

Research Paper

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Law Faculty

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**Topic: AN ANALYSIS OF SOUTH AFRICA'S EFFORTS TO REALIZE THE RIGHT
TO BASIC EDUCATION IN LIGHT OF COVID-19.**

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Abstract

This study is an analysis of South Africa's efforts toward ensuring the realisation of the right to basic education during the Covid-19 pandemic. In South Africa, the Covid-19 pandemic presented unprecedented challenges which intensified the existing inequalities that are threatening the realisation of the right to basic education for many young South Africans. During the Covid-19 pandemic, the shift from physical school attendance to online learning was one of the remarkable challenges that the basic education system failed to address due to a number of challenges such as lack of access to internet and technology in many South African schools. As a result, millions of young South Africans were left behind and their right to basic education was violated. Therefore, for the South African government to be still facing such challenges after 30 years of democracy shows a lack of commitment to protecting the right to basic education that is entrenched in our constitution.

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Key words

1. Basic education
2. Poor infrastructure
3. COVID-19
4. Immediate realisation
5. Inequality
6. Online learning

1.1 Background

The right to a basic education in South Africa is an absolute right. A basic education is the foundational right through which other rights can be realised because it enables the beneficiaries to grow as human beings and to pursue a meaningful life.¹ It is the precondition for the enjoyment of many economic, social and cultural rights. For instance, the right to receive higher education based on ability which can only be exercised hastily after a minimum level of education is reached.² A right to basic education can also give marginalized adults and children the means to escape from poverty and participate meaningfully in their societies.

In South Africa, prior to 1994, compulsory education had only been fully implemented regarding the White, and to a lesser extent, the Indian and Coloured sections of the population. The structure for basic education was marked by the central principle of apartheid, namely separate schooling infrastructure for separate groups and each designated ethnic or racial group had its own education infrastructure.³ However, the end of apartheid in 1994 was heralded nationally and internationally as a victory for democracy and human rights,⁴ although it left South Africa with a deeply unequal and dysfunctional education system.

Through its ratification of the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Dakar Framework for Action, South

¹ Universal Declaration of Human Rights 1948, General Comment No.13 para 1.

² Icelandic human rights centre available at <https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substance-human-rights/the-right-to-education-and-culture> (accessed 07 March 2023).

³ Morrow WE 'aims of education in South Africa' 1990 available at <https://doi.org/10.1007/BF01874882> (accessed 07 March 2023).

⁴ Haydn CJ 'Despite the political victory against apartheid, its economic legacy persists' 2015 available at <https://www.sahistory.org.za/article/despite-1994-political-victory-against-apartheid-its-economic-legacy-persists> (accessed 02 April 2024).

Africa has committed itself to achieving basic education for its children. However, the realisation of its commitment depends on meeting the obligations engendered by the right to basic education. This is possible only if the content of the right is understood first. The Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 13 and General Comment No 11 provide detailed content applicable to the right to basic education. All forms and levels of education, including basic education, should display the four interrelated features of availability, accessibility, acceptability, and adaptability.⁵ Firstly, education must be made available to learners. This entails the provision of schools and qualified teachers.⁶ In addition, access to education must be ensured. Education must be economically and physically accessible and must be guaranteed on a non-discriminative basis.

In South African law the right to basic education enjoys protection under s 29(1)(a) of the constitution which states that ‘everyone has the right to a basic education, including adult basic education’.⁷ There are also various legislation and regulation policies such as the South African Schools Act 84 of 1996 to ensure the protection and the realisation of the right to education in South Africa.

The Constitutional Court, in the case of *Musij Primary School and Others v Essay NO and others*, held that the right to basic education requires immediate realisation unlike other socio-economic rights.⁸ The immediate realisation of the right to basic education was also highlighted in the case of *Masingita Makume v Minister of Basic Education*. In this case, the court found that the government had failed to provide basic education to learners who were affected by the strike of teachers.⁹ Therefore, it held that the right to basic education is a fundamental right that must be protected and realised immediately.¹⁰ Notably, the case *Minister of Education v Harris* highlighted issues related to learner admission and power of the Minister of Education under the National Education Policy Act.¹¹ Another significant case, *Christian Education South Africa v Minister of Education* focused on the prohibition of corporal punishment in schools and its implications on religious freedom and children’s rights.¹² These cases are important for the recognition of the right to basic education as the right that must be immediately realised.

⁵ CESCR General Comment No.13 (1999) para 6.

⁶ CESCR General Comment No.13 (1999) para 6(a).

⁷ Constitution of the Republic of South Africa, 1996 Section 29(1)(a).

⁸ *Musij Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) para 83.

⁹ *Masingita Makume v Minister of Education* 2016 SA 301 (GP) para 71.

¹⁰ *Masingita Makume v Minister of Education* (2016) para 72.

¹¹ *Minister of Education v Harris* 2001 (4) SA 1297 (CC) para 13.

¹² *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 9.

According to the content of this right, the right to basic education includes having schools where learners are safe to learn and have adequate infrastructure and facilities to do so.¹³ However, during COVID-19, it was found that this is not the reality for many learners in South Africa.¹⁴

The South African education system is characterized by crumbling infrastructure, overcrowded classes, shortage of textbooks and other learning materials, thereby perpetuating inequality and as a result failing too many of its children.¹⁵ There are unacceptably large numbers of children in the Eastern Cape, Limpopo and KwaZulu-Natal, amongst other provinces, who attend classes under trees, overcrowded classrooms or have classrooms with no teachers, poor infrastructure at schools, and limited availability of textbooks and other learning materials to support learners.¹⁶ The issue of overcrowded classrooms is a continuous contributing factor to poor learning conditions because of the lack of space, fresh air and high noise levels that could lead to a lack of attention and even create stress within learners.¹⁷ During the COVID-19 pandemic, it was considered to be the biggest challenge when it comes to complying with COVID-19 regulations such as social distancing. In the Eastern Cape, Dalibango J.S.S was one of the schools with overcrowded classes due to the poor infrastructure and the shortage of teachers, about 35 learners and 4 teachers were infected by COVID-19 in one day of schools reopening.¹⁸

The shortage of textbooks at schools made the situation more difficult. Even before COVID-19 the limited access to textbooks was affecting the performance of the learners and also made it difficult for teachers to complete the syllabus, necessitating the transfer of what is in the textbook unto the chalk-board to accommodate all learners.¹⁹ At some schools, learners were sharing one textbook and during COVID-19 that was impossible because all learners at schools were required to adhere to social distance regulations, therefore, there were learners who were

¹³ Steytler M 'South Africa: Broken and unequal education perpetuating poverty and inequality' 2020 available at <https://amnesty.org.za/south-africa-broken-and-unequal-education-perpetuating-poverty-and-inequality/> (accessed 12 November 2023).

¹⁴ Mbeki SD 'Critical evaluation of the realization of the right to basic education in light of the 2012 Limpopo textbook saga' (unpublished LLM thesis university of KwaZulu-Natal, 2014) pg 27.

¹⁵ Victoria J 'Schoolbook shortage a chronic issue in SA' 2012 available at <https://mq.co.za/article/2012-08-10-00-schoolbook-shortage-a-chronic-issue/> (accessed 02 April 2024).

¹⁶ Mbeki SD (2014) 32.

¹⁷ Marais P 'We can't believe what we see: Overcrowded classrooms through the eyes of student teachers' (2016) 3.

¹⁸ Lauren I 'Eastern Cape has highest number of pupils who've contracted corona virus' (2020) 9.

¹⁹ Available at <http://www.google.com/amp/s.herald.co.zw/textbooks-shortage-impact-negatively-on-education/amp.co.za> (accessed 13 April 2023).

learning without textbooks.²⁰ The gravity of these problems was exposed by the impact of COVID-19, which was not necessarily the issue but compounded the government's challenges to realise the right to basic education for young South Africans. It is now more than 30 years of democracy in South Africa, but the right to a basic education is still not fully realised.

1.2 Problem statement

Given the fact that effective education of all South African learners was neglected before 1994, the inclusion of the right to education in the 1996 Constitution is aimed at advancing the socio-economic needs of the poor in order to uplift their human dignity and realise their potential.²¹ It has now been over 30 years since the advent of constitutional democracy but, the state is still having learners who attend classes under trees, there are still mud schools and classrooms with no teachers, no improvement on infrastructure, and is still unable to deliver learning materials such as textbooks on time.²² According to the South African Schools Act, this country needs a national system for schools which will redress past injustices in the provision of education and also one that will provide for education of progressively high quality for all learners and uphold the rights of all learners. However, the pace of redressing the past injustices has been very slow and that clearly shows that the state is failing to fulfil its obligations as conferred on it by the Constitution and SASA.

This is because if the government were not failing to provide young South Africans with a basic education, many learners across the country would have not suffered or struggled this much during COVID-19.²³ Learners faced unprecedented challenges in adjusting to a new mode of life and learning, the latter being characterized by the predominant use of online learning management systems and low-tech applications.²⁴ The move to online teaching and learning, as opposed to the traditional approach to education, was inevitable. Many learners thus found themselves excluded from schooling and unable to access online resources, due to a lack of infrastructure, the unavailability of electricity and electronic gadgets, and a lack of qualified teachers who can assist with online learning.²⁵ It would appear that online learning

²⁰ Schleicher A 'The impact of covid-19 on education- Insights from Education at a Glance 2020' Available at <https://www.oecd.org> (accessed 10 June 2023).

²¹ Mbazira C 'Litigating Socio-economic Rights in South Africa: A choice between Corrective and Distributive Justice' (2009) available at http://www.pulp.up.ac.za/cat_2009_07.html (accessed 25 February 2023).

²² Mbeki SD (2014) 37.

²³ Fernando MR 'Schools and Society During the COVID-19 Pandemic' (2021) 23.

²⁴ Bekithemba D 'Rural Online Learning in the Context of COVID-19 in South Africa: Evoking an Inclusive Education Approach' (2020) 40.

²⁵ Bekithemba D (2020) 40.

favours urban and well-privileged learners, thus, widening the gap between the poor and the rich.

The aim of this research is to conduct an analysis of South Africa's efforts to realise the right to basic education, particularly in the context of the COVID-19 pandemic. This analysis is aimed at answering the question: Did the South African government fail to provide a basic education for South Africans during COVID-19?

1.3 Literature review

The onset of COVID-19 in South Africa disrupted in-person learning at schools, which is the primary means of accessing basic education for many South Africans. Due to the closure of schools, educators were unable to complete the 2020 curriculum.²⁶ Strategies to try to save the academic year involved remote learning. The interruption of schooling, and partial transition to home and online learning, had and has both social and pedagogical implications. According to *Van der Berg & Spaull* many public schools have limited resources and little exposure to technology or access to digital platforms to implement online learning while; many better-off schools were able to assist their teachers to prepare online content for learners.²⁷ This includes many schools that are located in rural areas, and many learners in the rural areas are less privileged in terms of access to technology.²⁸ As such, it was difficult for South Africa to implement a remote-learning strategy effectively because access by all learners countrywide was impossible. Consequently, learners from disadvantaged backgrounds were left behind because they could not exercise their right to basic education through remote learning due to lack of access to technology and poor infrastructure.²⁹ For many learners in South Africa, being unable to participate in remote learning during COVID-19 resulted in learners from poor backgrounds being demoralized about completing their studies and hence dropping out of school.³⁰ Other scholars argue that remote learning was not a good idea due to South Africa's inequality.³¹

²⁶ Van der Berg S & Spaull N 'Counting the Cost: COVID-19 school closures in South Africa and its impact on children' *South African Journal of Childhood Education* (2020) 30.

²⁷ Van der Berg S & Spaull N (2020) 21.

²⁸ Du Plessis P & Mestry R 'Teachers for rural schools – a challenge for South Africa. *South African Journal of Education*' (2019) 39.

²⁹ Spaull N & Kotze J 'Starting behind and staying behind in South Africa: The case of insurmountable learning deficits in mathematics' *International Journal of Educational Development* (2015) 41.

³⁰ Du Plessis P & Mestry R (2019) 21.

³¹ Bekithemba D (2020) 20.

According to Bellita Bande and S Rembe, online classes were possibly a better way of trying to reach learners throughout the country.³² However, this view was criticized because around this intervention a lot of problems persisted; for example, not every household is a suitable or conducive environment for learning.³³ Furthermore, the intervention targeted only grades 10–12 and lessons ran for only 90 minutes per day, and that was not enough to cover everything that used to be covered in classes. On the one hand, Dube reported that “most of the learners in rural areas are experiencing problems with network, it is hard for them to access online learning materials provided by the department of basic education”.³⁴

Children from extremely disadvantaged backgrounds were also the most affected because their families occupy one-room shelters where it is difficult to do schoolwork.³⁵ In poorer households, many children did not have a quiet workspace, desk, computer, internet connectivity, or parents who had the time or capacity to take on the role of home scholars. Therefore, it was very difficult for many young South Africans to focus on their education and the government was not helping.

In South Africa there has long been a culture of dropping out of school, especially by learners from low-income groups and COVID-19 which resulted in the closure of schools made this problem worse.³⁶ Child-headed families were among the families that were hit the hardest by the lockdown.³⁷ The danger of the virus itself, and concerns about when the pandemic would end, was a concern to these families. There was enough stress just dealing with where the next meal would come from and trying to focus on school.³⁸ Many dropped out or resorted to theft because the piecemeal jobs that would normally be available outside of lockdown were nowhere to be found. Children from dysfunctional or abusive homes looked forward to leaving their homes to go to school, which is a haven for them. Being at home for a very long time and experiencing abuse affected them psychologically and had negative impacts on their education.³⁹

³² Bellita BC & Rembe S ‘*Children’s rights to education in South Africa twenty years after democracy*’ (2020) 39.

³³ Du Plessis P & Mestry R (2019) 39.

³⁴ Bekithemba D (2020) 19.

³⁵ Du Plessis P & Mestry R (2019) 41.

³⁶ World Bank ‘*Guidance note on education systems’ response to COVID-19*’ (2020) available at <https://bit.ly/3JXSu46> (accessed 21 April 2023).

³⁷ Kona N ‘*The Impact of the Covid-19 Pandemic on Children’s Rights to Education in South Africa*’ (2022) 5.

³⁸ Spaul N & Kotze J (2015) 47.

³⁹ Save the Children (2020) ‘*Children at risk of lasting psychological distress from coronavirus lockdown*’ available at <https://bit.ly/3f6yAFL> (accessed 30 March 2023).

According to Du Plessis in most schools government provide feeding schemes, and for many children it is a highly anticipated meal of the day.⁴⁰ The extended closure of schools precluded these learners from accessing those meals unless alternative measures are in place, and during COVID-19 there were no measures in place to ensure that learners still receive those meals while engaged in remote learning.⁴¹ The General Household Survey data demonstrated that, even prior to the lockdown, about 2.5 million children lived below the food poverty line and the closure of schools severely exacerbated their lack of food.⁴² In 2018, statistics showed that approximately 77% of children in public schools, or an estimated 9 million children, received a meal at school. Therefore, without meals, children cannot fully commit to their schoolwork and during COVID-19 since schools were closed children were expected to actively exercise their right to basic education without meals.⁴³

However, the above matter was taken to court by *Equal Education* against the Minister of Basic Education and the MEC of eight provinces. The Minister of Basic Education announced that schools would be reopened and the National School Nutrition Program (NSNP) which provides daily meal for all learners in South Africa who qualify based on economic need restored on 08 June 2020, but when grade 7 and 12 reopened the NSNP meals were not delivered as promised.⁴⁴ In the case of *Equal Education and Others v Minister of Basic Education and Others*, the applicants challenged the minister and MEC's phased-in approach as a breach of the government's constitutional and statutory duty to provide a daily meal for all qualifying learners whether attending schools or studying away from school as a result of the COVID-19 pandemic.⁴⁵ The court ruled in favour of the applicants and concluded that all qualifying learners were entitled to a daily meal from the NSNP. The NSNP was explicitly introduced to address both the right to basic education under section 29(1)(a) of the Constitution and the right of children to basic nutrition under section 28(1)(1). The government's failure to provide nutrition for learners was therefore a violation of the right to food and education.

⁴⁰ Du Plessis P & Mestry R (2019) 41.

⁴¹ Van der Berg S & Spaul N (2020) 10.

⁴² Department of Basic Education 'Education Statistics in South Africa 2016' Published by the Department of Basic Education, Pretoria (2018).

⁴³ Viner RM, Russell SJ, Croker H, Packer J, Ward J, Stansfield C, Mytton O, Bonell C, & Booy R 'School closure and management practices during coronavirus outbreaks including COVID-19: a rapid systematic review. *Lancet Child Adolescent Health* 4' (2020) 397.

⁴⁴ Department of Basic Education (2020) 'State of readiness for the reopening of schools' available at <https://bit.ly/3t8YErO> (accessed 08 March 2023).

⁴⁵ *Equal Education and Others v Minister of Basic Education and Others* [2020] 4 All SA para 18.

In South African schools there is an issue of adequate resources to support learners such as furniture, classrooms, and textbooks as core teaching and learning support materials. The situation of these problems was worsened by COVID-19. After some time of lockdown, the president announced the reopening of schools for different grades, where senior phase learners were the first to resume school. During the time of reopening of schools, the COVID-19 virus was still at the peak in terms of infections. When many learners reopened, the school challenges and the serious issues that young South Africans face in every day of their schooling were exposed by COVID-19 regulations such as social distancing. In South African schools even though learners did not return to school same time, it was still a big challenge to maintain social distance due to the shortage of classrooms. Therefore, since some schools were not able to adhere to social distancing regulations, they decided to bring regulation that there must be a rotation of classes where learners will attend classes in different days because some schools were not able to adhere to social distancing regulations. To maintain social distance at schools, it was a big challenge because the government failed to build enough classrooms even before the COVID-19 pandemic. It was a violation of their right to basic education because many children were struggling to complete their schoolwork because they were not getting enough time to catch up.⁴⁶

However, it is common because South Africa's efforts towards the immediate realisation of the right to basic education are not what it should be. Both media and scholarly commentary on the pandemic's impact has coalesced around its role as a force multiplier, exposing challenges in the provision of basic education that are not so much the consequences of the pandemic, rather they were exacerbated by it.⁴⁷ COVID-19 has both exposed the magnitude of challenges facing the basic education system including inequality, school capacity, resource distribution, and technological change and access.

From the literature explored above, it can be deduced that there is scanty research which explores the government's efforts to ensure the protection of the right to basic education in South Africa during the COVID-19 pandemic. The research explored largely focuses on addressing the challenges of basic education in South Africa in general. Therefore, this research will be different from other research because all the challenges that will be addressed align

⁴⁶ Department of Basic Education (2020) *'Basic Education and SABC launch Coronavirus COVID-19 TV and radio curriculum support programmes for learners'* available at <https://bit.ly/34yANYw> (accessed 08 May 2023).

⁴⁷ Heidi B *'Challenges Facing Basic Education in the Context of COVID-19'* MISTRA Report (2020) 9.

with the impact of COVID-19 and on how it exposed that the government is failing to provide basic education for many South Africans.

1.4 Research question

The main question of my research is:

How did the South African government fare with regard to the realisation of the right to basic education during the COVID-19 era?

The following sub-questions will be explored:

1. What are the obligations of the South African government to realise the right to basic education under international law?
2. What is the current state's legislation, regulations and policies providing for the immediate realisation of the right to basic education?
3. What was the impact of COVID-19 on South Africa's immediate duty to realise the right to basic education?
 - a. What were the challenges faced by students, teachers, and educational institutions in South Africa in implementing remote learning measures during the COVID-19 pandemic?
 - b. How did the digital divide exacerbate educational inequality in South Africa during COVID-19 pandemic, particularly in terms of access to online learning resources and technologies?
 - c. What measures were taken by South African government and educational institutions to mitigate the impact of COVID-19 on the right to education, and how effective were these measures?
4. Did the government fail to make sure that learners during COVID-19 were able to continue to access basic education?
5. What lessons can be drawn from other countries in addressing the impact of COVID-19 on the right to basic education?

1.5 Research objectives

The research objectives are as follows:

1. To get a better knowledge of whether the basic education system we have in South Africa is the one that the state has promised to provide.
2. To explore the challenges on immediate realisation of the right to basic education in South Africa.
3. To explore the contribution of COVID-19 to the poor realisation of the right to basic education in South Africa.
4. To explore whether the state can be held liable for failing to ensure the immediate realisation of the right to basic education.

1.6 Limitation of research

The study will only focus on the right to basic education in South Africa; it will not be relying on empirical study to understand better how COVID-19 impacted on the right to basic education in the country. In other words, it is not a quantitative study. As a qualitative study, it will only rely on methods such as legal analysis of primary and secondary sources of information and case studies to explore this issue. To elaborate further, this research paper will focus on to what extent the legal framework in South Africa, as well as international law impacted on the response to the COVID-19 pandemic in relation to the right to basic education. It will be limited to the right to education during the pandemic.

1.7 Framework of the research

The approach of this research will rely on the principle of “substantive equality” to the right to basic education as the basis of analysis. The South African Constitution mandates the radical transformation of the public basic education system.⁴⁸ To that end, the Constitution, read with the South African Schools Act, entrenches a right of equal access to basic education for all.⁴⁹ The substantive approach to equality is rooted in the transformative ideology of the Constitution, which necessitates an acknowledgment and overcoming of the past patterns of disadvantage based primarily on the grounds of race and socio-economic class.⁵⁰ Locating my analysis in “substantive equality” will provide a pathway towards assessing changes in law, basic education policies, and practices to achieve substantive equality in basic education.

⁴⁸ LORETTE A ‘*The South African Constitution’s empty promise of “radical transformation”: unequal access to quality education for black and/or poor learners in the public basic education system*’ (2019) available at <https://orcid.org/000-0002-2113-6279> (accessed 05 June 2023).

⁴⁹ LORETTE A (2019) 53.

⁵⁰ De Vos P ‘*Basic education: democratic South Africa has failed the children*’ (2015) available at <https://www.dailymaverick.co.za/opinionista/2015-12-03-basic-education-democratic-south-africa-has-failed-the-children> (accessed 10 June May 2023).

I find that the definition of “substantive equality” in education involves a holistic approach which encompasses all learners’ level of academic achievement, the provision of an adequate school infrastructure, availability of learning materials such as textbooks, equal access to technology for all learners, and schools that embrace a substantive form of democracy.⁵¹ Therefore, in examining each of these indicators, I find the emergence of a clear pattern for poor South African learners in the public school domain; disadvantage manifests in unequal access to basic education especially during the difficult time of COVID-19 in South Africa.

1.8 Research methodology

This study will use desktop research methods, based on a review of credible sources. These sources will range from primary to secondary materials. Primary sources will include the South African Constitution together with South Africa’s education legislation, regulations and policies, international instruments and case law. International instruments are important in this regard, as South Africa has a duty imposed on it by these international instruments in relation to education. This research will also use secondary sources such as journal articles and books relevant to the impact of COVID-19 on the immediate realisation of right to basic education. Statistical data, on the other hand, will provide pass rates for past years which will then enable the paper to evaluate the effectiveness and productivity levels of current education policies.

1.9 Chapter overview

Chapter 1: Introduction

The introduction will give a brief background on the right to basic education using International and National Legal Instruments, as well as supporting commentaries. It will also include the problem statement of this research, the research questions this research aims to answer, as well as the objectives of this research. Furthermore, it will also include the research methodology to be used for this research, as well as the overview of the chapters.

⁵¹ A Lorette (2019) 79.

Chapter 2: International and Regional laws relevant to South Africa on the right to education

This chapter will explore international and regional instruments in respect of the right to basic education. This chapter will also be aimed at understanding the meaning of the right to basic education in the international and regional context. Therefore, to explore, this chapter will refer to the jurisprudence of the relevant treaties such as Universal Declaration of Human Rights, Convention on the Rights of the Child, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination. It will also refer to regional instruments such as African Charter on Human and Peoples' Rights (Banjul Charter), African Charter on the Rights and Welfare of the Child, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo protocol), African Youth Charter and academic writings of various scholars.

Chapter 3: Domestic/National laws, policies, and regulations of South Africa on the right to education

This chapter will focus on the key South African legislation such as the Constitution, the South African Schools Act (SASA) and education policies that are governing the education system in South Africa. It will review all the legislation, regulations, and policies related to access to basic education. It will critically analyze the effectiveness of legislation and policy for realising the right to basic education for many South Africans. This chapter will also focus on the shortfalls of the legislation and policies in realising the right to basic education for many South Africans especially in the Eastern Cape, KwaZulu-Natal, and Limpopo provinces.

Chapter 4: Challenges to the full realisation of the right to basic education in South Africa, and the impact of Covid-19

This chapter will focus on the challenges that affected the immediate realisation of the right to basic education. These challenges will include but are not limited to lack of infrastructure developments both in rural and urban areas, shortage of school materials such as textbooks, and lack of access to internet and technology at schools. These challenges will be discussed in detail and how they contributed to the poor realisation of the right to basic education during the COVID-19 pandemic.

It will also discuss the impact of COVID-19 on the immediate realisation of right basic education in relation to the issues that already existed. For example, during COVID-19 at schools' learners were required to social distance however, it was difficult for learners to do that because when COVID-19 was discovered in South Africa there was issue of shortage of classes at schools. It will also analyse the effectiveness of the government response to COVID-19 to ensure immediate realisation of the right to basic education. This will be done by looking at measures that were taken such as rotation attendance of learners and switch to blended learning.

Chapter 5: Responses of other countries to the impact of Covid-19: Lessons for South Africa

This chapter will discuss how other countries responded to the impact of COVID-19 in relation to the right to basic education. It will also include the comparison between the responses of different jurisdictions and South Africa's response to protect the right to basic education for young South Africans.

Chapter 6: Conclusion and recommendations

Based on the findings of the chapters above, this chapter will draw a conclusion and make recommendations for the future.

Chapter 2: International and Regional laws relevant to South Africa on the right to education

2.1 Introduction

The international understanding of the right to basic education is that it is a fundamental human right, recognized by various international instruments including the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC). These international instruments declare that access to education is a fundamental human right that is necessary for enjoyment of rights as well as advancing world development. The right to basic education provides that education should be directed towards the full development of the human personality, strengthen respect for human rights and fundamental freedoms and should be accessible to everyone regardless of race, color, religion, gender or social status.⁵²

The importance of the right to basic education holds significance beyond itself. This is evident in the human rights-based approach to education adopted by many countries following declarations such as the Dakar Framework for Action (UNESCO, 2002) and the Jakarta Declaration on the Right to Basic Education (UNESCO, 2005).⁵³ Informed by key principles such as non-discrimination, inclusion, equality, participation, accountability and the rule of law, the human rights-based approach is underpinned by the view that all children, irrespective of their backgrounds must receive basic education.⁵⁴ The obligation to provide free basic education is mandated when the state ratifies international agreements that protect the right to basic education.⁵⁵ Failure of a state to comply with these obligations constitutes a violation of international law.⁵⁶

South Africa by ratifying international instruments is also obligated to ensure the protection of the right to basic education for all learners, despite their different backgrounds. Currently, in many countries, including South Africa, the fundamental principle of international human rights law is that basic education is compulsory up to grade 9.⁵⁷ For instance, the *International*

⁵² Kishore S 'Right to Basic Education and State Responsibility' (2012) *International Journal of Education Reform*.

⁵³ UNESCO 'The Dakar Framework for Action: Education for All: Meeting our Collective Commitments' (2002) 3.

⁵⁴ Marishane RN 'the right to basic education for all: implications for school principals' (2017) available at <https://doi.org/10.19108/KOERS.28.3.2331> (accessed 18 September 2023).

⁵⁵ Arendse L 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) 14 PER /PELJ 98.

⁵⁶ K Beiter 'The Protection of the Right to Education by International Law' (2006) 2.

⁵⁷ Mbeki SD (2014) 25.

Covenant on Economic, Social and Cultural Rights states that primary education shall be compulsory and available free to all.⁵⁸ Thus, South Africa by making basic education compulsory up to grade 9 is complying with one of its international obligations in relation to the right to basic education.

2.2 International instruments

2.2.1 The Universal Declaration of Human Rights

The first international instrument to protect the right to basic education was Universal Declaration of Human Rights (UDHR). The UDHR was adopted by the United Nations General Assembly on 10 December 1948 to give content to the notion of human rights however, it is not legally binding in nature.⁵⁹ The UDHR provides for the right to basic education under article 26 in these words:

“(1) everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.”⁶⁰

Basically, in terms of this article everyone has the right to an education, and primary school education should be free and mandatory. In this context, the “primary school” refers to the first few years of formal schooling for children.⁶¹ Therefore, article 26(1) reflects the social aspect of the right to basic education and it expects the state to attend positively to the realisation of the primary levels of education. Furthermore, the state has the obligation to take deliberate steps towards realising the right to education, including devoting financial, technical and other

⁵⁸ Article 13(2)(a) ICESCR.

⁵⁹ Green C ‘70 years of impact: insight on the Universal Declaration of Human Rights’ (2018) available at <https://unfoundation.org/blog/post/70-years-of-impact-insights-on-the-universal-declaration-of-human-rights/> (accessed 10 October 2023).

⁶⁰ Article 26 UDHR.

⁶¹ Taiwo EA ‘The Implementation of the Right to Education in South Africa and Nigeria’ (LLD thesis Nelson Mandela Metropolitan University, 2011) 42.

resources which may be available nationally to this end.⁶² As has been mentioned, in so far as making basic education compulsory the South African government can be said to adhere to this requirement through SASA which makes basic education compulsory and free for children from Grade R to Grade 9.⁶³

2.2.2 The International Covenant on Economic, Social and Cultural Rights

The second international instrument that provides for the protection of the right to basic education is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was also adopted by the UNGA on 19 December 1966.⁶⁴ The ICESCR imposes legally binding obligations on state parties, and it is one of the two treaties drafted to turn the principles of the UDHR into binding legal provisions, including the right to education, in an international agreement. Article 13(2)(a) of this international instrument on protection of the right to basic education states that 'primary education shall be compulsory and available free to all.'⁶⁵ Article 13 of ICESCR is arguably said to be the most comprehensive formulation of the right to education in international agreements because it covers all the aspects of education from primary to tertiary education.

ICESCR General Comment No.11 provides detailed content to the right by clarifying the two core elements of "free" and "compulsory."⁶⁶ It clarifies that 'compulsory education' means obligation of the appropriate government to provide free elementary education and ensure compulsory admission, attendance and completion of elementary education to every child in the six to fourteen age group.⁶⁷ 'Free' means that education shall be free for every child and the governments shall be liable to pay any kind of fee or charges or expenses which may prevent children from pursuing and completing elementary education.⁶⁸ This specifies the duties and responsibilities of appropriate governments, local authority and parents in providing free and compulsory education, and sharing of financial and other responsibilities between the Central and State Governments. It lays down the norms and standards relating to buildings and infrastructure, school-working days, teacher-working hours, etc.⁶⁹

⁶² Assim U 'The effects of reporting on the realisation of children's rights in Central Africa (Chad, Congo and the DRC)' in Miamingi R *State party reporting and realisation of children's rights in Africa* (2020) 58.

⁶³ Mbeki SD (2014) 27.

⁶⁴ Taiwo EA (2011) 112.

⁶⁵ Article 13(2)(a) ICESCR.

⁶⁶ CESCR General Comment 11, (1999) para 7.

⁶⁷ General Comment 11, (1999) para 7.

⁶⁸ General Comment 11, (1999) para 7.

⁶⁹ Arendse L (2011) 101.

South Africa is one of the countries that has signed and ratified this Covenant therefore it has the duty to comply with its provisions. In South Africa the requirement of free and compulsory basic or elementary education is not as strict when it comes to secondary or higher education. For example, section 29(1)(b) of the Constitution subject further education to progressive realisation within available resources.⁷⁰ Therefore, in relation to the primary education provided by s 29(1) of the Constitution the state cannot discharge the onus of proving that it has not complied with its obligation to provide basic education because of a scarcity of resources.⁷¹ This is because the right to basic education requires immediate realisation as it is stated in article 14 of ICESCR that each country that joins this agreement but does not yet have mandatory, tuition-free primary schooling must create an action plan within two years to gradually implement this policy over a set period.⁷² Therefore, state parties need to submit reports on the measures they have adopted, and the progress made in achieving the observance of the rights recognised in the Covenant.⁷³

2.2.3 The Convention on the Rights of the Child

The third international instrument that gives the content to protection of the right to basic education is the Convention on the Rights of the Child (CRC) which was adopted by the UNGA in 1989 and entered into force on 2 September 1990. The CRC contains provisions relating to education in articles 28 and 29. Article 28(1) state 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.”⁷⁴ This means that the state parties to this treaty including South Africa has the duty to provide every child with basic education without any cost to the child or their parents. However, the Committee interpreted the article 28 of CRC which is the right to education as the right that does not only encompass the access but also the quality of education that is inclusive, equitable and empowering.⁷⁵

In addition, the CRC includes two aspects that are not covered in the ICESCR. Article 28(1)(d) requires countries that are part of the treaty to ensure that educational and vocational resources

⁷⁰ Constitution s 29(1)(b).

⁷¹ Mbeki SD (2014) 39.

⁷² Article 14 ICESCR.

⁷³ Marishane RN (2017) 25.

⁷⁴ Article 28(1)(a) of CRC.

⁷⁵ CRC General Comment 1, para 9.

are easily accessible to all children.⁷⁶ Article 28(1)(e), on the other hand, requires that States parties take measures to encourage regular attendance at schools and the reduction of drop-out rates.⁷⁷ Article 28(2) of this Covenant directs state parties to “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.”⁷⁸ This provision is important as it aims to safeguard children from harsh, inhuman, or degrading disciplinary actions within educational settings.⁷⁹ The Committee on CRC adopted the first general comment emphasizing that children should not lose their human right by entering school premises therefore education must be provided in a way that respect strict limits on discipline stated in article 28(2) and promote non-violence in schools.⁸⁰ This was also one of the points raised by the state in advocating for elimination of corporal punishment in South African schools during the *Christian Education* case.⁸¹

2.2.4 The Convention on the Elimination of All Forms of Discrimination against Women

Another important international instrument relevant to the protection of the right to basic education is International Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW). The purpose of this instrument is to promote equality and to ensure that women are provided with access to realise their right to education.⁸² It provides for the right to education in article 10, which stipulates that “States parties shall take all appropriate measures to eliminate discrimination against women in order to ensure that women have equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women.”⁸³

Since, South Africa has a history of gender discrimination on education this is an important instrument to fight against gender inequality at schools. This is because at the international level discrimination against women is a serious violation human rights and South Africa as a state party to CEDAW have a duty to comply by taking appropriate measures to fight discrimination against gender to all South African schools. Committee on CRC also emphasis that states should be active in identifying any individual or group that is experiencing any form

⁷⁶ Article 28(1)(d) CRC.

⁷⁷ Marishane RN (2017) 37.

⁷⁸ Article 28(2) CRC.

⁷⁹ Mbeki SD (2014) 28.

⁸⁰ CRC General Comment 8, para 17.

⁸¹ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

⁸² Available at <https://www.ohchr.org/en/treaty-bodies/cedaw> (accessed 15 April 2024).

⁸³ Article 10(1) CEDAW.

of discrimination.⁸⁴ However, in many South African schools' discrimination on gender still exists especial in rural schools.

2.2.5 The International Convention on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted in 1965 and entered into force in four years later. ICERD also provide articles relevant to the protection of the right to education. Article 5 states that in compliance with article 2 of this convention states parties to this convention should undertake measures to prohibit and to eliminate racial discrimination in all forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, especially in the enjoyment of the right to education and training.⁸⁵ Article 7 imposes a responsibility on states to take measures in the field of education in order fight discrimination.⁸⁶

These articles are very important because the discrimination on the basis of race and gender is a serious problem in many countries and it is encountered in the education systems of many states including South Africa.⁸⁷ Discrimination on the basis of race may take the form of active discrimination by the state as was the case in South Africa under apartheid government.⁸⁸ Therefore, the majority of children who suffer from the state's inability to recognise the right to basic education in the country happen to be black and from impoverished parts of the country.

However, often such discrimination may be static in nature taking the form of discriminatory practices which have manifested themselves in the society with the state failing to take steps to eliminate these practices.⁸⁹ In South Africa, during Covid-19 the right to basic education equally and without discrimination has been put on back burner. South African government failed to provide public schools especially in rural areas with necessary study materials to support online learning while learners in private schools' learners were provided with

⁸⁴ CRC General Comment 5, para 12.

⁸⁵ Article 5(v) of ICERD.

⁸⁶ Article 7 of ICERD

⁸⁷ Mbeki SD (2014) 33.

⁸⁸ Strohwal A *'The child's rights to, in and through basic education: An analysis of South Africa's international obligations'* (2021) 82.

⁸⁹ Arendse L (2011) 78.

everything.⁹⁰ As a result, online learning did not work for many young South Africans especially those from poor families.

2.2.6 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966, and it also forms part of International Bill of Rights. ICCPR is multilateral treaty that commits nations to respect the civil and political rights of individuals including the right to life, freedom of religion and freedom from discrimination.⁹¹ The ICCPR does not explicitly provide a specific article that deals with the protection of the right to basic education. However, it has few articles relevant to education such as article 18, 26 and 27. Article 18 states that “Everyone shall have the right to freedom of thought, conscience and religion”⁹² and article 18(4) allow parents or guardians the liberty to ensure the religious and moral education of their children.⁹³

Article 18(4) is interpreted to allow the teaching in public schools of subjects such as general history of religion and ethics, if it is given in a neutral and objective manner.⁹⁴ The freedom of parents or legal guardians provided in article 18(4) to ensure that their children receive a religious and moral education consistent with their beliefs is linked to guarantees of freedom to teach religion or beliefs provided for in article 18(1). However, the Committee noted that the public teaching which includes the teaching about a particular religion or belief violate article 18(4) unless is non-discriminatory or is provided to meet the wishes of parents or guardians of children.⁹⁵

2.3 Regional instruments

The right to basic education is safeguarded not only by the global agreements but also by regional agreements. In Africa, regional instruments such as the African Charter on Human and Peoples’ Rights, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, the African Youth Charter and African Union Agenda 2063. There are also the recently endorsed

⁹⁰ Dube B ‘Rural online learning in the context of COVID-19 in South Africa: Exoking an inclusive’ (2020) available at <https://doi.org.10.17583/remie.2020.5607> (accessed 25 September 2023).

⁹¹ Available at <https://www.ohchr.org/en/treaty-bodies/ccpr/background-international-covenant-civil-and-political-rights-and-optional-protocols> (accessed 23 May 2024).

⁹² Article 18(1) of ICCPR.

⁹³ Available at <https://www.aq.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/rights-freedom-thought-conscience-and-religion-or-belief> (accessed 23 May 2024).

⁹⁴ HRC General Comment 22, para 6.

⁹⁵ General Comment 22, para 6.

Abidjan Principles that guide states in their responsibility to provide basic education. However, the Abidjan Principles are not legally binding.

2.3.1 African Charter on Human and Peoples' Rights (Banjul Charter)

The African Charter on Human and Peoples' Rights, commonly referred to as the Banjul Charter, was approved by the Organisation of African Unity in 1981 and became effective on 21 October 1986.⁹⁶ The Charter acknowledges fundamental civil and political rights as well as economic, social and cultural rights. It outlines the primary responsibilities of the States parties in article 1 by stating that they must acknowledge the rights, duties and freedoms outlined in this Charter and commit to implementing them through legislative or other measures.⁹⁷ However, the Banjul Charter does not specifically address the right to basic education as it is only article 17(1) that is dedicated to the right to education. It provides that every individual shall have the right to education and that every individual may freely take part in the cultural life of his community.⁹⁸ The supervision of the ACHPR is entrusted to the African Commission on Human and Peoples' Rights. State parties are required to submit reports on the measures taken by them to give effect to the rights of the Charter.⁹⁹

2.3.2 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted in 1990 and came into force in 1999 and it establishes more extensive and detailed right to education compared to African Charter on the Human and Peoples' Rights. Article 11 of the Charter ensures the right to education, outlines the objectives of education, and specifies the responsibility of States in fulfilling children's right to education.¹⁰⁰ It states that 'every child shall have the right to an education.'¹⁰¹ The ACRWC includes provisions that are similar to the CRC. In addition to reiterating the educational objectives outlined by the CRC, the ACRWC introduces three new educational aims.¹⁰² These include preserving national independence and territorial integrity, promoting African unity and solidarity and fostering a child's understanding of primary health care.¹⁰³ Article 11(6) of the ACRWC introduces a novel

⁹⁶ Taiwo EA (2011) 109.

⁹⁷ Article 1 ACPHR.

⁹⁸ Article 17(1) ACHPR.

⁹⁹ Article 62 ACHPR.

¹⁰⁰ Article 11 ACRWC.

¹⁰¹ Article 11 ACRWC.

¹⁰² Mbeki SD (2014) 40.

¹⁰³ Article 11(2)(e-h) ACRWC.

requirement for States to implement measures that allow pregnant learners to pursue their education on their capabilities.¹⁰⁴ This provision is crucial considering that certain schools used to treat pregnancy as a disciplinary issue, often resulting to the suspension or expulsion of pregnant girls from school. As a result, State parties have the responsibility to also submit reports on the measures taken to implement the rights outlined in the Charter.¹⁰⁵ Therefore, all state parties to the Charter including South Africa have responsibility to take appropriate measures to ensure immediate realisation of the right to basic education.

2.3.3 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo protocol)

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is also known as Maputo protocol was adopted in 2003 and highly relevant to the right to education in South Africa. South Africa ratified Maputo protocol in 2004. Maputo protocol provides a long list of rights to women such as the right to life, right to dignity and right to education and training. The right to education and training is provided in article 12 which requires States to “take all appropriate measures to eliminate all forms of discrimination against women and guarantee equal opportunity and access in sphere of education and training.”¹⁰⁶ States should also take appropriate measures to protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions.¹⁰⁷ These provisions require a positive action on states to fight against discrimination on the field of education and are almost similar to the formulation of article 10 of CEDAW. In South Africa where there is a history of gender inequality in education which is still existing, Article 12 of Maputo protocol is an important reminder for South Africa to address all gender inequalities in education and ensure that all South Africans are equal in the field of education.

2.3.4 African Youth Charter

The African Youth Charter (AYC) was adopted in 2006 and came into force in 2009. It is the first regional instrument that recognizes and supports national policies, programs and activities

¹⁰⁴ Article 11(6) ACRWC.

¹⁰⁵ Article 43(1) of ACRWC.

¹⁰⁶ Article 12(1)(a) Maputo protocol.

¹⁰⁷ Article 12(1)(c) Maputo protocol.

related to youth development.¹⁰⁸ It refers to the rights such as freedoms and responsibilities of African youth including the right to education. Article 13(1) is one of the utmost important articles and it states that “Everyone youth person shall have the right to education of good quality.”¹⁰⁹ This article refers to different forms of education which include both formal and informal learning. Therefore, the African Youth Charter imposes a duty on member states to provide free and compulsory basic education and take steps to minimise the indirect costs of education; revitalise vocational education and training relevant to current and prospective employment opportunities and expand access by developing centres in rural areas.¹¹⁰ Article 13 provisions are aligned with the commitment of African Union in achieving Continental Education Strategy for Africa and the Sustainable Development Goals which contained in goal 4.

2.3.5 African Union Agenda 2063

The African Union Agenda 2063 is a strategic framework that was adopted by African countries for the socio-economic transformation of African continent over the period of 50 years.¹¹¹ It was adopted in 2015 and one of its provisions provides for the inclusive growth and sustainable development and access to quality right to education for all citizens in Aspiration 6.¹¹² It recognizes the education as one of the most important rights that should be prioritized for the development of Africa and realisation of the vision of African Union. This Agenda have significant implications on many African countries including South Africa. South Africa as the member of this framework is committed to implementing the provisions of Agenda 2063 including those related to the right to education and it has strengthened its commitment by trying to address the remaining challenges in the education sector.

2.4. Abidjan principles

Abidjan Principles were developed to assist various stakeholders, especially states in comprehending their responsibilities within the international legal framework concerning the right to education, particularly with the growing presence of private entities in the education

¹⁰⁸ Ugwu B ‘African Youth Charter’ (2023) available at <https://youngafricanpolicyresearch.org/african-youth-charter/> (accessed 25 May 2024).

¹⁰⁹ Article 13(1) of AYC.

¹¹⁰ Summary of African Youth Charter available at <https://youngafricanpolicyresearch.org/african-youth-charter/> (26 May 2024).

¹¹¹ Available at <https://www.africaunionfoundation.org/agenda-2063/> (accessed 28 May 2024).

¹¹² Available at <https://au.int/en/agenda2063/aspirations> (accessed 28 May 2024).

sector.¹¹³ These principles consist of ten fundamental guidelines that outline states' duties to offer high-quality education free public education and to implement regulations and oversight mechanism for private education.¹¹⁴ The Abidjan Principles also emphasize that private educational institutions have individual obligations not to hinder or interfere with the right to education, and to provide reparation when they have negatively impacted on the right.¹¹⁵ According to Abidjan Principles it is crucial for states to ensure that private institutions are suitable, conforming to standards set by the state and informed by international human rights law.¹¹⁶ These principles are significant in the South African context, as the number of low-fee private schools and partial privatization of the schooling system is likely to increase.

The obligations of independent schools under section 29(1)(a) of the Constitution were unclear.¹¹⁷ Many independent schools potentially offer education beyond "basic education" and operate as private entities not necessarily serving public interest. In 2022, the Constitutional Court examined the involvement of independent schools in providing of basic education in the case of *AB and Another v Pridwin Preparatory School*.¹¹⁸ Here, Pridwin an exclusive independent primary school terminated the contract with the parents of two students due to parent's misconduct towards school staff without mutual agreement.¹¹⁹ The contract between Pridwin and the parents' contained clause that allowed Pridwin to unilaterally terminate the contract. The parents argued that they were entitled to a degree of procedural fairness before Pridwin could cancel the contract, as the cancellation would infringe on their children's right to basic education.¹²⁰

However, Pridwin argued that obligations under section 29(1)(a) of the Constitution did not apply to them because they were not providing a "basic education" in terms of section 29(1)(a).¹²¹ It was also argued that responsibilities outlined in section 29(1)(a) were obligations of the state.¹²² The court emphasized that 'independent schools cannot operate as isolated centers of authority except from constitutional responsibilities.'¹²³ Consequently, right to

¹¹³ Mtsumi A 'Commentary on the Abidjan Principle on the Right to Education' (2023) 6.

¹¹⁴ Mtsumi A (2023) 6.

¹¹⁵ Mtsumi A (2023) 7.

¹¹⁶ Mtsumi A (2023) 8.

¹¹⁷ Constitution s 29(1)(a).

¹¹⁸ *AB and Another v Pridwin Preparatory School* CCT249/18 (2020) para 33.

¹¹⁹ *AB and Another v Pridwin Preparatory School* (2020) para 33.

¹²⁰ *AB and Another v Pridwin Preparatory School* (2020) para 34.

¹²¹ *AB and Another v Pridwin Preparatory School* (2020) para 39.

¹²² *AB and Another v Pridwin Preparatory School* (2020) para 40

¹²³ *AB and Another v Pridwin Preparatory School* (2020) para 40

establish an independent school and the right to basic education in section 29 of the Constitution are complementary. While acknowledging that the obligations of an independent school are different from those of a public school, independent schools do grant access to the right to basic education and have a responsibility not to violate that right.¹²⁴

2.5 Conclusion

In conclusion, the right to basic education for all is now widely recognized as a fundamental human right. This chapter has shown that various international instruments provide content to the right to basic education and demonstrate a strong commitment by the international community to realise this right. As a result, the right to basic education is increasingly seen as not only a fundamental right, but also as essential for the realisation of all other rights.¹²⁵ However, South Africa has faced many challenges in complying with its international obligations during the COVID-19 pandemic which has highlighted the existing inequalities in its education system.¹²⁶ This is unacceptable because South Africa has an international obligation to provide free primary education for all children.

¹²⁴ *AB and Another v Pridwin Preparatory School* (2020) para 41.

¹²⁵ Kishore S 'the right to basic education: international obligations and regional normative action in Africa' (2004) available at https://brill.com/view/journals/sfyo/12/1/article-p437_12.xml (accessed 13 September 2023).

¹²⁶ Landa N, Zhou A & Marongwe N 'Education in emergencies: Lesson from Covid-19 in South Africa' (2021) available at <https://doi.org/10.1007/s11159-021-099903z> (accessed 20 September 2023).

Chapter 3: Domestic/National laws, policies, and regulations of South Africa on the right to education

3.1 Introduction

The post-1994 government inherited an education system rooted upon and full of inequalities. The system was racially fragmented and characterised by a disproportionate distribution of resources with former white schools receiving more resources than schools of other racial groups.¹²⁷ When the South African democratic government came into power, it showed its commitment to educational transformation as enshrined in the new constitution to shape the future of young South Africans. Further, the National Department of Education (NDE) received a constitutional mandate to put measures in place to realise the right to basic education in South Africa. As a result, democratic rules were applied to create a sound legislative policy framework for educational transformation.¹²⁸ South Africa enacted basic education laws, policies, and regulations such as the South African Schools Act (SASA), National Education Policy Act (NEPA), Employment of Educators Act (EEA), Children’s Act (CA), National Norms and Standards for School Funding (NNSSF) and Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure to give effect to section 29(1)(a) of the Constitution.

3.2 National legislation

3.2.1 Constitution of the Republic of South Africa

The right to basic education is the only unqualified socio-economic right in the Constitution.¹²⁹ An unqualified socio-economic right for the purpose of South African Constitution is a right that is formulated in a way which does not include internal limitations in its textual formulation.¹³⁰ This right is enshrined in section 29(1)(a) of the South African Constitution, which provides that “everyone has the right to a basic education.”¹³¹ The Constitutional Court has therefore held that s 29(1)(a) of the constitution imposes a positive obligation on the state

¹²⁷ Ocampo ML ‘A brief history of educational inequality from apartheid to the present’ (2004) available at https://web.stanford.edu/~jbaugh/saw/Lizet_Education_Inequality.html (accessed 17 April 2024).

¹²⁸ Ocampo ML (2004) 19.

¹²⁹ Woolman S and Fleisch B ‘*The Constitution in the Classroom: Law and Education in South Africa 1994-2008*’ (2009) 120.

¹³⁰ Woolman S and Fleisch B (2009) 120.

¹³¹ Constitution s 29(1)(a).

to provide and make basic education available to every person.¹³² In terms of this section, the right to basic education is not subject to ‘progressive realisation’ within available resources such as, the rights to further education, housing, healthcare, food, and social security.¹³³ This was also confirmed in the case of *Juma Masjid* that the right to basic education is not like other socio-economic rights because it requires immediate realisation.¹³⁴ There are no internal limitations requiring that the right be progressively realised within available resources subject to reasonable legislative measures. However, 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”.¹³⁵ Therefore, any limitation of the right to basic education should comply with section 36 of the Constitution.

That the Constitution, under Section 29(1), guarantees the right to basic education and this right is immediately realisable,¹³⁶ Means that every child in South Africa must automatically have access to basic education and the government must make provision to ensure that this right is not infringed. However, it is concerning that despite the present constitution which undoubtedly protects the right to basic education, South Africa still has learners who are denied access to basic education. The Constitutional court recently handed judgement on the case of *Moko v Acting Principal of Malusi Secondary School* where a grade 12 learner was denied to write paper 2 of Business Studies as part of the matric examination since he failed to attend extra classes.¹³⁷ The court found that the matric examinations fall within the purview of the ‘basic education’ which is protected by s 29(1)(a) of the Constitution.¹³⁸ As a result, the Constitutional Court declared the conducted of the Acting Principal to be a violation of the right to basic education.¹³⁹

3.2.2 South African Schools Act (SASA)

¹³² *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) para 47.

¹³³ Harding M ‘South African constitutional court confirms that the right to basic education encompasses access to final exams’ (2023) available at <http://www.right-to-education.org/blog/south-african-constitutional-court-confirms-the-right-basic-education-encompasses-access-final> (accessed 18 September 2023).

¹³⁴ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) para 36.

¹³⁵ Mtswesi A ‘The right to basic education’ (2024) available at <https://hsf/publications/hsf-briefs/the-right-to-basic-education> (accessed 28 May 2024).

¹³⁶ Constitution s 29(1).

¹³⁷ *Moko v Acting Principal of Malusi Secondary School* (unreported case no CCT297/20, 28-12-2020) para 8.

¹³⁸ *Moko v Acting Principal of Malusi Secondary School* (2020) para 11..

¹³⁹ *Moko v Acting Principal of Malusi Secondary School* (2020) para 11.

In addition to section 29 of the Constitution enshrining the right to basic education, the education sector is governed by the South African Schools Act (SASA). The South African Schools Act was enacted in 1996 and put into effect through the basic education department that is mandated to deliver and monitor the standard of education provided throughout South Africa.¹⁴⁰ It is currently the landmark legislation that tried to transform South African education system by increasing access to education and improving the quality of basic education, especially for learners from disadvantaged backgrounds.¹⁴¹ Although there are still challenges toward putting the provisions of SASA into action, South Africa has taken a positive action to comply with its international obligation to provide free and compulsory basic education by enacting this legislation to support section 29(1)(a) of the Constitution. Section 3(1) of SASA states that all children between the ages of 7 to 15 should have access to free and compulsory quality education without any form of discrimination.¹⁴² This provision complies with South Africa's international and regional obligation to make basic education compulsory at the age of 7 to 15 years as this was also emphasized by African Charter on the Rights and Welfare of the Child.

This act also provides two types of schools, these being independent schools that are largely used by the middle class and elites, and public schools attended by the majority of children whose families live below the poverty line.¹⁴³ It regulates the provision of public schools and the governance of schools, in particular the establishment and operation of School Governing Bodies (SGB), the funding of schools including state responsibilities, school budgets, fees and the framework for funding rules or norms, and the establishment and funding of independent (private) schools.¹⁴⁴

In the governing of schools, section 16A of the SASA outlines the functions and responsibilities of the principal of the public school.¹⁴⁵ This provision is also a primary source of discussions on the powers of SGB regarding management of all educators and appointment of support staff.¹⁴⁶ According to this section, the principal has responsibility for the professional

¹⁴⁰ Ndzendze B & Manaka L '*Basic education sector marred by a lack of political will*' (2022) available at <http://mq.co/thoughtleader/opinion/2022-07-13-basic-education-sector-marred-by-a-lack-of-political-will/> (accessed 20 September 2023).

¹⁴¹ Motala S '*Educational access in South Africa*' (2011) available at <https://journals.co.za/doi/epdf/10.10520/EJC160137> (accessed 15 May 2024).

¹⁴² SASA s 3(1).

¹⁴³ Ndzendze B & Manaka L (2022) 11.

¹⁴⁴ SASA s 34(1).

¹⁴⁵ SASA s 16A.

¹⁴⁶ Akambelwa MMD '*Children's Right to Education: A Case of School Fee Policies in South Africa*' (2018) 27.

management of the school including implementation of policies and the management of staff and resources.¹⁴⁷ However, there have been some debates over the constitutionality of s 16A of SASA with some arguing that it gives the state too much control over the governance of schools.¹⁴⁸ This is because it provides democratic school governance through SGB powers to govern schools' financial management while the SGB members may lack the necessary knowledge for financial management which result to inability to work out practical solutions of schools' financial problems.¹⁴⁹

To ensure that every child has access to basic education without discrimination, section 5(1) of SASA provides that public schools must admit learners and serve their educational requirements without being unfairly discriminated.¹⁵⁰ However, the admission of learners is a problem every year in South African schools with several learners being denied admission to schools. For example, in 2017, thirty-seven learners in Phakamisa High School were denied admission to school due to the admission policy that was implemented by the governing body of that school to exclude undocumented learners.¹⁵¹ The matter was taken to court and it was decided in favour of the learners, with the court declaring the relevant sections of the admission policy unconstitutional and in violation of the right to basic education.¹⁵² Therefore, all the children in South Africa regardless of the ability to produce birth certificates have the right to receive basic education. Should any child in South Africa be denied accessed to education under any ground listed in s 5 of SASA and s 9(3) of the constitution that will be in infringement of the child's right to basic education and a breach of South Africa's international obligation to provide basic education without discrimination.

3.2.3 National Education Policy Act (NEPA)

The National Education Policy Act (NEPA) was enacted in 1996 and brought into law the legislative policies monitoring the responsibilities of the Minister of Education, as well as the formal relations between national and provincial authorities.¹⁵³ For example, it granted the minister of basic education the authority to determine the policies with regards to the shapes and sizes of feeder zones that constrain the ability of the learners to access the schools they

¹⁴⁷ Suzaan V *The constitutionality of section 16A of the South African Schools Act 84 of 1996* (2013) 15.

¹⁴⁸ Suzaan V (2013)15.

¹⁴⁹ SASA s 16.

¹⁵⁰ SASA s 5(1).

¹⁵¹ *Centre for Child Law and Others v Minister of Basic Education and Others (2840/2017)* para 22.

¹⁵² *Centre for Child Law and Others v Minister of Basic Education and Others (2017)* para 42.

¹⁵³ Department of Education 'NEPA admissions regulations' (1998) 34.

attend.¹⁵⁴ That imposes the responsibility on MEC of each province to ensure all children live in their provinces are able to attend schools closer to their homes. Therefore, all the children of parents who live within the feeder zone have the right to attend the school within that area and whose parents' work address fall within the feeder zone the school their children have the right to attend the school in that area.¹⁵⁵ Unfortunately, some learners are still being denied space in schools that are within their feeder zone. This has recently happened in (Musgrave area) in KZN where a child was denied a space at the school nearby 1.5 km from their home due to the limited space.¹⁵⁶ According to section 33 of NEPA denying a child admission to a school in the area where the child lives is a violation of the child's right to basic education. Yet, it is still happening mostly in Gauteng province.

3.2.4 Employment of Educators Act (EEA)

The Employment of Educators Act is one of the important pieces of legislation relevant to the right to basic education in South Africa. This act was enacted in 1998 to regulate the employment of educators in South African schools to ensure a fair and transparency of employment.¹⁵⁷ Section 5 of the EEA provides that the Head of Department of Education (HDE) in each province determines the number of allocations of post for educators depending on factors such as number of learners in a class and subjects offered.¹⁵⁸ However, this provision is continuing to disadvantage poor schools especially in rural areas because schools in urban areas are likely to get more allocations of educator posts,¹⁵⁹ while schools in rural areas where the learners are very few at schools will be unlikely to benefit from more allocation of educators.

Consequently, South Africa is currently facing a challenge of shortage of teachers in provinces like Eastern Cape and Limpopo compared to Western Cape and Gauteng.¹⁶⁰ That was worsened by the impact of COVID-19 when many teachers were unable to return to work after lockdown due to health concerns and that resulted to a reduction in the number of teachers available to

¹⁵⁴ Department of Education (1998) 34.

¹⁵⁵ Department of Education (1998) 34.

¹⁵⁶ Walford G *'Ethnographic methodology: A virtual special issue of ethnography and education'* (2016) available at <https://www.education.ox.ac.uk/people/geoffrey-walford/> (accessed 02 June 2024).

¹⁵⁷ Mnguni S *'The application of section 17 of the Employment of Educators' Act'* (LLM thesis Nelson Mandela University, 2016) 66.

¹⁵⁸ EEA s 5.

¹⁵⁹ Brickhill J & Van Leeve Y *'Basic education provisioning'* (2016) *2ed Basic Education Rights Handbook* Ch13.

¹⁶⁰ Wills G *'South African teacher shortages as revealed through class sizes and learner-educator ratios'* (2023) available at <https://tdd.sun.ac.za> (accessed 25 May 2024).

teach learners. Many learners were left behind without the support they needed to continue exercising their right to education.

3.2.5 Children's Act (CA)

In addition, another relevant legislation to the protection of the right to basic education is the Children's Act that was enacted in 2005. It is largely focusing on the protection of children's rights, including provisions for the protection of children's right to education.¹⁶¹ These provisions are in compliance with the international standard which imposes the duty on states to ensure that educational institutions are easily accessible to everyone without any ground of discrimination.¹⁶² Therefore, South Africa has an obligation to remove all the obstacles unfairly hindering children from equal enjoyment of the right to education regardless of where they are. That is very important in the context of South Africa's basic education because during the COVID-19 pandemic, more children from rural areas were struggling to access education compared to children from urban areas due to a lack of online learning facilities.

3.3 Education policies

Since 1994, the government's focus has been to redress educational expenditure inequalities by developing policies such as the National Norms and Standards for School Funding (NNSSF), the No-Fee School Policy (NFSP), intended to excessively allocate state funds to low socio-economic schools,¹⁶³ National School Nutrition Programme NSNP and National Learner Transport Policy. These are discussed briefly below.

3.3.1 National Norms and Standards for School Funding (NNSSF)

The National Norms and Standards for School Funding (NNSSF) policy is an important framework that guides the allocation of resources in South African schools. In the context of South African basic education, this policy aims to address the historical inequalities in funding and resource allocation, particularly between schools in urban and rural areas, and between former Model C schools and township schools.¹⁶⁴ The NNSSF policy provides a statutory basis

¹⁶¹ Murungi N 'The Duty to provide basic education for children with severe and profound intellectual disabilities' (2011) ESR Review 11.

¹⁶² Article 2 of the ICESCR; Article 2 of the CRC; Article 2 & 3(1)-(2) of the ACHPR & Article 2 (1) & (2) of the AYC.

¹⁶³ Mestry R & Ndhlovu R 'The implications of the National Norms and Standards for School funding policy on equity in South African public schools' (2014) Vol.34 No.3.

¹⁶⁴ Mestry R 'A critical analysis of National Norms and Standard for School Funding policy: Implications for social justice and equity in South Africa' (2014) available at

for schools funding and schools are now classified into wealth quintiles and subsidised accordingly.¹⁶⁵ It ensures that all South African schools receive a minimum allocation of resources based on learner enrollment, poverty quintiles, and school classification.¹⁶⁶ Thus, it prioritizes schools in rural areas by recognizing the additional costs associated with delivering education in these contexts. This means that schools with large numbers of learners from low-income backgrounds such as rural areas should receive more funding to address their unique challenges.

However, the COVID-19 pandemic showed that despite the effort that South Africa has made to fight inequity and inequality in school funding, the basic structures of the education system in South Africa are not yet fully changed. It is evident that disproportionate allocations of resources which impact on teacher quality and learner performance still exist especially in rural and township schools.¹⁶⁷ During the COVID-19 pandemic, school learners were provided with tablets and laptops to be able to participate in online learning but learners from rural schools were not given such resources. Nevertheless, this policy was amended by SASA for independent schools to also include no-fee exemption and no-fee school policies which will be discussed below.

3.3.2 No-Fee School Policy (NFSP)

The No-Fee School Policy is a significant initiative for basic education in South Africa aiming to provide young South Africans with free basic education. It abolished school fees in designated schools, recognizing that financial constraints could prevent a child from accessing basic education.¹⁶⁸ The abolishment of fees in South African public schools reduced the financial burden on parents and allows children to attend school without fear of being financially excluded as it was the case before 1994. The no-fee schools' policy is an essential part of the South African government's strategy to alleviate the effects of poverty, and to redress the past imbalances in the education system, and to give poor learners free education and now children are no longer required to pay for school fees to get a basic education.¹⁶⁹

<https://www.researchgate.net/publication/284357497> *The implications of the National Norms and Standards for School Funding policy on equity in South African public schools* (accessed 21 May 2024).

¹⁶⁵ Mestry R & Ndhlovu R (2014) 88.

¹⁶⁶ Mestry R (2014) 47.

¹⁶⁷ Mestry R (2014) 47.

¹⁶⁸ Pampallis J 'School fees' (2017) *Centre for Education Policy Development* available at

<https://www.saide.org.za> (accessed 17 May 2024).

¹⁶⁹ Akambelwa MMD (2018) 27.

3.3.3 National School Nutrition Programme (NSNP)

The National School Nutrition Programme (NSNP) previously known as Primary School Nutrition Programme which was launched in 1994 is an important national school feeding scheme that feeds more than nine million South African learners.¹⁷⁰ It is aiming to address hunger and malnutrition among learners in South African schools by providing learners with daily meals at schools.¹⁷¹ In South Africa this is a very important initiative because nutrition plays an important role in cognitive development and academic performance. As a result, ever since this initiative was implemented, there have been significant improvements in learner attendance, concentration, and overall well-being.¹⁷² However, in 2020 the COVID-19 pandemic significantly disrupted the NSNP in South Africa due to the schools' closure leaving millions of children with no food.¹⁷³ After the schools were closed due to COVID-19 the traditional model of this programme of providing meals in schools was no longer feasible.

This led to a famous question about the effectiveness of this programme, whether it meets the existing international human rights standards when it fails to provide learners with food when the schools are closed.¹⁷⁴ In June 2020 when the schools reopened the right to basic education was alleged to have been violated by the government after the NSNP failed to provide school nutrition in eight provinces. However, that problem was later resolved in court and school nutrition was provided in those provinces although the NSNP is still facing challenges in other provinces. For example, a few months back in KZN about six thousand schools were not supplied with a feeding scheme after the Department of Education had failed to pay suppliers for months.¹⁷⁵

3.3.4 National Learner Transport Policy (NLTP)

¹⁷⁰ Available at <https://section27.org.za/campaigns/national-school-nutrition-programme/> (accessed 27 April 2024).

¹⁷¹ Available at <https://section27.org.za/campaigns/national-school-nutrition-programme/> (accessed 27 April 2024).

¹⁷² Hall K & Monson J 'Free learn: The School Fee Exemption policy and National School Nutrition Programme' (2006) available at <https://ci.uct.ac.za> (accessed 22 April 2024).

¹⁷³ Matidza K 'The effects of COVID-19 on in-school nutrition' (2023) available at <https://news.uj.ac.za/news/examining-the-impact-of-covid-19-on-in-school-nutrition-programmes-2/> (accessed 02 June 2024).

¹⁷⁴ Mulaudzi L, Reyneke M & Gcelu N 'Evaluating the South African National Nutrition Programme during schools breaks against the core principles and the right to education the Convention on the rights of the child' (2023) available at <https://www.tandfonlin.com/doi/epdf/10.1080/23311886.2023.2290692?needAccess=true> (accessed 03 June 2024).

¹⁷⁵ Sikhakhane N 'KZN school feeding scheme suppliers to sue education department over payment delays' (2024) available at <https://www.dailymaverick.co.za/article/2024-08-29-kzn-school-feeding-scheme-suppliers-to-sue-education-department-over-payment-delays/> (accessed 27 August 2024).

The National Learner Transport Policy was developed in 2009 and approved in 2015. The purpose of this policy is to address the challenges of accessibility and safety of learners and to improve the quality of education by providing safe, integrated and sustainable transport for learners.¹⁷⁶ In terms of the NLTP, all learners who walk a minimum of 5 km from home to the nearest school qualify to be scholar transport beneficiaries.¹⁷⁷ That is to ensure that learners from deep rural areas or disadvantaged communities have access to schools.¹⁷⁸ The court ruled that the state has the obligation to provide learners with scholar transport when distance is hindering their access to education.¹⁷⁹ However, the department of basic education has been taken to court several times for failing to fulfil its duty to provide thousands of learners with scholar transport especially in the Eastern Cape and Limpopo provinces.¹⁸⁰

3.4 Regulations

3.4.1 Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure

The right to education includes having a school where learners are safe to learn and have adequate infrastructure and other facilities to learn.¹⁸¹ The Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure require schools to ensure that there is access to ramps, handrails and sufficient space for navigating the school, for the differently-abled staff and learners, in order for such learners and staff to have full access to the schools.¹⁸² That is very important for South Africa to comply with international and regional standards protecting learners from harmful elements, accordingly, making certain that educational institutions provide acceptable learning environments for all learners.¹⁸³

3.4.2 Regulations on Safety Measures at Public Schools

¹⁷⁶ Phosa Y 'Learner Transport: Departments of Basic Education & Transport & Equal Education; with Deputy Minister' (2018) available at <https://pmg.org.za/committee-meeting/25934/> (accessed 12 June 2024).

¹⁷⁷ Available at <https://www.education.gov.za/ArchivedDocuments/ArchivedArticles/Learner-Transport-broadens-access-to-quality-education-in-South-Africa-0224.aspx> (accessed 10 June 2024).

¹⁷⁸ Mgushelo L 'The scholar transport programme in Eastern Cape: A case study of the beneficiaries at a secondary school in the Idutywa district' (thesis University of Pretoria, 2018) 58.

¹⁷⁹ *Tripartite steering committee and Another v minister of basic education and Others* [2015] 3 All SA 718 (ECG).

¹⁸⁰ Nowicki L 'Thousands of children stuck without transport months into school year' (2024) available at <https://groundup.org.za/article/thousands-of-children-still-stuck-without-school-transport-in-eastern-cape/> (accessed 05 June 2024).

¹⁸¹ Arendse L (2011) 99.

¹⁸² Joubert R 'Incorporating international standards into national education law in South Africa: The accountability of the state' (2014) SAPL 29.

¹⁸³ Joubert R (2014) 37.

The right to basic education includes the right of learners to have a clean and safe environment that enable them to learn, like maintained school buildings, clean toilets and water, and free from harassment.¹⁸⁴ The purpose of the regulations on safety measures at schools is to create a safe and enabling learning and teaching environment for all children in South Africa. When the South African government announced the reopening of schools in June 2020 school leaders were given a responsibility to ensure that their schools meet required standard for creating a safe environment for learning and teaching.¹⁸⁵ . However, due to the education challenges such as shortage of classrooms it was difficult for many schools to adhere COVID-19 safety measures such as social distance.

3.3 Conclusion

In conclusion, to comply with the international human rights standards to provide basic education, South Africa implemented several legislation and policies ensuring the protection of the right to free and compulsory basic education. The implementation of the various policies paints a good picture of the state's efforts in ensuring the right to education for all. However, during the COVID-19 pandemic South Africa was facing several challenges to comply with national legislation, policies and international instruments providing for the protection of the right to basic education.¹⁸⁶ For example, due to COVID-19 circumstances there was an ever-increasing demand for more schools and classrooms while most schools were already facing the shortage of classes and lack of access to technology.¹⁸⁷ These challenges raised serious concerns about South Africa's compliance with national obligations to provide basic education for young South Africans. Although, during the Covid-19 pandemic, South African government has faced so many challenges to comply with these legislations and policy framework. It can be argued that South African government has successfully taken a positive step by implementing legislative and policy frameworks that play an important role in promoting the protection of the right to basic education for all children in South Africa.

¹⁸⁴ Joubert R 'South Africa's approach to safety: can it succeed' (2007) 21.

¹⁸⁵ Venketamy R & Zijing H 'School leaders' responsible for ensuring safe schools for teaching and learning during COVID-19' (2022) available at <https://dx.doi.org/10.18820/2519593X/pie.v40.i2.2> (accessed 12 June 2024).

¹⁸⁶ Ndzendze B & Manaka L (2022) 17.

¹⁸⁷ Wills G & Van der Berg S 'COVID-19 disruptions and education in South Africa: Two years of evidence' (2022) available at <https://www.tandfonline.com/doi/full/10.1080/0376835X.2024.2311711> (accessed 30 May 2024).

Chapter 4: Challenges to the full realisation of the right to basic education in South Africa, and the impact of Covid-19

4.1 Introduction

The international and regional obligation for South African government to provide children with basic education also includes the responsibility to provide them schools with adequate infrastructure and other learning materials like textbooks, desks, and computers.¹⁸⁸ However, in South Africa the basic education system is characterized by many adverse challenges and frustrating situations that are hindering the enjoyment of the right to basic education for many young South Africans. These challenges include poor infrastructure most especially in rural areas, resulting in overcrowding in classes, shortage of educational resources, shortage of clean water and sanitation (which was needed the most during covid-19), lack of access to internet and technology, and lack of access to school nutrition.¹⁸⁹ It has also been acknowledged by the Minister of Basic Education that the South African education system is experiencing severe challenges such as infrastructure backlogs, overcrowding, and shortage of educational resources.¹⁹⁰

4.2 Basic education challenges during Covid-19

4.2.1 Lack of Infrastructure

One of the serious challenges that were faced by the basic education system in South Africa during the covid-19 pandemic is the lack of infrastructure in many schools. Educational infrastructure refers to the structures and resources that are mobilized by the government to South African schools to support learners in their academics.¹⁹¹ In the case of *Equal Education and Another v Minister of Basic Education*, the court stated that basic school infrastructure is an essential element to the fulfillment of the right to basic education.¹⁹² However, it is now 30 years of democracy in South Africa but the poor quality and shortage of educational infrastructure is still a major challenge that is affecting the realisation of the right to basic

¹⁸⁸ Arendse L (2011) 106.

¹⁸⁹ Aruleba K & Jere N 'Exploring digital transforming challenges in rural areas of South Africa through a systematic review of empirical studies' (2022) Vol.16, e01190.

¹⁹⁰ Luvhengo P 'SA education facing infrastructure backlog, overcrowding and shortage of teaching resources' (2023) 4.

¹⁹¹ Shirrell M 'Educational infrastructure, professional learning, and changes in teachers' instructional practices and beliefs' (2018) available at <https://doi.org/10.1080/19415257.2018.1452784> (03 October 2023).

¹⁹² *Equal Education and Another v Minister of Basic Education, Eastern Cape Division, Bhisho* (276/2016) Para 47.

education for many learners, especially in rural areas. In 2020 the Covid-19 pandemic worsened the situation which has consequently led to learners being deprived acceptable standard of basic education.¹⁹³ Some learners were trying to adapt to new learning environment under the Covid-19 circumstances while on other side were battling with the stress of attending school within run-down buildings that could collapse on them at any time because they are not being maintained.¹⁹⁴ It can thus be argued that it shows that South African government is failing to comply with its international and national obligation to invest on children's education and eradicating the difficulties in accessing basic education that were caused by apartheid government.

4.2.2 Shortage of classrooms

The Covid-19 pandemic has exacerbated the basic education challenge of a shortage of classrooms that existed way before the Covid-19 pandemic. With the social distancing measures that were in place to prevent the spread of the Covid-19, schools had to reduce the class size and create more space between learners.¹⁹⁵ That highlighted the shortage of classrooms that is the main reason for class overcrowding in many South African schools across the country. For example, at Mnceba High School 17 of 25 school classrooms have 70 or more learners and were sharing desks or others sitting on the floor due to the limited space.¹⁹⁶ With the Covid-19 guidelines requiring at least 1.5 meters of physical distancing between learners, it became even more challenging for schools such as Mnceba High School to accommodate all learners at the same time to adhere to social distancing guidelines. As a result, due to shortage of classes, when the schools reopened in June 2020 after the lockdown, in most schools it was impossible to return all learners to school and balance Covid-19 regulations because the shortage of classrooms was increasing the risk of the Covid-19 transmissions among learners and teachers.¹⁹⁷ For instance, Dalibango J.S.S in Eastern Cape is one of the schools that had overcrowded classes because of shortage of classrooms, about 35 learners and 4 teachers were infected by Covid-19 in just a few days of schools' reopening.¹⁹⁸ The school

¹⁹³ *Centre for Child Law v Minister of Basic Education (1749/2012) [2012] ZAECGHC* para 14.60.

¹⁹⁴ Siebritz G 'Poor infrastructure in schools makes leaning difficult' (2022) 3.

¹⁹⁵ Oikawa M, Tanaka R, Bessho S & Noguch H 'Do Class Size Reductions Protect Students from Infectious Diseases?.' (2022) available at <https://www.journals.uchicago.edu/doi/full/10.1086/719354> (accessed 20 May 2024).

¹⁹⁶ Law Resource Council available at <https://irc.org.za/03-june-2021-irc-calls-for-educators-to-be-prioritised-in-vaccination-drive/> (accessed 05 October 2023).

¹⁹⁷ Law Resource Council (2021) 3.

¹⁹⁸ Lauren I (2020) 17.

had to close again while learners and teachers were in isolation. That was very sad especially because it is always the schools located in disadvantaged areas who mostly suffer from the consequences of the government's failure.

4.2.3 Lack of school furniture

The lack of furniture in many South African Schools also poses a major challenge for children who either have to sit on their broken chairs or stand while listening to their teacher during the class.¹⁹⁹ The 2014 ruling in *Madzodzo and 7 Others v Minister of Education and Others* case, which challenged the lack of proper desk and tables in schools in the impoverished Eastern Cape Province, is a perfect example of this problem.²⁰⁰ The applicants argued that the learners' right to education had been violated by the state, including their constitutional rights to equality and dignity.²⁰¹ The court remarked that basic education services include access to basic furniture for the learners.²⁰² However, in South Africa many schools still do not have enough desks and chairs therefore children have to squeeze together at shared desks, balanced precariously on broken furniture or sit uncomfortably on the floor.²⁰³ During the Covid-19 pandemic this was jeopardizing the health and safety of learners while at the same time seating for extended periods without proper support or personal space can lead to discomfort, fatigue and reduce levels of concentration.

4.2.4 Lack of water and sanitation

The Covid-19 pandemic has increased the demand for water and sanitation while many schools in South Africa have no water or proper sanitation. A lack of water and proper sanitation in schools is a concerning matter that affects thousands of children, especially in rural areas.²⁰⁴ In 2014, a five-year-old child drowned in a pit toilet at his school outside Polokwane.²⁰⁵ This matter was referred to court in the case of *Komape and Others v Minister of Basic Education (1416/2015)*. The Limpopo High Court handed down a judgment in favour of Komape

¹⁹⁹ Gilbert M 'Lack of furniture at local school hinder exams' (2015) available at <https://www.google.com/amp/s/www.citizen.com.za/lowvelder/news-headlines/2015/11/04/lack-of-furniture-at-local-schoo-hinder-exam/amp> (accessed 03 April 2024).

²⁰⁰ *Madzodzo and Others v Minister of Basic Education and Others [2014]* ZAECMCHC5 para 4.

²⁰¹ *Madzodzo and Others v Minister of Basic Education and Other* (2014) para 2.

²⁰² *Madzodzo and Others v Minister of Basic Education and Other* (2014) para 88.

²⁰³ Corkery A 'How Data Is Helping in the Struggle for the Right to Basic Education In South Africa' (2017) available at <https://www.justiceinitiative.org/voices/how-data-helping-struggle-right-education-South-Africa> (accessed 05 January 2024).

²⁰⁴ Odeku OK 'Critical Analysis of School Pit Toilet System as an Impediment to the Right to Access Quality Education in South Africa' (2022) Vol.13 No.1.

²⁰⁵ Ryan C 'Komape family wins court battle after seven years their son drowned in a pit toilet' (2021) 19.

family.²⁰⁶ However, learners are still facing a challenge of using unsafe sanitation facilities such as plain pit toilets or relieve themselves in nearby fields.²⁰⁷ In 2021 at Tantseka Primary School in Mthatha, over 200 learners were relieving themselves in the open air.²⁰⁸ While in Masizame Junior Primary, a mud school in Centane near Butterworth, almost 180 learners have been using broken toilets.²⁰⁹ It was also reported that 983 schools in KwaZulu-Natal province are reliant on pit latrines.²¹⁰ This clearly shows that South African government is failing to comply with norms and standards that were promulgated in 2013 which include deadline for government to provide schools with access to water and sanitation.²¹¹ This hampered efforts to promote regular hand hygiene as preventive measures against Covid-19.

4.2.5 Lack of access to internet and technology

The Covid-19 Pandemic has additionally forced the world to operate within the digital space, consequently excluding many South African pupils who are without technological learning devices such as tablets, laptops and the internet.²¹² The Pandemic forced all schools to resort to online learning (e-learning), due to the national lockdown declared by the South African President.²¹³ This has exposed that many young South Africans are lacking, not just access to the internet but also access to digital devices that would enable them to learn remotely and continue with aspects of their lives via online channels.²¹⁴ According to data from Stats SA, in 2020 only 56.2% of households in South Africa have access to the internet.²¹⁵ Without internet access, many learners were unable to participate in online classes, access educational resources, or communicate with their teachers and classmates.²¹⁶ This created a major barrier to remote learning and puts disadvantaged learners at a greater disadvantage as they were left behind.

²⁰⁶ *Komape and Others v Minister of Basic Education (1416/2015)* para 76.

²⁰⁷ Siebritz G (2022) 7.

²⁰⁸ Binary E, Seleballo H & Borman J 'The struggle for infrastructure in eastern Cape' (2021) available at <https://www.news24.com/news24/opinion/s/columnists/questscolumn/opinion-a-perfect-storm-the-struggle-for-school-infrastructure-in-eastern-cape-20210408> (accessed 03 October 2023).

²⁰⁹ Binary E, Seleballo H & Borman J (2021) 13.

²¹⁰ Odeku OK (2022) 93.

²¹¹ Binary E, Seleballo H & Borman J (2021) 14.

²¹² Ndayi ZB 'A legal analysis of legislation and policies on the right to basic education in the Eastern Cape, South Africa' (LLM thesis University of the Western Cape, 2020) 28.

²¹³ Bangani Z 'Home learning in Covid-19 lockdown proves daunting' (2020) available at <https://www.newframe.com/home-learning-in-covid-19-lockdown-proves-daunting> (accessed 03 May 2024).

²¹⁴ Ahmed S 'How Covid-19 exposes the defects in South Africa's digital economy' (2020) available at <https://researchictafrica.net/2020/03/26/how-covid-19-exposes-the-defects-in-south-africas-digital-economy/> (accessed 06 May 2024).

²¹⁵ Stats SA (2020) available at <https://statssa.gov.za/p=15197> (accessed 06 October 2023).

²¹⁶ Mohd Basar Z 'The effectiveness and Challenges of Online learning for Secondary School students- A Case Study' (2021) Vol.17 No.3.

Even though the South African government has attempted to address this issue by providing free laptops and tablets,²¹⁷ these initiatives were limited in scope and effectiveness, especially for those living in rural areas where connectivity is particularly poor. Furthermore, online learning was challenging even for those learners who have access to the internet because of the affordability of data.²¹⁸ Internet data costs in South Africa are relatively high compared to other countries, making it difficult for low-income families to afford continuous connectivity for online learning.²¹⁹ Therefore, in South African schools the online learning was not a viable alternative for many learners across the country because government failed to ensure that all schools have access to internet and technology before the Covid-19.

4.2.6 Shortage of textbooks

The shortage of study materials such as textbooks in South African schools during the Covid-19 pandemic was one of the serious challenges that were faced by government in ensuring the immediate realisation of the right to basic education. The case of *Minister of Basic Education v Basic Education for All* confirmed that learners' access to textbooks is an integral aspect of the right to basic education.²²⁰ However, the government has not addressed this because many schools have insufficient resources such as textbooks, where two or three learners have to share one textbook.²²¹ During the Covid-19 pandemic this was challenging because learners were not allowed to seat next to each other as they had to adhere to social distancing regulations. Therefore, learners who could not afford to buy textbooks were attending classes without textbooks. The shortage of textbooks was dealt in the case of *Basic Education for All (BEFA) and Others v Minister of Basic Education and Others*, on the non-delivery of textbooks by the Department Basic Education to 39 schools in Limpopo Province.²²² The court held that the Department's failure to provide textbooks to learners in Limpopo amounted to unfair discrimination against the learners and it is a violation of children's right to basic education.²²³

²¹⁷ Gabara N 'Minister donates laptops to KZN schools' (2021) available at <https://www.dpsa.gov.za/thepublicservant/2021/06/15/minister-donates-laptops-to-kzn-school/> (accessed 06 October 2023).

²¹⁸ Chomunorwa S & Mugobo VV 'Challenges of e-learning in South African public schools: Learners perspectives' (2023) Vol.10 No.1.

²¹⁹ Chomunorwa S & Mugobo VV (2023) 83.

²²⁰ *Minister of Basic Education v Basic Education for All* (2079/2014) para 53.

²²¹ Nkambule T 'Exploring working conditions in selected rural schools: teachers' experiences' (2022) vol.42 No.1.

²²² *Minister of Basic Education and Others v Basic Education for All and Others* (20793/2014) para 34.

²²³ *Minister of Basic Education and Others v Basic Education for All and Others* (2014) para 94.

Therefore, the shortage of school textbook is a serious challenge that affected the full realisation of the right to basic education in South Africa during the Covid-19 pandemic.

4.2.7 Lack of school nutrition

In South Africa the closing of schools due to Covid-19 interrupted the provision of feeding scheme. When the government was implementing the online learning for young South Africans, it failed to ensure that learners continued to get food nutrition when learning from their homes.²²⁴ This affected many learners who depended on feeding scheme from their schools because their families are living below the poverty line.²²⁵ During the Covid-19 pandemic many young South Africans were learning without any meal and that affected the ability of learners to concentrate when studying. This struggle did not end during hard lockdown as the government failed to provide learners with nutrition when schools reopened in June 2020. The Minister of Basic Education announced that schools would reopen and National School Nutrition Program (NSNP) which provides daily meal for all learners in South Africa who qualify based on economic need restored on 08 June 2020, but when grade 7 and 12 learners resumed, the NSNP meal were not delivered as promised.²²⁶ However, this matter was taken to court by *Equal Education* against minister of basic education and MEC of eight provinces. The *Equal Education and Others v Minister of Basic Education and Others* case, challenged the minister and MEC's phased-in approach as a breach of the government's constitutional and statutory duty to provide a daily meal for all qualifying learners whether attending schools or studying away from school as a result of Covid-19 pandemic.²²⁷ The court held that NSNP had been introduced expressly to address both the right to basic education and the right of children to basic nutrition.²²⁸ Therefore, the minister of basic education and MECs had a constitutional duty to provide basic nutrition for all learners at schools.²²⁹

4.3 The impact of Covid-19 on the realisation of basic education in South Africa

4.3.1 Affected social services provided by schools

²²⁴ Kwatubana S & Molaodi VT 'Ensuring the Continuation of School Feeding Programmes during COVID-19 Pandemic: A case of "New Normal" Management' (2021) 17.

²²⁵ Kwatubana S & Molaodi VT (2021) 18.

²²⁶ Department of Basic Education (2020) 'State of readiness for the reopening of schools' available at <https://bit.ly/3t8YErO> (accessed 08 March 2023).

²²⁷ *Equal Education and Others v Minister of Basic Education and Others* [2020] 4 All SA para 11.

²²⁸ *Equal Education and Others v Minister of Basic Education and Others* (2020) para 47.

²²⁹ *Equal Education and Others v Minister of Basic Education and Others* (2020) para 52.

When it became clear that South Africa like other countries was staring at uncontrollable contagion in the eye, government closed the schooling system.²³⁰ On 23 March 2020 South Africa entered a period of lockdown in response to the COVID-19 global pandemic and all schools were closed. The initial three-week period was eventually extended until 08 June 2020, with different ‘levels’ of lockdown regulating the kinds of restrictions placed on people’s movement and activity. For 10 weeks, up until 8 June 2020, no children were permitted to go to school therefore basic education was temporary limited.²³¹ The physical school closures had a profound effect on vulnerable and disadvantaged learners, specifically those who rely on schools not only for educational benefits, but for a range of social services, including health and nutrition.²³² And immediately, after the schools had been closed certain social services provided by schools were directly affected.²³³ For example, from March to June 2020 the “*National School Nutrition Programme*” which feeds approximately 9 million learners within the country, saw an unfortunate four months suspension during the Covid-19 school closures.²³⁴

Consequently, the *Equal Education for All* instituted litigation to highlight the real-life ramifications for learners during the suspension of this programme.²³⁵ In terms of the structural interdict which was issued, the Department of Basic Education was ordered to report, rather urgently, on their plans to roll out the programme to all learners who qualified and to further provide progress reports to the Court on a regular basis.²³⁶ This is because the full realisation of the right to basic education in South Africa is inextricably linked with the right to nutrition as found in section 28(1)(c) of the Constitution.²³⁷ Therefore, the closing of schools in South Africa did not only affect the right to basic education for children but also their right to access nutrition.²³⁸

4.3.2 Loss of school learning time

²³⁰ Zhu X & Liu J ‘*Education in and after Covid-19: Immediate responses and long-term visions*’ (2020) available at <https://link.springer.com/article/10.1007/s24438-020-00126-3> (accessed 10 October 2023).

²³¹ Hoadley U ‘*Schools in the Time of COVID-19: Impacts of the Pandemic on Curriculum*’ (2020) 4.

²³² Orville H ‘*COVID-19 causes unprecedented educational disruption: Is there a road towards anew normal*’ (2020) Prospects 12.

²³³ Padachey D ‘*A child’s right to basic education during the Covid-19 pandemic: A comparative analysis and evaluation of the impact of Covid-19 on South African education system, and the effectiveness of the nation’s legal response in protecting a child’s right to education*’ (LLM thesis university of Stellenbosch, 2023) 54.

²³⁴ Shepard D & Mohohlwane N ‘*Special Public Health Surveillance Bulletin*’ (2021) 32.

²³⁵ *Equal Education and others v Minister of Basic Education and others* [2020] 4 All SA 102 (GP) para 34.

²³⁶ *Equal Education and others v Minister of Basic Education and others* (2020) para 103.

²³⁷ *Equal Education and others v Minister of Basic Education and others* (2020) para 40.

²³⁸ Van der Berg S & Spaul N (2020) 23.

During the 40 days of school closures schools lost about 50% of their school learning time for the 2020 academic year. It is the closure of schools and subsequent shift to remote or online learning which led to the significant loss of time for many young South Africans, particularly those from disadvantaged backgrounds who did not have access to online learning.²³⁹ There were attempts to replace the time lost as a result of the Covid-19 such as the launch of a multi-media “Covid-19 Learner Support” initiative from the 9th of April 2020. This initiative provided for certain alternative education support mechanisms and included the broadcasting of content across the SABC TV channels as well as certain allocated education channels on DSTV and Open View and 13 different radio stations.²⁴⁰ However, according to Van der Berg and Spaul, the instruction received across these platforms was only equivalent to about 5% of the face to face instruction time a learner would have received had schools been open.²⁴¹ As such, the curriculum taught across these platforms was severely limited. Therefore, learners learning through these platforms were prevented from receiving an adequate and comprehensive education during their learning periods.

Another thing that resulted in a loss of school learning time during the Covid-19 was the implementation of rotation of classes. When the schools reopened, learners were given different opportunities (times/slots) to attend school so that the learners can be able to adhere to social distancing in classrooms.²⁴² For example, in Madibane Secondary School in Diepkloof, Soweto, learners were divided into two groups and rotation learning was implemented on one day-in and one day-out cycle.²⁴³ The major disadvantage of that was that teachers were falling far behind the curriculum because they were losing a lot of school learning time and teachers, especially in public schools, were unable to complete the 2020 academic curriculum.²⁴⁴

That resulted to the decrease in the matric pass rate for the 2020 academic year which remained a serious concern for other grades because the curriculum was narrowed, and learners were not

²³⁹ Haffejee S ‘South African COVID-19 school closures: Impact on children and families’ (2023) available at <https://sajce.co.za/index.php/sajce/article/view/1415/2862> (accessed 22 May 2024).

²⁴⁰ Shepard D & Mohohlwane N (2021) 20.

²⁴¹ Van der Berg S & Spaul N (2020) 16.

²⁴² Haffejee S (2023) 19.

²⁴³ Ximba N ‘Rotation at schools is a vicious circle’ (2021) available at <https://witsvuvuzela.com/2021/12/20/rotation-at-schools-is-a-vicious-circle/#:~:text=Under%20this%20system%2C%20Schools%20around,others%20the%20opportunity%20to%atte> (accessed 11 October 2023).

²⁴⁴ Van der Berg S & Spaul N (2020) 18.

exposed to the full curriculum.²⁴⁵ And that was placing a huge burden on the basic education system to catch up the following year.²⁴⁶ Due to that pressure, many learners became discouraged about completing their studies and dropped out.²⁴⁷ The loss of school learning time also had a severe impact on subjects such as mathematics and physical sciences. Maintaining the rotating classes and not being able to attend classes in subjects such as mathematics and physical sciences especially on daily basis impacted disadvantaged learners more adversely than learners from affluent areas.²⁴⁸

4.3.3 Increased school drop-out rate

The Covid-19 pandemic disrupted education across the globe and while schools have managed to carry on using online learning and rotation attendance in South Africa some children have been unable to return to school as result of this disruption.²⁴⁹ In November 2020, South Africa's minister of basic education confirmed that more than 300 000 children had potentially dropped out of schools across the country in a six-month period.²⁵⁰ According to Mohohlwane, disruptions to the school year caused by the Covid-19 pandemic played a huge role in children not returning to school.²⁵¹ Some of the learners especially those from vulnerable communities dropped out of school due to economic hardships caused by the Covid-19 pandemic.²⁵² Behind these dropouts there were serious reasons such affordability of costs that go towards sending a child to school since many South Africans became unemployed due to the pandemic.²⁵³ Therefore, during the Covid-19 pandemic learners' dropout was among the serious consequences of the Covid-19 pandemic and will have long-term consequences on their educational attainment and prospects. The effort that the government has made to return dropped out learners to school was to encourage parents to send those learners to school through telephone calls, SMSs, local radio stations, and home visits.²⁵⁴

²⁴⁵ Mhaule R 'Basic Education reopening of Schools for academic year 2021' (2021) available at <https://pmg.org.za/committee-meeting/31743/> (accessed 14 October 2023).

²⁴⁶ Mhaule R (2021) 14.

²⁴⁷ Van der Berg S & Spaull N (2020) 24.

²⁴⁸ Van der Berg S & Spaull N (2020) 28.

²⁴⁹ Mlaba K '750 000 South African Children May Have Dropped Out of School Due to Covid-19 Pandemic' (2021) available at <https://www.globalcitizen.org/en/content/south-africa-children-school-drop-out-covid-19/> (accessed 11 October 2023).

²⁵⁰ Mlaba K (2021) 35.

²⁵¹ Mohohlwane N 'Learners in South Africa up to one school year behind where they should be' (2020) available at <https://www.unicef.org/press-releases/learners-south-africa-one-year-behind-where-they-should-be> (accessed 12 October 2023).

²⁵² Mohohlwane N (2020) 12.

²⁵³ Mlaba K (2021) 29.

²⁵⁴ Mlaba K (2021) 29.

4.3.4 Delayed examinations and assessments

In South Africa normally, matric exams start in October, however in 2020 due to the closing of schools because of the Covid-19, matric examinations were rescheduled to start in November. This has created uncertainty for 2020 matric learners regarding to their educational progression and university applications.²⁵⁵ That also affected 2020 matric re-write examinations because were scheduled to start on the 4th of May 2020 however due to the covid-19 were postponed until the end of June.²⁵⁶ In foundation phase the number of assessments was decreased, and the mid-year exams were reinstated as form of controlled tests.²⁵⁷

4.4 Conclusion

In conclusion, the South African government has both international and national obligations to provide basic education but has been struggling to comply with its obligations even before the Covid-19 pandemic. During the Covid-19 pandemic the South African government faced many challenges in providing all young South Africans with basic education. However, these challenges mostly affected schools situated in rural areas and that clearly shows the long way that the South African government stills need go to achieve equality in providing basic education. Majority of young South Africans suffered the impacts of Covid-19 on basic education which included learning losses because of closing of schools, decrease in pass rate, increased dropouts and widening of pre-existing basic education disparities.²⁵⁸ The closing of schools due to the Covid-19 pandemic also affected the right of the children to receive nutrition as part of the right to basic education because when the schools were being closed there was no plan on how learners will get the meals.

²⁵⁵ Mhaule R (2021) 15.

²⁵⁶ Mhaule R (2021) 15.

²⁵⁷ Hoadley U 'COVID-19 and the South African curriculum policy response' (2023) University of Stellenbosch Research Note.

²⁵⁸ Hanushek E & Woessmann L 'The Economic Impacts of Learning Losses' (2020) available at <https://www.oecd.org> (accessed 15 October 2023).

Chapter 5: Responses of other countries to the impact of Covid-19: Lessons for South Africa

5.1 Introduction

Globally, almost 140 countries were affected by the impact of the Covid-19 pandemic in providing basic education.²⁵⁹ Affected countries had to suspend the physical attendance of schools to prevent the spread of Covid-19 and implement online learning as the emergent response to ensure the protection of the right to basic education.²⁶⁰ However, it can be argued that the implementation of online learning as a Covid-19 response was not successful in most countries including South Africa and many other developing countries. This chapter will focus on how China (where the Covid-19 started), Kenya and Nigeria (as other African countries that were facing challenges related to providing basic education even before the Covid-19 pandemic) responded to the impact to Covid-19 in relation to their international and regional obligation to provide and protect the right to basic education for young children.

5.2 China's response to the impact of Covid-19 on basic education

China is a state party to several international instruments such as the ICESCR, CRC, ICERD and CEDAW that impose obligation on state parties to provide basic education. In late 2019, China was the first country affected by the Covid-19 pandemic which resulted to the disruption of China's ability to provide basic education and that necessitated a quick response to ensure minimal disruption in education.²⁶¹ The Chinese government quickly implemented online learning platforms and remote teaching methods as an alternative to traditional classroom instruction.²⁶² Immediately after the schools were closed, the Chinese government launched the *Disrupted Classes, Undisrupted Learning* initiative to ensure teaching and learning continued online even though schools were closed.²⁶³ That online learning initiative was

²⁵⁹ Policy Brief 'Education during COVID-19 and beyond' (2020) available at https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/08/sq_policy_brief_covid-19_and_education_august_2020 (accessed 27 July 2024).

²⁶⁰ Policy Brief (2020) 3.

²⁶¹ Wenting Z, Qianqian L & Xiumin H 'Implementation and Challenges of Online Education during the COVID-19 Outbreak: A National Survey of Children and Parents in China' (2022) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9334978/> (accessed 27 July 2024).

²⁶² World Health Organisation 'China's education arrangements during Covid-19 pandemic period' available at <https://internationaleducation.gov.au/international-network/china/PolicyUpdates-China/Pages/China's-education-arrangements-during-COVID-19-pandemic-period.aspx> (accessed 18 October 2023).

²⁶³ Huang R, Till A, Chang T, Zhang X, Nascimbeni F & Burgos D 'Disrupted classes, undisrupted learning during COVID-19 outbreak in China: application of open educational practices and resources' (2020) available at <https://doi.org/10.1186/s40561-020-00125-8> (accessed 12 April 2024).

conducted through various channels such as live streaming, educational apps, and video conferences.²⁶⁴

However, the Chinese government through that initiative also recognized that not all learners have equal access to technology or conducive learning environments at their homes and took steps to address such issues. The government started to provide financial assistance to families that need financial support so that can be able to buy all the necessary learning materials such as data packages for online learning.²⁶⁵ In rural areas with limited internet connectivity, local authorities set up community centers equipped with computers or tablets for learners without access at home.²⁶⁶ Learners were provided free access to digitized textbooks, teaching guides, and other digital resources through cloud-based platforms such as *eduyuni.cn* and the government also worked with several universities and think tanks to prepare strategies and tips for teaching online, then made these toolkits freely available for teachers online.²⁶⁷ That enabled the Chinese government to be able to continue providing education during lockdowns and under quarantine measures.

Therefore, Chinese government efforts invested more on improving connectivity across the country to support the online learning and ensure that learners from rural areas were not left behind. Because Chinese rural schools are not developed like the schools in the cities, the Chinese government permitted online learning in local level to be carried out in accordance with the local conditions.²⁶⁸ For example, the rollout plans for online learning at local level were developed region by region, together with a detailed schedule for online classes developed by schools.²⁶⁹ Zhejiang Provincial Department of Education recommended that for primary schools there should be 4 sessions a day, each online class session to be about 20-30 minutes and for secondary schools there should be 6 sessions a day and each session should be 40-50 minutes.²⁷⁰

However, that time allocation for online class sessions was not enough to cover the whole curriculum that could have been covered in physical classes. Therefore, when the schools

²⁶⁴ Huang R, Till A, Chang T, Zhang X, Nascimbeni F & Burgos D (2020) 8.

²⁶⁵ Huang R, Till A, Chang T, Zhang X, Nascimbeni F & Burgos D (2020) 8.

²⁶⁶ Huang R, Till A, Chang T, Zhang X, Nascimbeni F & Burgos D (2020) 11.

²⁶⁷ Zhang W & Wang Y 'Ministry of Education Suspending Classes Without Stopping Learning: China's Education Emergency Management Policy in the COVID-19 Outbreak' (2020) available at www.mdpi.com/journal/jrfmn (accessed 12 October 2023).

²⁶⁸ Responding to Covid-19 China Education available at <https://documents1.worldbank.org/curated/en/4900515936579206> (accessed 10 October 2023).

²⁶⁹ Huang R, Till A, Chang T, Zhang X, Nascimbeni F & Burgos D (2020) 15.

²⁷⁰ Huang R, Till A, Chang T, Zhang X, Nascimbeni F & Burgos D (2020) 16.

reopened in some provinces in April 2020, educational authorities had to adjust the curriculum and exam schedules to accommodate the disruption caused by the Covid-19 pandemic.²⁷¹ Consequently, some of the subjects were simplified or temporarily removed from exams to help learners focus on essential knowledge while dealing with reduced classroom times.²⁷²

5.3 Nigeria's response to the impact of Covid-19 on basic education

In Nigeria the right to basic education is protected under the Constitution of the Federal Republic of Nigeria 1999 and s2 of Compulsory, Free Universal Basic Education Act, which states that primary and secondary education should be free, compulsory and universal.²⁷³ In early 2020 when the first case of Covid-19 virus was reported in Nigeria, the government had to close down a number of institutions including educational institutions.²⁷⁴ On the 19th of March 2020, prior to the national lockdown measures being instituted, the Federal Ministry of Education in Nigeria approved the closure of all learning institutions to prevent the spread of the virus among learners and teachers.²⁷⁵ That was a necessary step to ensure the safety of children and minimize the transmission of COVID-19. The right to basic education for young Nigerians was thus impacted as they were unable to physically access their schooling facility or applicable schooling resources.²⁷⁶ Consequently, the Nigerian government initiated remote learning programs through radio and television broadcasts, as well as online platforms, to ensure the protection of the right to education while the schools were temporarily closed.²⁷⁷ That approach was aimed at reaching students across different regions of the Nigerian country, including those without access to internet services.²⁷⁸

However, in the implementation of remote learning there were serious challenges that were hindering the effectiveness of the remote learning in Nigeria.²⁷⁹ For example, education system in Nigeria is characterized by a lack well-equipped schools, libraries, and computer labs while

²⁷¹ Huang R, Till A, Chang T, Zhang X, Nascimbeni F & Burgos D (2020) 33.

²⁷² Huang R, Till A, Chang T, Zhang X, Nascimbeni F & Burgos D (2020) 13.

²⁷³ Azibike C 'The constitutional obligation to protect the right to basic education in Nigeria: A call for action' (2024) available at <http://dx.doi.org/10.17159/1996-2096/2024/v24n1a16> (accessed 27 March 2025).

²⁷⁴ eLearning Africa 'The Effect of Covid-19 on Education in Africa and its Implications for the Use of Technology: A Survey of the Experience and Opinions of Educators and Technology Specialists' (2020) available at https://www.elearning-africa.com/reports_surveys_COVID19.php (accessed 27 July 2024).

²⁷⁵ TEP Centre 'Learning in a Pandemic' (2020) 9 & Adelayun (2020) ITS 88.

²⁷⁶ Padachey D (2023) 58.

²⁷⁷ Padachey D (2023) 58.

²⁷⁸ eLearning Africa (2020) 5.

²⁷⁹ Olanrewaju GS, Adebay SB, Omotosho AY & Olajide CF 'Left behind? The effects of digital gaps on e-learning in rural secondary schools and remote communities across Nigeria during the COVID19 Pandemic' (2021) International Journal of Educational Research Open available at <https://www.sciencedirect.com/science/article/pii/S2666374021000625> (accessed 30 July 2024).

many households lack access to electricity, devices like radios or televisions, or reliable internet connectivity.²⁸⁰ That has created a digital divide that disproportionately affected children from low-income families and rural areas and made it difficult for many Nigerian learners to participate in remote learning activities.²⁸¹ The implementation of the remote learning also has been a challenge even on teachers because they were also struggling in adapting their teaching methods to remote learning environments due to limited training and availability of resources to support them when conducting remote learning.²⁸²

Nigeria's response to the impact of COVID-19 on basic education had both positive and negative aspects. While efforts were made to ensure continuity of education through remote learning initiatives, challenges such as limited access to technology, lack of infrastructure, and inadequate teacher training hindered its effectiveness.²⁸³ As a result, vulnerable populations faced greater difficulties in accessing education during the lockdown. These challenges are similar to the challenges that were encountered by South African basic education system in providing basic education during the Covid-19 pandemic. Most learners who struggled to access online learning were coming from poor backgrounds and that further exposed the existing inequality in South Africa's basic education system.

5.4 Kenya's response to the impact of Covid-19 on basic education

The right to basic education for all children in Kenya is protected under Article 53(1)(b) of Kenya's constitution which states that every child has the right to free and compulsory education.²⁸⁴ In March 2020 Kenya reported the first case of Covid-19 and it started to spread throughout the country. Like other countries, Kenya went into a lockdown which resulted to the closing of all schools and colleges. In Kenya, the Covid-19 crisis and the closure of schools happened when the government was dealing with two other crises, severe flooding and the swarms of desert locusts which also affected Kenya's basic education system.²⁸⁵ In closing of the schools to prevent the spread of Covid-19, to ensure minimal interruption to learning, the government developed and implemented the *Kenya Basic Education COVID-19 Emergency Response Plan*.²⁸⁶ The *Response Plan* was implemented immediately after the schools were

²⁸⁰ Padachey D (2023) 55.

²⁸¹ Olanrewaju GS, Adebay SB, Omotosho AY & Olajide CF (2021) 31.

²⁸² Padachey D (2023) 58.

²⁸³ Olanrewaju GS, Adebay SB, Omotosho AY & Olajide CF (2021) 31.

²⁸⁴ Kenya Constitution article 53(1)(b).

²⁸⁵ Moyi P 'Out of Classroom Learning: A Brief Look at Kenya's COVID-19 Education Response Plan' (2020) Vol. 48 No.3.

²⁸⁶ Moyi P (2020) 77.

closed to address the challenges that were facing the education sector during the pandemic.²⁸⁷ The plan set out measures to ensure that learning continued through remote and online platforms, including radio and television broadcasts, and online learning platforms.²⁸⁸ This was to ensure that the children's right to basic education provided in Kenya's constitution was not interrupted by the Covid-19 pandemic. The effectiveness of the online learning in Kenya was a serious concern because some of the areas have limited internet connection and it reminded Kenyans about the 2013 failed laptop project which was to provide all children with laptops.²⁸⁹ However, the government in collaboration with private entities provided affordable laptops, tablets and internet packages to vulnerable learners even though these laptops were not received by all children.²⁹⁰

There were several issues that were faced by Kenyans under the *Kenya Response Plan*. First, the plan did not offer any learning materials or services for children with special needs.²⁹¹ That highlighted the inequality, and many children did not have all the necessary materials to access online learning and some of their teachers were not familiar with online teaching method.²⁹² Similar to South Africa, the closure of schools also had socio-economic implications for vulnerable populations who heavily rely on school feeding programs or whose livelihoods depended on informal sector activities linked to schools. The government-initiated measures such as cash transfers and food distribution programs targeting affected families and children.²⁹³ However, many Kenyan disadvantaged families never benefitted from these programs.²⁹⁴

Therefore, even though Kenya implemented various strategies to mitigate the impact of COVID-19 on basic education, the significant challenges remain regarding access to quality remote learning options for all learners and addressing socio-economic disparities during school closures. The Kenyan government still needs to put more effort to ensure that all

²⁸⁷ Gichuhi L & Kalista J 'The Kenya Minister of Education's response to the COVID-19 pandemic' (2022) 17.

²⁸⁸ Gichuhi L & Kalista J (2022) 19.

²⁸⁹ Moyi P (2020) 73.

²⁹⁰ Moyi P (2020) 77.

²⁹¹ Malenya FL 'Provision of Basic Education in the Context of the COVID-19 Pandemic in Kenya' (2021) Vol.24 No.2.

²⁹² Malenya FL (2021) 27.

²⁹³ Mutail B 'We Are All Vulnerable Here: Kenya's Pandemic Cash Transfer Program Riddled With Irregularities' (2021) available at <https://www.hrw.org/report/2021/07/20/we-are-all-vulnerable-here/kenyas-pandemic-cash-transfer-program-riddled> (accessed 15 October 2023).

²⁹⁴ Mutail B (2021) 13.

children can access quality education regardless of their background to fulfill its constitutional duty to provide basic education.

5.5 Lessons for South Africa

China's response to the impact of Covid-19 on basic education demonstrated its ability to adapt swiftly by leveraging technological advancements and implementing comprehensive measures. The Chinese government was more supportive compared to South African government in ensuring that children's right to education is not violated as result of Covid-19. For example, in China learners and teachers were also provided emotional support such as online counseling services, psychological support hotlines, and social media campaigns promoting mental well-being tips.²⁹⁵ These efforts aimed to alleviate anxiety or stress caused by uncertainty surrounding the pandemic and challenges accompanied by the online learning. China's investment in digital infrastructure, support for vulnerable learners, and focus on mental health highlight key lessons that can be applied globally.

Nigeria also had an important lesson for South Africa because despite the challenges that it faced to implement online learning. Nigerian government collaborated with community members and distributed all the learning materials to support learners through community leaders, parents and teachers.²⁹⁶ Community involvement was important because it helped to ensure that learners who need those materials are prioritized. That can also help South Africa to ensure that learners from low-income families are being prioritized before others can benefit.

Although Kenya experienced significant challenges in providing children with basic education, its approach during Covid-19 gave an important lesson for South Africa. For example, the government's collaboration with private companies such as telecom and EdTech companies, and local broadcasters enabled the widespread dissemination of digital content, bridging the gap for students without access to traditional educational resources.²⁹⁷ That is an important lesson for South Africa because it highlights the potential for collaboration between government and the private sector to ensure the protection of education and enhance better

²⁹⁵ 'Responding to Covid-19 in China Education' available at <https://documents1.worldbank.org/curated/en/4900515936579206> (accessed 10 October 2023).

²⁹⁶ Olanrewaju GS, Adebay SB, Omotosho AY & Olajide CF (2021) 18.

²⁹⁷ Matone D 'Private sector complements govt's efforts to bridge digital divide' (2023) available at <https://www.itweb.co.za/article/private-sector-complements-govts-efforts-to-bridge-digital-divide/O2rQGqAFmdOqd1eq> (accessed 30 July 2024).

outcomes especially during times of crisis. Therefore, South Africa can also try to apply the collaboration of public and private sector to develop strong access to technology and digital resources to reduce unequal access to technology in the education sector.

5.5 Conclusion

In conclusion, the response to the impact of Covid-19 in relation to basic education in most countries was almost the same. The first response was to close all the school activities which were followed by the implementation of online learning to protect the right to basic education. However, both developed and developing countries have encountered some challenges regarding online learning which were not favoring many children from disadvantaged backgrounds.²⁹⁸ The common challenge encountered by South Africa, Nigeria, and Kenya was the lack of access to internet that was making it difficult for many children to access the remote learning.

China also experienced some challenges related to online learning however Chinese government efforts to ensure the protection of the right to basic education I argue it was way better compared to efforts of African states such as South Africa. This is because the Chinese government was more supportive to children from poor families by providing the necessary means for participating in online learning. In South Africa the implementation of online learning was not accompanied by any support such as providing children with data. However, in comparison to other African countries such as Kenya and Nigeria I would say that South Africa has been at the forefront in efforts to protect the right to basic education during Covid-19 even though online learning did not necessarily work for many children especially from rural areas.

²⁹⁸ Olanrewaju GS, Adebayo SB, Omotosho AY & Olajide CF (2021) 42.

Chapter 6: Recommendations and Conclusion

6.1 Introduction

The COVID-19 pandemic has posed unparalleled difficulties for many countries around the world, especially in the protection of the right to basic education.²⁹⁹ It has created the biggest disruption affecting global education systems in history, which affected billions of learners across the world.³⁰⁰ South Africa, along with many other countries across the world encountered various challenges in its efforts to maintain continuous access to basic education throughout the Covid-19 crisis.

6.2 Findings

After 1994, South Africa introduced several policies and programs to mitigate the harmful effects of the apartheid era on the basic education system but, there are still ongoing problems that need to be addressed to give all South Africans equal access to basic education.³⁰¹ The Covid-19 pandemic exacerbated all of these problems and made it difficult for South Africa to protect the right to basic education for all learners during the pandemic. For example, South Africa faced significant disparities in terms of infrastructure and technological capabilities among different regions.³⁰² Therefore, many disadvantaged areas lacked access to reliable internet connectivity and electronic devices and that made it impossible for learners coming from such areas to participate in online learning.³⁰³ Due to unemployment in South Africa, about 9 million learners get a meal per day at school, based on the South African school nutrition program.³⁰⁴ Since the schools were closed during the Covid-19 pandemic, all those children had no place to get their meals but were expected to also participate in online learning with their empty stomachs. These problems highlighted the socio-economic inequality in South Africa and hindered its efforts to realise the right to basic education in considering Covid-19.

²⁹⁹ Shamira A 'How Covid-19 exposes the defects in South Africa's digital economy' (2020) available at <https://researchictafrica.net/2020/03/26/how-covid-19-exposes-the-defects-in-south-africas-digital-economy/> [accessed 06 October 2023].

³⁰⁰ Policy Brief: Education during COVID-19 and beyond (2020) available at https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/08/sq_policy_brief_covid-19_and_education_august_2020 (accessed 27 July 2024).

³⁰¹ De Vos P (2015) 11.

³⁰² Makhathini M 'Infrastructure Provision as a Catalyst for Local Economic Development in South Africa' (2020) Strategic Review for Southern Africa Vol.42 No.1.

³⁰³ Makhathini M (2020) 37.

³⁰⁴ T Mafuge 'Challenges encountered in a South African school nutrition program' (2021) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7883013> (accessed 20 October 2023).

This is because many learners that were mostly affected by these basic education challenges were learners from rural areas, disadvantaged communities, and low-income families.³⁰⁵

However, South Africa has made some efforts such as implementing several emergency measures aimed to protect the realisation of the right to basic education throughout the Covid-19 pandemic.³⁰⁶ One of the remarkable South African efforts was the implementation of online learning via television lessons, learning programs through dedicated channels such as SABC, radio stations and free learning websites where learners were able to access learning materials of their grades like textbooks and past question papers.³⁰⁷ Unfortunately, South Africa's efforts to realise the right to basic education through these learning programs left many young South Africans behind. It is because not all South African households have televisions and many learners from poor families do not have cellphones or electronic devices like laptops to access learning materials online.

After three months of lockdown in 2020, South African department of education collaborated with other government departments to develop comprehensive guidelines and protocols for schools' safe reopening.³⁰⁸ These guidelines and protocols that were developed mostly emphasized health and safety precautions for both learners and teachers such as regular sanitization and physical distancing.³⁰⁹ The development of these guidelines and protocols led to the rotation attendance which also contributed to loss of learning time because South African schools have shortage of infrastructure like classrooms to accommodate all learners while practicing social distance.³¹⁰ Besides that, when the schools reopened in eight provinces, the feeding scheme was not delivered even though the matter was resolved in court which found that the government's failure to delivery feeding scheme was a violation of the right to basic education.³¹¹

³⁰⁵ Mohamed S 'South Africa: Broken and unequal education perpetuating poverty and inequality' (2020) available at <https://www.amnesty.org/en/latest/news/2020/02/south-africa-broken-and-unequal-education-perpetuating-poverty-and-inequality/> (accessed 17 August 2024).

³⁰⁶ Kona N (2022) 7.

³⁰⁷ Mhlanga D & Moloi T 'COVID-19 and Digital Transformation of Education: What Are We Learning on 4IR in South Africa?' (2020) 9.

³⁰⁸ Mhlanga D & Moloi T (2020) 7.

³⁰⁹ Mhlanga D & Moloi T (2020) 7.

³¹⁰ Ximba N (2021) 12.

³¹¹ *Equal Education and Others v Minister of Basic Education and Others* [2020] 4 All SA.

6.3 Recommendations

Based on the findings from the analysis of South Africa's efforts to realise the right to basic education during the Covid-19 pandemic, it is evident that South Africa is still far from achieving equal protection and access to basic education for all South Africans. Therefore, in order for South Africa to overcome some of the challenges that are hindering its efforts in protecting the right to basic education, it is important to invest more in digital infrastructure through expanding initiatives focusing on connectivity, targeting to support disadvantaged communities especially in the Eastern Cape, KZN, and Limpopo provinces.³¹²

In doing that, South African government should collaborate with NGOs and community-based organizations which can be able to identify all disadvantaged learners and communities who/which lack access to technology or face other socio-economic problems that affect children's right to basic education. The government's collaboration with NGOs and community-based organizations can help to ensure that no child is left behind during times of crisis. However, South Africa must be more focused on prioritizing long-term strategies aimed at building resilience within its education system by addressing systemic inequalities and investing in innovative approaches to teaching and learning. That is important and can help South Africa to have a basic education that has a strong and undisrupted foundation capable to effectively deal with any future crises.

Additionally, in delivering basic education, teachers' plays an important role, therefore it is important for them to receive adequate training especially for teaching on those online platforms effectively.³¹³ The government should organize comprehensive programs that are specifically focusing on providing teachers with essential skills such as navigating virtual classrooms, creating engaging content, and facilitating interactive discussions online because teacher struggled to conduct online learning during Covid-19 due to the lack of such skills.

Furthermore, government should also introduce continuous support through mentorship programs that can help teachers to easily adapt to new teaching methods. The impact of the covid-19 pandemic is an opportunity for the department of education to consider and implement a new curriculum that also addresses emerging needs and challenges that are being faced by learners. This is because a flexible curriculum that includes relevant topics related to health education, resilience building, and critical thinking will better prepare learners for future

³¹² Mhlanga D & Moloji T (2020) 9.

³¹³ Nkambule T (2022) 63.

crises.³¹⁴ Therefore, South Africa should emphasize and introduce basic education curriculum that is more focused on practical life skills that are easily transferable between in-person instruction and remote learning formats.

Parents or guardians of children also played an important role in children's education during Covid-19. Thus, the government should establish communication channels that provide regular updates on academic progress and offer guidance on supporting remote learning at home to prepare them for a future crisis. Promoting parental workshops on effective homeschooling techniques and managing children's emotional well-being can also contribute significantly to nurturing a conducive learning environment.³¹⁵ Therefore, addressing the challenges faced by basic education during COVID-19 requires a holistic approach involving investments in digital infrastructure, teacher training, curriculum adaptation, parental engagement, and collaboration with NGOs. By implementing these recommendations, South Africa can mitigate the adverse effects of the pandemic on the basic education sector and build a strong educational system for the future.

6.4 Conclusion

In conclusion, during the Covid-19 pandemic South Africa's efforts to realise the right to basic education provided in s 29 of the Constitution was characterized by unprecedented challenges that left many young South Africans behind. In South Africa the shift from physical school attendance to online learning was one of the remarkable challenges that exposed inequalities amongst learners from rural areas and urban areas which the government has failed to address. South Africa's efforts have shown lack of commitment in protecting the right to basic education. Therefore, it has breached its international and national duty to provide and protect the right to basic education for all young South Africans.

³¹⁴ UNESCO 'Building back resilient: how can education systems prevent, prepare for and respond to health emergencies and pandemics?' (2020) available at <https://unesdoc.unesco.org/ark:/48223/pf0000375278> (accessed 27 July 2024).

³¹⁵ Miller D & Venketsamy R 'Supporting Parents' Needs as Educational Partners to Enhance Children's Classroom Learning' (2022) Vol.9 No.1.

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