

**THE RIGHT TO BASIC EDUCATION FOR CHILDREN WITH SPECIAL
EDUCATION NEEDS IN SOUTH AFRICA**

By

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DISSERTATION

Submitted in fulfilment of the requirements for the degree of

MASTER OF LAWS (LLM)

In

PRIVATE LAW

In the

FACULTY OF MANAGEMENT AND LAW

(SCHOOL OF LAW)

At the

UNIVERSITY OF LIMPOPO

SUPERVISOR: Prof. Hoolo Nyane

08 SEPTEMBER 2025

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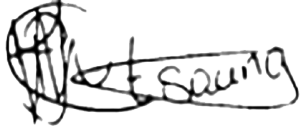
ABSTRACT

The right to education is guaranteed under section 29 of the Constitution of the Republic of South Africa (Act 108 of 1996). Notwithstanding this constitutional guarantee, children with special education needs face significant barriers in realising their right to education. The barriers they face include inadequate infrastructure, insufficient educator training, and challenges linked to policy implementation. This study investigated the realisation of the right to basic education for children with special needs in South Africa. It focused on the legislative and policy frameworks that promote inclusive education. The key questions that the study investigated are: To what extent do the provisions of the South African Schools Act 84 of 1996 comply with the constitutional obligation to guarantee the right to basic education for children with special education needs? What mechanisms are available to the state to best realise these rights in terms of the Constitution? Does the jurisprudence of the Constitutional Court and other superior courts affirm the immediate realisation of the right to basic education under section 29, particularly in relation to children with special education needs? The study utilised qualitative methodology, which involved a doctrinal analysis of primary sources, encompassing constitutional provisions, legislation, and case laws, alongside secondary sources like books, scholarly journal articles, policy documents, reports, government publications, the Education White Paper 6 of 2001, and statistical data. The key findings of this study revealed several significant shortcomings in the Schools Act regarding the provision of education for children with special education needs. The key issues identified included inadequate financial resources, a shortage of trained educators, and insufficient accessible infrastructure, all of which hinder the effective implementation of inclusive education. Furthermore, the state was found to have failed in fulfilling its constitutional obligations under section 29, due to the lack of accountability mechanisms, which hindered the provision of equal educational opportunities. The jurisprudence of the Constitutional Court affirmed the right to basic education as immediately realisable. However, the implementation of this constitutional right remains limited. The recommendations of the study address key areas where improvements are needed. For example, amendments to the Constitution, the Schools Act, and policy reforms.

KEYWORDS: Basic education; Special education needs; Socio-economic rights; Resource constraints; Inclusive education; State; International Law

DECLARATION

I declare that **THE RIGHT TO BASIC EDUCATION FOR CHILDREN WITH SPECIAL EDUCATION NEEDS IN SOUTH AFRICA** dissertation hereby submitted to the University of Limpopo, for the degree of Master of Laws in Private Law has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

A handwritten signature in black ink, appearing to read 'M. Tsama', written over a horizontal line.

Surname, Initials (Title)

08 September 2025

Date

ACKNOWLEDGEMENTS

I wish to formally express my sincere appreciation to all those who have contributed to the successful completion of this dissertation. First and foremost, I extend my most profound appreciation to my supervisor, Prof. Hoolo Nyane, a Professor at the University of Limpopo whose expert guidance, intellectual rigour, and thoughtful feedback have been indispensable throughout the research process. His support has not only shaped the direction of this dissertation but also enhanced my understanding of the legal frameworks surrounding the right to education.

I would also like to convey my deepest appreciation to the South African Law Reform Commission (SALRC) for granting me access to key legal databases and policy documents critical to the analysis of jurisprudence and legislative frameworks related to inclusive education.

My sincere thanks go to the academic and administrative staff at University of Limpopo for their assistance in facilitating access to essential resources and for maintaining a supportive research environment.

To my family, friends, and colleagues, your unwavering support, encouragement, and understanding have been a source of strength throughout this academic journey. I am truly thankful for your belief in me, which has sustained my commitment to this research.

Thank you to all who have made this work possible.

LIST OF ACRONYMS

| | |
|--------|--|
| ACHPR | African Charter on Human and Peoples' Rights |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| CADE | Convention against Discrimination in Education |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| DoE | Department of Education |
| ECHR | European Convention on Human Rights |
| ECOWAS | Economic Community of West African States |
| HoD | Heads of Department |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social, and Cultural Rights |
| MEC | Minister of the Executive Council |
| NSC | National Senior Certificate |
| RCL | Representative Council of Learners |
| SADC | Southern African Development Community |
| SGB | School Governing Bodies |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCRPD | United Nations Convention on the Rights of Persons with Disabilities |
| UNESCO | United Nations Educational, Scientific and Cultural Organisation |
| UNICEF | United Nations Children's Fund |

CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

In the Republic of South Africa, the right to basic education for children with special education needs is entrenched in the Constitution.¹ Section 29(1)(a) of the Constitution ensures each person the right to basic education.² This constitutional guarantee is operationalised by the South African Schools Act of 1996.³ Section 12 of the Act stipulates that the Member of the Executive Council (MEC) must ensure the provision of schools for the education of learners utilising allocated funds assigned for this aim by the legislative assembly. The section extends further to residential accommodation (hostels), educational support services, and accessible physical facilities.⁴ South Africa's commitment to this right for children with special education needs extends to its international obligations.⁵ In the case of *Juma Masjid Primary School and others v Essay NO and others*,⁶ the Constitutional Court highlighted the intersectionality of socio-economic rights and the right to basic education for children with special education needs by underscoring the importance of inclusive education.⁷ The right to basic education for children requiring specialised support is essentially a socio-economic right. It involves rights of access to suitable accommodation,⁸ healthcare facilities, nutrition and water, and social security,⁹ all of which are part of the broader set of rights enshrined in the Constitution.

¹ Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution').

² Section 29(1)(a) of the Constitution; See further, Van Rensburg, SKJ, Thobane, M, Kader, S, Aphane, MP, Mpuru, L, Mokotong, M, Ngoveni, TD, Ratiba, MM and Tredoux, L 'Navigating Learning for Learners with Special Educational Needs (LSEN) in South Africa: Barriers and Recommendations' (2024) 5(3) *EHASS* 328, 329. Retrieved from < <https://doi.org/10.38159/ehass.20245314> > accessed 26 January 2025.

³ Act 84 of 1996 (hereinafter 'the Act').

⁴ Section 12(1)(2)(3)(4)(5) of the Act; See further, Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 52-53.

⁵ Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 62-64; See further, Article 24(2)(a, b) of the United Nations Convention on the Rights of Persons with Disabilities, which South Africa ratified on 30 November 2007, came into effect on 3 May 2008.

⁶ 2011 (8) BCLR 761 (CC).

⁷ 2011 (8) BCLR 761 (CC) 1-88; See further, Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 49-54.

⁸ Section 26(1) of the Constitution.

⁹ Section 27 of the Constitution.

Despite these legal guarantees, challenges persist in ensuring that children with special education needs have unfettered access to quality basic education. The lack of adequate infrastructure, scholar transport, and mobility devices, coupled with discriminatory practices, hinders the full realisation of their educational rights. Furthermore, socio-economic factors, such as poverty, insufficient support services, and limited resources, remain significant barriers to access.

This research aims to explore the jurisprudence surrounding section 29(1) (a) of the Constitution, and further analyses the legislative framework and academic literature relating to the right to basic education and its intersection with socio-economic rights.

1.2 Problem statement

Drawing from the insights of Chiedza,¹⁰ it is evident that despite constitutional guarantees, the enforceability of the rights of children with special education needs remains precarious. The intersection of legal principles and enforceability poses notable obstacles, including resource constraints.¹¹ According to the Constitutional Court in *Juma Masjid Primary School*, the right to basic education as addressed in section 29(1)(a) of the Constitution is deemed ‘immediately realisable.’¹² Resource constraints are the challenges that the state faces when realising this right. The problem is more acute for children requiring specialised support. Yet, the courts insist that this right must be realisable immediately, unlike further education, which is conditional on available resources.

The right to education is classified as a socio-economic right. These rights necessitate progressive realisation rather than immediate availability.¹³ This implies that, while states are obligated to take action to attain full implementation of these rights over time progressively, they may not be immediately achievable consequent to resource constraints or other circumstances. The *progressiva exsecutio* of such rights acknowledges that certain rights, like the right to basic

¹⁰ Dr. Chiedza Simbo is a Senior Lecturer in the Department of Mercantile and Private Law, Faculty of Management, Commerce and Law, at the University of Venda.

¹¹ Chiedza, S ‘A Hexagon Right: The Six Dimensions of the South African Right to Basic Education’ (2018) 39 (1) *Obiter* 126, 133.

¹² 2011 (8) BCLR 761 (CC) 37.

¹³ For instance, the entitlement to suitable accommodation as stipulated in section 26(1) of the Constitution, along with the entitlement to healthcare services, sufficient food, and water, and social security as per section 27 of the Constitution, are rights subject to an internal limitation. This limitation mandates that the jurisdiction must enact statutory provisions measures within its available resources to progressively realise these rights.

education, healthcare services, housing, and social security, may not always be immediately fulfilled by governments.

1.3 Purpose of the study

1.3.1 *Aim of the research*

This study sought to critically examine the jurisprudence of the superior courts in South Africa concerning the right to basic education as enshrined in section 29(1) of the Constitution, with a particular focus on children requiring specialised support. The investigation focused on whether children with special education needs are able to fully realise their socio-economic rights, particularly their entitlement to basic education. The primary challenge arises from the tension between the immediate demand for quality primary education and the principle of the *progressiva exsecutio* of socio-economic rights. Certain measures may be introduced to effect significant progress in the short term, notwithstanding that the realisation of socio-economic rights, including the right to basic education, is an ongoing process that necessitates sustained effort and commitment. The immediate enforceability of these rights may be hindered by a range of factors, such as limited resources, budgetary constraints, systemic obstacles, and entrenched inequalities. While immediate access to basic education for these children should be pursued, the complete realisation of socio-economic rights, including the right to basic education, may be *progressiva executum*, subject to available resources.

1.3.2 *Objectives*

The study was undertaken in fulfilment of the following objectives:

- a) To analyse the statutory provisions of the Schools Act concerning the rights of children with special education needs.
- b) To investigate the mechanisms by which the state may best realise the rights of children with special education needs under the Constitution.
- c) To critique the jurisprudence of the Constitutional Court and other superior courts in South Africa on section 29(1) of the Constitution regarding children requiring specialised support.

1.4 Research questions

- a) To what extent do the statutory provisions of the Schools Act on the rights of children with special education needs comply with section 29(1) of the Constitution?
- b) What are the mechanisms by which the state may best realise the rights of children with special education needs under the Constitution of South Africa?
- c) Is the jurisprudence of the Constitutional Court and other superior courts in South Africa on section 29(1) of the Constitution that the right to basic education is realisable immediately, particularly as it relates to children with special education needs?

1.5 Hypothesis

The central hypothesis of the study is that the right to education is a socio-economic right and is best realised through the framework of socio-economic rights jurisprudence. The Constitutional Court's interpretation that section 29(1) mandates immediate enforceability is problematic as it overlooks the inherent limitations posed by resource constraints on all socio-economic rights, including the right to basic education for children requiring specialised support.

1.6 Research methodology

1.6.1 Research paradigm

Rocco et al delineate a paradigm as a 'world view.'¹⁴ It is a 'basic set of beliefs or assumptions' that directs a researcher's inquiry. This implies that every researcher will approach research with a plethora of interconnecting and occasionally contradicting philosophical assumptions and standpoints.¹⁵ Thus, this study adopts a paradigm that emphasises understanding social phenomena from the perspective of those experiencing them (interpretivism),¹⁶ and emphasises that knowledge and meaning are constructed through social interaction and experience (constructivism paradigm),¹⁷ examining the enforceability of socio-economic rights particularly,

¹⁴ Rocco, TS, Bliss, LA, Gallagher, S and Perez-Prado, A 'Taking the Next Step: Mixed Methods Taking the Next Step: Mixed Methods Research in Organisational Systems Research in Organisational Systems' (2003) 21 *Information Technology, Learning, and Performance Journal* 19, 20.

¹⁵ Ibid at 20.

¹⁶ Flick, U *An introduction to Qualitative Research* (5th Ed., SAGE Publications: London 2014) provides that: 'Interpretivism argues that truth and knowledge are subjective, as well as culturally and historically situated, based on people's experiences and their understanding of them. Researchers can never be completely separate from their own values and beliefs, so these will inevitably inform the way in which they collect, interpret and analyse data.'

¹⁷ Adom, A, Yeboah, A and Ankrah, AK 'Constructivism Philosophical Paradigm: Implication for Research, Teaching and Learning' (2016) 4 (10) *Global Journal of Arts Humanities and Social Sciences* 1, 2; See further,

the right to basic education for children with special education needs. Studying this subject from an epistemological stance, the study acknowledges that reality is socially developed and designed by interactions among stakeholders. Utilising qualitative methods like interviews, examines subjective interpretations of these rights and their enforcement challenges. Furthermore, this approach targets to reveal insights into the complexities of ensuring equitable educational opportunities for children with special education needs.

1.6.2 Research design

MacMillan and Schumacher define research design as a strategy for selecting subjects, research sites, and data collection procedures to answer research questions.¹⁸ Therefore, the study is doctrinal and encompasses analysing and interpreting legal doctrines including contained cases, journal articles, books, statutes, and policies.

1.6.3 Research method

The legal research method entails finding answers to legal questions. Research aims to answer questions, test theories, and establish facts through enquiry and investigation.¹⁹ In its simplest form, research 'refers to a search for knowledge.'²⁰ Thus, the methodology followed in this study was qualitative, as a myriad of the resources utilised were documentary-based. The information collection comprised a desktop review of available scholarly literature and research material pertaining to children with special education needs. Sources included case laws, journal articles, books, official publications, reports, and chapters. Such sources are authoritative and sufficient to address the research questions, making this approach most appropriate. It is also cost-effective, time-efficient, and avoids ethical challenges related to involving vulnerable groups like children with special education needs. Furthermore, studies commissioned by distinct organisations were consulted, along with research and studies relating to children with special education needs commissioned by different government departments.

Honebein, PC 'Seven Goals for the Design of Constructivist Learning Environments' in Wilson, B and Brent, G (eds), *Constructivist Learning Environments: Case Studies in Instructional Design* (Educational Technology Publications New Jersey: Englewood Cliffs 1996) describes constructivism philosophical paradigm as an approach that asserts that people construct their own understanding and knowledge of the world through experiencing things and reflecting on those experiences.

¹⁸ MacMillan, JH and Schumacher, S *Research in Education. A Conceptual Introduction* (5th Ed., New York: Longman 2001) 166.

¹⁹ Venter, F *Regsnavorsing: Metode En Publikasie* (Juta Cape Town 1990) 130.

²⁰ Kothari, CR *Research Methods* (New Age International Publishers New Delhi 2004) 2.

1.6.4 Study area

The study area refers to the ‘relevant area’ that is explicitly related to the research. Hence, this study area is national, involving the intersection of the right to basic education (statutes), and the education policy framework in South Africa. The focus is on ensuring the enforceability of the right to basic education and socio-economic rights for children with special education needs.

1.7 Ethical considerations

In concert with the rules and regulations of the university concerning conducting research using human subjects, ethical considerations were taken into account during the course of the study. These considerations are applied to qualitative research sections of this study. I have adhered to the ethical protocols provided by the university’s regulatory bodies. A plethora of sources have been acknowledged through appropriate citations in accordance with the established academic style guide.

This involves referencing all of the sources that were used in this study, including direct quotes, information that has been paraphrased, and concepts that have been taken from other studies, in accordance with the academic standardised referencing style, like footnotes. By appropriately citing and referencing all sources consulted in this study, the rules and regulations against plagiarism were respected and adhered to. This involves using one’s own words to paraphrase information whilst giving credit to the original source. Before submitting this dissertation, plagiarism detection software named Turnitin was used to check for any instances of inadvertent knowledge theft and similarity index. A similarity index report is attached in the appendices.

1.8 Significance of the research

Researching the entitlement of South African learners with special education needs to basic education and their socio-economic rights is crucial. A deeper understanding of the right to basic education, is essential for addressing inequalities and fostering inclusive educational opportunities. This research intends to influence amendments to the legislation, policy reforms, empower stakeholders, and improve educational experiences and outcomes for children with special education needs, benefiting individuals and society as a whole. It highlights the challenges faced by these children and proposes practical solutions.

Substantial gaps in legislative and policy frameworks hinder the realisation of inclusive education. Despite provisions such as the Schools Act and the Education White Paper 6 on inclusive education,²¹ discrepancies in enforcement and the lack of necessary resources,²² support,²³ and training,²⁴ impede the fulfilment of these requirements. To ensure the right to basic education is fully realised, this study identifies these gaps and advocates for reforms that will enhance legal protections, improve enforcement strategies, and increase accountability.

1.9 Limitations of the study

The challenges faced by learners with special education needs in South Africa are vast, and this study cannot address every issue they encounter. The focus of this research is specifically on the right to basic education for these learners and the examination of their socio-economic rights. The study narrows its focus to the conceptual framework to uncover key factors that hinder learners with special education needs from accessing their educational rights, including legislative and policy gaps. International law instruments, such as the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), will be assessed to evaluate South Africa's compliance regarding education for children with special education needs.

1.10 Chapter breakdown

This research report comprises five chapters, which are arranged as follows:

Chapter 1: Introduction and background to the study

Chapter one serves as an introduction and background (a roadmap to the dissertation), providing a concise overview of the research structure and subsequent chapters. It includes discussions on the problem statement, purpose of the research, and study objectives. Furthermore, the chapter presents the research questions, research hypothesis, research methodology, ethical

²¹ Department of Basic Education, Special Needs Education, Building an Inclusive Education and Training System White Paper (White Paper 6, 2001) (hereinafter 'Education White Paper 6').

²² Van Rensburg, SKJ, Thobane, M, Kader, S, Aphane, MP, Mpuru, L, Mokotong, M, Ngoveni, TD, Ratiba, MM and Tredoux, L 'Navigating Learning for Learners with Special Educational Needs (LSEN) in South Africa: Barriers and Recommendations' (2024) 5(3) *EHASS* 328, 334. Retrieved from < <https://doi.org/10.38159/ehass.20245314> > accessed 26 January 2025.

²³ See for example, Ibid at 337-338.

²⁴ Ibid at 333-334.

considerations, and the significance of the proposed research, study limitations, and a breakdown of the subsequent chapters.

Chapter 2: Conceptual framework on the right to education

This chapter outlines the legal foundations of the right to education, both internationally and within South Africa, emphasising accessibility, equity, and non-discrimination, particularly in the context of inclusive education for children with special education needs.

Chapter 3: International obligations on the right to basic education for children with special education needs

This chapter explores South Africa's international obligations regarding the right to education for children with special education needs, examining key global instruments and their influence on domestic policies.

Chapter 4: Domestic legal and policy frameworks for the realisation of the right to basic education for children with special education needs

This chapter investigates South Africa's legal and policy frameworks to ensure the right to education for children with special education needs, including constitutional provisions, legislation, and relevant policies.

Chapter 5: Conclusion and recommendations

Chapter five provides a comprehensive synthesis of the key findings from the preceding chapters, offering a cohesive overview of the discussions. It draws inferences regarding the right to basic education for children with special education needs in South Africa, identifying critical gaps in the legal, policy, and practical frameworks. Based on the lessons derived from the analysis, the chapter proposes actionable recommendations aimed at addressing the mentioned shortcomings. The recommendations focus on amendments and reforms to legislative and policy frameworks, aiming to enhance the accessibility, inclusivity, and the realisation of basic education. They are intended to ensure alignment with constitutional obligations and relevant international standards.

1.11 Conclusion

This study explored the critical issue of the enforceability of the right to basic education for children with special education needs in South Africa, within the broader context of socio-economic rights. The findings reveal a complex landscape in which laws and policies exist to safeguard these rights, yet significant barriers remain to their immediate enforcement. While South Africa's Constitution and international obligations guarantee the right to basic education for children with special education needs, practical obstacles such as resource constraints,²⁵ systemic inequalities,²⁶ and socio-economic gaps limit the effectiveness of these guarantees. Despite the legal framework, including decisions such as *Government of the Republic of South Africa and others v Grootboom and others*,²⁷ the realisation of these rights faces challenges. A sustained effort is required to bridge the gaps and ensure that legislative promises translate into tangible outcomes for all learners with special education needs.

²⁵ Chiedza, S 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 126, 133.

²⁶ See for example, Van Rensburg, SKJ, Thobane, M, Kader, S, Aphane, MP, Mpuru, L, Mokotong, M, Ngoveni, TD, Ratiba, MM and Tredoux, L 'Navigating Learning for Learners with Special Educational Needs (LSEN) in South Africa: Barriers and Recommendations' (2024) 5(3) *EHASS* 328, 328-329. Retrieved from < <https://doi.org/10.38159/ehass.20245314> > accessed 26 January 2025.

²⁷ 2001 1 SA 46 (CC); See further, 2011 (8) BCLR 761 (CC).

CHAPTER 2: CONCEPTUAL FRAMEWORK ON THE RIGHT TO EDUCATION

2.1 Introduction

In constitutional law, the right to education is paramount due to its direct impact on societal development and individual well-being. This chapter delves into various aspects surrounding this fundamental right in South Africa. It begins by examining the constitutional framework that underlies this right, emphasising its legal basis and significance. Central to this examination is an analysis of the unqualified nature of the right, emphasising its universal applicability and the obligations it imposes on the state. Additionally, the chapter examines the dual responsibilities of the state: the positive duty to facilitate access to education and the negative duty to refrain from actions that may hinder such access. Drawing on the Constitutional Court jurisprudence, the enforceability of the right to education is scrutinised, focusing on landmark cases that have shaped legal interpretations and enforcement mechanisms.

Despite progress, gaps persist within the existing literature, prompting a critical evaluation of the identified gaps. This analysis seeks to identify areas where scholarly discourse and legal analysis may fall short in fully comprehending and addressing challenges related to the right to education. One significant focus area is the academic discourse on the challenges preventing learners with special education needs from accessing their fundamental right to basic education. This section critically assesses barriers and systemic challenges that hinder equitable access to education for learners with special education needs, promoting a nuanced understanding of inclusivity in educational policies and practices.

This chapter offers a comprehensive analysis of the constitutional and legal aspects surrounding the right to education. It intends to elucidate the foundational principles within the constitutional framework, examine the right's enforceability and jurisprudence, and critically assess existing academic discourses, as well as legislative, and policy frameworks. Through these efforts, the chapter seeks to contribute to a deeper comprehension of the challenges and opportunities in realising universal access to quality education, particularly for marginalised groups.

The structure of the chapter is outlined as follows: the first part is the introduction which lays the context for the right to education in South Africa, subsequent to an exploration of the constitutional framework, which provides the foundation for the right. The discussion

emphasises the unqualified nature of the right to education, examining its universal applicability and the state's obligations. It also delves into the dual responsibilities of the state – to promote and protect the right education. Key Constitutional Court cases are reviewed to assess the enforceability of educational rights. The chapter identifies gaps in existing literature and critically analyses the current scholarly discourse, highlighting areas in need of further research. A detailed literature review covers the constitutional and legislative frameworks, the role of international law, and their impact on education policies. It also addresses the challenges faced by learners requiring specialised support and concludes by identifying obstacles to accessing quality education, and suggesting areas for future policy development.

2.2 The constitutional framework

The right to basic education is enshrined in section 29(1) of the Constitution of South Africa, which provides that: 'Everyone has the right - (a) to basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.'²⁸ This is pivotal as education is regarded as a fundamental human right, essential for the realisation of other rights. Timaeus et al stipulates that education is an indicator of human development, and progress.²⁹ Section 29(2) elaborates on the nature of this right, specifying that everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure effective access to, and implementation of the right education, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account: (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.³⁰ This implies an obligation on the government to not only provide education but to continuously improve its quality, and accessibility. The Constitutional Court, in the case of *Minister of Education v Harris* emphasised that the state has a duty to address historical inequalities in education, and ensure that resources are fairly distributed.³¹ Section 29(3) affirms another critical aspect: the recognition of the right

²⁸ Section 29(1)(a)(b) of the Constitution.

²⁹ Timaeus, IM, Simelane, S and Letsoala, T 'Poverty, Race and Children's Progress at School in South Africa' (2013) 49 (2) *The Journal of Development Studies* 270, 270-284.

³⁰ Section 29(2) of the Constitution.

³¹ 1999 (4) SA 330 (CC).

of individuals to establish independent educational institutions.³² Cheadle et al assert that, this promotes diversity in the education sector, and allows for alternative approaches to education, however, these institutions are subject to reasonable regulation by the state to ensure quality, and adherence to educational standards.³³

Furthermore, section 29(4) emphasises the state's duty to explore different educational models.³⁴ The Constitutional Court in *Minister of Education v Syfrets Trust Ltd. and others* emphasised the state's obligation to provide reasonable educational alternatives, including language-based options, without perpetuating racial discrimination.³⁵

Therefore, section 29 of the Constitution embodies the nation's commitment to education as a fundamental right. Through its provisions, and interpretations by the judiciary, and scholars *et cetera*, it seeks to ensure non-discriminatory access to quality education, thereby fostering the development of a more inclusive, and progressive society.

The Constitutional Court has handed down that the right to basic education imposes a positive obligation on the state to provide, and make basic education available to everyone. Furthermore, the court has distinguished this right from other socio-economic rights in that it is unqualified and as such, immediately realisable. Justice Nkabinde,³⁶ accentuated this assertion in *Juma Musjid Primary School* case,³⁷ emphasising that:

'Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures.' The right to basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable, and justifiable in an open and democratic society based on human dignity, equality, and freedom.' This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of the right, obliged, through reasonable measures to make further education 'progressively available and accessible.'³⁸

³² Section 29(3) of the Constitution.

³³ Cheadle, H, Davis, D and Hayson, N *South African Constitutional Law: The Bill of Rights* (Butterworths 2002).

³⁴ Section 29(4) of the Constitution.

³⁵ 2006 (1) SA 542 (CC).

³⁶ Justice Bess Nkabinde is a former judge of the Constitutional Court of South Africa. She served on the court from 2006 until her retirement in 2018.

³⁷ 2011 (8) BCLR 761 (CC).

³⁸ 2011 (8) BCLR 761 (CC) 37; See further, Chiedza, S 'The Right to Basic Education, the South African Constitution and the Juma Musjid case: An Unqualified Human Right and a Minimum Core Standard' (2013) 7

Regrettably, section 29(1) of the Constitution fails to elucidate the parameters or essence of basic education. Nonetheless, the absence of specification, the section does afford insights into the state's duty. Primarily, it delineates the unqualified nature of the right and secondarily, it imposes both negative and positive obligations, as discussed below.

2.2.1 The unqualified nature of the right to basic education

Human rights are categorised into three distinct yet interconnected groups, namely unqualified rights,³⁹ qualified rights,⁴⁰ and absolute rights.⁴¹

Unqualified rights are those that are not subject to specific internal limitations, such as resource availability or progressive realisation. The right to basic education, as set out in section 29(1)(a) of the Constitution, is an unqualified right and must therefore be immediately realised.⁴² Qualified rights, such as the right to housing in section 26 of the Constitution, are subject to explicit conditions, including the requirement that the State take reasonable legislative and other measures within its available resources, to achieve progressive realisation.⁴³ Absolute rights are those that are non-derogable and cannot be limited under any circumstances, including during a state of emergency; an example is the right to life under section 11 of the Constitution.⁴⁴ The unqualified nature of the right to basic education means the State may not defer its

Law, Democracy & Development 477, 478; Joubert, R 'Incorporating International Standards into National Education Law in South Africa: The Accountability of the State' (2014) 29 (1) *Southern African Public Law* 1, 14; Chiedza, S 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 126, 132; Arendse, L 'The Obligation to Provide Free Basic Education in South Africa: An International Law Perspective' (2011) 14(6) *Potchefstroom Electronic Law Journal* 97, 116.

³⁹ Unqualified rights are those that are not subject to any specific requirement such as resource availability or progressive realisation. For example, the right to basic education in section 21(1)(a) of the Constitution, which is not subject to any specific requirement for its realisation; See further, Chiedza, S 'The Right to Basic Education, the South African Constitution and the Juma Musjid case: An Unqualified Human Right and a Minimum Core Standard' (2013) 7 *Law, Democracy & Development* 477, 486-489.

⁴⁰ Qualified rights are those that are subject to specific requirements for their realisation such as resource availability and progressive realisation. For example, the right to housing in section 26 of the Constitution, which is subject to the requirements to take reasonable legislative measures, resource availability and progressive realisation.

⁴¹ Absolute rights are those that are non-derogable and not subject to any form of limitation whatsoever. For example, the right to life in section 11 of the Constitution, which is not subject to any limitation.

⁴² Liebenberg, S *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta Cape Town 2010) 141.

⁴³ 2001 (1) SA 46 (CC) 46.

⁴⁴ Govender, K 'The Limits of Law: A Critical Examination of South Africa's Non-Derogable Rights' (2010) 26(2) *South African Journal on Human Rights* 267, 270.

implementation on the basis of resource constraints, and any limitation must be justified under the general limitations clause in section 36.⁴⁵

2.2.2 *The positive and negative duty of the state*

The judiciary acknowledges that the absence of an internal qualifier encompasses both affirmative and negative elements. In the case of *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*,⁴⁶ the Constitutional Court articulated that section 29(1)(a) establishes a positive right to basic education for all individuals, rather than solely a negative right precluding obstruction in the pursuit of basic education.⁴⁷

Consequently, while the Constitution endows the right, it neither advocates nor disregards either an adequacy or time-bound approach. The emphasis primarily rests on the state's obligation to actually furnish education, within which it becomes apparent that both a negative and positive duty are incumbent upon the state.

The concept of positive and negative rights and their corresponding duties has extensively been discussed and elaborated upon by various philosophers. Philosophers delineate the distinction between positive and negative rights.⁴⁸ Put simply, the realisation of a negative right does not hinge upon the action of another individual or group, but rather it permits and necessitates inaction as part of its full realisation.⁴⁹ For instance, the right to freedom of speech is a negative right in that the state should refrain from impeding a citizen from exercising the right to basic education. No active intervention is required from the state for its realisation, but rather

⁴⁵ Section 36 of the Constitution provides as follows: (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

⁴⁶ *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 3 SA 165 (CC).

⁴⁷ 1996 3 SA 165 (CC) 9.

⁴⁸ *Ibid* at 9.

⁴⁹ *Ibid* at 9.

abstention.⁵⁰ Conversely, a positive right entails that fulfilment is contingent upon action by another individual or group. It permits and obligates action. For example, the right to healthcare imposes a duty on the state to act affirmatively and provide healthcare services, and thus, the state must take action to fulfil the right.⁵¹

Liebenberg posits that human rights necessitate both affirmative and negative actions from the state, as well as diverse resources to ensure their realisation.⁵² Accordingly, the state bears both positive and negative obligations to uphold fundamental levels of human rights.⁵³ This stance aligns with international agreements. For instance, states that have ratified the ICESCR are obliged to devise a comprehensive strategy for the realisation and enforceability of the right to adequate basic education for all.⁵⁴ Consequently, these rights are considered immediately applicable and unconditionally enforceable. Given the unqualified nature of the right to education, its realisation is thus expected to be immediate.⁵⁵ Negative duties are deemed suitable for enforcement in cases of alleged violations by individuals, overseen by an independent body of experts.⁵⁶

Liebenberg further contends that the majority of economic and social rights do not solely impose a positive obligation on the state for their realisation.⁵⁷ Rather, social and economic rights necessitate an active role from the state to ensure their full enforceability.⁵⁸ Hence, the state is mandated to guarantee the availability of resources requisite for this purpose. In providing basic education to all learners, including those with special education needs, the state assumes both positive and negative responsibilities. It must ensure access to adequate basic education,

⁵⁰ Section 16 of the Constitution.

⁵¹ Perman, M 'The Difference Between Negative Rights and Positive Rights' (30 January 2009) <[https://www.bing.com/ck/a?!&&p=d7b95b5ba105e0904a08a52cd9670f0ec4b7a2c7bd3ecec13e16305591c82344JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Perman%2cM+%e2%80%98The+Difference+Between+Negative+Rights+and+Positive+Rights%e2%80%99+\(30+January+2009\)+%3c+The+Difference+Between+Negative+Rights+and+Positive+Rights+-+MattPerman.com+%3e+accessed+27+May+2024&u=a1aHR0cHM6Ly9tYXR0cGVybWFuLmNvbS8yMDA5LzAxL3RoZS1kaWZmZXJlbnNlWJldHdlZW4tbmVnYXRpdmUtcmlnaHRzLWFuZC1wb3NpdGl2ZS1yaWdodHMv&ntb=1](https://www.bing.com/ck/a?!&&p=d7b95b5ba105e0904a08a52cd9670f0ec4b7a2c7bd3ecec13e16305591c82344JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Perman%2cM+%e2%80%98The+Difference+Between+Negative+Rights+and+Positive+Rights%e2%80%99+(30+January+2009)+%3c+The+Difference+Between+Negative+Rights+and+Positive+Rights+-+MattPerman.com+%3e+accessed+27+May+2024&u=a1aHR0cHM6Ly9tYXR0cGVybWFuLmNvbS8yMDA5LzAxL3RoZS1kaWZmZXJlbnNlWJldHdlZW4tbmVnYXRpdmUtcmlnaHRzLWFuZC1wb3NpdGl2ZS1yaWdodHMv&ntb=1)> accessed 26 January 2025.

⁵² Liebenberg, S 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) (11) *South African Journal on Human Rights* 359.

⁵³ Ibid at 359.

⁵⁴ Ibid at 359.

⁵⁵ Ibid at 359.

⁵⁶ Ibid at 359.

⁵⁷ Ibid at 359.

⁵⁸ Ibid at 359.

establish appropriate educational infrastructure, and engage competent teachers to instruct them. Concurrently, the state bears a negative duty to safeguard children, including those with special education needs, from attending school during hazardous weather conditions to ensure their safety.⁵⁹ This underscores the state's obligation to revoke any discriminatory legislation impeding equal access to education due to poverty or other structural factors.⁶⁰ The duty to protect human rights imposes an active obligation on the state, particularly in scenarios where non-governmental actors may undermine or infringe upon these rights.⁶¹ This becomes evident when educators fail to effectively comprehend and address the educational needs of learners.

From the aforementioned discussion, it is evident that the provision of basic education, as articulated in section 29(1) of the Constitution, imposes an obligation on the state to ensure its accessibility to all learners. Moreover, this right should be realised without internal qualifiers or considerations of progressive realisation. To achieve this objective, the state must establish educational facilities, equip teachers, and allocate resources to meet the educational requirements of all learners.

2.2.3 Constitutional Court jurisprudence on enforceability of the right to education

Section 7(2) of the South African Constitution mandates the state to actively pursue the promotion and fulfilment of socio-economic rights, including the right to basic education.⁶² However, it does not prescribe specific methodologies for the state to adhere to in fulfilling these affirmative constitutional obligations. Notwithstanding the state's affirmative duties to 'promote' and 'fulfil' guaranteed socio-economic rights, these rights are subject to three qualifications: 'reasonable legislative and other measures,' 'progressive realisation,' and 'within available

⁵⁹ See for example, Chiedza, S 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 126, 147; See further, United Nations, United Nations Human Rights Office of the High Commissioner, 'd) General Comment No. 13: The right to education (article 13) (1999)' (8 December 1999) < <https://www.bing.com/ck/a?!&&p=59f9fe16ed128386a0dbcf61eaae1d98a8996295e8d2452c6c6e3880b3ec1b0bJmltdHM9MTczNzc2MzlwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Article+13+of+CESCR&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL3Jlc291cmNlcy9IZHVjYXRvcnMvaHVtYW4tcmlnaHRzLWVkdWNhdGlvbi10cmFpbmluZy9kLWdlbmVyYWwtY29tbWVudC1uby0xMy1yaWdodCIIZHVjYXRpb24tYXJ0aWNsZS0xMy0xOTk5&ntb=1> > accessed 26 January 2025.

⁶⁰ Section 28 and 29 of the Constitution.

⁶¹ Forde, M 'Non-Governmental Interferences with Human Rights' 1985 (56) *British Yearbook of International Law* 253; See further, Alkema, EA 'The Third-Party Applicability or 'Drittwirkung' of the European Convention on Human Rights' in Matscher, F and Petzold, H (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Köln Heymanns 1988).

⁶² Section 7(2) of the Constitution.

resources.’ Consequently, the affirmative duties to ‘promote’ and ‘fulfil’ must be construed in conjunction with the language of a particular socio-economic right, considering the context of learners with special education needs.⁶³ When interpreting specific constitutional right, South African courts must take into account how the rights are formulated and construed at the international law level. In this context, the ICESCR holds relevance.

As outlined in the ICESCR, particularly in its General Comment No. 3, the principle of ‘progressive realisation’ within the discourse of socio-economic rights entails a degree of flexibility concerning the obligations of states parties and the enforcement of socio-economic rights. As a signatory to the ICESCR, the progressive realisation of socio-economic rights obligates the South African state to implement a reasonable and measurable plan, including the establishment of attainable benchmarks and timelines for the enjoyment of economic, social, and cultural rights within its available resources.⁶⁴ South African courts should interpret “progressive realisation” to mean that deliberate retrogressive measures are impermissible and must be fully justified by considering the entirety of rights.⁶⁵

Concerning vulnerable and disadvantaged groups, like learners with special education needs, progressive realisation should entail the enforceability of special measures beyond mere abstention from actions that may negatively impact the enjoyment of rights.⁶⁶ Therefore, a lack of resources cannot excuse state inaction or indefinite postponement of measures to uphold rights.⁶⁷ Instead, the South African state must demonstrate a commitment to enhancing the enjoyment of socio-economic rights, even in resource-constrained circumstances. Moreover, regardless of resource constraints, the South African state must prioritise ensuring that everyone has access to, at a minimum, basic levels of rights and must target programs to support the poor, marginalised, and disadvantaged.⁶⁸ The South African discourse on the ‘minimum core’ concept

⁶³ Allsop, G ‘Chapter 12: ‘Socio-Economic Rights’ (Date not specified) < <https://openbooks.uct.ac.za/uct/catalog/download/30/44/1489-1?inline=1> > accessed 27 May 2024.

⁶⁴ Chenwi, L ‘Unpacking “Progressive Realisation,” its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance’ (2013) 46 (3) *De Jure Law Journal* 742, 745.

⁶⁵ Ibid at 746.

⁶⁶ Ibid at 746.

⁶⁷ See, Paragraph I(10) of the Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc A/CONF.157/23 (1993).

⁶⁸ Office of the United Nations High Commissioner for Human Rights (OHCHR) *Fact Sheet No. 33*, ‘Economic, Social and Cultural Rights’ (1 December 2008) <

traditionally centers on its potential role in judicially enforcing constitutional socio-economic rights.⁶⁹ This is exemplified by the Constitutional Court's conception of the minimum core obligation when assessing compliance with the state's socio-economic rights-based duties. Despite the South African judiciary's awareness of international jurisprudence and the absence of an explicit mention of a 'minimum core' obligation in the Constitution, the Constitutional Court has thus far, declined to recognise a minimum core obligation of socio-economic rights for various reasons.⁷⁰

The South African Constitutional Court employs a reasonableness framework to assess the government's compliance with socio-economic rights obligations under the Constitution.⁷¹ This methodology was first established in significant cases like *Government of the Republic of South Africa & others v Grootboom & others (Grootboom and others)*,⁷² and *Minister of Health & others v Treatment Action Campaign & others (Treatment Action Campaign and others)*.⁷³ In these cases, the Court emphasised evaluating whether the government's strategies are reasonably effective in advancing socio-economic rights.⁷⁴ Subsequently, in cases like *Grootboom and others*, *Treatment Action Campaign and others*, and *Mazibuko v City of Johannesburg*,⁷⁵ the Constitutional Court outlined criteria for assessing the reasonableness of state actions, leading to scholarly debates.⁷⁶ It is argued that this approach reflects considerations of both 'progressive realisation' and 'resource availability.'⁷⁷ In instances such as *Grootboom and others*, *Treatment*

[https://www.bing.com/ck/a?!&&p=8202a25703b49d5709f527a1da05e858c47133c1237323c9c98cccc1d2606677JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Office+of+the+United+Nations+High+Commissioner+for+Human+Rights+\(OHCHR\)+Fact+Sheet+No.+33+%e2%80%98Economic%2c+Social+and+Cultural+Rights%e2%80%99+\(Date+and+month+not+specified+2008\)+%3c+UN+Human+Rights+Office+\(ohchr.org\)+%3e+accessed+29+May+2024&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL3B1YmxpY2F0aW9ucy9mYWN0LXNoZWV0cy9mYWN0LXNoZWV0LW5vLTmzLWZyZXF1ZW50bHktYXNrZWQtcXVlc3Rpb25zLWVjb25vbWljLXNvY2lhbC1hbmQtY3VsdHVyYWw&ntb=1](https://www.bing.com/ck/a?!&&p=8202a25703b49d5709f527a1da05e858c47133c1237323c9c98cccc1d2606677JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Office+of+the+United+Nations+High+Commissioner+for+Human+Rights+(OHCHR)+Fact+Sheet+No.+33+%e2%80%98Economic%2c+Social+and+Cultural+Rights%e2%80%99+(Date+and+month+not+specified+2008)+%3c+UN+Human+Rights+Office+(ohchr.org)+%3e+accessed+29+May+2024&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL3B1YmxpY2F0aW9ucy9mYWN0LXNoZWV0cy9mYWN0LXNoZWV0LW5vLTmzLWZyZXF1ZW50bHktYXNrZWQtcXVlc3Rpb25zLWVjb25vbWljLXNvY2lhbC1hbmQtY3VsdHVyYWw&ntb=1) > accessed 26 January 2025; See further, Mavedzenge, A 'Revisiting The Role of the Judiciary in Enforcing the State's Duty to Provide Access to the Minimum Core Content of Socio-Economic Rights in South Africa and Kenya' (2020) 7 (2) *Journal of Comparative Law in Africa* 60, 68-71.

⁶⁹ Fuo, O and Du Plessis, A 'In the Face of Judicial Deference: Taking the "Minimum Core" of Socio-Economic Rights to the Local Government Sphere' (2015) 19 (1) *Law, Democracy & Development Law Journal* 1, 7.

⁷⁰ *Ibid* at 7.

⁷¹ 2001 1 SA 46 (CC).

⁷² 2001 1 SA 46 (CC) 7.

⁷³ 2002 (10) BCLR 1033 (CC).

⁷⁴ 2001 1 SA 46 (CC) 41.

⁷⁵ 2010 (3) BCLR 239 (CC).

⁷⁶ Chenwi, L 'Unpacking "Progressive Realisation," its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) 46 (3) *De Jure Law Journal* 742, 757.

⁷⁷ *Ibid* at 757.

Action Campaign and others, and Mazibuko v City of Johannesburg, the Constitutional Court has determined that the adequacy of state measures to fulfil socio-economic rights depends on their reasonableness.⁷⁸

2.2.4 Identified gaps in the literature

Despite a growing body of scholarship on the enforcement of socio-economic rights in South Africa, several critical gaps remain, particularly in relation to the right to basic education under section 29(1)(a) of the Constitution and its application to learners with special education needs.

Firstly, much of the existing literature tends to address socio-economic rights enforcement in general terms, without sufficient focus on the specific and unique challenges faced by vulnerable groups, such as children requiring specialised support. There is a need for deeper engagement with how judicial decisions or the lack thereof impact the realisation of the right to basic education for such learners.

Secondly, while the Constitutional Court has affirmed the immediate realisability of the right to basic education, scholarly analysis has often failed to critically examine the tension between this constitutional mandate and the principle of judicial deference,⁷⁹ particularly in cases involving resource allocation. This includes insufficient scrutiny of how courts navigate institutional concerns like legitimacy and separation of powers when issuing remedies that may require policy changes or budgetary commitments.

Thirdly, there remains limited analysis of the role of international and regional human rights mechanisms in influencing domestic enforcement of socio-economic rights. While these bodies have contributed significantly to normative frameworks, their actual impact on national jurisprudence and implementation, especially in the education sector, has not been adequately explored.

⁷⁸ Clark, M, Dugard, J, Duncan, J, Moyo, K, Plagerson, S, Tissington, K, UlriKsen, M, Veriava, F, and Wilson, S ‘Socio-Economic Rights: Progressive Realisation?’ (ISBN (Print): 978-0-620-72617-7 Foundation for Human Rights 2016) 55.

⁷⁹ Deference refers to the principle by which courts may give a particular level of respect or deference to decisions made by other branches of government, like the executive or legislative branches. In the context of socio-economic rights, including the right to basic education, courts may sometimes defer to the expertise and discretion of government agencies or officials in determining how best to fulfil these rights, especially when it comes to resource allocation and policy decisions.

Finally, the literature has not fully addressed the potential for alternative or complementary enforcement mechanisms beyond the judiciary. This includes legislative, administrative, and policy-based approaches that could enhance accountability and ensure more effective realisation of education rights for children with special education needs.

This study seeks to fill these gaps by providing a critical evaluation of the South African judiciary's role in enforcing the right to basic education, assessing how constitutional and international frameworks interact, and proposing feasible, rights-based strategies for enhancing enforceability in contexts of vulnerability and resource constraint.

2.3 Literature review

2.3.1 Constitutional framework

The right to basic education is a cornerstone of human rights law, enshrined in the South African constitutional and legislative frameworks, and in international conventions. The literature review aims to explore the spectrum of perspectives among scholars and writers concerning basic education and socio-economic rights particularly, for children with special education needs within these aforementioned legal frameworks. Furthermore, case law delineates the responsibilities of school systems in ensuring the realisation of every child's right to basic education. Notably, gaps in the literature exist concerning strategies in accommodating children, requiring specialised support within the parameters of legal mandates for basic education. This review addresses these gaps by proposing further research and policy recommendations in this critical area.

Thus, the Constitution guarantees everyone, including those with special education needs, the right to basic education under section 29(1)(a). It is not qualified by the 'availability of resources' or 'progressive realisation,' requirements as is the right to suitable accommodation and access to healthcare facilities. The government is required to 'immediately realise' this right because it is an unqualified right. This means that regardless of how expensive it may be, the government must provide children requiring specialised support the same access to basic

education as other children.⁸⁰ It must be done immediately. Berger affirms the aforesaid assertions that section 29(1)(a) is ‘a ‘strong positive right,’ a right that can be asserted regardless of the state’s other budgetary imperatives.’⁸¹ Furthermore, Woolman and Bishop add that the state cannot invoke the defence of insufficient resources as a justification for failing to provide basic education.⁸²

The Constitution further incorporates socio-economic rights, affirming that access to basic education is not only a civil and political right but also a socio-economic one.⁸³ Sections 26 and 27 of the Constitution include the right to access suitable accommodation, healthcare facilities, and social security.⁸⁴ Access to these socio-economic rights is necessary for creating an enabling environment where children with special education needs can fully participate in and benefit from the educational system. Section 29(1)(a) acknowledges the imperative of progressively realising the right to basic education, while taking into account available resources, and requires that the state undertakes reasonable measures to attain this objective.

Socio-economic rights acknowledge that ‘human rights and the basic social conditions in which people live are fundamentally interconnected.’⁸⁵ The incorporation and integration of these rights into the Constitution seek to address substantive inequalities, thereby enabling children requiring specialised support from disadvantaged social and economic backgrounds to lead lives marked

⁸⁰ This provision is unqualified in the sense that, subsections 26 and 27, does not allow for progressive realisation within available resources. However, the right is qualified in another respect as it pertains solely to basic education. And this distinction must be emphasised; See further, Veriava, F and Coomans, F ‘The Right to Education’ in Brand, D and Heys, C (eds), *Socio-Economic Rights in South Africa* (Pretoria University Law Press Pretoria 2005) 62.

⁸¹ Berger, E ‘The Right to Education under the South African Constitution’ (2003) 103(3) *Columbia Law Review* 614, 625; See further, Chiedza, S ‘The Right to Basic Education, the South African Constitution and the Juma Musjid case: An Unqualified Human Right and a Minimum Core Standard’ (2013) 7 *Law, Democracy & Development* 477, 488.

⁸² Woolman, S and Bishop, M *Constitutional law of South Africa* (Juta Cape Town 2009); See further, Chiedza, S ‘The Right to Basic Education, the South African Constitution and the Juma Musjid case: An Unqualified Human Right and a Minimum Core Standard’ (2013) 7 *Law, Democracy & Development* 477, 488.

⁸³ Liebenberg, S ‘The Value of Human Dignity in Interpreting Socio-Economic Rights’ (2005) 21 *South African Journal on Human Rights* 1.

⁸⁴ Sections 26 and 27 of the Constitution.

⁸⁵ Brickhill, J and Ferreira, N ‘Socio-economic rights’ in Currie, I and De Waal, J (eds), *The Bill of Rights Handbook* (Juta and Company Ltd. 2013) 564-565; See further, Proudlock, P ‘Children’s Socio-Economic Rights’ in Boezaart, T (eds), *Child Law in South Africa* (Juta Cape Town 2009) 291.

by respect, liberty, and equity.⁸⁶ Socio-economic rights are described as rights pertaining to the fundamental conditions necessary for welfare and well-being.⁸⁷

The provisions that set out socio-economic rights in section 27 of the Constitution are characterised by the limitations that the state should take ‘reasonable legislative and other measures, within its available resources to achieve progressive realisation of the rights.’⁸⁸ This has led to the widely acknowledged principle and custom that the socio-economic rights of children should be prioritised, ensuring they have immediate and direct access to them.⁸⁹ Socio-economic rights are crucial for children requiring specialised support because they play a significant role in supporting the children’s physical and mental development.⁹⁰

2.3.2 Legislative framework

The National Education Policy Act 27 of 1996,⁹¹ and the Schools Act are the central legislation governing direct provision of basic education. However, the National Education Policy Act does not specify the details of the right to basic education. Nonetheless, it has aided and persists to aid in transforming the educational framework in South Africa by enabling the formulation and regulation of national policies related to this right.⁹² The principal emphasis, in accordance with the national legislation, lies in the Schools Act, which regulates the institution, governance, and financial support for schools while establishing a consistent framework for these aspects.⁹³

⁸⁶ Ibid at 291.

⁸⁷ Nolan, A *Children’s Socio-Economic Rights, Democracy and the Courts* (Oxford Hart Publishing 2011) 21.

⁸⁸ Section 27 of the Constitution; See further, Proudlock, P ‘Children’s Socio-Economic Rights’ in Boezaart, T (eds), *Child Law in South Africa* (Juta Cape Town 2009) 292; See further, Rosa, S and Dutschke, M ‘Child Rights at the Core: The use of International Law in South African Cases on Children’s Socio-Economic Rights’ (2006) 22 *South African Journal on Human Rights* 224, 236-238 for a precise discussion on ‘maximum extent of available resources’ and ‘progressive realisation’ in international law; Chiedza, S ‘The Right to Basic Education, the South African Constitution and the Juma Masjid case: An Unqualified Human Right and a Minimum Core Standard’ (2013) 7 *Law, Democracy & Development* 477, 487-488.

⁸⁹ Proudlock, P ‘Children’s Socio-Economic Rights’ in Boezaart, T (eds), *Child Law in South Africa* (Juta Cape Town 2009) 292; See further, Skelton, A ‘Girls’ Socio-Economic Rights in South Africa’ (2010) 26 *South African Journal on Human Rights* 141-146; Liebenberg, S ‘The Interpretation of Socio-Economic Rights,’ in Woolman, S and Bishop, M (eds), *Constitutional Law of South Africa* (2nd Juta Cape Town 2004) 48-49.

⁹⁰ Rosa, S and Dutschke, M ‘Child Rights at the Core: The use of International Law in South African Cases on Children’s Socio-Economic Rights’ (2006) 22 *South African Journal on Human Rights* 224, 236-238.

⁹¹ Act 27 of 1996.

⁹² Preamble of Act 27 of 1996.

⁹³ Preamble of Act 84 of 1996.

The Schools Act serves to operationalise the constitutional right to basic education,⁹⁴ acknowledging its reformatory quality,⁹⁵ and overseeing school access.⁹⁶ Section 5 of the Act confirms the equal entitlement of all children to basic education by setting out procedures for learner admission to South African public schools, emphasising non-discriminatory admission practices.⁹⁷ Philpott and McLaren assert that black children with special education needs are subject to multiple discrimination.⁹⁸ The court in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* emphasised that the education system was found to breach the constitutional rights to basic education; protection from neglect and degradation; equality and human dignity of children with profound intellectual disabilities.⁹⁹ Soudien and Baxen argue by asserting that public schools are mandated to admit learners without unfairly discriminating in any way, and the duty is placed on both the head of the education department and the school principal to consider the ‘rights and wishes’ of parents of children with special education needs.¹⁰⁰ Furthermore, Section 3 of the Act mandates compulsory basic education, allowing for limited exceptions to compulsory school attendance.¹⁰¹

Soudien and Baxen specify that the priority of learners with special education needs has clearly been articulated in state policy; various policy papers issued within the first two years of democratic governance outlined the principle of education as a basic human right.¹⁰² Hence, in the Education White Paper 6, the establishment of a comprehensive education and training framework, prioritising inclusivity acknowledges that the Department of Education (DoE) conveys ‘a special responsibility ... to ensure that all children, with and without special education needs, pursue their learning potential to the fullest.’¹⁰³ The policy focuses on early recognition and assistance for children with obstacles to education and growth, including special

⁹⁴ 2013 (6) SA 582 (CC) 53.

⁹⁵ Preamble of Act 84 of 1996.

⁹⁶ Veriava, F *Realising the Right to Basic Education in Socio-economic Rights: Progressive Realisation?* (Juta South Africa 2016) 90.

⁹⁷ Section 5(1) of Act 84 of 1996.

⁹⁸ Philpott, S and McLaren, P ‘Hearing the Voices of Children and Caregivers Situation Analysis of Children with Disabilities in South Africa’ (Pretoria, South Africa: Department of Social Development/UNICEF 2011).

⁹⁹ (2011) 5 SA 87 (WCC).

¹⁰⁰ Soudien, C and Baxen, J ‘Disability and schooling in South Africa’ in Watermeyer, B, Swartz, L, Lorenzo, T, et al (eds), *Disability and Social Change: A South African Agenda* (Pretoria, South Africa: HSRC Press 2006).

¹⁰¹ Subsections 3 and 4 of Act 84 of 1996.

¹⁰² Soudien, C and Baxen, J ‘Disability and schooling in South Africa’ in Watermeyer, B, Swartz, L, Lorenzo, T, et al (eds), *Disability and Social Change: A South African Agenda* (Pretoria, South Africa: HSRC Press 2006).

¹⁰³ Department of Basic Education, Report on the Implementation of Education White Paper 6 on Inclusive Education (White Paper 6, 2001) 11.

education needs.¹⁰⁴ Furthermore, equal education opportunities like reasonable accommodation should be provided to ensure that children requiring specialised support can fully take part in educational activities.¹⁰⁵

The right to basic education is closely intertwined with broader socio-economic rights in South Africa, like the rights to social security and to healthcare facilities. Section 27 of the Constitution guarantees everyone's right to access social security, encompassing appropriate social assistance for children and families in need.

2.3.3 International law

The Constitution expressly acknowledges the relevance of international law in interpreting the Bill of Rights. Section 39(1)(b) of the Constitution mandates that courts, tribunals, or forums must contemplate international law when interpreting the provisions of the Bill of Rights.¹⁰⁶ The Constitutional Court in *Kaunda v President of the Republic of South Africa and others* provided that, section 233 mandates the court to adopt any reasonable translation of the law that aligns with international law, prioritising such interpretations over those that conflict with international law.¹⁰⁷ Thus, article 24 of the CRC, deals distinctively with education for children with special education needs and guarantees a right to inclusive education.¹⁰⁸ It further stipulates in article 23(1) and (3) that 'state parties must recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the children's active participation in the community,' and that 'state assistance should be designed to ensure that children with special education needs have effective access to and receives basic education ...'¹⁰⁹

In international law, similar to the supreme law of South Africa, a children's right to basic education is considered immediately enforceable rather than subject to progressive realisation.

¹⁰⁴ Department of Basic Education, Draft Policy on Screening, Identification, Assessment and Support (SIAS, 2014).

¹⁰⁵ Section 12(2) of Act 84 of 1996.

¹⁰⁶ Section 39(1)(b) of the Constitution; See further, section 233 of the Constitution which provides that: When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law; 2004 (10) BCLR 1009 (CC) 33.

¹⁰⁷ 2004 (10) BCLR 1009 (CC) 33.

¹⁰⁸ Article 24 of the United Nations Convention on the Rights of the Child.

¹⁰⁹ Section 28, 23(1, 3) of the United Nations Convention on the Rights of the Child. South Africa ratified the agreement in 1989, and it came into effect in 1995.

United Nations Comment No. 13 of the Committee on Economic, Social and Cultural Rights (CESCR) establishes that basic education constitutes a minimum core obligation, which all states must promptly enforce.¹¹⁰ Accordingly, ‘the duties in respect of the right to primary education include granting it priority in resource allocation and enforceability, taking immediate (as opposed to progressive) measures towards the realisation thereof, and providing the service free of charge.’¹¹¹

The CRPD also recognises the right to basic education for children requiring specialised support, and in recognising and realising this right, state parties are obligated to ensure that ‘[p]ersons with special education needs are not excluded from the general education system on the basis of disability,’ and ‘can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.’¹¹² The Committee clarifies in its General Comments that basic education must be structured to achieve ‘the full development of the human personality and the sense of its dignity, and ... [to] strengthen the respect for human rights and fundamental freedoms.’¹¹³ Howell et al assert that these conventions oblige the state to ensure that children with special education needs have effective access to education.¹¹⁴

2.3.4 Summary of the gap in the literature

One significant gap is the limited enforceability of inclusive education laws and the failure to provide resources and support for learners requiring specialised support. According to Ngwena, notwithstanding the Department of Education’s commitment to ensuring education for all

¹¹⁰ United Nations Committee on Economic, Social and Cultural Rights General Comment No 13: The Right to Education (1999) para 51.

¹¹¹ Murungi, LN ‘Inclusive Basic Education in South Africa: Issues in its Conceptualisation and Implementation’ (2015) 18 *Potchefstroom Electronic Law Journal* 3160, 3176.

¹¹² Article 24(2)(a, b) of the United Nations Convention on the Rights of Persons with Disabilities. South Africa ratified the agreement on 30 November 2007, and it came into effect on 3 May 2008.

¹¹³ United Nations Committee on Economic, Social and Cultural Rights (1966).

¹¹⁴ Howell, C, Chalklen, S and Alberts, T ‘A History of the Disability Rights Movement in South Africa’ in Watermeyer, B, Swartz, L, Lorenzo, T, et al (eds), *Disability and Social Change: A South African Agenda* (Pretoria, South Africa: HRSC Press 2006).

learners, the government has encountered challenges in effectively enforcing inclusive education initiatives. Accordingly, the government has prolonged the segregation of inclusive education.¹¹⁵

Furthermore, the socio-economic disparities exacerbate these challenges. Due to restricted access to specialised schools or resources, learners from low-income households or those living in rural areas may face additional challenges. For instance, a study by Chiedza, highlights that, firstly, schools must be physically accessible, ensuring they are located in safe and convenient proximity. Secondly, General Comment No. 13 notes that in situations like those in South Africa, where children must transverse lengthy and frequently not safe routes to school, access to education is compromised or rendered impracticable, hence, impeding their right to basic education.¹¹⁶

Another critical gap in the literature is the paucity of information and research on the experiences of children with special education needs within the educational system. Studies that currently exist frequently lack thorough empirical data that could effectively guide policy and initiatives. For instance, a report by the Department of Women, Children and People with Disabilities, acknowledges that achieving the right of these children to access basic education remains a challenge for the state.¹¹⁷ There is insufficient, dependable, and up-to-date data concerning the essence and incidence of disabilities in our country.¹¹⁸ The ‘Integrated National Disability Strategy’ recognises that historically, disability was primarily perceived and addressed as a

¹¹⁵ Ngwena, C ‘Western Cape Forum for Intellectual Disability v Government of South Africa: A Case Study of Contradictions in Inclusive Education, *African Disability Rights Yearbook*’ (2013) 1 *African Disability Rights Yearbook* 152.

¹¹⁶ Chiedza, S ‘A Hexagon Right: The Six Dimensions of the South African Right to Basic Education’ (2018) 39 (1) *Obiter* 126, 147; See further, United Nations, United Nations Human Rights Office of the High Commissioner, ‘d) General Comment No. 13: The right to education (article 13) (1999)’ (8 December 1999) < <https://www.bing.com/ck/a?!&&p=59f9fe16ed128386a0dbcf61eaae1d98a8996295e8d2452c6c6e3880b3ec1b0bJmltdHM9MTczNzc2MzlwMA&pntn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Article+13+of+CESCR&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL3Jlc291cmNlcy9lZHVjYXRvcnMvaHVtYW4tcmlnaHRzLWVkdWNhdGlvbi10cmFpbmluZy9kLWdlbmVyYWwtY29tbWVudC1uby0xMy1yaWdodCIIZHVjYXRpb24tYXJ0aWNsZS0xMy0xOTk5&ntb=1> > accessed 26 January 2025.

¹¹⁷ Department of Social Development, Department of Women Children and People with Disabilities. *Children with disabilities in South Africa: A retrospective review: 2001-2011*. Pretoria: Department of Social Development/Department of Women, Children and People with Disabilities; See further, United Nations Children’s Fund (2012).

¹¹⁸ Department of Women, Children and People with Disabilities “Baseline country report to the United Nations on the implementation of the Convention on the Rights of Persons with disabilities in South Africa” [2013] v.

matter related solely to health and welfare.¹¹⁹ On a systematic level, it is estimated that almost 600 000 learners with special education needs languish out of school.¹²⁰ This figure is substantial. Furthermore, the array of legal and policy reforms undertaken by the state over the past two decades reflects a theoretical commitment to ensuring the right of children with special education needs to obtain elementary basic education. However, structural discrimination persists due to gaps in visibility and disparities in access to services.¹²¹

In conclusion, the gaps in the literature regarding South African learners requiring specialised support and their right to basic education reveal challenges like inadequate policy enforceability, socio-economic inequalities, and a dearth of solid empirical research. In order to create more effective inclusive education policies and guarantee that all learners in the country have their socio-economic rights fulfilled, it is imperative that these gaps be addressed.

2.4 Academic discourse on the challenges preventing learners with special education needs from accessing their fundamental right to basic education

The right to basic education holds paramount importance not only at a national level but also on an international scale. Empirical evidence and demonstrated benefits underscore the significance of education in mitigating poverty and in fostering human development, which in turn contributes to the advancement of nations. Thus, there is an urgent need for a more profound commitment and political determination on the part of the South African state.¹²² Education endows people, including learners with special education needs, with dignity, self-respect, and

¹¹⁹ Office of the Deputy President, ‘White Paper: Integrated National Disability Strategy White Paper’ (Date not specified November 1997) < <http://www.gov.za/documents/integrated-national-disability-strategy-white-paper> > accessed 03 May 2024.

¹²⁰ Department of Basic Education, Report on the Implementation of Education White Paper 6 on Inclusive Education. An Overview for the Period: 2013-2015 (2015) 21; See also, Hodgson, TS ‘The Right to Inclusive Education in South Africa: Recreating Disability Apartheid through Failed Inclusion Policies’ (2018) 3 *South African Law Journal* 461, 461.

¹²¹ Department of Social Development, Department of Women Children and People with Disabilities; See further, United Nations Children’s Fund (2012); Human Rights Watch (2015). *Complicit in exclusion: South Africa’s failure to guarantee an inclusive education for children with disabilities*. New York: Human Rights Watch.

¹²² Maddock, L and Maroun, W ‘Exploring the Present State of South African Education: Challenges and Recommendations’ (2018) 32 (2) *South African Journal of Higher Education* 192, 200-209; See further, Chürr, C ‘Realisation of a Child’s Right to a Basic Education in the South African School System: Some Lessons from Germany’ (2015) 18 (7) *Potchefstroom Electronic Law Journal* 2405, 2443-2444; Chiedza, S ‘A Hexagon Right: The Six Dimensions of the South African Right to Basic Education’ (2018) 39 (1) *Obiter* 126, 127-129.

confidence, serving as a fundamental human right upon which the realisation and fulfilment of other rights depend.¹²³

The unfortunate reality in South Africa, as affirmed by numerous legal and academic scholars, including the Minister of Education through court proceedings, is that the South African basic education system, comprising primary and secondary schooling,¹²⁴ is encountering significant challenges.¹²⁵ These challenges include inequalities in the school environment, a lack of quality basic education, insufficient funding allocation leading to budgetary constraints for education materials, inadequate infrastructure, and the failure of the school system to accommodate learning differences as envisaged in section 29(1) of the Constitution.¹²⁶ Given this array of challenges, South Africa risks rendering the right of access to basic education meaningless if schools continue to fall short of meeting minimum standards of adequacy in accordance with international norms.¹²⁷

Additionally, from this study's emphasis, the paucity of robust enforcement mechanisms, encompassing deficient enforcement of constitutional mandates pertaining to learners with special education requirements, ambiguity in administrative duties, involving indistinct allocation of responsibilities among governmental entities, inadequate training of educators, comprising deficient educational initiatives for instructors catering to learners with special

¹²³ Chürr, C 'Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany' (2015) 18 (7) *Potchefstroom Electronic Law Journal* 2405, 2406; See further, Paterson, K 'Constitutional Adjudication on the Right to Basic Education: Are we asking the State to do the Impossible?' (2018) 34 (1) *South African Journal on Human Rights* 113, 115.

¹²⁴ In common parlance, 'basic education in South Africa denotes the educational provision during an individual's primary and secondary schooling years, from grade R, the inaugural year of formal education enrolment, through grade 12, the period culminating in the administration of South Africa's matriculation examinations, the compulsory school attendance ages, conservatively estimated at 12 years or more, encompass the span between 7 and 14 years of age.' See Brickhill, J and Van Leeve, Y 'From the Classroom to the Courtroom: Litigating Education Rights in South Africa' in Fredman, S, Campbell, M, and Taylor, H (eds), *Human Rights and Equality in Education* (Bristol University Press, Policy Press: United Kingdom 2018)145-146.

¹²⁵ Chürr, C 'Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany' (2015) 18 (7) *Potchefstroom Electronic Law Journal* 2405, 2406; See further, Chiedza, S 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 126, 129; (2012) 4 All SA 35 (ECG) 14. The problems with the provision of basic education resources in South Africa are exceedingly serious and the negative effects of these problems are such that plenty of learners are already being denied their full rights to basic education.

¹²⁶ Chürr, C 'Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany' (2015) 18 (7) *Potchefstroom Electronic Law Journal* 2405, 2406; See further, Chiedza, S 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 126, 129.

¹²⁷ Paterson, K 'Constitutional Adjudication on the Right to Basic Education: Are we asking the State to do the Impossible?' (2018) 34 (1) *South African Journal on Human Rights* 113, 112.

education needs, constraints in resources, including shortages of specialised facilities, apparatus, and supportive services, and unequal access, involving disparities in educational quality across various provinces, collectively impede learners with special education needs from realising their entitlement to fundamental basic education rights.

Sefoka contends that the judiciary, when presented with opportunities to adjudicate on matters concerning the right to basic education, should consistently contribute to ensuring immediate realisation of access to basic education.¹²⁸ This objective can be attained through issuing judgments that advance the provision of quality and sustainable education, coupled with effective social services in schools throughout South Africa, aligning with the standards set forth in international and regional human rights law.¹²⁹ Despite a wealth of jurisprudence on education law since 1994, a significant concern among legal and academic scholars is the Constitutional Court's tendency to adopt a deferential approach in developing the normative framework for socio-economic rights, including the right to basic education.¹³⁰ Consequently, the absence of a clearly defined and legally determined scope and content of the right to education, particularly basic education as a socio-economic right, poses an inevitable challenge.¹³¹

Chiedza asserts that the responsibility for defining the normative framework and extent of the right to basic education rests with the legislature, and that this duty cannot be delegated to the judiciary.¹³² Consequently, the determination of the scope and content of section 29(1)(a) becomes a matter requiring substantial engagement and determination by the legislature.¹³³ Furthermore, Chiedza contends that courts are not the appropriate institutions for setting policy or advocating for societal change.¹³⁴ Liebenberg,¹³⁵ and Arendse,¹³⁶ however disagree with

¹²⁸ Sefoka, IM 'Judicial Administration and Enforcement of the Right to Quality Education in South Africa: A Discussion of Selected Case Laws' (2022) 12 (2) *Journal of Educational and Social Research* 199, 200.

¹²⁹ Ibid at 200; See further, Arendse, L 'Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-*Juma Masjid*' (2020) 20 *African Human Rights Law Journal* 285, 286.

¹³⁰ Ibid at 200; See further, Arendse, L 'Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-*Juma Masjid*' (2020) 20 *African Human Rights Law Journal* 285, 286.

¹³¹ Ibid at 200; Despite the passage of more than 25 years since the cessation of apartheid, it remains a lamentable fact that South Africa lacks any legislative document delineating the expressions 'basic education.'

¹³² Chiedza, S 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 126, 129.

¹³³ Ibid at 129.

¹³⁴ Ibid at 129.

Chiedza's perspective. They argue that South African courts possess broad and equitable remedial discretion conferred by section 172(1)(b) of the Constitution. They maintain that it is incumbent upon the courts to exercise this remedial discretion judiciously, with due caution, and in a manner consistent with judicial principles, all the while ensuring preservation of the separation of powers doctrine. Additionally, Liebenberg and Arendse assert that courts have a significant role in catalysing and supporting the profound transformative changes envisioned by the Constitution.¹³⁷

While the Constitutional Court may have rejected the minimum core obligations approach in adjudicating the enforcement of the right to housing and healthcare, Paterson argues that the obligations generated by the right to basic education closely resemble the minimum core standard articulated in international human rights law norms and standards.¹³⁸ The minimum core obligations necessitate heightened care and urgency, a notion reinforced and mirrored in the unequivocal nature of basic education rights.¹³⁹ Consequently, the right to basic education, as delineated in the cases below, represents a socio-economic right confirmed to possess the constitutional authority of immediate enforceability without the qualifier of progressive realisation.¹⁴⁰ The cases of *Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another (Hoërskool Ermelo and Another)*, *Juma Masjid Primary School and others, Department of Education, Free State Province v Welkom High School & Another (Welkom High School and Another)*,¹⁴¹ and the *MEC for Education in Gauteng Province & other v Governing Body of Rivonia Primary School & others (Governing Body of Rivonia Primary School and others)* stand as the four significant educational rights judgments rendered by the Constitutional Court in South Africa.

¹³⁵ Liebenberg, S 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 (1) *Potchefstroom Electronic Law Journal* 1, 15.

¹³⁶ Arendse, L 'Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-*Juma Masjid*' (2020) 20 *African Human Rights Law Journal* 285, 288-290.

¹³⁷ Liebenberg, S 'Social Rights and Transformation in South Africa: Three Frames' (2015) 31 (1) *South African Journal on Human Rights* 446, 447.

¹³⁸ Paterson, K 'Constitutional Adjudication on the Right to Basic Education: Are we asking the State to do the Impossible?' (2018) 34 (1) *South African Journal on Human Rights* 113, 119.

¹³⁹ *Ibid* at 119.

¹⁴⁰ *Ibid* at 112; See further, Sefoka, IM 'Judicial Administration and Enforcement of the Right to Quality Education in South Africa: A Discussion of Selected Case Laws' (2022) 12 (2) *Journal of Educational and Social Research* 199, 202. Emphasis is put more on the nature and meaning of this right, the court also referred to section 28(2) of the Constitution in which children are afforded socio-economic rights without limitation or core constraint, which requires qualification; refer to 2011 (8) BCLR 761 (CC) 37.

¹⁴¹ 2013 (9) BCLR 989 (CC).

The legal dispute in the *Juma Masjid Primary School and others* case arose from a conflict between the right to education of learners attending Juma Masjid Primary School and the property rights of the landowner, represented by a Trust. The case also raised the question of whether non-state actors have an obligation to promote and fulfil the right to education for learners of Juma Masjid Primary School.¹⁴² Among its significant pronouncements, the court ruled on the negative obligations outlined in section 29(1) of the Constitution. The *Juma Masjid Primary School and others* case was seminal for its judicial remedy, which affirmed the unconditional nature of section 29(1) and established the right to basic education as immediately realisable, only subject to limitations prescribed by laws of general application.¹⁴³ Consequently, lower courts have relied on and adopted case-based judgments, such as *Juma Masjid Primary School and others*, regarding the immediate realisation of the right to basic education to provide substantive content to section 29(1)(a) of the Constitution.¹⁴⁴

It is notable that the court in this case was not tasked with ruling on the positive obligations of the right to basic education. Scholars like Skelton and Arendse suggest that, had the court considered the positive dimension of the right, it might have tightened the scope of the right, potentially leading to higher fiscal implications for the state.¹⁴⁵ Brand argues that the enforcement of positive obligations is perceived as potentially encroaching on the executive or legislative branch's decisions regarding budgetary allocations based on the doctrine of separation of powers.¹⁴⁶ This deferential approach by the court was also evident in the *Governing Body of Rivonia Primary School and others* case, where the Constitutional Court upheld the KwaZulu-Natal provincial Department of Education's decision to reduce subsidies for independent schools, emphasising that budgetary decision-making and its consequences fall within the domain of the provincial department and must be respected by the courts.¹⁴⁷

¹⁴² 2011 (8) BCLR 761 (CC) 1-3.

¹⁴³ Ibid at 57-60; See further, section 36 of the Constitution.

¹⁴⁴ Arendse, L 'Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-*Juma Masjid*' (2020) 20 *African Human Rights Law Journal* 285, 290-291; See further, Chiedza, S 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 126, 132; 2014 2 All SA 339 (ECM) 15.

¹⁴⁵ Skelton, A 'How Far will the Courts go in Ensuring the Right to a Basic Education?' (2012) 27 (2) *Southern African Public Law* 392, 397.

¹⁴⁶ Brand, D 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand, D and Heyns, C (eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press 2005) 11.

¹⁴⁷ 2013 (4) SA 262 (CC) 63.

However, unlike other cases like *Hoërskool Ermelo and Another, Welkom High School and Another*, and *Governing Body of Rivonia Primary School and others*, the court in the *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal & others Liaison Committee (KwaZulu-Natal and others Liaison Committee)* was willing to craft a remedy addressing both substantive and procedural issues, and emphasised resolving disputes through cooperation or meaningful engagement, rooted in the values of human dignity.¹⁴⁸ Nevertheless, analysis by scholars like Liebenberg,¹⁴⁹ and Skelton,¹⁵⁰ suggests that the Constitutional Court exercises caution in interpreting and enforcing positive obligations derived from socio-economic rights. Arendse suggests that the enforcement of the right to basic education in the *Juma Masjid Primary School and others* case might have differed had the court been presented with facts necessitating a ruling on the positive obligations of the right to basic education.¹⁵¹

Apart from the *Juma Masjid Primary School and others* and *KwaZulu-Natal and others Liaison Committee* cases, the legal disputes in *Hoërskool Ermelo and Another, Welkom High School and Another*, and *Governing Body of Rivonia Primary School and others* revolved around the contested authority to influence or formulate policy for schools, including restraining instances of perceived excess of power, which has been subject to litigation up to the Constitutional Court.¹⁵² These cases stemmed from concerns raised by School Governing Bodies (SGBs) regarding interventions by provincial Heads of Departments (HoDs) of education in matters such as language, pregnancy, and admission policies adopted by the respective governing bodies.

A notable aspect of these cases is the utilisation of ‘meaningful engagement’ as a constitutional remedy within the context of education rights. This remedy was employed as a mechanism to promote and fulfil the interests of the child, including human dignity, when resolving disputes between different branches and domains of government.¹⁵³ The Constitutional Court underscored

¹⁴⁸ Fredman, S ‘Procedure or Principle: The Role of Adjudication in Achieving the Right to Education’ (2016) 9 (1) *Constitutional Court Review* 165, 193.

¹⁴⁹ Liebenberg, S ‘Social Rights and Transformation in South Africa: Three Frames’ (2015) 31 (1) *South African Journal on Human Rights* 446, 454; See further, Skelton, A ‘How Far will the Courts go in Ensuring the Right to a Basic Education?’ (2012) 27 (2) *Southern African Public Law* 392.

¹⁵⁰ Skelton, A ‘The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law’ (2013) 46 (1) *De Jure* 1, 5.

¹⁵¹ Arendse, L ‘Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-*Juma Masjid*’ (2020) 20 *African Human Rights Law Journal* 285, 290.

¹⁵² Fredman, S ‘Procedure or Principle: The Role of Adjudication in Achieving the Right to Education’ (2016) 9 (1) *Constitutional Court Review* 165, 197.

¹⁵³ See for example, 2008 3 SA 208 (CC); See further, 2010 3 SA 454 (CC).

the importance of engagement and cooperation between SGBs and provincial HoDs as a constitutionally mandated approach to resolving legal disputes in the education rights context. Consequently, meaningful engagement featured prominently as a remedy ordered by the court to address disputes, and was significantly developed in these major cases, often forming part of provisional orders or structural interdicts, particularly in the *Hoërskool Ermelo and Another* and *Juma Masjid Primary School and others* cases.¹⁵⁴

Many legal and academic scholars view meaningful engagement in these contexts as an innovative remedial response to constitutional violations of educational rights outlined in section 29(1) of the Constitution, as well as other related rights in the Bill of Rights.¹⁵⁵ According to Liebenberg, three principles underpin the court's enforcement of the right to education, deduced from examining the role of meaningful engagement as a pioneering remedial action: substantive judicial reasoning, transparent and fair participation, and respect for the doctrine of separation of powers.¹⁵⁶ However, Fredman notes that while these cases demonstrate the court's role in adjudicating education rights disputes and developing jurisprudence in this context, they have not fully addressed some of the most challenging issues concerning the fair distribution of resources to achieve an equal right to quality education for all.¹⁵⁷

However, in the *Section 27 v Minister of Education (GNP)* and *Madzodzo v Minister of Basic Education* cases, the court demonstrated flexibility in formulating remedies, emphasising the critical importance of adequate infrastructure and socio-economic resources to ensure an equal right to quality education for all.¹⁵⁸ Moreover, the Constitutional Court sought to address underlying substantive issues by establishing a duty for all stakeholders in the education sector, including non-state actors and private institutions, to cooperate and engage meaningfully with one another.¹⁵⁹

¹⁵⁴ Liebenberg, S 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 (1) *Potchefstroom Electronic Law Journal* 1, 3.

¹⁵⁵ *Ibid* at 1, 3-4.

¹⁵⁶ *Ibid* at 6.

¹⁵⁷ Fredman, S 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2016) 9 (1) *Constitutional Court Review* 165, 197.

¹⁵⁸ 2013 2 SA 40 (GNP) 22-36; See further, 2014 2 All SA 339 (ECM) 17.

¹⁵⁹ Sefoka, IM 'Judicial Administration and Enforcement of the Right to Quality Education in South Africa: A Discussion of Selected Case Laws' (2022) 12 (2) *Journal of Educational and Social Research* 199, 199-204.

The Constitutional Court's pioneering efforts in fostering meaningful engagement in these cases establish a foundation for a structured and inclusive remedial process, aimed at revising policies to ensure the protection of learners' right to education in a non-discriminatory manner.¹⁶⁰ As noted by Liebenberg and others, participatory remedies are particularly effective in addressing deeply rooted institutional resistance to significant reforms.¹⁶¹ Despite some criticisms regarding the perceived inconsistency of the meaningful engagement approach and calls for its further development, the Constitutional Court has reaffirmed its transformative role in resolving and addressing systemic legal challenges concerning educational rights.¹⁶² Most importantly, to remain responsive to evolving societal standards of social justice, Arendse concurs with Liebenberg's view that the normative scope of socio-economic rights should not remain fixed, but must evolve progressively over time.¹⁶³

2.5 Conclusion

While South Africa's jurisprudence, and constitutional framework provide a robust foundation for protecting the rights of learners with special education needs, significant gaps persist in the realisation of these rights. Despite progressive legal provisions, and landmark court decisions, challenges remain in translating these principles into tangible improvements in educational outcomes for learners with special education needs. One glaring gap lies in the inadequate application, and enforcement of existing legislation and court judgments. Notwithstanding the legal mandates requiring inclusive education, and support services for these learners, many educational facilities still lack the required resources, infrastructure, and trained educators to effectively accommodate diverse learning requirements. This enforceability gap undermines the implementation of socio-economic rights for these learners, perpetuating systemic inequalities within the education system.

Furthermore, there is a lack of comprehensive data, and monitoring mechanisms to assess the impact of policies and interventions on the educational outcomes of learners with special education needs. In the absence of accurate and up-to-date data, policymakers face challenges in

¹⁶⁰ Ibid at 204.

¹⁶¹ Arendse, L 'Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-*Juma Musjid*' (2020) 20 *African Human Rights Law Journal* 285.

¹⁶² Ibid at 312.

¹⁶³ Ibid at 312.

identifying gaps in service delivery, and targeting resources effectively to address the needs of this vulnerable demographic. Furthermore, the fragmentation, and overlap of responsibilities between distinct government departments, and agencies contribute to bureaucratic inefficiencies, and coordination challenges in the provision of support services for these learners.

Hence, to address these gaps, and advance the realisation of socio-economic rights for these learners, concerted efforts are necessary to strengthen enforceability mechanisms, improve data collection, and monitoring systems, enhance intergovernmental coordination, and promote awareness, and acceptance of disability rights within society. Only through comprehensive and coordinated action can South Africa address the divide between legal principles, and practical realities, ensuring that all learners have equal treatment to thrive and succeed in academics and beyond.

CHAPTER 3: INTERNATIONAL OBLIGATIONS ON THE RIGHT TO EDUCATION FOR CHILDREN WITH SPECIAL EDUCATION NEEDS

3.1 Introduction

The right to education, recognised under international law, is a fundamental human right that applies universally. It applies equally to children with special education needs. This international human rights framework is crucial for guiding and assessing national efforts, such as in South Africa, to ensure equal access to education. Section 39 of the Constitution requires courts, tribunals or forums to consider international law when interpreting the rights in the Bill of Rights,¹⁶⁴ thereby reinforcing the relevance of global standards. This strengthens the country's commitment to inclusive education and aligns its domestic policies with international human rights obligations.

The purpose of the chapter is to provide an in-depth analysis of international instruments that enshrine the right to education, and their relevance to children with special education needs. It analyses how the instruments have shaped South Africa's obligations under international law, and the extent to which the country has fulfilled its duties regarding inclusive education.

The structure of the chapter is outlined as follows; an introduction providing an overview of the study, and the importance of the right to education under international law, and the specific focus on children's education, particularly those with special education needs. International Covenant on Civil and Political Rights (ICCPR),¹⁶⁵ discussing its relevance to the protection of human rights and education, and examining the specific obligations it imposes on states regarding the right to education. The discussion then shifts to international instruments on the right to basic education, starting with the basic education clauses in the Universal Declaration of Human Rights (UDHR),¹⁶⁶ the International Covenant on Economic, Social, and Cultural Rights

¹⁶⁴ Section 39(1)(b) of the Constitution; See further, Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 62; Arendse, L 'The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective' (2011) (14)6 *Potchefstroom Electronic Law Journal* 97, 99; Currie, I and De Waal, J *The Bill of Rights Handbook* (6th Ed., Juta Cape Town 2013) 146-147; Section 233 of the Constitution; *Kaunda v President of the Republic of South Africa and others* (2) 2004 (10) BCLR 1009 (CC) 33.

¹⁶⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereinafter 'the ICCPR').

¹⁶⁶ Universal Declaration of Human Rights (adopted 10 December 1948) United Nations General Assembly Resolution (UNGA Res) 217 A (III) (hereinafter 'the UDHR').

(ICESCR),¹⁶⁷ and the Convention on the Rights of the Child (CRC),¹⁶⁸ exploring how these documents enshrine the right to education.

The international jurisprudence of the right to basic education is then analysed, addressing the definitions and the evolving scope of the right under international law, followed by an examination of the international legal obligations of states to uphold this right and the accountability mechanisms in place to ensure compliance. The chapter then examines international instruments on the right to education for children with special education needs, focusing on the Convention on the Rights of Persons with Disabilities (CRPD),¹⁶⁹ and its legal obligations regarding inclusive education, as well as the Salamanca Statement,¹⁷⁰ and its global influence on inclusive education policies.

The chapter then shifts to regional instruments and their influence on education, discussing regional human rights instruments, like the African Charter on Human and Peoples' Rights (ACHPR),¹⁷¹ the African Charter on the Rights and Welfare of the Child (ACRWC),¹⁷² Southern African Development Community (SADC),¹⁷³ and the African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (ADP),¹⁷⁴ and analysing their impact on the right to education within their respective regions; finally, the chapter concludes by recapping the central arguments, emphasising the role of international law in securing the right to education, and concluding the study with a focus on the importance of continued global efforts to ensure universal access to quality education for all children.

¹⁶⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (hereinafter 'the ICESCR').

¹⁶⁸ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (hereinafter 'the CRC').

¹⁶⁹ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (hereinafter 'the CRPD').

¹⁷⁰ Salamanca Statement and Framework for Action on Special Needs Education (adopted 7-10 June 1994) (hereinafter 'Salamanca Statement').

¹⁷¹ African Charter on Human and Peoples' Rights, also known as Banjul Charter (adopted 27 June 1981, entered into force 21 October 1986) (Doc. CAB/ LEG/67/3.) (hereinafter 'the ACHPR').

¹⁷² African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) (Doc. CAB/ LEG/24.9/49.) (hereinafter 'the ACRWC').

¹⁷³ Southern African Development Community (1992) (hereinafter 'SADC').

¹⁷⁴ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (adopted 29 January 2018, not yet in force) (hereinafter 'the ADP').

3.2 International Covenant on Civil and Political Rights (ICCPR)

South Africa signed the ICCPR in 1994 and ratified it in 1998.¹⁷⁵ The ICCPR is a core international instrument that is part of the International Bill of Rights.¹⁷⁶ Adopted by the United Nations (UN) in 1966, the ICCPR specifically addresses civil and political rights. However, it does not contain a specific article regarding the right to education. Nevertheless, two articles of the ICCPR are crucial in recognising and articulating the right to education.¹⁷⁷ Article 18 pertains to the right to freedom of thought, conscience, and religion granted to all individuals,¹⁷⁸ while article 18(4) specifically mentions religious and moral education.¹⁷⁹ Article 19 focuses on freedom of expression, which encompasses the right to seek, receive, and share information and ideas – fundamental elements of an effective learning environment.¹⁸⁰ The provision in article 18 safeguards the rights of parents and guardians concerning the upbringing of their children, particularly with regard to their religious and moral education in accordance with their beliefs

¹⁷⁵ United Nations, United Nations Human Rights Office of the High Commissioner ‘International Covenant on Civil and Political Rights’ (Date not specified 1996 – 2024) < <https://indicators.ohchr.org/> > accessed 14 November 2024.

¹⁷⁶ ICCPR entered into force for South Africa on the 10th of March 1999; however, for countries in general, the ICCPR entered into force on the 23rd of March 1976; United Nations, United Nations Human Rights Office of the High Commissioner ‘International Covenant on Civil and Political Rights’ (Date not specified 1996 – 2024) < <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> > accessed 13 November 2024; See further, Viljoen, F *International Human Rights Law in Africa* (2nd Ed., Oxford: Oxford University Press 2012) 96 – 114; Beiter, KD *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (Leiden Martinus Nijhoff 2006) 102.

¹⁷⁷ Beiter, KD *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (Leiden Martinus Nijhoff 2006) 102.

¹⁷⁸ Article 18(1)(2)(3) of the ICCPR provides that:

‘1. Every individual shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching;

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice; and

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others;’ See further, Beiter, KD *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (Leiden Martinus Nijhoff 2006) 103.

¹⁷⁹ Article 18(4) of the ICCPR, which provides that, ‘states parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable legal guardians to ensure the religious and moral education of their children in conformity with their own convictions;’ See further, Beiter, KD *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (Leiden Martinus Nijhoff 2006) 103.

¹⁸⁰ Article 19 of the ICCPR.

and convictions.¹⁸¹ State parties to the ICCPR are required to uphold the rights of parents concerning educational rights.¹⁸² Article 18(4) closely parallels article 13(3) of the ICESCR, which also identifies the element of freedom as a crucial aspect of the right to education.¹⁸³ The influence of the UDHR on the ICCPR is illustrated by comparing article 26(3) of the UDHR¹⁸⁴ to article 18(4) of the ICCPR.¹⁸⁵ It becomes clear that both these international human rights instruments highlight the significance of parental responsibilities and rights with respect to a child's educational development.

Therefore, this discussion further analyses the key principles and obligations of the UDHR, ICESCR, and CRC, analysing their roles in advancing and protecting the rights of children, particularly in the context of education, as discussed below.

3.3 International instruments on the right to basic education

3.3.1 *Basic education clauses in the UDHR, ICESCR and CRC*

To determine whether South Africa fulfils its international obligations, it is essential to define the precise nature of those obligations. This entails a thorough analysis of international law to identify these responsibilities. The right to basic education is protected by numerous international instruments and has been extensively articulated within the frameworks of children's rights and socio-economic rights discourse.

¹⁸¹ In South Africa's pluralistic society, the interplay between religious freedom and the right to education holds considerable importance, for a detailed discussion on this issue, see Part III, articles 18 and 19 of the ICCPR.

¹⁸² Article 18(4) of the ICCPR; See further, Beiter, *KD Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (Leiden Martinus Nijhoff 2006) 103.

¹⁸³ Beiter, *KD Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (Leiden Martinus Nijhoff 2006) 103; See further, Article 13(3) of the ICESCR which provides that 'states must respect the liberty of parents and legal guardians to choose schools for their children, other than those established by public authorities, as long as these schools conform to the minimum educational standards laid down or approved by the state. It protects further, the right of parents and guardians to ensure that the religious and moral education of their children aligns with their own convictions.'

¹⁸⁴ Article 26(3) of the UDHR which provides that 'parents have a prior right to choose the kind of education that shall be given to their children.' This provision recognises and protects the authority of the parents in making decisions concerning their children's education.

¹⁸⁵ Article 18(4) of the ICCPR which provides that 'states parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.'

The UDHR stands out as a foundational document in international human rights law, proclaiming the rights inherent to all human beings.¹⁸⁶ Article 26 of the UDHR articulates the right to education, stating that everyone has the right to education and that elementary education should be made free and compulsory.¹⁸⁷ This declaration serves as a guiding framework for countries around the world, including South Africa, in their quest to uphold the dignity and rights of individuals.

The ICESCR was signed by South Africa in 1994,¹⁸⁸ and subsequently ratified in 2015,¹⁸⁹ it represents a crucial component of international human rights law, recognising the right to education as essential for the realisation of other rights. Article 13 requires states to recognise the right of everyone to education. Similarly, the UDHR imposes a responsibility on states to make primary education compulsory and available for free to all.¹⁹⁰

¹⁸⁶ United Nations, Human Rights Office of the High Commissioner 'The Universal Declaration of Human Rights' (Date not specified 1996 - 2024) < <http://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx> > accessed 14 November 2024; See further, McMillan, LK 'What's in a Right? Two Variations for Interpreting the Right to Education' (2010) 56 *International Review of Education* 531, 531-545; Hüfner, K 'The Human Rights Approach to Education in International Organisation' (2011) 46 *European Journal of Education* 117, 120; Holzscheiter, A *Children's Rights in International Politics: the Transformative Power of Discourse* (UK: Palgrave Macmillan 2010) 125; United Nations General Assembly, 'Universal Declaration of Human Rights,' 10 December 1948, 217 A (III); Kalantry, S, Getgen, JE and Koh, SA 'Enhancing Enforcement of Economic, Social and Cultural Rights using Indicators: a Focus on the Right to Education in the ICESCR' (2010) 32 *Human Rights Quarterly* 253, 253-254.

¹⁸⁷ Article 26 of the UDHR; See further, Daudet, Y and Singh, K *The Right to Education: An Analysis of UNESCO's Standard-setting Instruments* (Paris UNESCO 2001) 15; Beiter, KD *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (Leiden Martinus Nijhoff 2006) 92.

¹⁸⁸ ICESCR entered into force for South Africa on the 12th of January 2015; however, for countries in general, the ICESCR entered into force on the 3rd of January 1976; United Nations, Human Rights Office of the High Commissioner 'International Covenant on Economic, Social and Cultural Rights' (Date not specified 1996-2024) < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> > accessed 14 November 2024; See further, United Nations General Assembly, 'International Covenant on Economic, Social and Cultural Rights,' 16 December 1966, United Nations, Treaty Series, vol. 993.

¹⁸⁹ United Nations, Human Rights Office of the High Commissioner 'Status of Ratification' (Date not specified 1996-2024) < <http://indicators.ohchr.org/> > accessed 14 November 2024; See further, United Nations General Assembly, 'International Covenant on Economic, Social and Cultural Rights,' 16 December 1966, United Nations, Treaty Series, vol. 993.

¹⁹⁰ Article 13 of the ICESCR; See further, for example, Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 62; Daudet, Y and Singh, K *The Right to Education: An Analysis of UNESCO's Standard-setting Instruments* (Paris UNESCO 2001) 14; Beiter, KD *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (Leiden Martinus Nijhoff 2006) 1; Arendse, L 'The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective' (2011) (14)6 *Potchefstroom Electronic Law Journal* 97, 100.

South Africa signed and ratified the CRC in 1995.¹⁹¹ It was considered the first human rights treaty to clearly forbid discrimination against children due to disability.¹⁹² It is a comprehensive treaty that enshrines the rights of children, emphasising the need for special protection for vulnerable groups, including those with special education needs. Articles 28 and 29 affirm the right to education,¹⁹³ while article 23 specifically acknowledges the rights of children with special education needs to receive appropriate care, education, and support tailored to their needs.¹⁹⁴

¹⁹¹ As ratified by South Africa on the 16th of June 1995 and entered into force on the 7th of January 1996; United Nations, Treaty Collection ‘Convention on the Rights of the Child’ (Date not specified 2024) < https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en > accessed 14 November 2024.

¹⁹² Moore, SA, Melchior, L and Davis, JM ‘Me and the 5 P’s: Negotiating Rights-Based Critical Disabilities Studies and Social Inclusion’ (2008) 16 *International Journal of Children’s Rights* 249, 254; See further, Boezaart, T ‘A Constitutional Perspective on the Rights of Children with Disabilities in an Educational Context’ (2012) 27 *Southern African Public Law* 456, 462-463.

¹⁹³ Articles 28(1) of the CRC which provides that ‘states parties recognise the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means; and
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.’ And article 29 which provides that ‘states parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;’ See further, for a full discussion on the issue, United Nations, United Nations Human Rights Office of the High Commissioner, ‘General Comment No. 1: The Aims of Education (article 29) (2001)’ (17 April 2001) <

[¹⁹⁴ Article 23 of the CRC; For a full discussion on the issue, see, United Nations, United Nations Human Rights Office of the High Commissioner, ‘Convention on the Rights of the Child’ \(Date not specified\) <](https://www.bing.com/ck/a?!&&p=6f0e557f338c95d3d8e486c63af98474992d32996bd1de760004f6f283ea3e5cJmltdHM9MTczNzc2MzIwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+Convention+on+the+Rights+of+the+Child%2c+%e2%80%98Committee+of+the+Rights+of+the+Child%3a+General+Comment+No.+1%3a+The+Aims+of+Education+(CRC%2fGC%2f2001%2f1)%e2%80%99+(17+April+2001)+%3c+CRC_General_Comment_1_en.pdf+%3e+accessed+14+November+2024&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL3Jlc291cmNlcy9lZHVjYXRvcnMvaHVtYW4tcmlnaHRzLWVkdWNhdGlvb10cmFpbmluZy9nZW5lcmFsLWNvbW1lbnQtbm8tMS1haW1zLWVkdWNhdGlvb1hcnRyY2x1LTl5LTl5MDE&ntb=1 > accessed 26 January 2025.</p></div><div data-bbox=)

[41](https://www.bing.com/ck/a?!&&p=2e6a7668e45a5d71524c10a09467bc1cd3dc004f4b4de3610578e30ebee87c7dJmltdHM9MTczNzc2MzIwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=%e2%80%98Convention+on+the+Rights+of+the+Child%e2%80%99+(Date+not+specific+d+2024)+%3c+Convention+on+the+Rights+of+the+Child+%7c+OHCHR+%3e+accessed+15+November+2024&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL2luc3RydW1lbnRzLW11Y2hhbm1zXmvaW5zdHJ1bWVudHMvY29udmVudGlvb1yaWdodHMtY2hpbGQ&ntb=1 > accessed 26 January 2025.</p></div><div data-bbox=)

The UDHR, along with binding ICESCR and CRC, not only establish a strong framework for the protection of children's rights, but also obliges states to ensure that all children, regardless of their circumstances, can enjoy their right to education.

3.3.2 *International jurisprudence on the right to basic education*

The understanding of the right to education under international law has been shaped by treaties, guidelines, and key case law, each offering insight into states' obligations. The ICESCR is a central instrument, with article 13 establishing education as a right and setting out its objectives.¹⁹⁵ The United Nations Committee on Economic, Social, and Cultural Rights (CESCR Committee) elaborated on this in General Comment No. 13, which clarifies four essential elements, namely: availability, accessibility, acceptability, and adaptability.¹⁹⁶

Availability entails that adequate educational infrastructure and resources must be in place as a prerequisite for the realisation of the right to education.¹⁹⁷ This obligation requires the state to

¹⁹⁵ Article 13 of the ICESCR; See further, Tomaševski, K *Right to Education Primers No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Gothenburg Novum Grafiska 2001) 3-43; Daudet, Y and Singh, K *The Right to Education: An Analysis of UNESCO's Standard-setting Instruments* (Paris UNESCO 2001) 14; Beiter, KD *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (Leiden Martinus Nijhoff 2006) 1; Arendse, L 'The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective' (2011) (14)6 *Potchefstroom Electronic Law Journal* 97, 100.

¹⁹⁶ For a full discussion on the issue, see United Nations, United Nations Human Rights Office of the High Commissioner, 'd) General Comment No. 13: The right to education (article 13) (1999)' (8 December 1999) < <https://www.bing.com/ck/a?!&&p=59f9fe16ed128386a0dbcf61eaae1d98a8996295e8d2452c6c6e3880b3ec1b0bJmldHM9MTczNzc2MzlwMA&pntn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Article+13+of+CESCR&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL3Jlc291cmNlcy9IZHVjYXRvcnMvaHVtYW4tcmlnaHRzLWVkdWNhdGlvbi10cmFpbmluZy9kLWdlbmVyYWwtY29tbWVudC1luby0xMy1yaWdodC1IZHVjYXRpb24tYXJ0aWNsZS0xMy0xOTk5&ntb=1> > accessed 26 January 2025; See further, Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 63; Tomaševski, K *Human Rights Obligations in Education: The 4-A Scheme* (Tilburg Wolf Legal Publishers 2006) 1-148; Tomaševski, K *Right to Education Primers No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Gothenburg Novum Grafiska 2001) 3-43.

¹⁹⁷ See the United Nations, United Nations Human Rights Office of the High Commissioner, 'd) General Comment No. 13: The right to education (article 13) (1999)' (8 December 1999) < <https://www.bing.com/ck/a?!&&p=59f9fe16ed128386a0dbcf61eaae1d98a8996295e8d2452c6c6e3880b3ec1b0bJmldHM9MTczNzc2MzlwMA&pntn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Article+13+of+CESCR&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL3Jlc291cmNlcy9IZHVjYXRvcnMvaHVtYW4tcmlnaHRzLWVkdWNhdGlvbi10cmFpbmluZy9kLWdlbmVyYWwtY29tbWVudC1luby0xMy1yaWdodC1IZHVjYXRpb24tYXJ0aWNsZS0xMy0xOTk5&ntb=1> > accessed 26 January 2025; See further, Article 13 of the ICESCR; Arendse, L 'The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective' (2011) (14)6 *Potchefstroom Electronic Law Journal* 97, 102; Tomaševski, K *Right to Education Primers No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Gothenburg Novum Grafiska 2001) 3-43; Tomaševski, K *Human Rights Obligations in Education: The 4-A Scheme* (Tilburg Wolf Legal Publishers 2006) 1-147.

ensure the physical presence of schools, appropriate training for educators, the provision of essential teaching materials, and access to sanitary facilities and relevant technology, necessary for creating an environment conducive to learning and enabling effective participation in education.¹⁹⁸

Accessibility encompasses three interdependent dimensions.¹⁹⁹ Firstly, physical accessibility requires that educational facilities be situated within a reasonable geographic distance, ensuring learners can reach them safely.²⁰⁰ Secondly, non-discriminatory access mandates that education be available to all without exclusion or discrimination on any grounds.²⁰¹ Thirdly, economic accessibility obliges that education be financially attainable for everyone,²⁰² prohibiting barriers, like tuition fees from impeding a learner's enrolment due to an inability to pay.²⁰³ These components collectively ensure that education is universally attainable and inclusive.

Acceptability requires that both the form and substance of education be culturally appropriate and of high quality.²⁰⁴ Accordingly, the curriculum and teaching methods used must meet standards of acceptability.²⁰⁵ This is particularly challenging in a country like South Africa, where diverse cultures and beliefs exist. What is deemed acceptable within one community may not be regarded as such in another.

Lastly, adaptability requires that education be responsive to the evolving needs of society.²⁰⁶ This involves equipping individuals with the relevant skills and knowledge essential for advancing economic and national development.²⁰⁷ Additionally, it encompasses the capacity of the education system to accommodate minority and vulnerable groups, like children with special

¹⁹⁸ See the United Nations, United Nations Human Rights Office of the High Commissioner, 'd) General Comment No. 13: The right to education (article 13) (1999)' (8 December 1999) <

<https://www.bing.com/ck/a?!&&p=59f9fe16ed128386a0dbcf61eaae1d98a8996295e8d2452c6c6e3880b3ec1b0bJmltdHM9MTczNzc2MzlwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Article+13+of+CESCR&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL3Jlc291cmNlcy9IZHVjYXRvcnMvaHVtYW4tcmlnaHRzLWVkdWNhdGlvbi10cmFpbmluZy9kLWdlbmVyYWwtY29tbWVudC1uby0xMy1yaWdodC1IZHVjYXRpb24tYXJ0aWNsZS0xMy0xOTk5&ntb=1> > accessed 26 January 2025.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

education needs.²⁰⁸ Thus, collectively, these four elements serve to realise the objectives of article 13 of the ICESCR.²⁰⁹

The Convention against Discrimination in Education (CADE),²¹⁰ also adds to the interpretation of the right enshrined in the CADE adopted by UNESCO in 1960,²¹¹ which strengthens the anti-discrimination dimension of the right to education, emphasising equality of opportunity. This Convention specifically requires states to take steps to eliminate discriminatory practices and barriers that prevent equal educational access, particularly for marginalised groups. A 2008 UNESCO comparative analysis demonstrates that both the CADE and the ICESCR share the objective of ensuring that all individuals can benefit from the right to education, regardless of background, reinforcing the universality and inclusivity of this right.²¹²

International case law further illustrates how courts enforce these standards. The Economic Community of West African States (ECOWAS) Community Court of Justice addressed educational accessibility in *Ghanaian Students v Ghana*,²¹³ where the failure to ensure free primary education was deemed a violation of international obligations.²¹⁴ The case highlights the judiciary's role in interpreting education rights and holding states accountable for barriers that infringe on this fundamental right.

²⁰⁸ Ibid.

²⁰⁹ See, United Nations, United Nations Human Rights Office of the High Commissioner, 'd) General Comment No. 13: The right to education (article 13) (1999)' (8 December 1999) <

<https://www.bing.com/ck/a?!&&p=59f9fe16ed128386a0dbcf61eaae1d98a8996295e8d2452c6c6e3880b3ec1b0bJm1tdHM9MTczNzc2MzlwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Article+13+of+ICESCR&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL3Jlc291cmNlcy9IZHVjYXRvcnMvaHVtYW4tcmlnaHRzLWVkdWNhdGlvbi10cmFpbmluZy9kLWdlbmVyYWwtY29tbWVudC1uby0xMy1yaWdodC1IZHVjYXRpb24tYXJ0aWNsZS0xMy0xOTk5&ntb=1> > accessed 26 January 2025; See further, Tomaševski, K *Human Rights Obligations in Education: The 4-A Scheme* (Tilburg Wolf Legal Publishers 2006) 1-148; Tomaševski, K *Right to Education Primers No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Gothenburg Novum Grafiska 2001) 3-43.

²¹⁰ UNESCO, Convention Against Discrimination in Education, adopted on the 14th of December 1960, entered into force on the 22nd of May 1962, 429 UNTS 93; See further; Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 62.

²¹¹ UNESCO, Convention Against Discrimination in Education, adopted by the General Conference of UNESCO at its 11th session, 14 December 1960.

²¹² UNESCO, Comparative Analysis of the Right to Education under the CDE and ICESCR (2008).

²¹³ ECOWAS Community Court of Justice, *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*, Case No. ECW/CCJ/APP/12/07, Judgement of 27 October 2009 (also referred to as 'Ghanaian v Ghana').

²¹⁴ Ibid.

The obligation to provide free and compulsory education is elaborated in the General Comment No. 11 of the CESCR, which outlines the Plans of Action for Primary Education.²¹⁵ According to this framework, compulsory education signifies that it is not optional for either the state or parents/guardians but that primary education must be mandatory.²¹⁶ The concept of free education is explicitly defined to ensure that no fees are levied that would prevent children from accessing primary education.²¹⁷ In instances where states are unable to immediately provide free and compulsory education, they are required to establish a progressive plan of action to implement this right in stages over time, in line with available resources and capacity.²¹⁸

3.3.3 *The right to basic education as an international legal obligation*

Legal obligations under international law, as emphasised by numerous scholars in the field, are anchored in several key principles and frameworks, which guide the implementation of the right to education. Craven emphasises that these obligations require states to take both immediate actions, such as providing free primary education, and progressive measures, including improving access to secondary education.²¹⁹ Cassese contends that customary international law also reinforces the right to education, obliging states to recognise its fundamental importance,

²¹⁵ United Nations Economic and Social Council, ‘General Comment No. 11: Plans of Action for Primary Education (art. 14 of the Covenant’ (10 May 1999) < [https://www.bing.com/ck/a?!&&p=527c42566fc87bfeb1bca8a25ce8678f5dfac04ad5dda6756ac46fa9b9737650JmltdHM9MTczNzc2MzIwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+Economic+and+Social+Council%2c+%e2%80%98United+Nations+Committee+on+Economic%2c+Social%2c+and+Cultural+Rights+\(E%2f1992%2f23\)%e2%80%99+\(10+May+1999\)+%3c+General+Comment+No.+11%3a+Plans+of+Action+for+Primary+Education+\(Art.+14+of+the+Covenant\)+%7c+Refworld+%3e+accessed+15+November+2024&u=a1aHR0cHM6Ly93d3cucmVmd29ybGQub3JnL2RvY2lkLzQ1Mzg4MzhjMC5odGIs&ntb=1](https://www.bing.com/ck/a?!&&p=527c42566fc87bfeb1bca8a25ce8678f5dfac04ad5dda6756ac46fa9b9737650JmltdHM9MTczNzc2MzIwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+Economic+and+Social+Council%2c+%e2%80%98United+Nations+Committee+on+Economic%2c+Social%2c+and+Cultural+Rights+(E%2f1992%2f23)%e2%80%99+(10+May+1999)+%3c+General+Comment+No.+11%3a+Plans+of+Action+for+Primary+Education+(Art.+14+of+the+Covenant)+%7c+Refworld+%3e+accessed+15+November+2024&u=a1aHR0cHM6Ly93d3cucmVmd29ybGQub3JnL2RvY2lkLzQ1Mzg4MzhjMC5odGIs&ntb=1) > accessed 26 January 2025; See further, Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 63; Arendse, L ‘The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective’ (2011) (14)6 *Potchefstroom Electronic Law Journal* 97, 100.

²¹⁶ United Nations Economic and Social Council, ‘General Comment No. 11: Plans of Action for Primary Education (art. 14 of the Covenant’ (10 May 1999) < [https://www.bing.com/ck/a?!&&p=527c42566fc87bfeb1bca8a25ce8678f5dfac04ad5dda6756ac46fa9b9737650JmltdHM9MTczNzc2MzIwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+Economic+and+Social+Council%2c+%e2%80%98United+Nations+Committee+on+Economic%2c+Social%2c+and+Cultural+Rights+\(E%2f1992%2f23\)%e2%80%99+\(10+May+1999\)+%3c+General+Comment+No.+11%3a+Plans+of+Action+for+Primary+Education+\(Art.+14+of+the+Covenant\)+%7c+Refworld+%3e+accessed+15+November+2024&u=a1aHR0cHM6Ly93d3cucmVmd29ybGQub3JnL2RvY2lkLzQ1Mzg4MzhjMC5odGIs&ntb=1](https://www.bing.com/ck/a?!&&p=527c42566fc87bfeb1bca8a25ce8678f5dfac04ad5dda6756ac46fa9b9737650JmltdHM9MTczNzc2MzIwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+Economic+and+Social+Council%2c+%e2%80%98United+Nations+Committee+on+Economic%2c+Social%2c+and+Cultural+Rights+(E%2f1992%2f23)%e2%80%99+(10+May+1999)+%3c+General+Comment+No.+11%3a+Plans+of+Action+for+Primary+Education+(Art.+14+of+the+Covenant)+%7c+Refworld+%3e+accessed+15+November+2024&u=a1aHR0cHM6Ly93d3cucmVmd29ybGQub3JnL2RvY2lkLzQ1Mzg4MzhjMC5odGIs&ntb=1) > accessed 26 January 2025.

²¹⁷ Ibid.

²¹⁸ United Nations General Assembly, ‘International Covenant on Economic, Social and Cultural Rights,’ 16 December 1966, United Nations, Treaty Series, vol. 993, Article 14.

²¹⁹ Craven, A *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Oxford Clarendon Press 1995).

regardless of treaty ratifications, when education is widely practiced and legally acknowledged as a norm.²²⁰ Furthermore, Olivier highlights that the obligation to provide education is recognised as a universal duty owed to all learners, ensuring accountability for violations that undermine access to education.²²¹ Alston points out that soft law instruments, such as General Comments No. 13 by the CESCR Committee, offer detailed interpretations of states' duties and contribute to the development of binding international norms over time.²²² Klabbers underscores that international organisations like the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and United Nations Children's Fund (UNICEF) further stress the importance of education as a global priority, offering guidance and support to states in fulfilling their obligations.²²³ Higgins notes that, despite these frameworks, enforcement mechanisms remain limited, relying on international bodies and the courts to hold states accountable and ensure compliance.²²⁴ Collectively, these legal obligations aim to guarantee the realisation of the right to education, particularly for marginalised groups and vulnerable populations, such as children with special education needs.

3.4 International instruments on the right to education for children with special education needs

3.4.1 *Convention on the Rights of Persons with Disabilities (CRPD)*

South Africa signed and ratified the CRPD in 2007.²²⁵ Under this Convention, several articles directly relates to the right to education for children with special education needs. While the country has since introduced legislation and policies aimed at supporting the rights of persons

²²⁰ Cassese, A *International Law* (2nd Ed., Oxford University Press 2005).

²²¹ Olivier, M 'The Relevance of 'Soft Law' as a Source of International Human Rights' (2002) 3 *Comparative and International Law Journal of Southern Africa* 290, 290-307.

²²² Alston, P 'Soft Law in International Human Rights Law: The Role of the Universal Declaration of Human Rights' (1987) 81 (3) *American Journal of International Law* 609.

²²³ Klabbers, J *Introduction to International Organisations Law* (3rd Ed., Cambridge University Press 2015).

²²⁴ Higgins, R *Problems and Process: International Law and How We Use It* (Clarendon Press 1994).

²²⁵ United Nations, Convention on the Rights of Persons with Disabilities 'Status of Ratification' (Date not specified 1996) <
[https://www.bing.com/ck/a?!&p=02ee9c5b8521a0c80f71b9aba8f13b21649d149fb3f074451a953b76b248fac5JmldHM9MTczNzg00TYwMA&pntn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations%2c+Convention+on+the+Rights+of+Persons+with+Disabilities+%e2%80%98Status+of+Ratification%e2%80%99+\(Date+not+specified+1996+%e2%80%93+2014\)+%3c-+OHCHR+Dashboard+%3e+accessed+16+November+2024&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL2luc3RydW1lbnRzLW11Y2hhbmlzbXMvaW5zdHJ1bWVudHMvY29udmVudGlvbi1yaWdodHMtcGVyc29ucy1kaXNhYmlsaXRpZXM&ntb=1](https://www.bing.com/ck/a?!&p=02ee9c5b8521a0c80f71b9aba8f13b21649d149fb3f074451a953b76b248fac5JmldHM9MTczNzg00TYwMA&pntn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations%2c+Convention+on+the+Rights+of+Persons+with+Disabilities+%e2%80%98Status+of+Ratification%e2%80%99+(Date+not+specified+1996+%e2%80%93+2014)+%3c-+OHCHR+Dashboard+%3e+accessed+16+November+2024&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL2luc3RydW1lbnRzLW11Y2hhbmlzbXMvaW5zdHJ1bWVudHMvY29udmVudGlvbi1yaWdodHMtcGVyc29ucy1kaXNhYmlsaXRpZXM&ntb=1) > accessed 26 January 2025.

with special education needs, it has not yet fully adopted measures to implement all provisions of this document.²²⁶ The Convention clarifies the obligations and legal duties of states to respect and ensure the equal enjoyment of all human rights by persons with special education needs.²²⁷ Plenty of the general principles governing the Convention have a direct bearing on the education context on children with special education needs,²²⁸ like: a) respect for the evolving capacities of the child;²²⁹ b) the right of the child to preserve their identity;²³⁰ c) full enjoyment of all human rights and freedoms on an equal basis with other children;²³¹ d) full and effective participation and inclusion;²³² and e) accessibility.²³³

Article 24(1) mandates that states recognise the right of individuals with disabilities to access education. In order to realise this right in a manner free from discrimination and based on equal opportunity, states must establish an inclusive education system at all levels and ensure lifelong learning opportunities. States are also required to promote the full development of the human potential, maintaining a sense of dignity and self-worth while fostering respect for human rights, freedoms, and diversity. Further, states must facilitate the development of individuals with

²²⁶ Boezaart, T and Skelton, A ‘From Pillar to Post: Legal Solutions for Children with Debilitating Conduct Disorder’ in Du Plessis, IG and Van Reenen, T (eds), *Aspects of Disability Law in Africa* (Pretoria University Press 2011) 119-120; See further, Boezaart, T ‘A Constitutional Perspective on the Rights of Children with Disabilities in an Educational Context’ (2012) 27 *Southern African Public Law* 456, 463.

²²⁷ Boezaart, T ‘A Constitutional Perspective on the Rights of Children with Disabilities in an Educational Context’ (2012) 27 *Southern African Public Law* 456, 463.

²²⁸ See article 3 of the CRPD; United Nations, United Nations Human Rights Office of the High Commissioner, ‘Convention on the Rights of Persons with Disabilities’ (12 December 2006) < [https://www.bing.com/ck/a?!&&p=d8fc1597c00d0b3a93ee6966d5e0f71f2370adf18bb4eeb24e0c9655fc28a355JmldHM9MTczNzg00TYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Convention+on+the+Rights+of+Persons+with+Disabilities%e2%80%99+\(12+December+2006\)+%3c+Convention+on+the+Rights+of+Persons+with+Disabilities&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL2luc3RydW1lbnRzLW11Y2hhbmlzbXMvaW5zdHJ1bWVudHMvY29udmVudGlvbi1yaWdodHMtcGVyc29ucy1kaXNhYmlsaXRpZXM&ntb=1](https://www.bing.com/ck/a?!&&p=d8fc1597c00d0b3a93ee6966d5e0f71f2370adf18bb4eeb24e0c9655fc28a355JmldHM9MTczNzg00TYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Convention+on+the+Rights+of+Persons+with+Disabilities%e2%80%99+(12+December+2006)+%3c+Convention+on+the+Rights+of+Persons+with+Disabilities&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL2luc3RydW1lbnRzLW11Y2hhbmlzbXMvaW5zdHJ1bWVudHMvY29udmVudGlvbi1yaWdodHMtcGVyc29ucy1kaXNhYmlsaXRpZXM&ntb=1) > accessed 26 January 2025; See further, Boezaart, T ‘A Constitutional Perspective on the Rights of Children with Disabilities in an Educational Context’ (2012) 27 *Southern African Public Law* 456, 463; Hansungule, Z and Boezaart, T ‘The Socio-Economic Rights of Children with Disabilities in South Africa: A Comparison Between the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons With Disabilities’ (2017) 5 *African Disability Rights Yearbook* 40, 50 Retrieved from < <http://doi.org/10.29053/2413-7138/2017/v5n1a3> > accessed 17 November 2024.

²²⁹ Article 3(h) of the CRPD; See further, *Ibid* at 463; *Ibid* at 50.

²³⁰ Articles 3(h) and 24(1)(b) of the CRPD; See further, *Ibid* at 463; *Ibid* at 50.

²³¹ Articles 4, 7(1) and 24(1)(a) of the CRPD; See further, *Ibid* at 464; *Ibid* 50.

²³² Articles 3, 19, 24(1)(c) and 30 of the CRPD; See further, *Ibid* at 464; *Ibid* at 50.

²³³ Articles 3 and 9 of the CRPD; See further; *Ibid* at 464; *Ibid* at 50.

disabilities in terms of their personality, talents, creativity, and both mental and physical capabilities, enabling their full participation in a free society.²³⁴

Article 24(2) stipulates that to ensure the realisation of the right to education, states must ensure that individuals with disabilities are not excluded from the general education system due to their disability. Moreover, children with disabilities must not be excluded from free and compulsory primary or secondary education based on their disability. States must ensure that individuals with disabilities can access inclusive, high-quality, free primary and secondary education on an equal basis with their peers in their respective communities. It also requires that reasonable accommodations be made to address individual needs and that necessary support is provided within the general education system to promote effective education. This support should include tailored individual measures aimed at maximising academic and social development in inclusive environments.²³⁵

Article 24(3) mandates that states facilitate the acquisition of life and social development skills for individuals with disabilities to promote their full and equal participation in education and community life. States must take appropriate measures, which may include supporting the learning of braille, alternative scripts, augmentative and alternative communication methods, and orientation and mobility skills, alongside peer support and mentoring. States are also required to promote the use of sign language and encourage the linguistic identity of the deaf community. Additionally, the education of blind, deaf, or deafblind individuals, particularly children, must be delivered in the most suitable languages, communication methods, and environments to optimise their academic and social development.²³⁶

Article 24(4) requires states to take appropriate steps to employ qualified teachers, including those with disabilities, who are proficient in sign language or braille. States must also ensure that educational professionals and staff at all levels of education are adequately trained in disability awareness and in the use of suitable augmentative and alternative communication methods, techniques, and materials to support individuals with disabilities.²³⁷

²³⁴ Article 24(1) of the CRPD; See further; Ibid at 464; Ibid at 54.

²³⁵ Article 24(2) of the CRPD; See further; Ibid at 464; Ibid at 55.

²³⁶ Article 24(3) of the CRPD; See further; Ibid at 464; Ibid at 55.

²³⁷ Article 24(4) of the CRPD; See further; Ibid at 464; Ibid at 55.

Generally, the key aspect of article 24 of the CRPD is to establish obligations for states, including South Africa, to ensure inclusion, equality, and accessibility for persons with special education needs across all areas of life.

3.4.2 Salamanca Statement

Aligned with Article 24 of the CRPD, which emphasises the right of persons with special education needs to inclusive education, the Salamanca Statement reinforces the principle of inclusive education by advocating for the integration of children with special education needs into mainstream educational settings.²³⁸ Thus, the right to education for children with special education needs was comprehensively addressed at the Salamanca Conference, which aimed to advance the objective of Education for All.²³⁹ Prior to the conference, the predominant educational responses for children with special education needs were largely influenced by the medical model of disability.²⁴⁰ Children with disabilities were classified as ‘children with special needs,’²⁴¹ a term that lacked a clear definition and encompassed those who did not conform to the standard educational framework.²⁴² Based on the nature of their disabilities, these children

²³⁸ World Conference on Special Needs Education: Access and Quality, The Right to Basic Education ‘The Salamanca Statement and Framework for Action on Special Needs Education’ (Date not specified 1994) Retrieved from < <https://www.right-to-education.org/resource/salamanca-statement-and-framework-action-special-needs-education> > accessed 17 November 2024.

²³⁹ Ibid, See also, UNESCO, The Salamanca Statement and Framework for Action on Special Needs Education (adopted at the World Conference on Special Needs Education: Access and Quality, Salamanca, 7-10 June 1994).

²⁴⁰ United Nations, United Nations Human Rights Office of the High Commissioner, ‘Thematic study on the right of persons with disabilities to education: report of the Office of the United Nations High Commissioner for Human Rights’ (18 December 2013) < [https://www.bing.com/ck/a?!&&p=72ee1d89cde67fb56fc616ad6c6d29c4e647c09134dc7f4464ca40139f7f756eJmltdHM9MTczNzc2MzlwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+General+Assembly%2c+Human+Rights+Council+\(UNHCR\)%2c+%e2%80%98Thematic+study+on+the+right+of+persons+with+disabilities+to+education%2c+18+December+2013%2c+A%2fHRC%2f25%2f29%e2%80%99+\(18+December+2013\)+Retrieved+from+%3c+untitled+%3e+accessed+17+November+2024&u=a1aHR0cHM6Ly9kaWdpdGFsbGlicmFyeS51bi5vcmevcmVjb3JkLzc2NjczMQ&ntb=1](https://www.bing.com/ck/a?!&&p=72ee1d89cde67fb56fc616ad6c6d29c4e647c09134dc7f4464ca40139f7f756eJmltdHM9MTczNzc2MzlwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+General+Assembly%2c+Human+Rights+Council+(UNHCR)%2c+%e2%80%98Thematic+study+on+the+right+of+persons+with+disabilities+to+education%2c+18+December+2013%2c+A%2fHRC%2f25%2f29%e2%80%99+(18+December+2013)+Retrieved+from+%3c+untitled+%3e+accessed+17+November+2024&u=a1aHR0cHM6Ly9kaWdpdGFsbGlicmFyeS51bi5vcmevcmVjb3JkLzc2NjczMQ&ntb=1) > accessed 26 January 2025, refer to page 6; See also, United Nations, United Nations Human Rights Office of the High Commissioner, ‘Thematic report on the right of persons with disabilities to education’ (18 December 2013) < [https://www.bing.com/ck/a?!&&p=0bddb51201cbb613116bbdce6f095709e216c73514baea4b38a9a664a0278eccJmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=%e2%80%98Thematic+report+on+the+right+of+persons+with+disabilities+to+education+%e2%80%99+\(18+December+2013\)+%3c+Thematic+report+on+the+right+of+persons+with+disabilities+to+education+November+2024&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL2Rpc2FiaWxp dGllcy90aGVtYXRpYylyZXBvcnQtcmInaHQtcGVyc29ucy1kaXNhYmlsaXRpZXMtZWRIY2F0aW9u&ntb=1](https://www.bing.com/ck/a?!&&p=0bddb51201cbb613116bbdce6f095709e216c73514baea4b38a9a664a0278eccJmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=%e2%80%98Thematic+report+on+the+right+of+persons+with+disabilities+to+education+%e2%80%99+(18+December+2013)+%3c+Thematic+report+on+the+right+of+persons+with+disabilities+to+education+November+2024&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL2Rpc2FiaWxp dGllcy90aGVtYXRpYylyZXBvcnQtcmInaHQtcGVyc29ucy1kaXNhYmlsaXRpZXMtZWRIY2F0aW9u&ntb=1) > accessed 26 January 2025.

²⁴¹ Stubbs, S and Lewis, I *Inclusive Education: Where There Are Few Resources* (The Atlas Alliance 2008) 42.

²⁴² Ibid at 43.

were either excluded from the educational system entirely, placed in specialised learning environments designed to meet their needs, or integrated into general education settings.²⁴³ At the Salamanca Conference, numerous countries recognised that marginalisation, segregation, and inclusion efforts were inadequate to fully uphold the educational rights of all children.²⁴⁴

In response to these identified issues, the Salamanca Statement and Framework for Action on Special Needs Education were adopted,²⁴⁵ advocating for a more inclusive approach to the education of children with special education needs.²⁴⁶ The concept of inclusive education was substantially elaborated upon in these documents,²⁴⁷ emphasising that every individual possesses the right to education and must be afforded an appropriate level of learning.²⁴⁸ It acknowledges that all children are unique and that, at various points in their educational journeys, most may encounter learning barriers; like disability.²⁴⁹ The Statement posits that what are often termed special learning needs are, in fact, ordinary learning needs that necessitate a more child-focused

²⁴³ United Nations, United Nations Human Rights Office of the High Commissioner, ‘Thematic study on the right of persons with disabilities to education: report of the Office of the United Nations High Commissioner for Human Rights’ (18 December 2013) < [https://www.bing.com/ck/a?!&&p=72ee1d89cde67fb56fc616ad6c6d29c4e647c09134dc7f4464ca40139f7f756eJmltdHM9MTczNzc2MzIwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+General+Assembly%2c+Human+Rights+Council+\(UNHCR\)%2c+%e2%80%98Thematic+study+on+the+right+of+persons+with+disabilities+to+education%2c+18+December+2013%2c+A%2fHRC%2f25%2f29%e2%80%99+\(18+December+2013\)+Retrieved+from+%3c+untitled+%3e+accessed+17+November+2024&u=a1aHR0cHM6Ly9kaWdpdGFsbGlicmFyeS51bi5vcmevcmVjb3JkLzc2NjczMQ&ntb=1](https://www.bing.com/ck/a?!&&p=72ee1d89cde67fb56fc616ad6c6d29c4e647c09134dc7f4464ca40139f7f756eJmltdHM9MTczNzc2MzIwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+General+Assembly%2c+Human+Rights+Council+(UNHCR)%2c+%e2%80%98Thematic+study+on+the+right+of+persons+with+disabilities+to+education%2c+18+December+2013%2c+A%2fHRC%2f25%2f29%e2%80%99+(18+December+2013)+Retrieved+from+%3c+untitled+%3e+accessed+17+November+2024&u=a1aHR0cHM6Ly9kaWdpdGFsbGlicmFyeS51bi5vcmevcmVjb3JkLzc2NjczMQ&ntb=1) > accessed 26 January 2025; See also, United Nations, United Nations Human Rights Office of the High Commissioner, ‘Thematic report on the right of persons with disabilities to education’ (18 December 2013) < [https://www.bing.com/ck/a?!&&p=0bddb51201cbb613116bbdce6f095709e216c73514baea4b38a9a664a0278eccJmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=%e2%80%98Thematic+report+on+the+right+of+persons+with+disabilities+to+education%e2%80%99+\(18+December+2013\)+%3c+Thematic+report+on+the+right+of+persons+with+disabilities+to+education+November+2024&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL2Rpc2FiaWxp dGllcy90aGVtYXRrPyYlYlZXBvcnQtcmllnaHQtcGVyc29ucy1kaXNhYmlsaXRpZXMtZWRIY2F0aW9u&ntb=1](https://www.bing.com/ck/a?!&&p=0bddb51201cbb613116bbdce6f095709e216c73514baea4b38a9a664a0278eccJmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=%e2%80%98Thematic+report+on+the+right+of+persons+with+disabilities+to+education%e2%80%99+(18+December+2013)+%3c+Thematic+report+on+the+right+of+persons+with+disabilities+to+education+November+2024&u=a1aHR0cHM6Ly93d3cub2hjaHIub3JnL2VuL2Rpc2FiaWxp dGllcy90aGVtYXRrPyYlYlZXBvcnQtcmllnaHQtcGVyc29ucy1kaXNhYmlsaXRpZXMtZWRIY2F0aW9u&ntb=1) > accessed 26 January 2025.

²⁴⁴ World Conference on Special Needs Education: Access and Quality, The Right to Basic Education ‘The Salamanca Statement and Framework for Action on Special Needs Education’ (Date not specified 1994) Retrieved from < <https://www.right-to-education.org/resource/salamanca-statement-and-framework-action-special-needs-education> > accessed 17 November 2024; See also, UNESCO, The Salamanca Statement and Framework for Action on Special Needs Education (adopted at the World Conference on Special Needs Education: Access and Quality, Salamanca, 7-10 June 1994).

²⁴⁵ Ibid; See further, Ibid.

²⁴⁶ Ibid; See further, Ibid.

²⁴⁷ Stubbs, S and Lewis, I *Inclusive Education: Where There Are Few Resources* (The Atlas Alliance 2008) 11.

²⁴⁸ World Conference on Special Needs Education: Access and Quality, The Right to Basic Education ‘The Salamanca Statement and Framework for Action on Special Needs Education’ (Date not specified 1994) Retrieved from < <https://www.right-to-education.org/resource/salamanca-statement-and-framework-action-special-needs-education> > accessed 17 November 2024.

²⁴⁹ Ibid at viii.

approach. States, are thus obligated to design educational systems that can accommodate a diverse range of learning requirements.²⁵⁰

The Salamanca Statement mandates that children with special education needs should be integrated into regular schools, which must be equipped to address each child's unique needs.²⁵¹ Inclusive education is characterised by its child-centred philosophy, which seeks to modify the educational environment to suit the child rather than compel the child to conform to a static educational framework.²⁵² Inclusive schools are obligated to be responsive to varying learning styles and paces, thereby providing quality education to all learners.²⁵³

Governments have the obligation to prioritise the establishment of laws and policies that foster a fully inclusive educational system, irrespective of the diverse circumstances faced by each child.²⁵⁴ Such laws and policies must guarantee that children with special education needs are accommodated within regular schools unless such accommodation is unfeasible.²⁵⁵ Furthermore, governments are called upon to fulfil their obligations by facilitating the engagement of communities, parents, educators, organisations representing persons with special education needs, and other pertinent stakeholders in the development of an inclusive education system.²⁵⁶ Collaboration across different governmental sectors, including health, social welfare, and employment, is also essential to implement cohesive measures that further collective educational goals.²⁵⁷

Although the Salamanca Statement is not legally binding on states, it has served as a foundational basis for subsequent international legal instruments addressing inclusive education, which many states are committed to upholding.²⁵⁸

²⁵⁰ Ibid at viii.

²⁵¹ See for example, Ibid at 13.

²⁵² World Conference on Special Needs Education: Access and Quality, The Right to Basic Education 'The Salamanca Statement and Framework for Action on Special Needs Education' (Date not specified 1994) Retrieved from < <https://www.right-to-education.org/resource/salamanca-statement-and-framework-action-special-needs-education> > accessed 17 November 2024.

²⁵³ Ibid at 12-13.

²⁵⁴ Ibid at ix.

²⁵⁵ Ibid at ix.

²⁵⁶ Ibid at ix.

²⁵⁷ Ibid at 17.

²⁵⁸ Stubbs, S and Lewis, I *Inclusive Education: Where There Are Few Resources* (The Atlas Alliance 2008) 10.

3.5 Regional instruments and their influence on education

3.5.1 Regional human rights obligations: ACHPR, ACRWC, SADC and ADP

South Africa signed and ratified the ACHPR in 1996,²⁵⁹ signed the ACRWC in 1997 and ratified it in 2000.²⁶⁰ Article 17 of the ACHPR provides that every individual shall have the right to education.²⁶¹ The ACRWC contains a more comprehensive provision on the right to education. Under article 11 of the ACRWC, states are obligated to promote and protect the right to primary education for all children.²⁶² Article 11(1) requires the state to ensure that every child enjoys the right to education.²⁶³ Consistent with other treaties, article 11(2)(a) recognises the significance of education in the promotion and development of the child's personality, talents, and, mental, and physical abilities to their fullest potential.²⁶⁴ Article 11(3)(a) requires states to provide free and compulsory basic education,²⁶⁵ while article 11(3)(d) requires states to take measures to encourage regular attendance at schools and reduction in the drop-out rate.²⁶⁶ Article 11(3)(e) further requires states to take special measures concerning disadvantaged children, to ensure equal access to education for all sections of the community.²⁶⁷

Article 13 of the ACRWC addresses provisions specifically related to children with special education needs.²⁶⁸ Hence, specific recognition is given to children with special education needs. Article 13(1) establishes that every child with a mental or physical disability is entitled to

²⁵⁹ African Union, 'African Charter on Human and Peoples' Rights' (9 July 1996) < <https://www.bing.com/ck/a?!&&p=d32d1da0c5b25487c27d06543435d7e218c12e42b65a018452ebd34c7fc1289aJmldtHM9MTczNzc2MzIwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=achpr+pdf&u=a1aHR0cHM6Ly9hdS5pbmQvZW4vdHJlYXRpZXMvYWZyaWNhbi1jaGFydGVyLWl1bWVlWFuZC1wZW9wbGVyLXJpZ2h0cw&ntb=1> > accessed 26 January 2025.

²⁶⁰ United Nations, United Nations Human Rights Office of the High Commissioner, 'African Charter on the Rights and Welfare of the Child' (11 July 1990) < [https://www.bing.com/ck/a?!&&p=2b837c34520978f7aecbc6f5cc1446cc9aa9043cb992049f70e61d0de48fac7cJmldtHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=African+Charter+on+the+Rights+and+Welfare+of+the+Child%e2%80%99+\(11+July+1990\)+%3c+2.+African+Charter+on+the+Rights+and+Welfare+of+the+Child+\(1990\)&u=a1aHR0cHM6Ly93d3cu b2hjaHh1bWVlWFuZC1wZW9wbGVyLXJpZ2h0cw&ntb=1](https://www.bing.com/ck/a?!&&p=2b837c34520978f7aecbc6f5cc1446cc9aa9043cb992049f70e61d0de48fac7cJmldtHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=African+Charter+on+the+Rights+and+Welfare+of+the+Child%e2%80%99+(11+July+1990)+%3c+2.+African+Charter+on+the+Rights+and+Welfare+of+the+Child+(1990)&u=a1aHR0cHM6Ly93d3cu b2hjaHh1bWVlWFuZC1wZW9wbGVyLXJpZ2h0cw&ntb=1) > accessed 26 January 2025.

²⁶¹ Article 17 of the ACHPR.

²⁶² Article 11 of the ACRWC.

²⁶³ Article 11(1) of the ACRWC.

²⁶⁴ Article 11(2)(a) of the ACRWC.

²⁶⁵ Article 11(3)(a) of the ACRWC.

²⁶⁶ Article 11(3)(d) of the ACRWC.

²⁶⁷ Article 11(3)(e) of the ACRWC.

²⁶⁸ Article 13 of the ACRWC.

appropriate protective measures that align with their physical and moral needs.²⁶⁹ This provision reinforces a comprehensive framework aimed at protecting children with special education needs, supporting their independence, and facilitating their active participation within society. Article 13(2) mandates states, within the limits of available resources, to provide assistance to children with special education needs and their caregivers as requested, ensuring that such support is tailored to the child's needs.²⁷⁰ Specifically, states are obligated to facilitate effective access for children with special education needs to training, employment preparation, and recreational opportunities, thereby promoting the child's social integration, individual development, and cultural and moral growth.²⁷¹ Article 13(3) obligates states to utilise their available resources to progressively ensure that individuals with mental and physical disabilities have full and convenient access to movement and to public facilities, buildings, and other locations that they are entitled to access.²⁷²

The Southern African Development Community (SADC) was established in 1992. It is a regional inter-governmental organisation aimed at promoting economic integration, sustainable development, and political cooperation among its member states in Southern Africa.²⁷³ Thus, the SADC Protocol on Education and Training adopted in 1997, provides a strong foundation for addressing both education rights and socio-economic rights in the region.²⁷⁴ The SADC Protocol on Education and Training emphasises the right to basic education as a socio-economic right and outlines measures to ensure its provision and accessibility.²⁷⁵ Article 4(1) explicitly commits member states to making basic education accessible to all as a means of addressing socio-

²⁶⁹ Article 13(1) of the ACRWC.

²⁷⁰ Article 13(2) of the ACRWC.

²⁷¹ Ibid.

²⁷² Article 13(3) of the ACRWC.

²⁷³ Southern African Development Community Towards A Common Future, 'History and Treaty' (17 August 1992) <<https://www.bing.com/ck/a?!&&p=16ff7e9e200a8b56ce9b959af96dd4ea7d1f2d6c1e7e0416099dedc26101d455JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Southern+African+Development+Community+Towards+A+Common+Future+History+and+Treaty+%7c+SADC&u=a1aHR0cHM6Ly93d3cuc2FkYy5pbmQvcGFuZXMvaGlzdG9yeS1hbmQtdHJlYXR5&ntb=1> > accessed 26 January 2025.

²⁷⁴ Southern African Development Community, 'Protocol on Education Training' (8 September 1997) <[https://www.bing.com/ck/a?!&&p=6f181a4774ac444d2861080345191619fca9cc0ca06950759a8d362f15ad50b0JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Southern+African+Development+Community%2c+%e2%80%98Protocol+on+Education+Training%e2%80%99+\(17+August+1997\)+%3c+Protocol_on_Education__Training1997.pdf+%3e+accessed+25+November+2024&u=a1aHR0cHM6Ly93d3cuc2FkYy5pbmQvcGFuZG9jdW1lbnQvcHJvdG9yb2wtZWRR1Y2F0aW9uLXRyYWluaW5nLTE5OTc&ntb=1](https://www.bing.com/ck/a?!&&p=6f181a4774ac444d2861080345191619fca9cc0ca06950759a8d362f15ad50b0JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Southern+African+Development+Community%2c+%e2%80%98Protocol+on+Education+Training%e2%80%99+(17+August+1997)+%3c+Protocol_on_Education__Training1997.pdf+%3e+accessed+25+November+2024&u=a1aHR0cHM6Ly93d3cuc2FkYy5pbmQvcGFuZG9jdW1lbnQvcHJvdG9yb2wtZWRR1Y2F0aW9uLXRyYWluaW5nLTE5OTc&ntb=1) > accessed 26 January 2025.

²⁷⁵ Ibid.

economic inequalities and promoting regional development, it highlights the importance of universal access to primary education as a foundational step in ensuring lifelong learning opportunities.²⁷⁶

The Protocol also promotes cooperation among member states to improve the quality of basic education. Article 4(2) calls for the exchange of expertise, joint curriculum development, and harmonisation of educational standards.²⁷⁷ These measures aim to ensure that basic education equips learners with the skills and knowledge necessary to contribute meaningfully to their societies and the regional economy.²⁷⁸

Furthermore, the Protocol acknowledges that socio-economic barriers, like poverty and inequality hinder access to education. To address this, article 4(3) encourages member states to adopt policies that reduce drop-out rates and improve retention in primary education.²⁷⁹ These policies include targeted interventions for disadvantaged groups, including children with special education needs, ensuring inclusivity and equality in accessing basic education.²⁸⁰ Through these provisions, the SADC Protocol on Education and Training demonstrates its commitment to treating basic education as a socio-economic right, foundational to reducing inequalities and fostering sustainable development.

International obligations are reflected in the SADC Protocol on Education and Training; article 4(1) of the SADC Protocol's requirement for member states to ensure that basic education is accessible to all, reflects article 13 of the ICESCR²⁸¹ as well as article 28 of the CRC.²⁸² Article 4(3) of the SADC Protocol also emphasises inclusivity, particularly for marginalised groups, including children with special education needs, which reflects article 2 of the CRC,²⁸³ and article 24 of the CRPD.²⁸⁴ Furthermore, article 4(2) of the SADC Protocol's focus on improving

²⁷⁶ Ibid at article 4(1) of the SADC Protocol on Education Training.

²⁷⁷ Ibid at article 4(2) of the SADC Protocol on Education Training.

²⁷⁸ Ibid.

²⁷⁹ Ibid at article 4(3) of the SADC Protocol on Education Training.

²⁸⁰ Ibid.

²⁸¹ For a full discussion on the issue; refer to section 3.3.1 above.

²⁸² Ibid.

²⁸³ Article 2 of the CRC which provides that:

‘States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’

²⁸⁴ For a full discussion on the issue; refer to section 3.4.1 above.

quality through regional collaboration, reflects international obligations under article 29 of the CRC.²⁸⁵ It also supports the goals of the Education 2030 Framework for Action,²⁸⁶ (aligned with Sustainable Development Goal 4) to ensure inclusive, equitable, and quality education globally.²⁸⁷ Article 4(3) of the SADC Protocol's measures to reduce drop-out rates and improve retention, reflects international efforts to address socio-economic barriers to education as outlined in the CESCRC Committee General Comment No. 13.²⁸⁸

By integrating international obligations into regional policy instruments, the SADC Protocol reinforces global commitments to education while addressing the unique socio-economic challenges within the Southern African region. It serves as a bridge between global standards and localised implementation, ensuring that member states uphold their obligations under international treaties while fostering regional collaboration for sustainable development.

Upon reviewing the ADP, it is clear that article 3(i) specifically addresses the best interests of the child.²⁸⁹ The provision requires that the best interests of the children with special education needs be a primary consideration in all decisions and actions affecting them. The principle aligns closely with the South African Constitution, which emphasises that the best interest of the child are of paramount importance in every matter concerning them.

²⁸⁵ For a full discussion on the issue; refer to section 3.3.1 above.

²⁸⁶ United Nations Educational, Scientific and Cultural Organisation, 'Education 2030 Incheon Declaration and Framework for Action' (21 May 2015) <[https://www.bing.com/ck/a?!&&p=0cbd5bd69cdc449eae75fc3ec5caca93fdf679b382d01b9aa8b81ca93ff58415JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+Educational%2c+Scientific+and+Cultural+Organisation%2c+%e2%80%98Education+2030+Incheon+Declaration+and+Framework+for+Action%e2%80%99+\(21+May+2015\)+%3c+Education+2030%3a+Incheon+Declaration+and+Framework+for+Action+for+the+implementation+of+Sustainable+Development+Goal+4%3a+Ensure+inclusive+and+equitable+quality+education+and+promote+lifelong+learning+opportunities+for+all%3b+2016+%3e+accessed+25+November+2024&u=a1aHR0cHM6Ly91bmVzZG9jLnVuZXNjby5vcmevYXJrOi80ODIyMy9wZjAwMDAyNDU2NTY&ntb=1](https://www.bing.com/ck/a?!&&p=0cbd5bd69cdc449eae75fc3ec5caca93fdf679b382d01b9aa8b81ca93ff58415JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+Educational%2c+Scientific+and+Cultural+Organisation%2c+%e2%80%98Education+2030+Incheon+Declaration+and+Framework+for+Action%e2%80%99+(21+May+2015)+%3c+Education+2030%3a+Incheon+Declaration+and+Framework+for+Action+for+the+implementation+of+Sustainable+Development+Goal+4%3a+Ensure+inclusive+and+equitable+quality+education+and+promote+lifelong+learning+opportunities+for+all%3b+2016+%3e+accessed+25+November+2024&u=a1aHR0cHM6Ly91bmVzZG9jLnVuZXNjby5vcmevYXJrOi80ODIyMy9wZjAwMDAyNDU2NTY&ntb=1)> accessed 26 January 2025.

²⁸⁷ United Nations Educational, Scientific and Cultural Organisation 'Education for Sustainable Development Goals: Learning Objectives' (Date not specified) <[https://www.bing.com/ck/a?!&&p=948d9ae3b03949bdca7573799571b771880e8c9bd40a334f2a15a1e8d6a2b4daJmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+Educational%2c+Scientific+and+Cultural+Organisation+%e2%80%98Sustainable+Development+Goal+4+\(SDG4\)%e2%80%99+\(21+May+2015\)+%3c+Sustainable+Development+Goal+4+\(SDG4\)+%7c+%23LeadingSDG4+%7c+Education2030+%3e+accessed+25+November+2024&u=a1aHR0cHM6Ly91bmVzZG9jLnVuZXNjby5vcmevYXJrOi80ODIyMy9wZjAwMDAyNDc0NDQ&ntb=1](https://www.bing.com/ck/a?!&&p=948d9ae3b03949bdca7573799571b771880e8c9bd40a334f2a15a1e8d6a2b4daJmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=United+Nations+Educational%2c+Scientific+and+Cultural+Organisation+%e2%80%98Sustainable+Development+Goal+4+(SDG4)%e2%80%99+(21+May+2015)+%3c+Sustainable+Development+Goal+4+(SDG4)+%7c+%23LeadingSDG4+%7c+Education2030+%3e+accessed+25+November+2024&u=a1aHR0cHM6Ly91bmVzZG9jLnVuZXNjby5vcmevYXJrOi80ODIyMy9wZjAwMDAyNDc0NDQ&ntb=1)> accessed 26 January 2025.

²⁸⁸ For a full discussion on the issue; refer to section 3.3.2 above.

²⁸⁹ Article 3(i) of the ADP.

Consequently, the integration of the best interest of the child into educational policies and practices is a constitutional obligation and a regional commitment under the ADP. It ensures that children with special education needs have access to an education that upholds their dignity, fosters their development, and enables their full participation in society.

As with the aforementioned declarations and treaties, state parties bear a general obligation to implement legislative and other measures to realise the rights enshrined in the Conventions, often in collaboration with organisations like the SADC which provides guidance, support and oversight on education standards and practices.

3.6 Conclusion

Third Chapter has provided an in-depth overview of the international legal framework surrounding the right to basic education, outlining the key instruments and obligations that states must uphold. International law recognises the right to education as a fundamental human right, reinforced by binding treaties, declarations, and frameworks that detail both the general right to education and specific obligations for states to progressively realise the right.

The discussion includes key international instruments such as the ICCPR, UDHR, ICESCR, CRC, and CRPD, which collectively demonstrate a unified global commitment to ensuring access to education. These instruments establish a comprehensive set of obligations for states, which include providing free and accessible education for all, progressively improving educational access, and ensuring non-discrimination in the education system.

Regional instruments, like the ACRWC, complement global commitments by addressing specific educational concerns and obligations within the regional context. The ACRWC builds on the foundations of the CRC, reinforcing the protection of children's educational rights and ensuring that these rights are respected in a way that takes into account the unique challenges and priorities of states.

Lastly, the chapter emphasises the interdependence of human rights and the need for a holistic approach to realising the right to education. Obligations arising from international instruments such as those related to non-discrimination, accessibility, and inclusivity, reinforce the goal of ensuring quality education for all. The inclusion of regional and cultural considerations ensures

that the right to education is implemented in ways that are contextually relevant and appropriate to each state's social, economic, and cultural realities.

Ultimately, the international legal framework for the right to basic education is both comprehensive and multifaceted, combining universal human rights principles with regional considerations. States, are obligated to take sustained action to ensure that education is not merely a legal right but a lived reality for all citizens, particularly, children with special education needs.

CHAPTER 4: DOMESTIC LEGAL AND POLICY FRAMEWORKS FOR THE REALISATION OF THE RIGHT TO BASIC EDUCATION FOR CHILDREN WITH SPECIAL EDUCATION NEEDS

4.1 Introduction

There are two prominent legal instruments underpinning the promotion of inclusive education in South Africa: the South African Schools Act,²⁹⁰ and the Education White Paper 6 of 2001.²⁹¹ These documents establish the foundational framework for inclusive education in the country. Lizette *et al* assert that various other legislative and policy measures, while not exclusively dedicated to inclusive education, contribute to its implementation and support.²⁹² Despite Section 29(1)(a) of the Constitution, which guarantees everyone the right to education, the legal and policy framework governing this right remain plagued by ambiguities and inadequacies. Critical terms like ‘special education needs,’ and ‘basic education’ lack precise definitions, which creates challenges for their practical implementation and enforcement. Furthermore, while the right to basic education is described as ‘immediately realisable,’ its interpretation and application remains inconsistent. These inadequacies, coupled with legislative gaps in key provisions of the Act and the limitations of the Education White Paper 6, perpetuate inequalities. This chapter critically analyses these issues, identifying areas of concern and proposing a clearer understanding of the challenges posed by the current framework.

The chapter is structured as follows: It begins with an introduction and then critiques the lack of definition of core terms in legal and policy frameworks, illustrates that the absence of clear definitions creates inconsistencies in how policies are interpreted and implemented, contributing to the challenges faced by learners with special education needs. This is followed by a discussion of the relevant terms, analysing their interpretation and implications for equitable access to education. Furthermore, it demonstrates how their undefined nature undermines the delivering of meaningful and quality education. The chapter further explores the limitations of the right to basic education, assessing how the right is restricted in practice. Particular attention is given to

²⁹⁰ Act 84 of 1996 (hereinafter ‘the Act’).

²⁹¹ Education White Paper 6: Special Needs Education – Building an Inclusive Education and Training System (2001) (hereinafter ‘Education White Paper 6’).

²⁹² Lizette, B, Jamieson, L, Mathews, S and Proudlock, P ‘South Africa’s progress in realising children’s rights’ *in* Proudlock, P (ed), *A Law Review* (Cape Town: Children’s Institute University of Cape Town and Save the Children South Africa 2014) 134.

the phrase ‘realisable immediately,’ which is constitutionally mandated yet inconsistently applied. The analysis unpacks the legal meaning of the phrase and evaluates whether existing frameworks align with the constitutional obligation of immediate realisation. Subsequently, the chapter critiques the gaps in the legislative frameworks, with specific reference to provisions in the Act. Areas of focus include compulsory attendance, admission to public schools, and the role of the representative councils of learners, the provision of public schools, and school governing bodies’ membership and governance structures. This discussion highlights how these provisions fail to address the unique needs of learners with special education needs.

The chapter then turns to the gaps in the policy framework, with a focus on the Education White Paper 6. It critiques the policy’s approach to defining and addressing special education needs and analyses the challenges of building an inclusive education and training system. The analysis underscores the disconnection between policy intentions and their implementation in practice, which undermines the goal of inclusive education. Lastly, it summarises the findings and reiterates the need for clear definitions, stronger legislative provisions and more effective policy frameworks. It emphasises that meaningful reform is necessary to ensure that the right to basic education for children with special education needs is upheld in accordance with the constitutional principles of equality, dignity and the child’s best interests.

4.2 Critiquing the lack of definition of core terms in legal and policy frameworks

4.2.1 *The term special education needs*

The Schools Act and the Admission Policies²⁹³ use the term ‘special education needs’ but neither of the instruments define the term. This creates uncertainty. While it is reasonable to infer that the term encompasses learners with ‘disabilities,’ it should also extend to include any learner requiring reasonable accommodations or specific support needs. This approach would ensure for instance, that learners from disadvantaged socio-economic backgrounds who require assistance are equally protected and accommodated. Veriava asserts that education provisioning involves the provision of various ‘educational inputs,’²⁹⁴ essential for delivering quality education to

²⁹³ For instance, See South Africa, Department of Education. Admission Policy for Ordinary Public Schools. Government Gazette No. 19377, Notice 2432 of 1998, 19 October 1998.

²⁹⁴ Veriava, F ‘Basic Education Provisioning’ in Veriava, F, Thom, A and Hodgson, TF (eds), *Basic Education Rights Handbook – Education Rights in South Africa* (e-book) (LexisNexis 2017) 220. < <https://section27.org.za/wp-content/uploads/2017/02/Chapter-12.pdf> > accessed 17 December 2024; According

learners.²⁹⁵ Veriava defines ‘educational inputs’ as the resources necessary for effective education, including, but not limited to, textbooks,²⁹⁶ qualified teachers,²⁹⁷ appropriate facilities, like buildings and furniture,²⁹⁸ transportation,²⁹⁹ and stationery.³⁰⁰ These inputs collectively create a ‘basket of entitlements’ that the state is required to supply to support the right to basic education.³⁰¹ However, many disadvantaged schools in South Africa continue to face challenges related to poor educational quality, primarily due to a persistent shortage of essential educational inputs that the state must provide to ensure the complete and proper realisation of the right to basic education.³⁰²

to Veriava, educational inputs refer to the resources used to educate learners. For example, these would include appropriate school infrastructure; various goods, such as stationery and textbooks; and personnel, such as teachers and other staff necessary in a schooling context.

²⁹⁵ Veriava, F ‘Basic Education Provisioning’ in Veriava, F, Thom, A and Hodgson, TF (eds), *Basic Education Rights Handbook – Education Rights in South Africa* (e-book) (LexisNexis 2017) 220. < <https://section27.org.za/wp-content/uploads/2017/02/Chapter-12.pdf> > accessed 17 December 2024.

²⁹⁶ Stein, N ‘Textbooks’ in Veriava, F et al (eds), *Basic Education Rights Handbook – Education Rights in South Africa* (e-book) (LexisNexis 2017) 262-273 < <https://section27.org.za/wp-content/uploads/2017/02/Chapter-15.pdf> > accessed 17 December 2024; See further, Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 54. *Minister of Basic Education and others v Basic Education for All and others* 2016 (4) SA 63 (SCA) 52-53, in which the court declared that every learner has the right to a basic education which includes the entitlement that every learner at a public school must be provided with every prescribed textbook for their grade, prior to the commencement of the academic year.

²⁹⁷ Sephton, S ‘Post Provisioning’ in Veriava, F et al (eds), *Basic Education Rights Handbook – Education Rights in South Africa* (e-book) (LexisNexis 2017) 246-261 < <https://section27.org.za/wp-content/uploads/2017/02/Chapter-14.pdf> > accessed 17 December 2024; See further, for example, *Centre for Child Law & others v Minister of Basic Education & others* 2020(3) SA 141 (ECG).

²⁹⁸ Draga, L ‘Infrastructure and Equipment’ in Veriava, F, Thom, A and Hodgson TF (eds), *Basic Education Rights Handbook – Education Rights in South Africa* (e-book) (LexisNexis 2017) 236-245 < <https://section27.org.za/wp-content/uploads/2017/02/Chapter-13.pdf> > accessed 17 December 2024; See further, Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 54, *Madzodzo v Minister of Basic Education* 2014 2 All SA 339 (ECM) 20.

²⁹⁹ See, for example, Joseph, S and Carpenter, J ‘Scholar Transport’ in Veriava, F, Thom, A and Hodgson, TF (eds), *Basic Education Rights Handbook – Education Rights in South Africa* (e-book) (LexisNexis 2017) 274-291 < <https://section27.org.za/wp-content/uploads/2017/02/Chapter-16.pdf> > accessed 24 September 2024; See further, Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 54, *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) 18-19.

³⁰⁰ Veriava, F ‘Basic Education Provisioning’ in Veriava, F, Thom, A and Hodgson, TF (eds), *Basic Education Rights Handbook – Education Rights in South Africa* (e-book) (LexisNexis 2017) 220-221 < <https://section27.org.za/wp-content/uploads/2017/02/Chapter-12.pdf> > accessed 24 September 2024.

³⁰¹ Ibid at 221.

³⁰² Ibid at 218-235.

Therefore, there is no consensual definition of special education needs.³⁰³ Hence, this study typically defines special education needs as the needs of learners who require additional support due to physical, mental, emotional, or learning challenges. This includes, but is not limited to, learners with disabilities (like auditory, visual or mobility impairments), cognitive impairments (like specific learning disabilities or intellectual disabilities), and emotional and behavioural disorders (like anxiety disorders). A ‘special learner’ is an individual with a disability or disabilities. It focuses on identifying and addressing the specific barriers to learning experienced by individual learners. For example, a child with autism spectrum disorder may have special education needs because they might need social skills training, communication aids, or a structured learning environment to thrive.

4.2.2 The term basic education

While the Constitution guarantees the right to basic education for all individuals; it does not specify what this right refers to.³⁰⁴ Similarly, the term ‘basic education’ is not explicitly defined in legislation.³⁰⁵ It is concerning that there is no clear definition of basic education within the South African legal framework, particularly given that it is recognised as an unqualified human right.³⁰⁶ The absence of a precise definition of basic education creates several challenges. At a fundamental level, it results in a lack of clarity regarding the state’s obligations, making it difficult to assess whether the state is fulfilling its duties.³⁰⁷ The Schools Act also fails to provide

³⁰³ For various definitions of the term, ‘special education needs,’ See Buli-Holmberg, J and Jeyaprabhan, S ‘Effective Practice in Inclusive and Special Needs Education’ (2016) 31(1) *International Journal of Special Education* 119. Retrieved from < <https://files.eric.ed.gov/fulltext/EJ1099986.pdf> > accessed 18 December 2024; See further, Kryszewska, H ‘Teaching Students with Special Needs in Inclusive Classrooms Special Educational Needs’ (2017) 71(4) *English Language Teaching Journal* 525; Campigotto, R, McEwen, R and Epp, CD ‘Especially Social: Exploring the use of an iOS Application in Special Needs Classroom’ (2013) 60(1) *Computers & Education* 74.

³⁰⁴ McConnachie, C, Skelton, A and McConnachie, C ‘The Constitution and the Right to Basic Education’ in Veriava, F, Thom, A and Hodgson, TF (eds), *Basic Education Rights Handbook: Education Rights in South Africa* (e-book) (LexisNexis 2017) 23 < <https://section27.org.za/wp-content/uploads/2017/02/Chapter-1.pdf> > accessed 19 December 2024.

³⁰⁵ This includes, for instance, The Constitution; Act 84 of 1996; National Education Policy Act 27 of 1997 (hereinafter ‘the Act’). None of these legislations provides a comprehensive definition of what ‘basic education’ entails.

³⁰⁶ 2011 8 BCLR 761 (CC).

³⁰⁷ Chiedza, S ‘Defining the Right to Basic Education in the South African Constitution: An International Law Approach’ (2012) 16 *Law, Democracy and Development* 162, 164.

a specific definition of basic education. The term is mentioned only once in the Act, in reference to the title of the Minister of ‘Basic Education,’ with no further mention or elaboration.³⁰⁸

While both the Constitution and the Schools Act remain silent on a precise definition of basic education, the judiciary has clarified its scope and application through various rulings. Building on this judicial clarification, the Constitutional Court in *Moko v Acting Principal Malusi Secondary School (Moko)* has now resolved some of the ambiguities surrounding what constitutes basic education.³⁰⁹ The case involved Mr. Moko, a Grade 12 learner, who was prevented from sitting for his final Business Paper 2 examination, necessary for him to obtain the National Senior Certificate (NSC). On 25 November 2020, when Mr. Moko arrived at school to write the exam, the Interim Principal denied him entry, citing his failure to attend additional lessons as the sole reason. The Interim Principal instructed Mr. Moko to bring his caregivers, but Mr. Moko was unable to contact them. When he returned alone, he found the school gate locked. Although another individual eventually allowed Mr. Moko entry, the Interim Principal refused to permit him into the examination room, as the other learners had already begun writing the exam. Consequently, the Interim Principal’s actions prevented Mr. Moko from taking the matriculation exam.³¹⁰

Following this, Mr. Moko and his uncle met with the Interim Principal, who informed them that Mr. Moko would be required to sit for a supplementary exam in May 2021. Concerned that this delay would hinder his pursuit of higher education and delay his progress by a year, Mr. Moko escalated the matter to the MEC of the Limpopo Department of Education (DoE). The MEC instructed the District Director to address the issue. While the District Director ruled against the

³⁰⁸ See, section 1 of Act 84 of 1996; ‘Minister’ refers to the Minister of Basic Education.’; See further, Chiedza, S ‘A Hexagon Right: The Six Dimensions of the South African Right to Basic Education’ (2018) 39 (1) *Obiter* 126, 127.

³⁰⁹ (CCT 297/20) [2020] ZACC 30.

³¹⁰ Harding, M, ‘Right to Education Initiative’ (17 April 2023) < [62](https://www.bing.com/ck/a?!&&p=12edee65266f6754c687c13878ca70f19567c47840f9897bd230248eef8cae89JmltdHM9MTczNzg0OTYwMA&p=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=South%2bAfrican%2bConstitutional%2bCourt%2bconfirms%2bthat%2bthe%2bbright%2bo%2bbasic%2beducation%2bcompasses%2baccess%2bto%2bfinal%2bexams%2b%257C%2bRight%2bto%2bEducation%2bInitiative%2b%3e%2baccessed%2b14%2bDecember%2b2024%26cvid%3d214502c100f14f18a5f443efd337228f%26gs_lcrp%3dEgRlZGdlKgYIABBFgDkyBggAEEUYOdIBCDI2NzRqMGo5qAIIIsAIB%26FORM%3dANAB01%26DAF0%3d1%26PC%3dHCTS&u=a1aHR0cHM6Ly93d3cucmlnaHQtdG8tZWRR1Y2F0aW9uLm9yZ9ibG9nL3NvdXRoLWFmcmJlYW4tY29uc3RpdHV0aW9uYWwtY291cnQtY29uZmlybXMtcmJnaHQtdYmFzaWMtZWRR1Y2F0aW9uLWVvY29tcGFzc2VzLWFjY2Vzcy1maW5hbA&ntb=1 > accessed 26 January 2025.</p></div><div data-bbox=)

Interim Principal's actions, he upheld the decision that Mr. Moko would still need to take the supplementary exam in May 2021. Dissatisfied with this outcome, Mr. Moko filed an urgent application with the High Court, seeking to be allowed to write the exam as soon as possible, prior to May 2021. However, the High Court ruled that the matter was not urgent and removed it from the Court's roll. Consequently, Mr. Moko approached the Constitutional Court, seeking an order that he be permitted to write the exam without delay so that his results would be released concurrently with those of other Grade 12 learners.³¹¹ Mr. Moko's application was based on the claim that the Interim Principal's actions, coupled with the state's refusal to allow him to sit for the exam immediately, infringed upon his constitutional right to basic education and his right to pursue higher education.³¹²

In a unanimous judgment written by Khampepe J, the Constitutional Court affirmed that the right to basic education includes access to the NSC. The Court held that interpreting the right to only encompass primary education or up to Grade 9 would be an overly restrictive interpretation, considering the right's transformative objective. This ruling is significant, as it confirms that the right to education in South Africa is broad and flexible, imposing a duty on the state to ensure access to the NSC.³¹³

The NSC is a fundamental requirement for various employment opportunities in South Africa and is also a gateway to higher education, expanding career prospects and social mobility. The Constitutional Court's clarification that access to the NSC is part of the right to basic education rather than a form of further education underscores the state's immediate obligation to provide learners with opportunities for better prospects. The Interim Principal's actions unjustly delayed Mr. Moko's opportunity to advance his future, which would have postponed his exam by a year. Fortunately, his rights were ultimately protected by the Constitutional Court.³¹⁴

This case is also significant in light of numerous complaints from organisations like SECTION27, highlighting the barriers learners face in accessing exams due to issues such as non-payment of school fees or incomplete documentation. The ruling reinforces that access to

³¹¹ Ibid.

³¹² Ibid.

³¹³ Ibid.

³¹⁴ Ibid.

examinations is critical to learners' unqualified right to education, irrespective of their circumstances.³¹⁵

4.3 Limitation of the right to education

4.3.1 *Limitation of the right to basic education*

Rights and the corresponding duties are not without limits and thus, rights limitations are possible. However, such limitations must be substantiated and justified.³¹⁶ A limitation of a right may be referred to as an infringement, which, when justified, is termed a 'justified infringement.'³¹⁷ Some, but not all infringements of fundamental rights are deemed constitutionally invalid. In certain circumstances, a law that infringes upon a specific right may be considered to be justifiable, resulting in a 'justifiable limitation.'³¹⁸ When considering the limitation of a child's right to basic education, the nature of the right as defined in section 29 of the Constitution, which is not qualified by any textual restrictions, plays a crucial role.³¹⁹ The limitation of a right can be characterised as a failure or restriction in fulfilling that right.³²⁰ The first step in analysing the right to basic education is to clarify its scope and content. Should this scope and content remain unfulfilled, it would result in an infringement. The next step would be to assess whether this infringement, or limitation, is justifiable.

Despite section 29(1)(a) of the Constitution lacking internal qualifiers, it does not follow that the limitation of the right to education cannot be justified.³²¹ Section 36 of the Constitution provides

³¹⁵ Ibid.

³¹⁶ Skelton, A 'Constitutional Protection of Children's Rights' in Boezaart, T (ed), *Child Law in South Africa* (Juta Cape Town 2017) 337; See further, Currie, I and De Waal, J *The Bill of Rights Handbook* (6th Ed., Juta Cape Town 2013) 150; McConnachie, C, Skelton, A and McConnachie, C 'The Constitution and the Right to Basic Education' in Veriava, F, Thom, A and Hodgson, TF (eds), *Basic Education Rights Handbook: Education Rights in South Africa* (e-book) (LexisNexis 2017) 16. < <https://section27.org.za/wp-content/uploads/2017/02/Chapter-1.pdf> > accessed 19 December 2024.

³¹⁷ Currie, I and De Waal, J *The Bill of Rights Handbook* (6th Ed., Juta Cape Town 2013) 151.

³¹⁸ Ibid at 26.

³¹⁹ McConnachie, C, Skelton, A and McConnachie, C 'The Constitution and the Right to Basic Education' in Veriava, F, Thom, A and Hodgson, TF (eds), *Basic Education Rights Handbook: Education Rights in South Africa* (e-book) (LexisNexis 2017) 26-27 < <https://section27.org.za/wp-content/uploads/2017/02/Chapter-1.pdf> > accessed 19 December 2024.

³²⁰ Ibid at 27.

³²¹ Woolman, S and Bishop, M 'Education' in Woolman S et al (eds), *Constitutional law of South Africa* (Juta Cape Town 2010) 57; See further, Woolman, S and Fleisch, B *Constitution in the Classroom: Education and the Law in South Africa 1994-2008* (Pretoria University Law Press Pretoria 2009) 125.

the criteria for determining whether a limitation is reasonable and justifiable.³²² The right to basic education can be limited either by the failure to meet positive duties,³²³ or by negative duties,³²⁴ which may lead to a denial of the right to education.³²⁵

Section 36 of the Constitution permits limitations on the right to basic education ‘in terms of law of general application,’ provided that such limitations are reasonable and justifiable within the context of an open and democratic society.³²⁶ Nevertheless, the limitation must be adequately justified.³²⁷ If the limitation arises from resource constraints, it may be justifiable, as the state cannot allocate resources beyond its capacity.³²⁸ If the limitation is a result of government policy or a particular school’s actions, it cannot be justified.³²⁹

Seleoane assert that the question of limiting a right should be treated separately from its interpretation.³³⁰ One must first understand the full scope and meaning of the right in order to determine what is being limited.³³¹ Introducing the potential limitation of a right at the

³²² Section 36(1) of the Constitution, which provides that:

‘(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.’; See further, Skelton, A ‘Constitutional Protection of Children’s Rights’ in Boezaart, T (ed), *Child Law in South Africa* (Juta Cape Town 2017) 335; Liebenberg, S *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta Cape Town 2010) 93-97.

³²³ For instance, adequate educational facilities must be established and accessible to ensure that children can fully exercise their right to education; See also, Liebenberg, S *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta Cape Town 2010) 244.

³²⁴ Legislation or policy that directly or indirectly discriminates, thereby depriving a learner of access to education, constitutes a breach of the state’s negative duty. For instance, prohibiting a pregnant learner from attending school exemplifies such a violation; See also, Liebenberg, S *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta Cape Town 2010) 244.

³²⁵ Liebenberg, S *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta Cape Town 2010) 244.

³²⁶ Section 36 of the Constitution.

³²⁷ Berger, E ‘The Right to Education under the South African Constitution’ (2003) 103(3) *Columbia Law Review* 614, 634.

³²⁸ *Ibid* at 637.

³²⁹ Woolman, S and Bishop, M ‘Education’ in Woolman S et al (eds), *Constitutional law of South Africa* (Juta Cape Town 2010) 58.

³³⁰ Seleoane, M ‘The Right to Education: Lessons from *Grootboom*’ (2003) 7 *Law, Democracy & Development* 137, 140.

³³¹ *Ibid* at 140.

interpretation stage may risk misinterpreting or diminishing the right from the outset. Upon consideration of the Constitution, this study argues that had a right been subject to resource availability, the Constitution would have explicitly incorporated this condition, undermining the purpose of section 29(1)(a).³³²

In cases where the right to basic education has been infringed, the courts must apply Section 36 to determine whether the limitation is justified. The courts must also identify and provide an appropriate remedy that achieves a fair and just result. Such remedies play a vital role in defining the scope of the right and its limitations. As emphasised in *Sanderson v Attorney-General, Eastern Cape*,³³³ judicial flexibility in crafting remedies can significantly influence the understanding and application of the right,³³⁴ ensuring the provision of effective relief.³³⁵

4.3.2 The right to basic education: what is the meaning of the phrase ‘realisable immediately’?

Central to the argument, drawing on the insights of ‘Nyane’,³³⁶ is that the way in which section 29(1)(a) of the Constitution was drafted has long been a source of controversy, and it continues to raise questions about how this right is interpreted and limited.³³⁷ The right to basic education is unqualified, making it one of the few socio-economic rights in the Constitution. Unlike the rights to further education contained in section 29(1)(b),³³⁸ and section 26(2) which applies to the right to housing; as subject to ‘progressive realisation,’ depending on ‘available resources,’ and ‘reasonable legislative measures.’³³⁹ This right is realised immediately and must be provided

³³² Ibid at 142.

³³³ 1998 2 SA 38 (CC); This case concerned the enforcement of the right to a fair trial as provided under section 25(3)(a) of the Interim Constitution.

³³⁴ Ibid at 27; See further, Woolman, S and Bishop, M ‘Education’ in Woolman S et al (eds), *Constitutional law of South Africa* (Juta Cape Town 2010) 57.

³³⁵ Woolman, S and Bishop, M ‘Education’ in Woolman S et al (eds), *Constitutional law of South Africa* (Juta Cape Town 2010) 57; See further, *Bel Porto School Governing Body v Premier of the Western Cape* 2002 (3) SA 265 (CC) 186, in this regard, the Constitutional Court emphasised that the remedy must be tailored to align with the scope of the right, rather than redefining the right to fit the remedy.

³³⁶ Prof. Hoolo ‘Nyane is an Associate and Head of the Department of Public and Environmental Law at the University of Limpopo, South Africa.

³³⁷ Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 58.

³³⁸ Section 29(1)(b) of the Constitution.

³³⁹ Section 26(2) of the Constitution.

without any delay,³⁴⁰ regardless of the resources available. Any limitation on this right can only be justified under the general limitations clause in section 36 of the Constitution.³⁴¹

An overview is necessary to refer to section 36 of the Constitution, which allows the limitation of the rights in the Bill of Rights, as stated in section 36(1), provided that the limitation is reasonable, justifiable, and in accordance with an open and democratic society grounded on human dignity.³⁴² The Constitutional Court in *Brümmer v Minister for Social Development*,³⁴³ highlighted that when imposing a limitation on a right, the factors outlined in section 36(1)(a)-(e) of the Constitution, must be taken into account.³⁴⁴ The clause has frequently been addressed in numerous court rulings,³⁴⁵ and its legal principles are generally well-established.³⁴⁶ While in an early judgment like *Ferreira v Levin NO and others*,³⁴⁷ the court affirmed that the interpretation of section 33, along with the general limitation provisions of the Interim Constitution, required a two-step process. The first step is to determine whether a guaranteed right has been infringed upon. If an infringement is found, the next step is to assess whether it can be justified under the limitation provisions.³⁴⁸

The former judge of the Constitutional Court of South Africa, Justice Mokgoro in *Khosa v Minister of Social Development*,³⁴⁹ argued against the principle of ‘immediate realisation’ of socio-economic rights. Views differ on whether section 36 applies to socio-economic rights,

³⁴⁰ 2011 8 BCLR 761 (CC) 37; See further, Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 58.

³⁴¹ Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 58.

³⁴² Section 36(1) of the Constitution; See further, Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 58.

³⁴³ 2009 6 SA 323 (CC).

³⁴⁴ Ibid; See further, section 36(1) of the Constitution; Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 58.

³⁴⁵ For example, See *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC).

³⁴⁶ Woolman, SD ‘Riding the push-me pull-you: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause’ (1994) 10 *South African Journal on Human Rights* 60. Retrieved from < <https://doi.org/10.1080/02587203.1994.11827529> > accessed 19 December 2024; See further, Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 58.

³⁴⁷ 1996 1 SA 984 (CC); See further, *S v Zuma* 1995 2 SA 642 (CC).

³⁴⁸ 1995 2 SA 642 (CC) 21; Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 58-59.

³⁴⁹ 2004 6 BCLR 569 (CC).

given their internal and special limitations.³⁵⁰ Mokgoro argued that applying the reasonableness test under section 36 to socio-economic rights would create confusion, as reasonableness is already inherent in these rights.³⁵¹ Scholars like Iles concurred with Mokgoro's views by asserting that applying section 36 to socio-economic rights creates what he labels 'methodological difficulty.'³⁵² The difficulty arises from the reasonableness requirement in both section 36 and the internal limitations of socio-economic rights.³⁵³ 'Nyane argues that it is problematic to assert that the right is immediately realisable as this is somewhat complex. This argument is fraught with several clear pitfalls.³⁵⁴ First and foremost, the interpretation is overly technical, textual, and literal, a method often criticised by the courts when interpreting constitutional provisions.³⁵⁵ The preferred approach to interpreting constitutional provisions is a general and purposive one.

In *African Christian Democratic Party (ACDP) v The Electoral Commission*,³⁵⁶ the Constitutional Court demonstrated a clear willingness to move beyond the exact wording of the statutory text when the purpose of the Constitution and relevant legislation warrants such an approach. In this context, the court affirmed that '[a] narrowly textual and legalistic approach is to be avoided.'³⁵⁷ The issue with adopting a strictly textual interpretation of section 29(1)(a) is that it fails to account for the inherent nature of the right to education as a socio-economic right. As with all socio-economic rights, the right to education, regardless of its specific formulation, imposes positive economic obligations on the state.³⁵⁸ Thus, the most reasonable approach is to

³⁵⁰ Iles, K 'Limiting socio-economic rights: Beyond the internal limitations clauses' (2004) 20(3) *South African Journal on Human Rights* 448. Retrieved from < <https://doi.org/10.1080/19962126.2004.11864829> > accessed 19 December 2024; See further, Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 59.

³⁵¹ 2004 6 BCLR 569 (CC).

³⁵² Iles, K 'Limiting socio-economic rights: Beyond the internal limitations clauses' (2004) 20(3) *South African Journal on Human Rights* 448. Retrieved from < <https://doi.org/10.1080/19962126.2004.11864829> > accessed 19 December 2024; See further, Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 59.

³⁵³ Steinberg, C 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-economic Rights Jurisprudence' (2006) 123(2) *South African Law Journal* 264-284.

³⁵⁴ Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 60.

³⁵⁵ *Ibid* at 60; See further, *S v Mhlungu* 1995 3 SA 867 (CC).

³⁵⁶ 2006 3 SA 305 (CC).

³⁵⁷ 2006 3 SA 305 (CC) 25.

³⁵⁸ McConnachie, C and McConnachie, C 'Concretising the right to a basic education' (2012) 129(3) *South African Law Journal* 554; See further, Nyane, H 'The Challenges of Litigating the Right to Basic Education in South

recognise that this section represents a typical socio-economic right, albeit one drafted differently from other socio-economic rights in the Constitution; Recourse to section 36 for limitations should not undermine this fundamental understanding.³⁵⁹ However, the use of section 36 should be approached cautiously, as it could lead to unjustifiable limitations on the right to education if applied without a clear understanding of its socio-economic context. Methodologically, upon considering section 36, two of its components, the ‘nature of the right’ and ‘reasonableness,’ will naturally lead the analysis to the typical socio-economic qualifiers. The nature of the right is undisputed, as the right to basic education is undeniably socio-economic in nature. The reasonableness test to be applied here is the one already established by the Constitutional Court in *Grootboom v Government of the Republic of South Africa (Grootboom)*.³⁶⁰

In addition to the difficulty beyond the interpretative difficulties lies the impracticality of requiring the immediate realisation of the right to basic education, which complicates the state’s positive obligations under section 29(1)(a).³⁶¹ The reality of this right is inherently economic in nature and is thus contingent on the availability of resources. In light of the Constitutional Court’s judgment in *Soobramoney v Minister of Health (Soobramoney)*,³⁶² and *Grootboom* the most appropriate method to ensure that the government fulfils its obligations under section 29(1)(a) is to subject claims regarding the unavailability of resources to the reasonableness test, as established.³⁶³ This test, as affirmed by the courts, demands that such claims be evaluated in a manner that ensures they align with constitutional standards of reasonableness, thereby upholding the principles of access to basic education as guaranteed under the Constitution. Insistence on the right being realisable immediately without much regard to sometimes genuine

Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 60.

³⁵⁹ Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 60.

³⁶⁰ *Grootboom v Government of the Republic of South Africa* (2000) 11 BCLR 1169 (CC); See further, Iles, K ‘Limiting socio-economic rights: Beyond the internal limitations clauses’ (2004) 20(3) *South African Journal on Human Rights* 448. Retrieved from < <https://doi.org/10.1080/19962126.2004.11864829> > accessed 19 December 2024; Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 60.

³⁶¹ Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 60.

³⁶² *Soobramoney v Minister of Health (Soobramoney)* (1998) 1 SA 765 (CC).

³⁶³ Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 60.

claims of lack of resources is counter-intuitive.³⁶⁴ The case of *Komape v Minister of Basic Education (Komape)* serves as an evidential example of difficulty.³⁶⁵ The case concerned, Michael Komape when he drowned to death in a dilapidated pit toilet at his school in Limpopo in 2014. His family, represented by SECTION27, sought damages from the government for its negligent failure to eradicate pit toilets at schools,³⁶⁶ and also sought a declaratory order stating that the government had violated their constitutional obligations.³⁶⁷ Further to the claim for constitutional damages, Muller J stated that:

‘It was common cause that the government had breached its constitutional obligations towards Komape and other children in the Limpopo province who attended schools with pit toilets.³⁶⁸ The constitutional rights of learners to dignity,³⁶⁹ equality,³⁷⁰ life,³⁷¹ an environment that is not harmful to their wellbeing,³⁷² basic education,³⁷³ and children’s right to have their best interests considered as paramount in all matters concerning them,³⁷⁴ were violated by the presence of plain pit toilets in schools in Limpopo.’³⁷⁵

Thus, regarding the right to education, the court held that it includes the provision of adequate and safe toilets at public schools, and failure to provide them compromises the best interests of children under section 28(2) of the Constitution.³⁷⁶ The court faced a significant challenge in determining an appropriate remedy. Concluding that a structural interdict was neither just nor

³⁶⁴ Mokgwathi, MS, Graham, MA and De Villiers, JJR ‘School Infrastructure Challenges in South Africa: Experiences of High School Principals and Teachers’ (2023) 43(4) *South African Journal of Education* 1. Retrieved from < <https://doi.org/10.15700/saje.v43n4a2303> > accessed 20 December 2024; See further, Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 60.

³⁶⁵ 2020 (2) SA 347 (SCA).

³⁶⁶ 2020 (2) SA 347 (SCA) 6-12; See further, Veriava, F and Harding, M ‘The *Komape* litigation – ensuring effective remedies’ (2023) *De Jure Law Journal* 505, 508. Retrieved from < <http://dx.doi.org/10.17159/2225-7160/2023/v56a30> > accessed 20 December 2024; Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 60-62.

³⁶⁷ Veriava, F and Harding, M ‘The *Komape* litigation – ensuring effective remedies’ (2023) *De Jure Law Journal* 505, 509. Retrieved from < <http://dx.doi.org/10.17159/2225-7160/2023/v56a30> > accessed 20 December 2024; See further; Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 61.

³⁶⁸ 2020 (2) SA 347 (SCA) 55.

³⁶⁹ Section 10 of the Constitution.

³⁷⁰ Section 9 of the Constitution.

³⁷¹ Section 11 of the Constitution.

³⁷² Section 24 of the Constitution.

³⁷³ Section 29(1) of the Constitution.

³⁷⁴ Section 28 of the Constitution.

³⁷⁵ 2020 (2) SA 347 (SCA) 63; See further; Veriava, F and Harding, M ‘The *Komape* litigation – ensuring effective remedies’ (2023) *De Jure Law Journal* 505, 509. Retrieved from < <http://dx.doi.org/10.17159/2225-7160/2023/v56a30> > accessed 20 December 2024.

³⁷⁶ 2020 (2) SA 347 (SCA) 63.

equitable in the circumstances and thus, directed the state to take active steps to provide the necessary basic sanitary facilities to affected schools.³⁷⁷ Acknowledging the challenges posed by its order, the court emphasised that the magnitude of the task could not excuse the state from fulfilling its constitutional obligations in accordance with the Constitution.³⁷⁸ The court acknowledged, in measured terms, that the obligation could not be realised immediately, further noting that:

‘... this court is ever mindful that an order that the state replace the pit toilets at rural schools will place an additional burden on the resources of the state. Information as to the time it will take and the program to be developed to achieve that goal in the shortest period of time must be placed before the court to enable this court to play a supervisory role in the execution of the order to vindicate the constitutional rights of the children attending schools with pit toilets in rural Limpopo.’³⁷⁹

Therefore, the Limpopo government’s continued failure to comply with the June 2022 court order aimed at eradicating unsafe pit latrines in schools is not merely a matter of resource constraints or administrative delay, it constitutes a direct violation of an unqualified constitutional right. The state’s inaction particularly, in the face of a binding court order, amounts to contempt of court and underscores a broader failure to respect, protect, promote, and fulfil its constitutional obligations under section 7(2) of the Constitution.

The persistent reliance on hazardous sanitation infrastructure in Limpopo schools, nearly a decade after the tragic death of Michael Komape, reveals a pattern of systemic neglect rather than a measured effort at progressive realisation.³⁸⁰ While economic constraints are a legitimate

³⁷⁷ Ibid at 70.

³⁷⁸ Ibid at 70.

³⁷⁹ Ibid at 72; See further, Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 61.

³⁸⁰ Ryan, C, ‘GroundUp’ (17 September 2021) < <https://www.bing.com/ck/a?!&&p=b88a1932d5fdd1252292eefd036a8b2f5535c6305de73447ed2d757af746e118JmltdHM9MTczNzg0OTYwMA&pbn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Komape+family+wins+court+battle+seven+years+after+their+son+drowned+in+a+pit+toilet+%7c+GroundUp+%3e+accessed+17+December+2024&u=a1aHR0cHM6Ly9ncm91bmR1cC5vcmcuemEvYXJ0aWNsZS9rb2lhcGUtZmFtaWx5LXdpcnMtc2Nob29sLXNhbmI0YXRpb24tY2FzZS1saW1wb3BvLWWhpZ2gtY291cnQtc2V2ZW4teWVhenMtYWZ0ZXItZmI2ZS15ZWYyLW9sZC1zb24tZlJvd25lZC1waXQtdG9pbGV0Lw&ntb=1> > accessed 26 January 2025; See further, Equal Education, ‘Michael Komape Court Case (Limpopo)’ (Date not specified 2024) < [https://www.bing.com/ck/a?!&&p=816173b3fa3791007df053eebceae10971e1ff7ecf1ace90fbb53f4298090593JmltdHM9MTczNzg0OTYwMA&pbn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Equal+Education%2c+%e2%80%98Michael+Komape+Court+Case+\(Limpopo\)%e2%80%98](https://www.bing.com/ck/a?!&&p=816173b3fa3791007df053eebceae10971e1ff7ecf1ace90fbb53f4298090593JmltdHM9MTczNzg0OTYwMA&pbn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Equal+Education%2c+%e2%80%98Michael+Komape+Court+Case+(Limpopo)%e2%80%98)

consideration in the implementation of qualified socio-economic rights, they cannot be invoked to justify non-compliance with a constitutionally enshrined and judicially affirmed obligation to provide basic education in conditions that uphold the dignity, safety, and well-being of learners.

4.4 Gaps in the legislative framework

4.4.1 Critique of specific provisions in the South African Schools Act 84 of 1996

4.4.1.1 Compulsory attendance

The Schools Act stipulates in section 3(1) that school attendance is compulsory for children from the age of seven until the age of fifteen or until the completion of grade nine, whichever occurs first.³⁸¹ The *Juma Masjid Primary School* case emphasised the importance of basic education as an immediately realisable right under section 29(1)(a) of the Constitution. Section 3(2) of the Schools Act further provides that the Minister of Basic Education must determine the ages for compulsory school ‘attendance’ for learners with special education needs.³⁸² To date, the Minister has not fulfilled the obligation to prescribe the ages for compulsory school attendance, which contravenes the obligation to make schooling compulsory for children with special education needs.³⁸³

This study further notes that the Schools Act’s failure to define ‘attendance’ in section 3(2) is concerning. The provision is silent on what constitutes adequate ‘attendance.’ Does it only mean physical presence, or does it include active participation and engagement in education? This is critical for learners facing systemic barriers to meaningful access. The dearth of clarity can lead to inconsistent interpretation and enforcement, leaving learners, particularly those facing systemic obstacles including for example, learners with special education needs, to physically attend school but be excluded from meaningful engagement due to inadequate support resulting from resource constraints. Research has shown that learners facing disabilities are often

99+(Date+not+specified+2024)+%3c+Michael+Komape+Court+Case+(Limpopo)+-+Equal+Education+%3e+accessed+17+December+2024&u=a1aHR0cHM6Ly9lcXVhbGVkdWNhdGlvbi5vcmcuemEvY291cnQtY2FzZS9taWNoYWVsLWtvbWFwZS1jb3Vydc1jYXNILWxpbXBvcG8v&ntb=1 >
accessed 26 January 2025

³⁸¹ Section 3(1) of Act 84 of 1996.

³⁸² Section 3(2) of Act 84 of 1996.

³⁸³ Lizette, B, Jamieson, L, Mathews, S and Proudlock, P ‘South Africa’s progress in realising children’s rights’ in Proudlock, P (ed), *A Law Review* (Cape Town: Children’s Institute University of Cape Town and Save the Children South Africa 2014) 142.

marginalised in educational settings, where their participation in the curriculum may be limited by inadequate infrastructure.³⁸⁴ Thus, defining ‘attendance’ as more than mere physical presence is essential to ensure that all learners receive meaningful access to education.

4.4.1.2 Admission to public schools

Section 5(1) of the Schools Act establishes a foundational principle requiring that public schools admit learners and serve their educational requirements without unfair discrimination.³⁸⁵ The *Centre for Child Law and others v Minister of Basic Education and others* is a relevant case concerning the admission of learners to public schools, particularly undocumented learners.³⁸⁶ This court case dealt with the constitutionality of policies that restricted the admission of learners without proper identification documents, including birth certificates.³⁸⁷ The Eastern Cape High Court ruled that these policies infringed the constitutional right to education, as stipulated in section 29 of the Constitution. The court emphasised that all children should be admitted to public schools regardless of their documentary status.³⁸⁸ This reinforces the principles of equality and non-discrimination in education. This case aligns with section 5(1) of the Schools Act, as it upholds the right to admission and non-discriminatory treatment in public schools, echoing its commitment to providing equal educational opportunities to all learners. Hence, this sets the stage for the more specific subsequent provisions, including section 5(6) of the Schools Act.

Section 5(6) of the Schools Act stipulates that in determining the placement of a learner with special education needs, the Head of Department and principal must ‘take into account’ the rights and wishes of the parents of such learner.³⁸⁹ This subsection reflects an essential acknowledgement of parental involvement in the educational decisions affecting learners with special education needs. However, this study notes that the provision is open to critique, particularly concerning the words ‘take into account.’ This phrase lacks specificity. While it suggests that parental input must be considered, it does not impose an obligation to act in alignment with those wishes. As a result, decision-makers could fulfil this requirement

³⁸⁴ Anil, K and Yusuf, S ‘Assessment Policy in Post-Apartheid South Africa: Challenges for Improving Education Quality and Learning. Assessment in Education: Principles, Policy and Practice’ (2013) 20(4) *Journal of Education Policy* 442.

³⁸⁵ Section 5(1) of the Constitution.

³⁸⁶ 2020 (3) SA 141 (ECG).

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Section 5(6) of the Constitution.

superficially, by merely acknowledging parental views without meaningfully integrating them into placement decision. This lack of precision creates potential tension, especially when parents' views conflict with the school's resources or policies. For instance, parents might wish for their child to attend a mainstream school, but the principal may argue for placement in a special school based on 'available resources' or 'perceived capacity.' Thus, without clearer language, like 'prioritise,' the provision risks marginalising parents' voices in critical decisions affecting their children's education.

4.4.1.3 Representative council of learners

The Representative Council of Learners (RCL) is as a statutory body established under the Schools Act. It provides a platform for learners to actively participate in the governance of their schools and contribute to decision-making processes affecting their education.³⁹⁰ Thus, section 11(3) of the Schools Act,³⁹¹ permits the MEC to exempt public schools for learners with special education needs from the obligation to establish a RCL under section 11(1) of the Schools Act,³⁹² provided it is deemed 'practically impossible.' However, the effectiveness of RCL's in representing diverse learner interests and influencing school policies and practices warrants further investigation, particularly concerning inclusivity and practical implementation challenges.³⁹³

4.4.1.4 Provision of public schools

Section 12 of the Schools Act mandates the establishment and maintenance of public schools by the state, ensuring access to basic education for all learners in alignment with the constitutional

³⁹⁰ Section 11 of Act 84 of 1996.

³⁹¹ Section 11(3) of Act 84 of 1996.

³⁹² Section 11(1) of Act 84 of 1996.

³⁹³ For a full discussion on the issue, see, for example, Hunt, F 'Learner Councils in South African Schools: Adult Involvement and Learners' Rights' (2014) 9(3) *Journal of Education, Citizenship and Social Justice* 268-285. Retrieved from <
[https://www.bing.com/ck/a?!&&p=cc4d681807dcd9d7931037fb4eda0e5122c4f74cb94f68611d81ef40941840c8JmldtHM9MTczNzc2MzlwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Hunt%2c+F+%e2%80%98Learner+Councils+in+South+African+Schools%3a+Adult+Involvement+and+Learners%e2%80%99+Rights%e2%80%99+\(2014\)+9\(3\)+Journal+of+Education%2c+Citizenship+and+Social+Justice+268-285.+Retrieved+from+%3c+\(PDF\)+Learner+councils+in+South+African+schools%3a+Adult+involvement+and+learners%27+rights+%3e+accessed+20+December+2024&u=a1aHR0cHM6Ly9qb3VybmFscy5zYWdlcHVlLnNvbS9kb2kvMTAuMTE3Ny8xNzQ2MTk3OTE0NTQ1OTI4&ntb=1](https://www.bing.com/ck/a?!&&p=cc4d681807dcd9d7931037fb4eda0e5122c4f74cb94f68611d81ef40941840c8JmldtHM9MTczNzc2MzlwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Hunt%2c+F+%e2%80%98Learner+Councils+in+South+African+Schools%3a+Adult+Involvement+and+Learners%e2%80%99+Rights%e2%80%99+(2014)+9(3)+Journal+of+Education%2c+Citizenship+and+Social+Justice+268-285.+Retrieved+from+%3c+(PDF)+Learner+councils+in+South+African+schools%3a+Adult+involvement+and+learners%27+rights+%3e+accessed+20+December+2024&u=a1aHR0cHM6Ly9qb3VybmFscy5zYWdlcHVlLnNvbS9kb2kvMTAuMTE3Ny8xNzQ2MTk3OTE0NTQ1OTI4&ntb=1) > accessed 26 January 2025.

right to education,³⁹⁴ setting the stage for the more specific provisions that follow, including section 12(3),³⁹⁵ 12(4),³⁹⁶ and 12(5).³⁹⁷ Section 12(3) of the Schools Act stipulates that a ‘public school may be an ordinary public school or public school for learners with special education needs.’³⁹⁸ The Act thus, distinguishes between ‘ordinary public school’ and ‘public school for learners with special education needs.’ This classification could reinforce segregation by separating learners based on their needs rather than promoting inclusion in mainstream schools. Hence, a more inclusive approach would ensure that all public schools are equipped to support learners with special education needs.

Section 12(4) of the Schools Act stipulates that the relevant MEC must, ‘where reasonably practicable, provide education for learners with special education needs at ordinary public schools and appropriate educational support services.’³⁹⁹ This provision imposes a duty on the MEC to ensure that sufficient measures are implemented to accommodate and support the learning needs of learners once admitted to ordinary schools. Section 12(5) of the Schools Act further stipulates that the MEC ‘must take all reasonable measures to ensure that the physical facilities at public schools are accessible to disabled persons.’⁴⁰⁰ These sections are significant because they require the government to take active steps toward realising the right to basic education. Section 12(4) of the Act aims to include learners with special education needs in ordinary schools, ensuring they receive the aid necessary to benefit from the education system equally as their counterparts.⁴⁰¹

Section 12(5) of the Schools Act focuses on removing physical barriers to ensure that schools are reachable to learners with physical impairments.⁴⁰² In underprivileged and rural areas, school buildings may not only be inaccessible but also inadequately maintained, making them not

³⁹⁴ Section 12 of Act 84 of 1996.

³⁹⁵ Section 12(3) of Act 84 of 1996.

³⁹⁶ Section 12(4) of Act 84 of 1996.

³⁹⁷ Section 12(5) of Act 84 of 1996.

³⁹⁸ Ibid at section 12(3) of the Act.

³⁹⁹ Ibid at section 12(4) of the Act.

⁴⁰⁰ Ibid at section 12(5) of the Act.

⁴⁰¹ Ibid at section 12(4) of the Act.

⁴⁰² Ibid at section 12(5) of the Act.

safe.⁴⁰³ Essentially, these sections impose a duty on the government to create an accessible and safe environment conducive to learning for all learners.

However, this study notes that issues relating to the Schools Act have been brought to attention. Section 12(4) of the Act limits the government's duties by including the phrase 'where reasonably practicable,' which qualifies its obligations.⁴⁰⁴ The use of 'must' in these sections suggests a mandatory duty, but the qualification of 'reasonably practicable' gives the MEC wide discretion to determine what is reasonable.⁴⁰⁵ Given the unqualified nature of the right to education, the state should be required to make every possible effort to ensure education is accessible to everyone.⁴⁰⁶ Limiting access to ordinary schools in this way means that children with special education needs might still be excluded if the state can prove it is not reasonably practicable to accommodate them. This goes against the compulsory nature of school attendance, as children cannot be expected to attend school if the state fails to provide the necessary accommodations. Furthermore, the Schools Act does not specify what happens to children when placing them in ordinary schools is not reasonably practicable.⁴⁰⁷

Sections 12(4) and (5) of the Act support inclusive education by requiring the government to accommodate children with special education needs in ordinary schools. From one perspective, this study argues that the limit of reasonable practicability is justified because inclusive education is not the same as basic education, meaning children with special education needs could be placed in special schools instead. However, the limited number of special schools and their often underprivileged conditions have made it difficult to accommodate most children with special education needs.⁴⁰⁸ Because of this, inclusion in ordinary schools is key to ensuring that children with special education needs can fully realise their right to education.

4.4.1.5 Membership of governing body of ordinary public school

⁴⁰³ For instance, See Chiedza, S 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 126, 147.

⁴⁰⁴ *Ibid* at section 12(4) of the Act.

⁴⁰⁵ National Commission on Special Needs in Education and Training (NCSNET) and National Committee on Education Support Services (NCESS) 'Quality Education for All: Overcoming Barriers to Learning and Development' (1997) at 37.

⁴⁰⁶ *Ibid* at 37.

⁴⁰⁷ Section 12(4) of Act 84 of 1996.

⁴⁰⁸ Department of Basic Education, Report on the Implementation of Education White Paper 6 on Inclusive Education. An Overview for the Period: 2013-2015 (2015) at 71.

Generally, section 23 of the Schools Act concerns the composition and membership of governing bodies in ordinary public schools, emphasising diverse representation, proportional balance, and the inclusion of expertise where necessary, particularly for special education needs.⁴⁰⁹ More specifically, this section focuses on section 23(5).⁴¹⁰

Section 23(5) of the Schools Act requires the governing body of an ordinary public school that provides education to learners with special needs to, where practically possible, co-opt a person or persons with expertise regarding the special education needs of such learners.⁴¹¹ The study however, notes that this provision has major inadequacies. First, the phrase ‘where practically possible’ weakens the provision by allowing schools discretion that may result in non-compliance, particularly in under-resourced areas. This lack of a binding obligation risks leaving learners without adequate support. Second, the provision does not specify the criteria for identifying or appointing such experts, potentially leading to inconsistent quality of co-opted expertise. This is especially concerning given the critical role of specialised knowledge in effectively addressing the learners’ needs. Furthermore, the provision does not address broader systemic challenges like funding or access to qualified experts, which may hinder the ability of schools to fulfil this requirement. Hence, without addressing these barriers, the provision risks being impractical in many contexts, including for example, rural schools which often lack access to qualified special education experts, making it difficult to co-opt such individuals despite the provision’s intent.

4.4.1.6 Membership of governing body of public school for learners with special education needs

Subject to section 24(2), the Schools Act,⁴¹² provides that the MEC must, by notice in the Provincial Gazette, determine the number of members in each category referred to in section 24(1),⁴¹³ and the manner of election or appointment of such members at every public school for learners with special education needs within his or her province. Section 24(2) is accordingly, vague as it does not provide any specific guidelines or principles to inform the MEC’s

⁴⁰⁹ Section 23 of Act 84 of 1996.

⁴¹⁰ Section 23(5) of Act 84 of 1996.

⁴¹¹ Ibid at section 23(5) of the Act.

⁴¹² Section 24(2) of Act 84 of 1996.

⁴¹³ Section 24(1) of Act 84 of 1996.

decisions.⁴¹⁴ This study argues that, this opens the door to inconsistent applications across provinces, as there is no uniform standard or framework established within the Act to guide the MEC.

The requirement for the MEC to issue a notice in the Provincial Gazette appears procedural, but lacks substantive safeguards to ensure that the decisions made are equitable. There is no requirement for public participation, consultation with stakeholders or any form of review or oversight. This absence creates a structural gap in accountability as section 24(2),⁴¹⁵ relies solely on the MEC's discretion without embedding mechanisms to evaluate the suitability or impact of the decisions. Furthermore, section 24(2) does not account for the unique needs of public schools for learners with special education needs.⁴¹⁶ It is generic and fails to mandate specific considerations, like representation by parents of learners with special needs or professionals with expertise in inclusive education. The oversight suggests a lack of alignment between the subsections' (24(2)),⁴¹⁷ drafting and the principles of inclusive education, which are central to other legal and policy frameworks like the Education White Paper 6.

The subsection's reliance also, on the MEC to define key aspects of governance creates potential for legal uncertainty. This study notes that without clear parameters or criteria embedded in the Schools Act, stakeholders may challenge the MEC's decisions on the grounds of arbitrariness or inconsistency. This structural flaw could result in disputes that may delay or disrupt the functioning of governing bodies, particularly in schools where governance is already a critical factor in ensuring access to quality education for learners with special education needs. Ultimately, the study argues that section 24(2)⁴¹⁸ which is overly reliant on the discretion of the MEC, lacks accountability measures, and thus, fails to address the specific context of special education needs, and also risks legal challenges due to its vague formulation.

4.4.1.7 *Office-bearers of governing bodies*

⁴¹⁴ Ibid at section 24(2) of the Act.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

Section 29 of the Schools Act governs the election, roles, and restrictions of office-bearers within school governing bodies.⁴¹⁹ Under section 29(1), the governing body is required to elect office-bearers, including at least a chairperson, a treasurer, and a secretary, from its members.⁴²⁰ Section 29(2) further specifies that only a parent member of the governing body who is not employed at the school may serve as the chairperson.⁴²¹ Section 29(3) stipulates that in the case of a public school for learners with special education needs, any member of the governing body elected from the categories of persons referred to in section 24(1)(a) and (e)-(i),⁴²² may serve as the chairperson of that governing body.⁴²³

Section 29(3) of the Act allows any member of a governing board elected from the specified categories under section 24(1)(a) and (e)-(i),⁴²⁴ to serve as the chairperson, raises both inclusivity and practicality considerations. On one hand, the provision recognises the diversity of stakeholders in special education, ensuring that representatives from various categories, like parents, educators, and community members – can assume leadership roles, aligning with Act’s broader goal of fostering participation and accountability in school governance.

This study however, notes that the flexibility might present challenges in practice. Leadership on a governing board requires significant knowledge of educational policies, financial management, and the unique needs of learners with special education needs. While the provision is inclusive, it does not impose specific qualifications or criteria for serving as chairperson, potentially risking scenarios where individuals without the requisite expertise or capacity lead the board. This could undermine the effective governance of schools catering to learners with special education needs, especially given the additional challenges these institutions face. Furthermore, the inclusion of broader categories, while commendable, could create tensions if stakeholders prioritise differing agendas or lack a shared understanding of the school’s goals.

4.4.1.8 Committees of governing body

⁴¹⁹ Section 29 of Act 84 of 1996.

⁴²⁰ Section 29(1) of Act 84 of 1996.

⁴²¹ Section 29(2) of Act 84 of 1996.

⁴²² Section 24(1)(a), (e)-(i) of Act 84 of 1996.

⁴²³ Section 29(3) of Act 84 of 1996.

⁴²⁴ Section 24(1)(a) and (e)-(i) of Act 84 of 1996.

Through the formation of specialised committees, section 30 of the Schools Act establishes the responsibilities of school governing bodies in ensuring that public schools accommodate and support learners with special education needs.⁴²⁵ Section 30(1)(a) provides that the governing bodies may establish various committees, including an executive committees.⁴²⁶ The Act further allows in section 30(1)(b) governing bodies to appoint persons with expertise who are not members of the governing body, to serve on the committees. The subsection stipulates that a member of the governing body must chair each committee.⁴²⁷

Section 30(2) of the Act stipulates that a governing body of an ordinary public school which provides education to learners with special education needs must establish a committee on special education needs.⁴²⁸ The Act appears to incorporate progressive provisions to ensure inclusivity and responsiveness to such learners' needs. However, several gaps and discrepancies emerge when considering its practical implications and alignment with broader inclusive education goals. The provision lacks detailed guidance on the committee's composition, roles, and expertise, risking inconsistent implementation. Furthermore, it provides no accountability mechanisms, leaving room for uneven application, particularly in schools without enough resources. Systemic issues, like inadequate infrastructure extend beyond the committee's scope, limiting its impact.

4.5 Gaps in the policy framework

4.5.1 Critique of the Education White Paper 6: Special Needs Education – Building an Inclusive Education and Training System (2001)

Despite its commendable vision for inclusive education, the Education White Paper 6,⁴²⁹ has faced substantial criticism for its inadequacies, particularly in enforceability and addressing the diverse needs of learners with special education needs in South Africa. One of the main critiques is that the policy lacks a comprehensive strategy for enforceability. While the Education White Paper 6 sets out ambitious goals for inclusion, it fails to provide detailed, practical guidance on

⁴²⁵ Section 30 of Act 84 of 1996.

⁴²⁶ Section 30(1) of Act 84 of 1996.

⁴²⁷ Section 30(1)(b) of Act 84 of 1996.

⁴²⁸ Section 30(2) of Act 84 of 1996.

⁴²⁹ Department of Basic Education, Special Needs Education, Building an Inclusive Education and Training System White Paper (White Paper 6, 2001) (hereinafter 'Education White Paper 6').

how schools can effectively enforce the changes. Wildeman and Nomdo argue that the policy is overly vague in regard to resource allocation, and inadequate teacher training has been a significant barrier to progress.⁴³⁰ This study demonstrates that without a clear roadmap, schools are left struggling to make the transition to inclusive education. The policy's failure to adequately address the practical realities of under-resourced environments has been a critical flaw. Donohue and Bornman highlight that although the policy promotes inclusion, many schools do not have the necessary infrastructure or materials to support learners with special education needs.⁴³¹ This study demonstrates that the lack of adequate teacher training and the limited availability of specialised resources, like assistive devices (e.g., wheelchairs) further exacerbates these challenges, making inclusive education difficult to realise.

Furthermore, the Education White Paper 6 has been criticised for the disconnection between its theoretical framework and the on-the-ground realities educators face. Engelbrecht et al argue that the policy's focus on inclusion has not been accompanied by sufficient practical solutions to address systemic barriers.⁴³² Their study demonstrates that, while teachers may understand the goals of inclusion, the lack of institutional support and resources hinders their ability to make inclusive practices work in everyday classroom settings.⁴³³ Naicker adds that the policy does not reflect a sustained government commitment to addressing these issues.⁴³⁴ Although the Education White Paper 6 articulates the ideological importance of inclusive education, Naicker's study demonstrates that the policy's vision remains largely aspirational rather than achievable without consistent resourcing, monitoring, and enforcement.⁴³⁵ The government's failure to ensure adequate funding for inclusive education has further undermined the policy's success.

Lastly, Muthukrishna and Schoeman argue that the policy fails to account for the diversity of disabilities and the varying levels of support needed by learners.⁴³⁶ Their study demonstrates that

⁴³⁰ Wildeman, RA, and Nomdo, C 'Implementing inclusive education: Challenges in resource allocation and teacher training in South Africa' (2018) 7(1) *African Journal of Disability* 1.

⁴³¹ Donohue, D and Bornman, J 'The Role of Policy in Creating Inclusive Education Systems: A South African perspective' (2014) 18(7) *International Journal of Inclusive Education* 747.

⁴³² Engelbrecht, P, Green, L, Naicker, S, and Engelbrecht, L *Inclusive education in South Africa* (Pretoria Van Schaik Publishers 2006).

⁴³³ Ibid.

⁴³⁴ Naicker, S 'Sustaining Inclusive Education: The Role of Government Commitment and Funding (2016) 7(24) *Journal of Education and Practice* 93.

⁴³⁵ Ibid at 93.

⁴³⁶ Muthukrishna, N, and Schoeman, M 'Understanding the Implications of Inclusion for Learners with Diverse Needs: A Critical Analysis of White Paper 6' (2016) 36(1) *South African Journal of Education* 1.

while the Education White Paper 6 speaks to inclusion broadly, it does not consider the specific requirements of learners with severe special education needs or those with multiple disabilities, resulting in an education system that remains inaccessible for many.

In summary, while the Education White Paper 6 offers a visionary framework for inclusive education in South Africa, its inadequacies in regard to detailed enforceability, resource allocation, teacher training, and infrastructural support continue to hinder its effectiveness. Without addressing these gaps, the goal of achieving true inclusivity remains out of reach for many learners with special education needs.

4.6 Conclusion

This chapter demonstrates that the legal and policy frameworks have substantial inadequacies that impede the effective realisation of the right to basic education for children with special education needs. The absence of clear definitions for critical terms such as ‘special education needs’ and ‘basic education’ results in inconsistent application and potential misinterpretation of legal obligations, undermining the practical enforcement of relevant legislation and policies. The ambiguity surrounding the phrase ‘realisable immediately’ within the right to education raises concerns regarding the prioritisation and allocation of resources. This is evident in the *Komape* case,⁴³⁷ which reiterates the state’s failure to provide safe and adequate school infrastructure. The case emphasised the need for urgent measures to guarantee the right to basic education in a manner that upholds human dignity, equality, and the best interests of the child.

Furthermore, the chapter highlights gaps within the legislative and policy frameworks, such as those found in the Schools Act and the Education White Paper 6, which despite some progress, continue to present significant barriers to achieving an inclusive education system. Provisions in the Schools Act concerning compulsory attendance, school admissions, and the composition of governing bodies fail to adequately address the unique needs of learners with special education requirements, limiting their access to quality education. This reflects the concerns raised in *Section 27 and others v Minister of Education and Another*,⁴³⁸ where the North Gauteng High Court found that providing learner support material in the form of textbooks is an essential component of the right to basic education. Thus, ‘the failure to provide textbooks, somewhat

⁴³⁷ 2020 (2) SA 347 (SCA).

⁴³⁸ *Section 27 and others v Minister of Education and Another* 2013 2 SA 40 (GNP).

midway through the academic year would *prima facie* constitute a violation of the right to basic education.’⁴³⁹

Moreover, the absence of clear, enforceable obligations for inclusive education at all levels of governance further perpetuates the exclusion of children with special education needs. For instance, the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*⁴⁴⁰ case affirmed the government’s responsibility to ensure that educational environments are accessible to all learners, regardless of their needs, by providing the necessary resources and support.⁴⁴¹ These legal precedents illustrate the ongoing challenges within the South African education system, where, despite the constitutional mandate, the practical implementation of inclusive education remains insufficient.

Thus, the chapter concludes that a more comprehensive and stronger legal and policy framework is required to guarantee the right to education for all children, especially those with special education needs. Clearer definitions, enforceable provisions, and a more explicit commitment to inclusivity are essential to addressing existing gaps. A strengthened legal framework, supported by targeted policy interventions, is critical in fostering an educational environment where all children, irrespective of their needs, can thrive. Until these critical issues are addressed, the full realisation of the right to education for children with special needs will remain an unattainable goal, and their complete inclusion in the educational system will continue to be obstructed.

⁴³⁹ 2013 2 SA 40 (GNP).

⁴⁴⁰ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).

⁴⁴¹ 2011 5 SA 87 (WCC).

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Summary of the findings

This is the final chapter of this dissertation. It concludes the study by reflecting on its primary objectives.⁴⁴² It summarises the key findings and proposes actionable recommendations to address the challenges identified. The study analysed the provisions of the Schools Act in relation to the rights of children with special education needs and how the law addresses their educational entitlements.⁴⁴³ The study further examined the mechanisms through which the state can effectively realise these rights and ensure compliance with the constitutional guarantees for children with special education needs.⁴⁴⁴ Furthermore, the study critically assessed the jurisprudence of the Constitutional Court and other superior courts in South Africa regarding section 29(1) of the Constitution, with a specific focus on its interpretation and application to children requiring specialised educational support.⁴⁴⁵

This chapter is organised into five main sections. The first section is the summary of the findings. Secondly, it reflects on the purpose of the study, revisiting the research questions and hypothesis providing a clear context for the analysis and findings. Thirdly, it outlines the key findings that emerged from the research, drawing connections between legal and policy frameworks and the challenges faced by children with special education needs. Fourthly, it outlines recommendations based on these findings, emphasising the need for legal reform, policy enhancements, and practical measures to ensure equitable access to education. The last section provides a conclusion that encapsulates the study's contribution to the discourse on inclusive education while reasserting the importance of sustained efforts to protect the rights of children with special education needs in South Africa.

5.2 Reflection on the purpose of the study: research questions and the hypothesis

This study's research questions and hypothesis critically engaged with the challenges surrounding the realisation of the right to education for children with special education needs in South Africa in light of constitutional provisions and existing jurisprudence. These questions

⁴⁴² See Chapter 1, Section 1.3, Subsection 1.3.2 for the objectives of the study.

⁴⁴³ Ibid at Section 1.3, Subsection 1.3.2.

⁴⁴⁴ Ibid at Section 1.3, Subsection 1.3.2.

⁴⁴⁵ Ibid at Section 1.3, Subsection 1.3.2.

addressed the intersection of legislative provisions, state obligations, and the practical challenges involved in ensuring access to education for children with special education needs under South Africa's constitutional framework, particularly section 29(1)(a), which guaranteed the right to basic education.

The first research question concerned whether the Schools Act effectively addresses the rights of children with special education needs.⁴⁴⁶ This inquiry was essential for assessing whether the Schools Act, which is intended to provide comprehensive access to education, adequately accommodates the unique needs of children requiring specialised educational support. The investigation focused on whether the Act's provisions ensure sufficient mechanisms for inclusivity and whether the required resources are allocated to facilitate the full participation of children with special education needs in the educational system.

The second research question sought to identify the strategies the government could employ in fulfilling its obligations under the Constitution, including reforms to educational policies, adequate funding for special education, and the development of infrastructure capable of supporting inclusive education.⁴⁴⁷ The inquiry critically assessed how the state operationalises its constitutional mandate to provide education to children with special education needs, focusing on whether the allocation of resources, teacher training, and infrastructure development are sufficient to meet their needs.

The third research question concerned the jurisprudence of the Constitutional Court and other courts of law in South Africa regarding the immediate realisation of the right to basic education under section 29(1).⁴⁴⁸ The Constitutional Court had affirmed that socio-economic rights, including the right to education, are immediately realisable. However, this principle might not have adequately accounted for the resource constraints inherent in providing inclusive education, especially when considering the specialised resources required for children with special education needs. This question invited a critical analysis of whether the court's interpretation of the immediate enforceability of socio-economic rights was consistent with the practical limitations of state resources, particularly in the context of specialised education.

⁴⁴⁶ See Chapter 1, Section 1.4 for the research questions of the study.

⁴⁴⁷ Ibid at Section 1.4.

⁴⁴⁸ Ibid at Section 1.4.

The study hypothesised that the right to education, as a socio-economic right, is most effectively understood through socio-economic rights jurisprudence.⁴⁴⁹ The hypothesis critiqued the view that section 29(1) mandates the immediate realisation of the right to education, arguing that this approach disregards the resource constraints faced by the state. Specifically, the study suggests that the needs of children with special educational requirements necessitates additional resources and that the judicial expectation of immediate realisation may not have been practically feasible. Thus, the hypothesis suggests a more measured approach that considers the need for gradual implementation, strategic resource allocation, and long-term planning to ensure that children with special education needs could fully access their constitutional right to education.

Hence, the research questions and hypothesis sought to clarify the tension between the constitutional guarantee of the right to education and the practical realities of its delivery. This study critically engaged with both legal principles and the operational challenges involved in providing education for learners with special education needs, aiming to propose viable solutions for realising their rights under the Constitution.

5.3 Key findings of the study

This dissertation examined the inadequacy of South Africa's legislative and policy frameworks, alongside the roles of the state, government, and judiciary in ensuring the right to basic education for children with special education needs, highlighting key areas of concern and non-compliance with constitutional and international standards. Thus, the following section presents the key findings in evaluating the research questions and hypothesis discussed above.

The provisions of the Schools Act, insofar as they relate to children with special education needs, establish a legal framework that mandates the inclusion of such children in mainstream education.⁴⁵⁰ Specifically, the Act provides for the development of individualised educational

⁴⁴⁹ See Chapter 1, Section 1.5 for the hypothesis of the study.

⁴⁵⁰ Section 3(1) of the Act mandates compulsory education for children aged seven to fifteen and requires that education for learners with special education needs be provided at ordinary public schools, along with relevant educational support services; See further, Equal Education Law Centre, 'A 20-year Review of the Regulatory Framework for Inclusive Education and its Implementation in South Africa' (Date not specified November 2021) <[https://www.bing.com/ck/a?!&&p=d15b615335ad88d8eed255fdd42a7db30b53850d45b0abd8f5972c8b46bf9807JmltdHM9MTczNzg0OTYwMA&pptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Equal+Education+Law+Centre%2c+%e2%80%98A+20-year+Review+of+the+Regulatory+Framework+for+Inclusive+Education+and+its+Implementation+in+South+Africa%e2%80%99+\(Date+not+specified+November+2021\)+%3c+let-in-or-left](https://www.bing.com/ck/a?!&&p=d15b615335ad88d8eed255fdd42a7db30b53850d45b0abd8f5972c8b46bf9807JmltdHM9MTczNzg0OTYwMA&pptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Equal+Education+Law+Centre%2c+%e2%80%98A+20-year+Review+of+the+Regulatory+Framework+for+Inclusive+Education+and+its+Implementation+in+South+Africa%e2%80%99+(Date+not+specified+November+2021)+%3c+let-in-or-left)>

plans and accommodations to facilitate the integration of the children, including those with special education needs.⁴⁵¹ However, a critical analysis revealed a significant disjunction between the legislative framework and its practical application.⁴⁵² While the Act ostensibly supports the constitutional right to education, the lack of sufficient financial resources, trained personnel, and accessible infrastructure impedes the effective realisation of these provisions.⁴⁵³ Section 29(1) guarantees everyone the right to basic education. Despite this, the full implementation of these rights remains hindered by practical limitations in the education system, which often leads to exclusion or the provision of substandard educational experiences for children with special needs.⁴⁵⁴ Hence, while the Schools Act aims to align with the Constitution's guarantees, the realisation of the rights of children with special education needs is

[out.pdf+%3e+accessed+17+January+2025&u=a1aHR0cHM6Ly9lZWxhd2NlbnRyZS5vcmcuemEvd3AtY29udGVudC91cGxvYWRzL2xldC1pbilvcilslZWZ0LW91dC5wZGY&ntb=1](#) > accessed 26 January 2025

⁴⁵¹ Section 12(1)-(5) of the Act; See further, Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 52-53.

⁴⁵² Donohue, D and Bornman, J 'The Challenges of Realising Inclusive Education in South Africa' (2014) 34(2) *South African Journal of Education* 1, 1; Despite the inclusive policies, there is a significant gap between legislation and practice. The article highlights that up to 70% of children with special education needs are out of school, indicating challenges in policy implementation.

⁴⁵³ Mpu, Y and Adu, EO 'The Challenge of Inclusive Education and its Implementation in Schools: The South African Perspective' (2021) 39(2) *Perspectives in Education* 225, 227-232. Retrieved from < [https://www.bing.com/ck/a?!&&p=d1179f00bc00d3f52ddf42bdc43097c23603dad1cbfad5a48f3e9b6767805bfJmltdHM9MTczNzc2MzlwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Mpu%2c+Y+and+Adu%2c+EO+%e2%80%98The+Challenge+of+Inclusive+Education+and+its+Implementation+in+Schools%3a+The+South+African+Perspective%e2%80%99+\(2021\)+39\(2\)+Perspectives+in+Education+225-238.+Retrieved+from+%3c+View+of+The+challenges+of+inclusive+education+and+its+implementation+in+schools%3a+The+South+African+perspective+%3e+accessed+17+January+2025&u=a1aHR0cHM6Ly9qb3VybmFscy51ZnMuYWMuemEvaW5kZXgucGhwL3BpZS9hcnRyY2xlL3ZpZXcvNDU4Mw&ntb=1](https://www.bing.com/ck/a?!&&p=d1179f00bc00d3f52ddf42bdc43097c23603dad1cbfad5a48f3e9b6767805bfJmltdHM9MTczNzc2MzlwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Mpu%2c+Y+and+Adu%2c+EO+%e2%80%98The+Challenge+of+Inclusive+Education+and+its+Implementation+in+Schools%3a+The+South+African+Perspective%e2%80%99+(2021)+39(2)+Perspectives+in+Education+225-238.+Retrieved+from+%3c+View+of+The+challenges+of+inclusive+education+and+its+implementation+in+schools%3a+The+South+African+perspective+%3e+accessed+17+January+2025&u=a1aHR0cHM6Ly9qb3VybmFscy51ZnMuYWMuemEvaW5kZXgucGhwL3BpZS9hcnRyY2xlL3ZpZXcvNDU4Mw&ntb=1) > accessed 26 January 2025; See further, Mitchell, C 'Let's Not Leave This Problem: Exploring Inclusive Education in Rural South Africa' (2008) 38(1) *Prospects* 99. Retrieved from < <https://doi.org/10.1007/s11125-008-9057-y> > accessed 17 January 2025; Kgothule, RJ and Hay, J 'Educators' Views on Management Practices in the Implementation of Inclusive Education: An Ecosystemic Approach' (2013) 42(1) *Journal of Human Ecology* 33. Retrieved from < <https://doi.org/10.1080/09709274.2013.11906579> > accessed 17 January 2025; Mkwandawire, MT, Maphale, SP and Tseeke, MR 'A Comparative Assessment of Special Education Situations between Lesotho and Malawi' (2016) 5(4) *International Journal of Education and Research* 171.

⁴⁵⁴ Khumalo, S and Hodgson, TF 'The Right to Education for Children with Disabilities in South Africa: SECTION27's action from national research and litigation strategies to international advocacy' (14 April 2015) <

<https://www.bing.com/ck/a?!&&p=997217a1ab98faa34a2bf3bc9c13ade26f54c5fe43a0dd158caa58df7c13c2faJmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=The+Right+to+Education+for+Children+with+Disabilities+in+South+Africa%3a+SECTION27%e2%80%99s+action+from+national+research+and+litigation+strategies+to+international+advocacy+%7c+Right+to+Education+Initiative&u=a1aHR0cHM6Ly93d3cucmlnaHQtdG8tZWRR1Y2F0aW9uLm9yZy8&ntb=1> > accessed 26 January 2025.

substantially obstructed by systemic challenges related to resource allocation and implementation.

In order to fully realise the rights of children with special education needs as guaranteed under the Constitution, a comprehensive approach is necessary. First and foremost, the state must prioritise the allocation of increased financial resources towards special education services, including funding for specialised training for educators, the development of assistive technologies, and the expansion of physical infrastructure to accommodate children with special education needs.⁴⁵⁵ It is imperative that the state takes concrete steps to address the existing disparities in access to specialised educational services.⁴⁵⁶ Additionally, a comprehensive national policy strategy that incorporates special education into the broader framework of inclusive education should be developed.⁴⁵⁷ Such a policy should mandate the integration of children with special education needs into mainstream schools,⁴⁵⁸ where feasible, and ensure that resources are available to support the integration.⁴⁵⁹

⁴⁵⁵ For a full discussion on the issue, See specifically Chapter 2-4 of the Education White Paper 6; See further, Dalton, EM, Mckenzie, JA, and Kahonde, C ‘The Implementation of Inclusive Education in South Africa: Reflections Arising from a Workshop for Teachers and Therapists to Introduce Universal Design for Learning’ (2012) 1(1) *African Journal of Disability* 1. Retrieved from < <http://dx.doi.org/10.4102/ajod.v1i1.13> > accessed 17 January 2025.

⁴⁵⁶ Khumalo, S and Hodgson, TF ‘The Right to Education for Children with Disabilities in South Africa: SECTION27’s action from national research and litigation strategies to international advocacy’ (14 April 2015) < <https://www.bing.com/ck/a?!&p=997217a1ab98faa34a2bf3bc9c13ade26f54c5fe43a0dd158caa58df7c13c2faJmldHM9MTczNzg00TYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=The+Right+to+Education+for+Children+with+Disabilities+in+South+Africa%3a+SECTION27%e2%80%99s+action+from+national+research+and+litigation+strategies+to+international+advocacy+%7c+Right+to+Education+Initiative&u=a1aHR0cHM6Ly93d3cucmlnaHQtdG8tZWR1Y2F0aW9uLm9yZy8&ntb=1> > accessed 26 January 2025.

⁴⁵⁷ Walton, E and Engelbrecht, P ‘Inclusive Education in South Africa: Path Dependencies and Emergences’ (2024) 28(10) *International Journal of Inclusive Education* 2138. Retrieved from < <https://www.tandfonline.com/doi/full/10.1080/13603116.2022.2061608#abstract> > accessed 17 January 2025.

⁴⁵⁸ See for example, Rose, R, Garner, P and Farrow, BJ ‘Developing Inclusive Education Policy in Sierra Leone: A Research Informed Approach: Insights from Educators across World’ (2019) *Inclusion, Equity and Access for Individuals with Disabilities* 427. Retrieved from < <https://www.bing.com/ck/a?!&p=f00afbeb233c6f9528ff8c8037784e5a4401699e4b4848403fe296a295040306JmldHM9MTczNzg00TYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Developing+policy+for+inclusive+education+in+Sierra+Leone&u=a1aHR0cHM6Ly93d3cucmVzZWZyY2hnYXRILm5ldC9wdWJsaWNhdGlvbI8zMzE0NzQ2ODJfRGV2ZWxvcGluZ19JbmNsdXNpdmVfRWR1Y2F0aW9uX1BvbGljeV9pbI9TaWVycmFfTGvbmVfQV9SZXNIYXJjaF9JbmZvcml1ZF9BcHByb2FjaF9JbnNpZ2h0c19mcm9tX0VkdWNhdG9yc19hY3Jvc3NfV29ybGQ&ntb=1> > accessed 26 January 2025.

⁴⁵⁹ Makoelle, TM and Burmistrova, V ‘Funding Inclusive Education for Equity and Social Justice in South African Schools’ (2020) 40(4) *South African Journal of Education* 1. Retrieved from < <https://doi.org/10.15700/saje.v40n4a2037> > accessed 17 January 2025.

The state must also implement strong mechanisms for monitoring and accountability to ensure that educational institutions comply with their obligations towards children with special education needs.⁴⁶⁰ Regular evaluations of schools' adherence to inclusive education policies would provide an avenue for intervention where necessary.⁴⁶¹ Furthermore, to protect and promote the rights of children with special education needs, a cooperative approach involving the state, civil society organisations, advocacy groups, and parents should be fostered.⁴⁶² Public awareness campaigns focused on the constitutional rights of children with special education needs would also help to shift societal attitudes and generate the necessary political will to effect change.⁴⁶³ Therefore, the realisation of these rights requires not only a commitment from the state but also a cooperative effort that integrates the contributions of multiple stakeholders.⁴⁶⁴

The jurisprudence of the Constitutional Court with respect to section 29(1) has established the right to basic education as an immediately enforceable right.⁴⁶⁵ This interpretation, however presents particular challenges when applied to the context of children with special education needs. While the court has emphasised the immediacy of the right to education, this understanding fails to take into account the substantial resource constraints and infrastructural limitations that impede the delivery of adequate education to children with special education needs.⁴⁶⁶ The interpretation that the right to education is immediately realisable does not

⁴⁶⁰ See for example, Bolt, SE, Roach, AT and Quenemoen, RF *Inclusive Assessment and Accountability: A Guide to Accommodations for Students with Diverse Needs* (1st Ed., The Guilford Press 2008); The book provides guidelines for selecting appropriate accommodations and alternative testing practices for learners with special education needs, emphasising the importance of accountability in inclusive education.

⁴⁶¹ Obah, A 'The Effectiveness of Inclusive Education Policies for Students with Disabilities' (2024) 2(5) *International Journal of Humanity and Social Sciences* 50.

⁴⁶² Ainscow, M 'Promoting Inclusion and Equity in Education: Lesson from International Experiences' (2020) 6(1) *Nordic Journal of Studies in Educational Policy* 7.

⁴⁶³ See for example, Sirem, Ö and Çatal, T (2023) 'An Analysis of Classroom Teachers' Awareness of Inclusive Education' (2023) 38(2) *European Journal of Special Needs Education* 203. Retrieved from < <https://doi.org/10.1080/08856257.2022.2050971> > accessed 17 January 2025.

⁴⁶⁴ See for example, Genovesi, E, Jakobsson, C, Nugent, L, Hanlon, C and Hoekstra, RA 'Stakeholder experiences, attitudes and perspectives on inclusive education for children with developmental disabilities in sub-Saharan Africa: A systematic review of qualitative studies' (2022) 26(7) *Review* 1606.

⁴⁶⁵ 2011 (8) BCLR 761 (CC) 37; See further, Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 48; Chiedza, S 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 126, 131-132.

⁴⁶⁶ Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 58-61; See further, Chiedza, S 'A Hexagon Right: The Six Dimensions of the South African Right to Basic Education' (2018) 39 (1) *Obiter* 126, 132; See also, for example, Ryan, C, 'GroundUp' (17 September 2021) <

adequately address the fact that children with special education needs require significant and specialised support, which can only be provided through well-resourced and adequately staffed educational institutions.⁴⁶⁷

The Constitutional Court has generally applied the principle of immediate enforceability to socio-economic rights, including the right to education. However, this approach assumes that the state has the necessary resources to fulfil its constitutional obligations instantaneously, an assumption that is often impractical in the case of children with special education needs.⁴⁶⁸ The progressive realisation of socio-economic rights is an established principle under international

<https://www.bing.com/ck/a?!&&p=b88a1932d5fdd1252292eefd036a8b2f5535c6305de73447ed2d757af746e118JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Komape+family+wins+court+battle+seven+years+after+their+son+drowned+in+a+pit+toilet+%7c+GroundUp+%3e+accessed+17+December+2024&u=a1aHR0cHM6Ly9ncm91bmR1cC5vcmcuemEvYXJ0aWNsZS9rb21hcGUtZmFtaWx5LXdpcnMtc2Nob29sLXNhbm10YXRpb24tY2FzZS1saW1wb3BvLW9pZ2gtY291cnQtY2V2ZW4teWVhenMtYWZ0ZXItZml2ZS15ZWYyLW9sZC1zb24tZlJvd25lZC1waXQtdG9pbGV0Lw&ntb=1> > accessed 26 January 2025; See further, Equal Education, ‘Michael Komape Court Case (Limpopo)’ (Date not specified 2024) <

[https://www.bing.com/ck/a?!&&p=816173b3fa3791007df053eebceae10971e1ff7ecf1ace90fbb53f4298090593JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Equal+Education%2c+%e2%80%98Michael+Komape+Court+Case+\(Limpopo\)%e2%80%99+\(Date+not+specified+2024\)+%3c+Michael+Komape+Court+Case+\(Limpopo\)+ +Equal+Education+%3e+accessed+17+December+2024&u=a1aHR0cHM6Ly9lcXVhbGVkdWNhdGlvb3V5cmcuemEvY291cnQtY2FzZS9taWNoYWVsLWtvcWVwZS1jb3VyZC1jYXNlLWxpbnBvcG8v&ntb=1](https://www.bing.com/ck/a?!&&p=816173b3fa3791007df053eebceae10971e1ff7ecf1ace90fbb53f4298090593JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Equal+Education%2c+%e2%80%98Michael+Komape+Court+Case+(Limpopo)%e2%80%99+(Date+not+specified+2024)+%3c+Michael+Komape+Court+Case+(Limpopo)+ +Equal+Education+%3e+accessed+17+December+2024&u=a1aHR0cHM6Ly9lcXVhbGVkdWNhdGlvb3V5cmcuemEvY291cnQtY2FzZS9taWNoYWVsLWtvcWVwZS1jb3VyZC1jYXNlLWxpbnBvcG8v&ntb=1) > accessed 26 January 2025.

⁴⁶⁷ Ibid at 58–61; See further; McConnachie, C and McConnachie, C ‘Concretising the Right to a Basic Education’ (2012) 129(3) *South African Law Journal* 554, 557; McConnachie and McConnachie provides that, they accept that the right to basic education is an unqualified right but argue that although it is unqualified, the right to basic education “does not mean that the state will be required to provide adequate facilities immediately, irrespective of budgetary and capacity constraints or other urgent demands on its resources.”; Chiedza, S ‘A Hexagon Right: The Six Dimensions of the South African Right to Basic Education’ (2018) 39 (1) *Obiter* 126, 132–134.

⁴⁶⁸ Nyane, H ‘The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?’ (2024) 49 (3) *Journal for Juridical Science* 46, 58–61; See further, Chiedza, S ‘A Hexagon Right: The Six Dimensions of the South African Right to Basic Education’ *Obiter* (2018) 39 (1) 126, 132; See also, for example, Ryan, C, ‘GroundUp’ (17 September 2021) <

<https://www.bing.com/ck/a?!&&p=b88a1932d5fdd1252292eefd036a8b2f5535c6305de73447ed2d757af746e118JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Komape+family+wins+court+battle+seven+years+after+their+son+drowned+in+a+pit+toilet+%7c+GroundUp+%3e+accessed+17+December+2024&u=a1aHR0cHM6Ly9ncm91bmR1cC5vcmcuemEvYXJ0aWNsZS9rb21hcGUtZmFtaWx5LXdpcnMtc2Nob29sLXNhbm10YXRpb24tY2FzZS1saW1wb3BvLW9pZ2gtY291cnQtY2V2ZW4teWVhenMtYWZ0ZXItZml2ZS15ZWYyLW9sZC1zb24tZlJvd25lZC1waXQtdG9pbGV0Lw&ntb=1> > accessed 26 January 2025; See further, Equal Education, ‘Michael Komape Court Case (Limpopo)’ (Date not specified 2024) <

[https://www.bing.com/ck/a?!&&p=816173b3fa3791007df053eebceae10971e1ff7ecf1ace90fbb53f4298090593JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Equal+Education%2c+%e2%80%98Michael+Komape+Court+Case+\(Limpopo\)%e2%80%99+\(Date+not+specified+2024\)+%3c+Michael+Komape+Court+Case+\(Limpopo\)+ +Equal+Education+%3e+accessed+17+December+2024&u=a1aHR0cHM6Ly9lcXVhbGVkdWNhdGlvb3V5cmcuemEvY291cnQtY2FzZS9taWNoYWVsLWtvcWVwZS1jb3VyZC1jYXNlLWxpbnBvcG8v&ntb=1](https://www.bing.com/ck/a?!&&p=816173b3fa3791007df053eebceae10971e1ff7ecf1ace90fbb53f4298090593JmltdHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=Equal+Education%2c+%e2%80%98Michael+Komape+Court+Case+(Limpopo)%e2%80%99+(Date+not+specified+2024)+%3c+Michael+Komape+Court+Case+(Limpopo)+ +Equal+Education+%3e+accessed+17+December+2024&u=a1aHR0cHM6Ly9lcXVhbGVkdWNhdGlvb3V5cmcuemEvY291cnQtY2FzZS9taWNoYWVsLWtvcWVwZS1jb3VyZC1jYXNlLWxpbnBvcG8v&ntb=1) > accessed 26 January 2025.

human rights law, and it provides a more nuanced understanding of the state's obligations under section 29(1).⁴⁶⁹ In light of this, the Court's current jurisprudence on the immediate enforceability of education rights should be reconsidered to account for the specific challenges faced by children with special education needs, like long-term infrastructural changes, which cannot be achieved overnight. Thus, while the right to education is undoubtedly fundamental, its immediate realisation for children with special education needs is fraught with practical and financial constraints that must be acknowledged and addressed.⁴⁷⁰

The central hypothesis of this study anchors on the fact that the right to education, as guaranteed under section 29(1), is a socio-economic right subject to progressive realisation, acknowledging that full implementation may take time and is contingent on the availability of resources. The Constitutional Court's position that the right to basic education is immediately enforceable has posed challenges, particularly for children with special education needs, as it fails to consider the significant resource constraints within the education system. Immediate enforceability overlooks the fact that providing education for children with special needs requires substantial financial investment, specialised staff, and infrastructure, which may not be readily available. Furthermore, the current jurisprudence, which interprets socio-economic rights like the right to education as immediately realisable, does not sufficiently address the limitations of available resources.

The realisation of the right to education requires a more flexible, gradual approach that reflects the state's practical constraints. The progressive realisation framework, as developed by international human rights jurisprudence, would allow the state to take meaningful steps towards fulfilling its obligations under section 29(1), without the unrealistic expectation that these rights can be fully realised in the short term. Therefore, the study suggests that a shift towards a more resource-conscious interpretation of the right to education for children with special education needs is necessary to align the Constitution's guarantees with the realities of the South African education system.

5.4 Recommendations

⁴⁶⁹ Articles 2(1) and 13(2) of the ICESCR; See further, Article 28(1) of the CRC; Article 24 of the CRPD; Article 11 of the ACRWC.

⁴⁷⁰ 2011 (8) BCLR 761 (CC) 37; See further, *Minister of Basic Education v Basic Education for All* 2019 (3) SA 227 (SCA) 52; Skelton, A 'The Role of the courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law' (2013) 46 *De Jure* 1, 10-12.

Drawing from the key findings of this research, the following recommendations are hereby proposed. Firstly, the Constitution is entrenched, requiring a stringent amendment process involving supermajorities in legislative chambers or approval from state legislatures.⁴⁷¹ Although this process is demanding, it is recommended that the Constitution be amended to explicitly enshrine the right to equitable access to quality education, ensuring conformity with international human rights standards and addressing existing inadequacies in access to and the quality of education for children with special education needs.⁴⁷² Furthermore, the Schools Act should be amended to strengthen legislative provisions, mainly by instituting more stringent accountability measures that mandate the allocation of adequate resources, the employment of qualified educators, and the implementation of inclusive practices to support all learners, particularly those from disadvantaged backgrounds.⁴⁷³

Additionally, the development of effective monitoring and evaluation mechanisms is critical to ensure the effective implementation of educational policies, enabling the timely identification of challenges and the institution of necessary corrective measures.⁴⁷⁴ The state must also discharge its constitutional duty under section 29 by taking proactive steps to guarantee sufficient funding, a supportive policy framework, and access to quality education for all children, particularly in underserved regions.⁴⁷⁵ Immediate measures must be undertaken to fully realise the right to basic education by eliminating barriers, like poverty, inadequate infrastructure, and geographic isolation.⁴⁷⁶ It is further recommended that the judiciary assume an active role in upholding educational rights, ensuring that judicial rulings compel compliance with the state's obligations

⁴⁷¹ Institute for Democracy and Electoral Assistance 'Constitutional Amendment Procedures' (International IDEA 2014)

<https://www.bing.com/ck/a?!&&p=dfb9eae69f42dccaef634cbeb7077ac9675cadfb389c390eacdd8db1c226JmldHM9MTczNzg0OTYwMA&ptn=3&ver=2&hsh=4&fclid=3ac29575-7416-6ba5-141a-811675356ae7&psq=constitutional+amendment+process+PDF&u=a1aHR0cHM6Ly9jb25zdGl0dXRpb25uZXQub3JnL3NpdGVzL2RlZmF1bHQvZmlsZXMvY29uc3RpdHV0aW9uYWxfYW1lbmRtZW50X3Byb2NlZHVyZXMucGRm&ntb=1> > accessed 27 January 2025.

⁴⁷² Chaskalson, P *Human Rights in the New South Africa* (Juta Cape Town 2000); See further; De Vos, P *Constitutional Law in South Africa* (Oxford University Press Cape Town 2010).

⁴⁷³ Sayed, Y and Jansen, J 'Implementation of Educational Policy in South Africa: A Focus on the South African Schools Act' (2001) 21(2) *International Journal of Educational Development* 147.

⁴⁷⁴ Morrow, W 'Learning to Teach: Accountability and Educational Policy Reform in South Africa' (2007) 51(4) *Comparative Education Review* 412; See further, Ndebele, A 'Accountability and Education Policy in South Africa' (2006) 26(2) *South African Journal of Education* 209.

⁴⁷⁵ Baartjie, R 'The Right to Basic Education: Constitutional Duty and Policy Implementation' (2009) 53(2) *Journal of African Law* 135.

⁴⁷⁶ Miller, T and Scott, A 'Barriers to Education: Poverty, Infrastructure, and Geographic Isolation' (2022) 11(2) *Education for All Journal* 34.

to provide quality education, particularly for marginalised and vulnerable groups.⁴⁷⁷ Lastly, a national awareness campaign should be initiated to educate the public on the constitutional right to education, while also enhancing the capacity of educators, parents, and communities to engage in advocacy and contribute to the improvement of the educational system.⁴⁷⁸

5.5 Conclusion

This dissertation has critically examined the right to basic education for children with special education needs in South Africa, addressing the research objectives through a comprehensive analysis of legislative, constitutional, and judicial frameworks. The findings reveal both strengths and weaknesses in the country's efforts to fulfil this fundamental right. In particular, the study highlights the urgent need for a more coordinated and inclusive approach to education policy and practice, which this research contributes to by engaging with the ongoing discourse on socio-economic rights in education for children with special education needs.

Despite being enshrined in the Constitution as an 'immediately realisable' and 'enforceable right,' the right to education for children with special education needs remains inadequately fulfilled. As Nyane critiques, the assertion that these rights are automatically enforceable is 'problematic.'⁴⁷⁹ Skelton further asserts that such claims 'do not wave a magic wand.'⁴⁸⁰ The education system continues to face significant challenges, including severe infrastructure deficiencies and stark inequalities in the quality of education.⁴⁸¹ The primary obstacle, however lies not with the judiciary but with the state's failure to enforce these rights effectively.

⁴⁷⁷ Terreblanche, S 'Judicial Oversight of State Action in South Africa's Educational Context' (2002) 1 *Constitutional Court Review* 113; See further, Liebenberg, S 'The Role of Courts in South Africa's Constitutional Education Rights Jurisprudence' (2002) 119(1) *South African Law Journal* 56.

⁴⁷⁸ Motala, S 'Building Community Involvement in Education: A Framework for Advocacy and Policy Action' (2007) 33(4) *Journal of Education for Teaching* 355; See further, Duflo, E and Saez, E 'The Role of Community-Based Educational Interventions: Awareness Campaigns and Educational Change' (2003) 93(3) *American Economic Review* 239.

⁴⁷⁹ Nyane, H 'The Challenges of Litigating the Right to Basic Education in South Africa: Is the Right Realisable Immediately or Subject to Resource Limitation?' (2024) 49 (3) *Journal for Juridical Science* 46, 60.

⁴⁸⁰ Skelton, A 'The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law' (2013) 46 *De Jure* 1, 4; The phrase 'does not wave a magic wand' is not a standard legal term but rather a figurative expression often used in colloquial language to convey the idea that a process, especially one requiring substantial effort or time, cannot be resolved instantly or effortlessly. In a legal context, this kind of phrase could be used to indicate that laws, regulations, or policies will require sustained effort and cannot bring about immediate or perfect results.

⁴⁸¹ *Ibid* at 4.

The state must confront the reality of these challenges and be honest about its inability to meet the needs of children with special education needs. The chronic failure to address these issues highlights a fundamental incapacity to fulfil its constitutional and international obligations. Under the South African Constitution, the state is bound to ensure that education is accessible to all, and this obligation is further strengthened by international frameworks such as the CRPD and ICESCR, which obligate the state to take appropriate measures to ensure inclusive education.

This study has revealed the critical gaps between the legal right to education and the reality of its implementation. The state must address these issues urgently, acknowledging the fundamental challenges in infrastructure, educator training, and financial resources. The state can only transform this right into a tangible reality for all children by fulfilling its constitutional and international obligations. The findings of this dissertation underscore the pressing need for reform and a commitment to inclusive, accessible education. Without such reforms, South Africa risks failing its most vulnerable citizens. The time for meaningful action is now.

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