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Faculty of Law

LL.M. Thesis

An evaluation of whether South Africa fulfils the requirements of the International Covenant on Economic, Social and Cultural Rights: To what extent is South Africa obliged to realise the right to basic education, and to what extent is South Africa meeting those obligations?

by

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I. INTRODUCTION

The right to education is often described as being an empowering right, because when it is guaranteed, it enables the realisation of various other human rights.¹ This is illustrated by the fact that education empowers people to find work, which in turn opens up financial opportunities that enable them to afford homes, provide food for themselves and their families, and get help for any health-related issues.² Nelson Mandela acknowledged the importance of education when he stated that:

‘[e]ducation is a great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that a son of a mineworker can become the head of the mine, that a child of a farm worker can become a president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another.’³

In order to be able to enjoy the great opportunities that accompany education,⁴ and so that the realisation of other human rights is not denied, education must be made available to all people.⁵ Education is a critical tool if everybody is to have the same chances in life, regardless of one’s background.⁶

This thesis examines whether South Africa is in compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR), an international treaty that aims to strengthen the right to education. The scope of the obligations regarding the right to basic education must be assessed, as should South Africa’s compliance with those. This thesis assesses South Africa’s compliance with the ICESCR in particular, as it is in various aspects one of the most unequal societies

¹ UNESCO ‘The Right to education’ 2006, available at <https://unesdoc.unesco.org/ark:/48223/pf0000147125>, accessed on 28 February 2021 at 1; Richard Pierre Claude ‘The Right to Education and Human Rights Education’ (2005) 2 SUR International Journal on Human Rights at 37.

² See L Arendese ‘The Obligation to provide free basic education in South Africa: An international law perspective’ (2011) 14(6) *Per* at 101; Katarina, Tomaševski *Human rights obligations: making education available, accessible, acceptable and adaptable* (2001) at 10.

³ Quote taken from goodreads ‘Long Walk to Freedom Quotes’ available at <https://www.goodreads.com/work/quotes/2501119-long-walk-to-freedom-the-autobiography-of-nelson-mandela>.

⁴ Sharon E Lee ‘Education as a Human Right in the 21st Century’ (2013) 21(1) *Democracy & Education* at 1.

⁵ Tomasevski op cit note 2 at 10; CESCR ‘General Comment no. 11: Plans of Action for Primary Education (Art 14)’ 10 May 1999, U.N. Doc. E/1992/23 para 4.

⁶ White Paper on Education and Training GN 196 in GG 16312 of 15 March 1995.

in the world.⁷ The causes of this intolerable state of South African society include the different levels of education that were afforded to people during Apartheid.⁸ While South Africa has had a problem guaranteeing people the right to education for decades, it is evident that especially during the period of Apartheid, education was weaponised to divide people into classes and to grant opportunities only to certain citizens. This led to the complete exclusion of some, depriving them of any real prospects.⁹ The history of education in South Africa is explained in chapter II in order for the reader to fully understand the inequality of Apartheid education, and to outline the importance of education for every South African.

As the importance of the right to education is also recognised by many declarations, treaties and other documents at the international level, a brief overview of these is given in chapter III. Following this, due to the centrality of the ICESCR, chapter IV shows when and how international law is applied in national law in South Africa, and to what extent obligations exist at the international level. Subsequently, the relevance of this treaty for South Africa and the extent to which South Africa has committed itself to it will be discussed.

The ICESCR is then addressed in chapter V in more detail, including the definition of education, the different forms of education set out in the ICESCR, the obligations under the ICESCR, and the monitoring mechanism. In the following chapter the core questions of the thesis are dealt with, namely: To what extent is South Africa obligated by the ICESCR with regard to the provision of basic education, and to what extent is South Africa meeting those obligations? Answering these questions is done by identifying the existing situation in South Africa, partly on the basis of court cases, but also from reports from non-governmental

⁷ David Francis, Edward Webster 'Inequality in South Africa' (2019) 36(6) *Development Southern Africa (Sandton, South Africa)* at 733; Mondli Hlatshwayo et al 'Womxn's Work and Income Inequality in South Africa' (2020) at 12; The World Bank 'The World Bank in South Africa' 10 October 2019, available at <https://www.worldbank.org/en/country/southafrica/overview>, accessed on 28 February 2021; Raj Mestry 'A critical analysis of the learners' constitutional rights to basic education in South African public schools' (2017) 82 *Koers (Potchefstroom, South Africa)* at 1.

⁸ *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) (14 October 2009) para 45; *ibid* Mestry at 1.

⁹ Faranaaz Veriava 'Free to Learn, A discussion paper on the School Fee Exemption policy' in Leatt a, Rosa S (eds) *Towards a Means to Live: Targeting poverty alleviation to make children's rights real* (2005) at 1-2.

organisations and legislation. The so-called 4-A scheme is then used to assess whether the requirements of the ICESCR are being fulfilled.

II. HISTORY OF EDUCATION IN SOUTH AFRICA

The right to education is, as the South African Constitutional Court stated,

‘an important socio-economic right directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right. ...’¹⁰

Before the first permanent settlers arrived in South Africa, African societies had educational programmes that were mostly directed towards the fulfilment of their needs, thus although no school system as it is understood today existed, there was certainly education taking place.¹¹ When the European settlers came to Africa, this system was overthrown.¹² The settlers, who wanted to secure their future in their new environment, were considerably more aggressive about ‘owning’ assets and living space than the indigenous people.¹³ This led to the imposition of the settlers’ systems including, *inter alia*, a different educational structure.¹⁴

Before World War II, different education systems existed in South Africa,¹⁵ one of which was set up by the British authorities.¹⁶ By imposing a British education, they aimed to ensure that their culture and language would be established in the colony.¹⁷ Another system was created for people who did not want to follow the British curriculum, mainly because they feared losing their own heritage.¹⁸ These

¹⁰ *The Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) para 43.

¹¹ Ali A Abdi 'Apartheid and Education in South Africa: Select Historical Analyses' (2003) 27 *The Western Journal of Black Studies* at 89; Christie, Pam Christie *The right to learn: the struggle for education in South Africa* 2ed (1991) at 30.

¹² Abdi *ibid* at 90.

¹³ *Ibid* at 90.

¹⁴ *Ibid*.

¹⁵ Matthew McKeever 'Educational Inequality in Apartheid South Africa' (2017) 61 *American Behavioral Scientist* at 118.

¹⁶ Christie *op cit* note 11 at 34.

¹⁷ *Ibid*.

¹⁸ J D Omer-Cooper *History of Southern Africa* 2ed at 150; Christie *op cit* note 11 at 50.

people established their own system, called Christian National Education schools.¹⁹ The two systems were largely set aside for ‘white’ people,²⁰ thus a third kind of school was set up and governed by Christian missionaries for the indigenous population.²¹ Despite this, education was generally not made available for Africans,²² ie segregation in education was already in place before Apartheid was introduced.²³

Following the implementation of Apartheid in 1948, the Bantu Education Act of 1953 was enacted.²⁴ This piece of legislation had a tremendous influence on the South African educational system, as it made the government being in charge over the school system for ‘black’ South Africans.²⁵ These schools were mostly run by missionaries, with the Ministry of Bantu Affairs in charge of administration.²⁶ Because these schools were under the control of the government, they could be shut down when they did not comply with the aims of the Apartheid system.²⁷ Furthermore, the Minister of Education had the power over, *inter alia*, who was teaching and the teaching programme.²⁸ In 1957, the Minister of the Department of Native Affairs stopped granting subsidies to private African schools, which resulted in the closure of almost all of them.²⁹ The South African government at the time wanted to provide only the kind of education to ‘africans’ that would match the life opportunities they had foreseen for them, ie jobs in lower paying positions that would provide the required labour needed for its capitalist aspirations.³⁰ In this way,

¹⁹ Christie op cit note 11 at 50.

²⁰ Under Apartheid, people living in South Africa were divided into different racial groups: ‘africans’ (or ‘black’), ‘coloured’, ‘asian’ and ‘white’. As this distinction is necessary to understand the evolution of the South African educational system, those terms are being used despite the obvious political incorrectness.

²¹ Christie op cit note 11 at 36; Rowena Martineau 'Women and Education in South Africa: Factors Influencing Women's Educational Progress and Their Entry into Traditionally Male-Dominated Fields' (1997) 66 *The Journal of Negro education* at 384.

²² Christie op cit note 11 at 38.

²³ Ibid at 55.

²⁴ Abdi op cit note 11 at 91.

²⁵ Leonard Thompson *A history of South Africa* (2000) 3ed at 196.

²⁶ R Bentley Anderson “‘To Save a Soul’”: Catholic Mission Schools, Apartheid, and the 1953 Bantu Education Act’ (2020) 44 *Journal of religious history* at 150; UNESCO *Apartheid: its effects on education, science, culture, and information* (1962) at 31; Martineau op cit note 21 at 384.

²⁷ Pam Christie, Colin Collins 'Bantu Education: apartheid ideology or labour reproduction?' (2006) 18 *Comparative education* at 67.

²⁸ Ibid at 66-7.

²⁹ UNESCO op cit note 26 at 31-2.

³⁰ Christie & Collins op cit note 27 at 66, 70; Mestry op cit note 7 at 1.

the Education Act created a separation in society through schooling, which led to different opportunities to choose work and therefore different standards of living for the different racial groups. The dramatic difference in quality can be attributed in part to the varying amounts spent on schooling children in South Africa during Apartheid. It is estimated that the costs per pupil amounted to R1.88 for ‘blacks’, R13.37 for ‘coloureds’, and R32.88 for ‘whites’ for education in 1965.³¹

In 1959, the Extension of Universities Act was promulgated, which led to the exclusion of ‘black’ students from ‘white’ universities.³² Universities for ‘black’ people existed, but the state had complete power over those facilities.³³

The Coloured Peoples Act of 1963 was then created to put the education of ‘coloured’ people under the state’s control under the auspices of the Department for Coloured Affairs.³⁴ The Indians’ Education Act of 1965 followed, giving power over Indian children’s education to the Department of Indian Affairs.³⁵ All these Acts were enacted by the government in order to implement segregated development in the educational sector.³⁶

The high level of inequality under the Apartheid regime and its remaining consequences for South African society, including education, were recognised by the Constitutional Court in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*:

‘Apartheid has left us with many 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.’³⁷

³¹ UNESCO op cit note 26 at 41.

³² Christie & Collins op cit note 27 at 67; Thompson op cit note 25 at 197.

³³ Ibid.

³⁴ UNESCO op cit note 26 at 32-3.

³⁵ Ibid at 33.

³⁶ Ibid.

³⁷ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) (14 October 2009) para 45.

III. THE RIGHT TO EDUCATION ON AN INTERNATIONAL LEVEL

As can be observed from the history of South Africa, the right to education has a significant impact on each individual, but also on society as a whole. On an international level, the importance of the right to education has been recognised and protected in various treaties, as well as soft law documents. Existing instruments that protect the right to education to be enjoyed without discrimination include, for example, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief³⁸ and the Declaration on the Elimination of All Forms of Racial Discrimination.³⁹ In art 5(3) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, it is stated that a child should not be refused access to a certain school because of their faith. In the Declaration on the Elimination of All Forms of Racial Discrimination, art 3(1) requests that discrimination be prevented, *inter alia*, in the field of education, not only through omission, but also by demanding that ‘particular efforts’ be made. As the main target group of the right to education is children, this right is also enshrined in children’s rights instruments.⁴⁰ One of these is the Declaration of the Rights of the Child.⁴¹ Principle 7 provides that:

‘[t]he child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society. ...’

Another important document on the topic of education is the Convention on the Rights of the Child (CRC).⁴² As opposed to the other instruments mentioned above, the CRC ‘is a legally binding document’.⁴³ The CRC is overseen by the

³⁸ UNGA Resolution 36/55 of 25 November 1981.

³⁹ UNGA Resolution 1904 (XVIII) of 20 November 1963.

⁴⁰ Klaus Dieter Beiter *The protection of the right to education by international law: including a systematic analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights* (2006) 82 at 114-15.

⁴¹ UNGA Resolution 1386 (XIV) of 20 November 1959.

⁴² UN Convention on the Rights of the Child, 1989.

⁴³ Beiter op cit note 40 at 115.

Committee on the Rights of the Child, which obliges signatory states to submit reports on the realisation of the rights.⁴⁴ In art 28(1) of the CRC, it is laid down that:

‘States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all’

Article 28 of the CRC cannot be looked at in isolation, however,⁴⁵ as art 4 notes:

‘State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention. With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.’

Thus, to realise the right to education, the state parties must do everything within their power, which may be limited due to a lack of resources, to enforce the CRC.⁴⁶

Another instrument created to protect the right to education is the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴⁷ which is the main legal document referred to in this thesis. The ICESCR is part of the so-called International Bill of Human Rights. The International Bill of Rights also consists of the Universal Declaration of Human Rights (UDHR)⁴⁸ and the International Covenant on Civil and Political Rights (ICCPR).⁴⁹ As the first international instrument to establish that everyone has the right to education,⁵⁰ and by providing the foundation for the ICESCR,⁵¹ the UDHR was of great importance for the development of the right to education. Article 26(1) of the UDHR, which is non-binding as it is a resolution, states that, ‘[e]veryone has the right to education.

⁴⁴ Reporting guidelines regarding periodic reports are contained in UN Doc. CRC/C/58.

⁴⁵ Beiter op cit note 40 at 118.

⁴⁶ Ibid.

⁴⁷ International Covenant on Economic, Social and Cultural Rights (1966).

⁴⁸ Universal Declaration of Human Rights (1948).

⁴⁹ International Covenant on Civil and Political Rights (1966).

⁵⁰ Beiter op cit note 40 at 90.

⁵¹ Ibid at 94.

Education shall be free, at least in the elementary and fundamental stages.
Elementary education shall be compulsory. ...'

Article 26 also cannot be read without art 22 of the UDHR, which demands that positive measures be taken to realise people's right to education to the extent of the states' available resources. As the state parties are expected to fulfil their obligations from the UDHR as much as they can, this obligation grows with the states' capabilities to do so.⁵²

The other document that belongs to the International Bill of Human Rights is the ICCPR. Unlike the UDHR, which puts positive obligations on the state parties, the ICCPR ensures through art 18(4) that a state cannot interfere in a particular way. It states that: '[t]he States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.'

Article 2(3) of the ICCPR ensures that persons 'have an effective remedy' in case of a violation of rights that are recognised in the Covenant. Therefore, individuals as well as states have enforceable rights if an allegedly violating state has signed and ratified the Optional Protocol to the ICCPR.⁵³ Furthermore, the states have to write reports on what they have done so that their citizens can enjoy the rights of the Covenant according to art 40(1). The supervising body of those procedures, the Human Rights Committee, can also make General Comments due to art 40(4) of the ICCPR.

IV. THE APPLICATION OF INTERNATIONAL LAW IN SOUTH AFRICA

International law was first mentioned and acknowledged in a South African Constitution in the Interim Constitution of 1993.^{54,55} Under Apartheid, the government did not feel bound by international law and therefore violated it on many

⁵² Ibid at 92.

⁵³ Optional Protocol to the International Covenant on Civil and Political Rights (1966); *see* Beiter op cit note 40 at 103.

⁵⁴ The Interim Constitution of the Republic of South Africa, Act 200 of 1993.

⁵⁵ Michele Olivier 'Interpretation of the Constitutional Provisions Relating to International Law' (2003) 6(2) *Potchefstroom Electronic Law Journal* at 26.

occasions.⁵⁶ The final Constitution of 1996⁵⁷ incorporates international law in various sections. The most relevant sections for this paper are s 39(1)(b), s 231, and s 232. Section 39(1)(b) of the Constitution imposes the obligation on courts, tribunals, and forums to ‘consider international law’ when the Bill of Rights is being interpreted; s 232 states that customary international law is automatically law in South Africa; and s 231 deals with international agreements in terms of precisely who can make those agreements, when those agreements are binding, and how those agreements enter the domestic sphere.

A. Monism and dualism

In order to fully understand the impact of international law on the South African domestic level, the terms ‘monism’ and ‘dualism’ must be explained.

Monism and dualism describe how municipal legal systems are distinct in respect to how states treat international law on a domestic level.⁵⁸ According to monism, international law and municipal law are seen as forming one system.⁵⁹ Thus, when a treaty is concluded between states, ie on an international level, this treaty automatically becomes enforceable municipal law without any formal requirements or incorporation acts.⁶⁰ Contrary to this system, dualism considers international and domestic law to be two systems, which has the consequence that international law does not affect municipal law unless international law is ‘incorporated’ into it.⁶¹ To enforce international treaties, legislation with their content must have been passed by the signatory states at the domestic level.⁶²

Many states do not have a purely monist or dualist system, but rather have components of both systems in their Constitution.⁶³ South Africa belongs to this category of states. On the one hand, a monist element can be deduced from s 232 of

⁵⁶ Ibid; Werner Scholtz 'A few thoughts on section 231 of the South African Constitution, Act 108 of 1996: notes and comments' (2004) 29 *South African Yearbook of International Law* at 202.

⁵⁷ Constitution of the Republic of South Africa, 1996.

⁵⁸ See Anthony Aust 'Modern treaty law and practice' 3ed (2013) at 163-77.

⁵⁹ Scholtz op cit note 56 at 204.

⁶⁰ Ibid; Aust op cit note 58 at 163; G Ferreira, A Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 *Potchefstroom electronic law journal* at 1471.

⁶¹ Scholtz p cit note 56 at 205; Aust op cit note 58 at 167.

⁶² Aust op cit note 58 at 187; Ferreira & Ferreira-Snyman op cit note 60 at 1471.

⁶³ Aust ibid at 182.

the Constitution, which states that '[c]ustomary law is law in the Republic' without requesting any incorporating act by the state.⁶⁴ On the other hand, the dualist feature is identifiable through s 231(2) and s 231(4) of the Constitution, which demands that an international agreement must generally be approved by Parliament for it to become binding on the Republic, and that it must be 'enacted into law by national legislation' except for some self-executive provisions.⁶⁵

South Africa thus 'follows a dualist approach with regard to international agreements'⁶⁶ from which some issues can arise, for example when an international agreement has been ratified which imposes obligations on the state, but the state refrains from incorporating the international agreement in its domestic law.⁶⁷ In this situation, the state cannot avoid its responsibility towards its international obligations by referring to the errors in the incorporation process, because it has to ensure that its municipal law is in accordance with its obligations deriving from the international agreements.⁶⁸ Thus, the state is bound on the international level regarding the international agreement even if there is a failure in the implementation of it on the domestic level.

Another situation that can, and has, led to confusion, is the uncertainty surrounding what happens when the national executive ratifies an international agreement without the approval by resolution of parliament when such approval is needed, which means that it does not fall within the scope of s 231(3) of the Constitution.

Section 231(2) of the Constitution states that a resolution of the parliament is necessary to make an international agreement binding for the Republic. This means that if an international agreement must be ratified or accessioned, and is not an agreement in the sense of s 231(3) of the Constitution, it needs approval by resolution to be binding on the domestic level.⁶⁹ On the international level, however, it is only determining if there is an expression of consent as required by international

⁶⁴ Ferreira & Ferreira-Snyman op cit note 60 at 1472.

⁶⁵ Ibid.

⁶⁶ Ibid at 1476.

⁶⁷ Scholtz op cit note 56 at 205.

⁶⁸ Ibid; Franziska Sucker 'Approval of an International Treaty in Parliament: How Does Section 231(2) "Bind the Republik"?' 2013 *Constitutional Court Review V* at 427.

⁶⁹ Sucker op cit note 68 at 420.

law to make the international agreement binding.⁷⁰ Thus, if the executive acts according to international law but disregards its internal obligations deriving from s 231(2) of the Constitution, South Africa is bound on an international level.⁷¹ The binding effect in the international sphere is therefore not dependent on the approval by resolution by the South African parliament, as the internal laws of the states that are part of the international agreement are irrelevant on the international level.

Thus, the two situations that were described and examined above reflect that domestic law cannot be used to justify violations of international agreements.⁷² The basis for this is art 27 of the Vienna Convention on the Law of Treaties,⁷³ which reads as follows: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. ...’

It can thus be concluded that South Africa is bound to international treaties like the ICESCR when it commits to them internationally, ie even if there were issues with the incorporation of international law in domestic law, they would be irrelevant to the obligations at the international level.

B. The ICESCR in South Africa

South Africa signed the ICESCR on 3 October 1994, but only ratified it on 12 January 2015.⁷⁴ In the time between the signing and ratification, South Africa was ‘obliged to refrain from acts which would defeat the object and purpose of [the] treaty’, according to art 18 of the Vienna Convention on the law of treaties. This obligation had an impact on the final Constitution in so far as it made South Africa include economic, social and cultural rights⁷⁵ in it.⁷⁶

Furthermore, through s 39(1)(b) and s 233 of the South African Constitution, which states that ‘when interpreting any legislation, every court must prefer any

⁷⁰ Ibid; See *Glenister v President of the Republic of South Africa and Others* 2011 (7) BCLR 651 (CC) para 91.

⁷¹ Sucker op cit note 68 at 420.

⁷² Retselisitsoe Phooko ‘The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law’ 2018 (21) *PER / PELJ* at 18.

⁷³ Vienna Convention on the Law of Treaties (1969).

⁷⁴ Manisuli Ssenyonjo, ‘The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa’ (2017) 64 *Netherlands International Law Review* at 277.

⁷⁵ See for example op cit note 57 s 26 ‘Housing’, s 27 ‘Health care, food, water and social security’ and s 29 ‘Education’.

⁷⁶ Ssenyonjo op cit note 74 at 277.

reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’, it was ensured even before the ratification of the ICESCR that South Africa took its content into consideration on the domestic level.⁷⁷ An illustration of this can be seen in the case of *Juma Masjid*,⁷⁸ where the Constitutional Court used arts 13 and 14 of the ICESCR to deal with the right to education, even though the ICESCR had not been ratified at this point.⁷⁹

Despite South Africa’s ratification of the ICESCR,⁸⁰ no specific legislative implementation has taken place.⁸¹ However, this does not change the international obligations arising from the Covenant, as explained before, which means that South Africa has to interpret all existing legal provisions according to the requirements of the ICESCR.⁸²

In addition to the lack of specific incorporation of the Covenant, South Africa made a declaration upon ratification stating that ‘[t]he Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13 (2)(a) and Article 14, within the framework of its National Education Policy and available resources’.

This declaration was highly criticised, as can be seen by the joint statement made by SECTION27, Equal Education, the Centre for Child Law, the Legal Resources Centre, and the Equal Education Law Centre.⁸³ These organisations claimed that South Africa was trying to intentionally restrain people’s constitutional right to basic education in terms of promising ‘progressive’ rather than immediate realisation, as well as by promising ‘available resources’, which was explicitly

⁷⁷ Ibid at 277-8.

⁷⁸ *Juma* supra note 10 paras 40-3.

⁷⁹ Ssenyonjo op cit note 74 at 280.

⁸⁰ Supra note 73 arts 2(1)(b), 14(1), 16.

⁸¹ See International Commission of Jurists ‘International Commission of Jurists’ submission to the Committee on Economic, Social and Cultural Rights in advance of the examination of South Africa’s initial periodic report under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights’ 31 August 2018 para 17.

⁸² Ibid.

⁸³ SECTION27 ‘Education declaration mars ICESCR ratification’ available at <https://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/> accessed on 25 November 2020; see Robert Nanima ‘Four years following South Africa’s declaration upon the ratification of the ICESCR and jurisprudence on the right to basic education: A step in the right direction? (2019) 23 *Law Democracy & Development* at 277.

denied by the case of *Juma Masjid*.⁸⁴ The reservation expressed by the South African government concerning the right to education enshrined in the ICESCR thus conflicts with the South African Constitution.⁸⁵

South Africa did not sign or ratify the Optional Protocol to the ICESCR,⁸⁶ so there is no complaint mechanism for ‘individuals or groups of individuals, under the jurisdiction of a State Party’ when there has been an infringement of a right arising from the ICESCR.⁸⁷ Remarkably, the Optional Protocol includes the possibility that the violation of rights set out in the ICESCR can also be communicated to the Committee on Economic, Social and Cultural Rights (CESCR) by a third party on behalf of allegedly violated parties, even without their authorisation.⁸⁸ This advances the realisation of the rights arising from the ICESCR.⁸⁹

V. THE RIGHT TO EDUCATION IN THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The ICESCR is discussed in more detail in this chapter, including a definition of education according to the Covenant and an explanation of the different forms of education as per the ICESCR. Subsequently, the obligations of the ICESCR and the mechanism that exists to monitor compliance with these obligations are presented.

A. Definition of education in the ICESCR

There are many different definitions of the term ‘education’. In art 1(a) of the United Nations Educational, Scientific and Cultural Organization’s (UNESCO) Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms of 1974, it is stated that education implies:

⁸⁴ Ibid; *Juma* supra note 10 para 37.

⁸⁵ South African Alternate Report Coalition ‘Alternate Report to the UN Committee on the Rights of the Child in response to South Africa’s Combined 2nd, 3rd and 4th Periodic Country Report to the UN Convention on the Rights of the Child’ 2015 para 41.

⁸⁶ See Status of Ratification interactive dashboard ‘Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ available at <https://indicators.ohchr.org> accessed on 23 January 2021.

⁸⁷ Optional Protocol to the International Covenant on Economic, Social and Cultural rights (2009), art 2.

⁸⁸ Ibid.

⁸⁹ Irene Biglino, Christophe Golay ‘Academy in-brief no.2: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2013) 2 Geneva Academy of International Humanitarian Law and Human Rights at 11.

‘the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their person capacities, attitudes, aptitudes and knowledge.’

This wide definition is not generally used on an international level.⁹⁰ In that sphere, education is defined, rather narrowly, as ‘instruction imparted within a national, provincial or local education system, whether public or private’.⁹¹ In art 1(2) of the UNESCO’s Convention against Discrimination in Education of 1960, for example, education is defined as ‘all types and levels of education, [including] access to education, the standard and quality of education, and the conditions under which it is given’.

B. The different forms of education in the ICESCR

In this thesis, the fulfilment of South Africa’s obligation to provide basic education is examined. As the ICESCR only contains the terms ‘primary’, ‘secondary’, ‘higher’ and ‘fundamental’, these different terms of education must be explained.

Secondary education is meant to elaborate on the knowledge and skills that have been acquired through primary education.⁹² The goal is that after receiving secondary education, students can perceive either a career or ‘higher educational opportunities’.⁹³

Higher education provides more complex knowledge than secondary education, and aims to specialise people in certain areas.⁹⁴

To provide fundamental education is necessary for those who have not been equipped with their ‘basic learning needs’, as per the World Declaration on Education for All.⁹⁵ As everyone has this right, it is not restricted, which means that all people who have not received primary education have this right – adults as well as children.⁹⁶

⁹⁰ Beiter op cit note 40 at 19.

⁹¹ See *ibid*.

⁹² UNESCO Institute for Statistics: International Standard Classification of Education ISCED 2011 at 40.

⁹³ CESCR ‘General Comment No. 13: The Right to Education (Art.13)’ 8 December 1999, U.N. Doc. E/C.12/1999/10 para 12.

⁹⁴ Beiter op cit note 40 at 522.

⁹⁵ CESCR op cit note 93 para 23.

⁹⁶ *Ibid* para 23-4.

According to the CESCR, which bases its interpretation of the term ‘primary education’ on the World Declaration on Education for All, primary schooling is the major medium through which children are provided with basic education.⁹⁷ Moreover, the CESCR has taken on UNICEF’s stance in regard to the interrelation of the terms ‘primary education’ and ‘basic education’, noting that ‘[p]rimary education is the most important component of basic education’.⁹⁸ Hence, the CESCR does not use these terms synonymously, as it clarifies that everyone, not only children, are entitled to basic education.⁹⁹ To specify what basic education includes, the CESCR made reference to the World Declaration,¹⁰⁰ which states that:

‘[the basic learning needs] comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human being to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. ...’¹⁰¹

In South Africa, the term ‘basic education’ is not defined, although it is used in legislation and educational policies.¹⁰² Some argue that basic education is provided when ‘minimum levels of literacy, numeracy and essential life skills necessary to do more than menial work in a complex society’ are attained.¹⁰³ Thus, like the World Declaration definition, this approach bases its definition of basic education on the adequacy of the education transmitted and not on the time when school was attended or at which age.¹⁰⁴ One argument for this view is the wording of sec 29(1)(a) of the South African Constitution,¹⁰⁵ which states that ‘[e]veryone has the right to a basic education, including adult basic education’. This indicates that basic learning needs are usually provided through primary school, however these skills and knowledge can also be imparted to adults. Additionally, it is claimed by

⁹⁷ Ibid para 9.

⁹⁸ Ibid.

⁹⁹ Ibid para 23.

¹⁰⁰ Ibid para 22-3.

¹⁰¹ UNESCO, World Declaration on Education for All (1990), art 1.

¹⁰² See supra note 57 s 29; *White Paper* op cit note 6 chap 12 para 12; The South African Schools Act (1996), sec 3(1).

¹⁰³ Stu Woolman & Brahm Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994- 2008* (2009) at 113.

¹⁰⁴ Ibid; Chris McConnachie, Ann Skelton, Cameron McConnachie ‘The Constitution and the Right to a Basic Education’ in Faranaaz Veriava et al (eds) *Basic Education Rights Handbook* (2017) at 23.

¹⁰⁵ McConnachie & Skelton ibid.

several legal experts that the term ‘basic education’ originated in the World Declaration and is consequently to be interpreted as it is there.¹⁰⁶ Therefore, the term ‘basic education’ is used synonymously in the ICESCR and the South African context.

The right to basic education, as the main focus of this thesis, is to be seen as the education that produces basic knowledge so that those who receive it have a chance to live a self-determined life. Those basic skills include reading, writing and arithmetic, and are mainly provided by primary education. Therefore, this thesis is not exclusively concerned with primary education, but with the essential education and the circumstances of achieving it that everyone should receive.

C. Obligations

1. General obligations

To be able to understand the general obligations of the ICESCR, art 2 of the ICESCR has to be examined. Article 2 of the Covenant clarifies that the rights that are determined therein are generally supposed to be realised progressively, and that the state parties are obliged to use all of their ‘available resources’ to fulfil the rights laid down in the ICESCR. This shows that on the one hand, the ICESCR recognises that not all state parties can provide the full enjoyment of all of rights immediately and to the full extent, yet on the other hand, certain obligations of the ICESCR must be realised immediately.¹⁰⁷ One of these obligations is, according to art 2(1) of the ICESCR, ‘to take steps’, which means that the state parties must show actions towards the realisation of the rights of the ICESCR shortly after the Covenant comes into effect for the state party.¹⁰⁸ The steps are expected to be ‘deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant’.¹⁰⁹

¹⁰⁶ Ibid at 24.

¹⁰⁷ CESCR ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art 2, Para. 1, of the Covenant)’ 14 December 1990, U.N. Doc. E/1991/23.

¹⁰⁸ Ibid para 2.

¹⁰⁹ Ibid.

The obligation to progressively realise some of the rights enshrined in the ICESCR acknowledges the various circumstances of the state parties, nevertheless they are obliged ‘to move as expeditiously and effectively as possible’.¹¹⁰

Article 2(2) of the ICESCR prohibits the rights of the Convention from being exercised in a discriminatory manner. The prohibition of discrimination is subject to immediate realisation as it is one of the core principles of international human rights law.¹¹¹

The CESCR also dictates that the state parties are obliged to guarantee the ‘minimum core’ of the rights of the ICESCR,¹¹² ie the state parties must at least fulfil the very essence of the rights laid down in the ICESCR.¹¹³ Consequently, it is a violation of the ICESCR if there is not even some form of the rights provided. Due to the different situations of the state parties with regard to their available resources, the fulfilment of the minimum core must be assessed accordingly.¹¹⁴

2. Specific obligations

According to the CESCR, the right to education must under no circumstances be discriminatory or unequally exercised.¹¹⁵

Primary education, which is ‘the most important component of basic education’,¹¹⁶ must be generally granted immediately as per the CESCR.¹¹⁷ This is the case because primary education is broadly seen on the international level as a minimum core obligation, and therefore must be prioritised so it can be provided immediately and for free.¹¹⁸ By prioritisation, the CESCR means that ‘each State party [has] to take the necessary steps “to the maximum of its available resources”’.¹¹⁹ Thus, the non-fulfilment of a minimum core obligation is only justified if it can be shown that all available resources have been exhausted in order

¹¹⁰ Ibid para 9.

¹¹¹ CESCR ‘General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights’ 2 July 2009, U.N. Doc. E/C.12/GC/20 paras 1,7.

¹¹² CESCR op cit note 107 para 10.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ CESCR op cit note 93 para 31.

¹¹⁶ See ibid para 9.

¹¹⁷ Ibid para 51.

¹¹⁸ Ibid; LN Murungi ‘Inclusive basic education in South Africa: Issues in its conceptualisation and implementation (2015) 18 PER/PELJ at 3176.

¹¹⁹ CESCR op cit note 107 at 10.

to comply with the obligation.¹²⁰ The mere assertion that a state party cannot fulfil the minimum core obligation because of budgetary constraints is therefore not sufficient.

Furthermore, state parties of the ICESCR have the obligation ‘to respect, protect and fulfil’ the right to education.¹²¹ This means that state parties must refrain from doing anything to make the right to education less realisable; to ensure that no interference from others, that is opposed to the right, is occurring; and to support the bearers of the right through ‘positive measures’.¹²² Generally, state parties must provide the rights enshrined in the ICESCR when it is impossible for the right-holders to realise them themselves.¹²³ Regarding the right to education, mainly states are responsible, thus they have to take action towards the fulfilment of this right.¹²⁴ It must be pointed out that the obligation to fulfil is different depending on which form of education is being discussed, which can be drawn from the wording of art 13(2).¹²⁵ Nevertheless, all forms of education shall be available, accessible, acceptable and adaptable.¹²⁶ The details of those aspects are set out in chapter VI.

D. Monitoring mechanisms

The implementation of the ICESCR is monitored by the CESCR,¹²⁷ which was established in 1985 by the United Nations’ Economic and Social Council (ECOSOC).¹²⁸ The treaty party governments that suggest the 18 members of the Committee have no right to give orders to them,¹²⁹ thus the members can act independently.¹³⁰ These experts examine the reports that governments have to submit

¹²⁰ Ibid.

¹²¹ CESCR op cit note 93 para 46.

¹²² Ibid para 47.

¹²³ Ibid.

¹²⁴ Ibid para 48.

¹²⁵ Ibid.

¹²⁶ CESCR op cit note 93 para 6; ECOSOC ‘Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33’ 13 January 1999, U.N. Doc E/CN.4/1999/49 para 50-74.

¹²⁷ Fons Coomans ‘The Role of the UN Committee on Economic, Social and Cultural Rights in Strengthening Implementation and Supervision of the International Covenant on Economic, Social and Cultural Rights’ (2002) 35(2) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* at 182.

¹²⁸ ECOSOC, *Resolution 1985/17*, 28 May 1985, U.N. Doc. E/RES/1985/17.

¹²⁹ Coomans op cit note 127 at 183.

¹³⁰ Ibid.

to ECOSOC according to arts 16 and 17 of the ICESCR.^{131,132} In order to obtain sufficient information from the state parties that is reported in a standardised way, the CESCR has established guidelines for those reports.¹³³ In addition, for the CESCR to get the whole picture regarding the fulfilment of the obligations of the state parties, it can reach out to non-governmental organisations to gather deeper insights.¹³⁴ The involvement of these non-governmental organisations is also regulated by guidelines.¹³⁵ Based on the information received through the reports and meetings, in which state representatives are expected to participate, the CESCR draws up its concluding observations.¹³⁶ In these conclusions, the CESCR lays out to what extent the state parties have acted positively or negatively regarding their fulfilment of the rights of the ICESCR, as well as how the implementation of those rights could be improved.¹³⁷

The CESCR also introduced a procedure for monitoring what the state parties have done or are doing ‘with regard to the suggestions and recommendations of the concluding observations’.¹³⁸

In the case of non-compliance of state parties to submit reports, the CESCR observes and evaluates the fulfilment of economic, social and cultural rights on all alternative sources that can provide adequate information, ie reports from NGOs.¹³⁹ This approach is followed because of the concerns that the credibility of the functioning of the monitoring mechanism might be eroded otherwise.¹⁴⁰

¹³¹ Ibid.

¹³² ICESCR supra note 47 arts 16, 17.

¹³³ See Report of the Secretary-General ‘Compilation of guidelines on the form and content of reports to be submitted by States parties to the international human rights treaties’ 3 June 2009, U.N. Doc. HRI/GEN/2/Rev.6 at 7-16, 26-42.

¹³⁴ CESCR ‘Report on the Forty-Fourth and Forty-Fifth Session’, 2011, U.N. Docs. E/2011/22 - E/C.12/2010/3 para 52; op cit 129 at 184.

¹³⁵ CESCR ‘Report on the Forthieth and Forty-first Sessions’ 2009, U.N. Docs E/2009/22- E/C.12/2008/3, annex VIII.

¹³⁶ Report op cit note 134 paras 29-30.

¹³⁷ Coomans op cit note 127 at 184.

¹³⁸ See CESCR op cit note 139 paras 106.

¹³⁹ See CESCR ‘Report on the Twenty-second, Twenty-third and Twenty-fourths Sessions’ 2000, U.N. Doc. E/2001/22 - E/C.12/2000/21 at 23, 154.

¹⁴⁰ Ibid para 47.

VI. THE OBLIGATIONS OF THE ICESCR REGARDING BASIC EDUCATION AND THEIR FULFILLMENT

A. The approach for evaluation

In order to evaluate the extent to which South Africa is obligated by the ICESCR concerning the provision of basic education, which is mainly provided through primary education, and South Africa's compliance with those obligations, the 4-A scheme is applied in this paper. The 4-A scheme and its key aspects are explained first, following which the situation in South Africa regarding basic education is described according to different categories related to the right to basic education. In order to present the situation as extensively as possible, court cases, legislation, reports of non-governmental organisations and other relevant documents are used. The aspects are then assessed individually and in detail based on the 4-A scheme.

B. The 4-A scheme

The 4-A scheme was established by the former Special Rapporteur on Education of the United Nations, Katarina Tomaševski.¹⁴¹ It states that education must be available, accessible, acceptable and adaptable.¹⁴²

1. Availability

There are two obligations for governments regarding the availability of education.¹⁴³ The first of these is that governments are obliged to allow non-state actors to create their own institutions to provide education and to establish and/or fund educational institutions or find other ways to guarantee the availability of education.¹⁴⁴ Yet while governments are not the sole funding source for elementary schools, they bear the ultimate responsibility of providing the necessary financial means.¹⁴⁵ If the government cannot provide those means, it is not in breach of its obligation to make education available because the law cannot request the impossible.¹⁴⁶ Although third parties must be permitted to establish their own schools, the government must ensure that certain standards, particularly the quality of the provided education, are met

¹⁴¹ Ibid at 2.

¹⁴² Tomaševski op cit note 2 at 13.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid at 17.

¹⁴⁶ Ibid at 19.

within those institutions.¹⁴⁷ An obstacle to the availability of education is a government's power to shut down educational institutions, for example because the teachers are spreading ideas that are not in line with the government's agenda.¹⁴⁸ Therefore, availability incorporates the obligation of the states to take precautions against such an abuse of power.¹⁴⁹

Furthermore, availability includes the educational institutions being equipped in a certain way, for example they have to provide shelter from the elements, offer sanitary facilities, and ensure adequate learning materials.¹⁵⁰ The extent of the required infrastructure of the institution depends on the available resources – in some countries buildings and books are sufficient, whereas in other countries libraries and computers have to be made available.¹⁵¹

2. Accessibility

Education must be accessible for everyone, which presumes that discrimination must be omitted, that the institutions or programmes have to be physically accessible, and that everybody has to be able to afford an education.¹⁵² In terms of physical accessibility, it must be ensured that the institution can be reached without physical danger, or, if this is not possible, must be provided differently, for example through remote learning.¹⁵³ Moreover, education has to be made economically available.¹⁵⁴ This means, according to art 13(2) of the ICESCR, that primary education shall be free, and secondary and higher education shall progressively be made free.

3. Acceptability

Education has to be made acceptable for the learners and, if appropriate, the parents of the learners.¹⁵⁵ This means that respect must be shown regarding the religious, moral, or other persuasions of the learner and/or their parents when providing education.¹⁵⁶ For example, to meet the specific requirements of acceptability of

¹⁴⁷ See *ibid* at 18; see *op cit* note 93 para 6(c).

¹⁴⁸ Tomaševski *op cit* note 2 at 19.

¹⁴⁹ *Ibid*.

¹⁵⁰ CESCR *op cit* note 93 para 6(a).

¹⁵¹ *Ibid*.

¹⁵² *Ibid* para 6(b).

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid* para 6(c).

¹⁵⁶ Tomaševski *op cit* note 2 at 29.

minority groups, governments have to let them establish schools that provide education that takes into account their languages and religions.¹⁵⁷ Furthermore, the aspect of acceptability includes the quality of the education imparted.¹⁵⁸ With regard to the quality of education as well as health and safety in schools, a minimum standard must be ensured by the state parties in order to meet the requirements of the ICESCR.¹⁵⁹

4. Adaptability

To fulfil the requirement of adaptability, education must be inclusive for all learners.¹⁶⁰ This is especially important for students who have special needs, such as disabled persons.¹⁶¹ Therefore, education has to be supplied in a manner that adapts to the circumstances in which the student is situated.¹⁶²

C. Immediate realisation: *Governing Body of Juma Masjid Primary School and Others v Essay N.O. and Others*

One of the more remarkable cases concerning the right to basic education in South Africa is *Juma Masjid Primary School and Others v Essay NO and Others* case (*Juma* case).¹⁶³ This case primarily revolved around the question of whether there is an obligation of a private property owner towards the right to basic education under s 29(1)(a) of the Constitution. The court ruled that non-state actors have a constitutional obligation, arising from s 8(2) of the Constitution, ‘not to impair the learners’ right to a basic education’.¹⁶⁴ Contrary to the positive obligation of state actors, this is solely a negative obligation.¹⁶⁵

However, this decision of the Constitutional Court is of importance for this thesis for another reason, as the Court clearly states in paragraph 37 of the judgement that the right to basic education is ‘immediately realisable’.¹⁶⁶ As there is no limitation included in s 29(1)(a) of the South African Constitution, the right to basic

¹⁵⁷ See Ibid.

¹⁵⁸ Ibid at 13.

¹⁵⁹ Ibid at 12-3, 29.

¹⁶⁰ Ibid at 31.

¹⁶¹ Ibid.

¹⁶² CESCR op cit note 93 para 6(d).

¹⁶³ *Juma* op cit note 10.

¹⁶⁴ Ibid para 60.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid para 37.

education ‘may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ...’¹⁶⁷ In this respect, the right to basic education is distinct from the other socio-economic rights of the South African Constitution. The other socio-economic rights can be limited in a way that the state is only obliged to provide ‘reasonable legislative measures, within its available resources, to achieve the progressive realisation of the right’.¹⁶⁸ Thus, the Constitutional Court claims that there is no justification for referring to the right to basic education being constrained by the fact that there are not enough resources and that it can only be realised progressively.

The Court in the *Juma* case also made clear that there is a distinction between the different levels of education.¹⁶⁹ Further education is laid down in s 29(1)(b) of the South African Constitution and must, in contrast to basic education, only be made ‘progressively available and accessible’. Thus, further education falls into the category of other socio-economic rights in terms of its possibilities regarding limitations.

In subsequent judgements, other courts also rejected the justification of not granting the right to basic education simply due to financial difficulties based on this decision.¹⁷⁰

The ICESCR imposes the requirement of immediacy as the CESCR states that primary education, being the ‘most important component of basic education’,¹⁷¹ must be realised immediately.¹⁷² Through the *Juma* court decision, South Africa is in compliance with this requirement of the ICESCR regarding basic education. With regard to the 4-A scheme, it must be noted that basic education is made available and accessible by this landmark decision. It confirms that the South African judiciary also considers the realisation of the right to basic education to be guaranteed

¹⁶⁷ According to art 36(1) of the South African Constitution.

¹⁶⁸ *Juma* supra note 10 para 37.

¹⁶⁹ Ibid.

¹⁷⁰ For example, in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 74; *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM) para 35.

¹⁷¹ See op cit note 93 para 9.

¹⁷² Ibid para 51.

immediately, and thus places the same requirements on the right to education as the ICESCR.

D. School Fees

As was illustrated in chapter II, the educational system during Apartheid was unequal and discriminatory. One of the obstacles to obtaining a quality education as a ‘non-white’ learner was poor funding by the state, which saw the budget for ‘black’ learners being 20 times less than for ‘white’ learners.¹⁷³ Until today, there are still enormous differences in schools’ financial assets,¹⁷⁴ thus the effects of the systematic disadvantages in terms of education of people of certain races can still be experienced years after the Apartheid educational system was abolished.

1. No-fee schools

The South African government began to address the issue of inequality in education in 1996 through the South African Schools Act (SASA).¹⁷⁵ According to s 21 of the SASA, schools are allowed to request the payment of school fees.¹⁷⁶ This provision would seem to encourage the exact opposite effect to the intention regarding equality, but as South Africa was not in a financial situation to be able to provide an adequate schooling system for all learners, the government felt the need to allow school fees to be requested from people who could afford them.¹⁷⁷ Thus, by reducing the need for public funding for schools that could sustain themselves through school fees and fundraising, for example, the government aimed to provide more financial support to poor schools.¹⁷⁸ Therefore, all South African schools can request school fees, except so-called no-fee schools.¹⁷⁹ In order to be able to divide public schools into different categories and to set up norms and standards in terms of public funding in those categories, the Education Laws Amendment Act 24 of 2005 was passed.¹⁸⁰

¹⁷³ OECD *Publishing Reviews of national policies for education* (2008) at 152.

¹⁷⁴ Raj Mestry 'A critical analysis of the National Norms and Standards for School Funding policy: Implications for social justice and equity in South Africa' (2014) 42 *Educational management, administration & leadership* at 852.

¹⁷⁵ The South African Schools Act, 1996.

¹⁷⁶ Yusuf Sayed, Shireen Motala 'Equity and ‘No Fee’ Schools in South Africa: Challenges and Prospects' (2012) 46 *Social policy & administration* at 675.

¹⁷⁷ OECD op cit note 173 at 156.

¹⁷⁸ Ibid; Sayed & Motala op cit note 176 at 673.

¹⁷⁹ Mestry op cit note 174 at 852; no-fee schools are defined in Amended Norms and Standards for School Funding in GN 869 GG 29179 of 31 August 2006 para 156.

¹⁸⁰ Mestry ibid at 859.

Section 3 of this Act obliges the Minister of Education to ‘determine national quintiles for public schools and national norms and [minimum] standards for [public] school funding’. There are five different quintiles of which quintile 1 is the poorest, scaling up to quintile 5 which are the schools with the most financial means.¹⁸¹ Schools in quintiles 1, 2, and 3 are no-fee schools.¹⁸² To be able to determine which schools should receive public funding, the National Norms and Standards for School Funding (NNSSF) requires the Minister of Education to determine which schools will be considered non-fee schools for the following year.¹⁸³ For the Minister of Education to be able to do so, paras 101 and 102 of the NNSSF lay out the obligation to deliver the ‘school poverty scores’ of all public schools in their provinces, as well as how this must be done, by the Provincial Education Departments (PEDs). To rank the schools according to a poverty score, data from Statistics South Africa (StatsSA) should be used¹⁸⁴ ‘to inform three different indicators of poverty: income; dependency ratio (or unemployment rate); and level of education of the community (or literacy rate)’.¹⁸⁵ The communities on which the school poverty scores are based are the communities that are located geographically around the respective schools.¹⁸⁶

This approach to set the school poverty score, especially the determination of the national quintiles, has been criticised, because the communities surrounding the schools are not always indicative of the amount of government support that is actually needed.¹⁸⁷ This can lead to unjust outcomes for learners who do not reside in a school’s community, for example having to at least initially pay school fees despite coming from a background for which the no-fee schools were initiated, or learners whose backgrounds allow them to pay school fees being exempted from being charged those.¹⁸⁸ In addition, some no-fee schools charge a registration fee as a prerequisite for a learner to be allowed to enrol at the school.¹⁸⁹ This constitutes a

¹⁸¹ See op cit note 173 at 151; Sherylle Dass, Amanda Rinqest ‘School Fees’ in Faranaaz Veriava et al (eds) *Basic Education Rights Handbook* (2017) at 146.

¹⁸² Ibid.

¹⁸³ NNSSF op cit note 179 para 157.

¹⁸⁴ Ibid para 101 (b).

¹⁸⁵ Ibid para 102 (b).

¹⁸⁶ Ibid para 101 (a).

¹⁸⁷ Mestry op cit note 174 at 863.

¹⁸⁸ Ibid.

¹⁸⁹ Dass & Rinqest op cit note 181 at 153; Cally Ballack “‘No-fee’ schools turn away children who can’t pay’ *GroundUp*, 14 January 2019, available at <https://www.groundup.org.za/article/no-fee-schools-turn-away-children-who-cant-pay/>, accessed on 04 January 2021.

violation of s 39(5) of the SASA, which reads: ‘No public school may charge any registration, administration or other fees, except school fees as defined in section 1.’

2. Fee Exemption Policy

In order to grant children whose parents cannot pay the school fees, either in part or in their entirety, access to schools within quintiles 4 and 5, South Africa has a fee exemption policy in place.¹⁹⁰ According to this policy, there are automatic exemptions for certain people, for example for those who have custody over an orphan.¹⁹¹ In the absence of any of the automatic exemptions, a full, partial or conditional exemption may be granted based on the low income of the parent or parents.¹⁹² Moreover, the fee exemption policy states that the School Governing Body (SGB) must inform a parent of the sum they have decided must be paid for the child to be allowed to attend the school.¹⁹³ The SGBs have the obligation to advise the liable persons of the possibility of an exemption of school fees and the steps that are necessary to achieve this.¹⁹⁴ In the event that the exemption is not granted, the parents have the right to appeal to the Head of the Department of Education to contest the decisions of the SGBs.¹⁹⁵ In order to guarantee that the exemption from the fees or the appeal against the decision of the SGB are not denied due to any problems the parents of the learners face regarding the application and appeal procedures that are necessary to obtain the exemption, the schools are obliged to assist the parents in these processes.¹⁹⁶

There have been issues with the implementation of this policy, however. In 2018, GroundUp, a news agency, reported on a case where parents who could not afford to pay the school fees because of the loss of their business were not informed about their right to apply for a fee exemption, and were faced with debt collectors sent by the school to confiscate household items to collect the outstanding school

¹⁹⁰ Regulations relating to the Exemption of Parents from Payment of School Fees in Public Schools in GN 1052 GG 29311 of 18 October 2006.

¹⁹¹ Ibid s 1; NNSSF op cit note 179 para 165-6; Department of Basic education ‘School fees and exemption’ available at <https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolFees.aspx>, accessed on 03 January 2021.

¹⁹² Regulations op cit note 190 s 6(2)(3)(4).

¹⁹³ Ibid s 3(1)(a).

¹⁹⁴ Ibid.

¹⁹⁵ Ibid s 8.

¹⁹⁶ Ibid s 9.

fees.¹⁹⁷ This constitutes a violation of s 3(1)(a) of the regulations relating to the Exemption of Parents from Payment of School Fees in Public Schools, as well as a violation of s 41 of the SASA. The Amendment of s 41 states that a public school can ‘enforce the payment of school fees ... only after it has ascertained that (a) the parent does not qualify for exemption from payment of school fees in terms of this Act’¹⁹⁸ This and similar unlawful practices of schools disregarding the fee exemption policy have been reported multiple times.¹⁹⁹ Another common violation of this policy is the denial of exemptions although parents were entitled to them.²⁰⁰ Additionally, the organisation Equal Education reports that some schools are trying to dissuade parents from seeking a waiver of school fees by pointing out in the application forms that the requested exemption would come at the expense of the fee paying parents.²⁰¹ The public schools that demand school fees use this to shame the parents who cannot afford the fees, because the compensation by the government for the fee exemptions is not taking place or is very restricted.²⁰² Thus, the schools either receive a smaller or no contribution at all for the non-fee paying learners.²⁰³

3. 4-A scheme evaluation

Article 13(2) of the ICESCR states that primary education must be free of charge. The wording of the article is very clear about the general prohibition of public schools to charge school fees.²⁰⁴ Indirect costs such as registration fees or textbook costs can also constitute a violation of the right to primary education.²⁰⁵ Whether or not this is the case is decided by the CDESCR when considering individual cases.²⁰⁶ In the instance that this general obligation to provide free primary education cannot be fulfilled immediately, the state parties concerned are nevertheless obliged to

¹⁹⁷ Siphon Mzakwe ‘Schools ignore the law when enforcing payment of school fees’ 19 June 2018, available at <https://www.groundup.org.za/article/schools-ignore-law-when-enforcing-payment-school-fees/>, accessed on 24 January 2021.

¹⁹⁸ Amendment of s 41 of Act 84 of 1996 by the Education Laws Amendment Bill of 2005.

¹⁹⁹ See Veriava op cit note 9 at 9, 10; See Head of Department Western Cape Education Department and Others v S 2018 (2) SA 418 (SCA); Elin Martinez “*Complicit in Exclusion*” *South Africa’s Failure to Guarantee an Inclusive Education for Children with Disabilities* (2015) at 30.

²⁰⁰ Veriava ibid at 10; *Head of Department* case ibid para 83(4); Mestry op cit note 7 at 5.

²⁰¹ Dass & Rinquest op cit note 181 at 153.

²⁰² Ibid at 152.

²⁰³ Ibid.

²⁰⁴ CDESCR op cit note 5 para 7.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

establish a ‘plan of action’ that determines in detail how this obligation will be met as soon as possible.²⁰⁷ The plan must be developed within two years after the ICESCR is ratified and must be turned into reality ‘within a reasonable’ time.²⁰⁸ Thus, the fact that South Africa does not provide free universal primary education does not mean that there is a violation of the ICESCR, however the failure of South Africa to develop a ‘plan of action’ for the removal of school fees, despite having ratified the ICESCR in 2015, does.²⁰⁹

South Africa has made considerable progress in terms of economic access to schools with the quintile system and the fee exemption policy,²¹⁰ yet despite these positive developments, there are still many obstacles to the access of basic education. One issue is the ranking system of the quintiles. Some learners, especially those in rural areas, must commute long distances to attend school, and are therefore not included in the radii that are considered for the quintile rankings of their schools.²¹¹ Moreover, not every learner attending a school represents the wealth status of the community around the school.²¹² This is an issue that mostly arises in urban areas; it is often the case that communities adjoining each other are extremely different in terms of their prosperity.²¹³ Alexandra and Sandton, as well as Yeoville and Houghton, are examples of such unequal neighbourhoods in Johannesburg, South Africa. A school that specifically demonstrates the inappropriateness of the quintile approach is King Edward VII Preparatory School in Houghton, Johannesburg. This school is prestigious and can therefore charge very high school fees, whereas Yeoville, which is avoided even during the day by many people from Johannesburg, begins just across the street. Thus, the immediate vicinity of schools is often not indicative of the financial situation of the learners and their parents.²¹⁴ A more

²⁰⁷ Ibid at 7-8.

²⁰⁸ Article 14 ICESCR; CESCR op cit note 5 para 10.

²⁰⁹ Amnesty International *Broken and Unequal: The State of Education in South Africa* (2020) at 101.

²¹⁰ SECTION27 op cit note 181; Regulations op cit note 190.

²¹¹ Daniel McLaren ‘Funding Basic Education’ in Faranaaz Veriava et al (eds) *Basic Education Rights Handbook* (2017) at 67; Parliamentary Monitoring Group ‘Department of Basic Education on Quintile system & budget allocation’ 25 August 2020, available at <https://pmg.org.za/committee-meeting/30934/>, accessed on 02 February 2021.

²¹² IOL ‘Calls intensify for education dept to scrap quintile rank system’ 25 November 2018, available at <https://www.iol.co.za/sunday-tribune/news/calls-intensify-for-education-dept-to-scrap-quintile-rank-system-18250382>, accessed on 02 February 2021.

²¹³ Amnesty International op cit note 209 at 91.

²¹⁴ Ibid; H van Dyk, CJ White ‘Theory and practice of the quintile ranking of schools in South Africa: A financial management perspective’ (2019) 39 *South African Journal of Education* at 6.

appropriate system for determining quintiles would be to base the assessment of the support that is needed by schools on the learners themselves, as proposed by Mr. Kama in a meeting of the Standing Committee on Education.²¹⁵ Through this approach, schools with financially disadvantaged learners would be ranked more appropriately regarding the support that is required for them.

Furthermore, the prohibition on charging school fees is circumvented by some schools, despite being non-fee schools or having attendees who are entitled to fee exemptions.²¹⁶ This is accomplished through ‘indirect costs’ such as registration fees and the illegal denial of fee exemptions. Therefore, the economic accessibility that is required by the ICESCR is not provided in these cases. These indirect costs, which deny learners access to primary education, violate their right to education as set out in the ICESCR.²¹⁷ The steps of making schools fee-free and introducing the fee exemption policy were necessary to make sure that even children from the poorest backgrounds have the opportunity to attend school. Primary education, being one of ‘the most basic forms ... of education’, is, according to the CESCR, the minimum core of the right to education and must be ensured for everybody.²¹⁸ If the state does not comply, it will be in breach of one of its obligations under the ICESCR.²¹⁹ There is no justification for denying people access to primary education, which occurs when fees are required from people who cannot pay them.

The levying of school fees on people who can afford them is allowed by the ICESCR due to the government’s financial constraints,²²⁰ but by ratifying the Covenant, South Africa has committed to do its utmost to ensure that the right to free primary education for all is fully implemented, at least in the future.²²¹ Yet as South Africa has failed to even put a plan of action in place to fully guarantee this right for all in the future, the country is infringing the ICESCR.

²¹⁵ Parliamentary Monitoring Group op cit note 211.

²¹⁶ Dass & Rinquest op cit note 181 at 146; DBE op cit note 191.

²¹⁷ CESCR op cit note 5 para 7.

²¹⁸ CESCR op cit note 107 para 10; ESCR-Net ‘Minimum Core Obligations’ available at <https://www.escr-net.org/resources/minimum-core-obligations>, accessed on 01 February 2021.

²¹⁹ CESCR *ibid*.

²²⁰ *Ibid*.

²²¹ CESCR op cit note 5 para 8.

E. Transportation

1. Situation in South Africa

The applicants in the *Tripartite Steering Committee v Minister of Basic Education*²²² case requested that schools transport learners to and from campus when this is necessary for learners to be able to access school.²²³ Plasket J pointed out that the provision of school transportation is important because of the great distance to schools for many students, as well as because of the dangers that learners face on their way to school.²²⁴ As Equal Education reported, learners have become victims of crime, including rape and murder, when walking from or to school.^{225,226} The main question in this case was whether the right to basic education included the right to be provided with transportation.²²⁷ To argue in favour of this, Plasket J referred to Kollapen J's judgment in the *Section 27 v Minister of Education*²²⁸ case, which stated that the right to basic education, 'in order to be meaningful, includes "such issues as infrastructure, learner transport, security at schools, nutrition and such related matters"'.²²⁹ He also pointed out, by citing the judgment made in *Trackstar Trading 256 (Pty) Ltd t/a Mth-Wethemba v Head of the Department of Transport, Province of the Eastern Cape*,²³⁰ that without the provision of transportation to schools many students would be unable to participate in school lessons.²³¹ Therefore, Plasket J argued that because everyone has the right to basic education, the state has the obligation to provide transport to learners if the educational facilities cannot be reached for financial reasons or due to distance.²³²

²²² *Tripartite Steering Committee and Another v Minister of Basic Education and Others* [2015] 3 All SA 718 (ECG).

²²³ *Ibid* para 10.

²²⁴ *Ibid* para 13.

²²⁵ Solminic Joseph, Julian Carpenter 'School Transport' in Faranaaz Veriava et al (eds) *Basic Education Rights Handbook* (2017) at 278.

²²⁶ *Ibid*.

²²⁷ *Tripartite* op cit note 222 para 2.

²²⁸ *Section 27 and Others v Minister of Education and Another* 2013 (2) SA 40 (GNP) para 22.

²²⁹ *Ibid* para 17.

²³⁰ *Trackstar Trading 256 (Pty) Ltd t/a Mth-Wethemba v Head of the Department of Transport, Province of the Eastern Cape & others* (ECG) unreported case no 3611/13 of 4 December 2014 para 12.

²³¹ *Tripartite* op cit note 222 para 19.

²³² *Ibid*.

The right to transportation is set out in the policy of the KwaZulu-Natal provincial government,²³³ which states that only learners who have a certain distance to their schools are eligible to request free transportation.²³⁴ On this aspect, Plasket J remarked that those kilometre indications are only approximate guidelines to determine what distances are unbearable for the learners to walk.²³⁵

Another issue which makes it clear that the right to education should include free transportation to school is that the students are otherwise not able to perform at their best.²³⁶ Because students are exhausted after having to travel long distances on foot and are also frequently exposed to bad weather conditions on their way to school, they often have difficulties concentrating.²³⁷ Additionally, the difficulty of reaching school leads to learners dropping out more often, delaying attending school until they are older, or not going at all.²³⁸ Consequently, the long journey to school is an obstacle to people exercising their right to education.

The National Learner Transport Policy was put in place on 23 October 2015 to address and eliminate the problems outlined above,²³⁹ yet according to Equal Education, the policy failed in certain aspects to fully achieve this goal.²⁴⁰ Equal Education argues, for example, that the identification of those learners who are intended to be granted transportation is not adequate.²⁴¹ Because of the failure in the National Learner Transport Policy to define the terms ‘needy’ and ‘long distance’, which are criteria to obtain transportation to school,²⁴² the provinces have interpreted these words differently, leading to significant differences in the application of the

²³³ See *Tripartite* op cit note 222 para 20.

²³⁴ Draft Learner Transport Policy: 2020 in Provincial Notice 41 *Provincial Gazette* 2180 of 16 April 2020 s 1(6)(2).

²³⁵ *Tripartite* op cit note 222 para 32.

²³⁶ Solminic & Carpenter op cit note 225 at 279; Equal Education ‘The Long Walk to School: The battle for free and safe scholar transport in South Africa’ available at https://equaleducation.org.za/wp-content/uploads/2016/07/TransportPoster_English_04.pdf, accessed on 15 January 2021; Katharine Hall ‘Children’s access to education’ in Maylene Shung-King et al (eds) *South African Child Gauge* (2019) at 243.

²³⁷ *Ibid.*

²³⁸ See *Tripartite* supra note 222 para 21.

²³⁹ National Learner Transport Policy in GN 997 *GG* 39314 of 23 October 2015.

²⁴⁰ Equal Education ‘National Learner Transport Policy a Step in the Right Direction – But Not Far Enough’ 25 January 2016, available at <https://equaleducation.org.za/2016/01/25/national-learner-transport-policy-a-step-in-the-right-direction-but-not-far-enough/>, accessed on 03 January 2021.

²⁴¹ *Ibid.*

²⁴² Policy op cit note 239 at 3.3.1.

policy.²⁴³ This is contradictory to the aim of the National Learner Transport Policy, which is to ‘provide ... a uniform ... framework of norms and standards regarding the governance and management of learner transport in South Africa. ...’²⁴⁴

Therefore, Equal Education requested in 2016 that a unified understanding of these terms be established.²⁴⁵ Equal Education also raised concerns about the lack of provisions in the National Learner Transport Policy regarding the implementation and how this policy is being overseen.²⁴⁶ Despite these criticisms, the National Learner Transport Policy has yet to be adjusted.

In order to ensure the implementation of the National Learner Transport Policy in KwaZulu-Natal, Equal Education approached the judiciary in 2017²⁴⁷ with the aim of urging the provincial Department of Education to make transportation available to and from 12 schools.²⁴⁸ In addition, Equal Education intended to point out how great the need was for the support of the provincial government in the provision of school transport.²⁴⁹ KwaZulu-Natal had the biggest issues with the transportation of learners;²⁵⁰ in 2013, 2.4 million learners had to walk to school – the most of all of the provinces.²⁵¹ Furthermore, the province had the highest percentage of learners who had to travel more than an hour to get to their educational institution.²⁵² The outcome of this approach was a court order that stipulated that 12 schools in the municipality of Nquthu would be provided with transportation by

²⁴³ Equal Education op cit note 240.

²⁴⁴ Policy op cit note 239 at 6.1.

²⁴⁵ Equal Education op cit note 240.

²⁴⁶ Ibid.

²⁴⁷ *Equal Education v MEC for Education: Kwazulu-Natal (KZP)* unreported case no 3662/17P of 17 November 2017; See Equal Education ‘Media Statement: Victory for EE in Scholar Transport Court Case!’ 7 November 2017, available at <https://equaleducation.org.za/2017/11/07/equal-education-media-statement-victory-for-ee-in-scholar-transport-court-case/>, accessed on 03 January 2021.

²⁴⁸ Ibid.

²⁴⁹ *Equal Education* op cit 247 applicant’s long heads of argument para 1.

²⁵⁰ Equal Education ‘Victory Statement: We Secure a Date for Release of Draft KZN Scholar Transport Policy For Public Comment’ 23 October 2019, available at <https://equaleducation.org.za/2019/10/23/victory-statement-equal-education-today-secures-a-date-for-the-release-of-the-draft-kwazulu-natal-scholar-transport-policy-for-public-comment/>, accessed on 03 January 2021.

²⁵¹ Statistics South Africa ‘National Household Travel Survey 2013, Statistical release P0320’ Table 4.5.

²⁵² Ibid.

April 2018.²⁵³ This component of the court order was complied with,²⁵⁴ however the other part of the agreement – to ‘publicly release[e] the provincial scholar transport policy’ by the end of December 2018 – was not fulfilled.²⁵⁵ Finally, on 16 April 2020, the Draft Learner Transport Policy was published by the KwaZulu-Natal Department of Education.²⁵⁶ There are still concerns about this policy however, as it does not appropriately address the transportation of learners with disabilities, as SECTION27 pointed out.²⁵⁷

Thus despite the progress that was made with the establishment of the National Learner Transport Policy, there are still shortcomings regarding learners’ transportation, for example many provinces do not make their policies accessible to the public.²⁵⁸ When the Human Sciences Research Council tried to obtain information about learner transport, it gave up after three months of trying.²⁵⁹ For this reason, it is largely unclear whether the provinces are fulfilling their obligations regarding this issue. Another problem with the National Learner Transport Policy is that since it is up to each province to implement it and there is no cooperation between the provinces, it is applied very differently in each region, including the distribution of funds.²⁶⁰

2. 4-A scheme

According to art 13(2)(a) of the ICESCR, ‘[p]rimary education shall be compulsory and available free to all’. This obligation includes both direct costs, ie school fees, and indirect costs, eg school transport costs.²⁶¹ In cases where the South African

²⁵³ *Equal Education* op cit note 247 court order.

²⁵⁴ *Equal Education* ‘Victory! Buses and Taxis arrive at Nquthu schools! #LongWalkToSchool’ 11 April 2018, available at <https://equaleducation.org.za/2018/04/11/equal-education-media-statement-victory-buses-and-taxis-arrive-at-nquthu-schools-longwalktoschool/>, accessed on 24 February 2021.

²⁵⁵ *Equal Education* op cit note 247 court order; see *EE* op cit note 250.

²⁵⁶ Draft Learner Transport Policy op cit note 234.

²⁵⁷ SECTION27 Submission ‘Kwazulu-Natal Learner Transport Policy: 2020’ 1 June 2020, available at <https://section27.org.za/wp-content/uploads/2020/06/Comments-on-KZN-Draft-Policy-FINAL-01-06-2020.pdf>, accessed on 17 January 2020.

²⁵⁸ *Equal Education*, *Equal Education Law Centre* ‘Joint Parallel report by Equal Education and Equal Education Law Centre to the United Nations Committee on Economic, Social and Cultural Rights for its Consideration of South Africa’s Initial State Party Report - 64th Session’ August 2018, para 11.

²⁵⁹ Parliamentary Monitoring Group ‘Learner Transport in South Africa: HSRC briefing’ 28 February 2018 available at <https://pmg.org.za/committee-meeting/25873/>, accessed on 17 January 2020.

²⁶⁰ *EE*, *EELC* op cit note 258 para 12; Parliamentary Monitoring Group ‘Learner Transport: Departments of Basic Education & Transport & Equal Education; with Deputy Minister’ 07 March 2018, available at <https://pmg.org.za/committee-meeting/25934/>, accessed on 12 February 2021.

²⁶¹ *CESCR* op cit note 5 para 7; see *Amnesty International* op cit note 209 at 91.

government does not provide free transport for learners who cannot afford it and whose homes are too remote from schools to reach them on foot, these students are economically and physically denied the right to a basic education.²⁶²

Moreover, the transportation of disabled learners is even more pressing as they are especially vulnerable. The lack of transportation denies them physical accessibility and is also discriminatory. Disabled children are often placed into so-called special schools, which are often in a far distance from the childrens' families and require additional costs regarding transportation,²⁶³ hence they are even more in need of free transportation. As state parties are obliged to ensure that all rights under the ICESCR are made available immediately without discrimination, these issues should have been resolved.²⁶⁴

Although the KwaZulu-Natal Draft Learner Transport Policy is advancing the right of learners to transportation, there are still certain aspects that need to be corrected or added, for example, the policy does not include provisions concerning inclusive education²⁶⁵ and related transportation specifics.²⁶⁶

F. Infrastructure

1. Furniture

a) The *Madzodzo* case²⁶⁷

In *Madzodzo v Minister of Basic Education*,²⁶⁸ the question was addressed of whether there was a breach of learners' rights to basic education, equality and dignity because the respondent did not provide 'adequate, age and grade-appropriate

²⁶² See CESCR op cit note 93 para 6(b)(ii), (iii).

²⁶³ Silomo Khumalo, Tim Fish Hodgson 'The Right to Basic Education for Children with Disabilities' in Faranaaz Veriava et al (eds) *Basic Education Rights Handbook* (2017) at 112.

²⁶⁴ See CESCR op cit note 98 para 43.

²⁶⁵ According to Murungi op cit note 118 at 3166 inclusive education is achieved when all learners, regardless of their specific needs receive adequate education without being separated from other learners or treated unequally.

²⁶⁶ SECTION27 'SECTION27 concerned that KZN draft learner transport policy is inadequate for learners with disabilities' 4 June 2020, available at <https://section27.org.za/2020/06/section27-concerned-that-kzn-draft-learner-transport-policy-is-inadequate-for-learners-with-disabilities/>, accessed on 30 January 2021.

²⁶⁷ *Madzodzo* supra note 170.

²⁶⁸ *Ibid.*

furniture'²⁶⁹ to schools in the Eastern Cape.²⁷⁰ The outcome of the application, which was brought to court by the parents of affected learners on 29 November 2012, was an agreement between the parties.²⁷¹ This agreement included the duty of the respondents to ensure that the concerned schools would have the requested desks and chairs on or before 16 January 2013.²⁷² It also contained the obligation of the respondents to 'ensure that a comprehensive audit to assess the furniture needs at all public schools in the Eastern Cape is conducted and finalised on or before 28 February 2013'.²⁷³ The respondents further committed in the agreement to ensure that all schools in the Eastern Cape would have the opportunity to request furniture until 21 January 2013.²⁷⁴ To make sure that all the schools knew about this opportunity, the respondents had to inform the schools on or before 1 December 2012.²⁷⁵ According to the agreement, the fulfilment of any and all requests had to be completed by June 2013.²⁷⁶

Due to a breach of the agreement by the respondents, the applicants approached the court again in August 2013.²⁷⁷ The number of applicants had increased because some schools had been excluded from the audit report that was used to notify schools regarding the provision of furniture.²⁷⁸

Some of the applicants' requests were met by another agreement on 26 September 2013,²⁷⁹ however the applicants had to refer the matter to the court a third time to obtain an order which stated that the schools would be furnished, as per the audit, within 90 days.²⁸⁰ There was no dispute regarding whether the absence of desks and chairs was infringing the learners' right to basic education, as it was evident to all parties that the right had been violated,²⁸¹ however the respondents

²⁶⁹ Ibid para 2.

²⁷⁰ Ibid.

²⁷¹ Ibid para. 3

²⁷² Ibid para 4.

²⁷³ See *ibid*.

²⁷⁴ Ibid para. 6

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid para 7.

²⁷⁸ Ibid.

²⁷⁹ Ibid para 8.

²⁸⁰ Ibid para 11.

²⁸¹ Ibid para 21.

claimed that they could not provide the furniture in a set time frame because of budgetary issues, so they requested an undetermined time for completion.²⁸²

This argument was rejected by Goosen J, who referred to the *Blue Moonlight* case²⁸³ where the court stated that measures are not unreasonable if there is a failure to take the fulfilment of an obligation into consideration when budgeting and planning.²⁸⁴ In Goosen J's view, the respondents had been aware of the needs of the schools for three years, so there had been sufficient time to plan the budget accordingly.²⁸⁵ Furthermore, he stated that the respondents had enough information for this purpose.²⁸⁶ He identified 90 days as being reasonable, although he was aware of the budgetary issues and therefore ordered that the schools in the Eastern Cape should get the requested furniture in this period after the respondents provided an audit of the required desks and chairs.²⁸⁷ In the event of the respondents not being able to comply with this order, Goosen J obliged the respondents to file an affidavit with detailed explanations of why they could not comply with the order and what they had done or would do to comply with the order in the future.²⁸⁸

Goosen J referred to the Constitutional Court in the *Juma* case,²⁸⁹ where it was made clear that the right to 'basic education' is 'immediately realisable and is not subject to the limitation of progressive realisation, as is the case with other socio-economic rights guaranteed by the Constitution'.²⁹⁰ Moreover, it expressed that infrastructure that is necessary for learners, such as 'schools, classrooms, teachers, teaching materials and appropriate facilities', is part of this right.²⁹¹ As the furniture within the scope of infrastructure, it should be provided immediately to fulfil the obligation of s 29 of the South African Constitution. Another outcome of the case was that budgetary issues do not exempt the responsible parties from their

²⁸² Ibid para 22.

²⁸³ *Blue Moonlight* supra note 170 para 74.

²⁸⁴ *Madzodzo* supra note 170 para 34.

²⁸⁵ Ibid para 35.

²⁸⁶ Ibid.

²⁸⁷ Ibid paras 40-1.

²⁸⁸ Ibid para 41.

²⁸⁹ *Juma* supra note 10 para 37.

²⁹⁰ *Madzodzo* supra note 170 para 16.

²⁹¹ Ibid para 20.

obligation, as fulfilling the requirement of providing basic education includes planning and budgeting beforehand.

b) 4-A scheme

The *Madzodzo*²⁹² case demonstrates that South African courts are aware of the international and national obligation to supply schools with equipment like desks and chairs. Through the 4-A scheme, South Africa, as a party to the ICESCR, is obliged to make education available, which includes the equipment needed for adequate learning.²⁹³ Chairs and desks are important for several reasons, including that sitting on the ground has a negative impact on learners' health due to their poor body position, which in turn can cause physical pain and affect a learner's concentration. Moreover, desks also make writing easier, as they serve as a suitable surface.

Although the CESCR recognises that state parties of the ICESCR have different financial situations and therefore different levels of obligation,²⁹⁴ the argument made by the respondents in the *Madzodzo* case²⁹⁵ did not apply, as it was evident that the budget for furniture was not available due to a lack of planning.

2. Textbook cases

a) *Section27 v Minister of Education*²⁹⁶

In 2012, no textbooks were made available for several schools in Limpopo.²⁹⁷ The first applicant, SECTION27, a public interest law centre, confronted the Department of Basic Education at the end of February 2012 about the lack of learning material after the school year had already started and demanded to be informed when to expect a supply.²⁹⁸ As the Department of Basic Education did not adhere to its promise that the books would be delivered in April at the latest, and postponed the date of delivery to 15th June, the applicants felt compelled to initiate legal action at the North Gauteng High Court.²⁹⁹ In the judgment, the question was addressed

²⁹² *Madzodzo* supra note 170.

²⁹³ CESCR op cit note 93 para 6(a).

²⁹⁴ CESCR op cit note 107 para 9.

²⁹⁵ *Madzodzo* supra note 170 para 22.

²⁹⁶ *Section27* supra note 228.

²⁹⁷ *Ibid* paras 15-6.

²⁹⁸ *Ibid* para 17.

²⁹⁹ *Ibid* paras 17-18.

whether the right to basic education was infringed by the non-delivery of the textbooks.³⁰⁰ In order to answer this question, the judge referred to statements made by the state regarding learners' access to textbooks, which clearly confirmed the importance of books for the realisation of the right to basic education and their indivisibility from each other.³⁰¹ The Department of Basic Education in Limpopo, for example, declared that all learners would be equipped with textbooks throughout the whole teaching period of 2011 to 2012.³⁰² Based on those 'policy statements of the State in respect of textbooks and their relationship to giving effect to the right to basic education', the judge ruled that the right to education includes the provision of textbooks and so the failure to provide them violated this right.³⁰³

b) *Basic Education for All v Minister of Basic Education*³⁰⁴

This court case also addressed the issue of the lack of textbooks for learners in Limpopo. In this case, the Department of Basic Education argued that it did not violate the right to basic education because it had already supplied around 97 per cent of the required textbooks.³⁰⁵ As in the *Section27*³⁰⁶ case, Tuchten J held that the right to basic education comprises the supply of school books.³⁰⁷ Furthermore, he held that the argument of the Department of Basic Education that only a few learners did not have access to textbooks was unsustainable, because according to s 29(1)(a) of the South African Constitution, everyone is entitled to the right to basic education.³⁰⁸ Hence, a failure to provide textbooks to even a single learner was enough to constitute an infringement of the right to basic education.³⁰⁹ In conclusion, the order was made that every learner had to be provided with textbooks so that their right to basic education was not violated.³¹⁰

³⁰⁰ Ibid para 21.

³⁰¹ Ibid para 23.

³⁰² Ibid.

³⁰³ Ibid para 25.

³⁰⁴ *Basic Education For All and Others v Minister of Basic Education and Others* 2014 (9) BCLR 1039 (GP).

³⁰⁵ Ibid para 44.

³⁰⁶ *Section27* supra note 296 para 25.

³⁰⁷ Ibid para 51.

³⁰⁸ Ibid para 52.

³⁰⁹ Ibid.

³¹⁰ Ibid para 82.

c) *The Minister of Basic Education v Basic Education for All*³¹¹ case

This case resulted from the fact that the Department of Basic Education (DBE) did not agree with the judgment of *Basic Education for All v Minister of Basic Education*, and therefore appealed.

The DBE attempted to justify the lack of textbooks by referring to difficulties concerning logistics and budgetary issues.³¹² The Department also claimed that the publishers did not have enough textbooks, so they could not be purchased.³¹³ Further, it argued that the DBE was not provided with the correct number of learners by the schools.³¹⁴ Finally, the DBE justified its shortcomings with the argument that the budget for the school equipment was R293 million short.³¹⁵

The court laid down that the necessity of textbooks to realise the right to basic education is undisputed,³¹⁶ but the DBE was convinced that this did not mean that every student had to have their own textbook.³¹⁷ According to the DBE, this would be an ideal that could not be claimed.³¹⁸

This assumption of the DBE of the content of the right to basic education was denied by the court, which stated that the DBE itself let affidavits be made that specified that every learner should get his or her own textbook. Additionally, the court referred to the DBE's 'Action Plan to 2014 – Towards the Realisation of Schooling in 2025'.³¹⁹ In the plan, it was clear that the government itself set out that the delivery of textbooks was not an ideal, but rather a standard that was laid down by the government itself.³²⁰

The attempt by the DBE to justify the failure of providing textbooks due to budgetary constraints was also refused by the court.³²¹ It made clear that the DBE could and should have planned its budget accordingly before the curriculum was

³¹¹ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

³¹² *Ibid* paras 22, 29.

³¹³ *Ibid*.

³¹⁴ *Ibid*.

³¹⁵ *Ibid* para 29.

³¹⁶ *Ibid* para 41.

³¹⁷ *Ibid*.

³¹⁸ *Ibid*.

³¹⁹ *Ibid* para 42.

³²⁰ *ibid*.

³²¹ *Ibid* para 43.

implemented, or at least within the three years of the ‘implementation period’.³²² The DBE never asserted that the necessary resources could not have been obtained even if the planning had been accurate.³²³

The court concluded that the shortcomings in the delivery of textbooks to learners infringed their ‘right to basic education, equality, dignity, SASA and s 195 of the Constitution’.³²⁴ Thus, this judgment once again provided certainty regarding the need for textbooks, as well as the need for planning. The court case further asserted that the learners who were not receiving textbooks were discriminated against because they were treated differently to other learners, without any justification for this distinction.³²⁵

d) 4-A scheme

The textbook cases above illustrate situations where South Africa did not fulfil its obligations to the ICESCR.³²⁶ The Supreme Court of Appeal took the same stance as in the *Madzodzo* case³²⁷ when it stated that the budgetary constraints existed due to failures in the planning for the budget and were therefore not justified.³²⁸ This view of the court is as per the requirements of the ICESCR, contrary to the demonstrated view of the Department of Basic Education which shows that the South African government has not been adhering to its obligations. The state parties must use as much money as possible to fulfil the rights of the ICESCR, ie they cannot spend their budgets on other items³²⁹ and claim that they have insufficient funds. Also, in the case of not providing all learners with textbooks, South Africa was violating art 2(2) of the ICESCR and discriminating against those learners. As the shortfall of textbooks only affected learners at no-fee schools, this discrimination impacted already socially disadvantaged learners.

As Amnesty International states, there are still several schools in South Africa that lack adequate learning materials such as textbooks.³³⁰ Therefore, it can be

³²² Ibid.

³²³ Ibid.

³²⁴ Ibid para 46.

³²⁵ Ibid para 48.

³²⁶ CESCR op cit note 93 para 6(a).

³²⁷ *Madzodzo* supra note 170 para 33-5.

³²⁸ *Minister of Basic Education* supra note 311 para 43.

³²⁹ CESCR op cit note 107 para 10.

³³⁰ Amnesty International op cit note 209 at 7-8.

concluded that violations of the right to education under the ICESCR are still taking place in South Africa.

3. Sanitation at schools

a) South Africa's situation

The issue of sanitation at South African schools has been highlighted in recent years in the most tragic way by the deaths of two 5-year-old learners.³³¹ One of the students, Michael Komape, fell into a pit toilet in which he subsequently drowned in January 2014 at Mahlodumela Lower Primary School in Chebeng.³³² This incident highlighted the intolerable conditions regarding the sanitation infrastructure in many schools in South Africa. It should be noted that this event took place even though the unacceptable conditions of the sanitation facilities at many South African schools were already known of.³³³ In 2012, evidence of the unsanitary and dangerous conditions was provided by SECTION27, which communicated with the Limpopo Department of Education about these issues.³³⁴ Furthermore, while the national Department of Basic Education was subsequently informed by the Limpopo Department of Education about the situation, no action was taken.³³⁵

The authorities' lack of action was not due to financial shortcomings, as there is evidence that in 2012 and 2013 budget was set aside to supply 66 schools with adequate sanitation.³³⁶ Rather, the failure was due to their inability to obtain signatures on service level agreements.³³⁷ This led to the money not being used, despite the urgent need.³³⁸

³³¹ Hlumela Dyantyi 'The indignity of pit toilet deaths: Michael Komape in 2014, now Lumk Mthethwa' *Daily Maverick*, 16 March 2018, available at <https://www.dailymaverick.co.za/article/2018-03-16-the-indignity-of-pit-toilet-deaths-michael-komape-in-2014-now-lumko-mkhethwa/>, accessed on 24 January 2021; Jay Bhagwan 'Toilets still the pits at schools despite deaths' *Independent Online*, 14 April 2018, available at <https://www.iol.co.za/capeargus/opinion/toilets-still-the-pits-at-schools-despite-deaths-14416824>, accessed on 14 January 2021.

³³² *Komape and Others v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC 18 paras 17, 21.

³³³ *Ibid* para 24.

³³⁴ *Ibid*.

³³⁵ *Ibid*.

³³⁶ *Ibid* para 25.

³³⁷ *Ibid*.

³³⁸ *Ibid*.

The inability to use available funds seems to be a trend, as there have been problems with the allocation of monies for years. The School Infrastructure Backlogs (SIB) grant, for example, was supposed to help implement the Minimum Norms and Standards for School Infrastructure, but throughout its existence, large amounts have been given back rather than spent.³³⁹

In the *Komape* case it was clarified that the right to basic education covers the availability of sanitary facilities at public schools, which must be secure and appropriate.³⁴⁰ The court ordered that all schools in Limpopo be supplied with toilets that are ‘easily accessible, secure and safe and which provide privacy and promote health and hygiene based on an assessment of the most suitable safe and hygienic sanitation technology’.³⁴¹

Despite this judgment, in 2018 another 5-year-old learner, Lumka Mthethwa, died in a pit toilet.³⁴² The extent of the government’s failure to provide adequate sanitation facilities is apparent when one considers that despite s 12(4) of the Regulations Relating to Minimum Norms and Standards for School Infrastructure, according to the Department of Basic Education’s 2020 report, there are still 3 164 public schools in South Africa with only pit toilets.³⁴³

In addition, the DBE’s report showed that there are at least 5 839 schools in South Africa that have an unreliable water supply, and 460 have no electricity.³⁴⁴ Equal Education called the accuracy of these figures into question however, as data collection by the national and provincial authorities is not sufficiently coordinated.³⁴⁵

³³⁹ Parliamentary Monitoring Group ‘ASIDI & Conditional Grant expenditure; Department of Basic Education, Umalusi, SACE: Auditor-General input’ 03 October 2017, available at <https://bit.ly/2wv64rd>, accessed on 14 January 2020; see Center for Economic and Social Rights, Institute for Economic Justice, SECTION27 ‘Joint Submission to the Committee on Economic, Social and Cultural Rights on the occasion of the review of South Africa’s first period report at the 64th Session’ October 2018 para 75.

³⁴⁰ *Komape* supra note 332 para 63.

³⁴¹ *Ibid* order 2.2.

³⁴² Dyantyi, Bhagwan op cit note 331.

³⁴³ Department of Basic Education ‘National Education Infrastructure Management System Standard Report August 2020’ available at <https://equaleducation.org.za/wp-content/uploads/2020/11/DBE-NEIMS-REPORT-2020.docx.pdf>, accessed on 14 January 2021, Table 5 A.

³⁴⁴ *Ibid* Table 3,4.

³⁴⁵ Equal Education ‘Statement: Latest provincial school infrastructure reports show some progress in delivery, but Education Departments are failing miserably to comply with the 2020 deadline of the Norms and Standards for public school infrastructure’ 25 November 2020, available at <https://equaleducation.org.za/2020/11/25/statement-latest-provincial-school-infrastructure-reports->

This is extremely problematic, as it is necessary to have all the facts if appropriate measures are to be taken.³⁴⁶

b) 4-A scheme

In order to fulfil the requirements of the ICESCR, schools must provide adequate sanitation facilities to make education acceptable for learners. This includes the safety of the facilities and preserving the privacy and dignity of the learners.³⁴⁷ South Africa is currently not fulfilling this obligation, however, as at least 3 164 schools still only have pit toilets. As these toilets are neither secure nor guarantee privacy or dignity, they constitute a violation of the ICESCR.

The view about the interrelation between the right to basic education and sanitation that the court in the *Komape* case took is in accordance with an independent expert who reports to the Human Rights Council, as well as the United Nation's Special Rapporteur on the right to education.³⁴⁸ The UN Special Rapporteur based their findings on the fact that poor sanitation at schools leads to learners falling ill and being unable to participate in classes.³⁴⁹

Adequate sanitation facilities are especially important for girls, as currently many do not attend school when they start menstruating,³⁵⁰ and a large number drop out of school completely.³⁵¹ The Special Rapporteur recommended in 2006 that the parties of the ICESCR should '[e]stablish efficient mechanisms for supplying sanitary towels to adolescent girls who so wish, especially in rural areas, and ensure

show-some-progress-in-delivery-but-education-departments-are-failing-miserably-to-comply-with-the-2020-deadline-of-the-norms-and-standards-f/, accessed on 26 January 2021.

³⁴⁶ Ibid.

³⁴⁷ U.N. Doc. A/75/178 op cit note 217 paras 31, 76, 95; Tomaševski op cit note 2 at 12-3.

³⁴⁸ Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque 'Promotion and Protection of all Human Rights, Civil, Political, Social and Cultural Rights, including the Right to Development' 1 July 2009, U.N. Doc. A/HRC/12/24 para 30; Report of the Special Rapporteur on the right to education, Koumbou Boly Barry, 20 July 2020, U.N. Doc. A/75/178 para 9-14.

³⁴⁹ U.N. Doc. A/HRC/12/24 ibid.

³⁵⁰ Ibid; UN Doc. A/75/178 op cit note 348 para 12; Karen, Jeynes 'Do 7 million SA girls miss school every month due to lack of sanitary pads' *African Check* 09 August 2016, available at <https://africacheck.org/reports/do-7-million-sa-girls-miss-school-every-month-due-to-lack-of-sanitary-pads/>, accessed on 11 February 2021.

³⁵¹ U.N. Doc. A/HRC/12/24 op cit note 348 para 30.

they can always have the use of the sanitation facilities they need' to make education available for female adolescent learners.³⁵²

In addition, the Department of Basic Education's 2020 report showed that 5 839 public schools in South Africa have an unreliable water supply.³⁵³ This is concerning as access to water is important when it comes to ensuring the right to education.³⁵⁴ If water is not being provided at all schools, the right to education under the ICESCR is being violated.

A further concern regarding adequate sanitation facilities at school is the ongoing Covid-19 pandemic, which has made hygiene in South African schools more urgent than ever before. As the coronavirus is often transmitted via hands, it is extremely important to wash one's hands frequently and thoroughly.³⁵⁵ If, of course, there is no water available at schools, one of the key ways to stop the transmission of the virus is unavailable to students and teachers alike. Due to the potential effects of the virus, the access of learners to education might be denied for a long time.

4. Overcrowding and teacher shortages

a) Current status

Amnesty International reported that when they visited schools in South Africa, they were faced with overcrowded classrooms.³⁵⁶ A classroom is considered overcrowded when more than 35 students are assigned to one teacher, which is the norm at 48 per cent of public schools in South Africa. This is according to a survey conducted amongst 101 school governing body representatives in Gauteng, the Eastern Cape and Limpopo by Amnesty International and the National Association of School Governing Bodies.³⁵⁷ This means that in addition to the lack of teaching materials, furniture and space, there are also issues with the number of teaching staff at South African schools. In the above-mentioned survey, 41 per cent of the participants noted

³⁵² Report submitted by the Special Rapporteur on the right to education, Mr. V. Muñoz Villalobos 'Girls' right to education' 8 February 2006, U.N. Doc. E/CN.4/2006/45 para 132.

³⁵³ DBE op cit note 343 Table 4.

³⁵⁴ Reports op cit note 348.

³⁵⁵ UNICEF 'Everything you need to know about washing your hands to protect against coronavirus (COVIC-19)' 23 March 2020, available at <https://www.unicef.org/georgia/stories/everything-you-need-know-about-washing-your-hands-protect-against-coronavirus-covid-19>, accessed on 20 January 2021.

³⁵⁶ Amnesty International op cit note 209 at 10.

³⁵⁷ Ibid.

that only a few schools, if any, have sufficient numbers of teachers.³⁵⁸ Moreover, this survey revealed that 54 per cent of the schools struggle to hire new teachers.³⁵⁹

The large numbers of learners per class and the lack of teachers were also pointed out by learners across South Africa as two of the biggest issues facing public schools.³⁶⁰

b) 4-A scheme

The state parties to the ICESCR are obligated to ensure that the education received by every child is of a certain quality.³⁶¹ The overcrowding of classes due to an insufficient number of schools and teachers is an indicator of the poor quality of the education many children are currently receiving.³⁶² This is because in overcrowded classes, less learning material can be covered, and it happens more frequently that there are acoustic difficulties with teaching, to mention just two issues.³⁶³ Unfortunately the problem of overcrowded classrooms looks like it will not be solved any time soon, as there is also the problem of a lack of teachers. As South Africa is thus not fulfilling its obligation to provide quality education, this means that it is violating the terms of the ICESCR.

5. Overall infrastructural situation in South Africa

This section shows how much remains to be done in terms of providing basic education in South Africa in terms of school infrastructure. The need to be able to set minimum requirements for the infrastructure of schools was recognised by the South African parliament, which incorporated s 5A into the South African Schools Act.³⁶⁴ This section states that:

‘[t]he Minister [of Basic Education] may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for – (a) school infrastructure; (b)

³⁵⁸ Ibid at 11.

³⁵⁹ Ibid.

³⁶⁰ Statistics South Africa ‘General Household Survey 2019, Statistic Release P0318’ at 17.

³⁶¹ CESCR op cit note 5 para 6; Tomaševski op cit note 2 at 12-3.

³⁶² CESCR ‘The right to education: Background paper submitted by World University Service (WUS)’ 24 September 1998, U.N. Doc. E/C.12/1998/15 para 12.

³⁶³ See Amnesty International op cit note 209 at 74.

³⁶⁴ Lorette Arendse ‘Slowly but surely: The substantive approach to the right to basic education of the South African courts post-Juma Masjid’ (2020) 20 African Human Rights Law Journal at 304.

capacity of a school in respect of the number of learners a school can admit; and (c) the provision of learning and teaching support material. ...³⁶⁵

Subsection 2 of s 5A of the South African Schools Act concretises what is meant by the terms of subsec 1, but does not exclude the possibility of extending this scope. Furthermore, s 58C of the South African Schools Act obliges the Executive Council to ensure that the norms and standards of s 5A of the South African Schools Act are being implemented.³⁶⁶

On 29 November 2013, the Ministry of Basic Education published its regulations based on s 5A of the South African Schools Act,³⁶⁷ however Equal Education had to make a significant effort to ensure that this publication was created.³⁶⁸

These regulations include requirements for basic infrastructural needs such as water and electricity, but also more ‘advanced’ needs such as internet connectivity and libraries.³⁶⁹ Timings for the implementation of the regulations were included, but varied according to the urgency of needs.³⁷⁰ The South African government committed to ensuring that all so-called ‘mud-schools’ would be replaced and that schools without electricity, water and sanitation would receive access by 29 November 2016.³⁷¹ The deadline to adhere to the norms and standards of the regulations regarding ‘classrooms, electricity, water, sanitation, electronic connectivity, and perimeter security’ was set for 29 November 2020 for all schools.³⁷² Furthermore, libraries and laboratories must be made available by 29 November 2023.³⁷³ The time limit for all the remaining norms and standards is 31 December 2030.³⁷⁴

³⁶⁵ Section 5A of the South African Schools Act 84 of 1996 as amended by Act 31 of 2007.

³⁶⁶ Ibid sec 58C.

³⁶⁷ Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure in GN 920 GG 37081 of 29 November 2013.

³⁶⁸ Equal Education ‘School Infrastructure’ available at <https://equaleducation.org.za/campaigns/school-infrastructure/>, accessed on 08 February 2021.

³⁶⁹ See supra note 367 s 16, 10.

³⁷⁰ See ibid s 4.

³⁷¹ See ibid s 4 (3)(a), (b) read with s 4 (1)(b)(i) as it should be read according to the court order of *Equal Education and Another v Minister of Basic Education and Others* 2019 (1) SA 421 (ECB).

³⁷² See ibid s 4 (3)(c) read with s 4(1)(b)(ii).

³⁷³ See ibid s 4 (3)(d) read with s 4(1)(b)(iii).

³⁷⁴ Ibid s 4 (1)(b)(iv).

The reports on the plans and the actual implementation of these obligations were made available to the public only after the Department of Basic Education was forced to do so by a court judgment.³⁷⁵ One report was published in 2018, where it was evident that the deadline of 29 November 2016 had not been met. According to the report there were still 269 schools without electricity, 37 without sanitation, and 4 358 schools with only pit latrines.³⁷⁶ In addition, the deadline of 29 November 2020 was not met, as the DBE's report from August 2020³⁷⁷ already suggested.³⁷⁸ There was no information provided regarding if there were sufficient classrooms, however there were still 460 schools without any electricity supply and 3 345 with an unreliable electricity supply.³⁷⁹ Moreover, at the time of the report, there were still 3 164 schools with only pit toilets.³⁸⁰ These toilets were already supposed to have been prohibited at schools, as s 12(4) of the 2013 Regulations states that '[p]lain pit and bucket latrines are not allowed at schools'.

It is also concerning that in three provinces, KwaZulu-Natal, Mpumalanga, and the Northern Cape, no-fee schools did not receive the minimum per learner amount (R1 466)³⁸¹ in 2020.³⁸² School allocations are the amounts that are determined each year and are assigned by the state to support public schools regarding expenses for 'non-personnel, non-capital expenditure items'.³⁸³ Due to the underfunding of the schools that already struggle the most, there is no prospect of

³⁷⁵ See *Equal Education* supra note 371 paras 154-5, court order 6., 7.

³⁷⁶ Department of Basic Education 'National Education Infrastructure Management System Standard Reports January 2018' available at <https://www.education.gov.za/Portals/0/Documents/Reports/NEIMS%20Report%20%2020172018.pdf?ver=2018-01-30-120305-787>, accessed on 6 December 2020; Parliamentary Monitoring Group 'Infrastructure and Rationalisation; Provincial Education Departments Reporting System review' 07 March 2017, available at <https://pmg.org.za/committee-meeting/24092/>, accessed on 08 February 2021.

³⁷⁷ DBE op cit note 343.

³⁷⁸ Ayanda Mthethwa 'Provincial education departments set to fail again to improve infrastructure at public schools' *Daily Maverick* 27 November 2020, available at <https://www.dailymaverick.co.za/article/2020-11-27-provincial-education-departments-set-to-fail-again-to-improve-infrastructure-at-public-schools/>, accessed on 27 February 2021.

³⁷⁹ DBE op cit note 343 at Table 3.

³⁸⁰ Ibid.

³⁸¹ This amount was published in the National table of targets for school allocation in GN 657 GG 43 145 of 27 March 2020 at 36.

³⁸² Parliamentary Monitoring Group 'Question NW1089 to the Minister of Basic Education and Ministers Reply' 13 July 2020, available at <https://pmg.org.za/committee-question/14011/> accessed on 15 January 2020.

³⁸³ Schedule National Norms and Standards for School Funding in GN 869 GG 29179 31 August 2006 para 87.

improvement in the infrastructure of the poorest South African schools. When the Minister of Basic Education was criticised for the lack of funding for schools, the possibility of making use of para 163 of the National Norms and Standards for School Funding was pointed out.³⁸⁴ This paragraph allows no-fee schools to request fees if the school allocation amount is not provided by the state. As the schools are no-fee schools because the background of the learners does not enable them to pay fees, this proposal seems unjust.

It is evident from the reports that South Africa is not fulfilling its obligations according to the ICESCR to make the necessary infrastructure available at schools, which is especially alarming as the Covid-19 pandemic has worsened the situation.

G. Skills achievement

1. Study results

The Progress in International Reading Literacy Study revealed that in South Africa, 46 per cent of the Grade 5 learners in 2017 did not reach the lowest benchmark of reading achievement. The same was true of 78 per cent of the 4th grade learners.³⁸⁵ When compared against international standards, only 4 per cent of global students did not achieve the lowest standard.³⁸⁶ According to the study, of 50 countries, South Africa has the most 4th grade learners who are not reaching the lowest level of reading skills.³⁸⁷ The lowest international benchmark is reached when learners can obtain information that is given within a simple text,³⁸⁸ ie it is missed if the learner cannot understand the meaning of a text or cannot reproduce the information provided in the text to answer questions about it.³⁸⁹

Through the South African report in the Progress in International Literacy Study, it became clear that the achievement of the respective benchmarks varied greatly depending on the quintile.³⁹⁰ Only 17.5 per cent of quintile 5 learners did not reach the low benchmark, whereas over 60 per cent of the learners in quintiles 1, 2,

³⁸⁴ Parliamentary Monitoring Group op cit note 382.

³⁸⁵ Ina V.S. Mullis et al 'PIRLS 2016 International Results in Reading' 2 ed (2017) at 56.

³⁸⁶ Ibid at 55.

³⁸⁷ Ibid.

³⁸⁸ Ibid at 59; Sarah Howie et al '*PIRLS Literacy 2016 Progress in International Reading Literacy Study 2016: South African Children's Reading Literacy Achievement*' 2017 at 72.

³⁸⁹ Ibid.

³⁹⁰ Ibid at 78.

and 3 did not.³⁹¹ Significant differences were also evident in other benchmarks, for example only 0.7 per cent of the quintile 1 learners reached the high benchmark, whereas 21 per cent of the quintile 5 learners achieved this level.³⁹² This shows that there are still significant differences in the quality of education depending on the background of the learner.

The Trends in International Mathematics and Science Study (TIMSS) conducted in 2019 showed that South Africa's Grade 5 learners also score very poorly in an international comparison when it comes mathematics and science achievements.³⁹³ In this study of 64 countries, South Africa was ranked the third lowest.³⁹⁴ The study also revealed that 63 per cent of South African Grade 5 learners did not have even basic mathematical knowledge as they did not reach the lowest benchmark.³⁹⁵ Regarding basic science knowledge, the percentage of learners who reached the lowest benchmark was only 28 per cent, ie 72 per cent had not achieved even a basic knowledge in this field.³⁹⁶ Considering the quintiles, a similar pattern emerged as in the Progress in International Literacy Study.³⁹⁷ In the no-fee schools, 76 per cent did not reach the lowest benchmark for mathematics achievement, while only 32 per cent of the fee paying learners did not reach this target.³⁹⁸ Regarding the science results, 86 per cent of no-fee paying learners compared to 40 per cent of the fee paying learners did not reach the lowest benchmark, which means that they did not have even a basic knowledge of science.³⁹⁹

2. 4-A scheme

It is evident from these studies that South Africa is not fulfilling its obligations to the ICESCR, which require that the state parties provide learners with an acceptable education. This would be the case if at least a minimum level of quality was being reached.⁴⁰⁰ With the knowledge that many learners who are already in Grade 5 still

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ See Vijay Reddy et al 'TIMSS 2019, Highlights of South African Grade 5 Results in Mathematics and Science, Achievement and Achievement Gaps' 2019 at 3.

³⁹⁴ Ibid.

³⁹⁵ Ibid at 5.

³⁹⁶ Ibid.

³⁹⁷ Ibid at 8.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Tomaševski op cit note 142 at 12-3.

cannot read for meaning and do not have basic knowledge in science and mathematics, this minimum level of quality is clearly not being provided by many schools in South Africa. It is also evident from the studies that there is still a big gap between the rich and poor schools regarding the achieved levels of knowledge.

H. Disabilities

1. South Africa's situation

In South Africa, the importance of education for disabled learners has been officially recognised as per s 12 of the SASA, as well as the Education White Paper 6 (EWP6)⁴⁰¹ which was issued in 2001 to implement the SASA.⁴⁰² Additionally, various guidelines have been produced regarding the necessary steps towards the realisation of adequate education for disabled learners.⁴⁰³ Moreover, the National Strategy on Screening, Identification, Assessment and Support (SIAS) policy was established in 2014.⁴⁰⁴

Yet despite the various documents that South Africa has put forward to fulfil the right to education of disabled students, there is still a long way to go until this becomes reality. This finding is based on, amongst other aspects, the numbers that the Department of Basic Education has provided regarding the school attendance of disabled children. According to 2001 estimations there were around 280 000 children with disabilities who were of mandatory school age, but did not attend school.⁴⁰⁵ In the following years this number increased; it is estimated that approximately 600 000 children with disabilities between the age of 5 and 18 did not go to school in 2014.⁴⁰⁶ One of the reasons for these high numbers is that children with disabilities are often put into so-called 'special schools',^{407,408} which are often far from the disabled

⁴⁰¹ The *White Paper 6: Special Needs Education, Building an Inclusive Education and Training System* (02 July 2001).

⁴⁰² Khumalo & Hodgson op cit note 263 at 117.

⁴⁰³ For example: Department of Basic Education 'Guidelines for Responding to Learner Diversity in the classroom through Curriculum and Assessment Policy statements' 2011; Department of Basic Education 'Guidelines to Ensure Quality Education and Support in Special Schools and Special-School Resource Centres 2014'.

⁴⁰⁴ Policy on Screening, Identification, Assessment and Support GN 1044 in GG 38356 of 19 December 2014.

⁴⁰⁵ *White Paper 6* op cit note 401 at 30.

⁴⁰⁶ Department of Basic Education 'Report on the Implementation of Education White Paper 6 on Inclusive Education: Overview of the Period 2013-2015' May 2016 at 21.

⁴⁰⁷ Khumalo & Hodgson op cit 263 at 110.

⁴⁰⁸ *Ibid* at 112.

learners' homes and therefore the costs for transportation are too high for their parents to be able to send their children there.⁴⁰⁹

Transportation costs are not the only problems for parents of disabled children, however. In 2019, after special schools were declared no-fee schools in Gauteng, only five out of the 128 were listed as such.⁴¹⁰ As discussed, special schools are often far away from the learners' homes, which again illustrates the problem with the use of the quintile system.⁴¹¹

In the event that disabled learners are placed into mainstream public schools, the learner is charged an additional fee.⁴¹² Further, disabled children often attend school later as they are put on waiting lists before they can attend special schools, which they are referred to by the government.⁴¹³

Yet even when learners have access to special schools, various issues negatively affect their education. Based on interviews with affected persons, Human Rights Watch revealed that there is a shortage of qualified teaching staff⁴¹⁴ and the standard of education in these schools is sometimes so poor that the learners leave without the ability to read and write.⁴¹⁵ This is because the learners are often not provided with the knowledge that is required by the National Curriculum Statement.⁴¹⁶ This is very problematic as disabled children should have the same opportunities as every other child, and be provided the same basic knowledge to be as independent as possible.

⁴⁰⁹ Human Rights Watch 'Submission by Human Rights Watch to the Committee on Economic, Social and Cultural Rights on South Africa' 30 August 2018; Khumalo & Hodgson op cit note 263 at 112.

⁴¹⁰ Human Rights Watch 'South Africa: Children with Disabilities Shortchanged' 24 May 2019, available at <https://www.hrw.org/news/2019/05/24/south-africa-children-disabilities-shortchanged>, accessed on 31 January 2021.

⁴¹¹ HRW op cit note 409 at 27; see Khumalo & Hodgson op cit note 263 at 112; *ibid.*

⁴¹² *Ibid.*

⁴¹³ HRW op cit note 199 at 37; Moira Levy 'Children with disabilities grow old waiting for schools' 12 July 2017, available at <https://www.groundup.org.za/article/children-disabilities-grow-old-waiting-schools/>, accessed on 28 January 2021; Parliamentary Monitoring Group 'Inclusive Education and Special Education: DBE Progress Report; with Deputy Minister' 30 May 2017, available at <https://pmg.org.za/committee-meeting/24505/>, accessed on 31 January 2021.

⁴¹⁴ HRW op cit note 410.

⁴¹⁵ *Ibid.*

⁴¹⁶ DBE op cit note 406 at 34; Judith McKenzie 'Intellectual Disability in Inclusive Education in South Africa: Curriculum Challenges' 2020 *Journal of Policy and Practice in Intellectual Disabilities* at 3.

An additional concern at some of these schools is the abuse of learners, which was mentioned in a report by the Department of Basic Education in 2015.⁴¹⁷

The poor implementation of inclusive education is another problem in South Africa, where many disabled children are sent to special schools instead of trying to integrate them into ordinary schools.⁴¹⁸ This is contrary to the aims of the Education White Paper 6 and the SIAS, which instruct that disabled children be placed in regular schools whenever possible.⁴¹⁹

2. 4-A scheme

With regard to disabled children, South Africa is in breach of its obligations under the ICESCR in several aspects, for example Article 2 states that there must be no discrimination against any learners. By having to pay more for their education, however, families of disabled children are discriminated against.⁴²⁰ This constitutes a violation of art 13 of the ICESCR, as education must be economically accessible for all learners.⁴²¹ In addition, the fact that some disabled children are put on waiting lists and cannot enrol in school when they reach school-going age means that they are deprived of access to basic education.

Furthermore, given the fact that there are still many issues with the implementation of inclusive education, South Africa is breaching its obligations to the ICESCR. The right to basic education includes the right of disabled children to attend, when adequate, ordinary schools, and be provided with the same education as children without disabilities.⁴²² As most disabled learners in South Africa are simply placed in special schools where the learners are not provided with basic educational knowledge, which makes it evident that the National Curriculum Statement is not being implemented, South Africa is violating its obligation of the ICESCR. The inferior quality of these schools also violates the ICESCR because the provided education is not acceptable.⁴²³

⁴¹⁷ DBE op cit note 406 at 7, 27.

⁴¹⁸ Op cit note 410;

⁴¹⁹ See Murungi op cit note 118 at 3172.

⁴²⁰ See Joint submission op cit note 339 para 51.

⁴²¹ CESCR op cit note 93 para 6 (b).

⁴²² CESCR 'General Comment no. 5: Persons with Disabilities' 9 December 1994, U.N. Doc. E/1995/22 para 35.

⁴²³ CESCR op cit note 93 para 6(c); Tomaševski op cit note 2 at 12-3.

I. Nutrition

1. Court case

In *Equal Education v Minister of Basic Education*,⁴²⁴ the applicants requested a court order to ensure that nine million children at quintile 1, 2 and 3 schools who were going to school or studying from home because of the Covid-19 crisis were provided with a daily meal. This was as per the government's National School Nutrition Programme (NSNP), which was established in 1994 to support learners in need by providing them with one nutritious meal per day.⁴²⁵ Because of the pandemic, this programme could not be implemented and therefore left those children without food whilst they were trying to learn.⁴²⁶

One of the issues of the court case was to determine whether the duty arising from s 29(1)(a) of the Constitution included the obligation to supply food to the learners. The respondents argued that this must be negated because the provision of nutrition is only covered by s 28(1)(c) of the Constitution.⁴²⁷ They denied that nutrition is a component of the right to basic education, arguing that 'the nutritional aspects of the NSNP [are] just a by-product of their duty to educate'.⁴²⁸ The court illustrated that this assertion was not accurate by referring to the state's own reports, in which the importance of nutrition in terms of the right to basic education and their inseparable connection are set out.⁴²⁹ Therefore, the court concluded that the respondents, under s 29(1)(a) of the Constitution, had both the duty to educate and the duty to provide nutrition.⁴³⁰

It was not disputed that the NSNP could not be implemented during the lockdown period, but when some schools reopened at the beginning of June 2020, only the children who were allowed to return to school received nutrition. This was despite the fact that several announcements were made before the re-opening of schools that no distinction would be made between the learners based on their

⁴²⁴ *Equal Education and Others v Minister of Basic Education and Others* 2021 (1) SA 198 (GP).

⁴²⁵ Department of Planning, Monitoring and Evaluation, Department of Basic Education 'Report on the Implementation Evaluation of the National School Nutrition Programme' 16 September 2016 at 1; see *Equal Education and Others* *ibid* para 17.

⁴²⁶ See *Equal Education and Others* *ibid* para 20.

⁴²⁷ *Ibid* para 35.

⁴²⁸ *Ibid* para 40.

⁴²⁹ *Ibid* para 38.

⁴³⁰ *Ibid* para 42.

learning environments.⁴³¹ Based on these facts, the court decided that the right to some children's basic education was being violated,⁴³² and ordered that all children enrolled in school be served one meal per day through the NSNP.⁴³³

In this way, the court made clear that it is wrong to distinguish between learners due to their learning environment. Regardless of their location, all learners must be fed so that they are able to concentrate and thus exercise their right to education. It is also worth noting that the court took the urgency and severity of the situation into account by ordering that the NSNP must be effected immediately for all learners.

2. 4-A scheme

As the right to education includes the right to a certain quality of education,⁴³⁴ the provision of food is covered by this. Given that a quality education can only take place if children can concentrate, they must be provided with food where necessary. It is a simple biological phenomenon that concentration sinks with a low level of sugar in a learner's body. The court ruling has thus ensured that South Africa complies with this obligation, which is positive with regard to the fulfilment of the right to education.

VII. CONCLUSION

In South Africa, the granting of the right to education has been problematic for decades. The education provided during the Apartheid era was racist and highly unequal, with education being instrumentalised to deny certain population groups opportunities for advancement and to exploit them as workers. This practice, which was carried out over many years, can still be observed today, as is illustrated by the fact that South Africa is one of the most unequal societies in the world.

The high value placed on education is evident in international law through many treaties and soft law instruments. This thesis closely examined one treaty in particular, the International Covenant on Economic, Social and Cultural Rights, which is supposed to guarantee the right to education. The ICESCR obliges state

⁴³¹ Ibid paras 69, 72.

⁴³² Ibid para 85.

⁴³³ Ibid para 103.2.

⁴³⁴ Tomaševski op cit note 2 at 13.

parties to realise the right to primary education immediately, as do the South African courts. By signing and ratifying this Covenant, South Africa committed itself to fulfilling its obligations. By looking at different aspects concerning basic education, this thesis shows how far-reaching the obligations of the right are. It further demonstrates to what extent South Africa is fulfilling these obligations, as well as its shortcomings.

One of the obligations arising from the ICESCR is that state parties must provide free access to primary education, thus it is positive that South Africa has no-fee schools and a fee exemption policy in place. To realise the right to free basic education, however, learners at the no-fee schools must also be exempted from 'indirect' costs, for instance for transportation or uniforms. In addition, the system for determining quintiles should be revised so that schools with learners from socially disadvantaged families receive sufficient support. This would be ensured, for example, through an assessment based on the learners themselves. Furthermore, the fee exemption policy needs to be fully implemented, including ensuring that the relevant persons are made aware of their right to it and are not held back by shaming measures made through the schools. Because South Africa does not have the financial resources to do so, it is not violating the ICESCR by not providing free education to all learners, however it is not fulfilling the requirement of the ICESCR to establish a plan of action to ensure free education in the future.

South Africa, being a state party to the ICESCR, must also guarantee that children have physical and economic access to schools, which includes transportation. In order to ensure this, South Africa introduced the National Learner Transport Policy, yet there are still students who do not receive free transport to school, even though it is necessary due to the distances and dangers they face. In addition, the policy, which is implemented by the provinces, is often implemented poorly or not at all with regard to disabled students. Further, some of the provincial policies cannot be assessed and improved if necessary, because they have not been made accessible to the public.

Furthermore, the ICESCR obliges state parties to make education available to all learners. In terms of infrastructure, this includes the provision of learning materials such as textbooks, as well as sanitary facilities. It has been argued in

various cases by the South African government that the provision of textbooks, chairs, desks or even sanitary facilities cannot be always fully guaranteed due to financial constraints, however several court cases have revealed that these financial shortages were mainly due to budgetary miscalculations and administrative incompetence in allocating funds. Therefore, the South African state must be called upon to improve these plans and, above all, to ensure that funds that are so urgently needed for the schools are not returned unused, but are fully utilised to not only ensure the provision of basic education, but also the protection of learners' health and safety.

The ICESCR requires not only the provision of education, but education of a certain quality. This cannot be guaranteed if classes are overcrowded and there is a shortage of teachers, however. As this is the case in 48 per cent of public schools in the three provinces in South Africa that took part in a study, this requirement is clearly not being fulfilled. While it is positive that the Uniform Minimum Norms and Standards for Schools Infrastructure have been implemented, which require certain infrastructural standards to be met within a set period, those deadlines have been missed so far. There is thus a need for strong advocacy for the future implementation of these regulations, as they will strengthen the implementation of the right to basic education in terms of the provision of water, electricity and other necessary infrastructure at schools.

Once again, the need for adequate sanitation facilities should be emphasised, as pit toilets in particular pose an unacceptable risk to children's lives. Furthermore, adequate sanitary facilities are urgently needed, especially in times of Covid-19, as the virus spread can be greatly reduced by hygienic measures.

The requirement of education being of a certain quality arising from the ICESCR is also not fulfilled in South Africa, as international studies show that the quality of education provided is among the worst in the world. In particular, the no-fee schools need to be improved so that these learners are taught at least the most basic skills in reading, writing and science. For a higher quality of teaching, the class sizes at these schools must be reduced and more teachers must be trained and made available.

The ICESCR further requires that all rights must be exercised without discrimination, yet South Africa violates this by charging disabled learners fees that they do not charge learners without disabilities. In addition, learners with disabilities are often denied access to schools for years, as they are put on waiting lists and have no opportunity to attend a school during this period. If these learners are then placed in 'special' schools, the education provided is in most cases insufficient to give the learners a basic education, which in turn is a violation of these students' rights.

Since the ICESCR requires that learners receive a quality education, in cases where learners do not receive sufficient food at home, it must be provided at schools so that they are able to concentrate on their schoolwork. South Africa is fulfilling this requirement, which is inseparable from the right to education, through the NSNP programme.

In conclusion, despite many positive steps having been taken towards the realisation of the right to basic education, South Africa is obliged by the ICESCR to take further steps to ensure this right for all learners.

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