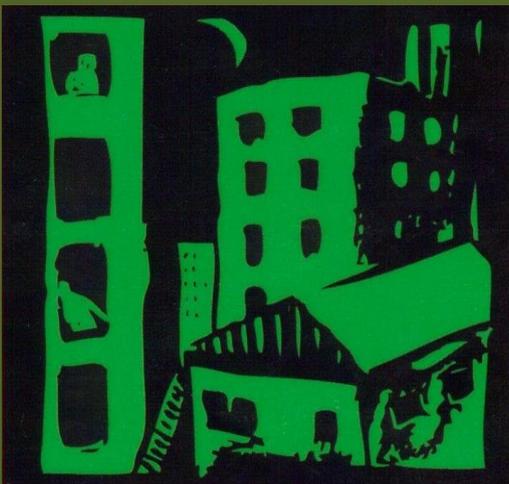


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**Four years
following South
Africa's declaration
upon the
ratification of the
ICESCR and
jurisprudence on
the right to basic
education: A step in
the right direction?**

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ABSTRACT

Education empowers individuals to develop the skills needed for economic success in order to contribute to nation-building and reconciliation. Following South Africa's ratification of the International Covenant on Economic, Social and Cultural Rights, there were mixed reactions on account of the much-anticipated ratification, on the one hand, and the declaration that subjected the right to basic education to the National Education Policy Framework and the available resources, on the other. This article interrogates the efficacy of this declaration in the realisation of the right to basic education in South Africa. It utilises a three-step approach. First, it contextualises the right to education and evaluates the declaration. Secondly, it evaluates selected decisions of the South African courts to establish the trend on the right to basic education. The third step juxtaposes the executive's and the courts' approaches from the ratification to date. A conclusion and recommendations inform the way forward.

Keywords: Best interests principle, Eviction of schools, Immediate realisation, National policy, Provision of textbooks, Right to basic education, Staffing.

1 INTRODUCTION

A study by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Institute for Statistics (UIS), indicates that 263 million children, adolescents and youth worldwide account for 1 out of every 5 children out of school. Further disaggregation of these figures indicates that at the primary level, 63 million children between the ages of 6 and 11 account for 9 per cent that do not go to school.¹ A closer look at statistics from South Africa indicates that the dropout rate for children at the primary level is higher than for those at secondary schools and tertiary institutions.² In this regard, the dropout rate in 2010 stood at 30 per cent accounting for 1,090,765 of the 3,628,337 learners. In 2013, the figure increased to 30.4 per cent. In 2017, this number increased to an alarming rate which showed that 60 per cent of first graders do not complete grade 12.³ These numbers are worrying in that children at primary schools as critical beneficiaries of the right to basic education drop out of school. On the basis of these statistics, this article deliberately concentrates on the right to basic

¹ UNESCO "Education data release: One in every five children, adolescents and youth is out of school" (2018) available at <http://uis.unesco.org/en/news/education-data-release-one-every-five-children-adolescents-and-youth-out-school> (accessed 24 October 2019).

² Chürr C "Realisation of a child's right to a basic education in the South African school system: some lessons from Germany" (2015) 18(7) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 2405 at 2407.

³ Elizabeth HW, Linda LC, Hui X, Lisa W & Edward AS "Predicting secondary school dropout among South African adolescents: a survival analysis approach" (2017) 37(2) *South African Journal of Education* 1 at 2.

education. It contextualises the right to education and evaluates the declaration, followed by an evaluation of selected decisions by South African courts to establish the trend on the right to education. The third step is a juxtaposition of the executive's approach from ratification to date and the courts' approach in the same regard. A conclusion and recommendations follow.

The previous paragraph presented the numbers and percentages of the dropout rate. In addition to the questions on basic education that need to be answered, these statistics reflect an increase in children's drop-out rates with regard to the right to basic education, and leave many questions unanswered. The main question is : what informs the child dropout rate from school. At its core, this question interrogates the conditions of learning that a child experiences,⁴ the social and academic environment in terms of infrastructure, materials and human resource skills. Any answers to these challenges that impede the child's enjoyment of the right to education offer a yardstick in the evaluation of the right to education.⁵ Some scholars state that issues, such as, the lack of textbooks, sanitation and infrastructure, buildings, teaching materials, and accountability of the accounting officers in the Department of Education, hinder the delivery and realisation of basic education.⁶ It is thus prudent to contextualise the nature and expanse of the right to education from a normative perspective. It is only then that the declaration by the government can be scrutinised as the basis for the subsequent evaluation of the courts' approach in dealing with cases on the right to basic education.

2 CONTEXTUALISATION OF THE RIGHT TO EDUCATION AND AN EVALUATION OF THE DECLARATION

This part contextualises the right to education under international law, followed by a reflection on its interpretation in South Africa. Thereafter an evaluation of the declaration is undertaken. The Constitution of the Republic of South Africa 1996 (Constitution) requires that international law must be used in the interpretation of the Bill of Rights.⁷ The jurisprudence of international law offers insights into the nature of the right to education. In its General Comment, the Committee on Economic, Social and

⁴ Chürr (2016) at 2406.

⁵ Chürr (2016) at 2406.

⁶ Odeku KO & Nevondwe L "An analysis of the constitutionally guaranteed right to basic education in South Africa" (2014) 6(3) *Mediterranean Journal of Social Sciences* 847 at 847.

According to s 39 (1)(b) of the Constitution , it is required that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. Furthermore, application of international law is provided for in s 233 which requires that when interpreting that section, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Cultural Rights (CESCR)⁸ recognises that the right to education is a human right and an indispensable means of realising other human rights.⁹ It is viewed as a tool of empowerment that aids the improvement of the status of persons who are economically and socially marginalised in society. Furthermore, it is intrinsically linked to the safeguarding of children from exploitative and hazardous labour and sexual exploitation.¹⁰

2.1 Contextualisation of the right to education

Contextualisation is engaged under both international and national law. Under international law and in respect to some obligations, the ESCR Committee requires that States Parties adhere to the minimum core standard as regards the nature of its obligations under the ICESCR.¹¹ A subjective standard has to be applied to establish whether the States Parties have adhered to this minimum core because it is based on the availability of resources in the context of each country. First, an assessment of whether a State has discharged its minimum core obligation requires an account of the resource constraints that a given country is facing.¹² Secondly, the State Party should show the necessary steps it has taken to the maximum of its available resources to uphold the right before an intermittent failure is stated.¹³ These necessary steps have not limited the adoption of legislative and judicial measures, but rather administrative, financial, educational and social measures.¹⁴ It is argued that a State Party's engagement with these two steps lead to an evaluation of the progressive realisation of such right.

This subjective standard is then interpreted in the light of steps that are taken to have a progressive realisation of the rights or the realisation of these rights over a period of time.¹⁵ While this concept of progressive realisation is interpreted to mean flexibility in terms of the obligations of States in the enforcement of certain rights, it has to show improvements in the realisation over periods of time, other than deliberate retrogressive measures.¹⁶

⁸ UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 13: The Right to Education (Article 13) available at <https://www.refworld.org/docid/4538838c22.html> (accessed 6 November 2019).

⁹ CESCR General Comment No 13 para 1.

¹⁰ CESCR General Comment No 13 para 1.

¹¹ CESCR General Comment No 3: The Nature of States Parties' Obligations (Art 2 para 1 of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23).

¹² CESCR General Comment No 3 para 10. See Fukuda-Parr S, Lawson-Remer T & Randolph S *Measuring the progressive realization of human rights obligations: an index of economic and social rights fulfilment* (2008) at 7.

¹³ CESCR General Comment No 3 para 10.

¹⁴ CESCR General Comment No 3 paras 3, 5, 7 & 8.

¹⁵ CESCR General Comment No 3 para 9.

¹⁶ See Chenwi L "Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance" (2013) 46(3)

SA'S DECLARATION UPON THE RATIFICATION OF THE ICESCR

The nature of the right to education under international law is governed by four essential features : availability, accessibility, acceptability and adaptability.¹⁷ With respect to availability, it is expected that the educational institutions and programmes have infrastructure, such as, buildings, proper sanitation facilities for the sexes, safe drinking water, trained teachers, and training materials, such as, textbooks, libraries, and computer information technology facilities.¹⁸

Accessibility requires that the right to education is accessible to all persons including vulnerable groups,¹⁹ within safe physical reach, and affordable to them.²⁰ This is a defining factor that distinctly requires that there is no discrimination in the provision of education insofar as the government is required to ensure that there is the immediate realisation of physical accessibility to the right.²¹ With reference to acceptability, it is expected that the form and substance of education, in terms of the curriculum, have relevance and are culturally appropriate²². Adaptability requires that education has to be flexible to adapt to the perceptions and needs of a changing society.

23

De Jure 742 at 744-745. Compare the African Charter on the Rights and Welfare of the Child, 1990, CAB/LEG/24.9/49, published 11 July 1990, which engages the progressive realisation qualification under Art 11(3)(3) on children's right to education. See *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya* Communication 002/2009.

¹⁷ CESCR General Comment No 13 paras 6(1), 6(2), 6(3) & 6(4). See para 50 of the Report by the Special Rapporteur on the right to education E/CN.4/1999/49. The General Comment requires that the best interest of the child guides the application of these principles. See also para 7.

¹⁸ General Comment No 13 para 6(1). See the discussion of the *Juma Masjid* case in part 3.1 below and (the mud schools case) in part 3.6 below.

¹⁹ Children are taken to be a vulnerable group of persons under the Constitution .

²⁰ This refers to the child's ability to enrol at and attend school. This was upheld in *Centre for Child Law & others v Minister for Basic Education & others* [2012] 4 All SA 35 (ECG), *Adam Legoale v MEC for Education, North West* (North West High Court, Mafikeng) unreported case no 499/2011.

²¹ General Comment No 13 paras 31 & 32 on discrimination. See also the UNESCO Convention against Discrimination in Education 429 UNTS 93 (1962), the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (1980), the International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (1969), the Convention on the Rights of the Child 1577 UNTS 3 (1989), and the ILO Indigenous and Tribal Peoples Convention 1989 (Convention No 169) available at https://www.zaoerv.de/59_1999/59_1999_2_s_543_592.pdf (accessed 6 November 2019).

²² General Comment No 13 para 6(c). See *Governing Body of Rivonia Primary School v MEC of the Department of Education Gauteng Province* [2012] 1 All SA 576. See also the discussion in the *Juma Masjid* case, where the Court referred to the educational disaggregation in South Africa during the apartheid era.

²³ General Comment No 13 para 6(d). See Skelton A "The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law" (2013) 46(1) *De Jure* 1 generally, where she evaluates these "four As" as crucial aspects of the right to education. See *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC).

The ICECSR provides for the immediate realisation of the right to education.²⁴ Some of the obligations that are of immediate effect include the obligation to ensure that the provision of education is not marred by discrimination of any kind.²⁵ The point of departure will be discussed in the part on the evaluation of the emerging jurisprudence from the South African courts.

Under South African law, the Constitution provides for the right to basic education thus: “everyone has the right to basic education, including adult basic education”.²⁶ The courts have in consonance with international law consistently held that the right to basic education is immediately rather than progressively realisable.²⁷ It was stated in *Governing Body of the Juma Masjid Primary School and Beatrice Kisheta Kyubwa & others v Minister of Education & others (the Juma Masjid case)* that unlike other socio-economic rights, this right is immediately realisable without any internal limitation due to the available resources subject to reasonable legislative measures.²⁸

In South Africa, education policies are regulated by the National Education Policy Act.²⁹ Under this Act the Minister of Education in the exercise of powers under sections 3(4) (f) and 7 passes education policies from time to time. Some of the policies that have been passed relate to furniture, textbooks, infrastructure and staffing. As will be seen later, these policies in part inform the reasons used by the national and provincial Departments of Basic Education to justify their decisions.³⁰ The Department of Basic Education has various policies which have been used over a period of time.³¹ Other laws

²⁴ CESCR General Comment No 13. See also General Comment No 3, available at <https://www.refworld.org/docid/4538838e10.html> para 1 (accessed 6 November 2019).

²⁵ General Comment No 13 paras 31, 41, 43, 51 & 52.

²⁶ Section 29(1)(a) of the Constitution.

²⁷ See the critique of the decisions in part 3 below. This is also evident in General Comment No 13 para 57.

²⁸ [2011] ZACC 13 at para 37.

²⁹ Act 27 of 1996.

³⁰ See the discussion under the cases.

³¹ These policies include the Amended National Norms And Standards For School Funding; Draft Policy on Draft Regulations to Minimum Uniform Norms and Standards for PTDIS and DTDCS; Draft Policy on Rural Education; Draft Policy: National policy for the provision and management of Learning and Teaching Support Material; Draft Policy: The incremental introduction of African languages in South African schools; Education Labour Relations Council (ELRC) - policy handbook for educators. Others include the policy on improving access to free and quality basic education to all; Integrated School Health Policy; Interim Policy for Early Childhood Development Language in Education Policy; National Education Information Policy; National Education Policy Act 27 of 1996 - Admission Policy For Ordinary Public Schools ASIDI Disbursement, Professional and Management Fee Policy and Procedure; National policy for determining school calendars for public schools in South Africa; National Policy Framework for Teacher Education and Development in South Africa; National Policy on an Equitable Provision of an Enabling School Physical Teaching and Learning Environment; National policy on the conduct, administration and management of the National Senior Certificate; National Policy on Whole School Evaluation; National policy pertaining to the programme and promotion requirements of the National Curriculum Statement; Policy Document on Adult Basic Education and Training. Others include the policy on HIV, STIs and TB for Learners,

that regulate basic education include the South African Schools Act 84 of 1996. The outstanding question is whether the framers of the declaration were cognisant of South Africa's constitutional provisions in the light of the National Education Policy Framework on Education.

2.2 An evaluation of the declaration

The ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) was followed by a declaration by the South African government that stated:

“The Government of the Republic of South will give progressive effect to the right to education, as provided for in Article 13 (2)(a) and Article 14, within the framework of its National Education Policy and available resources.”

This declaration recognised the nature of the progressive realisation of the right to education under international law and that this realisation of this right would be subjected to the availability of resources. However, it did not point to the immediate realisation of the right to basic education under the ICESCR, and above all under the South African Constitution. One may be quick to conclude that since the declaration points to progressive realisation, it is in consonance with the international human rights jurisprudence that agitates that the enjoyment of socio-economic rights requires progressive realisation.³² This is, however, not the position as basic education is immediately realisable. Like other obligations, the obligation to provide basic education is immediately realisable.³³ It is on this basis that one would conclude that the declaration in itself was not informed by the constitutional underpinning that bound the executive, and the position of international law as a source of law in South Africa. As such, this declaration portrayed a simplistic argument that would not pass constitutional muster, let alone its inherent violation of the Republic's obligations under international law in respect to the provision of basic education as an immediately realisable right.

Educators, School Support Staff and Officials in all Primary and Secondary Schools in Basic Education Sector; Policy on Learner Attendance; Policy On The Conduct, Administration And Management Of The Annual National Assessment (ANA); Policy on the Organisation, Roles and Responsibilities of Education Districts; and Rights and Responsibilities of Parents, Learners and Public Schools: Public School Policy Guide 2005. Available at <https://www.education.gov.za/Resources/Policies.aspx> (accessed 24 October 2019). See also the Curriculum Assessment Policy Statements (CAPS) available at [https://www.education.gov.za/Curriculum/CurriculumAssessmentPolicyStatements\(CAPS\)/tabid/420/Default.aspx](https://www.education.gov.za/Curriculum/CurriculumAssessmentPolicyStatements(CAPS)/tabid/420/Default.aspx) (accessed 24 October 2019).

³² See similar declarations by other countries and these have not affected them.

³³ The CESCR in General Comment No 13 para 51 states that the obligation to provide primary education for all is an immediate duty of all States Parties.

In an open letter to the government, Civil Society Organisations (CSOs) argued that this declaration signified a deliberate intention by the South African government to misinterpret the right to basic education as enshrined in the Constitution, and the unqualified nature of a right as confirmed by the Constitutional Court in the *Juma Masjid case*.³⁴ They added :

“The declaration made by the SA government to qualify its ratification of the ICESCR is, therefore, a deliberate attempt to insert ‘progressive realization’ and ‘available resources’ qualifications into the right, qualifications which the Constitutional Court has expressly rejected in its binding interpretation of the Constitution.”³⁵

They were of the opinion that the policy ought to be drawn up to comply with the constitutional right, not the other way around.³⁶ It is on this basis that the jurisprudence on section 29 of the Constitution in the light of the declaration is evaluated. The response from the CSOs is instructive insofar as it is later (as will be shown,) replicated in the decisions of the courts. It has been established under international law, that to a great extent the right to education has to be progressively realised.³⁷ In South Africa, while the right to education has to be progressively realised, the right to basic education is immediately realisable without any limitations due to the available resources or legislative measures.³⁸ To establish the efficacy of the declaration, it is important that the content and context of this declaration are situated within the policies of government, on the one hand, and the decisions of the judiciary, on the other. This should be done in a manner that engages the policies and decisions both before and after the declaration.

3 EVALUATION OF SELECTED CASES ON THE RIGHT TO BASIC EDUCATION

This part evaluates selected decisions of South African courts on the right to basic education, to determine trends that the courts have adopted. This discussion will show that there has been, and continues to be, jurisprudence before and after the declaration. There are both policies and court decisions from before and after the declaration. This part evaluates the decisions before and after the reservation, followed by an

³⁴ Education declaration mars ICESCR ratification by Section 27 21 Jan 2015 available at <http://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/> (accessed 24 October 2019).

³⁵ Education declaration mars ICESCR ratification by Section 27 21 Jan 2015 available at <http://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/> (accessed 24 October 2019).

³⁶ Education declaration mars ICESCR ratification by Section 27 21 Jan 2015 available at <http://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/> (accessed 24 October 2019).

³⁷ CESCR General Comment No 3 para 1.

³⁸ *Juma Masjid case* para 37.

interrogation of the trends discernible in the decisions. It is instructive to note how these decisions interpret the right to education during the apartheid and the democratic dispensations. The period under the democratic dispensation covers the period before and after the reservation.

3.1 *The Juma Masjid case (the eviction case)*

In the *Juma Masjid case*,³⁹ there was an agreement that the private entity that ran the school would ensure that it continued functioning properly on the understanding that the Department of Education provided financial support to the school.⁴⁰ Unfortunately, the Department never paid the outstanding amounts and the trust sought to close the school and establish a private institution.⁴¹ It was also on record that the Department of Education would ensure that the children would be enrolled in other schools in 2012.⁴² The issue was whether an eviction order was tenable against the school. The Constitutional Court determined, first, whether the MEC did not fulfil their constitutional obligations that pertain to the learners' right to basic education; secondly, whether the trustees, when vindicating their property rights, had constitutional obligations with respect to the learners' right to basic education⁴³, and thirdly, whether the trustees acted reasonably in seeking an order of eviction, it did not require that such order be given.⁴⁴

3.1.1 Interpretation of the right to basic education in the light of corresponding obligations

The Court approached the interpretation of the right to education in the light of the eviction from a broad perspective that encompassed various rights. It stated :

“There can be no doubt that this case raises important constitutional issues of public interest. The right to basic education, property rights and the paramountcy of the child's best interests are implicated.”⁴⁵

While the effect of this broad application saw the engagement of other rights, it ultimately pointed to the logical resolution that the interpretation of other rights in the Bill of Rights upheld the best interests of the child. This interpretation was extended to instances where a person (including a juristic person) had a duty not to prevent the enjoyment of the right to basic education. To this end, the juristic nature of a person could not be used as an excuse for the violation of a child's constitutional rights.

³⁹ [2011] ZACC 13.

⁴⁰ Paragraphs 1-4.

⁴¹ The extensive narrative of the factual situation is evident in paras 11-14.

⁴² This issue questioned the position of a valid and subsisting contract on the interests of a child.

⁴³ *Juma Masjid case* para 7.

⁴⁴ Paragraph 3.

⁴⁵ Paragraph 31.

The context of the foregoing two provisions is the need for a person to refrain from acts that fail to provide an enabling environment for the enjoyment of the right to basic education. This questions how this broad based interpretation can be fused with the declaration.

3.1.2 *The progressive realisation of the right?*

The Court underscored the difference between the progressive realisation of socio-economic rights and the immediate realisation of the right to education. It stated :

“It is important, for the purpose of this judgment, to understand the nature of the right to basic education under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right is progressively realised within available resources subject to reasonable legislative measures.”⁴⁶

While the Court recognises that socio-economic rights are progressively realisable, the right to basic education is immediately realisable, an interpretation that places a higher obligation on the State, and both public and private individuals , to ensure that all decisions that are made do not look towards a progressive right to the realisation of the right to basic education. This is evident from the manner in which the Court goes ahead to distinguish basic education from the right to further education in terms of the checks that have been established to ensure that this right is enforced to the letter. First, it is compulsory for learners to attend school until the age of 15 or until Grade 9, whichever is earlier.⁴⁷ Closely related to this is the duty on the MEC to ensure that there are enough school places so that every child who lives in his or her province attends school as required by section 3(1) of the South African Schools Act.⁴⁸ The Act creates offences that lead to the imprisonment of, or imposition of a fine on, a person who without just cause prevents a child from attending school.⁴⁹

The provision of the constitutional right to basic education together with the cumulative effect of the provisions in the South African Schools Act show a disconnect in the move by the government to enter a declaration to the ICECSR. This is so because the qualification to the realisation of the right to education to the National Educational Policy Framework and the available resources question the nature of the right to basic education. It brings to the fore questions, such as, whether South Africa sought to deviate from the immediate realisation of the right to basic education to its progressive

⁴⁶ Paragraph 37.

⁴⁷ Paragraph 38. See also the South African Schools Act 84 of 1996 s 3(1).

⁴⁸ Act 84 of 1996 s 3(3).

⁴⁹ See *Juma Masjid case* para 44. See also ss 3(6) (a) and (b) of the South African Schools Act which creates offences for parents or any other persons who fail to cause a child to attend school, and who are liable on conviction to suffer a fine or imprisonment of up to six months.

realisation subject to available resources.⁵⁰ With regard to the amounts due to the trust that the MEC had been paying, it is worth noting that the MEC stated that "...in terms of her departmental policy, she was not obliged to pay these expenses and therefore insisted on paying a nominal rental in the sum of R3 000 per annum to the Trust".

It is clear that failure to pay these expenses on account of a departmental policy was equally instructive in the circumstances that led to the application for the eviction order. It is also an indication that the right to education of the learners would be subjected to the progressive realisation principle that generally deals with socio-economic rights. This position adopted by the MEC showed the Executive's regard for leaning to the policy requirements at the expense of the immediate realisation of the right to basic education.

3.1.3 The best interests principle

This concept of the best interests of the child is recognised in the Constitution under section 28(2). The Court reiterated the need to uphold this principle as a key aspect of the right to basic education. As stated earlier, the effect of the use of the best interests principle as an all-encompassing aspect embraced other rights that had the effect of placing the best interests of the child at the fore. The Court used the historical narrative of South Africa's education system to arrive at the dangers it presented to the children and the engagement of the best interests principle. The Court stated:

"The significance of education, in particular, basic education for individual and societal development in our democratic dispensation in light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."⁵¹

This was an engagement of the adaptability concept as far as the Court referred to the educational disaggregation in South Africa during the apartheid era and its lasting effects on society.⁵²

The education policies and system left negative effects on the children who passed through the system then. It is expected that this historical narrative should inform the actions of the executive. As such, the courts have been proactive to create

⁵⁰ Answers that point to possible limitations are effectively put on hold by the normative frameworks in international law, which recognise the right to education without qualification. See Arts 13 and 14 of the International Covenant on Economic, Social and Cultural Rights 1577 UNTS 3.

⁵¹ *Juma Masjid* case para 42.

⁵² Skelton (2013) at 19.

obligations that require negative protection of the right to education from invasion.⁵³ It follows that one may arrive at the conclusion that the subsequent entry of a declaration was an indication that the executive might have forgotten everything and learnt nothing from the education system during the apartheid era. The failure of any person or entity to respect the existing protection of this right with measures that diminish this protection amounts to a violation of the best interests principle.⁵⁴ As such, while the entry of the declaration was a violation of the already existing normative and jurisprudential framework, it undermined the best interests principle and the right to basic education.

Furthermore, the Court distinguished between reasonability and the best interests of the child. It showed that if the reasonability of an action does not uphold the best interests of a child, then the subsequent reasonable action is not saved. The Court stated:

“Accepting that the Trustees acted reasonably did not imply that they were entitled to an eviction order, like the rest of the provisional order made plain by setting aside the High Court order granted in their favour, and by indicating that the High Court did not properly consider the learners’ best interests.”⁵⁵

This leads the question as to the bounds of the best interests principle. The jurisprudence from the international human rights bodies indicates that this principle serves as a gap-filling tool that reconciles the violation of the rights of a child with the expected solution to the violation.⁵⁶ Other scholars state that the best interests principle clarifies approaches and meanings of the rights under a given law, and gives a mediating principle to resolve conflicts among competing rights.⁵⁷ An application of this

⁵³ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26 para 78, *Jaftha v Schoeman & others, Van Rooyen v Stoltz & others* [2004] ZACC 25 paras 33-34.

⁵⁴ *Jaftha v Schoeman & others, Van Rooyen v Stoltz & others* [2004] ZACC 25 paras 33-34.

⁵⁵ Paragraphs 33-34.

⁵⁶ According to the Committee on the Rights and Welfare of the Child, the best interests of the child requires that this determination engages what is in the best interests of the child and “requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs”. See General Comment No 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin, Committee on the Rights of the Child, 2005 (CRC/GC/2005/6), para 20. See also the UNHCR (2006) Guidelines on Formal Determination of the Best Interests of the Child, 12, 14 & 48 available at <https://www.unicef.org/violencestudy/pdf/BID%20Guidelines%20-%20provisional%20release%20May%2006.pdf> (accessed 24 October 2019). Freeman M “Article 3: The best interests of the child” in Alen A, Lanotte JV, Verhellen E, Ang F, Berghmans E & Verheyde M (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2007) 32. Attempts to offer a definition are discouraged. See *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232.

⁵⁷ Alston P “The best interests principle: Towards a reconciliation of culture and human rights” (1994) 8 *The International Journal of Law, Policy and the Family* 1 at 16.

interpretation questions the declaration that the Republic entered with regard to the implementation of the ICESCR.

3.2 Section 27 & 2 others v Minister of Education & another (2012) (the textbook case)

In this case, the applicants questioned whether the Court held that the failure by the first respondent to provide textbooks was a violation of the rights to basic education, equality and dignity.⁵⁸ Consequently, it sought orders that either the National or the Limpopo Department of Education provided textbooks for Grades 1, 2, 3 and 10 by 31 May 2012.

3.2.1 The interpretation of the right to basic education

This decision correlates with the decisions in parts 3.3 and 3.4 below insofar as the Department of Basic Education was given limited timeframes within which to act. This shows the importance that the courts attach to the right to basic education. This order underscores the immediate realisation of the right to basic education as shown in the subsequent applications.

Furthermore, the Court relied on the *Juma Masjid case* to widen the contextual obligations of the State in the light of its interpretation of the right to basic education, from protection against violation of the right to ensuring the enjoyment of the right by providing a child with all the basic requirements, including infrastructure, transport, security and nutrition among other pertinent matters.⁵⁹ It follows that the Court held that the provision of textbooks was a key ingredient in the enjoyment of the right to education.⁶⁰

3.2.2 The (mis)use of a National Policy Framework

The Court reiterated the government's policy to ensure that all learners had access to a minimum set of textbooks.⁶¹ This was an indication that while the government had a policy on the provision of textbooks, adequate steps had not been taken to follow it to the letter. As such, the broader approach by the Court saw a move that sought to create a space within which the learners would enjoy the right to education in a much more practical respect, and other than as an abstract notion of possible enjoyment without regard to substantive issues that affected the practical aspects of the right to basic education. This case can be compared to one where the Respondent claimed budgetary constraints as the reason for the failure to deliver the textbooks to the learners in

⁵⁸ [2012] 3 All SA 579 (GNP) para 12.1.

⁵⁹ Paragraph 22.

⁶⁰ Paragraphs 22-23.

⁶¹ Paragraph 23.

various schools.⁶² The Appellate Court (in upholding the decision of the High Court) stated that the lack of resources in respect of the milestones set by the Department of Higher Education did not suffice due to the immediate realisable nature of the right to basic education.⁶³

3.3 *Centre for Child Law & others v Minister of Basic Education & others (National Association of School Governing Bodies as amicus curiae) [2012] (the staff teaching case)*

In *Centre for Child Law & others v Minister of Basic Education & others (National Association of School Governing Bodies as amicus curiae)*,⁶⁴ the facts were that the first six original applicants applied for orders to compel the respondents to declare and implement post establishments for non-educator staff in public schools in the Eastern Cape.⁶⁵ The respondents were: the Minister of Basic Education; the Director-General, Department of Basic Education; the Member of the Executive Council in the Department of Basic Education, Eastern Cape Province; and the Head of the Department of Basic Education in the Eastern Cape. The effect of such an order was to ensure that appointments were made to vacant positions, and that the salaries of temporary teachers were to be paid by a specific date. Furthermore, that the declaration of the 2013 educator post establishment had to include employment of non-teaching staff by specific dates; that the Department of Education and the MEC had to report to the Court on the progress in the implementation of these orders; and to make the reports available for inspection at district offices and by the parties.⁶⁶ The issue that the Court had to determine was whether the respondents were obliged to declare the post establishment of non-educator staff of public schools in the Eastern Cape Province, and to fill such posts.

3.3.1 Interpretation of the right to basic education in the light of administrative obligations

The Court reiterated the constitutional right to basic education, which was violated to an immense and worrying degree in the Eastern Cape Province.⁶⁷ The Court inferred the violation of this right from the practical realities that the applicant schools were facing. The facts of this case represented a shift from the interpretation of the enforcement of an eviction order as a violation of the right to basic education, to consideration of the failure by the Department of Basic Education to fill vacant positions. This case

⁶² Paragraph 29.

⁶³ The Court stated in para 36 that s 29(1)(a) has “no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’”.

⁶⁴ [2012] 4 All SA 35 (ECG).

⁶⁵ Paragraph 2.

⁶⁶ Paragraph 2.

⁶⁷ Paragraph 1.

presented different problems to those in the *Juma Masjid case*. First, the provincial department failed to attend to post provisioning⁶⁸, and secondly, the Eastern Cape Department of Basic Education did not offer effective support for the administrative processes of the schools.⁶⁹ The fact that these problems affected the learners' enjoyment of the right to education catapulted the broad interpretation of section 29 to instances where the national and provincial Departments of Education were not performing their obligations for the immediate realisation of the right to basic education.

An interpretation that led to the consequential enjoyment of the right to basic education lay in establishing who bore the obligation to appoint educators. In this vein, the Court recognised that the MEC was empowered under the Public Service Act to determine both teaching and non-teaching staff establishments.⁷⁰ Secondly, the South African Schools Act required that the governing bodies, such as, the national and provincial governments, had to know the teacher and non-teacher establishments, for the purpose of determination of the budgets and the need for more posts.⁷¹

It follows that the right of the child was best served when the administrative matters at both the national and provincial government levels were understood.

3.3.2 *The best interests of the child principle*

In the course of the hearing, the Minister ascribed the failure to have adequate numbers of teachers in every school to

“... the weak capacity of the Eastern Cape Education Department to discharge its obligations effectively in respect of policy compliance; effective and efficient budgeting, planning and expenditure; and effective support of the pedagogic and administrative processes in schools...”.⁷²

The effect of this statement was to vindicate the Department of Basic Education at the national level against that at the provincial level. It is also clear that according to the Minister, while the policy was good, the problem lay in its interpretation. The question was thus whether, in light of a good policy, the courts would not apportion blame to the Executive. The Court found that the officers of the Department of Basic

⁶⁸ This situation led to some schools having a high number of educators and others having a low number of educators, and consequently relied on temporary educators. Subsequently, the learners faced the consequential prejudicial effects of few teachers at under-sourced schools. See para 12. See also the comment by the Minister of Education in a Report on the Remediation of the Present Challenges in Basic Education in the Eastern Cape Province (reproduced in para 14) where he stated that “the problems being encountered in basic education in the Eastern Cape province are extremely serious” and that the “consequences of these problems are such that many learners in the province are already being denied their full rights to quality basic education”.

⁶⁹ Paragraphs 15-16.

⁷⁰ Paragraph 32.

⁷¹ Paragraph 32.

⁷² Paragraph 15.

Education (both at the national and provincial levels) had a role to play in ensuring that proper post provisioning was done. The Court stated :

“The importance of the provision of education of non-teaching staff at public schools is recognised in the Amended National Norms and Standards for School Funding (2006) published by the Minister of Education. They apply, according to s 7, ‘uniformly in all provinces, and are intended to prevail in terms of Section 146(2) of the Constitution’. Sections 29 and 30 are of significance. They state: the allocation of non-teaching staff to schools, including administrative and support staff, is extremely uneven. The provision of such personnel has been severely lacking in historically disadvantaged and small schools. Inequalities in the provision of such staff members are almost certainly associated with major inefficiencies in schools which serve poor communities. The Minister of Education is responsible for determining norms for the provision of noneducator personnel, including non-teaching personnel at school level [sic].”⁷³

However, the Court still indicated that the application of the education policies had to be a holistic effort by both the national and provincial Departments of Education to achieve the desired enjoyment of the right to basic education. The implicit application of the best interests of the child was evident in the ability of the Court to contextualise the problem presented by the administrative mishaps and the use of the principle to ensure that the right to basic education was enjoyed. As such, while the practical realities that the applicant schools were facing were not in the best interests of the child, they were occasioned by the failure of the Respondents generally. In addition, since the Eastern Cape Department of Basic Education did not offer effective support for the administrative processes of the schools⁷⁴, an application of the best interests principle by implication lay in the Court’s dual application of juvenile justice. This was evident in the application of the Public Service Act,⁷⁵ and the National South African Schools Act.⁷⁶ As such, the application of the best interests principle was implicitly engaged in the Court’s broad interpretation of the violation of the foregoing sections.

The Court decided that the first to fourth respondents implement the 2012 educator establishment, appoint educators on a temporary basis pending their permanent appointment, and pay salaries of all educators on a temporary basis.⁷⁷ In addition, the first to fourth respondents were required to declare and ensure that the 2013 educator establishments are fully funded, that educator and non- educator

⁷³ Paragraph 22.

⁷⁴ Paragraphs 15-16.

⁷⁵ Paragraph 32.

⁷⁶ Paragraph 32.

⁷⁷ Paragraphs 35(1)-(7).

personnel are appointed thereto and to assume their positions by not later than 31 January 2013.⁷⁸

3.4 *Linkside & others v Minister of Basic Education & others* (3844/2013) [2015] ZAECGHC 36 (the staff teaching case)

This case was closely related to *Centre for Child Law & others v Minister of Basic Education and others* insofar as it also dealt with teaching and non-teaching staff. What should be noted is that in this case the Court was tasked to establish the position of persons who were presumed to be teachers and subsequently appointed by the State. At the time of filing this case, the government had done little to fulfil the orders of the Court in *Centre for Child Law & others v Minister of Basic Education & others* (2012).⁷⁹ The Court adopted a radical approach and ordered that all teachers who were serving in an acting capacity under the 2015 educator post establishment were deemed to have been duly appointed by the Department of Basic Education.⁸⁰ Pursuant to this order, the fourth respondent was ordered to issue the teachers with letters of permanent employment specifying their remuneration.⁸¹ In addition, the Schools Governing Bodies (SGBs) had to interview the applicants and make recommendations to fill the positions in 30 days.⁸² In addition, the Court added that where the first and fourth respondents failed to act on such recommendations within 15 days, the educators would be deemed appointed.⁸³

3.4.1 The best interests principle and immediate realisation

The Court remained consistent in using the best interests principle as a tool to correct the wrongs which were affecting the children's enjoyment of the right to education. The case reiterated the right to education as an immediate right which was not subjected to progressive realisation.

⁷⁸ Paragraph 35(8)-(10).

⁷⁹ [2012] 4 All SA 35 (ECG).

⁸⁰ *Linkside & others v Minister of Basic Education & others* (2013) para 2.

⁸¹ Paragraph 2.2.

⁸² Paragraph 3.2.

⁸³ Paragraph 3.3. The fourth respondent would then be expected to issue a letter of appointment within 10 days thereafter.

3.5 *Madzodzo & 7 others v Minister of Education & 4 others* (2014) (the furniture case)

In *Madzodzo & 7 others v Minister of Education & 4 others* (*Madzodzo case*),⁸⁴ The parents of learners attending Madzodzo, Mgcanyana and Vucapi Primary Schools applied for an order declaring the respondents to be in breach of the learners' rights to education, equality and dignity.⁸⁵ The Applicants claimed that the violations were due to the failure of the respondents to provide adequate, age and grade appropriate furniture at those schools.⁸⁶ They also sought that the orders, which were granted, would apply to all the affected schools in the Eastern Cape since the respondents had failed to give an indication as to when the applicant schools would get the furniture.⁸⁷ The Respondents contended that they could not attach a given timeframe within which to deliver the furniture because of the budgetary constraints that were faced by the Department of Education.⁸⁸ This matter was brought to court because an earlier agreement to ensure that the Department of Education provide the furniture within a period of three months had not been adhered to. The Court reiterated the constitutional right to basic education, which was violated to an extensive and worrying degree in the Eastern Cape Province.⁸⁹ The Court inferred the violation of this right from the practical realities that the applicant schools were facing. The facts of this case represented a shift from the interpretation of the enforcement of an eviction order as a violation of the right to basic education, or consideration of the failure by the Department of Basic Education to fill vacant positions. This case presented different problems to those in the *Juma Masjid case*. First, the provincial department failed to attend to post provisioning.⁹⁰ Secondly, the Eastern Cape Department of Basic Education did not offer effective support for the administrative processes of the schools.⁹¹ The fact that these problems affected the learner's enjoyment of the right to education catapulted the broad interpretation of section 29 to instances where the national and provincial Departments of Education were not performing their obligations for the immediate realisation of the right to basic education.

An interpretation that led to the consequential enjoyment of the right to basic education lay in establishing who bore the obligations to appoint educators. In this vein, the Court recognised that the MEC was empowered under the Public Service Act to determine both teaching and non-teaching staff establishments.⁹² Secondly, the South African Schools Act required that the governing bodies, such as, the national and

⁸⁴ 2014 (3) SA 441 (ECM).

⁸⁵ Paragraph 2.

⁸⁶ Paragraph 2.

⁸⁷ Paragraphs 3-11.

⁸⁸ Paragraph 12.

⁸⁹ Paragraph 1.

⁹⁰ See comment in fn 68.

⁹¹ Paragraphs 15-16.

⁹² Paragraph 32.

provincial governments, had to know the teacher and non-teacher establishments, for the purpose of determination of the budgets and the need for more posts.⁹³

It follows that the right of the child was best served when the administrative matters of both the national and provincial governments were understood. The issue before the Court was whether the Respondents' failure to provide adequate, age and grade appropriate furniture to all public schools in the Eastern Cape was a violation of the learners' rights to basic education, equality and human dignity as guaranteed by the Constitution.⁹⁴

3.5.1 Interpretation of the right to basic education in the light of immediate realisation

Before the Court addressed the possible violations, it reiterated the nature of the right to basic education as follows:

“Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right is ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’. The right to basic education in section 29 (1) (a) may be limited only in terms of the law of general application, which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. This right is therefore distinct from the right to ‘further education’ provided for in section 29 (1) (b). The state is, in terms of that right, obliged, to reasonable measures, to make further education ‘progressively available and accessible’.”⁹⁵

This was a replica of the finding in the *Juma Masjid case*,⁹⁶ and as such, consistent with the peculiar nature of the right to education. It must be noted that the Court hastened to add that the implication of the nature of the right to basic education was to ensure that measures were taken to realise the right with immediate effect.⁹⁷ This finding underscores the importance of ensuring that the stakeholders in the provision of the right to basic education are cognisant of this fact.

Furthermore, the nature of the right was underscored as an empowerment right,⁹⁸ which developed the faculties of a child as to his or her personality, talents, and mental and physical abilities.⁹⁹ The character of the right to education cannot be severed from the checks in place to ensure its realisation. As such, one is expected to ensure that these checks and balances led to the immediate realisation of this right. It follows that attempts to disregard this right would mean that the child cannot enjoy the

⁹³ Paragraph 32.

⁹⁴ Paragraph 14.

⁹⁵ Paragraph 16.

⁹⁶ *Juma Masjid case* para 37.

⁹⁷ Paragraph 17.

⁹⁸ See *Juma Masjid case* para 43.

⁹⁹ *Madzodzo case* para 18.

right until the State has established the resources to lead to this conclusion. Secondly, that the child's empowerment and development as an individual would be effectively placed on hold until the Department of Education complied with its duties. The Court followed the reasoning in the *Juma Masjid case* to hold that the nature of the right to basic education required immediate realisation.

3.5.2 *The best interests of the child principle*

The Court was silent on the direct use of the best interests principle. Some aspects of this decision are, however, indicative of the application of this principle. For instance, the Court found access to schools to be a pivotal aspect of the achievement of the right to education.¹⁰⁰ Thus, it was important that the right is enjoyed within an environment where it would ably shape the social and economic development of South Africa society in the long run.¹⁰¹ The Court juxtaposed society during apartheid as follows:

“Our own history demonstrates the role that education plays in shaping social and economic development. Apartheid education has left a profound legacy, not only in the unequal and inadequate distribution of resources but in the appalling levels of literacy and numeracy still found in the general population as a consequence of decades of unequal and inadequate education.”¹⁰²

This shows that the Court was wary of how the negative effects of the education system under apartheid were evident in South Africa's contemporary society. Consequently, the Court reiterated that provision of basic education was not limited to ensuring that there were available places in schools, but that the children had resources, such as, schools, classrooms, teachers, teaching materials, and appropriate facilities for learners. The historical narrative along with the requirement for a holistic provision of an enabling environment for the enjoyment of the right to basic education implies the Court's recognition of the historically violated right to education and the constitutional requirement that this right is broadly and positively interpreted in the best interests of the child.

3.5.3 *The use of a National Policy Framework with regard to immediate realisation of the right*

The respondents in the *Madzodzo case* contended that there was a National Norms Standard for School Funding that was developed in terms of the South African Schools Act, which engaged the progressive realisation of provision of the basic requirements of the children.¹⁰³ The Respondents did not produce the document in court and therefore did not make submissions on whether the National Norms Standard for School Funding

¹⁰⁰ Access has been interpreted to include the presence of qualified staff, and resources such as textbooks. See *Centre for Child Law & others v Minister of Basic Education & others (National Association of School Governing Bodies as amicus curiae)* [2012] 4 All SA 35 (ECG) para 32.

¹⁰¹ *Madzodzo case* para 19.

¹⁰² *Madzodzo case* para 19. See also *Juma Masjid case* para 42.

¹⁰³ *Madzodzo case* para 22.

overrides the constitutional mandate in section 29.¹⁰⁴ It is unlikely that the Court would hold otherwise. The Court reiterated :

“This court’s determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something if it should indeed have planned and budgeted for it in the fulfilment of its obligations.”¹⁰⁵

Therefore, it was not in order for the department to used budgetary constraints as a reason to disregard the enjoyment of the right to education. That furniture would be provided when resources were available, had been identified as a violation of the obligation to ensure immediate access to basic education, which includes the provision of adequate furniture in public schools.

3.6 Makaziwe & others v The Government of the Republic of South Africa 2017 (the mud schools case)

This case was concerned with the government’s failure to uphold its constitutional and statutory obligations to provide learners with adequate infrastructure for the enjoyment of their right to education.¹⁰⁶ Hence, these mud schools, which were public schools, posed various dangers to the learners and effectively halted proper teaching and learning. The Applicants sought three major orders against the Respondents: first, that the Applicants explain to the management of the individual schools when the mud schools would be eradicated and what infrastructural assistance was going to be given by the Department of Basic Education¹⁰⁷ ; secondly, that all affected schools which were not on the Adequate School Infrastructural Development Initiative (ASIDI) list be added thereto¹⁰⁸ ; and thirdly, that the government provide emergency relief for the applicant schools by obtaining temporary infrastructure for the schools in their desperate predicaments.¹⁰⁹

3.6.1 Interpretation of the Mud Schools case

In this case, the applicants sought an order that the failure by the Department of Basic Education to provide adequate infrastructure was a violation of the right to basic

¹⁰⁴ *Madzodzo case* para 22.

¹⁰⁵ The Court in para 34 reiterated the same principles that had been used in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC) at para 74.

¹⁰⁶ *Makaziwe & others v The Government of the Republic of South Africa* (2017). A similar case is (the mud schools case) of 2010 referred to in *Centre for Child Law v The Government of the Eastern Cape* (ECHR, Bisho) unreported case no 504 / 2010.

¹⁰⁷ Paragraph 22.1.

¹⁰⁸ Paragraph 22.1.

¹⁰⁹ Paragraph 22.1.

education. The Court established a nexus between the state of the infrastructure and the learners' performance, and stated that adequate infrastructure was a necessary element for the provision of an adequate education.¹¹⁰

3.6.2 *The use of a National Policy Framework*

The Court directed the government to use its own National Policy,¹¹¹ which provided as follows:

“School infrastructure remains a critical issue on the social agenda for South Africa for a number of reasons. In the first place, infrastructure differentials are so large in South Africa and some of the infrastructure available so inadequate that it is inconceivable that it DBEs [does] not impact on learner performance. Secondly, the highly unequal access to quality facilities remains critical in the light of our Constitution and the Bill of Rights which demand equity and equality.” (page 4)

Thus, the Court required the government to do what the Policy required it to do in the event that there was a violation of the right to basic education. A similar case where there was appalling infrastructure was *Rosina Mankone Komape & others v Minister for Basic Education & others* where the Court ordered damages for the loss that a family suffered when a child lost his life when he fell into a pit latrine.¹¹²

In *Equal Education & another v Minister of Basic Education & others*,¹¹³ the Minister of Basic Education attempted to convince the Court that the discharge of the government's obligations under section 29(1) on the provision of infrastructure had to be done progressively to realise the right to basic education:

“The Minister acknowledged that infrastructure is a facet of the right to basic education and that the right to education is an immediately realizable right and not progressively realizable. However, her proposition was that in this case, this Court should take the approach that the positive dimension of the right to education is realized or fulfilled progressively or over a period of time.”¹¹⁴

¹¹⁰ Paragraph 102.

¹¹¹ National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (National Policy for an Equitable Provision).

¹¹² *Rosina Mankone Komape & others v Minister for Basic Education & others* (Limpopo High Court) unreported case no 1416/2015.

¹¹³ [2018] 3 All SA 705 (ECB).

¹¹⁴ Paragraph 72.

In addition, that "... the right to basic education with regard to the desired infrastructure at public schools shall be realised progressively subject to available resources at the disposal of the state[sic]" .¹¹⁵

The Minister contended that she could not do anything to compel the government to account for its failure to provide infrastructure for the schools under the South African Schools Act.¹¹⁶ The Court was quick to strike down these perceptions and stated that the State had to account for and justify its failure to uphold its obligation within the bounds of justifiable limitations.¹¹⁷ It relied on section 35(1) of the Intergovernmental Relations Framework Act 13 of 2005 which provides:

"Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, those organs of state must coordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol."¹¹⁸

Thus, the regulations that required that the Minister did not need to account for the failure to provide infrastructure for primary schools, were declared unconstitutional.¹¹⁹

4 A JUXTAPOSITION OF THE EXECUTIVE'S AND THE COURTS' APPROACHES

Four points are significantly evident from the discussion in part 3. First, the cases establish a progressive trend in superimposing the obligation on the State to have an immediate realisation of the right to basic education. For instance, in the *Juma Masjid case*, the Constitutional Court also took cognisance of section 3(1) of the South African Schools Act which makes school attendance compulsory for learners between the ages of seven and 15 years or until the learner reaches the ninth grade, whichever occurs first. In the *Madzodzo case*, the Court stated that the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the city to state that it has not budgeted for something if it should indeed have planned and budgeted for it in the fulfilment of its obligations.

Thus, the Court contended that the right to basic education was unarguably immediately deliverable, and the failure by the Minister to deliver this right and the consequences of the delay constituted a violation of section 29(1)(a). In *Equal Education*

¹¹⁵ Paragraph 80.

¹¹⁶ Paragraph 182.

¹¹⁷ Paragraph 185.

¹¹⁸ Paragraph 39.

¹¹⁹ Paragraph 209.

& another v Minister of Basic Education, the Supreme Court of Appeal distinguished the right under section 29(1)(a) from other socio-economic rights that required progressive realisation. It underscored the importance of education in redressing the entrenched inequalities caused by apartheid, and its significance in transforming our society.¹²⁰ Hence, the Court required that in an unconcealed design, the social unevenness had to be addressed by a radical transformation of society as a whole and of public education in particular, that required that the right to basic education be recognised as an immediately realisable right.

Secondly, in all the cases, while the government was determined to provide for the right within the bounds of availability of resources, the courts, on the other hand, enforced the recognition and enjoyment of the right to education as an immediately realisable right. On this basis, it is correct to assert that the two arms of government displayed a parallel regime with respect to the right to basic education. While the government was intent on following its policies to the letter, the courts interpreted the policies in a manner that allowed for the immediate realisation of the right. Where it was not possible, a court would strike down the policy or the sections that led to the violation of this realisation of the right to education.

Thirdly, as a consequence, the jurisprudence emanating from the courts indicates a trend that creates an environment for the right to basic education to flourish. This holistic approach requires that the government ensures that children arrive at school to study, have the requisite textbooks, availability of both teaching and non-teaching staff, availability of furniture, and structural infrastructure in terms of classrooms, toilets and related materials. Closely linked to this is the continued declaration of invalidity of policies or laws that undermine this holistic approach.

Fourthly, the approach by the courts in the interpretation of the right under section 29(1)(a) is an indication that the domestic jurisprudence on the right to basic education is in tandem with the high standard in international law. This is based on the immediate realisation standard by the domestic courts and the international human rights bodies, such as the CESC.

It should be noted that in its Concluding Observations to the government of South Africa, the CESC expressed concerns about the declaration to the right to basic education, noting that it was inconsistent with the decision of the Constitutional Court in the *Juma Musjid case*.¹²¹ Therefore, it urged the South Africa government to withdraw the declaration with immediate effect.¹²² While commending the efforts of the government towards achieving universal access to education, the CESC expressed its concerns regarding the poor quality of the infrastructure in public schools. It noted, among others, that a number of public schools “have limited or no access to water, sanitation facilities or electricity, owing to budgetary cuts and, in some cases,

¹²⁰ Paragraph 174.

¹²¹ See CESC Concluding Observations to the Initial Report of South Africa E/C.12/ZAF/CO/1 29 November 2018 para 6.

¹²² Paragraph 7.

mismanagement of funds".¹²³ The CESCR further expressed concerns about the high drop-out rates among school children mainly due to a weak learning foundation. It, therefore, urged the government to improve the quality of school infrastructure, "and ensure that all schools have access to water, sanitation facilities and electricity by allocating and effectively managing a sufficient level of funding".¹²⁴ The government was requested to remove all barriers to access to quality education for vulnerable and marginalised groups, reduce the drop-out rates, and guarantee high-quality education to all children, especially disadvantaged children.

5 CONCLUSION AND RECOMMENDATIONS

This article set out to situate the declaration in relation to the context and content of the right to basic education. It interrogated the declaration and evaluated selected decisions by South African courts to establish the trend on the right to education. It then embarked on a juxtaposition of the approaches of the government and the courts.

A few points are worth noting here. While the executive has attempted to use progressive realisation as the yardstick for upholding its obligation in respect to the right to basic education, the courts have been consistent in holding that this right requires immediate realisation. This reflects a parallel approach by the courts and the executive.

The courts have metaphorically created an environment that clothes the learner without qualification in terms of providing the right to attend school, have meals, textbooks, and classrooms in an acceptable state. As such, the domestic jurisprudence is on a par with the high standard recognised under international law in respect to immediate realisation of the right to basic education . Thus, the use of the minimum core requirement as the gauge for the progressive realisation of the right to education does not arise in the adjudication of the right to basic education.

The consistent jurisprudence of the courts is a bold step in the right direction. It is recommended that the perception of the founding father of this nation, Mr Nelson Mandela, about the power of education to act as a tool for the development of skills, economic success, and as a contribution to nation-building and reconciliation should not be forgotten. Rather, it should be harnessed through the immediate realisation of the right to basic education.

It has been established that South Africa's declaration is misplaced in content and context insofar as it does not embrace the realisation of the right to basic education. It rather justifies a parallel regime that defies the jurisprudence that had been developed prior to the ratification of the ICESCR. It provides the executive with a tool that disregards the immediate realisation of the right to education. This misdirection is

¹²³ Paragraph 71.

¹²⁴ Paragraph 71.

evident in the wording of the declaration that suggests that the government's progressive realisation of the right to education is subject to the National Policy Framework.¹²⁵

This article opens up another area for continued introspection on judgments that have been delivered against the State but have not been honoured. This raises further questions as to whether the immediate realisation is relegated to a progressive realisation where the State still insists on taking its time to uphold its obligations. It is hoped that the identified trends of the courts and the executive demand the need for consistency in the immediate realisation of the right to basic education.

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