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RIGHTS-BASED ANALYSIS OF BASIC EDUCATION IN SOUTH AFRICA

SUMMARY

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The right to basic education is a fundamental human right, the realisation of which is dependent on the holistic fulfilment of all educational needs. The study reflects on the interpretation of basic education by the South African legislation, supported by regional and international treaties and case law. The analysis is anchored on the rights-based approach, as prescribed by the Committee on the Rights of the Child, General Comment 13. The study adopts a qualitative methodology which outlines thematic education challenges faced by children in South Africa, especially in the rural areas. These issues include poor schooling infrastructure, lack of water and sanitation services, discrimination, inclusive education, and harmful cultural practices. Thus, considering the role of various stakeholders in promoting basic education, the study recommends that concerted efforts be made to enhance engagement with local communities and civil society, and advocates for effective accountability mechanisms on implementing education policies in South Africa.

1. INTRODUCTION

The right to a basic education is universal, and its realisation is mandatory for all children regardless of gender, race, geographic, social or economic status.¹ The study denotes the relationship between constitutionalism² and international law in promoting human rights. The right to a basic education is entrenched in various regional and international human rights instruments, including the Convention on the Rights of the Child (hereafter, the CRC) of 1989 and the African Charter on the Rights and Welfare of the Child (hereafter, the ACRWC) implemented in 1999. Furthermore, the right is recognised as a global development priority through the Education for All (EFA) initiative, Millennium Development Goals (MDGs), and Sustainable Development Goals (SDGs).

Constitutionally, the right to basic education is outlined in sec. 29(1) of the *Constitution of the Republic of South Africa*, 1996 (hereafter, the *Constitution*).



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- 1 Tran & Mwanri 2013
- 2 Defines a state that has its roots in the law and constitution. Bekink 2006; Wanki 2005.

However, despite the timely ratification and domestication of international treaties by South Africa, and adopting the *Constitution* as a national legal framework, the realisation of the right to a basic education is far from reality; especially for vulnerable children in rural areas.³ Scholars assert documented challenges in schools located in rural areas. The Eastern Cape province, which is predominantly rural, faces several difficulties, including shortage of resources, poor infrastructure, and lack of teaching support as a result of rural to urban migration.⁴

South Africa is identified as one of the most unequal countries in Africa, and a child in the poorest home in South Africa is seventeen times more likely to be hungry and lacks resources to further education.⁵ Furthermore, with a specific view on children, the Eastern Cape province has a high dependency rate, with 33 per cent of the population represented by children under the age of fifteen years.⁶ For this reason, rural communities such as in the Eastern Cape province are harshly affected as welfare and social services in these regions are predominantly underdeveloped. The province has the second highest rate of child poverty at 79 per cent and the state of basic education has been quoted as an “education crisis”.⁷ Many children living in poverty report being denied access to basic education.⁸ These among other factors elevate this research as an area compelling significance.

2. SOUTH AFRICA'S CONSTITUTION

The constitution of a state is the *grundnorm*⁹ from which all national laws and policies derive their validity. It establishes the relationship between the government and the people within that jurisdiction; breathes life into juridical existence; lays down the governance framework; enumerates and limits powers, and declares certain fundamental rights and principles to be inviolable.¹⁰ The extent of government power only extends as far as stipulated in the constitution and not beyond.¹¹ Conversely, constitutionalism is not guaranteed, as many countries have a constitution on paper, which is not necessarily applied in action.¹²

The context of South African political and social history has been a major contributing factor leading to the constitutional dispensation. The pre-1994 period was marred with excessive racial discrimination, unequal and racially defined distribution of resources, and African children were subjected to

3 Thurman *et al.* 2006; Swart & Pettipher 2005; Dyson 2001.

4 Nkomo 2018; Lombo & Subban 2024.

5 Polus *et al.* 2020.

6 Stats SA 2022; Osei-Agyakwa 2012.

7 Ngumbela 2021; Stats SA 2020; Equal Education 2016.

8 Giese *et al.* 2002.

9 Applies to the basic norm of the law, adopted from Hans Kelsen's *Pure theory of law*.

10 Owosuyi 2016; Mzikamanda 2011.

11 Bekink 2006.

12 Okoth-Ogendo 2003.

inferior education, having limited access to basic education.¹³ The *Constitution* not only recognises the injustices of the past, but also depicts post-apartheid South Africa as an open and democratic society based on human dignity, equality, and freedom.¹⁴ This background is essential because it uniquely contextualises the *Constitution* as a legislative document which is not limited to governance, but rather shows how access to basic education for all children has been a primary objective. Secs. 28(1)(c),¹⁵ 29(1)(a),¹⁶ and 29(1)(b)¹⁷ advocate for the protection of children's rights and access to basic education.

The implementation of the right to basic education under sec. 28 has a higher priority relative to other rights.¹⁸ The phrase 'basic education' has two main meanings ascribed to it, based on South African education policy. 'Basic' represents a level of education computed based on time; for example, five years of primary education, and 'education' focuses on the content of education such as arithmetic, reading, and skills.¹⁹ The above view has been the foundational definitional view adopted in Chapter 7²⁰ of the White Paper 1 on Education and Training,²¹ which was adopted at the dawn of democratic governance in South Africa. Furthermore, this is aligned with international standards endorsed by the World Education for All, which appropriates the age and experience of the learner.

Children's rights, as underpinned in sec. 28 of the *Constitution*, are established on four major principles.²² First, the right of the child to development and protection from maltreatment or abuse and neglect or degradation. Secondly, the right to have a voice and be listened to. Thirdly, the best interests of the child²³ should be of primary concern. Fourthly, the right to freedom from discrimination. In order to measure the state's effectiveness to ensure the right to basic education, it is important to determine the scope and content of the right.²⁴ In the context of South Africa, basic education is recognised as a

13 Van der Vyver 1997.

14 Robinson 2003.

15 Sec. 28(1)(c) of the *Constitution* states that every child has the right to basic nutrition, shelter, basic health care services and social services.

16 Sec. 29(1)(a) of the *Constitution* states that everyone has the right to a basic education, including adult basic education.

17 Sec. 29(1)(b) of the *Constitution* states that everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.

18 Roithmayr 2003.

19 Seleokane 2004.

20 Since the phrase 'basic education' is not defined in the *Constitution*, it must be settled by policy in such a way that the intention of the *Constitution* is affirmed ... basic education should be defined in terms of learning needs and outcomes, or qualification levels, or school grades, and whether the content of basic education needs to be the same for children ...

21 Policy documents that outline the preliminary stages of basic education policy formulation in South Africa.

22 Republic of South Africa 1996.

23 UNCRC "List of issues prior to submission of the combined third to sixth periodic reports of South Africa" (2021) UN Doc CRC/C/ZAF/QPR/3-6:par. 11.

24 Veriawa & Coomans 2005.

right, as guaranteed in sec. 29 of the *Constitution*, but no clear definition of basic education is outlined. Arguably, there is no legal clarity in sec. 29 on the context of basic education with regards to school attendance and education quality.²⁵ Even without a clear definition, the right to basic education should be considered a priority to make the right to education a reality for all children. The implementation of the right to basic education, as set out in sec. 29(1)(a)²⁶ of the *Constitution*, is compulsory for all and not subject to resource availability. Thus, sec. 29 of the *Constitution* equates that the right to basic education has to be directly and immediately implemented. This raises the debate on the supremacy of other rights compared to others, yet all rights are regarded as equal. However, commentators on the right to basic education, as ascribed in sec. 29, support that the right to basic education is of higher priority relative to other rights.²⁷

Scholars highlight a dual perspective view of basic education in South Africa. First, basic education as a level of education is time bound, usually a time frame of five years. Secondly, the content which is mostly elementary reading and arithmetic skill.²⁸ The latter view prioritises adequacy rather than the level of education.²⁹ This definition is in sync with the World Declaration on Education for All (1990) that focuses on minimum levels of literacy, numeracy, and essential life skills. The attainment of basic learning needs is essential for a child to participate in various aspects of the community.

3. SELECTED POLICY FRAMEWORK ON BASIC EDUCATION

The justice system has significantly improved its performance in promoting rights and in advocating for issues relating to children, through various legal instruments discussed in this section. In response to the common needs of children in South Africa and in keeping with the supreme law of the country and international obligations, myriad other legislative instruments have been developed. These include the amended *Children's Act* of 2005 (hereafter, *Childrens Act*), which outlines how children should be cared for and protected from abuse.³⁰ Although the *Childrens Act* refers to vulnerable children, it does not address orphaned children or the challenges affecting them. Significantly, the concept of vulnerable children is centred on the neediest children in society, particularly rural children who experience significant disparities compared to their urban peers.³¹

25 McConnachie *et al.* 2016.

26 Sec. 29(1)(a) states that 1. Everyone has the right to a basic education.

27 Franklin & McLaren 2015; Churr 2015; Roithmayr 2003.

28 Woolman & Bishop 2010; Seleokane 2004.

29 Woolman & Fleisch 2009.

30 Hall 2016; Abrahams & Matthews 2011.

31 Skinner *et al.* 2006; Bettenhausen *et al.* 2021.

The *South African Schools Act* 84 of 1996 (hereafter, *Schools Act*)³² is the first port of call in the inquiry on the meaning of basic education, because it gives practical guidelines, namely that access to basic education is compulsory for all children from the age of 7 to 15 years or Grade 9, whichever comes first.³³ The legal instrument is an architect of making basic education available, accessible, and affordable for every child. This is aligned with other international conventions. For instance, the CRC acknowledges the importance of basic education to children. Significantly, the *Schools Act* authorises the Minister of Education in line with the *National Education Policy Act* 27 of 1996 (hereafter, *National Education Policy*)³⁴ and sec. 29 of the *Constitution* pronounces regulations on the minimum uniform norms and standards for school infrastructure.³⁵

The National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment,³⁶ adopted in 2010, provides the fundamental requirements for a school to accommodate children to learn.³⁷ It is important to note the vague nature of the policy, because it does not provide any timelines to address these gross infrastructural imbalances, due to historic inequalities prevalent in the Eastern Cape province. Thus, this paper proposes a reformatory approach to policy implementation, by providing clear guidelines on addressing the infrastructural backlogs, predominantly in the rural schools of South Africa.

By contrast, the Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure outline the acceptable and adequate measures for access to education.³⁸ The regulations provide prerequisite guidelines. For example, sec. 12(4) mentions that plain pit and bucket latrine toilets are not allowed at schools, and sec. 18(13) states that schools must not be constructed with mud or asbestos material or any other inappropriate material.³⁹ Despite the few generalised areas, the publication of the regulations is significant, as it provides legal binding standards for provincial education governments to be held accountable.⁴⁰

32 The *South African Schools Act* 84/1996 advocates for schooling for all children below 15 years, quality education without discrimination and promotes governance in the schooling system.

33 Simbo 2012; Ndonga 2012; Republic of South Africa 1996.

34 The *National Education Policy Act* 27/1996 outlines the policies, legislative and monitoring responsibilities of the Minister of Basic Education.

35 The *South African Schools Act* 84/1996:sec. 5A(1)(a)-(c).

36 Also referred as *The National Policy* in this research.

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

38 Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (GN R920/2013).

39 Republic of South Africa 2013.

40 Equal Education 2018; Murungi 2015.

The reference to mud schools in sec. 18(13)⁴¹ is an area of concern in the Eastern Cape province, which has been described as “extremely serious” and the failure of the government to budget and implement policy.⁴² The “mud school case”⁴³ clearly articulates the failure of the government to this effect. The Government of South Africa pledged that, by 2016, all primary schools built by mud and inappropriate material will be replaced.⁴⁴ Unfortunately, this is not the case. Similarly, the Eastern Cape province has the highest number of pit latrine toilets; thus, the argument in sec. 18(13) of the Minimum Uniform Norms and Standards, that, in critical areas, it identifies the problem without a timeline.

4. LEGAL INTERPRETATION OF BASIC EDUCATION AND POLICY

“A positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education”.⁴⁵ In other words, the State must take positive steps to realise the right to a basic education. This translates as that the state has an obligation to fulfil the right to a basic education for all, as underpinned in sec. 29(1)(a) of the *Constitution*. The *Governing Body of the Juma Musjid Primary School v Essay NO and others* (Juma Musjid)⁴⁶ case underpins the nature and context of the right to a basic education in light of the best interests of the child.⁴⁷ In this case, the School Governing Body (SGB) of the Juma Musjid Primary School, also representing the parents and guardians of the enrolled students, appealed against an eviction order by the Member of the Executive Council (MEC) for education. In response, the Constitutional Court ruled in support of the applicant based on the impact of the eviction on the learners’ right to basic education, as stipulated in the *Constitution* of South Africa.

This resonates from the failure of the *Constitution* in providing an exact definition of basic education.⁴⁸ The case judgement aligned with art. 29 of the CRC with the interpretation of sec. 29 of the *Constitution*, which focused on the right to a basic education.⁴⁹ The Musjid case concluded that “access to

41 Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (GN R920/2013).

42 Ndayi 2020.

43 *Centre for Child Law v Government of the Eastern Cape Province Eastern Cape High Court, Bhisho*, case no. 504/10.

44 Damba-Hendrik 2020.

45 *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC); par. 9. See S Liebenberg *Socio-economic Rights – Adjudication under a Transformative Constitution* 2010; Arendse 2011.

46 *Governing Body of the Juma Musjid Primary School v Essay NO and Others* 2011 8 BCLR 761.

47 The principle of “best interests of the child” establishes that in all actions or decisions that concern the child, to ensure full and effective enjoyment of children’s rights (United Nations 2013).

48 Murungi 2015; Churr 2015; Sloth-Nielsen & Kruuse 2013; Liebenberg 2010.

49 *Governing Body of the Juma Musjid Primary School v Essay*; par. 40.

a school" is a necessity for achieving the right to basic education. The CRC Committee acknowledged the important role of the judiciary in South Africa. The Constitutional Court in this case upheld that the right to basic education is immediately realisable.

In the Eastern Cape province, the Legal Resources Centre (LRC) representing the Centre for Child Law and several schools in the Eastern Cape successfully won the "Mud schools case". As established in this research based on the 4-A scheme, the infrastructure of the school is an important component of access to basic education. Mud schools are built using mud. In most of the instances, these are dilapidated structures and, in some instances, without proper roofing.⁵⁰ Moreover, several broken promises by the government on the issue of mud schools were exposed. For example, in the 2008 Budget Speech, Minister of Education in the Eastern Cape province stated that "[a]ll mud schools have been declared unsafe and are required to be replaced in 2008/09".⁵¹

The "mud schools case" exposed the government on the "gerrymandering" of financial resources, which were initially allocated for building schools. Notably, the case had two key outcomes: first, the R8.2 billion settlement by the Department of Basic Education to eliminate mud schools in the province and, secondly, developing the Accelerated Schools Infrastructure Development Initiative (ASIDI) to eradicate the school infrastructure backlogs in line with the Basic Safety Norms. The programme has not yielded results in the Eastern Cape province.⁵²

5. THE CONVENTION ON THE RIGHTS OF THE CHILD

The CRC⁵³ is the first legally binding international convention to affirm human rights for all, including access to basic education for all children.⁵⁴ The right to a basic education is elaborated in art. 28(1)(a) of the CRC, which articulates that "states parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: make primary education compulsory and available free to all". This demonstrates that it is the responsibility of member states to avail resources and implement measures to ensure primary education is accessible for all children.⁵⁵ As such, the state has an obligation to promote and protect all universally recognised fundamental rights and individual freedoms, in accordance with international human rights instruments.⁵⁶

50 Skelton 2017.

51 *Sunday Times* 2010.

52 Skelton 2017.

53 South Africa ratified the CRC on 16 June 1995 (Republic of South Africa 2015; Viviers 2014).

54 Carlsson 2020; Buck 2014; Mwanza 2013; Mauras 2011; Holzscheiter 2010; McCarney 2008; Fottrell 2000.

55 Jonas 2006.

56 Shaw 2008; Heyns & Killander 2006; Chartier 2002; David 2002; Nowak 2000.

The first paragraph of art. 4 of the CRC provides that “state parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”.⁵⁷ Moreover, art. 4 of the CRC presents several technicalities on the obligation of the state on human rights. The CRC uses phrases such as “other measures” to ensure consistency with other international human rights instruments, which often specify other measures that go beyond legislation.⁵⁸ Furthermore, academic commentators indicate that the reference to “appropriate measures” in other provisions of the CRC is intended to include consideration of those provided by the *Constitution*.⁵⁹

6. THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The ACRWC was adopted by African countries (including South Africa)⁶⁰ in July 1990, and 50 out of 54 countries have ratified the treaty as of February 2023.⁶¹ ACRWC has been described as an authoritative tool for the awareness, protection, and development of the rights of all children in Africa.⁶² Essentially, the treaty is a key instrument to address the effects of war, famine, colonialism, and apartheid on the rights of the child in Africa. “The African children’s charter prides itself on its African perspective on rights yet was inspired by the trends evident in the UN system. It was intended to be a complementary mechanism to that of the UN to enhance the enjoyment of the rights of children in Africa”.⁶³ The ACRWC is in tandem with the United Nation’s call for regional dialogue on the protection and promotion of children’s rights.⁶⁴ In this case, the provisions of basic education in art. 28 of the CRC are entrenched in art. 11(3)(a)⁶⁵ of the ACRWC.

57 CRC 1990.

58 Rishmawi 2006.

59 Detrick 1999.

60 South Africa ratified the ACRWC on 10 October 1997 (ACERWC 2022b).

61 ACERWC 2022b.

62 Mezmur 2020; Olowu 2002; Van Bueren 1995.

63 Lloyd 2002a

64 Adu-Gyamfi & Keating 2013.

65 Art. 11(3)(a) of the ACRWC states: States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular: provide free and compulsory basic education.

In addition, the contribution of the ACRWC has been recognised in several African constitutions, including Namibia,⁶⁶ Uganda,⁶⁷ and Southern Sudan.⁶⁸ The ACRWC and CRC have a complementary relationship, and none is automatically superior at face value. Thus, the superiority of the treaty is dependent on the progressive nature of the right it protects. The foundation of children's rights is established in art. 3 of the CRC, as the principle of the "best interests of the child". The ACRWC has been acknowledged for the "Africaness" approach to the children rights discourse; for example, art. 21 addresses the protection of children from harmful cultural and traditional initiation practices, which hinder access to basic education.⁶⁹

However, a comparison of the rate of ratification between the ACRWC and the CRC shows that African countries quickly ratified the CRC, but the same bandwagon effect was not applied in the case of the ACRWC, as African governments slowly ratified the treaty.⁷⁰ For instance, whilst it took only five years, from 1990 to 1995, for 52 African countries to ratify the CRC, during the same period only seven African countries had ratified the ACRWC.⁷¹ It is also worth noting that all the countries that have ratified the ACRWC have also ratified the CRC. By contrast, some countries, including Morocco, Somalia, South Sudan, and Tunisia have ratified the CRC but not the ACRWC.⁷² This raises critical questions such as: Are African governments confident in ratifying and being accountable to African treaties on promoting children rights? If not, what are some of the reasons contributing to the slow ratification process? Despite the procrastination by African countries in adopting the ACRWC, literature supports that the treaty has had a pivotal role in promoting the rights of children in Africa.

7. CONTRIBUTION OF THE AFRICAN CHARTER ON CHILDREN'S RIGHTS

The ACRWC is a binding international law instrument that identifies the child as a possessor of certain rights and makes it possible for a child to assert those rights in domestic, judicial or administrative proceedings.⁷³ The African children's charter prides itself on its African perspective on rights, yet was

66 Art. 20 of the Constitution of Namibia states: Primary education shall be compulsory, and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge. Republic of Namibia 1990.

67 Art. 30 states: All persons have a right to education. Republic of Uganda 1995.

68 Art. 29(2) of the Constitution of South Sudan states: All levels of government shall promote education at all levels and shall ensure free and compulsory education at the primary level; they shall also provide free illiteracy eradication programmes. Constitute Project 2011.

69 Kaime 2009; Lloyd 2002b; Viljoen 2000; Aidoo 1993.

70 ACERWC 2022b; OHCHR 2023; Mbise 2017.

71 To date, only 47 African countries have ratified the ACRWC; ACERWC, 2022b.

72 ACERWC 2022b; OHCHR 2023.

73 Chirwa 2002.

inspired by the trends evident in the UN system. It was intended to be a complementary mechanism to that of the UN to enhance the enjoyment of the rights of children in Africa.⁷⁴

As shown earlier, the adoption of the ACRWC is in tandem with the United Nation's call for regional dialogue on the protection and promotion of children's rights.⁷⁵ For example, the similarities in the provisions of basic education between arts. 11(3)(a)⁷⁶ and 28 of the CRC and ACRWC, respectively. These are interpreted in several constitutions in Africa, including art. 20⁷⁷ of Namibia, and art. 30⁷⁸ of Uganda, which all refer to basic education.

In the initial ACRWC Country Report for the period 2000 to 2013,⁷⁹ the Government of South Africa acknowledged that, despite legal developments⁸⁰ to align customary law with the Bill of Rights, the trend of abuse of young girls, through forced marriages and the traditional practices of *ukuthwala*, has been persistent.⁸¹ In response, in the second Country Report for the period 2013 to 2016,⁸² the ACERWC called upon the Government of South Africa to take all necessary measures to protect children from harmful cultural practices and child marriages. Similar remarks are included in the concluding recommendations by the ACERWC on South Africa, vocally outlining the cultural vulnerabilities on children:

The Committee calls upon the Government of South Africa to take all the necessary measures to combat the practice of *ukuthwala* which subject[s] girls to forced marriage. Further, the Committee recommends the State Party to address the issue of death and mutilation of boys as a result of botched circumcision. In addition, the State Party shall ban virginity testing of children.⁸³

74 Lloyd 2022b.

75 Mezmur 2020; Meix-Cereceda 2020; Adu-Gyamfi & Keating 2013.

76 Art. 11(3)(a) of the ACRWC states: States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular: provide free and compulsory basic education;

77 Art. 20 of the Constitution of Namibia states: Primary education shall be compulsory, and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge. Republic of Namibia 1990.

78 Art. 30 states: All persons have a right to education. Republic of Uganda 1995.

79 South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child (2000-2013).

80 These include the *Council of Traditional Leaders Act* 1997, *Traditional Leadership and Governance, Framework Act* 2003, and the *Traditional Leadership and Governance Framework Amendment Act* 2003.

81 ACERWC 2013.

82 South Africa's second Country Report on the African Committee of Experts on the Rights and Welfare of the Child on the African Charter on the Rights and Welfare of the Child 2013-2016.

83 ACERWC 2022a.

Moreover, the increased vulnerability of children to HIV/AIDS, as a result of forced marriages and cultural practices (for instance, *ukuthwala* in sub-Saharan countries such as Malawi, Zambia, and Zimbabwe) have made children primary victims of discrimination and abuse. Art. 21⁸⁴ of the ACRWC calls on governments to review their commitment to children's rights, by addressing harmful cultural practices that violate their rights, including child marriages.

In many respects, children are more likely to be victims of human rights violations than adults, and African children are more likely to be victims than children on other continents. Causes of human rights violations in Africa, such as poverty, HIV/AIDS, warfare, famine and harmful cultural practices have a disproportionate impact on the continent's children.⁸⁵

As reflected above, the rights of the child have often been overlooked and viewed as alien in Africa. This has been attributed to the lack of what is termed "Africanness" in the children rights discourse.⁸⁶ Children's rights have been rejected in highly traditional societies, due to historical influence, culture, and colonial rule.⁸⁷

However, research shows that children's rights are not a new phenomenon, as traditional societies have always and continue to respect the rights of children.⁸⁸ In post-colonial Africa, some writers erroneously assume that the CRC was the instrument that brought children's rights to Africa.⁸⁹ In support, Kaime (2009) amplified the concerns of African children:

the situation of children living under apartheid; the disadvantages facing the African girl child; the African conception of the community's responsibilities and duties; and the role of the extended family in the upbringing of children.

This was mainly because of the inadequacy⁹⁰ of the CRC to address concerns prevalent in the African states. Some of these concerns were regarded as having been overlooked, but their effects are still rampant in the present

84 Art. 21 of the ACRWC states: 1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and b) those customs and practices discriminatory to the child on the grounds of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

85 Viljoen 2000.

86 Aidoo 1993.

87 Rafudeen 2016; Lloyd 2002.

88 Mezmur 2008.

89 Adu-Gyamfi & Keating 2013; Njungwe 2009.

90 The CRC has been criticised as aid-oriented, using children's rights as a road to access aid. Reynolds *et al.* 2006; Quennerstedt *et al.* 2018; Fairhall & Woods 2021.

generation and can affect future generations if not addressed. In response to the above critics, commentators recommend the need to take an unambiguous stance on the applicability of the CRC on children, by considering the socio-economic and developmental diversities of African children, and echo that it is unavoidable to support the CRC without the contribution of an African counterpart.⁹¹ The ACRWC is grounded on an African perspective's key principles of non-discrimination, the best interests of the child, children's participation and the survival, culture and development of the child. Thus, the application of the ACRWC to promote and protect children's rights in Africa is justifiable.

8. IMPACT OF CULTURAL PRACTICES ON BASIC EDUCATION

Culture incorporates the beliefs, value systems, norms, myths, behaviour, and structural elements of a group or society.⁹² In the context of this research, the Eastern Cape province has a rich cultural background, which includes early and forced marriages known as *ukuthwala*. The custom results in the violation of children's rights and involves forcing girls as young as twelve years into arranged marriages, without their consent, resulting in poor school performance, increasing dropout rate, sexual abuse, and exposure to HIV AIDS.⁹³

The cultural practice is labelled as a form of human trafficking and the perpetrators of such actions as rapists.⁹⁴ These issues have been echoed by areas of concern by the CRC Committee, as highlighted below:

The Committee is concerned at the high prevalence of harmful practices in the State party, which include child and forced marriage, virginity testing, witchcraft, female genital mutilation, polygamy, violent or harmful initiation rites and intersex genital mutilation. The Committee is also concerned that, although the practice of *ukuthwala* involving children is considered an "abuse of *ukuthwala*" and is a crime, as the State party noted during the dialogue, this practice still exists.⁹⁵

91 Adegbola 2007; Ankut 2007.

92 Hugo 2002; Onibere *et al.* 2001; Parsons 1999.

93 Kugara *et al.* 2017; Nkosi & Wassermann 2014; Gaffney-Rhys 2011; Mwambene & Sloth-Nielsen 2011; De Silva-de-Alwis 2008.

94 Ngcukana 2009.

95 CRC 2016.

Unfortunately, it is deplorable to note that the above issues have not been addressed, as reflected in the recently published report by the CRC Committee.⁹⁶ This includes the violation of children's rights of young boys at illegal initiation schools, as reported in the Eastern Cape province.⁹⁷ The province has the highest number of child deaths and hospitalisation as a result of botched circumcision and unsterilised equipment.⁹⁸ The correlation between impacts of health of the botched circumcision and access to education are significant, because depending on the severity of the injury and access to healthcare, the initiates will be forced out of school, whilst they recover from the injuries or long-term consequences can force them to drop out of school.⁹⁹

Sec. 28(1) of the *Constitution*, and as supported in secs 12(1),¹⁰⁰ 2(a),¹⁰¹ 3,¹⁰² and 8¹⁰³ of the *Children's Act* states that every child has the right to be protected from abuse, forced marriage, and harmful cultural practices. The CRC Committee calls for the Government of South Africa to criminalise these acts and expeditiously sanction the perpetrators.¹⁰⁴ The impetus of basic education for vulnerable children has been eroded by the inability to enforce laws in line with the Bill of Rights.¹⁰⁵ For example, progress to provide a legislative framework on culture was only assented to in June 2021, in the form of the *Customary Initiation Act*.¹⁰⁶ In the process, this has ignited the debate on the role of traditional leaders in the domestication of treaties.

Sec. 211 of the *Constitution* provisions the role and status of traditional leaders, specifically in customary law, but does not detail legislative responsibilities required in the domestication of treaties.¹⁰⁷ The application of treaties cannot be achieved when there is a vacuum in power between the state and

96 CRC 2021; UNCRC "List of issues prior to submission of the combined third to sixth periodic reports of South Africa" (2021) UN Doc CRC/C/ZAF/QPR/3-6. With reference to the Committee's previous concluding observations (CRC/C/ZAF/CO/2:par. 40), please provide information on the legislative and practical steps taken to prohibit and eradicate all forms of harmful practices carried out on children in the State party, including the abduction of girls for the purpose of forced marriage (*ukuthwala*), child and forced marriage, so-called "virginity testing", witchcraft, female genital mutilation, polygamy, violent or harmful initiation rites, and intersex genital mutilation (UNCRC, 2021).

97 Makama 2018.

98 Morei 2017; AIDS Foundation 2012; Nqeketo 2008.

99 Nomngcoyiya & Kang'ethe 2017.

100 (1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.

101 A child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement.

102 Genital mutilation or the circumcision of female children is prohibited.

103 Circumcision of male children under the age of 16 is prohibited, except when performed in prescribed manner and recommended by medical practitioner.

104 CRC 2021.

105 Nomngcoyiya & Kang'ethe 2017.

106 The South African legislation regulates customary initiation practices and outlines the roles and functions of the various role players involved during the initiation process.

107 Republic of South Africa 1996.

traditional leaders. The Eastern Cape province is the classic example where culture is a significant component of the community, and traditional leaders have a critical role to address various cultural practices that violate the rights of the child, through *ukuthwala* and underage initiation practices.

The above argument on culture is critical, as not all cultural values violate the rights of the child. Art. 31(2)¹⁰⁸ of the CRC supports engaging in cultural activities as long as the right of the child is upheld, and the best interests of the child are maintained. As such, the role of the community is important in addressing the education challenges facing children in the Eastern Cape province, as provided in the values of *ubuntu*, which translate to “I am what I am because of who we all are”.¹⁰⁹ Therefore, the community as a whole should participate in protecting and promoting the right to basic education.¹¹⁰

9. SOUTH AFRICA'S PROGRESS IN REPORTING AND OUTSTANDING ISSUES

The state reports to treaty monitoring bodies provide information on implementation, progress, and compliance with treaty provisions.¹¹¹ Significantly, the NGO sector, government departments, and relevant community stakeholders have a critical role in the preparation state reports.¹¹² At the compiling of this research, the Government of South African had an outstanding report, due on 15 February 2022,¹¹³ responding to the concluding observations (CRC/C/ZAF/CO/2) as adopted in 2016, to provide an update on the domestic efforts made at implementing the CRC. The specific recommendations with regards to basic education include:

- The need for child rights-based approach to achieve SDG 4.1.¹¹⁴
- To provide access to free and quality basic education for all children, prioritising access to education for children facing multiple forms of discrimination.
- To develop a comprehensive law and policy for children rights-based model for children with disabilities. To adopt a community support plan of action to support vulnerable children in the rural areas.

108 Art. 31(2) of the CRC states: States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity (CRC 1990).

109 Msengana 2006; Maluleke 2012.

110 Ng'weshemi 2002.

111 Fraser 2018; Leblanc *et al.* 2010.

112 Tawana 2021; Chenwi 2010.

113 Overdue report III-VI https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/LateReporting.aspx

114 By 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes.

- The provision of statistical information and disaggregated data on children. For example, basic education and vulnerable children.
- The legislative and practical measures taken to eradicate harmful cultural practices on children, including *ukuthwala*, so-called “virgin testing”, and genital mutilation.

In the initial ACERWC Country Report for the period 2000 to 2013,¹¹⁵ the Government of South Africa acknowledged that, despite legal developments¹¹⁶ to develop customary law in line with the Bill of Rights, the trend of abuse on young girls continues, through forced marriages and the traditional practices of *ukuthwala*. In response, in the second Country Report for the period 2013 to 2016,¹¹⁷ the ACERWC called upon the Government of South Africa to take all necessary measures to protect children from harmful cultural practices and child marriages. Similar remarks are included in the concluding recommendations by the ACERWC on South Africa, vocally outlining the cultural vulnerabilities on children:

The Committee calls upon the Government of South Africa to take all the necessary measures to combat the practice of *ukuthwala* which subject[s] girls to forced marriage. Further, the Committee recommends the State Party to address the issue of death and mutilation of boys as a result of botched circumcision. In addition, the State Party shall ban virginity testing of children.¹¹⁸

Specifically in the South African case, the national parliament has played a remote role, lacking political will on state reporting and there has been a disconnect between domestic role players and the state.¹¹⁹

10. BASIC EDUCATION FRAMEWORK: GENERAL COMMENT NO. 13 (4-A SCHEME)

The CRC General Comment No. 13 (hereafter referred to as 4-A Scheme) provides a child-centred framework on basic education, anchored on four key elements: availability, accessibility, acceptability, and adaptability. The framework outlines the minimum requirements of the state for the realisation of basic education.¹²⁰ The state has a primary responsibility to ensure that basic education is available for all children, through the provision of adequate

115 South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child (2000-2013).

116 These include the *Council of Traditional Leaders Act 1997*, *Traditional Leadership and Governance Framework Act 2003*, and the *Traditional Leadership and Governance Framework Amendment Act 2003*.

117 South Africa's second Country Report on the African Committee of Experts on the Rights and Welfare of the Child on the African Charter on the Rights and Welfare of the Child (2013-2016).

118 ACERWC 2022a.

119 Tawana 2021.

120 Churr 2015.

and functioning schools.¹²¹ Therefore, infrastructure and the provision of educational resources are vital aspects of basic education.¹²² As such, the realisation of basic education is limited when educational institutions are not available.

The accessibility aspect shows that the school environment should not promote discrimination, abuse, and inequalities on children.¹²³ In application, access to education is divided into three main dimensions:

- Non-discrimination – this ensures that basic education is accessible to all, with special focus on the most vulnerable children, without any form of discrimination.¹²⁴
- Physical accessibility – the school should be within a safe physical reach. This includes both geographical location and e-learning for distance learning. Special attention is required in the rural areas, as established in this study. The Eastern Cape province has limited e-learning access and children, especially learners with disabilities, are forced to travel long distances to the nearest school.
- Economic accessibility – access to basic education has to be affordable for all children. Several legal cases in South Africa have shown that the state has a responsibility to cover even additional costs in the form of learning material and transportation.¹²⁵ The CRC unequivocally advocates for free basic education for all children. Unfortunately, this is not the reality in South Africa.¹²⁶

The next element of acceptability advocates that the schooling environment has to be safe, non-discriminatory, culturally appropriate, and that educators have to be both qualified and professional.¹²⁷ This helps ensure that the quality of basic education is not compromised, regardless of the social, economic, cultural, and political environment.

In terms of adaptability, basic education should be receptive to the context of the community, and flexible to the global view to develop learners. This is achieved through child-friendly teaching methods and learning curriculum which reflects on other aspects of the community, including language, culture, and disparities.¹²⁸ For example, as reflected in the research, the use of play learning methods in teaching create an open learning environment with less discrimination.

121 Veriava & Coomans 2019; Tomaševski 2006.

122 Churr 2015.

123 Arendse 2011; Kalantri *et al.* 2010; Pendlebury *et al.* 2009.

124 Courtis & Tobin 2019.

125 For example: *Tripartite Steering Committee v Minister of Basic Education* 2015 3 All SA 718 (ECG) (25 June 2015); *Section 27 v Minister of Education* 2013 2 SA 40 (GNP); *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA).

126 Strohwald 2021.

127 Kalantri *et al.* 2010; Pendlebury *et al.* 2009; Tomaševski 2001.

128 Tomaševski 2006.

11. RIGHTS-BASED APPROACH TO BASIC EDUCATION

The research is inclined towards a rights-based approach to a basic education theoretical framework, which is established on international children's rights standards to protect and promote the right to basic education. The rights-based approach integrates the principles of international children's rights into the policies and programmes.¹²⁹ The rights-based approach is established on the four key principles of the CRC, namely non-discrimination,¹³⁰ best interests of the child,¹³¹ the right to survival, and the development and views of the child.¹³² The application of a rights-based approach to the implementation of the right to education is paramount to promoting a multidimensional and non-discriminatory view in basic education.¹³³ Arts. 2(2), 23, and 28(1)(a) of the CRC, which advocate for access to basic education for all children, protect all children from all forms of discrimination, and recognise the rights of children with special needs.¹³⁴

Research has shown an increasing emphasis on the rights-based approach in education.¹³⁵ The approach is based on seven foundational principles. First, universal nature supports that all children are entitled to children's rights. Evidently, art. 28(1)(a) of the CRC promotes access to basic education for all children. Secondly, the approach argues that children's rights are indivisible, interdependent, and interrelated; as a result, they cannot be ranked in any form of hierarchy. The third and fourth principles focus on equality and non-discrimination, respectively, as all children have the right to basic education without being subject to any form of discrimination. Access to basic education must be guaranteed free from any form of discrimination.¹³⁶ Furthermore, art. 1 of the Universal Declaration of Human Rights (UDHR) establishes that all children are equal in dignity and rights.¹³⁷

129 Churr 2015.

130 Art. 2 reads: "States parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's parents or legal guardian, race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, poverty, disability, birth or other status" (CRC 1989).

131 Art. 3(1) reads: "In all actions concerning children whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration" (CRC 1989).

Art. 6(2) reads: "State parties shall ensure to the maximum extent possible the survival and development of the child" (CRC 1989).

132 Art. 12(1) reads: "States parties shall assure to the child who is capable of forming his or her own views the rights to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child" (CRC 1989).

133 UNESCO 2007.

134 CRC 1990.

135 UNICEF 2007.

136 Lohrenscheit 2002,

137 UNICEF 2007.

The fifth principle explores free, active, and meaningful participation of rights. This is also linked to the sixth principle of the approach, which seeks the importance of empowerment. The aim is to help grow and give people capabilities to improve their communities.¹³⁸ Lastly, the seventh principle is based on accountability, and in the process improving the governance of the basic education sector. For example, the research examines the right to basic education in relation to certain cultural practices; for instance, *ukuthwala* in the Eastern Cape province. As noted in sec. 31(2) of the *Constitution*, cultural rights should not be exercised to violate any rights included in the Bill of Rights.¹³⁹

12. METHODOLOGY, DATA COLLECTION, AND ANALYSIS

This study is qualitative in nature. Scholars recommend the qualitative research design, as it is flexible, responsive, and provides a holistic approach to the participants' lived experiences.¹⁴⁰ As a result of the COVID-19 outbreak,¹⁴¹ the Government of South Africa introduced lockdown measures to reduce transmission.¹⁴² Thus, in the case of primary data, key informant interviews were conducted using electronic and telephonic methods. Various online platforms, including Microsoft Teams, Skype, and Zoom were used. However, considering the rural nature of some of these areas, connectivity challenges were experienced when conducting online interviews and alternative arrangements were made to conduct some interviews telephonically. Moreover, due to lockdown restrictions, some participants were in different time zones. As a result, such interviews were conducted late at night or early in the morning to accommodate the participants' preferences.

The researcher used the Atlas.ti, research software to analyse the data findings, through the content analysis method. The research population of 50 representatives from NGOs, primary schools, and Government Department in the Eastern Cape province, was selected using the snowball sampling method. The study was registered and approved by the Research Ethics Committee at the University of Pretoria (Ethics approval number: HUM035/0820). The researcher ensured that participation was voluntary, and permission to conduct key informant interviews was obtained from all the participants, through informed consent.

The researcher also used secondary data sources from legal and policy documents to fully comprehend and understand basic education as a fundamental right. The right to a basic education cannot be implemented in isolation, while ignoring other fundamental rights prescribed in the *Constitution*, education policies, and ratified treaties. South Africa has a three-

138 UNICEF 2007.

139 *Constitution of the Republic of South Africa* 108/1996; Republic of South Africa 1996.

140 Creswell & Creswell 2022; Shikwambana & Fourie 2023.

141 Caused by a novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) (Pillay-Van Wyk *et al.* 2020).

142 Republic of South Africa 2020.

tier system of government, made up of the national, provincial and local levels of government.¹⁴³ The article focuses on the Eastern Cape province, which includes the Amathole, Sarah Baartman, Chris Hani, and OR Tambo districts and areas such as Gqeberha,¹⁴⁴ East London, Qonce,¹⁴⁵ Dikeni,¹⁴⁶ Middeldrift, Mthatha,¹⁴⁷ Port Alfred, Komani,¹⁴⁸ Seymour, and Fort Beaufort. Based on the participants' responses, six main challenges on basic education are discussed in the findings.

12.1 Nutrition

Approximately 368 million children receive meals at school every day.¹⁴⁹ The right to access to sufficient food is stated in secs. 27(1)(b)¹⁵⁰ and 28(1)(c) of the *Constitution*.¹⁵¹ Art. 24(2)(c)¹⁵² of the CRC supports the provision of meals for children to combat malnutrition. The South African government adopted the National School Nutrition Programme (NSNP)¹⁵³ to initiate nutrition programmes in the Eastern Cape province, as supported by a participant during the research:

And then we work with the community to support the children with a healthy snack or first bread. And then every child gets a hot lunch. So, there's like a stew with soya. And there are always veggies in it. There's always protein in it. So yeah, they all get a hot lunch. And then in the hostel, kids get food.

In another interview, the participant revealed:

I cannot say we do not get any support. What I can say is yes, we spoke with them, whatever we talked to them about did not come to fruition because we have been given so many promises but those promises are not putting anything on the table. Because even the students come to school and can be hungry and we have to find something for them to eat in the morning. But imagine if the student has to be with us till 3 pm or 4 pm, they will still need something to eat.

143 Republic of South Africa 1996; Mudau 2020.

144 Formerly known as Port Elizabeth.

145 Formerly known as King Williams Town.

146 Formerly known as Alice.

147 Formerly known as Umtata.

148 Formerly known as Queenstown.

149 World Food Programme 2016.

150 Everyone has the right to have access to (b) sufficient food and water.

151 Republic of South Africa 1996; Kallman 2005; Lacey 2012.

152 Art. 24(2)(c) of CRC states: States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

153 The National School Nutrition Programme is a government programme that provides one nutritious meal to all learners in poorer primary and secondary schools.

These efforts are significant as 60 per cent of children below the age of six years in the Eastern Cape province experience poverty, and half of them are exposed to food poverty.¹⁵⁴ Furthermore, 66 per cent of the participants indicated that there is a backlog of financial assistance on the feeding programmes initiated as part of the NSNP between 2019 to 2022 in the Eastern Cape province.

12.2 Water and sanitation

Sec. 27(1)(b) of the *Constitution* highlights that access to water is a basic right.¹⁵⁵ This is supported by the *Water Services Act* 108 of 1997, which states that everyone has the right to basic sanitation, which is safe, clean, and well ventilated. In addition, arts. 6 and 24 of the CRC refer to rights on water sufficiency for children.¹⁵⁶ Another participant stated:

You would never say that we have schools that have pit latrine toilets.¹⁵⁷
So, for me, it's just a little sad that we were fixated on optics and not producing tangible results in education in the province.

Access to basic education takes into consideration the state of sanitation and hygiene to which the students are exposed. This includes the availability of toilets in schools, provision of water, and hygiene.

In the Eastern Cape province, issues of concern included a lack of sufficient toilets for the number of pupils in line with the learner-to-toilet ratio of 1:30; lack of an adequate and/or reliable water supply often requiring the use of a borehole; poor hygiene with associated health problems among students; leaking septic tanks; broken sanitation infrastructure that could not be repaired owing to lack of funds and an inability to remedy vandalism or theft in sanitation facilities.¹⁵⁸

The above summary is critical, as it provides a clear picture of the state of sanitation in the Eastern Cape province. A toilet ratio of 1:30 is unjustifiable. Whether in a rural or urban set-up, when it pertains to access to basic education, both learners and educators have the right to proper sanitation and hygiene. In 2018, President Ramaphosa¹⁵⁹ launched Sanitation Appropriate for Education (SAFE), aimed at removing all pit latrines by 2023, but little progress has been made in the Eastern Cape province, as the province still has the highest number of pit latrine toilets at 1,585, followed by 1,365

154 Hall & Sambu 2017.

155 Republic of South Africa 1996.

156 Two legally binding human rights covenants of 1966, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), have recognised water as a human right (ICESCR 1976).

157 Also known as latrines, used for human excreta to manage the waste usually located within a specific area, the toilets are prone to collapsing if not properly built (Still *et al.* 2012; Odeku 2022).

158 Equal Education 2016.

159 The 5th democratically elected president of South Africa.

in KwaZulu-Natal, whilst primary schools in more urban provinces such as, Gauteng, Northern Cape, and Western Cape have no pit latrine toilets recorded.¹⁶⁰ In response, another participant reiterated:

But we're still sitting with over 1000 schools with pit latrines.¹⁶¹ The second timeline was on school infrastructure, we still have hundreds of schools with improper infrastructure, with poor quality materials from zinc, asbestos, and all those things.

The issue of pit latrine toilets in primary schools should be regarded as an issue of concern, considering the safety implications involved. Scholars attest to the lack of commitment to eradicate pit latrine toilets.¹⁶²

12.3 Discrimination

This study supports previous research that explores discrimination and limited access to basic education, due to social and cultural abuse.¹⁶³ The prohibition of discrimination against children is highlighted in secs. 28(1)(d)¹⁶⁴ and 9(1)¹⁶⁵ of the *Constitution* and complemented in arts. 2(1),¹⁶⁶ 6,¹⁶⁷ 12(1),¹⁶⁸ and 34(1)¹⁶⁹ of the CRC, which focus on non-discrimination, the best interests of the child, the right to life, and the views of children, respectively.¹⁷⁰ In addition, as recommended, the State must consider equity, practicability, and the need to remedy the injustices of racially discriminatory laws.¹⁷¹ Participants identified instances of racial discrimination:

¹⁶⁰ Amnesty International 2020.

¹⁶¹ This type of toilet uses a groundwater system, whereby human waste enters a hole in the ground that collects human faeces into a pit or hole in the ground.

¹⁶² Human Rights Watch 2021; Equal Education 2016; Louton *et al.* 2015; Legotlo 2014.

¹⁶³ Gregsoon *et al.* 2005.

¹⁶⁴ Every child has the right (d) to be protected from maltreatment, neglect, abuse or degradation.

¹⁶⁵ Everyone is equal before the law and has the right to equal protection and benefit of the law.

¹⁶⁶ States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

¹⁶⁷ States Parties recognise that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child.

¹⁶⁸ States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

¹⁶⁹ States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.

¹⁷⁰ Republic of South Africa 1996; CRC 1990.

¹⁷¹ Stein 2017.

I believe that we need to be less racially conscious in the township schools. In black-dominant communities, you will hardly find any special need facility; yet in white dominant, there seems to be more effort and schools to cater for children with special needs. I don't know it might not be now maybe our history has a role to play in the current state. I think that teachers that have proved their worth in other (even non-township) schools need to be employed.

The response shows that a racial divide is still prevalent, even in issues related to access to basic education. The central feature that distinguishes South Africa in terms of education provision is the extent to which racially entrenched attitudes and discriminatory practices led to extreme disparities.¹⁷² This relates to both the availability of schools and special needs facilities in the Eastern Cape province.

12.4 Safety infrastructure

In South Africa, rural areas mostly lack the social and economic viability needed to sustain technological improvement.¹⁷³ Sec. 28(2) of the *Constitution* recommends that the interests of the child are paramount; therefore, the safety of a child at school is significant. However, issues pertaining to lack of infrastructure development were cited during the research.

But in terms of our agreement with the Department, we are supposed to meet quarterly, where we can raise issues that some of the schools are having. And this year (2022), we haven't had those quarterly meetings. They have always been postponed. Concerning the Norms and Standards law, we are supposed to produce a yearly report of progress around infrastructure. So, we analyse reports. And if there are discrepancies, for example, in 2019, the Department did a copy-and-paste of the report. It is the same as the one they sent last year. And also, there is a lot of analysis of the reports, and there are a lot of discrepancies between what is sent to Parliament and what is in the Department reports.

This shows a lack of successful implementation of the standards for school infrastructure. This perspective is supported in reference to the lack of implementation of the Norms and Standards:

By 29 November 2016, all schools must have access to some form of power supply, water supply and sanitation. Schools entirely made of inappropriate materials, such as mud, metal, asbestos or wood, must be replaced with new schools. In the Eastern Cape province, a lot of our work has been around creating accountability that's linked to the law of norms and standards.¹⁷⁴

172 Engelbrecht 2006.

173 Cristobal-Fransi Montegut-Salla *et al.* 2020; Hall 2019.

174 Equal Education 2016.

In terms of sec. 4(3)(a) of Norms and Standards, “all schools built entirely from mud as well as those built entirely from materials such as asbestos, metal and wood must be prioritised”. In this way, all children are entitled the right to basic education. This includes providing appropriate school infrastructure which is safe and does not endanger the life of both children and teachers.¹⁷⁵

12.5 Inclusive education

In relation to inclusive education in the Eastern Cape province, 59 per cent of the participants highlighted the educational challenges facing children with disabilities. Sec. 9(3) of the *Constitution*, arts. 2(1)¹⁷⁶ and 23(1)¹⁷⁷ of the CRC advocate against the discrimination of children with special needs in schools. The Government of South Africa instituted inclusive education policies such as White Paper 6 to reinforce the call of inclusive education, but the participants reflected on the lack of policy implementation:

However, though, where we are failing the children. The compulsory school-going age for learners with disabilities is not determined. That is where we have failed, that has exacerbated the issue and then in South Africa, yes, we have an Inclusive Education system and the White Paper but I think implementation on the ground is still not happening.

In addition, other participants mentioned the lack of sufficient schools to accommodate a growing population of children with special needs in the province:

We don't have enough schools, very minimal, especially for children with disabilities. Since we are here in Port Alfred, you will find that the nearest centre is far away. And there are only 2 Government special schools in Gqeberha. And only 1 specialised school in the Eastern Cape province. Most children are still on the waiting list, over 2500 in this area alone

As such, because of the long waiting list for children with disabilities, only a few schools can accommodate them; as a result, children with special needs, especially those located in the rural areas, are forced to travel long distances to the closest available school. This means that children in areas such as, Zwide, Nkwenkwezi, Nqanqarhu, Ikhwezi, Kwazakhele, and Ndevana have to travel between 60km to 250km to the nearest school in Gqeberha.

175 Amnesty International 2020; Du Plessis & Mestry 2019; Chukwuemeka & Ikechukwu 2013.

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

177 Art. 23(1) states: “States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

12.6 COVID-19 pandemic

The first case of COVID-19 in South Africa was recorded on 5 March 2020.¹⁷⁸ In response to the high infection and death rate, the Government of South Africa declared a state of emergency in accordance with sec. 37 of the *Constitution*, and the *State of Emergency Act* 64 of 1997. The COVID-19 pandemic was cited as a major challenge by 72 per cent of the responses.

Because of such challenges, we are left behind, and with physical learning, due to Covid, they're only allowed to attend classes once or twice depending on the lockdown restrictions. In some cases, students have gone months without access to learning material.

Due to the lockdown restrictions, children in rural schools did not have access to learning materials. The introduction of online education was disadvantageous in several ways, including the lack of resources to support the online learning.

Currently, we are working in a climate that uses the hybrid model which [is] also physical and virtual learning. The challenge is that working with learners from previously disadvantaged backgrounds means their economic status does not necessarily allow them to participate in virtual learning because of various reasons such as, they might not have cell phones or laptops where we could connect via WhatsApp. Some do have cell phones but do not have the means to buy data.

In the context of the COVID-19 pandemic, the issue of lack of access to education was not limited to resources but more to structural issues; for instance, an online network in rural areas. Rural learners and teachers were seemingly helpless on how to approach online learning during the COVID-19 lockdown measures; therefore, the chasm between the “haves and the have-nots” gets ever deeper, especially when considering the socio-economic inequalities in South Africa.¹⁷⁹

13. CONCLUSIONS

The study discussed the contribution of the *Constitution* and international children's rights treaties on access to basic education. The case study on the Eastern Cape province showed lack of adherence to the right to a basic education as laid out in sec. 29(1)(a) of the *Constitution* and art. 28 of the CRC, which show that the right to a basic education can only be achieved by recognising other rights as inscribed in statutes, including the right to food, health, protection from abuse, and inclusive education.

Furthermore, the study showed children's rights violations as a result of harmful cultural practices such as *ukuthwala* and initiation ceremonies that are common in the Eastern Cape province. Although both the *Constitution* and the CRC refer to the right of culture, the ACRWC specifically refers to the violation of children's rights by child marriages and the betrothal of girls.

178 Giandhari *et al.* 2021; Pillay-Van Wyk *et al.* 2020.

179 Dube 2020.

The findings obtained from the online interviews exposed significant challenges in the basic education sector, including nutrition, water and sanitation, discrimination, safety infrastructure, inclusive education, and the COVID-19 pandemic. An area that needs immediate action is addressing the challenges facing children with disabilities in the Eastern Cape province. The impact of the COVID-19 pandemic predominantly affected schooling during the research, especially in the primary schools located in rural areas, where access to online network is limited.

However, to provide a balanced analysis, the research appreciates the significant role of NGOs and community through various efforts, including nutrition programmes and inclusive education initiatives. Some proposed recommendations to address the basic education challenges include enhancing engagement opportunities with local communities and NGOs and developing effective accountability mechanisms on implementing education policies. The study demonstrated that the application of constitutional and international law through treaties has not likened progress on access to basic education in the Eastern Cape province, especially in the case of the dilapidated infrastructure, water and sanitation system.

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