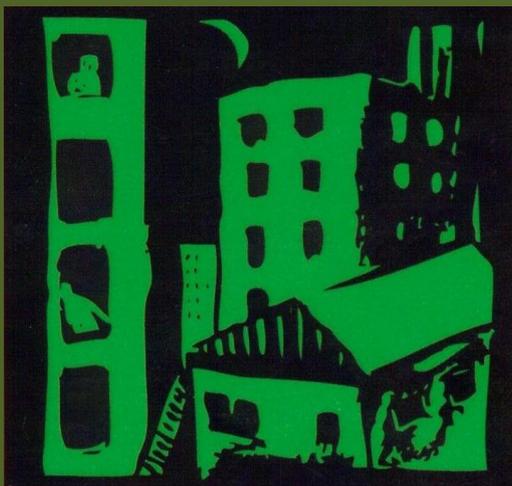


LAW
DEMOCRACY
& DEVELOPMENT



VOLUME 16 (2012)

DOI: <http://dx.doi.org/10.4314/dd.v16i1.9>

ISSN: 2077-4907

Defining the term basic education in the South African Constitution: An international law approach

CHIEDZA SIMBO

*Law Lecturer, North West University,
South Africa*

1 INTRODUCTION

South Africa has reassured and affirmed¹ to the world that it is in

¹ Education for All A Framework for Action in Sub-Saharan Africa: Education for African Renaissance in the Twenty-first Century: Adopted by the Regional Conference on Education for All for Sub-Saharan Africa Johannesburg, South Africa, (1999) see preamble cited in The Dakar Framework for Action, Education for All: Meeting our Collective Commitments Adopted by the World Education Forum Dakar, Senegal, 26-28 April 2000 Including Six Regional Frameworks for Action. "If the next century is going to be characterised as a truly African century, for social and economic progress of the African people, the century of durable peace and sustained development in Africa, then the success of this project is dependent on the success of our education systems. For nowhere in the world has sustained development been attained without a well-functioning system of education, without universal and sound primary education, without an effective higher education and research sector, without equality of educational opportunity." President Thabo Mbeki, Opening Speech, Conference on Education for African Renaissance in the Twenty-first Century, Johannesburg, South Africa, 6 December 1999.

solidarity with and will promote the vision² of the World Declaration on Education for All³ (World Declaration) to make basic education universally accessible. Indeed, it is with recognition of the social, economic and political benefits that accrue to an educated person and from an educated populace that the right to education is provided for in international law and various Constitutions in the world. In line with international standards the Constitution of the Republic of South Africa, 1996 (Constitution) provides for the right to education. Of particular importance is that section 29 (1) (a)⁴ provides a benchmark of education called basic education, an unqualified human right that everyone is entitled to.⁵ Of particular note is that the term basic education in section 29 (1) (a) is similar to that which was defined by the World Declaration. However, the Constitution does not state that it alludes to the basic education defined by the World Declaration. To this end, the problem this paper confronts is that while the Constitution⁶ states that everyone has the right to basic education it does not define the term. More so, although the Bill of Rights does not deny the existence of other rights conferred by legislation⁷ there is no legislative document that defines basic education and South African Courts have not defined the term. To clarify the meaning of the term basic education the paper contends that the World Declaration defined the term basic education and stated that it refers to basic learning needs.⁸

² Expanded Commentary on the Dakar Framework for Action Education For All: Meeting Our Collective Commitments at para 4 cited in The Dakar Framework for Action, Education for All: Meeting our Collective Commitments Adopted by the World Education Forum Dakar, Senegal, 26-28 April 2000 Including Six Regional Frameworks for Action. Countries stated the importance of the World Declaration and agreed that “[t]he vision of Jomtien remains pertinent and powerful. It provides a broad and comprehensive view of education and its critical role in empowering individuals and transforming societies. Its key points and principles include universal access to learning; a focus on equity; emphasis on learning outcomes; broadening the means and the scope of basic education; enhancing the environment for learning; and strengthening partnerships. Tragically, reality has fallen far short of this vision: millions of people are still denied their right to education and the opportunities it brings to live safer, healthier, more productive and more fulfilling lives. Such a failure has multiple causes: weak political will, insufficient financial resources and the inefficient use of those available, the burden of debt, inadequate attention to the learning needs of the poor and the excluded, a lack of attention to the quality of learning and an absence of commitment to overcoming gender disparities. There can be no doubt that the barriers to achieving Education for All are formidable. Yet they can and must be overcome”.

³ World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs. Adopted by the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand (1990).

⁴ The Constitution of the Republic of South Africa 1996. Section 29 (1) (a) “Everyone has the right to a basic education, including adult education”.

⁵ Justice Nkabinde understanding the textual formulation of section 29(1) (a) stated that the right to basic education is an unqualified human right which may be limited only “in terms of a law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” See *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 36 to 38.

⁶ Constitution (n 4 above).

⁷ Ibid see section 39 (3).

⁸ World Declaration (n 3 above).

2 WHY DEFINE THE TERM BASIC EDUCATION?

The lack of a concrete and precise definition of basic education means that no one knows what the term exactly means in South Africa and compliance with section 29(1) (a) by the government is therefore difficult. There is no clarity on whether the term refers to the learner's right to merely attend school for a specified schooling period or the learner's right to receive a particular quality of education during a certain schooling period.⁹ Today the lack of a concrete definition of the term basic education is a problem in urgent need for resolution. Of particular note is that, instead of focusing on delivering basic education which begins by first knowing what the term basic education entails, the Quality Assurance body on basic education in South Africa Umalusi seems to focus on mark adjustments of final matric students.¹⁰ There seems to be an unwelcome practice by Umalusi of adjusting final marks for matriculants,¹¹ yet it seems to refuse to discuss with the public¹² on the manner and reasons of the mark adjustments. It is desirable for Umalusi to discuss with the public on whether the syllabuses or the papers with the marks adjusted were in line with the outcomes of a basic education at the level of the students and to justify such adjustments. Yet, without a nationally accepted definition of basic education, it may prove difficult for Umalusi to focus on ensuring that all the syllabuses and matric examination papers are set at the correct levels.

The lack of a nationally accepted definition of section 29 (1) (a) that guides the Department of Basic Education in complying with its constitutional obligation to provide basic education inevitably makes it difficult for Umalusi to assess the quality of the education delivered in South Africa by the Department of Basic Education. Whether the South African government basks in the glory of an increased pass rate or laments over a decreased pass rate in any year, the truth is that assessments of students done by the department of basic education in 2011 revealed that "[t]he national average performance in literacy at grade three level is 35%, while in numeracy it is only 28%. At grade six level, the national average performance in languages is 28%, while in maths it is little better at 30%"¹³. In addition, the numeracy and literacy tests which were completed around 2008 concluded that of the 45 developing countries that took part in the survey South Africa took the 45th position which shows that the South African education system is producing a large number of graduates who are illiterate and innumerate.¹⁴ The above statistics point to the fact that a majority of South African

⁹ Woolman S and Bishop M "Education" in Woolman S et al *Constitutional Law of South Africa* (2009) at 15-16

¹⁰ Parker F "Myths busting the matric pass rate" <http://mg.co.za/article/2012-01-07-myth-busting-the-matric-pass-rate> (accessed 27 July 2012).

¹¹ Ibid.

¹² "The extent of the adjustments made to the 2010 matric results will not be made public, the council responsible for assessing and qualifying the National Senior Certificate exam, Umalusi, said on Wednesday". See "Umalusi: Matric adjustments Confidential" found at <http://m.news24.com/news24/SouthAfrica/News/Umalusi-Matric-adjustments-confidential-20110119> (accessed 31 July 2012).

¹³ Parker (n 10 above).

¹⁴ Woolman S and Fleisch B *The Constitution In The Classroom: Law and education in South Africa 1994-2008* (2009) at 109-110.

learners do not possess the literacy and numeracy skills of a child who has acquired basic education or who is acquiring basic education at their level.

The literacy and numeracy problems in South Africa make one doubt if education institutions that provide basic education appreciate what learners are looking for when they come to school. Learners come to school for an opportunity to receive a certain quality of education that prepares them to proceed successfully through higher education and consequently through life. Any tests that conclude that most South African learners are innumerate and illiterate make one question whether the government and several institutions that provide basic education appreciate that the acquisition of literacy and numeracy skills forms part of acquiring a basic education. The fact that many South African children are illiterate and innumerate means that the government is failing to make sure that everyone receives basic education as such focus should be placed on defining the term basic education. It has to be clear what basic educators should deliver in the classroom and what they should look for in a student who has acquired basic education. As argued in this paper, basic education provided by section 29(1) (a) points to the quality of education that learners must receive and not the number of years a learner attends school. The increase in the number of enrolments at matric level or the number of schools built by the South African government is important but it does not translate to the provision of basic education alluded to by section 29 (1) (a). Whilst it is important for students to have an opportunity and a platform to acquire basic education in well-built schools stocked with textbooks and having good teachers, the basic education they gain at school is that which is very important. Understanding that basic education points to the quality of education to be given to all learners and not merely the provision of schools by the government is important otherwise the government will fail to frame standards and indicators for it to identify its violations. Without a definition for basic education government will also fail to identify violations by other educational institutions that aim to provide basic education.¹⁵ In addition, understanding what constitutes a basic education helps the public to devise yardsticks that can help it to assess whether the state or other educational institutions are indeed complying with their obligation to provide basic education.¹⁶ After recognising that an education system that continuously produces illiterate and innumerate children disadvantages the child and consequently the nation and the international community, the term basic education is defined in this paper.

3 A HISTORICAL CONTEXT OF THE RIGHT TO BASIC EDUCATION IN SOUTH AFRICA

3.1 Introduction

A firm grasp of the historical context of the right to basic education in South Africa provided by section 29(1) (a) of the Constitution is important to assist us in

¹⁵ Donders Y and V Vladimir *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) at 111.

¹⁶ Ibid.

ascertaining the most probable meaning of the term basic education. Delving deeper into a contextual understanding of the right to education in South Africa advances the argument that the definition of the term basic education alluded to by the Constitution should be located in international law. An international law approach is paramount because South Africa does not only give high accord to the World Declaration's objectives¹⁷ but the basic education defined by the World Declaration, if provided by the South African government will redress the ills left by the colonial and apartheid past in basic education. It is important to note that the unjust experiences of apartheid education were mainly experienced by the Black majority as a result the history of basic education in South Africa is inherently biased against the White minority. With such recognition, this paper, does not demean or deny the harm that the apartheid government caused to White South Africans. There is no deliberate attempt to ignore the history and problems of education for White learners but 'the crisis [was] most acute in [education for Black learners]'.¹⁸

3.2 Informal education in the pre-colonial era

Prior to the settlement of the Dutch and the Europeans informal education was already established in South Africa.¹⁹ South Africans of the African origin already occupied the land at the Cape before the settlers arrived in 1652²⁰ and education was always part of their lives.²¹ Within their community, education was in the form of storytelling, the teaching of cultural values and the transmitting of skills practiced within tribal groups.²² The purpose of education was to preserve culture and social wellbeing.²³ Education was on daily activity and it did not stop at a certain age like schooling.²⁴ Individuals felt the impact of education as it was mainly for the common good.²⁵ Informal education still forms part of the African community in South Africa.²⁶

3.3 The history of formal education from the colonial era to the apartheid era

3.3.1 Pre-apartheid era

Formal education (schooling) is the education protected by section 29 (1) (a) of the Constitution. Its history though inconsistent began during the pre-apartheid-era in South Africa. Upon settling at the Cape of Good Hope, in 1652, the Dutch East India Trading Company (DEIC) "appointed Jan van Riebeeck as its first Commander of the

¹⁷ Education for All A Framework for Action in Sub-Saharan Africa (n 1 above) at preamble.

¹⁸ Kallway P "An Introduction of the study of education for blacks in South Africa" in Kallway P, *Apartheid and Education: Education of Black South Africans* (1984) at 2.

¹⁹ "Education" Available at <http://countrystudies.us/south-africa/56.htm> (Accessed 21 June 2010).

²⁰ Christie P *The rights to learn* (1991) at 30-31.

²¹ Farrant J S *Principles and Practices of education* (2006) at 30.

²² Christie (n 20 above).

²³ Mialaret *The Child's right to education* (1979) at 20.

²⁴ Christie (n 20 above) at 30.

²⁵ Mialaret (n 23 above) at 20.

²⁶ Christie (n 20 above) at 30.

newly created refreshment station".²⁷ Formal education was subsequently introduced at the Cape.²⁸ From the time the first school was opened and before the 19th century, education was purely a responsibility of missionaries and they did not receive any financial assistance from the Government.²⁹ The establishment of a proper educational system came with the British occupation.³⁰ After the abolishment of slave trade in all British colonies in 1807, the Cape colony abolished it in 1833.³¹ During this period, colonialism became fully established and the establishment of the first department of education followed in 1839.³² Even if the government was increasingly being involved in education, missionaries still had a leading role in providing education for Africans.³³ As missionary education continued, the British government began to fund the mission schools in order to gain control of them.³⁴ However, despite government's funding, schools for Black students often lacked teachers and teaching materials.³⁵ Only 5% of African children in the schools knew how to read, write or basic arithmetic, there was poor attendance from African children and there were no textbooks in African languages.³⁶ Most Africans in South Africa failed to receive proper education and in addition they did not see the need to attend school regularly.³⁷ In 1882, the Inspector-General of the Cape stated that missionary schools were not delivering proper education and their closure would not amount to a loss of educational advancement for the students who attended the schools.³⁸

3.3.2 *Apartheid era*

After the National Party won the national elections in 1948, there was an introduction of the policy of apartheid.³⁹ The apartheid era saw the legalisation of a system of segregation that already existed during the colonial era.⁴⁰ "Separate development"⁴¹ was the rationale behind the apartheid policy and it caused an unequal distribution of

²⁷ Rose and Tunmer *Documents in South African Education* (1975) at 85.

²⁸ "A History Turning Points: The beginning of Formal Education" Available at <http://www.sahistory.org.za/classroom/feature/hiseduc.htm> (Accessed 21 June 2010).

²⁹ Behr A L *New Perspectives in South African Education* (1978) at 159.

³⁰ Nekhutivha F "Transformation education: The Education Crisis and Suggested Solutions" (1987) at 5: A paper delivered to the Association for Sociology in Southern Africa in June- July 1987 at the Conference held in the Western Cape.

³¹ "Timeline-What happened after 1807", Available at <http://www.royalnavalmuseum.org/visit-see-victory-cfexhibition-timepost1807.ht> (Accessed 21 June 2010).

³² Molteno F "The Historical Foundations of the Schooling of Black South Africans" in Kallway P, *Apartheid and Education: Education of Black South Africans* (1984) at 49-51.

³³ Christie (n 20 above) at 33-37.

³⁴ Ibid at 226-228.

³⁵ Nekhutivha (n 30 above) at 9.

³⁶ Christie P (n 20 above) at 74-75.

³⁷ Ibid at 36-38.

³⁸ Ibid.

³⁹ Nekhuwevha (n 30 above) at 84.

⁴⁰ Ibid at 10.

⁴¹ Robertson N and Robertson B *Education in South Africa* (1977) at 6.

education opportunities.⁴² Apartheid ushered in an era that organised education along racial lines and education was now used as a tool to further perpetrate hate and resentment among races.⁴³ The education system was racist and unequal both at social and economic levels.⁴⁴ For the purposes of education, there was a division of schools along racial lines.⁴⁵

Just like the colonial era, education for Black South Africans had an inferior design as it was still aimed at teaching them to learn to read and to write in order to be employable as servants.⁴⁶ Due to the lack of adequate funding in Black schools, there was no quality education among Black people and unemployment rose among the Black community.⁴⁷ At the peak of apartheid in the 1970s, per pupil spending in schools for White learners was ten times that in Black South African schools.⁴⁸ Most schools for Black learners were underfunded and overcrowded.⁴⁹ They did not have trained teachers, enough classrooms, and Black teachers were under paid.⁵⁰ On the other hand, schools for White learners had well trained teachers.⁵¹ They had their own special

⁴²Christie P (n 20 above) at 56-57.

⁴³ "A History: Turning Points- The coming of Apartheid", Available at http://www.sahistory.org.za/classroom/education-350years/history_4.htm (Accessed 21 June 2010).

⁴⁴ Nekhutivha (n 30 above) at 11.

⁴⁵Races were divided into four classes, that is Blacks, Indians, Coloureds and Whites coupled with different legislation and curriculums that governed them. Legislation included the Coloured Persons Act of 1963 and the Indian Education Act 1965. The Bantu education Act 1953 regulated African education. See Molteno (n 32 above) at 88-89. With the passing of the Bantu Education Act education became the responsibility of the state. See Behr (n 29 above) at 170-171. The Act had two aims; firstly, it brought "an end missionary control of the education of black people and institute[d] a system of mass education". Secondly, it legalized a special form of education for Blacks in South Africa that differentiated it from the education for the White minority See "A History: Turning Points- The coming of Apartheid" (n 28 above).

⁴⁶ "A History Turning Points: The beginning of Formal Education" (n 28 above). To support the objectives of the education, in 1953, Hendrik Verwoerd the then minister of Native or Bantu education addressed parliament on the issue of a special form of education for natives. He stated that natives ought to be educated in a way that did not make them expect to cross the boundaries of the opportunities that South Africa provided them. See Nekhutivha (n 30 above) at 10-11. He further stated that it was useless to educate Blacks for professions that would never absorb them. "My departments' policy is that education should stand with both feet in the reserves and have its roots in the spirit and being of Bantu society. The Bantu must be guided to serve his own community in all respects. There is no place for him in the European community above the level of certain forms of labor. Within his own community however all doors are open. For that reason it is of no avail for him to receive a training which has as its aim absorption in the European community where he cannot be absorbed. Until now he has been subjected to a school system which drew him away from his own community and misled him by showing him the greener pastures of the European society in which he was not allowed to graze. The attitude is not only uneconomic because money is spent for education which has no specified aim, but it is also dishonest to continue it. The effect on the Bantu community we find is the much discussed frustration of educated natives who can find no employment which is acceptable to them. It is abundantly clear that unplanned education creates many problems, disrupting the community life of Bantu and endangering the community like of the European". See Robertson N and Robertson (n 41 above) at 7.

⁴⁷ Christie P (n20 above) at 55-56.

⁴⁸ "Education" Available at <http://countrystudies.us/south-africa/56.htm> (Accessed 21 June 2010). The endeavour was to ensure an African in South Africa who would accept White superiority as normal while his/her ambition will be to assert and fight for tribal superiority. See Molteno (n 32 above) at 94.

⁴⁹ Mncwabe M P *Post-Apartheid Education: Towards Non-Racial, Unitary and Democratic Socialization in the New South Africa*, (1993) at 27.

⁵⁰ Ibid.

⁵¹ Robertson and Robertson (n 41 above) at 19-23.

curriculums⁵² yet schools for Black learners had curriculums that made it almost impossible for them to go beyond matric or to qualify for admission in any higher education institution.⁵³ South African history did not form part of the school curriculum in schools and teachers had to comply with harsh rules and regulations.⁵⁴ An estimated 95% out of 100 African students in South Africa dropped out of school before secondary education.⁵⁵ As the African National Congress (ANC) was growing in numbers, it also rejected Bantu Education as it saw it as a form of oppression that educated Africans in South Africa to submit to White rule and supremacy.⁵⁶ In 1976 there was an uprising by high school students which was named the Soweto uprising.⁵⁷ It was a direct resistance of Bantu education and students contended that they wanted an education that could empower them.⁵⁸ As a reaction to the Soweto uprising, the South African Institute of Race Relations appointed a Commission which compiled a report that stated the need for equal opportunities and non-discrimination in education.⁵⁹ It proposed changes in the allocation of resources in the South African budget, which would see more spent on education.⁶⁰ The report emphasised a change in the management of schools to foster community involvement.⁶¹ It stated that there was a need to change the school curriculums and textbooks so that they would not offend other races.⁶²

It also stated the need for schools and education with an open enrolment for all.⁶³ In recognition of an existence of unqualified Black adults, it emphasised the need for adult education as a high priority.⁶⁴ In June 1980, the Government of South Africa commissioned and funded the Research Council Review Commission (HSRC) to review South African Education.⁶⁵ The HSRC appointed the De Lange Committee on education, which issued a report stating that, what education required was not only desegregation but also a further recognition that education is a human right.⁶⁶ The report recognised that education in South Africa was in a crisis hence it attempted to make

⁵² Nekhutivha (n 30 above) at 9-12.

⁵³ Taylor R "The Narrow Ground: Critical Intellectual Work on South Africa under Apartheid" (1991) V5 No 4 *Critical Arts* at 31 Available at <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/Critical%20Arts/cajv5n4/caj005004004.pdf> (Accessed 21 June 2010).

⁵⁴ Mukandala R S "Students and Revolution in South Africa" at 166 - 167 Available at <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/Utafiti/vol4no2/aejp004002006.pdf> (Accessed 21 June 2010).

⁵⁵ Ibid.

⁵⁶ Christie (n 20 above) at 228-232.

⁵⁷ Mncwabe (n 49 above) at 3-23.

⁵⁸ Ibid.

⁵⁹ Mncwabe (n 49 above) at 9-13.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Chisholm L "Redefining Skills: Black education in South Africa in the 1980's" at 388 found in Kallway P, *Apartheid and Education: Education of Black South Africans* (1984).

⁶⁶ Mncwabe (n 49 above) at 3-23.

recommendations to confront the problems.⁶⁷ It emphasised that every South African had an entitlement to a “rightful share” in education and stated that the “demand for equal share in education is only viable as a principle of distributive justice.”⁶⁸ It is important to note that the government selectively accepted the recommendations opting to commit to the principles of the Christian National Education, which informed the worldview of the day.⁶⁹ The De Lange report was criticised for failing to address the real symptoms and problems in Bantu education, which were rooted in the politics of the day.⁷⁰

3.4 The reform of the education system at the end of apartheid

The end of apartheid saw the dawn of a new era in the South African educational system.⁷¹ Reorganising the educational system was one of the daunting tasks the government had to make. The rejection of a proper and meaningful education for a vast number of years resulted in a generation of Black youngsters who had not received a quality of education to make them competitive in the labour market.⁷² Among others, the choices of the apartheid government resulted in two concerns; first, many Black people had received apartheid education at primary school level which was insufficient for them to proceed to high school or to train in any industrial programme.⁷³ As reported in 1988, only 2.7% of Black African students were in standard ten.⁷⁴ The 1989 matriculation results for Africans were reported to be disastrous and following a back to school campaign the waiting list for registration with the Department of Education increased to 30 644 names.⁷⁵ 4/5 of the Black African students who had passed standard 5 in 1989 failed to go to standard 6 due to lack of places in secondary schools.⁷⁶ On the contrary, White students had different results, in 1981 94 % White matriculants passed their standard 10 and 49% received a matric exemption.⁷⁷

The second concern was that many young Black people had not received any education at all.⁷⁸ In 1988 research concluded that 1 051 189 Black children had not been able to attend school.⁷⁹ In March 1989 there was a shortage of 60 343 primary school and 99 505 secondary school classrooms⁸⁰ whilst there were an estimated 213 215 empty seats in schools for White learners.⁸¹ As a step towards reforming the

⁶⁷Kallway (n 18 above) at 32.

⁶⁸ Mncwabe (n 49 above) at 3-23.

⁶⁹ Christie (n 20 above) at 189.

⁷⁰ Kallaway (n 18 above) at 32.

⁷¹ Malherbe R “A fresh start 1: Education rights in South Africa” (2000) 4 *European Journal for Education Law and Policy* at 49.

⁷² Mncwabe (n 49 above) at 39-40.

⁷³ Ibid at 3-23.

⁷⁴ Christie (n 20 above) at 121.

⁷⁵ Mncwabe (n 49 above) at 38.

⁷⁶ Ibid at 3-23.

⁷⁷ Christie (n 20 above) at 120.

⁷⁸ Mncwabe (n 49 above) at 3-23.

⁷⁹ Christie (n 20 above) at 119.

⁸⁰ Mncwabe (n 49 above) at 37-41.

⁸¹ Christie (n 20 above) at 119.

education system, in 1993 president F.W. De Klerk in his parliamentary speech stressed the need to reform the educational system to be non-racial yet flexible enough to preserve the culture and language of every racial group.⁸² Following his speech there was an invention of a new Education Co-ordination Service that was obligated to manage education during the political transition and it worked together with the National Education and Training Forum, a body of education experts who were tasked to formulate education policy.⁸³ As reforming education began in 1993, South Africa became a democratic state led by a majority government in 1994. When a democratic government assumed power in 1994, the budget for education was high at both national and international level and using the Growth Employment and Redistribution (GEAR) strategy the government reduced the fiscal spent on education.⁸⁴ However, despite such reforms, to date the amount spent on education is the highest on the South African budget 'totalling R165 billion in 2010/11'⁸⁵. A further R2, 7 billion was allocated to the Department of Basic Education in 2010/11 to enable it to distribute work books in all official languages in South Africa and to increase literacy and numeracy skills for learners.⁸⁶

3.5 The regulation and structure of the education system in the post-apartheid era

From 1994, the democratic government of South Africa consolidated the fragmented school system into one department called the National Department of Education.⁸⁷ In 2009, The National Department of Education was split into two departments that are the Department of Basic Education and the Department of Higher Education and Training.⁸⁸ The Department of Basic Education deals with schools from Grade R to 12 and adult literacy programmes. The Department of Higher Education and Training "is tasked with the responsibility for the coordination of the education and training sub-systems of post-school education, including universities, Further Education and

⁸² "South Africa: Soweto and its Aftermath" Available at <http://www.country-data.com/cgi-bin/query/r-12130.html> (Accessed 21 June 2010).

⁸³ Ibid.

⁸⁴ Carter E "Education in South Africa: Some points for policy coherence" at 21-22 in Maile, S. (ed). *Education and poverty reduction strategies: issues of policy coherence: colloquium proceedings* (2008) available at http://www.hsrb.ac.za/research/output/outputdocuments/5521_carter_educationinsomepointsforpolicycoherence.pdf (Accessed 13 August 2010).

⁸⁵ "Education" (n 48 above). In the 2009 budget, the government allocated a bigger portion of its budget to education compared to other departments stating that the government was still addressing and paying for the backlogs of the past. It stated that many schools were still in need of 'classrooms, toilets, sports fields and equipment. Salaries of teachers make up about three quarters of the education budget. We have a large proportion of young people in South Africa around one third of our people are children.'

⁸⁶ Ibid.

⁸⁷ Carter (n 84 above) at 21-22.

⁸⁸ "The Department of Basic Education" available at <http://www.education.gov.za/TheDBE/tabid/54/Default.aspx> (accessed 04 September 2012).

Training Colleges, Sector Education and Training Authorities, and Adult Basic Education”.⁸⁹

Education is now a human right provided by section 29 of the Constitution. The Constitution has therefore ushered in an era of transformation in the educational system towards a new constitutional regime that advances equality, freedom and human dignity.⁹⁰ The Constitution now obligates the government to provide basic education for every South African citizen without any qualification or justification to derogate from such duty.⁹¹ Formal education of the same quality is now a human right compulsory for all races.⁹² The Bill of Rights is read together with other legislative documents that further its mandate to equitably provide the right to education.⁹³ One such legislative document is the NQF (National Qualifications Framework) which is “a set of principles and guidelines, which provide a vision, a philosophical base and an organizational structure for the construction [of the equitable provision of education]”.⁹⁴

The NQF divides education into three bands namely, General Education and Training (GET), Further Education and Training (FET) and Higher Education (HE).⁹⁵ The GET band comprises the reception year (Grade R), up to Grade 9 (primary education is to grade 7) as well as an equivalent Adult Basic Education and Training (ABET) qualification.⁹⁶ The FET band comprises Grades 10 to 12 in schools, as well as education and training within the NQF Level 2 to 4, including National Certificate 1 to 3 in FET colleges.⁹⁷ These levels are all included within the NQF, as stipulated by the South African Qualifications Authority (SAQA) Act 58 of 1995.⁹⁸ SAQA is ‘the body responsible for overseeing the development and implementation of the National Qualifications Framework, established in terms of the SAQA Act no. 58 of 1995’.⁹⁹ Another legislative document which is read together with the Constitution is the South African Schools Act 1996 which makes education compulsory from grade 1 to grade 9 and between the age of 7 and 15 depending on what comes first.¹⁰⁰ Education is not compulsory after grade 9.

⁸⁹ “Higher Education South Africa” found at <http://www.hesa.org.za/partnersandlinks/department-higher-education-training-dhet> (accessed 04 September 2012).

⁹⁰ Malherbe (n 71 above) at 49.

⁹¹ See Section 1 Constitution of South Africa.

⁹² Ibid See Section 29.

⁹³ Ibid Section 39 (3).

⁹⁴ “Education in South Africa”, Available at <http://www.saeduservices.com/pages/EducationInformation.aspx> (Accessed 21 June 2010).

⁹⁵ “South Africa: fast facts” available at <http://www.southafrica.info/about/facts.htm> (Accessed 21 June 2010).

⁹⁶ “Cape Gateway, easy access to government information and services”, Available at <http://www.capegateway.gov.za/eng/directories/services/11471/15045> (Accessed 21 June 2010).

⁹⁷ “Education in South Africa”, Available at <http://www.saeduservices.com/pages/EducationInformation.aspx> (Accessed 21 June 2010).

⁹⁸ “Education in South Africa” (n 94 above).

⁹⁹ “Web definitions” Available at <http://www.google.co.za/search?hl=en&defl=en&q=define:saqa&sa=X&ei=t9lITNu3A8uh000TpdkC&ved=0CBQQkAE> (Accessed 21 June 2010).

¹⁰⁰ “South Africa: Fast facts” (n 95 above).

4 IS COMPULSORY SCHOOL ATTENDANCE THE MEANING OF BASIC EDUCATION?

Although the Constitution does not define basic education and the term has no definite meaning in South African jurisprudence, it is important to note that the South African Schools Act 1996 (Schools Act) gives us a starting point in our attempt to define the term basic education. The Schools Act states that education is compulsory from grade 1 to grade 9 and between the age of 7 and 15 depending on what comes first.¹⁰¹ Primary schooling which goes up to grade 7 coupled with 2 years of secondary education is therefore compulsory in South Africa. The question that follows is that, in the absence of a definition for basic education, is compulsory primary schooling up to grade 7 coupled with 2 years of secondary education the meaning of basic education referred to by section 29 (1) (a). In other words, can we define basic education as the compulsory attendance of school in line with the provisions of the Schools Act? In this paper the above question is answered in the negative for the following reasons.

First, with consideration of the history of the right to education in South Africa it would be an absurd conclusion to say that compulsory attendance of school connoted by the Schools Act is the definition of basic education alluded to by section 29 (1) (a). The absurdity is clear when one is to consider that such a conclusion would not entitle anyone to demand a certain quality of education that is different from the apartheid education that South Africans fought against. Mere school attendance for a specified period of time would suffice as the acquisition of basic education which is definitely absurd. It is noteworthy that although the apartheid government specifically designed an inferior quality of education for other races, it arguably gave all learners from all races the opportunity to go to school for a specified number of years. Yet, one cannot say that it delivered quality education rather it provided an opportunity for learners to go to school.

Second, the Schools Act says nothing about basic education. It does not mention or define the term basic education. It does not state that the compulsory school attendance it safeguards is synonymous to basic education rather it aims to make sure that every child compulsorily attends seven years of primary school and two years of secondary school. It is therefore important to note that although the Schools Act does not define basic education its provision that education is compulsory from grade 1 to grade 9 and also between the ages of 7 and 15 is important in that it makes it unequivocally possible for children to acquire basic education at primary school level and in their first two years at secondary school. The provision of compulsory schooling whilst not being the definition of basic education is important as it ensures that all children have an opportunity to acquire basic education. To further the same agenda as

¹⁰¹South African Schools Act, 1996, Section 3 (1) states that "Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first".

the South African Schools Act, the Namibian Education Act¹⁰² clarifies that “basic education is the education provided for from the level of the first grade to the level of the twelfth grade and includes adult education, special education and any education declared by the minister to be basic education”.¹⁰³ It further explains that “a primary school is a school or a part of a school where basic education is provided from the first grade to the seventh grade” whilst a “secondary school is a school or part of a school in which basic education from the level of the eighth grade to the level of the twelfth grade is provided”.¹⁰⁴ The above provisions mean that the school is only a forum for children to acquire basic education so compulsory attendance of primary school required by the Schools Act is to ensure that children acquire basic education; it is not a definition of basic education.

Third, by making primary education compulsory, the Schools Act aligns undoubtedly with international law provisions that intend to ensure that basic education is available to all through compulsory attendance of primary school.¹⁰⁵ In addition to making primary education free and compulsory¹⁰⁶ international law states that “primary education is the most important component of basic education”.¹⁰⁷ Primary education is the most important component of basic education because it is the stage where basic education is first introduced. In other words, if any person more specifically a child desires to acquire basic education they go to primary school which is the forum for which learners begin to receive basic education.¹⁰⁸ This means that compulsory attendance of school for a number of years especially primary school years is vital, however the rationale behind international law providing for compulsory and free primary education is that every child must be able to acquire basic education through primary education without obstruction from resource or other constraints. This argument is important as it gives us the basis to justify why the South African government should be obligated to make primary education compulsory and free as required by international law. To this end, this paper refutes any possible arguments that basic education means compulsory school attendance provided by the Schools Act. The paper argues that international law as discussed below makes it clear that basic

¹⁰² Education Act (2001) Act No. 16 of 2001 “Definitions” found at http://www.chr.up.ac.za/chr_old/indigenous/documents/Namibia/Legislation/Education%20Act.pdf (Accessed 27 July 2012).

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ See for example, the United Nations Convention on the Rights of the Child (UNCRC) which was adopted on 20 November 1989 and entered into force on 2 September 1990. South Africa ratified the Convention on 16 June 1995.

Article 28(1)(a) and (b) provides:

“State 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”.

¹⁰⁶ Ibid.

¹⁰⁷ Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment no. 13 The Right to Education (article 13 of the covenant) (1999) para 9.

¹⁰⁸ Universal Declaration of Human Rights (1948) Article 26.

education is the quality of education that the South African government ought to provide to school learners.¹⁰⁹

5 RIGHT TO EDUCATION IN SOUTH AFRICA AND INTERNATIONAL LAW

5.1 The legal connection between international law and the South African Constitution

South Africa is a constitutional democracy that makes international law a pillar of its democracy.¹¹⁰ International law has three sources which are, “customary international law, treaties and conventions and soft law”.¹¹¹ Treaties and conventions become part of national law by ratification.¹¹² Customary law does not become part of national law by ratification like treaties and conventions but it binds all nations and its provisions are widely recognised.¹¹³ Declarations like the World Declaration form part of international “soft law” which “refers to all sources of non-binding international law that can provide guidance on the interpretation of international treaties”.¹¹⁴ All the above sources of international law are internationally recognised instruments which are useful in guiding states pertaining to their conduct and provide sizeable guidance in interpreting section 29 (1) (a) in this paper.¹¹⁵

In regulating the interpretation of human rights the Constitution makes it mandatory to consider international law in interpreting the Bill of Rights.¹¹⁶ It also makes international customary law part of the law of South Africa unless it is in contradiction with constitutional provisions or legislation.¹¹⁷ The Constitution further states that when interpreting any legislation the approach that is consistent with international law is more preferable to that which contradicts it.¹¹⁸ Consequently, there is no doubt that the Constitution accords high regard to international law and accepts guidance from it in interpreting the Bill of Rights. However as mentioned above, conventions become part of national law by ratification. Following the above statement one might question the use conventions that have not been ratified by South Africa as well as non-binding international law to interpret the Bill of Rights and subsequently to

¹⁰⁹ Although basic education can be provided to adults lacking basic knowledge and skills. The enjoyment of this right is not limited by age or gender; it extends to children, youth and adults, including older persons, and it is an integral component of adult education and lifelong learning.

¹¹⁰ Dugard J “International Law and the South African Constitution” *Kaleidoscope* at 1 Available at <http://www.ejil.org/pdfs/8/1/1426.pdf> (Accessed 12 July 2010).

¹¹¹ “The role of international law in South African health law and policy-making” at 131 Available at <http://www.section27.org.za/wp-content/uploads/2010/04/Chapter5.pdf> (Accessed 14 July 2010).

¹¹² Ibid.

¹¹³ Bailey P “The creation of the Universal Declaration of Human Rights” at 1 Available at <http://www.universalrights.net/main/creation.htm> (Accessed 12 July 2010).

¹¹⁴ “The role of international law in South African health law and policy-making” (n 111 above) at 132.

¹¹⁵ Office of the United Nations High Commission for Human Rights 1996-2007, “International Law”, at 1. Available at <http://www2.ohchr.org/english/law/> (Accessed 08 March 2010).

¹¹⁶ See Section 39 Constitution of South Africa (n 4 above).

¹¹⁷ Ibid see Section 232.

¹¹⁸ Ibid see Section 233.

advance the argument in this paper. The Constitutional Court responded to and addressed the issue in the Makwanyane case.¹¹⁹

In the Makwanyane case, the Constitutional Court (Court) stated that the international law that must be considered in interpreting the Bill of Rights refers to both binding and non-binding international laws.¹²⁰ The Court emphasised that customary international law and international agreements are important and should be considered in interpreting the Bill of Rights since they make available a framework in which we understand the Bill of Rights.¹²¹ It further made it clear that although South Africa has a principle of recognising international law the weight of international law and principles recognised will vary on a case by case basis.¹²² In other words, although the Courts must take into account international law when interpreting constitutional provisions, they need not follow the international law rules if they believe they are not applicable to South Africa. International law (binding and non-binding) is therefore useful to make clear our understanding of section 29 (1) (a). This paper defines basic education with guidance from the World Declaration. Its arguments although rooted in the provisions of the World Declaration they are further supported by provisions of other sources of international law as discussed below.

5.2 What is the meaning of the term basic education? An international law approach

To define basic education the World Declaration stated that the acquisition of a basic education is synonymous to the acquisition of basic learning needs. This means that the term basic education refers to basic learning needs. Describing the basic learning needs, the World Declaration states that,

“These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.”¹²³

After breaking down the components of the above definition, one can conclude that basic education is the acquisition of basic learning needs which comprise of essential learning tools and the basic learning content. Such a definition means that the term basic education is quality oriented. For a more clear understanding of the term basic learning needs, this paper breaks down its components and the terms essential learning tools and the basic learning content are defined separately. Essential learning tools include “literacy, oral expression, numeracy, and problem solving”.¹²⁴ It is

¹¹⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 para 26.

¹²³ World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs see Article 1 (1) (n 3 above).

¹²⁴ *Ibid.*

important to note that words like “literacy, oral expression, numeracy, and problem solving” are broad and contested words that do not have an exact definition. However in this paper, an attempt is made to give them more simplified definitions that are easy to understand.

There is not one concrete definition for literacy but a more simplified one would be “an individual’s ability to read, write, speak in English, compute and solve problems at levels of proficiency necessary to function on the job, in the family of the individual and in society”.¹²⁵ As seen from the above definition literacy is a broad word that goes beyond the mere ability to read and write.¹²⁶ In the world of information and technology, a child who has been taught literacy as part of basic education should have acquired skills that will enable him/her to grow, function and integrate successfully in the family and the national and global society. Oral expression connotes the ability of the learner to articulate ideas and to speak with clarity in a way that intellectually and socially empowers him/her.¹²⁷ Orally articulating an idea influences “the development of critical thinking, problem solving abilities and general learning outcomes. In addition, opportunities to practice oral expression will help students become [communicators that are more competent]”.¹²⁸ The above definition means that after being taught oral expression as part of basic education a child should be able to participate fully in the development of the self and of the society due to an enhanced ability to communicate his/her views.

Numeracy is a term coined to mathematical skills when used in the classrooms. A more simplified definition of numeracy would be

“[A]n individual’s capacity to identify and understand the role mathematics plays in the world, to make well-founded judgments, and to use and engage with mathematics in ways that meet the needs of that individual’s life as a constructive, concerned and reflective citizen.”¹²⁹

The above definition seems to state that after being taught numeracy and at the completion of basic education a child should have a minimum level of proficiency with mathematics and the ability to reason and to think logically when confronted with the role to make judgements individually or within a society. Problem solving can be defined simply as a process of “clarifying description of the problem, analyzing causes, identifying alternatives, assessing each alternative, choosing one, implementing it and evaluating whether the problem was solved or not”.¹³⁰ Solving maths in the classroom is

¹²⁵ De Valenzuela J S “Definitions of Literacy” Available at <http://www.unm.edu/~devalenz/handouts/literacy.html> > (Accessed 13 July 2010).

¹²⁶ Ibid.

¹²⁷ OHIO University “Oral Expression Across the Curriculum” Available at <http://www.ohio.edu/gened/help/oe.cfm> > (Accessed 13 July 2010).

¹²⁸ Ibid.

¹²⁹ Ceo Sydney “What is numeracy” Available at <http://www.ceosyd.catholic.edu.au/cms/Jahia/site/curriculumonline/pid/3780> > (Accessed 13/07/2010).

¹³⁰ Free management library “Problem solving” Available at http://managementhelp.org/prsn_prd/prob_slv.htm > (Accessed 13 July 2010).

usually part of the process of problem solving”.¹³¹ After being taught problem solving and at the completion of a basic education a child is capable of finding ways to manoeuvre difficult situations and is creative enough to think of new methods to adapt to new challenges. The above discussion shows us the picture of the content of essential learning tools. Without teaching South African children literacy, oral expression, numeracy and problem solving, an education cannot qualify to be a basic education. It is almost apparent from the above discussion that children who have not received a basic education will find it difficult to proceed successfully to further education and they cannot be agents in the development of themselves and others.

As stated by the definition of basic education in the World Declaration in addition to essential learning tools, basic learning needs also comprise of a basic learning content. The basic learning content includes “knowledge, skills, values and attitudes” essential for human beings to “be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions and to continue learning”.¹³² The aspects of the basic learning content are difficult to define individually as they are interconnected and sometimes define each other as will be seen in this discussion. Skills are part of acquiring a basic learning content. A skill can be defined as “the ability, coming from one’s knowledge, practice and aptitude.”¹³³ The above definition of skill seems to mean that for a child to be able to do a job or perform a task with excellence in future they need to have acquired the knowledge and the practice to give them the ability to perform the task. There is therefore a link between skill as an essential tool and knowledge as an essential tool. The word knowledge does not have a concrete definition but is has been defined as, “a fluid mix of framed experience, contextual information, values and expert insight that provides a framework for evaluating and incorporating new experiences and information”.¹³⁴ The definition above means that for learners to obtain knowledge as part of their basic education they need to learn through experiment. They should learn to contextualise information and teachers as education experts ought to construct and teach ways of understanding that will enable learners to have a structure to evaluate and incorporate new information.

The definition of knowledge above also shows that understanding values as an aspect of the basic learning content is part of the teaching process that will make the learner obtain knowledge. Values are difficult to define but one can define them as beliefs or ideas that humans safeguard as special.¹³⁵ Values influence the attitudes of

¹³¹ Richard Rusczyk “What is Problem Solving?” Available at <<http://www.artofproblemsolving.com/Resources/articles.php?page=problemsolving>> (Accessed 13 July 2010).

¹³²World Declaration on Education For All and Framework for Action to Meet Basic Learning Needs see Article 1 (1) (n 3 above).

¹³³ Dictionary.com “Skill” Available at <<http://dictionary.reference.com/browse/skill>> (Accessed 13 July 2010).

¹³⁴ Alkahaldi F M and M Olaimat “The theory of infoledge, A logical, mathematical and Geometrical Interpretation” (2008) 5 *The Journal of Issues in Informing Science and Information Technology*.

¹³⁵Business Dictionary “Values” Available at <<http://www.businessdictionary.com/definition/values.html>> (Accessed 06 August 2010).

individuals and groups about what are good and bad habits.¹³⁶ Cultural values which include language, human rights values, national values and family values are examples of values that a child should be taught.¹³⁷ Teaching values as part of a basic education is especially important because it is a step towards reconciling “diverse values through dialogue and respect for difference. Moreover, children are capable of playing a unique role in bridging many of the differences that have historically separated groups of people from one another”.¹³⁸ The definition of values as an essential learning tool shows us that values influence attitudes of people and can act as one way of bridging the racial divide that characterised the apartheid regime. Attitude(s) as an essential learning tool is difficult to define but one can generally define an attitude as “one’s feelings or mood toward things, circumstances or people”.¹³⁹ The above definition shows us that teaching children the importance of positive attitudes, the impact of negative attitudes and the kind of attitudes to foster in different situations is an important aspect of a basic education as the knowledge of attitudes contributes to individual development and the developments of nations.¹⁴⁰ A conglomeration of the essential learning tools and the basic learning content leads me to an analysis that the terms basic education alludes to an education that teaches the learner knowledge about numeracy, literacy and life skills.

5.3 How the state ought to measure its compliance with section 29 (1) (a)

A learner who has received basic education is a very important indicator that the state can use to measure whether it is fulfilling its obligations to provide basic education. A learner who has received basic education should be tested using national tests. The results of the tests ought to show that he/she possesses basic learning needs as required by the World Declaration. Tests should target learners who finished primary education coupled with two years of secondary education since they are the compulsory schooling years in South Africa. In line with the World Declaration, the results of the tests should show that the learners possess basic learning needs that enable them to live a life characterised by a “balanced, human rights-friendly response to the challenges¹⁴¹ that accompany a period of fundamental change driven by globalization, new technologies and related phenomena.”¹⁴²

Following the World Declaration’s definition of basic education tests that will show that a learner has received a basic education ought to also show that during his/her primary school years a learner developed individual skills enough to enhance

¹³⁶ Ibid.

¹³⁷ General Comment no. 1 (2001) Article 29 (1): The aims of education CRC/GC/2001/1 see Article 29(1).

¹³⁸ Ibid.

¹³⁹ Abraham J “Positive attitude” (2003) 1 Issue no. 36 *The Docimican.net*.

¹⁴⁰ Ibid.

¹⁴¹ Such challenges include the tensions between; inter alia, the global and the local; the individual and the collective; tradition and modernity; long- and short-term considerations; competition and equality of opportunity; the expansion of knowledge and the capacity to assimilate it; and the spiritual and the material. General Comment no.1 see Article 29 (3) (n 137 above).

¹⁴² Ibid.

his/her individual participation in the society in which he/she lives.¹⁴³ The learner's abilities ought to reflect that he/she values diversity and accepts difference.¹⁴⁴ The learner should show that he/she has knowledge about gender diversity, female health, protection against HIV/AIDS and family planning.¹⁴⁵ A learner who has received basic education should be a person who values peace, responsibility and the need to "promote understanding, tolerance and friendship among all nations, racial or religious groups"¹⁴⁶ which is part of the basic learning content. Tests that successfully state that a learner has received basic education should conclude that the learner is useful, morally and socially responsible¹⁴⁷ and has the ability to exercise individual judgements¹⁴⁸ which is part of essential learning tools discussed above.

As a precautionary measure to ensure that learners receive basic education, the state should employ teachers that are well trained and qualified to teach children in a way that makes them learn that they are responsible and empowered individuals who have the obligation to:

"[R]espect and build upon their collective cultural, linguistic and spiritual heritage, to promote the education of others, to further the cause of social justice, to achieve environmental protection, to be tolerant towards social, political and religious systems which differ from their own, ensuring that commonly accepted humanistic values and human rights are upheld, and to work for international peace and solidarity in an interdependent world."¹⁴⁹

Since basic education is largely provided at primary school level, the state should be obliged to devise a school curriculum that aims to promote the child's full opportunity for play and recreation.¹⁵⁰ The opportunity to play and recreate is only possible if the state ensures that discipline at primary schools is "administered in a manner consistent with the child's human dignity"¹⁵¹ and the best interest of the child are considered always.¹⁵² It is also important for the state and other education providers for primary education to understand that basic learning needs are meant to maximise the child's abilities and to enhance his/her opportunity to be responsible and to fully participate in society. This means that the:

"[T]ype of teaching that is focused primarily on accumulation of knowledge, prompting competition and leading to an excessive burden of work on children, may seriously hamper the harmonious development of the child to the fullest potential of his or her abilities and talents. [Basic] [e]ducation should be child-friendly, inspiring and motivating the individual child. Schools

¹⁴³ International Covenant on Economic Social and Cultural Rights see Article 13 (1) (n 107 above).

¹⁴⁴ Coomans F, "In search of the core content of the right to education' in Brand D and Russell, *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) at 165.

¹⁴⁵ Ibid.

¹⁴⁶ Universal Declaration of Human Rights see Article 26 (2) (n 108 above).

¹⁴⁷ Declaration of the Rights of the Child (1959) G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 see Principle 7.

¹⁴⁸ Ibid.

¹⁴⁹ World Declaration on Education For All and Framework for Action to Meet Basic Learning Needs, see Article 1 (2) (n 3 above).

¹⁵⁰ Declaration of the Rights of the Child (1959) see Principle 7 (n 147 above).

¹⁵¹ Convention on the rights of the Child, 1989, Article 28 (3) see also, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757.

¹⁵² General Comment no. 1 (2001) see Article 29 (6): (n 137 above).

should foster a humane atmosphere and allow children to develop according to their evolving capacities.”¹⁵³

The state as an education provider and a supervisor for other educational institutions providing primary education should therefore ensure that the goal of a basic education is to “empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence.”¹⁵⁴ All the outcomes of the national tests mentioned above are all rooted and tied to the operational definition of basic education by the World Declaration as well as in consideration of other international laws that provide for the outcomes of education for children in particular.

6 CONCLUSION AND RECOMMENDATION

Whilst the South African Constitution provides for the right to basic education, the main problem is translating the right into tangible reality. The government should be compelled to understand its obligations relating to the right to basic education and to devise methods to deliver them. The recognition of the fact that the legislature has not found it important to define the term basic education and the South African courts have not yet defined it calls for the need to unpack the obligations imposed by section 29 (1) (a). The major recommendation is that there is need for a Basic Education Act in South Africa. Such Act should define the term basic education and its objectives. It ought to regulate the content of basic education and the curriculum for basic education. The Act must delve deeper to provide guidance on how schools should deal with issues of religion, ethics as well as the mother tongue and how these maybe incorporated in the curriculum. It should provide guidance on the basic education needs of children with special needs. The Act also needs to provide assessment criteria for students.

The Department of Basic Education cannot simply enact policy that unpacks the scope and content of basic education. The problem is that “policies are objectives that an organization or a government sets for itself to achieve in a given period of time”, whilst laws “are the standard rules and regulations that are compulsory and to be followed by all the people of the country”.¹⁵⁵ The difference between laws and policies mean that a Basic Education Act will bind the South African government as well as other bodies that might endeavour to offer basic education to South Africans. Whereas a certain policy binds either the government or the body that chooses to be bound by it but unlike law it does not bind everyone in the country. Suggesting that the government can simply define basic education through policy overlooks the fact that policies do not have the same legal force as the law. They can be different between organisations and the government which is an undesirable situation. There is a need to regulate the provision of basic education by having concrete legal provisions of its scope and content. Such an approach will ensure that children across South Africa acquire the same basic education with the same intended outcomes. Such an approach will

¹⁵³ Ibid see Article 29 (12).

¹⁵⁴ Ibid see Article 29 (3).

¹⁵⁵ Olivia O “Difference between Law and Policy” found at <http://www.differencebetween.com/difference-between-law-and-vs-policy/> (Accessed 27 July 2012).

therefore ensure that South Africans will not receive different kinds of education like the way it was done during the apartheid era. It will also demystify the myths (or realities) that children in South African private schools receive a better education than those in South African public schools. All schools will have the same approach to delivering basic education as will be outlined in the Basic Education Act. In order to see an example of such a Basic Education Act the South African government can look at the Basic Education Act of Finland.¹⁵⁶

The arguments in this paper on what basic education possibly entails were largely informed by international law but they were also motivated by the need to redress the ills of the apartheid past and help in the drafting of the basic education Act in South Africa. Insights from this paper should guide the government to comply with its constitutional obligation to provide basic education and to enlighten South Africans of their right to basic education so that they can compel the government to deliver when it fails. They send the message that there is need for action that compels the government to deliver the right to basic education in South Africa otherwise without education there is no hope for all children in South Africa especially those who are Black and disadvantaged. A deprivation of basic education for children means that the vicious cycle of poverty and ignorance will continue in South Africa which is a situation that negatively affects the individual and everyone rich or poor.

Postscript

From 2011 when this article was written there has been more pressure on the Government to deliver Basic Education especially from Non-Governmental Organisations. Recently, in the case of *Section 27 and others v The Minister of Basic Education and others* (24565/2012) the government was taken to Court to compel it to provide textbooks for South African children at Basic Education level. Also, in the case of *Centre for Child Law and Others v Minister of Basic Education and Others* (1749/2012) the Legal Resources Centre and the Centre for Child Law took the government to Court for failure to fill vacant teaching posts at Eastern Cape schools. More litigation against the government from Non-Governmental Organisations is anticipated. However, it should be noted that despite continued litigation on section 29 of the South African Constitution, even to date the term basic education has not been defined by any Statute or by the Courts. The author proposes that a concrete definition of the term might ensure the provision of quality basic education in South Africa.

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