



**UNIVERSITY OF THE WESTERN CAPE**  
**FACULTY OF LAW**

**A legal analysis of legislation and policies on the right to basic education in the Eastern  
Cape, South Africa.**

A mini thesis submitted in partial fulfillment of the requirements of the LL.M degree in the  
Faculty of Law of the University of the Western Cape

By

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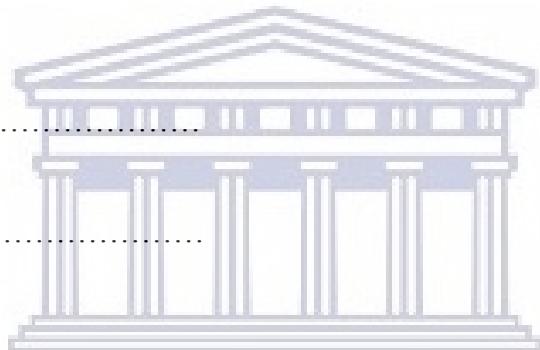
## **Declaration**

I, Zoliswa B. Ndayi do hereby declare that, *A legal analysis of legislation and policies on the right to basic education in the Eastern Cape, South Africa* is my own work, that it has not been submitted for another degree or to any other institution of higher learning, and that I have properly acknowledged all the sources which I have used by means of complete references.

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Signed .....

Date .....



Supervisor: Professor Lea Mwambene

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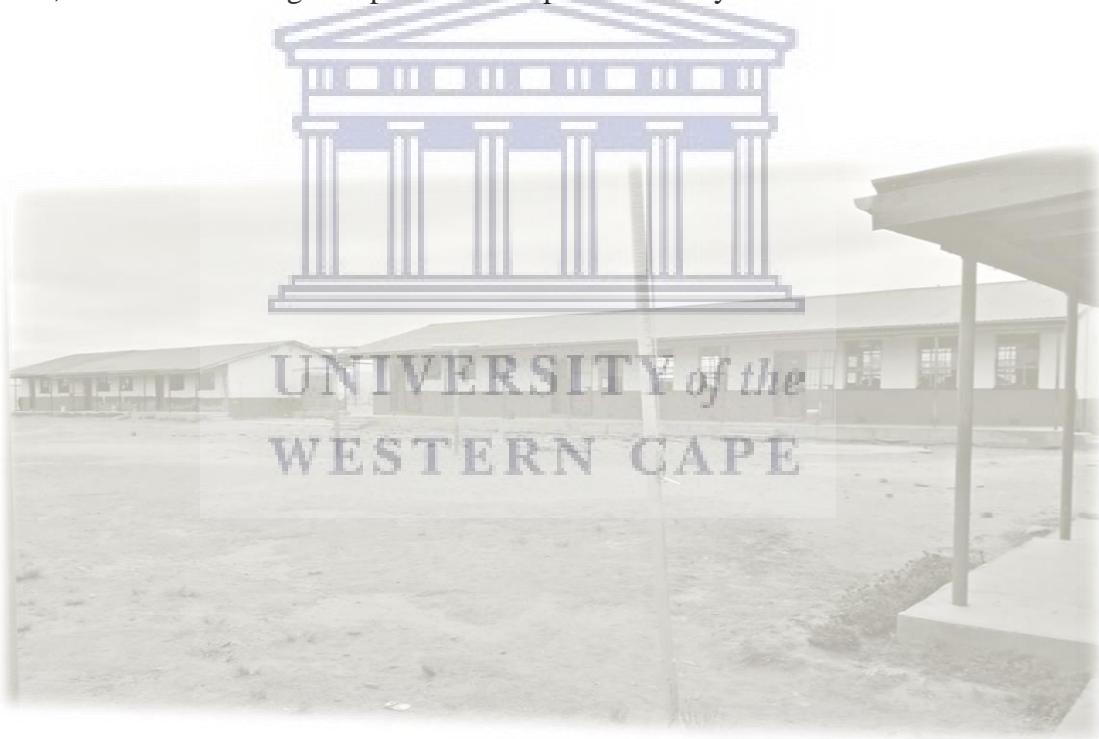
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## Acknowledgements & Dedications

Firstly, I would like to thank my Lord and Saviour for His abundant love, His grace that is always beyond sufficient and for His never-ending mercies. During this process, you kept revealing yourself in ways I cannot even begin to articulate. Moreover, I am deeply thankful to my supervisor Professor Lea Mwambene for her support during the writing of this thesis. I would like to thank my family and friends for their love and support, my heart is truly full of gratitude. Furthermore, I would like to extend my gratitude to the Faculty of Law, Graduate Lecturing Assistant (GLA) Programme for the financial assistance it provided.

I dedicate this body of work to my late grandmothers Nofemeli Ndayi and Nothobile Dukwe, the good Lord has honoured your prayers. And to my niece, Esothando Azwelam Azenathi Ndayi (and the many other Ndayi grandchildren that will follow you) may this be a reminder to you that, with God all things are possible. His promises are yes and amen.



This picture was taken at Enduku SS Primary School, situated at Engcobo, Eastern Cape, in the Manzana village (the place where my family is from and most importantly the place that inspired this dissertation). I dedicate this research project to all the young people who are still fighting to be recognised by an education system that seems to have forgotten their worth. One day, they will see you, and you shall take up space in your rightful places.

## **Keywords**

- **African Charter**
- **Basic Education**
- **Constitution**
- **Discrimination**
- **Eastern Cape**
- **International Law**
- **Legislation**
- **Policy**
- **Regional Law**
- **Standards**



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## List of Acronyms

<b>ACHPR</b>	African Charter on Human and People's Rights
<b>ACRWC</b>	African Charter on the Rights and Welfare of Children
<b>CADE</b>	Convention against Discrimination in Education
<b>CEDAW</b>	Convention for the Elimination of All forms of Discrimination Against Women
<b>CRC</b>	Convention on the Rights of the Child
<b>ECSEA</b>	Eastern Cape Schools Education Act
<b>ECHR</b>	European Court of Human Rights
<b>EFA</b>	Education for all
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICSECR</b>	International Covenant on Economic, Social and Cultural Rights
<b>NEPA</b>	National Education Policy Act
<b>NGOs</b>	Non-Governmental Organisations
<b>SASA</b>	South African Schools Act
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNCRPD</b>	United Nations Convention on the Rights of Persons with Disabilities
<b>UNESCO</b>	United Nations Educational, Scientific, and Cultural Organization

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## **Chapter 1: Overview of the Study**

### **1.1 Background and Problem Statement**

The right to a basic education is recognised as an essential right in international and regional law, with numerous instruments regulating it.<sup>1</sup> There are soft laws, in the form of General Comment documents, which provide guidelines to interpreting this right.<sup>2</sup> Among these instruments, for example, the International Covenant on Social, Economic and Cultural Rights (hereafter referred to as ‘the ICESCR’) and the African Charter on Human and People’s Rights (hereafter referred to as ‘the ACHPR’) implore member states to ensure that every child within their jurisdiction is able to gain access to education.<sup>3</sup> The ICESCR acknowledges that basic education as a socio-economic right is realisable overtime, its full realisation dependent on the availability of state resources.<sup>4</sup> Furthermore, the state is required to ensure that ‘scientific and technical knowledge’ is made accessible, thus incorporating modern teaching and learning methods.<sup>5</sup> In addition, the state is called to ensure that the quality of their education is acceptable and of a similar standard in all of their public schools.<sup>6</sup> Moreover, the Convention on the Rights of the Child (hereafter referred to as the ‘CRC) and the African Charter on the Rights and Welfare of the Child (hereafter referred to as the ‘ACRWC’) require the state to take measures that will encourage learners to attend school regularly and thus reduce the dropout rates.<sup>7</sup> These instruments lay down normative standards, giving guidance on the content of the right to basic education, i.e. defining what availability, accessibility, acceptability, and the adaptability (4As) means within the broader context of the right to basic education.

The right to a basic education, in theory is immediately realisable; however in practice, it can be argued that it is being treated like other socio-economic rights, subjected to the principle

<sup>1</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR)(1966)Universal Declaration of Human Rights (UDHR)(1948), Convention on the Rights of the Child (CRC)(1989), Convention on the Elimination of All forms of Discrimination against Women (CEDAW)(1979), Convention against Discrimination in Education (CDE)(1960), United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)(2007), and the World Declaration for All. Regionally, the African Charter on Human Rights and People’s Rights (ACHPR) (1981), African Charter on the Rights and Welfare of the Child (ACRWC)(1990), Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol)(2003), African Youth Charter (AYC) (2006)and 2000 Dakar Framework for Action.

<sup>2</sup> CESCR General Comment No 11: Plans of Action for Primary Education: article 14 (1999); CESCR General Comment No 13: The right to education: article 13 (1999).

<sup>3</sup> Art 13 of the ICESCR; Art 17 of the ACHPR.

<sup>4</sup> Chenwi L ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ (2013) 39 DEJURE 743.

<sup>5</sup> Art 28 (3) of the CRC.

<sup>6</sup> Art 4(b) of the CDE.

<sup>7</sup> Art 28(1)(e) of the CRC; Art 3 (d) of the ACRWC.

of progressive realisation.<sup>8</sup> This right, unlike other socio-economic rights in South Africa, is *sui generis*, it has no internal qualifiers, meaning that it can only be limited in terms of a law of general application that is reasonable and justifiable in an open and democratic society founded on human dignity, freedom and equality.<sup>9</sup> As a party to most of the above instruments, the post-apartheid government of South Africa through its Constitution<sup>10</sup>, has entrenched the right to basic education under section 29(1)(a). Through this constitutional recognition, numerous legislation and policy documents have been enacted, which directly deal with the implementation of this right.<sup>11</sup> Accordingly, the following selected legal instruments have been essential tools used to assist the relevant stakeholders with defining and implementing the right to a basic education , not just at the national level but also provincially.<sup>12</sup> These instruments are the South African Schools Act,<sup>13</sup> National Education Policy Act<sup>14</sup> and the Employment of Educators Act,<sup>15</sup> which are the main statutes on basic education. In addition, the Eastern Cape Schools Education Act,<sup>16</sup> Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>17</sup> Children's Act,<sup>18</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act,<sup>19</sup> Criminal Procedure Act and the Refugees Act,<sup>20</sup> which shall be discussed in detail in chapter 4 of the study.

When assessing the availability, accessibility, and the acceptability of basic education resources in the Eastern Cape (hereafter referred to as 'the EC'), the province appears to be lagging when compared to some of the other provinces. For instance, the National Education Infrastructure Management System Report (hereafter referred to as 'NEIMSR') stated that out of the 5393 schools audited from the EC, 1945 of these schools had pits and 37 had no

<sup>8</sup> For a detailed discussion on the concept of progressive realisation as it pertains to the right to a basic education, See Chenwi L 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 39 *DEJURE* 742-769; Simbo C 'The right to basic education, the South African constitution and the *Juma Musjid*' case: An unqualified human right and a minimum core standard' (2013) 17 *LDD* 477-503.

<sup>9</sup> *Juma Musjid Primary School and others v Essay NO and others* 2011 (8) *BCLR* 761 (CC), para 36-38. See also, Arendse L 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) 14 *PER/PELJ* 116.

<sup>10</sup> Constitution of the Republic South Africa, 1996.

<sup>11</sup> National Education Policy Act 27 of 1996; South African Schools Act 84 of 1996; Employment of Educators Act 76 of 1998; Eastern Cape Schools Education Act 1 of 1999.

<sup>12</sup> Simbo C 'Defining the Term Basic Education in the South African Constitution: An International Law Approach' (2012) 16 *LDD* 172.

<sup>13</sup> Act 84 of 1996.

<sup>14</sup> Act 27 of 1996.

<sup>15</sup> Act 76 of 1998.

<sup>16</sup> Act 1 of 1996.

<sup>17</sup> Act 4 of 2000.

<sup>18</sup> Act 38 of 2005

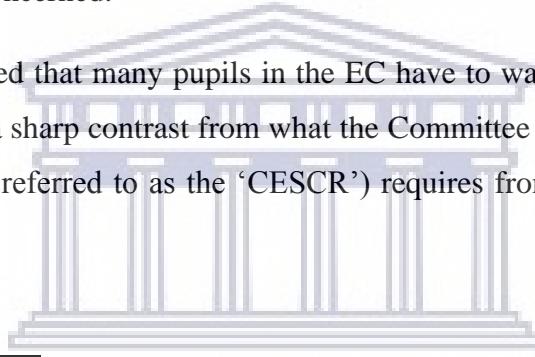
<sup>19</sup> Act 56 of 1955.

<sup>20</sup> Act 130 of 1998.

sanitation facilities<sup>21</sup>. In addition, 92.99% of the 5393 schools in the province do not have libraries and 4.21 % of the schools recorded have adequately resourced libraries.<sup>22</sup> This is to be contrasted to 63.24% schools that have libraries in Gauteng.<sup>23</sup> In addition, the illiteracy rate in the province is estimated at 10, 4% when compared to other provinces, which is against the background that the province has experienced a decline in learner enrolment over the last few years.<sup>24</sup>

Furthermore, the province is said to be “the worst-affected province in terms of the number of schools built using inappropriate material,<sup>25</sup> and there are still 436 mud schools in the province.<sup>26</sup> The infrastructure issues have led to schools being overcrowded, which contravenes the relevant national legislation.<sup>27</sup> Minister Angie Motshekga has been reported to have admitted that the province of the EC has been lagging behind where providing suitable infrastructure is concerned.<sup>28</sup>

The media has also reported that many pupils in the EC have to walk more than 10km daily to get to school.<sup>29</sup> This is a sharp contrast from what the Committee on Economic, Social and Cultural Rights (hereafter referred to as the ‘CESCR’) requires from its member states.<sup>30</sup> In



<sup>21</sup> Department of Basic Education ‘NEIMS Standard Reports’ January 2018. Table 5.

<sup>22</sup> Department of Basic Education ‘NEIMS Standard Reports’ January 2018. Table 7.

<sup>23</sup> Department of Basic Education ‘NEIMS Standard Reports’ January 2018. Table 7.

<sup>24</sup> Equal Education ‘PLANNING TO FAIL: A Report on Equal Education’s Eastern Cape School Visits’, November 2016. Available at <https://equaleducation.org.za/wp-content/uploads/2016/07/Full-EE-Planning-to-Fail-Report-2017.pdf> (accessed 11 August 2019).

<sup>25</sup> Phakathi B ‘Eastern Cape schools are worst in SA for poor infrastructure’ *Business Live* 25 May 2018 available at <https://www.businesslive.co.za/bd/national/education/2018-05-25-eastern-cape-schools-are-worst-in-sa-for-poor-infrastructure/> (accessed 25 March 2019).

<sup>26</sup> Macupe B ‘Eastern Cape mud schools progress stalls’ *Mail & Guardian* 04 May 2018 available at <https://mg.co.za/article/2018-05-04-00-eastern-cape-mud-schools-progress-stalls>] (accessed 29 March 2019).

<sup>27</sup> See section 29 of the Constitution and section 9(2) of the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure; Ngqakamba S ‘Overcrowded Eastern Cape schools at the centre of court application against education MEC’ *News 24* 11 September 2018 available at <https://www.news24.com/SouthAfrica/News/overcrowded-eastern-cape-schools-at-the-centre-of-court-application-against-education-mec-20180911>] (accessed 27 March 2019).

<sup>28</sup> Phakathi B ‘Eastern Cape schools are worst in SA for poor infrastructure’ *Business Live* 25 May 2018 available at <https://www.businesslive.co.za/bd/national/education/2018-05-25-eastern-cape-schools-are-worst-in-sa-for-poor-infrastructure/> (accessed 25 March 2019).

<sup>29</sup> Macupe B ‘Pupils still forced to walk to class’ *Mail & Guardian* 15 February 2019 available at <https://mg.co.za/article/2019-02-15-00-pupils-still-forced-to-walk-to-class>] (accessed 29 March 2019); Macupe B ‘Pupils at four Eastern Cape schools get ticket to ride’ *Mail & Guardian* 28 February 2019 available at <https://mg.co.za/article/2019-02-28-pupils-at-four-eastern-cape-schools-get-ticket-to-ride>] (accessed 29 March 2019).; Mvumvu Z ‘30 000 pupils still have to walk to school’ *Dispatch Live* 16 March 2018 available at <https://www.dispatchlive.co.za/news/2018-03-16-30-000-pupils-still-have-to-walk-to-school/> (accessed 29 March 2019).

<sup>30</sup>Under General Comment 13, para 6(b), the committee requires the state to make basic education accessible

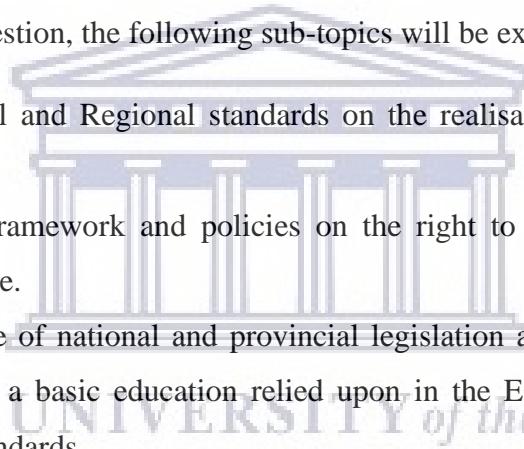
addition, the ACRWC requires the state to ensure that the learners have the necessary means encouraging them to attend school.<sup>31</sup>

Against this background, and the continued problems experienced in realising basic education in the EC, this paper seeks to examine whether the legislation and policies on basic education relied upon in the province comply with the international and regional standards.

## **1.2 Research Question**

Given the issues outlined above, particularly on the availability, accessibility, acceptability and adaptability of the basic education institutions and programmes in the EC, the main research question is: whether or not the legislation and policy documents on the right to a basic education, relied upon in the Eastern Cape are in accordance with the international and regional standards.

To answer the research question, the following sub-topics will be examined:

- 
- a. International and Regional standards on the realisation of the right to basic education.
  - b. The legal framework and policies on the right to a basic education in the Eastern Cape.
  - c. Compliance of national and provincial legislation and policy documents, on the right to a basic education relied upon in the EC, with international and regional standards

## **1.3 Significance of the Study**

Much has been reported in the media on the conditions of basic education in the EC, as it will be discussed in chapter 2. However, there has not been research conducted that specifically analysed the legislation and policies governing basic education in the province, through the lens of international and regional law standards. This research project will provide a detailed scope of legislation and policy documents as they relate to the right to a basic education in the EC. Therefore, it will contribute to the existing research on the normative framework on the right to a basic education in South Africa, relevant to researchers, policy makers, courts, as well as academics.

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<sup>31</sup> Art. 11(3) of the ACRWC.

## **1.4 Aims and objectives**

The research aims of this study are to provide an overview of the state of basic education in the Eastern Cape, South Africa. To additionally examine international and regional standards on the right to a basic education. Moreover, to analyse the extent at which national and provincial legislation in South Africa complies with the outlined international and regional standards on basic education. Accordingly, the objective of the study is to provide a detailed assessment of the availability, accessibility, acceptability and adaptability of basic education in the Eastern Cape, South Africa, as provided for in the relevant legislation and policies, through the lens of international and regional standards.

## **1.5 Literature Review**

When it comes to scholarly research on the right to a basic education, the focus has been on defining the right or rather the term ‘basic education’. Moreover, its core content, including assessing the state’s obligations in providing basic education against international law standards, the governance of basic education, nationally and provincially. And additionally, the role of the courts in ensuring the realisation of basic education.

In defining the right to a basic education, research from scholars reveals that there are issues that have been identified with the definition of the term ‘basic education’ in South Africa<sup>32</sup> which include *inter alia* the fact that there is no consensus on the true definition of the term basic education.<sup>33</sup> The Constitution does not directly indicate its definition of basic education, so it is not clear as to whether legislature had envisioned the World Declaration definition of the term.<sup>34</sup> In the *Governing Body of the Juma Musjid v Essay*, the Constitutional Court regarded it critical that the legislature had made the distinction between basic and further education, stating that it showcased the importance of the right to basic education.<sup>35</sup> Now, given that neither the Constitution nor any other pieces of legislation on basic education provide clarity on the definition of the term,<sup>36</sup> it is often left to the courts to interpret what this right entails.<sup>37</sup> The concern around the vagueness of the definition of basic education is that, without a precise definition interpreting section 29(1) (a), difficulties are created in

<sup>32</sup>Churr C ‘Realisation of a child’s right to a basic education in the South African school system: Some lessons from Germany’ (2015) 18 *PER/PELJ* 2410.

<sup>33</sup> Murungi LN ‘Inclusive Basic Education in South Africa: Issues in its Conceptualisation and Implementation’ (2015) 18 *PER/PELJ* 3160.

<sup>34</sup> Simbo C (2012) 163.

<sup>35</sup> *Governing Body of the Juma Musjid Primary School v Essay N.O [2011] ZACC13 para 37*

<sup>36</sup> Simbo C (2012) 163. See also Taiwo E A *The Implementation of the Right to Education in South Africa and Nigeria* (LLD thesis Nelson Mandela Metropolitan University 2011) 116.

<sup>37</sup> Arendse L ‘The obligation to provide free basic education in South Africa: An international law perspective’ (2011) 14 *PER/PELJ* 98.

complying with the right itself.<sup>38</sup> Therefore, clarity is essential to understand what legislature intended as encompassing this right. In the meantime, it is unclear if the right just secures school attendance for a specified duration or if it also encompasses the right to acceptable education for a designated schooling period.<sup>39</sup> It is proposed that to remedy the uncertainty around the definition of basic education, it is best that the legislature clarifies what it had envisioned regarding the right.<sup>40</sup>

When assessing the state's obligations on the right to basic education against international standards, literature has unearthed that, since this right is a socio-economic right, international law obligates the state to make education available and accessible to all without any discrimination.<sup>41</sup> Moreover, greater priority is given to basic education than other levels of education, by international law.<sup>42</sup> It requires basic education to be made free and compulsory;<sup>43</sup> however in South Africa, the constitutional entrenchment of the right to a basic education does not include all the ‘universally accepted’ education rights.<sup>44</sup> For example, international law requires basic education to be made free and compulsory, in South Africa education has been made compulsory through the South African Schools Act,<sup>45</sup> however the same statute makes no mention of basic education being absolutely free.<sup>46</sup>

Literature on the governance of basic education has been focused on a number of notions, such as the idea of participatory democracy, democratisation of education, co-operative governance, and meaningful engagement. It has been found that the challenge in the EC has been that of integrating former Bantustans, or homelands, to the task of creating provincial governance arrangements.<sup>47</sup> This is due to the historical patterns of ‘clientelism’<sup>48</sup> which

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<sup>38</sup> Simbo C (2012) 164. See also *Daniels v Scribante and Another* 2017 ZACC 13 para 44 where the Constitutional Court had to determine whether section 29(1)(a) of the Constitution was binding to a Trust, a consequence of the vagueness the scholars are concerned about.

<sup>39</sup> McConnachie C, Skelton A & McConnachie C *The Constitution and the Right to a Basic Education in Basic Education Rights Handbook: Education Rights in South Africa* (2017) 23; Simbo C (2012) 164.

<sup>40</sup> Simbo C (2012) 163. The term ‘basic education’ as defined by the *World Declaration on Education for all* (1990), encompasses education that focuses on teaching and learning; therefore endorses accessibility of teaching and learning resources.

<sup>41</sup> Arendse L (2011) 97. See also Churr C (2015) 2408; Mestry R ‘A critical analysis of the learners’ constitutional rights to basic education in South Africa’ (2017) 82 *KOERS- Bulletin for Christian Scholarship* 2

<sup>42</sup> Arendse L (2011) 101.

<sup>43</sup> Arendse L (2011) 101.

<sup>44</sup> Churr C (2015) 2409.

<sup>45</sup> Act 84 of 1996.

<sup>46</sup> Churr C (2015) 2409.

<sup>47</sup> Levy B, Cameron R, Hoadley U & Naidoo V (ed) *The politics and Governance of Basic Education: A tale of two South African Provinces* (2018) 11. See also Ncanywa T ‘A Descriptive Analysis of the Eastern Cape School Indicators’ (2015) 3 *Africa’s Public Service Delivery & Performance Review* 27.

were inherited from the Apartheid government administration.<sup>49</sup> It must be noted these issues were not just unique to the EC but throughout the country. It has been suggested in literature that the first avenue that the EC administration could explore is to shift its governing culture into one that is impersonal, however acknowledging improbability of such a suggestion since even national intervention had failed.<sup>50</sup> Secondly, it has been proposed that the governance issues could be resolved at school level,<sup>51</sup> which would involve the proactive participation on the part of the communities and the parents of the children. Therefore supporting school-level performance, what scholars have referred to as co-operative governance.<sup>52</sup> Additionally, it has been recommended that the managers at all education levels should be provided with management skills in order to efficiently exercise their legal duties,<sup>53</sup> which would certainly establish participatory democracy in the governing of schools in the province.

And lastly, literature on basic education has also been focused on the role played by the courts. It unearthed that, it is often difficult for the courts to adjudicate socio-economic rights, because of the various interests that need to be balanced.<sup>54</sup> The task of balancing these interests has had an impact on the doctrine of separation of powers, which apportions separate powers to the three branches of government.<sup>55</sup> The courts have had to apply judicial deference in the adjudication of socio-economic rights.<sup>56</sup> The Constitutional Court has self-imposed upon itself a mechanism of restraint founded on the principle of ‘reasonableness’, in order to prevent itself from contravening the doctrine of separation of powers.<sup>57</sup> This decision by the court has been criticised by scholars, on the basis that the court is refusing to be involved in establishing the core content of socio-economic rights, it has rather resigned itself

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<sup>48</sup>Refers to an exchange of material goods for political support, often involving an implicit or explicit quid-pro-quo exchange.

<sup>49</sup>Kota Z, Hendricks M, Matambo E and Naidoo V ‘The governance of basic education in the Eastern Cape’ *Graduate School of Development Policy and Practice: Strategic Leadership for Africa’s Public Sector*’ (2017) 6 *Occasional Working Paper* 3. See also Mansfield-Barry S & Stwayi L *School Governance in Basic Education Rights Handbook: Education Rights in South Africa* (2017) 76.

<sup>50</sup> Kota Z et al (2017) 27.

<sup>51</sup> Kota Z et al (2017) 27.

<sup>52</sup> Levy B et al (2018) 1.

<sup>53</sup> Ncanywa T (2015) 50.

<sup>54</sup> Skelton A ‘How far will the courts go in ensuring the right to a basic education? ’ (2012) 27 SAPL 392; Brand D & Heyns C ‘Introduction to socio economic rights in the South African Constitution’ (1998) 2 *Law, Democracy and Development* 153.

<sup>55</sup> 164; Churr C (2015)2410.

<sup>56</sup> Skelton A (2012) 393. See also Brand D & Heyns C (1998) 154.

<sup>57</sup> Skelton A (2012) 394.

<sup>57</sup> Skelton A (2012) 395.

to being content with just calling upon the other branches to explain their conduct and decisions.<sup>58</sup>

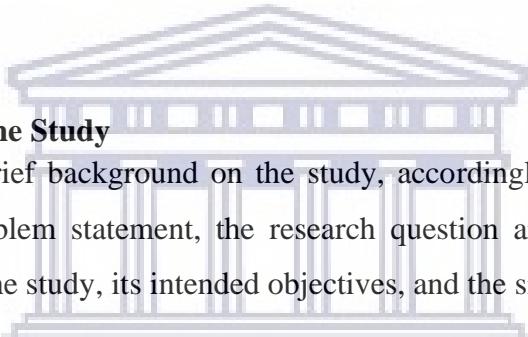
## **1.6 Methodology**

A great deal of fieldwork on the availability and accessibility of basic education in South Africa has been conducted, particularly by Non-governmental Organisations such as Equal Education, Section 27 and the Centre for Child law, among others. Consequently, further fieldwork and empirical research will not be necessary. Accordingly, this research will be a desk-top research project, which will be relying on both primary, and the secondary data of those that have conducted primary research. Therefore, it will comprise of literature, journal articles, online sources, reports, and case law. The desk-top primary research for this study will focus on international conventions, national and provincial legislation, policies and the relevant case law.

## **1.7 Chapter Outline**

### **Chapter 1: Overview of the Study**

This chapter provides a brief background on the study, accordingly outlining the rationale behind the study, the problem statement, the research question arising from the problem statement, the purpose of the study, its intended objectives, and the significance of the study.



### **Chapter 2: International and Regional Legal Standards on the Right to Basic Education**

This chapter will consider the international and regional legal frameworks on the right to a basic education. It will undertake this through utilising the ICESCR 4A-Scheme, as analysed and discussed by Tomasevski, which is relied upon to examine a country's compliance with international and regional law standards within its domestic laws. Accordingly, this chapter will discuss the international and regional normative framework through the principles of availability, accessibility, acceptability and adaptability, the concepts of the 4-A scheme.

### **Chapter 3: The Context of Basic Education in Eastern Cape, South Africa.**

In this chapter, an overview of the state of basic education in the EC will be provided. It will outline the challenges experienced by the learners in the EC when accessing basic education services. The identified challenges will be used in chapter 4 to assess the adequacy of the available legislation and policies in championing the right to a basic education in EC. Furthermore, through statistics and other available research studies, the chapter will provide content on the availability of basic education resources, accessibility of teaching and learning

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<sup>58</sup> Skelton A (2012) 395; See also Churr C (2015) 2409.

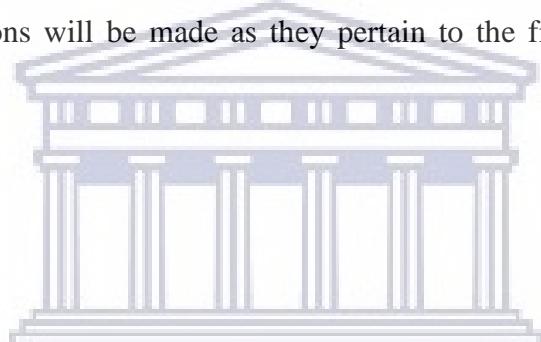
facilities, acceptability of the learning conditions and the quality of educational resources and the degree of adaptability of basic education in the province.

#### **Chapter 4: The selected National and Provincial Framework on Basic Education in the Eastern Cape.**

Against the background of the international and regional standards of the right to a basic education provided in chapter 2, as well as the state of basic education provided in chapter 3, this chapter will analyse the applicable national and provincial legislation and policies on basic education as they pertain to the EC. This analysis will be conducted with the intention to ascertain whether South Africa is complying with the international and regional standards in realising the right to a basic education in the EC.

#### **Chapter 5: Recommendations and Conclusions**

This chapter shall conclude the dissertation by summarising the abovementioned chapters. Moreover, recommendations will be made as they pertain to the findings unearthed in the study.



## **Chapter 2: International and Regional Legal Standards on the Right to Basic Education**

### **2. Introduction**

In the introductory chapter, international and regional law standards were discussed briefly. Although international law on the right to basic education exists independently from the 4-A scheme, the discussion on these standards will be discussed through the principles of the 4-A scheme, as analysed and discussed by Tomasevki,<sup>59</sup> a former special rapporteur for the United Nations Human Rights Office of the High Commissioner, in order to establish a clear structure of the discussion. As previously mentioned, the right to education is protected by numerous international and regional law instruments around the world. More specifically, the UDHR, UNCRPD and the ICESCR recognise this right.<sup>60</sup> Moreover, the CRC and the ACRWC make specific reference to the right to education of children.<sup>61</sup> The ACHPR, AYC and the ACRWC are some of the other instruments protecting the right to education of everyone.<sup>62</sup>

Historically, international educational conventions and treaties shifted from the term ‘primary education’ in their language to utilising the term ‘basic education’. Use of the term ‘basic education’ was introduced in the year 1990 at the *1990 Jomtien Conference*.<sup>63</sup> International and national legal frameworks and ‘statistical categories’, that came after this conference, were subsequently influenced by this new term.<sup>64</sup> As a result, the drafters of section 29 of the Constitution of the Republic of South Africa were inspired to use the term basic education after the conclusion of the 1990 Jomtien Conference, where the *Declaration on Education for All* was adopted. The influence of this new terminology, ‘basic education’, was observed further, in the *African Charter on the Rights and Welfare of the Child (1990)*<sup>65</sup> and the *World Summit for Children*.<sup>66</sup> In the South African context, the term ‘basic education’ was formally

<sup>59</sup> See Tomasévski K *Human rights obligations: Making education available, accessible, acceptable and adaptable* (2001) Swedish Development Cooperation Agency: Lund

<sup>60</sup> Art 26(1) of the UDHR; Art 24(1) of the UNCRPD; Art 13(1) of the ICESCR.

<sup>61</sup> Art 28 of the CRC; Art 11(1) of the ACRWC.

<sup>62</sup> Art 17 (1) of the ACHPR; Art 13(1) of the AYC; Art 11(1) of the ACRWC.

<sup>63</sup> The March 1990 Jomtien, Thailand Conference resulted in the *World Declaration on Education For All* which used the term “basic education” throughout the document. Available at: [http://www.unesco.org/education/pdf/JOMTIE\\_E.PDF](http://www.unesco.org/education/pdf/JOMTIE_E.PDF) (14 October 2019).

<sup>64</sup> *Preliminary report of the Special Rapporteur on the right to education*, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33 E/CN.4/1999/49 13 (January 1999) at para 15. available at: <http://www2.ohchr.org/english/issues/education/rapporateur/annual.html>) (accessed 23July 2019)

<sup>65</sup> Art 11 (3)(a) of the ACRWC.

<sup>66</sup> In its final declaration, it states that providing basic education and literacy for everyone is one of the most essential contributions that can be done towards the development of the children around the world. [The World

mentioned in the Interim South African Constitutional document, in its fifth progress report to be specific.<sup>67</sup>

Indeed, basic education has a life-changing impact for the beneficiaries concerned. It is for this reason that the state and other stakeholders must work together, tirelessly, towards ensuring its full and uncompromised enjoyment. Accordingly, we must look towards international and regional law for the guidance and perspective on the way a country ought to realise this crucial right. Therefore, this chapter has been divided into 4 sections, availability, accessibility, acceptability and adaptability, the 4-A scheme, in order to fully discuss the international and regional standards on the right to a basic education.

## 2.1 The 4-A Scheme

The 4-A scheme is the instrument proposed for the realisation of the law. The relevance of this scheme in the study emanates from the international understanding that this scheme defines the right to education in a wider context. The 4-A scheme comprises of four principles that are interrelated and important elements of education.<sup>68</sup> These principles are availability, accessibility, acceptability and adaptability. They are used to examine the country's compliance with the fulfilment of the right to a basic education and they provide substantial content to the right.<sup>69</sup> Moreover, they measure and monitor the extent of the realisation of basic education within the domestic legislation and policies of the country.<sup>70</sup>

The 4-A scheme accordingly requires the right to a basic education to be progressively realised in a non-discriminatory manner, thus ensuring that basic education is made available, accessible, acceptable and adaptable to all children who are still in the school-going age.<sup>71</sup> Furthermore, this scheme requires education to be made flexible, in order to adapt to the ever-changing needs of society and the respective communities and thus respond to the needs of the students from diverse cultural and social settings.<sup>72</sup> For that reason, it is required that all aspects of education should be made available, accessible, acceptable and adaptable.<sup>73</sup>

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Summit for Children adopted the *World Declaration on the Survival, Protection and Development of Children* (September 1990). (available at: <http://www.unicef.org/wsc/declare.html>) para. 13.

<sup>67</sup> Technical Committee on Fundamental Rights during the Transition: Fifth Progress Report (11 June 1993), page 2. See also section 32(a) of the Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>68</sup> General Comment 13, para 6.

<sup>69</sup> General Comment 13, para 6.

<sup>70</sup> Beiter KD *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (2006) 335.

<sup>71</sup> General Comment 13.

<sup>72</sup> ESCR Committee General Comment 13, para 6(d)

<sup>73</sup> General Comment 13, para 57.

## 2.1.1 Availability of Basic Education

The principle of availability requires essential educational resources to be made available to effectively realise the right to a basic education. These educational resources encompass the legislative provisions that ensure compulsory education, physical infrastructure of schools, educators and, learning and teaching materials.<sup>74</sup> The ability to fully develop the learner's potential, as required by the UDHR,<sup>75</sup> relies on the degree of availability of the education provided, as a consequence the education system's capacity to encourage and stimulate the learners will influence the magnitude of the pupil's personality development.<sup>76</sup> Availability, therefore, additionally encompasses the funds designated towards the fulfilment of the right to education, appropriate schools and the availability of educators.<sup>77</sup>

The ICESCR, UNESCO CADE, ACHPR and the ACRWC require state parties to work out, expand and implement national policies, in order to ensure that people can complete their education regardless of their circumstances.<sup>78</sup> The CRC further requires the state to recognise the children's rights to education, and accordingly take all the necessary steps towards its realisation.<sup>79</sup> Moreover, the CEDAW and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (hereafter referred to as the 'Maputo Protocol') call for the state to ensure that their Constitution and laws embody the principle of equality for both genders,<sup>80</sup> and accordingly enact legislation and policies that prohibit discrimination against women [girls].<sup>81</sup> This will thus establish mechanisms that will legally protect women's rights and ensure that women are treated equally with men.<sup>82</sup> In addition, the UNCRPD requires the government to take all the necessary actions to make sure that all children with special needs operate on an equal basis and have full access to their rights and fundamental freedoms.<sup>83</sup>

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<sup>74</sup>South African Human Rights Commission 'Report of the Public Hearing on the Right to Basic Education' (2006) available at <http://www.sahrc.org.za/.../Reports/Right%20to%20basic%20education%202006.pdf> (accessed on 15 March 2020) 10.

<sup>75</sup> Art 26(2) of the UDHR.

<sup>76</sup> Reyneke JM 'The best interests of the child in school discipline in South Africa' (PhD Thesis University of Free State, 2013) 311.

<sup>77</sup> Tomasêvski K *Human rights obligations: Making education available, accessible, acceptable and adaptable*' (2001) 12.

<sup>78</sup> Art 13(d) of the ICESCR; Art 4(c) of the UNESCO CADE; Art 1 of the ACHPR; Art 11(1) of the ACRWC

<sup>79</sup> Art 28 & 29 of the CRC.

<sup>80</sup> Art 2(a) of the CEDAW

<sup>81</sup> Art 2(b) of the CEDAW

<sup>82</sup> Art 2(c) of the CEDAW; Art 2(a) & (b) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol).

<sup>83</sup> Art 7(1) of the UNCRPD.

Regionally, should a country obstruct the availability of education, it can be held accountable by the African Commission on Human and People's Rights, as it was observed in the *Free Legal Assistance Group and Others v. Zaire, African Commission on Human and Peoples' Rights*. This was the first case where the availability of education and the violation of the right to education were considered by the African Commission. The communication submitted by the Union Interafircaine des Droits de l'Homme, dated 20 March 1993, among many other violations, alleged that Zaire had closed universities and secondary schools for more than two years, in a time of social and political unrest.<sup>84</sup> Consequently, the Commission found that the closure of these educational institutions constituted a violation of Art 17 of the ACHPR, which guarantees the right to education.<sup>85</sup>

#### **2.1.1.1 Physical Infrastructure**

The content of the curriculum is not the only component that determines the quality of education, rather the material conditions where the learners receive their education influences the quality of education.<sup>86</sup> Availability calls for educational institutions and programmes to be made available by the state in adequate quantities.<sup>87</sup> These educational institutions and programmes comprise buildings and additional protection components such as sanitation facilities for both genders, suitable drinking water, educators who are sufficiently trained and accordingly receive competitive remuneration, adequate teaching and learning resources, libraries, computer facilities and information and technology.<sup>88</sup>

According to Tomasevski, availability pertains to two different state duties, a civil and political duty. These duties involve authorising private entities to establish educational institutions, and the social and economic right aspect of the right to education which place a duty on the state to establish and fund these educational institutions.<sup>89</sup> This accordingly facilitates the establishment of adequate physical infrastructure domestically.

#### **2.1.1.2. Funding**

Substantial investment is required in order to ensure that primary schools are available for all children.<sup>90</sup> As a consequence, international human rights law compels the state to be the main investor, ensuring that primary schools are made available to all learners of school-going

<sup>84</sup> Free Legal Assistance Group and Others v. Zaire, African Commission on Human and Peoples' Rights, para 4.

<sup>85</sup> Free Legal Assistance Group and Others v. Zaire, African Commission on Human and Peoples' Rights, para 48.

<sup>86</sup> Woolman S and Bishop M *Education* (2009) in Woolman, S. et al. *Constitutional Law of South Africa* 57-19.

<sup>87</sup> General Comment 13, para 6(a).

<sup>88</sup> General Comments 13, para 6(a).

<sup>89</sup> Tomasevski K (2001) 13.

<sup>90</sup> Tomasevski K (2001) 17.

age.<sup>91</sup> It is for this reason that state parties are called to utilise their resources to their maximum scope,<sup>92</sup> which includes the resources obtained from the international community.<sup>93</sup> And consequently, a critical area that the CRC focuses on is the budget allocation for education.<sup>94</sup> As a result, any deliberate retrogressive actions by the state towards education, have to be justified, requiring the state to make reference to all their protected rights and the context of the full use of their 'maximum' available resources.<sup>95</sup> Thus, the state must prove that they have exhausted all their available resources in pursuit of the fulfilment of this right. In addition, the former Special Rapporteur on Education opined that the state should set up schools or allocate funds to allow private entities to build and launch schools.<sup>96</sup>

#### **2.1.1.3. Learning and Teaching Materials**

It is required that education should be focussed on ensuring the full development of the learner's personality.<sup>97</sup> In addition, the UN Committee on Economic, Social and Cultural Rights stipulates that availability includes schools being equipped with adequate teaching materials, based on the domestic circumstances of a country.<sup>98</sup> This includes computer facilities, libraries and information technology being made available.<sup>99</sup> In addition, the CRC implores state parties to oversee access to scientific and technological resources, including modern teaching technologies.<sup>100</sup>

Moreover, the World Declaration on Education for All requires the state to provide the basic learning necessities, which comprise important learning resources and fundamental learning materials, the resources that all human beings need in order to navigate their lives, and to enhance their 'full capacities' so that they can live and work in dignity.<sup>101</sup> Accordingly, through these learning resources, the individuals are able to make significant improvements

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<sup>91</sup> Tomasevski K (2001) 17.

<sup>92</sup> Art 4 of the CRC.

<sup>93</sup> General Comment 3, para 13.

<sup>94</sup> Verheyde MA *Commentary on the United Nations Convention on the Rights of the Child: Article 28 The Right to Education* (2015) 53.

<sup>95</sup> General Comment 3, para 9.

<sup>96</sup> Tomasevski K (2001) 13.

<sup>97</sup> Art 26(2) of the UDHR.

<sup>98</sup> General Comment 13, para 6(a).

<sup>99</sup> General Comment 13, para 6(a).

<sup>100</sup> Art 28(3) of the CRC.

<sup>101</sup> Art 1 of the World Declaration on Education for All.

in the quality of their lives and be sufficiently informed in order to make informed contributions and learn continuously.<sup>102</sup>

#### **2.1.1.4 Educators**

Availability of basic education includes skilled educators that receive nationally competitive salaries.<sup>103</sup> Moreover, the UNESCO CADE calls for the state to provide sufficient training avenues for teachers without any prejudice.<sup>104</sup> Educators must be educated and adequately trained to teach the learners, accordingly they should have an excellent command of the teaching language of instruction.<sup>105</sup> The ICESCR additionally requires that the working conditions of educators should be constantly improved.<sup>106</sup>

#### **2.1.2 Accessibility of Basic Education**

Accessibility is a feature requiring the government to make educational institutions and programmes accessible to all persons, without prejudice.<sup>107</sup> It requires legal and administrative limitations, financial challenges, hindrances to compulsory schooling such as fees and distance, to be eradicated.<sup>108</sup> Accessible education should be made inclusive, free of charge, encourage school attendance and promote parental freedom of choice.<sup>109</sup> The UDHR was the first instrument under international law to require education to be made compulsory and free.<sup>110</sup> Subsequent international and regional instruments calling for primary education to be made free and compulsory, among others, include the UNESCO Convention against Discrimination in Education (hereafter referred to as the ‘CDE’), CRC, ICESCR, ACRWC and the AYC.<sup>111</sup> The UNCRPD calls for the government to ensure that learners with disabilities are not excluded from accessing free and compulsory education.<sup>112</sup> There are three components to the notion of accessibility, and they encompass physical accessibility, economic accessibility and non-discrimination.<sup>113</sup>

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<sup>102</sup> Art 1 of the World Declaration on Education for All.

<sup>103</sup> General Comment 13, para 6(a).

<sup>104</sup> Art 4(d) of the UNESCO CADE.

<sup>105</sup> Tomasevski K (2001) 23-24.

<sup>106</sup> Art 13(2)(e) of the ICESCR.

<sup>107</sup> General Comment 13, para 6(b).

<sup>108</sup> Tomasevski K (2001) 12.

<sup>109</sup> Tomasevski K (2001) 13-14.

<sup>110</sup> Art 26(1) of the UDHR.

<sup>111</sup> Art 4(a) of the UNESCO CDE; Art 28 of the CRC; Art 13(2) of the ICESCR; Art 11(3)(a) of the ACRWC; Art 13(4)(a) of the AYC.

<sup>112</sup> Art 24 (2)(a) of the UNCRPD.

<sup>113</sup> General Comment 13, para 6(b)(i)-(iii).

### **2.1.2.1 Physical Accessibility**

With the learners in the EC walking between 10-30kms daily to access educational institutional and programmes schools, according to international standards, the state has to ensure that these facilities are within a safe physical distance.<sup>114</sup> The government can accomplish this through ensuring that schools are located in a reasonable geographical location, such as building schools within the neighbourhood or in an area nearby.<sup>115</sup> Modern technology can also be a mechanism utilised to bring educational facilities closer to learners, through initiating distance learning programmes.<sup>116</sup> Acute disproportions in the education expenditure policies that lead to differing qualities of education for persons living in different geographic locations can be deemed to be discriminatory.<sup>117</sup>

Moreover, the state is expected to ensure that learners attend school regularly, and reduce the number learners that drop-out of school.<sup>118</sup> It is acknowledged that there will be some legal and administrative challenges that will delay access to educational institutions and programmes.<sup>119</sup> The state is therefore required to eradicate any such hindrances.<sup>120</sup>

### **2.1.2.2 Economic Accessibility**

The ICESCR encourages member states to aspire to make education free and compulsory within a period of two years after acquiring their membership.<sup>121</sup> It additionally recommends that these member states should adopt a plan of action, if they are unable to make education free and compulsory within these two years. Within this plan of action, they are expected to outline their strategy for realising the right to education, with projected timeframes included.<sup>122</sup>

What is more, is that the state must ensure that persons with special needs are not excluded from the general education system on the basis of their disabilities, which includes ensuring that children with special needs have unrestricted access to education that is free and compulsory.<sup>123</sup> The state has to further ensure that persons with special needs have access to education that is all-encompassing, acceptable and free.<sup>124</sup> Factors such as school fees and

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<sup>114</sup> General Comment 13, para 6(b)(ii).

<sup>115</sup> General Comment 13, para 6(b)(ii).

<sup>116</sup> General Comment 13, para 6(b)(ii).

<sup>117</sup> General Comment 13, para 35.

<sup>118</sup> Art 28(1)(e) of the CRC; Art 12(2)(c) of the Maputo Protocol; Art 13(4)(c) of the AYC.

<sup>119</sup> Tomasevski K (2001) 12.

<sup>120</sup> Tomasevski K (2001) 12.

<sup>121</sup> Art 14 of the ICESCR.

<sup>122</sup> Art 14 of the ICESCR.

<sup>123</sup> Art 24 (2)(a) of the UNCRPD.

<sup>124</sup> Art 24(2)(b) of the UNCRPD.

other direct costs emanating from having access to education may hinder the enjoyment of the right to education; as a consequence it is deemed that education is to be considered free only in instances where parents or guardians are not expected to pay for these costs.<sup>125</sup> The state should, in particular, ensure that children who are vulnerable are protected from discrimination which is based on their specific status, particularly those who are unable to access school because of their inability to afford school fees or other educational costs such as transport or school uniform.<sup>126</sup> For that reason, once education is made free, school attendance among children will improve and drop-out rates will improve significantly.

Applying these standards to the EC, where there is high poverty and unemployment, the South African government is required to make certain that education is affordable for everyone, particularly at the primary education level.

#### **2.1.2.3 Non-discrimination**

‘Non-discrimination is the ‘overriding’ principle of human rights law’, therefore access to educational institutions and programmes should be guided by it.<sup>127</sup> Discrimination of any kind is prohibited under the ICESCR, CRC, ACHPR and the AYC.<sup>128</sup> The UN Committee on Economic, Social and Cultural Rights has opined that discrimination in the access to basic education can be direct, indirect, intentional or unintentional.<sup>129</sup> As a consequence, it stated that conduct shall be deemed to be discriminatory if it affects the child’s human dignity and it potentially affects the manner in which the child benefits from educational prospects.<sup>130</sup> Accordingly, non-discrimination encompasses ensuring that education is accessible to everyone without prejudice, particularly those members of society that, in law and fact, belong in vulnerable groups.<sup>131</sup> Moreover, progressive realisation of the right to education or the unavailability of state resources cannot be used to justify discrimination.<sup>132</sup>

Evident disparities in spending policies which lead to differing qualities of education for persons who reside in different geographic locations can be classified as discrimination under the ICESCR.<sup>133</sup> It is for this reason that the committee urges state parties to pay close attention to education, which includes ensuring that all relevant policies, institutions,

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<sup>125</sup> General Comment 11, para 7.

<sup>126</sup> Arendse L (2011) 106.

<sup>127</sup> Tomasevski K (2001) 27.

<sup>128</sup> Art 2 of the ICESCR; Art 2 of the CRC; Art 2 & 3(1)-(2) of the ACHPR; Art 2 (1) & (2) of the AYC.

<sup>129</sup> General Comment 13, para 10.

<sup>130</sup> General Comment 13, para 10.

<sup>131</sup> General Comment 13, para 6(b)(i).

<sup>132</sup> General Comment 13, para 31.

<sup>133</sup> General Comments 13, para 35.

programmes, spending patterns and other methods utilised, are supervised in order to be able to identify and put in place the necessary precautions to make improvements to any form of discrimination which might occur.<sup>134</sup> Furthermore, the Maputo Protocol calls for the government to ensure that they include the principle of equality within their constitution and legislation.<sup>135</sup> Moreover, states are required to be active in identifying an individual or group that is experiencing discrimination,<sup>136</sup> which entails identifying and prioritising marginalised and disadvantaged groups.<sup>137</sup> The CRC requires the state parties to do more than enact legislation; it requires them to address the issue of discrimination through taking ‘administrative, financial and educational measures’.<sup>138</sup>

#### 2.1.2.3.1 Access for girls

The Maputo Protocol requires member states to eliminate all kinds of discrimination against women [and girls], through the enactment of legislation and other protective measures.<sup>139</sup> And in addition, the state should take all necessary measures to eradicate all kinds of discrimination that are encountered by women [and girls] and further guarantee equal opportunity and access to education and training.<sup>140</sup> In addition, the CEDAW, AYC and the ACRWC calls for state parties to ensure that young girls and women are able to actively, equally and effectively perform in all spheres economically, politically, culturally, socially, with the boys [men].<sup>141</sup> The Maputo protocol further requires state parties to ensure that they eradicate all stereotypes in textbooks, syllabuses and in the media, which have been targeted towards women [and girls].<sup>142</sup>

#### 2.1.2.3.2 Learners with disabilities

Moreover, the notion of accessibility and non-discrimination requires education to be made accessible to children and young people, including those with special educational needs.<sup>143</sup> The UNCRPD requires member states to take all necessary actions to promote an attitude of respect towards the rights of persons with special needs, at all levels of their education system, which will encompass children in their early age of basic education.<sup>144</sup> State parties

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<sup>134</sup> General Comments 13, para 37.

<sup>135</sup> Art 2 (a) & (b) of the Maputo Protocol.

<sup>136</sup> CRC Committee General Comment 5 (2003), para 12.

<sup>137</sup> CRC Committee General Comment 5 (2003), para 30.

<sup>138</sup> CRC Committee General Comment 5 (2003), para 12.

<sup>139</sup> Art 1 of the Maputo Protocol.

<sup>140</sup> Art 12 (1)(a) of the Maputo Protocol.

<sup>141</sup> Art 10 of the CEDAW; Art 23 (b) of the AYC; Art 13(e) of the ACRWC.

<sup>142</sup> 12(1)(b) of the Maputo Protocol.

<sup>143</sup> General Comment 13, para 6(b).

<sup>144</sup> Art 8(2)(b) of the UNCRPD.

are therefore called to recognise the right to education of persons with special needs, and thus embark on realising this right without discrimination and to additionally ensure that they establish an education system that is inclusive at all learning levels.<sup>145</sup> In addition, they should ensure that lifelong learning of learners with disabilities is focussed on ensuring the full development of their potential, sense of dignity and self-worth.<sup>146</sup> For that reason, the state should ensure that the learners' talents are nurtured, and thus foster their personalities and their creativity, which includes their cognitive and physical abilities.

Moreover, the state must ensure that it creates opportunities for the learners' with special needs in order to enable them to effectively participate in a free society.<sup>147</sup> Additionally, taking all the necessary precautions that ensure that children with special needs are able to perform at the same level as the rest of the other learners, and accordingly ensuring that they have full access to all their human rights and fundamental freedoms.<sup>148</sup> Also in line with the CRC's cardinal principle, the best interests of children with special needs are to be considered with great significance.<sup>149</sup> Accordingly, it should be ensured that children with special needs are able to express their opinions freely in matters affecting them, and that such opinions are deliberated with importance.<sup>150</sup>

Furthermore, government must provide reasonable accommodation for the individuals with special needs,<sup>151</sup> and as a result ensure that the general education system offers the learners with special needs the necessary support to facilitate their education.<sup>152</sup> In addition, it must ensure that in reaching the goal of full inclusion, it provides individualised support mechanisms in the learning environments of learners with disabilities, thus enhancing their educational and social development.<sup>153</sup>

### **2.1.3 Acceptability**

The principle of acceptability focuses on the quality of the educational institutions and programmes. For that reason, it deals with the quality of the form and substance of the education provided to students,<sup>154</sup> including the relevance, cultural appropriateness and

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<sup>145</sup> Art 24 (1) of the UNCRPD.

<sup>146</sup> Art 24(1)(a) of the UNCRPD.

<sup>147</sup> Art 24(1)(c) of the UNCRPD.

<sup>148</sup> Art 7(1) of the UNCRPD

<sup>149</sup> Art 7(2) of the UNCRPD.

<sup>150</sup> Art 7(3) of the UNCRPD.

<sup>151</sup> Art 24(2)(c) of the UNCRPD.

<sup>152</sup> Art 24(2)(d) of the UNCRPD.

<sup>153</sup> Art 24(2)(e) of the UNCRPD.

<sup>154</sup> General Comment 13, para 6(c).

quality of the curricula and teaching methods.<sup>155</sup> State parties have to adhere to this principle, because should the standard of their education fail to meet the requirements of acceptability, such education may be considered unacceptable education. As a consequence, it may be concluded that the country's performance is discriminatory for the reason that it makes it harder for its students to learn.<sup>156</sup> Accordingly, the principle of acceptability comprises the regulation and supervision of minimum standards, respect for diversity, and language of instruction in schools, school discipline and the rights of learners.<sup>157</sup>

#### **2.1.3.1 Provision of adequate curricula and satisfactory teaching methods**

The ICESCR, ACRWC and the AYC call state parties to ensure that they provide education that will facilitate the process of assisting the individual in reaching their full 'human personality', therefore developing their sense of dignity.<sup>158</sup> Most importantly, they are required to ensure that the quality of education provided is such that it permits everyone to effectively participate within a free society.<sup>159</sup> The Framework for Action in Sub-Saharan Africa, in addition, proposed that it should be ensured that by the year 2015, children at a school-going age should be provided with quality basic education.<sup>160</sup> As such, the 2000 Dakar Framework for Action and the AYC require the state to ensure that it develops all aspects of quality education and ensure excellence for all, in order to achieve 'recognised and measurable' educational outcomes, particularly within numeracy, literacy and necessary life skills.<sup>161</sup>

##### **2.1.3.1.1 Language**

When the language of instruction has been found to be unacceptable to young children, the education too shall be deemed to be inadequate.<sup>162</sup> Consequently, the issue of language of instruction is so important, because it has the potential of barring children from gaining full access to quality education.<sup>163</sup> It therefore also requires the respect of the religious convictions of learners and parents. The ACHPR prohibits discrimination based on religious beliefs and language.<sup>164</sup>

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<sup>155</sup> General Comment 13, para 6(c).

<sup>156</sup> General Comment 13, para 6(c).

<sup>157</sup> Tomasevski K (2001) 14.

<sup>158</sup> Art 13 (1) of ICESCR; Art 11(1) & 2(a) of the ACRWC.

<sup>159</sup> Art 13 of the AYC.

<sup>160</sup> Art 5.2 of the Framework for Action in Sub-Saharan Africa: Education for African Renaissance in the Twenty-first Century.

<sup>161</sup> Art 7(vi) of the Dakar Framework for Action; Art 13 (2)(a) of the AYC.

<sup>162</sup> Tomasevski K (2001) 15.

<sup>163</sup> Tomasevski K (2001) 29.

<sup>164</sup> Art 2 of the ACHPR.

According to the UNESCO Institute for Lifelong Learning, the desirable language model for education in a country should encompass the different spheres of their unique languages.<sup>165</sup> The aim should be to connect all the different levels of society and thereby enhancing communication, wealth sharing and encourage participation in governance.<sup>166</sup> As a result, it opined that African languages can be used throughout all education levels, from primary to tertiary education.<sup>167</sup>

Teaching and learning in the mother tongue was tabled in the agendas of the Committee on Economic Social and Cultural Rights (CESCR) on the Monitoring of the Right to Education and the Tenth Meeting of the Joint Expert Group of the United Nations Education, Scientific and Cultural Organisation [UNESCO], titled the *Mother Tongue, Multilingualism and the Right to Education*, where it was stated that in the formative years of the child's education, recognising the mother tongue is essential because it enables the child to learn their national language.<sup>168</sup> Moreover, three primary features, on the use of the mother tongue, were highlighted. The first feature provided that UNESCO endorses improving the quality of education through the use of the mother tongue, based upon the learners' and teachers knowledge and experience thereof.<sup>169</sup> Furthermore, that UNESCO encourages the use of multiple languages at all levels of education as a means of promoting linguistic diversity in society.<sup>170</sup> And lastly, the third principle stipulated that UNESCO acknowledges the use of language as a key element of inter-cultural education because it connects different population groups thus promoting fundamental rights.<sup>171</sup>

In relation to this research project, this discussion is to be considered in light of the language discussion which will be unpacked in chapter 3 and the fact that the department of basic education is working with a number of institutions to ensure that learners in the EC are taught in their mother tongues, mainly Xhosa and Sotho.<sup>172</sup> Moreover, it has been reported that the

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<sup>165</sup> UNESCO Institute for Lifelong Learning (UIL): annual report (2010) UIL/2011/PI/H/1 available at <https://unesdoc.unesco.org/ark:/48223/pf0000191891> (accessed 4 April 2020) 25.

<sup>166</sup> UNESCO Institute for Lifelong Learning (UIL): annual report (2010) UIL/2011/PI/H/1 available at <https://unesdoc.unesco.org/ark:/48223/pf0000191891> (accessed 4 April 2020) 25.

<sup>167</sup> UNESCO Institute for Lifelong Learning (2010) 22.

<sup>168</sup> Education in a multilingual world: UNESCO education position paper (2003) ED.2003/WS/2 available at <https://unesdoc.unesco.org/ark:/48223/pf0000129728> (accessed 4 April 2020) 20.

<sup>169</sup> UNESCO (2003) 21.

<sup>170</sup> UNESCO (2003) 21.

<sup>171</sup> UNESCO (2003) 21.

<sup>172</sup> Staff Writer 'Government wants to make language changes at South Africa's schools- including matric exams' *Business Tech* 12 June 2020 available at <https://businessstech.co.za/news/government/407231/government-wants-to-make-language-changes-at-south-africas-schools-including-matric-exams/> (accessed 20 July 2020).

department is working with UNICEF to create an innovative multi-language concept paper to encourage other provinces in South Africa to use mother-tongue languages at schools.<sup>173</sup>

#### 2.1.3.2 Harmless Learning Environments for Learners

The principle of acceptability has been broadened to include the prohibition of corporal punishment and other harmful acts that may be committed against learners.<sup>174</sup> The government is required to ensure that children are protected from any kinds of torture or inhumane and/or degrading conduct, particularly conduct leading to mental or physical injury, abuse, neglect or maltreatment including being sexually abused.<sup>175</sup> Moreover, the CRC and the ACRWC, require the states to take all the necessary legislative, administrative, educational and social measures to address the issue of mental violence, injury or abuse, neglect, maltreatment and/or exploitation while in the care of any person.<sup>176</sup> Therefore, acceptability refers to ensuring that children are not mistreated, as a consequence infringing on their dignity.<sup>177</sup> In chapter 3, the danger that comes with pit latrines in schools in the EC and other provinces with similar issues, is highlighted. It is clear from these international and regional standards that the state ought to protect its learners from all kinds of dangerous elements, humans or otherwise.

#### 2.1.4 Adaptability

This principle focuses on reinforcing all the elements that positively contribute towards the child's identity and their best interests. States are thus required to integrate these elements in the education provided to their learners. Accordingly, the principle of adaptability refers to ensuring that education is flexible, as a result responding to the needs of the ever evolving societies and communities.<sup>178</sup> Therefore, responding adequately to the needs of students within diverse cultural and social settings.<sup>179</sup> Adaptability thus refers to ensuring that education and its mode of delivery is specifically tailored for the students' needs. The CRC and UNCRPD require the state to prioritise the best interests of the child in all matters

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<sup>173</sup> Staff Writer 'Government wants to make language changes at South Africa's schools- including matric exams' *Business Tech* 12 June 2020 available

at <https://businesstech.co.za/news/government-wants-to-make-language-changes-at-south-africas-schools-including-matric-exams/> (accessed 20 July 2020).

<sup>174</sup> Tomasevski K (2001) 15.

<sup>175</sup> Art 16 of the CRC.

<sup>176</sup> Art 19 of the CRC; Art 11(5) of the ACRWC.

<sup>177</sup> Woolman & Bishop (2009) 57-32.

<sup>178</sup> General Comment 13, para 6(d).

<sup>179</sup> General Comment 13, para 6(d).

pertaining to the child.<sup>180</sup> This reinforces the need to ensure that education is adapted around the learners' diverse needs.

What is more, is that the principle of adaptability obligates the state to ensure that the prescribed school programme and the school setting should be inclusive, thus encouraging diversity and for that reason adhere with the standard of non-discrimination.<sup>181</sup> The CRC provides that education should guarantee the freedom of thought, consciousness and religion.<sup>182</sup> In addition, it protects the right for children to freely participate in their own cultural and religious practices and to further use their mother tongue when engaging with member of their own groups.<sup>183</sup> Moreover, the ACRWC and the AYC require that education should aspire towards preserving and promoting African morals, traditions, values and cultures that positively influence people.<sup>184</sup>

### **2.1.5 Conclusion**

In light of the 4A- Scheme that has been used to discuss the international and regional standards on basic education, it is clear that the domestic laws of a country have to embodying the principles and values of these conventions. Therefore, the state must ensure that within their laws, the standards outlined above are maintained and remain uncompromised. In addition, states should work towards providing free basic education and accordingly making school compulsory and thus encouraging regular school attendance. The government should further ensure that it develops the child's personality, cognitive and physical abilities to their greatest potential, and accordingly ensure that they provide quality education. Moreover, the learners should be provided with their basic educational needs, which encompass essential learning apparatus, like scientific and technical information. Furthermore, there should be no discrimination in the fulfillment of basic education. In addition, the culture, values, language and morals of the concerned group of individuals has to be respected and protected in the process of realising this right.

Now that international and regional standards have been fully discussed, in the following chapter, the study will discuss in greater detail the state of basic education in the Eastern Cape, South Africa. The aim is to fully capture the basic education experience and reality of the learners in the province, before the legislation and policies concerned are analysed.

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<sup>180</sup> Art 3(1) of the CRC; Art 7(2) of the UNCRPD.

<sup>181</sup> Reyneke (2013) 330.

<sup>182</sup> Art 14(1) of the CRC.

<sup>183</sup> Art 30 of the CRC.

<sup>184</sup> Art 11(2)(c) of the ACRWC; Art 13(3)(d) of the AYC.



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## **Chapter 3: The Context of Basic Education in Eastern Cape, South Africa.**

### **3.1 Introduction**

As mentioned above, in the methodology, in chapter one, much fieldwork has been gathered on the situation in the EC. It is through the data from this fieldwork that this chapter shall be discussed. In addition, majority of basic education related case law in South Africa comes from this province. It is thus imperative that we assess the current state of basic education in the EC before the legislation and policies relied upon in the province can be analysed for compliance with the international and regional standards. This discussion will provide context and clarity to some of the challenges experienced by the learners in the EC when accessing basic education services. The aim of this chapter is to fully examine the condition of basic education in the EC. This chapter has been divided into nine sub-topics that seek to highlight the issues that exist in the province pertaining to the availability, accessibility, acceptability and adaptability of basic education.

The problems experienced in the EC seem to be as a result of the social planning schemes from colonial and Apartheid times, which were not unique to the EC (at that time, the EC was known as the Ciskei and Transkei region).<sup>185</sup> During Apartheid, the Department of Education in the EC had to merge the education departments from the homeland system.<sup>186</sup> This presented a myriad of problems since they had been poorly managed by the apartheid government.<sup>187</sup> The policies, economic failures and corruption inherited from the apartheid government meant that only limited infrastructural and economic development transpired within the province and that caused ‘spatial dualities’ and various forms of inequalities’ which exist even in the present day.<sup>188</sup>

#### **3.1.1 Infrastructure**

More than 20 years post-Apartheid, the EC still has the most mud schools in the country which is, arguably, the post-apartheid government’s unwillingness to invest in the children’s’

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<sup>185</sup> Equal Education ‘PLANNING TO FAIL: A Report on Equal Education’s Eastern Cape School Visits’ November 2016. available at <https://equaleducation.org.za/wp-content/uploads/2016/07/Full-EE-Planning-to-Fail-Report-2017.pdf> (accessed 11 August 2019) 13.

<sup>186</sup> Skelton A ‘leveraging funds for the school infrastructure: The South African ‘mud schools’ case study’ (2014)39 *International Journal on Education Development* 2; see also The Bantu Authorities Act of 1951, which legalised the deportation of black people into these homelands.

<sup>187</sup> Ncanywa T (2015) 27.

<sup>188</sup> Skelton A (2014) 2; See also Hamann, M & Tuinder, V *Introducing the Eastern Cape: A quick guide to its history, diversity and future challenges* (2012), which provides a detailed historical background on the political history of the Eastern Cape.

education.<sup>189</sup> The Minister of basic education was reported acknowledging that the situation in the EC is ‘extremely serious’ and has consequently led to learners in the province being deprived of acceptable basic education.<sup>190</sup> Moreover, the Minister opined that these failures by the Eastern Cape Education Department are a consequence of the department’s inability to discharge its duties efficiently with regards to adhering to relevant policies, aptly budgeting and their inability to spend the designated funds.<sup>191</sup> As rightly pointed in the *Equal Education and Another v Minister of Basic Education* case, basic school infrastructure is an essential element to the fulfilment of the right to basic education.<sup>192</sup> In this case, the court had to determine whether the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (2013) were in accordance with the Constitution, the South African Schools Act and the prescribed court order.<sup>193</sup> Within these Norms and Standards, the fulfilment of the basic education amenities was subjected to the availability of state’s funds and the co-operation of government officials and other relevant stakeholders, which is one of the issues disputed by the applicants, because it provided the state with a getaway strategy from their constitutional duty.<sup>194</sup> As a consequence, the court ordered members of the executive to rectify parts of the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (2013) and it additionally declared other sub-regulations to be inconsistent with the Constitution and accordingly invalid insofar as they had hindered the realisation of the right to basic education.<sup>195</sup>

The condition of the school infrastructure in the EC is unfortunately against the background pledge that, by the year 2016, the department of basic education would have replaced the school structures built by means of mud, asbestos, metal or wood with those made from appropriate materials.<sup>196</sup>

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<sup>189</sup> Department of Basic Education, February 2013. ASIDI Brief 1.

<sup>190</sup> *Centre for Child Law v Minister of Basic Education* (1749/2012) [2012] ZAECGH 60 para 14

<sup>191</sup> *Centre for Child Law v Minister of Basic Education* (1749/2012) [2012] ZAECGH 60 para 15

<sup>192</sup> *Equal Education and Another v Minister of Basic Education, Eastern Cape Division, Bhisho*, case no. 276/2016. para 47.

<sup>193</sup> *Equal Education and Another v Minister of Basic Education, Eastern Cape Division, Bhisho*, case no. 276/2016 para 46.

<sup>194</sup> *Equal Education and Another v Minister of Basic Education, Eastern Cape Division, Bhisho*, case no. 276/2016 para 61.

<sup>195</sup> *Equal Education and Another v Minister of Basic Education, Eastern Cape Division, Bhisho*, case no. 276/2016 para 209 (1)-(8).

<sup>196</sup> Damba-Hendrik N ‘Eastern Cape learners walk more than 30 km to a school without teachers for them’ *Ground Up* 11 March 2020 available at <https://www.groundup.org.za/article/eastern-cape-learners-walk-more-20km-school-where-there-are-no-teachers-them/> (accessed 03 June 2020).

### 3.1.2 Water & Sanitation

In 2017, it was reported that about 2127 Eastern Cape Schools had no proper sanitation system instead, they only had access to pit latrines.<sup>197</sup> It was again reported that around 931 schools do not have water supply, and additionally other schools were waiting to receive water tanks to be delivered to them.<sup>198</sup> This is obviously a major concern in championing the right to basic education in the province. There have been reports of a learner dying as result of falling inside a pit latrine.<sup>199</sup> The infrastructure and sanitation crisis is not just an issue in the EC, but it is a concerning matter across other rural parts of South Africa. For example, in the *Equal Education and Another v Minister of Basic Education*<sup>200</sup> case, tragic incidents related to poor infrastructure and sanitation facilities at various schools in the Limpopo province were documented. These events, which occurred in Limpopo, included a death of a 5-year-old who fell inside a pit toilet and another incident where teachers have had to share a toilet with pupils.<sup>201</sup>

The Minister of Basic Education has acknowledged this backlog, which exists in basic school infrastructure, encompassing sanitation.<sup>202</sup> The sanitation backlog is estimated at around R2.5 Billion nationally.<sup>203</sup> Accordingly, the department has committed itself to ensuring that all schools shall have water, electricity and sanitation;<sup>204</sup> however, the department thus far failed to produce the amenities promised. The subsequent deadline is November 2020,<sup>205</sup> and yet

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<sup>197</sup>Equal Education (2019) *Media Statement available at (<https://equaleducation.org.za/2019/03/27/statement-provincial-school-infrastructure-reports-reveal-education-departments-cant-properly-plan-meanwhile-the-2018-reports-are-still-owed/>)* (accessed 15 July 2019).

<sup>198</sup>Dispatch Live ‘Eastern Cape schools without water, sanitation won’t open on Monday’ *Talk of the Town* 03 May 2020 available at <https://www.talkofthetown.co.za/2020/05/30/eastern-cape-schools-without-water-sanitation-wont-open-on-monday/> (accessed 05 June 2020).

<sup>199</sup>Etheridge J ‘Girl, 5, dies, after falling into pit toilet at Eastern Cape school’ *News24* 15 March 2018 available at <https://m.news24.com/SouthAfrica/News/girl-5-dies-after-falling-into-pit-toilet-at-eastern-cape-school-20180315> (accessed 18 April 2020); see also Pijoos, I (2019) ‘R37m allocated to EC school after child falls into unfinished pit toilet’ *Times Live* 17 September 2019 available at <https://www.timeslive.co.za/news/south-africa/2019-09-17-r37m-allocated-to-ec-school-after-child-falls-into-unfinished-pit-toilet/> (accessed 28 December 2019).

<sup>200</sup>*Equal Education and Another v Minister of Basic Education, Eastern Cape Division, Bhisho, 276/2016*

<sup>201</sup>*Equal Education and Another v Minister of Basic Education, Eastern Cape Division, Bhisho, 276/2016* para 55

<sup>202</sup>*Equal Education and Another v Minister of Basic Education, Eastern Cape Division, Bhisho* 276/2016 para 48.

<sup>203</sup>Damba-Hendrik N ‘Eastern Cape learners demand basic infrastructure for schools’ *Ground Up* 18 October 2019 available at [www.groundup.org.za/article/eastern-cape-learners-demand-basic-infrastructure-schools/](http://www.groundup.org.za/article/eastern-cape-learners-demand-basic-infrastructure-schools/) (accessed 03 June 2020).

<sup>204</sup>Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (GN R920/2013).

<sup>205</sup>Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (GN R920/2013); Draga L *Infrastructure and Equipment in Basic Education Rights Handbook: Education Rights in South Africa* 8 (2017) 241.

there are still schools in the province that are built from these inappropriate materials and there continues to be water and sanitation challenges.

### **3.1.3 School Furniture**

In order to understand the issue of school furniture in the EC, the *Madzodzo v Minister of Basic Education* case is instructive. The case was ignited by the unavailability of school furniture at numerous public schools across the province.<sup>206</sup> The applicants argued that the learners' rights to education had been violated by the state, including their constitutional rights to equality and dignity.<sup>207</sup> The respondents had failed to provide the requested school furniture to the selected schools in the province. In addition, the applicants argued that the state had breached its agreement with regards to the time frames that they had mutually settled upon.<sup>208</sup> As a consequence, it had failed to take all the reasonable measures as per the court orders. In addition, they failed to construct a concise strategy to remedy the furniture crisis at schools in the province.<sup>209</sup> The state, after conducting an assessment of their state budget for the requested merchandise, contended that it had insufficient resources to provide these amenities at once.<sup>210</sup> The court remarked that basic education services included access to basic furniture for the learners, and additionally that the duties of the state are not limited to issues of securing classrooms, they encompass providing educational resources such as teaching materials, appropriate amenities for learners, and teachers.<sup>211</sup> More importantly, and speaking to the theme of this thesis, the court ruled that the department had contravened the constitutional right to basic education of the learners in the EC,<sup>212</sup> which the 'Department recognised is a matter of extreme urgency as it constitutes an ongoing and serious infringement of the learners' right to basic education'.<sup>213</sup>

### **3.1.4 Internet Access/Digital Divide**

In 2018, it was reported that only 945 schools out of 5421 schools in the EC had some internet connection, which amounts to only 17% of the pupils with internet access.<sup>214</sup> And this is in addition to the fact that thousands of children in the province are without access to

<sup>206</sup> *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMCHC5 para 1.

<sup>207</sup> *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMCHC5 para 2.

<sup>208</sup> *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMCHC5 para 2

<sup>209</sup> *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMCHC5 para 12.

<sup>210</sup> *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMCHC5 para 12.

<sup>211</sup> *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMCHC5 para 20.

<sup>212</sup> *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMCHC5 para 41.

<sup>213</sup> *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMCHC5 para 12.

<sup>214</sup> Anderson N 'Only 17% of the Eastern Cape schools have access to internet' *The South African* 07 June 2018 available at <https://amp.thesouthafrican.com/news/17-eastern-cape-schools-access-to-internet> (accessed 03 March 2020).

adequately stocked and well-maintained learning facilities.<sup>215</sup> The situation is further compromised with the fact that even the existing public libraries in the province, that could assist learners in accessing the necessary learning resources, have inconsistent internet connections, with others having stopped providing free internet access, due to the department's failure to source out internet providers.<sup>216</sup>

The Covid-19 Pandemic has additionally forced the world to operate within the digital space, consequently excluding many South African pupils in the EC who are without technological learning devices such as tablets, laptops and the internet. The Pandemic has forced learning institutions to resort to online learning (e-learning), due to the national lockdown declared by the South African President.<sup>217</sup> The e-learning route is proving to not be a viable alternative for learners in the province because the internet infrastructure is inadequate and consequently failing to create basic education that is inclusive and equally enjoyable.<sup>218</sup>

### 3.1.5 Libraries

Linked to the situation of internet access discussed above, provision of well-functioning libraries where learners can access educational materials becomes more relevant. The situation in the EC is however not conducive. It has been reported that around 15 libraries have been forced to close their doors in the EC due to delays, complications in grant transfers to municipal institutions that have left the municipalities 'cash-strapped'.<sup>219</sup> The core reasoning behind the closure is mainly the lack of basics services, which are water and electricity.<sup>220</sup> For example, a mobile library in the Village of Mango in Matatiele, has been counted among the libraries that will be closed as a result of water and electricity deficiencies in the area.<sup>221</sup> Such closure will certainly have unimaginable consequences on the

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<sup>215</sup> Anderson N 'Only 17% of the Eastern Cape schools have access to internet' *The South African* 07 June 2018 available at <https://amp.thesouthafrican.com/news/17-eastern-cape-schools-access-to-internet> (accessed 03 March 2020).

<sup>216</sup> Chirume J 'Eastern Cape learners battle without internet access' *Ground Up* 14 May 2018 available at <https://groundup.org.za/article/eastern-cape-citizens-miss-internet/> (Accessed 22 March 2019)

<sup>217</sup> Bangani, Z 'Home learning in Covid-19 lockdown proves daunting' *New Frame* 06 April 2020 available at <https://www.newframe.com/home-learning-in-covid-19-lockdown-proves-daunting> (accessed 03 June 2020).

<sup>218</sup> Bangani, Z 'Home learning in Covid-19 lockdown proves daunting' *New Frame* 06 April 2020 available at <https://www.newframe.com/home-learning-in-covid-19-lockdown-proves-daunting> (accessed 03 June 2020).

<sup>219</sup> Pijoos I 'Anger as lack of funding forces a dozen Eastern Cape libraries to close' *Times Live* 03 February 2019 available at [www.timeslive.co.za/amp/news/south-africa/2019-02-03-anger-as-lack-of-funding-forces-a-dozen-eastern-cape-libraries-to-close/](http://www.timeslive.co.za/amp/news/south-africa/2019-02-03-anger-as-lack-of-funding-forces-a-dozen-eastern-cape-libraries-to-close/) (accessed on 23 April 2019).

<sup>220</sup> George Z '15 libraries have been shelved' *Dispatch Live* 15 November 2017 available at [www.dispatchlive.co.za/amp/news/2017-11-11-15-libraries-have-been-shelved/](http://www.dispatchlive.co.za/amp/news/2017-11-11-15-libraries-have-been-shelved/) (accessed 23 April 2019).

<sup>221</sup> George Z '15 libraries have been shelved' *Dispatch Live* 15 November 2017 available at [www.dispatchlive.co.za/amp/news/2017-11-11-15-libraries-have-been-shelved/](http://www.dispatchlive.co.za/amp/news/2017-11-11-15-libraries-have-been-shelved/) (accessed 23 April 2019).

accessibility and acceptability of basic education learning materials for pupils residing in that village.

### 3.1.6 Textbooks

It has been reported that approximately, 214 schools in the province had been without textbooks.<sup>222</sup> The media has also reported that some learners have been without textbooks between the years 2014-2016, consequently being forced to rely on study guides and other available literature in those periods.<sup>223</sup> This shortage of school textbooks has been linked to the subsequent poor matric results and is perceived as an indicator of the state's inadequate support in assisting pupils to progressively realise their dreams.<sup>224</sup> And according to Chisholm, the textbook 'saga' observed in the province is linked to corruption by state officials in the province who have been entrusted to deliver textbooks in schools.<sup>225</sup>

### 3.1.7 Transport

A large number of scholars of all ages live far from the schools they attend. Consequently, they have to walk in varying harsh weather conditions, to and from school each day.<sup>226</sup> It is estimated that about 30000 learners in the EC walk long distances of between 10 to 30 kilometres on a daily basis to and from school, with some being forced to cross water streams.<sup>227</sup> The learners' right to access basic education is hindered by the inability to afford transport costs.<sup>228</sup> Moreover, it has been alleged that some of the designated state school transportation has proven to be unreliable,<sup>229</sup> thus jeopardising the learners' safety and ability

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<sup>222</sup> Sain R '214 Eastern Cape schools without textbooks' *IOL* 13 January 2017 available at <https://www.iol.co.za/news/southafrica/eastern-cape/214-eastern-cape-schools-without-textbooks-7400329> (accessed 23 April 2019).

<sup>223</sup> Sain R '214 Eastern Cape schools without textbooks' *IOL* 13 January 2017 available at <https://www.iol.co.za/news/southafrica/eastern-cape/214-eastern-cape-schools-without-textbooks-7400329> (accessed 23 April 2019).

<sup>224</sup> As said by Van Vuuren in Sain R '214 Eastern Cape schools without textbooks' *IOL* 13 January 2017 available at <https://www.iol.co.za/news/southafrica/eastern-cape/214-eastern-cape-schools-without-textbooks-7400329> (accessed 23 April 2019).

<sup>225</sup> Chisholm L 'The textbook saga and corruption in education' (2013) 19 *South African Review of Education* 10.

<sup>226</sup> *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG); 2015 ZAECGH 67 para 12.

<sup>227</sup> Mvumvu Z '30 000 pupils still have to walk to school' *Dispatch Live* 16 March 2018 available at <https://www.dispatchlive.co.za/news/2018-03-16-30-000-pupils-still-have-to-walk-to-school/> (accessed 29 March 2019); see also Damba-Hendrik, N 'Eastern Cape learners walk more than 30 km to a school without teachers for them' *Ground Up* 11 March 2020 Available at <https://www.groundup.org.za/article/eastern-cape-learners-walk-more-20km-school-where-there-are-no-teachers-them/> (accessed 03 June 2020).

<sup>228</sup> Damba-Hendrik, N 'Eastern Cape learners walk more than 30 km to a school without teachers for them' *Ground Up* 11 March 2020 Available at <https://www.groundup.org.za/article/eastern-cape-learners-walk-more-20km-school-where-there-are-no-teachers-them/> (accessed 03 June 2020).

<sup>229</sup> Damba-Hendrik, N 'Eastern Cape learners walk more than 30 km to a school without teachers for them' *Ground Up* 11 March 2020 available at <https://www.groundup.org.za/article/eastern-cape-learners-walk-more-20km-school-where-there-are-no-teachers-them/> (accessed 03 June 2020).

to access education. In the *Tripartite Steering Committee and Another v Minister of Basic Education and others*, a matter concerning the right to basic education as it pertains to the availability and accessibility of school transportation. The department had refused to provide transportation for the learners.<sup>230</sup> The court had to thus examine the validity of their decision.<sup>231</sup> The applicants were demanding scholar transport to be provided to the documented learners within 30 days.<sup>232</sup> The court held that, in the situation where the learners' access to schools is affected by distance and is additionally exacerbated by the incapacity to meet the expense of the cost of transportation, the state has the duty to provide transport in terms of section 7(2) of the Constitution, which requires the state to promote and fulfil the right to basic education.<sup>233</sup>

### 3.1.8 Educators

Schools in the province are understaffed and lack skilled educators, with some schools having just two educators to teach 140 learners.<sup>234</sup> This leads to teachers being forced to teach subjects that they are not sufficiently skilled to teach. Furthermore, some of the learners are forced to teach themselves key subjects like English, Mathematics and Life Sciences.<sup>235</sup> Increased learner drop-out rates has also been linked to the absence of educators in some schools in the province.<sup>236</sup>

In the *Centre for Child Law and Others v Minister of Basic Education*, the court acknowledged that post-provisioning in the EC has been a decade long issue, which has led to some schools in the province having more teachers than it is necessary, whereas others would have very few teachers allocated.<sup>237</sup> In the matter, state officials had failed to declare the 2013 educator post establishment, and to additionally make appointments to all vacant established teaching and general staff posts and place moratoriums on all the available

<sup>230</sup> *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG); 2015 ZAECGHC 67 para 2.

<sup>231</sup> *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG); 2015 ZAECGHC 67 para 2.

<sup>232</sup> *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG); 2015 ZAECGHC 67 para 9.

<sup>233</sup> *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG); 2015 ZAECGHC 67 para 19.

<sup>234</sup> Damba-Hendrik, N 'Eastern Cape learners walk more than 30 km to a school without teachers for them' *Ground Up* 11 March 2020 available at <https://www.groundup.org.za/article/eastern-cape-learners-walk-more-20km-school-where-there-are-no-teachers-them/> (accessed 03 June 2020).

<sup>235</sup> *Centre for Child Law v Minister of Basic Education* (1749/2012) [2012] ZAECGHC 60 para 12.

<sup>236</sup> Sizani M 'Parents shut down Eastern Cape school over teacher shortage' *Ground Up* 14 February 2020 available at [www.groundup.org.za/article/parents-shut-down-eastern-cape-school-over-teacher-shortage/](http://www.groundup.org.za/article/parents-shut-down-eastern-cape-school-over-teacher-shortage/) (accessed 27 April 2020).

<sup>237</sup> *Centre for Child Law v Minister of Basic Education* (1749/2012) [2012] ZAECGHC 60 para 12.

vacancies.<sup>238</sup> Furthermore, they had failed to transfer excess teaching staff to positions where they were required, which consequently led to the allocated budget spiralling out of control.<sup>239</sup> The court stated that the right to basic education of the pupils was threatened in situations where the state fails to effect appropriate post-provisioning for teaching staff.<sup>240</sup> In its conclusion, the court held that the state is obligated to declare post establishment for teaching and non-teaching staff in public schools for the year 2013. Consequently, they had to fill these vacant posts.<sup>241</sup> In addition, in the *Tripartite Steering Committee and Another v Minister of Basic Education and others* judgment, the court held that the right to education has no true meaning without teachers that teach.<sup>242</sup>

### 3.1.9 Language

In post-apartheid South Africa, learners have only been able to write their matric exams in either the English or the Afrikaans language.<sup>243</sup> Language in basic education is one of the most under-estimated hindrances to the accessibility and full enjoyment of this right. The official languages spoken in the EC are Xhosa and, in some parts of the Eastern Cape, the Sotho language. As a result, mother-tongue based teaching, learning and assessment has recently been initiated in the province. It has been reported that the Eastern Cape Education Department has approved the matriculants of 2020 to write their final examinations in their home languages, Xhosa and Sotho.<sup>244</sup> This decision by the state is a brilliant move at ensuring accessibility and acceptability of basic education in the province.

## 3.2 Conclusion

The context of the right to basic education discussed above in the EC indicates that the EC is in a crisis, falling short of required international standards, and accordingly calling for an

<sup>238</sup>Centre for Child Law v Minister of Basic Education (1749/2012) [2012] ZAECGHC 60 para 2.

<sup>239</sup>Centre for Child Law v Minister of Basic Education (1749/2012) [2012] ZAECGHC 60 para 12.

<sup>240</sup>Centre for Child Law v Minister of Basic Education (1749/2012) [2012] ZAECGHC 60 para 16.

<sup>241</sup>Centre for Child Law v Minister of Basic Education (1749/2012) [2012] ZAECGHC 60 para 34.

<sup>242</sup>Tripartite Steering Committee and Another v Minister of Basic Education and Others 2015 (5) SA 107 (ECG); 2015 ZAECGHC 67 para 18.

<sup>243</sup>Sibanda B *The use of English and IsiXhosa in teaching and learning Physical Sciences in four schools in King Williams Town education district of the Eastern Cape: A case study* (LLM Thesis University of Fort Hare, 2013) 10; See also Jacob B ‘Matric pupils to write 2020 exams in IsiXhosa and Sotho at the Eastern Cape schools’ *Times Live* 29 December 2019 available at <https://www.timeslive.co.za/news/south-africa/2019-12-29-matric-pupils-to-write-2020-exams-in-isixhosa-and-sotho-at-eastern-cape-schools/> (accessed 20 July 2020).

<sup>244</sup>Jacob B ‘Matric pupils to write 2020 exams in IsiXhosa and Sotho at the Eastern Cape schools’ *Times Live* 29 December 2019 available at <https://www.timeslive.co.za/news/south-africa/2019-12-29-matric-pupils-to-write-2020-exams-in-isixhosa-and-sotho-at-eastern-cape-schools/> (accessed 20 July 2020); See also Staff Writer ‘Government wants to make language changes at South Africa’s schools- including matric exams’ *Business Tech* 12 June 2020 available at <https://businesstech.co.za/news/government/407231/government-wants-to-make-language-changes-at-south-africas-schools-including-matric-exams/> (accessed 20 July 2020).

investigation into the legislation and policies governing this right in the province. There are still a myriad of obstacles standing in the way of the learners pertaining to the availability, accessibility, adaptability, and the acceptability of the basic education institutions and programmes. The following chapter therefore lays down the international normative standards on the right to basic education.



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## **Chapter 4: The selected National and Provincial Framework on Basic Education in the Eastern Cape**

### **4. Introduction**

Against the background of international and regional standards discussed in chapter 2 and the state of basic education in the Eastern cape discussed in chapter 3, this chapter will analyse the legislation and policies on the right to a basic education which are relied upon in the EC in order to realise this right. This analysis, therefore, will be conducted with the intention to ascertain whether there is compliance with the international and regional standards in the South African legal framework pertaining to the EC on the right to a basic education.

The main statutes on the right to basic education are the South African Schools Act (hereafter referred to as ‘the SASA’), the ‘National Education Policy Act (hereafter referred to as ‘the NEPA’) and the Employment of Educators Act (hereafter referred to as ‘the EEA’). For purposes of the study being undertaken, additional statutes and policy documents will be analysed using the 4A-scheme discussed in chapter 2. The chapter will be divided into two main parts. The first part looks at the legal position of international and regional law in South Africa. The second part will be analysing the South Africa’s legislative and policy framework on the right to basic education relied upon in the EC.

#### **4.1 Legal Position of International and Regional Law in South Africa**

Under the South African Constitution, when interpreting the rights in the Bill of Rights, such as the right to basic education, it is required that international law has to be considered and there may be a consideration of foreign law.<sup>245</sup> In addition, an international agreement will be binding on South Africa only after it has been approved by motion in both the National Assembly and the National Council of Provinces.<sup>246</sup> The approval of the National Assembly and the National Council of Provinces will not be necessary if the international agreement is of a ‘technical, administrative or executive nature’ or if it is an agreement that does not warrant accession or ratification.<sup>247</sup> However, in this instance it must be tabled in the Assembly and the Council within a reasonable period of time.<sup>248</sup>

In addition, the Constitution requires customary international law to be recognised as law within the country unless it is deemed to be inconsistent with the Constitution or an Act of

<sup>245</sup> Section 39 (1) (b) and (c) of the Constitution.

<sup>246</sup> Section 231(2) of the Constitution.

<sup>247</sup> Section 231(3) of the Constitution.

<sup>248</sup> Section 231 (3) of the Constitution.

parliament.<sup>249</sup> The Constitution also requires that, upon the interpretation of any legislation, when applying international law, every court should make a decision that is consistent with international law preferences.<sup>250</sup> According to Calderhead, this means that the court must prefer any interpretation that is reasonable in its interpretation of s29 (1) (a), particularly one that is aligned with international law.<sup>251</sup>

## **4.2 Analysis of Selected Constitutional, National and Provincial Laws and Policies**

Considering that the objective of this study is to analyse laws and policies on basic education that are relied upon in the EC, for the realisation of basic education, the study has selected national and provincial laws and policies because much of the provincial legal framework endorses the national framework.

### **4.2.1 Availability**

In Chapter 2 of the study, it was stated that the principle of availability entails ensuring that essential resources, such as infrastructure, learning and teaching materials and adequately skilled educators, are made available to learners. In discussing the availability of basic education facilities, the right to dignity<sup>252</sup> of the learners concerned cannot be overlooked because it recognises every person's self-worth.<sup>253</sup> It protects learners from the atrocious conditions in which many learners find themselves, particularly those pupils residing in rural areas. The South African Constitution has, in addition, entrenched the right to an environment that is not harmful to the welfare of its citizens [learners].<sup>254</sup> This entails ensuring that the environment where the learners' access basic education resources is accommodative of their unique educational needs. The South African Human Rights Council (SAHRC) contends that the extent of availability of basic education expected from the state includes making certain that functional educational institutions are available in adequate quantities, that there is a sufficient number of available qualified teachers, ensure that teaching and learning resources

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<sup>249</sup> Section 232 of the Constitution.

<sup>250</sup> Section 233 of the Constitution.

<sup>251</sup> Calderhead V 'The Right to an 'adequate' and 'equal' education in South Africa: An analysis of S 29 (1) (a) of the South African Constitution and the right to equality as applied to basic education'(2011) available at [http://www.section27.org.za/wp-content/.../The Right.to.a-Basic-Education.pdf](http://www.section27.org.za/wp-content/.../The%20Right%20to%20a%20Basic%20Education.pdf) (accessed on 16 March 2019) 9.

<sup>252</sup> Section 10 of the Constitution.

<sup>253</sup> McConnachie C and Others (2017) 32; See also *Madzodzo and Others v Minister of Basic Education and Others [2014] ZAECMCHC5* para 2. A case which concerned unavailability of school furniture at public schools across the EC.

<sup>254</sup> Section 24(a) of the Constitution.

and equipment are readily obtainable and that sufficient funds have been designated to schools in order to sustain the availability of schooling.<sup>255</sup>

#### **4.2.1.1 Physical Infrastructure**

To examine the degree of compliance, by national and provincial legislation to international and regional law, the analysis will begin by at looking at the South African Schools Act.<sup>256</sup> The Act provides that the Minister, through regulation, may lay down minimum uniform norms and standards for school infrastructure, accordingly dictating the schools capacity with respect to the number of students that a school can accept and the availability of learning and teaching support facilities.<sup>257</sup> Section 5A, moreover, requires that the norms and standards should include, but not limited to, the availability of classrooms, electricity, water, sanitation, a library, science, technology, mathematics and life sciences laboratories, facilities for sports and recreation, electronic connectivity at a school and provide security for the school grounds.<sup>258</sup> This gives effect to section 29 (1) (a) of the Constitution and the obligations which have been imposed upon the state, which are correlative to it.<sup>259</sup> It should be noted that it is only around the year 2013 that these norms and standards were promulgated by the Minister. Prior to that, there was *the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment*,<sup>260</sup> which was put in place to provide guidance in the realisation of enabling physical teaching and learning environments that would be acceptable and adequate for every learner in the country.<sup>261</sup> However, this policy did not dictate certain important details as to how the stakeholders ought to ensure acceptable and adequate school infrastructure amenities, namely, the manner in which the school buildings are to be build, the capacity of learners in a school, ensuring that each school has water, sanitation and electricity, among many other school infrastructure essentials. This could be one of the reasons behind the backlogs experienced, not just the EC, but also in other rural areas across the country. Therefore, it can be concluded that prior to these regulations there was minimal legislative compliance with international and regional

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<sup>255</sup> South African Human Rights Commission (SAHRC) ‘Charter of Children’s Basic Education Rights’ (2012) available at <http://www.sahrc.org.za/home/21/files/SAHRC%20Education%20Rights%20Charter> (accessed 15 March 2020)15.

<sup>256</sup> Act 84 of 1996.

<sup>257</sup> Section 5A (1) (a)-(c) of the South African Schools Act 84 of 1996.

<sup>258</sup> Section 5A (2) (a)(ix) of Act 84 of 1996.

<sup>259</sup> *Equal Education and Another v Minister of Basic Education, Eastern Cape Division, Bhisho, case no. 276/2016 para 7.*

<sup>260</sup> National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (GN 515/2010).

<sup>261</sup> Foreword of GN 515/2010.

standards as they pertain to the availability of infrastructure in the province, and across the country.

These regulations by the Minister, also known as the *Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure* outline the fundamental necessities that render a school an educational institution worth accommodating learners.<sup>262</sup> They outline the school infrastructure necessities such as water, electricity, libraries, laboratories, and further indicate the deadlines for achieving the norms and standards on infrastructure,<sup>263</sup> a position which is unlike the *National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment* mentioned above.

Furthermore, under these regulations, the minimum uniform norms and standards in the ‘design and construction’ of the newly established schools are dictated.<sup>264</sup> This has certainly provided needed clarity as to what the state envisioned as encompassing school buildings worth accommodating all learners, regardless of their learning needs. Accordingly, the expected capacity of learners in varying schools is indicated with great detail.<sup>265</sup> In the EC, schools have failed to comply with the minimum capacity ratios provided, as discussed in chapter 3. The specification of the learner capacity by these regulations accordingly should assist the relevant stakeholders in determining whether a school is either overcrowded or whether it should be rationalised. Moreover, it would have also been beneficial to indicate the maximum capacity of learners that a classroom ought to have, as this would reduce the teaching and learning issues experienced when classrooms are overcrowded. With this in mind, the regulations still align with international standards requiring educational institutions to be made available to learners.<sup>266</sup>

Regarding the availability of water at schools, according to the regulations, all schools should have an adequate amount of water supply.<sup>267</sup> This requires that water is made available at all

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<sup>262</sup> Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (GN R920/2013).

<sup>263</sup> GN R920/2013.

<sup>264</sup> Reg. 2 of the GN R920/2013; Reg. 6(1) of the GN R920/2013. According to the regulations, buildings, indoor and outdoor facilities, signage, access paths, communication amenities in new schools, and other school improvements in existing schools should comply with requirements and principles of universal design.

<sup>265</sup> Reg. 5(3)(i)-(v) of the GN R920/2013. The Regulations additionally determine the minimum space in a Micro and small primary schools are expected to not exceed the minimum of 135 learners, 311 learners being the minimum expected capacity for medium primary schools, with large primary schools constrained to not exceed 621 pupils and the mega primary schools are to have a minimum of 931 students.

<sup>266</sup> See General Comments 13, para 6(a).

<sup>267</sup> Reg. 11(1) of the GN R920/2013.

times for consumption, personal cleanliness and the preparation of food.<sup>268</sup> This is important, considering that in Chapter 3 of the study it was highlighted that many schools in the rural parts of the EC are without functioning water and sanitation facilities. In addition, the availability of water in schools has been put to the test during this Covid-19 pandemic. As a consequence, some schools have been unable to open their doors to learners until the issues around water supply have been remedied, further delaying learners' access to education.<sup>269</sup> Moreover, the regulations require the stakeholders to ensure that there is an availability of water-collection points and water-use facilities within the schools, which will thus improve access to water for consumption, personal cleanliness and food preparation.<sup>270</sup> The regulations, as they pertain to the availability of water at schools are concise in guiding the service providers as to what is legally expected from them in ensuring that water is made available at all schools, which accordingly, complies with international and regional standards.<sup>271</sup>

On the matter of sanitation, the regulations require all schools to be provided with an adequate number of sanitation facilities that are accessible to all learners and educators, ensuring privacy and security, promoting health and hygiene values and in good working conditions.<sup>272</sup> The acknowledgment of the essential importance of sanitation facilities by the regulations aligns with the principle values around sanitation according to international standards.<sup>273</sup> In addition, the regulations call for appropriate sanitation technology to be chosen based on the specific requirements of the particular school.<sup>274</sup> No definition is provided as to what is meant by 'appropriate sanitation technology', which could be problematic in the provision of sanitation facilities in rural areas. However, what is clear is that service providers cannot provide plain pits and bucket latrines in schools.<sup>275</sup>

As highlighted in chapter 3, availability of electricity at some schools in the province remains a problem. The regulations require all schools to have connection to some type of power

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<sup>268</sup> Reg. 11(1) of the GN R920/2013.

<sup>269</sup> Dispatch Live 'Eastern Cape schools without water, sanitation won't open on Monday' *Talk of the Town* 03 May 2020 available at <https://www.talkofthetown.co.za/2020/05/30/eastern-cape-schools-without-water-sanitation-wont-open-on-monday/> (accessed on 05 June 2020); See also Nandipha K 'Parents say school re-opening is reckless' *Eastern Cape Rising Sun* 30 April 2020 available at <https://www.easterncaperrisingsun.com/post/parents-say-school-re-opening-is-reckless> (accessed 05 June 2020).

<sup>270</sup> Reg. 11(2) of the GN R920/2013.

<sup>271</sup> Art 24 & Art 27 of the CRC; See also Art 28(2)(a) of the UNCRPD.

<sup>272</sup> Reg. 12(1) of the GN R920/2013.

<sup>273</sup> Art 24 & Art 27 of the CRC; see also Art 14(2) (h) of CEDAW.

<sup>274</sup> Reg. 12(2) of the GN R920/2013.

<sup>275</sup> Reg. 12(4) of the GN R920/2013.

supply, which should be in accordance with all relevant laws.<sup>276</sup> The wording of this regulation suggests that the Department is authorised to explore and consider various sources of energy which could provide a sustainable power connection for the schools. This allows the Department to choose a source of energy that would align with their budgets, yet still providing electricity to the schools concerned. Furthermore, the Department has to keep in mind that the preferred power supply has to meet the demands of all individual schools, and it has to be based on the best source of power supply necessary for the particular school.<sup>277</sup> The recognition by the regulations for the need to have electricity in all schools regardless of the kind of energy source chosen adheres to the international standards requiring the provision of all resources necessary to ensure the availability of educational institutions.<sup>278</sup>

Furthermore, international, and regional law standards discussed in chapter 3, require that physical infrastructure encompasses the availability of all educational institutions and programmes, including sports and recreational facilities. Similarly, the regulations require that all schools should have an area allocated for all educational programmes directed at the physical wellness of the learners, namely sports and recreational activities.<sup>279</sup> These will be dictated by the type of sporting and recreational programmes preferred by the individual school.<sup>280</sup> The regulations have left it upon the stakeholders to determine the kind of sport and recreational facilities which would be appropriate for each school. This is a good stance because schools are permitted to decide what sporting and recreational facilities are satisfactory for their learners. Accordingly, through this legislative protection of sport and recreational facilities at schools, the regulations continue to accord with international and regional standards.<sup>281</sup>

Lastly, the regulations make reference to additional alterations and improvements that could be undertaken in existing schools and accordingly provides timeframes within which school infrastructure backlogs should be eliminated.<sup>282</sup> According to the regulations, all mud schools built from undesirable resources namely asbestos, metal and wood should have been completed by 2016.<sup>283</sup> However, this has not been the case as demonstrated in Chapter 3 of

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<sup>276</sup> Reg. 10(1) of the GN R920/2013.

<sup>277</sup> Reg. 10(2) of the GN R920/2013.

<sup>278</sup> See General Comment 13, para 6.

<sup>279</sup> Reg. 15(1) of the GN R920/2013.

<sup>280</sup> Reg. 15(2) of the GN R920/2013.

<sup>281</sup> Art 28 of the CRC; Art 11(1) of the ACRWC.

<sup>282</sup> Reg. 2 of the GN R920/2013.

<sup>283</sup> Reg. 4(1)(b) and 4(2)(a) of the GN R920/2013.

the study. In addition, the state bound itself to remedy the issues relating to ensuring that there are an adequate number of classrooms, proper electrical connections within schools, sufficient reserves of water on school premises, acceptable sanitation facilities and establishing security parameters at school, by the year 2020.<sup>284</sup> Moreover, by 2023, the state vowed to set up more libraries, science, technology and life sciences laboratories that adhere to the norms and standards provided.<sup>285</sup> What is more, is that by 2030, the state hopes to have established other norms and standards contained in the regulations, which will determine, among others, the architectural requirements for all educational institutions, specifications on the different kinds of schools, standards for universal access, site and identification of schools, classification of school areas and their specific sizes, classroom conditions, preferred electric connections, ideal water and sanitation facilities, sport and recreational facilities, and security and safety measures.<sup>286</sup> The time frames by the Department of Basic Education are poorly projected and have consequently led to unmet expectations and most importantly, unmet deadlines. Accordingly, this amounts to a poor observation of the international standards requiring the state to have a precise plan of action containing concise deadlines which will allow it to realise the right to a basic education.<sup>287</sup>

Overall, it is concluded that the legislation and policies on the availability of school infrastructure could be clearer in matters relating to, i.e. sanitation. However, in assessing compliance with international and regional standards, except for the projected timeframes which need to be revisited and revised, the regulations are compliant. More importantly, the regulations have been instrumental in assisting the affected communities to seek remedy for the unacceptable and shocking infrastructure conditions encountered at their schools, consequently assisting in holding the state accountable.<sup>288</sup>

#### **4.2.1.2 Learning and Teaching**

##### **4.2.1.2.1 Learning and Teaching Materials**

The international and regional standards require the state to ensure that education is directed at ensuring that the learners' human personalities are fully developed.<sup>289</sup> Moreover, that learning and teaching resources are made available, in order to facilitate the learning process.

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<sup>284</sup> Reg. 4(1)(b)(ii) of the GN R920/2013.

<sup>285</sup> Reg. 4(2)(a) of the GN R920/2013.

<sup>286</sup> Reg. 4(b)(iv) of the GN R920/2013.

<sup>287</sup> See General Comment 11, para 10.

<sup>288</sup> Draga L, Stuurman C & Petherbridge D *Pregnancy in Basic Education Rights Handbook: Education Rights in South Africa* 8 (2017) 239.

<sup>289</sup> Art 26(2) of the UDHR; Art 1 of World Declaration on Education for All.

In addition, these learning and teaching materials comprise libraries, computer facilities and information technology.<sup>290</sup>

The *Draft National Policy for the provision and management of Learning and Teaching Support Material (LTSMP) policy* provides a definition of what should be considered as learning and teaching materials.<sup>291</sup> The definition provided aligns with the international and regional standards<sup>292</sup> and accordingly with the learners' domestic learning needs. The draft policy has been intended to regulate the manufacture and selection of acceptable learning and teaching support materials with the aim of ensuring that they are adequately made available to all public schools and at an acceptable standard.<sup>293</sup> Moreover, the policy facilitates the learners' and educators' access to the learning and teaching resources that are required in all basic education learning levels.<sup>294</sup> The policy goes a step further by seeking to endeavour on making parents aware of these learning resources and therefore their responsibilities in terms of the maintenance and usage thereof.<sup>295</sup> The policy also goes as far as regulating the learners' understanding of the importance of playing an active role in completing their school tasks at school and at home, using these resources.<sup>296</sup> The problem identified with this Draft policy is that it has been drafted in such a manner that it does not provide sufficient guidance to the relevant stakeholders as does the *Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure*, which would be so beneficial in ensuring the supply of these resources. The concern is, therefore, that it could lead to varying interpretations, particularly by the service providers who have been authorised to ensure that these learning and teaching resources are made available to all schools, as it was observed in 'no fee schools' in Limpopo.<sup>297</sup> This policy therefore meets the minimum international and

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<sup>290</sup> General Comment 13, para 6(a).

<sup>291</sup> Department of Basic Education 'Draft National Policy for the Provision and Management of Learning and Teaching Support Material' (2014), 3. These learning and teaching materials comprise classroom resources used by learners and their educators such as wall charts, textbooks, e-books, readers, stationery and science kits among others.

<sup>292</sup> Art 1 of World Declaration on Education for All; Art 28(3) of the CRC.

<sup>293</sup> Department of Basic Education 'Draft National Policy for the Provision and Management of Learning and Teaching Support Material' (2014) 7.

<sup>294</sup> Department of Basic Education 'Draft National Policy for the Provision and Management of Learning and Teaching Support Material' (2014) 7.

<sup>295</sup> Department of Basic Education 'Draft National Policy for the Provision and Management of Learning and Teaching Support Material' (2014) 9.

<sup>296</sup> Department of Basic Education 'Draft National Policy for the Provision and Management of Learning and Teaching Support Material' (2014) 9.

<sup>297</sup> *Minister of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA 198 (2 December 2015)*. In the matter, no fee schools, who are inherently unable to purchase their own textbooks, were holding the state accountable for not providing the required textbooks. It can therefore be said that the lack of sufficient guidance in policy pertaining to the availability of learning and teaching materials, is the cause of the issues observed in the provision of these resources.

regional standards, because it acknowledges the need to supply learning and teaching support materials, and it thus seeks to regulate their availability and preservation.<sup>298</sup> However, further concise guidance ought to be provided to the relevant stakeholders to avoid future congestions in the availability of these learning and teaching resources.

Furthermore, in view of the fact that learning and teaching materials comprise computer facilities and information technology.<sup>299</sup> It becomes important to deal with the availability of internet connectivity in schools, based on the learners' necessity to have adequate access to the internet amid the digital era. The regulations only provide that all schools should have some form of wireless connectivity for communication purposes,<sup>300</sup> which have to be duly maintained and in good working order. These shall include but not limited to, telephone, fax, internet connectivity and intercom facilities.<sup>301</sup> The formulation of the regulation is not clear as to whether it envisioned internet connectivity for the learners, and furthermore, that such a connection shall be mandatory. This is therefore concerning because the provision of reliable internet connection for learners will thus not be treated with the urgency and importance that it deserves and may thus affect its availability. It is therefore recommended that the regulation be revisited so as to provide unambiguous legal and policy direction on the need for internet connectivity. Considering that internet connectivity is an essential educational resource at all learning levels of education, this regulation does not adequately fulfil international requirements.<sup>302</sup>

According to international and regional standards, learning and teaching materials also include libraries.<sup>303</sup> In chapter 3, it was highlighted that some libraries in the province were facing closure due to the lack of functioning infrastructural amenities namely water, sanitation and electricity.<sup>304</sup> The *Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure* requires public schools to be provided with school libraries or a media centres.<sup>305</sup> This includes a library collection comprising of minimum, adequate and suitable facilities. It is required that the library should be stocked up on a

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<sup>298</sup> Art 26(2) of the UDHR; Art 1 of World Declaration on Education for All.

<sup>299</sup> General Comment 13, para 6(a).

<sup>300</sup> Reg. 16(1) of the GN R920/2013.

<sup>301</sup> Reg. 16 (2)(a)-(d) of the GN R920/2013.

<sup>302</sup> Art 15 of the ICESCR requires the state to recognise everyone's right to enjoy the benefits of scientific progress; For a detailed discussion on access to the internet as a human right , see Segura-Serrano A 'Internet Regulation and the Role of International Law' (2006) 10 UNYB, 264.

<sup>303</sup> General Comment 13, para 6(a); Art 28(3) of the CRC.

<sup>304</sup> See Chapter 2 of the Study.

<sup>305</sup> Reg. 13(1) of the GN R920/2013.

regular basis, in line with the needs of the particular school.<sup>306</sup> This regulation is in accordance with international standards that require schools to have libraries, as part of ensuring that sufficient teaching and learning resources are available to pupils.<sup>307</sup>

What is more is that learning and teaching materials further encompass laboratories for science, technology and life sciences, which are provided for in the regulations as well.<sup>308</sup> Moreover, all schools that offer science subjects within their curriculum are expected to have a laboratory and the necessary equipment that will render it probable to conduct scientific research and investigations.<sup>309</sup> Therefore, these provisions from the *Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure* further meet the terms of international and regional standards on the availability of learning and teaching materials.<sup>310</sup>

Moreover, the ECSEA authorises the MEC to determine the school education policy which shall be directed towards improving the quality and availability of educational learning resources to the learners of the province,<sup>311</sup> this legislative authorisation further facilitates the availability of learning and teaching materials and accordingly adheres to the international and regional standards.

#### **4.2.1.3 Educators**

In *Phenithi v Minister of Education and Other*, the court observed that real meaning is provided to the child's right to education when the educator is available to teach in a classroom.<sup>312</sup> It is therefore essential that learners have access to qualified educators, who will be committed to their vocation for the prescribed hours and dedicated to completing the prescribed teaching curriculum.<sup>313</sup> International and regional law require the employed educators to be sufficiently skilled and to accordingly receive domestically competitive remuneration for their work.<sup>314</sup> Accordingly, in view of that fact, the SASA and the EEA, authorise the setup of teaching and non-teaching staff by the respective stakeholders.<sup>315</sup> Moreover, to ensure that learners are never without educators, the School Governing Bodies

<sup>306</sup> Reg. 13(1) & (2) of the GN R920/2013.

<sup>307</sup> General Comment 13, para 6(a); Art 28(3) of the CRC.

<sup>308</sup> Reg. 14(1)-(5) of the GN R920/2013.

<sup>309</sup> Reg. 14(1) of the GN R920/2013.

<sup>310</sup> Art 28(3) of the CRC.

<sup>311</sup> Section 4(1)(b) of Act 1 of 1999.

<sup>312</sup> *Phenithi v Minister of Education and Others* [2005] ZASCA 130 para 25.

<sup>313</sup> South African Human Rights Commission (SAHRC) 'Charter of Children's Basic Education Rights' (2012) 27-28.

<sup>314</sup> General Comments 13, para 6(a); see also Tomasevski K (2001) 23-24.

<sup>315</sup> Section 20(1)(i) & (j) of Act 84 of 1996; Section 5(2) of Act 76 of 1998.

(SGBs) are additionally empowered to create additional posts for both teachers and non-teaching staff.<sup>316</sup> In addition, the NNSSF calls for schools to have a sufficient number of teachers and non-educator staff.<sup>317</sup> It is further required that these staff members have to be equitably spread according to the educational requirements of the school concerned.<sup>318</sup> These legislative measures are necessary in ensuring the availability of skilled educators, thus complying with international standards.<sup>319</sup>

As discussed in Chapter 3, the principle of the availability of trained educators encompasses providing domestically competitive salaries. The national legislation on the matter makes certain that educators receive ‘fair, equitable and competitive’ salaries for educators.<sup>320</sup> The remuneration system provided therein ensures that there are longer salary bands and spatial overlaps between remuneration levels to assist satisfactory ‘salary progression’ to employees who choose to remain at the teaching level instead of applying for managerial positions within the schools.<sup>321</sup> Moreover, the costs accruing from the setup of school personnel are to be constrained within provincial budgets.<sup>322</sup> The legislative protection of the educators’ remuneration is in accordance with international standards discussed in chapter 2.<sup>323</sup>

*The Draft National Policy for the provision and management of Learning and Teaching Support Material (LTSMP) policy* further seeks to ensure that educators receive the necessary training required to continuously develop their understanding and use of the learning and teaching support materials which accordingly ensure that they become confident in their profession.<sup>324</sup> This is important because it aligns with international requirements that require educators to be sufficiently trained and prepared for teaching.<sup>325</sup>

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<sup>316</sup> Section 20(4) & (5) of Act 84 of 1996.

<sup>317</sup> Amended National Norms and Standards for School Funding (GN 869/2006), para 3.

<sup>318</sup> GN 869/2006, para 3.

<sup>319</sup> General Comment 13, para 6(a).

<sup>320</sup> See Education Labour Relations Council’s (ELRC) Collective Agreement No. 1 of 2008 through the Occupation Specific Dispensation (OSD).

<sup>321</sup> Education Labour Relations Council’s (ELRC) Collective Agreement No. 1 of 2008; see also Boshoff E, Morkel P, Deacon J & Merabe J *Education Law and Policy Handbook* (1999) Juta & Co. Ltd.

<sup>322</sup> GN 869/2006, para 3.

<sup>323</sup> General Comments 13, para 6(a).

<sup>324</sup> Department of Basic Education ‘Draft National Policy for the Provision and Management of Learning and Teaching Support Material’ (2014) 9.

<sup>325</sup> Art 13(2)(e) of the ICESCR; Tomasevski K (2001) 23-24.

#### **4.2.2 Accessibility**

Accessibility is a feature requiring the government to make educational institutions and programmes available to everyone, without any discrimination.<sup>326</sup> In addition, it requires the state to ensure that education is provided free of any charges, accordingly encouraging school attendance and promoting parental freedom of choice.<sup>327</sup> As discussed in chapter 2, there are three components to the notion of accessibility, namely physical accessibility, economic accessibility and non-discrimination.<sup>328</sup> Moreover, it is required that no person, entity or group should infringe on any child's right to accessing education.<sup>329</sup> The state, in particular, has to ensure that all children attend primary school without any hindrances.<sup>330</sup> Furthermore, it should be noted that ensuring that basic education is compulsory and free is a minimum core obligation, which means that it should not be dependent on the availability of state resources. The duty to ensure free and compulsory basic education is more immediate than other socio-economic rights, as mentioned in chapter one.

In ensuring that all children attend primary school, the SASA and the ECSEA make school attendance compulsory, accordingly making the right to a basic education compulsory for learners between the ages of 7 to 15 years or from grade R to grade 9.<sup>331</sup> It should however be noted that it has been recommended that 'compulsory education' should be extended to include all the grades until grade 12.<sup>332</sup> Moreover, the ECSEA requires learners to be entitled to a total of ten years of basic education and equal access to educational facilities,<sup>333</sup> thus further protecting compulsory basic education at the EC schools. In making basic education compulsory, these provisions seem to be in accordance with international and regional standards, as discussed in Chapter 2.<sup>334</sup>

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<sup>326</sup> General Comments 13, para 6(b).

<sup>327</sup> Tomasevski K (2001) 13-14.

<sup>328</sup> General Comment 13, para 6(b)(i)-(iii). *See also* South African Human Rights Commission (SAHRC) 'Report of the Public Hearing on the Right to Basic Education'(2006) available at <http://www.sahrc.org.za/.../Reports/Right%20to%20basic%20education%202006.pdf> (accessed 15 March 2020).

<sup>329</sup> General Comment 11, para 6.

<sup>330</sup> Art 28(1)(e) or CRC; Art 3 (d) of the ACRWC; Art 11(3) of the ACHPR; Art 13(4)(a) & Art 13(4)(c) of the AYC.

<sup>331</sup> Section 3 of Act 84 of 1996; Section 47 of Act 1 of 1999 (this provision endorses section 3 of SASA).

<sup>332</sup> National Planning Commission 2012 'National Development Plan 2030: Our future – make it work', 306available at <http://www.info.gov.za/.../national-development-plan-2030-our-future-make-it-work> (accessed on 19 April 2020).

<sup>333</sup> Section 4(1)(n) of Act 1 of 1999.

<sup>334</sup> Art 4(a) of the UNESCO Convention against Discrimination in Education; Art 28 of the CRC; Art 13(2) of the ICESCR; Art 11(3)(a) of the ACRWC; Art 13(4)(a) of the AYC.

The state is further expected to also promote school attendance, since it is not enough to merely make education compulsory. The SASA authorises the MEC for education within the particular province to ensure that schools are able to accommodate all children, in order for every child to be able to attend school.<sup>335</sup> In addition, the *Admission Policy for Ordinary Public Schools* further guarantees that no one may prevent a learner subject to compulsory attendance from attending a school without just cause.<sup>336</sup> Moreover, the ECSEA has authorised the MEC to determine the school education policy, which declares every person's right to a basic education and equal access to schools and learning facilities.<sup>337</sup> Furthermore, the Act provides that no learner shall be refused access to a school based on their race and/or their religion.<sup>338</sup>. Accordingly, it authorises the appointment of a school attendance officer, by the Head of Department, in order to encourage and ensure compulsory school attendance within the province.<sup>339</sup> The Act has gone as far as making preventing a child subject to compulsory education from attending school a punishable offence.<sup>340</sup> It can therefore be concluded that the SASA, ECSEA, *Admission Policy for Ordinary Public Schools* and the NNSF adhere with international and regional standards in terms of making basic education compulsory and moreover encouraging school attendance through legislation and policy documents.<sup>341</sup>

#### **4.2.2.1 Physical Accessibility**

In analysing the compliance of legislation and policies pertaining to physical accessibility of basic education, two components of physical accessibility will be discussed, namely transport and home education. These components are some of the mechanisms that the state has adopted to make basic education amenities accessible for the learners.

##### **4.2.2.1.1 Transport**

Physical accessibility refers to making basic education amenities accessible to everyone by all means necessary, in order to encourage learners to attend school and as a result minimise the drop-out rates. It also entails that educational institutions are located within a secure geographical location and/or that modern technology is incorporated through having distance

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<sup>335</sup> Section 3(3) of Act 84 of 1996.

<sup>336</sup> *Admission Policy for Ordinary Public Schools* (1998), para 9.

<sup>337</sup> Section4(1)(a) of Act 1 of 1999 .

<sup>338</sup> Ss45 of Act 1 of 1999.

<sup>339</sup> Section11(1) of Act 1 of 1999.

<sup>340</sup> Section55 of Act 1 of 1999.

<sup>341</sup> General Comment 13, para 6(b); Tomasevski K (2001) 12-14; Art 28(1)(e) of the CRC; Art 12(2)(c) of the Maputo Protocol; Art 13(4)(c) of the AYC.

learning programmes.<sup>342</sup> Accordingly, the SASA requires relevant stakeholders to ensure the compulsory attendance of learners in schools,<sup>343</sup> and it additionally requires the Head of Department to take the necessary measures to remedy any issues that hinder the learner's ability to attend school.<sup>344</sup> Through the SASA, stakeholders are implored to act positively in ensuring the accessibility of educational institutions; this aligns with international and regional standards that require legislations to facilitate accessibility.<sup>345</sup> Moreover, the *Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure* provides some necessary specifics regarding the location of the schools.<sup>346</sup> However, the regulations shied away from providing the maximum distance as it pertains to the distance of schools from where learners are able to access them. This would have provided the much-needed clarity regarding the discussion on the distance learners often have to walk to access schools in the EC.

The transport system is one of the mechanisms used by the state to ensure that educational institutions are accessible. Accordingly, the *National Learner Transport Policy* was enacted to address the safety and school access challenges met by learners across South Africa.<sup>347</sup> It ensures that learners from deep-rural areas and disadvantaged communities have access to schools.<sup>348</sup> This policy has set some specifications as it pertains to the establishment of a transport system for learners, in order to facilitate access to schools. Within this policy, the guidelines for applying to gaining access to learner scholar transportation are set out in section 3.3.1 of the policy.<sup>349</sup> The guidelines herein provide the much needed guidance to

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<sup>342</sup> Kamga SAD 'Realising the right to primary education in Cameroon' (2011) 11 *African Human Rights Law Journal*, 179.

<sup>343</sup> Section 3 of Act 84 of 1996.

<sup>344</sup> Section 3 (5)(b) of Act 84 of 1996

<sup>345</sup> Art 28(1)(e) of the CRC; Art 12(2)(c) of the Maputo Protocol; Art 13(4)(c) of the AYC.

<sup>346</sup> Reg. 7(1)(a) of the GN R920/2013 requires schools to be easily accessible to roads, sewage lines and other basic services.

<sup>347</sup> Foreword of the Department of Basic Education & Department of Transport 'National Learner Transport Policy' 2015 (GN 997/2015).

<sup>348</sup> Foreword of the GN 997/2015. See also Mgushelo L 'The Scholar Transport Programme in the Eastern Cape: A case study of the beneficiaries at a secondary school in the Idutywa district' (MA Sociology, University of Pretoria, 2018) 28.

<sup>349</sup> The principals, after consulting the School Governing Body, have to identify the learners that require the subsidised learner transport services. However, they must adhere to the provided criteria. In order to access the transport service, the learners have to be identified as being 'needy' and should be in grades R to 12. The learner transport is subsidised only to the nearest appropriate school and not to the school the parents have enrolled their children at, and priority is to be give learners with disabilities and the nature of such a disability is considered. Moreover, priority is to be given to learners who walk long distances to schools. Furthermore, existing learner transport services should be taken into consideration when identifying the learners in need of these services, in order to avoid wasting state resources and consequently duplicating these subsidised transport services.

stakeholders and thus facilitate the accessibility of educational institutions and programmes at the basic education level, accordingly complying with international and regional standards.<sup>350</sup>

It should be noted that the national policy, however, left the planning of the learner transport provision to be developed by the respective provinces.<sup>351</sup> The implementation of these plans and strategies would have to be developed by the provinces in line with the national policy.<sup>352</sup> This leads the analysis to *the Eastern Cape Provincial Learner Transport Policy* which has set out much more specific guidelines for stakeholders, thus ensuring accessibility to educational institutions in the EC through transportation services. The policy provides that eligibility for the subsidised transport services is limited only to learners who reside and attend schools within the province.<sup>353</sup> Additionally, it is intended for learners who walk a distance of more than 10 km daily and provides preference to learners who walk much longer distances.<sup>354</sup> This guideline is important because it addresses the issues discussed in chapter 3 of learners who are forced to walk close to 30 km in order to access school daily. Moreover, it complies with international standards because preference is provided to the learners residing far away from educational institutions.<sup>355</sup> Furthermore, the policy recognises that finances can hinder access to schools and it therefore makes provision for a transport system to be made available to learners in different categories: i.e. learners who did not receive their boarding allowances, learners whose parents earn less than the stipulated minimum wage, learners who attend the nearest school from their place of residence (which can sometimes be located far away), learners who were forced to attend schools that are far from the nearest school, and learners who are orphans.<sup>356</sup> In the *Tripartite Steering Committee and Another v Minister of Basic Education and others* the court opined that the Eastern Cape Learner Transport Policy should not be viewed as the last resort to the learner transport matter and should accordingly be considered as a legal instrument used by the department to fulfil its

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<sup>350</sup> General Comments 13, para 6(b)(ii); Tomasevski K (2001) 12.

<sup>351</sup> Department of Basic Education & Department of Transport 'National Learner Transport Policy' 2015.

<sup>352</sup> Department of Basic Education & Department of Transport 'National Learner Transport Policy' 2015.

<sup>353</sup> Section 4 (1) of the Eastern Cape Provincial Learner Transport Policy. See also *Tripartite Steering Committee and Another v Minister of Basic Education and Others 2015 (5) SA 107 (ECG); 2015 ZAECGHC 67* para 22.

<sup>354</sup> Section 4.2.1 & Section 4.2.2 of the Eastern Cape Provincial Learner Transport Policy. See also *Tripartite Steering Committee and Another v Minister of Basic Education and Others 2015 (5) SA 107 (ECG); 2015 ZAECGHC 67 para 22.*

<sup>355</sup> General Comment 13, para 6(b)(ii).

<sup>356</sup> Section 4 (3) – 4(8) of the Eastern Cape Provincial Learner Transport Policy.

duties as it is mandated by section 29 of the Constitution.<sup>357</sup> It can therefore be concluded that this statutory protection is in accordance with international requirements.<sup>358</sup>

#### **4.2.2.1.2 Home Education**

In light of the issues around accessing educational institutions and programmes, discussed in chapter 3, as well as lockdown regulations due to the Covid-19 pandemic, the importance of home education for all learners in SA, and the EC province, cannot be overemphasised. It has been one of the alternatives explored by schools and the parents to ensure that learning is not disrupted.

The SASA makes provision for parents to apply to the head of department to register their children for home education.<sup>359</sup> It, however, requires that the level of education that the learner will receive from home will be at the same or similar standard as that found in the public school curriculum.<sup>360</sup> This means that the provisions on basic education in the SASA discussed above and elsewhere in the study, apply *mutatis mutandis*.<sup>361</sup> Through these SASA provisions, the accessibility of the right to basic education is protected, as parents are implored to ensure that their children are able to still receive good education while being home schooled. By doing this, legislature ensured that the right to a basic education is still protected despite the chosen mode of its accessibility, accordingly complying with international standards.<sup>362</sup>

Moreover, the head of department must be satisfied that such an enrolment is in the best interests of the child,<sup>363</sup> and this is where the provisions of the Children's Act play an important role.<sup>364</sup> To further provide guidance and protection in the institution of home education, the *Policy on Home Education* and the *Final Draft of the Eastern Cape Policy for the Registration of Learners for Home Education*, provide detailed guidelines on home education, nationally and provincially respectively. Both policies outline the application

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<sup>357</sup> *Tripartite Steering Committee and Another v Minister of Basic Education and Others 2015 (5) SA 107 (ECG); 2015 ZAECGH 67 para 57.*

<sup>358</sup> Tomasevski K (2001) 12.

<sup>359</sup> Section 51 of Act 84 of 1996.

<sup>360</sup> Section 51(2)(a)-(b) of Act 84 of 1996.

<sup>361</sup> See Section 3 & 51 of Act 84 of 1996.

<sup>362</sup> See General Comment 13, para 6(b)(ii) requires the state to initiate or facilitate distance learning programmes.

<sup>363</sup> Section 51(2)(a)-(b) of Act 84 of 1996.

<sup>364</sup> Section 8 of the Children's Act 38 of 2005, requires the best interests of the child to be considered with the utmost importance in all matters relating to the child. This, in addition has to be aligned with the Act's definition of 'care' which entails meeting the child's educational needs (e).

process, conditions and the registration for home education.<sup>365</sup> The national and provincial guidance from these policy documents provide stakeholders with the necessary information to facilitate the home education process<sup>366</sup> and accordingly ensure that basic education is accessible and in accordance with the requirements of international law.<sup>367</sup> The policy, as a mechanism of guaranteeing access to basic education for learners subject to home education, has outlined the duties of parents pertaining to monitoring home education.<sup>368</sup> The legislature went above the minimum requirement provided by international law which requires the state to provide distance learning programmes in order to ensure accessibility of educational programmes.

#### **4.2.2.2 Economic Accessibility**

The EC is one of the most impoverished provinces in the country, and it is for that reason that it is deeply dependent on state funding. As stated in chapter 2, factors such as school fees and other direct costs emanating from having access to education may hinder the enjoyment of the right to education. As a consequence, it is deemed that education is to be considered free only in instances where parents or guardians are not expected to pay for these costs.<sup>369</sup> Accordingly, economic accessibility involves putting measures in place that strive towards ensuring that education is free of any charges, accordingly encouraging pupils to attend school and consequently reduce drop-out rates.

The NEPA provides the Minister of Basic Education with the authority to guide the national policy on the development, provisioning, funding, post-provisioning of teaching and non-teaching personnel, organising, managing, governing, supervising and evaluating the basic education system.<sup>370</sup> In addition, it requires the Minister to provide a framework which provinces, such as the Eastern Cape, can use to determine specifications for the education structure, including school funding, which the Provincial Education Department can put into force.<sup>371</sup> Through this authorisation, stakeholders are thus able to facilitate the process of

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<sup>365</sup> Section 12 & Section 13 of the Policy on Home Education (GN 1239/2018); Section 5-15 of the Final Draft of the Eastern Cape Policy for the Registration of Learners for Home Education (Proposed).

<sup>366</sup> Section 12(1)-(2) of the GN 1239/2018 & Section 5 of the Final Draft of the Eastern Cape Policy for the Registration of Learners for Home Education (Proposed), provide detailed guidelines for the parents and the HOD (and Superintendent General according to the DRAFT policy) relating to the application for home education. Moreover, under section 13 & 14 of the GN 1239/2018 and Sections 10-20 of the Final Draft of the Eastern Cape Policy for the Registration of Learners for Home Education (Proposed).

<sup>367</sup> General Comment 13, para 6(b)(ii).

<sup>368</sup> Chapter 3 of the GN 1239/2018; Section 21 of the Final Draft of the Eastern Cape Policy for the Registration of Learners for Home Education (Proposed).

<sup>369</sup> General Comment 11, para 7.

<sup>370</sup> Section 3(4) of Act 27 of 1996; see also McLaren D *Funding Basic Education in Basic Education Rights Handbook: Education Rights in South Africa 2* (2017) 56.

<sup>371</sup> Section 3(4) (g) of Act 27 of 1996; see also McLaren (2017) 56.

ensuring that basic education is made accessible through enacting norms and standards and regulations that would attempt to make basic education as free as possible in South Africa. It must be noted, however, that basic education is not free in South Africa, as it is required by international and regional standards.<sup>372</sup> The assessment below will look at legislation and policies that have provisions on school funding, and consequently analyse whether such provisions adhere to the international and regional standards.

The SASA was put in place to assist with the obliteration of poverty and to ensure the economic well-being of the people within the country.<sup>373</sup> It is for this reason that the Act prohibits the refusal to admit a learner based on their parents' inability to fund their child's tuition fees.<sup>374</sup> It additionally requires that the state funds public schools with resources obtained from public revenue.<sup>375</sup> These provisions align with the international standards requiring the state to ensure that funding is made available in order to make basic education accessible for everyone.<sup>376</sup>

Moreover, the SASA empowers the Minister to determine the national quintile rankings for public schools, on an annual basis, with the aim of efficiently identifying schools that should be exempt from charging school fees.<sup>377</sup> In addition, SASA provides that school tuition may be determined and charged at school on condition that such a determination has been approved by the majority of parents,<sup>378</sup> in a meeting called by the school governing body. This empowers parents to have their financial concerns addressed. The Act and the *Regulations relating to the exemption of parents from payment of school fees in public school* require partial or full fee exemption of fees to allow learners who are from financially struggling homes to be able to attend schools that charge fees, and this applies to all public schools' except for those declared 'no fee' schools.<sup>379</sup> It must be noted that the schools which have fee-exempted learners are not compensated by the state, the learners are

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<sup>372</sup> Art 14 of the ICESCR; Art 24(2)(a)-(b) of the UNCRPD; General Comments 11, para 7; General Comments 13, para 6(b)(iii).

<sup>373</sup> *Preamble* of Act 84 of 1996.

<sup>374</sup> Section 5(3) of Act 84 of 1996.

<sup>375</sup> Section 34 of Act 84 of 1996.

<sup>376</sup> Art 4 of CRC; Tomasevski K (2001) 17; General Comment No. 3 (1990) para 13.

<sup>377</sup> Section 39(7) of Act 84 of 1996. Quintile rankings refer to the classification of schools into 5 categories, known as quintiles. These quintiles help the state to determine which schools shall be allocated the most state subsidy to assist to operate better. For a detailed discussion on quintile rankings, see Mestry R & Ndhlovu R 'The implications of the National Norms and Standards for School Funding policy on equity in South African public schools' (2014) 34 *South African Journal of Education*, 3.

<sup>378</sup> Section 39 of Act 84 of 1996.

<sup>379</sup> Act 84 of 1996; Department of Education 'Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools', 2006.

subsidised by the parents of the learners who are able to fund their school fees.<sup>380</sup> According to the Act, should parents be denied fee-exemption, they are able to appeal this decision to the head of department.<sup>381</sup> The concept of fee exemption as introduced by the SASA, although it does not fully guarantee free basic education for learners, it does permit learners to have access to schools that they would not be able to access if it was not for these provisions, even though it is sometimes at the expense of the other learners' parents. Therefore, the state is fulfilling its international obligations through using the maximum extent of its resources as required by international standards.<sup>382</sup>

The NNSF established the quintile system that is based on the learners' financial means.<sup>383</sup> The quintile system ranks every school within the country into quintiles, based on the 'income and wealth' of each individual community. Schools located in the poorest communities are grouped in quintile one.<sup>384</sup> The state partially or fully funds schools grouped in quintiles one to three.<sup>385</sup> The aim is to provide the poorer schools with greater funding than wealthier schools. Moreover, these norms and standards additionally authorise the reassignment of a school from one quintile to another,<sup>386</sup> which could have positive or an opposite financial effect on the learners and their parents depending on which quintile the school has been reassigned to. In addition, the NNSF, to improve school attendance, authorised the declaration of the 'no-fee' schools, thus ensuring that fees did not deter learners from attending schools.<sup>387</sup> The formulation of the provisions in the NNSF, complies with the international standards requiring the state to be the main investor in facilitating the realisation of basic education institutions and programmes.<sup>388</sup>

Although schools in these quintiles receive 27% of non-personnel funding; however, learners in these no-fee schools must still pay for educational costs such as uniforms, books, stationery and transportation.<sup>389</sup> Accordingly, as far as 'no-fee schools' are concerned, South

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<sup>380</sup> McLaren D (2017) 67.

<sup>381</sup> Section 40(2) of Act 84 of 1996; McLaren D (2017) 68.

<sup>382</sup> See the Art 4 of CRC.

<sup>383</sup> Section 35(d) of Act 84 of 1996.

<sup>384</sup> McLaren D (2017) 65.

<sup>385</sup> Dass S & Rinquest A *School fees in Basic Education Rights Handbook: Education Rights in South Africa* 7 (2017) 146.

<sup>386</sup> Section 103(c) of the GN 869/2006. .

<sup>387</sup> McLaren (2017) 66.

<sup>388</sup> See Tomasevski K (2001) 17.

<sup>389</sup> McLaren D (2017) 66.

Africa complies with International and regional law obligations on ensuring that basic education is made free as possible.<sup>390</sup>

Furthermore, provincially, the ECSEA authorises the MEC to determine the school education policy, which provides government and parents with joint financial responsibility on obligatory and voluntary contributions towards the learners' school fees in respect of compulsory education, provided that no learner shall be prohibited from accessing compulsory education.<sup>391</sup> Furthermore, the Act authorises the MEC, in agreement with the financial head or the school governing body, to exempt learners who reside at boarding schools from paying their fees, in whole or in part.<sup>392</sup> These provisions from the ECSEA, comply with the international requirements that require the state to fund basic education,<sup>393</sup> although such funding is shared with the parents of the learners. These provisions will have to be interpreted in accordance with international standards that require the state to ensure costs accrued from access to basic education do not hinder access to education for the learners,<sup>394</sup> particularly those from rural EC, who are from poor households.

#### **4.2.2.3 Non-discrimination**

As the overriding principle in human rights law, non-discrimination encompasses ensuring that basic education is made accessible to everyone without prejudice, particularly those members of society that, in law and fact, belong in vulnerable groups.<sup>395</sup> The state has to promulgate special measures with the intention of bringing equality for persons belonging in these marginalised and vulnerable groups.<sup>396</sup> In addition, the ICESCR requires the state to ensure that they provide equal access to primary education for every child in the school-going age that resides within their national territory.<sup>397</sup> It should be noted that, the analysis herein shall not be limited to the challenges outlined in Chapter 3, because it is crucial to analyse and discuss areas that affect learners where discrimination is likely to affect learners in order to propose possible legislative guidance.

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<sup>390</sup> Art 14 of the ICESCR; Art24(2)(a) -(b) of the UNCRPD; *See also* McLaren, D. (2017) 66.

<sup>391</sup> *Section 4(1)(o)* of Act 1 of 1999.

<sup>392</sup> *Section 52(3)(c)* of Act 1 of 1999.

<sup>393</sup> Tomasevski K (2001) 17.

<sup>394</sup> See General Comment 11, para 7; *See also* Arendse L. (2011) 106.

<sup>395</sup> General Comment 13, para 6(b)(i).

<sup>396</sup> General Comment 13, para 32.

<sup>397</sup> General Comment 13, para 34.

#### **4.2.2.3.1 Access for Girls**

International and regional human rights instruments require state parties to take the necessary measures to reduce the number of school drop-outs, particularly that of females.<sup>398</sup> Furthermore, the AYC and the ACRWC call for the state to provide female learners with the opportunity to complete their education, should it be affected by pregnancy or an early marriage.<sup>399</sup>

In SA, particularly EC, female learners find protection in the Constitution, which prevents discrimination based on pregnancy by the state or any other party.<sup>400</sup> Moreover, these learners' have the right to dignity, which should be respected and protected at all times.<sup>401</sup> In addition, the best interests of the child are to be considered with significant importance.<sup>402</sup> These provisions of the Constitution align with the provisions of the Maputo Protocol,<sup>403</sup> accordingly complying with regional standards.

In addition, SASA requires parents to ensure that their children attend school on a compulsory basis from the ages of 7 to 15 years.<sup>404</sup> The Act and the Equality Act additionally require public schools to admit learners without unfairly discriminating the learners in any manner.<sup>405</sup> More specifically, the Equality Act prohibits discrimination based on gender and/or pregnancy.<sup>406</sup> This means that learners who are pregnant and should not be subjected to discrimination based on the fact that they are pregnant. It can therefore be concluded that the following provisions comply with international and regional standards,<sup>407</sup> in terms of allowing girls to remain in school during and after their pregnancies or child marriage. Accordingly, in a matter emanating from the Free State province, the *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another*,<sup>408</sup> where the powers of the Head of a Provincial Department of Education (HOD) to

<sup>398</sup> Art 13 of ICESCR; Art 12(2) of the Maputo Protocol; Art 23(G) of the AYC; Art 11(6) ACRWC.

<sup>399</sup> Art 13(4)(h) of the African Youth Charter; Art 11(6) of the African Charter on the Rights and Welfare of the Child.

<sup>400</sup> Section 9(3) & (4) of the Constitution.

<sup>401</sup> Section 10 of the Constitution.

<sup>402</sup> Section 28(2) of the Constitution.; see also Art 3(1) of the CRC.

<sup>403</sup> See Art 1 & 12(1)(a) of the Maputo Protocol.

<sup>404</sup> Section 3 (1) of Act 84 of 1996.

<sup>405</sup> Section 5(1) of Act 84 of 1996.; Section 6 of the Equality Act 4 of 2000.

<sup>406</sup> Section 8 of Act 4 of 2000; Section 8(f) of Act 4 of 2000.

<sup>407</sup> Art 13(4)(h) of the African Youth Charter; Art 13 of ICESCR; Art 12(2) of the Maputo Protocol; Art 23(G) of the AYC; Art 11(6) ACRWC.

<sup>408</sup> *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC)

direct the principal of a school to contravene the learner pregnancy policy adopted by the School Governing Body of the school, were disputed. The HOD ordered two pupils to be reinstated at their respective schools after they had been dismissed through the learner pregnancy policy due to pregnancy. The Constitutional Court held that the learner pregnancy policy infringed on the learners' rights to dignity, freedom from unfair discrimination and their right to receive a basic education thus ordered the policies to be reviewed through the principles of cooperative governance contained within the *SASA*.<sup>409</sup>

The Equality Act prohibits discrimination that can potentially lead to the limitation of women's [and girls] access to social services, their right to health or education.<sup>410</sup> Strengthening the Equality Act, the *NEPA* authorises the Minister of Basic education to determine a national policy on education support services which should encompass health, welfare, counselling and provide additional guidance on the matter.<sup>411</sup> Such a policy could address the many issues that potentially threaten the female learners' access to basic education. In addition, the *ECSEA* authorises the HOD of the school to, entirely or partially, exempt a learner from compulsory school attendance, if the learner is pregnant.<sup>412</sup> Such an exemption is necessary because it allows the learner to receive leave from school for the duration of her pregnancy and until such time that they are ready to return to school and accordingly access basic education institutions and programmes. These legislative provisions provide minimum protection for female learners as it pertains to their access to basic education institutions and programmes. It can therefore be concluded that these provisions comply with international and regional standards on ensuring access for female students.<sup>413</sup>

#### **4.2.2.3.2 Access for learners with disabilities**

Accessibility in basic education institutions and programmes is a privilege to be enjoyed by all persons, including learners with disabilities. The *UNCRPD* prohibits the exclusion of children with special needs from the general education system.<sup>414</sup> It therefore requires the state to provide these learners with the necessary support within its general education

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<sup>409</sup> *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC), para 7.*

<sup>410</sup> Section 8(g) of Act 4 of 2000.

<sup>411</sup> Section 3(4)(0) of Act 27 of 1996.

<sup>412</sup> Section 48 of Act 27 of 1996.

<sup>413</sup> See Art 13 of ICESCR; Art 1 & Art 12(2) of the Maputo Protocol; Art 23(G) of the AYC; Art 11(6) ACRWC; Art 13(4)(h) of the African Youth Charter.

<sup>414</sup> Art 24(2)(d) of the *UNCRPD*.

system.<sup>415</sup> This would encompass ensuring that learners with disabilities are academically and socially on an equal footing with the other learners.<sup>416</sup>

Constitutionally, discrimination against anyone based on their physical disabilities is prohibited.<sup>417</sup> This entails that failure by the state to provide equal access to basic education, for children with special needs, will amount to discrimination based on one's disability. Children with special needs additionally have a right to have their dignity, and freedom and security protected.<sup>418</sup> These constitutional provisions are in concurrence with the requirements of the UNCRPD.<sup>419</sup>

All the provisions and regulations under the SASA, equally apply to children with special needs, which encompasses ensuring that their school attendance is made compulsory.<sup>420</sup> In addition, the SASA further requires the MEC to provide these pupils with education at regular schools and to accordingly provide the relevant educational support, where it is reasonably possible to do so.<sup>421</sup> When enrolling a learner with special education needs, the SASA requires the Head of Department and the school principal to consider the plight and wishes of the learner's parents.<sup>422</sup> This particular provision aligns with the principles of the CRC which require the best interest of the child to be considered with paramount importance.<sup>423</sup> The provisions of the SASA analysed herein are in accordance with international standards,<sup>424</sup> requiring basic education to be inclusive.

Moreover, the Equality Act prohibits unfair discrimination based on one's disability, including denying a person [learner] access to any supporting or enabling facility that is essential to how they function in society.<sup>425</sup> Furthermore, the Children's Act additionally requires that all matters concerning children with special learning needs must ensure accessibility to educational activities for the learners.<sup>426</sup> These provisions accord with the international standard requiring the state to ensure that educational institutions and

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<sup>415</sup> Art 24(2)(d) of the UNCRPD.

<sup>416</sup> Art 24(2)(d) of the UNCRPD.

<sup>417</sup> Section 9 of the Constitution.

<sup>418</sup> Section 10 & 12 of the Constitution.

<sup>419</sup> Art 8(2)(b) of the UNCRPD; Art 24 (1) of the UNCRPD.

<sup>420</sup> Section 3(1) of Act 84 of 1996.

<sup>421</sup> Section 12(4) of Act 84 of 1996.

<sup>422</sup> Section 5(6) of Act 84 of 1996.

<sup>423</sup> Art 3(1) of the CRC.

<sup>424</sup> See Art 24 (1) of the UNCRPD; *see also* Tomasevski K (2001) 13-14.

<sup>425</sup> Section 9 (a) of the Equality Act 4 of 2000.

<sup>426</sup> Section 11 (1)(b) of the Children's Act 38 of 2005. See also Murungi N 'The Duty to provide basic education for children with severe and profound intellectual disabilities' (2011) 12 *ESR Review* 11.

programmes are accessible to everyone without discrimination.<sup>427</sup> This includes failing to remove any hindrances or failing to take the necessary precautions that unfairly limit or restrict the learner from fully enjoying equal opportunities.<sup>428</sup> This is essential in the access of basic education amenities at the designated educational institutions, because learners with disabilities should be able to access all the available school facilities without any problems, regardless of their physical abilities or their geographic location.

Furthermore, the *Education White Paper 6 Policy* (hereafter referred to as the ‘WP6’), is a legal document which envisions an education system that is inclusive and non-discriminatory.<sup>429</sup> It has been enacted with the aim of annihilating all kinds of limitations to learning.<sup>430</sup> Central to this policy, is the human rights concept, which encompasses the notion that all learners have the ability to learn, and that every child is different and moreover that all children require support at some level.<sup>431</sup> The fundamental components of the WP6’s strategy is to develop an all-encompassing education system that comprises the mobilisation of out-of-school children and young people with special needs, thus improving schools of special needs learners through developing full-service schools, establishing district-based support teams and school-based support teams, creating teaching and learning support and training programmes and focusing on providing financial support for the establishment of an inclusive education and training system.<sup>432</sup> In addition, the WP6 provides for the training and skilling of educators who work with children with special needs.<sup>433</sup> It further regulates the funds allocated to schools specially designated for children with special needs, in order to address history of neglect when it comes to children with special needs.<sup>434</sup> This policy generally adheres to international and regional standards in multiple ways. Firstly, the formulation of ways to redressing past injustices as they relate to persons with special needs

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<sup>427</sup> General Comment 13, para 6(b); Tomasevski K (2001) 13-14; Art 2 of the ICESCR; Art 2 of the CRC; Art 2 & 3(1)-(2) of the ACHPR; Art 2 (1) & (2) of the AYC

<sup>428</sup> Section 9(c) of Act 4 of 2000.

<sup>429</sup> Department of Basic Education ‘Education White Paper 6: Building an Inclusive Education and Training System’ (2001) 11.

<sup>430</sup> Department of Basic Education ‘Education White Paper 6: Building an Inclusive Education and Training System’ (2001) 9.

<sup>431</sup> Department of Basic Education ‘Education White Paper 6: Building an Inclusive Education and Training System’ (2001) 24.

<sup>432</sup> Department of Basic Education ‘Education White Paper 6: Building an Inclusive Education and Training System’ (2001) 7-8.

<sup>433</sup> Department of Basic Education ‘Education White Paper 6: Building an Inclusive Education and Training System’ (2001) 18.

<sup>434</sup> Department of Basic Education ‘Education White Paper 6: Building an Inclusive Education and Training System’ (2001) 25.

in the policy, is in accordance with the requirements of the UNCRPD.<sup>435</sup> The skilling and training of educators envisioned in the policy is in line with the international standards that require the state to ensure that it provides adequately skilled educators for all learners.<sup>436</sup> And lastly, the fact that this policy makes provision for funding of all these inclusive programmes and facilities aligns with international standards that require the state to invest in its [basic] education institutions and programmes,<sup>437</sup> and that additionally require basic education amenities to be economically accessible.<sup>438</sup>

A further essential policy that ensures non-discriminatory access for learners with disabilities is the *Policy on Screening, Identification, Assessment and Support* (hereafter referred to as ‘SIAS’ policy), which provides concise guidelines to parents, learners and the school on the procedures for enrolling and admitting pupils with learning barriers.<sup>439</sup> The policy requires that, where it is possible, learners with special learning needs should be accommodated at ordinary schools and at special schools where further support is required thus amplifying the requirements of the SASA.<sup>440</sup> It additionally provides information on how to identify and decide on the level support for learners, accordingly equipping the schools, parents and learners with the necessary knowledge on adequately meeting the needs of the learners. This policy concurs with the UNCRPD requirements that require the state to ensure the full development of the learners’ talents, personality, self-dignity and mental and physical abilities.<sup>441</sup>

Moreover, the *Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure* additionally require schools to ensure that there is access to ramps, handrails and sufficient space for navigating the school, for the staff and learners, in order for learners and staff have full access to the schools.<sup>442</sup> This provision aligns with the international and regional standards that require basic education institutions and programmes to be made physical accessible.<sup>443</sup>

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<sup>435</sup> See Art 24 (1) of the UNCRPD.

<sup>436</sup> General Comment 13, para 6(a); Art 4(d) of the UNESCO CADE.

<sup>437</sup> Art 4 of CRC; *See also* Tomasevski K (2001) 17.

<sup>438</sup> Art 24(2)(b) of the UNCRPD; General Comment 13, para 6(b)(iii).

<sup>439</sup> Department of Basic Education ‘Screening, Identification, Assessment and Support Policy’, 2014.

<sup>440</sup> Murungi LN ‘Inclusive Basic Education in South Africa: Issues in its Conceptualisation and Implementation’ (2015) 18 *PER/PELJ* 3172.

<sup>441</sup> See Art 24(1)(a) of the UNCRPD; Art 7(1) of the UNCRPD.

<sup>442</sup> Reg. 6(3)(a) of the GN R920/2013

<sup>443</sup> See Art 28(1)(e) of the CRC; Art 12(2)(c) of the Maputo Protocol; Art 13(4)(c) of the AYC; see also Tomasevski K (2001) 12.

What is more important is that the ECSEA provides detailed guidelines on the enrolment of a child with special needs within the province.<sup>444</sup> These guiding provisions will provincially assist the relevant stakeholders in ensuring that the best interests of the child are upheld, as required by international standards.<sup>445</sup>

#### **4.2.2.3.3 Access for learners in the LGBTIQ+ community**

The state is required to ensure that basic education institutions and programmes are accessible to everyone, particularly those members of society belonging in marginalised and vulnerable groups.<sup>446</sup> The subject of gender and sexual orientation requires all relevant stakeholders to play an active role in creating a safe environment in schools for learners and educators belonging within the LGBTIQ+ community.

The right to equality prevents the unfair discrimination of individuals based on their gender, sex and/or their sexual orientation.<sup>447</sup> The equality clause ensures that everyone is treated equally and enjoys ‘full and equal’ access to all of their rights and freedoms. Accordingly, as per the Constitution, the duty to disclose one’s sexuality for learners and educators has been left in their hands, allowing them share their gender identity and sexuality at their own volition.<sup>448</sup> Moreover, the learners’ freedom of expression is protected in the Constitution,<sup>449</sup> and it accordingly protects the individual’s right to be vocal about their sexuality and gender identity. Considering the provisions of the Constitution analysed herein, it can be concluded therefore that the Constitution of the country accords with international and regional standards on non-discrimination.<sup>450</sup>

Moreover, the *Equality Act* for that reason prohibits anyone from intentionally publishing, spreading propaganda, advocating or spreading upsetting, damaging, or distributing hatred related content based on sex, gender and sexual orientation.<sup>451</sup> However, a lot more still needs to be done with regards to legally protecting learners and educators belonging in the LGBTIQ+ community, thus more legislative guidance is still necessary for educators, learners and other relevant stakeholders.

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<sup>444</sup> See Section 37- 41(2) of Act 1 of 1999.

<sup>445</sup> See Art 3(1) of the CRC; Art 7(3) of the UNCRPD.

<sup>446</sup> General Comment 13, para 6(b)(i); General Comment 13, para 32.

<sup>447</sup> Section 9 of the Constitution.

<sup>448</sup> Ally N & Phala T *Sexual Orientation and Gender Identity in Schools in Basic Education Rights Handbook: Education Rights in South Africa* 9 (2017) 176.

<sup>449</sup> Section 16 of the Constitution.

<sup>450</sup> General Comment 13, para 6(b)(i); General Comment 13, para 32; Art 2 of the ICESCR; Art 2 of the CRC; Art 2 & 3(1)-(2) of the ACHPR; Art 2 (1) & (2) of the AYC.

<sup>451</sup> Section 1 of Act 4 of 2000 (under the definition of ‘harassment’).

### **4.2.3 Acceptability**

The state is called to ensure that the quality of education it provides is such that it permits everyone to effectively participate within a free society, as a result promoting ‘tolerance’, ‘understanding’ and creating a relationship between all people.<sup>452</sup> The AYC requires that the education of young people is focused towards the promotion of the development of their cognitive, creative and the emotional abilities of young people so that they can reach their full potential.<sup>453</sup> There are two main themes to acceptable basic education, namely, the first refers to basic education being acceptable in ‘form and substance’, and thus including the curricula and methods of teaching, and quality education that furthers the advancement of the child’s other rights.<sup>454</sup> The second concept, according to the Special Rapporteur, refers to the prohibition of corporal punishment and other harmful acts that may be committed against the learners.<sup>455</sup>

The right to basic education, as entrenched in the Constitution, consequently compels the state to supply satisfactory education in order for the right to be effectively realised.<sup>456</sup> The Constitutional Court has emphasised the importance of ensuring that basic education is of an acceptable nature.<sup>457</sup> Moreover, the South African Human Rights Commission opined that it is a huge challenge to provide ‘current, culturally fitting and quality education’ in a diverse country such as South Africa.<sup>458</sup> The Commission accordingly stated, among others, the prohibition of corporal punishment, issues relating to the language of instruction and the consideration of teaching indigenous minorities, are some of the areas that the state should focus on to guarantee quality education.<sup>459</sup> Accordingly, this section of analysis will focus on the quality of education as it relates to the provision of adequate curricula and satisfactory teaching methods through the language of instruction and furthermore on the quality of education as it relates to a harmless learning environment for learners.

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<sup>452</sup> Art 13 of the ICESCR.

<sup>453</sup> Art 13 (2)(a) of the AYC.

<sup>454</sup> UNESCO ‘The right to education free of charge for all: Ensuring compliance with International obligations’ (2008) available at [https://www.right-to-education.org/sites/right-to-education.org/files/resource\\_attachments/UNESCO\\_Right\\_Primary\\_Education\\_Free\\_2008\\_en\\_fr.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource_attachments/UNESCO_Right_Primary_Education_Free_2008_en_fr.pdf) (accessed 09 July 2020) 3; see also Calderhead V (2011) 4.

<sup>455</sup> Tomasevski K (2001) 15; see also Veriava F and Coomans F ‘The right to education’ socio-economic rights in South Africa’ (2005) *Pretoria University Law Press* (PULP), 71.

<sup>456</sup> Churr, C (2015) 2409.

<sup>457</sup> *Head of Department, Mpumalanga Department of Education & Another v Hoerskool Ermelo & Another [2009] ZACC 32; 2010 (2) SA 415 (CC)* para 45-47.

<sup>458</sup> South African Human Rights Commission (SAHRC) ‘Report of the Public Hearing on the Right to Basic Education’(2006) available at

<http://www.sahrc.org.za/.../Reports/Right%20to%20basic%20education%202006.pdf> (accessed 15 March 2020)14

<sup>459</sup> SAHRC (2006) 14.

#### **4.2.3.1 Provision of adequate curricula and satisfactory teaching methods**

The state has the obligation to address the issue around the appropriate teaching and learning language, which is a crucial teaching and learning method that has an influence on the quality of education provided. When the language of instruction has been found to be unacceptable to young children, the education too shall be deemed to be inadequate.<sup>460</sup> In view of that fact, the state has to ensure that it develops all features of the quality education and guarantee excellence for all, in order to achieve ‘recognised and measurable’ educational outcomes, particularly within numeracy, literacy and necessary life skills.<sup>461</sup>

##### **4.2.3.1.1 Language**

Language has an impact on two areas in the realisation of basic education, and these are namely, the accessibility of basic education and the acceptability of basic education.<sup>462</sup> It is for this reason that it was crucial to discuss it in chapters, 2 and 3 of the study and moreover to analyse the legislation and policies pertaining to it.

The 1996 Constitution prohibits discrimination based on race and language.<sup>463</sup> Every learner in South Africa has the right to be taught in any language of their choice, where it is practically possible.<sup>464</sup> In fulfilling this right, the state has to take into account equity, practicability and the need to remedy the injustices of the past racially discriminatory laws and practices.<sup>465</sup> It is for this reason that stakeholders are called to promote multilingualism with the aim of developing official languages used in the country, including sign language.<sup>466</sup> The National Development Plan requires that the learner’s home language should be the language of instruction for a much longer period, than the existing used duration.<sup>467</sup>

The NEPA and the SASA empower the Minister of Basic Education to determine the language policy and the norms and standards of the language in public schools, respectively.<sup>468</sup> Moreover, the SASA and the ECSEA authorise the relevant stakeholders to

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<sup>460</sup> Tomasevski K (2001) 15.

<sup>461</sup> Art 7(vi) of the Dakar Framework for Action; Art 13 (2)(a) of the AYC; See also Veriava & Coomans (2005) 71.

<sup>462</sup> Tomasevski K (2001) 29.

<sup>463</sup> Section 9(3) of the Constitution.

<sup>464</sup> Section 29(2) of the Constitution.

<sup>465</sup> Stein N *Language in Schools in Basic Education Rights Handbook: Education Rights in South Africa* (2017) 208.

<sup>466</sup> *Preamble*, Norms and Standards for Language Policy in Public Schools (GN R1701/1997).

<sup>467</sup> National Planning Commission ‘National Development Plan 2030: Our future – make it work’(2012) available at <http://www.info.gov.za/.../national-development-plan-2030-our-future-make-it-work> (accessed 19 April 2020) 304.

<sup>468</sup> Section 4(a)(v) of Act 27 of 1996; Section 6(1) of Act 84 of 1996.

determine the language policy of the specific schools,<sup>469</sup> permitting learners to be taught in the language of their choice, where this is reasonably actionable.<sup>470</sup> Legislature placed a caveat in the development of this language policy and these norms and standards. The qualification being, that learners would be instructed in the language of their choice ‘where it is reasonably possible’ to do so. This means that although a learner might prefer to be taught in their mother tongue, they are subject to the standard of reasonableness. This can present its fair share of issues in a country like South Africa that has 11 official languages. Additionally, sign language is to be recognised at the same level as the other official national languages.<sup>471</sup> It can thus be concluded that, the legislative recognition of the importance of instructing learners in the language of their choice aligns with international and regional standards as discussed in Chapter 2.<sup>472</sup>

In recognising cultural diversity and to further endorse multilingualism, the Minister was authorised to publish the *Language in Education Policy* and the *Norms and standards for Language Policy in public schools*. The *Language in Education Policy* requires the language of instruction and that of learning and teaching to be one of the official languages of the country.<sup>473</sup> This provision broadens the approach to be used in deciding the language of instruction; consequently the task of deciding the language of instruction is left to the relevant stakeholders to decide whether they will use their home language as the language of instruction or that they shall use the English or the Afrikaans language which are the official mediums of instruction.<sup>474</sup> The policy additionally requires that in Grades 1 and 2, all students will have to learn at least one of the approved languages and furthermore that an additional language is to be introduced after the language of instruction has been established

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<sup>469</sup> Section 6(2) of Act 84 of 1996.

<sup>470</sup> Section 4(a)(v) of Act 27 of 1996; Section 6(3) of Act 84 of 1996 (these powers are limited by the fact that the language policy has to adhere to the norms and standards that have been determined by the minister, and therefore cannot unfairly discriminate against any learner based on race, and should accordingly respond the needs and desires of the community); see also Stein N *Language in Schools in Basic Education Rights Handbook: Education Rights in South Africa* (2017) 210 (the SGBs implored to consider the best interests of the community concerned, a qualification dealing with the reasonableness in the consideration of the language of instruction to be used in schools); Section 4(1)(b) of Act 1 of 1999.

<sup>471</sup> Section 6(4) of Act 84 of 1996.

<sup>472</sup> See Education in a multilingual world: UNESCO education position paper (2003) ED.2003/WS/2 available at <https://unesdoc.unesco.org/ark:/48223/pf0000129728> (accessed 4 April 2020) 20; UNESCO Institute for Lifelong Learning (UIL): annual report (2010) UIL/2011/PI/H/1 available at <https://unesdoc.unesco.org/ark:/48223/pf0000191891> (accessed 4 April 2020) 25.

<sup>473</sup> Reg. 4(E) of the Norms and Standards for Language Policy in Public Schools (GN R1701/1997).

<sup>474</sup> Sibanda B *The use of English and IsiXhosa in teaching and learning Physical Sciences in four schools in King Williams Town education district of the Eastern Cape: A case study* (Master of Education-Thesis University of Fort Hare, 2013) 10.

in Grade 3.<sup>475</sup> Equitable time and resource allocation have to be provided for all language subjects.<sup>476</sup> Again, these provisions have left it to the stakeholders to decide whether to choose to teach the learners' in their mother tongues or to use the official mediums of instruction, which are English and/or Afrikaans. The use of the mother tongue is on a discretionary basis, which is troubling not just nationally but provincially, particularly in the EC since the languages spoken there are mainly IsiXhosa and Sotho as mentioned in chapter 3.

In addition, *Norms and standards for Language Policy in public schools* and the *Language in Education Policy* require the provincial education department to facilitate the process of ensuring that the language of instruction is one that accommodates the majority of learners in the classroom.<sup>477</sup> Furthermore, it requires the school governing body to encourage multilingualism within schools, accordingly, permitting the adoption of more than one language of instruction, at the discretion of the head of the provincial education department.<sup>478</sup>

The policies discussed above, merely recognise the use of the mother tongue language as the language of instruction. However, it leaves the use as a language of instruction in schools to the discretion of the relevant stakeholders. It is for this reason that these policies comply with international and regional standards only as far as they recognise and make it possible for the mother tongue to be used as a language of instruction in schools.<sup>479</sup> However, the *Draft Policy on the Incremental Introduction of African Languages in South African Schools* encourages learners across the country to take up a home language and, in addition, requires the necessary learning materials and educators to be made available in all the African languages.<sup>480</sup> Two things make this policy adhere to international standards.<sup>481</sup> The Draft policy plainly encourages the adoption of home languages, or the mother tongue, to be taken up by learners. Moreover, the Draft policy requires learning and teaching materials to be made available in all the African languages. This is an important addition to the policy because legislature recognised that the mere encouragement of the adoption of home

<sup>475</sup> Reg. 4(D) of GN R1701/1997.

<sup>476</sup> Reg. 4(D) (3) of the GN R1701/1997.

<sup>477</sup> Reg. 5 (C) (2) of the GN R1701/1997.

<sup>478</sup> Reg. 5 (C) (1) of the GN R1701/1997.

<sup>479</sup> Education in a multilingual world: UNESCO education position paper (2003) ED.2003/WS/2 available at <https://unesdoc.unesco.org/ark:/48223/pf0000129728> (accessed 4 April 2020) 21.

<sup>480</sup> Department of Basic Education 'The Incremental Introduction of African Languages in South African Schools Draft Policy', 2013; See also Stein N (2017) 211.

<sup>481</sup> See UNESCO (2003) 20

languages would not be sufficient without the learning and teaching to accompany the notion. Accordingly, this ensured that the use of the home language as a language of instruction would be acceptable as required by international standards.<sup>482</sup>

#### **4.2.3.2 Harmless Learning Environments for Learners**

The principle of acceptability has been broadened to include the prohibition of corporal punishment and other harmful acts that may be committed against learners.<sup>483</sup> International and regional law, particularly the CRC and ACRWC, require the state to take all the necessary legislative, administrative, educational and social measures to address the issue of mental violence, injury or abuse, neglect, maltreatment and/or exploitation while in the care of any person.<sup>484</sup> Additionally, to protect children [the learners] from any kinds of torture or inhumane and/or degrading conduct, particularly conduct leading to mental or physical injury, abuse, neglect or maltreatment including being sexually abused.<sup>485</sup> Therefore, acceptability entails ensuring that children are not treated in a manner that violates their right to dignity.<sup>486</sup> The following discussion, therefore, analyses legislation and policy documents as they pertain to the protection of learners from harmful elements at school and furthermore their protection from mental violence, injury or abuse, neglect, maltreatment and/or exploitation in schools (which will encompass corporal punishment and disciplining learners).

##### **4.2.3.2.1 Protection from harmful elements at school**

To ensure the safety of learners and teaching staff, the *Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure* require that every school site must be surrounded by appropriate fencing to a minimum height of 1.8 meters, including all outdoor buildings and sport and recreational facilities.<sup>487</sup> What is expected from the service providers has been made clear and unambiguous. The fencing contemplated herein will ensure the safety of learners and teaching staff while they are within the school premises. Moreover, the regulations additionally, provides for the installation of burglar proofing of all windows in the ground floor buildings used by learners and teachers, and the further permits for additional arrangements to be made with a security personnel or the installation of an

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<sup>482</sup> UNESCO Institute for Lifelong Learning (UIL): annual report (2010) UIL/2011/PI/H/1 available at <https://unesdoc.unesco.org/ark:/48223/pf0000191891> (accessed 4 April 2020) 22.

<sup>483</sup> Tomasevski K (2001) 15.

<sup>484</sup> Art 19 of the CRC.

<sup>485</sup> Art 16 of the CRC.

<sup>486</sup> Woolman S & Bishop M *Education* (2009) in Woolman, S. *et al.* Constitutional Law of South Africa 57-32.

<sup>487</sup> Reg. 17(1) of the GN R920/2013.

alarm system.<sup>488</sup> These provisions are accordingly in concurrence with international and regional standards requiring learners to be protected from harm while at school.<sup>489</sup>

Moreover, regarding the harm caused by pit latrines at schools, as discussed in chapter 3, the Regulations prohibit any further installation of these pit latrines.<sup>490</sup> This has been prioritised by the state in its goals to eliminate any remaining pit latrines in the near future.<sup>491</sup> Accordingly, these provisions from the *Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure* comply with international and regional standards<sup>492</sup> protecting learners from harmful elements, accordingly making certain that educational institutions provide acceptable learning environments for the learners.

#### **4.2.3.2.2 Protection from mental violence, injury or abuse, neglect, maltreatment and/or exploitation in schools**

A harmless learning environment includes protecting learners from any form of violence that threatens their mental, physical and emotional health. The Constitution accordingly protects the learners' right to dignity, their right to freedom and security and their general rights as children.<sup>493</sup> In matters involving a child at school, the courts rely on the concept of *loco parentis*, which denotes that educators are responsible for the children in their care, therefore requiring them to ensure the safety of the children at all times.<sup>494</sup> The Children's Act requires that every decision concerning a child should uphold the best interests of the child, thus giving effect to section 28(d) of the Constitution.<sup>495</sup> Furthermore, the SASA requires the School Governing Bodies (SGBs) to draft a code of conduct which shall regulate the behaviour and relationships in schools.<sup>496</sup> Moreover, the EEA prohibits educators from engaging in any conduct that could result to unfair discrimination towards a learner based on the listed grounds.<sup>497</sup> In addition, misconduct by the educator includes, but is not limited to,

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<sup>488</sup> Reg. 17(2)(a)-(c) of the GN R920/2013.

<sup>489</sup> Art 19 of the CRC; Art 11(5) of the ACRWC.

<sup>490</sup> Reg. 12(4) of the GN R920/2013.

<sup>491</sup> Ngqakamba, S (2019) 'Fail! School pupils, Equal Education hand Angie Motshekga her report card... and its not glowing'. *News 24* 03 December 2019 available at <https://m.news24.com/SouthAfrica/News/fail-school-pupils-equal-education-hand-angie-motshekga-her-report-card-and-its-not-glowing-20191203/> (accessed 28 December 2019).

<sup>492</sup> See Art 19 of the CRC; Art 11(5) of the ACRWC.

<sup>493</sup> Section 10, 12 & 28 of the Constitution.

<sup>494</sup> Power T 'School Violence' in *Basic Education Rights Handbook: Education Rights in South Africa* 17 (2017), 304.

<sup>495</sup> Section 2(b)(iv) of the Children's Act 38 of 2005.

<sup>496</sup> Section 8 of Act 84 of 1996.

<sup>497</sup> Section 18 of the Employment Educators Act 76 of 1998 prohibits discrimination based on, among others, gender, disability, sex, age, disability, or any other grounds prohibited by the Constitution.

sexual assault, theft, bribery, fraud and seriously assaulting a student.<sup>498</sup> Furthermore, it is required that educators should avoid engaging in indecent physical contact, harassment of any kind, a sexual relationship of any kind and using inappropriate language when engaging with the learners.<sup>499</sup>

In addition, the Criminal Law (Sexual Offences and Related Matters) Amendment Act has made non-consensual sex and sexual intercourse with an underage person a criminal offence.<sup>500</sup> Furthermore, the Children's Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act places a duty upon educators to protect the learners under their care, through the act of reporting any suspicions relating to the wellbeing of the learners, to any child protection organisation.<sup>501</sup> Failure to report the suspected misconduct may result into a criminal offence.

Arguably, the regulation of the relationship between learners and educators, and the protection of the learners' best interests in the process, complies with international and regional standards.<sup>502</sup> In addition, the requirement to report suspected misconduct being perpetrated against a learner aligns with international and regional standards requiring the learners to be protected from all harmful acts.<sup>503</sup>

#### 4.2.3.2.2.1 Corporal punishment

For purposes of analysing legislation and policies relating to the use of corporal punishment against international and regional standards, as discussed in chapter 2, reference will be made to the SASA and the Children's Act. In the *S v Williams* (1995) judgment, the Constitutional Court held that in order for South Africa to truly move away from its violent past, corporal punishment had to be abolished, in consequence banning the whipping of learners in schools.<sup>504</sup> The SASA accordingly prohibits the use of corporal punishment in schools, as a failure to adhere to this law amounts to a criminal offence.<sup>505</sup> For that reason, the provisions

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<sup>498</sup> Employment Educators Act 76 of 1998.

<sup>499</sup> South African Council for Educators Code of Professional Ethics (2020) available at <https://www.sace.org.za/pages/the-code-of-professional-ethics> (accessed 20 May 2020); Section 4(1)(e) of Act 1 of 1999.

<sup>500</sup> Chapter 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>501</sup> Section 110 (1) of Act 38 of 2005; Section 54(1) of Act 32 of 2007.

<sup>502</sup> Art 19 of the CRC; Art 11(5) of the ACRWC; Art 3(1) of the CRC.

<sup>503</sup> See Art 19 of the CRC; Art 11(5) of the ACRWC; Tomasevski K (2001) 15.

<sup>504</sup> *S v Williams and Others* (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) (9 June 1995) para 91.

<sup>505</sup> Section 10 (1) & (2) of Act 84 of 1996.

of the SASA fully comply with international and regional standards,<sup>506</sup> regarding protecting children from the use corporal punishment.

#### *4.2.3.2.2.1.1 Disciplining Learners*

The banning of corporal punishment did not do away with need to discipline learners. Through the NEPA, the Minister of Education was empowered to develop policies that will provide guidance to the relevant stakeholders in terms of disciplining a child, without the use of corporal punishment.<sup>507</sup> It is through the NEPA authorisation that the *Regulations to Prohibit Initiation Practices in Schools* were developed. These regulations authorise school authorities to discipline learners in a manner that does not infringe on their constitutional rights.<sup>508</sup> In addition, when a child is being disruptive, ill-disciplined and begins to violate the rights of other learners and those of the educators, the educator is obligated to refer the learner to the principal and the school governing body.<sup>509</sup>

Moreover, under the SASA, school governing bodies are authorised to have a code of conduct for the learners that is directed at creating a ‘disciplined and purposeful’ learning environment which is committed to improving and maintaining the quality of the learning procedure.<sup>510</sup> For that reason, the learners have a responsibility to adhere to the code of conduct. As a result, no learner is exempt from the rules and regulations contained therein.<sup>511</sup> The code of conduct has to regulate the due process that protects the learners’ interests and additionally provide support processes and structures for wellness and well-being of the learners, should the matter be referred to disciplinary proceedings.<sup>512</sup> A learner who has contravened the school rules will be subject to a disciplinary hearing, particularly if they are found with dangerous objects, or have tested positive for an illegal substance.<sup>513</sup> Consequently, if it is discovered and concluded that the learner is guilty of serious misconduct, the school governing body is authorised to suspend the pupil.<sup>514</sup> In addition, ECSEA, in an instance where a learner has been found guilty of serious misconduct, the school authorities are empowered to expel them.<sup>515</sup>

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<sup>506</sup> Art 16 of the CRC; See also Tomasevski K (2001) 15; Art 19 of the CRC; Art 11(5) of the ACRWC.

<sup>507</sup> Section 3(4)(n) of Act 27 of 1996.

<sup>508</sup> Reg. 3.5.2 of the *Regulations to Prohibit Initiation Practices in Schools* (GN 1589/2002).

<sup>509</sup> Reg. 6.4 of the GN 1589/2002.

<sup>510</sup> Section 8(2) of Act 84 of 1996.

<sup>511</sup> Section 8(4) of Act 84 of 1996.

<sup>512</sup> Section 8(5)(a) -(b) of Act 84 of 1996.

<sup>513</sup> Section 8(12)(a) -(b) of Act 84 of 1996.

<sup>514</sup> Section 9(1) of Act 84 of 1996.

<sup>515</sup> Section 50 of Act 1 of 1999.

It can therefore be concluded that the provisions of the NEPA, *Regulations to Prohibit Initiation Practices in Schools*, SASA and the ECSEA, in providing alternative disciplinary methods for disciplining learners, align with the standards of international and regional law relating to the creation of a harmless learning environment for learners.<sup>516</sup>

#### 4.2.4 Adaptability

The ACRWC and the AYC requires education to be focussed towards preserving and promoting African morals, traditions, values and cultures that positively influence people [learners].<sup>517</sup> Accordingly, adaptability focuses on reinforcing all the elements that positively contribute towards the child's identity and their best interests, and accordingly requires the state to integrate them in the education provided. Education has to constantly adapt to the ever-evolving needs of society [learners], and accordingly become more flexible, thus respond to the needs of the pupils who come from diverse cultural and social settings.<sup>518</sup> It is imperative, therefore, that states ensure that the kind of education that is discharged adapts to the needs of the learners.<sup>519</sup>

In the *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others*, the Court opined that schools should always evolve, therefore refuse to remain stagnant while society changes.<sup>520</sup> This remark related to changes in the curriculum, learning and teaching methods and the protection of learners. The Court further urged SGBs to be guided by the social interests of the communities around them.<sup>521</sup> This principle requires stakeholders to recognise and encourage diversity and non-discrimination; therefore it requires the school curriculum and learning environment to be receptive to diversity.<sup>522</sup> This entails accommodating persons with differing physical abilities,<sup>523</sup> which has been discussed and analysed in detail under the principle of accessibility for persons with special needs. Moreover, it includes providing a platform to allow children to express themselves in their mother tongues.<sup>524</sup> This too has been analysed and discussed under the notion of

<sup>516</sup> See Art 19 of the CRC; Art 11(5) of the ACRWC.

<sup>517</sup> Art 11(2)(c) of the ACRWC; Art 13(3)(d) of the AYC.

<sup>518</sup> General Comment 13, para 6(d).

<sup>519</sup> Kamga (2011) 185.

<sup>520</sup> *Head of Department, Mpumalanga Department of Education & Another v Hoerskool Ermelo & Another* [2009] ZACC 32; 2010 (2) SA 415 (CC) para 80.

<sup>521</sup> *Head of Department, Mpumalanga Department of Education & Another v Hoerskool Ermelo & Another* [2009] ZACC 32; 2010 (2) SA 415 (CC) para 80.

<sup>522</sup> Reyneke (2013) 330.

<sup>523</sup> Art 7(2) of the UNCRPD; See also Woolman S & Fleich B *The Constitution in the classroom: Law and Education in South Africa 1994-2008*.134-135.

<sup>524</sup> Art 30 of the CRC.

acceptability, a further discussion will not be necessary. And in addition, adaptability entails adjusting school polices to accommodate learners from diverse religious and cultural groups. The latter shall be the focus of this analysis.

The right to freedom of religion is protected under the 1996 Constitution,<sup>525</sup> accordingly, mandating religious observations in schools. This right ensures that those who choose to observe their religious practices do so freely and voluntarily.<sup>526</sup> Furthermore, the Constitution protects the rights of cultural, religious and linguistic communities.<sup>527</sup> As a result, it prohibits any denial of the people's right to enjoy their cultural and religious practices.

Furthermore, the SASA and the ECSEA permits religious observations in public schools, on the prerequisite that such observations do not violate the constitution or any applicable provincial law or the rules established by the school governing body.<sup>528</sup> This entails that staff members and learners are able to partake on religious observation freely and voluntarily.<sup>529</sup> Additionally, the Act further obligates the school governing body, upon consulting with the learners, parents and educators, to create a code of conduct for their learners.<sup>530</sup> The school governing bodies are to be guided by the *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners*, which contains important principles and values.<sup>531</sup> These guidelines outline the importance of developing the learners' academic, spiritual, occupational, sport, social and cultural interests.<sup>532</sup> The provisions of the Constitution, the SASA and the ECSEA which encourage freedom of conscience, religion and cultural beliefs, are in accordance with international and regional standards that require the state to guarantee freedom of thought, consciousness and religion, in pursuit of an adaptable approach to the realisation of the right to a basic education.<sup>533</sup>

### 4.3 Conclusion

The analysis undertaken in Chapter 4 has found that, prior to the *Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure*, there was minimal

<sup>525</sup> Section 15 of the Constitution.

<sup>526</sup> Hodgson TF *Religion and Culture in Public Education in South Africa* in *Basic Education Rights Handbook: Education Rights in South Africa* 10 (2017) 188.

<sup>527</sup> Section 31 of the Constitution.

<sup>528</sup> Section 7 of Act 84 of 1996; Section 4(1)(f) of Act 1 of 1999.

<sup>529</sup> Hodgson T F (2017) 190. See also Soudien C 'Making a new South African learner: An analysis of the South Africa Schools Act' (2019) 36 *Human Sciences Research Council and the University of Cape Town* 154.

<sup>530</sup> Section 8 of Act 84 of 1996.

<sup>531</sup> Department of Basic Education 'Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners', 1998.

<sup>532</sup> Hodgson T F (2017) 190.

<sup>533</sup> See Art 14(1) of the CRC; Art 11(2)(c) of the ACRWC; Art 13(3)(d) of the AYC.

legislative compliance with international and regional standards as they pertain to the regulation of the availability of infrastructural amenities such as the availability of water, sanitation, etc, across the country. Moreover, to reduce the teaching and learning issues experienced when classrooms are overcrowded, it would have also been beneficial to insert the maximum capacity of learners that a classroom ought to have within the *Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure*. Furthermore, in regulating the availability of sanitation facilities, legislature failed to clearly define what they envisioned by ‘appropriate sanitation technology’ in the *Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure*, which the study has argued that it could lead to problems in the realisation of sanitation facilities in rural areas. Moreover, the failure to indicate with clarity the beneficiaries of the internet connectivity to be installed at the schools rendered these regulations ambiguous as far as they pertain to providing internet connectivity at the schools. And lastly, regarding the projected deadlines that the Department has given itself, regarding remedying the infrastructural backlogs and other basic education related amenities, the study argues that these deadlines are unrealistic, considering that the Department has failed to meet any of the prior deadlines, accordingly they require revising. In Addition, the *Draft National Policy for the provision and management of Learning and Teaching Support Material (LTS M) policy* was found to lack proper legislative guidance in ensuring the availability of Learning and Teaching Support Materials.

Moreover, in light of the fact that learners have been forced to walk long distances to access schools, it was found that although the *Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure* provide guidance regarding the location of the schools, they shied away from providing a specific maximum distance as it pertains to the distance of schools from where learners are able to access them. In addition, regarding international and regional standards requiring basic education to be made free, the state has put good procedures in place like the quintile system and the declaration of ‘no-fee’ schools to facilitate access to basic education, even though basic education is not free in the country. Furthermore, it has also been found that there is insufficient legal protection offered to learners belonging in the LGBTIQ community, thus to ensure unhindered access to basic education institutions and programmes for the learners and teachers, thorough legislative regulation in this area is necessary.

Additionally, where it pertains to the acceptability of basic education through language, it was uncovered that the use of the mother tongue is on a discretionary basis; however learners in the EC wishing to be taught in their mother tongues can rely on the provisions of the *Draft Policy on the Incremental Introduction of African Languages in South African Schools* analysed herein. Overall, the study found that the legislation and policies pertaining to the right to basic education, which are relied upon in the Eastern Cape, South Africa, are in accordance with international and regional standards, as indicated in the analysis above.



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## **CHAPTER 5: Conclusion and Recommendations**

### **5.1 Conclusion**

This mini thesis, embarked on critically analysing legislation and policies on the right to a basic education, in the Eastern Cape, Post-Democracy South Africa. In Chapter 2, international and regional legal standards on the right to basic education were examined with the aim of fully investigating the international and regional expectations on the manner in which basic education ought to be realised. The 4-A scheme was the mechanism used to fully discuss these international regional standards. The study uncovered that the state had the duty to ensure the availability of physical infrastructure, state funding for basic educational institutions and programmes, source skilled and sufficiently compensated educators and to make provision for learning and teaching materials. Additionally, ensure that basic education is made physically and economically accessible, and without any discrimination. Moreover, the state has to make basic education acceptable, accordingly ensuring that there is sufficient curricula and quality teaching methods, and further create a harmless learning environment for learners in order to preserve the quality of the education provided. Furthermore, it has to make basic education adaptable to the ever-changing society, in order to ensure that education remains culturally relevant.

In Chapter 3, the study provided an in-depth context to the post-democracy position of basic education in Eastern Cape, South Africa. This discussion unpacked issues in infrastructure, water and sanitation, school furniture, internet access and the digital divide, libraries, textbooks, transport crisis, post-provisioning of teaching and non-teaching staff. It is clear from the data provided that the EC is in crisis and there is no one-size fits all solution to the problems highlighted. The courts, in the case law discussed, without interfering with the duties of the executive branch, have been able to assist in the realisation of the right to a basic education. Accordingly, the information provided in chapter 3 justified the purpose of the study, and it provided context to the need to assess the legal framework on basic education relied upon in the EC.

In Chapter 4, the national and provincial framework on basic education relied upon in the EC were analysed against the international and regional standards discussed in chapter 2, using the principles of the 4-A scheme.

From analysing the legislation and policies relied upon in the EC, it was discovered that these legal documents, complied with international and regional standards discussed in chapter 2,

with the minor exception of those areas where it was indicated in the study that the legislature should provide more clarity and/or further expand on the legislation and policies. Moreover, it has been accordingly uncovered that the problems in the province, discussed in chapter 3, are as a result of issues in the implementation of the said legislation and policies on basic education by the relevant department stakeholders. The executive branch of government is failing to efficiently and effectively discharge its constitutional duties, in order to ensure that basic education is made available, accessible, acceptable and adaptable in the EC.

## 5.2 Recommendation

### 5.2.1 Regulating the s100 national interventions on failing provincial Administrations

Considering the discoveries made in the study that the legal framework on basic education relied upon in the EC was largely in accordance with international and regional standards, it was thus concluded that the basic education backlogs are a consequence of departmental failures to execute their duties effectively and efficiently as it is required by the laws and policies in place. It is accordingly recommended that the more attention should be drawn on the Section 100 interventions which are authorised by the Constitution, permitting intervention on financially distressed provincial administrations.<sup>534</sup> The interventions have been intended to remedy issues identified in the administration of government institutions.<sup>535</sup> The issue around these interventions is that they are not clearly regulated, as it was observed in the EC when the Eastern Cape Education Department succeeded in its High Court application to halt the intervention on the basis that the set period designated for the intervention had lapsed,<sup>536</sup> regardless of the fact that there still had not been much tangible changes derived from the intervention that had ensued.

This study therefore is proposing that these interventions should last for as long as there are still financial issues in the administration of the provinces. The study thus recommends that comprehensive legislative regulation of these section 100 national interventions must be developed. These regulations will thus have to clearly outline elements that should be considered to warrant the institution of s100 interventions, furthermore provide clear

<sup>534</sup> Section 100 of the Constitution of the Republic of South Africa, Act 108 of 1996; See also McNaught D ‘When provinces fail to deliver on their constitutional obligations, the national government may intervene. The basic rule for such interventions are described in Section 100 of the South African constitution’ *Spotlight* 6 December 2012 Available at <https://www.spotlightnsp.co.za/2012/12/06/section-100/> (accessed on 06-07-2020)

<sup>535</sup> McNaught D ‘When provinces fail to deliver on their constitutional obligations, the national government may intervene. The basic rule for such interventions are described in Section 100 of the South African constitution’ *Spotlight* 6 December 2012 Available at <https://www.spotlightnsp.co.za/2012/12/06/section-100/> (accessed on 06-07-2020)

<sup>536</sup> Somgede B National Assembly: Written Reply. Question 672. INTERNAL QUESTION PAPER: 10/2017.

conditions for the interventions, prescribe the duration of such interventions and clearly indicate what a ‘successful’ intervention entails. The current standard of the interventions must be adjusted to a standard that aligns with the values of a transformative democracy.

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