

The international legal framework regarding the accessibility of infrastructure for physically disabled learners at public schools in South Africa

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I have no legs,
But still I have feelings,
I cannot see,
But I think all the time,
Although I am deaf,
I still want to communicate,
Why do people see me as useless, thoughtless, talkless,
When I am as capable as any,
For thoughts about our world.

- Coralie Severs, 14, United Kingdom¹

1 Simkiss 2013 *Paediatrics and Child Health* 451. This poem speaks for millions of children and adults living everywhere in the world, who have disabilities. Many face discrimination every day. Their abilities are overlooked and their capacities underestimated. They do not get the education and health care they need, and they are excluded from activities in their community. But children and adults have the same rights as everyone else. Also see Cyndi Lauper: True Colors (MattyBRaps Cover ft Olivia Kay) <https://www.youtube.com/watch?v=dXmaE0041Y0> & https://www.youtube.com/watch?v=9b7y9UYt_fm [date accessed 17 September 2014].

Abstract

The international legal framework regarding the accessibility of infrastructure for physically disabled learners at public schools in South Africa

According to Section 29(1) of the *Constitution of the Republic of South Africa, 1996* everyone is entitled to and has the right to basic education. “Everyone” includes disabled learners. The international framework regarding the right to basic education and the accessibility of the infrastructure for physically disabled learners in public schools was examined to determine whether or not South Africa complies with the formalities and obligations prescribed and what the implications are, if the state does not comply. To reach the purpose of the above statement made there has to be determined which legislation is applicable to disabled learners and a definition needs to be provided for the term ‘physical disability’ (Chapter 1). Secondly the core of the research question concealed in the above statement and its applicable articles will be discussed as seen in *General Comment No. 13 of the International Covenant on the Economic, Social and Cultural Rights* (Chapter 2). Thereafter international legislation will be discussed with the focus on basic education, disability, the accessibility of the infrastructure and the obligations placed on the state (Chapter 3 and 4).

The focus will then be moved to the regional framework and the provision made with regards to the right to basic education and disability (Chapter 5). The relevant constitutional sections will then be investigated before reaching a conclusion. The sections that will be taken into account are sections 7, 9, 28, 29, 36, 39 and 233 of the *Constitution of the Republic of South Africa, 1996*. The purpose of the investigation of the constitutional sections is to determine what basic education entails and if there is a uniform definition thereof. A further purpose with the investigation of the constitutional provisions is to determine whether there is an infringement of disabled learners’ rights to equality and to basic education. Another purpose is to determine to which extent South African schools are accessible to disabled learners in the provision of infrastructure of school buildings as it is now and the obligation that rests on the state to adapt the infrastructure (Chapter 6).

After the discussion of the above mentioned chapters a conclusion will be reached on to what extent the state complies with its constitutional and international obligations to realize disabled children's right to basic education can be come to (Chapter 7). The inaccessibility of public school buildings in South Africa and disabled children's need for basic education has led to the research question.

Key words: General Comment No. 13, disability, legislative framework, right to basic education, accessibility, reasonable accommodation, international instruments, infrastructure, building regulations, Constitution, equality, non-discrimination, state's obligation.

Uittreksel

Die internasionale wetlike raamwerk ten opsigte van die toeganklikheid van infrastruktuur vir fisies gestremde leerders by openbare skole in Suid-Afrika

Volgens artikel 29(1) van die *Grondwet van die Republiek van Suid-Afrika*, 1996 is almal geregtig op die reg tot basiese onderwys. “Almal” sluit gestremde leerders in. Die internasionale raamwerk ten opsigte van die reg tot basiese onderwys en die toeganklikheid van die infrastruktuur vir fisies gestremde leerders in openbare skole gaan in diepte bespreek word om vas te stel of Suid-Afrika aan die formaliteite en verpligtinge wat voorgeskryf word voldoen en wat die implikasies is as hulle nie daaraan voldoen nie. Om die doel van die bogenoemde stelling wat gemaak is te bereik moet bepaal word watter wetgewing van toepassing is op gestremde leerders en 'n definisie moet voorsien word vir die term fisiese gestremdheid (Hoofstuk 1). Tweedens is die kern van die navorsing vraag versteek in die stelling hierbo en die toepaslike artikels sal bespreek word, soos uiteengesit in Algemene Kommentaar No. 13 van die Internasionale Verdrag oor die Ekonomiese, Sosiale en Kulturele Regte (Hoofstuk 2). Daarna sal die internasionale wetgewing met die fokus op basiese onderwys, gestremdheid, die toeganklikheid van die infrastruktuur en die verpligtinge geplaas op die staat (Hoofstuk 3 en 4) bespreek word.

Die fokus sal dan verskuif na die plaaslike raamwerk en die stelling wat gemaak is met betrekking tot die reg op basiese onderwys en gestremdheid (Hoofstuk 5). Die betrokke grondwetlike artikels sal dan ondersoek word voordat 'n gevolgtrekking gemaak word. Die artikels wat in ag geneem moet word, is artikels 7, 9, 28, 29, 36, 39 en 233 van die *Grondwet van die Republiek van Suid – Afrika*, 1996. Die doel van die ondersoek van die grondwetlike artikels is om te bepaal wat basiese onderwys behels en of daar 'n eenvormige definisie van die term bestaan. 'n Verdere doel met die ondersoek van die grondwetlike bepalings is om te bepaal of daar inbreek gemaak word op die gestremde leerders se regte tot gelykheid en basiese onderwys. Nog 'n doel is om te bepaal tot watter mate Suid-Afrikaanse skole toeganklik is vir gestremde leerders deur die voorsiening van infrastruktuur van skoolgeboue soos dit nou is en die verpligting wat rus op die staat om die infrastruktuur (Hoofstuk 6) aan te pas.

Na afloop van die bespreking van die bogenoemde hoofstukke sal 'n gevolgtrekking bereik word tot watter mate die staat voldoen aan sy grondwetlike en internasionale verpligtinge om gestremde kinders se reg tot basiese onderwys te verwesenlik, (Hoofstuk 7). Die ontoeganklikheid van openbare skoolgeboue in Suid-Afrika en gestremde kinders se behoefte aan basiese onderwys het gelei tot die navorsingsvraag.

Sleutel woorde: Algemene Kommentaar No. 13, gestremdheid, wetgewende raamwerk, reg tot basiese onderwys, toeganklikheid, redelike akkommodasie, internasionale instrumente, infrastruktuur, bouregulasies, Grondwet, gelykheid, nie-diskriminasie, die staat se verpligting.

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List of Abbreviations

ACC	<i>African Convention on the Rights and Welfare of the Child (1990)</i>
ICESCR	<i>International Covenant on Economics, Social and Cultural Rights (1966)</i>
SASA	<i>South African Schools Act 84 of 1996</i>
UNCRC	<i>United Nations Convention on the Rights of the Child (1989)</i>
THRHR	<i>Tydskrif vir die Hedendaagse Romeins Hollandse Reg</i>
ASIDI	Report on Progress on Accelerated Schools Infrastructure Delivery Initiative

1 Introduction and problem statement

Former President Nelson Mandela once said that education is the most powerful tool with which one can change the world.² In this study the right to basic education is investigated regarding physically disabled learners and whether they are granted an equal right to such education, in terms of the infrastructures of schools as they currently exist. The international legal framework, regarding the accessibility of infrastructure for such learners at public schools and the implications for South Africa are to be investigated and discussed in depth.

The right to basic education is firstly examined on an international³ and regional⁴ level, followed by a discussion on the *Constitution of the Republic of South Africa, 1996*⁵, as well as other legislation and case law to amplify the implications of the above as it concerns South Africa.⁶ The right to basic education in South Africa is deliberated as it seems that the South African *Constitution* accords rights to its citizens, while giving dual rights and responsibilities to the state and its members. The question remains: to what extent does the state comply with the international legal framework regarding the obligation to accommodate physically disabled learners to realise their right to basic education at public schools in South Africa?

Section 28(2) of the *Constitution* states that a child's best interests are of paramount importance in every matter concerning him/her. Section 29(1)(a) of the *Constitution* stipulates that everyone has the right to a basic education. "Everyone" also includes learners with disabilities.⁷ Firstly, it is essential to explain the meaning of the term

2 Brainy Quotes www.mobile.brainyquotes.com/quotes/authors/n/nelson_mandela.html [date accessed 22 February 2014].

3 The international legal framework is discussed in Chapters 2 – 4 of this study.

4 The regional legal framework is considered in Chapter 5.

5 *Constitution of the Republic of South Africa, 1996* (hereinafter referred to as the *Constitution*) is discussed in Chapter 6.

6 The *Constitution* as well as the case law, are examined in Chapter 6.

7 Van Dalen: *The states obligation with regard to disabled learner's right to basic education*: Abstract.

education⁸ as used in the human rights context.⁹ Secondly, it is imperative to establish the difference between the terms basic¹⁰ and primary¹¹ education, as used in the current discourse on the right to education, because this distinction is significant in understanding the state's responsibilities for the right to education.¹² Moreover, it is of cardinal importance to understand the difference between the terms basic and primary education. In Chapter 6 of this study, section 29 of the *Constitution* is examined and in section 29 the term 'basic education' is used. The necessary case law to support the practical implication of the above mentioned section is also discussed.¹³

This study's focus is on learners with physical disabilities and their right to basic education. The accommodation and adaptability of the infrastructure at public

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- 8 The term education encompasses the lifelong process of learning which occurs in both formal and informal settings and therefore the concept of formal instruction, normally undertaken within school settings, refers to the international and regional human rights instruments and is therefore the narrow view of education. While the broader view of education encourages the recognition of a full range of educational possibilities, it also presents fundamental challenges in the monitoring and evaluation of such responsibilities. African Union 2014 The African Committee of Experts on the Rights and Welfare of the Child - Concept Note on the Day of the African Child – Theme: "A child friendly, quality, free and compulsory education for all children in Africa" <http://www.african-union.org> [date accessed 18 September 2014] 4.
 - 9 African Union 2014 The African Committee of Experts on the Rights and Welfare of the Child - Concept Note on the Day of the African Child – Theme: "A child friendly, quality, free and compulsory education for all children in Africa" <http://www.african-union.org> [date accessed 18 September 2014] 4.
 - 10 The term basic education is, less concerned with the completion of specific formal programmes or certification requirements and more focused on the content of education in a way that embraces the broad understanding of 'education'. This could mean that the entitlement to basic education, such as is provided for under article 11 of the ACC, refers to the substance of education such as a certain level of literacy or numeracy. African Union 2014 The African Committee of Experts on the Rights and Welfare of the Child - Concept Note on the Day of the African Child – Theme: "A child friendly, quality, free and compulsory education for all children in Africa" <http://www.african-union.org> [date assessed 18 September 2014] 4.
 - 11 The term primary education is not universally defined and therefore goes hand in hand with the narrow meaning of the term education. African Union 2014 The African Committee of Experts on the Rights and Welfare of the Child - Concept Note on the Day of the African Child – Theme: "A child friendly, quality, free and compulsory education for all children in Africa" <http://www.african-union.org> [date accessed: 18 September 2014] 4. Essentially, therefore, the implementation of the right to basic education under the ACC means that at the minimum, it appears as if the state parties have a duty at least to ensure primary education in accordance with international standards, and to facilitate other forms of the term basic education, as far as possible.
 - 12 African Union 2014 The African Committee of Experts on the Rights and Welfare of the Child - Concept Note on the Day of the African Child – Theme: "A child friendly, quality, free and compulsory education for all children in Africa" <http://www.african-union.org> [date assessed 18 September 2014] 3.
 - 13 Discussed in Chapter 6 of this study.

schools for learners with physical disabilities is furthermore considered in detail.¹⁴ The accommodation of learners with physical disabilities forms part of the four “A’s” of basic education used as a yardstick to measure if schools truly comply with their obligations in this regard. The four “A’s” comprise: availability, accessibility, acceptability and adaptability. The “A” concentrated on in this study is adaptability,¹⁵ which refers to the extent to which children with special needs are accommodated, and is also discussed in Chapters 3 and 6 of the proposed study.

It appears as if the infrastructure at public schools is suitable for the everyday, ordinary learners and is built according to the building regulations provided for such schools. Although conforming to the said building regulations, they may still appear inaccessible for physically disabled learners who have the cognitive capacity of an ordinary learner.¹⁶ Therefore, this issue was researched and is discussed in the current study to illustrate the implications in international law, as well as South African law. The term 'disability' is too broadly defined for the purpose of this study. Boezaart's¹⁷ proposal of the human rights model is contributory to the different models in defining the term 'disability'. 'Physical disability' may be defined in various ways, but no attempt will be made here to create a new definition for the term. The definition used to define the said term in this study is Boezaart's, to ensure that no discrimination takes place, as stated in section 9(3) and (4) of the *Constitution* where the prevention or prohibition of unfair discrimination is defined. Therefore, the definition of disability, as proposed by Boezaart, is as follows:

14 Discussed in Chapters 3 and 6.

15 Although the word accessibility of the infrastructure is used in the title of the study, it is discussed in the four A's under the term adaptability. The short definition of the word adaptability as well as the discussion on it takes place in Chapter 3 and 6.

16 It means that a learner who has the who have the cognitive capacity of an ordinary learner and who wants to go to a public school is often limited because of his/her physical disability that prevents him/her accessing the infrastructure of a public school building, for example, stairs instead of a ramp. For more information on the levels of cognitive capacity, consult SIAS: National Strategy on Screening, Identification Assessment and Support School Pack <http://www.education.gov.za/LinkClick.aspx?fileticket=Q5%2BHeU%2By44c%3D&tabid=436&mid=1753> [date accessed 22 October 2014].

17 Boezaart 2012 *South African Journal of Public Law* 455
http://repository.up.ac.za/bitstream/handle/2263/20908/Boezaart_Constitutional%282012%29.pdf?sequence=1 [date assessed 17 September 2014]. See also the Report on the Committee of the Rights of the Child *General Comment No. 9: The Rights of Children with Disabilities* (2006) CRC/C/GC/9 <https://www.ohchr.org/RefDoc.aspx?symbol=HRC/GC/9> [date accessed 17 September 2014].

Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

This definition was used to assist in answering the research question: To what extent does the state comply with the international legal framework regarding the obligation to accommodate physically disabled learners to realise their right to basic education at public schools in South Africa? The reason for employing this definition was that even if the term disability, is defined as a broad concept, clear associations can be traced to physical disability and will be fully understood as the chapters to follow are discussed in detail. In the case of *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*¹⁸, the Court held that this provision in section 29(1)(a) of the *Constitution* creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed from pursuing his or her basic education.¹⁹ It consequently does create a duty for the state to fulfil the obligation placed on it by the *Constitution*. Therefore, it seems that the state must grant every child the privilege to realise their right to basic education.²⁰

It is of fundamental importance to take note of section 39(1)(b)²¹ and 233 of the *Constitution*, which states that when interpreting the Bill of Rights, a court, tribunal or forum, must give consideration to international law and that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation

18 *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC).

19 Veriava F & Coomans F 'The right to education' in Brand D & Heyns C (eds.) *Socio-Economic Rights in South Africa* 61. See also Veriava F "The resourcing of public schools: an analysis of compliance with, and measurements of the state's constitutional obligations (Research paper for the Studies in Poverty and Inequality Institute" (SPII) September 2010 17 and Calderhead V The right to an 'adequate' and 'equal' education in South Africa: An analysis of section 29(1)(a) of the South African Constitution and the right to equality as applied to basic education (for SECTION 27 and Equal Education March 2011) 13 www.section27.org.za/wp-content/uploads/2011/04/The-Right-to-a-Basic-Education.pdf. [date accessed 22 February 2014].

20 Discussed in full in Chapter 6, where section 7 of the *Constitution* and its importance is stipulated.

21 Mahery P "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" 323-324.

that is consistent with international law over any alternative interpretation that is inconsistent with international law. Therefore, it would seem as if South Africa is bound by international instruments with regard to the right to education. This further requires an obligatory analysis of international legislation, which in turn provides the framework for the ratified national legislation with regard to the right to basic education. The international framework regarding the right to basic education is thoroughly discussed per the *United Nations Convention on the Rights of the Child*²² and its focus on the right to basic education and disability; this is focussed on in Chapter 4 and the *African Charter on the Rights and Welfare of the Child* addressed in Chapter 5, creating an distinct picture of what is expected of each member state that signs and ratifies international documents into its national law.

Only a few of the international documents are used in this introductory chapter regarding the right to basic education, while the rest of the international documents are deliberated in Chapters 2 and 3 of the proposed study. Particular attention is given to the *United Nations Convention on the Rights of People with Disabilities* and the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* as focussed on in Chapter 3 and the *International Covenant on the Economic, Social and Cultural Rights* with regard to adaptability, which is concentrated on in Chapter 2.

The starting point of this investigation is found in the *International Covenant on the Economic, Social and Cultural Rights General Comment 13: The Right to Education (Article 13)*, based on the commentary given by the Committee of the ESCR, which creates the foundation for the whole of the study and is considered in Chapter 2. The *United Nations Convention on the Rights of the Child* (1989)²³ stipulates that state parties will recognise the right of the child to education; and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

22 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" 311.

23 Article 28 of the *United Nations Convention on the Rights of the Child* (1989) (hereinafter referred to as the *UNCRC*). University of Minnesota Human Rights Resource Centre The right to education www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module16.htm [date accessed 22 February 2014].

make primary education compulsory and available, free to all. The *African Charter on the Rights and Welfare of the Child* (1990)²⁴ stipulates that every child shall have the right to an education. The specific article further provides guidelines on how the child's right to education shall be promoted and implemented.

South Africa ratified the *UNCRC* into national law in 1995²⁵ and the *ACC* in 2000.²⁶ In terms of this, the *Constitution*²⁷ and therefore the Bill of Rights, which is the cornerstone of South African democracy, strengthens the obligation placed on the state concerning the right, and therefore the right to basic education and disability is researched to discover whether the state has an obligation to realise the right to basic education or not. This study focuses solely on basic education and not on any other form of education. The discussion above gave rise to the research question. Chapter 2 deals with the *ICESCR* and *General Comment 13 of the ICESCR*, which are discussed in detail there.

24 Article 11 of the *African Charter on the Rights and Welfare of the Child* (1990) (hereinafter referred to as the *ACC*) goes further and states that the child's personality, talents and mental and physical abilities will be promoted and developed to their fullest potential, according to the specific article. The *ACC* places an apparent obligation on the state to take all appropriate measures into consideration, with a view of achieving the full realisation of the right of every child to have an education. See also Van Dalen LJ *The states obligation with regard to disabled learner's right to basic education* (LLM-thesis NWU 2011) 210.

25 South Africa signed this Convention on 29 January 1993 and ratified it into national law on 16 June 1995 see <http://www1.umn.edu/humanrts/> [date of use 3 March 2014]. See also Boezaart 2011 *THRHR* 265 and Jansen van Rensburg & Horsten 2004 *Journal for Juridical Science* 55 where they make reference to the fact that South Africa has ratified the Convention. See also Friedman, Pantazis & Skelton "Children's Rights" 47-1. Also see Van Dalen LJ *The states obligation with regard to disabled learner's right to basic education* 186.

26 South Africa signed this Charter on 10 October 1997 and ratified it into national law on 7 January 2000 see <http://www1.umn.edu/humanrts/> [date assessed 3 March 2014]. See also Friedman, Pantazis & Skelton "Children's Rights" i 47-1. Also see Boezaart 2011 *THRHR* 269-271 where she discusses the Charter as well as Combrinck "The Hidden Ones: Children with Disabilities in Africa and the Right to Education" 310-312.

27 Section 7(1) of the *Constitution of the Republic of South Africa*, 1996.

2 International Covenant on the Economic, Social and Cultural Rights (1966)²⁸

2.1 Introduction

The starting point which is based on the commentary given by the Committee on Economic, Social and Cultural Rights²⁹ is the foundation of this study and is discussed in depth in this chapter. In its *General Comment on the Right to Education*, the Committee on ESCR³⁰ sketched the basic features which need to be guaranteed in order to give meaning to any declaration of the right to basic education. Therefore, the Comment starts with an important statement, explaining the nature of educational rights, which declares that education is both a human right in itself and an essential means of realising other human rights.³¹

Progressively, education is recognised as one of the greatest financial investments that states are able to make.³² 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.³³ The practicability of including learners

28 *International Covenant on the Economic, Social and Cultural Rights* (1966) (hereafter referred to as the *ICESCR*); this was signed by South Africa on 3 October 1994 but has not yet been ratified into South African law, thus making it non-binding on this country, but it assisted in interpreting the basic principles of the socio-economic rights referred to in the *Constitution* under section 39(1)(b). Liebenberg “The Interpretation of Socio-Economic Rights” 33-11. See also Seleane 2009 *Law, Development and Democracy* 145.

29 Herein afterwards referred to as the Committee on ESCR.

30 Paragraph 1 of the *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014].

31 As an empowerment right, education is the primary vehicle by which economically and socially disadvantaged children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education plays a vital role in empowering women and safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment and controlling population growth. Paragraph 1 of the *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014].

32 Paragraph 1 of the *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014].

33 Paragraph 1 of the *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014].

with physical disabilities³⁴ is no longer an issue to be contemplated; it is an actuality in public schools worldwide.³⁵ Learners with physical disabilities have for years been entering public schools.³⁶ A relevant issue to consider is what inclusion³⁷ as well as accessibility implies and whether the international framework, with regard to the inclusion and accessibility of physically disabled learners in public schools, adhere to.³⁸ Seemingly inaccessible schools are a noticeably prominent issue for children with disabilities, bearing in mind the amount of time spent in these surroundings.³⁹ Inaccessible schools ostensibly contravene the international agreements that most states have adopted.⁴⁰ For the purposes of this study, accessibility is defined as:

the absence of barriers or anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability, including a physical barrier, an architectural barrier, an information or communications barrier, an attitudinal barrier, a technological barrier, a policy or a practice.⁴¹

In this chapter of the proposed study the above mentioned comment is discussed in detail as a means to establish exactly what the right to basic education and the accessibility of the infrastructure at public schools and inclusion entail.

2.2 International Covenant on the Economic, Social and Cultural Rights

General Comment 13: The Right to Education (Article 13)⁴²

34 Learners with physical disabilities are generally thought to be easier to include than learners with disabilities that are more challenging in terms of learning. Eloff, Engelbrecht & Swart 2002 *Koers* 78. This may be due to the fact that learners with physical disabilities may not necessarily need adjustments to the curriculum, but they may require some modifications to the physical learning environment; for example, the accessibility of the infrastructure. Sands, Kozleski & French *Inclusive Education for the 21st Century*.

35 Eloff, Engelbrecht & Swart 2002 *Koers* 78.

36 Eloff, Engelbrecht & Swart 2002 *Koers* 78.

37 Inclusion does not mean that disabled children should only slot into an unchanging society. In this instance it seemingly denies both disability and difference. One should take into consideration that inclusion is about disabled children having their needs met and their rights protected in an adapting society. Most importantly, disabled people should be involved in shaping an inclusive society in everyday life. Philpott S *Vulnerability of children with disability, the impact of current policy and legislation* 273.

38 Eloff, Engelbrecht & Swart 2002 *Koers* 78.

39 Pivik 2010 *Journal of Environmental Psychology* 30 510.

40 Pivik 2010 *Journal of Environmental Psychology* 30 510.

41 Pivik 2010 *Journal of Environmental Psychology* 30 511.

42 ICESCR General Comment No. 13: *The Right to Education (Article 13)* (1999) *E/C.12/1999/10* <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014]. See also Kalantry, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 253. *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008) institutes an individual complaint mechanism to address state violations of economic, social, and cultural rights, as seen in Kalantry, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 255.

For educational rights to be sufficiently guaranteed they must be available and accessible to all in a physical, economical and non-discriminatory way.⁴³ Educational rights need to be acceptable, which means that they must be relevant, culturally appropriate and of good quality.⁴⁴ Last and most importantly, educational rights need to be adaptable to diverse social and cultural settings, taking into account that this apparently means that provision needs to be made for physically disabled learners with the cognitive capacity of an ordinary learner in public schools.⁴⁵ The right to education remains one of the most important, universal, yet complex rights in international human rights law.⁴⁶ The said right may be seen as a multiplier⁴⁷ or empowerment right⁴⁸ as well as a crucial means to encourage other rights,⁴⁹ the enjoyment of which increases all rights and freedoms while its violation jeopardizes them all.⁵⁰ The right to primary education may be found in article 13(2)(a) of the *International Covenant on Economic, Social and Cultural Rights* (1966) which states as follows:⁵¹

43 Wallace & Shaw "Education, Multiculturalism and the Charter of Fundamental Rights of the European Union" 238. See also paragraph 31 of the *ICESCR General Comment No. 13: The right to education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014]. The prevention against discrimination enshrined in article 2(2) of the *ICESCR* is subject neither to advanced realisation nor the availability of resources; it applies fully and instantaneously to all aspects of education and incorporates all internationally prohibited grounds of discrimination. The Committee on ESCR interprets articles 2(2) and 3 in the light of the *UNESCO Convention against Discrimination in Education*, the relevant provisions of the *Convention on the Elimination of All Forms of Discrimination against Women*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Rights of the Child* and the *ILO Indigenous and Tribal Peoples Convention* (1989).

44 Wallace & Shaw "Education, Multiculturalism and the Charter of Fundamental Rights of the European Union" 238.

45 Wallace & Shaw "Education, Multiculturalism and the Charter of Fundamental Rights of the European Union" 238. See also paragraph 44 of the *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014] which states that the realisation of the right to education over time, can be seen as progress, but should not be construed as depriving state parties' obligations of all significant content. Progressive realisation means that states parties have an explicit and ongoing obligation to move as expeditiously and efficiently as possible towards the full realisation of article 13.

46 Kalantri, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 260.

47 Tomaševski *Human Rights Obligations in Education: The 4-A Scheme* 7.

48 Coomans "Clarifying the Core Elements of the Right to Education" 11.

49 *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014].

50 Tomaševski *Human Rights Obligations in Education: The 4-A Scheme* 47.

51 It should be remembered that the aspect of free education will not be discussed in this study. Article 13 of the *International Covenant on Economics, Social and Cultural Rights* (1966) – other important parts of article 13 are as follows: Article 13(1) The state parties to the present

13(2) The states parties to the present Covenant recognise that, with a view to achieving the full realisation⁵² of this right: (a) Primary education⁵³ shall be compulsory⁵⁴ and available free to all. Primary education is fundamental to the development of an individual's abilities and society as a whole and should thus have priority in available resource allocation.⁵⁵ This therefore reinforces the compulsory nature of primary education.⁵⁶

The Committee on ESCR, created in terms of the *ICESCR*, has the principal responsibility⁵⁷ for monitoring socio-economic rights, including the right to

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 nations and all racial, ethnic or religious groups and further the activities of the United Nations for the maintenance of peace; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

- 52 Paragraph 43 of the *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014]. While the *ICESCR* provides for advanced realisation and recognises the constraints due to the restrictions of available resources, it also imposes on state parties numerous obligations which are of instantaneous effect. State parties have immediate obligations in relation to the right to education, such as the guarantee that the right will be exercised without discrimination of any kind as seen in article 2(2) and the obligation to take steps as seen in article 2(1) towards the full realisation of article 13. Such steps must be deliberate, concrete and targeted towards the full realisation of the right to education.
- 53 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 377. Primary education focuses on imparting basic learning skills and providing 'basic education' therefore providing literacy, numeracy, skills relating to one's health and social skills such as oral expression as well as the objectives of education as laid down in the international human rights instruments.
- 54 The element of compulsion serves to highlight the fact that neither parent nor guardian nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, also required by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should however be emphasized that the education offered must be adequate in quality, relevant to the child and must promote the realisation of the child's other rights. *ICESCR General Comment No 11: Plans of action for primary education, (Article 14)* (1999) paragraph 6.
- 55 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 378. Also see paragraph 51 of *ICESCR General Comment No. 13: The right to education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014].
- 56 The obligation to provide primary education for all is an immediate duty of all states parties as seen in paragraph 51 of the *ICESCR General Comment No. 13: The right to education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014].
- 57 The Committee wishes to emphasize that the Covenant's limitations clause, article 4, is principally intended to be protective of the rights of individuals rather than accommodating of the imposition of limitations by the State. Paragraph 42 of *ICESCR General Comment No. 13: The right to education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014].

education.⁵⁸ The Committee on ESCR has issued a number of General Comments in which the rights embedded in the *ICESCR* are given contents, deeper and concise meaning.⁵⁹ The most relevant for the right to education are *ICESCR General Comment No 3: The Nature of States Parties' Obligations (Article 2)* (1990)⁶⁰, *ICESCR General Comment No 11: Plans of Action for Primary Education, (Article 14)* (1999)⁶¹ and *ICESCR General Comment No 13: The Right to Education, (Article 13)* (1999).⁶²

The rights in the *ICESCR* are subject to the concept of progressive realisation noted in article 2(1) unless specified otherwise elsewhere.⁶³ As stated above, progressive realisation means that states parties are not obligated to realise these rights immediately but rather that states may fulfil these rights over time.⁶⁴ Furthermore, the realisation of the *ICESCR* rights are subject to state parties maximum available resources.⁶⁵ At this juncture, the Committee allows them the discretion to determine the meaning of maximum available resources, including which resources to apply

58 Veriava & Coomans 'The Right to Education' 58.

59 Veriava & Coomans 'The Right to Education' 58.

60 Paragraph 53 of the *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date assessed 21 September 2014] states in its *General Comment 3*, that the Committee established that state parties have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the *ICESCR*, including the most basic forms of education. In the context of article 13, this core includes an obligation to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for other educational institutions; and to ensure free choice of education without interference from the state or third parties, subject to conformity with minimum educational standards as seen in article 13(3) & (4). Also see *ICESCR General Comment No 3: The Nature of States Parties' Obligations (Article 2)* (1990) paragraph 1 This General Comment explains terms such as 'to the maximum of available resources', 'achieving progressively the full realisation of the rights' and 'all appropriate means'.

61 *ICESCR General Comment No 11: Plans of Action for Primary Education (Article 14)* (1999) This General Comment deals with the provisions in article 14 but is not focused on in this chapter.

62 *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014]. This General Comment deals with the provisions in article 13. This is the main focus and starting point of the chapter.

63 Kalantray, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 267.

64 Kalantray, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 267.

65 Paragraph 9 of the *ICESCR General Comment No 3: The Nature of States Parties' Obligations (Article 2)* (1990) with resources which can mean money, natural resources, human resources, technology and information. See also Beiter *The Protection of the Right to Education by International Law* 328.

and what to regard as maximum.⁶⁶ In addition, the Committee on ESCR has professed that the concept of progressive realisation imposes an obligation to move as expeditiously and effectively as possible towards the goal of the full realisation of the right in question.⁶⁷ Even though the rights in the *ICESCR* may be realised progressively over time, state parties are immediately obligated to take steps toward the full realisation of those rights.⁶⁸ According to the Committee's *General Comment No 3: The Nature of States Parties' Obligations (Article 2)* (1990), while the full realisation of the relevant rights may be achieved progressively and steps need to be taken towards that goal, it must be taken within a reasonably short time after the Covenant's entry into force for the states concerned.⁶⁹

In contrast to some progressive obligations, the *ICESCR* explicitly provides time periods for the realisation of free and compulsory primary education.⁷⁰ State parties must implement a plan within two years, and this plan must call for the enactment of free and compulsory primary education within a realistic number of years.⁷¹ The Committee on ESCR appears to approve the requirement that state parties should provide compulsory and free education, which is subject to a more robust requirement than progressive realisation.⁷² The Committee on ESCR take note of the fact that, when read together, articles 13(2) and 14 require state parties to prioritise the introduction of compulsory, free primary education.⁷³ Consequently, the obligation to provide free and compulsory education is not subject to progressive realisation, but rather to the immediate action that must be taken.⁷⁴

66 Paragraph 9 of the *ICESCR General Comment No 3: The Nature of States Parties' Obligations (Article 2)* (1990).

67 Paragraph 9 of the *ICESCR General Comment No 3: The Nature of States Parties' Obligations (Article 2)* (1990).

68 Steiner H.J & Alston P *Human Rights in Context* 246-249. See also Beiter *The Protection of the Right to Education by International Law* 367-37.

69 Paragraph 2 of the *ICESCR General Comment No 3: The Nature of States Parties' Obligations (Article 2)* (1990).

70 Kalantry, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 269.

Paragraph 10 of the *ICESCR General Comment No 11: Plans of Action for Primary Education, (Article 14)* (1999).

72 Kalantry, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 269.

73 Paragraph 51 of the *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014].

74 Kalantry, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 270.

The Committee has articulated five minimum core obligations with respect to the right to education of which only three is applicable to the study at hand:

[1] to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; [2] to ensure education conforms to the objectives set out in article 13(1) of the *ICESCR*; [3] to provide free and compulsory primary education for all;⁷⁵

As may be deduced from the minimum core obligations, the right to primary education is dire and should be provided for on an urgent basis, if the above is taken into consideration as well as the current situation with regards to the right to basic education.

2.3 Adaptability⁷⁶

In order for the substance of the right to education to be effectively implemented, states are obliged to make education available, accessible, acceptable and adaptable for all.⁷⁷ Basic education consists of four elements and for it to be a significant right, it must contain these four factors.⁷⁸ The concept of the four A's, mentioned earlier, was developed, as one of the best ways to assess and act upon a situation, by the former United Nations Special Rapporteur on the Right to Education, Katarina Tomasevski.⁷⁹ Although the outcomes of the four A's are not definitive, they are extremely useful to explain the right to education in terms of tangible factors.⁸⁰ It should be noted that the four A's are not necessarily the standard used in every international treaty and therefore, should not be treated as a

75 Paragraph 57 of the *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date assessed 21 September 2014]. The rest of the minimum core obligations are [4] to adopt and implement a national education strategy which includes provision secondary, higher and fundamental education; and [5] to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" as stated in articles 13(3) and (4).

76 The reason for working with the adaptability factor of the four A's is that it deals with the physical accessibility of infrastructure, a central focus of this study.

77 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 386.

78 Action Aid *Right to Education Project* <http://www.right-to-education.org/node/226> [date accessed 24 April 2014].

79 Action Aid *Right to Education Project* <http://www.right-to-education.org/node/226> [date assessed 24 April 2014].

80 Action Aid *Right to Education Project* <http://www.right-to-education.org/node/226> [date accessed 24 April 2014].

general and complete guide to what the right to education means under every law.⁸¹ However, the *ICESCR General Comment No 13: The Right to Education, (Article 13)* (1999), makes it a competent authority to use.⁸² A short definition of the four A's is as follows:

Availability refers to the availability of educational opportunities and facilities, including schools, teachers and study material, but also to the condition and competency of the available facilities and teachers.⁸³ Accessibility refers to the child's ability to enrol and attend school.⁸⁴ Accessibility also requires free basic education.⁸⁵ Acceptability refers to the quality of education that should be provided.⁸⁶ Adaptability refers to the extent to which children with special needs are accommodated.⁸⁷

The General Comment thus creates four state obligations with regards to the right to education and will be discussed in the paragraph to follow. The first state obligation is that the functional educational institutions and programmes have to be available in sufficient quantities within the jurisdiction of the specific state party.⁸⁸ The second state obligation is that it must be ensured that educational institutions and programmes are accessible⁸⁹ to everyone without any form of discrimination, within the jurisdiction of the specific state party.⁹⁰ The third state obligation is ensuring that

81 Action Aid *Right to Education Project* <http://www.right-to-education.org/node/226> [date accessed 24 April 2014].

82 *ICESCR General Comment No 13: The Right to Education, (Article 13)* (1999).

83 Malherbe "Educational Rights" 402. Also see Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387.

84 Malherbe "Educational Rights" 402. Also see Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387; here accessibility has three overlapping dimensions, being non-discrimination, physical accessibility and economic accessibility. The physical accessibility being dimension as used here deals with the safety component of the location of the school, which needs to be located conveniently close for children.

85 Malherbe "Educational Rights" 402. Also see Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387.

86 Malherbe "Educational Rights" 402. Also see Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387.

87 Malherbe "Educational Rights" 402. Also see Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387 which here deals with a broader coverage of how adaptable the education system needs to be; thus it states that education has to be flexible so it can adapt to the needs of an evolving society and communities and to respond to the needs of students in their diverse social and cultural settings.

88 Ssenyonjo *M Economic, Social and Cultural Rights in International Law* 387.

89 Accessible environments are a particularly important element influencing functioning and participation of children with disabilities, as stated in Pivik 2010 *Journal of Environmental Psychology* 30 511. Infrastructure that may seemingly be identified as problematic and which will constitute accessibility barriers are doors, ramps, hallways, classrooms, bathrooms, playgrounds and fixtures such as lockers and water fountains.

90 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387.

the quality of education is acceptable to the parents as well as the children.⁹¹ The last, but most important state obligation is to ensure that education is flexible in such a manner that it may adapt to the needs of changing societies and communities, being able to respond to the needs of children, learners, students within their diverse social and cultural settings.⁹²

Another important word beginning with an “A” that may be added to the four existing A’s is accountability and the right to education, as submitted to the 68th session of the General Assembly by the Special Rapporteur, Kishore Singh, who suggested that accountability should be a cornerstone of the post-2015 development agenda, with the emphasis on mechanisms to hold states accountable to their commitments.⁹³ Singh presented a report to the 23rd session of the Human Rights Council on the 10th of May 2013, entitled: Justiciability of the Right to Education.⁹⁴ The report regards justiciability of the right to education as a key instrument for its realisation.⁹⁵ It therefore subjects government policies and provisions of education to review and determination by judicial and quasi-judicial bodies.⁹⁶ Adjudication of the right to education by such bodies ensures that the right to education is respected, protected and fulfilled.⁹⁷

Adaptability addresses the need for education to be flexible and able to respond to the needs of students within their diverse social and cultural settings.⁹⁸ In achieving adaptability in education, the state parties should provide resources which enable schools to develop customised education plans that meet the needs of the communities served by the schools.⁹⁹ In addition to customising the curricula,

91 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 388.

92 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 388.

93 Skelton 2014 *International Journal of Educational Development* 1-2. See also the Report of the Special Rapporteur on the right to education, August 2013: The right to education A/68/294 paragraph 126 & 129.

94 Skelton 2014 *International Journal of Educational Development* 2.

95 Skelton 2014 *International Journal of Educational Development* 2.

96 Skelton 2014 *International Journal of Educational Development* 2.

97 Skelton 2014 *International Journal of Educational Development* 2. Also see Report of the Special Rapporteur on the right to education, Kishore Singh, May 2013: Justiciability of the right to education A/HRC/23/35 part III.

98 Kalantry, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 279.

99 Kalantry, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 279.

schools must monitor the performance of teachers and students and make modifications depending on the results.¹⁰⁰ Article 13(1) of the *ICESCR* states that:

Education shall be directed to the full development of the human personality and the sense of its dignity, . . . strengthen the respect for human rights and fundamental freedoms . . . and enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.¹⁰¹

In order for education to achieve these goals, it must be adaptable.¹⁰² Moreover, in order to know whether a state party is respecting, protecting and fulfilling the right to education, indicators must be employed to measure this component of the state's obligations concerning the right to education.¹⁰³ The Committee on ESCR has further emphasised that education must be malleable in order to adapt to the needs of changing societies and communities and respond to the needs of a diverse student population in varied cultural settings.¹⁰⁴

2.4 Conclusion

Considering the above discussion, it may be said that article 13 of the *ICESCR* obliges state parties to make all education, whether public or private, formal or non-formal, directed towards the aims and objectives identified in article 13(1). The right to education as a human right in international law has been examined in this chapter. Singh has suggested that rights-holders, which in this case are the physically disabled children, should have the ability to challenge governments to meet their international obligations if and when they are not respected and fulfilled. It is now necessary to ensure that the right to a basic education is a justiciable right, and that

100 Kalantrý, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 279. An education system that is not adaptable is likely to have a high dropout rate for vulnerable groups of students, such as pregnant girls. See also the Right to Education Project, Education and the 4 As: Adaptability <http://www.right-to-education.org/node/230> [date accessed 21 September 2014].

101 *International Covenant on the Economic, Social and Cultural Rights* (1966).

102 Kalantrý, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 279.

103 Kalantrý, Getgen & Koh 2010 *Human Rights Quarterly* 32(2) 279.

104 Paragraph 6(d) & 57 of the *ICESCR General Comment No. 13: The Right to Education (Article 13)* (1999) E/C.12/1999/10 <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> [date accessed 21 September 2014]. Furthermore, the state must allow for free choice of education without interference from the State or third parties, subject to conformity with minimum educational standards.

governments failing to provide adequate quality education to all their children, must be held accountable.

3 United Nations Convention on the Rights of People with Disabilities (2006)¹⁰⁵ and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities¹⁰⁶

3.1 Introduction

The participation of children who have disabilities, in public schools, are seemingly too often the prerogative of education boards, who decide whether a child is able to learn within current educational surroundings, rather than requiring universal change and organisation in school syllabuses that would grant the right of education to all children.¹⁰⁷ It appears that the barriers in the physical environment¹⁰⁸ as well as the lack of adequate transportation, inadequate training of teachers or insufficient support systems further reduce the educational choices available to children and youth with disabilities.¹⁰⁹ Inaccessible schools are a particularly salient issue for the

105 *United Nations Convention on the Rights of People with Disabilities* (2006) (herein afterwards referred to as the *Disability Convention*). South Africa signed the *Disability Convention* on 30 March 2007 and ratified it into national law on 30 November 2007 <http://www.un.org/disabilities/countries.asp?navid=17&pid=166> [date accessed 22 September 2014]. Also see Boezaart 2011 *THRHR* 268–269. Combrinck “The Hidden Ones: Children with Disabilities in Africa and the Right to Education” 309–310. Pivik 2010 *Journal of Environmental Psychology* 30 510, interestingly enough highlights another international agreement that supports the inclusion of disabled learners and correlates with the above Convention - the Salamanca Statement (World Conference On Special Needs Education: Access And Quality (1994) which states that schools should accommodate all children regardless of their physical, intellectual, emotional, social, linguistic or other conditions; and where regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all.

106 *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (1993) (herein afterwards referred to as the *Standard Rules*).

107 Rioux & Pinto *British Journal of Sociology of Education* 31(5) 621.

108 Many persons with disabilities live in areas where the basic service infrastructure is at its weakest and have no access to piped water, electricity or indoor toilet facilities. *Integrated National Disability Strategy White Paper* (1997) Chapter 1.

109 Rioux & Pinto *British Journal of Sociology of Education* 31(5) 626. See also *United Nations Human Rights Council* 2007. In Bolivia, for instance, a female wheelchair user reported feelings of distress for having been refused admission to one school due to lack of physical accessibility in the building. The data collected by Statistics South Africa in the 2007 Community Survey conducted that while only 1.9% of children were reported as having a disability, children with disabilities accounted for 10% of all children who were not attending school. Fleisch, Shindler & Perry “Children out of School: Evidence from the Community Survey” 43. See also Palime “Characteristics of People with Disabilities in South Africa” Paper presented at the 6th Africa Symposium of Statistical Development 2010 http://www.statssa.gov.za/assd2010/Presentations/6th_ASSD/Characteristics%20of%20People%20with%20Disabilities.%20User%20South%20Africa.pdf 17 [date accessed 25 September 2014]. It was estimated that by 2009, as many as 467 005 children of school-going age with

physically disabled learner, considering the amount of time spent in these environments.¹¹⁰ Even after decades of equity reform, schools that have students with disabilities remain impeded by accessibility¹¹¹ barriers and stigmatising attitudes

disabilities, were not attending school, an increase of 207 005 from the 260 000 estimation in 2001. Du Plessis 2013 *Law Democracy & Development* 17 <http://dx.doi.org/10.4314/ldd.v17i1.10203> [date assessed 25 September 2014]. The National Department of Education estimated that by 2011, 108 240 learners with disabilities or impairments were accommodated in 442 special schools that were serviced by 9 585 educators. South African Department of Basic Education "Education Statistics in South Africa 2011" (2013) 28 <http://www.education.gov.za/LinkClick.aspx?fileticket=mpjPX4pwF9s%3D&tabid=93&mid=2399> [date accessed 25 September 2014]. The number of learners with disabilities in public schools are unknown.

- 110 Pivik 2010 *Journal of Environmental Psychology* 30 510-511. One popular method for direct observation is the "walkthrough method" which involves walking through the environment and noting those elements which contravene building codes, association standards or users' needs. Each of these methods for identifying environmental barriers has both advantages and disadvantages. Objective assessments are able to provide a level of standardization across difference spaces however, the evaluation is static and may miss unique elements specific to that space. Subjective assessments typically include feedback from relevant stakeholders however, the information is often retrospective and dependent on recall. Post-occupancy evaluations, while useful can be costly and time consuming, with the conclusions usually being based on the perspective of the architect or planning professional. Within schools, inclusive environmental assessments are normally conducted by planners, architects, health professionals and/ or school personnel using the walkthrough method. However, planners are realising that "accessibility standards are often based on limited research and seldom address the physical and emotional needs disabled children have" contending that the child's perception of the environment and its impact is particularly salient in environmental assessment and evaluation. Pivik suggests that by asking the child to identify their experiences and perceptions of child-orientated environments, could be designed to facilitate child developmental outcomes.
- 111 Article 9 of the *United Nations Convention on the Rights of People with Disabilities* (2006) states that (1) to enable persons with disabilities to live independently and participate fully in all aspects of life, state parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia: (a) buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces; (b) ... and that (2) state parties shall also take appropriate measures to: (a) develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public; (b) ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities; (c) provide training for stakeholders on accessibility issues facing persons with disabilities; (d) provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms; (e) provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public; (f) promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information; (g) promote access for persons with disabilities to new information and communications technologies and systems, including the Internet; (h) promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost which indicates that at national or state-level education plans for investments in schools and infrastructure must include budgets and planning for accessible transportation to and from Early Childhood Care and Education (herein afterwards referred to as the ECCE) programmes and schools, and accessible programme and school facilities. Inclusion

of the community and non-disabled learners.¹¹² The concepts of disability, inclusion, equality and non-discrimination have found expression in international human rights law, particularly the *Disability Convention*, and form a milieu of corresponding and supporting principles, which hold the potential of strengthening legal mechanisms for inclusion if they are successfully implemented into domestic law.¹¹³

3.2 United Nations Convention on the Rights of People with Disabilities

Although article 2 of the *Disability Convention* does not clarify the term disability explicitly in the definitions section, it does offer some guidance and its methodology clearly reflects the social model.¹¹⁴ In the preamble, which forms part of the context for the purpose of interpreting the international legal framework, it states in paragraph “e” that disability is an evolving concept which results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.¹¹⁵ Article 24 of the *Disability Convention*, which is dedicated to education, further establishes the right to reasonable accommodation as a means to guarantee access and success in education for learners with disabilities.¹¹⁶ Article 24 of the

International “The Implications of the Convention on the Rights of Persons with Disabilities (CRPD) for Education for All” www.ii.inclusioneducativa.org [date assessed 12 October 2014] 11.

112 Pivik 2010 *Journal of Environmental Psychology* 30 510–511 In relation to identifying accessibility barriers within school settings, youth with mobility impairments have demonstrated that they are capable of retrospectively identifying both barriers and solutions to those barriers. Fifteen students with mobility impairments were asked to identify the barriers at their schools. The students identified accessibility barriers associated with doors, ramps, hallways, elevators, classrooms, washrooms, playgrounds and fixtures, such as lockers and water fountains.

113 Loper 2010 *Hong Kong Law Journal (HKLJ)* 40(2) 425-426.

114 Loper 2010 *Hong Kong Law Journal (HKLJ)* 40(2) 426.

115 Loper 2010 *Hong Kong Law Journal (HKLJ)* 40(2) 426. Stated differently, it means that disability involves the ways in which social structures and attitudes create disadvantage and limit participation, which in return focuses on the social and environmental obstacles, rather than the impairment. What is dissimilar about people who are blind, deaf and wheelchair-users is that their abilities are seemingly not catered for, because they are impaired in an unusual way. In the preamble and in many of its provisions, the Convention emphasises the need to transform social structures in order to ensure the rights of persons with disabilities in all areas. Paragraphs a – y of the *Disability Convention* refer.

116 Rioux & Pinto *British Journal of Sociology of Education* 31(5) 629. See also Article 7 of the *United Nations Convention on the Rights of People with Disabilities* (2006) which states: (1) state parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children and (2) in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration and that (3) state parties shall ensure that children with disabilities have the right to

Disability Convention makes provision for the right to education for persons with disabilities, which therefore includes children with disabilities.¹¹⁷ The *Disability Convention*, moreover, provides that state parties should recognise the right of persons with disabilities to education and that, in order to realise this right, without discrimination¹¹⁸ and on the basis of equal opportunity, states should ensure an inclusive education system at all levels as soon as possible.¹¹⁹

The principle of non-discrimination means that all rights are applicable to everyone, without distinction, exclusion¹²⁰ or restriction, based on disability or race, sex, language, religion, political or other opinion, national or social origin, property, birth, age, or any other status.¹²¹ In the milieu of disability, discrimination means any distinction, exclusion or restriction that has the purpose or effect of denying the recognition, enjoyment or exercise by persons with disabilities, on an equal footing, of all human rights and basic freedoms.¹²² Inclusive education¹²³ refers to the

express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right which entails that children with disabilities have a right to education on an equal basis with other children. Inclusion International “The Implications of the Convention on the Rights of Persons with Disabilities (CRPD) for *Education for All*” www.ii.inclusioneducativa.org [date accessed 12 October 2014] 9.

117 Akinbola 2010 *African Human Rights Law Journal* 10 269.

118 Article 5 of the *United Nations Convention on the Rights of People with Disabilities* (2006) states (1) state parties recognise that all persons are equal before and under the law and are entitled, without any discrimination, to the equal protection and equal benefit of the law and that (2) state parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds and (3) in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided and that (4) specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention, which means that in addition to guarantees of access to inclusive education, without discrimination on the basis of disability, that clear procedures and mechanisms are in place to provide for lodging, investigating, and ruling on individual complaints of discrimination in education, and legal supports are in place to assist people with disabilities and their families in making these complaints; and independent mechanisms are in place to investigate and rule on systemic discrimination and exclusion from inclusive education, on the basis of disability. Inclusion International “The Implications of the Convention on the Rights of Persons with Disabilities (CRPD) for *Education for All*” www.ii.inclusioneducativa.org [date assessed 12 October 2014] 8.

119 Article 24(1) of the *United Nations Convention on the Rights of People with Disabilities* (2006).

120 It is observed that the notion of excluding people with disabilities from the public schools is born out of the erroneous belief that disabled persons are incapable of coping with society at large and most life activities, as stated in Degener T “International disability law: A new legal subject on the rise: The interregional experts” meeting in Hong Kong, December 13-17.

121 Rioux & Pinto *British Journal of Sociology of Education* 31(5) 628 & 630.

122 Rioux & Pinto *British Journal of Sociology of Education* 31(5) 628. A rights-based perspective in education demands that the best interest of the child should always prevail and inform the

practice of including every learner, irrespective of talent, disability, socio-economic background or cultural origin, in supportive mainstream schools and classrooms, in that regard.¹²⁴ The logic of preparing children with disabilities as a requirement for their universal inclusion is symbolic of a primary supposition of the requirement to reinstate the child to a level of normality that enables them to voluntarily adapt and fit in to the public education system, consequently permitting their educational rights to be more effectively realised.¹²⁵

3.3 Standard Rules on the Equalization of Opportunities for Persons with Disabilities¹²⁶

The Standard Rules is not a binding international agreement, thus, there is no enforcement mechanism.¹²⁷ However, they do lay out principles that are influential in the movement towards inclusive education and, more importantly, a broader recognition of the purpose of education.¹²⁸ The United Nations Special Rapporteur on Disability on the Operation of the Standard Rules has, nevertheless, emphasised the fact that many states have no legislation dealing with special educational needs and, that in some countries, schooling for children with special educational needs is

provision of quality education that empowers all children. See also Loper 2010 *Hong Kong Law Journal (HKLJ)* 40(2) 433-434, which provides that discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. The definition in the *Disability Convention* goes further than previous instruments, however, and specifies that discrimination on the basis of disability includes all forms of discrimination, including denial of reasonable accommodation. The Committee on *ESCR* has also interpreted the meaning of discrimination under the *ICESCR* as it applies to persons with disabilities to include the denial of reasonable accommodation. The *Disability Convention* further defines the term 'reasonable accommodation' as the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

123 Peters 2007 *Journal of Disability Policy Studies* 18(2) 98.

124 Stainback J & Stainback L *Inclusion: A Guide for Educators* 3.

125 In order to implement such an approach, states should ensure that teachers are trained to educate children with disabilities within public schools and that the necessary equipment and support are available to bring learners with disabilities up to the same level of education as their non-disabled learners.

126 *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (1993).

127 Rioux & Pinto *British Journal of Sociology of Education* 31(5) 633.

128 Rioux & Pinto *British Journal of Sociology of Education* 31(5) 633.

still provided for primarily in isolated environments.¹²⁹ Most of the Standard Rules, nevertheless, still focus on access and equality of opportunity, seemingly without addressing the quality of the facilities to which a child with disabilities may have access.¹³⁰ The Standard Rules was adopted by the United Nations General Assembly in 1993, indicating the United Nations' ratification of the human rights approach to disability.¹³¹ The Standard Rules address the exclusion of people with disabilities by emphasising individual empowerment for independence and improved structural access.¹³²

The Standard Rules were a direct result of the rights-based philosophy of disability established by the adoption of the World Programme of Action and which remained essential during the Decade of Disabled Persons.¹³³ In recent times, the Special Rapporteur reported that the Standard Rules are currently functional in all regions of the world, implemented by many states and disability organizations for activism, policy-making, legislation, and evaluation.¹³⁴ The Standard Rules promote accessibility, encouraging states to develop programmes of action that guarantee accessible physical environments and access to information and communication.¹³⁵ The Standard Rules are designed to ensure that children with disabilities are able to access the same rights and obligations as other members of their society without obstacles.¹³⁶ The Standard Rules reflect a robust human rights perspective in giving states the responsibility for the removal of such obstacles in partnership with

129 Final Report of the Special Rapporteur of the Commission for Social Development *Monitoring the implementation of the standard rules on the equalisation of opportunities for persons with disabilities* (2003) A/52/56. Gabriela Arrieta of Bolivia and Audrey Cheynut of Monaco made the following statement at the Opening address at the United National Special Session on Children in May of 2002: We are not the sources of problems. We are the resources that are needed to solve them. We are not expenses, we are investments. However, all major policy documents most often refer to disability as a problem, not a resource; and to education as an expense, not an investment. Peters 2007 *Journal of Disability Policy Studies* 18(2) 98.

130 Peters 2007 *Journal of Disability Policy Studies* 18(2) 104.

131 Quinn & Degener *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* 2002 Geneva Office of the High Commission for Human Rights <http://193.194.138.190/disability/study.htm> [date assessed 10 October 2014].

132 Lindqvist B "All means All!" Key-note speech at the Osaka Forum October 2002 Osaka Japan.

133 Rioux & Carbert 2003 *Journal on Developmental Disabilities* 10(2) 5.

134 Lindqvist B "Towards the Establishment of a UN Convention to Promote and Protect the Rights of Persons with Disabilities" Statement at the Osaka Forum October 2002 Osaka Japan.

135 Rioux & Carbert 2003 *Journal on Developmental Disabilities* 10(2) 5.

136 Rioux & Carbert 2003 *Journal on Developmental Disabilities* 10(2) 5.

individuals and organisations.¹³⁷ Initially, the Standard Rules were not legally binding, serving rather as guidelines for policy development and demonstrating a commitment to enabling the human rights of people with disabilities through equality of prospects.¹³⁸

3.4 Conclusion

As the above discussion emphasises, the *Disability Convention* states that all education systems should be inclusive at all stages, regardless of the learner's severity of disability, making it explicit that education is a right for persons with disabilities. The gap between the international commitments to ensure that all children are educated without exclusion and the reality of educating children with disabilities in their communities, still remains to be addressed, as is clear from the discussion. The recognition of the right to education for children with disabilities to become accepted and implemented, remains a slow process. Based on this research, it is my submission that to ensure universal basic education for all and without discrimination, there should be a greater commitment to the education of children with disabilities at the various levels of government concerned.

137 Rioux & Carbert 2003 *Journal on Developmental Disabilities* 10(2) 5.

138 Rioux & Carbert 2003 *Journal on Developmental Disabilities* 10(2) 5.

4 International Framework: United Nations Convention on the Right of the Child (1989)¹³⁹

4.1 Introduction

The *travaux préparatoires*¹⁴⁰ of article 28 of the *UNCRC* confirms that the obligation imposed on the state parties was based upon the obligation assumed under article 13 of the *ICESCR* by the said state parties.¹⁴¹ Article 13(1) declares that the state parties recognise the right to education for everyone.¹⁴² Similarly, the *chapeau*¹⁴³ of article 28 of the *UNCRC* states that the state parties recognise the right of the child to education.¹⁴⁴ In this chapter of the study, the right to basic education and the issue of disability, according to the *UNCRC*, are discussed and analysed in depth in order to reach a conclusion. The purpose and relevance of the following discussion is to understand the meaning of the right to basic education in the South African context,

139 United Nations Convention on the Rights of the Child (1989) (herein afterwards referred to as the *UNCRC*) <http://www.hrweb.org/legal/child.html> [date accessed 17 September 2014]. It has become the convention in human rights writings to note that the *UNCRC* is the most ratified treaty in the United Nation's history. However, it should simultaneously be broadly agreed that the accompanying rights of the child are possibly the most violated, neglected or denied. See also Johnson 2010 *International Journal of Children's Rights* 18 185. South Africa signed this Convention on 29 January 1993 and ratified it into national law on 16 June 1995 refer: <http://www1.umn.edu/humanrts/> [date assessed 3 March 2014]. See also Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" 309.

140 *Travaux préparatoires* of the *UNCRC* exists to provide an overview of the drafting process of the Convention, as knowledge of the drafting process forms a pre-condition for a better understanding of the object and purpose of each article of the Convention and is, as it were, the point of departure for all further dealings with the Convention. Detrick *The United Nations Convention on the Rights of the Child: A guide to the "Travaux Préparatoires"* 2.

141 Article 13 of the *ICESCR* is discussed in depth in Chapter 2 of this study. Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 475.

142 Detrick: *A Commentary on the United Nations Convention on the Rights of the Child* 475-476. Certain obligations that have been undertaken under article 28 of the *UNCRC*, with the most important one being achieving this right progressively. Achieving the right progressively was included in order to indicate that the specific obligations enumerated under article 28 were to be read hand in hand with article 4 of the *UNCRC*, which deals with the general obligations clause.

143 The legal definition of *chapeau* in international law is the introductory text appearing in a treaty that broadly defines its principles, objectives, and background <https://www.wordnik.com/words/chapeau> [date accessed 17 September 2014].

144 Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 477. State parties undertake the obligation to take all appropriate, legislative, administrative and other measures to the maximum extent of their available resources for the implementation of the right recognised in article 28.

after taking into consideration the ratification of the above mentioned international instrument, into national law.

4.2 The right to basic education

Article 28(1)(a) of the *UNCRC*¹⁴⁵ focusses on education,¹⁴⁶ asserting that state parties recognise the right of the child to education and, with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: make primary education compulsory and available, free to all.¹⁴⁷ The education to which every child has a right is one aimed at: providing the child with life skills, strengthening the child's capacity to enjoy the full range of their human rights and encouraging a culture which is infused by applicable human rights' values.¹⁴⁸

The overall objective of education is to maximize the child's ability and opportunity to participate fully and responsibly in a free society.¹⁴⁹ The first objective of a child's

145 Article 28(1)(a) of the *UNCRC* <http://www.hrweb.org/legal/child.html> [date accessed 17 September 2014]. See also Simkiss 2013 *Paediatrics and Child Health* 23(10) 450. The promotion and protection of the full development of the human personality is the principle purpose of the right to education. Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 474. See also Verheyde *Commentary on the United Nations Convention on the Rights of the Child* 15.

146 The term "education" implies the entire process of social life by means of which individuals and social groups learn to develop constantly within, and for the benefit of, national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge. This process is not limited to any specific activities.

147 In this chapter the focused is solely on the right to basic education and therefore, the availability of free education is not discussed nor is any other level of education discussed. Article 28 is directly related to article 29 of the *UNCRC*, which focusses on the aims of education of the child and thus they should be evaluated and discussed together. Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 473 & 477. The right to basic education is included under the four P's and more specifically, Provision of the *UNCRC*, which implies that children have to be provided with services to realise their basic needs. Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" 315.

148 United Nations Committee on the Rights of the Child (CRC), *CRC General Comment No. 1: The Aims of Education* (2001) CRC/GC/2001/1 as may be found in paragraph 2 <http://www.refworld.org/docid/4538834d2.html> [date accessed 17 September 2014]. The objective is to empower the children by developing their skills, knowledge and other capabilities, as well as human dignity, self-worth and self-confidence.

149 United Nations Committee on the Rights of the Child (CRC), *CRC General Comment No. 1: The Aims of Education* (2001) CRC/GC/2001/1 as can be found in paragraph 12 <http://www.refworld.org/docid/4538834d2.html> [date accessed 17 September 2014]. As may be

education, referred to in article 29 of the *UNCRC*¹⁵⁰, is the development of a child's personal talents and mental and physical abilities to their fullest potential.¹⁵¹ Certain provisions set out in article 23 of the *UNCRC*, which focus on the special rights of disabled children, relate to article 28 that is currently under discussion.¹⁵² Despite all these provisions recognising the right of "everyone" to education, children, as is expected, are the principal beneficiaries.¹⁵³ With the view to achieving the right of the child to education progressively¹⁵⁴ and on the basis of equal opportunity and non-discrimination¹⁵⁵ specific obligations, enumerated under article 28(1) were imposed on the state parties.¹⁵⁶ Article 4 of the *UNCRC*¹⁵⁷ contains the relevant umbrella provisions with regard to the economic, social and cultural rights, which interconnect with the general obligations clause, as set out in the second sentence of article 4.¹⁵⁸

found in article 29 of the *UNCRC*, education and the surroundings should be child-friendly, inspiring and motivating to each and every individual child.

150 Heijnen-Maathuis 2008 The Convention on the Rights of the Child and Quality Education Concept Paper 3 <http://resourcecentresavethechildren.se/sites/default/files/documents/1531.pdf>. [date accessed 17 September 2014]. See also Dall "Children's Right to Education" 145.

151 Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 474.

152 Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 474.

153 Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 474–475.

154 McGoldrick. 1991 *International Journal of Law and the Family* 138. See also Verheyde *Commentary on the United Nations Convention on the Rights of the Child* 15. Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" 314.

155 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" 316 - 318.

156 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" 313. See also Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 485. The specific obligations placed on the state parties should be directly distinguished from their immediate obligation, under article 28(1) read together with article 2(1) of the *UNCRC*, to respect and ensure the right to education to each and every child within their jurisdiction without being discriminated against. Article 2(1) of the *UNCRC* stipulates that states parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (2) State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. See also Johnson 2010 *International Journal of Children's Rights* 18 188.

157 Dall "Children's Right to Education" 145. See also Article 4 of the *UNCRC* read with *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child* (2003) (arts 4, 42 and 44 para 6) CRC/GC/2003/5 https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCUQFjAB&url=http%3A%2F%2Fwww2.ohchr.org%2Fenglish%2Fbodies%2Fcrd%2Fdocs%2FGC5_en.doc&ei=4cpDVNXfG8fvaNPhgkg&usq=AFQjCNGXRqB1QvYhXvpd1C_DR2WN90r95g&sig2=5eMivo4VO_YIKDfggRpbPQ [date accessed 15 October 2014].

158 Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 493. Article 4 of the *UNCRC* sets out the following obligations: state parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in

4.3 Disability

Article 23(1) of the *UNCRC*¹⁵⁹ focusses on disabled children in general and provides that the state parties must recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.¹⁶⁰ Part of that active participation in the community, as stated above, includes receiving access to education as articulated in article 23(3) of the *UNCRC*.¹⁶¹ According to the *travaux préparatoires* of the *UNCRC*, article 23 was included as special provision on disabled children, to emphasise that disabled children should not be merely regarded as a vulnerable group of children.¹⁶² The children ought to rather be considered as a specific group of children entitled to special treatment.¹⁶³ The resources chosen to

the present Convention. With regard to economic, social and cultural rights, state parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

159 Article 23(1) of the *UNCRC*, which, with the rest of article 23, states the following: (2) states parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child (3) recognising the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article, shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development (4) states parties shall promote, in the spirit of international co-operation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries <http://www.hrweb.org/legal/child.html> [date assessed 17 September 2014]. Simkiss 2013 *Paediatrics and Child Health* 23(10) 450.

160 *United Nations Committee on the Rights of the Child (CRC), CRC General Comment No. 1: The Aims of Education* (2001) CRC/GC/2001/1 as may be seen in paragraph 22 <http://www.refworld.org/docid/4538834d2.html> [date accessed 17 September 2014].

161 Article 23(3) of the *UNCRC* compliments and supports Article 28(1)(a) of the *UNCRC* which deals with the right to basic education. Also see Pivik 2010 *Journal of Environmental Psychology* 30 510. Article 23(3) specifies the steps that need to be taken by state parties for the implementation of this right; for instance, in the areas of education, health care services, training, rehabilitation services, employment preparation and recreation opportunities. Detrick A *Commentary on the United Nations Convention on the Rights of the Child* p377 & 381. Article 23 of the *UNCRC* is an innovative universal human rights provision.

162 Detrick A *Commentary on the United Nations Convention on the Rights of the Child* 378.

163 Detrick A *Commentary on the United Nations Convention on the Rights of the Child* 378. The original proposal, with regard to article 23, was submitted by Poland and was based on Principle

promote the complete realisation of the economic, social and cultural rights of disabled people will naturally differ from country to country, but seemingly, there is no single country in which a major policy and programme effort is not required, to fulfil what is expected of them.¹⁶⁴ As has been pointed out, the provision of basic needs is critical for forming the cornerstone of national programmes, particularly with regard to the provision of education for disabled children in sizeable parts of the world.¹⁶⁵

According to the *travaux préparatoires* of the *UNCRC*, the word “effective” was inserted into article 23(3) to amplify that disabled children should have effective access to services needed and should be placed in such a position as to effectively receive the services needed.¹⁶⁶ Article 23 of the *UNCRC* set out certain provisions, which relate to the definite enjoyment of the right to education, by disabled children.¹⁶⁷ State parties are explicitly required to extend assistance, designed to ensure that the disabled child has effective access to and receives education,

5 of the *United Nations Declaration of the Rights of the Child* (1959) which stated that the child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition. *General Assembly Resolution 1386 (XIV)* of 20 November 1959.

164 Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 381. See also Verheyde *Commentary on the United Nations Convention on the Rights of the Child* 16.

165 Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 381.

166 Mahery “The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law” 317-318. The Committee on the Rights of the Child specifically requires state parties to provide information in their reports regarding the consideration given to the inclusion of disabled children, together with children without disabilities in institutions, services and facilities, including within the educational system, as is discussed in Chapter 6 of this study. In the same frame of mind, the Committee on ESCR has indicated that people with disabilities are best educated within the general educational system. For such an approach to be implemented, the Committee has suggested that state parties should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring children with disabilities up to the same level of education as their non-disabled peers. Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 387-388; 394. *Committee on the Economic, Social and Cultural Rights General Comment No. 5* (1994) 74 para 35. See also Verheyde *Commentary on the United Nations Convention on the Rights of the Child* 16. Besson 2005 *The International Journal of Children’s Rights* 13(4) 456-458.

167 Detrick: *A Commentary on the United Nations Convention on the Rights of the Child* 488. See also McCowen 2011 *Theory and Research in Education* 9(3) 285. Seeing education as a right, rather than merely as an instrumentally valued moral is imperative, principally because access to education is then unconditional and valued individually of whether the individuals in question will subsequently prove to be productive in the economy.

training and preparation for employment in a manner conducive to the child achieving the fullest possible social integration and individual development.¹⁶⁸

4.4 Conclusion

Taking the above mentioned into consideration, it is safe to say that the human rights of children with disabilities¹⁶⁹ must be protected and promoted through general as well as specifically designed laws, policies and programmes. It should also be taken into account that, as stated in article 4 of the *UNCRC*, all appropriate legislative, administrative and other measures should be used for the implementation of the right to basic education for disabled children. The said appropriate measures should be used to the maximum extent of the state parties' capacity and that they should utilise the available resources taking the right of equality and non-discrimination into consideration. The influence that the *UNCRC* has had and will continue to have on an international, regional and national level is undisputed and therefore, the discussion concerning the *ACC* in Chapter 5 analyses the right to basic education on a regional level.

168 Detrick: *A Commentary on the United Nations Convention on the Rights of the Child* 488. Also see United Nations Committee on the Rights of the Child (CRC), *CRC General Comment No. 1: The Aims of Education* (2001) CRC/GC/2001/1 as may be found in paragraph 22 <http://www.refworld.org/docid/4538834d2.html> [accessed 17 September 2014].

169 Children with disabilities are especially vulnerable to exploitation, abuse and neglect and are, in accordance with article 10(3) of the *ICESCR* and as discussed in Chapter 2 of this study, entitled to special protection. Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 382.

5 International Framework: African Charter on the Rights and Welfare of the Child (1990)¹⁷⁰

5.1 Introduction

The ACC offers a basis for the promotion and protection of the rights of children at national and regional levels and classifies the responsibilities of the state, community and individual for the protection of the civil, cultural, economic, political and social rights of the child.¹⁷¹ Primary education is seemingly the main focus of the ACC because the original reasons for declaring it to be each child's birth right, remain unchanged.¹⁷² While African governments have articulated a legal and political commitment to the realisation of the right to basic education for instance, through the ratification of the ACC, there seemingly needs to be a greater effort placed on ensuring accountability and improving the national capacity to legislate, plan and budget for scaling up free, quality and inclusive education and ensuring that the right to basic education is one that can be realised.¹⁷³ Basic education and disability were researched in order to compare this chapter to the previous chapters. It is of the utmost importance to compare the chapters with each other as all of them are interconnected concerning the wording used in section 29 of the *Constitution* and as

170 *African Charter on the Rights and Welfare of the Child* (1990) (hereafter referred to as the ACC). The ACC is the first regional treaty on the human rights of the child which was adopted by the Organization of African Unity (now the African Union) in 1990 and entered into force in 1999, and is an enormously positive step towards securing the protection of children's rights in Africa. See also Ankut P.Y. "The African Charter on the Rights and Welfare of the Child: Linking Principles with Practice" 1. South Africa signed this Charter on 10 October 1997 and ratified it national law on 7 January 2000; see <http://www1.umn.edu/humanrts/> [date accessed 3 March 2014]. Viljoen "The African Charter on the Rights and Welfare of the Child" 331.

171 Ankut "The African Charter on the Rights and Welfare of the Child: Linking Principles with Practice" 1. Also see Chirwa 2002 *International Journal of Children's Rights* 10 162.

172 African Committee of Experts on the Rights and Welfare of the Child 2014 Statement of the Chairperson of the African Committee of Experts on the Rights and Welfare of the Child on the occasion of the celebration of the day of the African Child - A Child friendly, quality, free and compulsory education for all children in Africa <http://acerwc.org> [date accessed 18 September 2014]. According to the ACC, education ought to prepare children to live responsibly in a free society. Regrettably, we have loudly proclaimed, but ultimately and quietly, seemingly neglected some of these rights of our children. See also Viljoen "The African Charter on the Rights and Welfare of the Child" 339.

173 African Committee of Experts on the Right and Welfare of the Child 2014 Statement of the Chairperson of the African Committee of Experts on the Rights and Welfare of the Child on the occasion of the celebration of the day of the African Child - A Child friendly, quality, free and compulsory education for all children in Africa <http://acerwc.org> [date accessed 18 September 2014].

discussed in Chapter 6, as well as with regards to the implications for South Africa if the necessary basic education is not provided.

5.2 The right to basic education

Article 11(1) of the ACC states that every child shall have the right to an education, while in article 11(3)(a) of the ACC, it goes further and stipulates that the state parties to the present charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular provide free and compulsory basic education.¹⁷⁴ The African Union's report on the State of Africa's Children of 2010 took note of the fact that education in most African countries was characterised by laws and policies that are not openly free in relation to primary

174 Kindly take note that the issue of free education that needs to be provided for is not addressed here; the focus here being on just the basic education that should be furnished. Article 11(1) and 3(a) of the *African Charter on the Rights and Welfare of the Child* (1990). The remainder of the Article stipulates as follows: (2) The education of the child shall be directed to: (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions; (c) the preservation and strengthening of positive African morals, traditional values and cultures; (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples people's? peoples 'ethnic, tribal and religious groups; (e) the preservation of national independence and territorial integrity; (f) the promotion and achievements of African Unity and Solidarity; (g) the development of respect for the environment and natural resources; (h) the promotion of the child's understanding of primary health care. (3)(b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all; (c) make higher education accessible to all on the basis of capacity and ability by every appropriate means; (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates; (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community. (4) States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose their children's schools, other than those established by public authorities, which conform to such minimum standards and that may be approved by the State, to ensure the religious and moral education of the child in a manner commensurate with the evolving capacities of the child. (5) States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter. (6) States Parties to the present Charter shall have taken all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability. (7) No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph I of this Article and the requirement that dealing with the education given in such institutions shall conform to such minimum standards as may be laid down by the States. See also Viljoen "The African Charter on the Rights and Welfare of the Child" 339.

education.¹⁷⁵ In the 2012 Millennium Development Goals report, it was specified that Africa, particularly Sub-Saharan Africa, still has the highest number of out-of-school children, in particular: girls, children with disabilities, and children from marginalised communities.¹⁷⁶

5.3 Disability

Article 13 of the ACC¹⁷⁷ deals with handicapped children and states that every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community. It further states that state parties to the present charter shall ensure assistance, subject to available resources, to a disabled child and to those responsible for his care. Application for appropriate assistance should be made. In particular, state parties shall ensure that the disabled child has effective access to training, preparation for employment and recreational opportunities in a manner conducive to achieving the fullest possible social integration, individual development and his cultural and moral development.¹⁷⁸

With regard to article 13 of the ACC, Rosa and Dutschke state that the state parties to the present charter shall use their available resources with a view to achieving progressively¹⁷⁹ the full convenience of the mentally and physically disabled person in terms of movement, as well as facilitate access to public highways, buildings and

175 African Committee of Experts on the Right and Welfare of the Child 2014 Statement of the Chairperson of the African Committee of Experts on the Rights and Welfare of the Child on the occasion of the celebration of the day of the African Child - A Child friendly, quality, free and compulsory education for all children in Africa <http://acerwc.org> [date accessed 18 September 2014].

176 African Committee of Experts on the Right and Welfare of the Child 2014 Statement of the Chairperson of the African Committee of Experts on the Rights and Welfare of the Child on the occasion of the celebration of the day of the African Child - A Child friendly, quality, free and compulsory education for all children in Africa <http://acerwc.org> [date accessed 18 September 2014].

177 Article 13 of the *African Charter on the Rights and Welfare of the Child* (1990).

178 Viljoen "The African Charter on the Rights and Welfare of the Child" 338-339.

179 Rosa and Dutschke 2006 SAJHR 236.

other places to which the disabled may legitimately want to have access.¹⁸⁰ The relevance for South Africa lies in the fact that the more accessible public buildings are, especially for physically disabled people, the more such persons will be included in everyday living, thus eliminating inequality and discrimination factors.¹⁸¹

Apparently children with disabilities have long been excluded from education generally available to all children in the society, or from any kind of education at all.¹⁸² State parties have been challenged in various forums to adopt measures to ensure that children with disabilities enjoy their rights on a basis equal with all other children in the communities in which they live.¹⁸³ Article 13(3) of the ACC is an innovative addition to the right contained in the *UNCRC* under article 23, as discussed in Chapter 4 above. Article 13(3) of the ACC aims to assure the mobility of the disabled child and his or her access to public institutions or facilities.¹⁸⁴ The provisions are subject to the availability of resources and the progressive realisation thereof.¹⁸⁵ The state parties' obligation created by article 13(3) could include different measures, such as construction of public buildings with easy access for disabled people; for example, stairs must be supplemented by ramps, doors must be wide enough to allow passage, toilets must be designed so that disabled people can use

180 Gose *The African Charter on the Rights and Welfare of the Child* 89. The wording in this article is very clear in its application and contains a specific right, which narrows down what is seemingly expected from the state parties.

181 Viljoen "The African Charter on the Rights and Welfare of the Child" 336-337.

182 African Union 2014 The African Committee of Experts on the Rights and Welfare of the Child - Concept Note on the Day of the African Child – Theme: "A child friendly, quality, free and compulsory education for all children in Africa" <http://www.african-union.org> [date accessed 18 September 2014] 11. Therefore, it is accordingly reported that only two present categories of persons with disabilities in Africa have access to formal education, and a majority of these are educated in special schools.

183 African Union 2014 The African Committee of Experts on the Rights and Welfare of the Child - Concept Note on the Day of the African Child – Theme: "A child friendly, quality, free and compulsory education for all children in Africa" <http://www.african-union.org> [date accessed 18 September 2014] 11. Regrettably, children with disabilities are largely invisible in the Second African Decade on Education, only being mentioned under the category of girls and other vulnerable groups. In the Concept Note on the 2012 Day of the African Child, the Committee noted that children with disabilities represent the majority of children excluded from universal primary education for a variety of reasons.

184 Gose *The African Charter on the Rights and Welfare of the Child* 92.

185 Gose *The African Charter on the Rights and Welfare of the Child* 92.

them.¹⁸⁶ The inclusion of the right contained in article 13(3) is welcomed, as it increases the level of protection for children with disabilities.¹⁸⁷

5.4 Conclusion

From the above research, it is perceived that the ACC provides for the right to education in general; not only in article 11(1), but it also focuses on the right to basic education and its importance, in particular, in subsection 11(3). The ACC concentrates on the importance of children with disabilities in article 13, but surprisingly, provision was made specifically for the mobility of disabled children in article 13(3). This is a provision that should not only be of great importance for disabled children in Africa, but everywhere in the world. Therefore this cannot be regarded as a unique feature of a specific country, but should be regarded as being of the utmost importance to the realisation of the rights of children with disabilities, everywhere. As a state party and as a country seriously committed to the promotion and protection of the rights of children at a domestic level, there is both a legal and moral imperative on South Africa to respect its obligations under the ACC. Therefore the *Constitution*, other legislation and case law are discussed in Chapter 6 of this study.

186 Gose *The African Charter on the Rights and Welfare of the Child* 92.

187 Gose *The African Charter on the Rights and Welfare of the Child* 92.

6 The Constitution of the Republic of South Africa, 1996

6.1 Introduction

The *Constitution of the Republic of South Africa, 1996*¹⁸⁸ is the fundamental law of the South Africa, its cornerstone.¹⁸⁹ It reflects the underlying and unifying values of society.¹⁹⁰ It spells out the basic rights of each person, serves as a framework for all other laws and policies and cannot easily be changed.¹⁹¹ The right to basic education is stipulated in section 29 of the *Constitution*¹⁹² but there are various other pieces of legislation that regulate the right to education. The most important element to be discussed in this chapter is whether the *National Minimum Uniform Norms and Standards for School Infrastructure* can be implemented or not and what the right to basic education with regards to the *Constitution* and *SASA* entail.

South Africa has signed and ratified almost every international convention as can be seen in the above discussion but the effective implementation thereof is seemingly non-existent.¹⁹³ The Director-General of Education PB Soobrayan has emphasised that the quality of school buildings is critically important in the drive for improving education.¹⁹⁴ Good quality facilities provide teachers and students with supportive environments that are responsive to their changing needs and could make a real difference to learning and teaching.¹⁹⁵ Successful teaching and learning depends on

188 *Constitution of the Republic of South Africa, 1996* (herein after referred to as the *Constitution*).

189 Section 2 of the *Constitution of the Republic of South Africa, 1996*. Action Aid Right to Education Project <http://www.right-to-education.org/node/226> [date accessed 20 September 2014].

190 Action Aid Right to Education Project <http://www.right-to-education.org/node/226> [date accessed 20 September 2014].

191 Action Aid Right to Education Project <http://www.right-to-education.org/node/226> [date accessed 20 September 2014].

192 Section 29 of the *Constitution of the Republic of South Africa, 1996*.

193 In many cases the right exists along with the assumption that the user should pay for this right, undermining the very concept and existence of a right. In others, the right exists in theory but there is seemingly no capacity to implement these rights effectively in practice to achieve the 100% efficiency thereof. Milan DS *Action Aid Right to Education Project* <http://www.right-to-education.org/node/226> [date accessed 20 September 2014].

194 Guidelines Relating to Planning for Public School Infrastructure <http://www.info.gov.za/view/DownloadFileAction?id=172470> [date accessed 10 October 2014].

195 Guidelines Relating to Planning for Public School Infrastructure <http://www.info.gov.za/view/DownloadFileAction?id=172470> [date accessed 10 October 2014].

the availability of crucial resources, such as learning materials and a teaching and learning environment that is conducive.¹⁹⁶

The four 'A' structure describing the right to basic education is a useful device to analyse the content of this right in terms of section 29(1)(a), and the reciprocal obligations deriving from this unqualified right. The extent to which these criteria are being met in South Africa through the existing policy framework, that is, SASA¹⁹⁷, the *White Paper* 6 of 2001 and its accompanying regulations, as well as the case law, is analysed briefly below.

6.2 Right to basic education and the South African Schools Act

Section 7 of the *Constitution*¹⁹⁸ states that the *Bill of Rights* is a cornerstone of democracy in South Africa, as is also declared in section 2 of the *Constitution*. It protects the rights of all people in our country and confirms the autonomous principles of human dignity, equality and freedom.¹⁹⁹ The state must respect, protect, promote and fulfil the rights in the *Bill of Rights*.²⁰⁰ These rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.²⁰¹ In section 28(2) of the *Constitution*²⁰² it is asserted that a child's best interests are of paramount importance in every matter concerning the child.

See also the National Plan of Action for Children in South Africa 2012-2017 http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/-cNGjg4nuNgBT_Vi3oCZ90JDdKDDCJxkZUASGLi7YEQ/mtime:1381178349/files/docs/121129nationalplan.pdf [date accessed 10 October 2014].

196 Guidelines Relating to Planning for Public School Infrastructure <http://www.info.gov.za/view/DownloadFileAction?id=172470> [date accessed 1 October 2014].

197 The *South African Schools Act*, Act 84 of 1996 (herein after referred to as SASA).

198 Section 7 of the *Constitution of the Republic of South Africa*, 1996.

199 Section 7(1) of the *Constitution of the Republic of South Africa*, 1996

200 Section 7(2) of the *Constitution of the Republic of South Africa*, 1996

201 Section 7(3) of the *Constitution of the Republic of South Africa*, 1996

202 Section 28 of the *Constitution of the Republic of South Africa*, 1996.

Section 29(1)(a) of the South African *Constitution* of 1996 provides as follows.²⁰³

(1)(a) Everyone has the right to a basic education

Section 29²⁰⁴ is not only a civil and political right for it contains forms of freedom of choice which it guarantees, but most importantly it is a socio-economic right that obliges the state to make education accessible and available for all.²⁰⁵ A 'strong positive right'²⁰⁶ can be found in section 29(1)(a). While analysing and discussing section 29 it should be kept in mind that South Africa has obligations according to international law and that this country is developing constitutional jurisprudence regarding the right to basic education.²⁰⁷ In the case of the *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), Judge Yacoob stated that:²⁰⁸

Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of chapter two and the *Constitution* as a whole. On the other hand, rights must also be understood in their social and historical context

One implication of this citation is that all rights in the *Bill of Rights* should be regarded as interconnected and equally supporting each other and as stated above, education is a prerequisite for the enablement of the exercise of other rights.²⁰⁹ Consequently, the denial of access to education will also lead to the denial of the full

203 Section 29(1)(a) of the *Constitution of the Republic of South Africa*, 1996. This section however does not mention the facilities that are needed for the proper realisation of this right: without proper facilities this right will not be able to be realised; however guidelines are given in section 29(1)(b) of the *Constitution*. Section 29 is consequently made up of a collection of education rights that are divided into subsections, but the only subsection that will be discussed is subsection 1(a).

204 Section 29(2),(3) & (4) of the *Constitution of the Republic of South Africa*, 1996.

205 Section 29(1)(b) of the *Constitution of the Republic of South Africa*, 1996. See also Veriava & Coomans 'The Right to Education' 60.

206 Kriel 'Education' 38-1. It seems to be inevitable that the hybrid character of section 29 is a display of the interdependence and indivisibility of all human rights. see Veriava & Coomans 'The Right to Education' 59. Section 29(1)(a) of the *Constitution of the Republic of South Africa*, 1996.

207 Veriava & Coomans 'The Right to Education' 57-83. Section 29(1)(a) of the *Constitution of the Republic of South Africa*, 1996.

208 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 CC par 22 (herein afterwards referred to as *Grootboom*).

209 Veriava & Coomans 'The Right to Education' 60. Chapter 2 of the *Constitution of the Republic of South Africa*, 1996.

enjoyment of other rights that will enable an individual to develop to his or her full potential and to participate significantly in society.²¹⁰

The right to basic education is by contrast unqualified and is therefore an absolute right.²¹¹ When looking at the textual aspect of section 29(1)(a)²¹² and when compared to these other socio-economic rights in the *Constitution*, the realisation of the unqualified and absolute nature of the right to basic education comes into being.²¹³ It requires a standard of review higher than that used in respect of the qualified rights to determine the extent of the state's obligations in respect of the right to basic education.²¹⁴ It is argued that this higher standard requires that the state implement measures to give effect to the right as a matter of absolute priority.²¹⁵

This would mean that where the state fails to apportion resources for the building of a primary school in a particular area, an individual learner from that area may have a direct claim against the state to provide adequate primary school facilities.²¹⁶ In the

210 Veriava & Coomans 'The Right to Education' 60.

211 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 CC par 38, where the Court confirmed that socio-economic rights imposed obligations on the state, but stated that those obligations were in certain instances, such as housing, not absolute or unqualified, but had to be defined by these three key elements. The three key elements are considered separately: (a) the obligation to "take reasonable legislative and other measures" (b) "to achieve the progressive realisation" of the right; and (c) "within available resources." In par 39-44 of the above mentioned case the standard of review established in respect of the qualified rights was to determine whether or not state measures were *reasonable* in progressively facilitating access to the right in question. In par 39-44 the Court set out some of the criteria for evaluating whether measures are reasonable. Such review need not necessarily require an inquiry into the content of the right or whether the measures were the most desirable under the circumstances. This was confirmed in the recent case of *Minister of Health & Others v Treatment Action Campaign & Others* 2002 5 SA 721 CC (herein afterwards referred to as *TAC*). Also see Veriava & Coomans 'The Right to Education' 62.

212 Section 29(1)(a) of the *Constitution of the Republic of South Africa*, 1996.

213 see Veriava & Coomans 'The Right to Education' 62.

214 see Veriava & Coomans 'The Right to Education' 62.

215 For the state to make the right to basic education an absolute priority, it would require that the former prioritise those programmes, in its policies and budgetary allocations, that seek to give effect to the right over its other spending requirements. See also Veriava & Coomans 'The Right to Education' 62. See also the Budget Speech by the Minister of Finances 27 February 2013 http://www.parliament.gov.za/live/content.php?Item_ID=2891 [date accessed 20 September 2014]. See, in addition, How the Budget Works For Us <http://www.parliament.gov.za/content/Budget%20Pamphlet%20sml.pdf> [date accessed 20 September 2014].

216 An inquiry as to whether or not the state has with absolute priority sought to give effect to the right, for all entitled to enjoyment of the right, requires an understanding of the scope and content

matter of *The Governing Body of the Juma Masjid Primary School v Essay NO (Centre for Child Law and Another as amici curiae)* 2011 7 BCLR 651 CC²¹⁷ the judgment of the Constitutional Court threw a direct light on the nature of the right to basic education.²¹⁸ Nkabinde J, who penned the judgment on behalf of a unanimous court, stated the following:²¹⁹

It is important, for the purposes of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights this right is immediately 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'.

The *Juma* case judgment has now made it clear that the court's interpretation of the right to a basic education in section 29(1)(a) is that it is immediately enforceable, subject only to limitation in terms of section 36²²⁰ of the *Constitution*.²²¹ Therefore, unlike the *Grootboom* and *TAC* cases, where the Court was able to avoid an investigation into the content of the rights to housing and health respectively, it is essential in respect of the right to basic education to verify the nature of the entitlements which make up the substance of the right and which would achieve the basic learning needs protected by the right.²²²

of the right to basic education and an evaluation of the extent to which state policies and practice actually seek to give effect to the right. see Veriava & Coomans 'The Right to Education' 63.

217 *The Governing Body of the Juma Masjid Primary School v Essay NO (Centre for Child Law and Another as amici curiae)* 2011 7 BCLR 651 CC (herein afterwards referred to as *Juma*).

218 Skelton 2013 *De Jure* 2-3.

219 *The Governing Body of the Juma Masjid Primary School v Essay NO (Centre for Child Law and Another as amici curiae)* 2011 7 BCLR 651 CC par 37.

220 Section 36 of the *Constitution of the Republic of South Africa*, 1996. However, the legal claim that the right to a basic education is immediately enforceable does not wave a magic wand.

221 Skelton 2013 *De Jure* 2-3. An inquiry into whether or not the state has met its obligations in respect of the right to basic education, as an unqualified right, necessitates a consideration of the purpose of the scope and content of the right in order to determine whether the state has with absolute priority sought to give effect to the right Veriava & Coomans 'The Right to Education' 64.

222 Veriava & Coomans 'The Right to Education' 64.

The unqualified nature²²³ of section 29(1)(a) obviates the necessity of setting minimum obligations in respect of the right to basic education.²²⁴ As indicated, basic education consists of four elements; for it to be a meaningful right it must be available, accessible, acceptable and adaptable.²²⁵ It should be noted that the four A's are not necessarily the standard used in every international treaty and therefore should not be treated as a generic, comprehensive guide to what the right to education means under every law.²²⁶ The four A's are to be respected, protected,

223 Similar methods of reasoning can be found in Viljoen 'Children's Rights: A Response from a South African Perspective' 201. According to Viljoen, the argument in favour of clarifying core content in respect of unqualified rights such as children's rights in section 28 of the *Constitution of the Republic of South Africa*, 1996 refers to the need to clarify vague terms. The notion of a 'core content' of the right of access to adequate housing as defined in the General Comments to ICESCR was rejected in *Grootboom*. The gist of the Court's reasoning in paragraph 29-33 of *Grootboom* was that there is a wide range of diversity as to what would constitute adequate housing, given the variations in housing needs, and that, based on the available information in that case, it was unable to determine the content of the right of access to adequate housing within a South African context. However, the Court stated explicitly that 'there may be cases where it may be possible and appropriate to have regard to the content of minimum core obligations to determine whether the measures taken by the state are reasonable'. This approach in *Grootboom* was confirmed in the *TAC* case in paragraph 34. In paragraphs 32-33 of *Grootboom* the Court in doing this has left the door open for defining the content of socio-economic rights, in respect of a reasonableness inquiry for those socio-economic rights that are qualified, but only in so far as a country-specific core is capable of being ascertained. Compare with the view of Coomans, who argues that the core content of a right should be universal and that a country dependent core would undermine the concept of the universality of human rights - Coomans F 'In Search of the Core Content of the Right to Education' in Brand D & Russel S (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* 180. See also ICESCR General Comment No. 13: The Right to Education, Article 13 (1999) par 57, which defines the elements of the core content of the right to education. In ICESCR General Comment No 3: *The Nature of States Parties' Obligations*, Article 2 (1990) par 1. This General Comment explains terms such as 'to the maximum of available resources', 'achieving progressively the full realisation of the rights' and 'all appropriate means' – the Committee confirms that state parties have 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including 'the most basic forms of education'. In the context of article 13, this core includes an obligation to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis, to ensure education conforms to the objectives set out in article 13(1), to provide primary education for all in accordance with article 13(2)(a), to adopt and implement a national strategy which includes provision for secondary, higher and fundamental education and to ensure free choice of education without interference from the state or third parties, subject to conformity with 'minimum educational standards' which can be found in articles 13(3) & (4). See also Veriava & Coomans 'The Right to Education' 64.

224 Veriava & Coomans 'The Right to Education' 64

225 The concept of the four A's was developed as one of the best ways to assess and act upon a situation by the former United Nations Special Rapporteur on the Right to Education, Katarina Tomasevski. Although the four A's are not definitive they are extremely useful to explain the right to education in terms of tangible factors. Action Aid *Right to Education Project* <http://www.right-to-education.org/node/226> [date of use 20 September 2014].

226 Action Aid *Right to Education Project* <http://www.right-to-education.org/node/226> [date accessed 20 September 2014]. Also see *Article 13 of the CESC General Comment No. 13: The Right to Education, Article 13*, 1999 providing the competency of the authority to use the four "A's" as guidelines.

promoted and fulfilled as stated in section 2 and 7 of the *Constitution*²²⁷ by the government, as the prime duty-bearer.²²⁸ There are also duties on other parties in the education process, as follows:²²⁹

the child as the privileged subject of the right to education and the bearer of the duty to comply with compulsory education requirements, the child's parents who are the 'primary(first) educators', and the professional educators, namely the teachers

Goal 24 of *Action Plan 2014: Towards the Realisation of Schooling 2025*²³⁰ requires the Department to provide every school with the physical infrastructure and an environment that inspires learners to want to come to school and learn, and teachers to teach.²³¹ Paragraph 2 of the guidelines relating to planning for public school infrastructure, which deals with the scope, states that these guidelines apply to public schools and will be implemented progressively and within the scope of the available resources.²³² In paragraph 13 of these guidelines, which deals with the average space per learner, it states that the average space in a school allocated for each learner should be as follows: grade R: 2m² to 2.6m², ordinary primary and secondary schools: 1.2m² to 1.5m², and for learners with disabilities: 2.4m².²³³ Paragraph 16 of the said guidelines, which deals with comfort levels, stipulates that

227 Section 2 and 7 of the *Constitution of the Republic of South Africa*, 1996.

228 Action Aid *Right to Education Project* <http://www.right-to-education.org/node/226> [date accessed 20 September 2014].

229 By using a participatory process the framework of the four A's can become a tool to enable people to think through what the right to education really means to them, and then to compare their current reality to this ideal context. Action Aid *Right to Education Project* <http://www.right-to-education.org/node/226> [date accessed 20 September 2014].

230 Goal 24 of *Action Plan 2014: Towards the Realisation of Schooling 2025* – the question to be asked here is why only 2025; why not now?

231 Guidelines Relating to Planning for Public School Infrastructure <http://www.info.gov.za/view/DownloadFileAction?id=172470> [date accessed 10 October 2014]. This guideline is aimed at achieving the overall goal, namely to improve the quality of education for all learners in South Africa, as well as to provide the basic mix of educational resource inputs that will guide the provision of infrastructure to schools.

232 Guidelines Relating to Planning for Public School Infrastructure <http://www.info.gov.za/view/DownloadFileAction?id=172470> [date accessed 10 October 2014]. "This is not just a Special Session on children. It is a gathering about the future of humanity." Kofi A. Annan, Secretary-General of the United Nations - The United Nations General Assembly Special Session on Children "Building a world fit for children" 8-10 May 2002 http://www.unicef.org/sowc06/pdfs/pub_build_wffc_en.pdf [date accessed 10 October 2014].

233 Guidelines Relating to Planning for Public School Infrastructure <http://www.info.gov.za/view/DownloadFileAction?id=172470> [date accessed 10 October 2014].

the physically disabled learner has the right to be overjoyed, for the school facilities should be suited to the needs and requirements of learners with a disability.²³⁴

The Minister of Education made reference to District Director Nuku's four pillars of education which should be built on: (i) quality teaching and learning; (ii) effective instructional leadership (iii) support for system-wide improvement and (iv) clear and collaborative relationships, especially interpreting and managing the external environment to improve learner performance.²³⁵ The Director-General of Education PB Soobrayan stated that over the past two years the Department of Basic Education had done work on catering for learners with disabilities but the intention was to do much more.²³⁶

Section 3 of the SASA stipulates that school attendance is compulsory from the age of 7 years and that the Minister must, by notice in the Government Gazette, determine the ages of compulsory attendance at school for learners with special education needs.²³⁷ Section 5A of SASA stipulates that there should be norms and standards for basic infrastructure and capacity in public schools.²³⁸ These sections go hand in hand with section 29(1)(a) of the *Constitution*, which further strengthens the right to basic education that needs to be realised.

6.3 Discrimination and Equality

234 Guidelines Relating to Planning for Public School Infrastructure <http://www.info.gov.za/view/DownloadFileAction?id=172470> [date accessed 10 October 2014]. Public schools should facilitate access and functionality in accordance with the principles embedded in *White Paper 6* of 2001, and should also be in line with universal access guidelines. Guidelines Relating to Planning for Public School Infrastructure <http://www.info.gov.za/view/DownloadFileAction?id=17247> [date accessed 10 October 2014].

235 Sitholi N Address at the Opening of Welese Primary School by Mrs Angie Motshekga, Minister of Basic Education, Ngqeleni, Libode District, Eastern Cape: 3 April 2013 <http://www.education.gov.za/Newsroom/Speeches/tabid/298/ctl/Details/mid/2341/ItemID/3612/Default.aspx> [date accessed 10 October 2014].

236 Minister and Deputy Minister on Department of Basic Education Strategic Plan 2013 <http://www.pmg.org.za/report/20130508-minister-and-deputy-minister-department-basic-education-strategic-plan-2013> [date accessed 10 October 2014]. See also the Millennium Development Goals: Goal 2 Achieve universal primary education http://www.statssa.gov.za/nss/Goal_Reports/GOAL%20ACHIEVE%20UNIVERSAL%20PRIMARY%20EDUCATION.pdf [date accessed 5 October 2013].

237 Section 3 of the *South African Schools Act, Act 84 of 1996*.

238 Section 5A of the *South African Schools Act, Act 84 of 1996*.

Section 9 of the *Constitution*²³⁹ stipulates that everyone is equal before the law and has the right to equal protection and benefit of the law. Equality thus includes the full and equal enjoyment of all rights and freedoms. Therefore, in order to promote the achievement of equality, legislative and other measures, designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. The section clearly stipulates that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The section also stipulates that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of the above mentioned grounds of disability, which therefore also places an obligation on natural persons and ordinary people. National legislation must consequently be enacted to prevent or prohibit unfair discrimination. Discrimination on one or more of the grounds listed above is unfair unless it is established that the discrimination is fair on evidence that will prove it. If there is no proper infrastructure at public schools it may constitute an argument that a physically disabled learner is being discriminated against unfairly and that equality is lacking.

Children with disabilities are vulnerable to abuse and to exploitation.²⁴⁰ The percentage of children not attending school is highest in the Northern Cape - 27%, followed by the North West - 15% and Gauteng - 12%.²⁴¹ The most prevalent disabilities among children in South Africa include visual impairment - 36%, hard of

239 If section 9 is taken into consideration, it could mean that public schools that do not have the necessary infrastructure or the accessibility thereof to accommodate a physically disabled learner, are discriminating unfairly towards the learner on the basis of denying her or him the right to education as stipulated in section 29 of the *Constitution*. It should also be taken into consideration that the human dignity of the physically disabled learner, which should be respected and protected according to section 10 of the *Constitution*, is infringed where the physically disabled learner has the mental capacity of a normal human being. *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, No. 14 (United Nations Geneva 2007). Also see Integrated National Disability Strategy White Paper, 1997 <http://www.info.gov.za/whitepapers/1997/disability.htm> [date accessed 5 October 2014].

240 National Plan of Action for Children in South Africa 2012-2017 http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/-cNGjg4nuNgBT_Vi3oCZ90JDdKDDCJxkZUASGLi7YEQ/mtime:1381178349/files/docs/121129nationalplan.pdf [date accessed 10 October 2014].

241 Statistics South Africa (2009): “*General Household Survey, 2008*” – Pretoria.

hearing - 22% physical disability - 16% and intellectual disability - 5%.²⁴² Despite the policy and legislative framework guaranteeing that children with disabilities are admitted to and retained at public schools or at special schools, the implementation of the policy has been described as seemingly inadequate.²⁴³

An environment that is physically accessible benefits everyone, not just persons with disabilities.²⁴⁴ In article 9(1)(a) of the *Disability Convention*²⁴⁵ it is stated that measures should be undertaken to eliminate obstacles and barriers to indoor and outdoor facilities, including schools, medical facilities and workplaces. Not only buildings are included, but also sidewalks, footpaths, kerbs, and obstacles that block the flow of pedestrian traffic.²⁴⁶ All new constructions, whether buildings or sidewalks, should be based on designs that incorporate accommodations for persons with disabilities.²⁴⁷ The cost of including these features at the time of construction could be minimal as stated by the World Bank.²⁴⁸ It has also been shown that making buildings accessible adds less than 1 per cent to construction costs.²⁴⁹ Some barriers that play a role in educating learners with disabilities are the fact that there are inadequate school budgets, resulting in a lack of appropriate

242 National Plan of Action for Children in South Africa 2012-2017 http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/-cNGjg4nuNgBT_Vi3oCZ90JDdKDDCJxkZUASGli7YEQ/mtime:1381178349/files/docs/121129nationalplan.pdf [date accessed 10 October 2014].

243 National Plan of Action for Children in South Africa 2012-2017 http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/-cNGjg4nuNgBT_Vi3oCZ90JDdKDDCJxkZUASGli7YEQ/mtime:1381178349/files/docs/121129nationalplan.pdf [date accessed 10 October 2013] The Department of Education increased the number of Special Schools from 375 to 392 between 2002 and 2009.

244 *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, No. 14.

245 Article 9(1)(a) of the *Convention on the Rights of Persons with Disabilities*, 2006. In article 9(2)(a) of the *Disability Convention* governments are asked to set an example in ensuring full participation in society for persons with disabilities by developing guidelines to make public facilities and services accessible. Public facilities include school buildings.

246 *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, No. 14.

247 *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, No. 14.

248 *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, No. 14. The following must also be kept in mind: accessibility may require providing ramps into government buildings, signage in Braille, accessible toilets and sign-language interpreters or closed-captioning on public television.

249 *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, No. 14.

facilities, inaccessible school buildings, very high learner to teacher ratios, and limited support for learners with disabilities.²⁵⁰

Teachers have inadequate training in inclusive methodologies and cannot deal with the range of children with disabilities.²⁵¹ There is limited awareness of disability among teachers and school staff.²⁵² The term reasonable accommodation means carrying out, when necessary, suitable modifications and adjustments, which do not inflict a disproportionate or undue burden, so that persons with disabilities can enjoy their human rights and fundamental freedoms on an equal basis with others, exactly as stated in article 2 of the *Disability Convention*.²⁵³

Rule 5 of the *Standard Rules in the Equalization of Opportunities for Persons with Disabilities*²⁵⁴ stipulates the following regarding accessibility at schools:

States should recognize the overall importance of accessibility in the process of the equalisation of opportunities in all spheres of society. For persons with disabilities of any kind, States should (a) introduce programmes of action to make the physical environment accessible; and (b) undertake measures to provide access to information and communication.

(a) Access to the physical environment:

(1) States should initiate measures to remove the obstacles to participation in the physical environment. Such measures should be to develop standards and guidelines and to consider enacting legislation to ensure accessibility to various areas in society, such as housing, buildings, public transport services and other means of transportation, streets and other outdoor environments. (2) States should ensure that architects, construction engineers and others who are professionally

250 A Department for International Development Practice Paper “Education for Children with Disabilities: Improving Access and Quality.” https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67664/edu-chi-disabil-guid-note.pdf [date accessed 10 October 2014].

251 A Department for International Development Practice Paper “Education for Children with Disabilities: Improving Access and Quality.” https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67664/edu-chi-disabil-guid-note.pdf [date accessed 10 October 2014].

252 A Department for International Development Practice Paper “Education for Children with Disabilities: Improving Access and Quality.” https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67664/edu-chi-disabil-guid-note.pdf [date accessed 10 October 2014].

253 Article 2 of the *Convention on the Rights of People with Disabilities* (2006) *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, No. 14.

254 Rule 5 of the *Standard Rules in the Equalization of Opportunities for Persons with Disabilities*, 1993.

involved in the design and construction of the physical environment have access to adequate information on disability policy and measures to achieve accessibility. (3) Accessibility requirements should be included in the design and construction of the physical environment from the beginning of the designing process. (4) Organizations of persons with disabilities should be consulted when standards and norms for accessibility are being developed. They should also be involved locally from the initial planning stage when public construction projects are being designed, thus ensuring maximum accessibility

In terms of the above mentioned rule it is important to take note that not only should the schools be accessible for physically disabled learners, but the entire school environment should also be accessible. Subsection 2 of the rule clearly states that the architects and construction engineers should be professional and competent and have adequate information regarding disability policies. According to subsection 3 of the rule the accessibility component should be part of the planning and design from the beginning. Maximum accessibility should be ensured by making contact with organisations of people with disabilities.

Probably the biggest issue of all in the whole spectrum of barriers to access to education for learners with a physical disability, along with the matter of insufficient funding, is infrastructure.²⁵⁵ The department of Basic Education confirms that the department is not meeting the objectives it set itself regarding schools infrastructure.²⁵⁶ By March 2012, only 55% of schools had what the department called a “very basic level of school infrastructure”.²⁵⁷ The incomplete and dilapidated infrastructure is but one of the many problems plaguing the school system, but it is the problem most directly in government's hands to fix.²⁵⁸

255 There are not enough services available to students with disability to match their requirements. That is what the Australian government believes when it comes to physically disabled learners wanting to attend a normal public school. Hastings E Disability Discrimination Commissioner: Australian Human Rights Commission “Access to Education for Students with a Disability: Barriers and Difficulties” <http://www.humanrights.gov.au/publications/access-education-students-disability-barriers-and-difficulties> [date accessed 10 October 2014].

256 Molefe O ‘Crisis or Challenge, School Infrastructure is Nowhere Near Where It Should Be’ Daily Maverick 19 June 2012 <http://www.dailymaverick.co.za/article/2012-06-19-crisis-or-challenge-school-infrastructure-is-nowhere-near-where-it-should-be/> [date accessed 10 October 2014].

257 Molefe O ‘Crisis or Challenge, School Infrastructure is Nowhere Near Where It Should Be’ Daily Maverick 19 June 2012 <http://www.dailymaverick.co.za/article/2012-06-19-crisis-or-challenge-school-infrastructure-is-nowhere-near-where-it-should-be/> [date accessed 10 October 2014]. The department had hoped this figure would have been 88% by that date.

258 Molefe O ‘Crisis or Challenge, School Infrastructure is Nowhere Near Where It Should Be’ Daily Maverick 19 June 2012 <http://www.dailymaverick.co.za/article/2012-06-19-crisis-or-challenge-school-infrastructure-is-nowhere-near-where-it-should-be/>

Minister Motshekga has estimated that at least R86.6 billion was needed to upgrade and maintain infrastructure at public schools to the requisite levels, in other words the levels to which the international legal framework as well as national framework bind the government.²⁵⁹ At the opening ceremony of another school in the Eastern Cape in April 2013 Minister Motshekga said that the development of infrastructure is important for developing the economy and for creating wealth.²⁶⁰

Overall the Department of Basic Education has been allocated R8.8 billion for infrastructure projects in 2013/14.²⁶¹ It is increasingly important for the Department to accelerate delivery on all infrastructure projects not only to avoid delays to the actual schools but also to evade incurring further cost as a result of stalled projects.²⁶² In order to optimise limited budgets, the planning and financial management at both national and provincial levels must become more rigorous.²⁶³

school-infrastructure-is-nowhere-near-where-it-should-be/ [date accessed 10 October 2014]. See also the Report on Progress on Accelerated Schools Infrastructure Delivery Initiative 6 February 2012 (herein afterwards referred to ASIDI) <http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/r6KCx762TAhHf8r8OKBdUN3KpzRbdg13AJjvR-8fheM/mtime:1347616796/files/docs/120912asidi.ppt> [date accessed 10 October 2014] to determine what has taken place since an action was launched by Equal Education. Progress has been delayed on the construction of the 49 schools due to a number of challenges outlined in the background to this report. As a result the contractors could not start with construction as originally scheduled in November and December 2011. Completion date is also now scheduled for 31st August 2012 this has passed, though; needs updating instead of 30th March 2011 as originally agreed with DBSA in the MOA. Commencement of the construction works started on 23 January 2012.

259 Molefe O 'Crisis or Challenge, School Infrastructure is Nowhere Near Where It Should Be' Daily Maverick 19 June 2012 <http://www.dailymaverick.co.za/article/2012-06-19-crisis-or-challenge-school-infrastructure-is-nowhere-near-where-it-should-be/> [date accessed 10 October 2014]. That is about three times more than what was spent on 10 World Cup stadiums or twice bigger than the controversial arms deal, and far, far more than the entire department's budget for the next three years.

260 Sitholi N Address at the Opening of Welese Primary School by Mrs Angie Motshekga, Minister of Basic Education, Ngqeleni, Libode District, Eastern Cape: 3 April 2013 <http://www.education.gov.za/Newsroom/Speeches/tabid/298/ctl/Details/mid/2341/ItemID/3612/Default.aspx> [date accessed 10 October 2014]. Every classroom we build and furnish serves to promote the national goal of ending poverty, inequality and unemployment.

261 Kota Z "Education Budget Analysis" - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 1 October 2014].

262 Kota Z "Education Budget Analysis" - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 10 October 2014].

263 Kota Z "Education Budget Analysis" - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM)

On both the national and provincial scale, spending on education remains the single largest government budget allocation, commensurate with the lately developed delivery agreements.²⁶⁴ Education is ranked as a top priority, outcome 1 being “improved quality of basic education”.²⁶⁵ The Department of Basic Education has highlighted infrastructure as a priority spending area over the 2013/14 to 2015/16 Medium Term Expenditure Framework,²⁶⁶ which will occur in the form of transfers of the infrastructure grants to provinces.²⁶⁷

The 2013/14 allocations for upgrades and renovations as well as for the rehabilitation of buildings both reflect decreases when compared to the 2012/13 attuned appropriations.²⁶⁸ Over the Medium Term Expenditure Framework, the budget of R168 million in 2013/14 decreases to a mere R54 million in 2015/16.²⁶⁹ In

<http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 10 October 2014].

264 Crucial institutional changes must be realised if key priorities in human resource and infrastructure provisioning are to be fulfilled. Kota Z “Education Budget Analysis” - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 10 October 2014].

265 The Delivery Agreement is related to Government’s *Action Plan to 2014*; a document detailing the 12 outcomes for work to be done by the South African Government in consultation with various stakeholders” The delivery agreement is intended to be “an important input into the budgeting process for 2011/12” and reviewed on an annual basis. Department of Basic Education, *Republic of South Africa: Delivery Agreement For Outcome 1: Improved Quality of Basic Education*.

266 *National Treasury Estimates of National Expenditure Vote 15: Basic Education 5* <http://www.treasury.gov.za/documents/national%20budget/2013/enebooklets/Vote%2015%20Basic%20Education.pdf> [date accessed 10 October 2014].

267 The Department, in placing an increased emphasis on creating safe and secure learning spaces, has committed to escalating spending on infrastructure. The education infrastructure grant is intended to be additional to provincial infrastructure programmes. It is inclusive of maintenance, rehabilitation and upgrading of new and existing infrastructure. Kota Z “Education Budget Analysis” - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 10 October 2014].

268 The maintenance budget, however, sees an astounding 77% nominal increase. This is likely an effect of the under expenditure in 2012/13 and is also in recognition of the perennial need for daily and large scale maintenance and repairs. Kota Z “Education Budget Analysis” - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 10 October 2014].

269 This equates to a decrease of 25% in real terms. Thus the 2015/16 maintenance budget is lower than it was even in 2009/10. Kota Z “Education Budget Analysis” - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 10 October 2014].

light of the need to commit to an enhanced maintenance plan, the intended increase in new infrastructure as well as the existing maintenance backlogs, this budget is unlikely to meet future maintenance needs.²⁷⁰ It is particularly important that the Provincial Department adhere to the norms, relating to annual allocations to maintenance of infrastructure, so as to avoid unnecessary losses due to seemingly poorly planned and disorganised maintenance procedures, as has been the trend.²⁷¹ It is especially disturbing to note the decrease in the overall national budget for infrastructure in real terms of 1.71 percent.²⁷² Spending on education, sport and culture will amount to R233 billion in 2013/14.²⁷³

Over the period ahead, the basic education sector will focus on improving numeracy and literacy, expanding enrolment in grade R and reducing school infrastructure backlogs.²⁷⁴ Together with the broader education infrastructure grant, R23.9 billion is available to provincial education departments for infrastructure over the next three years.²⁷⁵ If the actions discussed above are implemented and the budget allocated to upgrade infrastructure at public schools is used, no discrimination and inequality with relation to physically disabled learners will occur.

270 Eastern Cape Department of Education Annual Performance Plan 2013/14 30th March 2013 37. There is an acknowledgement of a significant maintenance backlog in the Department's 17 year history. The Annual Performance Plan reports the cost of the backlogs owing to insufficient budgeting as between R5 billion and R10 billion.

271 There is an urgent need for the Department to institutionalise the best practice in the upkeep of all its buildings and fixed assets and of schools in particular. It is unclear from the national estimates of revenue expenditure what the allocations specifically dedicated to maintenance and repairs are, as this is categorised in the larger education infrastructure conditional grant. It is also not clear what the overall expenditure was over the previous financial year. Kota Z "Education Budget Analysis" - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 10 October 2014].

272 This may be attributable to previous under expenditure on infrastructure projects resulting in the reprioritisation of funds. Kota Z "Education Budget Analysis" - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date of use 1 October 2014].

273 Budget speech 2013 <http://www.info.gov.za/speeches/docs/2013/budget2013.pdf> [date accessed 10 October 2014].

274 Budget speech 2013 <http://www.info.gov.za/speeches/docs/2013/budget2013.pdf> [date accessed 10 October 2014].

275 Budget speech 2013 <http://www.info.gov.za/speeches/docs/2013/budget2013.pdf> [date accessed 10 October 2014].

6.4 White Paper No 6 Special Needs Education Building an Inclusive Education and Training System 2001

In 2001 a *White Paper* was published by the Department of Education regarding inclusive education.²⁷⁶ According to this *White Paper* the sector of special educational needs is one of those that suffered most under Apartheid. The purpose of this *White Paper* was to move away from the distinction and separation with regard to the categories of disability used to organise institutions.

The *White Paper* defines inclusive education as follows:

Acknowledging that all children and youth can learn and that all children and youth need support. Enabling education structures, systems and learning methodologies to meet the needs of all learners. Acknowledging and respecting differences in learners, whether due to age, gender, ethnicity, language, class, disability, HIV or other infectious diseases. Broader than formal schooling and acknowledging that learning also occurs in the home and community, and within formal and informal settings and structures. Changing attitudes, behaviour, teaching methods, curricula and environment to meet the needs of all learners. Maximising the participation of all learners in the culture and the curriculum of educational institutions and uncovering and minimising barriers to learning

Inclusive education is primarily about restructuring school cultures, policies and practices so that they respond to the diversity of students in their locality.²⁷⁷ It sees individual differences not as problems to be fixed, but as opportunities for enriching learning and for education systems to embrace change.²⁷⁸ It is a dynamic, continuing process of facilitating the participation of all students, including those with disabilities.²⁷⁹ Governments need to develop national plans to extend inclusive education for children with disabilities, including detailed targets, strategies for

276 In the apartheid era, schools were divided on the basis of race and disability. The result of the division was that schools with white disabled learners enjoyed access to good resources but the few schools for black disabled learners had access to resources that were much less adequate. Accessibility to education was a problematic experience for disabled learners. *White Paper No. 6 Special Needs Education Building an Inclusive Education and Training System* 2001.

277 Leonard Cheshire Disability "Inclusive Education" <http://www.lcint.org/?lid=5060> [date accessed 10 October 2014].

278 Leonard Cheshire Disability "Inclusive Education" <http://www.lcint.org/?lid=5060> [date accessed 10 October 2014].

279 Leonard Cheshire Disability "Inclusive Education" <http://www.lcint.org/?lid=5060> [date accessed 10 October 2014].

improving access and learning achievement, and comprehensive plans for providing financing and training teachers.²⁸⁰

The starting point for such a plan is a credible needs assessment based on a national survey of the prevalence of disability.²⁸¹ The inclusive education approach promoted by the *Disability Convention* is based on a growing body of evidence which demonstrates that inclusive education not only provides the best and most conducive educational environment, which helps to break down barriers but that it also challenges stereotypes.²⁸² The proposed inclusive education and training system as set out in *White Paper 6*, is welcomed, because such an inclusive system will create a wider distribution of the support systems that are in line with what is required of learners with disabilities.²⁸³ Disabled learners have the right to receive a basic education on exactly the same basis as non-disabled learners. If the *White Paper* is reviewed, it looks promising with regards to inclusive education, but the reality is that to date insufficient effort has been made by the Department of Education to make this type of education adequate.²⁸⁴ To date no legislation has been enacted with regard to this type of education, either to achieve or regulate it. The result is that disabled learners still do not receive the basic education to which they are entitled. If the students are placed in other schools where they can possibly be accommodated in their area, it could cause great strain on the school and, consequently, the educators and learners with disabilities themselves.²⁸⁵

6.5 Adaptability South Africa

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- 280 EFA Global Monitoring Report 2010
<http://unesdoc.unesco.org/images/0018/001866/186606e.pdf> [date accessed 10 October 2014].
- 281 EFA Global Monitoring Report 2010
<http://unesdoc.unesco.org/images/0018/001866/186606e.pdf> [date accessed 10 October 2014].
- 282 *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, No. 14. See also Department of Education "Education White Paper 6: Special Needs Education, Building an Inclusive Education Training System" 2011.
- 283 Bekink & Bekink Stell LR 2005 139.
- 284 Reynecke & Oosthuizen 2003 *Journal for Juridical Science* 102.
- 285 Olivier & Williams 2006 *Acta Academica* 223-245. See also Eloff, Engelbrecht & Swart 2002 *Koers* 77-99. Smit, Russo & Engelbrecht 2010 *XLIII CILSA* 1.

Basic education consists of four elements which have been discussed previously.²⁸⁶ The accommodation of learners with physical disabilities forms part of these four “A’s”. The “A” concentrated on in the present study is adaptability.

Adaptability in basic education relates to the flexibility of the system of education to adapt to the changing needs in society, and to respond to the diverse needs of learners within their diverse social and cultural settings, most particularly the needs of the more vulnerable segments of society.²⁸⁷ The state’s attempt to address this is reflected in its policy framework. A final note in respect of section 29(1)(a) is that, while it is not subject to any internal limitations and is in that sense absolute, it is nevertheless subject to the general limitations clause in terms of section 36, as with all other rights in the Bill of Rights. Therefore any claim to the right may nevertheless become subject to limited resources arguments under the limitation clause. Such arguments would of course be subject to the stringent requirements imposed by the balancing test of the limitations clause.²⁸⁸

The provisions in the *National Minimum Uniform Norms and Standards for School Infrastructure* that were published for comments dealing with universal access have also been elaborated upon in the new version of the regulations.²⁸⁹ The regulations now clearly state that schools for learners with special education needs must be fully accessible, and that such access includes ramps, handrails and space for manoeuvrability for all learners and educators. For this purpose, the following minimum Universal Design requirements are specifically provided for: (a) Clear floor area in passages, walkways and points of ingress for people using wheelchairs and other mobility devices and aids. (b) Parking for persons with disabilities to be located as close as possible to entrance areas. (c) Ramps and handrails with regulated gradients, heights and spacing. (d) Toilets for the disabled must meet the

286 Action Aid *Right to Education Project* <http://www.right-to-education.org/node/226> [date accessed 10 October 2014].

287 *Grootboom* par 44. One of the requirements for evaluating whether or not a programme is reasonable is to evaluate to what extent such a programme responds to the needs of the most desperate in society.

288 *S v Mhlungu and Others* 1995 (3) SA 867 (CC).

289 Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure 29 November 2013 par 4.6 <http://www.education.gov.za/Newsroom/MediaReleases/tabid/347/ctl/Details/mid/2327/ItemID/3862/Default.aspx> [date accessed 25 September 2014].

requirements of the *National Building Regulations*.²⁹⁰ (e) All schools must be provided with adequate notice boards which are accessible for all users in the school building and which contain signage that is visible and legible. (f) Tactile signage should be provided for learners and educators with impaired vision. (g) Visual aids should be provided for communication with learners and educators who are deaf or hearing impaired. (h) All other aspects of Universal Design must be compliant with the relevant requirements of the National Building Regulations and SANS 10-400.²⁹¹

The actual state of affairs is far from ideal and must be attended to as this will have adverse implications for the maintenance and longevity of current infrastructure.²⁹² In cases where teaching and learning occur under conditions of overcrowding and poor infrastructure, there is added strain on educators and learners alike.²⁹³ It is suggested that the Department should present a concise plan to address underutilised schools which also add pressure to an already strained, poorly managed budget in the Public Ordinary School Programme.²⁹⁴ Access to education does not only have to do with the education system.²⁹⁵ Changing the physical infrastructure may seem intimidating, but it does not have to be.²⁹⁶ Over time, as buildings need to be refurbished, they could be retrofitted to include accessible

290 *National Building Regulations and Building Standards Act*, Act 103 of 1977.

291 *National Building Regulations and Building Standards Act*, Act 103 of 1977.

292 This, as has been illustrated, is an area in which the Department already struggles significantly. A thorough audit of the total cost to the Department emanating from underutilised schools in terms of personnel and operational costs is recommended. Of still greater concern are the implications for teaching and learning. Kota Z “Education Budget Analysis” - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 10 October 2014].

293 Kota Z “Education Budget Analysis” - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 10 October 2014].

294 Kota Z “Education Budget Analysis” - Monitoring and Advocacy Programme, Public Service Accountability Monitor (PSAM) <http://www.psam.org.za/outputs/Budget%20Analysis%201%202%202013-14.pdf> [date accessed 10 October 2014].

295 *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, No. 14.

296 *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, No. 14.

design features.²⁹⁷ In the future, it should be mandatory for all new buildings, including educational facilities, to be accessible.²⁹⁸

6.6 Conclusion

This chapter has attempted to define the scope and content of section 29(1)(a) and to provide an overview of the most significant policies that have been developed to give effect to the rights under section 29.²⁹⁹ These policies appear to have as their main objective the creation of an education system that ensures equal access for all.³⁰⁰ However, to the extent that certain policies do not facilitate the full enjoyment of the rights under section 29, these policies should be revised to ensure constitutional compliance.³⁰¹ The international treaties provisions and interpretative work by international supervisory bodies may provide guidance on this.³⁰²

297 UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, No. 14.

298 UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, No. 14. *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and another*. Du Plessis M “The Social Model of Disability, Rights Discourse and the Impact of South Africa’s Education White Paper 6 on Access to the Basic Education System for Persons with Severe or Profound Intellectual Impairments” 2013 *Law Democracy & Development* 17 <http://dx.doi.org/10.4314/ldd.v17i1.10> [date accessed 25 September 2014].

299 Veriava F & Coomans F ‘The Right to Education’ in Brand D & Heyns C (eds) *Socio-Economic Rights in South Africa* 57–83.

300 Veriava F & Coomans F ‘The Right to Education’ in Brand D & Heyns C (eds) *Socio-Economic Rights in South Africa* 57–83.

301 Veriava F & Coomans F ‘The Right to Education’ in Brand D & Heyns C (eds) *Socio-Economic Rights in South Africa* 57–83.

302 Veriava F & Coomans F ‘The Right to Education’ in Brand D & Heyns C (eds) *Socio-Economic Rights in South Africa* 57–83.

7 Conclusion and recommendations

In chapter 2 of this study it was pointed out that article 13 of the *ICESCR* obliges state parties to direct all education, whether public or private, formal or non-formal, towards the aims and objectives identified in article 13(1). Singh has suggested that rights-holders, which in this case will be any physically disabled child, should have the ability to challenge governments to meet their international obligations if and when they are not respected and fulfilled. It is now necessary to ensure that the right to a basic education is a justiciable right, and that governments failing to provide adequate quality education to all their children must be held accountable.

Furthermore in chapter 3 it was noted that in the *Disability Convention* all education systems should be inclusive at all stages, regardless of the learner's severity of disability, making it unambiguous that education is a right for persons with disabilities. The gap between the international commitments to ensure that all children are educated without exclusion, and the reality of educating children with disabilities in their communities, still remains to be addressed, as can clearly be seen from the above discussion. Accepting and implementing the recognition of the right to education for such children continues to be a slow process. It is my humble submission that to ensure universal basic education for all and without discrimination, there should be a seemingly more definite commitment at the various levels of government to the education of children with disabilities.

Therefore as indicated in chapter 4 of this study, after taking the above discussion into consideration it is safe to say that the human rights of children with disabilities³⁰³ must be protected and promoted through general as well as specially designed laws, policies and programmes. It should also be taken into account that, as stated in article 4 of the *UNCRC*, all appropriate legislative, administrative and other

303 As discussed in Chapter 2 of the study, children with disabilities are especially vulnerable to exploitation, abuse and neglect and are, in accordance with article 10(3) of the *ICESCR*, entitled to special protection. Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 382.

measures should be used for the implementation of the right to basic education for disabled children. The appropriate measures should be employed to the maximum extent possible for the state parties, who should make full use of the available resources, with the rights of equality and non-discrimination being taken into consideration. The influence that the *UNCRC* has had and will continue to have on an international, regional and national level is undoubted.

Subsequently in chapter 5 it was stated that the *ACC* provides the right to education in general not only in article 11(1), but also focuses on the right to basic education and its importance more specifically in subsection 11(3). The *ACC* focuses on the importance of children with disabilities in article 13, but surprisingly provision was made specifically for the mobility of disabled children in article 13(3). This is a provision that should not only be of great importance for disabled children in Africa, but also everywhere in the world. Therefore this cannot be regarded as a unique feature of a specific country, but as being of the utmost significance for the realisation of the rights of children with disabilities everywhere. As a state party and as a country seriously committed to the promotion and protection of the rights of children at a domestic level, there is both a legal and moral imperative on South Africa to respect its obligations under the *ACC*.

It is often not their disability but rather the seeming denial of opportunities for education that affects disabled children's education.³⁰⁴ Physically disabled learners attend schools that do not accommodate their physical needs to realise the right to basic education, as evident from the above discussion. South Africa does not fully abide by the four A's of basic education, as is evident from the discussion in chapter 6 above. The general infrastructure for a public school may be up to standard according to the *National Building Regulations and Building Standards Act, Act 103* of 1977, but it is frequently lacking in specific infrastructure, in such a manner that a physically disabled learner will not be able to realise his right to basic education. The lack of properly accessible infrastructure in public schools to accommodate

304 Bekink B & Bekink M "Children with Disabilities and the Right to Education: A Call for Action" 2005 *Stellenbosch Law Review* 142.

physically disabled learners has a much wider implication than that of human – and constitutional – rights being violated. It places an obligation on the state to provide the necessary funding to redress the situation. The *Constitution* is an enriching piece of legislation. It is a promise of equality, fairness and justice, but it is only a promise, it is not self-executing. The state is required to employ every possible means to fulfil these promises.

In the case of *Brown v Board of Education of Topeka* 347 US 438 (1954) the Court stated that: ‘Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him [sic] for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.’ The following proposals are made in the light of the foregoing:

Firstly, it is recommended that the provisions on the rights of children with disabilities, as contained in the various international human rights instruments, should be domesticated and implemented in the country effectively, in such a manner that all children from all spheres of life will be able to realise their right to basic education. For instance, Rules 6(1), (7) and (8) of the *Standard Rules on the Equalisation of Opportunities for Disabled People* recommend special education as an exception where the general school system is inadequate to meet the needs of people with disabilities.

Secondly, the right to education which is included in the *Constitution* should not only be part of the fundamental objectives and directive principles of state policy, it is recommended that the implementation thereof be made a reachable goal in the lives of every physically disabled child. Constitutional reform elevating this right to the status of a fundamental right is therefore imperative. Also in this regard, all the relevant laws and policies on the rights of persons with disabilities should be harmonised and adequately implemented.

Thirdly, it is recommended that a specific human rights commission be established to cater for the rights of children with disabilities on a national level, so as to make the implementation of the basic right to education realisable. As an alternative, an arm of the existing *National Human Rights Commission* should be given these functions. To make the right to education meaningful, inclusive and universal, the government cannot afford to ignore the rights of children with disabilities. One of the fundamental elements of the right to education is that it be provided in a non-discriminatory manner to all. Lack of adequate attention to education and welfare of people with disabilities constitutes discrimination in terms of the provisions of *CRC*. The inevitable conclusion from the discussion in this proposed study is that the protection and realisation of the right to education for children with disabilities in South Africa is inadequate – to such an extent that the inaccessibility of the infrastructure prevents physically disabled learners from realising their right to basic education. Policies that could give meaning to the rights of this category of persons call for implementation. This will require a strong commitment on the part of government at every level.

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