

The State's duty to realise the Right to Education in a culturally diverse classroom

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DECLARATION

I, Zaida Essop, Identity Number 860219 0236 088 and Student Number 13040936, hereby declare that this dissertation titled 'The state's duty to realise the right to education in a culturally diverse classroom' is my own original work. The dissertation is hereby humbly submitted to the North-West University (NWU) in partial fulfilment of the requirements for the degree LLM in Comparative Child Law. This dissertation has not been submitted anywhere before.

.....
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Date: 14 November 2018

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ABSTRACT

Title: The state's duty to realise the right to education in a culturally diverse classroom

In terms of section 29(1) of the *Constitution of the Republic of South Africa, 1996* (hereinafter referred to as the Constitution), "everyone has the right to basic education".

This dissertation investigates whether the state fulfils its obligation to protect the child's constitutional right to basic education without infringing on the child's right to religion and culture. The study further investigates whether the cultural and religious diversity of schoolchildren gives rise to a disregard of their religious and cultural needs. While investigating the aforesaid, it became clear that the best interest principle as well as the child's right to equality, which is provided for in section 9 of the Constitution, play important roles when the child's right to education is being realised. This is discussed in the dissertation. To evaluate discrimination against children in a culturally diverse classroom, it is mandatory to look at what the right to basic education entails and what obligations this right places on the state – more specifically on the Department of Basic Education - when it comes to promoting the right to basic education, while protecting children's other constitutional rights.

South Africa has ratified a number of international instruments and some of these international instruments are looked at to determine what the scope of the right basic to education. Specific reference is made to the *Convention on the Rights of the Child*, the *International Covenant on Economic, Social and Cultural Rights*, and the *African Charter on the Rights and Welfare of the Child*. Case law where the right to education was adjudicated is discussed, as are the obligation of the state and the limiting of the right to basic education.

Key terms: The right to basic education, child's right to religious belief and cultural practice of choice, the state's duty and obligation, equality, best interest of the child, Constitution, international instruments.

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
CESCR	Committee on Economic, Social and Cultural Rights
Columbia LR	Columbia Law Review
CRC	Convention on the Rights of the Child
ESR Rev	Economic and Social Rights Review
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJCR	International Journal of Children's Rights
NEPA	National Education Policy Act
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

1 Introduction

Education is the most powerful weapon we can use to change the world. –
Nelson Mandela, 2003¹

For the longest time, education has been seen as the process used by society to transfer knowledge from one age group to another.² Today this same process is seen as a human right and is acknowledge across the world.³ The *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution)⁴ states that "everyone has the right to education".⁵ According to Chürr, education is seen as one of the key constitutional rights, due to the fact that it promotes economic and social well-being.⁶

Everyone has the right to freedom of conscience, religion, thought, belief and opinion,⁷ and the right to participate in the cultural life of his or her choice.⁸ However, in the culturally diverse South African environment the right to education and the child's right to participate in the cultural life of their choice may be in conflict with each other. The conflict referred to can mean that the child's right to participate in the cultural life of his or her choice might be sacrificed to the right to education. The education system and Code of Conducts of schools might not be acceptable and adaptable to the different cultural practices of learners, and this could result in infringing the child's right to the cultural life of choice. According to Chürr, despite the changes that have been made, the school system in South Africa still does not yet function satisfactorily. She bases this view on the fact that the school system still excludes some learners because they have different interests, which might

¹ Veriava "Realising the right to basic education in South Africa" 81.

² Chürr 2015 *PELJ* 2405.

³ Chürr 2015 *PELJ* 2405.

⁴ *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the Constitution).

⁵ Section 29(1) of the Constitution.

⁶ Chürr 2015 *PELJ* 2405.

⁷ Section 15(1) of the Constitution.

⁸ Section 30 of the Constitution.

include particular religious and cultural practices.⁹ This might lead to the child's right to equality being breached.

While investigating the state's duty to protect the child's constitutional right to basic education this study will explore how this right should be valued when it comes in conflict with other constitutional rights such as the rights to the religious beliefs and cultural practices of choice. In determining how the right to education and the right to a cultural life of choice should be balanced in a culturally diverse classroom, it is mandatory to analyse what is intended by the term basic education as well as to determine what the purpose of basic education is.

This study investigates the relation between basic education and the right to equality as provided in the Constitution.¹⁰ Based on the wording in section 9 of the Constitution, education must be made available to all equally. The state is obliged by the *Universal Declaration of Human Rights*¹¹ to respect all ethnic and minority groups, languages and religious rights when realising the right to education.¹² However, in a diverse classroom, realising the right to education might lead to the infringement of the child's right to his or her own culture and religious beliefs, and where this happens the child's right to equality is being infringed.

An investigation into whether the right to basic education can be limited in terms of section 36 of the Constitution is important to this study, which investigates whether the state fulfils its duty to protect the child's constitutional right to basic education without infringing on the child's right to religion and culture and consequently breaching the child's right to equality. While investigating the state's duty to protect the child's constitutional right to basic education, an investigation will also be conducted to investigate how the child's right to basic education can be balanced with the child's right to religion and

⁹ Chürr 2015 *PELJ* 2438.

¹⁰ *Constitution of the Republic of South Africa*, 1996.

¹¹ *Universal Declaration of Human Rights* (1948) (herein after referred to as the UDHR).

¹² Article 25 of the *Universal Declaration of Human Rights* (1948).

cultural life of choice. This study will further investigate whether the cultural and religious diversity of schoolchildren give rise to a disregard of their religious and cultural needs when the child's right to education is realised by the state.

The Constitution is the superior law in South Africa. The *Bill of Rights* is contained in Chapter 2 of the Constitution.¹³ The *Bill of Rights* is the foundation of democracy in South Africa.¹⁴ It preserves the rights of the people in South Africa and asserts the democratic values of human dignity, equality and freedom.¹⁵ Section 7(2) of the Constitution obliges the state to respect, protect, promote and fulfil the rights in the *Bill of Rights*.¹⁶ Socio-economic rights are protected in the Constitution as rights that are capable of being determined by a court of law, and this create obligations and entitlements with regard to these rights.

Most socio-economic rights are subject to progressive realisation by reasonable measures within available resources.¹⁷ This means that people are not entitled to these socio-economic rights but that the state has to take reasonable measures in order to realise these rights within the available resources.¹⁸ In the case of *Governing Body of the Juma Masjid Primary School v Essay*,¹⁹ the court found that "unlike other socio economic rights which have textual qualifiers, the right to basic education is immediately realisable".²⁰ The conclusion can be drawn from this that the right to education is different from other rights and anything less than providing the right will constitute a limitation.²¹

¹³ Chapter 2 of the Constitution; ss 7 to 39 of the Constitution.

¹⁴ Section 7(1) of the Constitution.

¹⁵ Section 7(1) of the Constitution.

¹⁶ Section 7(2) of the Constitution.

¹⁷ Sections 26, 27 and 29(1)(b) of the Constitution.

¹⁸ McConnachie and McConnachie 2012 *SALJ* 563.

¹⁹ 2011 8 BCLR 761 (CC) (hereinafter referred to as the *Juma Masjid* case).

²⁰ *Juma Masjid* case para 37.

²¹ McConnachie and McConnachie 2012 *SALJ* 564.

The Constitution was enacted more than two decades ago, however, despite the constitutional guarantee of socio-economic rights and the positive constitutional obligation on the state to fulfil the rights granted in the *Bill of Rights*, millions of South Africans still live in appalling poverty. This is the result of the state's failure to comply with its constitutional duties to ensure that these rights are protected and realised in their totality. The dawn of democracy during 1994 in South Africa led to the Government having to address the inequalities and imbalances caused by the Apartheid regime. The imbalances in education had to be addressed.²² Even though the state has partially fulfilled its obligation of providing basic education for example by building schools and providing free basic education to poor schools,²³ there are still many children whose rights to religious beliefs and culture are being infringed upon on in schools.²⁴

To evaluate discrimination against children, it is necessary to investigate what the right to basic education, as provided for in the Constitution, entails. The right must also be interpreted to determine what the extent of the right is, what the right entails and what it includes. An evaluation and investigation will give an indication of what obligations the right places on the state when it comes to promoting the right to education, while protecting a child's right to the religious and cultural life of choice.

The right to basic education as provided for in the Constitution cannot be read in isolation from the equality clause, section 9 of the Constitution, which provides that "everyone is equal before the law" and that "everyone has the right to equal protection and benefit of the law".²⁵ The conclusion drawn from section 9 is that no child should be discriminated against and that each child

²² Nkosi *The implications of being declared a no fee school* 13.

²³ GN No.869 GG 29179 2006/08/31.

²⁴ *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* 2017 6 SA 129 (GJ) (hereinafter referred to as *Organisasie vir Godsdienste-Onderrig en Demokrasie*).

²⁵ Section 9(1) of the Constitution.

should be given the opportunity to enjoy the same rights without being discriminated against on the basis of their religious beliefs or cultural practices.

The view and position that South African courts take when dealing with cases where the right to basic education is under investigation are also discussed in this thesis. South African courts must in terms of section 39(1)(b) and section 233 of the Constitution consider international law when interpreting the *Bill of Rights*. Specific reference is made in this dissertation to *Convention on the Rights of the Child* 1989, the *African Charter on the Rights and Welfare of the Child* 1990, and the *International Covenant on Economic, Social and Cultural Rights* 1966 when referring to international instruments. These instruments and especially the *International Covenant on Economic, Social and Cultural Rights*, 1966 refer to states' obligations in terms of the right to basic education. Article 13 of the *International Covenant on Economic, Social and Cultural Rights*, 1966 states that:

Education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.²⁶

The Department of Basic Education is responsible for providing basic education on behalf of the state, and careful consideration must be given to what the state's role is when the right to basic education is realised. The question that should be asked is to what extent the state is currently succeeding in protecting and realising the child's constitutional right to basic education without violating freedom of religion and culture in the light of the culturally diverse environment in South Africa. This study critically investigates the realisation of the right to basic education by the state in the light of the cultural and religious diversity of the South African environment.

In answering the research question, the content of the right to basic education as well as the right to equality will be looked at first. Thereafter the international instruments which is pertinent to this problem will be discussed. The thesis will

²⁶ Article 13 of the *International Covenant on Economic, Social and Cultural Rights*, 1966.

then look at the best interest of the child. In chapter five the Religious and cultural diversity in public schools and the approach adopted by South African courts will be investigated. Chapter six will measure the states duty to realise the right to basic education and lastly a conclusion will be drawn.

2 The content of the right to basic education and the right to equality

According to Krüger and McConnachie the Constitution is of profound importance in the school environment in South Africa. They note that every child in South Africa must attend school for at least nine years and that most children attend public schools. They are of the opinion that the school environment provides possibilities for the rights enshrined in the Constitution to be realised, and at the same time it also presents risks to the realisation of those rights.²⁷

Krüger and McConnachie also state that the ideal is that schools should enable an environment that promotes and fulfils the constitutional rights of learners. They are of the opinion that through education learners are offered the opportunity to address the unequal distribution of competencies and skills as well as to break the cycle of poverty.²⁸ Pre 1994 the schooling system in South Africa was of such that the education was designed to perpetrate hate amongst people from different races. Simbo state that the educational system at the time of Apartheid was one that was unequal and that the system divided people from different races. The system was designed as such that the education for Black South African was inferior to the education system for white learners and the funding in Black schools were not sufficient, This resulting in Black schools not having well trained teachers, sufficient class space and the funding in Black schools was also limited.²⁹ Simbo state that the

²⁷ Krüger and McConnachie "The impact of the Constitution on learners' rights" 534; Section 3 of the *South African School's Act* 84 of 1996.

²⁸ Krüger and McConnachie "The impact of the Constitution on learners' rights" 535.

²⁹ Simbo 2012 Vol 16 *Law, Democracy and Development* 168.

end of Apartheid and the dawn of Democracy brought about a new era for the education system in South Africa.³⁰ Post 1994 the school system in South Africa has undergone radical change,³¹ but there are still some shortfalls.³² Some of the changes was that the democratic government made available more funds for Education.³³ The Preamble of the *South African Schools Act*³⁴ (hereafter referred to as the *Schools Act*) state that:

This country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities.

Some of the shortfalls include a lack of infrastructure, books and ablution facilities. These shortfalls are mostly experienced in the previously disadvantaged schools due to the fact that during the Apartheid era there was a lack of funding by the Government in Black South African Schools compared to the funding made available to White learners.³⁵ The inadequate funding of the past thus still reflect today in the previously disadvantages schools. Moseneke DCJ in the case of the *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*³⁶ stated the following when describing the lasting effects of the South African history in education:

White public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they were shored up by relatively affluent white communities. Whereas on the other hand, formerly black public schools have been and by large remain scantily resourced.³⁷

³⁰ Simbo 2012 Vol 16 *Law, Democracy and Development* 170.

³¹ The divided education system that existed during Apartheid was consolidated into one by the new Democratic Government and was called the National Department of Education. The National Department of Education is divided into the Department for Basic Education and the Department of Higher Education.

³² Krüger and McConnachie "The impact of the Constitution on learners' rights" 535.

³³ Simbo 2012 Vol 16 *Law, Democracy and Development* 171.

³⁴ *Schools Act*.

³⁵ Simbo 2012 Vol 16 *Law, Democracy and Development* 168.

³⁶ 2010 2 SA 415 (CC) (hereinafter referred to as the *Ermelo* case).

³⁷ 2010 2 SA 415 (CC) para 46.

The right to basic education is provided in the Constitution. Section 29 of the Constitution states that "everyone has a right to basic education".³⁸ In terms of section 39(1) of the Constitution any court, forum or tribunal must, when dealing with rights enshrined in the *Bill of Rights*, promote those values that underlie a democratic society based on freedom, human dignity and equality.³⁹

The content of the right to basic education is discussed in this chapter, as well as the right not to be discriminated against.

2.1 The right to basic education

Education is a key for the development of every human being.⁴⁰ Skelton is of the opinion that "it is axiomatic that children who cannot access basic education do not reach their full potential".⁴¹ The South African Parliament as well as the Provincial Legislatures are responsible for introducing laws that govern education.⁴² There is a broad legal framework for the provision of education on the national level.⁴³ The *Schools Act*, the *National Education Policy Act*⁴⁴ (hereafter referred to as the NEPA) as well as the *Employment of Educators Act*⁴⁵ create the legal framework for education on national level. In terms of the NEPA the Minister of Basic Education must develop regulations, norms and policies as well as standards to govern the school system in such a way as to promote and advance the rights as contained in the Constitution.⁴⁶

In the context of this study a clear understanding of the right to basic education is necessary. The term basic education is not defined in either the Constitution or the Interim Constitution.⁴⁷ The *Schools Act* does not provide a definition for basic education and only provides a definition as to what

³⁸ Section 29(1) of the Constitution.

³⁹ Section 39(1) of the Constitution.

⁴⁰ Kamga "The right to a basic education" 517.

⁴¹ Open Society Foundations "Strategic Litigation Impacts" 22.

⁴² Krüger and McConnachie "The impact of the Constitution on learners' rights" 536.

⁴³ Krüger and McConnachie "The impact of the Constitution on learners' rights" 536.

⁴⁴ NEPA.

⁴⁵ *Employment of Educators Act* 76 of 1998.

⁴⁶ Section 4 of the NEPA.

⁴⁷ 200 of 1993; Seleane 2003 *Law, Democracy and Development* 143.

compulsory school attendance is.⁴⁸ The term basic education is derived from the term primary education.⁴⁹ Primary education means ensuring that all children's basic learning needs are satisfied.⁵⁰

In satisfying the basic need to learn, the culture of the community must be taken into account.⁵¹ The difference between primary and basic education is that primary education is defined as a compulsory period of education and the term basic education refer to education with a substantive content.⁵² Basic education can then be seen as education through which the individual's basic learning needs are satisfied.⁵³ Section 29 of the Constitution states the following:⁵⁴

- (1) Everyone has the right –
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Malherbe is of the opinion that the right to education is of the utmost importance as this right is the key which unlocks the other rights as contained in the *Bill of Rights*.⁵⁵ Berger questions the content of section 29 with specific reference to section 29(1)(a) and asks "[w]hether section 29(1)(a) merely promises a place to go to school or does it provide for an 'adequate' education?" According to Veriava and Coomans, section 29 of the Constitution contains a cluster of rights. They are of the opinion that section 29 can be seen as a "hybrid right" due to the fact that section 29(1) captures the socio-economic essence of the right, while sections 29(2) and (3) refer to civil and political rights.⁵⁶ Woolman and Fleisch are of the opinion that the term basic

⁴⁸ Section 3 of the *Schools Act*.

⁴⁹ *World Declaration on Education for All* Article 5.

⁵⁰ *World Declaration on Education for All* Article 5.

⁵¹ *World Declaration on Education for All* Article 5.

⁵² McConnachie and McConnachie 2012 *SALJ* 567.

⁵³ McConnachie and McConnachie 2012 *SALJ* 567.

⁵⁴ Section 29(1) of the Constitution.

⁵⁵ Malherbe "Education rights" 399.

⁵⁶ Veriava and Coomans "The right to education" 60.

education can have two interpretations, one having to do with the standard of education and the other with the duration of education.⁵⁷

According to Seleoane the right to basic education is a stronger right than the other socio-economic rights in three respects. He states that the right is immediate, it is not dependent on available resources, and it is direct.⁵⁸ This means that the provision of education is not conditional on the availability of resources.

Seleoane further states that the availability of resources might be a factor when limiting a right in the *Bill of Rights* only in terms of section 36 of the Constitution. He is further of the opinion that the meaning of any right should first be established before the right can be limited to avoid confusion with regards to what is being limited. According to him, any suggestion of there being a link between a limitation of the right to basic education and the availability of resources is questionable. He draws the conclusion that if the Constitution wanted to subject the right to the availability of resources it would have been stated in section 29(1)(a) of the Constitution. He further states that limiting the right as a result of the unavailability resources would defeat the objectives of 29(1)(a) of the Constitution. The right to basic education is direct in its nature, as this right offers the beneficiary not only access to education but also access to relevant education.⁵⁹ Seleoane states that the right to basic education places a positive duty on the state to realise the right.⁶⁰ This means that the state must make available study materials, infrastructure and teachers in order for the right to be realised. When realising the right to education, the state enables children to learn how to provide for themselves when they are grown up, thus enabling them to lift themselves from poverty.

⁵⁷ Woolman and Fleisch *The Constitution and the classroom* 127.

⁵⁸ Seleoane 2003 *Law, Democracy and Development* 140.

⁵⁹ Seleoane 2003 *Law, Democracy and Development* 140-141.

⁶⁰ Seleoane 2003 *Law, Democracy and Development* 142.

Nkabinde J in the *Juma Masjid* case quoted from general comment 13 of the Committee on Economic, Social and Cultural Rights⁶¹ to the effect that:

Education is both a human right in itself and an indiscernible means of realising other human rights. As an empowerment right, education is the primary vehicle by which other economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.⁶²

The South African courts first dealt with the content of the right to basic education in the *Juma Masjid* case. In this case, when dealing with the right to basic education the court preferred the substantive interpretation of the term and stated that effecting basic education does not only mean granting a child a place in a school for a certain time period.⁶³ The court found that the right to basic education is an unqualified right which is distinct from other textually qualified socio-economic rights as provided in the Constitution.⁶⁴ Nkabinde J held 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 a 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 that right, obliged, through reasonable measures, to make further education progressively available and accessible.⁶⁵

⁶¹ Hereinafter referred to as the CESCR.

⁶² *Juma Masjid* case para 41.

⁶³ McConnachie and McConnachie 2012 *SALJ* 556.

⁶⁴ *Juma Masjid* case para 37.

⁶⁵ *Juma Masjid* case para 37.

The findings in the *Juma Masjid* case set the right to basic education apart from other socio-economic rights such as the right to access to housing⁶⁶ or the right to further education.⁶⁷ This is as a result of the absence of the textual qualifiers.⁶⁸ In order to understand the distinction one has to look at the approach that is followed when dealing with the right to basic education,⁶⁹ the right to access to housing,⁷⁰ the right to access to health care services⁷¹ and the other rights provided for in the *Bill of Rights*.⁷²

When dealing with other socio-economic rights the courts choose to follow a reasonableness approach. The reason for the court taking the reasonable approach was because of the wording of the sections 26 and 27 rights.⁷³ The reasonable approach means that even though there is a positive duty on the state to realise the rights as stated in section 26 and 27, the state need only to prove that it had taken reasonable measures and steps to realise the right progressively within its available resources. According to Liebenberg the court, when establishing what is reasonable, asks only whether the steps taken by the state are reasonable.⁷⁴ She is further of the opinion that there are two factors that influence the courts' assessment of the reasonableness approach. The first factor is the internal limitations, as stated in subsections 26(2) and 27(2), which provide that the rights contained in sections 26(1) and 27(1) must be "progressively realised" and that the availability of resources plays a role. The second factor is that reasonableness is judged in the historical, social and economic context.⁷⁵

⁶⁶ Section 26(1) of the Constitution.

⁶⁷ Section 29(1)(b) of the Constitution; McConnachie and McConnachie 2012 *SALJ* 561.

⁶⁸ McConnachie and McConnachie 2012 *SALJ* 561.

⁶⁹ Section 29(1)(b) of the Constitution.

⁷⁰ Section 26(1) of the Constitution.

⁷¹ Section 27(1) of the Constitution.

⁷² McConnachie and McConnachie 2012 *SALJ* 561.

⁷³ McConnachie and McConnachie 2012 *SALJ* 561.

⁷⁴ Liebenberg 2004 *ESR Rev* 8.

⁷⁵ Liebenberg 2004 *ESR Rev* 9.

In the case of *Minister of Health v Treatment Action Campaign (No 2) (TAC)*⁷⁶ the court stated the following:⁷⁷

Section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to "respect, protect, promote and fulfil" such rights.

When dealing with textually qualified and sometimes even textually unqualified socio-economic rights such as the rights contained in section 28(1)(c),⁷⁸ the courts sometimes adopt the reasonableness approach.⁷⁹ In the case of *Government of the Republic of South Africa v Grootboom*⁸⁰ Yacoob J stated that section 28(1)(c) does not give rise to the direct claim to the socio-economic rights and goods as this would conflict with the "carefully constructed constitutional scheme for the progressive realisation of socio-economic rights".⁸¹ The court confirmed in the *Juma Masjid* case, however, that the right to basic education is different.⁸² The court found that this right is a basic right and that anything less constitutes a limitation of the right.⁸³ Nkabinde J stressed the importance of basic education. She found that:

The significance of education, in particular basic education, for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked.⁸⁴

The right to basic education is seen as a stronger right and is distinguished from rights such as the right to health care and the right to housing in three different respects.⁸⁵ The right is immediately realisable, it is not subjected to

⁷⁶ 2002 5 SA 721 (CC).

⁷⁷ *Minister of Health v Treatment Action Campaign (No 2) (TAC)* 2002 5 SA 721 (CC) para 39.

⁷⁸ The rights of children to basic nutrition, shelter, basic health care services and social services.

⁷⁹ McConnachie and McConnachie 2012 *SALJ* 564.

⁸⁰ 2001 1 SA 46 (CC) (hereinafter referred to as the *Grootboom* case).

⁸¹ *Grootboom* case para 71.

⁸² McConnachie and McConnachie 2012 *SALJ* 564.

⁸³ McConnachie and McConnachie 2012 *SALJ* 564.

⁸⁴ *Juma Masjid* case para 42.

⁸⁵ Seleane 2003 *Law, Democracy and Development* 140.

the availability of resources, and it is direct.⁸⁶ The right to basic education was given stronger protection than the other rights that children are entitled to in the Constitutional Court.⁸⁷ In order to identify the substantive content of the right to basic education, there is a threefold inquiry that must be conducted.⁸⁸ First, one has to identify the broad purpose of education; second, the learner's basic needs must be identified, and last, one has to identify the inputs required to meet the basic needs.⁸⁹

When consulting international instruments, it is also clear that on an international level the substantive interpretation is the preferred interpretation. This means that the right to education is viewed to be of the utmost importance and significance on the national and international levels. In both the *Convention on the Rights of the Child*, 1989⁹⁰ as well as the *International Covenant on Economic, Social and Cultural Rights*, 1966⁹¹ international education strategies moved away from the term primary education and made a shift towards the term basic education.⁹²

According to Malherbe, the right to basic education is a social and economic right that is guaranteed in the Constitution.⁹³ Woolman and Fleisch are of the opinion that the absence of the word "access" in section 29(1) is proof that there is a positive obligation on the state to realise the right to education.⁹⁴ In *Grootboom* the court found that the right to access means that there is an obligation on the State to ensure that citizens are able to realise their rights, as against the situation where the right is direct and there is an obligation on the State to ensure that the content of the right is available.⁹⁵

⁸⁶ Seleokane 2003 *Law, Democracy and Development* 140.

⁸⁷ Proudlock "Children's socio-economic rights" 359.

⁸⁸ McConnachie and McConnachie 2012 *SALJ* 568.

⁸⁹ McConnachie and McConnachie 2012 *SALJ* 568.

⁹⁰ Hereinafter referred to as the CRC.

⁹¹ Hereinafter referred to as the ICESCR.

⁹² McConnachie and McConnachie 2012 *SALJ* 567.

⁹³ Malherbe 2004 *TSAR* 430.

⁹⁴ Woolman and Fleisch *The Constitution and the classroom* 120.

⁹⁵ Seleokane 2009 *Law, Democracy and Development* 140.

It is evident from the above that the right to basic education does not only entail that the child must attend school. The scope of the right to education requires a broader interpretation. The right to education as envisaged by section 29 of the Constitution conceptualizes "education" as a tool through which children can enable themselves to reach their full potential, and the conclusion can be drawn from this that the Constitution provides the right to basic education, that the education provided must be of a certain standard, and that the education provided must be quality education. To establish whether the state is fulfilling its duty to provide basic education, the question that needs to be asked is whether each child in South Africa is enjoying the same right, free of discrimination. This question will be analysed in paragraph 2.2 below.

2.2 The right to equality and not to be discriminated against

Section 9 of the Constitution provides that "everyone is equal before the law and that everyone has the right to the equal protection and benefit of the law".⁹⁶ The *Bill of Rights* guarantees a number of socio-economic rights for children.⁹⁷ The Preamble of the Constitution states that when these rights are realised, this must be done in such a way that it aims to achieve equality, frees the potential of each person, and improves the lives of citizens.⁹⁸

Section 39(1) of the Constitution states that when the rights as enshrined in the *Bill of Rights* are interpreted, this must be done in such a way that it promotes those values that underlie a democratic society based on freedom, human dignity and equality.⁹⁹ Malherbe is of the opinion that it will only be in the context of section 39(1) that the link between section 29 and section 9 can be accurately discussed.¹⁰⁰ Section 29 is qualified by section 9 of the Constitution, and this means that the right to education also means a right to

⁹⁶ Section 9(1) of the Constitution.

⁹⁷ Sections 26, 27, 28(1)(c) as well as 29(1).

⁹⁸ Proudlock "Children's socio-economic rights" 359.

⁹⁹ Section 39(1) of the Constitution.

¹⁰⁰ Malherbe 2004 *Perspectives in Education* 11.

equal education.¹⁰¹ The right to equality prohibits the state from unfair discrimination and at the same time requires that steps be taken to undo past disadvantage.¹⁰²

Kruger and McConnachie are of the opinion that the South African education system was in the past shaped by unfair discrimination. They further state that the aim of section 9 is to undo patterns of disadvantage in schools and to address the ongoing unfair discrimination in schools. According to them the Right to Equality as provided in section 9¹⁰³ has three components.¹⁰⁴ Section 9(1)¹⁰⁵ guarantees equality before the law as well as the equal protection and benefit of the law to all citizens. Section 9(2)¹⁰⁶ affirms the equal enjoyment of the rights provided to all citizens in the Constitution. Sections 9(3) and 9(4)¹⁰⁷ prohibit unfair discrimination.¹⁰⁸

The *Schools Act*, the *Employment of Educators Act* and the NEPA give effect to the right to equality.¹⁰⁹ In terms of the preamble of the *Schools Act*, one of its objectives is to "create a system in schools which will redress past injustices in the education system as well as prohibit unfair discrimination".¹¹⁰ The NEPA empowers the Minister to create policies aiming at the promotion of equality, and the *Employment of Educators Act* makes unfair discrimination a dismissible offence.¹¹¹ Under section 9(3) of the Constitution, the test for unfair discrimination involves two steps.¹¹² First, one needs to establish whether there is indeed discrimination, and if there is discrimination the question is whether or not the discrimination is unfair.¹¹³

¹⁰¹ McConnachie and McConnachie 2012 *SALJ* 571.

¹⁰² McConnachie and McConnachie 2012 *SALJ* 571.

¹⁰³ Section 9(1) of the Constitution.

¹⁰⁴ Krüger and McConnachie "The impact of the Constitution on learners' rights" 538.

¹⁰⁵ Section 9(1) of the Constitution.

¹⁰⁶ Section 9(2) of the Constitution.

¹⁰⁷ Sections 9(3) and 9(4) of the Constitution.

¹⁰⁸ Krüger and McConnachie "The impact of the Constitution on learners' rights" 538.

¹⁰⁹ Krüger and McConnachie "The impact of the Constitution on learners' rights" 539.

¹¹⁰ Krüger and McConnachie "The impact of the Constitution on learners' rights" 539.

¹¹¹ Krüger and McConnachie "The impact of the Constitution on learners' rights" 539.

¹¹² Krüger and McConnachie "The impact of the Constitution on learners' rights" 539.

¹¹³ Krüger and McConnachie "The impact of the Constitution on learners' rights" 539.

Equality means that people who are in the same situations qualify to enjoy the same rights and that they should receive equal treatment.¹¹⁴ When reading the *Schools Act* as well as NEPA it becomes evident that these legislation envisions equality for all learners in all opportunities. In the case of *Pretoria City Council v Walker*¹¹⁵ the Constitutional Court dealt with section 8 of the Interim Constitution. Section 8 of the Interim Constitution entrenched the right to equal protection and equality under the law. The same section also prohibited unfair direct or indirect discrimination. The Constitutional court held that: Section 8(2) prohibits unfair discrimination which takes place "directly or indirectly". This is the first occasion on which this Court has had to consider the difference between direct and indirect discrimination and whether such difference has any bearing on the s 8 analysis as developed in the four judgments to which I have referred. The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by s 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of s 8(2).¹¹⁶

When dealing with the issue of equality it is important to differentiate between substantive equality and formal equality. This was dealt with in the *Pillay v MEC for Education, KwaZulu-Natal 2006 6 SA 363 (EqC)*.¹¹⁷ The Equality court stated that:

The conception of equality which insists on symmetrical treatment fails to recognise or repair or avoid establishing or entrenching or intensifying deep patterns of historic group discrimination and disadvantage which inevitably impair an individual's human dignity. Sachs J expressed his views as follows, in this respect, in *National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)*:

"(132) The present case shows well that equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behavior but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion,¹¹⁸

Formal Equality demands that all individuals in the same situations must be treated the same.¹¹⁹ Formal Equality require that the law be applied equally to all members of society without investigating the circumstances.¹²⁰ The Equality

¹¹⁴ Malherbe 2004 *TSAR* 442.

¹¹⁵ 1998] ZACC 1; 1998 (2) SA 363 (CC).

¹¹⁶ 1998] ZACC 1; 1998 (2) SA 363 (CC) para 30-31.

¹¹⁷ Hereinafter referred to as the *Pillay Equality Court* case.

¹¹⁸ *Pillay Equality Court* case para 26.

¹¹⁹ Smith 2014 14 *AHRLJ* 611.

¹²⁰ Smith 2014 14 *AHRLJ* 612.

Court in the *Pillay case* held that formal equality does not take into consideration the historical inequalities which the Constitution is trying to overcome nor does formal equality take into consideration significant differences amongst members of society.¹²¹

Substantive Equality on the other hand envisage to eliminate the barriers that exclude certain groups of society by analysing the effects that the laws, practices and policies have will have on the different groups.¹²² The Equality Court in the *Pillay case* stated that substantive equality demands that differences of the past is recognised.¹²³

Smith state that section 9 of our Constitution envisage a substantive notion of equality. She further points out that the Constitution recognise that there is a need to address the disadvantages of the past.¹²⁴

Fagan is of the opinion that discrimination is present when the rights as enshrined in the *Bill of Rights* are made available to a certain group of people only, and others are excluded.¹²⁵ With specific reference to education, this means that discrimination occurs when a certain group of children is excluded. According to Krüger and McConnachie discrimination in schools occurs when children are treated differently based on the grounds listed in section 9(3) of the Constitution. There can be direct discrimination or indirect discrimination. Discrimination is direct when the prohibited grounds listed in section 9(3) is used to inflict benefits or burdens to a specific group. Indirect discrimination is present when the withholding of benefits has a disproportionate impact on a specific group.¹²⁶

In the matter of In *Harksen v Lane NO & others*¹²⁷ the issue of discrimination was dealt with. The Constitutional court in this matter, in order to see whether differentiation resulted in unfair discrimination, set out a two staged enquiry and held that:

Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not

¹²¹ *Pillay Equality Court case* para 47.

¹²² Smith 2014 14 *AHRLJ* 612.

¹²³ *Pillay Equality Court case* para 41.

¹²⁴ Smith 2014 14 *AHRLJ* 615.

¹²⁵ Fagan 1998 *SAJHR* 235.

¹²⁶ Krüger and McConnachie "The impact of the Constitution on learners' rights" 539.

¹²⁷ 1998 (1) SA 300 (CC). Hereinafter referred to as *Harksen v Lane*.

on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.¹²⁸

Equality will have to be addressed in the school system, and both the preamble to the Constitution and the preamble to the *Schools Act* state that the purpose of these acts is to address the inequalities of the past and promote equality. One of the purposes of the Constitution is to enhance the living standards of all South African citizens.¹²⁹

In most instances when the right to education is breached it is by way of indirect discrimination.¹³⁰ One example of indirect discrimination occurred in the matter of *Pillay v MEC for Education, KwaZulu-Natal*,¹³¹ where the school refused a Hindu learner permission to wear the nose stud that had religious and or cultural significance for the learner. The High Court in this matter found that the school's refusal to allow the learner to wear the nose stud constituted indirect discrimination and that the school's conduct was unfair. The court judgement was based on the fact that the nose stud had religious and cultural significance for the learner, and by preventing her from wearing the nose stud the school was withholding her from fully enjoying her cultural rights.¹³² The court further stated that the learner concerned belonged to a marginalised group which in the past had been discriminated against, and that there was no proof that the learner's wearing the nose stud would cause disruption or have a disruptive effect on the operation of the day-to-day school activities.¹³³

¹²⁸ *Harksen v Lane* para 54.

¹²⁹ De Vos 2001 *SAJHR* 268.

¹³⁰ Krüger and McConnachie "The impact of the Constitution on learners' rights" 540.

¹³¹ 2006 6 SA 363 (EqC); 2006 10 BCLR 1237 (N) (hereinafter referred to as the *Pillay* case). A further discussion of the *Pillay* case will be done in Chapter 5 of this dissertation.

¹³² *Pillay* case para 15.

¹³³ *Pillay* case para 17.

Discrimination can also be present when a right is denied or unfavourable treatment is received on the basis of more than one prohibited ground.¹³⁴ A Muslim learner may experience religious prejudice while at school, but should the Muslim learner be a black female Muslim learner she can experience religious prejudice, sexism and racism all at once.¹³⁵ Should a public school prohibit a Muslim female learner from wearing the *hijab*,¹³⁶ this would constitute discrimination on the overlapping grounds of culture, gender and religion.¹³⁷

In terms of section 9 of the Constitution, education must be provided on an equal basis to all South Africans, but there are still some disadvantages of the past that have not been addressed. It was stated by Justice O'Regan in the *Pillay case* that even though things have improved, some of the disadvantages of the past have not been erased.¹³⁸

2.3 Conclusion

Basic education is so important in the life of any child that the fact that a child might be excluded based on his or her cultural or religious beliefs constitutes a breach of the child's right to basic education and to equality and this should be addressed. The state is obliged by the Constitution to provide each child with an education free from discrimination, allowing the child to realise his or her full potential. The religious and / or cultural beliefs of a child should not be cause for the child to be discriminated against, either directly or indirectly. The state has an obligation towards the progressive realisation of the constitutional rights of each child, and should the state fail in this duty, especially with regard to the right to education, this would deny the child the opportunity to reach his or her full potential. No child should be discriminated against and each child should be given the opportunity to enjoy the same

¹³⁴ Krüger and McConnachie "The impact of the Constitution on learners' rights" 540.

¹³⁵ Krüger and McConnachie "The impact of the Constitution on learners' rights" 540.

¹³⁶ *Hijab* means the headscarf worn by Muslim woman.

¹³⁷ Krüger and McConnachie "The impact of the Constitution on learners' rights" 540.

¹³⁸ McConnachie and McConnachie 2012 *SALJ* 571.

rights without being discriminated against on the basis of his or her religious beliefs or culture. It is clear that the right to education and the right to equality must be read together, and that the right to basic education therefore includes the right to equal education.

3 International Instruments and Regional Instruments on the Right to Basic Education and the Right not to be Discriminated Against

The right to education is extensively protected by international law.¹³⁹ South African courts must in terms of section 39(1)(b) and section 233 of the Constitution also consider international law when interpreting the *Bill of Rights*. In this chapter, the right to basic education and the right not to be discriminated against are discussed, and specific reference is made to the *Convention on the Rights of the Child*, 1989,¹⁴⁰ the *International Covenant on Economic, Social and Cultural Rights*, 1966¹⁴¹ and the *African Charter on the Rights and Welfare of the Child*, 1990.¹⁴²

3.1 The right to basic education

3.1.1 Convention on the Rights of the Child, 1989

In 1989 the CRC was unanimously adopted by all member states of the United Nations, and it came into force in 1990.¹⁴³ This was the first instrument that was globally binding and which focussed on a variety of rights for children.¹⁴⁴ The CRC has been almost universally ratified, it has 196 state parties.¹⁴⁵ The contents of the CRC can be sorted into four categories, which consist of guiding principles, protection rights, survival and development rights, and the participation rights of children.¹⁴⁶ In terms of the CRC all human beings who

¹³⁹ Arendse 2011 *PELJ* 98.

¹⁴⁰ *Convention on the Rights of the Child* (1989) 28 ILM 1456 (hereinafter referred to as the CRC).

¹⁴¹ *International Covenant on Economic Social and Cultural Rights* (1967) 6 ILM 368 (hereinafter referred to as the ICESCR).

¹⁴² *African Charter on the Rights and Welfare of the Child* 21 ILM 58 (1982) (hereinafter referred to as the ACRWC).

¹⁴³ Doek 2009 *Child Abuse and Neglect* 771.

¹⁴⁴ Mezmur "The United Nations Convention on the Rights of the Child" 404.

¹⁴⁵ Mezmur "The United Nations Convention on the Rights of the Child" 404.

¹⁴⁶ Skujyte *Rights of African children under the African Charter* 12.

are younger than 18 years of age are children "unless under the law applicable to the child, majority is attained earlier."¹⁴⁷

The principles of the CRC are contained in the Constitution as well as in the *Children's Act*.¹⁴⁸ Section 28 of the Constitution contains those rights that are specifically for children. Article 28 of the CRC deals with the child's right to education and states:

States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) . . .
- (c) . . .
- (d) . . .
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.¹⁴⁹

Article 4 of the CRC outlines the implementation obligations of member states, and says that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention."¹⁵⁰ Article 4 and Article 28 place a positive obligation on state parties, and the obligation to comply with social, economic and cultural rights is progressive.¹⁵¹ The CRC draw a distinction between primary education and other education.¹⁵²

Article 28(1) of the CRC places a duty on state parties to make basic education, secondary education and higher education available.¹⁵³ Article 28(1) of the CRC provides that primary education must be free and available for all, but limits the right to higher education in terms of the state's having the capacity

¹⁴⁷ Article 1 of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

¹⁴⁸ 38 of 2005 (hereinafter referred to as the *Children's Act*).

¹⁴⁹ Article 28 of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

¹⁵⁰ Article 4 of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

¹⁵¹ Johnson 2010 *IJCR* 187.

¹⁵² Johnson 2010 *IJCR* 188.

¹⁵³ Article 28(1) of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

to deliver it.¹⁵⁴ When a state adopts and ratifies the CRC, that state undertakes to ensure that the education provided "shall be directed to the development of the child's personality, mental and physical abilities, and to the development of their talents to their fullest potential."¹⁵⁵ The CRC further requires that the education must also be aimed at the development of respect for human rights and fundamental freedoms.¹⁵⁶

It is thus clear that in terms of the CRC there is a higher standard that must be adhered to by member states when realising the right to basic education.¹⁵⁷ Article 29 of the CRC also deals with the type of education that must be made available to minority groups.¹⁵⁸ The CRC has four general principals.¹⁵⁹ These principles are the best interest of the child, non-discrimination, child participation, and the right to life, survival and development.¹⁶⁰ A child's right to education is one of the development rights of the child. It is clear that the CRC requires from member states to make basic education available to all children in order for the child to develop to his or her full potential, and requires that education must be provided without discriminating against any child.

3.1.2 *International Covenant on Economic, Social and Cultural Rights, 1966*

The ICESCR refers to the state's obligation in terms of the right to basic education. In order to measure whether or not the state is fulfilling its duty, one would have to look at this instrument. Articles 13 and 14 of the ICESCR deal with the right to education. Article 13(1) of the ICESCR states that:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that Education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all

¹⁵⁴ Johnson 2010 *IJCR* 188.

¹⁵⁵ Article 29(1)(a) of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

¹⁵⁶ Article 29(1)(b) of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

¹⁵⁷ Johnson 2010 *IJCR* 188.

¹⁵⁸ Dall "Children's right to education" 145.

¹⁵⁹ Mezmur "The United Nations Convention on the Rights of the Child" 410.

¹⁶⁰ Mezmur "The United Nations Convention on the Rights of the Child" 410.

nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.¹⁶¹

Article 14 of the ICESCR states that:

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.¹⁶²

Article 13 of the ICESCR states that all state parties to the Convention must recognise the fact that everyone has the right to basic education. The Committee on Economic, Social and Cultural Rights (hereinafter referred to as the CESCR), which was established in terms of the ICESCR, has produced a number of general comments.¹⁶³ In General Comment No 13 the CESCR states that the right to basic education is important and that it should be recognised as a human right. In the same General Comment, the CESCR states that basic education is the best investment a state can make. The main purpose of the CESCR is to ensure that the right to education is realised.¹⁶⁴

According to Arendse, the ICESCR is the most notable instrument that embeds the right to education. She is also of the view that General Comment No 13 provides the most comprehensive statement with regard to the contents of the right to basic education in international law.¹⁶⁵

According to the CESCR, parties to the Convention are under an obligation to ensure the accessibility, availability, acceptability and adaptability of education.¹⁶⁶ These four A's are seen as the standard against which states can

¹⁶¹ Article 13(1) of the *International Covenant on Economic, Social and Cultural Rights*, 1966.

¹⁶² Article 14 of the *International Covenant on Economic, Social and Cultural Rights*, 1966.

¹⁶³ Veriava "Realising the right to basic education in South Africa" 85.

¹⁶⁴ Veriava and Coomans "The right to education" 58.

¹⁶⁵ Arendse 2011 *PELJ* 100.

¹⁶⁶ Kamga "The right to a basic education" 518.

measure themselves with regard to the realisation of the right to basic education.¹⁶⁷

3.1.2.1 Availability

Availability means that a state must make sure that there are educational institutions and programmes available within its jurisdiction.¹⁶⁸ According to Beiter, this means that the state must provide schools and competent educators. He is also of the opinion that this means that the state must make education available on all levels.¹⁶⁹ Beiter also believes that this means that state parties will have to build schools and equip these schools in order for education to be provided in a meaningful manner.¹⁷⁰ The state bears the obligation to ensure that the teachers have the correct qualifications to teach.¹⁷¹

3.1.2.2 Accessibility

Accessibility means that that the state must make sure that educational institutions are available for all learners.¹⁷² "Accessible" means that the education system must be physically accessible to all learners, it should be a non-discriminatory and this accessible to all groups, and it should be economically accessible.¹⁷³ Beiter is of the opinion that this means that primary education should be free and that the obligation is on the state to make education progressively free on other levels as well.¹⁷⁴ He is also of the opinion that the obstacles that might impede admission to education must be eliminated. These obstacles could be economic or physical in nature or they could take the form of discrimination. Beiter believes that states must take

¹⁶⁷ Woolman and Fleisch *The Constitution in the classroom* 130.

¹⁶⁸ ICESCR *General Comment* 13 para 6(b); also see Veriava "Realising the right to basic education in South Africa" 86.

¹⁶⁹ Beiter *The Protection of the Right to Education by International Law* 478.

¹⁷⁰ Beiter *The Protection of the Right to Education by International Law* 479.

¹⁷¹ Beiter *The Protection of the Right to Education by International Law* 483.

¹⁷² ICESCR *General Comment* 13 para 6(b).

¹⁷³ ICESCR *General Comment* 13 para 6(b).

¹⁷⁴ Beiter *The Protection of the Right to Education by International Law* 477.

steps ensure that education is accessible without discrimination, and take to promote the education of the children of disadvantaged groups.¹⁷⁵

Article 2 of the ICESCR prohibits discrimination. When a school puts measures in place, for instance a code of conduct, the school must ensure that those measures do not have the effect that there are unequal rules that apply to different groups.¹⁷⁶ This will make education accessible without discrimination. The state must take special measures to ensure not only that "active" discrimination is prevented but also that "static" discrimination¹⁷⁷ is prevented as well. Education cannot be said to be accessible in instances where the child's right to cultural and religious beliefs is infringed upon in the code of conduct and hidden under the veil of "uniformity". Uniformity can sometimes be the reason that some learners' right to cultural and religious beliefs are denied, and this can be seen as denying learners their identity.¹⁷⁸ The Constitutional Court in the *Pillay case* stated that the schools wish to maintain uniformity in the school without out evidence to the contrary, is not enough to proof that by allowing a practice, there will be a disruption in discipline in the school.¹⁷⁹ When the code of conduct of a school is such that it makes education inaccessible for a certain group of individuals, the code of conduct has the effect that certain religions and cultures would be marginalised, and this would be against the values of the Constitution.¹⁸⁰ Section 5 of the *Schools Act* prohibits unfair discrimination. The same provision prohibits the non-admission of a learner to a school based on a certain specified ground.¹⁸¹

¹⁷⁵ Beiter *The Protection of the Right to Education by International Law* 487.

¹⁷⁶ ICESCR *General Comment* 13 para 32.

¹⁷⁷ Beiter in his work *The Protection of the Right to Education by International Law* defines active and static discrimination. According to Beiter active discrimination is as a result of state action and static discrimination is discrimination refers to situations that effects the vulnerable groups of society

¹⁷⁸ *Pillay case* para 17.

¹⁷⁹ *Pillay Constitutional case* para 114.

¹⁸⁰ *Pillay case* para 92.

¹⁸¹ Veriava and Coomans "The right to education" 67; Section 5(3) (a)-(c).

3.1.2.3 Acceptable

Acceptable education refers to an education system where the teaching methods are acceptable to the learners.¹⁸² An acceptable education system should be considerate and foster the human rights of the learner.¹⁸³ The type of education provided should be acceptable to both parents and children.¹⁸⁴ According to Beiter, states must formulate standards to ensure the safety of the children at school and ensure that quality education is provided. He is also of the opinion that the teaching and learning must be of such a nature that it has regard for the cultural background of the learner and that it satisfies the basic needs of the learner.¹⁸⁵ Beiter also says that this means that states should respect the decision of parents to educate children in accordance with their own persuasion.¹⁸⁶

The conclusion to draw from this is that the state and more specifically the Department of Basic Education should respect the fact that some learners' religions entails that they might have to wear the *Hijab*¹⁸⁷ or the nose stud from a certain age. Question now arises whether the refusal of a school to allow a learner to wear *Hijab* or a nose stud in accordance with a cultural or religious belief results in discrimination and an infringement of the particular learner's right to education? This also means that the way of presenting lessons should be such that it respects the cultural and religious beliefs of all learners in the class and that one religion or culture should not be given preference over another, thus respecting the child's dignity.¹⁸⁸ The code of conduct of schools should make provision for the prevention of preference being given to one religion above another. The state must regulate the code of conducts drafted by schools and in this way ensure that minimum standards

¹⁸² ICESCR *General Comment* 13 para 6(c).

¹⁸³ Kamga "The Right to a Basic Education" 519.

¹⁸⁴ Beiter *The Protection of the Right to Education by International Law* 492.

¹⁸⁵ Beiter *The Protection of the Right to Education by International Law* 492.

¹⁸⁶ Beiter *The Protection of the Right to Education by International Law* 492.

¹⁸⁷ A head scarf for Muslim girls or a hat for Muslim boys.

¹⁸⁸ Beiter *The Protection of the Right to Education by International Law* 494.

are enforced to ensure acceptable education for all.¹⁸⁹ This means education that respect the religious and cultural views of the learners.

3.1.2.4 Adaptability

Adaptability means that the education system needs to be pliable so that it can adapt to the change in communities and societies and to make sure that the education provided, is in line with the needs of the learners within their diverse cultural and social settings.¹⁹⁰ According to Beiter, education must be of such a nature that it adapts to changing global realities, and at the same time it must be accommodating of the needs of the learner. According to Beiter these needs are related to the ethnic, religious or linguistic identities of the learner.¹⁹¹ We see that people move from one country to another. This means that people with different cultures, background and religious beliefs are most likely to end up being mixed in the same communities.

According to Beiter education must be flexible in order to adjust to these changes. He is of the opinion that education should be diversified in order to fulfil the different needs of different groups.¹⁹² Case law regarding education in South Africa shows that the education system is lacking, it is not adaptable. This issue will be discussed in Chapter 5 below.

3.1.3 *African Charter on the Rights and Welfare of the Child, 1990*

The Assembly of Heads of State and Government of the Organisation of African Unity approved the ACRWC on 11 July 1990.¹⁹³ Before it could enter into force,

¹⁸⁹ Beiter *The Protection of the Right to Education by International Law* 492.

¹⁹⁰ ESCR *General Comment* 13 para 6(d).

¹⁹¹ Beiter *The Protection of the Right to Education by International Law* 506.

¹⁹² Beiter *The Protection of the Right to Education by International Law* 507.

¹⁹³ Lloyd 2002 *AHRLJ* 11.

it required ratification by 15 Organisation of African Unity member states, and as a result of this it came into force only on 29 November 1999.¹⁹⁴

The ACRWC is the first regional and comprehensive binding instrument which proclaimed the rights of children on a regional level.¹⁹⁵ It is an instrument that explicitly provides for the protection of African children and their rights.¹⁹⁶ It provides that state parties must ensure that the rights of the child as embodied in International instruments are protected.¹⁹⁷ South Africa ratified the ACRWC the 7th of January 2000.¹⁹⁸

Children are seen as potential sources of development, and the statement is made that they themselves can be developed only through education.¹⁹⁹ Article 11 of the ACRWC refers to the education of the child. Article 11 states that "every child has the right to an education, to develop his or her personality, talents and mental and physical abilities to their fullest potential".²⁰⁰ Unlike the CRC, the ACRWC focusses more on the cultural and traditional values of the child and the protection thereof.²⁰¹

Article 12 of the ACRWC state that:

1. State Parties shall recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. State Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

From the above it is evident that the right to education is protected on an international as well as on a regional level. South Africa is taking steps to meet its obligations in terms of international law but the question that remain is with

¹⁹⁴ Mezmur "The United Nations Convention on the Rights of the Child" 426.

¹⁹⁵ Skujyte *Rights of African children under the African Charter* 22.

¹⁹⁶ Lloyd 2002 *AHRLJ* 12.

¹⁹⁷ Article 18(3) of the *African Charter on the Rights and Welfare of the Child* 21 ILM 58 (1982).

¹⁹⁸ Sloth-Nielsen "The African Charter on the Rights and Welfare of the Child" 444.

¹⁹⁹ Viljoen "The African Charter on the Rights and Welfare of the Child" 339.

²⁰⁰ Article 11 of the *African Charter on the Rights and Welfare of the Child* 21 ILM 58 (1982).

²⁰¹ Lloyd 2002 *AHRLJ* 15.

regard to the protection of the child's cultural and traditional values in a diverse classroom.

3.2 The right not to be discriminated against

The right to equality in terms of section 9 of the Constitution requires that efforts be made to avert and address the continuous unfair discrimination in schools.²⁰² This section also aims at undoing the patterns of disadvantages that were created by historical discrimination.²⁰³ The right to equality has three components. Section 9(1) guarantees that "everyone is equal before the law and that everyone is entitled to the same benefits and protection of the law."²⁰⁴ Section 9(2) affirms that equality includes the equal enjoyment of rights.²⁰⁵ Subsections 9(3) and 9(4) prohibit discrimination, whether it is by the state or any person, on the grounds as listed in section 9(3).²⁰⁶ It is thus important that strict measures be put in place to prevent and eliminate unfairness in schools.²⁰⁷

3.2.1 Convention on the Rights of the Child, 1989

The CRC has four basic principles. These principles include non-discrimination,²⁰⁸ the best interest of the child,²⁰⁹ the survival and development rights of the child²¹⁰ and child participation.²¹¹ These principles are the cornerstone of the rest of the rights contained in the CRC. The CRC emphasises equal education in article 2(1) and article 28(1).²¹² Article 2(1) states:

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

²⁰² Krüger and McConnachie "The impact of the Constitution on learners' rights" 538.

²⁰³ Krüger and McConnachie "The impact of the Constitution on learners' rights" 538.

²⁰⁴ Section 9(1) of the Constitution.

²⁰⁵ Section 9(2) of the Constitution.

²⁰⁶ Sections 9(3) and 9(4) of the Constitution.

²⁰⁷ Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 39.

²⁰⁸ Article 2 of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

²⁰⁹ Article 3 of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

²¹⁰ Article 6 of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

²¹¹ Article 12 of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

²¹² Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 36.

race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.²¹³

Children who reside in distant areas must be given special attention. These children are often neglected because there is not adequate infrastructure or there are no educators who are willing to go to these remote areas.²¹⁴

In the *Convention Against Discrimination in Education*, 1960 "discrimination" refers to any differences, advantages, exclusions or limitations based on any ground which will have the effect that education is not provided to learners equally.²¹⁵ South Africa ratified the *Convention Against Discrimination in Education*, 1960 on 9 March 2000.²¹⁶ The limitation of a certain group of people's right to education also constitutes discrimination in education.²¹⁷

Article 28(1) refers to equality and the realisation of the right to education.²¹⁸ Equality in the context of education under the CRC refers to the fact that states must make education available to all children equally.²¹⁹ It is thus clear that under the CRC all member states must provide education and especially basic education to all children on an equal basis and that no child should be discriminated against when his or her right to education is being realised.

3.2.2 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965²²⁰

South Africa signed the *ICERD* on 3 October 1994. The same instrument was ratified by South Africa only on 10 December 1998.²²¹ In terms of the *ICERD*, "discrimination" means:

... any distinction, exclusion, restriction or preference based on race, colour or origin that has the purpose of impairing the recognition, enjoyment or

²¹³ Article 2(1) of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

²¹⁴ Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 41.

²¹⁵ Article 1(a) of the *Convention Against Discrimination in Education*, 1960.

²¹⁶ Veriava and Coomans "The right to education" 58.

²¹⁷ Article 1(b) of the *Convention Against Discrimination in Education*, 1960.

²¹⁸ Article 28 of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

²¹⁹ Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 36.

²²⁰ Hereinafter referred to as the *ICERD*.

²²¹ Dugard *International Law* 322.

exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other sphere of the public life.²²²

It is clear that the ICERD requires from all state parties that they ensure that no child is discriminated against based on his or her cultural belief. The state should thus, without any delay, ensure that there are policies in place that prevent discrimination in schools when it comes to children's cultural and religious beliefs when their right to basic education is realised.

3.2.3 *International Covenant on Economic, Social and Cultural Rights, 1966*

The ICESCR also refers to "equal treatment" and "non-discrimination" in education. The ICESCR places a minimum core obligation on states. In terms of article 13, states have the duty to make basic education available to everyone and to ensure that it is realised without any discrimination.²²³ In their General Comment, the ESCR Committee stated that the proscription against discrimination as contained in article 2(2) of the ICESCR is not subject to progressive realisation or the availability of resources.²²⁴ This includes protection against discrimination.²²⁵ It also includes the duty of the state to take steps to give effect to the rights contained in article 13 of the ICESCR.²²⁶

In light of the above it is clear that the state should ensure that there is no discrimination when the right to basic education is realised, and that each child is given the opportunity to enjoy this right equally.

3.2.4 *African (Banjul) Charter on Human and Peoples Rights, 1981*²²⁷

South Africa signed this instrument on 9 July 1996 and ratified the same instrument on 9 July 1996. The preamble of the *Banjul Charter* states that civil

²²² Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965.

²²³ Article 13(2) of the *International Covenant on Economic, Social and Cultural Rights*, 1966.

²²⁴ ICESCR *General Comment* 13 para 31.

²²⁵ ICESCR *General Comment* 13 para 43.

²²⁶ ICESCR *General Comment* 13 para 44.

²²⁷ Hereinafter referred to as the *Banjul Charter*.

and political rights cannot be separated from economic, social and cultural rights and that compliance with economic, social and cultural rights serves as a guarantee of the benefit of civil and political rights.²²⁸ One can draw the conclusion from this that the right to basic education can't be seen in seclusion. In terms of the *Banjul Charter*, every learner is equal before the law and thus eligible to equal protection from the law.²²⁹

3.2.5 *African Charter on the Rights and Welfare of the Child, 1990*

Article 4 states that in any matter relating to a child, the best interest of the child will be the primary consideration.²³⁰ Article 11 states that every child has the right to education.²³¹ The ACRWC further states that the purpose of education must be to develop the child.²³²

3.3 *Conclusion*

It is clear that on international as well as a regional level there is a positive obligation placed on states to ensure that children's right to education is realised, and that when the right is realised it is done without infringing on any other rights that the child is entitled to in terms of the law. As seen above, the ICESCR extensively protects the right to education and the protection of other rights when the right to education is realised. States have the responsibility to realise the right immediately and to take reasonable steps to ensure that the right to education is available, accessible, acceptable and adaptable. It is clear from the international as well as the regional instruments that when states do so, no child should be discriminated against based on any ground, which includes their cultural and religious beliefs.

²²⁸ Dugard *International Law* 558.

²²⁹ Article 3(1) of the *African (Banjul) Charter on Human and Peoples Rights*, 1981.

²³⁰ Article 4 of the *African Charter on the Rights and Welfare of the Child* 21 ILM 58 (1982).

²³¹ Article 11(1) of the *African Charter on the Rights and Welfare of the Child* 21 ILM 58 (1982).

²³² Article 11(2)(a) of the *African Charter on the Rights and Welfare of the Child* 21 ILM 58 (1982).

Most children in South Africa attend public schools. This means that there are many children with different cultural backgrounds in the same classroom. The state should adapt the education curriculum to accommodate the diversity in the classroom and be flexible to the different cultures of learners. The CESCR has clarified the standards of the right to education.²³³ The CESCR has identified the minimum core obligation to ensure the provision of the educational rights of all children.²³⁴ To consider the minimum obligation with regard to the right to basic education, it is paramount to ask the question what must be available immediately.²³⁵ Education should aim at strengthening human rights and it should enable all person to participate in the community.²³⁶

It is clear, in light of the above, that the interpretation of the right to basic education on an international level focusses on what the purpose of basic education is. If this point of view were to be followed in South Africa it would be easier to establish what the state's duties and obligations are in terms of basic education.

The state in terms of these international instruments has a duty to ensure that educators are educated and that the rules laid out by governing bodies are not prejudicial to a certain group of people based on any ground. The contents of textbooks provided must be acceptable.²³⁷ They must respect the diversity of the learners and can thus not foster prejudicial ideas in respect of certain groups of people or beliefs. There is a duty on the state to ensure that the education provided is appropriate in the sense of culture and that it does not exclude minority and indigenous groups in any way.²³⁸ The state has the obligation to ensure that the education system adapts to changes in society and that the system adapts to the diversity of school populations.

²³³ ICESCR *General Assembly Resolution* 2200A (XXI) A 2(1).

²³⁴ ESCR *General Comment* 3.

²³⁵ Kamga "The Right to a Basic Education" 519.

²³⁶ Article 13(1) of the *International Covenant on Economic, Social and Cultural Rights*, 1966.

²³⁷ Beiter *The Protection of the Right to Education by International Law* 569.

²³⁸ Beiter *The Protection of the Right to Education by International Law* 494.

4 Best interests of the child

Section 28(2) of the Constitution and section 9 of the *Children's Act* state that in every aspect or matter relating to a child the best interests of the child must be of paramount importance. South Africa has signed and ratified both the CRC and the ACRWC. As previously stated, section 39(1) of the Constitution states that when a court, tribunal or forum interprets the Bill of Rights, it (the court) must:

- a) Promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b) Consider international law; and
- c) May consider foreign law.²³⁹

Section 39(1)(b) sets a positive duty on the state thus to consider international instruments. It can be argued that the wording of section 28 is based on the wording of Article 3 of the CRC and Article 4 of the ACRWC. Article 3 of the CRC states that the best interest of the child shall be a primary consideration in matters relating to a child.²⁴⁰ Article 4 of the ACRWC states that the best interest of the child must be the primary consideration.²⁴¹ The best interest of the child is one of the four basic principles of the CRC. The preamble of the CRC states that all children are entitled to special care and assistance.²⁴² The preamble further states that:

the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.²⁴³

According to Schäfer section 28(2) is not articulated as a right by the courts but it is categorised as such.²⁴⁴ The court dealt with the best interest approach in the case of *Jooste v Botha* 2000 2 SA 199 (T) and found that section 28(2)

²³⁹ Section 39(1) of the Constitution.

²⁴⁰ Article 3 of the *Convention on the Rights of the Child* (1989) 28 ILM 1456.

²⁴¹ Article 4 of the *African Charter on the Rights and Welfare of the Child* 21 ILM 58 (1982).

²⁴² The preamble of the CRC.

²⁴³ The preamble of the CRC.

²⁴⁴ Schäfer *Child Law in South Africa* 153.

is more of a general guideline than a right. Section 28(2) can be used to establish the meaning, scope and the limitation of other rights in the *Bill of Rights*.²⁴⁵

In the case of *McCall v McCall*²⁴⁶ the court set out a checklist of relevant elements that must be taken into consideration to establish what will be in the best interest of the child. The factors as listed in *McCall* were enacted by the president on 8 June 2006 and are now contained in section 7 of the *Children's Act*. Section 7 of the *Children's Act* lists the following factors:

- a) The nature of the personal relationship between the child and his or her parents, or any specific parent, and between the child and any other caregiver or relevant person. b) The attitude of the parents, or any specific parent towards the child and the exercise of parental responsibilities or rights in respect of the child.
- b) The capacity of the parents, any specific parent, or any other caregiver or person, to provide for the child's needs, including his or her emotional or intellectual needs.
- c) The likely effect any change in the child's circumstances would have on the child. This includes the likely effects of the child's separation from both parents, and either parent, a sibling, another child or any caregiver or any person with whom child has been living.
- d) The practical difficulty and expense of the child having contacts with his or her parents, or specific parent, and whether that difficult or expense would substantially affect the child's right to maintain personal relations and direct contact with that parent on a regular basis.
- e) The child's need to remain in the care of his parents, family and extended family, and to maintain contact with his or her parents, extended family, tribe, culture or tradition. g) The child's age, maturity, stage of development, background and any other relevant characteristics of the child.
- f) The child's physical and emotional security and intellectual, emotional, social and cultural development.
- g) The child's need to brought up a stable family environment or, if this cannot be achieved, in environment resembling a family environment as closely as possible
- h) Any family violence involving the child or family member of the child.

²⁴⁵ Skelton "Constitutional and International Protection of Children's Rights" 280.

²⁴⁶ 1994 3 SA 201 (C) (hereinafter referred to as the *McCall* case).

- i) Which action or decision would avoid or minimize the further legal or administrative proceedings regarding the child.²⁴⁷

The best interest of the child should therefore be considered in all matters relating to the child.²⁴⁸ The best interest approach should also be used in cases where other constitutional or legal rights of the child are affected.²⁴⁹

In the case of *S v M*²⁵⁰ the court had to define what "paramount importance" means. Sachs J stated that there is no general formula that can be used, as the best interest of the child is decided by the circumstances of each case.²⁵¹ Sachs J further stated that even though the best interest of the child is of importance, it is not an absolute right.²⁵² Just like any other right in the *Bill of Rights*, this right can be limited. When it is in conflict with any of the other rights in the *Bill of Rights*, the right will have to be balanced with the other rights.²⁵³

The best interest approach of the child is enforceable against state and state organs.²⁵⁴ The argument can then be made that if the state fails to realise the right to basic education the state is not only infringing on the child's right to basic education but that state is also failing to act in the best interest of the child.²⁵⁵ The purpose of basic education is to prepare and to develop the child. In conclusion it can be stated that the right to basic education is indeed in the best interest of the child as this right will help the child to equip him or herself for the future. By obtaining an education the child will be able to become sustainable. The right to education is of the utmost importance for the development of the child, and if the state fails to realise this right or allows

²⁴⁷ Section 7 of the *Children's Act*.

²⁴⁸ Malherbe 2008 *TSAR* 268.

²⁴⁹ Malherbe 2008 *TSAR* 268.

²⁵⁰ 2008 3 SA 232 (C).

²⁵¹ *S v M* 2008 3 SA 232 (C) para 24.

²⁵² *S v M* 2008 3 SA 232 (C) para 26.

²⁵³ Malherbe 2008 *TSAR* 284.

²⁵⁴ Malherbe "The impact of constitutional rights education" 440.

²⁵⁵ Berger 2003 *Columbia LR* 628.

certain barriers to prevent children from obtaining an education, the state would be causing a great injustice for the children of South Africa.

5 Religious and cultural diversity in public schools and the approach adopted by South African courts

South Africa is a country with different people of many different cultures, values and beliefs, which makes South Africa a multicultural society.²⁵⁶ People with different cultures have different value systems.²⁵⁷ Gretta stated that culture, according to Banks, can be defined as follows:

Culture is in us and around us, just like the air we breathe. It is personal, familiar communal, institutional and societal in its scope and distribution. Yet culture is a notion that is often difficult to grasp. As we learn and use culture in daily life, it becomes habitual. Our habits become, for the most part, invisible to ourselves. Culture therefor shifts in and out of our reflective awareness. Culture is a product of human creativity in action, which, once we have it, enable us to extend our activity still further.²⁵⁸

According to Gretta there was a separate education system for each different race and cultural group in South Africa during apartheid. The position changed after 1994 and the public schools opened their doors to all children in South Africa, irrespective of their race or culture.²⁵⁹ Teachers are now obliged to teach in multicultural and diverse classrooms, which can be problematic. The problems arise due to the fact that each learner will bring with him or her a particular understanding of values, beliefs and experiences.

Gretta is of the opinion that these values, belief and experiences can influence the behaviour and attitudes of the learners. She states that all cultural values are important and that where teachers and learners lack knowledge of the differences and similarities in cultures and values, conflict may arise.

The obligation rests on the teacher to try to bridge the gaps which may exist within the classroom.²⁶⁰ This remains a problem in the classroom, however.²⁶¹

²⁵⁶ Gretta *A critical analysis of multicultural education* 1.

²⁵⁷ Gretta *A critical analysis of multicultural education* 1.

²⁵⁸ Gretta *A critical analysis of multicultural education* 18; also see Banks and Lynch *Multicultural education: issues and perspectives* 33.

²⁵⁹ Gretta *A critical analysis of multicultural education* 6.

²⁶⁰ Gretta *A critical analysis of multicultural education* 7.

²⁶¹ Gretta *A critical analysis of multicultural education* 8.

Before South Africa became a democratic society, certain cultures used to dominate other cultures. This was the root of many conflicts in society as well as in schools.²⁶² Gretta notes that in a society where there are so many different cultures there is cultural diversity.²⁶³ According to Gretta such diversity requires that the school system, within appropriate and justifiable limits, should respect, accept, tolerate, search for and advance diversity. Cultural diversity, according to Gretta, occurs when the members of the society are exposed to many cultures.

The acceptance of cultural diversity causes the members of society to be culturally enhanced and enables them to work effectively with others.²⁶⁴ There is great cultural diversity in South Africa.²⁶⁵ Even though culture and education are two separate concepts, the two are related.²⁶⁶ Gretta states that Gunter defines education as follow:

Education is a deliberate, purposive, systematic and responsible intervention in the situation of a child by an adult assisting the child on his way to adulthood in the true sense, which is worthy of a human being, as the goal.²⁶⁷

Post 1994, many changes and much restructuring has taken place in the South African school system.²⁶⁸ It is clear, however, that there is still room for improvement and much still needs to be achieved.²⁶⁹ According to Phatlane there has been minimal change in the practices and cultures in schools as well as in the development of programmes to address issues of inequality and diversity.²⁷⁰

²⁶² Gretta *A critical analysis of multicultural education* 8.

²⁶³ Gretta *A critical analysis of multicultural education* 19.

²⁶⁴ Gretta *A critical analysis of multicultural education* 19.

²⁶⁵ Gretta *A critical analysis of multicultural education* 35.

²⁶⁶ Gretta *A critical analysis of multicultural education* 40.

²⁶⁷ Gretta *A critical analysis of multicultural education* 38.

²⁶⁸ Phatlane *Experiences of diversity* 32. ²⁶⁸ Pre 1994 the schooling system in South Africa was of such that the education was designed to perpetrate hate amongst people from different races. The system was designed as such that the education for Black South African was inferior to the education system for white learners and the funding in Black schools were not sufficient, thus resulting in Black schools not having well trained teachers, sufficient class space and the funding in Black schools was also limited.

²⁶⁹ Phatlane *Experiences of diversity* 32.

²⁷⁰ Phatlane *Experiences of diversity* 32.

Section 4 of the NEPA aims to protect and guarantee the right:

- (i) of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever;
- (ii) of every person to basic education and equal access to education institutions;
- (iii) of a parent or guardian in respect of the education of his or her child or ward;
- (iv) of every child in respect of his or her education;
- (v) of every student to be instructed in the language of his or her choice where this is reasonably practicable;
- (vi) of every person to the freedoms of conscience, religion, thought, belief, opinion, expression and association within education institutions;
- (vii) of every person to establish, where practicable, education institutions based on a common language, culture or religion, as long as there is no discrimination on the ground of race;
- (viii) of every person to use the language and participate in the cultural life of his or her choice within an education institution.²⁷¹

The Preamble of the *Schools Act* states that South Africa needs a new National school system to redress past injustices in education; to provide education of high quality; and to lay the foundations for, inter alia, combating racism, sexism and all forms of discrimination and intolerance and to protect and advance our diverse cultures and languages.²⁷²

Due to the change in the education system, teachers and learners are faced with challenges on a daily basis. From the number of cases²⁷³ being adjudicated it is clear that there are still situations where learners from different backgrounds struggle due to the fact that their cultural beliefs clash with the codes of conduct of public schools, and as a result they cannot attend these public schools.

Private schools may allow them to dress according to their cultural beliefs, but such schools are too expensive for most people, and the expense effectively

²⁷¹ Section 4(a) of NEPA.

²⁷² The Preamble of the *Schools Act*.

²⁷³ Some of these cases will be discussed in Chapter 5 of this dissertation.

excludes the learner from the school. A female Muslim learner might feel required to wear the *Hijab* as part of her religious and cultural beliefs. Muslim women wear the headscarf, *Hijab*, in accordance with their religious beliefs.²⁷⁴ The headscarf covers the hair and neck of the woman and leaves her face exposed. A Muslim woman is obliged by the *Quran* to wear the headscarf. The question that now arise is whether a school's refusal to allow a Muslim learner to wear the headscarf constitutes an infringement of the learner's religious and cultural rights.

Another example of how problems may arise from the lack of cultural diversity in schools could arise from the fact that the school requires that the week must commence with scripture reading from the Bible and that all learners should be present as the scripture reading that happens at assembly. Does the fact that the learners' attendance at the scripture reading at some schools are compulsory constitute a breach of the rights of learners who are not Christians?

Article 13(2) of the ICESCR states that:

Education has to be flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.²⁷⁵

Section 15 of the Constitution states:

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that—
 - (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising—

²⁷⁴ Osman 2014 *PELJ* 1318.

²⁷⁵ ICESCR *General Comment* 13 para 6.

- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
- (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.²⁷⁶

Section 31 of the Constitution states that:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community —
 - (a) to enjoy their culture, practise their religion and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.²⁷⁷

The South African judiciary have tackled the issue of cultural and religious diversity in various cases. In the matter of *Prince v President, Cape Law Society*²⁷⁸ Ngcobo J stated that:

The constitutional right to practice one's religion ... is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society.²⁷⁹

In the matter of *Christian Education SA v Minister of Education*²⁸⁰ the court stated that:

There can be no doubt that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity.²⁸¹

²⁷⁶ Section 15 of the Constitution.

²⁷⁷ Section 31 of the Constitution.

²⁷⁸ 2001 2 BCLR 133 (CC) (hereinafter referred to as the *Prince* case).

²⁷⁹ *Prince* case para 25.

²⁸⁰ 2000 1 BCLR 1051 (CC); 2000 4 SA 757 (CC) (hereinafter referred to as the *Christian Education* case).

²⁸¹ *Christian Education* case para 36.

It is clear that there is still a lot to do in terms of education and the education system. The number of cases that goes through the courts annually is proof that there are still concerns with the current education system. In the next paragraph some of the cases where issues were raised with regard to the right to education and other rights being in conflict with one another will be discussed. After discussing the outcomes of these cases, the courts approach will be discussed, as well as the issue of balancing the right to education with other rights when these rights come into conflict with one another.

5.1 The Pillay case

This issue was first dealt with by the school, and then the mother of the complainant, a minor child, approached the Equality court. The discussion below will state the facts of the process that was followed by the Equality Court, the High Court and the Constitutional Court.

5.1.1 Pillay Equality Court case

In this case the school's code of conduct allowed the learners to wear only watches as jewellery, and the girls could wear one pair of studded earrings.²⁸² The mother of the learner concerned enrolled her daughter in the school during 2004.²⁸³ Before the learner was admitted to the school, her mother signed an undertaking that she would ensure that the learner complies with the Code of Conduct of the school.²⁸⁴ The school allowed the learner to wear the nose stud until October 2004, in order for the piercing to heal.²⁸⁵ The learner, however, continued to wear the stud until 2005, when the new academic year commenced.²⁸⁶ The school then asked the mother to write a

²⁸² *Pillay Constitutional Court case* para 5.

²⁸³ *Pillay Constitutional Court case* para 4.

²⁸⁴ *Pillay Constitutional Court case* para 4.

²⁸⁵ *Pillay Constitutional Court case* para 6.

²⁸⁶ *Pillay Constitutional Court case* para 6.

letter motivating why the learner should be allowed to continue to wear the nose stud.²⁸⁷ The mother of the learner gave the following explanation:

She and her daughter came from a South Indian family that intends to maintain cultural identity by upholding the traditions of the women before them. The insertion of the nose stud was part of a time-honoured family tradition. It entailed that a young woman's nose was pierced and a stud inserted when she reached physical maturity as an indication that she had become eligible for marriage. The practice today is meant to honour daughters as responsible young adults. When her daughter turned sixteen, her grandmother would replace the gold stud with a diamond stud. She claimed that this was to be done as part of a religious ritual to honour and bless her daughter. The mother made it clear that the wearing of the nose stud was not for fashion purposes but as part of a long-standing family tradition and for cultural reasons.²⁸⁸

The school consulted with an expert in order to get an opinion and was informed by the expert that the school is not under an obligation to allow the nose stud. The school accepted this advice and informed the learner's mother accordingly.²⁸⁹ After receiving the letter the mother wrote a letter to the Department of Basic Education stating that the school's decision not to allow her daughter to wear the nose stud was a violation of her daughter's constitutional rights to "practise the religious and cultural traditions of her choice."²⁹⁰

The Department sided with the school and informed the mother that the learner should remove the nose stud.²⁹¹ In its response the Department stated that "schools are not obliged, as it is unreasonable to expect them, to accommodate all idiosyncratic practices".²⁹² The learner's mother, after receiving this unsatisfactory response, approached the Equality Court in terms of section 20 of the *Promotion of Equality and Prevention of Unfair Discrimination Act*.²⁹³

²⁸⁷ *Pillay* case para 7.

²⁸⁸ *Pillay* case para 7.

²⁸⁹ *Pillay* case para 8.

²⁹⁰ *Pillay* case para 9.

²⁹¹ *Pillay* case para 9.

²⁹² *Pillay* case para 10.

²⁹³ 4 of 2000 (hereinafter referred to as the *Equality Act*).

In the Equality Court it was found that the school had not unfairly discriminate against the learner, and the mother then appealed this decision to the Natal provincial division of the High Court.²⁹⁴

5.1.2 *Pillay v MEC for Education, KwaZulu-Natal 2006 10 BCLR 1237 (N)*²⁹⁵

The matter went on Appeal and the Appellant was the mother of the learner concerned. The Appellant requested the court to make an order stating that the respondent, who was the school, be prohibited from unfairly infringing on her daughters right to equality and that the respondent be ordered not to discriminate against her daughter based on religion, culture or belief. The appellant further requested that the respondent be ordered to take measures in view of transformation.²⁹⁶

The High Court found that the Governing Body was obliged in terms of the *Schools Act* to take steps to ensure that there was discipline in the school by adopting a code of conduct.²⁹⁷ In the Constitutional Court judgment, O'Regan J stated that section 9 of the Constitution had been adopted to acknowledge that by giving advantage to people from a certain group, can have the result of group disadvantage patterns being formed.²⁹⁸ In this context it means that when schools, in their Code of Conduct, advance one particular religious or cultural practice which is prejudice to some learners, the schools conduct is not in line with section 9 of the Constitution. It was further stated that discrimination of this nature was unfair and it led to inequality amongst the different groups in society.²⁹⁹ The Court held that when the Governing Body made rules for the school, the rules must be conforming with the *Schools Act* as well as with the guidelines.³⁰⁰

²⁹⁴ *Pillay Constitutional Court* case para 14.

²⁹⁵ Hereinafter referred to as the *Pillay High Court* case.

²⁹⁶ *Pillay High Court* case para 1.

²⁹⁷ *Pillay High Court* case para 17.

²⁹⁸ *Pillay High Court* case para 22.

²⁹⁹ *Pillay High Court* case para 22.

³⁰⁰ *Pillay High Court* case para 31.

The court referred to the Preamble of the *Schools Act*, which states that the country needs a new school system that will advance the representative transformation of the society. This school system must fight racism and other forms of discrimination. The new school system will also advance and protect the diverse languages and cultures of the learners, parents and teachers.³⁰¹ The guidelines make provision that when a code of conduct is adopted it must comply with the Constitution and other legislation such as the Provincial legislation and the *Schools Act*. The code of conduct of the school must uphold constitutional values such as human rights and dignity.³⁰²

The Court stated that the Code of Conduct was not consistent with the provisions of the Constitution.³⁰³ The Court further held that the prohibition of wearing the nose stud undermined the value of such religious and cultural symbols. This result was that a message was being conveyed to other learners that cultural practices and religious beliefs did not have the same value as other rights.³⁰⁴

5.1.3 *MEC of Education Kwazulu-Natal v Pillay 2008 1 SA 474 (CC)* ³⁰⁵–

The Constitutional Court held that:

The conduct of the School was discriminatory against the learner and was unfair in terms of the Equality Act. It held that our society prohibits both direct and indirect discrimination and aims to eliminate entrenched inequalities. It held further that the Equality Court had failed to consider properly the impact of the Constitution and the Equality Act on the Code and that both religion and culture are equally protected under the Equality Act and the Constitution. Because the nose stud had religious and/or cultural significance to the learner, the failure to treat her differently from her peers amounted to withholding from her "the benefit, opportunity and advantage of enjoying fully [her] culture and/or of practising [her] religion" and therefore constituted indirect discrimination.³⁰⁶

³⁰¹ *Pillay High Court case para 32.*

³⁰² *Pillay High Court case para 33.*

³⁰³ *Pillay High Court case para 34.*

³⁰⁴ *Pillay High Court case para 35.*

³⁰⁵ Hereinafter referred to as the *Pillay Constitutional Court case*.

³⁰⁶ *Pillay Constitutional Court case para 15.*

The Court further pointed out that the learner was part of a group of people against whom there had been discrimination in the past.³⁰⁷ The court highlighted the marginalised and vulnerable status of Hindu people in South Africa, the demeaning effect of denying the learner her identity, as well as the systematic nature of the discrimination.³⁰⁸ The School was dissatisfied with the order of the High Court and applied for leave to appeal to the Constitutional Court.³⁰⁹

In the Constitutional Court Langa J, in the majority judgment, found that indeed the school had discriminated unfairly against the learner when refusing her the right to wear the nose stud in accordance with her religious and cultural beliefs.³¹⁰ The court pointed out that the problem with the Code of Conduct was that it did not make provision for learners like this learner to procure exemption from the strict jewellery restrictions as stated in the Code of Conduct.³¹¹ This compromised the religious beliefs and cultural practices of such learners, but not those of learners with different beliefs or practices.³¹² In handing down the judgment the court emphasised that:

The norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs, which also involve the piercing of a body part, at the expense of minority and historically excluded forms. Accordingly, a burden is placed on learners who are unable to express themselves fully and must attend school in an environment that did not completely accept them.³¹³

The court further pointed out that:

Freedom is one of the underlying values of our bill of rights and Courts must interpret all rights to promote the underlying values of 'human dignity, equality and freedom'. These values are not mutually exclusive but enhance and reinforce each other ... A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues. One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather

³⁰⁷ *Pillay Constitutional Court case para 17.*

³⁰⁸ *Pillay Constitutional Court case para 17.*

³⁰⁹ *Pillay Constitutional Court case para 18.*

³¹⁰ *Pillay Constitutional Court case para 119.*

³¹¹ Du Plessis 2009 *PELJ* 24.

³¹² Du Plessis 2009 *PELJ* 24.

³¹³ *Pillay Constitutional Court case para 44.*

than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.³¹⁴

The Constitutional Court judgement in the *Pillay case* is applicable to *bone fide* cultural and religious practices.³¹⁵ The Constitutional Court judgment will encourage learners who were afraid to raise their voices and practise their religious and cultural beliefs.³¹⁶ The court stated that it is important that learners should feel free to practise their beliefs as only by doing so we will come close to the society contemplated in the Constitution.³¹⁷ The court also pointed out that when religious practice is displayed it should be seen as a representation of a diversity which will enhance our schools and eventually our country.³¹⁸

5.2 Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo³¹⁹

In the *Ermelo* case the issue arose over receiving education in the language of choice.³²⁰ The school had always been an Afrikaans school.³²¹ The school was approached by the Department of Basic Education during 2006 to admit 27 English-speaking students who could not be admitted to an English school as all neighbouring English-medium schools were full, and this school had fewer students than the maximum it could accommodate.³²² The School refused the Department's request.³²³ The learners were then registered at a nearby English medium school but used the premises of the Hoërskool Ermelo, which had enough space to accommodate the additional learners.³²⁴ The school did not accommodate the learners in a classroom but made the laundry

³¹⁴ *Pillay Constitutional Court case* paras 63-64.

³¹⁵ *Pillay Constitutional Court case* para 107.

³¹⁶ *Pillay Constitutional Court case* para 107.

³¹⁷ *Pillay Constitutional Court case* para 107.

³¹⁸ *Pillay Constitutional Court case* para 107.

³¹⁹ 2010 2 SA 415 (CC) (hereinafter referred to as the *Ermelo case*).

³²⁰ *Ermelo case* para 1.

³²¹ *Ermelo case* para 6.

³²² *Ermelo case* para 12.

³²³ *Ermelo case* para 12.

³²⁴ *Ermelo case* para 13.

room available for the learners to be taught in.³²⁵ The Department paid the educators and the learners were taught in English.³²⁶ The Department then lodged a complaint about the school at the Commission for Human Rights, stating that the school was treating these learners as second-class human beings.³²⁷

As the shortage persisted when the 2007 academic year started, the Department took the decision that English-speaking learners who could not be placed in a school should be accommodated by Hoërskool Ermelo. On the day the school opened, officials from the Department accompanied the learners and parents to the school, but they were refused registration unless the children agreed to be taught in Afrikaans.³²⁸ The Department filed papers against the school and stated in the papers that in the Ermelo circuit the Hoërskool Ermelo was the only school that was not filled to capacity. There were 15 classrooms available in which grade 8 learners could be accommodated, irrespective of their language. The Department was of the view that the school could not refuse the learners access to the school.³²⁹

Due to the school's refusal, the Department then issued the school with two letters stating that a temporary committee would be appointed to deal with the issue, and secondly that the Head of the Department had decided to pull back the school's language policy effective immediately in view of the present predicament. About 113 learners were stranded at home.³³⁰ The amended policy stated that the languages of instruction at the school would be English and Afrikaans.³³¹

The school approached the High Court to have the Department's decision set aside.³³² The school was not successful. The court rejected the application and

³²⁵ *Ermelo* case para 13.

³²⁶ *Ermelo* case para 13.

³²⁷ *Ermelo* case para 13.

³²⁸ *Ermelo* case paras 14-18.

³²⁹ *Ermelo* case para 20.

³³⁰ *Ermelo* case para 21.

³³¹ *Ermelo* case para 26.

³³² *Ermelo* case para 25.

declined the school leave to appeal, but later granted the leave to appeal.³³³ The Supreme Court of Appeal overturned the outcome of the High Court and the appeal was upheld.³³⁴ The Constitutional Court found that the Department had the right to withdraw policies but only in cases where the governing bodies of schools failed to act.³³⁵ The court dealt with the procedural questions and Moseneke J sketched the context of the continuation of inequalities in our education system.³³⁶ He stated that the continuing inequalities were "a painful legacy of our apartheid history". The judgment further recognised Afrikaans as a cultural treasure but noted that the indigenous languages had weakened significantly and that learners who were not English speaking now had to fight to be schooled in English.³³⁷ The court stated that these were the some of the scars that apartheid had left behind in South Africa.³³⁸

5.3 *Christian Education SA v Minister of Education*

Section 10 of the *Schools Act* prohibits bodily punishment in any school.³³⁹ A group of Christian parents approached the High Court to strike out section 10 of the *Schools Act*. The parents stated that in compliance with their religious beliefs, corporal punishment was essential in the rearing of their children.³⁴⁰ The court found that the parents had relied on the Bible, and the Bible stated that only parents could administer corporal punishment, which excluded teachers.³⁴¹ When the Constitutional Court handed down judgment, Sachs J stated that section 10 of the *Schools Act* impose a constitutional limitation, which is acceptable, on parents' right to freedom of religion in terms of section

³³³ *Ermelo* case para 29.

³³⁴ *Ermelo* case para 33.

³³⁵ Skelton 2013 *De Jure* 16.

³³⁶ Skelton 2013 *De Jure* 16.

³³⁷ Skelton 2013 *De Jure* 16.

³³⁸ Skelton 2013 *De Jure* 17.

³³⁹ Section 10 of the *Schools Act*.

³⁴⁰ Du Plessis 2009 *PELJ* 18.

³⁴¹ Du Plessis 2009 *PELJ* 18.

36 of the Constitution and ordered that a *Curator ad litem* be appointed for the children concerned.³⁴²

The court dismissed the application and stated that:

Section 10 of the Schools Act did not constitute a substantial burden on religious freedom. Corporal punishment in schools infringed the children's right to dignity and security of the person and was accordingly not protected by section 31 of the Constitution.³⁴³

Freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.³⁴⁴

The court pointed out that section 10 of the *Schools Act* had the aim of protecting children from corporal punishment in school.³⁴⁵

The Appellants in this matter was of the opinion that section 10 of the *Schools Act* infringed on their rights to freedom of religious belief and opinion,³⁴⁶ language and culture³⁴⁷ and their right to cultural, religious and linguistic communities³⁴⁸ the Respondents argues that the fact that inflicting harm to the children, infringes the children's other constitutional rights like equality³⁴⁹ as well as the child's right to dignity³⁵⁰ and the child's right to freedom and security of person.³⁵¹

³⁴² *Christian Education* case para 53.

³⁴³ *Christian Education* case para 6.

³⁴⁴ *Christian Education* case para 36.

³⁴⁵ *Christian Education* case para 49.

³⁴⁶ Section 15 of the Constitution.

³⁴⁷ Section 30 of the Constitution.

³⁴⁸ Section 31 of the Constitution.

³⁴⁹ Section 9 of the Constitution.

³⁵⁰ Section 10 of the Constitution.

³⁵¹ Section 12 of the Constitution.

It is clear from this case that when a religious or cultural right infringe on other Constitutional right in such a manner that harm is inflicted on the child, the right can be limited in terms of the limitations clause.

5.4 Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart³⁵²

The applicant in this matter represented members and learners of a public school where there was an infringement of learners' constitutional rights. Serious questions were raised by the applicant in this case with regards to infringement of the right to freedom of religion in public schools. The applicant raised the issue of diversity and of public schools' support of one religion over another.³⁵³

The issues in question were:

- a) Whether or not children's right to religion was being infringed upon by the fact that the school's badge still represented the Holy Trinity?
- b) Whether the school's mission statement of "we believe" infringed on the children's rights?³⁵⁴
- c) Did religious instruction in schools and referring to any deity in a school song in schools infringe on some children's rights?³⁵⁵
- d) Was the handing out of Bibles at school an infringement on the rights of children who did not belong to the Christian faith?
- e) Did the opening of a school day with a reading from Scripture and explicit prayer dedicated to a particular God infringe on some learner's religious and cultural rights?³⁵⁶

³⁵² *Organisasie vir Godsdienste-Onderrig en Demokrasie.*

³⁵³ *Organisasie vir Godsdienste-Onderrig en Demokrasie* para 25.

³⁵⁴ Right to freedom of religion, belief and opinion, s 15 and the right to cultural, religious and linguistic communities, s 31 of the Constitution.

³⁵⁵ Right to freedom of religion, belief and opinion, s 15 and the right to cultural, religious and linguistic communities, s 31 of the Constitution.

³⁵⁶ *Organisasie vir Godsdienste-Onderrig en Demokrasie* para 119.

The courts stated that it was essential to bear in mind, before the matter was decided, that the view that the Constitutional Court took in matters like these was in favour of diversity, and the court remain neutral.³⁵⁷ The court stated that it was essential to note that legislation had been enacted on both national and provincial level that dealt with religious observance in public schools.³⁵⁸

The court referred to the *Schools Act* and stated that the Member of the Executive Council of a province is the one who is responsible for providing for the financial need of learners in that province. Such provision should be made from the provincial budget. The Court further pointed out that section 7 of the *Schools Act* "deals pertinently with freedom of conscience and religion at public schools".³⁵⁹

Section 7 of the *Schools Act* states the following:

Freedom of conscience and religion at public schools

Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary.³⁶⁰

On the matter of Diversity, the court remained concerned that a single faith might be branded.³⁶¹ The court made the following order:

It is declared that it offends section 7 of the Schools Act, 84 of 1996 for a public school

- (i) to promote or allow its staff to promote that it, as a public school, adheres to only one or predominantly only one religion to the exclusion of others; and
- (ii) to hold out that it promotes the interests of any one religion in favour of others.³⁶²

³⁵⁷ *Organisasie vir Godsdiensle-Onderrig en Demokrasie* para 22.

³⁵⁸ *Organisasie vir Godsdiensle-Onderrig en Demokrasie* para 27.

³⁵⁹ *Organisasie vir Godsdiensle-Onderrig en Demokrasie* para 28.

³⁶⁰ Section 7 of the *Schools Act*.

³⁶¹ *Organisasie vir Godsdiensle-Onderrig en Demokrasie* para 78.

³⁶² *Organisasie vir Godsdiensle-Onderrig en Demokrasie* para 102.

5.5 Conclusion

The question that arises from matters relating to all these cases being lodged against the State with regard to education is whether the four-A scheme is even taken into consideration when decisions are made. Important in this instance is the Adaptability leg. The state must ensure that when a code of conduct is passed for a school it is of such a nature that it accommodates the diverse cultures in South Africa.³⁶³ A code of conduct must be flexible and must accommodate the need of the learners.³⁶⁴ It is evident in the above cases that adaptability is lacking in the South African education system and that this needs to be addressed.

We have seen that the codes of conduct of schools in most instances lay down strict rules on how learners should dress and how they should not dress. Most of the time this results in learners' cultural rights being infringed upon, and some cases of this nature have required decisions by the judiciary. From this, the conclusion can be drawn that the school system has not adapted to the changes that came with democracy and section 9 of the Constitution, which states that everyone has the right to equal enjoyment of the law. The question that must be asked is whether the state is fulfilling its duty in realising the child's right to education, and whether the limitations imposed by the state in some cases are justifiable. This question is investigated in the next chapter.

³⁶³ Skelton 2013 *De Jure* 21.

³⁶⁴ Skelton 2013 *De Jure* 21.

6 Measuring the state's duty to realise the right to basic education against the limitation clause

The right to basic education places a positive obligation on the state to realise the right to education immediately.³⁶⁵ Article 2 of the ICESCR deals with the duties of states parties to the ICESCR. Article 2 describes the nature of the states parties' obligations. It states the following:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³⁶⁶

To establish what the obligations of states parties are, one has to look at the wording of Article 2. In General Comment 13 the CESCR states that:

While the Covenant provides for progressive realisation and acknowledges the existing constraints due to the limits of the available resources, it also imposes on states parties' various obligations which are of immediate effect.³⁶⁷

The CESCR further states in the same document that states parties have the instantaneous obligation to undertake that the right will be provided without any discrimination of any kind and that they must take reasonable steps towards the fulfilment of the right to education.³⁶⁸ These must be "deliberate, concrete and targeted".³⁶⁹ The CESCR also states that the right to education, just like all other human rights, imposes the obligations to respect, protect and fulfil on states parties.³⁷⁰

The CESCR states in General Comment No 13 that the duty to respect calls for state parties to avoid measures that can impede or preclude the enjoyment of

³⁶⁵ Section 29 (1)(a) states that everyone has the right to a basic education, including adult basic education.

³⁶⁶ Article 2 of the *International Covenant on Economic, Social and Cultural Rights*, 1966.

³⁶⁷ ICESCR *General Comment* 13 para 43.

³⁶⁸ ICESCR *General Comment* 13 para 43.

³⁶⁹ ICESCR *General Comment* 13 para 43.

³⁷⁰ ICESCR *General Comment* 13 para 46.

the right to education. The CESCR further states that the obligation to protect calls for states parties to take measures that will stop third parties from impeding the enjoyment of the right to education.³⁷¹ Article 2 also places a positive obligation on states parties to fulfil the right to education. The CESCR identifies the minimum core obligation, which is to ensure the provision of the minimum mandatory degree of each of the rights in the Covenant.³⁷² To consider the minimum obligation regarding the right to basic education one must ask what must be available immediately.³⁷³ Kamga is of the opinion that the ICESCR provides that "primary education must be compulsory and available free to all" and should be realised immediately. He further states that this differentiates primary education from other levels of education.³⁷⁴ In the *Juma Masjid* case the court found 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.³⁷⁵

Kamga draws the conclusion that primary education should be mandatory and that the state should not delay providing the minimum core requirements. He also states that a lack of resources should not be an excuse when the minimum core requirements must be met.³⁷⁶ Section 29(1) does not have an internal limitation like all the other socio-economic provisions and is subject only to the limitation clause, section 36, of the Constitution. Section 36 states 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;

³⁷¹ ICESCR *General Comment* 13 para 47.

³⁷² ICESCR *General Comment* 3.

³⁷³ Kamga "The right to a basic education" 519.

³⁷⁴ Kamga "The right to a basic education" 519.

³⁷⁵ *Juma Masjid* case para 37.

³⁷⁶ Kamga "The right to a basic education" 519-520.

- (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.³⁷⁷

In terms of section 36 it might be suggested that the availability of resources might be a factor to consider when limiting the right to basic education.³⁷⁸ Seleoane is of the opinion that the limitation of any right is a separate question from the meaning of the right. He is also of the opinion that the meaning of the right should be determined first in order to establish what right is being limited.³⁷⁹ The right to basic education does not have an internal limitation like the right to housing, for instance.³⁸⁰ The right is direct and is not dependant on available resources. The state must act immediately to realise the right.³⁸¹ The courts normally takes the reasonableness approach when dealing with textually qualified rights.³⁸²

In *Grootboom* the court held that section 28(1)(c) does not have the effect that socio-economic goods can be directly demanded from the state by the parents of the children. The court further stated that "this would be out of step with the "carefully constructed constitutional scheme for the progressive realisation of socio-economic rights".³⁸³

In the *Juma Masjid* case the court found that the right to basic education is different. The court stated that this is a right to a basic need and that anything less than its full provision constitutes a limitation of the right.³⁸⁴ Nkabinde J stated that:

... there is no internal limitation requiring that the right to education must be progressively realised within available resources or subject to reasonable legislative measures. The right to a basic education may be limited only in terms of a law of general application which is reasonable and justifiable in

³⁷⁷ Section 36 of the Constitution.

³⁷⁸ Seleoane 2003 *Law, Democracy and Development* 140.

³⁷⁹ Seleoane 2003 *Law, Democracy and Development* 140.

³⁸⁰ Seleoane 2003 *Law, Democracy and Development* 140.

³⁸¹ Seleoane 2003 *Law, Democracy and Development* 141.

³⁸² McConnachie and McConnachie 2012 *SALJ* 564.

³⁸³ *Grootboom* case para 71.

³⁸⁴ McConnachie and McConnachie 2012 *SALJ* 564.

an open and democratic society based on human dignity, equality and freedom.³⁸⁵

³⁸⁵ *Juma Masjid* case para 37.

7 Conclusion: The State's Failure to Realise the Child's Right to Basic Education in a Culturally Diverse Classroom

This study has investigated whether the state fulfils its duty to protect the child's constitutional right to basic education without infringing on the child's right to religion and culture. From a scrutiny of international instruments as well as the provisions in the Constitution it became clear that the right to basic education is the most important right that the state must realise, as this right empowers the child and other marginalised members of communities to lift themselves out of poverty. When the right to basic education is read together with section 9 of the Constitution, it is clear that every child should be able to enjoy his or her education free from any obstacles preventing the enjoyment of the right. Such obstacles could be anything preventing the child from accessing education. The state is entrusted with the obligation, derived from international instruments and domestic laws, to protect, promote, respect and fulfil the child's right to basic education free from any discrimination.

In South Africa's multi-cultural classrooms diversity is inevitable. In terms of the ICESCR, education should be free and available for all children. In general comment 13 the CESCR says that states parties are obliged to make education available, accessible, acceptable and adaptable. In a culturally diverse society the education system must adapt to change, and the child's other constitutional rights like the right to religious and cultural practice of choice should be respected.

In terms of section 8 of the *Schools Act* a "governing body of a public school must adopt a code of conduct." The code of conduct must be subject to the Constitution, the *Schools Act*, and Provincial legislation. The code of conduct must be adopted after the Governing body has consulted the parties who will be affected by this document. This would include the parents, the educators and the learners.³⁸⁶ The Minister of Basic Education may in terms of section

³⁸⁶ Section 8(1) of the *Schools Act*.

8(3) of the *Schools Act* provide guidelines that must be followed by the governing body when drafting the code of conduct. The aim of the code of conduct must be to promote and ensure that there is discipline in the school and to promote uniformity.³⁸⁷ Section 7 of the *Schools Act* states that when religious observances are conducted in public schools this must be done on a fair and impartial basis and that the attendance thereof should be voluntary to the learners as well as the educators.³⁸⁸

We have seen in the cases discuss above in Chapter 5 and other similar cases that the right to education often clashes with the right to religious and cultural beliefs and practices. This can be problematic for the learner, the parent and the school. So often we see that the strict principles laid down by the governing bodies of schools are of such a nature that they disregard the right to religious and cultural beliefs and practices and may infringe on the learners' constitutional rights. This was proven in the *Pillay case*. In this case the High Court found that the fact that the school's code of conduct was not consistent with the Constitution, the *Schools Act* and Provincial legislation meant that it contravened the law.³⁸⁹ When a ban of a certain cultural practice is clearly prohibited, the wrong message is sent to learners, and it could be seen that the Code of Conduct was not in line with the Equality Act. The message sent is that cultural practice and religious belief do not deserve the same protection as other constitutional rights.³⁹⁰ In this instance the Code of Conduct failed to accommodate diversity in schools.³⁹¹ In the *Pillay case* the court stated that: "There is no need to suppress individuality to achieve harmony".³⁹²

It is clear from the above that the right to education often clashes with the religious and cultural practices of learners due to the fact that the Code of Conduct of the school bans certain clothing, nose studs, headscarves and in some instances excludes certain languages as media of instruction. Should

³⁸⁷ Section 8(2) of the *Schools Act*.

³⁸⁸ Section 7 of the *Schools Act*.

³⁸⁹ *Pillay High Court case 34*.

³⁹⁰ *Pillay High Court case 35*.

³⁹¹ *Pillay High Court case 34*.

³⁹² *Pillay High Court case 36*.

schools not draft their codes of conduct in such a way that all constitutional rights of learners, including the right to religious and cultural choice, are catered for?

Fundamental rights are protected in legislation in order to protect the individuals who are the carriers of those rights. The state has a duty to protect those rights. This presupposes that the state must take legislative and progressive measures firstly to ensure that the individual enjoys the rights provided and secondly to protect the individuals' rights from the interference of a third party.³⁹³

It is inevitable that these constitutional rights will at some point come to clash with one another and result in conflict.³⁹⁴ Such conflict occurs when one right is realised and the others are suppressed and "fade away" or become less important than the one privileged.³⁹⁵ When there is conflict, the importance of the scope of the right conflicted is crucial. To find a solution for the conflict may be problematic. Many authors have suggested that when there is conflict between fundamental rights, a hierarchy should be found to solve the problem.³⁹⁶ The problem with this suggestion is that human rights instruments do not provide a ranking of fundamental rights. These instruments provide for the demarcation of "absolute rights" and "relative rights".³⁹⁷ Notwithstanding the attempts to rank fundamental rights, there is no such thing as a hierarchy of rights.³⁹⁸

When trying to resolve the conflict between two rights, the equality clause should be kept in mind and a balance between the rights in conflict should be established.³⁹⁹ States violate the right not to be discriminated against when they treat one group differently from another without reasonable and

³⁹³ Kayacan *How to resolve conflicts* 4.

³⁹⁴ Kayacan *How to resolve conflicts* 4-5.

³⁹⁵ Kayacan *How to resolve conflicts* 5.

³⁹⁶ Kayacan *How to resolve conflicts* 7.

³⁹⁷ Kayacan *How to resolve conflicts* 7.

³⁹⁸ Kayacan *How to resolve conflicts* 8.

³⁹⁹ Kayacan *How to resolve conflicts* 9.

justifiable grounds.⁴⁰⁰ All rights in the Constitution carry the same weight, no matter what the content of the right is. The limitation of any right then suggests that one right carries more weight than another. Balancing the rights seems to be the way to resolve conflicts that arise between rights. Balancing entails weighing the interests that are to be protected by the rights. The facts of the matters, however, remain crucial when attempting to balance different constitutional rights.⁴⁰¹ The seriousness of the violation of the rights should be categorised to reach a reasonable solution. The question that must be asked is what the extent of the infringement of the right is, and whether the approach that is being followed is reasonable. The proportionality principle can be used to establish whether or not a decision is reasonable.⁴⁰² The balancing of rights is used internationally when the public interest is being dealt with. When balancing rights, the court should take into consideration the fundamental rights of society. The balancing of rights plays a crucial role in the decisions of Constitutional Court when conflict between fundamental rights is being resolved.⁴⁰³

In light of the above, the question arises whether the governing bodies of schools should not rather deviate from laying down rules that will exclude indigent, minority and marginalised groups of society who have already experience inequalities in the past? It might be the best solution for schools to stop focussing on hairstyles, jewellery worn as part of cultural practices, and headscarves or clothing worn for religious purposes, and focus on how they could realise the right to education in the context of diversity, so that all learners enjoy the right to education balanced with their other constitutional rights. To achieve this end, school governing bodies should ask if their rules are the best interest of all the children attending the school. If this question is answered in the negative, even if only one child is negatively affected, then the governing body should revise the rules.

⁴⁰⁰ Kayacan *How to resolve conflicts* 10.

⁴⁰¹ Kayacan *How to resolve conflicts* 15.

⁴⁰² Kayacan *How to resolve conflicts* 16.

⁴⁰³ Kayacan *How to resolve conflicts* 17.

This analysis reflects the fact that current South African educational practices sometimes suppress individuality and the identities of learners. This is an indication that the focus should shift from the appearance of learners, especially when the requirements in the school's code of conduct infringe on other constitutional rights of the learner. This would require that constitutional rights should be balanced when they are in conflict with one another to prevent the limitation of one of the rights. In this way the state would fulfil its obligations in terms of international, regional and domestic law.

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