The Scope and content of the rights to ‘Basic Education’ and its implementation in the Eastern Cape.

By

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Abstract

In terms of Section 29 (1) of the Constitution, everyone has the right to basic education. This right is not subject to ‘reasonable legislative and other measures, available resources and progressive realisation.’ The right to basic, compulsory education is widely regarded as a fundamental human right. For example, this right is included in a number of international human rights treaties such as the ‘Universal Declaration of Human Rights’, the ‘International Covenant on Economic, Social and Cultural Rights,’ the ‘African Charter on the Rights and Welfare of the Child’, the ‘Convention on the Rights of the Child’, the ‘Dakar Framework for Action: Education for All’, and ‘UNESCO Convention against Discrimination in Education’. The South African Constitution, however, does not clarify the content and scope of the right to basic education. Consequently, the Constitution has given the state wide discretion to determine the scope, nature and content of this basic right.

Apartheid left the South African education system fragmented and unequal. The South African educational system has gone through numerous curricula and institutional changes. The changes in the curriculum were part of the transformation process of the South African education system. In addition, the state has allocated substantial public funds towards basic education. However, the investment in basic education does not commensurate with the quality of teaching and learning in poor and marginalised schools. For example, several rural and farm schools in the Eastern Cape lacked toilet facilities; textbooks and other education support material; furniture; and other essential necessities. Education loses its transformative power when poor and marginalised schools continue to lack these essential services. Consequently, inequality is perpetuated and the poor and marginalised are unable to compete meaningfully in the social, economic and political life of South Africa. The mini dissertation concludes by recommending that the Department of Basic Education should ensure that all
schools, especially those in rural communities and farms, have access to textbooks, qualified teachers, clean water and toilet facilities and other essential necessities needed for the delivery of quality basic education.

**Key Words:** Rights to education, socio-economic rights, Children rights, Bill of Rights, Inequality and marginalisation, Children’s Rights, Eastern Cape Department of Basic Education, Transformation.
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BIBLIOGRAPHY
International Instruments


Universal Declaration of Human Rights (1948).
Legislation


Bantu Education Act of 1953.

Constitution of the Republic of South Africa.

Education Laws Amendment Act, No. 24 of 2005.


Extension of University Education Act 45 of 1959

Group Areas Act of 1950.


South African Schools Act, 84 of 1996.

CHAPTER ONE
THE GENERAL OUTLINE OF THE STUDY

1.1 Background of the study

In 1994, South Africa was confronted with extreme poverty, racial and gender inequality. The legacy of apartheid had far-reaching consequences, resulting in many people living in abject poverty and other distressing conditions. The policies perpetuated by apartheid were fragmented, discriminatory and deprived the majority of South Africans from accessing essential services. The Group Areas Act, 1950 for example, infringed on the right of black South Africans to access basic education.\(^1\) The Bantu Education Act of 1953 and the Extension of University Education Act 45 of 1959, was specifically designed to ‘perpetuate the inferior economic and social status of black persons, and to reproduce the racially segregated division of labour in South Africa.’\(^2\) To this end, Nkiyanka, stated that the ‘failure to provide access to education to all who desire it on terms that they regard as acceptable may call into question the government’s legitimacy and threatens its political survival.’\(^3\)

The adoption of the Interim Constitution in 1993,\(^4\) laid down the foundation on which a more equitable society could be built.\(^5\) To this end, Ngcobo J held in the case of Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism\(^6\) that:

South Africa is a country in transition ... This transition was introduced by the Interim Constitution, which was designed to create a new order ... in which there is equality between men, women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms ... Our constitutional order is committed to the transformation of our society from a grossly unequal society to one in which there is equality between men and women and people of all races.\(^7\)

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\(^4\)Act 200 of 1993.
\(^5\)Ibid.
\(^6\)Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 7 BCLR 687 (CC), 2004 4 SA 490 (CC).
\(^7\)Ibid.
The Bill of Rights in the Constitution of South Africa expressly provides for comprehensive treatment of socio-economic rights in an attempt to address the injustices of the past. The Bill of Rights provides for the rights of the child in terms of section 28(1); the right to education in terms of section 29(1); the right to access adequate housing in terms of section 26(1); and the right to health care and social security in terms of section 27(1). The inclusion of socio-economic rights in the Constitution demonstrates the commitment of the government of South Africa to create an equitable society. Therefore, Liebenberg argues that the inclusion of socio-economic rights in the Constitution of South Africa is closely linked to the survival and development of humans.\(^8\) The inclusion of socio-economic rights also requires that the state must ‘respect, protect, promote and fulfil the rights in the Bill of Rights.’\(^9\) Moreover, the inclusion of socio-economic rights in the Constitution is hailed as ‘one of the strongest national statements regarding such rights since they provide valuable tools for those wishing to enforce them.’\(^10\)

In 1994, the South African government adopted the ‘Reconstruction and Development Programme’ (RDP).\(^11\) This demonstrated the government’s commitment to the eradication of inequality and poverty in South Africa. The RDP provided the institutional framework on which a more equitable society could be built. The RDP framework focussed on: building the economy, meeting basic needs, developing human resources and democratising the state.\(^12\) The RDP framework included the establishment of an infrastructure programme aimed at meeting the basic needs of the poor, through the provision of education, water, sanitation and energy.\(^13\) The development of a ‘comprehensive social security system,’ that included non-contributory and means-tested social assistance, old age pensions and disability grants and the school feeding scheme.\(^14\) Other measures, such as job creation also formed part of the social development programme.\(^15\) In 1997 the government introduced its ‘Poverty Alleviation Fund’ aimed at providing funding to government departments to address poverty

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\(^9\) Section 7(2) of the Constitution.
\(^11\) Ibid at 1.
\(^12\) Ibid.
\(^13\) Ibid at 11.
\(^14\) Ibid.
\(^15\) Ibid.
and to direct their services towards poverty alleviation. In addition, the state enacted several other legislation and policies aimed at addressing poverty and inequality.

The socio-economic condition in South Africa has improved considerably since the advent of democracy in 1994. For example, more children have access to primary and secondary education; about ten million have access to state funded housing, more South Africans have access to primary health care and access to water and electricity have been considerably improved. Paradoxically, South Africa remains confronted with social inequality, widespread poverty and insufficient economic growth to address high unemployment. Inequality in post-apartheid South Africa is no longer based purely on race and class. Seeking and Natrass points out that ‘high levels of inequality are increasingly based on intra-racial not inter-racial inequality.’ Furthermore, ‘inequality in the distribution of incomes both reflected and produces inequalities of opportunity.’

The mini dissertation argues that 2013 presents an opportune moment to reflect on the progress made by the state in fulfilling its obligation to provide basic education as a mechanism for addressing poverty and marginalisation in South Africa. Despite numerous reforms and resources allocated towards education, the results are not commensurate with the reforms. For example, South Africa ranked last in the 2013 ‘Trends in International

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16Ibid.


21 Ibid.

Mathematics and Science study’\textsuperscript{23} (TIMSS). The TIMSS assesses grade four learner’s Mathematics and Science achievements. The study focuses on four years of achievements and is done worldwide. The report scored South Africa last among international and African participating states.\textsuperscript{24}

The obligation of the state to provide ‘quality’ basic education is central to addressing poverty and inequality in poor and marginalised communities. In 2014, South Africa will celebrate twenty years of democratic rule, relative economic growth and stability. However, the optimism and enthusiasm that characterised the advent of democracy are slowly dissipating. The questions are thus posited: Has the state fulfilled its obligation to create a more equitable society through the provision of quality basic education? What measures are in place to address the disparities in the education system? How has the state used its available resources? Do the measures adopted by the state address inequality or does it further perpetuate inequality?

1.2 Problem statement

The Department of Basic Education committed itself to the provision of education and training that are of a high quality.\textsuperscript{25} The role of education in the transformation of South Africa is undeniable. Unlike other socio-economic rights, the right to basic education is immediately realisable. In other words, the state has an immediate obligation to provide quality basic education. However, the content and scope of ‘basic education’ has neither been clarified by the Constitution nor the courts. The state, though, adopted a policy of ‘compulsory school attendance’ from the age of seven or from pre-school to the ninth grade, whatever comes first.\textsuperscript{26}

The Eastern Cape is arguably the province mostly impacted by Bantu Education simply because it is the home to two former homelands, namely the former Ciskei and Transkei. The Eastern Cape is perhaps the most unequal province in South Africa. The province continues to be confronted with extreme poverty, underdevelopment and inequality. The Eastern Cape


\textsuperscript{24} Ibid.


\textsuperscript{26} Section 3(1) of South African Schools Act, 84 of 1996.
is indeed a tale of two cities, as it were. On the one hand, the province is home to well-developed metropolis, Port Elizabeth and East London with well-maintained infrastructure and other amenities. On the other hand, towns in the former homelands continue to deal with underdevelopment and other socio-economic challenges. The biggest challenge facing the Eastern Cape government is to provide basic services to the poor and the marginalised.

In 1994, the new ‘Eastern Cape Department of Education’ (ECDOE) was made into one department and 23 education districts. The new ECDOE incorporated the former ‘Department of Education and Training’ (DET) for black South Africans; the ‘House of Representatives’ (HOR) for coloured learners; the ‘House of Delegates’ (HOD) for Indians; and the ‘House of Assembly’ (HOA) for white South Africans. The vision of the new Eastern Cape Department of Education is ‘to offer a quality public education system that transforms schools into centres of community and promote shared moral values, good governance and sustainable development.’ However, the Eastern Cape continues to be one of the worst performing provinces in terms of education outcomes.

The Eastern Cape is home to about 5788 schools with 2076400 learners and 69620 educators. The ECDOE is marked by corruption and inefficiency. In 2006, it is estimated that approximately 46% of the schools in the province are either weak or in a very feeble condition. It is further estimated that about 19.5% of the schools in the Eastern Cape have no access to clean water, while another 9.9% have no access to safe toilets. In 2008, only 50.6% of grade 12 learners passed their exams and only 14% of those that passed secured a university endorsement. The management of the school feeding scheme has been marked by corruption and inefficiency. In 2013, the situation has not improved considerably.

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27 ‘A Brief History of Educational Inequality from Apartheid to the Present’ available on http://www.stanford.edu/~jbaugh/saw/Lizet_Education_Inequity.html accessed 22 June 2013.
32 Ibid.
33 Ibid.
34 Ibid at 24.
In 2011, the National Department of Basic Education published its ‘Statement of Intent on the Remediation of the Present Challenges in Basic Education in the Eastern Cape Province.’\textsuperscript{35} The notice to intervene into the Eastern Cape Department of Education is in pursuance of Article 100(1)(b) of the Constitution.\textsuperscript{36} Article 100(1) provides that the ‘national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation.’\textsuperscript{37} This action was specifically taken in pursuance of Article 100(1)(b) that provide that the national government may assume ‘responsibility … to the extent necessary’ to:

(i) Maintain essential national standards or meet established minimum standards for the rendering of an overhaul.

This action was precipitated by the mass of problems plaguing the ECDOE. These included the ‘dramatic over-expenditure of the budget for the compensation of employees because the province failed to effectively comply with policies, standards and norms related to educator post provisioning; failure to provide textbooks and stationery to Section 20 schools; the sudden suspension of the scholar transport problem; termination of the school nutrition programme and failure to implement the school infrastructure development programme.’\textsuperscript{38} In 2013, the National Department of Education continues to manage the affairs of the ECDOE in respect of the aforesaid.

The right of the national spheres to intervene into the competency of the provincial spheres was confirmed in \textit{Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996}.\textsuperscript{39} It held that section 100 provides that:

[w]hen a province cannot or does not fulfill an executive obligation in terms of legislation or the Constitution, the national executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation… [by] assuming responsibility for the relevant obligation in that province to the extent necessary to maintain essential national standards or meet established minimum standards for the

\textsuperscript{35} Basic Education Laws Amendment Bill deliberations; Department of Basic Education on Notice of intervention into Eastern Cape Department of Education in terms of Section 100 of the published on Parliament Monitoring Group available on www.pmg.org.za accessed on 22 July 2013.
\textsuperscript{36}Ibid at 25
\textsuperscript{37}Section 100 of the Constitution of South Africa.
\textsuperscript{38}Ibid at 25.
\textsuperscript{39}Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC).
rendering of a service; maintain economic unity; maintain national security; or prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.\textsuperscript{40}

Although the number of children attending school is increasing, the quality of education is lacking. In 2008, the ‘Annual National Assessment’ (ANA) was piloted.\textsuperscript{41} The ANA was implemented by the National Department of Basic Education to assess the literacy and numeracy skills of learners in the foundation phase (grade 1-3) and the language and mathematics competencies of the learners in the intermediate phase (grade 4-6).\textsuperscript{42} The ANA seeks to improve teaching and learning in the following ways:

1. Exposing teachers to best practices in assessment;
2. Targeting interventions to the schools that need them most;
3. Giving schools the opportunity to pride themselves in their own improvements; and
4. Giving parents better information on the education of their children.\textsuperscript{43}

In 2011, the ANA made the following findings:

1. Learners display a lack of basic literacy skills such as the correct spelling of frequently used words and improper use of language forms;
2. Learners handwriting was illegible and comprehension skills were generally low or poor;
3. Learners demonstrated an inability to handle basic numeracy operations (subtraction, multiplication and division);
4. Learners conception of fractions was seriously limited; and
5. Learners responses show that they were not able to translate word problems into numbers to solve them with relevant mathematical techniques.\textsuperscript{44}

The overall national percentage of literacy among grade three learners were 35\% and for mathematics among grade six learners were 30\%, respectively.\textsuperscript{45} In 2012, the national

\textsuperscript{40}See Section 100(1)(b) of the Constitution of South Africa.
\textsuperscript{41}Ibid.
\textsuperscript{42}Ibid.
\textsuperscript{43}The Importance of the Annual National Assessments, in Action Plan to 2014: Towards the Realisation of Schooling 2015.
\textsuperscript{44}Ibid.
\textsuperscript{45}Ibid.
average improved considerably. For instance, the national literacy average among grade three learners improved from 35% to 52% and for numeracy from 28% to 41%. Despite the national improvement, the provincial average in the Eastern Cape declined. The provincial average for Grade 1 mathematics declined by one percentage point, from 66% in 2011 to 65% in 2012. The provincial average percentage for Grade 2 mathematics declined by three percentage points, from 58% in 2011 to 55% in 2012. The provincial average percentage for Grade 2 language remained stagnant, hovering around 53 percentage points. The provincial average for Grade 5 mathematics declined by three percentage points, from 31% in 2011 to 28% in 2012.

In 2009, the National Department of Basic Education set twenty seven specific goals to deal with improving schooling. Among the twenty seven goals is the provision of 'textbooks, workbooks and other educational material, school governance and management, school funding and school infrastructure.' In addition, the department also set three standards that should be met in pursuance of the twenty seven goals. The standards are basic safety norms, minimum functionality norm and optimal functionality norms. In terms of the basic safety norm, learners should have access to clean drinking water, toilet facilities, electricity and a safe building. The minimum functionality norms require 14 classrooms for learners in grades 1 to 4. This norm provides for at least 40 learners per class. It also provides for among other things, a library, a laboratory, a kitchen and sick room. The optimal functionality norm would include, for example, a dining hall, school hall and a print room.

The paper will use the basic safety norm and minimum functionality norm as a framework to assess the progress made by the ECDOE in providing basic education to the most poor and marginalised learners in the province.

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47 Ibid.
48 Ibid.
49 Ibid.
50 Ibid.
52 Ibid.
53 Ibid at 139.
54 Ibid.
55 Ibid.
56 Ibid.
1.3 Research Questions

1. What are the content and scope of basic education?
2. How has the South African education system transformed?
3. What are the features of the newly transformed educational system?
4. What are the challenges in providing effective basic education in the Eastern Cape?
5. What measures are in place to deal with the challenges facing the Eastern Cape department of education?
6. How has the court interpreted the right to basic education in South Africa?
7. What guidance can the court draw from the UN Committee on Economic, Social and Cultural Rights ( CESCR) and other relevant international human rights treaties in interpreting the right to basic education? And
8. What transformative role should the court play in addressing the failure of the state to provide basic education in South Africa?

1.4 Hypotheses

It is hypothesised that basic education should be adequate, in other words, basic education should take place in an environment conducive for teaching and learning. The Department of Basic Education should ensure that all schools, especially those in rural communities and on farms have access to textbooks, qualified teachers, clean water and toilet facilities and other essential necessities needed for the delivery of quality basic education.

It is further hypothesised that there is a correlation between quality education, democracy and equality. Thomas Jefferson drew the connection between education and democracy. He argued that ‘to render democratic governments safe, the people’s minds must be improved to a certain degree.’ In other words, when the citizens are sufficiently educated then they will be able to fully participate in the democratic processes in the country. For Jefferson, ‘education is less about encouraging the very cleverest to climb the highest intellectual peaks and more about making competent members of society.’

The mini dissertation argues that when the state respects, protects and promote socio-economic rights, it ostensibly addresses poverty and inequality. Conversely, the failure of the

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state to fulfil its obligations will continue to perpetuate patterns of inequality and marginalisation.

Lastly, section 29(1) does not clearly define the content and scope of basic education; neither does it stipulate the standards and quality of basic education. Instead, section 29 (1) gives the state a wide discretion to determine the content and scope of basic education. The White Paper on Education defines basic education as ‘compulsory schooling from pre-school to grade nine.’ This has given the state wide discretion to determine the nature, content and scope of basic education. As a consequence, this wide discretion has resulted in the education system going through cycles of ‘development, implementation and revision’ often resulting in confusion and non-compliance.

1.5 Methodology
The research will adopt a multi-disciplinary approach. In other words, the research will consider literature from social science and law. The research is conducted through primary sources such as case law, treaty texts and the Constitution. The research will also include secondary sources, such as books, discussion papers, reports and journals. The research will draw from relevant international human rights instruments relating to the research topic.

1.6 Scope and Limitations of the Study
The scope of the paper is to contribute to the body of knowledge in socio-economic rights and the right to basic education in South Africa. The study is limited to an analysis on the obligation of the state to provide access to basic education. The paper will specifically focus on the socio-economic challenges in the Eastern Cape and the impact of such challenges on the quality of basic education in rural communities.

1.7 Conclusion
The right to education enshrined in the Bill of Rights is a fundamental human right and its transformative nature is authorititative. For instance, O’ Regan remarked that:

The constitution is not a description of the South African society as it exists, that requires nothing of us but the maintenance of its status quo. On the contrary, it is a Constitution that compels transformation. The Constitution recognizes that, for its
vision to be attained, the deep patterns of inequality that scar our society, and that are the legacy of apartheid and colonialism, need to be addressed urgently.\(^5\)

The Constitution of South Africa is regarded as one of the most progressive and admirable constitutions in the world and places a positive obligation on the state to realize the right to basic education.\(^6\) However, this image will be tainted if the state fails to provide quality basic education to poor and marginalized learners.

The inclusion of socio-economic rights renders the Constitution modern and liberal.\(^7\) Many states recognise and protect socio-economic rights, but few regard them as justiciable. This renders the South African Constitution unique in this regard. The obligation to provide basic education regardless of budgetary imperatives extends beyond merely adopting policies; it requires teaching and learning that are sufficient to enable the beneficiaries to be able to actively participate in the social, political and economic life of South Africa.

The mini dissertation argues that the drafters deliberately included socio-economic rights in the Constitution, envisaging that the latter would play a transformative role in addressing poverty and inequality.\(^8\) The inclusion of the right to basic education reiterates the drafter’s commitment to addressing the legacy of apartheid. The transformation of the educational system in South Africa provides the framework for the provision of quality basic education.

In sum, basic education must reflect the precepts of section 7 (1) of the Constitution, which compels the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights.’

\(^5\) O’ Regan ‘Equality Constitutional imperatives’ in Asmal et al Spirit of the Nation at 164-168.
\(^7\) Ibid at 30.
\(^8\) See S v Makwanyane 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 262, where it was held that ‘where the Constitution expressly aspires to do is to provide from these grossly unacceptable features of the past to a conspicuously contrasting … future.’; in Du Plessis v De Klerk 1996 3 SA 850 (CC), 1996 5 BCLR 658 (CC) par 157: ‘The Constitution is a document that seek to transform the status quo ante into a new order.’; Rates Action Group v City of Cape Town 2004 12 BCLR (C) par 100: ‘Ours is a transformative constitution. … Our Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past and past to a society in which all can live with dignity.’; also see, City of Johannesburg v Rand Properties (Pty) Ltd 2006 6 BCLR 728 (W) par 51-52: ‘Our Constitution encompasses a transformative provision. As such, the State cannot be a passive bystander in shaping the society in which individuals can fully enjoy their rights? The full transformative power of the rights in the Bill of Rights will only be realised when they are interpreted with reference to the specific social and economic contexts prevalent in the country as a whole and the social and economic context within which the applicant now finds itself in particular’.
Therefore, section 7 (1) is an important yardstick against which to measure the state’s progress in realising the right to quality basic education.
CHAPTER TWO
REVIEW OF LITERATURE

2.1 International Human Rights Instruments


2.1.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) provides a broad framework for the protection and enforcement of human and fundamental freedoms. The UDHR articulates basic and fundamental freedoms enjoyed by all human beings regardless of their nationality, place of residence, gender, national or ethnic origin and so forth. These rights and freedoms are inalienable and equally applicable to everyone. The UDHR provides for the right to social security (Art. 22); the right to fair labour practice (Art. 23); the right to adequate standard of life (Art. 25); and the right to education (Art. 26). The UDHR recognizes Civil and Political Rights and Social, Economic and Cultural Rights. Civil and political rights are subject to immediate realisation while social and economic rights are progressively realised. However, it should be noted that the right to basic education provided for in terms of section 29 (1) of the South African Constitution is not subjected to this limitation. The UDHR calls for ‘a common standard of achievement for all peoples and all nations’ requiring states ‘to secure their universal and effective recognition and observance.’

Section 26 of the UDHR specifically provides that everyone should have the right to at least a basic education. In other words, basic education should be free and compulsory. Education (specifically basic education) should aspire towards the development of human personality.

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63 Ibid at 23.
64 Ibid.
65 Ibid at 23.
66 Ibid at 30.
and other fundamental rights and freedoms.\textsuperscript{67} Education should reflect a society with diverse racial and religious groups; it should foster tolerance and understanding of diversity and plurality.\textsuperscript{68}

The 'World Declaration on Education for All' prefers the term ‘primary education’ instead of ‘basic education.’\textsuperscript{69} Primary education is defined as 'the main delivery system for the basic education of children outside the family ...[p]rimary education must be universal, ensures that the basic learning needs of all children are satisfied and take into account the culture, needs and opportunities of the community.'\textsuperscript{70}

2.1.2 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights provides overarching protection for socio-economic rights. The ICESCR recognises ‘the right of everyone to education … [that is] directed to the full development of the human personality and the sense of its dignity, and … [to] the respect for human rights and fundamental freedoms.’\textsuperscript{71} The ICESCR further provides that the right to education shall ‘in all its forms and at levels shall exhibit the following interrelated and essential features: availability, accessibility, acceptability and adaptability.’\textsuperscript{72} The ICESCR obligates states to use education as a tool for enhancing human rights and fundamental freedom to such an extent that it would build understanding and tolerance.\textsuperscript{73}

The Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 11 provide for free and compulsory basic education.\textsuperscript{74} General Comment 11 further states that:

The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State is entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education…. It should be emphasised, however, that the

\textsuperscript{67}Ibid.
\textsuperscript{68} Ibid.
\textsuperscript{70} See Article 9, General Comment 13 on the right to education in terms of the ICESCR.
\textsuperscript{71} See Article 13 of the International Covenant of Economic, Social and Cultural Rights.
\textsuperscript{72} Ibid at 39.
\textsuperscript{73} Ibid at 37.
\textsuperscript{74} CESCR General Comment No 11 (1999).
education offered must be adequate in quality, relevant to the child and must promote the realisation of the child’s other rights.\textsuperscript{75}

CESCR General Comment 13 provides that 'education in all its forms and all levels, must exhibit the following essential features: Available, Accessibility, Acceptability and Adaptability.' \textsuperscript{76} Availability requires a ‘functioning education institution’ that are in ‘sufficient quantity within the jurisdiction of the state party.’\textsuperscript{77} Furthermore, learners must have access to ‘sanitation facilities, safe drinking water, trained teachers, and teaching material, library and computer facilities.’\textsuperscript{78} Accessibility entails the provision of education to all without discrimination on any ‘prohibited ground.’\textsuperscript{79} Accessibility has two dimensions: physical and economic accessibility. In terms of the former, ‘education has to be within safe physical reach’.\textsuperscript{80} The latter requires the state to provide free primary education to all. In addition, the state should introduce progressively free secondary and higher education.\textsuperscript{81} Acceptability requires that ‘the form and substance of education, including curriculum and teaching methods, have to be acceptable.’\textsuperscript{82} Finally, Adaptability requires that education be flexible to the extent that it addresses the needs of the learner and the society at large.\textsuperscript{83}

2.1.3 African Charter on the Rights and Welfare of the Child \textsuperscript{84}

Article 11 (1) and (2) of the Charter provides that:

Every child shall have the right to education.

The education of the child shall be directed to:

1. The promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential;

\textsuperscript{75} Ibid.
\textsuperscript{76} The Committee on Economic, Social and Cultural Rights, General Comment 13 on the right to education of the ICESCR, available at http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument accessed on 12 June 2013.
\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid.
\textsuperscript{84} http://www.childinfo.org/files/fgmc_AfricanCharterontherightsandwelfareofthechild.pdf accessed on 25 July 2013
2. Fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on the human and peoples’ rights and international human rights declarations and conventions;

3. The preservation and strengthening of positive African morals, traditional values and cultures;

4. The preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups;

5. The preservation of national independence and territorial integrity;

6. The promotion and achievement of African Unity and Solidarity;

7. The development of respect for the environment and natural resources;

8. The promotion of the child’s understanding of primary health care.  

2.1.4 International Convention on the Rights of the Child

Article 28 provides 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, ‘make primary education compulsory and available free to all.’

2.1.5 The Dakar Framework for Action, Education for All

The Dakar Framework calls for ‘universal access to and completion of free and compulsory primary education of good quality by 2015 and improving all aspects of the quality of education’. South Africa is a signatory to the Dakar Framework for Action. As a signatory to the Dakar framework, South Africa commits itself to the eradication of poverty through the provision of quality and free basic education.

2.1.6 UNESCO Convention against Discrimination in Education

Article 1, prohibits the deprivation of any person or group of persons to access education. The Convention prohibits any action that has the effect of:

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85Ibid.
87 Arendse ‘The Obligation to provide free basic education in South Africa: An International Perspective’ PER / PELJ 2011(14)6 at 102.
1. Depriving any person or group of persons of access to education of any type or at any level;
2. Limiting any person or group of persons to education of an inferior standard;
3. Subject to the provisions of article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
4. Inflicting on any person or group of persons conditions which are incompatible with the dignity of man. 88

2.2 Domestic Law

The main features of the South African education system are summarized as:

1. The constitutional right to basic education that is not subject to internal limitations; such as available resources and progressive realisation;
2. The adoption of the National Education Policy Act, that provide the framework for the transformation of the South African educational system;
3. The adoption of the South African Schools Act, that ‘redresses past injustices in education provisions and contribute to the eradication of poverty and the economic well-being of society’;
4. A unified national educational system with devolving powers and functions between National (National Department), Provincial (Provincial Department) and local (School level) spheres;
5. Compulsory schooling for learners between the ages of 7 to 15 years old;
6. The establishment of Unified standards for the organization, governance and funding of public schools, for curriculum to be taught at schools and for learner assessment;
7. The establishment, funding and maintenance of public schools by provincial department of education;
8. The separate legal status and the relative autonomy of public schools;

9. Statutory power, duties and functions of public schools to adopt school policies on admission, discipline and fees;
10. The participation of parents through the School Governing body; and
11. The registration of independent schools.
12. ‘Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure.’^89

2.2.1 The Constitution of South Africa
Section 29 (1) of the Constitution provides that:
(1) Everyone has the right-
   (a) To a basic education, including adult basic education; and
   (b) To further education, which the state, through reasonable measures, must make progressively available and accessible.

The ‘White Paper on Education and Training,’ defines ‘basic education’ as ‘compulsory schooling through ninth grade and ‘further education’ as ‘post-compulsory’ education in tenth grade and beyond.^90 The distinction between basic and further education lies in the degree to which the state is obligated to realise the right. For example, the state is obligated to make basic education available regardless of budgetary constraints. Conversely, the state is only obligated to progressively realise further and higher education and the right is subject to resources available to the state. This distinction was confirmed by the Constitutional Court in its decision in Governing Body of the Juma Musjid Primary School & Another v Ahmad Asruff Essay,^91 where it held that:

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

^89 Barry Schools and the Law (2006) at 7-8
^91 See Governing Body of the Juma Musjid Primary School & Another v Ahmad Asruff Essay 2011BCLR 761 (CC).
freedom.’ This right is therefore distinct from the right to ‘further education’ provided for in section 21(1)(b). The state is in terms of that right obliged through reasonable measures to make further education ‘progressively available and accessible.’

2.2.2 White Paper, Education and Training in a Democratic South Africa
The right to basic education is guaranteed in the Constitution of South Africa. The Constitution obligates the state to provide basic education based on the values of human dignity, equality, human rights and freedoms, non-racism and non-sexism.

The state has enacted several policies with the view to afford every learner the right to access basic education. In 1995, the state adopted the first ‘White paper on Education and Training’ in a Democratic South Africa. This policy created the framework for transforming and democratising the education system in South Africa. The adoption of the South African Schools Act in 1996 affirmed the commitment of the state to provide quality education to all South Africans, especially the poor and marginalised.

2.2.3 South African Schools Act No 84 of 1996
The basic aim of the South African Schools Act is to transform the South African education system. The Act seeks to ‘redress past injustices in education provisions and contribute to the eradication of poverty and the economic well-being of society,’ to ‘advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, [and] protection and advance our diverse culture and language.’

The ‘National Development Plan’ (2011) provides the following vision for education:

By 2030, the schooling system is characterised by learners and teachers who are highly motivated; principals are effective managers who provide administrative and curriculum leadership; parents are involved in the schools their children attend; schools are accountable to parents; committed and professional, have good knowledge of the subjects they teach; schools and teachers are supported by knowledgeable district officials; the administration of education (including the appointment and disciplining of teachers) is the

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92 Ibid at para 42.
preserve of government, with unions ensuring proper procedures are followed; learning material are readily available; basic infrastructure requirements are met across the board; and high speed broadband is available to support learning.\footnote{See National Planning Commission National Development Plan (2011) at 266.}

### 2.2.4 National Education Policy No 27 of 1996

The Act provides the legal framework for the national education policy and the operation of the South African Schools Act. The Act envision a national education policy that will enable ‘… the full personal development of each student and to the moral, social, cultural, political and economic development of the nation at large, including the advancement of democracy, human rights and the peaceful resolution of rights.’\footnote{See National Education Policy Act, Act 27 of 1996, 24 April 1996, Article 4(b).} Section 3(4) of the Act provides that the Minister has certain functions including, ‘compulsory school education, management, governance, funding and establishment and registration of education institutions among other things.’\footnote{See Section 3(4) of the National Education Policy Act, Act 27 of 1996.}

### 2.2.5 Education Laws Amendments, No. 24 of 2005

In 1999, the Department of Education established ‘Norms and Minimum Standards’ for School funding. The Norms and Standards set out the funding procedures ‘to be adopted by the provincial departments in determining resource allocation to their schools.’ The norms and minimum standards provide for more funding to be allocated to poor schools and less to relatively advantaged schools. However, the norms and minimum standards for school funding ‘do not redress personnel costs in favour of poor schools the way it does for non-personnel costs.’\footnote{Rembe (2006) ‘The politics of transformation in South Africa: An evaluation of education policy and their implementation with particular reference to the Eastern Cape.’ at 13, available at \url{http://eprint.ru.ac.za/259/} accessed on 22 June 2013.}

In 2003, the ‘Review of the financing, resourcing and costs of education in public schools’ revealed challenges facing poorer provinces, like the Eastern Cape, Limpopo and KwaZulu-Natal. According to the Review, the respective provinces ‘spend less per capita on education despite spending a proportionately higher percentage of their provincial budgets on education.’ The Review concluded that ‘if more resources are shifted from relatively richer to relatively poorer provinces, it is imperative that the provincial education departments have in place the necessary mechanisms to make sure that these transferred resources reached the
poor in the receiving province.’ In 2006, the ‘Amended National Norms and Standards for School Funding’ (ANNSSF) was adopted withdrawing the power of the province to determine a school’s poverty score.

Act 24 of 2005, amended the South African Schools Act, 1996, to the extent that it:

- Added new definitions; to clarify the manner in which disciplinary proceedings must be conducted; to provide for a process to establish norms and standards for school funding by means of Quintiles; to clarify the charging and payment of school fees.

The Act provides for the introduction of the ‘Quintile’ system with respect to school fees. The National Department of Basic Education has identified five socio-economic quintiles. The quintile of the school is determined by the socio-economic condition of the school. In other words the greater the level of poverty the lower the quintile. Therefore, quintile 1 reflects a poor community and quintile 5 a wealthy community. It is estimated that 93% of the schools within the quintile 1 to 3 category is situated in the former ‘homelands’. At the same time, 70% of the schools in quintile 5 and 16% in quintile 4 are situated in historically white schools.

2.2.6 Education Laws Amendment Act, 31 of 2007

The Act requires the principal of each public school to submit on an annual basis to the provincial Head of Department:

1. A report showing the academic performance of the school in relation to minimum outcomes and standards and procedures for assessment;
2. A plan setting out how the academic performance is to be improved over the following year.

2.3 Conclusion

The UNHR; ICESCR; African Charter on the Rights and Welfare of the Child; Convention on the Rights of the Child; Dakar Framework for Action, Education for All; and the UNESCO Convention against Discrimination in Education, establishes the standard for basic

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98 Education Laws Amendment Act, No. 24 of 2005.
100 Ibid.
education. The international context defines the content, scope and the meaning of the right to basic education. In other words, ‘[b] basic education is more than an end in itself. It is the foundation for lifelong learning and human development on which countries may build … further levels … of education …’\(^\text{102}\) Therefore, ‘education is both a human right in itself and as an indispensable means of realising other human rights.’\(^\text{103}\) The South African Constitution provides that basic education is a fundamental human right. In addition, the Constitution recognises the importance of education in the transformation of the South African society. The South African Schools Act, National Education Policy Act and all subsequent national and provincial legislation, affirms the transformative nature of education.


\(^{103}\) Committee on Economic, Social and Cultural Rights, General Comment no 13 para 1; and see Governing Body, Rivinia Primary School v MEC for Education, Gauteng Province [2012] 1 All SA 576 (GSJ) para 28
CHAPTER THREE
THE LEGAL FRAMEWORK
AN OVERVIEW ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

3.1 Introduction
The main aim of the present chapter is to provide an overview on economic, social and cultural rights. The overview will provide the legal framework for further discussions and analysis on the right to basic education in South Africa. The chapter will firstly discuss the evolution of economic and social rights at the international level as the basis for the inclusion of socio-economic rights in the Constitution of South Africa. The chapter will proceed to discuss the correlation between the Constitution and the International Covenant on Economic, Social and Cultural Rights (ICESCR). To this end, the chapter will argue that the Constitution and the ICESCR are mutually reinforcing. Notwithstanding the difference in wording, the Constitution and the ICESCR have more similarities than differences.

3.2 The Evolution of Social and Economic Rights at the International Level.
The evolution of social and economic rights begins with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR embodies basic and fundamental freedoms enjoyed by all human beings regardless of their nationality, place of residence, gender, national or ethnic origin and so forth. The UNHR provides that these rights and freedoms are inalienable and equally applicable to everyone.

Among the rights enumerated in the UDHR are the right to social security (Art. 22), the right to fair labour practice (Art. 23), the right to adequate standard of life (Art. 25), and the right to education (Art. 26). There are two sets of human rights that are recognised by the Universal Declaration of Human Rights; Civil and Political Rights and Social, Economic and Cultural Rights. Civil and political rights are realised immediately while social and economic rights are progressively realised. The holistic approach adopted by the UDHR, recognises that human rights are interrelated and indivisible. This requires the international community to treat human rights, regardless of the nature of the rights, in a fair and equitable manner.

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105 Ibid.
106 Ibid at 23.
107 Ibid.
manner. The UDHR specifically states that all these rights are “a common standard of achievement for all peoples and all nations” calling on all nations “to secure their universal and effective recognition and observance.” This position was reaffirmed in the Vienna Declaration, which states that “all human rights are universal, indivisible, interdependent and interrelated.”

The International Covenant on Economic, Social and Cultural Rights was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 3rd January 1976. In terms of the Covenant, signatories undertook to respect and uphold the rights provided for in the ICESCR, without discrimination on the basis of race, sex, language, religion, political or other opinion, national or social origin, birth or other status.

The ICESCR requires state parties to adopt measures for the ‘progressive realisation of the rights provided for therein, to the maximum of their available resources.’ The ICESCR enumerates on the right to work, the right to fair wages, the right to decent living conditions, to a safe and healthy working conditions, equal opportunities, the right to social security, the right to an adequate standard of living (including the right to adequate food and housing and the right to education).

3.3 The interrelatedness of the International Covenant on Economic, Social (ICESCR) and Cultural Rights and the South African Constitution

In light of the overwhelming commitment to economic, social and cultural rights, the South African government signed the ICESCR on 03 October 1994. The South African government is yet to ratify the ICESCR but ratification seems imminent. The signing and ratification

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109 Ibid at 23.
110 The 1993 Vienna Declaration and Programme of Action states in paragraph 5 that- ‘All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. It is the duty of states, regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms.’
111 See General Assembly Resolution 2200A (XXI) Article 27.
113 Ibid.
114 See Article 6 of the ICESCR.
of the ICESCR will reaffirm a commitment by the government of South Africa to the protection, promotion and enforcement of socio-economic rights. The ratification of the ICESCR will render its provisions legally binding on South Africa in conformity with section 231(4) of the Constitution which provides that international law only become binding when incorporated into South African law.\textsuperscript{116}

Section 28 of the Constitution provides that every child has the right:

(a) ...  
(b) To family care or parental care, or to appropriate alternative care when removed from the family environment;  
(c) To basic nutrition, shelter, basic health care services and social services;  
(d) To be protected from maltreatment, neglect, abuse or degradation.

The rights provided for in section 28 supplement the general rights provided for in the Bill of Rights. The most important factor to be considered when weighing the rights of the child is the ‘best interest of the child.’\textsuperscript{117} Thus Article 10(3) of the ICESCR provides that:

Special measures of protection and assistance should be taken on behalf of all children and young people without any discrimination for reasons of parentage or other conditions. Children and young people should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.\textsuperscript{118}

Section 29(1) of the Constitution provides that ‘everyone has the right to a basic education, including basic adult education, and to further education, which the state through reasonable measures must make progressively available and accessible.’\textsuperscript{119} Similarly, Article 13 of the ICESCR provides that:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the

\textsuperscript{116} Section 231 (4) of the Constitution provides that ‘Any law International agreement becomes law in the Republic when it is enacted into law by national legislation ...’

\textsuperscript{117} See De Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2003 (3) SA 389 (W).

\textsuperscript{118} See Article 10(3) of the ICESCR.

\textsuperscript{119} Section 29 of the Constitution. Also see Devenish \textit{A Commentary on the South African Constitution} 1}\textsuperscript{st} Edition at 76.
human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.\textsuperscript{120}

The ICESCR provides much broader protection for the right to education. For instance, Article 13 provides for free and compulsory primary education. Section 29 (1)(b) of the Constitution restricts the right to further education by providing that, the right may be progressively realised subject to available resources. At the same time, the right to basic education, which includes basic adult education, are regarded as an unqualified socio-economic right.

The content and scope of basic education must still be defined by the court.\textsuperscript{121} The Constitution recognises the rights to basic education but it does not clarify the content and scope of this right. In this regard, the CESCR General Comment 11 and 13, the policies of the Department of Basic Education and the respective decision of the High Court, may serve as a guide to the Constitutional Court in the interpretation of the right to basic education.

3.4 Conclusion
There can be no doubt that the values underpinning the inclusion of socio-economic rights in the South African Constitution are reflective in the ICESCR. For instance, the ICESCR recognises that every human being has inherent dignity.\textsuperscript{122} Similarly, the Constitution and constitutional jurisprudence on socio-economic rights recognise dignity as the cornerstone of

\textsuperscript{120} Article 13 of the ICESCR further provides that:
1. The States Parties to the present Covenant recognize the right of everyone to education.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
(a) Primary education shall be compulsory and available free to all;
(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

\textsuperscript{121} Devenish \textit{A Commentary on the South African Constitution} at 76.
\textsuperscript{122} See Preamble of the ICESCR.
the South African democracy. Furthermore, the Constitutional Court held in its *Grootboom* decision that the foundational value of human dignity is denied to those who have no food, clothing or shelter ...

The indivisibility and interrelatedness of human rights is reflected both in the Constitution of South Africa and the ICESCR. There is general consensus that the human rights provisions in the Constitution are modelled on the UDHR, the ICESCR and the International Convention on Civil and Political Rights (collectively referred to as the International Bill of Rights). In almost all instances, the provisions of the ICESCR seem broad and all encompassing. Notwithstanding the differences in wording, the provisions of the ICESCR are consistent with the Constitution.

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123 Section 10 of the Constitution provides that ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’
124 See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 BCLR 1169 (CC); 2001 SA 46 (CC).
CHAPTER FOUR
CONCEPTUAL FRAMEWORK: INTERPRETING THE SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

4.1 Introduction
The aim of the mini dissertation is to discuss and analyse the right to basic education. For this purpose, the present chapter will provide an important background for further analysis on the right to basic education in South Africa. The essence of the present chapter is to examine the different approaches adopted by the Constitutional Court towards the interpretation of socio-economic rights. Reference will be made to the two main approaches developed by the Constitutional Court in this regard. The chapter will examine the ‘reasonableness test’ adopted by the Constitutional Court as a standard to review socio-economic claims.

4.2 The interpretation of the Bill of Rights
The Constitution states that ‘when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.’\(^\text{125}\) The role of the text is an important mechanism for establishing the meaning of a specific provision in the Bill of Rights.\(^\text{126}\) Therefore, the Constitutional Court, in S v Zuma, held that:

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. If the language used by the law giver is ignored in favour of a general resort to ‘values’ the result is not interpretational but divination.\(^\text{127}\)

The Constitutional Court has developed several approaches towards the interpretation of the Bill of Rights, including the ‘literal interpretation,’\(^\text{128}\) the ‘purposive interpretation,’\(^\text{129}\) the

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\(^{125}\) Section 39(1)(a)(b)(c) of the Constitution of South Africa.
\(^{127}\) See S v Zuma 1995 (2) SA 642 (CC) para 17.
\(^{128}\) See S v Zuma and S v Makwanyane 1995 (3) SA 391 (CC).
\(^{129}\) See for example, S v Makwanyane, where the Constitutions Court held that, ‘while paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] ‘generous’ and ‘purposive’ and ‘give … expression to the underlying values of the Constitution’.
Devenish argues that the South African constitutional jurisprudence reveals the emergence of two main approaches to the interpretation of socio-economic rights. The first approach that is emerging, according to Devenish, is a value-based or a teleological approach. This latter approach places much emphasis on specific values. The former approach places more emphasis on the literal meaning of the specific right, also known as the literal approach. The paper supports Devenish preference of a value-based approach in interpreting the Bill of Rights. This approach conforms to the Preamble of the Constitution, which envisages a ‘society based on democratic values, social justice, and fundamental rights,’ and S 39(1) that requires the interpretation of the Bill of Rights in a manner that would ‘underlie and open and democratic society based on human dignity, equality and freedom.’

4.3 The enforcement of socio-economic rights in South Africa through litigation

The right to access to justice is a fundamental component of the South African dispensation. The right to access justice incorporates access to the court and the right to legal representation. For this reason, section 35(3) (g) of the Constitution affords an accused person the right to legal representation at the state's expense. Section 35(3) (g) applies predominantly to criminal cases and does not include civil cases. Poor and marginalised people are therefore unable to access the civil courts and other superior courts in South

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130 See for example, S v Zuma, where the court cited Lord Wilberforce in Minister of Home Affairs v Fisher: [A supreme constitution requires] a generous interpretation … suitable to give to individuals the full measure of the fundamental rights and freedoms referred to …’.
131 See for example, Sanderson v Attorney-General, Eastern Cape the court observe that, ‘it is not useful to attempt a universally valid interpretation of a word so vague and which therefore derives much of its content and meaning from the particular context in which it is used.’
132 See for example, S v Mhlungu, Mahomed J (as he was known than) ‘the constitution is not simple some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radically and decisive break from the part of the past which is unacceptable. It constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for all ages, classes and colours’.
133 See for example, Sanderson v Attorney-General, Eastern Cape the court observe that, ‘it is not useful to attempt a universally valid interpretation of a word so vague and which therefore derives much of its content and meaning from the particular context in which it is used’.
135 Ibid at 86
136 Ibid.
137 Ibid at 104.
Africa. Dugard, for example, points to the fact that relatively low cases involving poor people have been brought to the Constitutional Court.\textsuperscript{138} Moreover, the Constitutional Court has in recent years adopted a very restrictive approach to the interpretation of socio-economic rights.\textsuperscript{139}

The inclusion of socio-economic rights in the South African Constitution is now widely accepted. The controversy, however, is in the extent to which socio-economic rights should be enforced. In other words, how should the court interpret the state's obligation in the face of limited resources on the one hand, and widespread inequality and marginalisation on the other hand? The Constitutional Court has reiterated in its first Certification Judgment, the importance of protecting socio-economic rights.\textsuperscript{140} The Constitutional Court stated that:

> It is true that the inclusion of socio-economic rights may result in the courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provisions of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that, by including socio-economic rights a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers.\textsuperscript{141}

Therefore, the inclusion of socio-economic rights does not violate the doctrine of separation of powers.\textsuperscript{142} The Constitutional Court further ruled that the inclusion of socio-economic rights does not ‘encroach on the proper terrain of the legislature and the executive.’\textsuperscript{143} According to Pieterse, the debate on justiciability of socio-economic rights takes place at two levels. On the first level their legitimacy and on the second level the institutional competence of the court to enforce socio-economic rights.\textsuperscript{144} Sachs J acknowledged the court’s incompentence to enforce and protect these rights.\textsuperscript{145} According to Sachs J ‘the court is not the

\textsuperscript{139} Ibid at 55.
\textsuperscript{140} See In re-Certification of the Constitution of the Republic of South Africa, 1996 10 BCLR 1253 (cc).
\textsuperscript{141} Ibid at para 77.
\textsuperscript{143} Ibid at 11.
\textsuperscript{145} Soobramoney para 58.
proper place to resolve the agonising personal and medical problems that underlie these choices’.  

It is worth noting that the ‘the incorporation of directly enforceable social and economic rights in the final Constitution is unique.’ The inclusion of socio-economic rights renders the South African Constitution as the ‘most admirable constitutions in the history of the world.’ Many national constitutions recognise and protect socio-economic rights but few made them justiciable. However, the Constitutional Court has demonstrated its disinclination towards the full realisation of socio-economic rights. The Court has, at least in three instances, in the Grootboom case, the TAC case and Mazibuko case; decline to endorse the ‘minimum core obligation’ formulation as articulated by the CESCR. According to the CESCR General Comment No 3:

The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individual is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

Blichitz argues that the threshold of people’s urgent interest in survival is protected by the notion of ‘minimum core obligation’ because “as the inability to survive wipes out all possibilities for realising the sources of value in the life of a being.”

146 Ibid at 54.
149 Examples of national constitutions protecting socio-economic rights are Namibia, India, and Germany.
150 Ibid at 15.
4.4 Conclusion

The Constitution obliges the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights.’\(^{153}\) The Constitution endows the court with the authority to determine whether the state honours its obligation with respect to the rights contained in the Bill of Rights. To this end, the court is obliged to ‘promote the values that underlie an open and democratic society based on human dignity’, when interpreting the Bill of Rights.

As noted earlier, the Constitutional Court has adopted several approaches in the interpretation of the Bill of Rights. The Constitutional Court recently adopted its ‘Reasonableness Test’ for reviewing socio-economic claims. The Constitutional Court based its decision to embrace the latter test instead of the ‘minimum core’ on the following reasons. Firstly, diverse groups have diverse socio-economic needs.\(^{154}\) Secondly, the Court lacks ‘an adequate informational base to determine the content of minimum core obligations.’\(^{155}\) The minimum core places an unrealistic demand on the state.\(^{156}\) The Court finally acknowledges that it was not ‘institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining what the minimum core standard should be.’\(^{157}\)

The Court seems adamant to adopt its ‘reasonableness test’ out a fear that any other test might force the court to unwittingly prescribe to the state how it should spend public funds. The criteria for assessing reasonableness is to inquire whether the states programme is ‘comprehensive, coherent, co-ordinated, balance and flexible and make appropriate provision for short, medium and long-term needs; reasonably conceived and implemented; transparent and its contents must be made known effectively to the public; appropriate financial and human resources must be available for its implementations; and it must provide relatively short-term measures of relief to those whose needs urgent.’\(^{158}\)

By not defining the ‘minimum core,’ the difficult task is given to the state in determining the extent to which it will fulfil its obligation. The state will invariably cite lack of funds as an impediment to the non-fulfillment of its obligation. The court has reiterated its unwillingness

\(^{153}\) See Bill of Rights, Section 7(2) of the Constitution of South Africa.

\(^{154}\) See Grootboom para 32-33.

\(^{155}\) See Treatment Action Campaign para 35.

\(^{156}\) Ibid at 63.

\(^{157}\) Treatment Action Campaign para 37.

to prescribe to the state on how the latter should spend public funds. The record of the state in fulfilling its obligations demonstrates that the ‘reasonableness test’ in its current conceptualisation fails to meet the threshold of section 39(1) of the Constitution.
5.1 Introduction
The aim of the chapter is to examine the transformation of basic education in South Africa. In the Introductory chapter we noted the devastating impact apartheid had on the quality and accessibility of basic education in pre-democratic South Africa. Furthermore, we highlighted the widespread inequality prevalent in post-apartheid South Africa and emphasised the transformative nature of education.

The present chapter evaluates the institutional and legislative mechanism implemented by the state to facilitate a uniformed and transformed education system in South Africa. The chapter will provide a brief historical perspective, followed by an examination of the legislative framework, and finally a conclusion. Understanding the historical perspective will enable the reader to develop an objective appraisal of the progress made by the state in realising the right to basic education.

This chapter serves as the baseline against which to measure the Eastern Cape Department of Education’s progress or lack of it, in providing basic education. The chapter will also assist in the interpretation of the content and scope of basic education.

5.2 Historical Background
The purpose of education during the apartheid system was ostensibly to perpetuate inequality through racist policies such as the Bantu Education Act of 1953 and the Extension of University Education Act. These laws were specifically adopted to provide inferior education to the majority of South Africans. For instance, the White population enjoyed unfettered privileges at the expense of the majority Black population. School attendance was compulsory during the apartheid era but altered according to race. This policy was applied to White learners from the age of seven to sixteen; Asian and Coloured learners from the ages of seven to fifteen; and Black learners from seven to thirteen years. The disparities within the education system were also reflected in the quality of education provided to the respective racial groups. For instance, the teacher student ration for White schools was 1:18, Asian

159 Maria Lizet Ocampo ‘Brief History A of Educational Inequality from Apartheid to the Present’ available on http://www.stanford.edu/~jbaugh/saw/Lizet_Education_Inequity.html accessed on 10 June 2013.
schools 1:24, Coloured schools 1:27 and Black schools 1:39. In addition to the quality of teaching, the disparities were also reflected in the qualifications of teachers. For example, 96% of the teachers in White schools were certified compared to the 15% of teachers in Black schools.

These historical antecedents necessitated the establishment of a universal and non-racial education system in South Africa. The advent of democracy facilitated the adoption of numerous education policies aimed at addressing past inequalities.

5.3 Legislative Framework

Section 29(1) of the Constitution provides that everyone has the right to basic education. The right to education is fundamental in addressing poverty and inequality in South Africa. Moreover, the Constitution obliges the state to provide every learner of school going age with the opportunity to access quality basic education in a manner that will promote the values of human dignity, freedom and equality.

The state has over the years, adopted numerous legislation and policies in an attempt to transform the education system in South Africa. For example, the ‘White Paper on the Organization, Governance and Funding of Schools’ (1996); the ‘White Paper on Education and Training’ (1998); and the ‘White Paper on Meeting the Challenges of Early Childhood Development in South Africa’ (2001). In addition, the state adopted the National Education Policy Act (27 of 1996). Section 3 (1) of the Act, provides that ‘the Minister shall determine national education policy in accordance with the provisions of the Constitution and this Act.’ Power is vested in the National Minister of Basic Education ‘to determine national norms and standards for educational planning, provision, governance, monitoring and standards.’

The state established one unified National Department of Basic Education responsible for the management of the nine provincial departments. In addition, other statutory bodies were

\cite{Ibid at 125.}
\cite{Ibid.}
\cite{Booyse et al A History of schooling in South Africa Pilot Ed at 276.}
\cite{Functions of Authority}
5. (1) Subject to the provisions of subsection (2), the Authority shall-
also established, for example, the ‘Heads of Education Department’s Committee’, 166 ‘General and Further Education’ and ‘Training Quality Assurance Council’; 167 ‘South African Qualifications Authority’, 168 ‘Council on Higher Education’, 169 ‘South African Council for Educators’, 170 ‘National Board for Further Education and Training’; 171 and the ‘Education Labour Relations Council’.172 All the respective statutory bodies have exclusive functions, all of which are significant in contributing to the efforts of the state to provide access to basic education. However, their specific contributions fall outside the scope of this paper.

5.4 The transformation of basic education

The adoption of the White Paper173 created the legislative framework for the transformation of education in South Africa. The White Paper provides that ‘education and training are basic human rights. It upholds the principles of lifelong learning, open access to education and redress of educational inequality.’174 Moreover, the White Paper seeks to establish national standards and qualifications based on learning programmes with specific outcomes.175

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166 This council was established in terms of section 10 of the Education Policy Act 27 of 1996.
168 The South African Qualifications Authority (SAQA) was established in terms of Act 58 of 1995.
169 Council on was established in accordance with the Higher Education Act 101 of 1997. The aim is to ‘establish a single co-ordinated higher education system …’
170 ‘SACE is the professional council for educators that aims to enhance the status of the teaching profession through appropriate Registration, management of Professional Development and inculcation of a Code of Ethics for all educators.’ available on http://www.sace.org.za/ accessed on 26 July 2013.
171 ‘To provide for the development and implementation of a National Qualifications Framework and for this purpose to establish the South African Qualifications Authority; and to provide for matters connected therewith.’ available on http://www.saqa.org.za/show.asp?id=445 accessed on 26 July 2013.
172 The Education Labour Relations Council (ELCR) was established in accordance with section 37 of the Labour Relations Act 66 of 1995.
174 Lawrence & Moyo Education and Social Transformation: An Eastern Cape Study at 16.
The education system in South Africa has, in recent years, gone through a significant curriculum change, from content-based education to outcomes-based education. In 1998, Curriculum 2005 was adopted with the view to ‘transform the processes and content from the point of entry into the school system during the Early Childhood Development years to the point of exit.’ This policy is also known as ‘Outcomes Based Education’ or OBE. Harber, note that OBE is primarily concerned with certain ‘desired outcomes’ and ‘competence, performance and subject content’ is of secondary concern. The department of education explains that outcomes refer to ‘the specifications of what learners are able to do at the end of a learning experience.’

In order to achieve these outcomes the curriculum was divided into eight learning areas: ‘Communication; Literacy; and Language Learning; Numeracy and Mathematics; Human and Social Science; Natural Science, Arts and Culture; Economic and Management Science; Life Orientation; and Technology.’ In 2000 and 2003, Curriculum 2005 was improved into the ‘Revised National Curriculum Statement.’ The ‘Revised National Curriculum Statement’ retained ‘critical outcomes’ but ‘specific outcomes for the learning areas were more clearly elucidated.’ The National Curriculum Statement from Grade 10-12 (General) was adopted to achieve ‘stipulated learning Outcomes and Assessment Standards.

The National Curriculum Statement is based on the principles of ‘social transformation; outcomes-based education; high knowledge and high skills; integration and applied competence; progression; articulation and portability; human rights, inclusivity, environmental and social justice and valuing indigenous knowledge systems.’ The Department of Basic Education has recently replaced the ‘Revised National Curriculum Statement’ with the ‘Curriculum and Assessment Policy Statement’ (CAPS). The CAPS programme places more emphasis on subjects like mathematics and languages (literacy and

176 Ibid at 112.
177 Lawrence & Moyo at 16.
178 Harber, State of Transition: Post-Apartheid Educational Reform in South Africa. at 45.
179 See Department of Education, 1997 at 12.
180 Ibid at 152.
181 Ibid at 149.
182 Ibid at 149.
184 Ibid.
numeracy) and the latter are arguably more structured.\textsuperscript{186} Education material like workbooks forms an integral part of the CAPS programme since much of the lessons are contained therein.\textsuperscript{187}

5.5 The administrative structure of education

The education system in South Africa is divided into three levels: national, provincial and local. The functions of the national department include:

1. The provision of educational policy support to the Department;
2. The development, evaluation and maintenance of a national policy, programme and systems for general and further education and training; and
3. The management of human resources in the education sector and the rendering of corporate services.\textsuperscript{188}

The provincial Department of Basic Education is responsible for general administration of provincial institutions and for administering examinations. The provincial Department of Basic Education may adopt provincial policies in accordance with national policies and guidelines.\textsuperscript{189} The governance of education at the local level is vested in the School governing bodies (SGBs). The functions of the SGBs include:

1. Determining the language and the admission policy of the school;
2. Drafting and adopting a constitution for the school;
3. Drawing up a code of conduct for learners;
4. Preparing budget;
5. Developing a mission statement for the school; and
6. Making recommendations to the provincial head of department in the appointment of educators and non-educators.\textsuperscript{190}

The national and provincial government is in a symbiotic relationship in matters relating to basic education. Chapter three of the Constitution of South Africa provides that the ‘principles of cooperative governance and intergovernmental relations’ should inform the conduct of the state. Bray, for example, points out that ‘the province is … in charge of all

\textsuperscript{186} Ibid.
\textsuperscript{187} Ibid.
\textsuperscript{188} See for example http://www.ecdoe.gov.za/ecdoe/publications/1/45/all, also see Section 104(1) of the Constitution.
\textsuperscript{190} See Chapter 3 of the Constitution of South Africa.
matters relating to school education in its province,’ and furthermore, ‘provincial laws will prevail over national legislation’ to the extent that there is no conflict over ‘school norms, policies and standards.’ The Constitution vest power in the provincial legislature to promulgate laws on those matters which the province exercise exclusive or concurrent jurisdiction. However, section 104 must be read in conjunction with section 100(1) of the Constitution which provides that:

When a province cannot or does not fulfil executive obligations in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation...

The National Education policy authorises the Minister of Education to formulate the national education policy consisting of norms and standards. Section 9 of the National Education Policy Act provides for the establishment of the ‘Committee of Education Ministers’ (CEM) to facilitate the interaction between the national and provincial spheres in education. Section 10 of the National Education Policy Act, provides for the establishment the ‘Heads of Education Departments Committee, (HEDCOM). The responsibility of HEDCOM includes advising the department and coordinates the implementation of the educational policy applicable to the province.

5.6 The state of basic education in the Eastern Cape

The Eastern Cape is home to appropriately 7,000,000 inhabitants which constitute 16% of the South African population. It is further estimated that nearly 4,100,000 are residing in non-urban areas (include rural and peri-urban). The Eastern Cape is divided into seven

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191 Bray, Human Rights in Education at 271.
192 Section 104 provides that-
(1) the legislative authority of the province is vested in its provincial legislature, and confers on the provincial legislature the power;
(a) …
(b) To pass legislation for its province with regards to-
(i) Any matter within a functional area listed in Schedule 4
(ii) Any matter within a functional area listed in Schedule 5

193 Section 100 of the Constitution of South Africa.
194 Section 2-7 of the National Education Policy Act, No. 27 of 1996.
195 See Section 9 of the National Education Policy, 1996.
196 See Section 10 of the National Education Policy Act, 1996.
197 Ibid at 140.
199 Ibid.
municipal districts; ‘Oliver Tambo, Amatole, Western, Chris Hani, Joe Gqabi, Alfred Nzo and East Griqualand.’

The term rural encompasses those areas characterised by ‘inferior infrastructure, low income, unreliable water availability and poor access to health facilities.’ The Eastern Cape continues to be faced with high levels of poverty, underdevelopment, weak infrastructure and high levels of unemployment. The state of basic education is a microcosm of the socio-economic profile of the Eastern Cape.

During a recent visit to Eastern Cape rural schools undertaken by human rights activists, academics and authors, the following observation was made:

This was a school with 876 students, and only four toilets that were overflowing and leaking. It was a serious health hazard and a real emergency situation,” … “The school said that they had written to the Department of Education two years ago, but had never received a response. One of the girls at the school said she had a problem… she would get pimples because of these toilets.

Throughout the visit the same observations were made: lack of textbooks and other reading material, lack of toilet and sanitation facilities and the unreliability and safety of the school building. The group acknowledged the situation described above was quite different in former Model C schools in the same province which are well-resourced. It is rather ironic that the former Model C schools benefited under apartheid and continue to do so under post-apartheid democratic South Africa. For example, the Court remarked in *Rivonia Primary School* that:

> It is so that white public schools were better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black

204 Ibid.
public schools have been and by and large remain scantily resourced. They were deliber­ately funded stingily by the apartheid government.’

The adoption of curriculum 2005 has clearly demonstrated this paradox. As pointed out earlier, rural schools have not responded well to OBE, simply because these schools still lack the most basic necessities. It is unconscionable to think that rural schools will be able to produce the same results as Model C schools. The reality is that learners emerging from these respective schools will be unable to compete with their peers in the workplace, at institutions of higher learning or in some other platform.

The research rejects the notion that OBE is incompatible with the socio-economic reality facing rural schools. Instead, the state should make every effort to provide rural schools with the necessities needed for quality teaching and learning. Essentials like the provision of textbooks and other educational material; school feeding scheme; providing a healthy and safe environment; and transportation should be prioritised by the Eastern Cape department of education.

As pointed out, the national department recently intervened in the affairs of the provincial Department of Education, in terms of section 100(1) (b) of the Constitution. The Minister stated in a document titled: ‘Statement of intent on the Remediation of the Eastern Cape Province’ that:

The problems being encountered in basic education in the Eastern Cape Province is extremely serious and the consequences of these problems are such that many learners in the province are already being denied their full rights to quality basic education.

The national intervention was triggered by the failure of the Eastern Cape Department of Education to effectively administer its school nutrition programme, scholar transport, and the delivery of textbooks. The school feeding scheme addresses an important need in rural communities and failure to provide this service will adversely impact on the quality of

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teaching and learning. Recent statistics released by the Eastern Cape Department of education reveal that the school feeding scheme feeds 1.6 million learners in the province every day.  

In 2009, the national department of education sets twenty seven specific goals for improving schooling. The key standards to be achieved are basic safety norms, minimum functionality norm and optimal functionality norms. The reality is that the Department of Education will not meet these goals based on the state of basic education in rural Eastern Cape. Moreover, various changes, such as revisions and amendments in education policy have had no tangible impact on the quality of teaching and learning in rural schools. The socio-economic conditions of these learners remain dire. The changes in the curriculum have been met with confusion and in some cases with rejection. The essentials needed for the OBE programme is simply lacking in rural schools.

As pointed out, the aforesaid policies were adopted to address the inequalities of the past, and to provide adequate basic education based on human dignity, equality and freedom. Despite effecting several curriculum changes, it remains questionable whether these policies will improve the standard of teaching and learning in the absence of textbooks, toilet facilities, and other essentials. On 23 August 2013, a local newspaper the Daily Dispatch published the most distressing article, titled, ‘Children are being taught in open.’ The article alleged that learners at the Vanana Primary School in Gonubie, East London are being taught under a tree. The primary school serves learners from the surrounding farm communities and accommodates 355 learners. According to the teachers interviewed, teaching does not take place on cold and raining days. In addition, Vanana Primary School lacks electricity, water, toilet facilities and furniture. The article concludes that the issue had been brought to the Eastern Cape Department of Education but no action had been taken.

On August 2013, the Eastern Cape provincial legislature’s education portfolio committee visited Mpondombini Senior School; Vulindlela Comprehensive Technical High School; Xolobeni Junior Secondary School and OR Tambo Technical High School in the Mbizana Local Municipality. The portfolio committee identified the following challenges facing these schools:

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208 Daily Dispatch, ‘Children being taught in the open’ date: 23 August 2013.
209 Ibid.
1. Teacher shortage;
2. Staff on long-term incapacity leave;
3. Lack of critical learning tools;
4. Furniture shortages;
5. High teacher absenteeism;
6. Large number of students who do not benefit from school transport;
7. High number of learner pregnancy; and
8. Lack of proper sanitation facilitation.\(^{210}\)

The above report highlighted teacher shortages as one of the main problems facing the four schools the Mbizana Local Municipality. However, the ECDOE recently announced its intention to cut more than 4000 teaching posts.\(^ {211}\) The ECDOE has already cut about 10,000 teaching posts since 2008.\(^ {212}\) The South African Democratic Teachers Union (Sadtu) threatens to ‘strike’ if the ECDOE continue with its plan to make 4000 teachers redundant.

As recent as 2010, the national teachers’ strike had a devastating impact on teaching and learning in South Africa, leaving many schools in disarray. The teachers strike shut down the entire education system disrupting the critical end of year examinations. Invariably, learners from poor and marginalised communities are adversely affected by such interruptions. To this end, the Department of Basic Education held during the 2010 national teachers’ strikes that ‘from the report received thus far, it goes without saying that learners who were affected are exclusively children from poor communities.’\(^ {213}\)

The quality of basic education in the Eastern Cape is dependent on the implementation and management of curriculum reforms; resource allocation to impoverished schools; providing textbooks and other educational support material and addressing the major school infrastructure backlogs, especially in poor and marginalised communities. In the latter instance, the government was compelled to address infrastructural challenges through litigation.\(^ {214}\) In 2011, seven schools (mud schools) in the Eastern Cape lacked toilet facilities.

\(^{210}\) *Daily Dispatch*, ‘Report highlight education woes’ date: 08 October 2013.

\(^{211}\) *Daily Dispatch*, ‘Sadtu threatens strike action over Bhisho plan to slash post’ date: 15 October 2013.

\(^{212}\) Ibid.


\(^{214}\) Centre for Child Law v Government of the Eastern Cape Province, Eastern Cape High Court, Bhisho, case no 504/10. The memorandum of understanding between the parties was signed 2011-02-04 accessed on 20 October 2013.
running water and school furniture rendering these schools unsuitable for teaching and learning. The seven schools lodge their complaints against both the National and Provincial Departments of Basic Education. The government stated in its response that its infrastructural plan will be ‘progressively realised’ within the ‘limited resources’ at its disposal. Nonetheless, the government signed a memorandum of agreement committing R8.2 billion towards addressing the schools infrastructure backlog nationally over the following three years.\textsuperscript{215} In addition, the government has recently published its first draft ‘National Minimum Uniform Norms and Standards for School Infrastructure’ for public comments.\textsuperscript{216}

5.7 Conclusion

The transformation of the education system was a natural process after the abolishment of apartheid. In 2009, the national department of education set twenty seven specific goals to deal with improving schooling.\textsuperscript{217} Among the twenty seven goals is the provision of ‘textbooks, workbooks and other educational material, school governance and management, school funding and school infrastructure.’\textsuperscript{218} In addition, the department also set three standards that should be met in pursuance of the twenty seven goals.\textsuperscript{219} The standards are basic safety norms, minimum functionality norm and optimal functionality norms.

In 2013, the education policy of South Africa had gone through several reviews and amendments. It is evident that these changes have had little impact on the quality of teaching and learning in most rural schools. Despite effecting several curriculum changes, it remains questionable whether the efforts of the state to provide basic education will meet the threshold of equality, quality and efficiency. In other words, does the change in the curricula translate into the provision of quality adequate basic education?

The Eastern Cape has three realities, developed urban cities; underdeveloped and poor rural communities. The disparities between development and underdevelopment are also manifested in the provision of basic education. There are certain conflicting characteristics

\textsuperscript{215}\textit{Ibid.}
\textsuperscript{218}\textit{Ibid.}
\textsuperscript{219}\textit{Ibid.}
that can be made in this regard. Learners from developed cities have a much broader scope to choose from a range of schools. Conversely, learners from rural town often enjoy limited education support outside the formal education setting. Furthermore, parents in rural schools are less inclined to assist their children with homework, simply because they might be looking after sick relatives; some may be illiterate, or simply indifferent. The opposite is true for learners from developed towns; their parents are more inclined to assist them with their homework and other extra curricula activities.

The difference between urban and rural schools is stark. Quality teaching and learning are continuing unabated in well-resourced schools, while the quality of teaching and learning in rural, often under resourced schools are constrained by many challenges. In the main, rural schools are confronted with many disadvantages such as shortage of textbooks, inadequate facilities and under-qualified teachers. Most rural schools lack basic amenities like clean water, electricity, libraries, laboratories and computer facilities. These deficits adversely impact the quality of teaching and learning in rural schools. Moreover, well-resourced schools are able to adjust to curriculum changes, while such changes in rural schools are often characterised by uncertainty and confusion.

It is incumbent upon the government to improve the quality of teaching and learning in rural schools to acceptable standards necessary to ensure that learner’s are able to participate in the economic and political processes in South Africa. Basic education must be adequate and it should be based on equality, quality and efficiency. The quality of education remains poor in many rural schools in the Eastern Cape. Students from rural and improvised schools continue to receive inferior education, while students from affluent schools receive quality education. Consequently, the quality of basic education will adversely impact the learner’s ability to seek employment or succeed in further education and higher education. The inferiority of the education provided to rural students will further perpetuate inequality and marginalisation.
CHAPTER SIX
CONCLUSION AND RECOMMENDATIONS

6.1 Introduction
In terms of Section 29 (1) of the Constitution, everyone has the right to basic education. This right is not subject to ‘reasonable legislative and other measures, available resources and progressive realisation.’ The absence of such limitations leads one to conclude that the drafters intended for right to basic education to be immediately realised. Moreover, the drafters envisaged that the Constitution, through the right to basic education, will transform the socio-economic condition of South Africa. The rights to basic, compulsory education is widely regarded as a fundamental human right. For example, international human rights treaties such the ‘Universal Declaration of Human Rights,’ the ‘International Covenant on Economic, Social and Cultural Rights,’ the ‘African Charter on the rights and welfare of the Child,’ the ‘Convention on the Rights of the Child,’ the ‘Dakar Framework for Action: Education for All,’ and ‘UNESCO Convention against Discrimination in Education.’

Apartheid left the South African education system fragmented and unequal. The South African Schools Act provided the legal framework for the creation of a uniformed high quality education system. The changes in the curriculum were part of the transformation process of the South African education system. Underpinning these changes were the ‘White Paper on Education and Training (1995), the ‘South African Qualifications Act (1995) and the ‘National Education Policy Act (1996). The first significant curriculum change was the introduction of sCurriculum 2005. It shifted teaching, learning and assessment, from the traditional content based to an outcomes-based assessment model. This process is also known as ‘Outcomes Based’ Education.

The OBE method was implemented on the backdrop of an unequal education system. The South African schooling system consists of well-resourced schools where quality teaching and learning takes place and under-resourced schools where teaching and learning takes place under deplorable conditions. Jansen observes that the OBE method will fail, because ‘the policy was being driven in the first instance by political imperatives which have little to do with the reality of the classroom.’ For example, the South African democratic government
has appointed four Education Ministers\(^\text{220}\) with each adopting a revised OBE model. The aim of Curriculum 2005 was to ‘empower teachers,’ however, it was resourced intensely and its implementation was extremely complex, especially in rural and under-resourced schools. Therefore, curriculum 2005 was improved to the ‘Revised National Curriculum Statement’ (RNCS). Unlike curriculum 2005, the RNCS was a simplified version of the OBE method. The RNCS method focussed on ‘basic skills, content knowledge and grade progression.’ Nevertheless, the RNCS was replaced by the ‘Curriculum and Assessment Policy Statement’ (CAPS). The CAPS method, it is argued, is a more ‘regulated learning programme’. In addition, the CAPS method focuses on languages and mathematics. Workbooks (study aid) are central to the successful implementation of CAPS.

The standard of the infrastructure in many schools remain in a poor and deplorable condition. For example, in 2010, it is estimated that 1700 schools where without water supply, 700 without toilet facilities, 400 schools built with mud (63% in the Eastern Cape and KwaZulu-Natal), 5640 schools nationally estimated to be below ‘basic safety standards,’ 63,000 classroom and 15,000 library facilities needed.\(^\text{221}\) The department of Basic Education published on 12 September 2013 its ‘new minimum norms and standard for school infrastructure.’\(^\text{222}\)

In 2003, the department of basic education reviewed the financing, resources and costs of education in public schools. The review highlighted the discrepancies in spending within provinces and between provinces. The fee exemption procedure contained in the School Funding Norms was amended in 2006. The Amended National Norms and Standards for School Funding (ANNSSF) were adopted to ensure that everyone that is unable to pay fees is exempted from doing so.\(^\text{223}\) The Education Laws Amendment Act empowers the National Minister of Education award “No-fee School’ status to public schools serving impoverished community.

\(^{221}\) Action Plan to 2014- Towards the realisation of schooling 2025, p 150
\(^{222}\) Action Plan to 2014- Towards the realisation of schooling 2025, p 151.
\(^{223}\) Department of Basic Education, Plan of Action Improving access to free and quality basic education for all, at 25.
Despite numerous curriculum changes and significant amounts of public funds allocated towards the improvement of basic education, the quality of basic education in the Eastern Cape remains poor. Endemic corruption and incompetence have rendered the Eastern Cape education system in disarray. The recent remedial action by the National Department of Basic Education in the affairs of the ECEOD bears testimony to the state of basic education in the Eastern Cape. Unfortunately corruption and incompetence adversely impact the teaching and learning of the poor and marginalised. Conversely, well-resourced schools are able to navigate around these challenges. Consequently, education thus loses its transformative power, inequality is perpetuated and the poor and marginalised are unable to compete meaningfully in the social, economic and political life of South Africa.

6.2 Recommendations
6.2.1 The role of the state to implement education policies
There is absolutely no doubt that education has the power to transform the South African society. The state, through legislative and other measures, laid the foundation for quality basic education based for all. The adoption of the Action Plan 2014, for example, forms the bases for an improved education system that provide quality basic education in a democratic South Africa. In addition, the Department of Education should address the school infrastructure backlog, through the urgent implementation of the ‘Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure.’ The ‘Minimum Uniform Norms and Standards’ provides that all public schools should have clean water and toilet facilities, electricity and classrooms, among other things. The state is required to comply with these ‘Minimum Uniform Norms and Standards’ within 10 years.

As pointed out, the Department of Basic Education recently adopted its ‘Curriculum and Assessment Policy Statement’ (CAPS). It was further noted that workbooks (study aid) are central to the successful implementation of CAPS. However, the recent textbook crisis in Limpopo demonstrates the bottlenecks in the system. It is recommended that the department of Basic Education continuously monitor the implementation of the 2010 Ministerial Task

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225 Ibid.
Team on Learning and teaching support material.\textsuperscript{226} It recommended that the procurement system be rationalized; the development of a national catalogue; centralised ordering; the establishment of a ‘learning and teaching support material’ institute and the reconfiguration of the government and private companies involvement in the supply of learning and teaching support material.\textsuperscript{227}

6.2.2 The role of the court in enforcing the rights to quality basic education

Section 29(1) of the Constitution provides that ‘everyone has the rights to basic education, including adult basic education.’\textsuperscript{228} Unlike other socio-economic rights, the right to basic education has no internal limitations. The right to basic education may only be limited in terms of section 36 of the Constitution that provides the fair and reasonable limitations of the any right contained in the Bill of Rights.\textsuperscript{229} The Constitution unfortunately does not clarify the scope and content of basic education. The paper argues that the court should derive guidance from international law (including binding and non-binding) and respective state policies (for example, the National Plan of Action: Improving access to free and quality basic education for all in 2013)\textsuperscript{230} when interpreting the right to basic education. To this end, the Constitutional Court confirmed in \textit{S v Makwanyane}, the applicability binding and non-binding international law when interpreting the Bill of Rights.\textsuperscript{231}

Section 39(1)(b) of the Constitution states that ‘when interpreting the Bill of Rights, a court, tribunal or forum … (b) must consider international law…’\textsuperscript{232} South Africa is a signatory to the Dakar Framework for Action (2000), which provide for ‘universal access to and completion of free and compulsory primary education of good quality by 2015 and improving all aspects of the quality of education.’\textsuperscript{233} Although South Africa has not yet ratified the ICESCR, the court remains obligated in terms of \textit{S v Makwanyane} to consider non-binding international law. CESCR General Comment No 11 and General Comment No 13 will assist

\begin{thebibliography}{99}
\bibitem{Ibid} \textit{Ibid}.
\bibitem{Section 29 (1) of the Constitution} Section 29 (1) of the Constitution
\bibitem{Section 36 (1) of the Constitution} Section 36 (1) of the Constitution provide that ‘The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justiciable in an open and democratic society based on human dignity, equality and freedom …’
\bibitem{National Plan of Action} \textit{National Plan of Action: Improving access to free and quality basic education for all in 2013}.
\bibitem{See} See \textit{S v Makwanyane} 1995 3 SA 391 (CC) para 35.
\bibitem{Section 39 (1) of the Constitution} Section 39 (1) of the Constitution of South Africa.
\bibitem{See Education for All} See Education for All: Meeting our Collective Commitments: The Dakar Framework for Action (2000).
\end{thebibliography}
in the interpretation of basic education. For example, General Comment 11 provides clarity on the right to free and compulsory basic education, and General Comment 13 provides that basic education must be available, accessible, acceptable and adaptable.\textsuperscript{234} \textsuperscript{235}

The Constitutional Court has continuously demonstrated its preference for the ‘purposive approach’ in interpreting the Bill of Rights.\textsuperscript{236} In Executive Council of the Province of the Western Cape, the court stated that, ‘A provision in a Constitution must be construed purposively and in the light of the Constitutional context in which it occurs. Our history, too, may not be ignored in that process.’\textsuperscript{237} The purpose of education, according to the Committee on the Rights of the Child, is to empower the child through a ‘child-centric’ and ‘child friendly’ education system.\textsuperscript{238} The Children’s Act of 2005 provides that the best interest of the child is paramount.\textsuperscript{239} However, the High Court of the Eastern Cape was not prepared to consider the best interest of the child in Freedom Stationery v MEC for Education, Eastern Cape.\textsuperscript{240} The case dealt with the tender award provided for school stationery. The plaintiff challenged the tender process, arguing that it was procedurally and substantively unfair.\textsuperscript{241} The rights of the plaintiff prevailed over the right to basic education. The Court observed that ‘the absence of stationary, transport and in some cases food, at so many schools, is directly attributable to the action (or inaction) of the Department of Education …’\textsuperscript{242} The North Gauteng High Court decision in S27 v Minister of Education is authoritative in cases whenever the state fails to provide to deliver textbooks, qualified teachers, adequate infrastructure, or any other essential tool necessary for the provision of quality basic

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\item \textsuperscript{234} See CESC\textsuperscript{R} General Comment No 11 (1999).
\item \textsuperscript{235} See CESC\textsuperscript{R} General Comment No 13 (1999).
\item \textsuperscript{236} See S v Makwanyane 1995 (3) SA 391 (CC); S v Mhlunga\& Others at para 8; Soobramoney at para 16-17 and Khosa at para 47.
\item \textsuperscript{237} Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others (CCT15/99,CCT18/99) [1999] ZACC 13; 2000 (1) SA 661; 1999 (12) BCLR 1360 (15 October 1999).
\item \textsuperscript{238} Committee on the Rights of the Child. At 45\textsuperscript{th} Session to consider reports submitted by state parties under Art. 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography available at http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPSC.SDN.CO.1.pdf accessed on 25 July 2013.
\item \textsuperscript{239} Section 7 of the Children’s Act 38 of 2005 provides that-
\begin{itemize}
\item (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factorty must be taken into consideration where relevant …
\end{itemize}
\item \textsuperscript{240} Freedom Stationery (PTY) Ltd v MEC for Education, Eastern Cape 2011 JOL 26927 para 28 (E).
\item \textsuperscript{241} Ibid.
\item \textsuperscript{242} Freedom Stationery Para 31.
\end{itemize}
\end{footnotesize}
education. The court did not prescribe but merely ordered compliance in accordance with the department of basic education’s own plans and policies.\textsuperscript{243}

Unlike other socio-economic rights, the right to basic education has not been subject to extensive litigation. Consequently, this has resulted in much confusion on the scope, content and nature of basic education in South Africa. The state has adopted numerous policies to enumerate on the right to basic education. These policies include that provision of textbooks and other educational material, the implementation of the ‘minimum basic norms’ (drinking water, toilet facilities, electricity, safe and reliable school building conducive for teaching and learning). The court should therefore hold the state accountable whenever it fail to provide these basic services.

\textsuperscript{243} Van der Merwe ‘How ‘basic’ is basic education as enshrined in section 29 of the Constitution of South Africa? 2002 SAPL at 377.
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