context.

### 3. Right to basic education in South Africa

Section 29 (1) (a) of the Constitution provides that everyone has the right to basic education as well as adult education.<sup>62</sup> The right to basic education is also linked to the best interests of the child and they are paramount importance for every matter concerning the child.<sup>63</sup> The definition of a child is every person who is under the age of 18 years.<sup>64</sup> Most of the learners who attend basic education

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<sup>53</sup> Ibid, Articles 17 (3).

<sup>54</sup> African Charter on the Rights and Welfare of the Child, 1990, Article 11 (1).

<sup>55</sup> Ibid, Article 11 (2) (a) and (b); World Declaration on Education for All and Framework for Action to Meet Basic Needs, 1990, Article 10.

<sup>56</sup> African Charter on the Rights and Welfare of the Child, 1990, Article 11 (2) (c) and (d).

<sup>57</sup> Ibid, Article 11 (2) (e) – (h).

<sup>58</sup> Ibid, Article 11 (3) (a) – (d).

<sup>59</sup> Ibid, Article 11 (3) (e).

<sup>60</sup> Ibid, Article 11 (4).

<sup>61</sup> Ibid, Article 11 (6); Convention on the Elimination of all Forms of Discrimination Against Women, 1979, Article 11 (h); Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, Article 12 (2) (c).

<sup>62</sup> See also C. McConnachie, A. Skelton and C. McConnachie, "The Constitution and the Right to a Basic Education", p. 23. Available at <http://eelawcentre.org.za/wp-content/uploads/2017/03/chapter-1.pdf> (accessed on 22 June 2022); C. Churr, "Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany", (18) 7 *PER / PELJ* 2015, p. 2405; R. Malherbe, "The Constitutional Dimension of the Best Interests of the Child as Applied in Education", 2 *TSAR* 2008, p. 274; *Minister of Home Affairs and Others v Wachenuka and Another* 2004 4 SA 326 (SCA). This case discusses the right of an asylum seeker child to access basic education in South Africa.

<sup>63</sup> Constitution of the Republic of South Africa, 1996, section 28 (2); R. Malherbe, "The Constitutional Dimension of the Best Interests of the Child as Applied in Education", 2 *TSAR* 2008, p. 285.

<sup>64</sup> Constitution of the Republic of South Africa, 1996, section 28 (3).

are under the age of 18 years and their best interests in regard to basic education must be protected. The implementation of the right to basic education is directly and immediately available. This is a higher priority compared to other rights as it does not depend on the availability of resources.<sup>65</sup> Furthermore, everyone has a right to further education and the state has a duty to take reasonable measures to make it progressively available and accessible.<sup>66</sup> The implementation of the right to education may face serious challenges in terms of language of instruction and other related issues.

Section 29 (2) of the Constitution of the Republic of South Africa states that “everyone has the right to receive education in the official language or languages of their choice in public educational institutions when that education is reasonably practicable.” There are 11 official languages in South Africa;<sup>67</sup> however, English and Afrikaans are the dominant languages in basic education. The promotion of sign language is the highest priority to accommodate the needs of the people with disabilities in education. The state has an obligation to facilitate effective access to and implementation of the language policy in education. In doing so, it must consider the equity; practicability; and the need to redress the results of past racially discriminatory laws and practices.<sup>68</sup> For the right to basic education to be successfully implemented, it must fulfil or comply with the four principles of education, namely availability, accessibility, acceptability and adaptability.<sup>69</sup> Each of these principles is discussed in much more details below.

### 3.1. Availability of education

The availability of basic education has been discussed in South African jurisprudence in more details.<sup>70</sup> In *Governing Body of the Juma Musjid Primary School v. Essay NO*,<sup>71</sup> the court linked the best interests of the child to the availability of basic education. This case concerned with the eviction of school learners from the property that belonged to the trust which was leased for education purposes. The court found that the responsibility to make facilities available for education belonged within the powers of the MEC for Basic Education. At the same time, the trust had a negative duty not to impair with the right to education for children as it had leased its property for this purpose.<sup>72</sup> The court ensured that appropriate alternative premises were available for the learners to continue with their right to basic education before it granted an eviction order. This judgment strengthened and promoted the availability of premises for basic education to learners to ensure that they received basic education.

The availability of education also refers to the premises that are used for learning purposes. For instance, in the Eastern Cape, some learners attended in mud schools with improper infrastructures.<sup>73</sup> As a general rule, schools must be maintained in a condition that facilitates adequate teaching and learning. The schools faced various problems, namely dilapidated mud buildings, lack of running water and/or sanitation, inadequate seats and desks for some learners attending school. The Legal Resources Centre in Grahamstown and the Centre for Child Law intervened and engaged

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<sup>65</sup> L.N. Murungi, “Inclusive Basic Education in South Africa: Issues in its Conceptualisation and implementation”, 18 (1) PER / PELJ 2015, p. 3162; D. Roithmayr, “Access Adequacy and Equality: the Constitutionality of School Fee Financing in Public Education”, *SAJHR* 2003, pp. 421 – 422; T. Boezaart, “A Constitutional Perspective on the Rights of Children with Disabilities in an Educational Context”, (27) 2 *SAPL*, 2012, p. 456.

<sup>66</sup> Constitution of the Republic of South Africa, 1996, section 29 (1) (b).

<sup>67</sup> *Ibid*, section 6 (1); *Chairperson, Council of the UNISA v. AfriForum NPC* 2022 2 SA 1 (CC); *AfriForum and Another v. University of The Free State* 2018 2 SA 185 (CC).

<sup>68</sup> Constitution of the Republic of South Africa, 1996, section 29 (b).

<sup>69</sup> A. Skelton, “The Role of the Courts in ensuring the right to a Basic Education in a Democratic South Africa: a Critical Evaluation of Recent Education Case Law”, *De Jure* (2013), pp. 6 – 22.

<sup>70</sup> L. Arendse, “The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective”, (14) 6 PER / PELJ 2011, pp. 112 – 115.

<sup>71</sup> *Governing Body of the Juma Musjid Primary School v. Essay NO* 2011 8 BCLR 651 (CC).

<sup>72</sup> *Ibid*, para 60; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC), para 78.

<sup>73</sup> A. Skelton, “The Role of the Courts in ensuring the right to a Basic Education in a Democratic South Africa: a Critical Evaluation of Recent Education Case Law”, 46 (1) *De Jure* (2013), p. 7.

with the Minister of Basic Education as well as the MEC for Basic Education in Eastern Cape.<sup>74</sup> The dispute was settled out of court and the government accepted to intervene and took necessary measures to address the issue of mud schools, its infrastructures and other learners in the similar position in the Eastern Cape.<sup>75</sup> This was a significant development in ensuring that the basic education is available to learners.

The challenge “to availability of basic education also include the failure to provide education materials and stationery”.<sup>76</sup> In *Section 27 and Others v. Minister and Education and Another*,<sup>77</sup> the court had to investigate whether the failure to deliver textbooks in Limpopo for learners constituted a violation of the right to basic education, equality and dignity. Kollapen J held that the failure of the Department of Basic Education to provide textbooks constituted a violation of the right to basic education.<sup>78</sup> This meant that textbooks were essential for learners to ensure that basic education is sufficiently available. The quality of learning and teaching depends on the availability of textbooks and other learning materials. Furthermore, teachers and non-educator staffs are also necessary in providing the right to basic education. The next point discusses the accessibility of basic education.

### 3.2. Accessibility of education

Accessibility of basic education refers to the ability for the child to enroll and attend school.<sup>79</sup> This means that learners must be able to reach their schools on time without any hindrance. In *Adam Legoale v MEC for Education*,<sup>80</sup> the Mafikeng High Court dealt with the issue of transport for learners whose parents or guardians were unable to pay for transport costs for learners to attend school. Some learners dropped out of schools due lack of bus fare. In this case, the matter was settled out of court and the MEC for Basic Education agreed to provide transport for learners so that they could attend school to achieve their basic education. Transport plans were properly communicated to the learners.

Accessibility to basic education is a challenge when pregnant learners are excluded from schools. The Department of Education had a view expel pregnant learners from school for a period of two years so that they could exercise their full responsibility for parenting.<sup>81</sup> In *Welkom High School v. Head, Department of Education, Free State Province*,<sup>82</sup> the court held that the pregnancy policy was punitively and arbitrarily implemented as the pregnant learners were expelled from school without considering their personal circumstances. Rampaj J ordered that the concerned learners should be readmitted and resume their school activities until the completion of their high-school careers.<sup>83</sup> This is a significant improvement of the rights to basic education for female learners who become pregnant during the course of their studies. However, the court also held that the respondents did not have power to intervene and undermine the policy of the School Governing Body lawfully formed. The first respondent unsuccessfully appealed to the Supreme Court of Appeals<sup>84</sup> and Constitutional Court.<sup>85</sup> It is apparent that pregnant learners are excluded from attending basic education during their pregnancy and after giving birth if this policy is provided by the School Governing Body. It is submitted that the pregnant learners should attend school as soon as possible after giving birth to avoid any unfair discrimination in education.

The other issue that created potential disputes between the School Governing Bodies and the

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<sup>74</sup> Ibid, page 7.

<sup>75</sup> Ibid, pages 7 – 8.

<sup>76</sup> Ibid, page 8.

<sup>77</sup> *Section 27 and Others v. Minister of Education and Another* 2013 2 SA 40 (GNP), paras 21 and 22.

<sup>78</sup> Ibid para 32.

<sup>79</sup> A. Skelton, “The Role of the Courts in ensuring the right to a Basic Education in a Democratic South Africa: a Critical Evaluation of Recent Education Case Law”, *De Jure* (2013), p. 11; L. Arendse, “The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective”, (14) 6 *PER / PELJ* 2011, pp. 112 – 115.

<sup>80</sup> *Adam Legoale v. MEC for Education, North West*, North West High Court, Mafikeng, case no 499/11, unreported.

<sup>81</sup> A. Skelton, “The Role of the Courts in ensuring the right to a Basic Education in a Democratic South Africa: a Critical Evaluation of Recent Education Case Law”, *De Jure* (2013), p. 13.

<sup>82</sup> *Welkom High School v. Head, Department of Education, Free State Province* 2011 4 SA 531 (FB), para 75.

<sup>83</sup> Ibid, para 92.5.

<sup>84</sup> *Head of Department, Department of Education, Free State Province v Welkom High School* 2012 6 SA 525 (SCA).

<sup>85</sup> *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (SCA).

Department of Education is the choice to receive education in the preferred official language.<sup>86</sup> Several cases have discussed this issue and the disputes concerned the use of Afrikaans as the language of medium of instruction for the learners.<sup>87</sup> There is nothing legally wrong in choosing the language of instruction at schools. However, in doing so, the School Governing Body must consider the best interests of learners, parents, stakeholders and community as well the principle of accessibility and inclusion for the basic education. This is still a challenge not only in basic education but also in higher education in South Africa.<sup>88</sup> The basic education must be accessible to all learners without any hindrance. The next topic discusses the acceptability of basic education.

### 3.3. Acceptability of education

Acceptability of basic education refers to admissions policy and the problem of capacity in urban schools.<sup>89</sup> It also implies an educational system in which its curricula and teaching methods are acceptable to learners.<sup>90</sup> The term also provides that the educational system should be relevant, culturally appropriate and of a good quality.<sup>91</sup> The Constitutional Court, in the case of *Revonia*,<sup>92</sup> was confronted with the issue of admission policy and the question of capacity of students in the dilemma of acceptability. A little girl, who was referred to as a learner in this case, lived with her mother within the catchment area of the school. The dispute arose from the fact that the mother applied for the admission of the learner to the school in grade 1.<sup>93</sup> The admissions process resulted in the learner being placed at number 20 on the “A” waiting list.<sup>94</sup> However, the learner’s mother appealed to the Provincial Department of Basic Education and it instructed the Rivonia Primary School to admit the child.<sup>95</sup> The Constitutional Court held the School Governing Body was empowered to determine a school’s admission policy, but it should be done in a manner determined by the Head of the Department.<sup>96</sup>

Furthermore, the court held that it would be extraordinary if the capacity of the school fell outside of the Provincial Education Department when it was statutorily bound by section 3(3) of the South African Schools Act<sup>97</sup> to ensure that every child in the province could attend school. Ultimately, the court found that the Head of Department erred in the manner in which he withdrew the admission function delegated to the principal, because this was done summarily, widely couched and unnecessary in the circumstances.<sup>98</sup> Therefore, the court made declaratory orders to the effect that a School Governing Body did not enjoy the unqualified power to determine the admission policy at a public school, and that the power to determine the maximum capacity of a school vested in the Department of Education and not in the School Governing Body. In addition, the Department of Basic

<sup>86</sup> A. Skelton, “The Role of the Courts in ensuring the right to a Basic Education in a Democratic South Africa: a Critical Evaluation of Recent Education Case Law”, *De Jure* (2013), p. 15.

<sup>87</sup> *Laerskool Middelburg v. Departementshoof, Mpumalanga van Onderwys* 2003 4 SA 160 (T), *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA), *Seodin Primary School v MEC of Education, Northern Cape* 2006 4 BCLR 542 (NC).

<sup>88</sup> *Chairperson, Council of the UNISA v. AfriForum NPC* 2022 2 SA 1 (CC); *AfriForum and Another v. University of The Free State* 2018 2 SA 185 (CC).

<sup>89</sup> A. Skelton, “The Role of the Courts in ensuring the right to a Basic Education in a Democratic South Africa: a Critical Evaluation of Recent Education Case Law”, *De Jure* (2013), p. 17.

<sup>90</sup> T. Boezaart, “A Constitutional Perspective on the Rights of Children with Disabilities in an Educational Context”, (27) 2 *SAPL*, 2012, p. 461.

<sup>91</sup> S. Woolman and B. Fleisch, *Constitution in the Classroom: Law and Education in South Africa 1994 – 2008* (Pretoria: Pretoria University Law Press, 2009), p. 56.

<sup>92</sup> *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* 2013 6 SA 582 (CC), para 41.

<sup>93</sup> *Governing Body of Rivonia Primary School v. MEC for Education, Gauteng Province* 2012 1 All SA 576 (GSJ), para 56. A court order indicates that no information that reveals or may reveal the identity of the child may be published.

<sup>94</sup> The “A” waiting list is for children who live or whose parents work within the catchment area of the list for those who live or whose parents work outside of that area.

<sup>95</sup> The learner had been attending a private school since the start of the school year, 2011-01-12.

<sup>96</sup> *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School and others* 2013 6 SA 582 (CC), paras 41 and 68.

<sup>97</sup> South African Schools Act 84 of 1996.

<sup>98</sup> *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School and others* 2013 6 SA 582 (CC), paras 56 and 81.

Education in Gauteng Province had the powers to intervene in the ability of the School Governing Body to determine the admission policy of a public school as the ultimate orbiter of whether or not a learner should be admitted to a public school.<sup>99</sup>

### 3.4. Adaptability of basic education

Refers to an educational system that is flexible to adapt to the needs of a changing society and respond to the quests of all learners within their diverse social and cultural settings.<sup>100</sup> This means that the state and its organs should adapt or adjust education to the needs of their community, and society.<sup>101</sup> Furthermore, adaptability is concerned with the question as to whether South Africa's education laws and policies are sufficiently flexible to respond to the needs of all learners, including those with disabilities. Thus, it encompasses educational access for children with special needs.

The Western Cape High Court, in the case of *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa*,<sup>102</sup> asserted a matter of children with severe or profound intellectual disabilities. This case dealt with adaptability of persons with severe disabilities to basic education. The Western Cape Forum catered for schools, centers and other services for 1200 children with intellectual disabilities in the Western Cape, but they did not receive any support or funding from the Department of Education.<sup>103</sup> However, the Department of Education argued that it only provided education for children with moderate to mild intellectual disability (IQ levels of between 35 and 70) but did not bear the responsibility to immediately provide education for profoundly intellectually impaired children, and furthermore, it argued that such children could not benefit from its education policy.<sup>104</sup> The court held that disabled children have been marginalized and ignored, denied their right to basic education and had had their dignity infringed.<sup>105</sup> It provided a supervisory order which directed the government to provide sufficient funds to organizations that offered services to children with severe disabilities to access basic education.<sup>106</sup>

### 4. Concluding remarks

The right to basic education is recognized under various international and regional instruments. They provide the right to basic education for everyone. Primary education is compulsory and freely available to everyone.<sup>107</sup> States have an obligation to provide compulsory primary education and make it available to every person under the age of 18 years. The same also applies to secondary education. The states must direct the education of the child to develop his or her talents, personality, mental and physical abilities.<sup>108</sup> The acquisition of these knowledge and skills can also be found outside the classroom. Comment No. 13 to the ICESCR provides the principles of education that must be fulfilled in order to provide education for all learners. They include availability, accessibility, acceptability and adaptability. Children with disabilities are also included and accommodated in the basic education. The African laws provides the right to basic education for all the children and impose an obligation on the states to allow every individual the freedom to choose to participate in the cultural life of his or her community.<sup>109</sup> The African child also has to be educated

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<sup>99</sup> Ibid, para. 81.

<sup>100</sup> T. Boezaart, "A Constitutional Perspective on the Rights of Children with Disabilities in an Educational Context", (27) 2 *SAPL*, 2012, p. 463 - 464.

<sup>101</sup> Ibid, p. 464.

<sup>102</sup> *Western Cape forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC); C. Ngweni and L. Pretorius, "Substantive Equality for Disabled Learners in State Provision of Basic Education: a Commentary on Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa", 28 (1) *SAJHR* 2012, p. 81.

<sup>103</sup> *Western Cape forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC), para 30.

<sup>104</sup> Ibid para 30.

<sup>105</sup> Ibid para 31.

<sup>106</sup> Ibid para 32.

<sup>107</sup> UDHR Article 26 (1); CRC Article 28.

<sup>108</sup> ICESCR Article 13.

<sup>109</sup> ACRWC Article 11, ACHPR Article 17.

to respect human rights and fundamental freedoms as well as international and African regional instruments dealing with human rights.<sup>110</sup>

The right to basic education is recognized in section 29 (1) (a) of the Constitution of the Republic of South Africa. This right is immediately available to children and does not depend on the availability of resources. The right to higher education is also recognized in the Constitution and the state must take all reasonable legislative and other measures to ensure that it is available and accessible to everyone according to merits.

The state experiences challenges when it tries to comply with the principles of basic education. The state has a duty to make basic education available to every child. The challenges experienced in this regard include lack of good infrastructures to provide basic education, including adequate buildings for schools, sanitation, toiletries, running/ or safe drinking water, scarce availability of study materials such as textbooks. Accessibility of education refers to the enrolment or education policy. Some learners struggle to get admitted in school in order to attend basic education. Pregnant learners may also take time to experience their parental responsibilities before being readmitted to schools. It is submitted that pregnant learners should be allowed to resume their basic education as soon as reasonably possible after giving birth to their babies. This can promote the right to basic education for female learners.

Acceptability refers to the admission policy of the schools. Some children experience challenges to get admission to schools. The often occurs in suburbs as many children and parents live in the cities for work purposes or other issues. Adaptability of basic education means that the government must take all necessary and reasonable measures to include the person with disabilities in basic education. It is submitted that South Africa still strives to provide the right to basic education to every child. Some robust measures must be taken to improve the right to basic education for learners in South Africa.

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