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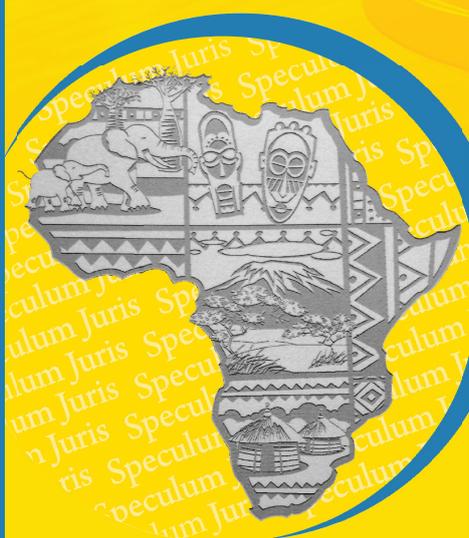
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# The “*Silent War*” of the COVID-19 Pandemic on the Realisation of the Right to Quality Education in South Africa

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## Abstract

*This article assesses the pre- and post-impact of the COVID-19 pandemic on the realisation of the right to quality basic education in South Africa. In the context of the COVID-19 pandemic on the realisation of the right to basic education, existing structural and other inequalities of basic education were unearthed and continue to be characterised by inequality between schools with proper infrastructure and those without (especially in the rural areas of the Eastern Cape Province). COVID-19 and the subsequent national lockdown regulations that were passed led to the closure of schools around the world to minimise the rate of infection. While learning was interrupted in most schools, owing to their closure, those with access to e-learning had minimal problems. However, those without access*

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*to this form of learning, such as those in rural areas, had their curricula stopped indefinitely. At such schools, the realisation of the quality of basic education remained problematic and the difficulties experienced at different schools. These challenges had the potential to compromise the advancement of social justice and the prospects of life chances in many other areas such as employment, health, social security and participation in life-affecting political processes. The lack of appropriate infrastructure in schools is not conducive to equitable access to education and resources. For example, the 2023 National Adjusted Estimates reported poor implementation of the delivery of water and sanitation facilities. As a result, out of a total number of 350 schools targeted, 206 were provided with sanitation facilities in the first half of 2023/24 (April to September). Therefore, COVID-19 did not only infect many individuals, but it also showed the existing and deep inequalities in South Africa's education system. While much has been done to ensure high school enrolment, access to quality basic education remains difficult.*

**Keywords:** quality of basic education; COVID-19; online learning; human rights

## 1 INTRODUCTION

South Africa's dawn of democracy in 1994, with the subsequent adoption of the 1996 Constitution<sup>1</sup> provided a new lease of life for the enjoyment and realisation of human rights in the country. According to the United Nations (UN),

human rights are commonly understood as being those rights which are inherent to the human being. The concept of human rights acknowledges that every single human being is entitled to enjoy his or her human rights without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>2</sup>

This is of particular significance for the right to basic education, which must be provided and enjoyed by all, without discrimination. This is a basic human right that is entrenched in many national and international instruments designed to eliminate and guarantee life-changing opportunities to everyone by way of education.<sup>3</sup> This means that the right to education is at the top of the international community's agenda and requires that all children be assured of quality education, which respects and promotes their right to dignity, enhances the goal for societal change and optimum development and growth.<sup>4</sup> It also entails that the provision of quality education is vital in reducing socio-political, legal and cultural inequalities that continue to manifest themselves in the post-apartheid constitutional dispensation.

South Africa has, to date, made progress in providing access to education that is grounded in the Constitution. The post-apartheid system of education has responded to the transformative ideals of the new dispensation through passages of legislation, such as the South African Schools Act 84 of 1996, policy documents and other legal measures designed to address the historical legacy of inequalities in education. The adopted legal framework reinforces this rights-based approach, which has the potential to contribute to attaining the fulfilment of the right to education. On the other hand, despite the legislative progress made, access to education, not only pre- or post-COVID-19 faces many challenges that overshadow the adopted legal framework, which

1 The Constitution of the Republic of South Africa 1996, hereinafter referred to as the "Constitution".

2 UN *Human Rights: A basic Handbook for UN Staff* (2000). <https://www.ohchr.org/documents/publications/hrhandbooken.pdf> (accessed 07-12-2020).

3 Mestry "A Critical Analysis of the Learners' Constitutional Rights to Basic Education in South African Public Schools" 2017 *KOERS: Bulletin for Christian Scholarship* 1–12 <https://doi.org/10.19108/KOERS.82.3.2327>, (accessed 03-12-2020).

4 UNICEF "A Human Rights-based Approach to Education For All: A Framework For the Realization of Children's Right to Education and Rights Within Education" 2007 <https://unesdoc.unesco.org/ark:/48223/pf0000154861> (accessed 03-12-2020).

compromise the quality of the rights envisaged therein. These challenges were laid bare by the outbreak of the COVID-19 pandemic, which disrupted access to schooling. The COVID-19 pandemic, a new acute respiratory syndrome coronavirus 2 (SARS-CoV-2), started in Wuhan, China in 2019, and spread throughout the world.<sup>5</sup> As of 21 April 2024, the World Health Organisation (WHO) reported more than 9 million cases of COVID-19 in Africa.<sup>6</sup> In South Africa, as of January 2023, 4 million cases had been reported, with 3.9 million recoveries and 102 595 deaths.<sup>7</sup> There were reports of infections in schools but the Department of Basic Education (DBE) and partners monitored the situation closely and directed the process of phased re-opening.<sup>8</sup>

Considering the above statistics, the COVID-19 pandemic has shown the deep structural and existing inequalities that characterised the provision of access to quality education. This is evident in the context where some of the schools did not even meet the basic learning infrastructure requirements such as access to laboratories, libraries and internet connections. In the case of *Equal Education and Amatolaville Primary School v Minister of Basic Education*,<sup>9</sup> the minister acknowledged that a large number of schools still lacked most basic resources such as water, sanitation and electricity,<sup>10</sup> in addition to little access to computers or the internet, leaving learners at a massive disadvantage compared to other students.<sup>11</sup> Chitsamatanga *et al* also point out that South Africa generally grappled with the outbreak of the COVID-19 pandemic which mostly affected the vulnerable,<sup>12</sup> which statement is relevant to the argument that rural schools continue to be affected by the post COVID-19 pandemic.

The existing challenges show that the COVID-19 pandemic required adaptation to new forms of teaching and learning such as online learning to respond to learners' needs as well as minimising the spread of the virus. It was our own observations that many schools found it difficult to adapt to new forms of learning and implement online learning. It also exposed the distinction between well-resourced and poorly-resourced schools. While the schooling curriculum was disrupted due to the closure of schools, some schools (with resources) were forced to use online learning to continue with the curriculum. Most of the schools (especially in rural areas) did not have resources to implement online learning. As such, learning stopped indefinitely at those schools, even though the Eastern Cape Department of Education (ECDoE) tried distributing learning materials through its website. Learning only resumed around February 2022 with extreme limitations for remote learning.

Against this background, this article discusses the impact of what the authors call the “silent war” of the COVID-19 pandemic on the realisation of the right to quality basic education in

5 Mhlanga and Moloi “COVID-19 and the Digital Transformation of Education: What Are We Learning on 4IR in South Africa?” 2020 *Education Sciences* 1–11.

6 Statistics obtainable from <https://data.who.int/dashboards/covid19/cases> (accessed 5-05-2024).

7 Statistics obtainable from <https://www.health.gov.za/covid19/> (accessed 5-05-2024).

8 Soudien, Reddy and Harvery “The Impact of COVID-19 in a Fragile Education System: The Case of South Africa” in Reimers (eds) *Primary and Secondary Education during COVID 19* (2022) 303–325 [https://doi.org/10.1007/978-3-030-81500-4\\_12](https://doi.org/10.1007/978-3-030-81500-4_12)

9 *Equal Education v Minister of Basic Education* 2018 9 BCLR 1130 (ECB).

10 *Ibid* para 48.

11 Staff Writer “Here’s How Many South African Schools Son’t Have the Internet or a Computer lab – And What It Will Cost to Fix the Problem” (2018) <https://businesstech.co.za/news/internet/259171/heres-how-many-south-african-schools-dont-have-the-internet-or-a-computer-lab-and-what-it-will-cost-to-fix-the-problem/> (accessed 19-11-2020).

12 Chitsamatanga and Ntlama-Makhanya “Building on the Evidence of the Impact of Coronavirus (COVID-19) in South African Informal Settlements. A Mini Review” 2021 *International Journal of Engineering, Management and Humanities* 47–60. See also Amnesty International “South Africa: Broken and Unequal Education Perpetuating Poverty and Inequality” (2020) <https://www.amnesty.org/en/latest/news/2020/02/south-africa-broken-and-unequal-education-perpetuating-poverty-and-inequality/> (accessed 19-11-2020).

South Africa. The objective is to use the rights-framework to unearth some, if not all, of the glaring existing challenges on the fulfilment of the right to education which have been exposed by the COVID-19 pandemic. It argues that the fulfilment of the right to education should not be limited on paper, but should be broadened to all branches, spheres of government and include various stakeholders to achieve the necessary reforms in compliance with constitutional and international human rights obligations to achieve quality education.<sup>13</sup> The focus and argument are also limited to the unqualified right to basic education as provided in section 28 of the Constitution, with reference to the advancement of the “best interests of the child” principle. Lessons will also be drawn from the international legal framework as a direct response of South Africa’s commitment to the ideals of the community of nations in the advancement of the rights of the child to basic education.

## 2 THE RIGHT TO EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW

The adoption of the Universal Declaration of Human Rights (UDHR) on 10 December 1948 saw the development of universality, indivisibility, and inter-dependence of human rights for all. Although the UDHR is not a binding instrument on states, it fostered a global perspective on adhering to the prescripts of rights within the community of nations. The commitment is of particular significance for the right to education because it is foundational to the enjoyment of other fundamental rights.<sup>14</sup> It is further recognised as a cornerstone of the 2030 Agenda for Sustainable Development<sup>15</sup> and represents a powerful tool to advance Sustainable Development Goal 4 (SDG4) on education, which aims to “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all”. The conceptual strength of the right to education is evidenced by its recognition in many international instruments adopted by the UN.<sup>16</sup> The strength of the right to education is found in article 26 of the UDHR which captures its content and reads as follows:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

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

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

The UDHR, read together with the International Covenant on Civil and Political Rights

13 See also Skelton “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 *De Jure* 1–23.

14 See Churr “Realisation of a Child’s Right to a Basic Education in the South Africa School System: Some Lessons from Germany” 2015 *PELJ* 2405–2455.

15 Adopted at the UN Summit in New York on 25–27 September 2015 <https://www.coe.int/en/web/programmes/un-2030-agenda> (accessed 15-032024).

16 UNESCO “UNESCO Convention against Discrimination in Education (1960) and Arts 13 and 14 (Right to Education) of the International Covenant on Economic, Social and Cultural Rights: A Comparative Analysis” (2006). <https://unesdoc.unesco.org/ark:/48223/pf0000145922> (accessed 20-09-2020).

(ICCPR)<sup>17</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>18</sup> are classified as the International Bill of Human Rights. The International Bill of Human Rights is further linked to the Convention of the Rights of the Child,<sup>19</sup> and at a regional level to the African Charter on Human and People's Rights (ACHPR)<sup>20</sup> and African Charter on the Rights and Welfare of the Child (ACRWC).<sup>21</sup> These instruments are inter-related to the UNESCO Convention against Discrimination in Education (CADE).<sup>22</sup> It is our considered view that CADE has a binding legal status as it “encompasses the idea that education is not a luxury, but a fundamental right and it underscores the state obligation to proscribe any form of discrimination in education while promoting equality of educational opportunity”.<sup>23</sup> CADE is of further importance today because it entails among other elements:

- the provision of a normative framework and essential elements of the right to education, with international obligations;
- The expression of the fundamental principle of equality of educational opportunities, enshrined in UNESCO's Constitution;
- the expression of another fundamental principle, that of non-discrimination;
- the provision of a normative basis for continuing education and learning, and the right to basic education for youth and adults;
- lays down the objectives of human rights education and training for teaching profession and other features of the right to education; and
- the Convention is the first legally binding instrument, which provides for standards and quality of education.<sup>24</sup>

The substance of these elements gives a general commitment for the “elimination of any form of discrimination in education and to promote equality of opportunity and treatment for all in education”.<sup>25</sup> The UN Committee on Economic, Social and Cultural Rights, in its General

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17 Article 18 of the ICCPR states that everybody has the right to think, feel, and worship as they see fit. This right includes the freedom to have or adopt a religion or belief of one's choosing, as well as the freedom to express his religion or belief in worship, observance, practice, and teaching, whether alone or in community with others, in public or private.

18 Article 13 of the ICESCR provides that the States Parties to the present Covenant acknowledge that everyone has the right to an education. They agree that education should focus on the full development of the human personality and feeling of dignity, as well as the promotion of human rights and fundamental liberties. They also agree that education should enable all people to engage successfully in a free society, promote understanding, tolerance, and friendliness among all nations and all racial, ethnic, and religious groups, and support UN peacekeeping efforts.

19 Article 28 of the said Convention states that States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.

20 Article 17(1) of the ACHPR provides that every individual has a right to education.

21 Article 11 of the ACRWC entrenches the right of every child to education.

22 Adopted in 1960, and see the Joint Expert Group UNESCO “Comparative analysis: UNESCO Convention against discrimination in education and arts 13 and 14 of the International Covenant on Social and Cultural Rights” (2006) UNESCO <https://unesdoc.unesco.org/ark:/48223/pf0000145922> (accessed 20-022024).

23 UNESCO-CADE.

24 UNESCO “The Right to Education For All: Ten Reasons Why the Convention Against Discrimination in Education is Highly Significant in Today's World” (2007) <https://unesdoc.unesco.org/ark:/48223/pf0000153765> (accessed 01-10-2020).

25 Coomans “UNESCO Convention Against Discrimination” in Henrard and Dunbar (eds) *Non-minorities-Specific Instruments, Provisions and Institutions* (2009).

Comment 13,<sup>26</sup> provided guidance on states regarding their obligations in ensuring the enjoyment of the right to education. The committee provided content and announced the elements of the right to education in the context of the four A's namely: availability, which requires the states to ensure the provision of enough educational infrastructure, equipped with all the materials and facilities needed to function properly in the particular context, such as buildings, teaching equipment and materials, trained and fairly-paid staff, protection from natural elements, sanitation facilities for both sexes, and safe drinking water; secondly, accessibility, which is grounded on key elements of non-discrimination, physical accessibility and economic accessibility particularly for the vulnerable wherein no one may be discriminated against, based on, among other grounds, sex, ethnicity, geographical location, economic circumstances, disability, citizenship or residence status, membership of a minority group, religion, detention, or sexual orientation. Schools should be within a safe and reasonable distance from communities or, for remote areas, accessible via modern technology. Education should be affordable to all, and States should progressively introduce free education at all levels; thirdly, acceptability, wherein subject to the overarching aims of education and to minimum educational standards set by the state, curricula and teaching methods should be acceptable to students and, in appropriate cases, parents. The contents of the curricula should be relevant to the child's context, needs and evolving capacities, and should be of good quality and culturally appropriate; fourthly, adaptability, which requires the flexibility of education to adapt and respond to changing societies and the needs of students within diverse social and cultural settings.<sup>27</sup>

Therefore, the state has a duty to ensure the realisation of the right to education in this respect. The right to education places on the state the duty to develop and sustain an educational system, with educational services available in all schools. Drawing from article 26 of the UDHR and General Comment 13 which entrench the four-A's, states are obligated to provide compulsory and free education for all. States should develop a national framework that will progressively expand and improve the educational system and successively introduce free education at all other levels, namely secondary, higher, and fundamental education. General Comment 11 contains long-articulated state obligations imposed by articles 13 and 14 of the ICESCR. These entail:

9 **Obligations:** A State party cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available. If the obligation could be avoided in this way, there would be no justification for the unique requirement contained in article 14 which applies, almost by definition, to situations characterized by inadequate financial resources. By the same token, and for the same reason, the reference to "international assistance and cooperation" in article 2.1 and to "international action" in article 23 of the Covenant are of particular relevance in this situation. Where a State party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community has a clear obligation to assist.

10 **Progressive implementation:** The plan of action must be aimed at securing the progressive implementation of the right to compulsory primary education, free of charge, under article 14. Unlike the provision in article 2.1, however, article 14 specifies that the target date must be "within a reasonable number of years" and moreover, that the time-frame must "be fixed in the plan". In other words, the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan. This underscores both the

26 Adopted at the Twenty First Session of the Committee on Economic, Social and Cultural Rights on 8 December 1999 (Document E/C12/1999/10) <https://www.refworld.org/legal/general/cescr/1999/en/37937> (accessed 10-05-2024).

27 Office of the High Commissioner for Human Rights "CESCR General Comment No. 13: The Right to Education (Art 13) Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 (Contained in Document E/C.12/1999/10)" <https://www.refworld.org/pdfid/4538838c22.pdf> (accessed 20-09-2020).

importance and the relative inflexibility of the obligation in question. Moreover, it needs to be stressed in this regard that the State party's other obligations, such as non-discrimination, are required to be implemented fully and immediately.<sup>28</sup>

The above instruments endorse Marishane's view that "the right to basic education for all, with its roots in the international conventions of the past century, is now universally accepted as a fundamental human right".<sup>29</sup> It is without doubt that the provision of a conducive environment for the enjoyment of a meaningful education advances the basic right to education. The state's responsibility, as envisaged in international human rights law, entrenches the recognition, promotion, protection and fulfilment of the rights from the national to the global community. This entrenchment does not only entail state's obligations but the rights-characteristic of the right, as Praneviciene and Puraite contend that

education itself is a human right, with its own content and required protection by the states. Education is also an inseparable means of achieving other human rights, as only educated people can obtain legal and economic instruments to combat poverty, social and economic discrimination, and other serious violations of human rights; and education is one of the most important and powerful tools for spreading democratic values, promoting human rights, and achieving self-esteem and self-realisation.<sup>30</sup>

It is in the context of the above factors, as articulated by Praneviciene and Puraite, that states continue to be required to address challenges on the enjoyment of the right to education that were laid bare by the wave of the COVID-19 pandemic, which swept across South Africa as well as the global community.<sup>31</sup>

### 3 THE CONTEXT OF THE SOUTH AFRICAN PERSPECTIVE ON THE RIGHT TO BASIC EDUCATION

#### 3.1 The Foundational Response to the Enjoyment of the Right to Education

Democratic South Africa inherited a racially segregated education system, with 19 different education departments, each upholding different standards and administering its own examinations.<sup>32</sup> The history of education in the apartheid era and the constitutional provision that guarantees the right to basic education indicate that the right must guarantee access to education of good quality. The segregated apartheid system was designed around the goal of fostering white privilege, while at the same time restricting black social and economic opportunities and mobility, by educating students of different races in accordance with the social and economic positions they were required to perform by the apartheid government. It is not the intention here to exhaust the impact of South Africa's history on the enjoyment of the right to education but rather to serve as a point of departure for the determination and reflection on progress made since the attainment of democracy in 1994. The new education structure of the

28 Adopted by the Committee on Economic, Social and Cultural Rights at the Twentieth Session E/C.12/1999/4, 10 May 1999.

29 Marishane "The Right to Basic Education For All in South Africa : Implications For School Principals" 2017 *Koers* 1–8 <http://www.scielo.org.za/pdf/koers/v82n3/09.pdf> (accessed 03-12-2020).

30 Praneviciene and Puraite "Right to Education in International Legal Documents" 2010 *Jurisprudence* 134. See also Hodgson "The Role and Purpose of Public Schools and Religious Fundamentalism: An International Human Rights Law Perspective" 2012 *Forum on Public Policy* 1–37.

31 Van der Berg 'COVID-19 School Closures and Their Impact on Children' 14 July 2020, The Conversation <https://theconversation.com/covid-19-school-closures-in-south-africa-and-their-impact-on-children-141832> (accessed 25-09-2020).

32 Department of Basic Education "A 25 Year Review of Progress in the Basic Education Sector" (2019a) <https://www.education.gov.za/Portals/0/Documents/Reports/DBE%2025%20Year%20Review%20Report%202019.pdf?ver=2019-12-13-133315-127> (accessed 27-11-2020).

democratic government, which aimed to open the doors of learning to all, replaced the divided and splintered education departments with a single national system of public education, with decentralised positions assigned to national and regional governments, districts and schools.<sup>33</sup>

While the 1994 democratic government has opened the doors of learning to all, the realisation of the right to quality education remains a challenge.<sup>34</sup> South Africa's education system continues to be characterised by unequal access between the rich and the poor which is a result of the apartheid era. Moseneke DCJ as he then was in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*<sup>35</sup> gave content to the impact of South Africa's history on education and held that:

apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. *While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us. It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.*<sup>36</sup> (Author's emphasis.)

This was echoed by Nkabinde J in *Governing Body of the Juma Masjid Primary School v Essay*<sup>37</sup> judgment where it was held that "in light of the legacy of apartheid, the importance of education, particularly basic education, for individual and societal growth in our democratic democracy cannot be underestimated".<sup>38</sup>

Three decades after the first democratic election, the traces of the dual system of apartheid education remain, in which a minority of students benefit from high-quality education, while the rest of the country's students are taught in schools without the basic infrastructure to ensure academic performance.<sup>39</sup> To date, the courts have produced voluminous jurisprudence on the impact of South Africa's history on the enjoyment of fundamental rights. Hence Mokgoro J in

33 Franklin and McLaren "Realising the Right to a Basic Education in South Africa: An Analysis of the Content, Policy Effort, Resource Allocation and Enjoyment of the Constitutional Right to a Basic En" 2015 *Studies in Poverty and Inequality Institute (SPII)* 1–166.

34 See Chitsamatanga and Ntlama-Makhanya "Is South Africa Failing to Uphold its Human Rights Obligation With Respect to the Rights to Basic Education Through Extermination of Pit Latrines in Schools? Implications for Department of Basic Education" 2022 *Alberta Journal of Education Research* 75–88.

35 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC).

36 *Ibid* paras 45–47.

37 *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC)

38 *Ibid* paras 42–44.

39 Mohamed "South Africa: Broken and Unequal Education Perpetuating Poverty and Inequality" (2020) Amnesty International <https://www.amnesty.org/en/latest/news/2020/02/south-africa-broken-and-unequal-education-perpetuating-poverty-and-inequality/> (accessed 20-03-2024). The author points out that the South African education system, characterised by crumbling infrastructure, overcrowded classrooms and relatively poor educational outcomes, is perpetuating inequality and as a result, failing too many of its children, with the poor hardest hit.

*Minister of Finance v Van Heerden*<sup>40</sup> spit-fired and held:

apartheid was not merely a system that entrenched political power and socio-economic privilege in the hands of a minority nor did it only deprive the majority of the right to self actualisation and to control their own destinies. It targeted them for oppression and suppression. Not only did apartheid degrade its victims, it also systematically dehumanised them, striking at the core of their human dignity. The disparate impact of the system is today still deeply entrenched.<sup>41</sup>

The acknowledgement of the impact of South Africa's history is foundational to the fulfilment of the right to education in the post-apartheid system of governance. This history concretises the importance of the right to education in addressing the continued manifestation of inequalities that are evident in the enjoyment of the right to education today. Ntlama expresses the same sentiments and argues that "history should be used as a starting point and a guideline for human rights enforcement in order to get significant insights into the origins of discriminatory behaviours that are largely unchanged, allowing societies to acknowledge and forge new instruments that will be central to change initiatives".<sup>42</sup> This history is of direct relevance, particularly in addressing the continued manifestation of the glaring inequalities that were exposed by COVID-19, regarding the fulfilment of the enjoyment of the right to education in the Constitution. Section 29(1)(a) of the Constitution, which provides for the right to basic education, including adult basic education is of particular significance because it is foundational to the enjoyment of many other fundamental rights, especially socio-economic rights. Arendse<sup>43</sup> holds a similar view and contends that "education also plays an important role in the fulfilment of socio-economic rights: education enhances a person's prospects of securing employment, which in turn secures access to food, housing and health care services".<sup>44</sup>

However, the right to basic education is a unique and distinct right from other socio-economic rights because it is of direct and immediate implementation, as it is not subject to internal qualifications that require progressive implementation. Nkabinde J in *Musjid* endorsed the contention, and distinguished the nature of the right to education from other socio-economic rights, by holding that it is "immediately realizable without internal qualification of progressive realization within the financial muscle of the state and subject to legislative measures".<sup>45</sup> This means that the right to education is subject to the broad limitation by laws of general application, as envisaged in section 36 of the Constitution.<sup>46</sup> This right is also distinguished from the right to further education as envisaged in section 29(1)(b) where the state is in terms of the said right is obliged, through reasonable measures, to make further education progressive and accessible.

40 *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC).

41 *Minister of Finance v Van Heerden* para 71.

42 Ntlama "Impediments in the Promotion of the Right to Gender Equality in Post-apartheid South Africa" (LLD thesis, Unisa, 2010) 29.

43 Arendse "The Obligation to Provide Free Basic Education in South Africa: An International Law Perspective" 2011 *PELJ* 96–126.

44 *Ibid* 101.

45 *Governing Body of the Juma Masjid* para 37.

46 Section 36 on Limitations of Rights reads as follows: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

the nature of the right;

the importance of the purpose of the limitation;

the nature and extent of the limitation;

the relation between the limitation and its purpose; and

less restrictive means to achieve the purpose.

Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

See also *De Reuck v Director of Public Prosecutions* 2003 12 BCLR 1333 (CC) para 89.

In limiting the right, Venter contextualises and contends that the limitation of the right entails: (i) compliance with all forms of legislation including common law and customary law; (ii) that law must be sufficiently clear, accessible and precise that persons who are affected by it can ascertain the extent of their rights and obligations; and (iii) equal application of the law to all.<sup>47</sup> It is evident that all the fundamental rights in the Bill of Rights are limited subject to a limitation that is reasonable and justifiable to fulfil a legitimate purpose.<sup>48</sup> Notwithstanding the limitation of the right, the right to education, as is the case with all other fundamental rights, captures the specific obligations of the state, which in the South African context, are entrenched in section 7(2) of the Constitution. The latter section requires the state to, first, respect the importance of the existing rights and refrain from interference in the enjoyment of the said right; (ii) secondly, protect the right and take steps to ensure access and ability to enhance the enjoyment of the right; (iii) thirdly, promote the right by creating a greater awareness of the right; and (iv) lastly, fulfil the said right by ensuring that those lacking access are provided with the opportunity to enjoy the right.<sup>49</sup>

The above obligations, as equally envisaged in the international instruments mentioned above, are domesticated in many other instruments that South Africa adopted in giving content to the right to education. The universal application of human rights obligates and exerts specific requirements from the South African government to ensure adherence and evolution of a culture on human rights in education. This culture of human rights is located and endorsed by the South African Schools Act 84 of 1996 which gives substance to section 29 of the Constitution. The Schools Act provides that:

whereas the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation, and whereas this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of discrimination.<sup>50</sup>

This commitment reinforces the rights-based approach to the enjoyment of the right to education. The rights-based approach is defined by Sandkull as a “conceptual analytical and methodological framework for identifying, planning, implementing and monitoring development activities based on international human rights standards”.<sup>51</sup> The approach is therefore, as Sandkull states, grounded in: (i) its defining feature is its explicit linkage to human rights standards which are universally accepted, set obligations and minimum guarantees; (ii) integrating the norms, standards and principles of the international human rights system into the plans, strategies, policies and the processes of development programming; (iii) requiring a high degree of participation from the targeted beneficiaries, including local communities, civil society, minorities, indigenous peoples, women and others; (iv) focusing on raising the levels of accountability and transparency by identifying the ‘rights-holders’ and the corresponding ‘duty-bearers’; (v) focus that is given to discrimination, equality and the status of vulnerable groups and gives preference to strategies for empowerment over mere service oriented responses; and

47 Venter “A Selection of Constitutional Perspectives on Human Kidney Sales” 2013 *PELJ* 357.

48 *Ibid* 358.

49 See also *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) para 17. Smit “Compatibility of Democracy and Learner Discipline in South African Schools” 2013 *De Jure* 345–365.

50 See Preamble of the Schools Act. See also s 4(a) of the National Education Policy Act 27 of 1996, which affirms the fundamental rights that are entrenched in the Constitution and the Schools Act.

51 Sandkull “Strengthening Inclusive Education by Applying the Rights-based Approach to Education Programming” (August 2005) 3.

(vi) overall, encompasses the importance of quality and inclusive education.<sup>52</sup>

With the defining characteristics of the rights-based approach, the right to education empowers people to ensure that they (i) have the ability to make informed political choices, such as choosing a suitable political representative or political party or even standing for public office; and (ii) play a crucial role in the fulfilment of socio-economic rights: education enhances a person's prospects of securing employment, which in turn secures access to food, housing and health care services.<sup>53</sup> It is deduced from these factors that they are a direct response to South Africa's Constitution which describes the Bill of Rights where the right to education is entrenched as a "cornerstone of democracy"<sup>54</sup> with its linkage to the foundational values of the new dispensation.<sup>55</sup> It is without doubt the rights-based approach, grounded on the significance of the Constitution with its defining characteristics, which are founded on values of dignity, freedom and equality.<sup>56</sup> The latter values are of further relevance and linkage to the substantive translation of the right to education into reality. However, in keeping with the universality of rights and international best practices on the translation of the right to education within the rights framework, traceable from South Africa's history as a point of departure in addressing the equal and full enjoyment of this right, the constitutional response and legislative framework to give content to the right entrenched in the Constitution, the question would be: how has South Africa fared in the fulfilment of this right in the light of the emergency situation of the COVID-19 pandemic?

#### **4 THE COVID-19 PANDEMIC LEFT THE RIGHT TO EDUCATION 'HUNG OUT TO DRY'**

##### **4.1 COVID-19: Uprooted and Exposed – the Existing Inequalities on the Realisation of the Fulfilment of the "Quality" of Basic Education.**

South Africa has some of the highest rates of universal access to primary education, with gross enrolment rates in primary schools having increased from 88.1 per cent in 2002 to 94.2 per cent in 2015.<sup>57</sup> However, in the year 2020 when COVID-19 was declared a national disaster, the "gross enrolment ratio was at its lowest level of 97.41 per cent as opposed to 98.37 per cent in 2019 with the ratio at its highest peak of 107.5 per cent in 2008".<sup>58</sup> While this high universal access can be noted, rural schools are facing significant problems that are special to their setting. Some of the obstacles to successful education are a lack of parental involvement in children's education, inadequate state funding, a lack of resources, under-qualified teachers, and multi-grade teaching. In rural areas, public schools are categorised by numerous factors that have a negative effect on the provision of quality education. Generally, rural areas are remote and largely under-developed. Consequently, many schools lack the requisite physical resources and basic sanitation facilities.<sup>59</sup> Because of financial constraints, provincial governments are unable to offer the requisite financial assistance to rural schools to help provide quality education for

52 *Ibid* 4–6.

53 Arendse 2011 *PELJ* 101.

54 The Constitution s 7.

55 *Ibid* s 1(a-c).

56 *Ibid* s 1.

57 Statistics South Africa "Education Series Volume III: Educational Enrolment and Achievement, 2016" (2017) 3 <https://www.statssa.gov.za/publications/Report%2092-01-03/Report%2092-01-032016.pdf> (accessed 14-12-2020).

58 See Cowling "Gross Primary School Enrolment in South Africa 2008-2020" (2023) <https://www.statista.com/aboutus/our-research-commitment/3664/natalie-cowling> (accessed 20-03-2024).

59 Du Plessis and Mestry "Teachers for Rural Schools – A Challenge for South Africa" 2019 *South African Journal of Education* 1–9 <https://doi.org/10.15700/saje.v39ns1a1774> (accessed 14-12-2020).

learners.

The access to quality education remains poor, mostly in the historically deprived areas; some schools do not even meet basic learning infrastructure requirements, such as access to laboratories, libraries and internet connections. This condition results in learners experiencing learning deprivation, higher-grade repetition and dropout rates. Goosen J in *Madzodzo v Minister of Basic Education*<sup>60</sup> highlighted the lack of access to quality education and held that:

multiple learners are forced to share a desk, which means that the learners squashed together and struggle to concentrate on their work. Moreover, it is difficult for them to write on the desk space provided. In some instances, learners are even forced to stand throughout lessons, leaving them with no writing surface. The overcrowding around the desks also causes discipline problems, as children fight over the few available desks and chairs. These discipline problems can disrupt the lesson and inhibit learning. The lack of furniture results in an environment that is not at all conducive to teaching and learning. Learners are squashed together, and some students are forced to squat on their haunches, stand, or sit on the floor during the lessons. Sometimes the learners are forced to sit on each other's laps. This makes it virtually impossible for the learners to take part in lessons. Many learners bring their own plastic chairs to the school, while others use empty beer crates and furniture cobbled together with broken frames and loose planks of wood. This helps children to have somewhere to sit, but almost none of the students have a desk to write on. This is completely unacceptable. Teachers are unable to give the students any writing exercises. The learners' dignity is seriously impaired when they are forced to sit on the floor or squashed into desks like animals.<sup>61</sup>

Commentators and researchers have made remarks and released reports on the challenges faced in providing quality education in South Africa. Nearly three decades have passed since apartheid was officially abolished in South Africa, yet the chasm between historically disadvantaged schools and former model C schools remains glaringly wide. Despite this, the Basic Education Minister speaks of improvements in matric pass rates, but such figures, when scrutinised, merely hint at progress while obscuring the persistent structural inequalities entrenched within the education system.

The purported advancements in matriculation results fail to account for the grim reality revealed by the Progress in International Reading Literacy Study report, which exposes that a staggering 82 per cent of grade 4 learners lack basic reading comprehension skills.<sup>62</sup> While this study focuses on a specific grade, its findings serve as a damning indictment of the systemic failures plaguing South Africa's education landscape across all levels. Moreover, the report underscores a pervasive culture of apathy towards literacy among learners, educators, and communities alike. Reading, once heralded as a cornerstone of education, now languishes in neglect within the confines of South African schools and households. It is evident that the fundamental pillars of learning and knowledge acquisition are crumbling, heralding a bleak future for generations to come.

Similarly, Spaul notes "South Africa is virtually unique among upper-middle-income countries in that most of our children (58%) do not learn to read for meaning in the first three years of school".<sup>63</sup> One of the reasons for what is happening in our schools, Spaul suggests, is that the teachers in the Foundation Phase "do not know (and have never been taught) how to teach

60 *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM).

61 *Ibid* para 20.

62 Sondlo-Mzileni "Why Our Children Cannot Read for Meaning at Grade 4 Level" (2023) <https://mg.co.za/thought-leader/opinion/2023-02-21-why-our-children-cannot-read-for-meaning-at-grade-4-level/#:~:text=The%20recent%20Progress%20in%20International,a%20whole%20across%20all%20grades> (accessed 11-05-2024).

63 Spaul "Funda Wande: Teaching Reading for Meaning" (2017) <https://nicspaul.com/2017/07/11/funda-wande-teaching-reading-for-meaning/> (accessed 18-11-2020).

reading”.<sup>64</sup> This is having a negative impact on the progress of students in schools. Another reason is that there is little formal teaching of spelling, vocabulary and writing. In addition to this, there is a lack of skills to teach reading/comprehension. There needs to be better resources at foundation phase and ensuring quality education from Grade R onwards.<sup>65</sup> Improving the quality of basic education will, have the potential to address several socio-economic problems, reduce dropout rates and better equip matriculants to pursue further education or enter the job market.

While South Africa continues to face the challenges exposed by COVID-19, most schools (in rural areas) do not have proper infrastructure for learning.<sup>66</sup> These conditions undermine the right to quality education for all. The duty of the state to provide basic education, as stipulated by the Constitution, is not restricted to having accessible places in schools. The provision of a variety of educational services is essential: classes, classrooms, teachers, instructional materials and sufficient facilities for learners. The COVID-19 pandemic has exposed huge inequalities in societies and economies around the world.<sup>67</sup> It became a “silent war” on the delivery of quality education as governments had to adopt innovative strategies and adapt to the new way of offering quality education to all without distinction. However, this adaptation continued to reinforce the existing inequalities on the realisation of quality education. The observations made during the strict enforcement of lockdown regulations in South Africa evidenced the hidden inequalities which showed the deep regress and “slow progress” in addressing decades of imbalance in the provision of quality basic education.

#### 4 2 COVID-19: At ‘War’ With the Realisation of the Right to Quality Basic Education

The COVID-19 pandemic reinforced the non-enjoyment and fulfilment of the right to quality education in South Africa. It disrupted the core-content of the five-key dimensions which are of significance in determining the provision of quality education that are identified by UNICEF as entailing: (i) what learners bring, which relates to the fact that when children go to school, they bring many things including, among others: their language, culture and early experiences wherein families and communities play a very important in the provision of early childhood experiences; (ii) an environment which is critical in ensuring the quality of education. This refers to learning environments such as adequate facilities at schools — infrastructure (building, sanitation, water and health services) and books. Therefore, a quality-learning environment is where learners are free to learn, and they have learning resources. A context where the environment is not conducive for children to learn is a characteristic of the unrealised quality of education; (iii) the content which has to do with relevant curriculum and learning materials. The curriculum and learning materials should enable learners to read for meaning; (iv) the processes that support quality education where there are well-trained teachers who engage in professional development. Of importance in this dimension is the teaching of learners in languages they understand; and (v) the “outcomes” which results in quality basic education results where

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64 *Ibid* 1.

65 Franklin and McLaren *Studies in Poverty and Inequality Institute (SPII)* (2015) 1–166.

66 Equal Education “Norms and Standards for School Infrastructure: Equal Education Summary of Analyses of Provincial School Infrastructure Reports” (2019) <https://equaleducation.org.za/wp-content/uploads/2019/06/Equal-Education-summary-of-analyses-2018-provincial-infrastructure-progress-reports-Norms-and-Standards.pdf> (accessed 14-12-2020).

67 Mhlanga and Moloi *Education Sciences* (2020) 1–11.

children are able to read and write critically.<sup>68</sup>

From the above, it can be seen that quality education includes healthy learners who are ready to learn. It also includes good and conducive environments that can provide adequate resources and facilities. The quality of basic education can be explained through resource inputs and outcomes. The concept of quality education begins with enough schools, books, pencils and educated teachers, as well as the number of children who have completed school. There are many meanings of quality in education, testifying to the concept's ambiguity and multi-faceted existence. The terms quality, effectiveness, equity and success are also used synonymously.<sup>69</sup> In other words, the main issue is whether learners are exposed to good learning environments that produce good outcomes. UNESCO promotes quality education as a human right and promotes the implementation of all educational activities through a rights-based approach.<sup>70</sup> Much concern about the quality of education stems from the assumption that low quality in this age of accelerating globalisation would frustrate attempts to use education as an effective lever for economic growth and development.<sup>71</sup>

As such, COVID-19 waged a "silent war" and undermined the quality of basic education by disrupting what went on inside and outside schools. Learners' access to schools, materials and teachers was disrupted. This has had a negative impact on the realisation of the right to quality education. Learners from privileged backgrounds could find their way past closed school doors to alternative learning opportunities, supported by their parents and eager and capable of learning. Many from under-privileged backgrounds were often left out when their schools shut down.<sup>72</sup> The pandemic exacerbated pre-existing inequalities in education by limiting the ability for many of the most disadvantaged children, young people and adults to pursue their learning, including those living in poor or rural areas, girls, migrants, people with disabilities, and forcibly displaced people. The world already faced daunting challenges before the pandemic in upholding the pledge of education as a fundamental human right.<sup>73</sup> Despite the virtually universal early grade enrollment in most countries, more than 250 million children were out of school and nearly 800 million adults were not educated.<sup>74</sup>

While learning was disrupted in public schools, it continued in private schools and universities as online remote learning was available.<sup>75</sup> While the implementation of distance learning was crucial to ensure continuity of education after schools had physically closed, students were likely to have experienced learning loss during the lockdown. Children studying at schools that are well-equipped in terms of digital resources had the advantage of online learning, as opposed to those from rural areas. Children from disadvantaged backgrounds were found attending

68 UNICEF "Quality Education for All: From a Girl's Point of View" (2002) <http://www.unicef.org/pubsgen/quality-education/qualityeducation-eng.pdf> CN - EFA 39 (accessed 07-12-2020).

69 UNICEF "Defining Quality in Education" (June 2000) [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNICEF\\_Defining\\_Quality\\_Education\\_2000.PDF](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNICEF_Defining_Quality_Education_2000.PDF) (accessed 03-12-2020).

70 UNESCO "Promoting Quality Education: Education For Peace, Human Rights And Democracy; Education For Sustainable Development; Curricula, Educational Tools And Teacher Training" (2003) <https://unesdoc.unesco.org/ark:/48223/pf0000129748> (accessed 14-12-2020).

71 Pigozzi "The 10 Dimensions of Quality in Education: UNESCO-IBE Training Tools for Curriculum Development" (2004) 1–9.

72 Schleicher "Covid-19 on Education Insights from Glance 2020" (2020) 1–31. <https://www.oecd.org/education/the-impact-of-covid-19-on-education-insights-education-at-a-glance-2020.pdf> (accessed 03-12-2020).

73 UN "Policy Brief: Education during COVID-19 and beyond" (2020) [https://www.un.org/sites/un2.un.org/files/sg\\_policy\\_brief\\_covid-19\\_and\\_education\\_august\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/sg_policy_brief_covid-19_and_education_august_2020.pdf) (accessed 04-12-2020).

74 United Nations 5.

75 Di Pietro *et al.* "The Likely Impact of COVID-19 on Education: Reflections Based on the Existing Literature and Recent International Datasets" (2020) 1–46.

schools with lower Information Communication Technology (ICT) resources. ICTs have the capacity to expand access to quality education, educational resources and provide teachers with new skills. However, most rural public schools have limited access to ICTs. As such, “one may assume that schools attended by more advantaged children could have found it easier to adapt to online learning following COVID-19”.<sup>76</sup> Schools in disadvantaged and rural areas lack the appropriate digital capacity and infrastructure required to deliver teaching remotely, which is a divisive factor. In 2021, the NEIMS report noted that 4 738 out of 23 258 public schools had internet connectivity for teaching and learning.<sup>77</sup> In the Eastern Cape, only 570 out of 5 290 public schools had such internet connection. In South Africa an advantaged elite minority has more access to digital literacy than the less privileged majority. This majority do not have access to the internet and, specifically, smart devices to access online resources. This further adds to the knowledge divide between schools in the country.

Rural schools continue to face several challenges, such as poor basic infrastructure, few material resources and no electricity in some places. The lack of access to information and communication technology in the rural areas is also increasing the divide between the haves and have-nots in basic education. In order to address this problem, digital literacy should be a part of the curriculum in schools around the world. As such, teachers should be able to integrate learning technologies into efficient curriculum management, enhance learner skills and enrich the learning experience.<sup>78</sup>

COVID-19 remains a test of societies, governments, communities and individuals. It is a time for solidarity and cooperation and to mitigate and thwart any manifestation of the effects, often unintended, of measures designed to halt the spread of COVID-19. Respect for human rights across the spectrum, including economic, social, cultural civil and political rights, will be fundamental to the success of the public health response and recovery from the pandemic.<sup>79</sup>

## 5 CONCLUSION

South Africa continues to be characterised by the context of a lack of fulfilment of the quality of basic education for most of the disadvantaged schools. This was exacerbated by the COVID-19 pandemic and the subsequent national lockdown that unearthed the existing and structural inequalities that continue to bedevil South Africa. The COVID-19 pandemic caused a substantial interruption in education, having already had a near-universal effect on students and teachers worldwide, from pre-primary to secondary schools, institutions of technical and vocational education and training (TVET), colleges, adult learning, and institutions of skills development. The pandemic had a devastating impact on the education sector. Schools with ICT resources implemented remote learning during the lockdown whilst schools without such privilege did not have the advantages. Children from the rural schools had their learning disrupted. Due to the uncertainty on how the COVID-19 is acquired by individuals, it became a “silent war” that permeated every sphere of human life, with a direct effect on the realisation of the right to quality basic education.

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<sup>76</sup> *Ibid* 5.

<sup>77</sup> National Education Infrastructure Management System (NEIMS) report. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.education.gov.za/Portals/0/Documents/Reports/NEIMS%20STANDARD%20REPORT%202021.pdf?ver=2021-05-20-094532-570 (accessed 11-05-2024).

<sup>78</sup> Brandt “Models of Internet Connectivity for Secondary Schools in the Grahamstown Circuit” (MA dissertation, Rhodes University, 2006).

<sup>79</sup> TUAC Secretariat Briefing “Impact and Implications of the COVID 19-Crisis on Educational Systems and Households” (2020) TUAC Secretariat Briefing [https://tuac.org/wp-content/uploads/2020/04/2004t\\_Impact-of-COVID-19-on-Educational-Systems\\_TUAC-Briefing\\_final-1.pdf](https://tuac.org/wp-content/uploads/2020/04/2004t_Impact-of-COVID-19-on-Educational-Systems_TUAC-Briefing_final-1.pdf) (accessed 18-11-2020).