

**A LEGAL ANALYSIS OF THE CONSTITUTIONAL RIGHT TO BASIC
EDUCATION IN ZIMBABWE AND SOUTH AFRICA**

By

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DECLARATION

By submitting this dissertation, I CHIEDZA SIMBO declare that the entirety of the work titled 'A legal analysis of the Constitutional Right to basic education in Zimbabwe and in South Africa' contained herein is my own, original work, that I am the author thereof (unless to the extent explicitly otherwise stated).

In compliance with the University of Zimbabwe rules for completion of a PhD, part of this work has been subjected to academic publishing and the resultant articles are attached to this dissertation. I confirm that the contents of the articles are my original individual work and I am the sole author thereof.

THIS IS DONE at the UNIVERSITY OF ZIMBABWE on the 03 day of September 2019.



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ABSTRACT

The year 1990 was a momentous year with world countries agreeing for the first time, through the World Declaration on Education for All, 1990, (World Declaration) that basic education was the type of education which would empower human beings, assist countries to eradicate poverty and ensure a decent and fulfilled life for everyone. Through the World Declaration, nations committed to the education for all goal and built upon the foundations laid by the provisions of earlier international instruments. In Africa, the obligation to provide basic education was translated into an international obligation by the African Charter on the Rights and Welfare of the Child, 1990 (African Charter). Whilst the World Declaration introduced the notion of basic education and defined the term, the African Charter provided for free and compulsory basic education. However, no international instrument followed to specify the scope and content of the right to basic education. Whereas Zimbabwe as well as South Africa also made constitutional and international commitments to provide basic education they also similarly do not have legislative documents which provide for its scope and content. In the absence of both international and national documents providing for the scope and content of a right to basic education, Zimbabwe and South Africa similarly continue to violate the right to basic education. In both countries, children are taught by unqualified teachers, they lack updated and adequate text books, well-equipped libraries and laboratories. Children lack schools to attend, pens to write with and books to write on. Children pay school fees, walk long distances to school and there is no definition of basic education or clarity on the number of years children must attend school to acquire it. Employing a doctrinal research method and using a human rights based approach which draws from international law this dissertation understood the similar challenges and commitments shared by Zimbabwe and South Africa and sought to provide the scope and content of the right to basic education for both countries. Whilst the lack of jurisprudence and the fact that the right to basic education is still a relatively new research area in both countries posed as a challenge to the doctrinal method, the conclusion was that, the right to basic education in both Zimbabwe and South Africa comprises of six components. The six components of the right to basic education were suggested in equal importance as follows; the term basic

education as defined by the World Declaration refers to the quality of education which must be provided to learners; the right to basic education includes primary and secondary school attendance; the right to basic education includes compulsory and free attendance at both primary and secondary schooling levels; the right to basic education is an unqualified right in both Zimbabwe and South Africa; the right to basic education is a minimum core content of the right to education in both Zimbabwe and South Africa and the right to basic education means the opportunity must be available, accessible, acceptable and adaptable.

KEY TERMS

Basic Education, primary schooling, secondary schooling, fundamental education, unqualified rights, qualified rights, minimum core content, quality, international law, right to basic education, compulsory schooling, free attendance, interpretation clause, text-based theories, practice-based theories

LIST OF ABBREVIATIONS AND ACRONYMS

African Charter	The African Charter on the Rights and Welfare of the Child 1999 (African Charter)
CRC	Convention of the Rights of the Child 1990
General Comment 11	General Comment 11: Plans of action for primary education, 1999
General Comment 13	General Comment 13: The right to education, 1999
General Comment 3	General Comment 3: The Nature of State parties obligations, 1990
ICCPR	Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights, 1966
Recommendation	Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedom (Recommendation)
Schools Act	South African Schools Act No, 84 of 1996
Universal Declaration	The 1948 Universal Declaration of Human Rights and the right to education

CADE	The Convention Against Discrimination in Education 1960 (CADE)
UNHCR	United Nations High Commissioner for Refugees
World Declaration	World Declaration on basic education for all, 1990

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CHAPTER 1

INTRODUCTION

1.1 Background

The acknowledgment of the economic, social and political benefits which follow an educated person and derived from an educated population is the biggest motivation for the provision of the right to education in both international and national laws.¹ Conceiving education as a human right which must be provided by states has become widespread. A study by the World Bank Research group on human rights in 187 countries concluded that, of the 165 countries which had written Constitutions, 116 had referred to the right to education, 95 of those stipulating free education for children at primary school level.² The right to education is so important that, it is probably the only human right, provided by international law which must be provided for free for everyone, at some stage in their life.³ The importance of education makes it widely acceptable that, the provision of education for everyone, 'is not an aspiration we can fit in where possible if time [or if] resources permit'.⁴ Educating everyone is 'an absolute requirement of justice' and 'an immediate obligation' which states must comply with.⁵

¹ Simbo C 'Defining the term basic education in the South African Constitution: An International Law approach' (2012) 16 Law Democracy and Development 163.

² Gauri V 'Social Rights and Economics Claims to Health Care and Education in Developing Countries' (2003) World Bank Policy Research Working Paper 3006, 1.

³ *Universal Declaration of Human Rights* (1948) Article 26 (1) '1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages'. See also Convention on the Rights of the Child, (1989) Article 28 1. 'States and 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: (a) Make primary education compulsory and available free to all'.

⁴ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 13.

⁵ Ibid.

With such recognition of the important rewards of education, section 75⁶ of the Constitution of Zimbabwe, 2013 and section 29⁷ of the Constitution of South Africa, 1996 provide for the right to education. Of significance for this study is that, section 75 (1) (a) of the Zimbabwean Constitution and section 29 (1) (a) of the South African Constitution provide a benchmark of education called 'basic education'. Section 75 (1) (a) of the Zimbabwean Constitution provides that 'every citizen and permanent resident has a right to a basic state-funded education'⁸ and section 29 (1) (a) of the South African Constitution provides that 'everyone has a right to basic education'.⁹ The constitutional provision of the right to basic education by both the Zimbabwean

⁶ *Constitution of Zimbabwe*, 2013, S75. Right to education

'1. Every citizen and permanent resident of Zimbabwe has a right to:

A. A basic State-funded education, including adult basic education, and

B. Further education, which the State, through reasonable legislative and other measures, must make progressively available and accessible.

2. Every person has the right to establish and maintain, at his/her own expense, independent educational institutions of reasonable standards, provided they do not discriminate on any ground prohibited by this Constitution.

3. A law may provide for the registration of educational institutions referred to in subsection (2) and for the closing of any such institutions that do not meet reasonable standards prescribed for registration.

4. The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the right set out in subsection (1)'.

⁷ *Constitution of South Africa*, 1996 S29, Education 29. (1) 'Everyone has the right— (a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account—

(a) equity,

(b) practicability, and

(c) the need to redress the results of past racially discriminatory laws and practices. (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

(a) do not discriminate on the basis of race;

(b) are registered with the state, and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions'.

⁸ *Constitution of Zimbabwe* 2013, S 75 (1) (a).

⁹ *Constitution of South Africa*, 1996, S 29 (1) (a).

and the South African Constitutions is in line with the international ideal¹⁰, to make basic education universally accessible.¹¹

However, constitutional provisions are neither exhaustive nor self-explanatory, the scope and content of their provisions need to be explained in national laws. National laws are 'allies of the Constitution' and 'designed to amplify and give more concrete effect to key provisions of the Constitution and the Bill of Rights'.¹² The need for legal documents which translate constitutional and international obligations was noted by the International Covenant on Economic Social and Cultural Rights (ICESCR) which, whilst conceiving the human rights it provides, noted that, citizens would not be able to enjoy them unless state parties 'took steps, including the adoption of legislative measures to fulfil the rights'.¹³ To begin with, the Committee on Economic,

¹⁰ Following the international commitments by countries in the *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 in Jomtien, Thailand* (1990). Sub-Saharan countries further agreed to an *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*. They stated that 'If the next century is going to be characterised as a truly African century, for social and economic progress of the African people and 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.

¹¹ *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 include multiple causes: weak political will, insufficient financial resources and the inefficient use of those available, the burden of countries' debts, 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'.

¹² Du Plessis L, 'The status and role of legislation in South Africa as a constitutional democracy: Some Exploratory Observations' (2011) 14 PER 9.

¹³ *International Covenant on Economic Social and Cultural Rights*, (1966) A 2 (1).

Social and Cultural Rights (Committee) states that, the obligation to 'take steps' to comply with the rights provided by the ICESCR, is absolute.¹⁴ In compliance with the ICESCR, steps were supposed to be taken immediately from the time both South Africa and Zimbabwe provided for the internationally-recognised right to basic education in their Constitutions.¹⁵ The steps should have been legislative, 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised by the [Constitutions]' as they are read together with international law.¹⁶ As rightly stated by the Committee, legislation to unpack constitutional obligations is 'highly desirable and in many instances indispensable'.¹⁷ The Committee even mentions education as a field where legislation can be (this dissertation says [is]) indispensable.¹⁸

However, despite the indispensable need for legislative documents which unpack the scope and content of the right to basic education, there is no law in either Zimbabwe or South Africa which details the scope and content of the right. The constitutional courts of both countries have also not had the opportunities to determine such scope and content. The situation poses challenges, particularly, for the realisation of this right in these two states. A question arises; *What is the scope and content of the right to basic education for purposes of its implementation in Zimbabwe and in South Africa?* In South Africa, the term 'basic education' is mentioned by the Schools African Schools Act, 1996 (Schools Act)¹⁹ only in reference to the definition of the word 'minister' who is referred to as the Minister of Basic Education.²⁰ In Zimbabwe, the Education Act²¹ does not state or define the term. Amid absent laws which translate the scope and content of the constitutional right to basic education in both Zimbabwe and South Africa, this dissertation notes that, citizens cannot identify state violations. When citizens suspect violations, in the absence of a legally determined scope and content of a basic education, they have no legal basis to demarcate the parameters of their right, neither do they have the ability to fathom

¹⁴ *General Comment No. 3: The Nature of States Parties' Obligations* (1990) Par 2.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid*, par 3.

¹⁸ *Ibid.*

¹⁹ *South African Schools Act No, 84 of 1996.*

²⁰ *Ibid*, Interpretation, 'Minister' means the 'Minister of Basic Education'.

²¹ *Education Act 25:04*, 1987.

the constitutional legal arguments to translate their discontents to legally enforceable claims.

In the view of this dissertation, the problems demonstrated by the lack of legislative documents which clarify the scope and content of the right to basic education in Zimbabwe and in South Africa have evidence. 11 years after the enactment of the South African Constitution and 4 years after the enactment of a Zimbabwean Constitution, violations of the right to basic education by the governments continue. Recently in Zimbabwe, the Minister of Primary and Secondary Education asked students who had no hard currency to pay school fees to pay it using goats.²² The request for fee payments for basic education was made amid worrying statistics of 75% pupils being unable to pay school fees nationwide.²³ In South Africa, with the imposition of school fees, an estimated 90 % pupils in Limpopo, 72% in the Eastern Cape, 32% in Gauteng and 28% in the Western Cape cannot pay it.²⁴ In the absence of a law which defines the scope and content of the right to basic education in both Zimbabwe and South Africa, it is not clear whether any imposition of school fees on learners is a violation of the right to basic education.

On the aspect of the delivery of quality standard paid education, South Africa has an estimated 5 139²⁵ unqualified teachers whilst Zimbabwe leads with an estimated 20 000 unqualified teachers.²⁶ Without knowledge of the scope and content of a basic education, citizens cannot conclude that the government's conduct of

²² Gwata W 'Pay School fees with Goats' 'Primary and Secondary Education Minister Dr Lazarus Dokora told this paper last week, 'Our schools have to be flexible and ensure those who do not have money to pay fees can work. For example, if there is a builder in the community, he/she must be given that opportunity to work as a form of payment of tuition fees. On the issue of livestock, the community has to arrange a market where everyone participates; from the school authorities, local leadership and parents themselves to avoid parents being duped', <http://www.sundaymail.co.zw/pay-school-fees-with-goats-labour/> April 16, 2017 accessed 5 July 2018.

²³ 'News Day 75% Likely to be unable to pay school fees' <https://www.newsday.co.zw/2015/09/03/75-likely-to-be-unable-to-pay-school-fees/> 09 March 2015 accessed 5 July 2018.

²⁴ 'Most pupils do not pay school fees' <http://www.news24.com/southafrica/news/most-pupils-do-not-pay-school-fees-20120503?Mobile=true> 03 March 2012 accessed 5 July 2018.

²⁵ Savides M 'SA schools have 5,139 teachers who are unqualified or under-qualified' <http://www.heraldive.co.za/news/2017/06/06/sa-schools-5139-teachers-unqualified-qualified/> 06 June 2017 accessed 05 July 2018.

²⁶ 'Zim has 20 000 unqualified teachers' <http://www.herald.co.zw/zim-has-20-000-unqualified-teachers/> 11 March 2015, accessed 17 July 2018.

employing unqualified teachers is in contravention of basic education obligations. The unqualified teachers, coupled with the current education curricula have however produced poor results, such as 0% pass rates in both Zimbabwe and South Africa.²⁷

Without a law stipulating the exact contents of a basic education curriculum or the qualifications of a teacher who must deliver basic education, it remains unclear whether or not the current child education curriculums of both Zimbabwe and South Africa align with the requirements of an internationally recognized basic education curriculum. In addition to fee payments, unqualified teachers and questionable curriculum contents, in Zimbabwe, children walk several kilometers to school, drinking water sources are as far as 4km away from school, children have no textbooks, classrooms have no desks and chairs and children face the frosty air and grueling effects of winter as they sit on the floor to learn.²⁸ In like manner, in South Africa, students lack learning resources such as textbooks and learn under trees or in classrooms that are dilapidated.²⁹ Whilst the lack of learning inputs, such as classrooms, textbooks, chairs and desks is evident in both Zimbabwe and South Africa, what remains unclear is whether such situations can be concluded to be a violation of the right to basic education by both governments.

In the view of this dissertation, the absence of a legally-clarified and determined scope and content of basic education is an inevitable challenge for citizens willing to hold the government accountable. If the scope and content of basic education is known, discontents are translated to legal claims and it becomes easier for citizens to demand government action as a human right. Further, without a rubric for compliance, governments can avoid all accountability questions citing the absence of legal

²⁷ Pieterse C '0% Pass Rate Shock' <http://www.news24.com/southafrica/news/0-pass-rate-schools-shock-20160111> news 24 11 January 2016 accessed 17 July 2018, see also Govender P 'Matric Results 2016: 18 schools obtain 0% pass rate' Mail and Guardian, for Zimbabwe, see 'Getting a zero percent pass rate' <http://researchandadvocacyunit.org/blog/2017/07/07/getting-zero-percent-pass-rate> 07 July 2017, accessed 05 July 2018.

²⁸ Matenga M 'Mwenezi- the sorry state of rural education pupils', <https://www.newsday.co.zw/2014/05/23/mwenezi-sorry-state-rural-education-pupils/> 23 May 2014 accessed 05 July 2018.

²⁹ Stein N 'Classrooms of the future' http://www.groundup.org.za/article/classrooms-future_2606/ 21 January 2015, accessed 17 July 2018.

obligations on their part. In an effort to speak of complaints as legal arguments, this dissertation delineates the scope and content of the right to basic education in Zimbabwe and in South Africa using a human rights based approach. The 'unconditionality' of enjoying the right to basic education flowing from the human rights-based approach makes it a much-needed approach if the education for all goal is to be achieved.³⁰

Without 'a notion of entitlement' on the part of the public, governments would simply not provide education for citizens.³¹ The human rights-based approach is, therefore, constructed on the international consensus that humans have rights which have a specific scope and content and states are duty holders with the responsibility to provide such scope and content.³² Within the human rights-based approach, focus is on the obligations and duties of the state and the need to empower the public to demand the state to comply with its obligations.³³ Employing a human rights-based approach, which by its nature draws from international law provisions,³⁴ the conclusion is that in relation to its scope and content, the right to basic education, in both Zimbabwe and South Africa comprises of six components which are explained in the following chapters.

1.2 Statement of the problem

The Constitutions of both Zimbabwe and South Africa provide for the right to basic education whose scope and content is clarified by a holistic reading of international

³⁰ Mccowan T *Education as a Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 12.

³¹ Ibid.

³² Boesen J and Martin T 'Applying a Rights-Based Approach: An Inspirational Guide For Civil Society (2007)' at the foreword of The Danish Institute for Human Rights, <http://gsdrc.org/document-library/applying-a-rights-based-approach-an-inspirational-guide-for-civil-society/> accessed 17 July 2018.

³³ Ultvedt I, 'Rights based approach and the Millennium Development Goals: The UNDP and Hurist experience' 1 www.undp.org, accessed 23 April 2016.

³⁴ A key aspect of this dissertation is international law which is viewed to provide for the scope and content of basic education which both Zimbabwe and South Africa must adopt. An international law approach is therefore followed. Continental instruments, such as the African Charter on the Rights and Welfare of the Child are also considered as part of the body of international law by this dissertation. Reference is also made to foreign laws in line with any similar interpretive guidelines provided by the Zimbabwean and the South African Constitutions.

law documents providing for the right to education for children. However, in both countries, the scope and content of the right to basic education is neither explained by the national laws nor have the constitutional courts of both countries clarified the scope and contents. Whilst researchers have assisted in the provision of knowledge on particular citizens' legal entitlements, the determination of the scope and content of basic education is already a battlefield for interested authors.³⁵ There are no agreements on whether the provision of basic education alludes to compulsory schooling, the quality of education, school attendance, the provision of school infrastructure, the mere provision of a constitutional right, the free provision of basic education or parts of or none of the above.³⁶ In both Zimbabwe and South Africa, the term 'basic education' is undefined and constitutional provisions do not specify whether or not basic education obligations are immediate or progressive.

The absence of clarity on the scope and content of basic education in both countries presents a practical dilemma when one considers the lived realities of citizens briefly discussed above and comprehensively in chapter 4 and 5, which are in contrast with the aspirations of international law. Amid deprivation of the right to basic education, citizens cannot remain ignorant of their basic education entitlements and continue to lack the legal foundations to identify their claims. This dissertation explores the scope and content of the right to basic education as it is conceived through the reading of international law, read together with the constitutional provisions of Zimbabwe as well as South Africa. It premises that an analysis of the provisions in the Constitutions of Zimbabwe and that of South Africa, vis-a-vis the provisions of international law should lead to an inference that the right to basic education comprises of six components.

1.3 Research questions

This dissertation will answer the following main research question;

³⁵ The views of authors and the views of this dissertation are discussed in chapter 4 and 5.

³⁶ The provisions of international law will be discussed in chapter 2 whilst academic debates will be interrogated in chapter 4 and 5.

1. What is the scope and content of the right to basic education in Zimbabwe and in South Africa?

To answer the above question, the following sub-questions are answered in the study:

1. What is the substantive content of the right to basic education as provided by international law?
2. How is section 75 (1) (a) of the Zimbabwean Constitution and Section 29 (1) (a) of the South African Constitution interpreted?
3. What is the scope and content of the right to basic education in Zimbabwe?
4. What is the scope and content of the right to basic education in South Africa?

1.4 Aim of study

The dissertation has one aim.

1. To delineate government obligations in relation to the provision of the right to basic education in Zimbabwe and in South Africa.

1.5 Objectives of study

1. To discuss the substantive content of the right to basic education as it is provided by international law.
2. To discuss the interpretation of the provisions of section 75 (1) (a) of the Zimbabwean Constitution.
3. To discuss the interpretation of the provisions of 29 (1) (a) of the South African Constitution.
4. To determine the scope and content of the right to basic education in Zimbabwe.
5. To determine the scope and content of the right to basic education in South Africa.
6. To encourage cooperation in the understanding, drafting and implementation of legislative reforms which are compliant with international laws that detail the

components of the right to basic education and bind both Zimbabwe and South Africa.

1.6 Significance of Study

This dissertation, taking the human rights based approach contributes to both the Zimbabwean and South African societies by enabling duty bearers to know their basic education obligations and rights bearers to know their basic education claims. This research is significant in its ability to guide governments on citizen entitlements and to guide citizens on claimable basic education demands. The greater necessity for access to school, basic education offered at appropriate schooling levels, quality basic education and basic education inputs significantly justifies this dissertation's agenda which is clarifying basic education claims in Zimbabwe and in South Africa. Following the recommendation of this dissertation, Zimbabwe and South Africa have to amend each of their national legislation so that they reflect the similar basic education constitutional obligations of the two governments discussed in this dissertation. This dissertation provides a roadmap for the two governments to provide accessible, available, acceptable and adaptable basic education which is free of charge , meeting the desirable quality, offered at primary and secondary schooling levels, immediately claimable and regarded as a non-derogable constitutional obligation. If the governments of both Zimbabwe and South Africa take seriously the six basic education obligations stated by this dissertation legislate and implement them, the citizens of the two countries will enjoy the significance of this research.

By juxtaposing Zimbabwe and South Africa without necessarily comparing them, this dissertation shuns from portraying any of the two countries as better than the other, the torch bearer or the master of either compliance or non-compliance with international law. It significantly uncovers that South Africa shares similar basic education obligations with those of Zimbabwe and it has already begun the journey to delineate them. Zimbabwe therefore has the opportunity to learn from South Africa's jurisprudence and to, in the future, contribute jurisprudence which maybe persuasive to the not perfect South African situation. For the researcher, the research is significant in that it uncovers uncharted ground in Zimbabwe. This dissertation

allowed the researcher to significantly begin to interrogate and add to the body of the much needed literature on the right to basic education in Zimbabwe.

In the case of South Africa, this dissertation adds to the body of existing literature seeking to explore the scope and content of the right to basic education. It uncovers the scope and content of the right to basic education as encompassing six elements, which many researchers have significantly not done. It also alerts South Africa to the point that it shares similar basic education obligations with Zimbabwe and regional collaboration is necessary both in an attempt to delineate basic education obligations and also in the need to devise more effective compliance methods and to formulate joint or singular fundraising approaches for the delivery of basic education. Other regional governments sharing similar regional and international obligations with Zimbabwe and South Africa should find this research significant in its potential to guide them on what an international law compliant provision of basic education entails.

More significant, a new scope and content of the right to basic education may have been arrived at in Zimbabwe and in South Africa.

1.7 Research Methodology

A research methodology is the manner or technique used in a research to 'identify, select, process and analyze information about a topic'.³⁷ A research methodology answers two questions, 'how was the data collected or generated and how was it analyzed'.³⁸ There are a variety of research methods but this dissertation categorizes them into two, that is, doctrinal method and non-doctrinal method. Whilst conducting research within the discipline of law, a non-doctrinal research method employs research techniques from non-law disciplines which aim to gather empirical data to answer legal research questions.³⁹ It uses research techniques such as interviews, observations, surveys, questionnaires, and other tools which make it possible to gather

³⁷ 'Research Support: Research Methodology', University of Witwatersrand Lib Guides <https://libguides.wits.ac.za/> accessed 07 July 2019.

³⁸ Ibid.

³⁹ Ibrahim Ali S et al, 'Legal Research of Doctrinal and Non-Doctrinal', (2017) 4 International Journal of Research and Developments 493.

empirical evidence.⁴⁰ Used in law, a non-doctrinal method places more importance to 'people , social values and social institutions and not to the legal aspects or doctrines'.⁴¹ A non-doctrinal research method is not used in this dissertation as it is not regarded as the traditional way of conducting legal research of this nature aimed at solving day to day client matters relating constitutional interpretation.⁴²

This dissertation, contrary to a non-doctrinal research method, does not concern itself with grassroot views or social conduct of people. Rather, it is concerned with the reading of existing text books, the usage of journal articles, the analysis of national and international laws as well as the use of case law and internet material to collect data and find an answer to research questions relating to the scope and content of the right to basic education in Zimbabwe and in South Africa. The doctrinal research method is therefore the most appropriate to answer the research questions posed by this dissertation as it 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'.⁴³ To further justify the use of the doctrinal method by this research, it is perhaps important to also understand the word 'doctrine'. Doctrine has been defined as principles, rules, guidelines to interpretation, principles and values synthesised to justify, make or explain law or any part of it.⁴⁴ A doctrinal approach is therefore a research in law⁴⁵ with roots in common law and concerns itself with the analysis of the law, its development and application⁴⁶. Closely linked to the term 'doctrinal' is the doctrine of precedents which aims to cement legal rules.⁴⁷

⁴⁰ Sarfaraz A 'Doctrinal and Non Doctrinal Research Essay Sample' [www. academic.edu](http://www.academic.edu) accessed 07 July 2019.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Hutchinson T, Duncan N 'Defining and describing what we do: doctrinal legal research' (2012) 17 Deakin Law Review 5,

<https://ojs.deakin.edu.au/index.php/dlr/article/view/70/75> accessed 17 July 2018.

⁴⁴ Hutchinson T, Duncan N 'Defining and describing what we do: doctrinal legal research' (2012) 17 Deakin Law Review 84,

<https://ojs.deakin.edu.au/index.php/dlr/article/view/70/75> accessed 17 July 2018.

⁴⁵ Ibid 85.

⁴⁶ Ibrahim Ali S et al, 'Legal Research of Doctrinal and Non-Doctrinal', (2017) 4 International Journal of Research and Developments 493.

⁴⁷ Ibid.

Unlike a non-doctrinal research method which seeks to investigate 'the "social face or dimension" of the law and "gaps" if any between "legal idealism" and "social reality",⁴⁸ the doctrinal research approach follows 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter [of basic education] under investigation'.⁴⁹ The 'conceptual analysis' has its basis in national and international law provisions, decisions of previous court judgments, writings by academics and rules of constitutional interpretation.⁵⁰ Following the doctrinal research method, the library is viewed as a laboratory, in the same manner that a scientist would view the laboratory.⁵¹ It is the place where discoveries are found, made, analysed, conclusions are made and change is suggested.⁵² Library books, legal documents, international laws and internet materials are used as sources of information needed to discover knowledge, reach conclusions and to suggest change.

The need to address the same research question, using the same doctrinal method, in two jurisdictions with similar national, regional and international obligations is one which led to the decision to discuss the similar basic education obligations for Zimbabwe and for South Africa in one dissertation. The reality is that, the right to basic education obligations in the Zimbabwean and South African Constitutions are similar although Zimbabwe enacted its Constitution almost 17 years after the enactment of the South African Constitution. It is therefore conceded that, beneficial to Zimbabwe is the reality that South Africa is at a more advanced research state than Zimbabwe in its bid to determine the scope and content of its right to basic education. However, South Africa is still yet to determine it, a situation similar to Zimbabwe.

⁴⁸ Sarfaraz A 'Doctrinal and Non Doctrinal Research Essay Sample' [www. academic.edu](http://www.academic.edu) accessed 07 July 2019.

⁴⁹ Terry Hutchinson 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) *Erasmus Law Review* December 132

⁵⁰ *Ibid.*

⁵¹ *Ibid* 132 'A few years later, in the Harvard Law School Annual Report, Langdell again noted: "The work done in the library is what the scientific men call original investigation. The Library is to us what a laboratory is to the chemist or the physicist, and what a museum is to the naturalist. In this respect Langdell was suggesting that the law ought to be studied from its own concrete phenomena, from law cases, in the same way that the laws of the physical sciences are derived from physical phenomena and experiments".'

⁵² *Ibid.*

Discussing the countries together using the doctrinal method allowed the researcher to strengthen the Zimbabwe's jurisprudential base by providing it with an opportunity to learn from South Africa's jurisprudence given the fact that they are both Roman Dutch countries within the same region sharing similar constitutional, regional, and international obligations. It further allowed both Zimbabwe and South Africa to learn from the approaches taken by both countries which continue to impede the realisation of the right to basic education. Since doctrinal research relies on legal writings by scholars, a reasonable provision of these materials by South Africa only enriched the quality of doctrinal research for Zimbabwe which would otherwise have been weakened by the absence of academic scholarship.

Through the reading of all relevant library and internet based research material, this doctrinal research exposed the inbuilt gaps and loopholes in both the Zimbabwean and South African laws regulating basic education. It invited both legislatures to amend education laws to make them compliant with their respective constitutional and international obligations and to further join efforts to make compliance with basic education obligations a reality.

1.8 Scope and delimitation of study

Employing a human rights-based approach, the focus of the dissertation is the determination of what would constitute the scope and content of the right to basic education in Zimbabwe and in South Africa. In this dissertation, the human rights-based approach is informed by the provisions of international law on human rights instruments. This dissertation therefore does not draw inspiration or conclusions from the provisions of Constitutions or laws of other countries but mainly from the provisions of various international law instruments.

In chapter 3 the dissertation discusses the manner in which the Constitutions of Zimbabwe and South Africa mandate that the right to basic education be interpreted. Whilst the constitutions of the countries are discussed in the same chapter, chapter 3 does not aim to take a critical approach. Chapter 3 aims to spell

out the manner in which the individual Constitutions mandate the interpretation of the right to basic education and the pronouncements made by the respective constitutional courts. Also, with the understanding that the right to basic education includes adult basic education in both countries, the scope of this dissertation is delimited to the right to basic education exclusive of adult-basic education.

Further, the dissertation, taking an international law human rights-based approach, only lays out a framework of the probable extent of Zimbabwe and South Africa's obligations relating to the provision of the right to basic education. It does not intend to provide a ready-made rubric which can be used as it is; more work will need to be done outside this research. Whilst some provisions of policy are used to highlight examples of non-compliance with international law obligations relating to the right to basic education, the aims of chapter 4 and 5 are to critique legislative provisions which impact on the provision of the right to basic education in both Zimbabwe and South Africa. Primary legislative documents which regulate the provision of basic education must be constitutional and international law-compliant in doing so they lay a foundation which allows policy documents to expand on the provisions of the internationally-compliant legislative documents.

1.9 Limitation of study and challenges faced

The term 'basic education' took time to emerge in education human rights law language. From 1948, during the time of the Universal Declaration of Human Rights, 1948 (Universal Declaration) the term did not appear in international law documents until around 1990 when it was introduced by the World Declaration of Education For All, 1990 (World Declaration). Subsequent international law documents such as General Comment 13: The right to education, 1999 (General Comment 13) of the ICESCR began to attempt a reconciliation between the provisions of earlier education instruments and the term 'basic education'. It is, therefore, significant to note that developments in conceptualizing the right to basic education are still ongoing even among authors meaning that vast amounts of literature -particularly on Zimbabwe- are not available. In Zimbabwe, since the Constitution was enacted in 2013, authors

have not begun to tackle questions relating to the scope and content of the right to basic education.

On the other hand, in South Africa, authors have in the last 10 years attempted to determine the various elements of the right to basic education. However, the scope and content of the right to basic education in South Africa is yet to be determined. This research is therefore limited by the absence of a wealth of scholarship and case law in both Zimbabwe and South Africa which is the greatest challenge which was also faced by the researcher. Like any research which is tackling a developing area of law with limited jurisprudence, bold assertions are made by this dissertation. It may be noted by any seasoned researcher or professor in the field of basic education that the arguments in this dissertation are considerable for an emerging researcher but may remain unpolished in comparison to those which might be made by a professor.

The research is also self-funded which presented a challenge that attempts to travel to all libraries in South Africa and Zimbabwe in search of written data which is not available online, were done but with restricted budgets and sometimes not possible. Had there been more funds to the disposal of the researcher to consult all libraries in Zimbabwe, South Africa and beyond, hope remains that there could have been more scholarly justifications for some of the arguments advanced by this dissertation.

1.10 Chapter Outline

This dissertation will consist of six chapters which are as follows:

1. Chapter 1

In chapter 1, the dissertation introduces basic education as the subject of study. It states the aim of the study, provides an overview of the objectives of the dissertation and describes the problem the thesis seeks to address. It further lays out the research

questions, delimits the study and explains the research methodology and approach taken by the study.

2. Chapter 2

In chapter 2, the dissertation outlines the substantive content of the right to basic education. This chapter begins by acknowledging education as a human right and discusses the origins and conceptions of human rights concluding that education is a socio-economic right. It proceeds to discuss the regulation of the right to education by international law, in particular, discussing the provisions of the Universal Declaration, the ICESCR and its General Comment General Comment 11: Plans for Primary Education, 1999, (General Comment 11) and General Comment 13, the African Charter on the Rights and Welfare of the Child, 1999 (African Charter), the Convention on the Rights of the Child, 1990 (CRC) and its General Comment no. 1 The aims of education 2001, (General Comment 1) and the World Declaration.

The chapter while discussing the regulation of education by international law, proceeds to discuss the justiciability of the right to education as provided by international law. Concretising the discussed provisions of international law regulating education and the literature on education, the chapter defines education, states its aims and clarifies its empowering nature as a human right. In determining the origins and meaning of common education terms including their link to basic education, the chapter proceeds to track the origins of education terms, such as primary, secondary, elementary, fundamental education and basic education. The chapter then interrogates the definition of the term basic education as well as the role of states in providing compulsory and free basic education. The chapter further discusses the international obligation to provide acceptable, accessible, adaptable and available basic education. In a study of a legal nature like this one, this chapter is critical in that it outlines the legal framework in which subsequent legal arguments in the following chapters are based.

3. Chapter 3

In chapter 3, the dissertation discusses the manner in which section 75 (1) (a) and section 29 (1) (a) of the Zimbabwean and South African Constitution must be interpreted respectively. The chapter elucidates the interpretation clauses of the respective Constitutions and describes the manner in which the constitutional courts have or should sanction the use of the provisions of the interpretation clauses. The chapter also discusses the interpretation guidelines provided by the constitutional courts which supplement the provisions of the interpretation clauses. It concludes that in Zimbabwe and in South Africa, the Constitution must be read as a transformative document which sanctions the provision of basic education as an internationally compliant right, as well as, an unqualified right.

4. Chapter 4

The chapter begins by discussing the history of education in Zimbabwe, proceeds to examine its legislative framework and concludes by individually discussing the proposed six components of the right to basic education in Zimbabwe.

5. Chapter 5

In chapter 5, the dissertation takes a similar approach taken in chapter 4. The chapter begins by discussing the history of education in South Africa, proceeds to discuss its legislative framework and concludes by individually discussing the proposed six components of the right to basic education. The arguments leading to the six components are based on international law provisions and similar to those discussed in chapter 4. However, the motivations behind arguments advanced for South Africa differ in many notable respects, particularly, in relation to the minimum core approach, the aspect of free basic education and the legislative provisions relating to the accessibility, availability, adaptability and acceptability of basic education. The differing motivations behind the arguments for the two countries are essentially

because of the different provisions in the law of general application, as well as, the different approaches taken by the courts in previous judgments.

6. Chapter 6

In chapter 6, the dissertation concludes with six recommendations for both Zimbabwe and South Africa.

1.11 Literature Review

The need to determine the scope and content of the right to basic education is a battlefield for authors in both Zimbabwe and South Africa. In South Africa, the Constitution is over a decade old but with no legal frameworks or pronouncements by the constitutional courts in relation to the scope and content of the right to basic education, South African authors have debated the issue. In Zimbabwe a discussion on the scope and content of the right to basic education is mostly uncharted territory and this dissertation offers a starting point. No scholarly work found thus far, has, like this dissertation, used an international law approach to suggest or agree that the right to basic education in Zimbabwe or in South Africa comprises of six elements. This part of the dissertation is a literature review and therefore reviews the contributions of authors relating to the scope and content of basic education with a three-fold purpose. First, it examines the existing research by authors in relation to the subject of basic education thereby identifying the ideas which have become agreeable among authors, second, it critically evaluates scholarly contributions against the contributions made by this dissertation and motivates the reasons behind standpoints taken by this dissertation and third, it spells out the novelty of the research done by this dissertation.

The formulations of the right to basic education by the Zimbabwean Constitution and that of the South African Constitution are regarded as similar by this dissertation so the literature on the right to basic education by South African authors interrogated herein is regarded as a jurisprudential base for Zimbabwe. Sandra Liebenberg, writing on the right to basic education as it is provided by section 29 (1)

(a) of the South African Constitution like authors such as Churr⁵³ recognises the absence of legal clarity relating to the scope and content of the right basic education and the lack of clarifications by the constitutional court.⁵⁴ The author identifies that the legislature provides for compulsory schooling and questions whether compulsory schooling can be equated to basic education.⁵⁵ Liebenberg further reasons that the right to basic education is unqualified and immediately realisable⁵⁶ a point also advanced by other authors such as Churr⁵⁷, Pillay⁵⁸, this dissertation and by Berger who calls it a 'strong positive right' due to the absence of qualifiers like 'access, progressively available and reasonable measures' which characterise the formulation of other socio-economic rights provided by the South African Constitution⁵⁹. Noting that the charging of school fees is a barrier to the acquisition of basic education and that international law provides for free and compulsory primary education, Liebenberg proceeds to question whether the right to basic education allows schools to charge school fees.⁶⁰

The work by Liebenberg does not clarify the scope and content of basic education but it poses two important questions. Whether or not school attendance is synonymous to basic education and whether or not the charging of school fees is a violation of basic education obligations. This dissertation answers the two questions as follows; for the first question, whether or not basic education equates to compulsory school attendance, the answer is that, first, there is a need to understand the difference between the right to basic education and the term basic education. It

⁵³ Churr C 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) 18 PER/PELJ 2408 'It is important to note that section 29 does not specify the content and quality of the education that the state must provide not has the South African Constitutional Court considers the scope and content of the right to basic education'.

⁵⁴ Liebenberg S Socio-economic Rights: Adjudication under a Transformative Constitution (Juta 2010) 242.

⁵⁵ Ibid, 243.

⁵⁶ Ibid, 244.

⁵⁷ Churr 'C Realisation of a Child's right to a basic education in the South African Constitution' (2015) 18 PER/PELJ 2416

⁵⁸ Liebenberg L and Pillay K 'Socio-Economic Rights in South Africa' (2000) The socio-economic rights project Community Law Centre, University Of Western Cape South Africa 351.

⁵⁹ Berger E 'The Right to Education Under the South African Constitution', (2003) 103 Columbia Law Review 625

⁶⁰ Liebenberg S Socio-economic Rights: Adjudication under a Transformative Constitution (Juta 2010) 254.

is explained that the term basic education is a term which refers to the quality of education and it is defined by the World Declaration. The quality component of education called basic education is then a component of the right to basic education. On the other hand, compulsory school attendance does not only 'provide insight into the core entitlements engendered by the right to basic education' as stated by Arendse⁶¹, rather this dissertation reasons that it is a component of the right to basic education. Compulsory school attendance enables children to acquire basic education. It is therefore a channel or the road which the state is internationally obliged to use to ensure children get to the destination of basic education.

For Liebenberg's second question, whether or not the right to basic education allows the charging of school fees, this dissertation answers it in the negative. This dissertation states that the charging of school fees for the acquisition of basic education is a violation of international obligations imposed on South Africa and on Zimbabwe by the African Charter which states that basic education must be free and compulsory as will be discussed in chapter 2. The African Charter obligations are read in the context of all other international obligations which already provide for free primary education as discussed in chapter 2. It is however important to note that elsewhere Liebenberg writing with Pillay partly or to a limited extent agreed with this dissertation's second answer to her question and stated that the right to basic education ought to be considered to mean that no one can be turned away from school for not affording schools fees.⁶² The writers did not however explicitly state that basic education must be free but only stated that no one can be turned away from school for non-payment which is different from the position of this dissertation, that basic education is free in accordance with the African Charter requirements.

This dissertation's answer to one of Liebenberg's two questions explained above differ with Churr's submissions that 'free and compulsory education does not

⁶¹ Arendse L 'The Obligation to Provide Free Basic Education In South Africa: An International Law Approach' (2011) 6 PER/PELJ 217

⁶² Liebenberg L and Pillay K 'Socio-Economic Rights in South Africa' (2000) The socio-economic rights project Community Law Centre, University Of Western Cape South Africa October 351.

form part of the right to education [in South Africa]'.⁶³ Churr argues that section 29 (1) (a) of the South African Constitution does not mandate the state to provide free education but does not however 'preclude a sliding scale of fees'.⁶⁴ In relation to the basic education's constitutional obligations imposed by the South African and the Zimbabwean Constitutions as they are interpreted using international law, the reasoning by this dissertation is that free and compulsory basic education forms part of a component of the right to basic education. The motivation for this dissertation's position is that, before the emergence of the term basic education international law instruments such as the CRC and the ICESCR had already stated that the right to education has a free component and primary education must be compulsory and free as discussed comprehensively in chapter 2. After the World Declaration introduced the quality of education to be provided to learners as basic education, international law reconciled the provisions of earlier instruments with the World Declaration's provisions through General Comment 13 which provides that, basic education is education provided at compulsory and free primary schooling levels as well as at accessible and eventually free secondary school levels as comprehensively discussed in chapter 2. For African states, the African Charter provides that basic education must be free and compulsory. Based on the above, the argument by Churr that sections 29 (1) (a) does not impose free and compulsory education is therefore deemed to be unconstitutional and against international laws binding on South Africa. A consideration of the right to basic education obligations binding on South Africa as well as Zimbabwe is reasoned to lead to a conclusion that, the quality of education and well as free and compulsory school attendance are components of the right to basic education.⁶⁵

Woolman and Fleish state that the right to basic education in South Africa has a positive dimension, it is unqualified and immediately realisable⁶⁶ a point accepted by

⁶³ Churr C Realisation of a Child's right to a basic education in the South African Constitution (2015) 18 PER/PELJ 2409

⁶⁴ Ibid 2411.

⁶⁵ Murungi LN 'Inclusive basic education in South Africa: Issues in its conceptualisation and implementation' (2015) 18 PER/PELJ 1.

⁶⁶ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 121.

many authors such as Churr⁶⁷, Liebenberg⁶⁸, Mirungi,⁶⁹ Berger⁷⁰ and this dissertation. Woolman and Fleisch explain the unqualified and immediate nature of the right to basic education by stating that it has a 'strong unqualified' character which can be distinguished in four ways, that is the absence of the 'access', 'reasonable and legislative measures', 'availability of resources' and 'progressive realization' in its formulation.⁷¹ The authors however note that despite its immediate obligations, the court is allowed to lean towards limiting section 29 (1) (a) since it rejected the minimum core approach in the *Minister of Health v Treatment Action Campaign* (TAC case).⁷² Without elaborating on the TAC case or its minimum core refusal or its professed limitation of basic education, the authors further support their argument by stating that Berger indicated that we cannot announce immediate standards that we cannot meet because that approach cheapens the Constitution.⁷³ They add more support for their argument by stating that in the *Government of the Republic of South Africa and Others v Grootboom and Others case*,⁷⁴ the court argued that the rights in the Constitution must be understood in context as such 'no matter how important one views the right to education, it is difficult to argue that [its immediate provision] should trump rights to housing, food, water and healthcare.'⁷⁵ They draw attention to the fact that in Grootboom the court rejected the fact that children could be given shelter as an unqualified right under section 28 (1) (b) and that it stated that the obligation rests first on the parent and only alternately on the state when the child is removed from

⁶⁷ Churr C 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) 18 PER/PELJ 7.

⁶⁸ Liebenberg S *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 243

⁶⁹ Murungi LN 'Inclusive basic education in South Africa: Issues in its conceptualisation and implementation' 18 (2015) PER/PELJ 1.

⁷⁰ Berger E 'The Right to Education Under the South African Constitution', (2003) 103 Columbia Law Review 638.

⁷¹ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 121.

⁷² *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC) See para [35].

⁷³ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 122.

⁷⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) Para 22

⁷⁵ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 123.

parental care.⁷⁶ The authors conclude that despite the right to basic education being unqualified, its provision as an immediate right is a standard which cannot be met by the state.⁷⁷

First, it is important to agree with the Woolman and Fleish that the right to basic education is unqualified and therefore imposes immediate obligations on the state. This dissertation however disagrees with the authors' action of muddling up the constitutional court's denial of the minimum core approach and using it to profess the limitation of section 29 (1) (a). The unqualified nature of the right to basic education is a constitutional formulation accepted by its drafters in light of their immediate expectations from the state relating to the right to basic education. On the other hand, the minimum core was formulated by General Comment 13 to suggest that each right has a core content as discussed in the following chapters. Accepting or denying the applicability of the minimum core approach does not and cannot strip the formulation of the right to basic education that is, its unqualified immediate nature. The unqualified nature of section 29 (1) (a) was not imposed by the minimum core but by the citizens who voted for the Constitution. Also, the denial of the existence of a core obligation by the court when it was interpreting a qualified right to health in the *TAC* case or a qualified right to housing to in the *Grootboom* case is not a convincing reason to conclude that it will refuse to regard section 29 (1) (a) as an immediate unqualified obligation. It is argued in chapter 5 that the pronouncements by the court in the *TAC* and *Grootboom* case relating to the applicability of the minimum core whilst interpreting qualified rights cannot be binding on the right to basic education since it is an unqualified right with inherent state obligations similar to those imposed by a minimum core obligation. This argument is further advanced in chapter 5 of this dissertation.

Woolman and Fleish further justifying their reasoning for a possibility of limiting the unqualified right to basic education, further quote Berger who states that by

⁷⁶ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 123.

⁷⁷ Ibid.

understanding section 29 (1) (a) to impose unqualified immediate obligations, the court would, 'announce standards than cannot be met [thereby] ultimately cheapen[ing] the Constitution'⁷⁸ This dissertation reasons that what would cheapen the Constitution is ignoring its immediate obligations relating to the provision of basic education. Non-compliance with constitutional obligations is what has cheapened the Constitution and led to the multiple violations of the right to basic education reminiscent of Zimbabwe and South Africa as discussed in chapter 4 and 5. The right to basic education was already prioritized by both Constitutions and government budgets must reflect such prioritization and provide it immediately.

Relating to the argument by Woolman and Fleish that whilst interpreting the *Grootboom* case, the constitutional court stated that human rights must be understood in context and that relating to implementation, the right to education cannot trump the child's right to housing, food and healthcare and take priority as an immediate obligation, the reasoning by this dissertation is that indeed the right to basic education takes priority. Despite its important empowering nature and its many empowering aims discussed in chapter 2, MacConnachie and MacConnachie argue rightly that the right to basic education is provided by the constitution as a good itself not merely access to a reasonable measure⁷⁹ which must be provided progressively which is typical of the right to food, healthcare and housing. The provision of access to a measure (housing, water or healthcare) must not be financially compared to the provision of a good (basic education) which is what Woolman and Fleish did. Trumping the point that section 29 (1) (a) is an unqualified right and immediate obligation, by stating that in the *Grootboom* case the court rejected the unqualified right to shelter for children is an incorrect argument.⁸⁰ This dissertation reasons that, the court did

⁷⁸ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 122.

⁷⁹ MacConnachie C and MacConnachie 'Concretising the Right to A basic Education' (2012) 129 *The South African Law Journal* Page 564

⁸⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

Para [77] 'It follows from subsection 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their

not deny that section (28) (1) (c)⁸¹ is unqualified, it stated that a reading of the section in context with section (28) (1) (b)⁸² which is also an unqualified right provided by the same section means that parents must take care of their parents first before the state can interfere. If a child can prove that their parents or family cannot take care of them, it is the reasoned by this dissertation that, there is nothing that should impede the right to shelter from being read as an unqualified immediate right. Also, of particular note is that unlike, shelter, water and food section 28 does not subject basic education to provision by parents. The right to basic education is only provided by section 29 (1) (a) as a state obligation.

Woolman and Fleish having rejected a reading that section 29 (1) (a) imposes immediate obligations, suggested a reading of the Constitution which would 'explain the unqualified nature of the right but does not, at the same time, make harsh of the budgetary constraints faced by the post-apartheid state'.⁸³ They suggested that the unqualified nature of the right to basic education be a reminder only of the inequalities of the apartheid past.⁸⁴ This dissertation submits that a reading of that nature is both unconstitutional and against international law obligations discussed in chapter 2. If the state redirects funds from instances where it is providing housing, water or food as goods and not merely providing access in compliance with the constitution, then it will be able to afford enough funds to provide basic education immediately as a good as envisaged by the Constitution.

MacConnache and MacConnache have a different understanding of the unqualified nature of the right to basic education. They differ from Woolman and Fleish in that they reject from the onset that section 29 (1) (a) imposes immediate

families. It follows that section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families'.

⁸¹ *Constitution of South Africa* 1996 see S 28 '(1) Every child has the right—(c) to basic nutrition, shelter, basic health care services and social services.'

⁸² *Ibid*, S 28 '(1) Every child has the right—; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment'.

⁸³ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 125

⁸⁴ *Ibid*.

obligations.⁸⁵ They accept that the right to basic education is provided as a good and an unqualified right as earlier stated but argue that although it is unqualified the right to basic education must not be taken to translate to immediate state obligations.⁸⁶ They defend their analysis by stating that, the state can justify its failure to deliver the right to basic education using the limitation clause (section 36)⁸⁷ of the South African Constitution discussed in chapter 3 of this dissertation.⁸⁸ This dissertation reasons that the South African constitutional court has already stated in the case of *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (Juma case) that the unqualified nature of the right to basic education commands immediate obligations.⁸⁹ The state or anybody is indeed allowed to ask the court to limit those immediate obligations using section 36 but this dissertation argues that, such a request cannot be a denial that section 29 (1) (a) commands immediate obligations. Kevin Iles convincingly argues that a court engaging in a section 36 limitation of a right engages in a two stage enquiry⁹⁰. First, it delimits the obligations imposed by the right before it engages in the limitation inquiry.⁹¹ Stage one 'ought to be, an interpretation stage only. It involves a definitional determination of the scope of the right and a delimitation of the boundaries of constitutionally protected activity'.⁹² The determination of the scope and content of the right is important in the first stage as it sets a scene for the second stage which assesses the justifiability of the requested limitation given the already determined nature of the right and its purpose in a value

⁸⁵ MacConnachie C and MacConnachie 'Concretising the Right to A basic Education' (2012) 129 The South African Law Journal 557

⁸⁶ Ibid.

⁸⁷ *Constitution of South Africa*, 1996 'S 36 Limitation of rights.-(1) 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- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) 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 right'.

⁸⁸ MacConnachie C and MacConnachie 'Concretising the Right to A basic Education' (2012) 129 The South African Law Journal 557.

⁸⁹ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] See also Iles K, 'A fresh look at limitations: Unpacking Section, 36', 72-73, https://journals.co.za/docserver/fulltext/ju_sajhr/23/1/ju_sajhr_v23_n1_a3.pdf?expires=1561372556&id=id&accname=58027&checksum=1EF26CC56A9E3EC3FFEB07586A64EFCA accessed 24 June 2019

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

based, free and democratic state.⁹³ The court 'cannot define the extent of the limitation unless [it] already knows the scope of the right'.⁹⁴ Once the scope and content of a right is known, the court will then proceed to the second stage and determine whether any infringement of the right is justifiable.⁹⁵

Human rights are never recklessly or arbitrarily limited. MacConnache and MacConnache should not pose Section 36 as a threat to the unqualified and immediate nature of the right to basic education. Constitutional rights voted by people in a free and democratic country, more so, those like the right to basic education which the court has already said commands immediate obligations on the state cannot be easily or capriciously limited. In any enquiry aiming to limit the right to basic education the first stage should be guided by the decision of the constitutional court in the *Juma* case which stated the nature of the right as one with no internal qualifiers, immediately realisable and having an empowering purpose. The Canadian case of *R v Oakes* stated that, a limitation of a right is not the norm, rather it is an exception to the general need to respect, protect and promote human rights.⁹⁶ A properly drafted limitation clause places restrictions on unnecessary and unjustified limitations which lead to the arbitrary deprivation of rights.⁹⁷ The court applying a limitation clause on a right must be able to distinguish between the parts of a right that cannot be limited and the extent of limiting a right which advances social justice.⁹⁸ A limitation of a right is therefore not a derogation from a right as MacConnache and MacConnache seem to suggest but a means to ensure that everyone enjoys human rights.⁹⁹ Limiting section 29 (1) (a) will therefore take into account the factors stated by section 36 which involve a consideration of the immediate nature of the right to basic education, its

⁹³ Iles K, 'A fresh look at limitations: Unpacking Section, 36', 72-73, https://journals.co.za/docserver/fulltext/ju_sajhr/23/1/ju_sajhr_v23_n1_a3.pdf?expires=1561372556&id=id&accname=58027&checksum=1EF26CC56A9E3EC3FFEB07586A64EFCA accessed 24 June 2019.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ahmed D and Bulmer E, 'Limitation Clauses', (2017) 2, International IDEA Constitution-Building Primer, 4-5, <https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf> accessed 07 July 2019.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

purpose and the relationship between the purpose and the limitation in a free and democratic state. The above arguments are deemed relevant for Zimbabwe in relation to the section 86 possible limitation of all the right to basic state-funded basic education as will be discussed in chapter 4.¹⁰⁰ Whilst *Maja* notes the limited jurisprudence on limitation of rights embodied by the Zimbabwean Constitution, the formulation of the limitation clause as well as the right to state funded basic education is similar in both Zimbabwe and South Africa as such South African jurisprudence is regarded as persuasive.¹⁰¹

In relation to the minimum core content of the right to education which Woolman and Fleisch seemed to have wanted to allude to above, Arendse following the argument by Coomans states that 'primary education is so essential for the development of the person's abilities that it can be rightly defined as a minimum claim'.¹⁰² The regard of primary education as the minimum core content of the right to education in both Zimbabwe and in South Africa is rejected because it will not ensure that children acquire their full course of basic learning needs which are provided at primary and secondary schooling levels as provided by General Comment 13. Further, whilst the regard of primary education as an immediate free and

¹⁰⁰ *Constitution of South Africa*, 1996 S 86, 'Limitation of Rights and Freedoms (1)The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.

(2)The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right or freedom concerned; (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others; (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and (f) whether there are any less restrictive means of achieving the purpose of the limitation'.

¹⁰¹ Maja I, 'Limitation of Human Rights and International Law and the Zimbabwean Constitution', (2016) The Zimbabwe Electronic Law Journal
<file:///C:/Users/chiedza.simbo/Desktop/dissertation%20corrections/Limitation%20of%20human%20rights%20in%20international%20law%20and%20the%20Zimbabwean%20Constitution.pdf> accessed 07 July 2019.

¹⁰² Arendse L 'The Obligation to Provide Free Basic Education In South Africa: An International Law Approach' (2011) 14 PER/PELJ 217.

compulsory right could have earlier fit the description of a minimum core obligation¹⁰³, the African Charter extended the obligation of African countries to the provision of an immediate free and compulsory basic education and this dissertation now regards basic education as the minimum core content of the right to education in both Zimbabwe and in South Africa. The argument is supported by the acceptance of the right to education as an unqualified obligation with immediate obligations similar to those imposed by the minimum core obligation described by General Comment 13. The regard of basic education as an immediate minimum core obligation provided at primary and secondary schooling levels is the foundation of the argument that, primary and secondary school attendance is consequently, an important component of the right to basic education.

In terms of defining the term basic education, the Woolman and Fleisch propose two possible approaches popularly known to have been put forward by Berger. Basic education could refer to a level of schooling that is primary school or its adequacy what is understood by this dissertation to mean 'quality'.¹⁰⁴ MacConnache and MacConnachie¹⁰⁵ like Murungi¹⁰⁶ conclude that in relation to its definition, the term basic education is quality oriented and defined by the World Declaration.¹⁰⁷ They quote two American cases *Campaign for Fiscal Equity v The state of New York 100 NY 2d 893* and *Campaign for Fiscal Equity*¹⁰⁸ which illustrated basic education to be quality oriented and spoke to some quality aspects such as literacy and skills.¹⁰⁹ The authors then proceed to mention that achieving the quality dimension of basic education 'is

¹⁰³ Arendse L 'The Obligation to Provide Free Basic Education In South Africa: An International Law Approach' (2011) 14 PER/PELJ 111, 'The minimum core obligations engendered by the right to basic education can therefore be derived from the concepts of "free" and "compulsory" assigned to primary education'.

¹⁰⁴ Berger E, 'The Right to Education Under the South African Constitution', (2003) 103 Columbia Law Review 625.

¹⁰⁵ MacConnachie C and MacConnachie 'Concretising the Right to A basic Education' (2012) 129 The South African Law Journal 565-568.

¹⁰⁶ Murungi LN 'Inclusive basic education in South Africa: Issues in its conceptualisation and implementation' (2015) 18 PER/PELJ 1.

¹⁰⁷ Berger E, 'The Right to Education Under the South African Constitution', (2003) 103 Columbia Law Review 625 see also MacConnachie C and MacConnachie 'Concretising the Right to A basic Education' (2012) 129 The South African Law Journal 127.

¹⁰⁸ *Pauley v Kelly* 255 SE 2d 859 (1977) 877 as quoted in Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 129

¹⁰⁹ *Ibid*, 128 and 129.

unequivocally beyond the current reach of the South African educational system' due to the inadequacy of resources.¹¹⁰ This dissertation concedes that the definition of basic education is quality oriented and defined by the World Declaration but contends that, there is no constitutional goal which can be beyond the reach of the educational system. Basic education is an unqualified immediate obligation in both Zimbabwe and South Africa. The state has an obligation to provide it immediately. To do so, it must reallocate resources to meet basic learning needs immediately. The basic education for all goal must not be conceived by a country as though it is an individual goal of a ministry, it is a national and international goal and poor countries like Zimbabwe and South Africa must reallocate their resources from sectors such as the army to education and further mobilize resources from the international community in order to meet the immediate basic education goal.

On the contrary to the above, in relation to defining the term basic education, Liebenberg and Pillay conclude that basic education is defined in South Africa to allude to compulsory school attendance up to age 15 or grade 9.¹¹¹ This approach is regarded as incorrect because as clarified earlier school attendance is only a means for children to acquire basic education. Basic education is the quality of education defined by the World Declaration and enabled by compulsory and free school attendance which must be provided immediately. It is however important to state that whilst the term basic education alludes to the quality of education the right to basic education is understood by this dissertation to include six elements stated earlier which include both quality education and school attendance.

Authors like Churr also agree that the four interrelated elements, availability, accessibility and acceptability and adaptability are important essential features of a basic education.¹¹² Arendse further states that they 'give concrete content to the right

¹¹⁰ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 130.

¹¹¹ Liebenberg L and Pillay K 'Socio-Economic Rights in South Africa' (2000) The socio-economic rights project Community Law Centre, University Of Western Cape South Africa 351.

¹¹² Churr C 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) 7 PER/PELJ 2414.

to basic education'.¹¹³ However, unlike Arendse¹¹⁴ or Churr¹¹⁵ who may think of them only as 'contributing to the successful provision of a basic education', this dissertation argues that, they are not the concrete content of the right to basic education but rather an element of the right to basic education together with its discussed elements discussed above. The South African Human Rights Commission which is a constitutional body has acknowledged that, 'one of the challenges experienced in fulfilling [its role] is the lack of a consolidated statement of the scope and content of the right [to basic education], and correlating obligations to basic education'.¹¹⁶ It therefore provided the Charter of Children's Basic Education Rights (Charter) which it said is a 4A framework of what is required of the State to give effect to the right to basic education for all children in South Africa.¹¹⁷ The Charter does not state that it provides for the scope and content of the right to basic education but borrows from the provisions of General Comment 13 that the right to basic education must be available, accessible, adaptable and acceptable, what it calls the 4A framework.¹¹⁸ It utilises the 4A framework as a tool to monitor government action and to provide indicators which are child-focused and mark the fulfilment of the right to basic education.¹¹⁹ It sees the 4A framework as defining the commitments needed and the role players responsible for the delivery of the right to basic education.¹²⁰ Unlike the Charter which uses only the 4A framework as its planning and monitoring tool, this dissertation reasons that, this 4A framework was never proposed by General Comment 13 as a concrete scope and content of the right to any education including basic education¹²¹. General Comment 13 stated that every kind of education must be available, accessible, acceptable and adaptable.¹²² This dissertation reasons that the

¹¹³ Arendse L 'The Obligation to Provide Free Basic Education In South Africa: An International Law Approach' (2011) 14 PER/PELJ 100.

¹¹⁴ Ibid.

¹¹⁵ Churr C 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) 7 PER/PELJ 2414.

¹¹⁶ South African Human Rights Commission, 'Charter of Children's Basic Education' Rights 10 https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/SAF_Charter_of_Children%27s_Basic_Education_Rights_2012_En.pdf accessed on 1 July 2019.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ *General Comment 13: The Right to Education (1999)*, para 6a-6d.

¹²² Ibid.

4 features are just one component of the six components of the right to basic education proposed by this dissertation. This dissertation therefore reasons that, the concrete content of the right to basic education has six elements discussed in this dissertation. The legal frameworks of both Zimbabwe and South Africa must therefore reflect the six essential features as the elements of the scope and content of a right to basic education.

1.12 Justifications for the right to basic education

1.12.1 The benefits and empowering nature of education, within the human rights framework¹²³

As already discussed within the legal tradition, human rights are unique in that by their legal recognition they give the holder an entitlement to claim from the duty-bearer, to gain control of the behaviour of the duty-bearer and to question the allocation of resources.¹²⁴ Education, as a human right is described as an empowerment right.¹²⁵ Empowerment is a contested word but the World Bank defines it as 'the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control and hold accountable institutions that affect their lives'.¹²⁶ Empowerment rights differ from other human rights in three respects. First, they guarantee that 'citizens are able to set the rules of the game and not merely be assured that the rules are applied or written'.¹²⁷ By knowing, the rules of the game educated people are able to participate in the politics of their country.¹²⁸ Meaningful participation in politics requires an educated understanding of the political structures

¹²³ The arguments in this part of the dissertation are further advanced in my publication C Simbo 'Defining the term basic education in the South African Constitution: An international law approach' (2013) *Law, Democracy and Development* 483-484.

¹²⁴ Wolfson S A 'Children's rights: The theoretical underpinning of the best interest' 10, In Freeman M and Veerman P *The ideologies of Children's rights* (Nijhoff Publishers, 1992) 10.

¹²⁵ Donders Y and V Vladimir *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (Routledge 2007) 185.

¹²⁶ 'What is the evidence on effectiveness of empowerment to improve health' 17 www.euro.who.int/_data/assets/pdf_file/0010174656/E88086.pdf accessed 10 June 2013.

¹²⁷ Woolman S and Bishop M 'Education' in Woolman S et al *Constitutional Law of South Africa* (Pretoria University Law Press 2009) 7.

¹²⁸ Beiter K, *The protection of the Right to education by International Law* (Martinus Nijhoff Publishers 2006 28-30.

and the ability to know and conceptualise, for example, the voting process in order to bring change to a country.¹²⁹ The right to education therefore enables individuals to resist any autocratic rule, to demand the right to speak and to understand the obligations of public figures.¹³⁰ Second, empowerment rights, 'allow the individual to determine the shape and direction of his or her life'.¹³¹ They give an individual skills and knowledge to make independent value judgements for his/her benefit and to the benefit of the society.¹³² Although formal education has been blamed for 'drawing children and youth away from their cultural origins and traditional familial customs'¹³³, education as an empowerment right helps cultural minorities to preserve and defend their culture.¹³⁴ Third, empowerment rights are also 'means' for individuals to benefit from other human rights.¹³⁵ The right to education enables citizens to enjoy other socio-economic as well as civil and political rights.¹³⁶ The link between the right to education and other human rights is born from the fact that human rights are universal, indivisible, interrelated and interdependent as discussed in chapter 2.¹³⁷ Without enjoying the right to education, a person cannot enjoy other human rights. General Comment 13, which is based on the provisions of article 14 of the ICESCR states that education is an empowerment right which allows people to enjoy other human rights.¹³⁸ It is a right which lifts the socially and economically marginalised

¹²⁹ Ibid.

¹³⁰ Donders Y and V Vladimir *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (Routledge 2007) 185.

¹³¹ Woolman S and Bishop M, *Constitutional Law of South Africa* (2009 Juta Publishers) 7.

¹³² Coomans F 'In search of the core content of the right to education' 220 in Chapman A R *Core obligations: building a framework for economic, social and cultural rights*, (Protea Book House) 220.

¹³³ Adams D *Education and National Development: Priorities, Policies, and Planning* (2002 Development Bank) 1.

¹³⁴ Donders Y and V Vladimir *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (Routledge 2007) 185.

¹³⁵ Ibid 185.

¹³⁶ Coomans F 'In search of the core content of the right to education' 220 in Chapman A R *Core obligations: building a framework for economic, social and cultural rights*, (Intersentia Publishers 2002) 219. 'The key to social action in defense of rights...is an educated citizenry, able to spread its ideas and to organize in defense of its right' Civil and political rights such as freedom of expression, freedom of association, or the right to political participation, obtain substance and meaning only when a person is educated. The same hold true to for the right to take part in a cultural life. For ethnic and linguistic minorities the right to education is an essential means to preserve and strengthen their cultural identity and heritage'.

¹³⁷ *United Nations General Assembly: World Conference on Human Rights, 'Vienna Declaration and Programme of Action, 1993'* [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en) accessed 12 April 2016.

¹³⁸ *General Comment 13: The Right to Education* (1999), para 1 'Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education

people from poverty and allows them to participate equally in their communities.¹³⁹ The right to education is therefore a valuable tool to enhance the realisation of other socio-economic rights, like the right to food, the right to work and the right to health.¹⁴⁰

Education as an empowerment right advances individual freedom since an educated person is likely to know the difference between oppression and liberation.¹⁴¹ An educated person experiences freedom and enhances his/her interest in society.¹⁴² Education allows a person to exercise individual judgements and to develop abilities and responsibility.¹⁴³ It promotes self-discovery thereby promoting creativity and the use of skills that enable the individual to discover all-important aspects of life that lead to happiness.¹⁴⁴ As self-discovery continues, there is a rise in competencies giving an individual the freedom to explore new potentials and to make a meaningful contribution to society.¹⁴⁵ Education enables a person to participate diligently in the community by adding and conserving cultural and religious values thereby enabling the community to choose the way it wants to live.¹⁴⁶ The process empowers vulnerable groups in society, such as women and children and allows them to defend themselves from exploitation of any form thus allowing a human being to have the 'joys and rewards of human existence' through freeing their mind and enlightening it to wander widely.¹⁴⁷ Education is, therefore, a 'discipline for improving body, mind and spirit and

is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence'.

¹³⁹ Ibid.

¹⁴¹ Beiter K, *The protection of the Right to education by International Law* (Nijhoff Publisher 2006) 28-30.

¹⁴² Du Plooy JL and Kilian CJG *Introduction to Fundamental Pedagogics* (1980 HAUM Educational Publishers) 21.

¹⁴³ Gurrey P *Education and the training of teachers* (1963 Longmans) 26.

¹⁴⁴ Ibid.

¹⁴⁵ Annand J. B *Education for self-discovery* (Hodder and Stoughton 1977) 3-4.

¹⁴⁶ Beiter K, *The protection of the Right to education by International Law* (Nijhoff 2006) 28-30.

¹⁴⁷ *General Comment 13: The Right to Education* (1999), Para 1.

a process for encouraging natural development'.¹⁴⁸ An educated person is able to choose his or her way in life, meaning that education leads to self-awareness and self-moulding.¹⁴⁹ By virtue of the ability of education to lead to self-awareness, an educated person acts conscientiously and in that regard is capable of knowing good and bad, false and true, success and failure as well as proper and improper.¹⁵⁰ An educated person is responsible, self-aware, independent and has faith in himself/herself.¹⁵¹ Education is thus considered as 'one of the best financial investments states can make'.¹⁵²

Education, clearly, has the ability to make individuals equal since it gives them the ability to be free to develop talent, individual callings and skills that enable a person to manoeuvre all the difficulties that weaken the human condition.¹⁵³ The education process 'provide[s] the individual with motivation, so that he may be in continual search for new ways to absorb the impact of change before he is swept off his[/her] feet'.¹⁵⁴ All the above facts point us to the fact that education is an active tool to protect human dignity and ensure personal development.¹⁵⁵ Education is, therefore, an ingredient for socio-economic development, since 'only educated individuals possess the ability to secure both the basic necessities for survival and the other material goods required for flourishing'.¹⁵⁶ An educated person has more prospects of finding a job, thereby improving personal income and the ability to escape poverty.¹⁵⁷ Such a person has increased basic knowledge about healthy living which increases individual life expectancy.¹⁵⁸

¹⁴⁸ Farrant J S *Principles and practices of education* (Longman 2006) 32.

¹⁴⁹ Du Plooy JL and Kilian CJG *Introduction to Fundamental Pedagogics* (1980 HAUM Educational Publishers) 21.

¹⁵⁰ Ibid, 1.

¹⁵¹ Ibid.

¹⁵² *General Comment 13: The Right to Education* (1999), Para 1.

¹⁵³ Mialaret G *The Child's right to education* (United Nations Educational Scientific and Cultural Organisation 1979) 20.

¹⁵⁴ Annand J. B *Education for self-discovery* (Hodder and Stoughton 1977) 3-4.

¹⁵⁵ *Universal Declaration of Human Rights (1948)* A 1 states that, 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience...'

¹⁵⁶ Beiter K, *The protection of the Right to education by International Law* (Nijhoff 2006 publisher) 28-30.

¹⁵⁷ Coomans F 'In search of the core content of the right to education' 220 in Chapman A R *Core obligations: building a framework for economic, social and cultural rights*, (Intersentia Publishers 2002) 220.

¹⁵⁸ Ibid.

In addition to the role of education in developing the individual, there is evidence that a proper education, coupled with a supportive environment can lead to economic development, the betterment of the aptitude of companies and national growth.¹⁵⁹ With such benefits of education, it cannot be surprising to discover that it was used to 'perpetuate and legitimize social and wealth divisions in society'¹⁶⁰ during the colonial era in Zimbabwe and the colonial as well as the apartheid era in South Africa. Understanding the fundamental benefits of education for individuals and societies, therefore, motivates us to argue that it must have a content that is compulsory and free. It gives us a desire to delineate the scope and content of basic education in a bid to force governments to comply with their constitutional and international obligations.

1.12.2 The aims of education

In conceiving the whole concept of education, various human rights instruments have explained its aims. The aims of education as they are stated by various international instruments have a focus 'around the substantive attainment of sufficient learning [which] enables a person to participate as citizen, contribute to society and derive self-fulfilment sufficient to enjoy one's dignity'¹⁶¹. The Universal Declaration, the foundational document of human rights states that the aim of education must be the full development of the personality of the human being and the strengthening of their respect of human rights and freedoms.¹⁶² Further, education must aim to promote the friendship of nations, tolerance, understanding and must further the maintenance of peace.¹⁶³

¹⁵⁹ Adams D *Education and National Development: Priorities, Policies, and Planning* (Asian Development Bank 2002) at 1.

¹⁶⁰ Ibid.

¹⁶¹ Calderhead V 'The right to an adequate and equal education in South Africa: An Analysis of S 29 (1) (a) of the South African Constitution and the right to equality as applied to basic education', draft paper, SECTION27 and Equal education 9, <http://section27.org.za/2011/04/the-right-to-an-adequate-and-equal-education-in-south-africa/> accessed 17 July 2018.

¹⁶² *Universal Declaration of Human Rights*, (1948) ,A 26 (2).

¹⁶³ Ibid.

The ICESCR, echoing the provisions of the Universal Declaration states that education must be aimed at the full development of the individual, which shall promote human dignity and strengthen the enjoyment of other human rights.¹⁶⁴ In the view of the ICESCR, an education provided by the state must aim at enabling people to participate fully in society, promote friendship, understanding and tolerance among nations as enunciated by the Universal Declaration.¹⁶⁵ The Convention Against Discrimination in Education 1960 (CADE) also echoing the provisions of the Universal Declaration states that education must aim at developing the human personality and strengthening their respect of human rights and fundamental freedoms whilst promoting 'understanding, tolerance and friendship among all nations and the maintenance of peace'.¹⁶⁶

The African Charter similar to the provisions of the Universal Declaration, states that education must aim at fostering the respect of human rights and freedoms¹⁶⁷; and aim at preserving the progressive African moral virtues, cultures and traditions.¹⁶⁸ It must prepare the child to live freely and responsibly in the spirit of 'tolerance, dialogue, mutual respect and friendship around all people, ethnic, tribal and religious groups'.¹⁶⁹ Education must, particularly, aim at directing African children towards the preservation of their national independence and the integrity of their territory.¹⁷⁰ It must aim to promote unity among Africans and foster their solidarity, the respect of their environment as well as natural resources.¹⁷¹

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol' (1988) reiterates the provisions of the Universal Declaration, that education must be aimed at the full development of the individual's personality and dignity and should enhance the individuals' respect for

¹⁶⁴ *International Covenant on Economic, Social and Cultural Rights. Adopted by the General Assembly of the United Nations on 16 December (1966) A 13 (1).*

¹⁶⁵ Ibid.

¹⁶⁶ *Convention against Discrimination in Education (1960) A 1 (5) (a).*

¹⁶⁷ *African Charter on the Rights and Welfare of the Child, (1999) A 11 (1-7).*

¹⁶⁸ Ibid.

¹⁶⁹ Ibid, A11 (a)

¹⁷⁰ Ibid, A11 (1-7)

¹⁷¹ Ibid.

human rights, justice, freedom and the peace of others.¹⁷² The Protocol states that education must enable a person to fully participate in a democratic society which is plural and promote tolerance and friendships among the diverse humanity.¹⁷³ The American Declaration of the Rights and Duties of Man (1948) also states that education must aim to prepare people to live a decent lives, to raise their standard of living and to be useful in society.¹⁷⁴ Education must be aimed at providing equal opportunity for everyone to explore and develop their talents and merits and to realise the importance of utilising all resources which the state or the community is willing to spend towards education.¹⁷⁵

Illustrating the similar provisions from the above mentioned international instruments shows us that the possession of education must be aimed at the development of the learner's overall personality. A person whose personality is fully developed enjoys meaningful existence.¹⁷⁶ Educated people recognize their dignity and that of others.¹⁷⁷ They assume responsibility, are self-understanding, independent thinkers, able to self-judgment and have moral independence.¹⁷⁸ They have the ability to justify any decision they take, be it religious, social, moral, political, economic, cultural, religious, intellectual or vocational.¹⁷⁹ A full development of the human personality entails the impartment of knowledge with an aim to make the learner insightful and capable of dealing with every new situation.¹⁸⁰ Whilst the child is taught in a specific society, he/she must however be fully aware that the society is in constant change.¹⁸¹ Education therefore has the additional aim to prepare the learner for

¹⁷² *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol'* (1988) A 13 (1-3).

¹⁷³ *Ibid.*

¹⁷⁴ *American Declaration of the Rights and Duties of man* (1948), A XII.

¹⁷⁵ *Ibid.*

¹⁷⁶ Landman W A, *An essence Analysis of the Situation of Educating* page 3 see also, Du Plooy JL and Kilian CJG *Introduction to Fundamental pedagogics* (HAUM Educational Publishers 1984) 97-99.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Du Plooy JL and Kilian CJG *Introduction to Fundamental pedagogics* (HAUM Educational Publishers 1984) 113-114.

¹⁸¹ *Ibid.*

constant change so that they are able to embrace and consider other members of the ever-changing society.¹⁸²

Pursuing the aim to develop the learners' personality, education must positively mold the mentality of educands in such a way to cultivate self-love, respect and the ability to accept individual experiences without exhibiting anger.¹⁸³ An educated person who is mentally mature, must reach a 'stage of autonomy when one is capable of taking a personal stand and accepting values that bind him, and demand self-sacrifice'.¹⁸⁴ Education must aim to develop the personality to such an extent that an educated person is able to examine activities he/she does at a distance and to avail himself/herself of every opportunity to 'ennoble and not to degenerate himself[/herself]'.¹⁸⁵ In developing the human personality, education must assist the learner to reach a stage of emotional maturity.¹⁸⁶ Emotional maturity is seen as the ability to make responsible choices, to stand by the decisions, to implement the choices and to be motivated by choices influenced by the values recognized by the adult, as well as other adults.¹⁸⁷

All discussed above international instruments point to education having an aim to maintain peace and the advancement of human dignity. Education should bring a learner to a realisation that there are widely accepted human rights values, such as the value of human dignity and equality. Such realisation should sensitise learners to the need to self-introspect and to change unacceptable behavior as it is judged by the norms and values widely accepted by them and others.¹⁸⁸ This dissertation emphasizes that the inculcation of the value of human dignity begins with the teacher treating the learner with dignity. Respecting the rights of the learners should strengthen their respect of the dignity and human rights of others. Put succinctly, learners aware of

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid page 102-103.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid, although wide acceptance of values alone does not mean that the values are good and advance equality. Some values such as those against the rights of sexual minorities must not be promoted.

their dignity can 'revere the dignity of other human beings'.¹⁸⁹ Education must aim at making the educands develop a self-image through the educator's candid appreciation of them as opposed to critical destruction through undignifying dehumanising speech or actions, such as beating the educands.¹⁹⁰

As will be discussed in chapter 2, the Universal Declaration, the CADE and the ICESCR all state that education must aim to promote tolerance, understanding and the maintenance of peace. Further to that education must aim to strengthen the respect and enjoyment of human rights and fundamental freedoms. The above aims indicates that when educators teach, they should exemplify values and human rights, such as tolerance, understanding and the pursuit of peace. Educators can use examples which formed their life view and that of the previous generation, however, they must not confine the learner to what is morally expected by them or society.¹⁹¹ Educands must be encouraged to truly flourish as human beings and develop their own world view, in a manner which strengthens their enjoyment of human rights.¹⁹² Knowledge should be taught, without educators stubbornly taking a specific moral or political view point.¹⁹³ Education must therefore aim to foster freedom of thought and conscience. Pupils must be encouraged to be curious enough to seek further knowledge and to have a 'desire to do something difficult'.¹⁹⁴ In relation to the aims of education, General Comment 13 states that, national parties must also ensure that, the aims of education are in compliance with the provisions of international instruments which are discussed below.¹⁹⁵

1.13 Conclusion

This chapter aimed to introduce the subject of this dissertation which is the determination of the scope and content of the right to basic education in Zimbabwe

¹⁸⁹ Ibid, 104.

¹⁹⁰ Ibid, 21-24.

¹⁹¹ Ibid, 100.

¹⁹² Ibid.

¹⁹³ Ibid 99.

¹⁹⁴ Russell B *On Education: Especially in Early Childhood* (George Allen and Unwin Ltd 1937) 192

¹⁹⁵ *General Comment 13: The Right to Education* (1999), Para 5.

and in South Africa. It presented that the lack of understanding of the scope and content of the right to basic education as a problem which leads citizens to be deprived of their entitlements and governments to fail to meet their basic education obligations. It laid out the objectives and aims of this study and presented literature on the subject of basic education and the gaps which remain. It clarified that this study is significant for governments, citizens, lawyer as well as researchers. The next chapters will proceed to analyze the provisions of international law regulating the right to basic education, the manner of interpreting obligations in the Zimbabwean and the South African Constitution and the determination of the scope and content of the right to basic education in Zimbabwe and in South Africa. The provisions of the two Constitutions, their respective education laws as well as the conduct of the governments are measured against the provisions of international law. The next chapter discusses the substantive framework of the right to basic education as it is provided by international law.

CHAPTER 2

THE SUBSTANTIVE CONTENT OF THE RIGHT TO BASIC EDUCATION AS PROVIDED BY INTERNATIONAL LAW

2.1 Introduction

The last chapter clarified the objective of this dissertation as the solving of the problem that in both Zimbabwe and South Africa there is no determined scope and content of the right to basic education. It clarified that, this dissertation studies the right to basic education from a human rights-based approach. It noted that, whilst the right to education is important and empowering, both Zimbabwe and South Africa do not provide internationally- compliant legal frameworks which make it possible to measure government's compliance with the constitutional right to basic education obligations. The current provisions of the right to basic education in Zimbabwe and in South Africa discussed in chapter 1 expose the fact that, citizens who desire to demand state compliance with the right to basic education's international obligations have the following legitimate questions; Does the attendance of primary school, secondary school or both form part of the right to a basic education? Is compulsory attendance of school part of the right to a basic education? Is the provision of free basic education part of the right to a basic education? Do modern infrastructure or perhaps the adequate textbooks, qualified teachers or safe schools form part of the right to basic education? Are state obligations relating to the provision of the right to basic education immediate or progressive?

To answer the above questions, this dissertation peruses through international law provisions and connects the quality-oriented term, basic education, with attendance of primary school, attendance of secondary school, and compulsory provision of education. It further connects the physical inputs of education such as teachers, classrooms and libraries with other aspects of education, including the pedagogical inputs of education, such as, the curriculum content. This chapter concludes that, at international law level, the right to basic education comprises of five essential elements. The five elements are that, children must acquire basic

education meeting the quality described by the World Declaration; the basic education which children are entitled to must be compulsory and free and it must be acquired at primary and secondary school levels; basic education must be viewed to be the minimum core content of the right to education in both Zimbabwe and South Africa and the basic education offered to children must be available, acceptable, accessible and adaptable. The international laws discussed in this chapter provide fertile ground to delimit the scope and content of section 75 (1) (a) and section 29 (1) (a) of the Zimbabwean and South African Constitutions, respectively.¹⁹⁶

2.2 Conceiving education as a human right

2.2.1 Introduction: Human rights as universal concepts

Whilst there has been various critiques of the concept of 'human rights'¹⁹⁷, it is now acceptable that, 'the idea of human rights by its very appeal to universally applicable ideas of the values of humanity, seems to resonate across cultures and traditions'.¹⁹⁸ It has been argued that human rights were largely influenced by concepts from the Western countries, however, it should be conceded that the perceptions and ideals founding human rights such as equality, human dignity and freedom resonate with the whole humanity and not only European countries.¹⁹⁹ Throughout the history of

¹⁹⁶ *Constitution of Zimbabwe, 2013*, S 46 (1) Interpretation of Chapter 4 '1. C. Must take into account international law and all treaties and conventions to which Zimbabwe is a party'. *Constitution of South Africa, 1996*, S 39. (1) 'When interpreting the Bill of Rights, a court, tribunal or forum— (b) must consider international law'.

¹⁹⁷ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 13 'In fact human rights as a whole have been the subject of sustained critique over the years. To start with, there are doubts over the very possibility of the notion of human rights. There are those who consider that rights can only exist within a bounded polity, and others that the whole concept is baseless, and that all that exists are the needs and interests. Sen (2004) groups these critiques into three types: legitimacy- the position that only legal rights exist; coherence- that it is hard to specify a duty-bearer; and cultural- that Asian values, for example are inimical to rights'.

¹⁹⁸ Ife Jim, *Human Rights and Social Work: Towards Rights Based Practice, 3rd Edition*, (Cambridge University Press 2012) 9.

¹⁹⁹ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 14 'Sen (2004) and Spring (2000) argue that human rights are not exclusively western ideas, even though the recent history of institutionalization of rights is predominantly European. There are many moral and political traditions worldwide that correspond closely to the notion of human rights' see also Ife Jim, *Human Rights and Social Work: Towards Rights Based Practice, 3rd Edition*, Cambridge (University Press 2012) 8.

mankind, the need to attain justice, to respect human dignity and to behave equally is central and has led to the acceptance of the concept of human rights.²⁰⁰

There remains various arguments about the origin and conceptions of human rights, but the idea of human rights seems to have triumphed over those arguments in both human rights history and other literature.²⁰¹ Today, networks advocating for transformation both at political, social, economic or religious levels often adopt the concept of human rights within their frameworks of governance.²⁰² Many 'scholars, philosophers, activists, community and NGO workers, students and politicians, now regard the language of human rights as an indispensable tool in protecting, explaining, exploring and nourishing the rich diversity of our humanity'.²⁰³ Human rights have therefore become integral in the survival of human beings, individually, within small and minority communities and in societies as a whole.²⁰⁴

2.2.2 Ife's three traditions of human rights

To conceptualise human rights, Ife identified three traditions of human rights which are useful to advance the arguments in this dissertation. First, in the perceptions of philosophers like John Locke, who follow the natural rights tradition, human rights originate with humanity - all men are born equal and every human being is born with unchallengeable rights.²⁰⁵ To understand human rights following this tradition, it is viewed that there is a need to recognise the importance of humanity as it is explored by philosophers, psychologists and theologians.²⁰⁶ This conception of human rights is not followed by this dissertation. The views of social-science philosophers like John Locke are indispensable in understanding law, however, they are not the foundation

²⁰⁰ Australian Human Rights Commission Website: Information for Students - Human Rights Essentials Resource Sheet: 'The Origins of Modern Human Rights Laws' <https://www.humanrights.gov.au/commission-website-information-students-human-rights-essentials-resource-sheet-origins-modern-human> accessed 20 February 2016.

²⁰¹ Ibid.

²⁰² Elisabeth J *et al.* *Activating Human Rights*, (Peter Lang AG International Publishers 2006) 1.

²⁰³ Ibid at 4.

²⁰⁴ Ibid at 1.

²⁰⁵ Ife Jim, *Human Rights and Social Work: Towards Rights-Based Practice*, (Cambridge University Press 2012) 14.

²⁰⁶ Ibid 15.

or primary source of exploring the arguments advanced by this dissertation; they may only add to the understanding of the scope and content of education as a human right.

The second Ife tradition suggests that human rights are legal obligations whose scope and contents are spelt out in legal documents.²⁰⁷ Within this tradition, to understand human rights we do not look into our humanity but into the provisions of legal instruments, such as statutes and conventions.²⁰⁸ This second approach of conceptualising human rights is the basis of the explorations in this dissertation. Within the legal tradition, human rights are explained by the law which is viewed as an agreement of how people conceive their rights, both nationally and internationally.²⁰⁹ The tradition recognises that in terms of the law all human beings are born endowed with human rights and the rights of every individual must be equally respected and may be limited only by the need to recognise the rights of others.²¹⁰ What is not clear within the law is clarified by judges.²¹¹ Within the legal tradition, human rights are unique in that by legal recognition, they give the holder an entitlement to claim from the duty bearer; to gain control of the behaviour of the duty bearer and to question the allocation of resources.²¹² Following this tradition, the scope and content of the right to basic education is explored by this dissertation.

The third tradition known as the 'constructed rights tradition' argues that human rights are known by how they are defined by people either as individuals, or as a collective.²¹³ From this perspective, human rights change depending on how they are defined and re-defined by categories of people.²¹⁴ Whilst people's ever changing conceptions about human rights are of value, this tradition is not the foundation of analysis in this dissertation.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Wolfson S A 'Children's rights: The theoretical underpinning of the best interest' 10, In Freeman M and Veerman P *The ideologies of Children's rights* (Kluwer Academic Publishers 1992) 10.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ife Jim, *Human Rights and Social Work: Towards Rights-Based Practice*, (Cambridge University Press 2012) 15.

²¹⁴ Ibid

2.2.3 The right to education within the legal tradition: A human rights- based approach²¹⁵

Within the legal tradition, human rights, including the right to education are 'justiciable claims, on legal grounds, to have or obtain something, or act in a certain way'.²¹⁶ They are viewed as legal entitlements that recognise our humanity, claims and benefits of belonging to the universal community²¹⁷. They 'recognize the inherent value of each person, regardless of [their] background, where [they] live, what [they] look like, what [they] think or what [they] believe' and are the cornerstone of every strong community.²¹⁸ They are legal guarantees which protect individuals and groups from omissions or actions of individuals, governments or other legal bodies.²¹⁹ The state is answerable for the observance of the right to basic education and its failure to deliver the right affords the aggrieved rights-holder the entitlement to institute legal proceedings before a court of law.²²⁰ Within the legal tradition, the right to institute legal proceedings on the pretext of deprivation of a right is not rooted in the contribution of a human being to the Gross Domestic Product (GDP) or any other contribution to the society; it is based on the existence of a right.²²¹ It is within this legal tradition that basic education obligations are demarcated by this dissertation.

Flowing from the understanding of human rights from the legal tradition is the human rights based-approach to development which is a pillar of analysis for the right to basic education in this dissertation. Human rights based-approaches ensure that

²¹⁵ The views in this part of the dissertation are further expanded in my publication titled C Simbo 'Living the Dream of fighting reality: Can the rights based approach tackle all forms of exclusion' (2013) Derebus <http://www.derebus.org.za/living-dream-fighting-reality/> accessed 17 July 2018.

²¹⁶ Grugel J and Piper N, 'Do rights promote Development' (2007) SAGE 81-83 see www.sagepublications.com accessed 24/04/2010 also Boesen J and Martin T Applying a Rights –Based Approach: An Inspirational Guide For Civil Society (The Danish Institute for Human Rights 2007) 11.

²¹⁷ Mccowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 11-12.

²¹⁸ Australian Human Rights Commission 'What are human Rights' <https://www.humanrights.gov.au/about/what-are-human-rights> accessed 17 July 2018.

²¹⁹ Boesen J and Martin T Applying a Rights –Based Approach: An Inspirational Guide For Civil Society (The Danish Institute for Human Rights 2007) 11.

²²⁰ C Simbo 'Living the Dream of fighting reality: Can the rights based approach tackle all forms of exclusion' (2013) Derebus see <http://www.derebus.org.za/living-dream-fighting-reality/> accessed 17 July 2018.

²²¹ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 12.

citizens enjoy public goods as entitlements, not as needs.²²² The approach is constructed on the international consensus that human rights have a specific scope and content and states are duty holders, with the responsibility to understand such scope and content.²²³ Within the human rights-based approach, focus is on the obligations and duties of the state and the need to empower the public to demand the state to comply with its obligations.²²⁴ Human rights-based approaches to the development of education would recognise that people are uneducated, not due to the social, political and economic structures of a country but because of the mere denial of their right by those responsible for its provision.²²⁵ By making the state²²⁶ a duty-bearer whose obligation is to deliver all legal entitlements,²²⁷ the human rights-based approach promotes the discovery of the very complex nature of poverty which includes the deprivation of legal entitlements, such as education.²²⁸ With this approach, the excluded are included in the planning and monitoring processes of

²²² Boesen J and Martin T 'Applying a Rights –Based Approach: An Inspirational Guide For Civil Society' (Danish Institute for Human Rights 007) foreword.

²²³ C Simbo 'Living the Dream of fighting reality: Can the rights based approach tackle all forms of exclusion' (2013) Derebus see <http://www.derebus.org.za/living-dream-fighting-reality/> accessed 17 July 2018.

²²⁴ Ultvedt I, 'Rights based approach and the Millennium Development Goals: The UNDP and Hurist experience' 1 www.undp.org, accessed 23 April 2015.

²²⁵ Mander H 'Rights as a struggle- towards a more just and humane world' 129 in Gready P and Ensor *Jonathan Re-inventing Development?: Translating Rights- Based approaches from theory into practice* (Zed Books 2005), <http://press.uchicago.edu/ucp/books/book/distributed/R/bo20851800.html> accessed 17 July 2018 also Boesen J and Martin T *Applying a Rights –Based Approach: An Inspirational Guide For Civil Society* (The Danish Institute for Human Rights 2007) 9, 'A central dynamic of RBA is thus about identifying root causes of poverty, empowering rights-holders to claim their rights and enabling duty-bearers to meet their obligations. In this way RBA calls attention to a number of central features of poverty and development'.

²²⁶ Boesen J and Martin T 'Applying a Rights –Based Approach: An Inspirational Guide For Civil Society' (Danish Institute for Human Rights 2007) 11. 'The state refers to all the organs of the state such as parliaments, ministries, local authorities, judges and justice authorities, police, teachers or extension workers. All these are legal duty-bearers'.

²²⁷ Unicef 'Human- Rights Based Approach: Statement of Common Understanding' <http://www.unicef.org/sowc04/files/annexb.pdf> 1-3 accessed 20 February 2015.

²²⁸ Harsh Mander 'Rights as a struggle- towards a more just and humane world' 240 in Gready P and Ensor *Jonathan Re-inventing Development?: Translating Rights- Based approaches from theory into practice* (Zed Books 2005). <http://press.uchicago.edu/ucp/books/book/distributed/R/bo20851800.html> accessed 17 July 2018 see also Boesen J and Martin T *Applying a Rights –Based Approach: An Inspirational Guide For Civil Society* (The Danish Institute for Human Rights 2007) 9. 'The growing recognition that poverty is about more than economic needs and that growth centred development has to address more complex and fundamental causes of poverty and inequality such as discrimination, exploitation and abuse. This also ensures that poverty is not merely seen as a fact of individual circumstances or capacities, but rather perceived within the structures of power and inequity embedded in the local, the national and the global context'.

delivering their rights.²²⁹ The socially excluded are treated as partners of the state and not merely recipients of benefits; an approach which may reverse the causes of their denial of rights.²³⁰ Within the human rights based approach, 'possessing and exercising a right is an active stance of holding ones government and others to account'. Without the notion of rights, amid competing demands, governments will simply make people beneficiaries and 'objects of charity which is disempowering'.²³¹ The human rights-based approach, therefore, positions people as agents of change and not just beneficiaries.

Human rights-based approaches to the developments of basic education advocate for a more active and informed public and a change of mentality towards more consultative forms of development.²³² The approaches pay attention to both outcomes and processes, ensuring that participation is done in order to achieve a result desired by all.²³³ They make the state the vehicle through which rights are enforced.²³⁴ The state, therefore, anchors the re-distribution of public goods as human rights, in order for justice to be achieved.²³⁵ Owing to the fact that a rights-based approach informs people about their claims and does not portray them as objects of charity, they do not only focus on 'poverty reduction' but fight 'poverty production'.²³⁶

²²⁹ Unicef 'Human- Rights Based Approach: Statement of Common Understanding' <http://www.unicef.org/sowc04/files/annexb.pdf> 1-3 accessed 20 February 2015.

²³⁰ Ibid.

²³¹ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic 2013) 12.

²³² Mander H 'Rights as a struggle- towards a more just and humane world' 245 in Gready P and Ensor Jonathan *Re-inventing Development?: Translating Rights- Based approaches from theory into practice* (Zed Books 2005) <http://press.uchicago.edu/ucp/books/book/distributed/R/bo20851800.html> accessed 17 July 2018.

²³³ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 12.

²³⁴ Unicef 'Human- Rights Based Approach: Statement of Common Understanding' Unicef 'Human- Rights Based Approach: Statement of Common Understanding' 1-3 <http://www.unicef.org/sowc04/files/annexb.pdf> accessed 20 February 2015.

²³⁵ Mander H 'Rights as a struggle- towards a more just and humane world' 246 in Gready P and Ensor Jonathan *Re-inventing Development?: Translating Rights- Based approaches from theory into practice* (Zed Books 2005), see <http://press.uchicago.edu/ucp/books/book/distributed/R/bo20851800.html> accessed 17 July 2018

²³⁶ Banik D, 'Implementing Human Rights-Based Development: Some preliminary evidence from Malawi', Expert seminar: Extreme poverty and human rights Geneva, 23-24 February 2007 http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan_Banik.pdf accessed 24 April 2010.

The goal is development but the development is also driven by the people because they know their rights.

2.3 The right to basic education and international law

2.3.1 Introduction

International human rights have been categorised into three categories, first generation or civil and political rights, second generation of socio-economic rights and third generation rights which focus on development and the environment. Although this sharp categorisation is done in this part of the dissertation, it is important to acknowledge that, the characterisation of human rights as different and imposing 'negative' or 'positive' obligations is problematic in theory and practice. As discussed below, despite categorisations, in practice human rights are equal and their realisation practically requires a combination of both 'positive' and 'negative' conduct from governments.

2.3.1.1 First generation human rights

The focus on liberation from oppression in the eighteenth and nineteenth century led to the fight for rights, such as the right to human dignity, equality, and life - known as civil and political rights.²³⁷ These rights also known as first generation human rights are liberty-oriented and impose a duty of 'non-interference' by the government.²³⁸ First generation rights have immediate obligations, are individualistic in nature and focus more on the liberty of the individual.²³⁹ They impose negative obligations on the state by requiring it to refrain from specific actions against citizens.²⁴⁰ They, therefore, spell out the conception of human rights, linking them to freedom, resulting in

²³⁷ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 22.

²³⁸ Ruppel C O 'Third Generation Human Rights and the Protection of the Environment in Namibia' 101 <http://www.kas.de/upload/auslandshomepages/namibia/humanrights/ruppel1.pdf> accessed 17 July 2018.

²³⁹ Ibid.

²⁴⁰ Ife Jim, *Human Rights and Social Work: Towards Rights Based Practice*, (Cambridge University Press 2012) 27.

negative obligations on the part of the state.²⁴¹ The almost overall acceptance that civil and political rights impose negative obligations on the state has seen their recognition and protection by most national Constitutions, including those of Zimbabwe and South Africa.

2.3.1.2 Second generation human rights

The conceptions of socio-economic rights, intellectually, originated in the 19th and 20th century tied to socialism and social democracy.²⁴² It was conceived that the state must not only protect citizens from abuses but must also provide socio-economic focused human rights for citizens.²⁴³ With political liberation, inequalities, industrialisation and the changed focus of the role of the state towards the provision of public good, it became important to articulate more on the provision of socio-economic rights.²⁴⁴ Socio-economic rights impose positive obligations on the part of the state, obliging it to realise or provide such rights as the right to education and the right to health.²⁴⁵ These require 'affirmative action' or positive steps by governments to provide the rights.²⁴⁶ The right to basic education is a socio-economic right.

2.3.1.3 Third generation human rights

Apart from civil, political, as well as socio-economic rights, with globalisation and the concern over the interconnectedness of humanity, environmental and development rights became more pronounced leading to a third generation of human rights.²⁴⁷ These rights include the right to live in an environment that is clean and protected

²⁴¹ Ibid.

²⁴² McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 23.

²⁴³ Ibid

²⁴⁴ Ife J, *Human Rights and Social Work: Towards Rights Based* (Cambridge University Press 2012) 45.

²⁴⁵ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 23.

²⁴⁶ Ruppel C O Third Generation Human Rights and the Protection of the Environment in Namibia 101 <http://www.kas.de/upload/auslandshomepages/namibia/humanrights/ruppel1.pdf> accessed 17 July 2018.

²⁴⁷ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 23.

from destruction, the right to self-determination and the right to development.²⁴⁸ These rights are known as 'solidarity rights' and impose affirmative obligations both on the state and individuals.²⁴⁹ It is notable that without the observance of third generation human rights, the attainment of both first and second generation rights by states will be impossible. As long as the environment is not protected, humans will continue to face global warming, deforestation, flooding which all affect the delivery of rights such as food and health. The rights to food and health are complementary rights which make it possible for children to enjoy their education.

2.3.2 The equal status of human rights: interdependence, interrelatedness and indivisibility of all human rights

Despite the above-mentioned categories of human rights, it is important to note that, all human rights provided by all international law instruments, are regarded as equal in importance. They are interdependent, interrelated and indivisible as emphasised by the Vienna World Conference on Human rights in 1993.²⁵⁰ The right to education belongs to the whole body of human rights, as such its enjoyment is not possible without the enjoyment of all the other human rights. Human rights are indivisible in that no human right is more important than the other²⁵¹, they 'have equal status, and cannot be positioned in a hierarchical order'.²⁵² Human rights are interdependent in that, although they are different, individuals are able to fully enjoy one category of right(s) only if they are enjoying the other categories of human rights.²⁵³ Rights are interrelated in the sense that they share the same foundation and common characteristics and they are part of a family that is the body of human rights.²⁵⁴ All

²⁴⁸ Ruppel C O 'Third Generation Human Rights and the Protection of the Environment in Namibia' 102 <http://www.kas.de/upload/auslandshomepages/namibia/humanrights/ruppel1.pdf> accessed 17 July 2018.

²⁴⁹ Ibid.

²⁵⁰ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 23.

²⁵¹ 'Human Rights principles' <http://www.unfpa.org/rights/principles.htm> accessed 12 May 2010.

²⁵² Ibid.

²⁵³ Whelan D J 'Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights'(2008), Working paper 7, The Human Rights Institute, University of Connecticut 2

²⁵⁴ Ibid 3-4.

the above shows that the right to basic education is part of a complementary framework and reliant on the enjoyment of other human rights.²⁵⁵

Confirming the equal importance and status of rights, state parties to the International Covenant on Civil and Political Rights (ICCPR) recognise, correctly, that

in accordance with the Universal Declaration, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.²⁵⁶

Similarly, in its third preamble, parties to the ICESCR (which provides for socio – economic rights) state that

in accordance with the Universal Declaration, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.²⁵⁷

The above intrinsic relationship between the different categories of human rights acknowledged by the two international instruments is one of the cornerstones of international law. A number of Conventions, such as the Convention on the Rights of

²⁵⁵ Flowers N 'Human Rights Here and Now: Celebrating the Universal Declaration of Human Rights' <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.htm> accessed 17 July 2018. 'to say human rights are universal means that there are other rights claims which cannot qualify as universal and therefore cannot fit into the category of human rights perhaps we may just call them rights. Imagine a situation where a professor demands a right to the latest technological gadget like an ipad which must be bought by the same funds which pay school fees for his students. Can it be said that the professor has a right to the latest technological gadget? Is the possession of a latest technological gadget at work a right demanded by all workers? It may be concluded that the right to a latest technological gadget is not a human right but perhaps a rights claim in the view of the professor given the arguments he makes'.

²⁵⁶ *International Covenant on Civil and Political Rights*, (1966). The ICCPR is important for this discussion because it provides for rights such as the right to dignity see A 7. 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. A 4 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant. Dignity and equality are both rights and values which need to be invoked in determining the scope and content of basic education as sanctioned by the Constitutions of both Zimbabwe and South Africa discussed in the next chapters. Human rights being interdependent and indivisible as discussed below, rights such as human dignity and equality cannot be separated from the right to education and are invoked to condemn any governments' violations relating to the provision of the right to basic education'.

²⁵⁷ *International Covenant on Economic, Social and Cultural Rights. Adopted by the General Assembly of the United Nations on 16 December (1966)*, Preamble.

the Child, (CRC) also acknowledge the interdependence and connectedness of the whole body of human rights by providing for both socio-economic and political rights in one Covenant.²⁵⁸ Also, the Declaration on the Right to Development, 1986 states that, equal consideration and attention should be paid towards implementing, promoting and protecting civil and political rights as well and cultural, social and economic rights as they are interdependent and indivisible.²⁵⁹ The Additional Protocol to the American Convention on Human Rights in the Matter of Economic, Social and Cultural Rights, also reaffirms in its preamble that human rights are indivisible.²⁶⁰

The lack of enjoyment of one category of rights, therefore, affects the enjoyment of the right to basic education. An example is that, without freedom of movement which is categorised as a civil and political right, one is not able to enjoy the right to education which requires free movement to schools. Without access to water, learning will become impossible at school due to the dirty and unhealthy conditions children will be exposed to which will eventually spread diseases. The indivisibility and interdependence of rights is also best understood by the right to life which is a civil and political right. Life as broadly understood in this dissertation includes everything involving human beings, from their time of conception up to the time of death. This means that the satisfaction of socio-economic rights such as education, nutrition, the provision of health facilities and the provision of shelter which enhance the quality of life for a human being must all be understood to be a part of the right to life. Life being a civil and political right cannot be enjoyed without the enjoyment of all socio-economic rights including the right to education.

²⁵⁸ *Convention on the Rights of the Child*, (1990).

²⁵⁹ *Declaration on the Right to Development*, 1986 A 6 of the Declaration states this clearly:

'1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.'

²⁶⁰ Melish 'T Protecting, social, economic and cultural rights in the Inter-American rights system: A manual on presenting claims' (2002) Centre for International Human Rights, Yale Law School 13.

Following the Universal Declaration and within the legal framework, human rights are not only indivisible, interrelated and interdependent²⁶¹ but also inalienable and universal.²⁶² They are universal in that they apply to every human being on the basis of their humanity. There is an international recognition that each right, including the right to education has a content which accrues to every human being by virtue of them being human and regardless of where they are.²⁶³ Human rights are inalienable in that no one can lose a human right in whatever circumstance and their enjoyment can only be limited in certain circumstances, where there is a need to safeguard the enjoyment of human rights by others.²⁶⁴ The Universal Declaration confirms the universal and inalienable nature of rights by stating that world peace, freedom and justice is only possible through recognition of 'the inherent dignity and of the equal and inalienable rights of all members of the human family'.²⁶⁵ The true provision of basic education is therefore only possible when the provision of other human rights is equally regarded as important which motivates the arguments for the justiciability of all categories of rights and in the context of this dissertation, socio-economic rights of which the right to education is part.

2.3.3 The binding nature of international law

Within the human rights-based approach, international law often determines the scope and content of a right and provide written grounds for humans to justify any claims.²⁶⁶

²⁶¹ Ife J, *Human Rights and Social Work: Towards Rights Based Practice*, (Cambridge University Press 2012) 23.

²⁶² Whilst this dissertation accepts the view that human rights are accepted universal human norms and standards rooted in every culture, Rayner M disputes their universality stating that 'The idea of 'human rights' is not universal - it is essentially the product of 17th and 18th century European thought. Even the idea of 'rights' does not necessarily exist in every society or advanced civilisation. Rights are not the same thing as standards of behaviour punishable or required by rules, which can be fundamentally unfair to individuals, or used to oppress minority interests', Rayner M, 'History of human rights' see <http://www.universalrights.net/main/histof.htm> accessed 18 July 2018.

²⁶³ Sarmiento R V 'Human Rights Universal? Indivisible? Interdependent?' <http://www.hrsolidarity.net/mainfile.php/1995vol05no02/92/> accessed 12 June 2010.

²⁶⁴ 'What are human Rights' see <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights> accessed 18 July 2018.

²⁶⁵ Flowers N 'Human Rights Here and Now: Celebrating the Universal Declaration of Human Rights' see <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.htm> accessed 17 July 2018

²⁶⁶ The legal documents are often Constitutions of countries as they are read together with subordinate legislation.

Human rights, codified by international conventions, declarations and treaties are what is termed 'international law'.²⁶⁷ International law is meant to supervise states and to emphasise the importance of individuals as rights-holders and states as duty-bearers.²⁶⁸ It has three sources – 'customary international law, treaties and conventions and soft law'.²⁶⁹ Only treaties and conventions become part of national laws by ratification.²⁷⁰ To explain the binding nature of treaties and conventions, the Vienna Convention on the Law of Treaties states that, states are bound by international laws through ratification - an act which makes a country bound by obligations of international law and accountable for any breaches.²⁷¹ On the other hand, if a country is just a signatory to an international law instrument, it is bound by the provisions of the instrument only to the extent that it must not act in contradiction to those provisions.²⁷² If a country has neither signed nor ratified an international instrument, it is not bound by the provision of the international instrument unless the international instrument is deemed to be international customary law.²⁷³

International customary law does not become part of a nation's law by ratification like treaties and conventions but its provisions are widely recognized as binding upon states due to the worldwide recognition and acceptance of the international instrument.²⁷⁴ Declarations, like the World Declaration on Basic Education

²⁶⁷ Boesen J and Martin T 'Applying a Rights –Based Approach: An Inspirational Guide For Civil Society' (Danish Institute for Human Rights 2007), 38.

²⁶⁸ 'The role of international law in South African health law and policy-making' 131 <http://www.section27.org.za/wp-content/uploads/2010/04/Chapter5.pdf> accessed 14 July 2010.

²⁶⁹ Ibid.

²⁷⁰ *Vienna Convention on the Law of Treaties, May 23, (1969), A 26, 'Ratification: Creates a binding international legal obligation to perform the terms of a treaty in good faith (art. 26). Failure to perform the relevant terms signifies a breach of international law, for which the breaching State may be held internationally accountable'.*

Art 18 'Signature: Creates a binding international legal obligation to refrain from acts that would defeat the object and purpose of the treaty'.

²⁷¹ *Vienna Convention on the Law of Treaties, May 23, (1969), A 26, 'Ratification: Creates a binding international legal obligation to perform the terms of a treaty in good faith (art. 26). Failure to perform the relevant terms signifies a breach of international law, for which the breaching State may be held internationally accountable'.*

Art 18 'Signature: Creates a binding international legal obligation to refrain from acts that would defeat the object and purpose of the treaty'.

²⁷² Ibid.

²⁷³ Boesen J and Martin T 'Applying a Rights –Based Approach: An Inspirational Guide For Civil Society' (Danish Institute for Human Rights 2007), Copenhagen 38.

²⁷⁴ Bailey P 'The creation of the Universal Declaration of Human Rights' 1 <http://www.universalrights.net/main/creation.htm> accessed 12 July 2016.

which is the foundational treaty defining basic education in this dissertation, 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 [law]'.²⁷⁵ Continental instruments, such as the African Charter on the Rights and Welfare of the Child are also considered as part of the body of international law by this dissertation.²⁷⁶ All the above mentioned sources of international law are internationally recognised and useful in guiding states on issues, such as those pertaining to delivering basic education. They hence provide sizeable guidance in determining the scope and content of the right to basic education in Zimbabwe and in South Africa.²⁷⁷

It is also important to note that, with the application of international law, some countries adopt a monist whilst others adopt a dualist system. A dualist system followed by both South Africa and Zimbabwe considers that, national law and international laws operate separately and there cannot be a conflict between national law and international law.²⁷⁸ With a dualist system, international law operates at international level whilst national law operates within the borders of a country.²⁷⁹ For international law to operate in a country following a dualist system, the contracting state must adopt it into national law through the legal process determined by the country.²⁸⁰ Following the dualist approach, the Zimbabwean Constitution provides that it obligates Zimbabwe to ensure that the international conventions, treaties and agreements Zimbabwe is party to are incorporated into national law.²⁸¹ Any ratified international instrument does not bind Zimbabwe unless it is approved by parliament and it will not be part of Zimbabwean domestic law unless its incorporated through an

²⁷⁵ Section 27 'The role of international law in South African health law and policy-making' 132 <https://section27.org.za/wp-content/uploads/2010/04/Chapter5.pdf> accessed 17 July 2018.

²⁷⁶ Kaime T *The African Charter on the Rights and Welfare of the Child a socio-legal perspective* (PULP 2009) 31 'As observed in the previous chapter, the African Charter on the Rights and Welfare of the Child (African Children's Charter) is a derivative instrument. It therefore forms part of a long line of international and regional instruments aimed at the promotion and protection human rights'.

²⁷⁷ Office of the United Nations High Commission for Human Rights 1996-2007, 'International Law', 1 <http://www2.ohchr.org/english/law/> accessed 28 July 2018.

²⁷⁸ Marian Brindus 'Dualist and Monist Theories, international laws' comprehension of these theories' http://revcurentjur.ro/old/arhiva/attachments_200712/recjurid071_22F.pdf accessed 9 July 2019.

²⁷⁹ Ibid.

²⁸⁰ Ibid

²⁸¹ *Constitution of Zimbabwe, 2013* S 34.

Act of parliament.²⁸² Also following a similar approach the South African Constitution provides that, an international agreement which has been ratified binds South Africa if it is approved by the National Assembly and National Council of Provinces.²⁸³ If it does not require accession or ratification it binds South Africa without such approval but must still needs to be tabled before the National Assembly and National Council of Provinces.²⁸⁴ Even when ratified, an international agreement becomes law in South Africa when it has been enacted into law through national legislation.²⁸⁵ The monist approach on the other hand sees international law and national laws as one unified system. With the approach 'one can conceive of international law together with the state legal systems as a unified system of norms in exactly the same way as one is accustomed to regarding the state legal system as a unity'.²⁸⁶ The ratification, adherence to and preference of international law positions explained in chapter 3 , 4 and 5 done by both Zimbabwe and South is progressive, however in these dualist nations, citizens will fully benefit from the provisions of international law when ratified international instruments are further domesticated.

2.4 International human rights instruments and the right to education

2.4.1 The 1948 Universal Declaration of Human Rights and the right to education

The most renowned legal instrument which began to protect human rights including the right to education, is the Universal Declaration of Human Rights, 1948 (Universal Declaration). During the nineteenth and twentieth centuries, the devastating effects of war, particularly, world war II, made the observance of human rights a universal concern leading to the formation of the United Nations.²⁸⁷ The United Nations came

²⁸² *Constitution of Zimbabwe, 2013*, S 327 (2) (a) (b),

²⁸³ *Constitution of South Africa, 1996*, S 231 (2).

²⁸⁴ *Ibid*, S 231 (3).

²⁸⁵ *Ibid*, S 231 (4).

²⁸⁶ Spaak Tobern ' Kelsen on Monism and Dualism' *file:///C:/Users/chiedza.simbo/Downloads/SSRN-id2231530.pdf* accessed 07 July 2019.

²⁸⁷ Australian Human Rights Commission 'The Origins of Modern Human Rights Laws' <https://www.humanrights.gov.au/commission-website-information-students-human-rights-essentials-resource-sheet-origins-modern-human> accessed 20 February 2016 'The extermination by Nazi Germany of over six million Jews, Sinti and Romani (gypsies), homosexuals, and persons with disabilities horrified the world. Trials were held in Nuremberg and Tokyo after World War II, and officials from the defeated countries were punished for committing war crimes, "crimes against peace," and "crimes against

into existence in 1945 and a United Nations Commission of Human Rights (Commission) was set up and given an obligation to draft a document which would spell out fundamental human rights.²⁸⁸ This led to the drafting of the first major human rights document in 1948 called, the Universal Declaration of Human Rights.²⁸⁹ Despite its criticisms as a statement of the views of Western countries, due to their dominance during its formulation, the Universal Declaration has been accepted as mirroring the humane ideas shared across cultures and religions.²⁹⁰ Its ideological base, as noted in article 2 states that, 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another

humanity" Governments then committed themselves to establishing the United Nations, with the primary goal of bolstering international peace and preventing conflict. People wanted to ensure that never again would anyone be unjustly denied life, freedom, food, shelter, and nationality. The essence of these emerging human rights principles was captured in President Franklin Delano Roosevelt's 1941 State of the Union Address when he spoke of a world founded on four essential freedoms: freedom of speech and religion and freedom from want and fear (See Using Human Rights Here & Now). The calls came from across the globe for human rights standards to protect citizens from abuses by their governments, standards against which nations could be held accountable for the treatment of those living within their borders'. See also, 'Flowers N 'Human Rights Here and Now: Celebrating the Universal Declaration of Human Rights' <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.htm> accessed 17 July 2018 'The language if human rights have their lineage drawn from the twentieth century, developed in response to horrendous crimes by humanity against itself, not to side line the impact humanity also had upon the planet. With well over 203 million people killed in that century by genocide , wars and other forms of cleansing and clearing, collective humanity's response was to institutionally inscribe an international standard of principles by which protection and affirmation could be declaration. The Universal Declaration of Human Rights, became a moral map of survival, a means of legitimising core human rights concerns across the spectrum of humanities' activities' see also Elisabeth J et al *Activating Human Rights*; (Peter Lang AG International Publishers 2006) 20.

²⁸⁸ Australian Human Rights Commission Website: Information for Students - Human Rights Essentials - Resource Sheet: 'The Origins of Modern Human Rights Laws'

<https://www.humanrights.gov.au/commission-website-information-students-human-rights-essentials-resource-sheet-origins-modern-human> accessed 20 February 2016.

'The UN's strong emphasis on human rights made it different from previous international organisations. UN member countries believed that the protection of human rights would provide for freedom, justice and peace for all in the future. The beginning of the UN's basic document, the UN Charter, stated that the peoples of the United Nations were determined: '*... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... and to promote social progress and better standards of life in larger freedom*' In its early years, the UN set about establishing and documenting basic human rights standards that would serve all people and all nations. It has continued to expand the range of standards that set out the obligations that governments and people can be expected to live up to. In doing this the UN was aware of the rights of sovereign states to decide whether they would be bound under International law by these standards or whether they would incorporate these standards into domestic legislation.'

²⁸⁹ Ibid.

²⁹⁰ Ife Jim, *Human Rights and Social Work: Towards Rights Based Practice*, (Cambridge University Press 2012) 16.

in a spirit of brotherhood'.²⁹¹ The ideological base of the Declaration is embracing of all humanity and is arguably shared cross-culturally and even across religions.

Whilst the Universal Declaration is not a legally binding document, the United Nations accepts it as the foundation of human rights at international level.²⁹² It is perceived as a very serious document in which '[t]he creation of the language of rights is genesis, binding standards are the commandments, and the lack of implementation is sin'.²⁹³ Subsequent to the drafting of the Universal Declaration of Human Rights, 'international human rights conventions have sought to define human rights and to provide mechanisms for people to appeal against the abuse or denial of these rights and to establish sanctions against those who are responsible for violating them'.²⁹⁴ In order to enforce the provisions of the Universal Declaration, during the seventh session of the United Nations Commission on Human Rights (Commission), governments in the Commission agreed that the two categories of rights provided by the Declaration needed to be elaborated in two separate covenants.²⁹⁵ The Commission accepted that

²⁹¹ *Universal Declaration of Human Rights*, (1948) A2.

²⁹² Dimitrijevic V 'Customary Law as An Instrument For the Protection of Human Rights' ISPI Working Paper 7 https://www.ispionline.it/it/documents/wp_7_2006.pdf accessed 18 July 2018. 'Twenty years after the adoption of the Declaration two important international gatherings, the Assembly for Human Rights in Montreal and the Teheran International Conference on Human Rights, adopted statements and proclamations to the effect that they believed that the Universal Declaration had become a part of customary international law'.

²⁹³ Bernstoff J 'The Changing Fortunes of The Universal Declaration of Human Rights: Genesis and Symbolic Dimensions Of the Turn to Rights in International Law' (2008) *The European Journal of International Law* 917

²⁹⁴ Ife Jim, *Human Rights and Social Work: Towards Rights Based Practice*, (Cambridge University Press 2012) 45.

²⁹⁵ 'Human rights in the administration of justice, Chapter 14: The Role of the Courts in Protecting Economic, Social and Cultural Rights'

<https://www1.umn.edu/humanrts/monitoring/adminchap14.html> accessed 18 July 2018.

'Some governments argued that a single Covenant would be ideal as emphasising the interdependence of rights. Other governments argued that "all those countries who opposed a single covenant automatically rejected the fundamental unity of economic, social and cultural rights with civil and political rights" and that "a few States, including Canada, France, the United Kingdom and the United States of America [placed] their national interest above every other considerations [and] were trying to segregate the economic, social and cultural rights. Governments however collectively noted the difference in the formulation of the two categories of human rights which became e important especially in view of the fact that with socio-economic rights are subject to resource availability and progressive realisation. France particularly highlighted that socio-economic rights would need a separate Covenant with its own obligations given that it had taken it more than forty years to have a functional social security system and that the struggle against literacy would require twenty to twenty-five years to conquer given the need to set up schools, train teachers and complete other tasks. The United States also pointed out that rights such as medical care and access to education 'depended very much on

civil and political rights as well as socio-economic rights would require different implementation procedures.²⁹⁶ The acceptance led to the drafting of two covenants - the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In relation to the right to education, article 26 (1) of the Universal Declaration states that, 'everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory'.²⁹⁷ In this dissertation, the provisions of the Universal Declaration relating to the right to basic education also form the foundation of the analysis for the scope and content of the right to basic education.

2.4.2 The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) and the right to basic education

2.4.2.1 Convention Provisions

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for socio-economic rights. Following the Universal Declaration, which protects socio-economic rights, ICESCR remains the foundational implementing treaty on economic,

resources of finance, equipment and personnel, which were undoubtedly not available in sufficient measures in all countries" making immediate their enforceability an onerous task'.

²⁹⁶ It further drafted many other Covenants including the, *Convention Relating to the Status of Refugees*, (1951), *Convention on the Elimination of All Forms of Discrimination against Women*, (1979), *Convention on the Rights of the Child*, (1989), *The Convention on the Elimination of All Forms of Racial Discrimination* (1969), *The Convention on the Prevention and Punishment of the Crime of Genocide 1951*, *The Convention on the Political Rights of Women*, (1954) , *The Slavery Convention of* (1926), *The Convention against Torture and Other Cruel*, (1987) , *Inhuman or Degrading Treatment or Punishment*, (1987).

²⁹⁷ *Universal Declaration of Human Rights*, (1948) A 26 (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.'

social and cultural rights or second generation rights.²⁹⁸ In relation to the right to basic education it is said to be 'the most comprehensive description of the right to education [for children] in international law'.²⁹⁹ Its pronouncements on education are mainly through its General Comments 3, 11 and 13³⁰⁰ published by the Committee on Social, Economic and Cultural Rights (Committee). In the assessment of this dissertation, the provisions of the General Comments are very pivotal in understanding the scope and content of the right to basic education and are interrogated very comprehensively in this dissertation. Both South Africa and Zimbabwe³⁰¹ have ratified the ICESCR and their Constitutions provide for socio-economic rights including the right to basic education. Following the ICESCR, socio-economic rights are also now provided for in other continent-based international instruments, such as the African Charter on Human and People's Rights, American Convention on Human Rights, 1969 (including the Additional Protocol in the Area of Economic, Social and Cultural Rights, 1988) and the European Social Charter 1996.

The ICESCR as read together with its General Comments is considered 'by theorist to be the most authoritative expression of the right to education'.³⁰² In relation to the right to education for children it states that,

The States Parties to the present Covenant recognize the right of everyone to education. Primary education shall be compulsory and available free to all; secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.³⁰³

²⁹⁸ United Nations 'Economic Social and Cultural Rights; Handbook for National Human Rights Institutions' (2005) 12 Professional Training Series number <http://www.ohchr.org/Documents/Publications/training12en.pdf> 5 accessed 18 July 2018.

²⁹⁹ L Arendse 'The obligation to provide free basic education in South Africa: An international Law Perspective' (2011) PER/PELJ 100.

³⁰⁰ *General Comment 13: The right to education*, (1999).

³⁰¹ *The International Covenant on Economic, Social and Cultural Rights*, (1966) were was acceded to by Zimbabwe in May 1991 and by South Africa in January 2015.

³⁰² McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 28.

³⁰³ *International Covenant on Economic, Social and Cultural Rights* (1966), A 13 1 (a) and (b).

2.4.2.2 General Comment 3: The nature of state obligations, (1990)

It is important to note the obligations relating to the provision of socio-economic rights which emanate from the Committee's interpretation of Article 2 of the ICESCR.³⁰⁴ Article 2 of the ICESCR mandates each member state to 'take steps', 'to the maximum of its available resources' for the provision of socio-economic rights provided by the Convention.³⁰⁵ Interpreting article 2, the Committee clarifies that, whilst the ICESCR provides for obligations with progressive realisation within the limits of available obligations, the obligation to 'take steps' towards attaining the rights provided by the ICESCR is not qualified.³⁰⁶ Steps towards the goal must be taken immediately as soon as the convention is in force in a country.³⁰⁷ The steps must be, 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised by the covenant'.³⁰⁸ The steps must be satisfied by any means appropriate, which includes adopting legislative measures.³⁰⁹ Education is mentioned by the Committee as a field where countries must take steps towards the enactment of legislation by providing its scope and content.³¹⁰ Other 'steps' to ensure the provision of the right to education also include the provision of judicial measures for its justiciability³¹¹ as well as the provision of resources to finance its provision.³¹²

³⁰⁴ Ibid A 2 (1). 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'.

³⁰⁵ Ibid.

³⁰⁶ *General Comment 3: The nature of state obligations*, (1990), Para 2.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Ibid Para 3.

³¹⁰ Ibid para 3.

³¹¹ Ibid para 5.

³¹² Ibid para 7.

2.4.2.3 General Comment 11: Plans for Primary Education (1999)

General Comment 11 is based on the article 14 of the ICESCR which states that:

Each state, party to the present Covenant which, at the time of becoming a party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction, compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.³¹³

The Committee elaborates some elements of article 14, such as the element of compulsory and free provision of education.³¹⁴ This element simply makes it mandatory for parents, guardians and the state to treat primary education as compulsory and free.³¹⁵ The education intended to be compulsory is the one the Committee views to be 'adequate in quality, relevant to the child' and capable of making the child able to realise other human rights.³¹⁶ The free of charge element is unequivocal.³¹⁷ Free education goes beyond the non-provision of fees by parents to the prohibition of charging indirect costs, such as compulsory levies.³¹⁸ Any fee is a disincentive and jeopardises the realisation of the need to enjoy the right to education.³¹⁹

2.4.2.4 General Comment 13: The right to education, 1999

Through General Comment 13, the Committee notes that education is an empowerment right which allows people to enjoy other human rights.³²⁰ It is a right which lifts socially and economically marginalised people from poverty and allows them to participate equally in their communities.³²¹ The Committee notes the significant role

³¹³ *International Covenant on Economic, Social and Cultural Rights. Adopted by the General Assembly of the United Nations on 16 December (1966) A 14.*

³¹⁴ *General Comment 11: Plans for Primary Education*, (1999), Para 6.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid*, para 7.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *General Comment 13: The Right to Education* (1999), para 1.

³²¹ *Ibid*

of the right to education as a right which empowers vulnerable groups in society, such as women and children, and allows them to defend themselves from exploitation of any form.³²² Education allows a human being to partake in the 'joys and rewards of human existence' through freeing their mind and enlightening it so that it is mobile and flexible.³²³ Education is thus considered as 'one of the best financial investments states can make'.³²⁴

In relation to the aims of education, the Committee states that, state parties must ensure that, the aims of education are in compliance with the provisions of the ICESCR stated in article 13 (1) including those of other international instruments such as the World Declaration³²⁵ and the CRC.³²⁶ Education in any form must comply with four interrelated elements which are discussed in this dissertation under the section on the five components of the right to basic education. These interrelated elements as will be discussed are availability, accessibility, acceptability and adaptability³²⁷. The Committee acknowledging guidance from the World Declaration states that, the main delivery of basic education, outside the family environment is primary education.³²⁸ Primary education must ensure that the basic learning needs of children are met.³²⁹ Primary education must be understood not to be basic education but to have a close correspondence with it.³³⁰ Primary education is the component that is the most important in relation to basic education³³¹ and its characteristics are that it must be compulsory and free.³³² Secondary education like any form of education must also possess the four interrelated elements stated above.³³³ Whilst primary education is the introduction phase for basic education, secondary education, 'includes the

³²² Ibid

³²³ Ibid

³²⁴ Ibid

³²⁵ Ibid para 5.

³²⁶ Ibid

³²⁷ Ibid para 6.

³²⁸ Ibid, Para 9.

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid, Para 10.

³³³ Ibid, Para 11.

completion of basic education' and consolidates lifelong learning.³³⁴ Secondary education must therefore also be made eventually free.³³⁵

In relation to discrimination in education, the Committee states that all grounds of discrimination are prohibited and there is an immediate obligation on the state to comply.³³⁶ Taking note of the provisions of the CRC the Committee states that, 'the principle of non-discrimination extends to all persons of school age residing in the territory as a state party, including non-nationals, and irrespective of their legal status'.³³⁷ In terms of discipline, the Committee states that, governments must ensure that schools safeguard the dignity of learners and aim to use non-violent means of discipline.³³⁸

2.4.3 Convention of the Rights of the Child 1990 (CRC)

2.4.3.1 Convention provisions

The United Nations High Commissioner for Refugees (UNHCR), states that '[w]hile child rights are set forth in a number of international legal instruments, CRC is the most authoritative international legal instrument for the protection of children's human rights, with almost universal acceptance'.³³⁹ The CRC is a groundbreaking document which views children as rights-holders and not only people in need of protection.³⁴⁰

States party to the CRC recognise that, 'childhood is entitled to special care and assistance' and acknowledges that, 'the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection,

³³⁴ Ibid, Para 12.

³³⁵ Ibid, Para 13.

³³⁶ Ibid, Para 31.

³³⁷ Ibid, Para 34.

³³⁸ Ibid, Para 41.

³³⁹ 'UNHCR Guidelines on Formal Determination of the Best Interest of The Child', 6 <http://www.unicef.org/violencestudy/pdf/BID%20Guidelines%20%20provisional%20realease%20May%2006.pdf> accessed 02 February 2013..

³⁴⁰ McCowan Tristan *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 29.

before as well as after birth'.³⁴¹ They agree that, children have a right to primary education which must be free and compulsory.³⁴² The parties recognise the need to develop secondary education and to eventually make it free.³⁴³ They agree that education must be directed at the full development of the children's talents, physical and mental abilities, their respect of human rights and freedoms and their respect of their own identity, language and values.³⁴⁴ Education shall prepare a child to live in a society in a spirit of understanding, friendship, tolerance, peace, thus equalise diverse people.³⁴⁵ Education must also lead children to respect their environment.³⁴⁶

The CRC also embodies two general principles that provide the context in which we understand the right of the child to basic education, in this dissertation. First, in all actions that affect children, their best interest must be taken into consideration.³⁴⁷ Parties agree that the best interest of the child shall be of primary consideration in all matters concerning children.³⁴⁸ Whilst the CRC itself does not define the meaning of 'best interest of the child', the UNHCR states that it alludes to the overall wellbeing of the child considering the specific situations and risks that children face.³⁴⁹ Second, children must be protected from any form of discrimination.³⁵⁰ State parties agree that all rights in the Convention must be provided without discrimination of any kind including any on the bases of 'national, ethnic or social origin'.³⁵¹ Further, they agree that appropriate measures should be taken by each state to protect children against any form of discrimination or punishment on reason of their status or that of their parents or families.³⁵² In addition, parties agree that measures must be taken to

³⁴¹ *Convention on the Rights of the Child*, (1990), preamble.

³⁴² Ibid, A 28 (1) (a).

³⁴³ Ibid, A 29 (1) (b).

³⁴⁴ Ibid, A 29 (1) (a) (b) (c).

³⁴⁵ Ibid, A 29 (1) (d).

³⁴⁶ Ibid, A 29 (1) (e).

³⁴⁷ Ibid, A 3.

³⁴⁸ Ibid, A 3 (1).

³⁴⁹ UNHCR 'Guidelines on determining the best interest of the child' (2008) 8 <http://www.unhcr.org/4566b16b2.pdf> accessed 18 July 2018.

³⁵⁰ *Convention on the Rights of Children*, (1990), A 2.

³⁵¹ Ibid, A 2 (1).

³⁵² Ibid, A (2) (2).

ensure that children seeking refuge or considered refugees must enjoy all rights in the Convention and in other international human rights instruments.³⁵³

2.4.3.2 General Comment 1: The aims of education (2001)

The Committee on the Rights of the Child states that the core value of the CRC is to protect the rights and dignity of the child.³⁵⁴ The aim of education must be to ensure that children develop to their full potential, learn to respect human rights and become fully aware of their identity, develop the capability to socialise and interact with others and respect their environment.³⁵⁵ Education must aim to empower children, to develop their life skills and to ensure that they develop a culture, informed by human rights values.³⁵⁶ Education must be centred on, and be friendly to the child.³⁵⁷ Education is only about access school but also about quality content.³⁵⁸ Education is therefore a tool which must allow children to live a 'balanced life which is informed by a human rights' friendly response to [diverse] challenges' and this must be reflected in national education programmes.³⁵⁹

2.4.4 The Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedom (Recommendation) 1974³⁶⁰

The Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental

³⁵³ Ibid, A 22 (1).

³⁵⁴ *General Comment no. 1 The aims of education*, (2001) A 29(1), Para 1.

³⁵⁵ Ibid, para 1.

³⁵⁶ Ibid, para 2.

³⁵⁷ Ibid, para 2.

³⁵⁸ Ibid, para 5.

³⁵⁹ Ibid.

³⁶⁰ This part is also expanded in my publication Simbo C, 'Defining the term basic education in the South African Constitution: An international Approach' (2013) *Law Democracy and Development* 481-483.

Freedom (Recommendation)³⁶¹ adopted by and binding upon UNESCO defines the general term education. It states that

The word education implies the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge. This process is not limited to anti specific activities.³⁶²

In the view of the Recommendation, education is a process of learning and development through social interaction.³⁶³ Meaning that, within the human rights framework, like in any social science, education is a process which develops human beings and benefits both individuals and communities. The Recommendation's definition of education is also very similar to the provisions of the General Comment 1 to the CRC ³⁶⁴ which state that education

goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.³⁶⁵

The two definitions above, point to the fact that education is not confined to formal schooling. A person is educated from the time they are born and it simply continues at school. From the time children are born, they are in constant learning.³⁶⁶ People are educated not because they want to be but because it is on-going, in every society, making it a 'social enterprise'.³⁶⁷ Education is a 'social undertaking' and its rules are not agreed individually but interpersonally.³⁶⁸ People are educated by the people they meet, how they treat others, how others treat them, how they play, work, leisure and the ideologies that surround them.³⁶⁹

³⁶¹ *Recommendation concerning education for international understanding, co-operation and peace and education relating to human rights and fundamental freedom adopted by the General Conference at its eighteenth session Paris* (1974) A 1 (1) (a).

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ *General Comment no. 1 The aims of education*, (2001) A 29(1).

³⁶⁵ Ibid A 29 (1) (2).

³⁶⁶ Ulich R *Philosophy of Education* (American Book Company 1961) 7-8.

³⁶⁷ White J *The aims of Education Restated* (Routledge and Kegan Paul Ltd 1982) 24-25.

³⁶⁸ Ibid.

³⁶⁹ Ulich R *Philosophy of Education* (American Book Company 1961) 6-7.

The embedment of education within society was most obvious during the primitive times when human beings were completely merged with the community and seemed not to possess much initiative outside their greater unity.³⁷⁰ As tools were developed and agricultural methods developed, men invented signs and symbols which enabled them to communicate between distances.³⁷¹ With the growing importance of such symbols, letters and numbers, organised learning emerged together with specialised teaching which is now termed 'formal education'.³⁷² Informal education is totally linked to the community, while formal education aims to also provide pupils with personal autonomy, to produce pupils who are able to think for themselves, who can work and plan their life, exercise reason and are not swept off their feet by the opinions of those they co-exist with.³⁷³

2.4.5 World Declaration on basic education for all, 1990: The game changer

In 1990, 155 governments, 125 non-governmental organizations and 33 intergovernmental organization all came together, convened by four developmental agencies - the United Nations for Children's Fund, the World Bank, the United Nations Development Programme and the United Nations Educational Scientific and Cultural Organization; the gathering launched a document - the World Declaration on Basic Education for All.³⁷⁴ The World Declaration became the founding document for the Education for All Goal.³⁷⁵ The World Declaration is a historic document which 'has given significant impetus to the undertaking of ensuring global educational justice'.³⁷⁶

³⁷⁰ Ibid 7-8 'Habits of tribes usually prescribed how the family or individual acted within the whole group and influenced the behaviour of the larger generation. Tribal collectivism however turned individuals to self-consciousness and distinct order'.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ White J *The aims of Education* (Restated Routledge and Kegan Paul Ltd 1982) 26-27.

³⁷⁴ *World Declaration of 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, (1990)* Preface 'The Jomtien Conference was clearly a major milestone in the international dialogue on the place of education in human development policy, and the consensus reached there has given renewed impetus to the worldwide drive to provide universal primary education and eliminate adult illiteracy. It has also inspired efforts to improve the quality of basic education and to find more cost effective ways to meet the basic learning needs of various disadvantaged population groups'.

³⁷⁵ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 4.

³⁷⁶ Ibid.

It introduced the term 'basic education' which has become a concrete statement of the importance of education.³⁷⁷ It does not only focus on the need to provide both access to education and quality education but it also sets a framework which ensures that countries set up legislative, political, economic and social strategies needed to ensure the dream of education for all becomes a reality.

Recognising the disparities which existed in the provision of education, the World Declaration states that basic education opportunities are supposed to be designed to meet basic learning needs.³⁷⁸ The basic learning needs which were defined in this chapter comprise of 'essential learning tools' and a 'basic learning content' which humans require to survive, 'to develop their full capacities, to live and work in dignity, to participate in development, to improve the quality of their lives, to make informed decisions and to continue learning'.³⁷⁹ The World Declaration states that, the satisfaction of basic learning needs produces responsible individuals who build themselves and their communities, spiritually, culturally and linguistically.³⁸⁰ These individuals have interest in the education of others; they focus on the achievement of social justice, tolerate the various views of a diverse society, advocate for the environment, ensure that human rights and values are respected and work for the peace and harmony of the international community.³⁸¹

The World Declaration states its expanded vision to include five elements - universal access, promoting equity, focussing on learning, broadening the means and scope of education, enhancing the environment of learning and strengthening partnerships.³⁸² On universalising access, children must be given equal access to basic education services and all disparities, including discrimination in accessing education opportunities, must be removed.³⁸³ Regarding learning, learning opportunities must

³⁷⁷ Ibid.

³⁷⁸ *World Declaration of 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, (1990) Para 1.*

³⁷⁹ Ibid, para 1.

³⁸⁰ Ibid, para 2.

³⁸¹ Ibid.

³⁸² Ibid, A 11 para 1.

³⁸³ Ibid, A 3 para 1 and 4.

result in 'actual learning acquisition and outcome, rather than [focus] exclusively [on] enrolment'.³⁸⁴ It is important for countries to define the levels acceptable for learning acquisition and the manners of assessment.³⁸⁵ On broadening the means and scope of education, the World Declaration states that learning begins at birth and the main delivery channel for basic education is the primary school.³⁸⁶ On enhancing the environment for learning, the Declaration states that learning is made possible when learners receive support in the form of health-care, nutrition, emotional and physical support.³⁸⁷ On strengthening partnerships, it states that, partnerships between government departments, educators, administrators, communities, families, religious groups and non-governmental organisations are necessary for the 'planning, implementing, managing and evaluation of basic education programmes'.³⁸⁸

2.4.6 The African Charter on the Rights and Welfare of the Child 1999 (African Charter)

By making the provision of basic education compulsory and free,³⁸⁹ the African Charter³⁹⁰ which is binding on Zimbabwe and South Africa, was the first to impose such obligations on African countries and, therefore, a game changer.³⁹¹ With recognition of the critical situations which continue to affect the African child, the African states agreed that, 'every child shall have the right to education'.³⁹² The African Charter states that, education has a purpose to promote the full development of the personality of the child, their talents, as well as their mental and physical abilities.³⁹³ Education must instil in a child the need to respect human rights and freedoms³⁹⁴ and

³⁸⁴ Ibid, A 4.

³⁸⁵ Ibid.

³⁸⁶ Ibid, A 5.

³⁸⁷ Ibid, A 6.

³⁸⁸ Ibid, A 7.

³⁸⁹ Ibid, A 11 (3) (a) 'State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and (a) shall in particular provide free and compulsory basic education'.

³⁹⁰ *African Charter on the Rights and Welfare of the Child* (1990).

³⁹¹ South Africa ratified on 09/07/1996 and Zimbabwe ratified on 30/05/1986.

³⁹² *African Charter on the Rights and Welfare of the Child* (1990), A, 11 (1).

³⁹³ Ibid, A 11 (2) (a).

³⁹⁴ Ibid, A 11 (2) (b).

must allow individuals to preserve their African morals, values and culture.³⁹⁵ It must prepare the child to live a responsible life, in a diverse society with the spirit of friendship, mutual respect, understanding and dialogue.³⁹⁶ Education must ensure children respect their environment³⁹⁷ and understand the idea of 'primary health care'.³⁹⁸ State parties note the value of discipline in school and note the need for discipline to safeguard the child's humanity and human dignity.³⁹⁹ State parties agree to take all measures practicable to, 'provide free and compulsory basic education'.⁴⁰⁰ Complementary to the right to education, state parties agree that, there must be no discrimination on any ground including 'national and social origin' in the provision of all the rights in the Charter.⁴⁰¹ Also like the provisions of the CRC discussed above, in any matters concerning children, their best interest must be of fundamental consideration.⁴⁰²

2.4.7 SADC Protocol on Education and Training 1997: Corporation in basic education, primary and secondary levels

In relation to the provision of basic education, SADC members which include South Africa and Zimbabwe acknowledge that both primary and secondary education are important for the provision of a foundation for tertiary education.⁴⁰³ Whilst not mentioning the link between basic education and primary or secondary education, member states note that, the curriculum of primary and secondary education should include information about SADC countries for the promotion of consciousness about the SADC community, thereby, promoting regional integration.⁴⁰⁴ Member states decide that basic education must at least comprise of 9 years of schooling.⁴⁰⁵ Whilst not prejudicing other students, those who are socially disadvantaged must be given

³⁹⁵ Ibid, A 11 (2) (d).

³⁹⁶ Ibid, A 11 (2) (d).

³⁹⁷ Ibid, A 11 (2) (g).

³⁹⁸ Ibid, A 11 (2) (h).

³⁹⁹ Ibid, A 11 (5).

⁴⁰⁰ Ibid, A 11 (3) (a).

⁴⁰¹ Ibid, A 3.

⁴⁰² Ibid, A 4 (1).

⁴⁰³ *SADC Protocol on Education and Training* (1997), A 5 (1).

⁴⁰⁴ Ibid, A 5 (2).

⁴⁰⁵ Ibid, A 5 (3).

special admission support in order to ensure a balance for all children in accessing basic education⁴⁰⁶. Member States also note that the aim of basic education must be to provide lifelong learning.⁴⁰⁷ Co-operation must take place among member states in the following areas:

curriculum design and development to ensure provision of high quality and relevant basic education and to move the education systems towards comparability, harmonisation and eventual standardisation; (b) joint development, provision and exchange of educational materials to improve the quality and relevance of education; (c) exchange of experiences, ideas and information to broaden the knowledge base and skills of curriculum developers, teachers, trainers and education managers; (d) development of national examinations and accreditation systems to move the education systems towards harmonised, equivalent, and eventually standardised certification.⁴⁰⁸

2.5 Justiciability of the right to education in international law

2.5.1 Introduction

Despite their provision in international, regional instruments and Constitutions of countries, the effectiveness of human rights, including the right to education and their capability to change human life hinges on their justiciability. Justiciability is the catalyst allowing the enjoyment of the right to basic education by citizens; the term refers to the possibility of a right to be adjudicated in a judicial fora.⁴⁰⁹ A justiciable right is a right which when violated, the rights-holder is able to bring a claim before a court of law and in the event that the claim is upheld, the rights-holder is granted an enforceable remedy.⁴¹⁰

Civil and political rights have been widely accepted as justiciable, however, there is no consensus relating to the justiciability of socio-economic rights, for which the right to basic education is one.⁴¹¹ With their provision being resource-intensive,

⁴⁰⁶ Ibid, A (4).

⁴⁰⁷ Ibid, A 5 (5).

⁴⁰⁸ Ibid, A 5 (6).

⁴⁰⁹ Kandukuru N 'Justiciability, Right to Education Project: Promoting Mobilisation and Accountability' see <http://www.right-to-education.org/node/343> accessed 17 July 2018.

⁴¹⁰ Ibid.

⁴¹¹ Ruppel C O Third Generation Human Rights and the Protection of the Environment in Namibia 102

there is no consensus on their binding status. Critiques continue to state that courts have no ability to enforce affirmative action on governments, as such socio-economic rights must be regarded as merely aspirational statements.⁴¹² They further argue that socio-economic rights are vaguely worded which makes it difficult for judges to identify and justify violations.⁴¹³ The above argument is not really convincing. In the view of this dissertation, the role of the judiciary is to fill the gaps in legislation and if socio-economic rights are at all vaguely worded, the judiciary has the role to clear these ambiguities in legislation.⁴¹⁴ Critiques have also argued that policy imperatives are an obligation of government and the realisation of socio-economic rights depends on government policy and not the courts.⁴¹⁵ The above argument is regarded by this dissertation as lacking clarity because by bringing a socio-economic matter before the judiciary, the courts are not being asked to make policy pronouncements but to actually review the constitutionality/legality of government policy and to ensure that government policy is in compliance with national, international and constitutional provisions.

2.5.2 The justiciability of socio-economic rights: Debates by government

During the debates by governments at the United Nations Commission on Human Rights (Commission) in the seventh session which led to the drafting of the ICESCR, India argued for the drafting of two separate Covenants, one protecting socio-economic rights and the other civil and political rights.⁴¹⁶ India's argument was that

<http://www.kas.de/upload/auslandshomepages/namibia/humanrights/ruppel1.pdf> accessed 17 July 2018.

⁴¹² Ibid.

⁴¹³ United Nations, 'The Concept of Economic Social and Cultural Rights: Can economic, social and cultural rights be litigated at Court'

<http://www.ohchr.org/EN/Issues/ESCR/Pages/canescrbelitigatedatcourts.aspx> accessed 18 July 2018.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ 'Human rights in the administration of justice, chapter 14: the Role of the Courts in Protecting Economic, Social and Cultural Rights' *<https://www1.umn.edu/humanrts/monitoring/adminchap14.html>* accessed 18 July 2018.

'The formal Indian proposal read as follows The Commission on Human Rights, Considering that the economic, social and cultural rights though equally fundamental and therefore important, form a separate category of rights from that of the civil and political rights in that they are not justiciable rights; Considering that the method of their implementation is, therefore, different; Recommends to the Economic and Social Council that the decision to include the economic, social and cultural rights in the same covenant with the civil and political rights, be reconsidered'.

socio economic rights are not justiciable.⁴¹⁷ The argument was rejected by Yugoslavia which argued that any allegation of a violation of a socio-economic right could be brought before the courts of law.⁴¹⁸ Yugoslavia reasoned that, the courts are empowered to provide redress in view of government's obligation to take reasonable legislative and other measures towards the realisation of socio-economic rights.⁴¹⁹ Guatemala also considered it 'incorrect' to refer to economic, social and cultural rights as non-justiciable rights.⁴²⁰ The Commission eventually rejected the view that socio-economic rights are not justiciable, and during these deliberations, Israel and France also warned against overemphasising the difference between civil and political rights and socio-economic rights, warning that human rights are equally interdependent and indivisible, as such, they must all be enforceable.⁴²¹

2.5.3 Constitutional provisions of countries on justiciability of socio-economic rights

The Commission clearly states that socio-economic rights are legitimate human rights which are enforceable. However, different countries of the world have treated socio-economic rights differently from civil and political rights, sometimes viewing them as merely directives informing government policy and not justiciable human rights. The Lesotho Constitution views socio-economic rights as merely principles of state policy which are 'not enforceable by any Court' but guide the performance of state authorities.⁴²² Similarly, the Constitution of India views socio-economic rights as unenforceable directives of state policy.⁴²³ The Constitution of Malta views socio-economic rights as Declaration of Principles which are unenforceable but essential in the governance of Malta and influential in any law-making process.⁴²⁴ On the other hand, the Constitution of Iraqi makes socio-economic rights including the right to

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² *Constitution of Lesotho, 1993*, S 25.

⁴²³ *Constitution of India, 2007*, A 45.

⁴²⁴ *Constitution of Malta, 1964*, S 21. 'The provisions of this Chapter shall not be enforceable in any court, but the principles therein contained are nevertheless fundamental to the governance of the country and it shall be the aim of the State to apply these principles in making laws'.

education enforceable human rights.⁴²⁵ Similarly the Constitution of Kenya and Namibia both provide for constitutionally-protected socio-economic rights.⁴²⁶ In a similar manner, America, in its American Convention on Human Rights as it is read together with the Additional Protocol to the American Convention on Human Rights in the Matter of Economic, Social and Cultural Rights, recognises the provision of socio-economic rights as binding upon treaty parties and certain socio-economic rights as individual claims justiciable through the Courts.⁴²⁷ The constitutional provisions of Zimbabwe and South Africa relating to the justiciability of the right to basic education are discussed in the following chapters.

2.5.4 Adjudication of socio-economic rights by international enforcement bodies

International courts and enforcement bodies have adjudicated upon socio-economic rights, particularly, the right to education which is the subject of this dissertation. On the right to education, the European Court in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark (1976)*, adjudicated upon the contents of the national curriculum.⁴²⁸ The Court stated that, the teaching of sex education did not amount to indoctrination, and did not violate the 'right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions'.⁴²⁹ On the other hand, the African Commission on Human and People's Rights in the case of *Rights Free Legal Assistance Group and Others v. Zaire (1995)* found that the two-year-long closure of universities and secondary schools in Zaire (as it was at the time)

⁴²⁵ *Iraqi Constitution 2005, A 29.*

'First: A. The family is the foundation of society; the State shall preserve it and its Religious, moral, and national values.

B. The State shall guarantee the protection of motherhood, childhood and old age, shall care for children and youth, and shall provide them with the appropriate conditions to develop their talents and abilities.

Second: Children have the right to upbringing, care and education from their parents. Parents have the right to respect and care from their children, especially in times of need, disability, and old age and

Article 34: First: Education is a fundamental factor for the progress of society and is a right guaranteed by the state. Primary education is mandatory and the state guarantees that it shall combat illiteracy. Second: Free education in all its stages is a right for all Iraqis'.

⁴²⁶ *Constitution of Kenya 2010, Constitution of Namibia, 1990.*

⁴²⁷ Melish T 'Protecting, social, economic and cultural rights in the Inter-American rights system: A manual on presenting claims Centre for International Human Rights' (2002), Yale Law School 12-13

⁴²⁸ Kandukuru N 'Justiciability', Right to Education Project: Promoting Mobilisation and Accountability <http://www.right-to-education.org/node/343> accessed 18 July 2018.

⁴²⁹ Ibid.

was a violation of the right to education as it is enunciated by Article 17 of the African Charter on Human and Peoples Rights.⁴³⁰ The Inter-American Commission on Human Rights also found in the *Case of 2137 Argentina (1978)* that the banning of the activities of the Jehovah witness pupils from sitting for exams was a violation of the right to education (Article XII) as guaranteed by the American Declaration of the Rights of Man.⁴³¹ Arguments against justiciability of the right to basic education would be both against international law and the constitutions in both Zimbabwe and South Africa, as will be discussed in the following chapters.

2.6 Reconciling international law education terms for the purposes of implementing and demanding the right to basic education: Elementary, fundamental, primary, secondary and basic education⁴³²

2.6.1 Origins of terms - elementary, fundamental, primary and secondary education in international law

To understand the types of education offered to children at school and their link to basic education, one has to track the origins of education terms and their implications for implementation and demand purposes. The developments of the terms relating to the education of children can be tracked from the Universal Declaration which mentions the terms fundamental and elementary education. Article 26 of the Universal Declaration states that everyone has the right to free elementary and fundamental education as well as compulsory education at elementary stages.⁴³³ The ICESCR, on the other hand mentions primary and secondary education stating that, everyone has

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² This is part of my publication, C Simbo 'Exploring the link between fundamental, elementary, primary and basic education' 18 (2016) *Economic & Social Rights Review in Africa* 7-10.

⁴³³ *Universal Declaration of Human Rights* (1948) A 26 (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'.

the right to free and compulsory education at primary level as well as accessible secondary education.⁴³⁴

The provisions of the ICESCR do not provide a link between elementary and fundamental education which was initially provided by the Universal Declaration and the primary and secondary education it provides, rather a new twist was established at international law. Relating to free education, the Universal Declaration provides for free education at elementary and fundamental stages, whilst the ICESCR provides for free education at primary level and accessible secondary education.⁴³⁵ Relating to compulsory education, the Universal Declaration provides for compulsory education only at elementary level whilst the ICESCR provides for compulsory education at primary education.⁴³⁶ The CRC follows the ICESCR and provides for compulsory and free education at primary level and accessible secondary education.⁴³⁷ The CRC is perhaps the 'most authoritative international legal instrument for the protection of children's human rights, with almost universal acceptance'⁴³⁸, and 'the most rapidly and widely ratified international human rights treaty in history' as already stated earlier.⁴³⁹ It is, however, notable that, 'the language of international educational strategists shifted from [elementary and fundamental education], primary [and secondary education] to basic education...'.⁴⁴⁰ The term basic education was introduced by the 1990 Jomtien Conference and influenced subsequent documents and planning, relating to the right to education for children⁴⁴¹.

⁴³⁴ *International Covenant on Economic, Social and Cultural Rights. Adopted by the General Assembly of the United Nations on 16 December (1966) A 13 (1).*

⁴³⁵ *Universal Declaration of Human Rights (1948) A 26 (1).*

⁴³⁶ *Ibid.*

⁴³⁷ *United Nations Convention on the Rights of the Child, (1989).*

⁴³⁸ UNHCR Guidelines on Formal Determination of the Best Interest of The Child 6 <http://www.unicef.org/violencestudy/pdf/BID%20Guidelines%20%20provisional%20realease%20May%2006.pdf> accessed 02/02/2013.

⁴³⁹ *United Nations Convention on the Rights of the Child (1989).*

A 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'.

⁴⁴⁰ Ms Kararina Tomasesvski 'Preliminary report of the special Rapporteur on the right to education' (1999), submitted in accordance with the Commission on Human Rights resolution, 15.

⁴⁴¹ *Ibid.*

2.6.2 Origins of the term basic education in international law

Following the terms primary, secondary, elementary and fundamental education, international law coined a new specific term - basic education. The World Declaration on Education For All and its Framework for Action to Meet Basic Learning Needs (1990) (World Declaration) became the foundational document to introduce and define the term, basic education. It states that basic education is the acquisition of basic learning needs.⁴⁴² Following the provisions of the World Declaration, in 1990, African states recalled, with concern, the critical socio-economic situation that continued to face the African child.⁴⁴³ Taking into consideration the historical circumstances of the African child and the need to promote and protect the rights and welfare of the child, African states, through the African Charter note that parties must endeavour to provide free and compulsory basic education.⁴⁴⁴ In addition to the African Charter, the SADC protocol also alludes to basic education which must be provided at primary and secondary school levels.⁴⁴⁵ The term, basic education, therefore became a new nomenclature after 1990 to be used in reference to education of the child after instruments such as the Universal Declaration of human rights, the ICESCR and the CRC which did not mention basic education.

2.6.3 Merging basic, elementary, fundamental and primary education

The Universal Declaration refers to elementary and fundamental education. Establishing the link between fundamental education and basic education, General Comment 13 states that 'fundamental education corresponds (resembles) to basic education as set out in the World Declaration on Education for all'.⁴⁴⁶ By stating that 'fundamental education corresponds to [or matches] basic education', General Comment 13 suggests that fundamental education is basic education.⁴⁴⁷

⁴⁴² *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, (1990) A 1 (1).*

⁴⁴³ *African Charter on the Rights and Welfare of the Child (1990), Preamble.*

⁴⁴⁴ *Ibid, Article 11 (1-7).*

⁴⁴⁵ *SADC Protocol on Education and Training, (2007), A 5 (1).*

⁴⁴⁶ *General Comment 13: The Right to Education (1999), para 22-24.*

⁴⁴⁷ *Ibid.*

To clarify the link between fundamental/basic education and primary education provided by the ICESCR, General Comment 13 states that 'individuals who have not received or completed the whole period of their primary education have a right to fundamental education, or basic education'.⁴⁴⁸ General comment 13 further clarifies the link between primary education and basic education stating that 'primary education is the most important component of basic education' and it is not basic education, rather there is a 'close correspondence between the two'.⁴⁴⁹ The close correspondence between primary education and basic education which makes primary education the most important component of basic education is explained by the World Education which states that 'the main delivery system for the basic education of children outside the family is the primary school'.⁴⁵⁰

Primary education is therefore the stage where basic education is first introduced outside the family. The above clarifications mean that, fundamental education which is basic education is not confined to the primary school stage but includes secondary education. Secondary education, 'includes the completion of basic education' and consolidates lifelong learning as provided by General Comment 13.⁴⁵¹ Fundamental/basic education must be offered at secondary education, a clarification provided by General Comment 13 which must be viewed as linking secondary education with fundamental/basic education.⁴⁵² The fact that basic/fundamental education is not confined to the primary school justifies the inclusion of the right to adult basic education in both the Zimbabwean and the South African Constitutions. In other words, if any person, specifically, a child desires to acquire basic education through formal schooling they go to the primary school as the first forum for learners to begin to receive their basic education.⁴⁵³ They must, however, proceed to secondary

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid.

⁴⁵⁰ *World Declaration of 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, (1990) A V.*

⁴⁵¹ *General Comment 13: The Right to Education (1999), Para 12.*

⁴⁵² Ibid.

school to acquire the parts of basic education provided at secondary school level which completes basic education and consolidates lifelong learning.

The above discussion links primary, secondary, education with fundamental or basic education. The link between elementary education and primary, secondary, fundamental or basic education has not been clearly clarified at international law level. Guidance can however be sought from the provisions of General Comment 13 to the ICESCR which states that, 'primary education has two distinctive features; it is compulsory and available free to all'.⁴⁵⁴ If primary education has these two distinctive features, juxtaposed with the provisions of the Universal Declaration discussed earlier, elementary education also has two distinctive features, compulsory and free. The fact that elementary and primary education have the same distinctive features, should lead to the conclusion that primary education is elementary education. Such a conclusion would mean that, in accordance with the Universal Declaration, primary education is compulsory and free whilst fundamental or basic education is free but not compulsory. The reference to primary education as elementary education has been done by some European countries.⁴⁵⁵

A summation of the above discussion leads to the conclusion that, basic education or fundamental education includes primary and secondary school education, therefore, primary and secondary school attendance. Basic education also goes beyond primary and secondary education to include adult basic education. Following the provisions of the Universal Declaration, the element of compulsion extends only to primary or elementary education, whilst the free education element extends to fundamental or basic education. Such a reading of international law, however, contradicts the provisions of the African Charter on the Rights and Welfare of the Child (African Charter) 1990 which is the regional instrument which states that basic education must be compulsory, as well as free.⁴⁵⁶ The African Charter extends the compulsory elements of education to basic education and not only primary

⁴⁵⁴ Ibid, 10.

⁴⁵⁵ The United Kingdom refers to the *Elementary Education Act, 1970*.

⁴⁵⁶ *African Charter on the Rights and Welfare of the Child* (1990), A, 11 (3) (a)

education.⁴⁵⁷ The implications of the African Charter provisions are that, as long as basic education is offered at primary and secondary school levels as envisaged by General Comment 13, primary and secondary schooling must be both free and compulsory.

Both the Zimbabwean Education Act and the South African Schools Act discussed in the next chapters also do not expressly provide a link between the terms primary/elementary school, secondary school and basic/fundamental education. Other education Acts of countries in the Southern African region, such as the Namibian Education Act⁴⁵⁸ note the link provided by international law. The Namibian Education Act clarifies the point 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'.⁴⁵⁹ It further explains that basic education is education offered at primary and secondary school levels.⁴⁶⁰

2.7 The five components of the right to basic education provided by international law

The object of this dissertation is to provide the scope and content of the right to basic education in Zimbabwe and in South Africa using an international law approach. In the absence of an international law document which provides the scope and content of the right to basic education at international law level, this part of the dissertation aims to concretize international law provisions on the right to education for children. The holistic reading of international law aims to produce the most probable scope and content of the right to basic education. A concretization of all international law provisions discussed in this dissertation leads to the conclusion that, the right to basic

⁴⁵⁷ Ibid.

⁴⁵⁸ *Namibian Education 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.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid.

education provided by international law should be regarded to have 5 components discussed below.

2.7.1 Component 1- The quality dimension of the right to basic education: Explaining the term basic education⁴⁶¹

2.7.1.1 Introduction

The first component is that, the right to basic education has a quality dimension and standard which is determinable by reference to the definition of the term basic education as it is defined by the World Declaration. The term basic education refers to the acquisition of basic learning needs as stated below.⁴⁶² As discussed in chapter 4 and 5, authors have already agreed that the right to basic education has a quality dimension which is defined by the World Declaration to be synonymous to basic learning needs. What however remains lacking is the attempt to describe the individual quality components of basic learning needs. This dissertation aims to fill the gap by making an attempt to elaborate on the contents of basic learning needs.⁴⁶³ It is essential to note that the explanations of basic learning needs as given in this chapter are just examples but not a rubric of how basic learning needs must be defined or understood by countries. Countries must invest widely in the process of coming up with acceptable definitions of terms and acceptable curriculum-content descriptions for basic education.

⁴⁶¹ The views in this part of the dissertation appears in my publication with the Law Democracy and Development, Simbo C 'Defining the term basic education in the South African Constitution: An international Approach' (2012) Law Democracy and Development 162-181.

⁴⁶² *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 in Jomtien, Thailand (1990)* A 1 (1) 'Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs. 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 s and cultures, and inevitably, changes with the passage of time'.

⁴⁶³ Simbo C 'Defining the term basic education in the South African Constitution: An international law approach' (2012) Law, Democracy & Development 162-181.

2.7.1.2 Components of the term basic education

The World Declaration and its framework of action became the first international instrument to emphasise on the quality of basic education.⁴⁶⁴ The World Declaration became momentous by bringing to the fore, the notion that access to education alone would not be sufficient if basic education was not of the desired quality.⁴⁶⁵ The World Declaration defines the term basic education although it leaves it to countries to fully elaborate on the elements mentioned in its definition. To define basic education, the World Declaration makes the acquisition of a basic learning needs synonymous to the acquisition of basic education.⁴⁶⁶ The term basic education, therefore, 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.⁴⁶⁷

An attempt to break down these components of a basic education is done below.

2.7.1.3 Essential learning tools

The World Declaration states that, essential learning tools comprise of 'literacy, oral expression, numeracy, and problem-solving'.⁴⁶⁸ In the view of the World Declaration, the acquisition of essential learning tools further qualifies an education to be called, a basic education. Without teaching Zimbabwean or South African children literacy, oral expression, numeracy and problem-solving, an education cannot qualify to be called

⁴⁶⁴ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 35.

⁴⁶⁵ Ibid

⁴⁶⁶ *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 in Jomtien, Thailand (1990) A 1 (1).*

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid.

a basic education. There is clarity from the discussion herein that, the deprivation of essential learning tools will make it difficult for children to have a successful progression in life, to be ambassadors of their development and others and to go forward with their education. Citizens who have not mastered essential learning tools, do not have the ability to contribute positively to the development of themselves, others or their countries and the global village. With no literacy, numeracy and problem solving skills, they cannot express themselves, they cannot think critically and have not conflict resolution skills.

A person educated with essential learning tools should not only possess the capability to give accurate answers in examinations but must exhibit and show the transformative part of education in their relational manner as well as observe things critically.⁴⁶⁹ The transformative part of education must show in the ability of human beings to understand and relate with fellow human beings in a cordial and relational manner. Essential learning tools must equip someone with the soberness to face and resolve complex problems, they must arm citizens with the ability to reflect on own actions and the wisdom to evaluate situations and resolve conflicts. Whilst this dissertation does not claim to know pedagogy, expressions such as literacy, oral expression, numeracy, and problem-solving do not have singular or exact definitions. An attempt is made to simplify them for the purposes of assisting law reform.

2.7.1.3.1 Literacy

Literacy has been defined as 'an individual's ability to read, write, speak, compute and solve problems at levels of proficiency necessary to function on the job, in the family of the individual and in society'.⁴⁷⁰ Literacy as a word goes beyond reading and writing.⁴⁷¹ A literate person, must be able to write, speak and use these skills to solve their individual as well as societal problems.⁴⁷² A person with literacy skills living in a

⁴⁶⁹ Barrow R and Woods R *An Introduction to Philosophy of Education* 1 (Metheun 1993) 11-18.

⁴⁷⁰ De Valenzuela J S 'Definitions of Literacy' <http://www.unm.edu/~devalenz/handouts/literacy.html> Accessed 13 July 2016.

⁴⁷¹ Ibid.

⁴⁷² Simbo C, 'Defining the term basic education in the South African Constitution' 16 (2012) Law Democracy and Development, 176.

world of technology should be a contributory member of the national, regional and international society.⁴⁷³ A literate person who also has problem-solving and oral expression skills must be able to communicate whilst at the same time showing empathy and sympathy for fellow men.

2.7.1.3.2 Oral Expression

The ability of a student 'to articulate ideas and to speak with clarity in a way that intellectually and socially empowers him/her' is what is called, oral expression.⁴⁷⁴ The articulation of ideas, orally, has an influence on 'the development of critical thinking, problem-solving abilities and general learning outcomes. In addition, opportunities to practice oral expression will help students become [communicators who are more competent]'.⁴⁷⁵ A learner, 'taught oral expression as part of basic education of 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'.⁴⁷⁶ The capability to express ideas needs to be taught strategically in a manner which allows the individual to grow mentally, to think critically and to develop abilities to fully solve problems.⁴⁷⁷

2.7.1.3.3 Numeracy

Numeracy 'as an essential learning tool is a term coined from mathematical skills when used in the classrooms'.⁴⁷⁸ Sydney defines numeracy as

[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 meets the needs of that individual's life as a constructive, concerned and reflective citizen.⁴⁷⁹

⁴⁷³ Ibid.

⁴⁷⁴ Ibid, 177.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Sydney C 'What is numeracy' Available at <http://www.ceosyd.catholic.edu.au/cms/Jahia/site/curriculumonline/pid/3780> accessed 13 July 2016.

The definition of a numerate child points to a person who knows the need to calculate, to think and to reflect on mathematics. The skills to calculate, reflect and think must be used both mathematically and practically when faced with life situations which require the making of judgments.⁴⁸⁰

2.7.1.3.4 Problem-solving

Problem-solving can be described as a process of 'clarifying description of the problem, analysing causes, identifying alternatives, assessing each alternative, choosing one, implementing it and evaluating whether the problem was solved or not'.⁴⁸¹ The solving of mathematical problems is also associated with problem-solving.⁴⁸² A person with problem-solving skills 'is able to objectively unpack a problem, describe it, determine its causes, identify the alternative solutions, choose one solution and implement the solution and then evaluate whether or not the problem has been solved'.⁴⁸³ To a problem-solver there are alternative means to and solutions to the solving of one problem. A problem-solver has an evaluation capability, being able to view, review and assess multiple solutions and approaches. A problem-solver manoeuvres difficult situations and creatively thinks and implements new strategies to adapt to new situations.⁴⁸⁴

2.7.1.4 The basic learning content

In addition to essential learning tools, The World Declaration defines the basic learning needs to also include basic learning content. The basic learning content comprises of 'knowledge, skills, values and attitudes' necessary for humans 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

⁴⁸⁰ Ibid.

⁴⁸¹ Free management library 'Problem solving' http://managementhelp.org/prsn_prd/prob_slv.htm 13 July 2010.

⁴⁸² Rusczyk R 'What is Problem Solving?'

<http://www.artofproblemsolving.com/Resources/articles.php?Page=problemsolving> 13 July 2016.

⁴⁸³ Simbo C, 'Defining the term basic education in the South African Constitution' 16 (2012) Law Democracy and Development, 177-178.

⁴⁸⁴ Ibid, 178.

continue learning'.⁴⁸⁵ The aspects of a basic learning content, like those of essential learning content, define each other and work holistically towards educating the child. An attempt is made to simplify them for the purposes of assisting law reform.

2.7.1.4.1 Skills

To acquire a basic learning content, one needs to be equipped with skills. A skill is defined as 'the ability, coming from one's knowledge, practice and aptitude'.⁴⁸⁶ This definition of skill shows that the presence of knowledge, continued practice and the capacity of a person to perform a task makes them skilled.⁴⁸⁷ Skills, therefore, includes

the ability to make well-balanced decisions, to resolve conflicts in a non-violent manner, to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents and other abilities which give children the tools needed to pursue their options in life.⁴⁸⁸

Every child must leave school ready to face the multiple challenges life confronts them with.⁴⁸⁹ The skills must therefore be both 'cognitive skills' and 'life skills'.⁴⁹⁰ Merging both cognitive and life skills, Bloom and Cohen proposed that skills which must be taught should 'include reading with understanding, writing with clarity, and speaking with confidence'.⁴⁹¹ Basic numeracy skills which allow human beings to quantify things in daily life must be taught, in addition to the peaceful ways to resolve conflict. Another important skill is the ability to find 'satisfaction in personal life and work'.⁴⁹²

2.7.1.4.2 Knowledge

⁴⁸⁵ *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 in Jomtien, Thailand (1990)* Article (1) (1).

⁴⁸⁶ Dictionary.com 'Skill.' <http://dictionary.reference.com/browse/skill> 13 July 2017.

⁴⁸⁷ Simbo C, 'Defining the term basic education in the South African Constitution' 16 (2012) *Law Democracy and Development*, 178.

⁴⁸⁸ Das Ajay *Right to education* (Axis publishers 2010) 83.

⁴⁸⁹ Ibid 82.

⁴⁹⁰ Ibid 40.

⁴⁹¹ Joel , Cohen, Bloom and Malin *Educating all children , a global agenda* (Cambridge, 2006) 16.

⁴⁹² Ibid 6.

Alkahaldi defines knowledge 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'.⁴⁹³ A knowledgeable child makes use of learned experiences, is alive to their context, possesses values and makes use of expert insight to evaluate new information and new experiences. Knowledge cannot, therefore, be understood outside one's life experience or one's awareness of the values which exist in one's society. Knowledge must therefore be 'about self and others'.⁴⁹⁴ The others include, both human and non-human species.⁴⁹⁵ Linking the skills and knowledge definitions discussed above, means that knowledgeable individuals must be able to translate their knowledge in a manner that benefits them rather than merely gaining knowledge for the sake of it. The skills that children learn must therefore enable them to .analyse, investigate, create and apply the knowledge' they would have been taught.⁴⁹⁶

2.7.1.4.3 Values

Values are 'beliefs or ideas that humans safeguard as special'.⁴⁹⁷ They inform human behaviour giving people the ability to conclude as to what is good and bad.⁴⁹⁸ Consensus on the values which must be regarded as noteworthy comes from culture, human right notions and other national values agreed upon.⁴⁹⁹ General Comment 1 to the CRC expresses the importance of teaching values which are internationally agreed upon such as the value of equality and human dignity. These values discussed in the next chapters are deemed to have a uniting effect and promote the respect for every human being.⁵⁰⁰ Through taught-human-rights values, '[children are] capable of playing a unique role in bridging many of the differences that have historically

⁴⁹³ Alkahaldi F M et al 'The theory of infoledge, A logical, mathematical and Geometrical Interpretation' (2008) The Journal of Issues in Informing Science and Information Technology 5.

⁴⁹⁴ Cohen J, Bloom and Malin *Educating all children , a global agenda* (Cambridge, 2006) 166.

⁴⁹⁵ Ibid.

⁴⁹⁶ Das Ajay *Right to education* (Axis publishers 2010) 83.

⁴⁹⁷ Business Dictionary 'Values' <http://www.businessdictionary.com/definition/values.html> accessed 06 July 2018.

⁴⁹⁸ Ibid.

⁴⁹⁹ *General Comment no. 1: The aims of education* (2001) Article 29(1).

⁵⁰⁰ Ibid.

separated groups of people from one another'.⁵⁰¹ To harness and promote the respect of values, they must be taught in the curriculum and be part of a basic education curriculum.⁵⁰² An example of mainstreaming human rights could be to teach geography and 'explore the issue of unequal access to resources; in science it can be to examine the impact of environmental pollution and the right to health'.⁵⁰³ However, the teaching of human rights values cannot be confined to the curriculum.⁵⁰⁴ The culture of the school and how the learning environment is managed must all promote and reflect the observance of human rights.⁵⁰⁵

2.7.1.4.4 Attitudes

As recognised above, values have an influence of what people may judge to be good or bad.⁵⁰⁶ Attitude(s) are, therefore, also shaped by the values people respect. An attitude can be defined as 'one's feelings or mood toward things, circumstances or people'.⁵⁰⁷ Feelings and moods cannot be essentially under academic control, however, attitude can be shaped by teaching children 'the importance of positive attitudes, the impact of negative attitudes and the kind of attitudes to foster in different situations [as] important aspects of a basic education, [since] the knowledge of attitudes contributes to individual development and the developments of nations'.⁵⁰⁸ On the aspect of teaching attitudes, the curriculum content must resonate with the lives that children live in order for them to be able to apply what they would have learnt.⁵⁰⁹ The 'interests, concerns and needs of the local environment [which children live in] and the interest of children must be accommodated and valued'.⁵¹⁰ The valuing for their interests and a sensitivity to their local environment must inform the attitudes

⁵⁰¹ Simbo C, 'Defining the term basic education in the South African Constitution' 16 (2012) Law Democracy and Development, 178-179.

⁵⁰² Das Ajay *Right to education* (Axis publishers 2010) 82.

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

⁵⁰⁶ Simbo C, 'Defining the term basic education in the South African Constitution' 16 (2012) Law Democracy and Development, 179.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Das Ajay *Right to education* (Axis publishers 2010) 82.

⁵¹⁰ Ibid.

to be taught in the curriculum.⁵¹¹ Education must, therefore, be the perspectives of human beings about themselves and their roles in the community.⁵¹² With 'defeating terrorism, reducing poverty, spreading justice, dignity and democracy as goals to conquer,' education must foster attitudes towards the collective good.⁵¹³

2.7.1.5 Qualities of an educated person

The above definitions of essential learning tools and a basic learning content show that whilst the educated man ought to be knowledgeable in many ways, being knowledgeable is 'not a self-justifying state on its own' the possession of knowledge is not in itself the hallmark of having an education.⁵¹⁴ In accordance with this dissertation, an educated person is able to translate the knowledge into various social skills and through being taught positive values and human rights values, they are able to foster positive attitudes, living a true value-based life which puts great importance and reliance on virtues like judiciousness, bravery, individuality of mind, restraint, logic, compassion, empathy, perception, humour and strength; all of which are acquired through possessing essential tools such as literacy, oral expression and problem-solving. A collection of the essential learning tools and the basic learning content leads to a conclusion that, basic education makes children holistic, numerate and literate human beings who have the knowledge, skills and competencies to successfully take advantage of life's opportunities and manoeuvre challenges. The World Declaration describes a person who has acquired basic learning needs as one who can:

respect 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

⁵¹¹ Ibid.

⁵¹² Joel , Cohen, Bloom and Malin *Educating all children , a global agenda* (Cambridge, 2006) 1616.

⁵¹³ Ibid 16-17.

⁵¹⁴ White J *The aims of Education Restated* (Routledge and Kegan Paul Ltd year) 122-123.

human rights are upheld, and to work for international peace and solidarity in an interdependent world.⁵¹⁵

Basic education is therefore the foundation of lifelong learning and the catalyst for life.⁵¹⁶ If Zimbabwe and South Africa desire to be regarded as countries providing basic education, then their basic education curricula should endeavor to provide children with all the basic learning needs and essential learning tools as stated above.

2.7.2 Component 2: School attendance at primary and secondary school levels

2.7.2.1 Introduction: The conceptual role of the school

MacCowan posed a question as follows; universally, the right to education is identified with the school, '[b]ut are we justified in seeing the right to education as being a right [to attend a school]? And if not then what?'⁵¹⁷ *The answer from this dissertation is, that the school is a delivery system of the right to basic education. Attendance of a school is concluded by this dissertation to be one of the five components of the right to education. Attendance of school is a crucial component of the right to basic education but alone cannot suffice as compliance with all the obligations imposed by the right.* In the view of this dissertation, education is not schooling. The school, however, is viewed by this dissertation as an appropriate and an indispensable input for the attainment of education. The relevance of the school is in the fact that 'it represents that life space in which the phenomenon, education, reveals itself in an orderly and systematic form'.⁵¹⁸

Conceptually the education relationship is established at birth.⁵¹⁹ In a natural 'education situation', parents work together as a team to educate their children so that

⁵¹⁵ *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 in Jomtien, Thailand (1990)* A 1 (2)

⁵¹⁶ *Ibid* A 1 (4).

⁵¹⁷ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 1.

⁵¹⁸ Viljoen TA and J.J Pienaar V *Fundamental pedagogics* (Butterworths 1971) 26.

⁵¹⁹ Das Ajay *Right to education* (Axis publishers 2010) 82.

they can one day find their way in life.⁵²⁰ The home environment offers the 'basic education situation in which valuable foundations are laid to help the child in future situations'.⁵²¹ Agreeing that the education process begins at home, the Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedom (Recommendation)⁵²² accepts that education is a 'process of social life' which develops the personal capacities, attitudes, knowledge and aptitudes of individuals within society.⁵²³ The General Comment 1 to the CRC⁵²⁴ also acknowledges that education is 'the broad range of life experiences and learning processes' which develops 'personalities, talents and abilities and to live a full and satisfying life within society' for every individual.⁵²⁵ Education by parents or in the home environment, usually called informal education, however, is just a starting part to education, the second part is formal or school education.

Formal education refers to 'the process of training and developing people in knowledge, skills, mind, and character in a structured and certified program' and it is commonly referred to as schooling.⁵²⁶ The importance of formal education became apparent after the realisation that society and its culture are too complex to learn through 'natural apprenticeship; which is in the activities and affairs of the elders'.⁵²⁷ The challenges of adult life could not be overcome by parental education.⁵²⁸ Learning, enhanced through a planned organisation, with libraries, equipment, laboratories, adequate buildings, trained teachers and administrators, developed.⁵²⁹ The 'idea that young people needed to undergo special forms of socialisation and training in public

⁵²⁰ Du Plooy JL and Kilian CJG *Introduction to Fundamental Education* (HAUM Educational Publishers 1984) 8.

⁵²¹ Ibid.

⁵²² *Recommendation concerning education for international understanding, co-operation and peace and education relating to human rights and fundamental freedom* (1974).

⁵²³ Ibid A 1 (1) (a).

⁵²⁴ *General Comment no. 1: The aims of education.* (2001) A 29 (1).

⁵²⁵ Ibid A 29 (1) (2).

⁵²⁶ 'What is formal education'

<http://www.sil.org/lingualinks/literacy/referencematerials/glossaryofliteracyterms/whatisformaleducation.htm> accessed 13 October 2010.

⁵²⁷ Ulich R *Philosophy of Education American* (Bok Company 1961) 10.

⁵²⁸ Joel E et al *Educating all children , a global agenda* (Cambridge 2006) 124.

⁵²⁹ Ulich R *Philosophy of Education* (American Book Company 1961) 10.

schools rather than homes or religious institutions gained favour'.⁵³⁰ Occupations initially done at family level have therefore transfigured from natural life in the family to specialised occupations and professions with rules of trade.⁵³¹ The accumulation of advanced knowledge and technique, hence, make the school the most viable source of education.⁵³²

2.7.2.2 Primary and secondary school attendance is a component of the right to basic education

The role of formal education through schooling has been accepted by international law. Within the human rights framework, the school is viewed as the medium for children to learn through equal access to learning programmes.⁵³³ This role of the school is well-regarded by international law to an extent that international law has provided that education offered by the school must be compulsory and free, as will be later discussed. To elaborate the role of the school, the World Declaration states that the school is the 'the main delivery system for the basic education'.⁵³⁴ The obligation on states to ensure children are provided with basic education at both primary and secondary school levels is a component of the right to basic education.

The provision of education at school was agreed upon from the time of the Universal Declaration as discussed above. At that time the signatories of the Universal Declaration committed themselves to implementing legislation which would make the

⁵³⁰ Joel E et al *Educating all children , a global agenda* (Cambridge 2006) 124.

⁵³¹ Ulich R *Philosophy of Education* (American Book Company 1961) 10'Formal education places emphasis on the need for the individual to grow irrespective of society. This means that unlike informal education, the design of the school curriculum is supposed to be designed to take into account the peculiar needs and interests of each learner. Formal education in schools does not however ignore the needs of the society in which the individual exists. Whilst schooling itself is not education, it is an atmosphere which extends the horizon of the child. At school, children acquire knowledge which will determine their future usefulness in society. Through mixing with various persons of various backgrounds the school also gives a child the platform to learn from and to compete with others thereby socially and individually growing them. The education given at the school is not just in the interest of the children but also serves the interest of the community in which the children live. The school is therefore an entity given a huge and complex responsibility by the society'.

⁵³² Ulich R *Philosophy of Education* (American Book Company 1961) 10.

⁵³³ *The Dakar Framework for Action, Education for All* (2000) para 2 (3).

⁵³⁴ *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 in Jomtien, Thailand (1990)* A V.

provision of primary school possible and compulsory.⁵³⁵ Most international and national law instruments discussed earlier, followed to reaffirm that education was to be provided at primary school levels compulsorily, while governments were obligated to make secondary schooling accessible. The momentous year of 1990 then brought the World Declaration which marked a shift from the terminology, primary and secondary education, to introducing an obligation for states to provide basic education at school.⁵³⁶

With the new international mandate being to provide basic education, General Comment 13 to the ICESCR then clarified the schooling levels for which basic education would be provided. General Comment 13 states that, the provision of basic education is not confined to the primary school stage but, secondary education, 'includes the completion of basic education and consolidates lifelong learning'.⁵³⁷ General Comment 13, clarified that basic education is offered at both primary and secondary levels. In accordance with General Comment 13, the primary schooling level is the stage where basic education is first introduced and its completion is done at secondary schooling level.⁵³⁸ For African countries, the African Charter proceeded to provide the much-needed clarity, stating that the acquisition of basic education is mandatory for all children.⁵³⁹ The African Charter does not in verbatim provide for primary and secondary school attendance but it places an obligation on member states to make the acquisition of basic education mandatory.⁵⁴⁰ The additional non-derogatory obligation imposed on African states by the African Charter, of requiring states to make the acquisition of basic education mandatory, are interpreted by this dissertation to mean that, as long as there is an international acceptance that basic education is offered at both primary and secondary levels as stated by General Comment 13, both primary and secondary school attendance must be compulsory for all African children.

⁵³⁵ *Universal Declaration of Human Rights*, (1948) A 26 (1).

⁵³⁶ *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 in Jomtien, Thailand (1990).*

⁵³⁷ *General Comment 13: The Right to Education* (1999), para 12.

⁵³⁸ *Ibid.*

⁵³⁹ *African Charter on the Rights and Welfare of the Child* (1990), A, 11 (3) (a).

⁵⁴⁰ *Ibid.*

Without focusing on primary and secondary school levels, the African Charter is interpreted as extending the initial compulsory schooling levels of education from primary to secondary school levels. The fundamental analysis of this dissertation is that, the African Charter provisions make it impossible for anyone to still argue that secondary education is optional. The understanding of this dissertation is that, the implications of the African Charter provisions are that, as long as compulsory basic education is offered at primary and secondary school levels as envisaged by General Comment 13, both primary and secondary schooling are compulsory.

2.7.3 Component 3- Free and compulsory basic education

2.7.3.1 Introduction

The third component of the right to basic education is that basic education must be both free and compulsory. The obligation to provide free and compulsory basic education at primary school is viewed as unequivocal by international law, as first stated by the Universal Declaration⁵⁴¹ which stated that elementary education must be free and compulsory.⁵⁴² International law from the time of the Universal Declaration in 1948 stated that education shall be free and compulsory at some stage of human life. Whilst the terminology of the various international instruments evolved from that of the Universal Declaration, what remained consistent is that education must be free and compulsory at some stage of a human life.

As discussed above, elaborating on the provision of the right to education, Article 26 of the Universal Declaration of Human rights states that everyone has the right to free education at the elementary and fundamental stages and elementary/primary education must be regarded as compulsory.⁵⁴³ The ICESCR, clarifying the

⁵⁴¹ *Universal Declaration of Human Rights*, (1948).

⁵⁴² Ibid, A 26 (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'.

⁵⁴³ Ibid.

provisions of the Universal Declaration states that, primary education must be free and compulsory at primary schooling levels.⁵⁴⁴ The obligation to provide free primary education was so important during the drafting of the ICESCR that, state parties to the Covenant who had not made primary school compulsory and free by the time of its ratification, undertook to have a plan of action for the introduction of compulsory and free primary education in their territories and those under their jurisdictions.⁵⁴⁵ The ICESCR further obligated states to ensure that they would make secondary education available and accessible to everyone and particularly ensure the 'progressive introduction of free education'.⁵⁴⁶ The Committee to the ICESCR through General Comment 11 discussed above reinforced the need to provide free and compulsory primary education

In 1989 nations through the CRC also declared that every child has the right to education and primary education must be compulsory and free.⁵⁴⁷ Deviating from the provisions of the Universal Declaration that fundamental/basic education must be free, the provisions of the ICESCR and the CRC stating that, only primary/elementary education must be immediately free and compulsory were rapidly accepted and followed by most world countries. The Iraqi Constitution provides for the right to compulsory primary school which must be provided for free⁵⁴⁸ whilst, the Namibian Constitution provides for free and compulsory primary education.⁵⁴⁹ The Constitution of Malta also states that as a matter of government directive, primary education shall be free and compulsory in all state schools.⁵⁵⁰ The provisions of the Constitutions of both Zimbabwe and South Africa on this point will be discussed later in following chapters.

2.7.3.2 Compulsory basic education

⁵⁴⁴ *International Covenant on Economic, Social and Cultural Rights* (1966) A 13 (2) (a).

⁵⁴⁵ *Ibid*, A 14

⁵⁴⁶ *Ibid*, A 13 (1) (2) (b) see also McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 27.

⁵⁴⁷ *Convention on the Rights of the Child* (1990).

⁵⁴⁸ *Iraqi Constitution 2005*, A 34.

⁵⁴⁹ *Constitution of Namibia, 1990*, A 20 (2).

⁵⁵⁰ *Constitution of Malta, 1964*, S 10.

In relation to the provision of compulsory basic education, it is notable that, following the provisions of General Comment 13 as well as the Africa Charter discussed above, the obligations imposed on African states by the African Charter are to provide free and compulsory basic education.⁵⁵¹ The additional non-derogatory obligation imposed on African states by the African Charter of requiring states to make the acquisition of basic education mandatory are interpreted by this dissertation to mean that, as long as there is an international acceptance that basic education is offered at both primary and secondary levels as stated by General Comment 13, both primary and secondary school attendance is compulsory. The compulsory provision of basic education advocated by the African Charter is 'both an important enabling condition and a significant political intention in national attempts to universalise access to basic education'.⁵⁵²

There is no other way that children can acquire basic education which is offered at both primary and secondary schooling levels without both schooling levels being compulsory. For the right to basic education not to be compromised, states are obliged by the African Charter to make sure that they provide it compulsorily at whatever level it is offered. The Africa Charter provides us a legal basis to argue that, as long as the provision of basic education is agreed to be at both primary and secondary school levels, attendance of the two schooling levels is compulsory on the part of children.

2.7.3.3 Free education

In relation to free education, although international instruments drafted after the Universal Declaration only provided for immediate free education at elementary/primary school levels, the African Charter follows the approach of the Universal Declaration and states that fundamental/basic education must be free.⁵⁵³ The view of this dissertation is that the African Charter and the Universal Declaration's

⁵⁵¹ *African Charter on the Rights and Welfare of the Child*, (1990), A 11 (3) (a) 'State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and (a) shall in particular provide free and compulsory basic education'.

⁵⁵² Joel E et al *Educating all children, a global agenda* (Cambridge 2006) 127.

⁵⁵³ *Universal Declaration of Human Rights*, (1948), S 26 (1).

obligation to make basic education free beyond the primary school does not in any way minimise the ICESCR and the CRC obligation on countries to make primary education immediately free; it is just an extension of the duty to offer free education. It is also worth noting that both the CRC and ICESCR had also somehow extended the duty to provide free education from primary to secondary schooling levels, even though they advocate for progressive, rather than immediate free secondary school.⁵⁵⁴

The establishment of two tiers of responsibility, one progressive provision (secondary) and the other, immediate provision (primary) by both the ICESCR and CRC was totally avoided by the African Charter which made the provision of basic education a free entitlement for citizens of African countries. By stating that education must be free at fundamental/basic education stages, the reasoning of this dissertation is that the Universal Declaration and the African Charter unconditionally expanded the free provision of education from primary level to any level where basic education is offered. This dissertation's view is that, the extension of the element of compulsion by the African Charter could only have been deliberate and can be attributed to the paramount importance of providing basic education for children and adults as it was defined and unpacked by the World Declaration in the above discussion. With a consideration of the fact that basic education can be provided beyond the primary school, it was important for African states to ensure that children compulsorily acquire basic education regardless of the stage it is offered.

Further, the World Declaration and the African Charter were drafted around the same time and the persuasion for every child in Africa to get basic education at any schooling stage of their life, could not have been more convincing. The approach of the African Charter was significant in that it extended the obligations advanced by international law and put the African children in an advantaged position where they must compulsorily and freely acquire basic education. The difference between the international law approach and the African Charter's regional approach is even more significant in a continent where millions of people do not have an education. Providing

⁵⁵⁴ *Convention on the Rights of the Child*, (1990) A 28 (b), *International Covenant on Economic, Social and Cultural Rights*, (1966) A 13 2 (b).

for compulsory and free basic education is a sure way to ensure that children are in school for their entire basic education years. In Africa, state parties to the African Charter are, therefore, obliged by the African Charter to provide free and basic education; the free of charge element is unequivocal.⁵⁵⁵ Free education goes beyond the non-provision of school fees.⁵⁵⁶ Any fee including the charging of indirect costs through levies charged on parents, and any other compulsory levies is a disincentive and jeopardises the realisation of the need to enjoy the right to education.⁵⁵⁷

2.7.4 Component 4 - Available, acceptable, accessible and adaptable school education

2.7.4.1 Introduction

The fourth component of the right to basic education is that it must be accessible, adaptable, acceptable and available in line with the international law requirements for any type of an education provided by a school.⁵⁵⁸ General Comment 13 to the ICESCR states that any education provided by a school must exhibit the above interrelated elements.⁵⁵⁹ General Comment 13 to the ICESCR has endeavoured to elucidate the essential elements desirable for any school to be deemed functional. The Committee to the ICESCR, through General Comment 13 elaborates that if schools are to offer any education, including basic education, such education 'shall exhibit the following interrelated and essential features 'availability, accessibility, acceptability and adaptability'.⁵⁶⁰ Education in any form must comply with these four interrelated

⁵⁵⁵ *African Charter on the Rights and Welfare of the Child*, (1990).

⁵⁵⁶ *General Comment 13: The Right to Education* (1999), Para 7.

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid, para 6, 'While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features availability, accessibility, acceptability and adaptability'.

⁵⁵⁹ Ibid.

⁵⁶⁰ UNESCO 'Right to education: Scope and Implementation General Comment 13 on the right to education (Art. 13 of the International Covenant on Economic, Social and Cultural Rights)' see http://portal.unesco.org/education/en/file_download.php/c144c1a8d6a75ae8dc55ac385f58102erighteduc.pdf accessed 06 July 2018 Par 6a-6d In particular relating to the provision of primary education, the Committee states that 'primary education [provided by a school] includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels'.

elements.⁵⁶¹ These elements are not in themselves the entire scope and content of the right to basic education but it is submitted by this dissertation that they are a component of the right to basic education. They are discussed below.

2.7.4.2 Availability

On availability the Committee states that education institutions (schools) which are functional must be available in sufficient quantity.⁵⁶² Numerous factors determine availability inclusive of the developmental context where the educational institutions operate.⁵⁶³ These factors will include the fact that any education institution needs buildings including elements like sanitation facilities for males and females, functional and well stocked libraries as well as computer facilities.⁵⁶⁴ Schools must have safe drinking water, teachers that are trained to handle the teaching materials and are receiving salaries that are competitive.⁵⁶⁵ The 'provision of schools teacher, books and equipment is a fundamental prerequisite of education'.⁵⁶⁶

School environments must not only be physically healthy and safe but also socially and emotionally safe.⁵⁶⁷ School environments must be gender-sensitive and sensitive to the needs of the disabled with appropriate facilities for play.⁵⁶⁸ All the above factors hinge on the creating of a conducive environment for learning, for children. If the learning environment does not provide functional schools, then, General Comment 13 is of the view that the education is not available. This means that if children in Zimbabwe or South Africa are going to schools which has no classrooms, sanitation, trained teachers, teaching materials, libraries, and computer facilities or grounds for recreational activities, the view of the Committee is that their education is not available. Although attendance of school is compulsory, children

⁵⁶¹ Ibid.

⁵⁶² *General Comment 13: The Right to Education* (1999), Para 6 (a).

⁵⁶³ Ibid.

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid.

⁵⁶⁶ Das Ajoy Right to education (Axis publishers 2010) 68.

⁵⁶⁷ Ibid 41-42.

⁵⁶⁸ Ibid 41-42.

cannot be obligated to attend schools which compromise their dignity, health and wellbeing.⁵⁶⁹ Such an education should be regarded as unavailable.

2.7.4.3 Accessibility

For accessibility, the Committee states that it has three dimensions, first there should be no discrimination based on any ground in the provision of school education.⁵⁷⁰ Equal treatment of learners is an immediate state obligation for any school which cannot be qualified even by resource constraints.⁵⁷¹ The need for equal provision of education by schools must be seen in the light of the provisions of the CADE.⁵⁷² To define 'discrimination in education', CADE states that this includes any distinction, preference, limitation or exclusion based on factors, including economic status, race, colour and sex.⁵⁷³ In particular CADE mentions that discrimination includes the deprivation of access to any type of education for a specific group of persons, the provision of education of an inferior standard to certain persons, the establishment of separate education systems for specific persons and groups or the imposition of undignifying education conditions on one specific group of persons.⁵⁷⁴ For the purposes of preventing and eliminating discrimination in the provisions of education, state parties agreed to discontinue any discriminatory practices in their states or colonial states and to ensure the enactment of legislation which eliminates discrimination in the admission of pupils at education institutions.⁵⁷⁵ State parties

⁵⁶⁹ Ibid 41-42.

⁵⁷⁰ *General Comment 13: The Right to Education (1999)*, Para 6 (b).

⁵⁷¹ Ibid.

⁵⁷² *Convention against Discrimination in Education*, (1960) preamble. The Conventions drafting was led by the United Nations Educational, Scientific and Cultural Organization (UNESCO) after it found the need to build on the provisions of the Universal Declaration of Human Rights in 1966. It must be further read in light of other specific international instruments such as the *Convention on the Elimination of Discrimination Against Women 1979* and the *International Convention on the Elimination of All forms of Racial Discrimination 1969* and the provisions of both the Zimbabwean and South African Constitution on non-discrimination.

⁵⁷³ Ibid, A (1) (a)

'For the purposes of this Convention, the term 'discrimination includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular'.

⁵⁷⁴ Ibid, A 1 (a-d).

⁵⁷⁵ Ibid, A 3 (a-e).

agreed to enact national policies which would promote equality in accessing schools and equal treatment of prospective learners and these policies would include 'making primary education free and compulsory', at the same time ensuring the provision of education of the same standards.⁵⁷⁶

General Comment 13 also states that, all grounds of discrimination are prohibited and there is an immediate obligation on the state to comply.⁵⁷⁷ Taking note of the provisions of the CRC the Committee states that, 'the principle of non-discrimination extends to all persons of school age residing in the territory including non-nationals, and irrespective of their legal status'.⁵⁷⁸ In terms of discipline, the Committee states that, it must not be discriminatory but aim to safeguard the dignity of learners and schools must aim to use non-violent means of discipline.⁵⁷⁹ Whilst reports of 'emotional abuse and humiliation [at schools] remain widespread throughout the world', such conduct violates the dignity of the child as well as the provisions of the CRC which stated unequivocally that discipline at school must be 'administered in a manner consistent with the child's human dignity'.⁵⁸⁰ Schools must aim to curb not only violence by teachers on students but the abuse of student by student(s).⁵⁸¹ Evidence has it that, violence of any form physical, emotional or verbal contributes to school drop-outs, increased failure rates and erodes self-esteem, thereby making education inaccessible.⁵⁸²

Whilst a state can adopt temporary measures to ensure that there is a balance of provision of education in schools between different children, policies that result in different spending for different groups, leading to different quality of basic education being offered by a school, constitute discrimination.⁵⁸³ If budgets for schools in Zimbabwe or South Africa are unfairly different for schools in the same country or

⁵⁷⁶ Ibid, A 4 (a-b)

⁵⁷⁷ *General Comment 13: The Right to Education* (1999), Para 31.

⁵⁷⁸ Ibid, para 34.

⁵⁷⁹ Ibid, para 41.

⁵⁸⁰ Das Ajay *Right to education* (Axis publishers 2010) 45 see also *Convention on the Rights of the Child*, (1990) A28 (2).

⁵⁸¹ Das Ajay *Right to education* (Axis publishers 2010) 45.

⁵⁸² Ibid

⁵⁸³ *General Comment 13: The Right to Education* (1999), Para 6 (b).

province, then that education can be deemed inaccessible. The current similar situations in both Zimbabwe and South Africa to be discussed, in the next chapters where some schools have libraries and others do not have; some children learn in classrooms and others under the tree or in shacks or where some children have textbooks and others do not have, may constitute discrimination in the provision of school education.

Second, still on accessibility, schools must be physically accessible meaning that they must be within safe reach or convenient location.⁵⁸⁴ On this second leg of accessibility, the General Comment is of the view that situations, prevalent in both Zimbabwe and South Africa (to be discussed in the next chapters) where children walk long and oftentimes unsafe distances to school, make education inaccessible.⁵⁸⁵ Third, still on accessibility, education must be economically accessible. According to General Comment 13, primary schools must not charge entrance fees, exam fees or attendance fees for learners at the primary school level and governments must aim to make secondary education completely free.⁵⁸⁶ This dissertation reasons, as mentioned before, that the African Charter obligation is to make basic education free, as such primary and secondary education must be free. As critiqued in the next chapters, the payment of school fees at primary school level is sanctioned by the legislations of both Zimbabwe and South Africa which makes education inaccessible.

2.7.4.4 Acceptability

For acceptability, the content of school education, the delivery methods, assessments and the curriculum must be of good quality, thus, relevantly and culturally aligning with the quality required by various international instruments.⁵⁸⁷ The curriculum must be tailored in such a way that it is inclusive, free of any harmful stereotypes including those based on gender or ethnic origins. Acceptable teaching and assessment methods

⁵⁸⁴ Ibid.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ibid.

⁵⁸⁷ Ibid, para 6 (c).

must view children as agents of their own change and masters of their destiny.⁵⁸⁸ The differences in the ages of children and their differing capacities must be respected and participatory environments promoted.⁵⁸⁹ If the education offered by the government or private schools in both Zimbabwe and South Africa is not of the quality required by international law as well as the provisions of the domestic law (which aligns with international law) then such education must be deemed unacceptable. On culture, education must be designed to suit the local needs of the learners and address various cultural issues otherwise it is not acceptable.⁵⁹⁰ A total negation and disregard of the culture of students in their learning process is what was desired by colonialists in both Zimbabwe and South Africa as discussed in the following chapters. Such an approach to education, discussed in the next chapters, is unacceptable, as students were taught to disregard their own languages and cultures and to view those who had not acquired foreign cultures and languages as barbaric.

Also, following the above argument, when an education does not address the cultural context of learners, it makes culture stagnant and it fails to positively develop it leading to the maintenance of cultures which are cruel, oppressive and against human rights. Also, if positive cultural attributes like the African shared-value of Ubuntu are not promoted in learning, students may fail to understand the link between their culture and concepts, expressed in the English language, such as dignity; yet the link between Ubuntu and the right to dignity has been clarified by various authors.

2.7.4.5 Adaptability

For adaptability, school education must be flexible enough to adapt to the needs of the society and the communities in which it is provided.⁵⁹¹ General Comment 13 states that if an education does not exhibit the above essential features, it cannot qualify to be called an education.

⁵⁸⁸ Das Ajay *Right to education* (Axis publishers 2010) 40-41.

⁵⁸⁹ Ibid 40-41

⁵⁹⁰ *General Comment 13: The Right to Education* (1999), Para 6 (c).

⁵⁹¹ Ibid para 6 (d).

2.7.5 Component 5- The right to education as a minimum core content of the right to education

The fifth component of the right to basic education is that, it must be beheld to be the minimum core content of the right to education alluded to by the ICESCR and its General Comments discussed above. General Comment 3 to the ICESCR states that all human rights have a minimum content which imposes an obligation on every state to ensure the provision of such core.⁵⁹² The minimum core approach proposes that there is a certain minimum extent of providing a human right which amounts to a mandatory minimum fulfilment of providing that right.⁵⁹³ The minimum core approach intends to establish an immediate priority need which the state must provide.⁵⁹⁴ Although its intricate details may be contextualised, the minimum core must be universal and not country-dependent.⁵⁹⁵

The minimum core as part of a right commanding immediate provision from the government commands similar obligations to those imposed by an unqualified right to basic education as it is discussed in chapter 4 and 5. It is not settled whether the minimum core content of the right to education is fulfilled when primary education is offered or whether its provision extends to secondary education. The argument advanced by other authors⁵⁹⁶ that only primary education is the minimum core

⁵⁹² *General Comment No. 3: The Nature of States Parties Obligations*, (1990) Para 10, 'On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*'.

⁵⁹³ Chowdhury 'Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights. A Comparative Perspective' (2009) Cornell Law Library 3.

⁵⁹⁴ Wesson M, 'Grootboom and beyond; Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 SJHR 298.

⁵⁹⁵ Coomans F, 'In search of the core content of the right to education' page at 166-167 in Brand D and Russell S *Exploring the core content of socio-economic rights: South Africa and international perspectives* (Protea Book House, 2002) 2.

⁵⁹⁶ *Ibid*, 'primary education is so fundamental for the development of a person's abilities that it can be rightfully defined as a minimum claim. Providing secondary and other forms of education would not belong to the core of the right. These levels of education have less priority from the perspective of the

obligation in relation to the provision of education is refuted from the onset by this dissertation. It is submitted that, the compulsory and free nature of basic education motivates the argument that it amounts to the minimum provision of the right to education. It is further submitted that, as long as basic education is offered at both primary and secondary education, secondary education must be regarded as forming part of the state's immediate obligation to provide basic education. It is noted that the South African constitutional court has rejected the application of the minimum core in relation to qualified socio-economic rights brought before it. The applicability of the minimum core in relation to the interpretation of rights in the South African Constitution is therefore discussed in detail in chapter 5.

In relation to the aspect of progressive realisation of the right to education, the Committee notes that, the realisation of economic, social and cultural rights may take time.⁵⁹⁷ However, the time needed to meet the obligations must not be misinterpreted to mean that the right has no 'meaningful content'⁵⁹⁸. In view of its experience, the Committee states that, it came to the view that, 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party'.⁵⁹⁹ The Committee provides that a country where a number of people are deprived 'of the most basic forms of education is failing to discharge its obligations'.⁶⁰⁰

The minimum core is a priority obligation and available resources must be channelled to its satisfaction.⁶⁰¹ The Committee notes that the term 'available resources' was crafted to include both national resources and those available 'through international cooperation and assistance'.⁶⁰² The Committee drew reference to the provisions of General Comment 2 and article 55 and 56 of the Charter of the United

essence of acquiring basic educational qualifications'. See also Arendse L 'The obligation to provide free basic education in South Africa: An International Law Perspective' (2011) *PER/PELJ* 109 - 110.

⁵⁹⁶ The arguments will be discussed in chapter 4 and 5.

⁵⁹⁷ *General Comment No. 3: The Nature of States Parties Obligations*, (1990) Para 9.

⁵⁹⁸ *Ibid*, para 9.

⁵⁹⁹ *Ibid*, para 10.

⁶⁰⁰ *Ibid*.

⁶⁰¹ *Ibid*.

⁶⁰² *Ibid*, para 13 and 14.

Nations which relate to the need for international cooperation.⁶⁰³ The expanded vision requires a level that 'surpasses present resources levels [money, human or otherwise], institutional structures, curricula and conventional delivery systems while building on the best in current practices'.⁶⁰⁴ The fact that governments might argue that they do not have the resources to attain the expanded vision does not arise, as legally speaking, the right to education also imposes an immediate obligation on states as required by the ICESCR. The immediate obligation is viewed to be basic education as will be further advanced by this dissertation. What is needed as stated by Pierre De Vos is for the government to share the sense of urgency to rectify the lingering injustices in education.⁶⁰⁵ The sense of urgency as the World Declaration states 'is a broader scope of action than in the past'⁶⁰⁶ and might require the reallocation of resources between sectors 'as, for example, a transfer from military to educational expenditure'.⁶⁰⁷ There is a need to emphasis that, the vision of basic education must be reshaped and new commitments made to ensure governments offer basic education whose contents meet the desired minimum core standard required by international law.

2.8 Conclusion

This chapter highlighted that education is a beneficial and transforming process which is now regarded as a human right. Within the human rights framework, education is a human right provided by various international instruments. It stated that, human rights are justiciable claims which give citizens entitlements and governments obligations. The right to basic education was discussed as a human right whose legal origins began with the Universal Declaration and was later defined by the World Declaration. The evolution of child education terms from primary education,

⁶⁰³ Ibid.

⁶⁰⁴ *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 in Jomtien, Thailand (1990)*, Ibid Article II.

⁶⁰⁵ De Vos P, 'Constitutionally Speaking' <http://constitutionallyspeaking.co.za/>, accessed 20 March 2016.

⁶⁰⁶ *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 in Jomtien, Thailand (1990)* Article IX (1).

⁶⁰⁷ Ibid Article IX (2).

fundamental education, secondary education, elementary education and basic education was discussed and it was determined that, the term basic education is now used to allude to a certain quality of education laid out by the World Declaration which must be acquired by children. The chapter concluded that, the right to basic education comprises of five elements which rank equally. First, the term basic education alludes to the quality of education learners are entitled to as it was defined by the World Declaration, second basic education must be offered at primary and secondary schooling levels and attendance of both primary and secondary school is essential for the attainment of basic education needs, third, both primary and secondary schooling must be compulsory and free to ensure that all children have a fair chance to acquire basic education, fourth, General Comment 13 states that all kinds of education must exhibit four elements that is available, acceptable, adaptable and accessible, fifth , General Comment 3 states that all human rights must be regarded to have a minimum core content and basic education is reasoned as the minimum core content of the right to basic education. The international expanded vision of basic education therefore focuses on curriculum content, learning and outcomes, the environment for learning, the need for free and compulsory basic education, the provision of basic education at primary and secondary school levels and the regard of basic education as an unqualified and minimum core right. The next chapter discusses the manner in which the right to basic education must be interpreted in both Zimbabwe and South Africa. The understanding of how rights must be interpreted in both countries will make it possible to assess their basic education constitutional obligations vis a vis international obligations discussed in this chapter.

CHAPTER 3

INTERPRETING SECTION 75 (1) (A) OF THE ZIMBABWEAN CONSTITUTION AND SECTION 29 (1) (A) OF THE SOUTH AFRICAN CONSTITUTION

3.1 Introduction

The last chapter discussed the international substantive content of the right to basic education as provided by international law. It stated that, the scope and content of the right to basic education at international law has five components with equal importance. However, such substantive content cannot be imposed on either Zimbabwe or South Africa. For many countries, inclusive of Zimbabwe and South Africa, a national Constitution and not international law is the supreme law of the land. Constitutional provisions are deemed to unquestionably bind any organs of the state and any citizen, hence, they enjoy supremacy to the extent that when their provisions are invoked, any law or conduct in contrast with their provisions is deemed null and void and in some circumstances, illegal. The fact that the Constitution is the supreme law of a country, however, has never meant that its text is often accepted on face value. Sometimes constitutional provisions are not clear and the necessity of giving them meaning arises. Whilst a constitutional provision that school attendance begins when a child turns 7 years may enjoy clarity, a provision that everyone has the right to basic education may instigate debate and therefore necessitate the need to interpret what basic education alludes to.

In an effort to determine whether the discussions of the last chapter would apply to both Zimbabwe and South Africa, this part of the dissertation seeks to explore the manner in which the socio-economic rights embodied by the Constitution of Zimbabwe and that of South Africa must be or have been interpreted. Focus is particularly on the interpretation of the right to basic education, that is, the manner in which section 75(1) (a) of the Zimbabwean Constitution and section 29 (1) (a) of the South African Constitution, must and have been interpreted. In the end, it is concluded that following the interpretive guidance embodied by the Constitutional clauses of both countries, both countries adhere to the provisions of international law

relating to the substantive content of basic education. Both countries are bound by their constitutional commitment to provide basic education as it was elaborated and defined in the last chapter. In addition to all the components discussed in the last chapter, it is reasoned further by this chapter that, in both Zimbabwe and South Africa, basic education must be understood to be an unqualified right.

3.2 Introduction to Constitutional interpretation

3.2.1 Introduction

Constitutional interpretation has its origins in common law.⁶⁰⁸ It is a process which enables the delimitation of the scope and content of governments' obligations.⁶⁰⁹ It sets the extent to which a person can claim an entitlement and reviews the constitutionality of legislation.⁶¹⁰ In constitutional democracies like Zimbabwe and South Africa, the judiciary is constitutionally entrusted with the role of interpreting Constitutional provisions.⁶¹¹ Judges often use theories of interpretation to give meaning to constitutional or legislative provisions. It is noted in this dissertation that, when a judge meets a theory of interpretation, like any human being, he/she may combine it with their views and other considerations to produce an outcome. It cannot be viewed as unheard of that, a judge with the task to interpret the constitution may strategically choose a theory which advances their views either personally, religiously, economically, socially or otherwise. An irresponsible judge may, through hiding behind a theory impute their views on the Constitution and distort its meaning.

⁶⁰⁸ L du Plessis 'Theoretical (Dis) position and strategic Letitmotivs in Constitutional Interpretation in South Africa' (2015) PER 18 1336.

⁶⁰⁹ Botha C *Statutory Interpretation: An Introduction for Students* (Juta 2012) 183.

⁶¹⁰ Ibid.

⁶¹¹ *Farai Mushoriwa v City of Harare* HC 4266/13

'Section 162 of the Zimbabwean Constitution clothes this Court with judicial authority and s 165 (1) (c) provides that, 'The role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.' In the words of Francis Bennion in his book *Statutory Interpretation 1984*, the courts are best suited to interpret and give effect to the law when he says at page 50: 'A Court is an agency charged with the function of exercising the judicial power of the State. Only a court as thus defined has the power authoritatively to determine what the law is, and therefore what is the legal meaning of a relevant enactment,' '.

Although it can be assumed that no responsible judge may plan to let his/her prejudices affect judicial judgement, judges are human beings and bias whether specific or general may become difficult to avoid in the interpretation process. An example, is that a judge may think that cruel and unusual punishment does not include a certain degree of corporal punishment for children and proceed to set their views as judicial precedent. With those considerations, the view of this dissertation is that constitutional interpretation is a serious practice which cannot enjoy the luxury of 'cherry-picking theories' or the advancement of personal views. It is an arena of law where certainty is vital in order for citizens to have confidence in their constitutions as well as in the judiciary. Judges must, therefore, not exercise their privilege arbitrarily but must act as the watchdogs of constitutions. Instead of an over-reliance on theories, judges must rely on the provisions of a Constitution relating to its interpretation. Such provisions are usually called-interpretation clauses. Constitutional provisions enjoy supremacy as such the provisions of interpretation clauses must enjoy supremacy over strict adherence to theories.

3.2.1 The difference between Constitutional interpretation and interpretation of statutes

The Constitution is the supreme law of a country.⁶¹² No matter what the legislature intended or what the essential meaning of a legislative provision is or the impact of context on the interpretation of a legislative provision, all legislative interpretations must yield a result which conforms to the Constitution.⁶¹³ When a need arises, a Constitution may nullify a legislative provision and develop common law including all common law rules and canons of interpretation.⁶¹⁴ The unique role of the Constitution,

⁶¹² L du Plessis 'Theoretical (Dis) position and strategic Letitmotivs in Constitutional Interpretation in South Africa' (2015) PER 18 1336

⁶¹³ Ibid 1338.

⁶¹⁴ Ibid 'legislature must be construed to promote the spirit, purport and objects of the Bill of Rights. This canon cannot be overridden by "legislative intent" couched in (allegedly) "clear and unambiguous language". The "intention of the legislature", in all its possible significations, will always be subject (and second) to the Constitution, and not only when a statute is (allegedly) inconsistent with a provision or provisions of the Constitution'.

as the law above all laws, makes it 'a new canon of statutory interpretation...'⁶¹⁵ A Constitution, unlike legislation is a new canon of interpretation which the Courts must use to ensure that every opportunity to interpret legislation brings forth results which uphold the values, rights, ethos and wishes of a nation.⁶¹⁶ Speaking about the unique role of Constitutions in different countries, the South African case of *S v Makwanyane* noted that, all Constitutions are the testament of the aspirations of countries, the values that bind countries and the unique moral ethos of a country.⁶¹⁷ Whilst there remains similarities, the value-laden character of all Constitutions makes their interpretation different from legislative documents.

To understand the reasons why constitutional interpretation must be different from legislative interpretation, the first thing is to acknowledge the differences between legislation and the Constitution.⁶¹⁸ Unlike legislation which is voted in by the majority through their representatives in parliament, the Constitution is voted in by everyone making it a social agreement to protect and advance the unique needs of everyone.⁶¹⁹ It is a socially living document which has the capability to adjust itself to the changing values and aspirations of citizens. Whilst legislation comprises of statutory instruments which may be repressive and are used by the legislature to govern the majority, a Constitution in most African countries is a 'bridge' which marks the movement from repressive pasts to new democratic eras.⁶²⁰ The Constitution is therefore an agreement by people to be guided by values which will lead to the respect and protection of everyone's rights.⁶²¹

⁶¹⁵ L du Plessis 'Theoretical (Dis) position and strategic Letitmotivs in Constitutional Interpretation in South Africa' 18 (2015) PER 1338.

⁶¹⁶ Ibid 1342.

⁶¹⁷ *S v Makwanyane* [1995] 3 SA 391 (CC) para 262 see also Brandon J Murril 'Modes of Constitutional Interpretation' (2018) Congressional Research Service 17 see, <https://www.hsdl.org/?abstract&did=809094> accessed 18 July 2018.

⁶¹⁸ Klaasen A 'Constitutional interpretation in the so-called 'hard cases' Revisiting *S v Makwanyane*' (2017) Dejure 4, see <http://www.saflii.org/za/journals/DEJURE/2017/2.pdf> accessed 18 July 2018.

⁶¹⁹ Ibid.

⁶²⁰ L du Plessis 'Theoretical (Dis) position and strategic Letitmotivs in Constitutional Interpretation in South Africa' (2015) PER 1345

⁶²¹ Kentridge J and Derek Spitz 'Interpretation' Constitutional Law of South Africa' 4 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-Interpretation.pdf accessed 06 July 2018.

Constitutions are also unique in the sense that, unlike legislation which often embodies defined cast-in-stone concepts, the rights and values protected by Constitutions are often strategically undefined, vague and abstract.⁶²² Constitutional texts are often silent on many constitutional questions⁶²³ and although they provide for values and rights they often do not clarify the person to be protected and the rights or values to be compromised in a bid to protect or compromise other rights.⁶²⁴ The abstract nature of values and rights in the Constitution makes it possible for Courts to flexibly determine the manner in which rights and values are to be defined so that they translate to reality, protect everyone and become applicable to specific unique contexts.⁶²⁵ Whilst interpreting legislation is about determining the meaning of a statutory provision, constitutional interpretation is about recognizing and applying values embodied by the Constitution.⁶²⁶

By virtue of the provision of open-ended often undefined values and rights, the Constitution solves the counter majoritarian dilemma which legislation cannot solve.⁶²⁷ Values assist the courts to base their judgments on principle making it possible for courts to make pronouncements which maybe against the majority, such as abolishing the death penalty or upholding same sex marriages.⁶²⁸ By virtue of its rights and values being open-ended, a judge who is trained, ethical and fair is able to interpret the rights and bring their enlightened views and opinions in the interpretation process.⁶²⁹ Bills of rights, unlike legislation are worded widely and give the judges more room to make

⁶²² Klaasen A 'Constitutional interpretation in the so-called 'hard cases Revisiting S v Makwanyane' (2017) Dejure 4.

⁶²³ Brandon J Murril 'Modes of Constitutional Interpretation Congressional Research Service' (2018) 2 see, <https://www.hsdl.org/?abstract&did=809094> accessed 18 July 2018.

⁶²⁴ Klaasen Abraham Constitutional interpretation in the so-called 'hard cases' Revisiting S v Makwanyane 2017 Dejure 2

⁶²⁵ Kentridge J and Spitz D 'Interpretation' (year) Constitutional Law of South 12Africa' http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-Interpretation.pdf accessed 06 July 2018.

⁶²⁶ *Matiso v Commanding Officer, Port Elizabeth Prison and another*, [1994] (4) SA 592 (SE) 596f-599c

⁶²⁷ Klaasen A 'Constitutional interpretation in the so-called 'hard cases Revisiting S v Makwanyane' (2017) Dejure 12-14

⁶²⁸ Kentridge J and Spitz D 'Interpretation' Constitutional Law of South Africa 23 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-accessed 06 July 2018.

⁶²⁹ Klaasen A 'Constitutional interpretation in the so-called 'hard cases Revisiting S v Makwanyane' (2017) Dejure 12-14

value judgments when interpreting them.⁶³⁰ The Bermuda court in the case of *Minister of Home Affairs v Fisher* stated that, the Constitution is 'drafted in a broad and ample style which la[ys] down principles of width and generality'⁶³¹ as such, it must be given a 'generous interpretation avoiding...the austerity of tabulated legalism'.⁶³² In addition to providing for rights, freedoms and values, Constitutions unlike legislation, often mandate the recognition of international law in their interpretation and afford value to other foreign laws.⁶³³

It remains, however, undeniable that, whilst legislative and constitutional interpretation presents notable differences, the coming in of a Constitution cannot render the old theories, rules and canons of interpretation nugatory and canons of interpretation cannot be ignored as valueless.⁶³⁴ At every opportunity to interpret either the Constitution or legislation, words are always the starting point to discern the meaning of a statutory or constitutional provision.⁶³⁵ Language is the parameter around which we understand constitutional values.⁶³⁶ The South African court in the case of *Minister of Home Affairs v Fisher* stated that a Constitution is a legal document, as such its language needs to be respected as well as 'traditions and usages which have given meaning to that language'.⁶³⁷ In both South Africa and Zimbabwe, the Constitutions provide a new legal order in which they provide for interpretation clauses giving clear indication of how they must be interpreted.⁶³⁸ The provision of a manner in which the Constitution must be interpreted by the Zimbabwean and the South African Constitution is a unique practice not popular in many countries, therefore, it needs to be taken as an advantage which goes a long way to settling the debates regarding the theories which should apply to constitutional interpretation. With

⁶³⁰ Kentridge J and Spitz D 'Interpretation' Constitutional Law of South Africa 15 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-accessed 06 July 2018.

⁶³¹ Ibid 10

⁶³² Ibid. See also *Minister of Home Affairs v Fisher* [1980] AC 319 328H, *S v Zuma and others* 1995 (2) SA 642 (CC), 995.

⁶³³ Ibid 4

⁶³⁴ Kentridge J and Spitz D 'Interpretation' Constitutional Law of South Africa 15 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-accessed 06 July 2018.

⁶³⁵ Ibid.

⁶³⁶ Ibid 30.

⁶³⁷ Ibid, 11,

⁶³⁸ Ibid, 15.

Constitutions providing for interpretation clauses which direct the consideration of values in the interpretation process, their interpretation in Zimbabwe and in South Africa should now be viewed as an endeavor to protect constitutional values and give effect to them. The use of canons of interpretation, whilst still possible, must be done in conjunction with the careful recognition that the Constitution is the supreme canon of interpretation providing for the manner it ought to be interpreted. Below a discussion of the traditional theoretical approaches of constitutional interpretation is done, followed by a discussion of the interpretation clauses of both Zimbabwe and South Africa.

3.3 Theories of Constitutional Interpretation

3.3.1 Introduction

In the process of interpretation, judges have often made reference to literature (scholarship) on constitutional interpretation. The scholarship of Constitutional interpretation is so varied and diverse that it is not deemed necessary for this dissertation to have an exhaustive list or discussion of all the constitutional interpretation theories developed by academic literature. The view of this dissertation is that, an attempt to agree on a chosen theory of constitutional interpretation is not necessary, however, what is important to note is that an overview of the theories of constitutional interpretation shows a distinction between 'constitutional theories that aim to fit the constitutional text and theories that aim to fit the constitutional practice'.⁶³⁹ Despite this sharp distinction between text-based theorist and practice-based theorist done by this dissertation, it is important to note that there are also divisions within those categories; which are not important to mention for the purposes of this discussion.⁶⁴⁰

⁶³⁹ Dorf C M 'Create your own Constitutional Theory' (199) California Law Faculty Publications 593 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=1097&context=facpub> accessed 18 July 2018.

⁶⁴⁰ Ibid.

3.3.2 Text-based theories

Text-based theories generally emphasise the importance of textual interpretation.⁶⁴¹ They give credit to the written text as opposed to the views of the interpreter.⁶⁴² Some text-based theories, such as literalism, place reliance on the literal meaning of the provisions of the written word.⁶⁴³ With literalism, the meaning of constitutional provision is deduced solely from the phrasing of the language used by the provision.⁶⁴⁴ The proponents of literalism argue that, strict reliance on constitutional text prohibits judges from reading in their own personal value judgments in constitutional text.⁶⁴⁵

Some text-based theories, such as intentionalism place emphasis on the use of text to search for the original or subjective intent of the constitutional framers.⁶⁴⁶ The theory proposes that, to determine what the constitutional drafters sought to convey through text, one has to figure out their original intent when they proposed and drafted the constitutional provision.⁶⁴⁷ They propose that, for a law to be ascertainable, it needs to have a fixed meaning which is determined by looking into the intention of those who drafted it.⁶⁴⁸ The parameters of constitutional interpretation are said to be set by those who drafted the document.⁶⁴⁹ The search for original intention of the drafters is proposed to ensure that judges do not enforce their value judgments during the interpretation process.⁶⁵⁰ Logically, in light of the complexity of Constitutional drafting and the fact that it involves various processes and referendums,

⁶⁴¹ P Thomas K R 'Selected Theories of Constitutional Interpretation' (2011), Congressional Research Service 4 <https://www.fas.org/sgp/crs/misc/R41637.pdf> accessed 18 July 2018.

⁶⁴² Ibid.

⁶⁴³ Fallon HR 'How to choose a constitutional theory.', (1999) 541, <https://dash.harvard.edu/bitstream/handle/1/12956282/How%20to%20Choose%20a%20Constitutional%20Theory.pdf?sequence=1> accessed 18 July 2018.

⁶⁴⁴ L du Plessis 'Theoretical (Dis) position and strategic Letitmotivs in Constitutional Interpretation in South Africa' 18 (2015) PER 1335.

⁶⁴⁵ Brandon J Murril 'Modes of Constitutional Interpretation Congressional Research Service' (2018) 17 see, <https://www.hsdl.org/?abstract&did=809094> accessed 18 July 2018.

⁶⁴⁶ Thomas K R 'Selected Theories of Constitutional Interpretation' (2011), Congressional Research Service 6 <https://www.fas.org/sgp/crs/misc/R41637.pdf> .accessed 18 July 2018.

⁶⁴⁷ Brandon J Murril 'Modes of Constitutional Interpretation Congressional Research Service' (2018) 7 see, <https://www.hsdl.org/?abstract&did=809094> accessed 18 July 2018.

⁶⁴⁸ Ibid.

⁶⁴⁹ Kentridge J and Spitz D 'Interpretation' Constitutional Law of South Africa 17-18 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-accessed 6 July 2018

⁶⁵⁰ Ibid.

variations in intention between those who drafted and those who may have attended the referendums or voted for the provisions are inevitable.⁶⁵¹ Constitutions are 'drafted after a good deal of political compromise so that it would be nearly impossible to ascertain a single collective intent of a large group of individuals, each who may have a different intentions'.⁶⁵² The excavation of the various intentions of people into one coherent intent is hardly possible.⁶⁵³ The various intentions of the many diverse people involved in the drafting process seem to be underestimated by text-based theorists.⁶⁵⁴ The problem of determining intention is further compounded by the reliance on subjective\original intention of the drafters of the Constitution.⁶⁵⁵ It should be noted that with changes in times, practices and beliefs, a strict reliance of the drafters' subjective/original intention is not sustainable. Thomas K suggests that

[A] court seeking to interpret a constitutional provision would need to 'state a core value [major premise] that the framers intended to protect' and then supply the minor premise necessary to protect the constitutional freedom at issue. In this manner, a judge can apply a Constitution to unforeseen facts without forgoing adherence to the intended constitutional intent of the subject provision.⁶⁵⁶

Thomas' view above is critical because it gives credence to the need to protect underlying principles and values safeguarded by the Constitution as opposed to endeavouring to figure out the subjective or even objective intention of the constitutional drafters. Thomas gives a relevant example, that in many Constitutions, the right to equality may not have been premised on the need to promote gender rights but with changing times what remains fundamental is the principle of equality which can be interpreted today to include gender equality⁶⁵⁷.

⁶⁵¹ Ibid.

⁶⁵² Thomas K R 'Selected Theories of Constitutional Interpretation' (2011), Congressional Research Service 8 <https://www.fas.org/sgp/crs/misc/R41637.pdf> accessed 17 July 2018.

⁶⁵³ J Kentridge J and Spitz D 'Interpretation' Constitutional Law of South Africa 17-18 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11 accessed 6 July 2018

⁶⁵⁴ Thomas K R 'Selected Theories of Constitutional Interpretation' (2011), Congressional Research Service 5 <https://www.fas.org/sgp/crs/misc/R41637.pdf> accessed 17 July 2018.

⁶⁵⁵ Ibid 6.

⁶⁵⁶ Ibid 7.

⁶⁵⁷ Ibid 7.

On the other hand, some text-based theories endeavour to use text to search for the essential meaning of a constitutional provisions.⁶⁵⁸ Searching for 'essential meaning is not realistic as it assumes that words, especially descriptive terms have a meaning which does not change regardless of context'.⁶⁵⁹ Searching for essential meaning would mean, for example, that the word 'chair' is expected to meet all the descriptive or essential elements of an object usually used for sitting called 'a chair', yet this word might not refer to a chair as an object but chair as a person, therefore an abbreviation for 'chairman' or 'chairlady'. The search for an essential meaning, therefore, attempts to bring an objectivity and certainty in interpretation which does not exist. The search for essential meaning appeals to those who yearn for 'certainty and objectivity' which the approach promises, yet words evolve which pushes us towards flexibility.⁶⁶⁰ Another very good illustration is the legal word 'marriage' which keeps changing and has changed over the years to now include same sex marriages. Adopting a flexible approach to the interpretation of the word 'marriage' in the case of *Commonwealth v Australian Capital Territory*, the court broadening the word 'marriage' in section SI (xxi) stated that marriage refers to

a consensual union formed between natural persons [not only men and woman] in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminated only in accordance with the law but also a union to which the law accords status affecting and defining mutual rights and obligations.⁶⁶¹

Besides the above recognition of a marriage as merely a union of persons, the word is also contextual and may mean something else in divorce and maintenance matters which require a legally-recognised marriage. It may also mean something completely different in matters of insolvency, inheritance and succession which may recognise living together as a form of marriage. Also, in other cultures when traditional rites are performed, a marriage is deemed to exist, regardless of its legal status, however, in

⁶⁵⁸ Stokes M, 'Meaning, theory and interpretation of Constitutional grants of power' (2013) Monash University Law Review 321.

⁶⁵⁹ Ibid.

⁶⁶⁰ Ibid.

⁶⁶¹ *Commonwealth v Australian Capital Territory* [2013] HCA SS [33].

other cultures, the performance of traditional rites would not signify the existence of a marriage, as long as the union is not legally registered.

3.3.3 Practice-based theories

On the other hand, the practice-based theories argue that, merely following the dictates of the written law and absenting from interpretation, the dictates of the judge, the history of constitutional provisions or values informing the Constitution would be too narrow an approach, as it ignores the social practices which inform the Constitutional order.⁶⁶² Ideally, we may wish 'the judicial branch of government had only one duty, to lay the article of the Constitution which is involved in the discussion, besides the statute which is challenged and to decide whether the latter squares with the former'.⁶⁶³ Practically, however, the meaning of a text may not be clear and in such instances, it does not help to 'instruct a judge to follow the plain meaning of constitutional text' or the intentions of the drafters.⁶⁶⁴ In accordance with practice-based theories, the presumed intentions of the drafters of legislation do not control interpretation.⁶⁶⁵ Intentions of drafters are understood to be various and near-impossible to determine and text is often too ambiguous to reflect all of them.⁶⁶⁶ Practice-based theorist therefore view the Constitution as a living document with a meaning which cannot be fixed in history.⁶⁶⁷ In accordance with the practice-based theories, the Constitution is not a document but a practice with text at its centre.⁶⁶⁸ The practice-based manner of interpreting the constitution was elucidated in the case

⁶⁶² Fallon HR 'How to choose a constitutional theory.', (1999) 546, <https://dash.harvard.edu/bitstream/handle/1/12956282/How%20to%20Choose%20a%20Constitutional%20Theory.pdf?sequence=1> accessed 18 July 2018.

⁶⁶³ Post R C 'Theories of Constitutional Interpretation' (1990) Yale law school *Faculty Scholarship Series* 14 http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1208&context=fss_papers accessed 18 July 2018.

⁶⁶⁴ Ibid

⁶⁶⁵ 'Theories of Constitutional Interpretation' www.law2.umkc.edu accessed 6 July 2018.

⁶⁶⁶ Ibid.

⁶⁶⁷ Following the practice based theorists, in the American case of *Cullah v Marylan* (1819) 17 US 316 it was stated that, 'the Constitution must be adapted to reflect changing circumstances a principle embodied in the metaphor of the living tree.

⁶⁶⁸ Fallon HR 'How to choose a constitutional theory' (year), 87, 544 <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?Article=1556&context=californialawreview> accessed 06 July 2018.

of *Edwards v Attorney General of Canada* which stated that the Constitution must be given a 'large and liberal interpretation'⁶⁶⁹ and that for 'constitutional text to be intelligent at all, it must be situated within the linguistic practice'.⁶⁷⁰ Constitutional text placed in linguistic practice would enable a judge to make value judgements and protect the rights of every individual citizen even against majority social, religious or political opinions.⁶⁷¹ A liberal interpretation of the Constitution allows for a purposive\teleological exercise, aimed at ascertaining the purpose of the guaranteed right and determining the interest the Constitution is meant to protect⁶⁷². A liberal approach to constitutional interpretation allows for the Constitution to be interpreted in a manner which fulfils the purpose of the right and makes sure that every individual fully benefits from its protection⁶⁷³. It is, therefore imperative to remember that, the purpose of the rights must be determined in their "linguistic, philosophical and historical context"⁶⁷⁴.

3.4 An Inclusive Interpretive Style

The distinctions between text-based theories and practice-based theories are there and although these theories may seem to exist independently of each other, practically, the motivations behind the conceptions of the theories are not independent of each other. It is often notable that when interpreting legislation, judges often use more than one theory or mode of interpretation.⁶⁷⁵ The view of this dissertation is that, whilst interpreting the Constitution, a judge must consider what this dissertation will call 'an inclusive interpretive style'. The inclusive interpretive style used by this

⁶⁶⁹ *Edwards v Attorney general of Canada* (1930) AC 124

⁶⁷⁰ Fallon HR 'How to choose a constitutional theory., (1999) 87, <https://dash.harvard.edu/bitstream/handle/1/12956282/How%20to%20Choose%20a%20Constitutional%20Theory.pdf?sequence=1> accessed 18 July 2018.

⁶⁷¹ Kentridge J and Spitz D 'Interpretation' Constitutional Law of South Africa 523-524 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-accessed 06 July 2018.

⁶⁷² Ibid 25.

⁶⁷³ Ibid, see also, the case of *Hunter v Southam Inc* (1985) 11 DLR (4TH) 641 stated that '... the proper approach to the definition of rights and freedoms was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect..'.
⁶⁷⁴ Kentridge J and Spitz D 'Interpretation' Constitutional Law of South Africa 25 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-accessed 06 July 2018.

⁶⁷⁵ Muril B J 'Modes of Constitutional Interpretation (2018)' Congressional 3

<https://fas.org/sgp/crs/misc/R45129.pdf> accessed 18 July 2018.

dissertation is founded on the various readings and views stated by other authors on constitutional interpretation. First it takes regard of the textual formulation of the Constitutional provision and then a determination of the spirit in which the textual provision operates. The 'obvious starting point' to determine the meaning of a written constitutional provision, is reference to the written text.⁶⁷⁶ A textual provision cannot be viewed in isolation of the provisions of the whole Constitution.⁶⁷⁷ Its meaning must be determined and interpreted holistically, in harmony with all constitutional provisions.⁶⁷⁸ Even when determining constitutional text holistically, the other obvious fact, however, is that, constitutional text is often too complicated to decipher its meaning outside the spirit in which it operates.⁶⁷⁹ Unless the meaning of a word is definitely evident, many words in Constitutions such as 'equality' and 'dignity' are open-ended and their implication from case by case bases cannot be determined by reference to their literal meaning.⁶⁸⁰ It, therefore, becomes evident that there is a need to determine the spirit in which a textual provision operates, in order to determine its purpose.

To determine the spirit within which the text operates, considerations should be on the history surrounding constitutional provisions, the values and principles intended to be safeguarded by these provisions, the structure of government as it is envisaged by the Constitution and the judges' own personal inclinations on politics, justice, morality and general social issues.⁶⁸¹ To determine the history of a constitutional provision, a judge may consider the source of history appropriate to the issue. There are so many historical sources, including judicial precedence, the provisions of international law, rules and traditional canons of interpretation.⁶⁸² Courts are permitted to rely on the *travaux preparetoires* which can be in the form of drafts

⁶⁷⁶ Currie I and De Waal J *The Bill of Rights Handbook* (Juta 2015) 135.

⁶⁷⁷ De Vos P and Freedman W *South African Constitutional Law in Context* (Oxford University Press 2016) 30-31.

⁶⁷⁸ Ibid.

⁶⁷⁹ Currie I and De Waal J *The Bill of Rights Handbook* (Juta 2015) 135.

⁶⁸⁰ Ibid 136.

⁶⁸¹ Thomas K R 'Selected Theories of Constitutional Interpretation' (2011), Congressional Research Service 2 <https://www.fas.org/sgp/crs/misc/R41637.pdf> accessed 09 July 2019.

⁶⁸² De Vos P and Freedman W *South African Constitutional Law in Context* (Oxford University Press 2016) 30-30 see also Klaasen A 'Constitutional interpretation in the so-called 'hard cases Revisiting S v Makwanyane' (2017) Dejure 4

reports of committees.⁶⁸³ Pre-drafting reports of recognised committees and position papers which had official recognition may be useful to clarify the formulation of rights or the purposes they intended to address.⁶⁸⁴ Reliance on these historical documents is not to determine the intentions of those who drafted them but to determine the purpose which the drafters sought to achieve.⁶⁸⁵ Judicial precedence is also another historical source. In accordance with the principle of judicial precedence, earlier decisions of courts and the legal rules and principles developed bind the courts in subsequent adjudication.⁶⁸⁶ The principle of judicial precedence is important in its ability to mandate the courts to follow their own rules thereby retaining predictability, stability, consistency and continuity.⁶⁸⁷

Still on historical context, from case-to-case bases, political history as well as historical perspectives of justice and social policies may also be considered in the process of interpretation.⁶⁸⁸ In many African states, the Constitution is a product of history and a document which marks the bridge between the repressive past and the anticipated future.⁶⁸⁹ The view of this dissertation is that each historical source must be used with care and the weight given to each, also depends on the opinion of the judge. History relates to past events, as such judicial considerations must not be cast in stone because perceptions influencing viewpoints change over time. A case of changed view points and perceptions is that, whilst same sex marriages may have been viewed as a sin at the time of the enactment of a Constitution, such views keep changing and same sex marriages are increasingly being tolerated, hence their continued prohibition may be seen as a violation of the right to equality.⁶⁹⁰ Similarly,

⁶⁸³ Kentridge J and Spitz D 'Interpretation' Constitutional Law of South Africa 5 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-accessed 06 July 2018.

⁶⁸⁴ Currie I and De Waal J *The Bill of Rights Handbook* (Juta 2015) 142.

⁶⁸⁵ Kentridge J and Spitz D 'Interpretation' Constitutional Law of South Africa 6 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-accessed 06/07/2018

⁶⁸⁶ Murril B J 'Modes of Constitutional Interpretation (2018)' Congressional Paper 10, <https://fas.org/sgp/crs/misc/R45129.pdf> accessed 18 July 2018.

⁶⁸⁷ Ibid 10.

⁶⁸⁸ Currie I and De Waal J *The Bill of Rights Handbook* (Juta 2015) 141.

⁶⁸⁹ Ibid.

⁶⁹⁰ Kelso RR 'Styles of Constitutional Interpretation and four approaches to consensual interpretation in American legal history' (1994) 163-165 <https://scholar.valpo.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=1924&context=vulr> accessed 18 July 2018.

equality might not have been viewed to encompass the rights of women when many Constitutions were enacted in the eighteenth and nineteenth centuries, yet a reading of any Constitution today would dictate that equality includes the equal treatment of men and women in any society.

In terms of the determination of the principles and values for which the constitutional provision intends to safeguard, constitutional interpretation should be a purposive exercise.⁶⁹¹ It must be aimed at first establishing the principles and values which the provision intends to uphold and then, determining the scope and content of the provision.⁶⁹² The determination of the principle or value intended to be protected by the Constitution is not often easy, especially if there is no precedence to guide the court or the law is not clear on the matter.⁶⁹³ Also, in many circumstances, the values provided by the constitution, either 'are often vague and abstract' and do not have a definition prescribed by the constitution or do not state how they must be applied to particular situations or how they must be negotiated in light of the need to protect other values.⁶⁹⁴ Such situations often lead to value-judgements from the judges, influenced by their personal values, norms, standards, principles and expectations. In choosing an interpretation supporting such values and principles⁶⁹⁵, Posner notes that

If a case is difficult in the sense that there is no precedent or other text that is authoritative, the judge has to fall on whatever resources he has to come up with a decision that is reasonable, that other judges would also find reasonable, and ideally that he could explain to a layperson so that the latter would also think it reasonable policy choice. To do this, the judge may fall back on some strong moral or even religious feeling. Of course, some judges fool themselves into thinking there is correct answer, generated by a precedent or other authoritative text to every legal question.⁶⁹⁶

A judge must, however, not be overly outweighed by their own views or biases.⁶⁹⁷ A judge must always aim to interpret a constitutional provision, both in view

⁶⁹¹ Currie I and De Waal J *The Bill of Rights Handbook* (Juta 2015) 139-140.

⁶⁹² Ibid.

⁶⁹³ Ibid.

⁶⁹⁴ Klaasen A 'Constitutional interpretation in the so-called hard cases Revisiting S v Makwanyane' (2017) *Dejure* 4.

⁶⁹⁵ Ibid 2.

⁶⁹⁶ Ibid 3.

⁶⁹⁷ Ibid 2.

of both its letter and its spirit, avoiding legalism and giving the Constitution a purposive and generous interpretation.⁶⁹⁸ Judges eventually have to provide judgements which are written and well-reasoned with referral to other sources of law, such as international law, foreign law, common law and judicial precedence all of which ought to constrain judges when they make a value judgement.⁶⁹⁹

A determination of the spirit of a constitutional provision involves an enquiry into the theoretical structure of the Constitution which includes a consideration of such elements as, the role of the courts in the democratic society, values embodied by the Constitution, separation of powers and good governance as they are stated by the Constitution.⁷⁰⁰ Regarding separation of powers, a judge must interrogate whether the Constitution envisages a strict separation of powers or a system of checks and balances.⁷⁰¹ Separation of powers and good governance questions are political and judges must decide the role of the courts in safeguarding citizens and upholding such ethos as social justice, protection of the poor and minority groups.⁷⁰² A determination of the spirit of a constitutional provision, will also involve an enquiry into the structural context of the Constitution.⁷⁰³ The structural context would include an analysis of the headings of sections and the text of the Constitution as a whole.⁷⁰⁴ The enquiry can also involve an understanding of textual context of the words through the use of traditional maxims of constructing grammar such as *eiusdem generis* (applying to the general kind or class) and expression *enius est exclusion alterius* (expression of one thing excludes another).⁷⁰⁵ The verbal maxims must, however, be used cautiously in light of the dictates of the constitution on how it must be interpreted.⁷⁰⁶

⁶⁹⁸ Currie I and De Waal J *The Bill of Rights Handbook* (Juta 2015) 135 139-140.

⁶⁹⁹ Klaasen A 'Constitutional interpretation in the so-called hard cases, revisiting S v Makwanyane' (2017) Dejure 5.

⁷⁰⁰ Kelso RR 'Styles of Constitutional Interpretation and four approaches to consensual interpretation in American legal history' (1994) Valparaiso University Law Review 133.

⁷⁰¹ Ibid.

⁷⁰² Ibid.

⁷⁰³ Ibid.

⁷⁰⁴ Ibid.

⁷⁰⁵ Ibid 131.

⁷⁰⁶ Currie I and De Waal J *The Bill of Rights Handbook* (Juta 2015) 145 , '[Textual] contextual interpretation is undoubtedly helpful, but it must be used with caution. The first danger is to use [textual] content to limit rights instead of to interpret them'.

Once a judge has decided the spirit of a constitutional provision, he/she must decide the extent to which the spirit and textual meaning are in harmony or the extent to which the spirit overrides the textual meaning or vice versa

factors which might be relevant in making this determination involve the clarity of textual language (the more clear the language, the more weight it is given), how much conflict exists between the letter and spirit of the provision. A clear conflict between the letter and the spirit suggests either that the letter of the language was not well drafted or the judge has misdirected the provision's purpose.⁷⁰⁷

In some instances the text is clear as to the spirit in which it operates, for example, the Constitution of South Africa states one of its purposes to be 'heal[ing] the injustices of the past'.⁷⁰⁸ Although such a statement may seem too general, it is useful in providing a general understanding of the premise from which a single provision must be understood. In the event that either the provisions of text or the spirit determined is in conflict with the values of the Constitution, the values of the Constitution must be promoted. Considering all the above, in reality and practice, the first thing a reader does is to engage with the text.⁷⁰⁹ Whilst texts may clearly point to a certain understanding, however, judges should not and cannot 'sustain practices, which although understood as constitutionally acceptable by the framing and ratifying generation, would broadly be condemned today as cruel and unusual'.⁷¹⁰ In the view of this dissertation, judges should be able to defend their reasoning socially, historically and not only textually. They cannot at all dispense of both the text-based and practice-based considerations. The judge must consider arguments about 'the plain meaning of the Constitution's text, the purpose or spirit and the historical background of the Constitution' and decide the weight to give to each.⁷¹¹

⁷⁰⁷ Kelso RR 'Styles of Constitutional Interpretation and four approaches to consensual interpretation in American legal history' (1994) Valparaiso University Law Review 33.

⁷⁰⁸ *Constitution of South Africa*, 1996, preamble.

⁷⁰⁹ De Vos P and Freedman W *South African Constitutional Law in Context* (Oxford University Press 2016) 30

⁷¹⁰ Fallon HR 'How to choose a constitutional theory.', (1999) 553, <https://dash.harvard.edu/bitstream/handle/1/12956282/How%20to%20Choose%20a%20Constitutional%20Theory.pdf?sequence=1> accessed 18 July 2018.

⁷¹¹ Kelso RR 'Styles of Constitutional Interpretation and four approaches to consensual interpretation in American legal history' (1994) Valparaiso University Law Review 123

3.5 Interpreting section 29 (1) (a) of the South African Constitution

The Constitution of South Africa prescribes the manner in which the bill of rights must be interpreted. Section 39 of the South African Constitution is the interpretation clause.⁷¹² It states that when interpreting the bill of rights 'a Court, Tribunal or Forum must promote the values underlying a democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign law'.⁷¹³ When interpreting the bill of rights, values and international law are peremptory considerations whilst foreign laws are optional considerations. The provisions of the interpretation clause are discussed below.

3.5.1 Value considerations

Kentridge and Spitz state that 'a value-based analysis is the best way to proceed in interpreting the Constitution'.⁷¹⁴ The courts have an obligation to promote the values in the Constitution when interpreting the Constitution.⁷¹⁵ South Africa is founded on all the values stated by section 1 of the Constitution, which include human dignity, equality, non-sexism, non-racialism and adult suffrage.⁷¹⁶ The interpretation clause highlights three particular values to be considered when interpreting the bill of rights;

⁷¹² *Constitution of South Africa*, 1996, Interpretation of Bill of Rights

'39. (1) When interpreting the Bill of Rights, a court, tribunal or forum -

(a) must promote the values that underlie an open and democratic society based on human Dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised Or conferred by common law, customary law or legislation, to the extent that they are consistent With the Bill'.

⁷¹³ Ibid, S 39 (1) (b) and (c)

⁷¹⁴ Kentridge J and Spitz D 'Interpretation' Constitutional Law of South Africa 6 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-accessed 06 July 2018

⁷¹⁵ Ibid 7.

⁷¹⁶ *Constitution of South Africa*, 1996 Republic of South Africa.

'S1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and Freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party System of democratic government, to ensure accountability, responsiveness and openness'.

the values are, human dignity, equality and freedom.⁷¹⁷ These values also set the spirit and tenure of the Constitution. They are not only founding values or considerations during interpretation of the bill of rights, but they are values affirmed by section 7 of the South African Constitution as important informants in understanding the provisions of the bill of rights.⁷¹⁸ The three values are further invoked in the process of delimiting rights in the South African Constitution.⁷¹⁹ These three values are discussed in reasonable detail below.

3.5.1.1 Human Dignity

Human dignity is a universal concept referred to both in national Constitutions and international laws. The idea that humans have dignity is rooted in Kant's theory of inherent worth.⁷²⁰ According to Kant, sensible human beings are morally conscious and know how to act which gives them an inherent worth, which Kant calls dignity.⁷²¹ Every person's inherent worth must be valued and respected and by doing so, a person's dignity is respected.⁷²² In recognition of the inherent worth of a person, the Universal Declaration provides that human beings, equally, have inherent dignity because of their ability to reason and to have a conscience, as such the spirit of brotherhood must prevail.⁷²³ The International Covenant of Civil and Political Rights

⁷¹⁷ Ibid, S 39 (1) (b) and (c).

⁷¹⁸ Ibid, Rights

'S7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all People in our country and affirms the democratic values of human dignity, equality and freedom'

⁷¹⁹ Ibid, Limitation of rights

'S36. (1) 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.'

⁷²⁰ Lieberberg S 'The value of human dignity in interpreting socio-economic rights,' (2005) South African Journal on Human Rights, 2.

⁷²¹ Ibid.

⁷²² Connell R, 'The Role of dignity in equality law, lessons from Canada and South Africa', (2008) 6 Oxford Journals 274 'This more socially oriented notion of dignity incorporates both a subjective element (how the individual feels valued in the society) and a more materialistic conception; for Rawls, an individual's self-respect may be devalued if social goods are unequally distributed (unless an unequal distribution works to the benefit of the least advantaged in society). Such a view, rather than questioning the legitimacy of social protection measures, regards them as intimately linked to dignity'.

⁷²³ *Universal Declaration of Human Rights* (1948) A 1 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.

(ICCPR) states that even those deprived of liberty have inherent worth and deserve to be treated with dignity and humanity.⁷²⁴ In agreement with international law, the Constitution of South Africa provides that everyone has a right to human dignity and such human dignity should be respected and protected.⁷²⁵

In South African jurisprudence, the value of human dignity has 'gained an upper hand'⁷²⁶. The South Africa constitutional court has accepted on many occasions that human dignity is a value and a human right which reinforces the intrinsic worth of human beings and shuns any kind of degrading treatment.⁷²⁷ Referring to the right to human dignity as it is protected by section 10 of the South African Constitution, the Court stated in the *Rahim* case that the various levels in which human dignity is asserted in the Constitution is to

contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.⁷²⁸

The value of dignity enables us to discover and identify the obscenities in any education system, as such it will be invoked in this dissertation. Such aspects as discipline in school must be intended to encourage learning as opposed to undignified

⁷²⁴ *International Covenant on Civil and political rights* (1966) A 10

⁷²⁵ *The Constitution of the Republic of South Africa, 1996* S,10 everyone has inherent dignity and the right to have their dignity respected and protected'.

⁷²⁶ L du Plessis 'Theoretical (Dis) position and strategic Letitmotivs in Constitutional Interpretation in South Africa' 18 (2015) PER 1343 see also the case of *MEC for Education: kwazulu Natal v Pillay* (2008) 1 SA 474 (CC) paras 63-64, 64

⁷²⁷ See for example, *S Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 47 - 49 (per Ackermann J); *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41 (per Goldstone J); *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 31 - 33 (per Ackermann, O=Regan and Sachs JJ); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC); 1998 (2) SACR 556 (CC) at paras 17 - 32 (per Ackermann J), paras 120 - 129 (per Sachs J); and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 24 at paras 41 - 2 and 48. Human dignity is also a founding value, a non derogable right and a cause for limiting other rights provided for in the South African Constitution.

⁷²⁸ *Rahim Dawoo and others vs The minister of Home Affairs and others* CCT 35/99 Para 35.

treatment which denies or restricts the freedom of the mind or actions of a child. Human dignity is also a non-derogable right in the South African Constitution⁷²⁹

3.5.1.2 Equality

Like human dignity, equality is also a founding value of the South African Constitution as already mentioned earlier. When interpreting the bill of rights equality as a value, must also be promoted. The principles of equality together with non-discrimination are said to form the basis of human rights law and have been invoked in various South African cases.⁷³⁰ The Universal Declaration states that all persons are equal before the law and must be equally protected by the law without any discrimination or incitement of such discrimination.⁷³¹ The South African Constitution, in line with international law, provides the right to equality and shuns all forms of discrimination, unless it fair, that is, discrimination aimed at achieving equality.⁷³² There should be no unfair discrimination in the provision of human rights, in this case, the right to basic education.⁷³³ The principles of equality and non-discrimination encompass equal treatment, equal protection of the law, equal opportunity and substantive equality.⁷³⁴ States are obliged to desist from discriminatory behaviour, laws and practices.⁷³⁵

⁷²⁹ *Constitution of South Africa*, 1996, 'No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -

(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, o the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

Extent to which the right is protected

9 Equality With respect to unfair discrimination solely on the rounds of race, colour, ethnic or social origins, ex, religion or language

10 Human Dignity Entirely'.

⁷³⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC), *Daniels v Campbell* 2004 5 SA 331 (CC).

⁷³¹ *Universal Declaration of Human Rights*, 1948 A 7.

⁷³² *The Constitution of South Africa* 1996, S 9.

⁷³³ *Universal Declaration of Human Rights* 1948 A2.

'Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, Property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'.

⁷³⁴ 'Economic Social and Cultural Rights; Handbook for National Human Rights Institutions' (2005) Professional Training Series number 12 United Nations New York and Geneva <http://www.ohchr.org/Documents/Publications/training12en.pdf> 5 accessed 8 July 2018.

⁷³⁵ *Ibid* 13

Equality is also a non-derogable human right in the South African Constitution and it can only be limited if the limitation is aimed at achieving equality.⁷³⁶ Equality as a value will be invoked in the legal analysis of the right to basic education in South Africa.

3.5.1.3 Freedom

In its preamble, the South African Constitution honors those who suffered for freedom.⁷³⁷ Like human dignity and equality, freedom is a founding value which must guide the understanding of human rights protected by the Constitution.⁷³⁸ Everyone in South Africa is free to enjoy human rights which must be equitably provided in compliance with Constitutional provisions. The Court in the case of *MEC for Education: KwaZulu Natal v Pillay* stated that, freedom is a value in the Constitution which must be interpreted in a manner which enhances the enjoyment of all other values in the Constitution.⁷³⁹ The value of freedom is invoked in the analysis of this dissertation. The provision of education must be done in a manner that freedom in its acquisition must be there. Education must free the human potential and enable people to do the good they are capable of doing as discussed in the last chapters. Every South African must be free to learn and be educated in an environment which unleashes their free potential as opposed to a restraining environment characterized by bullying, violence, beating and verbal abuse. Such restrictive education is not in compliance with international law which recognizes that it is important for learners to receive all

⁷³⁶ *Constitution of South Africa, 1996*, 'No Act of Parliament that authorises a declaration of a state of emergency, and no legislation

Enacted or other action taken in consequence of a declaration, may permit or authorise -

(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, To the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights Extent to which the right is protected, Equality With respect to unfair discrimination solely on the Grounds of race, colour, ethnic or social original, Sex, religion or language'.

⁷³⁷ Ibid, Preamble 'We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land'.

⁷³⁸ *MEC for Education: KwaZulu Natal v Pillay 2008 1 SA 474 (CC)* paras 63-64.

⁷³⁹ Ibid.

manners of support, physical and psychological to enable them to freely and actively participate and benefit from their education.⁷⁴⁰

3.5.2 International and foreign law considerations

An international agreement which has been ratified binds South Africa if it is approved by the National Assembly and National Council of Provinces International law.⁷⁴¹ If it does not require accession or ratification it binds South Africa without such approval but must still need to be tabled before the National Assembly and National Council of Provinces.⁷⁴² Even when ratified, an international agreement becomes law in South Africa when it has been enacted into law through national legislation.⁷⁴³ Customary law is regarded as law unless it is not consistent with the Constitution or Act of parliament.⁷⁴⁴ International is a peremptory consideration in the interpretation of the Constitution of South Africa. South Africa makes international law a pillar of its democracy.⁷⁴⁵ In regulating the interpretation of human rights, the Constitution makes it mandatory to consider international law in interpreting the Bill of Rights.⁷⁴⁶ 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.⁷⁴⁷ The Constitutional Court in the *Makwanyane* case cemented the position of all international laws in South Africa. It stated that the international law that must be considered in interpreting the bill of rights refers to both binding and non-binding international laws.⁷⁴⁸ The Court emphasized that customary international law and international

⁷⁴⁰ *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 in Jomtien, Thailand (1990)* AVI.

⁷⁴¹ *Constitution of South Africa, 1996*, S 231 (2).

⁷⁴² *Ibid*, S 231 (3).

⁷⁴³ *Ibid*, S 231 (4).

⁷⁴⁴ *Ibid*, S 232 .

⁷⁴⁵ Dugard J 'International Law and the South African Constitution' Kaleidoscope at <http://www.ejil.org/pdfs/8/1/1426.pdf> Accessed 12 July 2014. see also Bailey P 'The creation of the Universal Declaration of Human Rights' 1 <http://www.universalrights.net/main/creation.htm> accessed 12 July 2014.

⁷⁴⁶ *Constitution of South Africa, 1996*, S 39.

⁷⁴⁷ *Ibid* S 233.

⁷⁴⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35. See also the case of *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC)

agreements are all important and should be considered when interpreting the bill of rights since they make available a framework in which we understand it.⁷⁴⁹

It further clarified that whilst South Africa has a principle of recognizing international law as stated above, the weight of international law and principles recognized will vary on a case by case basis.⁷⁵⁰ In other words, whilst the Courts must take into account international law when interpreting constitutional provisions, the weight given to each international instrument may vary on a case by case basis. The Constitution further gives the interpreter the discretion of using foreign law when interpreting human rights in the bill of rights.⁷⁵¹ This dissertation will exercise that discretion and use the provisions of other foreign laws to assist in delimiting the scope and content of the right to basic education in both South Africa and Zimbabwe.

3.5.3 Constitutional Court Guidelines

The constitutional court is the one mandated by the Constitution to interpret the provisions of the Constitution.⁷⁵² It is the highest court of adjudication in relation to all constitutional matters.⁷⁵³ It decides only on constitutional matters, therefore, it makes final decisions in relation to constitutional matters.⁷⁵⁴ In discharging its role, the court has elaborated the provisions of section 39 of the Constitution and further laid down guidelines for interpreting socio-economic rights discussed below.

3.5.3.1 Textual considerations

The constitutional court has accepted the authoritative role of constitutional text in the interpretation of the South African Constitution. It accepted that the Constitution is written text and an engagement with the text is inevitable. In *S v Zuma*⁷⁵⁵ the court

⁷⁴⁹Ibid.

⁷⁵⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 para 26.

⁷⁵¹ *Constitution of South Africa, 1996*, S 39.

⁷⁵² Ibid, S 167 (3) (a).

⁷⁵³ Ibid.

⁷⁵⁴ Ibid.

⁷⁵⁵ *S v Zuma* 1995 (2) SA 642 (CC).

stated that whilst traditional rules of interpretation were no longer enough to ascertain the meaning of constitutional provisions, the complete negation of the role of text would lead to absurd conclusions.⁷⁵⁶ Justice Kentridge AJ stated that,

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am aware of the fallacy of supposing that general language must have a single 'objective meaning'. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination. I would say that a Constitution embodying fundamental principles should as far as its language permits be given a broad construction.⁷⁵⁷

The textual formulation of human rights, therefore, assists the process of delimiting the obligations they impose. Taking into account the textual formulation of the right to education, in the case of *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*,⁷⁵⁸ the constitutional court stated that, due to its textual formulation, the right to basic education in South Africa, unlike some of the other socio-economic rights, is immediately realisable.⁷⁵⁹ The court confirmed that because of the textual formulation of section 29 (1) (a) which excludes words such as 'access' to the right, that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education was stated to be unqualified and only capable of being limited in terms of the law of general application.⁷⁶⁰ This argument will be further advanced in chapter 5.

⁷⁵⁶ Ibid para 17.

⁷⁵⁷ Ibid para 17.

⁷⁵⁸ *Juma Masjid Primary School and others v Essay N.O and others* 2011 (8) BCLR 761 (CC) para 36 to 38.

⁷⁵⁹ Ibid, para 37 stated that 'It is important, for the purpose of this judgement, to understand the nature of the right to a basic education under section 29 (1) (a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be progressively realised within available resources subject to reasonable legislative measures. The right to basic education in section 29 (1) (a) may be limited only in terms of the law of general application, which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This right is therefore distinct from the right to further education provided for in section 29 (1) (b). The state is, in terms of that right, obliged, to reasonable measures, to make further education progressively available and accessible'.

⁷⁶⁰ Ibid, para 36 to 38.

3.5.3.2 The applicability of the minimum core content in the interpretation of the South African Bill of Rights

As already stated, South Africa has signed and ratified the ICESCR and its provisions are an important consideration when interpreting constitutional rights. The internally unqualified nature of section 29 (1) (a) discussed above and accepted by the constitutional court of South Africa provides us with a foundation to argue that the right to basic education is the minimum core standard of the right to education envisaged by General Comment 3. As discussed in the last chapter, General Comment 3 states that all human rights have a minimum core content.

To further elaborate on the minimum core concept, General Comment 3 states that the human rights protected by the ICESCR, including the right to education, have a minimum core content and impose an obligation on every state party to ensure the provision of such minimum core.⁷⁶¹ The minimum core approach proposes that there is a certain extent of provision of a right by the state, which amounts to a minimum fulfilment of that right.⁷⁶² This means that there is a certain minimum extent of providing a human right which amounts to a minimum compliance with the state's obligations to provide such a right. The minimum core approach intends to establish that the provision of certain needs enjoys priority over others and the state is obliged to provide those classes of needs, immediately, as a matter of individual right.⁷⁶³ The minimum core approach is a way of interpreting and understanding the obligations engendered by socio-economic rights and it provides us with a normative basis and a starting point towards their realisation.⁷⁶⁴ It is a starting point or a floor from which governments should first provide the core and then aim to go up and realise a human

⁷⁶¹ Ibid para 10.

⁷⁶² Chowdhury J 'Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights A Comparative Perspective' (2009) *Cornell Law Library* 3 http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?Article=1055&context=lps_clacp accessed 12/09/2010.

⁷⁶³ Wesson M, 'Grootboom and beyond; Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *SJHR* at 298.

⁷⁶⁴ Bilchitz D, *Poverty and Fundamental Rights, The justification and enforcement of socio-economic rights* 186, (Oxford University Press, 2007).

right at higher levels.⁷⁶⁵ The 'elements of a right which cannot be regarded as part of its core content (the peripheral part) are no less important but constitute, as it were, a derivative or consequent of the core content'.⁷⁶⁶ The minimum core is an analytical tool to assess compliance with socio-economic rights by the states and to identify their violations.⁷⁶⁷ Although minimum core's intricate details may be contextualised, the minimum core must be universal and not country-dependent.⁷⁶⁸ The minimum core is that part of a right that commands immediate provision from the government. To elaborate on that point, Young states that:

The United Nations Committee on Economic and Social Rights... the first international body to articulate the concept, has, since 1990, variously equated the minimum core with a presumptive legal entitlement, a non-derogable obligation, and an obligation of strict liability. At the constitutional level, advocates of the concept (whose positions... are most developed in relation to the economic and social rights provisions of the South African Constitution) have argued for the concept's immediate enforceability, justiciability, and value as a benchmark against which government programs can be temporally oriented and assessed.⁷⁶⁹

Whilst all human rights provided by the ICESCR are qualified, General Comment 3 did not subject the minimum core content of a right to any qualifications, stating that it is the part of a human right with immediate provision. Just like the obligations imposed by an unqualified right, a minimum core obligation is a non-excusable obligation that imposes a duty on the government to provide a certain content of a right, without alleging resource or any other constraints.

The South African constitutional court has clarified the applicability of the minimum core concept in the interpretation of **qualified** (my emphasis) and not unqualified socio-economic rights. In line with international law, the court acknowledged that international law provides for minimum core obligations as a way

⁷⁶⁵ Coomans F, 'In search of the core content of the right to education' page at 166-167 in Brand D and Russell S *Exploring the core content of socio-economic rights: South Africa and international perspectives* (Protea Book House, 2002).

⁷⁶⁶ Ibid 167.

⁷⁶⁷ Ibid 166.

⁷⁶⁸ Coomans F 'Identifying the Key Elements of the Right to Education: A focus on its core content' 2 <https://www.crin.org/en/docs/Coomans-CoreContent-Right%20to%20EducationCRC.pdf> accessed 18 July 2018.

⁷⁶⁹ Young C, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *The Yale Journal of International Law* 115.

to address the needs of the most vulnerable⁷⁷⁰ but however, basing its arguments on its inability to define the minimum core of a **qualified** (my emphasis) socio-economic right, it stated that the minimum core approach cannot be uncritically imported into South African constitutional law and that, at best, it can be used to assist the court to determine whether or not the state had acted reasonably for a human right, contingent to a reasonable action.⁷⁷¹ The court's critical approach towards using the minimum core when interpreting qualified socio-economic rights, although mainly based on its inability to quantify the minimum core is against the provisions of General Comment 3 which states that, both qualified and unqualified socio-economic rights have a minimum core content.

The position advanced by this dissertation is that, basic education must be understood to be the minimum core content of the right to education. A critique of the constitutional court's approach to the applicability of the minimum is more on the interpretation of qualified rights, vis a vis the interpretation of unqualified rights (basic education); this will be done in chapter 5 which discusses the scope and content of basic education in South Africa.

3.5.3.3 Contextual Considerations

Context is understood in this dissertation to include a consideration of the provisions of the whole Constitution as well as the historical context in which it was drafted. In terms of the provisions of the whole Constitution, the constitutional court has stated that the Constitution must be interpreted as a whole document, meaning that all its provisions must be considered in any attempt to give meaning to one single provision.⁷⁷² With the view of understanding the Constitution as a whole document, there are certain provisions which are viewed in this dissertation as of paramount

⁷⁷⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* SA 46; 2000 (CC) para 30-33.

⁷⁷¹ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703 para 26-39.

⁷⁷² Lieberberg S 'The value of human dignity in interpreting socio-economic rights,' (2005) South African Journal on Human Rights, 24-25.

consideration to an interpreter who attempts to give meaning to Constitutional provisions. Such provisions include section 7 (2) of the Constitution which states that the state must 'respect, protect, promote and fulfill the rights in the bill of rights'.⁷⁷³

The above mentioned obligations are explained as follows; under the obligation to respect, the state must abstain 'from performing, sponsoring or tolerating any practice, policy or legal measure' which denies, compromises or arbitrarily interferes with the enjoyment of human rights on the part of the public.⁷⁷⁴ The United Nations stated that the obligation to respect human rights includes - the rights of citizens not to be discriminated in the provision of their rights; the rights of citizens to influence laws and policies, and the right not to be arbitrarily denied access to a school.⁷⁷⁵ Under the obligation to protect, the state has the obligation to ensure that no citizen interferes with another citizen's enjoyment of rights.⁷⁷⁶ If a third party is interfering with a person's rights, the state must preclude such and provide legal remedies for the aggrieved party.⁷⁷⁷ According to the United Nations 'the obligation to fulfil economic, social and cultural rights requires positive measures by the State'.⁷⁷⁸ The government might need to rearrange its expenditure in order to ensure the provision of human rights. General Comment 13 states that the 'obligation to fulfill, incorporates both an obligation to facilitate and an obligation to provide'.⁷⁷⁹ Facilitating would entail positive initiatives taken to ensure the realization of socio-economic rights.⁷⁸⁰ Providing would mean government must make the right available.⁷⁸¹

In addition, section 36 also provides the context for which we must understand all human rights in the South African Constitution. Despite the fact that a human right is qualified or unqualified in its textual formulation, section 36 of the Constitution

⁷⁷³ *Constitution of South Africa, 1996, S 7 (2).*

⁷⁷⁴ 'Economic Social and Cultural Rights; Handbook for National Human Rights Institutions' (2005) Professional Training Series number 12 United Nations New York and Geneva 2005, 15 <http://www.ohchr.org/Documents/Publications/training12en.pdf> accessed 18 July 2018.

⁷⁷⁵ Ibid.

⁷⁷⁶ Ibid.

⁷⁷⁷ Ibid, 17.

⁷⁷⁸ Ibid, 18.

⁷⁷⁹ Ibid.

⁷⁸⁰ Ibid.

⁷⁸¹ *General Comment No.13: The right to Education* (1999), para 47.

states that that 'all human rights in the Constitution may be limited only in terms of the law of general application'.⁷⁸² The law of general application refers to limitations that are authorised by statutory or common law provisions.⁷⁸³ The limitation must, however, be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.⁷⁸⁴ Factors which may be relevant when one considers the limitation of a right, include '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'.⁷⁸⁵ As regards to 'the nature of the right', it is necessary to note that as already discussed, the constitutional court confirmed that section 29 (1) (a) unlike other socio-economic rights is unqualified and its provisions are not dependent on the availability of resources, reasonable measures or other considerations on the part of the state.⁷⁸⁶

Context is also much broader and includes historical context.⁷⁸⁷ The constitutional court of South Africa stated that the drafting of historical documents which preceded the Constitution can also form part of the historical context⁷⁸⁸. In the case of *S v Makwanyane* the court stated that, contextual evidence in the form of draft reports preceding the enactment of the Constitution can be considered by the Courts.⁷⁸⁹ The judge made it clear that, the intentions of those who wrote the reports will not necessarily determine the meaning of a constitutional provision.⁷⁹⁰ The

⁷⁸² *The Constitution of South Africa, 1996*, S 36.

⁷⁸³ Robinson JA 'The Children's Rights in the South African Constitution' <http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/03jarobi.pdf> accessed 22 August 2012.

⁷⁸⁴ *The Constitution of South Africa, 1996*, S 36.

⁷⁸⁵ Ibid.

⁷⁸⁶ *Louis Khoza v The Minister of social development Case CCT 12/03* Para 44 'However despite their unqualified nature, as regards dignity and equality as human rights the Constitutional Court stated that when the rights to life, dignity and equality are in question and "implicated in cases dealing with other socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness. What is relevant may vary from case to case depending on the particular facts and circumstances. The distinction between qualified and unqualified rights when one endeavors to interpret the cope and content of the rights in the bill of rights are were discussed above'.

⁷⁸⁷ Liebenberg S 'The value of human dignity in interpreting socio-economic rights,' (2005) *South African Journal on Human Rights*, 24-25,

⁷⁸⁸ Kentridge J and Spitz D 'Interpretation' *Constitutional Law of South Africa* 5-6 http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11-accessed 6 July 2018.

⁷⁸⁹ Ibid.

⁷⁹⁰ Ibid.

Constitution is a product of so many people and one contribution cannot be viewed as conclusive.⁷⁹¹ The judge stated that

Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence. It is sufficient to say that where the background material is clear, it is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a court in interpreting the Constitution⁷⁹².

The Constitution must be interpreted as a historic document that moved South Africa from a repressive apartheid regime to a democratic state whose founding values are human dignity, equality and freedom.⁷⁹³ The constitutional court has affirmed that the Constitution is 'simultaneously backward and forward looking' and illustrates the transformative nature of the South African society.⁷⁹⁴ History is a tool to understand the past and the bright future fought for and envisaged by the people of South Africa.⁷⁹⁵ In the *Shabalala* case, the constitutional court stated the importance of restating the apartheid history when interpreting the Constitution and the need for us to be constantly reminded that constitutional provisions must 'be interpreted so as to give effect to the purposes sought to be advanced by their enactment'.⁷⁹⁶

⁷⁹¹ Ibid.

⁷⁹² *S v Makwanyane and Anor* (1996) SA 391; para 19.

⁷⁹³ Liebenberg S 'The value of human dignity in interpreting socio-economic rights,' (2005) South African Journal on Human Rights, 24-25.

⁷⁹⁴ Ibid.

⁷⁹⁵ *Constitution of South Africa, 1996*, preamble. "We the people of South Africa recognise the injustices of our past. Honour those who suffered for justice and freedom in our land. We therefore through our elected representatives, adopt this Constitution as the Supreme law of the republic to- Heal the divisions of the past and establish a society in which government is based on the will of the people and every citizen is equally protected by law'.

⁷⁹⁶ *Shabalala* 1996 (1) SA 725 (CC) par 26. 'The Constitution represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised.⁴² The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is "justifiable in an open and democratic society based on freedom and equality. It is premised on a legal culture of accountability and transparency.⁴³ The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment'.

The Constitution further emphasizes the need to address the ills of the past. In its preamble, it echoes the nation of South Africa stating that, '[w]e the people of South Africa recognize the injustices of our past'⁷⁹⁷ and opt to '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.⁷⁹⁸ The history of the right to education in South Africa, discussed in the next chapter will expose the injustices of the past in the provision of basic education and motivate the need to understand section 29 (1) (a) as an immediate unqualified obligation intended to immediately address the effects of the apartheid past.

3.6 Interpreting section 75 (1) (a) of the Zimbabwean Constitution

3.6.1 Introduction

The Zimbabwean Constitution is relatively new and jurisprudence is only developing relating to the interpretation of the Constitution, particularly the bill of rights. The transition between the old regime interpretation of the Constitution under the old Constitution and its interpretation under the 2013 Constitution should be notable, since, unlike the old Constitution, the 2013 Constitution contains an interpretation clause dictating the manner in which the Constitution must be interpreted. The similarities and differences in relation to the interpretation of the old and 2013 Constitution are beyond the scope of this dissertation. However, what is notable is that, added to the dictates of the 2013 Constitution's interpretation clause, evidence shows that, the rules of interpretation laid down by the Courts before the Constitution remain applicable.

3.6.2 Interpretation of the Zimbabwean Constitution before 2013

Constitutional interpretation is not a new phenomenon in Zimbabwe. Before the enactment of the current Zimbabwean 2013 Constitution, the Zimbabwean Supreme

⁷⁹⁷ *Constitution of South Africa, 1996* preamble.

⁷⁹⁸ *Ibid.*

Court had already engaged in constitutional interpretation and pronounced the necessity of constitutional interpretation and the manner in which the Constitution must be interpreted. In the case of *In Re Munhumeso and Ors*, the court stated that when hearing a constitutional matter, the court 'must interpret the pertinent constitutional provision and the challenged legislation and determine the meaning of each [legislative provision] and then decide whether the legislation violates the constitutional provision'.⁷⁹⁹ To determine the meaning of the legislative provision as well as a constitutional provision, the court reiterated the importance of considering language in the process of constitutional interpretation.⁸⁰⁰ The court stated that, the language of the Constitution and legislative provisions is important.⁸⁰¹ Also, any derogations from conferred rights and freedoms must be done with strictness and in a narrow manner unless the language explicitly and conclusively alludes something to the contrary.⁸⁰²

The court further stated two principles to be considered when interpreting the Constitution. First, when a legislation is challenged and its interpretation affords more than one meaning, one meaning in line with the Constitution and one which is against the Constitution, the 'challenged legislation must be [narrowly] interpreted to suit the framework of the constitution'.⁸⁰³ The second principle of interpretation points to a more broad approach, rooted in the wholesome consideration of all the constitutional or legislative provisions bearing upon the subject before the court.⁸⁰⁴ After a wholesome consideration of all provisions affecting the subject, in order to reach a conclusion on whether a law infringes the Constitution, the examination of its effect rather than its subject or its object is important.⁸⁰⁵ The objective of a law is rendered irrelevant if its effect violates fundamental rights and freedoms.⁸⁰⁶ Any need to move

⁷⁹⁹ *In Re Munhumeso and ORS* (1994) (1) ZLR 49 (S) 50.

⁸⁰⁰ Ibid.

⁸⁰¹ Ibid.

⁸⁰² Ibid.

⁸⁰³ Ibid, 59.

⁸⁰⁴ Ibid, see also *Minister of Home Affairs and Ors ve Dabengwa and Anor* 1983 (1) ZLR 236 (S) at 244B, *S v Ncube and Ors* 1987 (2) ZLR 246 (S) at 264 F.

⁸⁰⁵ Ibid, 62.

⁸⁰⁶ Ibid see also *Nyambirai v NSSA and Anor* 1995 (2) ZLR 1 (S) 'From a procedural aspect, the onus is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on a state to show that it does not. To my mind, the limitation on the

away from the rights and freedoms should be given a narrow rather than a wide construction.⁸⁰⁷ Unless the spirit mandates otherwise, rights and freedoms cannot be diluted.

Reinforcing the importance of a broad, rather than a narrow interpretation of the Constitution, the court in the case of *Chirwa v Registrar General* also stated that constitutional interpretation 'must be approached from a broad perspective' and the Constitution 'must be interpreted generously so as to fulfil its purpose of securing the individual the full benefit of the [its] protection'.⁸⁰⁸ Similarly, in the case of *Smyth v Ushewokunze and Anor* the court stated that, it is fundamental to ensure that, a purposive, broad and generous interpretation of a right is done which promotes the 'spirit as well as the letter of the provision'.⁸⁰⁹ The interpretation must be alive to the social, value and norm context so that provisions are elastic enough to address new problems and challenges.⁸¹⁰ The aim of interpretation must be to make human rights a practical reality and to ensure a move from unnecessary formalism.⁸¹¹ The revered case of *Rattigan and Ors v Chief Immigration officer* also made it very clear that,

What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purposes. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefore as far as language permits should be narrowly or strictly construed.⁸¹²

applicants right, ... is far outweighed by the objective of the limitation. The court must weigh the impact of the limit upon the right of the applicant against the importance of the legislative objective. There must be a balancing process. The importance of the objective and the reasonableness of the manner in which it is achieved must be measured against the gravity of the infringement of the protected right. Generally this involves weighing the significance of the public interest in the limit against the seriousness of the infringement of the private right protected by the Constitution 13- 15 see also *Chirwa v Registrar General 1993* (1) ZLR 1 "Reasonable and justifiable limit would be a basis that would be regarded as being within the bounds of reason by fair minded people accustomed to the norms of a free and democratic society" 28.

⁸⁰⁷ *In Re Munhumeso and ORS* (1994) (1) ZLR 49 (S) 59.

⁸⁰⁸ *Chirwa v Registrar General 1993* (1) ZLR 1 15.

⁸⁰⁹ *Smyth v Ushewokunze and Anor 1997* (2) ZLR 553.

⁸¹⁰ *Ibid.*

⁸¹¹ *Ibid.*

⁸¹² *Rattigan and Ors v Chief Immigration 57* see also *Min of Home affairs and Ors v Dabengwa and Anor 1982* (1) ZLR 236 see also *Bull v Minister of Home Affairs 1986* (1) ZLR 202.

The pronouncements of the courts as reiterated above, including the *Rattigan* case points to the fact that a Constitution is an active document and not a 'lifeless museum piece', as such every opportunity for constitutional interpretation must be aimed at breathing life into the document.⁸¹³

In relation to the difference between legislative and constitutional interpretation, it is important to note the approach of the Zimbabwean courts. In the case of *Hewlett v Minister of Finance* the Court clarified that, constitutional interpretation was no different to the interpretation of legislation; the same principles apply.⁸¹⁴ It is important to note that, when the above pronouncement was made, the Constitution did not provide for an interpretation clause. In the absence of guidelines relating to interpretation of the Constitution (provided by the Constitution itself), it could have been understandable to treat legislative and constitutional interpretation in the same manner. In the above mentioned cases, the court did not also invoke or even mention the provisions of international law instruments, except the use of foreign English law in some circumstances. Also, whilst the need to give the Constitution a broad, generous and purposive interpretation is a commendable approach, there were no particular social values which the court sought to uphold. What the court however advanced was the need for a contextual wholesome consideration of all the rights and freedoms in the Constitution.⁸¹⁵ The court also mandated a consideration of the social value and norm context.⁸¹⁶ The court also repeatedly stated the need to interpret the Constitution in a manner which advances the rights and freedoms provided by the Constitution.⁸¹⁷

3.6.3 Interpretation of the new 2013 Constitution

The 2013 Constitution now contains an interpretation clause which mandates the manner in which the Constitution must be interpreted in section 46.⁸¹⁸ It states that

⁸¹³ *Rattigan and Ors v Chief Immigration* 59.

⁸¹⁴ *Hewlett v Minister of Finance* 1981 ZLR 571.

⁸¹⁵ Ibid.

⁸¹⁶ Ibid.

⁸¹⁷ Ibid.

⁸¹⁸ *Constitution of Zimbabwe 2013*, 'S46 Interpretation of Chapter 4

when interpreting the bill of rights, the courts must 'give full effect to the rights and freedoms enshrined in the Declaration of Rights'.⁸¹⁹ The interpreter must also promote the values and principles that underlie a democratic society, based on openness, justice, human dignity, equality and freedom as well as the founding values and principles set out in section 3.⁸²⁰ The interpreter must consider international law

(1) When interpreting this Chapter, a court, tribunal, forum or body—

- (a) must give full effect to the rights and freedoms enshrined in this Chapter;
- (b) must promote the values and principles that underlie a democratic society based on Openness, justice, human dignity, equality and freedom, and in particular, the values And principles set out in section 3;
- (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
- (d) must pay due regard to all the provisions of this Constitution, in particular the Principles and objectives set out in Chapter 2; and
- (e) may consider relevant foreign law;

In addition to considering all other relevant factors that are to be taken into account in the Interpretation of a Constitution.

(2) When interpreting an enactment, and when developing the common law and customary Law, every court, tribunal, forum or body must promote and be guided by the spirit and Objectives of this Chapter'.

⁸¹⁹ Ibid S 46 (1) (a)

⁸²⁰ Ibid, S3 Founding values and principles

'(1) Zimbabwe is founded on respect for the following values and principles—

- (a) supremacy of the Constitution;
- (b) the rule of law;
- (c) fundamental human rights and freedoms;
- (d) the nation's diverse cultural, religious and traditional values;
- (e) recognition of the inherent dignity and worth of each human being;
- (f) recognition of the equality of all human beings;
- (g) gender equality;
- (h) good governance; and
- (i) recognition of and respect for the liberation struggle.

(2) The principles of good governance, which bind the State and all institutions and Agencies of government at every level, include—

- (a) a multi-party democratic political system;
- (b) an electoral system based on—
 - (i) universal adult suffrage;
 - (ii) free, fair and regular elections; and
 - (iii) adequate representation of the electorate;
- (c) the orderly transfer of power following elections;
- (d) respect for the rights of all political parties;
- (e) observance of the principle of separation of powers;
- (f) respect for the people of Zimbabwe, from whom the authority to govern is derived;
- (g) transparency, justice, accountability and responsiveness;
- (h) the fostering of national unity, peace and stability, with due regard to diversity of Languages, customary practices and traditions;

Recognition of the rights of—'

- (i) ethnic, racial, cultural, linguistic and religious groups;
- (ii) persons with disabilities;
- (iii) women, the elderly, youths and children;
- (iv) veterans of the liberation struggle;
- (j) the equitable sharing of national resources, including land;

including all treaties and conventions of which Zimbabwe is part; must consider all provisions of the Constitution, especially, its principles and objectives, as they may pay regard to foreign law and must be guided by the spirit and objectives of the declaration of rights.⁸²¹ It must be noted from the onset that the Constitution of Zimbabwe, 2013 is relatively new and jurisprudence relating to its provisions is developing, meaning that bold propositions and assertions are sometimes made in this dissertation relating to the interpretation of its provisions. It is hoped that some of the propositions made in this dissertations will add to the emerging jurisprudence relating to the interpretation of the Constitution.

3.6.3.1 Giving full effect to the rights and freedoms

By obligating the interpreter to give full effect to human rights, the view of this dissertation is that, the Constitution places the obligation on the interpreter to ensure that when the process of interpretation is finished, the intended outcome of providing such right in the Constitution is achieved.⁸²² To achieve the intended outcome of a right, it is submitted that, the recent pronouncements in the *Makoni* case can provide us with a starting point.⁸²³ In the *Makoni* case the Court stated that, the established principle of Constitutional interpretation is to adopt a 'purposive and generous' as opposed to 'a pedantic or restrictive interpretation'.⁸²⁴ Quoting the Canadian case of *R v Big M Drug Mart Ltd*, the Court stated that, what a right means to say is ascertained by analysing its purposes, vis a vis the interest for which the provision must protect.⁸²⁵ The Canadian court stated that, the purpose or intended outcome of a right is found by referral to the 'character and larger objects of the *Charter* itself', an analysis of the language used by the right itself, a reference to the history of the concepts cherished by the right, and the import and resolve of other rights in the Constitution.⁸²⁶ The

(k) due respect for vested rights; and

(l) the devolution and decentralisation of governmental power and functions.'

⁸²¹ *Constitution of Zimbabwe 2013* S 46 (1) (a-e) and 2'.

⁸²² *Obediah Makoni v Commissioner of Prisons and one Other* (2016) 8 CCZ 23.

⁸²³ *Ibid*.

⁸²⁴ *Ibid*.

⁸²⁵ *Ibid* see also *R v Big M Drug Mart Ltd* (1985) 1 SCR 295, at 344:

⁸²⁶ *Ibid*.

interpretation of a right must be a liberal as opposed to a legalistic one which has an aim to endure the full benefit of the protection afforded by the Constitution.⁸²⁷

The *Makoni* case further quoted the South African *Zuma* case which stated the need of considering the text and language used by the Constitution as well, if one is to give full effect to a right.⁸²⁸ Giving full effect to the right to basic education, consideration would, therefore, be given to its textual formulation. Textually, the right to basic education is viewed as an unqualified right and a minimum core standard of the right to education in Zimbabwe (this point is further discussed in chapter 4). The interpreter, as well as the provider of the right to education, must be conscious of the unique formulation of the right to education when compared and contrasted to other socio-economic rights in the Constitution. In relation to its textual formulation, the right to basic education in Zimbabwe is also limited to the extent of its provision to citizens and permanent residents. It is the reasoning of this dissertation that giving effect to section 75 (1) (a) may mean the interpretation of the right to basic education as a right only available to citizens and permanent residents of Zimbabwe, however, such an approach is critiqued in Chapter 4 and deemed to be against the dictates of the African Charter which states that basic education must be available, compulsorily and free for all children. As it is, section 75 (1) (a) excludes the provision of basic education to refugees, asylum seekers, legal and illegal immigrants. This point is further discussed in chapter 4.

To give full effect to rights and freedoms, the courts have stated the need to interpret the Constitution in a liberal manner.⁸²⁹ The constitutional court in the case of *Loveness Mudzuru and Another v (1) Minister of Justice Legal and Parliamentary Affairs and 2 others (Mudzuru case)* stated that, determining the intended outcome of a right, calls for a broad interpretation of a right and not a 'a strict, narrow and literal interpretation'.⁸³⁰ The court stated that, concepts must be interpreted as 'elastic and

⁸²⁷ Ibid.

⁸²⁸ *State v Zuma* 1995 (2) SA 642 (CC), para 14.

⁸²⁹ *Obediah Makoni v Commissioner of Prisons and one Other* (2016) 8 CCZ 23.

⁸³⁰ *Loveness Mudzuru and Another v (1) Minister of Justice Legal and Parliamentary Affairs and 2 others* CCZ 12/2015 3.

relative rather than fixed and absolute'.⁸³¹ Further, a determination of the intended result of a right was said to involve a consideration of the provisions of the international human rights instruments for which a constitutional provision draws inspiration from.⁸³² In order to give full effect of the right protected by section 85 (1) of the Constitution, the Court stated that a court 'exercising jurisdiction under s 85(1) of the Constitution [had] to adopt a broad and generous approach' so that the rights in the bill of rights could be fully protected.⁸³³ In order to also give full effect to the words 'public interest' provided by section 85 (1) (d), the court in the Mudzuru case desisted from a narrow conception of words and stated that, to give full effect, of words, definitions 'must be left open' and be determined 'on the basis of the circumstances of each case'.⁸³⁴

3.6.3.2 Value considerations

Although the old Constitution did not address the need to consider values when interpreting the bill of rights, the case of *Smyth v Ushewokunze and Anor* had already noted that constitutional interpretation must be alive to the social, value and norm contexts so that provisions are elastic enough to address new problems and challenges.⁸³⁵ The constitutional court of Zimbabwe has also recently stated that, an interpretation of a right must 'resonate with the founding values and principles of a democratic society based on openness, justice, human dignity, equality and freedom set out in section 3 of the Constitution'.⁸³⁶ Further, the court stated that when interpreting a human right, emerging international values advanced by international

⁸³¹ Ibid, 18.

⁸³² Ibid, 3.

⁸³³ Ibid, 5 -6 reference was further made to the case of *Ferreira v Levin N.O. & Others* at 1082G P which stated that, 'Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled'.

⁸³⁴ *Loveness Mudzuru and Another v (1) Minister of Justice Legal and Parliamentary Affairs and 2 others* (2015) CCZ 1215-16.

⁸³⁵ *Smyth v Ushewokunze and Anor* (1997) (2) ZLR 553.

⁸³⁶ *Loveness Mudzuru and Another v (1) Minister of Justice Legal and Parliamentary Affairs and 2 others* (2015) CCZ 1215 26.

instruments Zimbabwe is party to, must also be considered.⁸³⁷ The approach taken by the courts is in line with section 46 (b) which states that a court interpreting the bill of rights 'must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3'. Section 3 states the founding values and principles of Zimbabwe to include - the supremacy of the Constitution, the dignity of the human being, the rule of law, respect for diversity (cultural, religious or otherwise), the equality of human beings, good governance, respect for the liberation struggle, respect of children, respect of human rights protected by the Constitution and gender equality.⁸³⁸

Section 46, particularly mentions five values, discussed here in depth, for the purposes of interpreting the right to basic education; these are, human dignity, openness, equality, justice and freedom.⁸³⁹ There is a need to realize that, the values of human dignity, equality and freedom also set the spirit and tenure of the Zimbabwean Constitution in that, not only are these founding values or considerations during the interpretation of the bill of rights, or values to be invoked in the process of delimiting rights in the Zimbabwean Constitution,⁸⁴⁰ human dignity, equality and freedom are also human rights in Zimbabwe. It is important to realize that the international tenets/components of the values of human dignity, equality and freedom are viewed as similar in content to those discussed above under section 39 of the South African Constitution as such repetition is not necessary.

⁸³⁷ Ibid.

⁸³⁸ *Constitution of Zimbabwe, 2013*, S 3 (1) n(g).

⁸³⁹ Ibid.

⁸⁴⁰ Ibid, S 86: Limitation of rights and freedoms

'(2) The fundamental rights and freedoms set out in this Chapter may be limited only in Terms of a law of general application and to the extent that the limitation is fair, reasonable, Necessary and justifiable in a democratic society based on openness, justice, human dignity, Equality and freedom, taking into account all relevant factors'.

3.6.3.2.1 Human Dignity

Human dignity is a foundation of the Zimbabwean state,⁸⁴¹ it is a human right⁸⁴², a non-derogable right⁸⁴³, value and a principle that must be promoted when interpreting the bill of right⁸⁴⁴. Whilst the constitutional court has not defined the term 'human dignity', scholars seem to point to the idea of human dignity in accordance with Kant's theory of inherent worth.⁸⁴⁵ As already stated above, Kant views sensible human beings to be morally conscious, and to, unlike animals, know how to act which gives them an inherent worth, called dignity.⁸⁴⁶ In recognition of the inherent worth of a person, the Universal Declaration provides that human beings equally have inherent dignity because of their ability to reason and to have a conscience, as such the spirit of brotherhood must prevail.⁸⁴⁷ The International Covenant of Civil and Political Rights (ICCPR) states that even those deprived of liberty have inherent worth and deserve to be treated with dignity and humanity.⁸⁴⁸ Whilst delineating the scope and content of a right, it becomes important that every person's inherent worth be valued and respected.⁸⁴⁹

The promotion of human dignity as a value and principle underlying the Zimbabwean state is mandated by section 46. Section 46 requires that an outcome of interpreting a right must show a respect for the human dignity of all the parties involved, regardless of the crime, delict or civil misdemeanour committed by the other party. The Zimbabwean constitutional court in the case of *Obediah Makoni v Commissioner of Prisons and one Other* did not refer to human dignity as a value or principle but acknowledged that it is a human right which reinforces the intrinsic worth

⁸⁴¹ *Constitution of Zimbabwe, 2013*, S 3 (e).

⁸⁴² *Ibid*, S 51.

⁸⁴³ *Ibid*, S 86 (3) (b).

⁸⁴⁴ *Ibid*, S 86 (2)

⁸⁴⁵ Lieberberg S 'The value of human dignity in interpreting socio-economic rights' (2005) *South African Journal on Human Rights* 2.

⁸⁴⁶ *Ibid*.

⁸⁴⁷ *Universal Declaration of Human Rights*, (1948) A 1 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

⁸⁴⁸ *The United Nations International Covenant on Civil and political* 1976 A 10

⁸⁴⁹ R Connell 'The Role of dignity in equality law, lessons from Canada and South Africa', (2008) *Oxford Journals* 274 .

of human beings and enjoys special status.⁸⁵⁰ The court stated that human dignity cannot be limited by any law nor violated.⁸⁵¹ The court further clarified that the right to human dignity is 'inviolable' and it is not 'derogable by dint of any law of general application'.⁸⁵²

3.6.3.2.2 Equality

The case of *Samuel Nkomo v Minister of Local Government, Rural & Urban Development and 2 Others* did not speak of equality as a value or principle but it did refer to it as a human right. The constitutional court stated that, equality envisages a situation where everyone is equally protected by the law and equally benefits from it.⁸⁵³ It was stated that the right to equality encompasses the right 'not to be subjected to treatment to which others in a similar position are not subjected to'.⁸⁵⁴ Like human dignity, equality is also a founding value of the Zimbabwean Constitution and must be considered during the process of interpreting a human right in accordance with section 46.⁸⁵⁵ The right to equality can only be limited if the limitation is aimed at achieving equality.⁸⁵⁶ When interpreting a human rights the court must ensure that the end result shuns all forms of discrimination unless the discrimination is fair discrimination which is aimed at achieving equality.⁸⁵⁷ The principles of equality together with non-discrimination form the basis of international human rights law.⁸⁵⁸ They encompass 'equal treatment, equal protection of the law, equal opportunity and substantive equality'.⁸⁵⁹ The Universal Declaration states that all persons are equal before the law and must be equally protected by the law without any discrimination or incitement of

⁸⁵⁰ *Obediah Makoni v Commissioner of Prisons and one Other* (2016) 8 CCZ 5.

⁸⁵¹ Ibid.

⁸⁵² Ibid.

⁸⁵³ *Samuel Nkomo v Minister of local government, Rural & Urban Development and 2 Others* (2016) 6 CCZ 7

⁸⁵⁴ Ibid.

⁸⁵⁵ *Constitution of Zimbabwe, 2013* S 3 (1) (f).

⁸⁵⁶ Ibid, S 56 (1) (5).

⁸⁵⁷ Ibid, S 56 (5).

⁸⁵⁸ Global Institute for Advanced Study 'The equality and Non-Discrimination Provision' (2016) Global institute for advanced Study 1 <https://www.openbookpublishers.com/shopimages/The-UDHR-21st-C-appendix3.pdf> accessed 6 July 2018.

⁸⁵⁹ Ibid.

such discrimination.⁸⁶⁰ The constitutional court must ensure that the interpretation of a right, shuns discriminatory behaviour, laws and practices.⁸⁶¹

3.6.3.2.3 Freedom

In its preamble, the Zimbabwean Constitution honors those who suffered for freedom.⁸⁶² Like human dignity and equality, various freedom(s) are founding values which must guide an understanding of human rights as protected by the Constitution.⁸⁶³ Freedom, particularly, as a value is considered in the delimitation of rights.⁸⁶⁴ In relation to the value of freedom, the court has not directly stated what the word 'freedom' as a principle and value would entail and the types of freedoms it refers to, but it has enunciated on the right to freedom of expression. The constitutional court has stated that, the freedom to impart and receive ideas 'is a core value of any democratic society deserving of the utmost legal protection'.⁸⁶⁵ The court recognised the freedom to express oneself, as an indispensable value to be respected by any democratic society.⁸⁶⁶

3.6.3.2.4 Openness

Before and after independence, Zimbabwe has been characterized by governments which do not tolerate divergent views or what can be termed, openness. The history of the country was, probably, the biggest motivation leading to the inclusion of the value of openness being an important consideration in determining the scope and content of human rights. Openness has been described as a 'tendency to accept new

⁸⁶⁰ *Universal Declaration of Human Rights*, (1948) A 7.

⁸⁶¹ *Ibid*.

⁸⁶² *Constitution of Zimbabwe, 2013* Preamble, 'Exalting and extolling the brave men and women who sacrificed their lives during the Chimurenga / Umvukela and national liberation struggles'.

⁸⁶³ *Ibid*, S 3 (1) (c)

⁸⁶⁴ *Ibid*, S 86 (2)

⁸⁶⁵ *Nevanji Madanhire and another v Attorney-General* (2014) 2 CCZ 7-8.

⁸⁶⁶ *Ibid*, 7-8 'There can be no doubt that the freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection. As such, it is prominently recognised and entrenched in virtually every international and regional human rights instrument'. See also, *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Another* 1995 (2) ZLR 199 (S) at 211C-F; *United Parties v Minister of Justice Legal & Parliamentary Affairs* 1997 (2) ZLR 254 (S) at 269A-E.

ideas, methods or changes'.⁸⁶⁷ Zimbabwe has been open enough to participate in the formulation of the education for all goal with the world and has participated in the setting up of international and regional laws and frameworks relating to basic education. In the event that the current provision of basic education in Zimbabwe is criticized before any court of law, the constitutional court should adopt an open approach which aims to promote the provisions of international and regional instruments as well as the spirit and tenure of the Constitution.

Openness is linked to the right to freedom of expression, freedom of conscience and access to information, protected under section 60, 61 and 62 of the Constitution respectively.⁸⁶⁸ International law, through the Universal Declaration provides for

⁸⁶⁷ 'Openness' <http://www.macmillandictionary.com/dictionary/british/openness>, accessed 06/07/2018/

⁸⁶⁸ *Constitution of Zimbabwe*, 2013, S 60 'Freedom of conscience

(1) Every person has the right to freedom of conscience, which includes—

(a) freedom of thought, opinion, religion or belief; and

(b) freedom to practise and propagate and give expression to their thought, opinion, Religion or belief, whether in public or in private and whether alone or together with Others.

(2) No person may be compelled to take an oath that is contrary to their religion or belief or To take an oath in a manner that is contrary to their religion or belief.

(3) Parents and guardians of minor children have the right to determine, in accordance with Their beliefs, the moral and religious upbringing of their children, provided they do not prejudice The rights to which their children are entitled under this Constitution, including their rights to Education, health, safety and welfare.

(4) Any religious community may establish institutions where religious instruction may be Given, even if the institution receives a subsidy or other financial assistance from the State.

61 Freedom of expression and freedom of the media

(1) Every person has the right to freedom of expression, which includes—

(a) freedom to seek, receive and communicate ideas and other information;

(b) freedom of artistic expression and scientific research and creativity; and

(c) academic freedom.

(2) Every person is entitled to freedom of the media, which freedom includes protection of The confidentiality of journalists' sources of information.

(3) Broadcasting and other electronic media of communication have freedom of Establishment, subject only to State licensing procedures that—

(a) are necessary to regulate the airwaves and other forms of signal distribution; and

(b) are independent of control by government or by political or commercial interests.

(4) All State-owned media of communication must—

(a) be free to determine independently the editorial content of their broadcasts or other Communications;

(b) be impartial; and

(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

(5) Freedom of expression and freedom of the media do not include—

(a) incitement to violence;

(b) advocacy of hatred or hate speech;

(c) malicious injury to a person's reputation or dignity; or

(d) malicious or unwarranted breach of a person's right to privacy.

individuals' right to express themselves, to hold opinions and impart ideas through the media or otherwise, without interference.⁸⁶⁹ The constitutional court of Zimbabwe has stated that freedom of expression, 'lies at the very foundation of a democratic society and that, consequently, it is a right that is jealously guarded by the courts'.⁸⁷⁰ The state, as well as the judiciary must promote and protect freedom to speak and think in order to make it possible for the public to air out injustices in the provision of education. The promotion of the right to freedom of speech includes the repealing or amending of draconian laws such as the Access to Information and Protection of Privacy Act (AIPPA)⁸⁷¹ and the Public Order and Security Act (POSA)⁸⁷², since their provisions have been heavily criticized for severely restricting the right to freedom of speech.⁸⁷³ Openness includes the government refraining from persecuting citizens who will speak against the injustices in the provision of basic education or conduct by public officials which limits or threatens the enjoyment of the right to education. In the case of *A Mutambara v Attorney General of Zimbabwe and Another*, the court accepted the argument that citizens must be allowed to openly criticize the conduct

62 Access to information

(1) Every Zimbabwean citizen or permanent resident, including the Zimbabwean media, Has the right of access to any information held by the State or by any institution or agency of 40

Government at every level, in so far as the information is required in the interests of public Accountability.

(2) Every person, including the Zimbabwean media, has the right of access to any Information held by any person, including the State, in so far as the information is required for The exercise or protection of a right.

(3) Every person has a right to the correction of information, or the deletion of untrue, Erroneous or misleading information, which is held by the State or any institution or agency of The government at any level, and which relates to that person.

(4) Legislation must be enacted to give effect to this right, but may restrict access to Information in the interests of defence, public security or professional confidentiality, to the Extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society Based on openness, justice, human dignity, equality and freedom'.

⁸⁶⁹ *Universal Declaration of Human Rights* (1948) A 19, 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas and any media regardless of frontiers'.

⁸⁷⁰ *A Mutambara v Attorney General of Zimbabwe and Another Judgment* No. CCZ 11/15 at 4(See *In re Munhumeso* 1995 (1) SA 551 (ZCC), *Woods and Others v Minister of Justice & Others* 1994 (2) ZLR 195 (S), *Madzingo & Others v Minister of Justice & Others* 2005 (1) ZLR 171 (S)).

⁸⁷¹ *Protection of Privacy Act* (2002).

⁸⁷² *Public Order and Security Act* (2002).

⁸⁷³ 'Posa, Aippa have no place in democracy' 13 September 2016, <https://www.newsday.co.zw/2016/09/posa-aippa-no-place-democracy/> accessed 24 July 2018.

of public officials including that of the judiciary.⁸⁷⁴ It was stated that, in relation to freedom of expression,

Criticism of public authority including the judiciary is a valuable element of the freedom of expression because the ability to criticise the courts promotes impartiality, accessibility and effectiveness, serves as a democratic check on the judiciary and promotes peace and stability (*S v Mamabolo* 2001 (2) SA 409 CC).⁸⁷⁵

The need to promote and protect the right to speak freely and openly on matters of human rights violations is essential in the light of the interdependence between civil and political rights and socio-economic rights. As already stated 'all human rights are universal, indivisible, interdependent and interrelated'.⁸⁷⁶ With no ability to articulate their views freely, and wishes, discontents relating to the provision of basic education, citizens cannot peacefully claim or enjoy their right to basic education. Talking about discontents in the provision of their right to basic education and participating in discussions which push for government action are some of the ways right-holders hold the government accountable. Open communication is a 'means' towards exercising the right to basic education and an 'end' in empowering those who demand their entitlements. Rights-holders can truly benefit from the human rights discourse when they are able to voice discontents freely and without restrictions and demand the government to comply with its obligations. As people speak out against government action, even judges discover true facts about the provision of education contrary to any misconceptions or political statements. Correct and informed judgments are only possible if openness is encouraged. Encouraging open conversations about the provision of education will also make sure that people are part of the developments needed in basic education.

⁸⁷⁴ *A Mutambara v Attorney General of Zimbabwe and Another Judgment No. CCZ 11/15* at 6. 'In considering the lengthy submissions of the parties on this matter, I find that there is no dispute as to the content and purpose of the right to the freedom of expression that was enshrined in the old Constitution. Nor is it disputed that such right is not absolute. I am, however, persuaded by the respondent's submissions as outlined above'. A similar argument was advanced in the *Mantombazana Edmie Tshabalala- Msimang and Medi Clivic Ltd and others* Case No: 18656/07 29 where the Court recognised and protected public opinions, ideas and speech concerning the conduct of public officials.

⁸⁷⁵ *A Mutambara v Attorney General of Zimbabwe and Another Judgment No. CCZ 11/15*, 4.

⁸⁷⁶ United Nations World Conference on Human Rights held in Vienna in June 1993 [171 countries in attendance].

Openness about the state of education guides the public in making decisions on the political parties to give the responsibility to provide and deliver their right. Constitutions are products of the ballot box, as such collective decision-making is only possible if the public has the facts to guide their voting process.⁸⁷⁷ In explaining the importance of open communication and how it guides the citizens to make informed decisions, the constitutional court in the case of *Nevanji Madanhire v Attorney-General* quoted the South African *Hoho* case stated that,

Suppression of available information and of ideas can only be detrimental to the decision-making process of individuals, corporations and governments. It may lead to the wrong government being elected, the wrong policies being adopted, the wrong people being appointed, corruption, dishonesty and incompetence not being exposed, wrong investments being made and a multitude of other undesirable consequences. It is for this reason that it has been said 'that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man'.⁸⁷⁸

In the *Madanhire* case, the court stated vehemently that, criminalising open communication or rather, providing for a crime of criminal defamation was counterproductive and inhibited the freedom of people to speak.⁸⁷⁹ When people speak, duty-bearers must feel pressured to meet their obligations.⁸⁸⁰

3.6.3.2.5 Justice

In addition to openness, human dignity, equality, freedom and free speech, section 46 of the Constitution states that justice is a value which must be considered in the interpretation of human rights. In the light of previous injustices in education during the colonial period as discussed later in this dissertation, it is important for the value of justice to be promoted when interpreting the Zimbabwean Constitution. The meaning of justice and the indicators that justice has been attained is a comprehensive discussion in the fields of social justice and such comprehensive discussion is beyond

⁸⁷⁷ Sadurski W 'Freedom of speech and its limits' (Springer 1999) at 20.

⁸⁷⁸ *Nevanji Madanhire and Nqaba Matshazi v Attorney-General Judgment* No CCZ 2/14 8, See also *Hoho v The State* (2008) ZASCA 98

⁸⁷⁹ Ibid.

⁸⁸⁰ Sadurski W 'Freedom of speech and its limits' (Springer 1999) 2.

the scope of this dissertation. From classical utilitarianism⁸⁸¹ which advocate that when utility is reached, justice has been attained to Armatyre Sen who proposes the capability theory⁸⁸² as a means to attain justice, so much has been discussed about social justice. In this dissertation justice is viewed as treating people fairly by providing them their right to basic education in the manner and with content for which they voted and agreed to. Justice in the provision of education is attained, when rights-holders are able to receive their basic education entitlements from the state as per its scope and content as is provided for in the Constitution and by international laws that Zimbabwe is party to. To ensure justice is attained in the provision of education, the Zimbabwean government must understand and accept the scope and content of section 75 (1) (a) and proceed to provide the right to basic education as it must be constitutionally and internationally provided. Justice is not attained when excuses are given by the government for its failure to provide basic education; rather, in the view of this dissertation, justice is attained when the right to basic education is provided as per the quality required by international law as discussed in chapter 2, as per its intended outcomes discussed in chapter 2 and as an unqualified right and a minimum core content of the right to education in Zimbabwe.

3.6.3.2.6 International law and foreign law considerations

On the consideration of international law, the Zimbabwean Constitution pays high regard to the use of international law. Section 46 (c) states that when interpreting the bill of rights, the court 'must take into account international law and all treaties and conventions to which Zimbabwe is a party'. The Constitution further states that the Zimbabwean state must ensure the domestication of all international law instruments it is party to and their incorporation into national laws.⁸⁸³ Customary law is considered part of the law of Zimbabwe unless it is considered inconsistent with the Constitution

⁸⁸¹ Stanford Encyclopaedia of Philosophy 'The History of Utilitarianism'
<https://plato.stanford.edu/entries/utilitarianism-history/> accessed 20 July 2018.

⁸⁸² Odi Briefing Paper 'Economic Theory, Freedom and Human Rights: The Work of Amartya Sen',
<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2321.pdf> accessed 20 July 2018.

⁸⁸³ *Constitution of Zimbabwe, 2013*, S 34.

or legislation.⁸⁸⁴ When interpreting legislation, the Constitution mandates the court to prefer the view consistent with customary international law as opposed to that which is against it.⁸⁸⁵ During the process, the court is also mandated to adopt an interpretation which is consistent with the provisions of any international instrument binding on Zimbabwe as opposed to any one against it.⁸⁸⁶ All the above positions were confirmed in the case of *Obediah Makoni v Commissioner of Prisons* case.⁸⁸⁷ The Constitution obligates Zimbabwe to ensure that the international conventions, treaties and agreements Zimbabwe is party to are incorporated into national law.⁸⁸⁸ Any ratified international instrument does not bind Zimbabwe unless it is approved by parliament and it will not be part of Zimbabwean domestic law unless its incorporated through an Act of parliament⁸⁸⁹.

In many cases, the constitutional court has affirmed the important position of international law in determining the scope and content of human rights embodied by the Zimbabwean Constitution. In the case of *Loveness Mudzuru*, the court stated that, the obligations imposed by the Constitution are not 'not ascertainable without regard being had to the context of the obligations undertaken by Zimbabwe, under the international treaties and conventions at the time it was enacted on 22 May 2013'.⁸⁹⁰ Further, '[b]y signing these documents, Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights [and to ensure that] they are enjoyed in practice'.⁸⁹¹ The position was further confirmed by the *Makoni* case which stated that, the consideration of international law and foreign law in the interpretation of human rights is afforded by section 46 (1) (c) and (e).⁸⁹² In fact, the Court stated unequivocally that it does not see the 'reason to depart from the foreign and international jurisprudence that has developed on the subject over the

⁸⁸⁴ Ibid, S 326 (1) 326.

⁸⁸⁵ Ibid, S 326 (2).

⁸⁸⁶ Ibid, S 327 (6).

⁸⁸⁷ *Obediah Makoni v Commissioner of Prisons and one Other* (2016) 8 CCZ 5 6.

⁸⁸⁸ *Constitution of Zimbabwe*, 2013, S 34.

⁸⁸⁹ Ibid, S 327 (2) (a) (b).

⁸⁹⁰ *Loveness Mudzuru and Another v (1) Minister of Justice Legal and Parliamentary Affairs and 2 others* (2015) CCZ 1226

⁸⁹¹ Ibid.

⁸⁹² *Obediah Makoni v Commissioner of Prisons and one Other* (2016) 8 CCZ 6.

past sixty years'.⁸⁹³ The constitutional court has not explicitly stated that non-binding international law must be considered when interpreting human rights. However, the position of this dissertation is that an interpretation of the right to basic education would include a compulsory following of the provisions of binding international law and at least a consideration of the provisions of non-binding international law, an approach which was followed by the Courts in the *Mudzuru* case.⁸⁹⁴ A determination of the scope and content of the right to basic education must however always align with the provisions of an international instruments which are binding on Zimbabwe.

Section 46 (e) further states that foreign laws may be considered when interpreting section 75 (1) (a) of the Constitution, an approach which was followed in the case of *Mutumwa Dziva Mawere v Registrar General*⁸⁹⁵ when the court made reference to the foreign judgments of the South African case of *S v Zuma*⁸⁹⁶ and the Namibian case of *Government of Republic of Namibia and Another v Cultura 2000 and another*⁸⁹⁷. Whilst the Court did not elaborate on the applicability of foreign law when interpreting the bill of Rights in Zimbabwe, its approach aligns with the discretion afforded by the Constitution.

3.6.3.2.7 Must consider all provisions of the Constitution especially principles and objectives: Consideration of all Contextual considerations

The discussion in the last chapter stated that a determination of the spirit of a constitutional provision, must involve an enquiry into the structural, historical and social context of Constitutional provisions. The need to consider the textual and structural context of a constitutional provision when interpreting it was propounded by section 46 (d) of the Constitution. Section 46 (d) states that, a court interpreting a human right in the Constitution, 'must pay due regard to all the provisions of this

⁸⁹³ Ibid, 14.

⁸⁹⁴ Ibid, 29.

⁸⁹⁵ *Mutumwa Dziva Mawere v Registrar General and others* CCZ 4/15 8

⁸⁹⁶ *S v Zuma* (1995) (2) SA 642 (CC) see also *Mutumwa Dziva Mawere v Registrar General and others*(2015)CCZ 4 e 8

⁸⁹⁷ *Government of Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 418 FH see also *Mutumwa Dziva Mawere v Registrar General and others*(2015) CCZ 8.

Constitution, in particular the principles and objectives set out in Chapter 2'. The Mudzuru case confirmed the section 46 (d) position stating that, 'to determine the purpose or objective of a provision, one will have to engage with the overall text of the Constitution'⁸⁹⁸. The position had been earlier on stated in the case of *Rattigan and Others v Chief Immigration Officer and Others* during which the Court stated that whilst interpreting human rights embodied in the Constitution, 'all relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as language permits should be narrowly or strictly construed'.⁸⁹⁹

Chapter 2 of the Constitution outlines the national objectives of the Zimbabwean republic.⁹⁰⁰ Section 11 in chapter 2 states that the state has the obligation to protect human rights and freedoms protected by the Constitution and they must promote their full realization and their fulfillment.⁹⁰¹ Section 44 of chapter 2 further states that the state, the agents of the state, every person and every juristic person must 'respect, protect, promote and fulfill the rights and freedoms' in the bill of rights⁹⁰². In alluding to the provisions of section 44, the constitutional court and in trying to determine the extent of the right imposed by section 85 stated that, section 44 'requires the state to protect every fundamental right and freedom regardless of the social and economic status of the right-holder'.⁹⁰³ The scope of the international obligation to promote, protect and fulfill human rights has been discussed in the last

⁸⁹⁸ *Loveness Mudzuru and Another v (1) Minister of Justice Legal and Parliamentary Affairs and 2 others* (2015) CCZ 12.

⁸⁹⁹ *Rattigan and Others v Chief Immigration Officer and Others 1994 (2) ZLR 54 (S) at 57 F-H* see also *Farai Daniel Madzimbamuto v The Registra General and Others* (2014) CCZ 5/14 5-6 see also *Immigration Officer and Others 1994 (2) ZLR 54 (S) at 57 F-H*

⁹⁰⁰ *Constitution of Zimbabwe, 2013*, National Objectives

'8 Objectives to guide State and all institutions and agencies of Government

(1) The objectives set out in this Chapter guide the State and all institutions and agencies of Government at every level in formulating and implementing laws and policy decisions that will Lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic Society in which people enjoy prosperous, happy and fulfilling lives.

(2) Regard must be had to the objectives set out in this Chapter when interpreting the State's obligations under this Constitution and any other law see also *Constitution of Zimbabwe Amendment (no.20) Act 2013* section 46 1 (b) and (d)'.
⁹⁰¹ *Ibid*, S 11.

⁹⁰² *Ibid*, S 44.

⁹⁰³ *Loveness Mudzuru and Another v (1) Minister of Justice Legal and Parliamentary Affairs and 2 others* (2015) CCZ 12

chapter and will not be repeated here. Section 19 of chapter 2 further states that, the state must further adopt measures and policies which ensure that in matters which relate to children, the best interests of children are paramount and ensure that children have access to education and their education is not placed at risk.⁹⁰⁴ The best interest of the child alludes to the overall wellbeing of the child considering the specific situations and risks that children face, particularly the girl child.⁹⁰⁵ Separate from section 75 (1) (a) which already provides for a right to basic education, section 27 (1) (a) and section 27 (2) in chapter 2 state that the state must promote the provision of free and compulsory basic education and ensure that girls are afforded the same educational opportunities as boys.⁹⁰⁶

Still on contextual understanding, section 86 of the Constitution also provides the context for which we must understand all human rights in the Zimbabwean Constitution. Section 86 of the Constitution states that 'the fundamental rights and freedoms set out in this chapter may be limited in terms of the law of general application' as long as the limitation remains 'fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom'.⁹⁰⁷ Consideration of others factors that may be relevant, include 'the nature

⁹⁰⁴ *Constitution of Zimbabwe, 2013*, 19 (2) (d).

⁹⁰⁵ UNHCR (note 15 above) at 8.

⁹⁰⁶ *Constitution of Zimbabwe, 2013*, 27 Education

'(1) The State must take all practical measures to promote—

(a) free and compulsory basic education for children; and

(2) The State must take measures to ensure that girls are afforded the same opportunities as Boys to obtain education at all levels'.

⁹⁰⁷ *Ibid*, S 86 Limitation of rights and freedoms

'(1) The fundamental rights and freedoms set out in this Chapter must be exercised Reasonably and with due regard for the rights and freedoms of other persons.

(2) The fundamental rights and freedoms set out in this Chapter may be limited only in Terms of a law of general application and to the extent that the limitation is fair, reasonable, Necessary and justifiable in a democratic society based on openness, justice, human dignity, Equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or freedom concerned;

(b) the purpose of the limitation, in particular whether it is necessary in the interests of Defence, public safety, public order, public morality, public health, regional or town Planning or the general public interest;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and freedoms by any person does not Prejudice the rights and freedoms of others;

(e) the relationship between the limitation and its purpose, in particular whether it imposes Greater restrictions on the right or freedom concerned than are necessary to achieve its Purpose; and

of the right or freedom concerned, the purpose of limitation, the nature and extent of limitation, the safeguard of the rights of others, relationship between limitation and purpose and whether there is a less restrictive means to achieve the purpose of the limitation'.⁹⁰⁸ The law of general application refers to limitations that are authorised by statutory or common law provisions.⁹⁰⁹ As regards limitations, it is important to note that unless the right is internally contingent to its limitations, section 86 does not limit a right based on accessibility, resources or progressive realisation. Depending on whether a right is unqualified or qualified in its formulation (the distinction was discussed under the section on South Africa above), the view of this dissertation is that common law or legislative law provisions cannot alter the nature of the right but can limit the extent of its enforcement, depending on Constitutional considerations stated by section 86. This view was advanced in chapter 1 under literature review and will further be advanced in chapter 4.

Tied to contextual consideration is historical context of the Constitution and its provisions. The Constitution states that it is based on the respect and recognition of the liberation struggle and honours the 'heroic resistance of colonialism, racism and all forms of domination and oppression'⁹¹⁰ some of which were evident in the provision of education during colonial times, as discussed in the next chapter. The Constitution must be interpreted also as a historic document that continuously moves Zimbabwe from repressive regimes towards a democratic state. A reading of the Constitution's preamble already illustrates a transformative agenda and a movement from a repressive pasts towards a bright future fought for and envisaged by the people of

(f) whether there are any less restrictive means of achieving the purpose of the limitation.

(3) No law may limit the following rights enshrined in this Chapter, and no person may Violate them—

(a) the right to life, except to the extent specified in section 48;

(b) the right to human dignity;

(c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or Punishment;

(d) the right not to be placed in slavery or servitude;

(e) the right to a fair trial;

(f) the right to obtain an order of *habeas corpus* as provided in section 50(7)(a).'

⁹⁰⁸ Ibid.

⁹⁰⁹ Robinson JA 'The Childrens's Rights in the South African Constitution'

<http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/03jarobi.pdf> accessed 22 August 2012.

⁹¹⁰ *Constitution of Zimbabwe, 2013*, Preamble.

Zimbabwe.⁹¹¹ The concept of basic education in Zimbabwe must be understood in light of the history of the right to education in Zimbabwe which will be discussed in the next chapters. It must be constructed with the need to understand that a movement from the arbitrary provision of human rights means that basic education should be regarded as a right which must be provided to everyone in Zimbabwe as an immediate unqualified obligation (imposed by section 75 (1) (a) meant to immediately address the ills of the past. In stating the importance of the history of a constitutional provision in the determination of the scope and content of a right, in the case of *Mutumwa Dziva Mawere v Registrar General and others* the court stated that when interpreting a human right, its scope and content must be ascertained by analyzing the purpose of the guaranteed right and viewing such purpose in the light of the historical origin, object and character of the concept enshrined in the Constitution.⁹¹² Further, in the *Mudzuru* case the court stated that, human rights' violations are context specific, as such [concepts must be understood to be flexible and capable of developing] in line with changing times and social conditions reflective of community attitudes. A consideration of historical context and the provisions of the Constitution as a whole, in the interpretation process is theoretically required by the Constitution and must be practically observed. This dissertation will consider historical context by discussing the history of education in Zimbabwe in the next chapters.

3.6.3.5 Constitutional Court Guidelines

The reasoning of this dissertation is that the Zimbabwean constitutional court has not, in many instances relating to cases brought before it after the enactment of 2013 developed any new interpretation guidelines. The judgments of the Court seem to focus mainly on the textual considerations and traditional canons of interpretation, and not the use of the interpretation guidelines provided by the Constitution. The constitutional court of Zimbabwe continues to make reference to the interpretive guidelines made before the enactment of the new Constitution, which are discussed below.

⁹¹¹ Ibid.

⁹¹² *Mutumwa Dziva Mawere v Registrar General and others* 4 (2015) CCZ 8.

3.6.5.1 Traditional Canons of interpretation and the interpretation clause

The interpretation clause provided by the Constitution already provides for the manner which the bill of rights must be interpreted. The position taken by this dissertation is that the interpretation of the right to education must be done primarily in the light of the provisions of the interpretation clause and a strict adherence to the traditional canons and rules of interpretation should be deemed secondary. Post the enactment of the 2013 Zimbabwean Constitution, the constitutional court, however, has also stated that the Constitution is a 'statue of parliament', hence, traditional rules of interpreting legislation are also used to interpret the Constitution.⁹¹³ The position was stated in the 2015 case of *Chihava and 2 others vs The Provincial Magistrate Francis Mapfumo N.O and another* when the court stated that:

In this respect, it is pertinent to note that a Constitution is itself a statute of Parliament. Therefore, any rules of interpretation that are regarded as having particular relevance in relation to constitutional interpretation, can only be additional to the general rule governing the interpretation of statutes. The starting point in relation the interpretation of statutes generally would be what is termed 'the golden rule' of statutory interpretation. This rule is authoritatively stated thus in the case of *Coopers and Lybrand & Others v Bryant* 1995 (3) SA 761 (A) at 767; 'According to the 'golden rule' of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.'⁹¹⁴

The Court proceeded to state that, the first step when interpreting is the use of the literal rule since the legislature is presumed not to have intended legislation, to be ambiguous or absurd.⁹¹⁵ The second step is to ascertain the intention of the legislature and this can only be done through giving words their 'practical effect'.⁹¹⁶ In the process of giving words their 'practical effect', the words must be interpreted in the manner consistent with the whole Constitution, the history of the legislative document, particularly, the provisions it preceded.⁹¹⁷ The last step is giving words a purposive

⁹¹³ *Chihava and 2 others vs The Provincial Magistrate Francis Mapfumo N.O and another* (2015) CCZ 6 8

⁹¹⁴ Ibid.

⁹¹⁵ Ibid.

⁹¹⁶ Ibid, 8.

⁹¹⁷ Ibid.

meaning.⁹¹⁸ The Court proceeded to clarify that, 'an interpreter should follow the submitted triple synthesis of literalism, intentionalism and purposiveness principles, as is done in the interpretation of any other statute...'⁹¹⁹

Whilst quoting the case of *Minister of Defence, Namibia v Mwandighi* 1992 (2) SA 355, the Court stated that interpretation of the Constitution would, however, requires, 'a broad and purposive interpretation' as opposed to a strict adherence to legalism.⁹²⁰ The Court clarified that,

Thus while a Constitution is to be interpreted in accordance with the rules relating to statutes generally, the authorities suggest that a court called upon to interpret such a Constitution should give a generous and purposive construction to its provisions, particularly the entrenched fundamental rights and freedoms.⁹²¹

To confirm its approach of using traditional canons and interpretation in interpreting constitutional provisions, the court also further referred to the mischief rule in the *Zimbabwe Electoral Commission v The Commissioner General Zimbabwe Republic Police* case,⁹²² and the golden rule and maxim '*in pari materia*' in the *Chihava* case⁹²³.

As already stated above, the approach taken by this dissertation is to interpret section 75 (1) (a) of the Constitution using the guidelines provided by the interpretation clause, as the primary source of reference. It is viewed that constitutional provisions are supreme to the traditional rules and canons of interpretation and take precedence. Traditional rules and canons of interpretation may be considered, but only when their use advances the objectives already protected by the interpretation clause.

⁹¹⁸ Ibid.

⁹¹⁹ Ibid.

⁹²⁰ Ibid.

⁹²¹ Ibid 9.

⁹²² *Zimbabwe Electoral Commission, The Chairperson of the Zimbabwe Electoral Commission v The Commissioner General Zimbabwe Republic Police & 19 ors* (2014) CCZ 3 9 'Another rule of construction, the mischief rule, can be called in aid at this juncture. In order to assist the court in deciding on the true intention of the legislature, the Court may have regard to 'the mischief' that the Act was designed to remedy. Thus the Court may look not only at the language of the statute, but also at the surrounding circumstances, and may consider its objects, its mischiefs, and its consequences'.

⁹²³ *Anna Colletta Chihava and two others v The provincial Magistrate Francis Mapfumo N.O and Another* (2015) 6 CCZ 6-7

3.6.5.2 Textual and Purposive approach

To clarify the use of text in the interpretation of the Zimbabwean Constitution, in the *Jelousy Mbizvo Mawarire v R G Mugabe N.O and Others* case, the court acknowledged that the Zimbabwean courts have used both the narrow and the wider approach in the reading of the words in statutes. The narrow approach which was articulated by the case of *The Queen v Judge of the City of London Court* states that, words in statutes must be followed as they are, even if they lead to absurd conclusions.⁹²⁴ On the other hand, following the wider approach propounded in *Venter v Rex* the court stated that if giving words their plain meaning leads to absurd conclusions in light of context or other considerations by the court, the court may depart from the ordinary 'effects of the words to the extent necessary'.⁹²⁵ In order to remove the absurdity, 'the Court [will] call into aid historical, schematic, teleological and purposive approaches to interpretation'.⁹²⁶ The *Farai Daniel Madzimbamuto v The Registrar General and 4 Others* case quoted the *Rattigan case*, stating that when interpreting human rights in the Constitution, 'narrow, artificial, rigid and pedantic interpretation' must be avoided in preference of interpretations which promote the objects and purpose of the Constitution.⁹²⁷ Following the wider approach which considers the context in which a word may operate, whilst interpreting the word 'public interest', the constitutional court in the *Loveness Mudzuru case* stated that, 'public interest' was a 'value laden' concept and the word had to be interpreted in a 'broad and flexible manner [so that its meaning can] develop in line with changing times and social conditions reflective of community attitudes'.⁹²⁸

⁹²⁴ *The Queen v Judge of the City of London Court* [1892] QBD 273 see also *Jelousy Mbizvo Mawarire v R G Mugabe N.O and others* (2013) CCZ 1/ 16.

⁹²⁵ *Venter v Rex* (1906) TS 910, p914-915 see also *Jelousy Mbizvo Mawarire v R G Mugabe N.O and others* (2013) CCZ 16-17.

⁹²⁶ *Ibid.*

⁹²⁷ *Farai Daniel Madzimbamuto v The Registrar General and 4 Others* (2014) CCZ 5, see also *Obediah Makoni v Commissioner of Prisons and one Other* (2016) 8 CCZ 22.

⁹²⁸ *Loveness Mudzuru and Another v Minister of Justice Legal and Parliamentary Affairs and 2 Others* (2015) 12 CCZ 16.

The wider approach seems to align with practice-based theoretical perspectives discussed in the last chapter, which states that words must be understood within the wider textual and historical context of the Constitution. The approach of understanding the textual formulation of statute within a wider context was also stated in the case of *Buchanan and Co v Babco* which was quoted by the court in the *Mawarire case* which stated that there is a time when the judge is confronted with a situation where they need to promote the spirit of the Constitution.⁹²⁹ In such circumstances, the interpreter must not go by the literal or grammatical meaning of words or sentence but must 'go by the design or purpose which lies behind it', therefore, the problem will be solved by determining the purpose for which the legislation was intended to achieve.⁹³⁰ In the *Mawarire case* the judge further stated that interpretation of the Constitution must further the spirit of constitutionalism embodied in section 2 of the Zimbabwean Constitution, which states that the Constitution is the supreme law of the land and any law or conduct inconsistent with it, is invalid to the extent of its inconsistency.⁹³¹

The position of the constitutional court in the *Mawarire case*, of determining the meaning of text within a wider structural context is beneficial to advance the argument in this dissertation, that section 75 (1) (a) is textually-phrased differently from other socio-economic rights and must be viewed as an unqualified right.⁹³² In its formulation, section 75 (1) (a) unlike section 75 (1) (b), eliminates words such as 'access', 'reasonable legislative or other measures', 'subject to progressive realisation' or 'within the limits of resources'.⁹³³ The reasoning of this dissertation is that, the

⁹²⁹ *Buchanan and Co v Babco (C.A) [1977] QBD 208 at 213 see also Obediah Makoni v Commissioner of Prisons and one Other (2016) 8 CCZ 6 7.*

⁹³⁰ *Buchanan and Co v Babco (C.A) [1977] QBD 208 at 213 see Jelousy Mbizvo Mawarire v R G Mugabe N.O and others (2013) CCZ 17.*

⁹³¹ *Ibid* 18

⁹³² *Ibid* 11

⁹³³ *Constitution of Zimbabwe, 2013, S 75 Right to education*

'(1) Every citizen and permanent resident of Zimbabwe has a right to—

(a) a basic State-funded education, including adult basic education; and

(b) further education, which the State, through reasonable legislative and other measures, Must make progressively available and accessible.

(2) Every person has the right to establish and maintain, at their own expense, independent Educational institutions of reasonable standards, provided they do not discriminate on any Ground prohibited by this Constitution.

(3) A law may provide for the registration of educational institutions referred to in

textual formulation of section 75 (1) (a), clarifies its peculiarity as a qualified or unqualified socio-economic rights.⁹³⁴ As discussed under the interpretation of human rights in South Africa, an unqualified socio-economic right, like that provided by section 75 (1) (a) is distinguished in four ways. First, its formulation eliminates the word 'access', second it eliminates words like 'reasonable and legislative measures', third it eliminates words like 'available resources' and fourth it eliminates words like 'progressive realisation' which makes it different from other socio-economic rights guaranteed in section 76 and section 77.⁹³⁵ This argument will be further advanced in chapter 4.

3.7 Conclusion

This chapter discussed constitutional interpretation as a process which enables the delimitation of the obligation imposed by a human right. It clarified that, unlike legislation, a Constitution is a living document whose underlying foundations and values are agreed by the people. Constitutional interpretation must therefore encompass a balance between text-based theoretical perspectives and practice-based theoretical perspectives. Whilst interpreting the Constitution, judges cannot ignore its text but they must further aim to give credence to both the letter and the spirit of the Constitution. The interpretive guidelines laid down by the Zimbabwean and the South

Subsection (2) and for the closing of any such institutions that do not meet reasonable standards Prescribed for registration.

(4) The State must take reasonable legislative and other measures, within the limits of the Resources available to it, to achieve the progressive realisation of the right set out in subsection Right to health care 76 Right to health care

(1) Every citizen and permanent resident of Zimbabwe has the right to have access to basic Health-care services, including reproductive health-care services.

(2) Every person living with a chronic illness has the right to have access to basic healthcare Services for the illness.

(3) No person may be refused emergency medical treatment in any health-care institution.
47

(4) The State must take reasonable legislative and other measures, within the limits of the Resources available to it, to achieve the progressive realisation of the rights set out in this Section,

Right to food 77(b) sufficient food;

And the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right'.

⁹³⁴ Woolman S and Fleisch B *The Constitution In The Classroom: Law and education in South Africa 1994-2008* (Pretoria University Law Press 2009) 120.

⁹³⁵ Ibid.

African Constitutions as elaborated by the constitutional courts of both countries were discussed and it became notable that, what is emphasised by the interpretative guidelines laid by the Constitutions of both countries is not the rigid adherence to the literal meaning of words, but the broad understanding of words within text, history, values and societies considerations. An engagement with text, the spirit of the Constitution and the guidelines laid by both Constitutions must lead to a conclusion that the right to basic education is an important empowering right meant to address the ills of the past and to be claimed as an immediate right. The next chapters will make use of similar interpretive guidelines in both countries in order to determine the scope and content of a basic education in both countries. International law, historical context, the need to uphold values and textual formulation of the right to basic education in both countries will aid the legal analysis of the right to basic education.

CHAPTER 4

THE SCOPE AND CONTENT OF SECTION 75 (1) A OF THE ZIMBABWEAN CONSTITUTION

4.1 Introduction

The last chapter elucidated that the Constitution of Zimbabwe is the supreme law in the country and every law and conduct must adhere to its provisions. However, a realisation was made that, a mere reading of a constitutional provision is not enough to understand its meaning. The Zimbabwean Constitution does not mean what we want it to say, it has to be interpreted. The last chapter therefore clarified the interpretation guidelines laid down by the Constitution of Zimbabwe. The discussed interpretive guidelines will aid the determination of the scope and content of the right to basic education discussed in this chapter. Also, already stated in the previous chapters is the point that education manifested with the existence of men and evolved to be now provided in schools. What is acknowledged is that there are social, economic and political benefits which accrue to an educated person and from an educated populace and these have motivated the provision of the right to basic education by section 75 (1) (a). Section 75 (1) (a) of the Zimbabwean Constitution provides that every citizen and permanent resident has a right to 'a state-funded basic education'.⁹³⁶

As already discussed in previous chapter, the constitutional provision for the right to basic state-funded education by the Zimbabwean Constitution is in line with the international ideal, to make basic education universally accessible.⁹³⁷ However, the scope and content of this right, in Zimbabwe, remains unclarified. The evident lack of understanding of the scope and content of the right to basic education, by both the government as well as the citizens of Zimbabwe is a problem which will continue to

⁹³⁶ *Constitution of Zimbabwe 2013 S75*

'(1) Every citizen and permanent resident of Zimbabwe has a right to—

(a) a basic State-funded education, including adult basic education; and

(b) further education, which the State, through reasonable legislative and other measures, must make progressively available and accessible'.

⁹³⁷ *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 in Jomtien, Thailand (1990).*

derail the attainment of the education for all goal in Zimbabwe. With multiple evident violations of the right to basic education, it is surprising that the Zimbabwean citizens neither engage in serious advocacy nor vigorous basic-education litigation to force the government to comply with its obligations. A similar disturbing realization was made by Deputy Chief Justice Moseneke in 2007 in relation to the similar right to basic education in South Africa when he said, 'we have not had one case on the right of access to education [provided by the Constitution], nobody has come to the [court] and said, my son is studying under a tree, there is no chalk, there's no black board, the teachers don't come to school every day'.⁹³⁸ The realization by this dissertation is that, the failure of citizens to demand compliance with section 75 (1) (a) obligations is not complacency or the love of their government, rather, when citizens know the extent of their claims, they will not be complacent or condone any violations of their basic education rights.⁹³⁹ It is evident, that citizens do not know how to delineate their right to basic education; consequently, they cannot claim a right whose components they do not know. If the law provided a clear scope and content of the right to basic education, it would provide a point of conversation between citizens who are claim-holders and the state which is the duty-holder.⁹⁴⁰

Human rights are enunciated by Constitutions, regional and international laws, so that they can be provided, protected, promoted and fulfilled by the governments and further claimed by citizens.⁹⁴¹ As long as national laws do not clarify the components of their rights, the view of this dissertation is that, citizens may find it difficult to clarify their claims and therefore make demands from the government. In like manner, as long as the government does not understand the scope and content

⁹³⁸ Yana van Leev 'Mobilising the right to a basic education in South Africa: What has the law achieved so far?' Draft Paper 5-6, <http://www.nylawreview.com/wp-content/uploads/sites/16/2014/11/van-Leeve1.pdf> accessed 18 July 2018.

⁹³⁹ Simbo C 'Human Rights for All: Living the Dream or fighting Reality', (2013) 535 *Derebus* 50-51. Despite a statement of a right in a Constitution, without the statement being explained, 'deprived people often failed to see their deprivations as their mentalities adjust to their situations making Constitutions futile'.

⁹⁴⁰ Yana van Leev 'Mobilising the right to a basic education in South Africa: What has the law achieved so far?' Draft Paper 3, <http://www.nylawreview.com/wp-content/uploads/sites/16/2014/11/van-Leeve1.pdf> accessed 18 July 2018. See also Simbo C 'Human Rights for All: Living the Dream or fighting Reality', (2013) 535 *Derebus* 50-51. 50 'human rights are yardsticks to formulate legal and moral arguments on how disadvantages individuals ought to be treated'.

⁹⁴¹ Danie Brand et al *South African Constitutional Law in Context* (OUP 2015) 702-707.

of its obligation, it cannot logically fully deliver the right or concede its failure to do so. National laws must provide a rubric for state compliance with human rights. The need for national laws which explain the rights of citizens was noted by the Covenant on Economic Social and Cultural Rights (ICESCR) which explained that legislation to protect human rights is indispensable and member states are mandated to 'take steps, including the adoption of legislative measures to fulfil the rights'.⁹⁴²

With the agenda to educate the citizens about the scope and content of their entitlement to basic education and to educate the government about the scope and content of its obligation relating to the provision of basic education, this chapter builds on discussion done by previous chapters and follows an international approach and discusses the scope and content of section 75 (1) (a) in this context. It is noted from the beginning that the Zimbabwean Constitution was enacted in 2013, as such today there is no wealth of jurisprudence legal or otherwise to support some of the points made by this dissertation. However, the Constitution of South Africa provides for a similar right to basic education section 29 (1) (a) and the constitutional court of South Africa and authors have sought to but have still not concluded the endeavour to clarify the scope and content of the right. This dissertation, where necessary also makes use of some recommendations from South Africa in line with the provisions of the Zimbabwean Constitution which allows the discretionary use of foreign law when interpreting the rights it provides.⁹⁴³

4.2 The History of Education in Zimbabwe

4.2.1 Introduction

The history of education will be understood in terms of two historical periods - the colonial and post-colonial era. The discussions on the colonial era will spell out the injustices in the provision of education which were caused by the colonisers and justify

⁹⁴² *International Covenant on Economic Social and Cultural Rights, 1966, A 2 (1).*

⁹⁴³ *Obediah Makoni v Commissioner of Prisons and One Other (2016) 8 CCZ 6.*

'The position was confirmed by the court in the *Makoni* case which stated that, the consideration of international law and foreign law in the interpretation of human rights is afforded by section 46 (1) (c) and (e)'.

the need for Zimbabwe to move away from the provision of education characteristic of that period. The post-colonial era will spell out the provision of education by a government which was voted in by the majority upon the attainment of independence in 1980. A discussion of the history of education will advance the realization that as long as citizens are not aware of their entitlements, they are not able to demand from the government what truly belongs to them. Multiple governments, therefore, will continue to violate their obligations in relation to the provision of basic education and the citizens will not be in a position to demand the entitlements they do not know. Also, there is no evidence that the Zimbabwean government understands its legal obligations relating to the provision of basic education, yet, the Zimbabwean constitutional court rightly noted that, 'like a shepherd', the government cannot escape the liability of providing and protecting human rights.⁹⁴⁴ The state is accountable to the public and is 'expected to know what is happening to fundamental rights and freedoms' and to 'ensure that they are enjoyed in practice'.⁹⁴⁵

4.2.2 The colonial era

The history of education in Zimbabwe dates back from the time when education was provided informally, within Zimbabwean traditional communities. It proceeds to the time of colonialism and the after-independence period. Understanding the provision of education during the colonial period is important, in order for one to appreciate the need for a Constitution which guarantees everyone's right to an education which must be demanded immediately despite lack of resource or other constraints.

The colonial history of education in Zimbabwe suffers from a lack of proper documentation, in book-library literature, however library resources found will be complemented by internet resources, although reliance on unverified sources is limited. The history of formal education in Zimbabwe began from the time of Cecil John Rhodes, who was coming from South Africa.⁹⁴⁶ From that time, two parallel

⁹⁴⁴ *Loveness Mudzuru and Another v Minister of Justice Legal and Parliamentary Affairs and 2 others* (2015) 12 CCZ 12.

⁹⁴⁵ *Ibid.*

⁹⁴⁶ Zvobgo R G *Colonialism and Education In Zimbabwe* (Sapes Books 1994) 44-57.

systems of education were introduced.⁹⁴⁷ There was education for Africans which was left entirely to missionaries and education for the White children of the settlers which was directed by the state.⁹⁴⁸ During the period, between 1890 and 1923, after the settlers invaded Zimbabwe, there was an agreement between the church and the state that the education policy and educational institutions needed to consider that both African and White pupils had to be competent in basic numeracy and literacy in order to further the objectives of Christianity⁹⁴⁹.

The then Anglican Bishop of Southern Africa explained that the church had to depend on the training in schools in order to further its mandates within the African community.⁹⁵⁰ Denominations had to recruit local pastors and evangelist trainees who needed some basic numeracy and literacy skills.⁹⁵¹ The settler economy was also dependent on cheap and unskilled labor as such 'industrial training' was also needed on the part of the Black majority, whilst the White minority received an academically-inclined education.⁹⁵² White colonists, believing themselves to be intellectually superior to Black people, taught White students an academic curriculum while Black students were taught basic numeracy and literacy coupled with manual and repetitive work as well as active participation in the Christian world.⁹⁵³ The curriculum for Africans focused on practical subjects that were needed for them to provide cheap labor, whilst the curriculum for White students was mainly academic with two technical subjects, like woodwork and needlework.⁹⁵⁴ The African had to be taught to be useful to his employer and to work with contentment.⁹⁵⁵ White pupils were taught that they were the ruling class who had authority over Africans; they developed a monopoly over

⁹⁴⁷ Ibid.

⁹⁴⁸ Ibid.

⁹⁴⁹ Ibid.

⁹⁵⁰ Ibid.

⁹⁵¹ Ibid.

⁹⁵² Ibid.

⁹⁵³ Zindi F 'Towards the Elimination of Disparities in Educational Provision: A Look at Zimbabwe and South Africa' (1996), *Journal of Social Development in Africa* 43.

⁹⁵⁴ Zvobgo R G *Colonialism and Education In Zimbabwe* (1994 Sapes Books) 44-57.

⁹⁵⁵ Ibid.

selected jobs in industry and agriculture.⁹⁵⁶ Education became the means of lifting the poor White man so that they would not identify with the oppressed African majority.⁹⁵⁷

Africans were taught to speak, understand and respect the English language as a superior language compared to their own language.⁹⁵⁸ There was an emphasis on respect and obedience for the authority of the White man which was calculated to instill a sense of inferiority in African students.⁹⁵⁹ The money spent on African education was extremely minimal, compared to that which was spent for the education of Whites.⁹⁶⁰ In 1910 the state appointed a committee of enquiry to investigate aspects of African education to assist policy makers.⁹⁶¹ The committee determined that Africans needed to be taught some numeracy and literacy skills and that industrial education was more important over academic education.⁹⁶² The committee stated that the state needed to control missionary schools in order to ensure that government policy was implemented.⁹⁶³ African schools began to be monitored by the state so that missionary schools would not emphasize academic education.⁹⁶⁴ Whilst there was high demand for education amongst Africans, there was, however, inadequate funding, teachers and supply of African schools.⁹⁶⁵ In 1920 there were 229 trained teachers in White schools as compared to none in African schools.⁹⁶⁶ In 1929 education was made compulsory for Whites between the ages of 7-14 years, whilst it was not compulsory for African pupils.⁹⁶⁷

Between the periods of 1934 to 1952, the development of education was influenced by industrialization.⁹⁶⁸ Industrialization demanded skilled labour and the

⁹⁵⁶ Ibid

⁹⁵⁷ Ibid.

⁹⁵⁸ Ibid.

⁹⁵⁹ Ibid.

⁹⁶⁰ Ibid.

⁹⁶¹ Ibid.

⁹⁶² Ibid.

⁹⁶³ Ibid.

⁹⁶⁴ Ibid.

⁹⁶⁵ Ibid.

⁹⁶⁶ Ibid.

⁹⁶⁷ Ibid.

⁹⁶⁸ Ibid.

White community was not sufficient in terms of numbers to undertake the process.⁹⁶⁹ In an attempt to solve the emerging concerns of the time, Huggins made education free for Whites, at both primary and secondary levels, including free books and learning material.⁹⁷⁰ Boarding school facilities were cheap for Whites and when they could not afford education they were offered scholarships by various organizations.⁹⁷¹ In 1936, the Fox commission was appointed to investigate the provision of education for Whites and it led to the enactment of the Education Act of 1938.⁹⁷² White parents and schools were given greater freedom to decide what children could learn and to ensure that education was a true expansion of European, social and political objectives.⁹⁷³ At this point, Africans were beginning to mobilize themselves politically and their demands for education could not be ignored and extending academically-inclined education to Africans became essential.⁹⁷⁴ The government began to build schools for Africans, although the main objective was the provision of primary education.⁹⁷⁵ Missionaries made intense efforts to secure secondary education for Africans⁹⁷⁶ forcing Huggins to make a qualified acceptance for the provision of secondary school for Africans, however stating emphatically that such a process had to be carefully controlled to ensure that the supply of secondary education would not outweigh the demand for it among Africans.⁹⁷⁷

Between the period of 1953 and 1963, there was the formation of the federation of Rhodesia and Nyasaland.⁹⁷⁸ Todd came into power and opened more educational opportunities for Africans⁹⁷⁹ as he viewed such an approach as crucial to instill bourgeois values in Africans and ensure that they shift the blame for lack of success

⁹⁶⁹ 'Looking back to look forward - education in Zimbabwe: a WOZA perspective' (2010) <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018.

⁹⁷⁰ Zvobgo R G *Colonialism and Education In Zimbabwe* (Sapes Books 1994) 44-57.

⁹⁷¹ Ibid.

⁹⁷² Ibid.

⁹⁷³ Ibid.

⁹⁷⁴ Ibid.

⁹⁷⁵ 'Looking back to look forward - education in Zimbabwe: a WOZA perspective' (2010) <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018.

⁹⁷⁶ Zvobgo R G *Colonialism and Education In Zimbabwe* (Sapes Books 1994) 44-57.

⁹⁷⁷ Ibid.

⁹⁷⁸ Ibid.

⁹⁷⁹ Ibid.

to an individual and not the White man.⁹⁸⁰ Todd made himself Minister of African Education and at that time few Africans were in primary and secondary schools and most dropped out of school.⁹⁸¹ Todd developed a 5-year plan to expand primary schools, to overcome teacher shortage by training more teachers and to ensure two years secondary education for all African children who successfully passed standard 6.⁹⁸² Todd did not create a mass enrolment for Africans but enrolments were increased.⁹⁸³ Todd was subsequently replaced by David Whitehead who continued with Todds' plans for educating Africans.⁹⁸⁴ David Whitehead failed to get any popularity votes for following Todd, leading to the formation of the RF party, a conservative party led by Ian Smith which eventually took over the government.⁹⁸⁵ At the same time Africans continued to mobilize themselves against the White rule leading to the RF party banning ZANU PF and ZAPU thereby fueling more political unrest.⁹⁸⁶

The Smith government made it an agenda to discriminate against Africans and Whites were granted better education which was meant to serve its social and political interest and to keep the black majority in a subservient position.⁹⁸⁷ The Smith government announced policy changes in 1966, among them was that senior secondary schools would enroll not more than 12.5% of African primary school graduates and junior secondary schools would enroll not more than 37.5%.⁹⁸⁸ The effect of that policy was that, not more than 20% of primary school graduates could proceed to secondary school and the other school drop-outs had to look for menial jobs as was desired by the White government of the day.⁹⁸⁹ In 1968, the government further announced that mission schools which had been providing 90% of schooling

⁹⁸⁰ Ibid.

⁹⁸¹ Ibid.

⁹⁸² Ibid.

⁹⁸³ Ibid.

⁹⁸⁴ Ibid.

⁹⁸⁵ Ibid.

⁹⁸⁶ Ibid.

⁹⁸⁷ Mungazi D A 'Educational Innovation in Zimbabwe: Possibilities and Problems' *The Journal of Negro Education*, (1985) Vol,54, 196.

⁹⁸⁸ Ibid.

⁹⁸⁹ 'Looking back to look forward - education in Zimbabwe: a WOZA perspective'(2010) 2 <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018

would not be allowed to operate, thereby, retarding the education for Africans.⁹⁹⁰ Between 1964 and 1965, the government spent \$197.30 per a White student for education whilst it spent \$18.40 per Black learner.⁹⁹¹ Between 1965 and 1966, the government spent \$206.00 per White student and \$18.90 per Black student.⁹⁹² Whilst Black students experienced discrimination in the provision of education, education for White children was compulsory and free with boarding schools providing them education in farms and mines.⁹⁹³ Schools for Whites were graded by academic ability, whilst technical schools were established to cater for the Whites who were technically-inclined.⁹⁹⁴ Africans who could enrol into secondary schools could not go to Whites-only schools.⁹⁹⁵ There was in addition a decree that only half of Africans who passed could pursue an academic 'curriculum; the other half would have to attend specially-designed vocational schools where they would learn practical skills such as bricklaying, building, dress making, carpentry and metal working'.⁹⁹⁶ Vocational education was also part of the curriculum for Whites together with an academic curriculum, but it was obscured to the point that Blacks began to demonise vocational education as inferior and a means of oppression.⁹⁹⁷ Africans felt that they had no choice than to fight the colonial government which led to independence in 1980.⁹⁹⁸ After independence Zimbabwe adopted an education-for-all policy which led to the enactment of the Education Act⁹⁹⁹ and decades later a new Constitution which provides for the right to education.

⁹⁹⁰ Mungazi D A Educational Innovation in Zimbabwe: Possibilities and Problems' (1985) 54 The Journal of Negro Education, 196.

⁹⁹¹ Ibid, 198.

⁹⁹² Ibid.

⁹⁹³ 'Looking back to look forward education in Zimbabwe: a WOZA perspective' (2010) <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018.

⁹⁹⁴ Ibid.

⁹⁹⁵ Zindi F 'Towards the Elimination of Disparities in Educational Provision: A Look at Zimbabwe and South Africa' (1996), Journal of Social Development in Africa 4

⁹⁹⁶ Zvobgo R G *Colonialism and Education In Zimbabwe* (Sapes Books 1994) 44.

⁹⁹⁷ Ndlovu M E, 'Zimbabwe's Educational legacy from the 1980's: Was it all Rosy' <http://www.thezimbabwean.co/2013/05/zimbabwes-educational-legacy-from-the/> accessed 18 July 2018.

⁹⁹⁸ 'Looking back to look forward - education in Zimbabwe: a WOZA perspective' (2010) <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018.

⁹⁹⁹ Mungazi D A Educational Innovation in Zimbabwe: Possibilities and Problems' 54 (1985) The Journal of Negro Education, 196.

⁹⁹⁹ Ibid.

4.2.3 The state of education during the post-independence era

Upon gaining independence, Zimbabwe was faced with the obligation to democratise and de-racialise education as well as expand education facilities to ensure access for all. In 1980, Prime Minister Canaan Banana stated that government would spend \$300 million to improve education.¹⁰⁰⁰ The then commitment to the provision of education by the Zimbabwean government cannot be questioned. Free schools were opened, especially targeting the rural community where 90% of the people lived.¹⁰⁰¹ In 1980 alone, 1,310,315 children registered to attend both primary and secondary school with 1,235,994 of the number registering to attend primary school and 74,321 registering to attend secondary school.¹⁰⁰² From term 3 of the 1980 school calendar year, school fees for primary and secondary school was abolished and enrolments continued to increase with nearly 97% of school-going-age children enrolled for primary education by 1984.¹⁰⁰³ The number of schools multiplied four times within the first six years.¹⁰⁰⁴ Secondary school education which was once a privilege of White people was made available for all, in particular for rural children who had only previously enjoyed primary schooling.¹⁰⁰⁵ The new government made the decision that regardless of the pass grade, every grade 7 student would proceed to secondary education causing the enrolment in secondary schools to quadruple in 1981.¹⁰⁰⁶ Due to the intense focus on the provision of access to education, around the 1990s access to primary and

¹⁰⁰⁰ Mungazi D A Educational Innovation in Zimbabwe: Possibilities and Problems' The Journal of Negro Education, 54 (1985) 196 -198.

¹⁰⁰¹ Ibid.

¹⁰⁰² Ndlovu M E, 'Zimbabwe's Educational legacy from the 1980's: Was it all Rosy' <http://www.thezimbabwean.co/2013/05/zimbabwes-educational-legacy-from-the/> accessed 18 July 2018.

¹⁰⁰³ Ibid.

¹⁰⁰³ 'Looking back to look forward - education in Zimbabwe: a WOZA perspective'(2010) 2 see <http://wozazimbabwe.org/wp-content/uploads/2010/01/looking-back-to-look-forward-education-in-zimbabwe-a-woza-perspective1.pdf> 2, accessed 18 July 2018.

¹⁰⁰⁴ Ibid, 3.

¹⁰⁰⁵ Ibid, 3-4.

¹⁰⁰⁶ Ndlovu M E, 'Zimbabwe's Educational legacy from the 1980's: Was it all Rosy' <http://www.thezimbabwean.co/2013/05/zimbabwes-educational-legacy-from-the/> accessed 18 July 2018.

¹⁰⁰⁶ 'Looking back to look forward - education in Zimbabwe: a WOZA perspective'(2010) 2 <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018

secondary education had been largely achieved.¹⁰⁰⁷ By the year 1991 both primary and secondary enrolments were over 3 million and a total of 28% of the population was in school.¹⁰⁰⁸ The education system in Zimbabwe began to be heralded as the best in Africa,¹⁰⁰⁹ although, it was not free of problems. With increased enrolment rates the system could not meet the capacity.¹⁰¹⁰ Teachers and classrooms were not enough forcing some schools to have three classes sharing the same class, consecutively or children being educated under the tree.¹⁰¹¹

To solve the problem of lack of teaching personnel, the government started using temporary teachers who were people who had not completed Form 4 in some instances, to teach in primary and secondary schools.¹⁰¹² The 'can do' approach of not hiring qualified expatriates but relying on under-qualified local teachers was later to be blamed for poor quality teaching and increased failure rates.¹⁰¹³ Access to education was there, however, issues of quality remained a problem with only a 24% pass rate for Ordinary (O) levels in 1995.¹⁰¹⁴ By 2004, despite quality concerns, Zimbabwe was said to have a literacy rate of around 90% and placed among the nations with the most literate persons on the African continent.¹⁰¹⁵ The noble goal was to achieve equal and quality education but neither of the two was achieved.¹⁰¹⁶ In

¹⁰⁰⁷ Ndlovu M E, 'Zimbabwe's Educational legacy from the 1980's: Was it all Rosy' <http://www.thezimbabwean.co/2013/05/zimbabwes-educational-legacy-from-the/> accessed 18 July 2018.

¹⁰⁰⁸ Ibid.

¹⁰⁰⁸ 'Looking back to look forward - education in Zimbabwe: a WOZA perspective' 2 (2010) <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018.

¹⁰⁰⁹ Ibid page 3 and 4.

¹⁰¹⁰ Ndlovu M E, 'Zimbabwe's Educational legacy from the 1980's: Was it all Rosy' <http://www.thezimbabwean.co/2013/05/zimbabwes-educational-legacy-from-the/> accessed 18 July 2018.

¹⁰¹¹ Ibid.

¹⁰¹¹ 'Looking back to look forward - education in Zimbabwe: a WOZA perspective'(2010) <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018.

¹⁰¹² Ndlovu M E, 'Zimbabwe's Educational legacy from the 1980's: Was it all Rosy' <http://www.thezimbabwean.co/2013/05/zimbabwes-educational-legacy-from-the/> accessed 18 July 2018.

¹⁰¹² 'Looking back to look forward - education in Zimbabwe: a WOZA perspective' 2 (2010) <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018

¹⁰¹³ Ibid.

¹⁰¹⁴ Ibid.

¹⁰¹⁵ IDASA 'Challenges to education in Zimbabwe' <http://idasa.wordpress.com/2009/06/26/challenges-to-education-in-zimbabwe/> accessed 18 July 2018.

¹⁰¹⁶ Zindi F 'Towards the Elimination of Disparities in Educational Provision: A Look at Zimbabwe and South Africa' (1996) *Journal of Social Development in Africa* 43.

terms of funding for education and infrastructure, whilst White private schools and some missionary schools could afford to build laboratories and to, therefore, offer O-level students, subjects like physics, chemistry and biology, some schools for the Africans did not have laboratories, leading to the introduction of a subject called ZimScience a subject which compressed aspects of science into one theoretical subject and which could not qualify students to study subjects, such as Biology, Chemistry or Physics at A levels, thereby affecting their career choices.¹⁰¹⁷ The social gap between Zimbabwean children of different social classes and races widened, due to access to the different quality education delivered by their schools.¹⁰¹⁸ White people and elite Black people were sending their children to well-equipped former White A schools situated in White and affluent Black suburbs.¹⁰¹⁹ Indian and coloured communities had their own schools to which some of the middle class blacks sent their children.¹⁰²⁰ The poor Black majority were sending their children to ill-equipped and underfunded government schools, in high density suburbs.¹⁰²¹ The elite Blacks continued to enrol their children in the 'A' schools when vacancies arose.¹⁰²² The social gap between the urban and rural students widened as those in high-density urban suburbs and rural schools did not have adequate classrooms and qualified teachers. ¹⁰²³ Further, those in rural areas walked up to 15 kilometres to school.¹⁰²⁴ School dropouts were also a

¹⁰¹⁷ Ibid.

¹⁰¹⁸ Ibid.

¹⁰¹⁹ Ibid.

¹⁰¹⁹ 'Education in Zimbabwe' <http://www.usapglobal.org/zimbabwe/education.htm> accessed 18 July 2018.

¹⁰²⁰ Zindi F 'Towards the Elimination of Disparities in Educational Provision: A Look at Zimbabwe and South Africa' (1996) *Journal of Social Development in Africa* 43.

¹⁰²⁰ 'Education in Zimbabwe' <http://www.usapglobal.org/zimbabwe/education.htm> accessed 18 July 2018.

¹⁰²¹ Zindi F 'Towards the Elimination of Disparities in Educational Provision: A Look at Zimbabwe and South Africa' (1996) *Journal of Social Development in Africa* (1996) 43.

¹⁰²¹ 'Education in Zimbabwe' <http://www.usapglobal.org/zimbabwe/education.htm> accessed 18 July 2018.

¹⁰²² Zindi F 'Towards the Elimination of Disparities in Educational Provision: A Look at Zimbabwe and South Africa' *Journal of Social Development in Africa* (1996) 53.see Zvobgo R G '*Colonialism and Education In Zimbabwe* (Sapes Books 1994) 44.

¹⁰²³ Ndlovu M E, 'Zimbabwe's Educational legacy from the 1980's: Was it all Rosy' <http://www.thezimbabwean.co/2013/05/zimbabwes-educational-legacy-from-the/> accessed 18 July 2018.

¹⁰²³ 'Looking back to look forward - education in Zimbabwe: a WOZA perspective'(2010) see <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018

¹⁰²⁴ Zindi F 'Towards the Elimination of Disparities in Educational Provision: A Look at Zimbabwe and South Africa' (1996) *Journal of Social Development in Africa* 43.

big problem with only 38% of those who started in 1993 managing to complete Form 4 by 2003.¹⁰²⁵

In the 1990s, a decade after independence, with the political instabilities and dwindling donor funds, school fees began to be charged in schools and this saw parents preferring to educate boys.¹⁰²⁶ Parents were now required to pay school fees in order to maintain schools, to buy furniture and text books.¹⁰²⁷ By the end of the second decade in the year 2000, schools buildings and furniture were now very old; schools no longer had text books and plumbing systems were broken.¹⁰²⁸ There was a mass exodus of teachers from the country in search of better employment opportunities outside Zimbabwe and the teachers who remained in Zimbabwe spend most of their times not working, but doing informal trade and on strike¹⁰²⁹. Tens of thousands of children dropped out of school because parents could not afford school fees and as pass rates slumped, parents were demotivated to pay fees for repeating students; students were also demoralized because those who had completed school could not find employment.¹⁰³⁰ In 2010 the drop-out rate was 8% among those aged 6 to 17 years.¹⁰³¹ Streets were characterised by multitude of school-going children termed 'street kids' roaming around, making it evident that school was no longer free and education was now for the privileged.

¹⁰²⁵ Ndlovu M E, 'Zimbabwe's Educational legacy from the 1980's: Was it all Rosy' <http://www.thezimbabwean.co/2013/05/zimbabwes-educational-legacy-from-the/> accessed 18 July 2018.

¹⁰²⁵ Zindi F 'Towards the Elimination of Disparities in Educational Provision: A Look at Zimbabwe and South Africa' (1996) *Journal of Social Development in Africa* 43.

¹⁰²⁶ Zvobgo R G *Colonialism and Education In Zimbabwe* (Sapes Books 1994) 44 'According to the World Bank (1990), when resources are short, Zimbabwean parents prefer to educate their sons at secondary level rather than their daughters. In 1990, only one in every two girls were enrolled in secondary schools compared to three out of every four boys of the same age. In the same year the government re-introduced the payment of school fees which has resulted in more girls dropping out of school'.

¹⁰²⁷ 'Looking back to look forward - education in Zimbabwe: a WOZA perspective'(2010) 3-4 <http://www.africafiles.org/article.asp?ID=22650> accessed 18 July 2018

¹⁰²⁸ Ibid.

¹⁰²⁹ Marist international Solidarity Foundation 'Universal Periodic Review of the Republic of Zimbabwe' <http://lib.ohchr.org/hrbodies/UPR/Documents/session12/ZW/fmsimaristinternationalsolidarityfoundati ononlus-eng.pdf> 1

¹⁰³⁰ Ibid.

¹⁰³¹ Ibid.

Zimbabwean education continues to suffer 'through the decade of economic collapse and political violence, starved of funding, abandoned by teachers, who left children to fend for themselves without much opportunity for learning'.¹⁰³² The situation has not improved today as Zimbabwe is still failing to recover from hard economic times. The education offered in public schools is neither accessible, available nor acceptable. The conditions of service and salaries for teachers remain unattractive and strikes still characterise the teaching profession.¹⁰³³ Schools lack basic infrastructure, like laboratories and libraries, as well as desks, chairs and textbooks. In 2010 'the Minister of Finance, Biti stated that 555 primary and 399 secondary schools had no desks and the average text book-to-pupil ratio was 1:15.¹⁰³⁴ In 2014 and 2015¹⁰³⁵, the situation was projected to be worse with the Deputy Minister for Education acknowledging that 'pupils need to have the best learning environment in order to perform well at school,' and 'Zimbabwe needs an extra 2,056 schools to decongest schools that have the hot-seating system and reduce distances [in excess of 24 km] which pupils are walking to school'.¹⁰³⁶ The Minister further added that children were learning in tobacco barns, others under trees with no furniture, classrooms were in a deplorable state and 1500 satellite schools needed to be massively rehabilitated.¹⁰³⁷ In Bubi at Molo Primary School in Zimbabwe,

pupils used dilapidated grass thatched, pole and dagga structures and cottages, from the time the school was established in 2000, up to 2014. Pupils were sitting on tree

¹⁰³² Ndlovu M E, 'Zimbabwe's Educational legacy from the 1980's: Was it all Rosy' <http://www.thezimbabwean.co/2013/05/zimbabwes-educational-legacy-from-the/> accessed 18 July 2018.

¹⁰³³ Staff Reporter, 'Zimbabwe needs an extra 2056 schools, Minister' <http://www.newzimbabwe.com/news18123children%20walking%2024km%20to%20school,%20minister/news.aspx> accessed 18 July 2018.

¹⁰³⁴ Marist international Solidarity Foundation 'Universal Periodic Review of the Republic of Zimbabwe' <http://lib.ohchr.org/hrbodies/UPR/Documents/session12/ZW/fmsimaristinternationalsolidarityfoundationlus-eng.pdf> 4.

¹⁰³⁵ Midlands correspondent 'Zimbabwe has a shortfall of 2000 school's

Zim+has+a+shortfall+of+2+000+schools,+Dokora/news.aspx accessed 19 July 2018, 'Because of the economic challenges we are facing government alone cannot deliver such infrastructure hence the need to partner with churches and companies,' Dokora said at the Seventh Day Adventist Church Schools Conference at Mkoba Teachers' College in Gweru.

¹⁰³⁶ Staff Reporter, 'Zimbabwe needs an extra 2056 schools, Minister' <http://www.newzimbabwe.com/news18123children%20walking%2024km%20to%20school,%20minister/news.aspx> accessed 17 July 2018. 'Primary school children should at least be five kilometres away from the nearest school, while secondary pupils should be at least 10 kilometres apart. They should not travel 24 kilometres like some children are doing,' Prof Mavhima said.

¹⁰³⁷ Ibid.

logs while some sat on bare dusty floors; this deplorable situation resulted in one of the mud blocks collapsing early in 2014 following heavy rains; the headmaster, Fortune Moyo confirmed this.¹⁰³⁸

Issues of economic access to education remain a problem. With the full knowledge of the fact that many children cannot afford to pay school fees, the government of Zimbabwe in 2001 introduced the Basic Education Assistance Module (BEAM), an initiative to assist children in marginalised communities to pay school fees.¹⁰³⁹ The fund aims at assisting orphans and vulnerable children with school fees, examination fees, levies and building assistance and was introduced in 2001 by the government of Zimbabwe.¹⁰⁴⁰ It targets children aged between 6 years and 19 years and is administered under the Ministry of Labour and Social Welfare whilst the Ministry of Education, Sports, Arts and Culture is responsible for implementation of the agreements.¹⁰⁴¹ The BEAM evaluation report by the Training and Research Support Centre with the Zimbabwe Teachers Association in 2012 estimated that, of 3.6 million children who were at the age of attending primary and secondary schooling, an estimate of 1 million needed financial assistance.¹⁰⁴² Of the 2.8 million children who were at primary school going age, it was estimated that, 28% of them needed financial assistance and only 16% has received assistance in 2011.¹⁰⁴³ For the children of secondary school going age, it was noted that, 24% of them were in need of financial assistance whilst only 17% received it.¹⁰⁴⁴ The report further stated that in both primary and secondary schools, out of 15243 potential beneficiaries, only 8533 which is only 56% of intended beneficiaries had received BEAM assistance.¹⁰⁴⁵ The report also noted the anomaly that, the assistance of BEAM was tied to the school more than the student in need, to the extent that when a child transferred from a school, BEAM

¹⁰³⁸ Nyamutata C 'Right to Education under threat' <http://nehandaradio.com/2014/06/26/right-education-threat/> accessed 19 July 2018.

¹⁰³⁹ Training and Research Support Centre (TARSC) with Zimbabwe Teachers Association (ZIMTA), 'Tracking the Governance and Accountability of the Basic Education And Assistance Module (BEAM) in Ten Districts of Zimbabwe' (2012) 2, <http://tarsc.org/publications/documents/BEAM%20rep%20final.pdf> accessed 20 July 2018.

¹⁰⁴⁰ Ibid.

¹⁰⁴¹ Ibid.

¹⁰⁴² Ibid.

¹⁰⁴³ Ibid.

¹⁰⁴⁴ Ibid.

¹⁰⁴⁵ Ibid.

assistance was seized.¹⁰⁴⁶ It also noted that, parents and guardians have complained over the lack of transparency in the choosing for beneficiaries of BEAM.¹⁰⁴⁷ Also, In cases where BEAM payments were late, schools asked for advance payment from parents and guardians of children benefiting from BEAM and there was no evidence of reimbursement.¹⁰⁴⁸

In 2015, the government of Zimbabwe stated that in addition to the legal requirement that all parents must pay school fees, it intends to introduce Grade 7 examination fees, which means that children between the ages of 11 and 13 will have to pay to write examinations so that they can proceed to secondary school.¹⁰⁴⁹ The move to introduce Grade 7 examination fees in addition to it being in violation of international law, practically obstructs access to education for children who are from poor backgrounds.¹⁰⁵⁰ It has been 'estimated that about 300,000 children are dropping out of school each year with 197 000 of that being estimated to be primary school pupils'.¹⁰⁵¹ While some children are dropping out after failing their O Levels, the majority are being forced to leave school due to economic hardships.¹⁰⁵² The figure of 300,000 school drop-outs yearly, over a five year period, translates to 1, 5 million drop outs over a five year period.¹⁰⁵³ Tied to the issue of high dropout rates due to increasing failure rates, is the problem of unqualified teachers.¹⁰⁵⁴ As at 2013, of the 98 446 teachers employed by government¹⁰⁵⁵, the number of unqualified teachers was estimated at around 20 000 which was said to have contributed to the decreasing 'O' Level pass rates which saw an 81.6% failure rate in 2012 with 19 schools reporting a

¹⁰⁴⁶ Ibid, 17.

¹⁰⁴⁷ Ibid 2-3.

¹⁰⁴⁸ Ibid 2-3.

¹⁰⁴⁹ Ncube S 'Zimbabwean Children's right to education under serious threat' <http://www.davidcoltart.com/2015/04/zimbabwean-childrens-right-to-education-under-serious-threat/> accessed 19 July 2018.

¹⁰⁵⁰ Ibid.

¹⁰⁵¹ Ibid.

¹⁰⁵² Ibid.

¹⁰⁵³ Ibid.

¹⁰⁵⁴ Staff Reporter 'Government to ban unqualified teachers' <http://www.newzimbabwe.com/news-10363-Unqualified+teachers+to+be+banned/news.aspx> accessed 09 July 2019.

¹⁰⁵⁵ Kakore N 'Zim has 20000 unqualified teachers' <http://www.herald.co.zw/zim-has-20-000-unqualified-teachers/> accessed 24 July 2018.

0% pass rate¹⁰⁵⁶ and a 80.5 failure rate in 2011 which was a decrease from the 84% failure rate in 2008.¹⁰⁵⁷ The decreasing pass rates did not only affect O levels but also Grade 7 pupils, since 'in 2011, 288365 children sat [for examinations] obtaining a pass rate of 28.89% and in 2012, the number went up to 292375 with a pass rate of 31.5%'.¹⁰⁵⁸ As of 2015, the Ministry of Education estimated that in Zimbabwe, 10 341 teachers were unqualified to teach at primary school level, while 11 519 teachers were unqualified to teach at secondary school level.¹⁰⁵⁹ The number of students per qualified teacher was pegged at 42:1 at primary school and 31:1 at secondary school.¹⁰⁶⁰ In addition to a lack of qualified teachers, is the lack of text books in primary and secondary schools with children going for four years of secondary education without a text book.¹⁰⁶¹ Education is still not free and the situation has gotten worse with the Minister of Education, Lazurus Dokora, sanctioning school authorities to institute civil suits against parents to recover money in unpaid fees.¹⁰⁶² In his words, 'parents have a responsibility to take care of their children because it's you who gave birth to these children, failure to do that [pay school fees] is criminal'.¹⁰⁶³

Whilst Zimbabwe has been hailed for its literacy and numeracy rate, that alone is not an indication of the delivery of accessible quality education. What entails quality education for children has been described by the World Declaration on Basic education discussed earlier. There is no clarity in the history of education in Zimbabwe that the

¹⁰⁵⁶ Correspondent '19 Zimbabwean Schools Record 0% O level pass rate' http://www.zimdiaspora.com/index.php?Option=com_content&id=5296:19-zimbabwe-schools-record-0-olevel-pass-rate&Itemid=18 accessed 24 July 2019.

¹⁰⁵⁷ Staff Reporter 'Government to ban unqualified teachers' <http://www.newzimbabwe.com/news-10363-Unqualified+teachers+to+be+banned/news.aspx> accessed 24 July 2018, see also Staff Reporter 'Coltart responds to 81 percent O level failure rate' <http://nehandaradio.com/2013/02/06/coltart-responds-to-81-percent-o-level-failure-rate/> accessed 24 July 2018.

¹⁰⁵⁸ Staff Reporter 'Coltart responds to 81 percent O level failure rate' <http://nehandaradio.com/2013/02/06/coltart-responds-to-81-percent-o-level-failure-rate/> accessed 24 July 2019.

¹⁰⁵⁹ 'Zim has 20 000 unqualified teachers' <http://www.herald.co.zw/zim-has-20-000-unqualified-teachers/> 11 March 2015, accessed 17 July 2018.

¹⁰⁶⁰ Ibid.

¹⁰⁶¹ Staff Reporter 'Coltart responds to 81 percent O level failure rate' <http://nehandaradio.com/2013/02/06/coltart-responds-to-81-percent-o-level-failure-rate/> accessed 24 July 2018.

¹⁰⁶² Staff Reporter 'Fees: Schools unleashes debt collectors on defaulters cattle' see <http://www.newzimbabwe.com/news-17503-Fees+School+to+seize+defaulters%E2%80%99+cows/news.aspx> accessed 24 July 2018.

¹⁰⁶³ Ibid.

acceptability of education focusing mainly on the provision of quality education is the centre of the education conversation; serious focus is actually on compelling parents to pay school fees. Education for children in Zimbabwe is neither accessible nor available. The discussion below will target the legal framework of education for children in order to assess whether or not it provides a framework to enable Zimbabwe to deliver basic education in the manner envisaged by its Constitution and international law, as discussed in previous chapters.

4.3 The legislative framework regulating basic education in Zimbabwe

4.3.1 Introduction

From 1980 Zimbabwe worked frantically to establish a legal framework that would allow the equitable provision of education. Zimbabwe introduced the Ministry of Primary and Secondary Education and the Ministry of Higher and Tertiary Education, Science and Technology Development. The Ministry of Primary and Secondary Education is responsible for ensuring the proper provision and regulation of primary and secondary education. In 1980, Zimbabwe enacted a Constitution which was the supreme law of the land and provided for the human rights of its citizen, however, it did not provide for the right to education, an anomaly that was rectified by the enactment of a new Constitution in 2013 which entitles children to a state-funded basic education.¹⁰⁶⁴ Whilst the 1980 Constitution did not provide for the right to education, it was, however, read together with the Education Act of 1987 which provided for the right to education. With education being a constitutional right, the Education Act is now read together with the Constitution of Zimbabwe 2013.

¹⁰⁶⁴ Marist international Solidarity Foundation 'Universal Periodic Review of the Republic of Zimbabwe' <http://lib.ohchr.org/hrbodies/UPR/Documents/session12/ZW/FMSI-maristinternationalsolidarityfoundationonlus-eng.pdf> accessed, 30 July 2018.

4.3.2 The Constitution of Zimbabwe, 2013

State-funded Basic Education is a right of every citizen and permanent resident of Zimbabwe.¹⁰⁶⁵ The provisions of the Constitution are read together with other sources of law, such as common law, legislative law and international law as prescribed by the Zimbabwean interpretation clause discussed in the last chapter. The people of Zimbabwe with a view to overcome the challenges that were impeding their progress, with an objective to defend and uphold their freedom and human rights, with a common desire for 'freedom, justice and equality', and a resistance to colonialism and all forms of domination voted for the Constitution of Zimbabwe 2013.¹⁰⁶⁶ The Zimbabwean Constitution is the supreme law of the Zimbabwean democracy as already stated in this dissertation.¹⁰⁶⁷ It binds all organs of the state and places upon them the mandate to fulfill its obligations.¹⁰⁶⁸ The last chapter stated the values which underlie the Zimbabwean Democracy as they are stated by the Constitution. It also illustrated the sanctioned manner of interpreting the bill of rights in the Zimbabwean Constitution. In relation to the issues concerning children, as a national objective, the Zimbabwean Republic must ensure that in matters relating to children, their best interest are considered paramount.¹⁰⁶⁹ Further as a matter of objective, the state is obliged to ensure that measures and policies are adopted to allow children access to education.¹⁰⁷⁰ The state is obliged to take practical measures to 'promote free and compulsory basic education for children'.¹⁰⁷¹

¹⁰⁶⁵ *Constitution of Zimbabwe, 2013* 'Section 75 (1) (a) Every citizen and permanent resident of Zimbabwe has a right to a basic State-funded education, including adult basic education.'

¹⁰⁶⁶ *Ibid*, Preamble.

¹⁰⁶⁷ *Ibid*, S 2, Supremacy of the Constitution.

¹⁰⁶⁸ *Ibid*, S 2 (2).

¹⁰⁶⁹ *Ibid*, S 19 (1).

¹⁰⁷⁰ *Ibid*, S 19 (2) (d).

¹⁰⁷¹ *Ibid*, S 27 (1) (a).

4.3.3 The Education Act 1987

From 1987 the Education Act had declared that every child has a right to an education although the previous Constitution had not made such declarations.¹⁰⁷² The purpose of the education Act is to regulate the provision of primary and secondary education in Zimbabwe, including the regulation and establishment of schools.¹⁰⁷³ While the Education Act does not state that it regulates the provision of basic education, it defines school education to include primary and secondary education and the Minister for Primary and Secondary Education in Zimbabwe is the one concerned with issues of the Basic Education Assistance Module (BEAM), hence allowing one to draw the inference that basic education is or must be offered at primary and secondary levels in Zimbabwe.¹⁰⁷⁴

The Education Act states that every child has the right to school education.¹⁰⁷⁵ Children are entitled to enrolment at any government school which is the nearest to their place of residence.¹⁰⁷⁶ It is an offense to refuse a child admission to a school or to discriminate a child through the imposition of an onerous term and condition of admission, based on their race, gender, nationality, political affiliation or place of origin.¹⁰⁷⁷ It is, however, a defence when the discrimination is based on creed

¹⁰⁷² *Education Act Chapter 1987, Preamble.*

¹⁰⁷³ *Ibid.*

¹⁰⁷⁴ *Ibid*, Interpretation S 2.

¹⁰⁷⁵ *Ibid*, S4 (1) (2) 'Subject to subsection (5), no child in Zimbabwe shall—

(a) be refused admission to any school or

(b) be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school; on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender. (3) For the purposes of subsection (2), a term or condition shall be deemed to be onerous if it requires the child upon whom it is imposed or the child's parent—

(a) to do anything; or

(b) to possess some quality, attribute, asset or property; which is not required to be done or possessed by children or parents, as the case may be, of a different race, tribe, place of origin, national or ethnic origin, political opinion, colour, creed or gender'.

¹⁰⁷⁶ *Ibid*, S10

¹⁰⁷⁷ *Ibid*, S 4 (1) (2) Subject to subsection (5), 'no child in Zimbabwe shall—

(a) be refused admission to any school; or

(b) be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school; on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender. (3) For the purposes of subsection (2), a term or condition shall be deemed to be onerous if it requires the child upon whom it is imposed or the child's parent—

(a) to do anything; or

(doctrine) and the school is controlled by members of a particular religion and gives preference to the admission of such members.¹⁰⁷⁸ Further it is a defence that discrimination was based on gender because of the physiological differences of children, the interest of defence, public morality and public safety that the school admits only one gender.¹⁰⁷⁹

Primary education is compulsory in Zimbabwe and parents have the duty to ensure the child's attendance.¹⁰⁸⁰ Primary and secondary education, however, not free in Zimbabwe. The Minister has the obligation to prescribe school fees including accommodation fees if the school offers accommodation.¹⁰⁸¹ Further, the Minister may also prescribe additional fees for special educational courses or subjects.¹⁰⁸² Subject to the direction of the Secretary for Education, a head of school may refuse to admit learners to school based on the fact that they have not paid school fees.¹⁰⁸³ If the Secretary however directs that the child be admitted despite not paying school fees, the parent is liable for such payment.¹⁰⁸⁴ In addition to payment of school fees, a

(b) to possess some quality, attribute, asset or property; which is not required to be done or possessed by children or parents, as the case may be, of a different race, tribe, place of origin, national or ethnic origin, political opinion, colour, creed or gender.

(4) Any person who contravenes subsection (2) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment'.

¹⁰⁷⁸ Ibid, '4 (5) It shall be a defence in any criminal proceedings for an offence under subsection

(2) for the accused person to show that, though he committed the act alleged against

Him—

(a) he committed the act on the grounds of the creed of the child against whom the act was committed, but he did so because the school concerned is controlled by a bona fide religious organization and members of that religious organization or adherents of a particular religious belief are accorded preference in admission to that school'.

¹⁰⁷⁹ Ibid, S 4 subsection (5) It shall be a defence in any criminal proceedings for an offence under subsection

(2) for the accused person to show that, though he committed the act alleged against him—

(b) he committed the act on the grounds of the gender of the child against whom the act was committed, but—

(i) the act was reasonably justified in view of physiological differences between children of different gender; or

(ii) the act was reasonably necessary in the interests of defence, public safety or public morality; or

(iii) the act was reasonably justified because the school concerned was reserved for the admission of children of one gender and the child against whom the act was committed is of the other gender'.

¹⁰⁸⁰ Ibid, S 5.

¹⁰⁸¹ Ibid, S 6.

¹⁰⁸² Ibid, S 13.

¹⁰⁸³ Ibid, S 13 (1-5).

¹⁰⁸⁴ Ibid.

headmaster may establish a general-purpose fund at a school to finance the establishment of facilities, as well as extracurricular activities for the benefit of pupils.¹⁰⁸⁵ The Secretary may fix different fees to be paid by different 'government schools or different categories of pupils attending such schools'.¹⁰⁸⁶

Three languages must be taught in primary schools - Shona, English and Ndebele - with Ndebele taught in areas where Ndebele is the mother language and Shona taught in areas where Shona is the mother language.¹⁰⁸⁷ Before Grade 4, mother languages can be used as a form of instruction although after this grade English will be a compulsory medium of instruction.¹⁰⁸⁸ In areas where minorities exist the Minister may prescribe the teaching of their language in those areas.¹⁰⁸⁹ The school curriculum and examination system is determined by the Secretary for all schools.¹⁰⁹⁰ Health in schools is regarded as important by the Education Act. The Minister may make regulations to safeguard the health of pupils in schools; such regulations may provide for the appointment of medical officers in schools, the entry and inspection of schools by medical officers, the closing of schools, residences, hostels and other buildings on the basis of health, the exclusion of pupils with communicable diseases or those who have not been vaccinated and for the medical, dental and physiological treatment of students.¹⁰⁹¹ Minimum health standards are supposed to be observed by schools, particularly, in residences or school offering catering services.¹⁰⁹² Without necessarily setting out the conditions of buildings that must be in government school or stating much about the teaching environment, except in relation to health, the Act gives a Ministry official, authority to enter a non-government school for the purposes of inspecting the buildings, equipment and grounds, enquiring about the qualifications of teachers, the school fees being paid by

¹⁰⁸⁵ Ibid, S 14 (1-5).

¹⁰⁸⁶ Ibid.

¹⁰⁸⁷ Ibid, S 62 (1).

¹⁰⁸⁸ Ibid, S 63 (3).

¹⁰⁸⁹ Ibid, S 62 (4).

¹⁰⁹⁰ Ibid, S 63.

¹⁰⁹¹ Ibid, S 64.

¹⁰⁹² Ibid.

learners, the progress of teaching, conduct as well as discipline of learners to see if they meet the conditions set out in the Act for non-government schools.¹⁰⁹³

4.3.4 The Education Amendment Bill 2018

Zimbabwe has taken a positive step and has begun the process to amend the Education Act in order to align its provisions with those of the Constitution. The Education Bill states its aim as seeking to address the 'shortcoming of the 2006 Education Act (Chapter 25:04)'.¹⁰⁹⁴ It endeavors to ensure that the Education Act complies with the Constitution of Zimbabwe, the CRC and the African Charter.¹⁰⁹⁵ It recognizes government's obligations to provide basic-state funded education and states that, it 'seeks to introduce the right to a basic state-funded education to 'all school-going children up to grade seven'.¹⁰⁹⁶ Whilst the Bill recognizes that the Constitution makes it a state objective to provide free and compulsory basic education,¹⁰⁹⁷ the minister is still given an obligation to consider the location and status of the school before prescribing fees.¹⁰⁹⁸ Whilst the minister may prescribe fees, no child must be excluded for non-payment.¹⁰⁹⁹

In line with the need to comply with equality and non-discrimination the Bill states that, in relation to admission no child can be discriminated on any basis including the place they were born, their nationality, opinion, tribe, disability, race, language, social class, ethnic origin, sex, marital status, pregnancy, culture, political affiliation, religious belief or status at birth.¹¹⁰⁰ In terms of provision of schools, local authorities are obliged to provide land where schools can be built.¹¹⁰¹ The Bill ensures that children have an entitlement to be enrolled at the schools near their residential

¹⁰⁹³ Ibid, S 66 (1-2).

¹⁰⁹⁴ Introduction, 'Education Amendment Bill 2018, H.B.1 2019', available at <https://parlzim.gov.zw/component/k2/education-amendment-bill-2018-h-b-1-2019> accessed 22 July 2019.

¹⁰⁹⁵ Ibid.

¹⁰⁹⁶ Ibid.

¹⁰⁹⁷ Ibid.

¹⁰⁹⁸ Ibid, point 4.6.

¹⁰⁹⁹ Ibid, point 4.13.

¹¹⁰⁰ Ibid, Point 4.2.

¹¹⁰¹ Ibid, point 4.4.

address and if there is no more space, to the nearest school.¹¹⁰² The Bill outlaws any form of corporal punishment and enjoins schools to draw up a discipline policy.¹¹⁰³

4.4 Is the basic education protected by international law the same as the right to basic state-funded education protected by section 75 (1) (a)?

This dissertation follows an international approach. With the Zimbabwean Constitution having been enacted in 2013, authors have not engaged much in relation to the scope and content of the right to basic-state-funded education, but international law offers useful guidance. The starting point is to note that no international law instrument regulating the provision of education for children refers to basic –state-funded education. General Comment 13 to the ICESCR refers to basic education¹¹⁰⁴, the African Charter provides for the right to free and compulsory basic education¹¹⁰⁵ and the World Declaration defines the concept of basic education.¹¹⁰⁶ The noted difference in the formulation of the right to basic education between international law and the Zimbabwean Constitution has not been a subject of discussion among authors, this dissertation views it as a matter of semantics than substance. This dissertation reasons that the basic education protected by the international instruments is the same as the basic state-funded education protected by the Zimbabwean Constitution. The difference between the terms – basic-state-funded education and basic education is viewed by this dissertation only in relation to their arrangements of words and not necessarily their scope and content. It is noted from the onset that although it is absent from the word basic education, like Zimbabwe, international law already provides that basic education must be state funded as will be discussed in this dissertation.

It is notable that, section 75 (1) (a) also provides for adult basic education in the same sentence that it provides for basic state-funded education. The word adult

¹¹⁰² Ibid, point 4.5.

¹¹⁰³ Ibid, point 4.13.

¹¹⁰⁴ *General Comment 13: The Right to Education* (1999), para 22-24.

¹¹⁰⁵ *African Charter on the Rights and Welfare of the Child* (1990), A11 (1-7).

¹¹⁰⁶ *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 in Jomtien, Thailand (1990).*

is placed before the words basic education to clarify the recipients of the basic education. In like manner the words state funded were inserted not to provide for a type of education which is not the same as that provided by international law but to afford clarity on who bears the responsibility to provide basic education for children. Basic education for children must be state funded and the drafters of the Constitution sought to provide such clarity. The contention that basic state funded education is the same as basic education is further clarified by the fact that section 27 (1) (a) of the Constitution makes reference to basic education stating that, as a matter of objective 'the State must take all practical measures to promote free and compulsory basic education for children'.¹¹⁰⁷ A reading of section 75 (1) (a) in context of the provisions of section 27 (1) (a) must bring one to a conclusion that basic state funded education provided by section 75 (1) (a) is the same right provided by section 27 (1) (a) as a government objective. It is therefore submitted by this dissertation that despite the terminology used by section 75 (1) (a) the basic education it provides is the same as that defined and unpacked by international law.

It is further notable that, the Education Amendment Bill discussed above makes it clear that it seeks to ensure that the Education Act complies the African Charter. The African Charter provides that basic education must be compulsory and free as discussed in chapter 2. The need by the Bill to ensure the Education Act complies with African Charter's basic education goals must also point to the fact that basic-state funded education provided by the Constitution is the same as basic education provided by the African Charter and referred to by the Education Bill.

4.5 Justiciability of the right to Basic Education in Zimbabwe

The Constitution of Zimbabwe adheres to the ICESCR by providing for a constitutionally justiciable bill of rights. In 2013 in the case of *Farai Mushoriwa vs City of Harare* the High Court of Zimbabwe confirmed that the right to water was a fundamental human right safeguarded by the Constitution and that the Constitution had placed upon the government the duty to respect, protect and fulfil the rights in

¹¹⁰⁷ *Constitution of Zimbabwe 2013 S27 (1) (a)*.

the Constitution.¹¹⁰⁸ The High Court never questioned its full authority to hear the matter concerning the right to water in Zimbabwe confirming the justiciability of socio-economic rights.¹¹⁰⁹ Further to that, in elaborating the obligations imposed by section 85 of the Zimbabwean Constitution which provides that everyone can approach a competent Court in Zimbabwe to enforce their right¹¹¹⁰, the constitutional court stated in the *Mudzuru* case that,

in relation to the enforcement of all the rights embodied by the Constitution, Section 85(1) of the Constitution is the cornerstone of the procedural and substantive remedies for effective judicial protection of fundamental rights and freedoms and the enforcement of the constitutional obligation imposed on the State and every institution and agency of the government at every level to protect the fundamental rights in the event of proven infringement. The right to a remedy provided for under s 85(1) of the Constitution is one of the most fundamental and essential rights for the effective protection of all other fundamental rights and freedoms enshrined in Chapter 4. The right to a remedy enshrined in s 85(1) constitutes a constitutional obligation inherent in Chapter 4 as a whole.¹¹¹¹

In the case of *Samuel Sipepa Nkomo v Minister of Local Government, Rural & Urban Development* case the court further elaborated that when a person approaches the Constitutional Court, the enquiry is not in the type of a right they seek to vindicate but that the person who seeks to vindicate the right must show he or she is 'adversely affected by the infringement of the right or freedom'.¹¹¹² The flouting of the right 'must be in relation to himself or herself as the victim or there must be harm or injury to his

¹¹⁰⁸ *Farai Mushoriwa vs City of Harare*, (2013) 4266 HC 5-6, S 44 of the Constitution imposes a duty on the State and all its institutions and agencies to respect fundamental human rights and freedoms. It reads as follows:- 'The State and every person, including juristic persons and every institution and agency of the government at every level must respect, protect and fulfil the rights and freedoms set out in this chapter'.

¹¹⁰⁹ Ibid.

¹¹¹⁰ *Constitution of Zimbabwe, 2013*'S, 85. Enforcement of fundamental human rights and freedoms 1. 'Any of the following persons, namely-- a. Any person acting in their own interests; b. Any person acting on behalf of another person who cannot act for themselves; c. Any person acting as a member, or in the interests, of a group or class of persons; d. Any person acting in the public interest; e. Any association acting in the interests of its members; is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation'.

¹¹¹¹ *Loveness Mudzuru and Another v (1) Minister of Justice Legal and Parliamentary Affairs and 2 others* CCZ 12/2015 page 13

¹¹¹² *Samuel Sipepa Nkomo v (1) Minister of Local Government, Rural & Urban Development and 2 Others* 06 CCZ (2016) 7.

or her own interests arising directly from the infringement of a fundamental right or freedom of another person'.¹¹¹³

4.6 The section 75 (1) (a) and the limitation clause

Due to the fact that, this dissertation argues that section 75 (1) (a) must be regarded as an unqualified and immediately realisable right, the question is, can this right be limited by section 86 of the Zimbabwean Constitution? Whilst the South African constitutional court already clarified that the unqualified right to basic education can be limited by section 36 which is the limitation clause as stated in the next chapter, clarifications are yet to be done in relation to the similarly formulated right to basic-state funded education. Discussing the manner in which section 75 (1) (a) can be limited is 'crucial because the extent to which limitations to [this right will be] considered legitimate determines the actual application and effectiveness of [this] right'¹¹¹⁴. For the purposes of limitation of rights by section 86, Maja first notes that, the subject of limitation of rights embodied by the Zimbabwean Constitution is still not yet tackled by Zimbabwean authors and there is still no jurisprudence.¹¹¹⁵ He however proceeds to categorise human Rights in the Zimbabwean Constitution into two categories, those classified as absolute and 'may' not be limited and the rest of the rights including basic-state funded education which are subjected to the limitation clause.¹¹¹⁶ For the purposes of this dissertation, all rights subjected to the limitation clause have two formulations, either they are qualified meaning self-limiting and subject to both their own internal qualifiers as well as the limitation clause or they are unqualified meaning they do not have internal qualifiers but can still be limited in consideration of the provisions of the general limitation clause. The discussion later below reasons that the right to state funded basic education is unqualified. However, it is important to note that it is still subject to the section 86 limitation and such

¹¹¹³ Samuel Sipepa Nkomo v (1) Minister of Local Government, Rural & Urban Development and 2 Others 06 CCZ (2016) 7.

¹¹¹⁴ Maja I 'Limitation of human rights in international law and the Zimbabwean Constitution', available at <file:/Limitation%20of%20human%20rights%20in%20international%20law%20and%20the%20Zimbabwean%20Constitution.pdf> accessed on 07 July 2019.

¹¹¹⁵ Ibid.

¹¹¹⁶ Ibid.

limitation does not deny its unqualified nature but simply means that in light of the detailed and stringent measures imposed by section 86, the right can be limited in circumstance justifiable in a democratic state.

A limitation clause is defined as 'a constitutional provision which enables constitutionally protected rights to be partially limited, to a specified extent and for certain democratically justifiable purposes'.¹¹¹⁷ Limitation clauses are not new to the South African or Zimbabwean Constitution they also feature in Constitutions of other countries such as the Canadian Charter of Rights and Freedoms.¹¹¹⁸ Limitation clauses also feature in the provisions of international law instruments such as the Universal Declaration which states that, everybody is subject to limitations determined by law which have a purpose to secure and protect the freedoms and rights of others.¹¹¹⁹ The International Covenant on Civil and Political Rights (ICCPR) also states that, freedom of expression maybe limited by the law to the extent that the limitation is necessary to respect the reputations of others, national security, public order, public morals and health.¹¹²⁰ Section 86 of the Zimbabwean Constitution which is the limitation clause states that,

(1)The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.

(2)The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right or freedom concerned; (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest; (c) the nature and extent of the limitation; (d) the need to ensure that

¹¹¹⁷ Ahmed D and Bulmer E, 'Limitation Clauses', (2017) 2, International IDEA Constitution-Building Primer, see <https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf> 3

¹¹¹⁸ Ibid, 3-8.

¹¹¹⁹ *Universal Declaration of Human Rights 1948* A 29(2) of states that:

'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.

¹¹²⁰ *International Covenant on Civil and Political Rights* (1976) A 19(3): 'The exercise of the rights to [freedom of expression], carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary, (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order or of public health or morals'.

the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others; (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and (f) whether there are any less restrictive means of achieving the purpose of the limitation.¹¹²¹

The Zimbabwean limitation clause defines circumstances in which the Court may limit a right. In terms of limitation of a right under section 86, six factors need to be considered for a limitation by a law of general application to be reasonable and justifiable. The six factors are, the nature of the right in question, the purpose for which the limitation is intended, the kind of limitation being considered and its extent, the need to ensure the enjoyment of rights by all, the relationship of the limitation with the purpose and any means which can be less restrictive to achieve the purpose of the limitation.¹¹²²

The South African case of *S v Manamela* engaging on a similarly formulated limitation clause in the South African Constitution stated that, factors such as the nature of the right, the purpose of the limitation, or any less restrictive means are 'key factors' to be considered in arriving at a judgement whether the limitation is reasonable and justifiable.¹¹²³ The court needs to engage in a 'balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list'.¹¹²⁴ Writing on the limitation of rights in the Zimbabwean Constitution, Maja describes proportionality by stating that,

a state can limit a right if there is an objective and reasonable justification and the justification has to be evaluated taking into account its goal, as well as its effect, assessed against the background of the principles inherent in democratic societies. The limitation has to have a legitimate aim and there must be a reasonable and proportional relationship between this aim and the means used to limit the right. The required proportionality is evaluated using the basic values of a democratic society such as tolerance, diversity and broadmindedness.¹¹²⁵

¹¹²¹ *Constitution of Zimbabwe 2013*, S 86.

¹¹²² *Ibid*, S 86 (2).

¹¹²³ *S v Manamela CCT 25/99* para 32-33

¹¹²⁴ *Ibid*.

¹¹²⁵ Maja I 'Limitation of human rights in international law and the Zimbabwean Constitution By, available at

file:/Limitation%20of%20human%20rights%20in%20international%20law%20and%20the%20Zimbabwean%20Constitution.pdf accessed on 07 July 2019.

The general rule must be, the more serious the gravity of the measure of limiting the right the more convincing and compelling must be the reasons.¹¹²⁶ Competing values must be weighed and an assessment must be reached founded on proportionality.¹¹²⁷ There is not one standard of reasonableness to be used to determine the reasonableness of the deprivation of rights but there needs to be a case by case analysis and different factors must be balanced as per requirement of proportionality.¹¹²⁸ The court in *S v Manamela* stated that, the proportionality of the limitation and its justifiability is assessed in light of the provisions of the limitation clause, the legislative setting, social setting and many other considerations, as such, section 86 considerations should not be regarded exhaustive.¹¹²⁹

When the request to limit a right is placed before the court, the Canadian case of *R v Oakes* stated that, the onus to prove that the criteria of limiting a right has been met, that is, it is reasonable and justifiable lies with the person seeking the limitation to be upheld.¹¹³⁰ A limitation of a right is not the norm, rather it is an exception to the general need to respect, protect and promote human rights.¹¹³¹ Human rights in the Constitution are guaranteed unless the party seeking a limitation successfully meets the limiting criteria provided in the Constitution.¹¹³² The standard of proof for meeting the reasonable, justifiable in a democratic society is on a balance of probabilities.¹¹³³ For a limitation to be reasonable and justified in a democratic society, first, the purpose of that limitation must be important to deserve overriding a constitutionally protected rights.¹¹³⁴ Trivial purposes or those against a free and democratic society must not be considered.¹¹³⁵ The objective must at least relate to social concerns which are pressing in a society aiming to uphold the dignity, equality and freedoms of citizens in a free and democratic society before it can be deemed

¹¹²⁶ *S v Manamela* CCT 25/99 para 32-33.

¹¹²⁷ *Ibid.*

¹¹²⁸ *Ibid.*

¹¹²⁹ *Ibid.*

¹¹³⁰ *R v Oakes* [1986], 1, S.C.R 105

¹¹³¹ *Ibid.*

¹¹³² *Ibid.*

¹¹³³ *Ibid.*

¹¹³⁴ *Ibid.*

¹¹³⁵ *Ibid.*

important.¹¹³⁶ Second, a form of proportionality test must be invoked. The measures used to limit the right must be fair and demonstrate their link to the purpose of limiting the right.¹¹³⁷ The measures should impair the right as little as possible and there must be some proportionality between the purpose of limiting the right and the effect of doing so, the more serious the effects of the measure, the more serious must be the purpose of the limitation.¹¹³⁸ Many rights may for justifiable reasons need their scope reasonably and justifiably narrowed in order to safeguard the dignity, equality and freedoms of others and to generally accommodate everyone's enjoyment of rights.¹¹³⁹ However, despite the possibility of a right being limited, a well drafted limitation clause 'prevents these limits, qualifications or restrictions from being taken too far or from being misapplied'.¹¹⁴⁰ Rights must be taken seriously and a limitation must be necessary, justified, acceptable and take into account the formulation of the right as it is provided by the Constitution.¹¹⁴¹ A properly drafted limitation clause places restrictions on unnecessary and unjustified limitations which lead to the arbitrary deprivation of rights.¹¹⁴² The South African case of *S v Makwanyane* stated that, to limit a constitutional right for a purpose that is necessary and reasonable in a democratic state founded on human dignity equality and freedom, one needs to base their assessment on proportionality.¹¹⁴³ Different aspects will need to be balanced and they include a consideration of the nature of the right, the importance of the right in a value based society, the purpose for limiting the right and the importance of that purpose to the society and whether the purpose could be reached without limiting the right.¹¹⁴⁴

¹¹³⁶ Ibid.

¹¹³⁷ Maja I 'Limitation of human rights in international law and the Zimbabwean Constitution', available at <file:/Limitation%20of%20human%20rights%20in%20international%20law%20and%20the%20Zimbabwean%20Constitution.pdf> accessed on 07 July 2019.

¹¹³⁸ *R v Oakes* [1986], 1, S.C.R 106

¹¹³⁹ Ahmed D and Bulmer E, 'Limitation Clauses', (2017) 2, International IDEA Constitution-Building Primer, 3 <https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf> accessed 9 July 2019.

¹¹⁴⁰ Ibid.

¹¹⁴¹ Ibid, 4-5.

¹¹⁴² Ibid.

¹¹⁴³ *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104 see also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 33-35.

¹¹⁴⁴ Ibid.

On considering the nature of the right, Maja notes that, in the whole constitutional scheme, rights do not carry the same importance, as such, 'a right that is important to the Constitutional ambition to create democratic society based on values embodied in section 3 of the Constitution will carry a lot of weight in the exercise of balancing the right against the justification for its infringement'.¹¹⁴⁵ Following this argument, a court considering limiting an unqualified right like basic education is obligated to consider that constitutional drafters acknowledged its importance and provided it as a right with unqualified and immediate obligations.¹¹⁴⁶ However, Iles cautions that the Constitution does not consider the 'importance' of the right it considers its nature so 'to attempt to categorise some rights as more important than others would be unguided by the constitutional text and, as such, subjective and uncertain'.¹¹⁴⁷ In the case of two competing rights, '[d]etermining which right should take precedence over another is always a fact-specific enquiry and the outcome of the analysis may vary from case to case'.¹¹⁴⁸ A court applying a limitation clause considering its nature must be able to distinguish between the parts of a right that cannot be limited and the extent of limiting a right will which advances social justice.¹¹⁴⁹ A limitation of a right is therefore not a derogation from a right but a means to ensure that everyone enjoys human rights.¹¹⁵⁰ Section 75 (1) (a) can therefore not be used to unjustifiably derogate from the unqualified and immediate nature of the right to basic education. On considering the purpose of the limitation, section 86 (2) (b) already lists circumstances in whose interest a right can be limited such as 'defence, public safety, public order, public morality, public health, regional or town

¹¹⁴⁵ Maja I 'Limitation of human rights in international law and the Zimbabwean Constitution', *file:/Limitation%20of%20human%20rights%20in%20international%20law%20and%20the%20Zimbabwean%20Constitution.pdf* accessed on 07 July 2019.

¹¹⁴⁶ Ahmed D and Bulmer E, 'Limitation Clauses', (2017) 2, International IDEA Constitution-Building Primer, see <https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf> 21- 22

¹¹⁴⁷ Kevill Iles, 'A fresh look at limitations: Unpacking Section, 36' 79, https://journals.co.za/docserver/fulltext/ju_sajhr/23/1/ju_sajhr_v23_n1_a3.pdf?expires=1561372556&id=id&accname=58027&checksum=1EF26CC56A9E3FFEB07586A64EFCA accessed 24 June 2019

¹¹⁴⁸ Ibid.

¹¹⁴⁹ Ahmed D and Bulmer E, 'Limitation Clauses', (2017) 2, International IDEA Constitution-Building Primer, 4-5 <https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf> accessed 29 July 2018.

¹¹⁵⁰ Ibid.

planning or the general public interest'.¹¹⁵¹ In the view of this dissertation, there is no foreseeable circumstance in which a law of general application can be enacted which limits the acquisition of basic education based on the above circumstances. A discussion on the aims of education in chapter 1 would show that, education is in essence the ingredient to ensure humans are orderly, preserve safety, peace, morality and see the importance of healthy living.

A limitation of the right to basic education which complies with section 75(1) (a) is therefore justifiable when it considers the nature of the right and any less restrictive means to achieve the purpose of the right. It must safeguard the purpose of the right and must not be abused to a point of stripping the right to basic education of its essential core which is argued to be basic education.¹¹⁵² It is therefore explained that, in accordance with this dissertation, the law of general application can limit the extent in which a right can be enjoyed but it should not derogate from state obligations relating to fulfilment of a right. States who are party to international obligations and profess to be constitutional democracies do not have the liberty to just deprive citizens of their rights in the pretext of limiting them.¹¹⁵³ If a legislation deliberately derogates from state obligations it is regarded as unconstitutional by this dissertation. The court faced with an argument that law or conduct limits the unqualified right to basic education must therefore 'first determine whether the impugned provision [or conduct] limits the constitutional right. If it does, the second enquiry determines whether the limitation of the right is justifiable in terms of the limitation clause'.¹¹⁵⁴

The right to basic stated funded education was voted by the people of Zimbabwe to be ordinarily delivered when its unqualified and capable of being demanded immediately as will be discussed later in this chapter. Limiting rights is

¹¹⁵¹ Section 86 (2) (b) Constitution of Zimbabwe 2013

¹¹⁵² Ahmed D and Bulmer E, 'Limitation Clauses', (2017) 2, International IDEA Constitution-Building Primer, 14 <https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf> accessed 29 July 2018.

¹¹⁵³ Ibid, 6.

¹¹⁵⁴ Ibid, 21- 22.

therefore the exception as and limitation clauses have no agenda to arbitrarily deny citizens the rights they formulated and voted for.¹¹⁵⁵

4.7 The applicability of section 75 (1) (a): A right for citizens and permanent residents only

4.7.1 Section 75 (1) (a) and international law provisions

The limitation on the applicability of the right to education on the basis of the nationality or resident status of rights-holders is viewed by this dissertation to be in breach of the international principle of equality and non-discrimination. This principle encompasses 'equal treatment, equal protection of the law, equal opportunity and substantive equality'.¹¹⁵⁶ It is embodied in many international instruments particularly the Universal Declaration which clarifies that the human rights protected by the Declaration, including the right to education are entitlements of every human being regardless of their 'national or social origin, birth or other status'.¹¹⁵⁷ The Declaration further states that everyone shall be entitled to human rights without distinction based on the country or territory they belong to or their international status.¹¹⁵⁸ It further enforces that human beings must be equally protected by the law against any discrimination or the incitement of discrimination.¹¹⁵⁹ The Convention Against Discrimination in Education also mentions, unequivocally that the deprivation of access to any type of education for a specific group of persons, the establishment of separate education systems for specific persons and groups or the imposition of undignifying education conditions on one specific group of persons is discriminatory.¹¹⁶⁰ State parties to the ICESCR also undertake to exercise the rights in the Covenant without any manner of discrimination, including discrimination based on social and national origins.¹¹⁶¹ State parties also undertake to 'ensure the equal enjoyment of all

¹¹⁵⁵ *R v Oakes [1986], 1, S.C.R 105*

¹¹⁵⁶ 'Economic Social and Cultural Rights: Handbook for National Human Rights Institutions' 2005 Professional Training Series 5

<http://www.ohchr.org/Documents/Publications/training12en.pdf> accessed 4 July 2017.

¹¹⁵⁷ *Universal Declaration of Human Rights* (1948) A2.

¹¹⁵⁸ *Ibid.*

¹¹⁵⁹ *Ibid* A7.

¹¹⁶⁰ *Convention Against Discrimination in Education* (1960) A1 (a-d).

¹¹⁶¹ *International Covenant on Economic, Social and Cultural Rights* (1966) A2(2).

economic, social and cultural rights set forth in the Covenant'.¹¹⁶² In relation to the rights of children, the CRC also states that, state parties must respect the rights in the Convention without discriminating against children based on their nationality, social or ethnic origin or that of their parents.¹¹⁶³ State parties to the CRC are further required to ensure the protection of children against any form of discrimination.¹¹⁶⁴

International instruments rest on the foundation that human rights must be of equal universal benefit to everyone.¹¹⁶⁵ International law has an 'all-inclusive approach' which extends the enjoyment of the right to basic education, beyond the nationality of the recipient.¹¹⁶⁶ The collective intent of all the above international conventions is that, the right to education should be all-inclusive and its application extends to immigrant learners as beneficiaries.¹¹⁶⁷ This suggests that the right to basic education for immigrant learners in Zimbabwe should be the same as the right to basic education enjoyed by Zimbabwean [citizens] and permanent residents.¹¹⁶⁸

4.7.2 The mandatory obligation on the Zimbabwean state: A value-based approach

It was discussed in chapter 3 that whilst interpreting the right to basic education, a value based approach which safeguards the spirit of the Constitution must be preferred. The promotion of the values and principles of the Zimbabwean Constitution and the consideration of the empowering nature of the right to basic education must lead to the conclusion that the limitation sanctioned by section 75 (1) (a) is against the need to promote the values of equality and human dignity of foreigners in Zimbabwe. On the need to promote the value of equality, the Zimbabwean case of *Samuel Nkomo v Minister of Local Government, Rural & Urban Development and 2 Others* stated that, equality envisages a situation where everyone is equally protected

¹¹⁶² Ibid A3.

¹¹⁶³ *Convention on the Rights of the Child* (1989) A2 (1).

¹¹⁶⁴ Ibid A2 (2).

¹¹⁶⁵ Marishane N, 'The right to basic education for all: Addressing the educational needs and barriers of immigrant learners in South Africa' (2013) 5 *International Journal of Educational Administration and Policy Studies*, 1.

¹¹⁶⁶ Ibid.

¹¹⁶⁷ Ibid.

¹¹⁶⁸ Ibid.

by the law and equally benefits from it.¹¹⁶⁹ The non-equal treatment of foreign children in Zimbabwe through the deprivation of the right to basic education is regarded by this dissertation as the inability of the law to equally protect non-citizens. The right to equality encompasses the right 'not to be subjected to treatment to which [children] in a similar position [of needing education] are not subjected to'.¹¹⁷⁰ The unequal treatment of foreigners by the Zimbabwean Constitution weakens the human-rights-based approach by giving the impression that, 'it is weak in protecting the rights of migrants who have no citizenship status as they are [not understood] to be [equally] covered by the bill of rights'.¹¹⁷¹

In relation to the need to protect the value of human dignity, the Zimbabwean constitutional court in the case of *Obediah Makoni v Commissioner of Prisons and one Other* reinforced the sanctity of humanity and the need to respect the intrinsic worth of human beings.¹¹⁷² Education is a right which protects and restores human dignity.¹¹⁷³ The role of education in protecting and preserving human dignity was reiterated by the South African court when it deliberated on a similar right to education.¹¹⁷⁴ In the case of *Minister of Home Affairs and Others v Muriel Millie Watchenuka*, the court was displeased by the unconstitutional limitation of the right to study for asylum seekers and stated that

the Standing Committee's general prohibition against study is also unlawful. The freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfilment. Furthermore, it is expressly protected by s 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education.¹¹⁷⁵

For Zimbabweans, basic education is a right which is state-funded and therefore as later discussed, regarded by this dissertation as freely claimable. If basic education

¹¹⁶⁹ *Samuel Nkomo v Minister of local government, Rural & Urban Development and 2 Others* [2016] 6 CCZ 7.

¹¹⁷⁰ *Ibid.*

¹¹⁷¹ Simbo C 'Human Rights for All: Living the Dream or fighting Reality', (2013) 535 *Derebus* 50-51.

¹¹⁷² *Obediah Makoni v Commissioner of Prisons and one Other* [2016] (8) CCZ 5.

¹¹⁷³ Simbo C 'The right to basic education, the South African Constitution and the Juma Masjid Case: Unqualified human right and a minimum core standard' (2013) 17 *LDD* 484.

¹¹⁷⁴ *Ibid.*

¹¹⁷⁵ *Minister of Home Affairs v Watchenuka* [2004] 4 SA 326 (SCA) 36.

is so dignifying for Zimbabweans that they had to vote for a Constitution which expressly provides it for free, it can only be a reasonable to conclude that its denial must be undignifying for any human being, including one regarded as a foreigner. The purpose of limiting the right to basic education to only Zimbabwean citizens is unclear yet the nature and purpose of the right to basic education does not warrant such drastic limitation. Whilst it is true that the constitutional court of Zimbabwe will have the final determination on the provision of basic education for foreign nationals in Zimbabwe, a total deprivation of the right for foreigners is discriminatory and overlooks the fact that human rights are universal as discussed in chapter 2 and apply to every human being on the basis of their humanity.¹¹⁷⁶ Special rapporteur, Kishor Singh reporting on the right to education shunned any form of discrimination in the provision of education.¹¹⁷⁷ He stated that, countries must ensure that legislation on education and its governance guarantee the right to education for children despite their citizenship, social or legal status.¹¹⁷⁸ States have an obligation to ensure non-discriminatory enrolments.¹¹⁷⁹ Legislation and administrative action in all countries should be harmonized to clarify that the right to education applies to migrants and refugees and that access to education is universal and must be done on an equal non-discriminatory bases¹¹⁸⁰. The need to desist from totally depriving foreigners of socio-economic rights can also be understood in the context of the need to promote the value of *Ubuntu* as reiterated by the South African, then constitutional court when judge, Justice Mokgoro stated that

The notion that a society can respect and entrench in its basic law, and actually enforce particularly the socio-economic rights of foreign nationals, may be viewed as a reflection of a commitment to a spirit of generosity characterizing such society. In the context of the ideals of *ubuntu*, a notion translatable as encompassed by the spirit and

¹¹⁷⁶ United Nations Human Rights Office of the High Commissioner 'Special Rapporteur of the Right to education' <http://www.ohchr.org/EN/Issues/Education/sreducation/Pages/sreducationindex.aspx> accessed 4 July 2017.

¹¹⁷⁷ Singh K Report of the Special Rapporteur on the right to education on his mission to Kazakhstan (12–20 September 2011) United Nations General Assembly https://digitallibrary.un.org/record/729705/files/A_HRC_20_21_Add-1-EN.pdf accessed 10 May 2018 16-17

¹¹⁷⁸ Ibid.

¹¹⁷⁹ Ibid.

¹¹⁸⁰ Ibid.

purport of our Constitution - it is envisaged that our societal generosity would prevail when interpreting and fulfilling the applicable rights in the Bill of Rights.¹¹⁸¹

Another important fact is that, children cannot wait until they are citizens to get educated. Unlike the right to vote which can be understandably exclusive to citizens of a country and be enjoyed elsewhere by foreigners¹¹⁸², the immediate nature of the right to education¹¹⁸³ means a foreign child living in Zimbabwe cannot be expected to wait to enjoy it elsewhere in another country. In the understanding of this dissertation, education is age-related and time-bound so the deprivation of education is immediate and its loss may become life damaging and impossible to rectify. Zimbabwe therefore has incumbent upon its shoulders, the duty to provide the right to basic education in an equal non-discriminatory manner. The duty is even more pronounced in relation to vulnerable groups, such as immigrants.¹¹⁸⁴

A government whose foundation is observance of human rights values must foster and promote a culture of human rights observance, particularly in public schools.¹¹⁸⁵ Public schools are 'a meeting point of children from diverse cultural, linguistic, religious and racial groupings who are bound together by a common goal of becoming better citizens of the world'.¹¹⁸⁶ Public school must therefore promote the observance of the rights of migrant children whose parents are in many circumstances living in poverty, undocumented and exposed to xenophobic attacks.¹¹⁸⁷ By stating that the right to basic education is available only to citizens and permanent residents, Zimbabwe imposes legal and financial barriers to access to education. Such an imposition affects both the children's access to school, retention and progression. Making the right to basic education applicable to only citizens and permanent residents does not only incite discrimination of others and violation of their human dignity, it condones it sanctioning it, as constitutional, which is totally against the provisions of

¹¹⁸¹ Mokgoro Y 'Ubuntu, the Constitution and the Rights of Non-citizens' (2010) STELL LR 221-229

¹¹⁸² Ibid.

¹¹⁸³ Simbo C 'The right to basic education, the South African constitution and the Juma Masjid Case: Unqualified human right and a minimum core standard' (2013) 17 LDD 491-492.

¹¹⁸⁴ Ibid 2.

¹¹⁸⁵ Ibid 3.

¹¹⁸⁶ Ibid.

¹¹⁸⁷ Ibid 2.

international law in chapter 2. By denying foreigners a right to basic-state-funded education, it is arguable that Zimbabwe has established a separate basic education system for foreigners, which is not founded on the existence of a right. The separate treatment of foreigners is viewed to be a discriminating, arguably xenophobic and undignifying. An interpretation of the Constitution which follows a value based approach as discussed in chapter 3 would reach to a conclusion that the exclusion of foreigners from having basic education as a right is totally against the tenets and values of human dignity and equality.

4.8 The scope and content of the right to basic education in Zimbabwe

The right to basic-state-funded education in Zimbabwe is viewed to have six components or six dimensions. The point advanced by this dissertation is that, any non-compliance with any of the below components of the right to basic education amounts to the violation of the right to basic education obligations. The components are therefore interconnected and interrelated and enjoy equal importance and priority. They are discussed below in no particular order of importance.

4.8.1 The right to basic education is compulsory and free.

4.8.1.1 Free and compulsory: International law

As already mentioned comprehensively in chapter 2, the Universal Declaration states that everyone has the right to free education at the elementary and fundamental stages and education shall be compulsory only at elementary stages.¹¹⁸⁸ The ICESCR states that, primary education must be free and compulsory.¹¹⁸⁹ The obligation to provide free and compulsory primary education was so important during the drafting of the ICESCR that, state parties to the Covenant who had not made primary education compulsory and free by the time of its ratification, undertook to have a plan of action

¹¹⁸⁸ *Universal Declaration of Human Rights*, (1948) A26 (1).

¹¹⁸⁹ *International Covenant on Economic, Social and Cultural Rights* (1966) A13 (1).

for its introduction in their territories and jurisdictions.¹¹⁹⁰ In 1989, nations through the CRC declared that every child has the right to education and primary education must be compulsory and free.¹¹⁹¹ While all the above international instruments provided for free primary education they had not clarified the type of education that children were to be provided freely at both primary and secondary school levels. The World Declaration then clarified that the education which all children have to be provided is called, basic education.¹¹⁹² General Comment 13 linking both primary education, secondary education and basic education then pointed out that, the first stage for introducing basic education outside the home is at the primary school.¹¹⁹³ General comment 13 further clarified that, the provision of basic education is not limited to the primary school but secondary education, 'includes the completion of basic education'.¹¹⁹⁴

Within the African context, the African Charter clarifies that, state parties must provide 'free and compulsory basic education'.¹¹⁹⁵ The view of this dissertation is that the African Charter extends the duty to offer free education and compulsory education from the primary school level through-out the basic education years.¹¹⁹⁶ The extension of compulsory attendance throughout the basic education years and not only at primary school levels stated by the African Charter, is crucial as 'both an important enabling condition and a significant political intention in national attempts' to ensure that the acquisition of basic education is universal and not tied to schooling levels.¹¹⁹⁷

¹¹⁹⁰ Ibid A14.

¹¹⁹¹ *United Nations Convention on the Rights of the Child* (1989) A28 (1) (a).

¹¹⁹² *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 in Jomtien, Thailand* (1990), A 1 (1).

¹¹⁹³ *General Comment 13: The Right to Education, 1990* par 13 (9).

¹¹⁹⁴ Ibid, par 12, 'While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities. Article 13 (2) (b) applies to secondary education 'in its different forms', thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages alternative educational programmes which parallel regular secondary school systems'.

¹¹⁹⁵ *The African Charter on the rights and Welfare of the Child* (1990), A11 (3).

¹¹⁹⁶ Ibid.

¹¹⁹⁷ Joel E et al *Educating all children , a global agenda* (Cambridge, 2006) 127.

Writing on a similarly formulated right to basic education in South Africa, Liebenberg writing with Pillay shy away from saying that basic education must be free rather stating that no one can be turned away from school for not affording schools fees.¹¹⁹⁸ This statement is not the same as saying 'basic education is free' as mandated by the African Charter provisions earlier mentioned.¹¹⁹⁹ Their lack of clarity on the free education requirement is important to note because not being turned away is not the same as not being required to pay school fees.¹²⁰⁰ The position of the writers is different from the position advanced by of this dissertation that basic education is free in accordance with the African Charter requirements. A situation of turning away children for non-payment will never arise if basic education is understood as a right mandating free provision. This dissertation also differs significantly with Churr's submissions relating to the similarly-formulated section 29 (1) (a) of the South African Constitution which state that the right to basic education does not mandate the state to provide free education but does not however 'preclude a sliding scale of fees'.¹²⁰¹ The argument by Churr that the right to basic education does not impose free education obligations on the state is against the African Charter's obligations. Free and compulsory school attendance are complementary components of the right to basic education.

4.8.1.2 The Zimbabwean Education Act provisions

The Education Act regulates the provision of primary and secondary education in Zimbabwe including the regulation and establishment of schools as already mentioned earlier.¹²⁰² Whilst there is no statement indicating that the Act regulates the provision of basic education, it defines school education to include primary and secondary education.¹²⁰³ The Minister responsible for primary and secondary education in

¹¹⁹⁸ Sandra Liebenberg and Kevashine Pillay 'Socio-Economic Rights in South Africa The socio-economic rights project' (2000) Community Law Centre, University Of Western Cape South Africa October 351

¹¹⁹⁹ Ibid.

¹²⁰⁰ Ibid.

¹²⁰¹ C Churr 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) 18 PER/PELJ 2411.

¹²⁰² *Education Act, 1987, Preamble.*

¹²⁰³ Ibid, Interpretation S 2.

Zimbabwe is the one concerned with issues of the Basic Education Assistance Module (BEAM) drawing an inconclusive inference that basic education is or must be offered at either primary or secondary levels or both.¹²⁰⁴ The Education Act states that every child has the right to a school education.¹²⁰⁵ Primary education, not secondary education is compulsory in Zimbabwe and the parents have the duty to ensure the child's attendance.¹²⁰⁶ The Minister has the obligation to prescribe school fees including accommodation fees, if the school offers accommodation.¹²⁰⁷ Further, the Minister may also prescribe additional fees for special educational courses or subjects.¹²⁰⁸

A headmaster of school may refuse to admit a learner to school based on the fact that they have not paid school fees.¹²⁰⁹ If the secretary however directs that the child be admitted, despite not paying school fees, the parent is liable for such payment.¹²¹⁰ In addition to payment of school fees, a headmaster may establish a general purpose fund at a school to fund the establishment of facilities as well as extracurricular activities for the benefit of pupils.¹²¹¹ The secretary may fix different fees to be paid by different 'government schools or different categories of pupils attending such schools'.¹²¹² In addition to other charges, school fees may be fixed differently for different 'government schools and schools fees can further be fixed differently for different categories of pupils'.¹²¹³ The Education Act also states that

¹²⁰⁴ Ibid.

¹²⁰⁵ *Education Act, 1987*, 'S 4 (1) (2) Subject to subsection (5), no child in Zimbabwe shall—

(a) be refused admission to any school; or

(b) be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school; on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender. (3) For the purposes of subsection (2), a term or condition shall be deemed to be onerous if it requires the child upon whom it is imposed or the child's parent—

(a) to do anything; or

(b) to possess some quality, attribute, asset or property; which is not required to be done or possessed by children or parents, as the case may be, of a different race, tribe, place of origin, national or ethnic origin, political opinion, colour, creed or gender'.

¹²⁰⁶ Ibid., S 5.

¹²⁰⁷ Ibid, section 6.

¹²⁰⁸ Ibid, section 13.

¹²⁰⁹ Ibid, S 13 (1-5).

¹²¹⁰ Ibid.

¹²¹¹ Ibid.

¹²¹² Ibid.

¹²¹³ Ibid.

subject to the direction of the Secretary, a head of school may refuse to admit learners to school based on the fact that they have not paid school fees.¹²¹⁴

4.8.1.3 The Education Act and Free basic education: A critique

It is notable that contrary to international law provisions and the provisions of a Constitution which provides for basic-state-funded education, the Zimbabwean Education Act imposes on parents the liability to pay school fees including fees for additional subjects and school facilities.¹²¹⁵ In addition to the provisions of international law and the Constitution mandating the provision of free basic education, the argument for the provision of paid basic education is simply intolerable. When the expense of paying for school fees falls on the parent, so many realities may manifest. To begin with, parents may simply find school fees so expensive that they would fail to pay and then choose not to send their children to school.¹²¹⁶ Parents who cannot afford the school fees may want to send their children to school but feel ashamed to send them without money.¹²¹⁷ Parents who have children in school may also be humiliated by school authorities and threats of legal action for failure to pay school fees which has happened in Zimbabwe.¹²¹⁸ Children whose parents may not be able to pay school fees may also be jeered and looked down upon by other students and they end up choosing to be absent from school for fear of humiliation¹²¹⁹. Children whose fees are not paid may become continuously absent or drop out.¹²²⁰

Currently, the Education Act, as well as the conduct of the Minister discussed earlier of threatening non-fee-paying parents with litigation places the child at the risk of not acquiring a basic education. It is not enough for the Education Act to provide

¹²¹⁴ Ibid.

¹²¹⁵ Ibid. S 6 S13.

¹²¹⁶ Ides N 'The Right to learn Educational strategies for socially excluded youth in Europe' (2000) The Policy Press University of Bristol 89.

¹²¹⁷ Ibid.

¹²¹⁸ Staff Reporter 'Fees: Schools unleashes debt collectors on defaulters cattle' <http://www.newzimbabwe.com/news-17503-Fees+School+to+seize+defaulters%E2%80%99+cows/news.aspx> accessed 24 July 2018.

¹²¹⁹ Nicaise Ides 'The Right to learn Educational strategies for socially excluded youth in Europe' (2000)

The Policy Press University of Bristol 89.

¹²²⁰ Ibid.

for compulsory primary education, the Act must be amended to include the provision of free and compulsory basic education. It has been stated that, 'the statutory guarantee of free compulsory education is the most important financial policy instrument in promoting equal opportunities'.¹²²¹ Any fee imposed upon a child by the Act and other direct or indirect education costs such as uniforms and levies can be regarded as hindrances which threaten the enjoyment of the right to basic education.¹²²² Whilst Finland may not be comparable socially, economically or politically to Zimbabwe, the provisions of its Basic Education Act offer useful guidelines relating to the provision of basic education for children. The useful guidance offered by the Finnish Basic Education Act will need to be contextualized by Zimbabwe to suit its own unique context. Following the recommendations from the Basic Education Act¹²²³ of Finland, the Education Act of Zimbabwe may consider stating that attendance of school, teaching and learning materials, textbooks, equipment to assist learning and all other materials must be free of charge for every learning pupil.¹²²⁴ Those who have special needs must have additional free facilities to assist their needs.¹²²⁵ Since children cannot learn when they are hungry and the state cannot guarantee that their parents give them a meal to eat at school, every learner must be entitled to a daily free supervised, balanced and organized meal.¹²²⁶ The current situation in Zimbabwe where children walk long distances to school is undesirable, as such following the recommendations from Finland, a pupil living within a stipulated distance (perhaps specified by the Minister of Basic Education in Zimbabwe) from the school should be entitled to free transport.¹²²⁷ A contextual provision of transport would mean that, a very young pupil in pre-primary education should be entitled to free transport which is also available despite distance, as long as the travel is 'too difficult, strenuous or dangerous to travel in view of the pupil's age or other circumstances'.¹²²⁸ Alternative to free transport, the Act may provide that a child can

¹²²¹ Ibid.

¹²²² Smith H, Chiroro P and Musker P 'Process and Impact of the Basic Education Assistance Module (BEAM) in Zimbabwe' CFBT, IRI and Paul Musker and Associates accessed 20 March 2012, 44.

¹²²³ *Basic Education Act, 1998*.

¹²²⁴ Ibid, S 31(1-2).

¹²²⁵ Ibid.

¹²²⁶ Ibid.

¹²²⁷ Ibid.

¹²²⁸ Ibid.

be provided with a subsidy which can be used for transporting or accompanying the child.¹²²⁹ If free transport or a subsidy cannot be provided to a child in accordance with the recommendations above, pupils should be entitled to free accommodation and free travel between where they are accommodated to their homes during weekends and public holidays.¹²³⁰

The Act must clarify that, every child must have a right to free welfare which is necessary for them to participate in basic education.¹²³¹ The welfare of the child means any 'action promoting and maintaining good learning, good mental and physical health and social well-being, and conditions conducive to these'.¹²³² The welfare must include the welfare of the child as it is determined by the school curriculum, the welfare of the child as determined by the public health laws and the welfare of the child as determined by the child welfare laws.¹²³³ Any accident or injury which will take place in school, during school travel or in the school accommodation should be treated free of charge.¹²³⁴ A reasoning that Zimbabwe must comply with the provisions of international law and provide for free basic education is alive to the reasoning that, 'energy and funding directed to basic education [is] perhaps the most profound investment in people and in the future of a country'.¹²³⁵ A scope of action going beyond the mere recognition of education as any other a human right is, therefore, required. An expanded vision of basic education would require resources to be mobilised to ensure that basic education is provided immediately to anyone who does not have it as part of 'a broader scope of action than in the past'; this demands the mobilisation of resources from the public and private sector as well as voluntary individuals.¹²³⁶

¹²²⁹ Ibid.

¹²³⁰ Ibid.

¹²³¹ Ibid.

¹²³² Ibid.

¹²³³ Ibid.

¹²³⁴ Ibid.

¹²³⁵ *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 in Jomtien, Thailand (1990), A IX (1).*

¹²³⁶ Ibid A, VIII.

Logically, the Education Act must also provide for free basic education or rather, free primary and secondary school attendance not only because of the provisions of international law but also that, in a country where millions live in abject poverty, logically it is useless to provide compulsory basic education and provide for penalties for parents who restrict children from attending school due to financial constraints. The law, therefore, cannot provide penalties for not sending children to school and then expect parents to somehow have the money to pay for their children's school fees and expenses. As long as there is an element of compulsion and penalties imposed on parents for restricting children from attending school, the availability of funds must be certain.

While BEAM discussed earlier sounds like a good policy to supplement the provisions of the Education Act and ensure that poor children financially access education, it is not the provision of free basic education required by international law as discussed in chapter 2. The charging of school fees has negative consequences for all children particularly those who are disadvantaged but fail to be counted as such. The charging of school fees has even further negative consequences for children with special needs whose schools are more expensive, since BEAM funding is often inadequate to meet their needs. It is also notable that, instead of providing free basic education as required by both international law and the Constitution, the Education Bill gives the minister the leeway to set school fees in consideration of the location and status of the area in which the school is located. This provision by the Bill is not sustainable and does not solve the current access problems presented by the Education Act and by BEAM as they were discussed earlier. Basic education must be free, any proposal to charge fees on the basis of the status of children's parents or guardians is against the best interest of the child which is to have a fully funded right to basic education. The financial means of the parents must not be the one to determine the cost, type and quality of education a child must get. The unconditionality of the human rights based approach demands that when a right is provided as state funded, the state must provide, protect and promote the right as state funded, it cannot cede those responsibilities to citizens or anybody.

4.8.1.4 *The Education Act and Compulsory Basic Education: An analysis*

The international law provision of compulsory education discussed earlier has a purpose. Children rely on the guidance of their parents who are expected to appreciate the reasons to send them to school. However, there is no guarantee that parents will appreciate the importance of education and send their children to school.¹²³⁷ Making basic education compulsory education therefore protects children from judgments and actions of irresponsible parents who would otherwise not care about the education of their children.¹²³⁸ Whilst most international instruments provide for compulsory primary school attendance, Glover in 2004 lamented that, there is no international obligation on states to provide compulsory secondary education.¹²³⁹ The view of this dissertation is that, the lamentation by Glover even at that time, might have overlooked the developing provisions of international law particularly relating to African countries. By 2004, General Comment 13 had already clarified that basic education is offered at primary and secondary schooling levels and the African Charter then pronounced that basic education would be compulsory as earlier on mentioned.¹²⁴⁰ By making basic education compulsory the African Charter essentially made secondary schooling compulsory since General Comment 13 had clarified that basic education is offered at both primary and secondary schooling level.¹²⁴¹ The first point of reform for the Education Act is therefore to make clear the provision of an unqualified right to basic state funded education in compliance with the Constitution. The Education Act must state the number of primary school years and secondary

¹²³⁷ Ides N, 'The Right to learn Educational strategies for socially excluded youth in Europe' (2000) The Policy Press University of Bristol 55.

¹²³⁸ Ibid.

¹²³⁹ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 28.

¹²⁴⁰ *African Charter on the Rights and Welfare of the Child* (1990), A 11 (3), 'States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular: (a) provide free and compulsory basic education'.

¹²⁴¹ *General Comment 13: The Right to Education* (1999), Para 1.par 12, 'While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities.7 Article 13 (2) (b) applies to secondary education 'in its different forms', thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages alternative educational programmes which parallel regular secondary school systems'.

school years for which basic education will be offered. The proposal by the Education Bill to provide for state-funded compulsory basic education up to grade 7 does not comply with the General Comment 13 requirement to have children acquire basic education at both primary and secondary schooling levels. It is no longer enough for the Education Act to provide only compulsory primary schooling. For children to acquire basic learning needs in full, the obligation to provide compulsory school attendance must be extended to secondary schooling years as clarified by General Comment 13.

4.8.2 The right to basic education is an unqualified right

4.8.2.1 Distinction between qualified and unqualified rights

The Constitution of Zimbabwe contains socio-economic rights whose formulations are different. The right to health and the right to water provide for socio-economic rights whose formulation includes words such as 'access' to the right, that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'.¹²⁴² The Constitution also provides for the right to basic education whose formulation is peculiarly different from other socio-economic rights in the sense that its formulation eliminates such words. Whilst the constitutional court of Zimbabwe has not yet clarified the distinction between the formulation of socio-economic rights it protects, the Constitution borrows a lot from the Constitution of South Africa. Just like Zimbabwe, the right to basic education stands out in the South African Constitution as a right without qualifiers. Writing on a similarly formulated right to basic education in South Africa, authors such as Liebenberg¹²⁴³ Churr¹²⁴⁴, Pillay¹²⁴⁵ and Berger have

¹²⁴² Stu Woolman and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 120.

¹²⁴³ Sandra Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 242.

¹²⁴⁴ C Churr 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) 18 PER/PELJ 2416.

¹²⁴⁵ Sandra Liebenberg and Kevashine Pillay 'Socio-Economic Rights in South Africa The socio-economic rights project' (2000) Community Law Centre, University Of Western Cape South Africa October 351.

already accepted that a similar formulated right to basic education is regarded as an unqualified socio-economic rights.¹²⁴⁶

In a detailed explanation, Woolman and Fleish distinguish an unqualified socio-economic right like section 75 (1) (a) in four ways. To begin with, its formulation excludes the word 'access' making it different from other socio-economic rights guaranteed in section 76 and section 77.¹²⁴⁷ Taking into account the recommendations from the South African constitutional court, in relation to human rights qualified by the word 'access', the government's obligation is not to provide the qualified right itself but to ensure that there is a system in place which allows human beings to have opportunities to acquire the right.¹²⁴⁸ What is required of the government is a liberal provision of a system and not an immediate undertaking to provide the right.¹²⁴⁹ In order to provide access the legislature must provide measures and a legislative framework that facilitates the acquisition of the right by individuals.¹²⁵⁰ The elimination of the word 'access' in section 75(1) (a) ought to be regarded in a similar manner to the South African *Juma* case, to mean that the government's duty is not only to make sure that basic education is accessible but that it is provided as a tangible good.¹²⁵¹ It should be clarified here that the word 'access' as a qualifier of some socio-economic rights in the Zimbabwean Constitution (right to water and further education) should not be confused with access to a school's basic education which children must have as provided by international law discussed in this dissertation.

Second, the government's constitutional provision of the right to basic education is not measured by 'reasonable legislative and other measures'.¹²⁵² It is

¹²⁴⁶ Berger E 'The Right to Education Under the South African Constitution' (2003) 103 Columbia Law Review 625.

¹²⁴⁷ Stu Woolman and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 121.

¹²⁴⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 para 35-37.

¹²⁴⁹ Simbo C 'The right to basic education, the South African Constitution and the Juma Musjid Case: Unqualified human right and a minimum core standard' (2013) 17 LDD 487.

¹²⁵⁰ Ibid.

¹²⁵¹ Ibid.

¹²⁵² Stu Woolman and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 120.

realizable that other socio-economic rights protected by the Zimbabwean Constitution are contingent on the qualification 'reasonable legislative and other measures'.¹²⁵³ Whilst Zimbabwean courts have not explained the meaning of the qualification, the Constitution accepts the useful guidance of foreign law when one is interpreting human rights.¹²⁵⁴ Explaining this qualification, the South African court stated that when providing a right qualified by reasonable measures, the test of compliance is the existence of legislative and other action on the part of the state.¹²⁵⁵ The legislative and other action must be regarded as reasonable.¹²⁵⁶ On the other hand, an inquiry into the state's 'reasonable legislative and other measures' will not, when one is determining the states compliance with the provision of basic education, be a measure of governments compliance with its obligations¹²⁵⁷. The reasonableness approach should be regarded as irrelevant in determining the state's compliance with providing basic education¹²⁵⁸. There is nothing in section 75 (1) (a) rationalizing its inference.

Third, section 75 (1) (a) is not dependent on the 'availability of resources'¹²⁵⁹ but rather clearly and unequivocally refers to a state-funded education. This means that the state cannot invoke the defence that it does not have adequate resources to provide a basic education since the textual formulation of section 75 (1) (a) does not lead the court to such a conclusion. Regarding the provision of basic education, the government should therefore work towards finding means to provide basic education through mobilizing resources as required by international law. Finally, the right to basic

¹²⁵³ Simbo C 'The right to basic education, the South African Constitution and the Juma Masjid Case: Unqualified human right and a minimum core standard' (2013) 17 LDD 488.

¹²⁵⁴ Ibid.

¹²⁵⁵ *Lindiwe Mazibuko and Others v City of Johannesburg and Others Case* 2010 (4) SA 1 (CC) para 49-50. In the *Mazibuko* case court stated that 'section 27 (1) does on entitle anyone to claim sufficient water but to reasonable measures by the government which aim to make water accessible'. See also *Government of the Republic of South Africa and Others v Grootboom and Others* par 39-44. Further, in the *Grootboom* case, the constitutional court noted that reasonable measures did not constitute the provision of a house but included the provision of temporary accommodation and constructive engagement, which would ensure humane evictions'.

¹²⁵⁶ Ibid.

¹²⁵⁷ Simbo C 'The right to basic education, the South African Constitution and the Juma Masjid Case: Unqualified human right and a minimum core standard' (2013) 17 LDD 487-488.

¹²⁵⁸ Stu Woolman and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 120.

¹²⁵⁹ Ibid.

education 'is not subject to progressive realisation'.¹²⁶⁰ The court in the South African *Grootboom case* stated that progressive realisation means the governments' liberal, overtime commitment to realise the goal.¹²⁶¹ Eliminating the progressive realisation qualifier in section 75 (1) (a) must mean that the government cannot be liberal in its provision of the right to basic education but must aim at instantaneous provision.¹²⁶² In explaining the implications of a similar unqualified right to basic education, the court in the South African in the *Juma* case stated that,

It is important for the purposes of the judgment, to understand the nature of the 'right to basic education' under section 29 (1) (a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation [in the text] requiring the right to be 'progressively realized' within 'available resources' subject to 'reasonable legislative measures'. The right to basic education in section 29 (1) (a) maybe limited only in terms of the law of general application, which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided in section 29 (1) (b). The state is in terms of that right, obliged to take reasonable measures to make further education 'progressively available and accessible'.¹²⁶³

Based on the discussion above ,and motivated by recommendations from South Africa, this dissertation submits that the right to basic-state-funded education in Zimbabwe is an unqualified right.

4.8.2.2 Reconciling section 75 (1) (a), 75 (1) (b) and 75 (4) and unqualified obligations

The contrast between section 75 (1) (a) and section 75 (1) (b) which provides for a qualified right to further education must be regarded as having provided clarity that the provision of an unqualified right to basic education by section 75 (1) (a) was a deliberate move by the Constitution to ensure the free provision of basic education.

¹²⁶⁰ Ibid, see also Simbo C 'The right to basic education, the South African Constitution and the Juma Musjid Case: Unqualified human right and a minimum core standard' (2013) 17 LDD 488

¹²⁶¹ *Government of the Republic of South Africa and Others v Grootboom and Others* par 45 see also *Lindiwe Mazibuko and Others v City of Johannesburg and Others* para 49-50. 'The court stated that it is insufficient for the government to show that the policy it has selected is reasonable, it must also show that the policy is consistent with the obligation to 'progressively realise' socio-economic rights'.

¹²⁶² Berger E 'The Right to Education Under the South African Constitution' (2003) 103 Columbia Law Review 625.

¹²⁶³ Ibid.

Section 75 (4), however, indicates that 'the state must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the right (singular and not plural) set out in subsection (1)¹²⁶⁴. Subsection 1 incorporates section 75(1) (a) which is the unqualified right to basic education and section 75(1) (b) which is the qualified right to further education. It is realizable that section 75 (4) imposes qualified obligations on a singular right embodied by section 75 (1). The question which this dissertation recognizes is, of the two rights embodied by section 75 (1), which one is qualified by section 75 (4)? The answer to the question forwarded by this dissertation is that, section 75 (4) did not mean to qualify section 75 (1) (a) but rather to emphasise the unqualified nature of section 75 (1) (b).

The above reasoning is motivated by the fact that section 75 (4) refers to the qualified nature of one right (singular) and such right should be understood to refer to section 75 (1) (b) which provides for a qualified right to further education and not section 75 (1) (a) which provides for an unqualified component, basic education. Following that argument, it is noted by this dissertation that the provisions of section 75 (4) which are singular in nature, refers to the qualified component of the right in section 75 (1) which is section 75 (1) (b). Whilst arguments by other authors may differ, the provisions of section 75 (4) should not be deemed applicable to the right to basic education because by its formulation, it is not qualified. Section 75 (1) (a) in its formulation, already provides for obligations in contrast with those provided by section 75 (4) and the only sensible reasoning is that section 75 (4) is applicable to the qualified part of section 75 (1) which is section 75 (1) (b). In addition, the drafters of the Constitution must be viewed as having particularly qualified section 75 (1) (b) as a conscious move to clearly distinguish between the qualified and the unqualified component of the right provided by section 75 (1).

If the above argument, however, is not accepted, that 'the right' alluded to by section 75 (4) refers to section 75 (1) (b), then an alternative argument is submitted

¹²⁶⁴ *The Constitution of Zimbabwe, 2013*, S 75(4).

that the ICESCR which Zimbabwe is party to, provides that each state party must provide each socio-economic right with a content which is immediately realizable as discussed in chapter 2.¹²⁶⁵ If section 75 (4) is deemed to wholly apply to the provisions of section 75 (1) in general and not specifically to 'further education' and the 'right' is understood to mean both basic and further education, the right to education in Zimbabwe will still be expected to have a content which must be unqualified and immediately realizable in compliance with ICESCR obligations. That minimum unqualified content of the right to education in Zimbabwe is reasoned to be basic education as discussed later in this dissertation.

If the above two arguments are still rejected as unsustainable by other scholars, it is reasoned that section 75 (4) can be regarded to wholly apply to the right to education in general which encompasses both basic and further education. A court interpreting the obligations imposed by section 75 (1) is therefore obligated to distinguish between the obligations imposed by the two rights embodied by section 75 (1) and to then reconcile the obligations with the provisions in subsection 75 (4). Such reconciliation must be alive to the need to give the right to basic education and the right to further education their full effect as indicated by the interpretation clause as discussed in chapter 3. To do so, in the *Makoni* case the Court stated that a 'purposive and generous' approach must be adopted as opposed to 'a pedantic or restrictive interpretation'.¹²⁶⁶ The purpose or intended outcome of the right to basic education is found by referral to analysis of the language used by the right itself as well as a reference to the history of the concepts cherished by the right.¹²⁶⁷ The interpretation of section 75 (1) (a) must therefore be cognisant of the fact that whilst the broad right to education maybe regarded as qualified, it has within its formulation an unqualified component (basic education) whose purpose is to be immediately claimed for the immediate benefit of Zimbabwean citizens. Such an approach ensures that citizens enjoy the full benefit of section 75 (1) (a). As discussed in chapter 3, the Constitution 'must be interpreted generously so as to fulfil its purpose of securing the

¹²⁶⁵ *General Comment No. 3: The Nature of States Parties' Obligations*, (1990), par 10.

¹²⁶⁶ *Ibid.*

¹²⁶⁷ *Ibid.*

individual the full benefit of the [its] protection'¹²⁶⁸. Constitutional interpretation must consider the text used by the Constitution and must be alive to the need to promote the spirit and tenure of the Constitution advanced by the inclusion of different formulated rights that is qualified and unqualified rights. A serious consideration of the formulation of section 75 (1) (a) is therefore an important consideration in giving effect to its purpose of addressing the injustices of the past and ensuring that every person at least gets one type of education which is basic education compulsorily and freely.

4.8.2.3 Unqualified rights and the immediately realisable debate

Woolman and Fleish state that the right to basic education in South Africa which is similar in formulation to the right to basic education in Zimbabwe has a positive dimension, it is unqualified and immediately realisable¹²⁶⁹ a point accepted by many authors such as Churr¹²⁷⁰, Liebenberg¹²⁷¹, Mirungi,¹²⁷² and Berger¹²⁷³. This dissertation makes the same point they make in relation to the similar-formulated right to basic education in Zimbabwe. This dissertation submits that the unqualified nature of the right to basic education must lead to the conclusion that it is immediately realizable. Woolman and Fleish, however, note empathetically, that the impossibility of providing basic education immediately on the part of the government.¹²⁷⁴ The authors conclude that despite the right to basic education being unqualified, its provision as an immediate right is a standard which cannot be met by the state.¹²⁷⁵ This dissertation submits that, compliance with basic education obligations means realizing as

¹²⁶⁸ *Chirwa v Registrar General* 1993 (1) ZLR 1 15.

¹²⁶⁹ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 121.

¹²⁷⁰ C Churr 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) 18 PER/PELJ 7.

¹²⁷¹ Sandra Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 243

¹²⁷² Murungi LN 'Inclusive basic education in South Africa: Issues in its conceptualisation and implementation' 18 (2015) PER 1.

¹²⁷³ Erick Berger 'The Right to Education Under the South African Constitution' (2003) 103 Columbia Law Review 638

¹²⁷⁴ Woolman Stu and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 122.

¹²⁷⁵ *Ibid*, 123.

MacConnachie and MacConnachie do, that, the right to basic education is provided by the Constitution as a good in itself, not merely as access to a reasonable measure which must be provided progressively.¹²⁷⁶ The right to basic education had already been prioritized by the Constitution and government budgets must reflect such prioritization and provide it immediately. Woolman and Fleish also quote Berger who states that by understanding the right to basic education to impose unqualified immediate obligations, the Court would, 'announce standards than cannot be met [thereby] ultimately cheapen[ing] the Constitution'.¹²⁷⁷ This dissertation reasons that, what would cheapen the Constitution is ignoring its immediate obligations relating to the provision of basic education. Non-compliance with its constitutional obligation is what continues to cheapen the Constitution and led to the multiple violations of the right to basic education, reminiscent in Zimbabwe. Woolman and Fleish having also rejected a reading that the South African Constitution section 29 (1) (a) (similar to section 75 (1) (a) imposes immediate obligations, suggest a reading of the Constitution which would 'explain the unqualified nature of the right but does not, at the same time, make harsh of the budgetary constraints faced by the post-apartheid state'.¹²⁷⁸ They suggest that the unqualified nature of the right to basic education must be a reminder only of the inequalities of the apartheid past.¹²⁷⁹ This dissertation submits that a reading of that nature is against the unqualified obligations imposed on the right to basic education by the Constitution.

4.8.3 The right to basic education is a minimum care content required by the ICESCR

4.8.3.1 The minimum core approach

¹²⁷⁶ McConachie and McConachie 'Concretising the Right to A basic Education' (2012) 129, The South African Law Journal Page 564.

¹²⁷⁷ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 122.

¹²⁷⁸ Ibid 125.

¹²⁷⁹ Ibid.

The above argument that basic education is an unqualified right is the foundation for the reasoning that it should also be regarded as the minimum core obligation alluded to by General Comment 3 to the ICESCR.¹²⁸⁰ As stated in chapter 2, the minimum core concept originates from the obligations imposed on states by the General Comment 3 to the ICESCR.¹²⁸¹ The minimum core approach therefore visualises an unqualified immediate important part of every socio-economic right which must be immediately provided by the state.¹²⁸² A state which fails to provide at least the minimum content of the right is in breach of ICESCR obligations.¹²⁸³ The minimum core is consequently a 'floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation'.¹²⁸⁴ All states who are party to the ICESCR, such as Zimbabwe, must comply with the provisions of the ICESCR and clarify the components of the right to education which citizens must know as comprising of the minimum core provision of the right.

4.8.3.2 Is the minimum core concept applicable when interpreting human rights provided by the Zimbabwean Constitution?

The court has not yet clarified the applicability of the minimum core concept when interpreting socio-economic rights, particularly, the right to education. Whilst the court has not clarified the position, in relation to the interpretation of socio-economic rights, the Constitution as mentioned above, states that Zimbabwe is bound by the provisions of the international law it has ratified. The court has also affirmed the important position of international law in determining the scope and content of human rights embodied by the Zimbabwean Constitution. In the case of *Loveness Mudzuru*, the court stated that, the obligations imposed by the Constitution are not 'not ascertainable without regard being had to the context of the obligations undertaken by Zimbabwe under the international treaties and conventions at the time it was

¹²⁸⁰ Simbo C. 'The right to basic education, the South African Constitution and the Juma Masjid Case: Unqualified human right and a minimum core standard' (2013) 17 LDD 491

¹²⁸¹ Chowdhury *Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights. A Comparative Perspective* (Cornell Law Library 2009) 3.

¹²⁸² Wesson, 'Grootboom and beyond; Reassessing the socio-economic jurisprudence of the South African Constitutional Court' 2004 20 *SJHR* 298.

¹²⁸³ *General Comment No. 3: The Nature of States Parties' Obligations*, (1990) para 30.

¹²⁸⁴ *Ibid* 31.

enacted'.¹²⁸⁵ By ratifying the ICESCR 'Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights [and to ensure that] they are enjoyed in practice'.¹²⁸⁶

4.8.3.3 What can be regarded as the minimum core content of the right to basic education?

The obligations imposed by the minimum core obligation are similar to those imposed by section 75(1) (a). Just like the section on unqualified right, a minimum core obligation is a non-excusable obligation imposing a duty on the government to provide a certain content of a right without alleging any constraint. The similarity of obligations imposed by the minimum core and those imposed by an unqualified right section 75 (1) (a) leads to an argument that, by virtue of its similarity with an unqualified right and by reason of Zimbabwe having ratifying the ICESCR, section 75 (1) (a) must be read as providing for basic education, as both an unqualified right and a minimum core obligation of the right to education in Zimbabwe.

4.8.4 Basic education points to the quality of the education

The term, basic education, is quality-oriented and points to an education which must be provided for children. The term is viewed as having originated from, defined and elaborated upon by the World Declaration which pointed us to the quality of education that learners must receive. It is a significant realisation that expanding access to education alone is not sufficient if the quality of education does not meaningfully contribute to the development of the individual and society. Whilst access to education is key to the provision of the right, quality is also at the centre of the education goal. The aspect of quality in education was considered by the Universal Declaration¹²⁸⁷,

¹²⁸⁵ *Loveness Mudzuru and Another v Minister of Justice Legal and Parliamentary Affairs* (2015) 12 CCZ page 26

¹²⁸⁶ *Ibid* 27.

¹²⁸⁷ *Universal Declaration of Human Rights* (1948), A 26 (2).

the ICESCR¹²⁸⁸ and the African Charter¹²⁸⁹ among many international instruments which all stated that education given at school must have some sort of aims.

4.8.4.1 *The qualities of a person who acquired basic education: The litmus test*

In conceiving education, various human rights instruments have explained its aims as discussed in chapter 1. The aims of education as they are stated by various international instruments have focus on '*the substantive attainment of sufficient learning* [which] enables a person to participate as a citizen, to contribute to society and derive self-fulfilment, sufficient to enjoy one's dignity'.¹²⁹⁰ Elaborating on the provisions of the international instruments shows us that the possession of education of any kind must be aimed at the development of the learner's overall personality and equipping them with life skills. Singh made it clear that, the development of life skills must be integrated in the national curriculum.¹²⁹¹ People whose life skills have been developed have a personality developed enough to allow them to enjoy meaningful existence.¹²⁹² They recognize one's human dignity, other people's dignity, assumes responsibility, self-understanding, independent thinking, self-judgment, moral independence and the ability to justify any decision, be it religious, social, moral, political, economic, cultural, religious, intellectual, vocational.¹²⁹³ The full development of the human personality is a life skills which entails the impartment of knowledge with an aim to make the learner insightful and capable of dealing with every new situation.¹²⁹⁴ A child is taught in a specific society, but the society is in constant

¹²⁸⁸ *International Covenant on Economic, Social and Cultural Rights*, (1966) A13 (1).

¹²⁸⁹ *African Charter on the Rights and Welfare of the Child*, (1990) A 11 (1) (7).

¹²⁹⁰ Calderhead V 'The right to an 'adequate' and 'equal' education in South Africa: An Analysis of s. 29 (1) (a) of the South African Constitution and the right to equality as applied to basic education', draft paper, SECTION27 and Equal education 9.

¹²⁹¹ Kishore Singh 'Report of the Special Rapporteur on the right to education on his mission to Kazakhstan (12–20 September 2011)' United Nations General Assembly https://digitallibrary.un.org/record/729705/files/A_HRC_20_21_Add-1-EN.pdf accessed 10 May 2018 17-18.

¹²⁹² W A Landman 'An essence analysis of the situation of education found in W A Landman , SG Ross and Liebenberg *Opvoedkunde en opvoedingsleer* (University Publishers and Booksellers 1975) 3.

¹²⁹³ Ibid.

¹²⁹⁴ Du Plooy JL and Kilian CJG *Introduction to Fundamental Pedagogies* (1985 HAUM) page 113-114.

change, as such education has the aim to prepare the learner for constant change, to embrace and consider other members of the ever-changing society.¹²⁹⁵

Mental maturity is part of the development of life skills and the human personality as desired by international law. An educated person who is mentally mature must reach a 'stage of autonomy where one is capable of taking a personal stand and accepting values that bind him, and demand self-sacrifice'.¹²⁹⁶ Pursuing the aim to develop the learner's personality, education must positively mould the mentality of the educand in such a way as to cultivate self-love, respect and the ability to accept individual experiences without exhibiting anger.¹²⁹⁷ Education must aim to develop the personality to such an extent that an educated person is able to examine activities at a distance and to avail himself/herself of every opportunity to 'ennoble and not to degenerate himself'.¹²⁹⁸ In developing the human personality, education must assist the learner to reach a stage of not only mental maturity but also emotional maturity which is seen as the ability to make responsible choices, to stand by the decisions, to implement the choices and to be motivated in the choices made which are influenced by the values recognized by the adult as well as other adults.¹²⁹⁹ All discussed international instruments also point to education having an aim to fully develop the individual, to promote the friendship of nations, tolerance, understanding, the maintenance of peace and the advancement of human dignity. Education should bring a learner to a realisation that there are widely accepted human rights' values such as the important value of human dignity. Such realisation should call the learners to the need to self-introspect and to change unacceptable behaviour as it is judged by the norms and values widely accepted by them and others.¹³⁰⁰

It is important to note that the inculcation of the value of human dignity begins with the teacher aiming to treat the learner with dignity. Respecting the rights of the learner strengthens their respect of the dignity and human rights of others. Put

¹²⁹⁵ Ibid.

¹²⁹⁶ Ibid 99.

¹²⁹⁷ Ibid 110.

¹²⁹⁸ Ibid 102-103.

¹²⁹⁹ Ibid.

¹³⁰⁰ Ibid.

succinctly, learners aware of their dignity can 'revere the dignity of other human beings'.¹³⁰¹ Singh also notes that a quality education curriculum must be one 'in conformity with human rights law, including but not limited to those relating to the right to education'.¹³⁰² Education must indeed aim to strengthen the respect and enjoyment of human rights and fundamental freedoms. The above aim means that when educators teach, they should exemplify values and human rights such as tolerance, understanding and the pursuit of peace.¹³⁰³ In the view of this dissertation, education must therefore aim to promote both the enjoyment of both individual and collective rights. It must foster freedom of thought and conscience.

Whilst the above discussion focuses on the general quality of education desired by international law, basic education is a specific type of education whose quality is specifically mentioned by international law. As discussed in chapter 2, the particular standard of quality basic education desired for every country including Zimbabwe was concretized by the World Declaration which states that basic education:

comprises 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.¹³⁰⁴

A commitment into investing, understanding and legally elucidating the essential learning tools and the basic learning content described by the World Declaration's definition of basic education above, is essential for countries intending to understand the quality of basic education desired by International law. Yves Daudet and Kishore Singh note the special role of the World Declaration as an instrument which broadened and modernized the concept of basic education and reflected on its necessary

¹³⁰¹ Du Plooy JL and Kilian CJG *Introduction to Fundamental Pedagogies* (1985 HAUM) 104.

¹³⁰² Kishore Singh 'Report of the Special Rapporteur on the right to education on his mission to Kazakhstan (12–20 September 2011)' United Nations General Assembly https://digitallibrary.un.org/record/729705/files/A_HRC_20_21_Add-1-EN.pdf accessed 10 May 2018 17-18.

¹³⁰³ Ibid 100.

¹³⁰⁴ *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 in Jomtien, Thailand (1990)*, A 1 (1).

conditions.¹³⁰⁵ They recognize its role of giving generations an 'expanded vision of and a renewed commitment to, basic education to address the scale and complexity of the challenge [of ensuring education for all]'.¹³⁰⁶ The individual aspects of essential learning tools as well as the basic learning content stated by the World Declaration set the quality for basic education. A comprehensive deliberation cannot be undertaken by this dissertation but by the Zimbabwean government in consultation with stakeholders involved in education, such as civil society, education professionals, regional and international education bodies, cultural and religious leaders.¹³⁰⁷

Zimbabwe must also consult the Framework for Action for the World Declaration¹³⁰⁸ which is intended as a guide for countries who want to set quality basic education curricula in compliance with the provisions of the World Declaration.¹³⁰⁹ To ensure quality standard-setting for basic education in each country, the Framework for Action envisages three levels of action by countries '(i) direct action within individual countries, (ii) cooperation among groups of countries sharing certain characteristics and concerns, and (iii) multilateral and bilateral cooperation in the world community'.¹³¹⁰ National plans of action set by Zimbabwe must take into account the provisions of the World Declaration whilst at the same time taking into account their individual context and specific resources they require.¹³¹¹ States may find it beneficial to draw up such plans using the UNESCO frameworks for action as a reference. Thus the Framework for Action to Meet Basic Learning Needs, adopted in Jomtien in 1990, invites states to use these plans to 'develop their own specific plans

¹³⁰⁵ Daudet Y, Singh K 'The Right to Education: An Analysis of UNESCO's Standard-setting Instruments' (2001) *UNESCO* <http://unesdoc.unesco.org/images/0012/001238/123817e.pdf> accessed 10 May 2018 16-17.

¹³⁰⁶ Ibid.

¹³⁰⁷ Simbo C 'Defining the term basic education in the South African Constitution: An International Law Approach' (2012) *Law, Democracy and Development* 162 .

¹³⁰⁸ The Dakar Framework for Action (2000) UNESCO <http://unesdoc.unesco.org/images/0012/001211/121147e.pdf> accessed 30 July 2018.

¹³⁰⁹ Daudet Y, Singh K 'The Right to Education: An Analysis of UNESCO's Standard-setting Instruments' (2001) *UNESCO* 16-17 <http://unesdoc.unesco.org/images/0012/001238/123817e.pdf> accessed 10 May 2018 .

¹³¹⁰ Ibid.

¹³¹¹ Ibid 31

of action and programmes in line with their particular objectives, mandates and constituencies'.¹³¹²

In addition to countries setting their own national quality education indicators, the Special Rapporteur to the right to education Kishore Singh in a separate report also reinforced the interdependence of quality education with all other education inputs which form part of the components of the right to basic education discussed in this dissertation.¹³¹³ He stated that, when teachers are unqualified or there is inadequate staffing or teachers are underpaid, quality education is very difficult to deliver and becomes an unenviable task.¹³¹⁴ To ensure the delivery of quality basic education, countries therefore need to ensure that they comply with all other components of basic education discussed in this dissertation, such as making education available, accessible, acceptable and adaptable. Also, in order to improve quality, Singh stated that, textbooks must be revised, infrastructure must be improved and there should be clear rules on the development of teaching materials and manuals.¹³¹⁵ He recommended the establishment of national quality assessment bodies which will measure the provision of all other education inputs, such as qualified teachers, quality textbooks and standard teaching to ensure the delivery of quality standards which meet both national and international indicators.¹³¹⁶ Yves Daudet, Kishore Singh also noted that, the quality required for basic education is achievable only if competent teachers are selected and teachers must have an opportunity to further their knowledge.¹³¹⁷ They also stated that, quality education also includes developing programmes which adapt to the different specific groups of people including the vulnerable and disadvantaged groups such as women and girls.¹³¹⁸

¹³¹² Ibid 31.

¹³¹³ Singh K 'Report of the Special Rapporteur on the right to education on his mission to Kazakhstan (12–20 September 2011)' United Nations General Assembly 2011 https://digitallibrary.un.org/record/729705/files/A_HRC_20_21_Add-1-EN.pdf accessed 10 May 2018 17-18.

¹³¹⁴ Ibid.

¹³¹⁵ Ibid.

¹³¹⁶ Ibid.

¹³¹⁷ Yves Daudet, Kishore Singh 'The Right to Education: An Analysis of UNESCO's Standard-setting Instruments' (2001) *UNESCO* <http://unesdoc.unesco.org/images/0012/001238/123817e.pdf> accessed 10 May 2018 16-17.

¹³¹⁸ Ibid 36.

In a separate report, the Special Rapporteur for education, Singh also stated that assessment is also important in any conversation relating to the delivery of quality education.¹³¹⁹ Assessment is not the only indicator of quality education but as stated by Singh, it is an international legal obligation upon states 'to ensure that each child completes a basic education of good quality, as assessed by a national assessment mechanism'.¹³²⁰ Assessment enables schools to identify learning needs and develop targeted initiatives to provide support for individual learners.¹³²¹ Analysis of results enables governments to assess whether they are achieving their educational objectives and to adjust policy and resources accordingly.¹³²² Dissemination of results is a necessary aspect of accountability and transparency in education and facilitates discussions on the quality of education.¹³²³ National assessments focusing on 'country specific curricula' may be used to measure the competency of learners in mastering basic learning needs.¹³²⁴

Singh makes it clear that, 'merely attending school does not lead to the completion of basic education - all students should be required to have a recognized qualification of successful completion of basic education'.¹³²⁵ Singh however notes the limits of the international approach of assessing mainly language , mathematics and sciences neglecting the assessment of the human-rights-based approach, 'the role of education in promoting sustainable development' and such important things as learning to respect diverse cultures as a human heritage and learning to live

¹³¹⁹ Kishore Singh 'Report of the Special Rapporteur on the right to education: Assessment of the educational attainment of students and the implementation of the right to education' (2014) United Nations http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR_Assessment_Educational_Attainment_of_Students_2014.pdf accessed 10 May 2018 8.

¹³²⁰ Ibid 8.

¹³²¹ Ibid.

¹³²² Ibid.

¹³²³ Das Ajay *Right to education* (Axis publishers 2010) 41.

¹³²⁴ Joel E *Educating all children , a global agenda* (Cambridge , 2006) 18.

¹³²⁵ Kishore Singh 'Report of the Special Rapporteur on the right to education: Assessment of the educational attainment of students and the implementation of the right to education' (2014) 8 http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR_Assessment_Educational_Attainment_of_Students_2014.pdf accessed 10 May 2018.

together.¹³²⁶ National assessment must be able to evaluate the extent to which students have acquired human rights' knowledge and values and how they are prepared to incorporate them in their daily behaviour.¹³²⁷ Performance tests:

should be devised to assess the extent to which students have incorporated [human rights] values into their understanding, commitment and day-to-day behavior patterns. This constitutes a response to rising levels of violence in many schools, a phenomenon which deserves consideration in assessing school-based evaluations.¹³²⁸

Singh however warns against overreliance on assessments, especially summative assessment stating that, by 'virtue of their particular accounts of learning, especially among younger students, standardized assessments may contribute to undermining the quality of teacher-student interactions and distorting curricular reforms'.¹³²⁹ Summative assessments must therefore be done with a balance of classroom formative assessments.¹³³⁰ The 'balance of assessments should emphasize to a greater extent teacher-designed, classroom-based formative assessments aimed at improving teaching and learning processes'.¹³³¹

4.8.4.2 The quality term basic education and the Education Act

More than 4 years after the enactment of the 2013 Constitution which provides for the right to basic education, the Education Act has not been amended to include the type of education which schools must provide. The World Declaration stated the necessity of governments to 'define acceptable levels of learning acquisition for educational programmes and to improve and apply systems of assessing learning

¹³²⁶ Ibid 10-11.

¹³²⁷ Ibid 15.

¹³²⁸ Ibid 15.

¹³²⁹ Kishore Singh 'Report of the Special Rapporteur on the right to education: Assessment of the *educational attainment of students and the implementation of the right to education*' (2014) 10 http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR_Assessment_Educational_Attainment_of_Students_2014.pdf accessed 10 May 2018.

¹³³⁰ Ibid.

¹³³¹ Ibid.

achievement'.¹³³² Countries need to have 'collective commitments' aimed at 'improving all aspects of the quality of education and ensuring excellence for all so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills'.¹³³³ The Education Act must, therefore, adopt the definition of the term, basic education, and its scope and content defined by the World Declaration. As stated above, the components of the definition must be context-specific taking into account the needs of Zimbabwe and in some instances to the needs of particular groups of people in Zimbabwe as long as such distinctions do not amount to unfair discrimination. The manner in which the basic learning needs must be taught and assessed needs to be clarified and such information must also be used as part of training educators when they are still attending colleges. Every pupil must have the right to be taught according to the curriculum, to be guided, counselled and be given sufficient support in learning.¹³³⁴

4.8.5 The Basic Education provided by schools must be available, accessible, adaptable and acceptable

4.8.5.1 International law interrelated elements and the Basic Education Act

The accessibility, adaptability, acceptability and availability of the right to basic education is an important component which is in compliance with the provisions of General Comment 13 of the ICESCR as they were elaborated in chapter 2.¹³³⁵ Authors like Churr agree that the four interrelated elements - availability, accessibility and acceptability and adaptability - are essential features of a basic education.¹³³⁶ Arendse states that these elements 'give concrete content to the right to basic education and

¹³³² *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 in Jomtien, Thailand (1990), A, IV.*

¹³³³ Yves Daudet, Kishore Singh 'The Right to Education: An Analysis of UNESCO's Standard-setting Instruments' (2001) UNESCO <http://unesdoc.unesco.org/images/0012/001238/123817e.pdf> accessed 10 May 2018 36.

¹³³⁴ *Basic Education Act, 1998 S30(1).*

¹³³⁵ *General Comment 13: The Right to Education* (1999) para 6 (c).

¹³³⁵ *Ibid.*

¹³³⁶ C Chuur 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) 18 PER/PELJ 7 2414.

contribute to the successful provision of a basic education'.¹³³⁷ The Zimbabwean Education Act does not currently provide that basic education must be available, accessible, adaptable or acceptable. Even if the mentioning of the interrelated elements is not viewed to be important, still the Education Act does not provide a scope and content of education which meets the above components as they are discussed by international law. A legal provision of a basic education framework which ensures that the provision of basic education in Zimbabwe meets the above components is vital.

An analysis of the available education is about ensuring that inputs are there which make learning possible. The basic form of availability is the existence of the schools.¹³³⁸ It is therefore encouraging to note that the Education Bill gives local authorities the task to ensure land to build schools is available as discussed above. However, once land is identified, schools must be built and infrastructure, teachers and school facilities must be available.¹³³⁹ Without the inputs identified by the General Comment 13, learning will be impossible. This view was advanced in the American case of *Campaign for Fiscal Equity* which stated that, whilst basic education is about achieving certain learning goals, it requires adequate physical inputs.¹³⁴⁰ In line with the provisions of General Comment 13, the Education Act must provide that basic education will only be regarded as available in a country if the country has functional educational institutions.¹³⁴¹ Indicators of functionality are numerous, ranging from the numbers and quality of school classrooms, laboratory and sports buildings which have sanitation facilities for males and female, computer facilities as well as the provisions of functional and well- stocked libraries. The Act must also specify that a functional available school must have well-maintained sporting grounds, clean running water and reliable electricity and materials to assist those who are disabled and those with other

¹³³⁷ Arendse L 'The obligation to provide free basic education in South Africa : an international law perspective' (2011) 14 PER/PELJ 100.

¹³³⁸ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 39.

¹³³⁹ Ibid.

¹³⁴⁰ *Campaign for Fiscal Equity* 86 NY 2d 307 (NY 1995).

¹³⁴¹ *General Comment 13: The Right to Education (1999)*, para 6 (a).

special needs as well.¹³⁴² All the above components are inputs which make the attainment of a basic education possible.

On the aspect of a safe learning environment which is regarded to be an aspect of a functional available school, the government must establish detailed minimum health and security standards for every learning environment.¹³⁴³ Schools must be equipped with means to combat fire and flooding and this also involves the need for proper electrical wiring, water and in possible circumstances, fire proof buildings. The importance of safety was stated in the Indian case of *Avinash Mehrota v Union of India* where the court noting that the state had failed to deliver the right to education through the provision of safety measures against fire stated that, 'education requires more than a teacher and a blackboard, or a classroom and a book, the right to education requires that a child study in a quality school and a quality school certainly should pose no threat to the child's safety'.¹³⁴⁴ On the aspect of sanitation facilities, a mere mention of the words or rather phrase sanitation facilities will not suffice to satisfy the General Comment 13 requirement. The number of the facilities per number of school enrolments and the budget allocations for the maintenance must be mentioned. The need for customised functional available sanitation facilities for the disabled as well as for members of various genders must be specified. The presence of sanitation facilities adjacent to the classroom must be specified relating to the age of the learners. The availability and sufficiency of such things as tissues, hand wash, water, electricity, condoms and sanitary pads for girl children must be specified in view of the need for healthy environments at school. On the aspect of libraries, a mere mention of the word 'library facilities' is not enough. The number of well-stocked libraries per school enrolments and subjects offered must be clarified as well as those responsible for fundraising and resourcing the libraries. In the view of this dissertation, depending on provincial climates, the availability of air conditioning, fans or temperature-control mechanisms in the library must be considered as indicators of a conducive learning and reading environments for children.

¹³⁴² Ibid.

¹³⁴³ Ajay D *Right to education* (Axis publishers 2010) 86.

¹³⁴⁴ *Avinash Mehrota v Union of India* 2009 6 SCC 398 para 30.

An available educational institution must also have sufficient qualified teachers and adequate textbooks. It has been stated that, 'the shortage of qualified and experienced teachers, as well as low morale and motivation of the teaching force is a key factor for low performance of education systems'.¹³⁴⁵ The Education Act needs to be amended to provide for teaching programs and their content which will be important to ensure the provision of basic education.¹³⁴⁶ The mere mention that a teacher should be qualified is not enough. The qualifications per subject must be specified and their continuous training must be provided for. If special considerations or derogations are to be made the extent of derogations must be specified. In relation to monitoring and evaluation, the Education Act must provide for continuous appraisal systems which 'focus on evaluating the ability of the teacher to perform his/her job'.¹³⁴⁷ The appraisal system may include 'teacher competency test' and these should be developmental and not used for punitive purposes.¹³⁴⁸

The making of education available also means the different circumstances of children, especially, marginalised children needs to be mainstreamed and barriers of any kind which can impede children from accessing quality education must be removed.¹³⁴⁹ Monitoring and evaluation is important, as such an independent inspectorate must be established to assess the availability of education being provided and its compliance with both law and policy.¹³⁵⁰ During the regional conference on Education for All for Sub-Saharan Africa in 1999, African education ministers with the representatives of civil society, as well as international agencies recognized the importance of safe learning environments by stating that 'safe and inspiring learning environments will enable [learners to] realize their full potential'.¹³⁵¹ A legal framework must be enabled which endeavours to ensure learners are socially, culturally, religiously, economically and politically safe even if they may be persons of a particular

¹³⁴⁵ Joel *E Educating all children , a global agenda* (Cambridge 2006) 324.

¹³⁴⁶ Ibid.

¹³⁴⁷ Ibid.

¹³⁴⁸ Ibid.

¹³⁴⁹ Ibid.

¹³⁵⁰ Ibid.

¹³⁵¹ *Dakar Framework of Action: Meeting our collective Commitments: A Framework for action in the sub-Saharan Africa Education for the African Renaissance in the 21st century: Priority areas of focus.*

gender, social orientation, economic and cultural status or even foreigners. The Act must further provide a legal framework where school authorities cooperate and engage with community authorities to ensure the safety of children.

For acceptable education, the key point here is, 'it is not access to any kind of education that counts: The right to education is only fulfilled if certain Constitutions are in place, such as it being offered in an appropriate language of instruction, avoiding indoctrination, and respecting the cultural backgrounds of learners'.¹³⁵² The first acknowledgment is that the Education Act of Zimbabwe does not mention the type of education it intends for learners. It does not mention the term - basic education - or provide indications relating to the contents of the curriculum for the constitutionally- desired type of education which is basic education. The suggestion by this dissertation is that, as a starting point, the Act must lay foundations for educators and policy-makers which gives informative specifics relating to the curriculum contents of a basic education. Noting that the term - basic education - in the Zimbabwean Constitution was first conceptualised by the World Declaration, an acceptable basic education must logically be founded on compliance with the quality of basic education explanations desired by the World Declaration. The content of the curriculum must address specific components of the essential learning tools and a basic learning content as they were identified by the World Declaration. The Act must address aspects of delivery methods and assessments which must all align to the objectives intended by the World Declaration and various international instruments discussed in chapter 2.¹³⁵³

Aspects like language, assessments which support the curriculum for a child to successfully acquire basic learning needs must be clearly regulated. Whilst the Education Act of Zimbabwe specifies the languages to be used at primary and secondary level, it states that the mother language can only be used for the first four years in primary school and English must be used for the remaining period of basic

¹³⁵² McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 39.

¹³⁵³ *General Comment 13: The Right to Education* (1999) para 6 (c).

education.¹³⁵⁴ The problem is that a learner would have spent the first four years learning primarily in their mother language, hence, English will be a foreign language to them. The possibility that the learner might not have mastered the English language may be there and the Act must give the leeway for teachers to continue using the mother language as long as it is still in the best interests of the learner. On the aspects of delivery methods, teaching and evaluation for basic education, the Act must clarify the body responsible for evaluating learners, the frequency of evaluation and the outcomes intended of such evaluation. The Education Act must mandate every education provider to implement a plan which intends to safeguard pupils against violence, bullying and harassment at schools.¹³⁵⁵ Violence, bullying and harassment must be defined to include these actions between student and student, teacher and student, student and non-teaching staff or any combination of the above. The treatment of learners with dignity must be regarded as the pinnacle of a functional school. Dignified forms of discipline, such as cautions and warnings must be sanctioned as preferable and dismissal must be viewed as the last resort.¹³⁵⁶

Adaptability is about the extent to which institutions adapt to the needs of the diverse society and foster inclusivity as well as cope with changing times¹³⁵⁷. On Adaptable education, the Education Act must lay a framework of basic education which offers education that is flexible enough and can adapt to the needs of the Zimbabwean society it operates in. The Education Act must ensure the prescription of education which suits the local needs of the learners and addresses various cultural issues, an approach which aligns with the World Declaration and General Comment 13 which recommends that education must adapt to the local needs of learners.¹³⁵⁸ Basic Education must be adapted to the special needs of minorities, such as the disabled. General Comment 13 states that basic education must be accessible as earlier on discussed. Whilst there are obstacles which may exist which may make learners find

¹³⁵⁴ *Education Act 1987*, s 62 (1) 'Three languages must be taught in primary schools which are Shona, English and Ndebele with Ndebele taught in areas where Ndebele is the mother language and Shona taught in areas where Shona is the mother language' accessed 2 June 2015.

¹³⁵⁵ *Ibid.*

¹³⁵⁶ *Ibid.*

¹³⁵⁷ McCowan Tr *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 39.

¹³⁵⁸ *General Comment 13: The Right to Education* (1999), para 6 (c).

it difficult to access education of quality, basic education must be accessible.¹³⁵⁹ Accessibility is about the elimination of barriers which make the acquisition of quality basic education possible; barriers can be economic, legal or administrative.¹³⁶⁰ Legal barriers include laws such as the Education Act of Zimbabwe which do not provide for basic education as stated in the Constitution. Legislative barriers also include the non-provision of free education at both primary and secondary school levels by the Education Act. The aspect of accessibility is linked to the provision of free and compulsory basic education discussed earlier. As recommended earlier, the Act must ensure basic education is compulsory, free and within the physical reach of all children. Discrimination of any kind in the provision of education, either on sexual, national, religious, financial or on any grounds prohibited by the Constitution or international law must be abolished. In the case of *Amos Makani and Others v Arundel School and Others*, the court stated that, section 4 of the Zimbabwean Education Act prohibits discrimination in the admission of children to school.¹³⁶¹

4.8.6 Basic education is provided at primary and secondary school levels

The right to basic education is not school attendance but school attendance is a component of the right to basic education as discussed in chapter 2. Within the human rights framework, the school is viewed as the medium for children to learn through and equally to accessing learning programmes.¹³⁶² In elaborating the role of the school, the World Declaration of Basic Education states that the school is the 'the main delivery system for the basic education'.¹³⁶³ As mentioned earlier, General Comment 13 to the ICESCR was the first to lay bare the close relationship between basic education and school attendance.¹³⁶⁴ In accordance with its provisions, the first point

¹³⁵⁹ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 39.

¹³⁶⁰ Ibid 41.

¹³⁶¹ *Amos Makani and Others v Arundel School and Others* (2016) 7 CCZ 9.

¹³⁶² *The Dakar Framework for Action, Education for All : Meeting our Collective Commitments Adopted by the World Education Forum Dakar, Senegal (2000) Including six regional frameworks for action para 2 (3).*

¹³⁶³ *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 in Jomtien, Thailand (1990), A V.*

¹³⁶⁴ *General Comment 13: The Right to Education (1999)*, para 13(9).

of introducing basic education outside the home is at the primary school.¹³⁶⁵ General comment 13 proceeds to state that the provision of basic education is not limited to the primary school but secondary education, 'includes the completion of basic education and consolidates lifelong learning'.¹³⁶⁶ General Comment 13 therefore provides the clarity that basic education is provided at both primary and secondary schooling levels making the attendance of both primary and secondary school vital for the acquisition of basic education.¹³⁶⁷

As earlier mentioned, MacCowan paused a question as follows, universally, the right to education is identified with the school, '[b]ut are we justified in seeing the right to basic education as being a right [to attend a school]?'¹³⁶⁸ Liebenberg further questioned whether or not schooling could be equated to basic education.¹³⁶⁹ The answer by this dissertation is, that, whilst the right to education is broader than school attendance, school attendance at primary and secondary school levels is a component of the right to basic education. The school is a delivery system for the right to basic education¹³⁷⁰. Attendance of both primary and secondary school is concluded by this dissertation to be one of the six components of the right to education. It is an important realization of this dissertation that, attendance of school alone does not suffice as compliance with all the obligations imposed by the right to education; it is just one of the components. The acquisition of basic education is therefore enabled by primary schooling and secondary schooling making them important components of the right to basic education. The Education Act mentions that, it regulates the

¹³⁶⁵ Ibid.

¹³⁶⁶ Ibid, para 12, 'While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities.7 Article 13 (2) (b) applies to secondary education 'in its different forms', thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages alternative educational programmes which parallel regular secondary school systems'.

¹³⁶⁷ Ibid.

¹³⁶⁸ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 1.

¹³⁶⁹ Liebenberg S *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 243.

¹³⁷⁰ McCowan T *Education as Human Right: Principles for a Universal Entitlement to learning*, (Bloomsbury Academic, 2013) 69.

provision of primary and secondary education in Zimbabwe.¹³⁷¹ Whilst it does not state that it regulates the provision of basic education, it clarifies that school education is provided at both primary and secondary school levels.¹³⁷² The Education Act must be amended to provide that, both primary and secondary school levels must be compulsory to allow learners to acquire basic education.

4.9 Conclusion

This chapter placed the determination of the scope and content of the right to basic education within a historical context that Zimbabwe was once a colonial state and education was once used as a tool to perpetuate racial discrimination. Education was regarded as so important that, its deprivation or limited provision was used as a device to ensure that the poor remained poor and oppressed. The independence of Zimbabwe did a lot to ensure the equitable provision of education but the joy was short-lived. A legislative framework against international law as well as the continued deterioration of the economic situation in Zimbabwe both contributed to an education for children which is today faced by among others fee payments, lack of schools, lack of teachers, chairs and desks, high failure rates and a legislative framework against international law obligations binding on Zimbabwe. Today, whilst the constitutional provision of the right to state-funded basic education is progressive and welcome, the deprivation of basic education to foreigners within the Zimbabwean jurisdiction is still against international law.

To ensure the provision of basic education which meets the obligations imposed by both international law and the Zimbabwean Constitution, the reasoning by this chapter is that in relation to Zimbabwe, the right to basic education has a recognised scope and content which encompasses six components which have equal importance. First, it is a right which prescribes the provision of a type of education called basic education which is quality-oriented. Second, the provision of basic education is not possible without the attendance of primary and secondary school. Third, the

¹³⁷¹ *Education Act, 1987*, Preamble.

¹³⁷² *Ibid*, Interpretation S 2.

attendance of primary and secondary school is made possible if schools are not only compulsory but free. Fourth, the right to basic education should be regarded as an immediately claimable right which is not qualified by resource or other constraints and fifth the right to basic education must be regarded as the minimum core content of the right to education and sixth, any education including basic education must exhibit characteristics of the interrelated elements sanctioned by General Comment 13 which states that education must be accessible, acceptable, adaptable and available. The next chapter will discuss the right to basic education in South Africa stating its components to encompass six interrelated elements which are similar to those of Zimbabwe. The ultimate recommendation is that with similar obligations, Zimbabwe and South Africa must collaborate and discuss strategies to ensure compliance with the right to basic education obligations.

CHAPTER 5

THE SCOPE AND CONTENT OF SECTION 29 (1) (A) OF THE SOUTH AFRICAN CONSTITUTION

5.1 Introduction

As already noted from the last chapters, conceiving education as a human right which must be provided by states has become international. Just like in the case of Zimbabwe discussed in the last chapter, the importance and benefits of education also led to the enactment of section 29 (1) (a) of the South African Constitution which provides that 'everyone has a right to basic education'.¹³⁷³ The constitutional provision of the right to basic education by the Constitution is commendable and in line with the international ideal to make basic education universally accessible. However, whilst the right to basic education is provided by international law, 23 years after the enactment of the Constitution, there is no legislative document in South Africa which details the scope and content of section 29 (1) (a) or of the right to basic education. Whereas our motivations may differ, the concern relating to the lack of a determined legally-enforceable scope and content of the right to basic education is a sustained conversation in South Africa. As stated in chapter 1, Liebenberg¹³⁷⁴, writing on the section 29 (1) (a) of the Constitution and authors, such as Churr¹³⁷⁵ have already recognised the absence of legal clarity relating to the scope and content of the right to basic education. Despite the lack of clarity, the importance of explaining constitutional provisions in laws of general application is noted by this dissertation.¹³⁷⁶ The need for constitutional interpretation and delimitation of the obligations imposed by constitutional obligations is important in order to ensure that states know their obligations and citizens know their entitlements. Also, as stated in chapter 1,

¹³⁷³ Ibid, S29 (1) (a).

¹³⁷⁴ Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 242.

¹³⁷⁵ Chuur 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) *PER/PELJ* 7 2408 'It is important to note that section 29 does not specify the content and quality of the education that the state must provide nor has the South African Constitutional Court considered the scope and content of the right to basic education'.

¹³⁷⁶ Du Plessis 'The status and role of legislation in South Africa as a constitutional democracy: some exploratory observations' 14 (2011) *PER* 9.

legislation specifying the scope and content of the right to basic education is highly desirable. The reality in South Africa is that, contrary to providing the scope and content of basic education, the South African Schools Act (Schools Act)¹³⁷⁷ mentions the term, basic education, only in reference to the definition of the word 'minister' who is referred to as the Minister of Basic Education.¹³⁷⁸ The remaining question is;- What is the scope and content of the right to basic education for the purposes of its implementation in South Africa? This chapter intends to answer the above question.

5.2 The history of basic education in South Africa

5.2.1 Introduction

The history of education in South Africa dates back from the time when communalism formed the basis of life among Africans and education was conducted informally in a manner that benefited the extended family,¹³⁷⁹ to the colonial times when missionaries had a leading role in providing education for Africans.¹³⁸⁰ It proceeds to the apartheid era when education was provided along racial lines, to the constitutional era when education is now a human right protected by section 29 of the Constitution. It will be noted that, whilst the apartheid era legalised discrimination in education, the post-apartheid era in many circumstances continued to reinforce the legacy left by the apartheid era. The discriminatory provision of education still manifests itself in various forms as will be discussed under the history of education below. The situation justifies the need for a legal framework which provides for the scope and content of the right to basic education and provides citizens with clear entitlements to demand the state to rectify any situation which poses itself as a denial of the right to basic education.

5.2.2 The apartheid era

¹³⁷⁷ *South African Schools Act No, 84 of 1996.*

¹³⁷⁸ *Ibid* Preamble.

¹³⁷⁹ Farrant J S *Principles and practices of education* (London: Longman 2006) 30.

¹³⁸⁰ Christie P *The rights to learn* (Ravan Press 1991) 10.

After the National Party won the national elections in 1948, there was the introduction of the policy of apartheid in South Africa.¹³⁸¹ Apartheid 'epitomised a harsh scheme of enforced segregation, racial discrimination, inequality and political oppression'.¹³⁸² During apartheid, discrimination in the provision of education was legalised. 'Separate development'¹³⁸³ was the rationale behind the system of apartheid and it ensured the unequal distribution of education opportunities in South Africa.¹³⁸⁴ The introduction of apartheid was hand in glove with the introduction of the Christian National Education (CNE) Policy of 1948.¹³⁸⁵ CNE had the objective to christianise the Black person thereby bringing them into permanent economic and political subordination and control by the White person.¹³⁸⁶ The education system was racist and unequal both at social and economic levels.¹³⁸⁷ For the purposes of education, there was a division of races into four classes - Blacks, Indians, Coloureds and Whites - coupled with different legislation and curricula that governed each class.¹³⁸⁸ Discriminatory legislation included the Coloured Persons Act 1963, the Indian Education Act 1965 and the Bantu

¹³⁸¹ Nekhuwevha F 'Transformation education: The education crisis and suggested solutions', A paper delivered to the Association for Sociology in Southern Africa in June- July 1987 at the Conference held in the Western Cape (1987) 15.

¹³⁸² Smit M H *Fundamentals of human rights and democracy in education-A South African perspective* (Van Schaik 2011) at 47.

¹³⁸³ Robertson N & Robertson B *Education in South Africa* (Delta Kappa Publishers 1977) 6.

¹³⁸⁴ Christie P *The rights to learn* (Ravan Press 1991) 56-57.

¹³⁸⁵ Msila V 'From Apartheid Education to the Revised National Curriculum Statement: Pedagogy for Identity Formation and Nation Building in South Africa' 16 (2007) *Nordic Journal of African Studies* 148. 'As early as 1855 , the British had also began to establish missionary schools and colleges such as Lovedal and Fort Hare University with the agenda to westernise Africans and share with them a Christian world view in order that they would become subservient and controllable slaves. In 1855 Sir Gorge Grey was quoted stating that 'If we leave the natives beyond our border ignorant barbarians, they will remain a race of troublesome marauders. We should try to make them a part of ourselves, with a common faith and common interests, useful servants, consumers of our goods, contributors to our revenue. Therefore, I propose that we make unremitting efforts to raise the natives in Christianity and civilization, by establishing among them missions connected with industrial schools. The native races beyond our boundary, influenced by our missionaries, instructed in our schools, benefiting by our trade would not make wars on our frontiers'. The above quotation summarizes the basic political intentions of missionary education among the Africans. It was geared to make the Africans docile and tame through the use of the Christian philosophy. Missionary education had an impact on the indigenes and while they were being anglicized, the Afrikaners started formulating their own education system. The Afrikaners had set up their schools in the trekker states such as the Orange Free State and the Transvaal. It was in these trekker states that Apartheid Education had its beginnings'.

¹³⁸⁶ Ibid.

¹³⁸⁷ Nekhuwevha F 'Transformation education: The education crisis and suggested solutions', A paper delivered to the Association for Sociology in Southern Africa in June- July 1987 at the Conference held in the Western Cape (1987) 11.

¹³⁸⁸ Molteno F 'The historical foundations of the schooling of Black South Africans' in Kallway P *Apartheid and education: Education of Black South Africans* (Ravan Press 1984) at 88-89.

Education Act 1953 which regulated education for the South Africans of African origin who were often referred to as 'Natives'.¹³⁸⁹ Aspects of the CNE policy were said to have been recognisable in the Bantu Education Act although the CNE policy was not properly enforced in relation to the education of White people.¹³⁹⁰

Natives, whose history of education is the main focus of this article, were Africans originating from South Africa, who were the majority, the most in crisis, the most oppressed and those whose education was regulated by the Bantu Education Act.¹³⁹¹ The Bantu Education Act had two aims, first, it brought 'an end to missionary control of the education of black people and institute[d] a system of mass education'¹³⁹² and secondly, it legalised a special, inferior, form of education for Blacks in South Africa that differentiated it, specifically from the education provided for the White minority.¹³⁹³ To support the objectives of Bantu education, in 1953, Hendrik Verwoerd, the then Minister of Native or Bantu Education, addressed parliament concerning a special form of education for natives.¹³⁹⁴ He stated that Natives had limited opportunities in South Africa and as such they needed minimal education as they would never be absorbed in certain professions.¹³⁹⁵ At the peak of apartheid in the 1970s, per pupil spending in schools for White learners was ten times that in schools for Black learners.¹³⁹⁶ Most Black schools did not have trained teachers or enough classrooms, were underfunded, overcrowded and black teachers were underpaid.¹³⁹⁷ On the other hand, White learners had their own schools with mostly well-trained

¹³⁸⁹ Ibid.

¹³⁹⁰ Eshak I, 'Authority In Christian National Education and Fundamental Pedagogics'. A Research Report submitted to the Faculty of Education, University of the Witwatersrand, Johannesburg, in part-fulfilment of the requirements of the degree of Master of Education. <http://www.sahistory.org.za/archive/authority-christian-national-education-and-fundamental-pedagogics-yousuf-ismail-eshak-1987>, accessed 24 July 2018.

¹³⁹¹ 'A history turning points: The beginning of formal education.' <http://www.sahistory.org.za/classroom/feature/hiseduc.htm> accessed 7 July 2014.

¹³⁹² Ibid.

¹³⁹³ Ibid.

¹³⁹⁴ Nekhuwevha F 'Transformation education: The education crisis and suggested solutions', A paper delivered to the Association for Sociology in Southern Africa in June- July 1987 at the Conference held in the Western Cape (1987) 10-11.

¹³⁹⁵ Ibid.

¹³⁹⁶ 'Education' Available at <http://countrystudies.us/south-africa/56.htm> accessed 21 June 2015.

¹³⁹⁷ Mncwabe M P *Post-Apartheid education: Towards non-racial, unitary and democratic socialisation in the new South Africa* (Lanham: University Press of America,1993) at 27.

teachers.¹³⁹⁸ They also had their own special curricula whilst Blacks in schools for Black learners had curricula that made it almost impossible for African students to go beyond matric or to qualify for admission to any higher education institution.¹³⁹⁹

As resistance to apartheid grew more fierce, there was an uprising by Black students which was termed - the 1976 Soweto uprising.¹⁴⁰⁰ One of the main reasons behind the uprising was the decision by the government to force Black students to learn in Afrikaans. African students contended that they could not learn in Afrikaans and they also wanted an education that could empower them.¹⁴⁰¹ The government reacted harshly to the confrontation and more than 500 students died.¹⁴⁰² However, because of the Soweto uprising, the South African Institute of Race Relations appointed a Commission, which compiled a report that stated that there was a need for equal opportunities and non-discrimination in education.¹⁴⁰³ It proposed changes in the allocation of resources in the South African budget, which would see a higher percentage of the budget spent on education and a more equitable distribution of resources. The report emphasised that it would be important to change the management of schools to foster community involvement.¹⁴⁰⁴ The Commission reported that there was a need to change the school curricula and textbooks so that they would not offend Black South Africans.¹⁴⁰⁵ It also stated the need for schools and education with an open enrolment for all.¹⁴⁰⁶ In recognition of the existence of substantial number of unqualified Black adults, the report emphasised the need to institute adult education as a high priority.¹⁴⁰⁷

¹³⁹⁸ Robertson N & Robertson B *Education in South Africa* (Delta Kappa Publishers 1977) 19-23.

¹³⁹⁹ Taylor R 'The narrow ground: Critical intellectual work on South Africa under Apartheid' (1991) 5(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.

¹⁴⁰⁰ Mncwabe M P *Post-Apartheid education: Towards non-racial, unitary and democratic socialisation in the new South Africa* (Lanham: University Press of America,1993) at 27.

¹⁴⁰¹ Ibid.

¹⁴⁰² Ka Choeu C 'The right to education: An elusive quest for the youth in South Africa' (1991) 38 *Africa Today* 75.

¹⁴⁰³ Mncwabe M P *Post-Apartheid education: Towards non-racial, unitary and democratic socialisation in the new South Africa* (Lanham: University Press of America,1993) at 9-13.

¹⁴⁰⁴ Ibid.

¹⁴⁰⁵ Ibid.

¹⁴⁰⁶ Ibid.

¹⁴⁰⁷ Ibid.

In June 1980, the government of South Africa commissioned the Research Council Review Commission (RCRC) to review South African education.¹⁴⁰⁸ The RCRC 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.¹⁴⁰⁹ The report recognised that education in South Africa was in a crisis and attempted to make recommendations to confront the problems.¹⁴¹⁰ It emphasised that every South African had an entitlement to a 'rightful share' of education.¹⁴¹¹ 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.¹⁴¹² The De Lange report was criticised for proposing the adoption of Christian National Education again since its foundation and principles were already found in Bantu education.¹⁴¹³ Among others, the choices of the apartheid government had resulted in many Black people not receiving an education. In 1988 an estimated 1 051 189 Black children had not been able to attend school¹⁴¹⁴ and only 2.7% of Black African students were in standard ten.¹⁴¹⁵

The 1989 matriculation results for Africans were reported to be disastrous and following - a back to school campaign - in that year, the waiting list for registration with the Department of Education increased to 30 644 names.¹⁴¹⁶ 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.¹⁴¹⁷ On the contrary, White students had different

¹⁴⁰⁸ Chisholm L 'Redefining skills: Black education in South Africa in the 1980s' in Kallway P, *Apartheid and education: Education of Black South Africans* (Ravan Press 1984) at 388.

¹⁴⁰⁹ Mncwabe M P *Post-Apartheid education: Towards non-racial, unitary and democratic socialisation in the new South Africa* (Lanham: University Press of America,1993) 13.

¹⁴¹⁰ Kallway P *Apartheid and education: Education of Black South Africans* (Ravan Press 1984) at 32.

¹⁴¹¹ Mncwabe M P *Post-Apartheid education: Towards non-racial, unitary and democratic socialisation in the new South Africa* (Lanham: University Press of America,1993) at 3-23.

¹⁴¹² Christie P *The rights to learn* (Ravan Press 1991) 189.

¹⁴¹³ Kallway P *Apartheid and education: Education of Black South Africans* (Ravan Press 1984) 32.

¹⁴¹⁴ Christie P *The rights to learn* (Ravan Press 1991) 119.

¹⁴¹⁵ Ibid, 121.

¹⁴¹⁶ Mncwabe M P *Post-Apartheid education: Towards non-racial, unitary and democratic socialisation in the new South Africa* (Lanham: University Press of America,1993) 38.

¹⁴¹⁷ Ibid 3-23.

results and as early as 1981, 94 % of White matriculants passed their standard 10 and 49% received a matric exemption.¹⁴¹⁸ In March 1989 there was a shortage of 60 343 primary schools and 99 505 secondary school classrooms for Black students¹⁴¹⁹ whilst there were an estimated 213 215 empty seats in schools for White learners.¹⁴²⁰ As a step towards reforming the 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.¹⁴²¹ 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.¹⁴²² As the reforming education process began in 1993, South Africa became a democratic state led by a majority government in 1994.

The fight for a better education led to a relook of the whole education system when South Africa gained independence leading to the enactment of the Constitution of South Africa which embodies the right to basic education. The Constitution of South Africa is read together with the South African Schools Act and the two will be discussed in this chapter.

5.2.3 The state of education during the post-independence era

The end of apartheid saw the dawn of a new era in the South African educational system.¹⁴²³ South Africa inherited the unequal apartheid regime which had legalised segregation in Schools.¹⁴²⁴ Reorganising the educational system was one of the

¹⁴¹⁸ Christie P *The rights to learn* (Ravan Press 1991) 120.

¹⁴¹⁹ Mncwabe M P *Post-Apartheid education: Towards non-racial, unitary and democratic socialisation in the new South Africa* (Lanham: University Press of America,1993) 37-41.

¹⁴²⁰ Christie P *The rights to learn* (Ravan Press 1991) 119.

¹⁴²¹ 'South Africa: Soweto and its Aftermath' Available at <http://www.country-data.com/cgi-bin/query/r-12130.html> accessed 21 June 2010.

¹⁴²² Ibid.

¹⁴²³ Malherbe R 'A fresh start 1: Education rights in South Africa' 4 (2000) *European Journal for Education Law and Policy* 49.

¹⁴²⁴ Ibid, 42 'The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation, even in education and schools in South

daunting tasks the government had to make. The rejection of education for a vast number of years had resulted in a generation of Black youngsters who had not received an education or quality education which could enable them to be competitive in the labour market.¹⁴²⁵

The need to review the divided curriculum was the most notable inevitable duty of the Ministry of Education. Arguments were put forward which called for the need to critique theories which informed apartheid education.¹⁴²⁶ Critiques noted that 'the philosophical base of the Bantu Education curriculum was fundamental pedagogics, which served apartheid interests'.¹⁴²⁷ The whole conception of children as helpless and under the ultimate control and guidance of the adult in the education situation led to the view that apartheid teachers who were also trained in fundamental pedagogy were not democratic as they were trained to perpetuate repressive systems by use of control in the classroom.¹⁴²⁸ The premise of the Bantu Education which was that teachers in authority must reinforce a certain oppressive ideology and reinforce passive acceptance of the ideology from Black students was said to be the authoritative view of life shared by fundamental pedagogics.¹⁴²⁹ Without totally disregarding the views by fundamental pedagogists, they were criticized for having one rigid way of viewing the education process - as an undemocratic one.¹⁴³⁰

Whilst fundamental pedagogists claimed to be 'scientists' studying education as a science not as politics, they were blamed for sharing the Christian education notion

Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners'.

¹⁴²⁵ Woolman and Fleisch *The Constitution In The Classroom: Law and education in South Africa 1994-2008* (Pretoria University Law Press 2009) 39-40.

¹⁴²⁶ Rusznyak L 'South African Education still fails many 20 years after apartheid' <http://theconversation.com/south-african-education-still-fails-many-20-years-after-apartheid-22069>, accessed 23 July 2018.

¹⁴²⁷ Naicker MS 'From Apartheid Education to Inclusive Education: The Challenges of Transformation' (2000) Paper Presented at Education Summit for a Democratic Society Wayne State University Detroit Michigan USA June 26-28, <http://www.wholeschooling.net/WS/WSPress/From%20Aparthied%20to%20Incl%20Educ.pdf> accessed 23 July 2018.

¹⁴²⁸ Ibid 7-8.

¹⁴²⁹ Ibid.

¹⁴³⁰ Ibid.

that authority is power.¹⁴³¹ In addition to fundamental pedagogics, Christian National Education referred to earlier was said to be similar to fundamental pedagogics in the promotion of 'an authoritarian approach to education'.¹⁴³² Both theories were blamed for being authoritarian,

backed by inducements or by threats of punishment, with practices not open to question or debate. There was no consultation, authority being vested by God in Christian National Education and by science in fundamental pedagogy tenets which do not tally with the tenets of a democratic education system.¹⁴³³

Following the criticisms of the apartheid education, after independence, South Africa introduced a more liberal education called – Outcomes-Based Education (OBE).¹⁴³⁴ OBE was intended to move away from focusing on the content of education to focusing on the lifelong learning of the students being educated.¹⁴³⁵ Instead of education being an act of leading by the teacher through the teaching content, OBE encouraged children to democratically express their opinions in discussion with the teacher.¹⁴³⁶ Democracy being the premise of OBE, the classroom was to be viewed not as a means to oppress people but as an opportunity for students and teachers to learn to think critically, to participate in public life and to act responsibly.¹⁴³⁷ OBE viewed each learner as capable and in need of accommodation through various teaching and

¹⁴³¹ Eshak I 'Authority In Christian National Education and Fundamental Pedagogics' <http://www.sahistory.org.za/archive/authority-christian-national-education-and-fundamental-pedagogics-yousuf-ismail-eshak-1987> accessed 23 July 2018.

¹⁴³² Yonge DG 'Ideological Alchemy: The Transmutation of South African Didactics (and Fundamental Pedagogics) into Apartheid Education' (2008) *Journal of Curriculum Studies*, 409.

¹⁴³³ Eshak I 'Authority In Christian National Education and Fundamental Pedagogics' <http://www.sahistory.org.za/archive/authority-christian-national-education-and-fundamental-pedagogics-yousuf-ismail-eshak-1987> accessed 23 July 2018.

¹⁴³⁴ Laugsh R et al 'Outcomes Based Education in South Africa: Using an Instrument to assess school level environments during implementation' <http://www.ied.edu.hk/obl/files/lau07011.pdf>, accessed 28 July 2016'Outcomes-Based Education (OBE) approach. This bold step was taken to be in line with international trends – moving away from the content-driven curriculum emphasising examination results towards an emphasis on facilitating lifelong learning (Department of Education, 1997)'.

¹⁴³⁵ Ibid.

¹⁴³⁶ Rusznyak L 'South African Education still fails many 20 years after apartheid' <http://theconversation.com/south-african-education-still-fails-many-20-years-after-apartheid-22069>, accessed 23 July 2018.

¹⁴³⁷ Msila V 'From Apartheid Education to the Revised National Curriculum Statement: Pedagogy for Identity Formation and Nation Building in South Africa' *Nordic Journal of African Studies* 16 (2) (2007) 152.

assessment methods.¹⁴³⁸ Whilst the intentions of OBE seemed noble, the 'democratic' approach taken by South African teachers was criticized for diminishing the role and authority of existing educational knowledge through the over-reliance on unverified opinions by both students and teachers, as a source of knowledge.¹⁴³⁹ OBE seemed to challenge the use of text-books and the contention was that 'outcomes-based education called for a democratic relationship between teacher and learners, where the teacher simply facilitated lessons and students shared what they thought about a topic [instead of sharing what they would have read in text books]'.¹⁴⁴⁰ Teachers were said not to be encouraged to use textbooks as sources of knowledge and children seemed to have had no real reason to read.¹⁴⁴¹

The conception of education by OBE immediately led to problems with claims that students had become very confident in expressing opinions but never gaining any knowledge leading to low literacy and numeracy levels.¹⁴⁴² The situation led to curriculum changes with the aim 'to strengthen the knowledge-base of the curriculum and promote text-based learning'.¹⁴⁴³ Amid rising complaints about low pass rates, teachers were now encouraged to use textbooks for learning; this saw rising calls for the government to deliver textbooks in schools and a heavy focus on the need to

¹⁴³⁸ Naicker MS 'From Apartheid Education to Inclusive Education: The Challenges of Transformation' (2000) Paper Presented at Education Summit for a Democratic Society Wayne State University Detroit Michigan USA June 26-28, <http://www.wholeschooling.net/WS/WSPress/From%20Aparthied%20to%20Incl%20Educ.pdf> 3, accessed 23 July 2018.

¹⁴³⁹ Rusznyak L 'South African Education still fails many 20 years after apartheid' <http://theconversation.com/south-african-education-still-fails-many-20-years-after-apartheid-22069>, accessed, accessed 23 July 2018.

¹⁴⁴⁰ Ibid.

¹⁴⁴¹ Ibid.

¹⁴⁴² Mthsali N 'The ugly truth about Basic Education' IOL News South Africa, <http://www.iol.co.za/news/south-africa/ugly-truth-about-sa-education-> accessed, 28 July 2017, 'The country wide numeracy and literacy test taken by the Department of Basic Education in 2011 showed an average score mark of 30% between those in grade 2 to grade 10. 21% of those in grade 3 could comprehend text and only 25% had basic numeracy skills with 23% capable to write numbers in a sequential manner. Only 49 % of the grade 4's could understand text and most learners in this group could not motivate an answer. Only 8% of those in grade 4 could use tenses with only 12 % capable of thinking and reasoning. Only 20% of those in grade 5 could use tenses, and only 23% of those in grade 6 could read and understand what they were reading. Only 5 % of those in grade 6 could write an introduction and conclusion. Despite the increase in Matric pass rates, there are still schools which have a 0% pass rate and very few students qualify for university entrants.'

¹⁴⁴³ Rusznyak L 'South African Education still fails many 20 years after apartheid' <http://theconversation.com/south-african-education-still-fails-many-20-years-after-apartheid-22069>, accessed, accessed 23 July 2018.

improve pass rates yearly.¹⁴⁴⁴ The focus on increasing pass rates, however, exposed more problems within the education system. Despite the fact that UMALUSI¹⁴⁴⁵ had in the past added marks to failing students in order to improve the yearly pass rates¹⁴⁴⁶, the increase in pass rates is measured not by the percentage of students who registered to attend school in Grade 1 but by those who sit for examinations at the end of Grade 12. The 2011 census in South Africa indicated that there is a high school dropout rate¹⁴⁴⁷ in South Africa with only an average of 48% of students' who start Grade 1 completing Grade 12.¹⁴⁴⁸ Also, because of too much focus on pass rates, some schools were said to be discouraging poor-performing students from writing examinations so that these schools can improve pass rate statistics.¹⁴⁴⁹ Additionally, a pass alone is not enough for a student to pursue further education, and most students who were recorded as passed could not proceed to University; only 30.6% students managed to achieve a pass which could enable them to go to University in 2013.¹⁴⁵⁰ For those who qualify for university entrance, the basic education Minister confirmed that they did not have enough grounding in basic education and were finding it very

¹⁴⁴⁴ Recently, in the case of *Section 27 and others and The Minister of Basic Education (24565/2012)* the government was taken to Court to compel it to provide text books for South African Children at Basic Education level. Recommended books are no delivered on time and students have to go for long periods without books which make learning difficult if not impossible.

¹⁴⁴⁵ Umalusi's role in education and training in South Africa, <http://www.umalusi.org.za/show.php?id=2894> , accessed 23 July 2018, 'Umalusi Council sets and monitors standards for general and further education and training in South Africa in accordance with the National Qualifications Framework Act No 67 of 2008 and the General and Further Education and Training Quality Assurance Act No 58 of 2001.'

¹⁴⁴⁶ 'UMALUSI Matric Adjustments confidential' <http://www.news24.com/southafrica/News/Umalusi-Matric-adjustments-confidential-20110119> accessed, 23 July 2018, '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'.

¹⁴⁴⁷ Moadiasaotsile MB 'The failing standards of Basic Education in South Africa' <http://www.ai.org.za/wp-content/uploads/downloads/2012/03/No.-72.The-Failing-Standard-of-Basic-Education-in-South-Africa1.pdf> 1-3, accessed 28 June 2018, 'The school dropout rate is very high, the teachers are blamed for being less committed and learners have no support outside the school because many parents have never attended school themselves, and so do not know how to read, write and count properly'.

¹⁴⁴⁸ 'Rusznayak L 'South African Education still fails many 20 years after apartheid' <http://theconversation.com/south-african-education-still-fails-many-20-years-after-apartheid-22069>, accessed 23 July 2018. The school dropout rate is very high, the teachers are blamed for being less committed and learners have no support outside the school because "many parents have never attended school themselves, and so do not know how to read, write and count properly'.

¹⁴⁴⁹ Ibid.

¹⁴⁵⁰ Ibid.

difficult to progress through their university education.¹⁴⁵¹ It will be later noted in this dissertation that rising pass rates are not an indication of quality education.

The move towards textbook-learning however means that children must have access to both text books and libraries. On the issue of textbooks, the Department of Basic Education which is tasked with the provision of books has been blamed for failing to deliver textbooks on time or to deliver enough or updated textbooks.¹⁴⁵² The real problem has been said to be the 'mismanagement in the procurement and delivery of schoolbooks' with reports in 2012 stating that 80% of 200 schools did not receive sample textbooks enough for one learner.¹⁴⁵³ In 2013, SECTION27 which is a civil society lobby group approached the court for an order which was granted to compel the court to deliver text books by the end of December 2012 in preparation for the 2013 school year.¹⁴⁵⁴ Also to address the crisis that learners across South Africa do not use the same textbooks, in 2014 it was reported that Basic Education Ministry had drafted the Provision and Management of Learning and Teaching Support Material policy in order to provide a framework where all pupils in South Africa use the same study material and textbooks.¹⁴⁵⁵

In relation to libraries, most public schools do not have libraries.¹⁴⁵⁶ By 2009 as much as 20 000 public schools had no libraries¹⁴⁵⁷ yet a research by Equal Education, a lobby group concluded that 'over 50% of learners identified school libraries as places where they would do homework and study for exams and libraries offered stable sites for studying'.¹⁴⁵⁸ In addition to lacking libraries, some schools do not have basic infrastructure. In 2011 Department of Basic Education National Education

¹⁴⁵¹ Ibid.

¹⁴⁵² Dlodlo N and Foko T 'Challenges facing textbook provision to South African Schools' http://ceur-ws.org/Vol-955/papers/paper_21.pdf, accessed 23 July 2018.

¹⁴⁵³ John V 'Schoolbook shortage a chronic issue in SA' <http://mg.co.za/article/2012-08-10-00-schoolbook-shortage-a-chronic-issue>, accessed 23 July 2018.

¹⁴⁵⁴ Ibid.

¹⁴⁵⁵ Ibid.

¹⁴⁵⁶ Nicholson J 'Access denied: The state of libraries in Post-Apartheid South Africa' <http://www.ibiblio.org/wlp/>, accessed 23 July 2018.

¹⁴⁵⁷ Equal Education 'School libraries' <http://www.equaleducation.org.za/page/school-libraries>, accessed 23 July 2018.

¹⁴⁵⁸ Ibid.

Infrastructure Management System Report reported that 3 544 schools did not have electricity supply; 804 schools had an unreliable electricity source; 2402 schools did not have water supply; 2611 schools had unreliable water supply; 913 did not have ablution facilities and 11 450 schools used pit latrine toilets.¹⁴⁵⁹ 22 938 schools did not have a fully-stocked libraries, while 19 541 did not even have a room to use as a library; 21 021 schools did not have facilities for a laboratory while 1 231 schools did not have equipped laboratories; 2 703 schools were not fenced; 19 037 schools did not have a computer centre, whilst a further 3 267 had a space for a computer centre but did not have computers.¹⁴⁶⁰

Further on the issue of infrastructure, in 2012, 2401 schools had no water on the school site, 3544 were not connected to electricity and 913 schools had no ablution facilities.¹⁴⁶¹ Further, in 2013 the Department of Basic Education confirmed that South Africa has about 510 mud schools despite the fact that¹⁴⁶² the government was taken to court in the case of *Centre for Child Law and 7 others v Government of the Eastern Cape Province and Others*¹⁴⁶³ over mud schools. Amid legal battles to stop education in mud schools, the government introduced the Accelerated School Infrastructure Development Initiative in 2010 and President Zuma opened the first 49 schools under the programme in the year 2012.¹⁴⁶⁴ The initiative aimed to replace over 500 mud schools and to 'upgrad[e] existing schools so that they comply with basic standards in water supply, sanitation and electricity. Supplying sanitation to over 900 schools, installing electricity to over 900 schools and providing 1000 schools with basic water supplies for the first time'.¹⁴⁶⁵ Critics, however have stated that the government is falsely presenting its progress in replacing mud schools and there is still a lot that

¹⁴⁵⁹ Ibid.

¹⁴⁶⁰ Ibid.

¹⁴⁶¹ Skelton A 'Leveraging funds for school infrastructure: The South African mud schools case' http://repository.up.ac.za/bitstream/handle/2263/41581/Skelton_Leveraging_2014.pdf?Sequence=11-2, accessed 23 July 2018.

¹⁴⁶² Ibid.

¹⁴⁶³ *Centre for Child Law and 7 others v Government of the Eastern Cape Province and others*, Eastern Cape High Court, Bhisho, case no 504/10.

¹⁴⁶⁴ ASIDI – 'Accelerated School Infrastructure Development Initiative On Track' <http://www.architectafrica.com/node/29903>, accessed, 24 July 2018.

¹⁴⁶⁵ Vodacom 'Second Phase of Mud School Eradication Underway' <http://digitalclassroom.co.za/digitalclassroom/latestnews/news-2013/386-second-phase-of-mud-school-eradication-underway> accessed 24 July 2018.

needs to be done relating to school infrastructure, in order to ensure that learners are educated in proper schools which provide a conducive environment for learning.¹⁴⁶⁶

Proponents for quality education and critics of the current South African education also argue that the presence of unqualified teachers in South African classrooms contributes to the rising dropout rates as learners are not well taught and do not have adequate support throughout the teaching process. In 2013 South Africa was reported to have had 10 725 unqualified or under-qualified teachers¹⁴⁶⁷ with the average teacher student per learner ratio being 1 to 32 in public schools.¹⁴⁶⁸ South African pupils further complained that some of the teachers are not only unqualified or under-qualified but are disinterested in the subject they teach and seem only to teach for the purposes of employment.¹⁴⁶⁹ In recognising the rising problem of unqualified and under-qualified teachers, the Legal Resources Centre and the Centre for Child Law in the case of *Centre for Child Law and Others v Minister of Basic Education and Others* took the government to Court for failure to fill vacant teaching posts at Eastern Cape schools.¹⁴⁷⁰

Access to basic education in South Africa has also been hampered by a legislative framework that does not make public education free in public schools. The elite public schools charge fees as much as US\$4000 which means that they are already beyond the reach of the poor majority in South Africa who send their children to poor-performing, cheap schools or sometimes, selectively free public schools.¹⁴⁷¹

¹⁴⁶⁶ Wilkinson K 'How South Africa's department of Basic Education is misleading the Public' <http://africacheck.org/reports/how-south-africas-department-of-basic-education-is-misleading-the-public/> accessed 24 July 2018.

¹⁴⁶⁷ Ispas 'M Over 10 000 Unqualified Teachers In Public Schools In 2013' <http://www.sabreakingnews.co.za/2014/03/20/over-10-000-unqualified-teachers-in-public-schools-in-2013/>, accessed 24 July 2018. Hawker D 'Thousands of unqualified teachers are teaching SA children' <http://www.enca.com/south-africa/thousands-unqualified-teachers-sa-schools> accessed 24 July 2018.

¹⁴⁶⁸ Moadiasaotsile MB 'The failing standards of Basic Education in South Africa' <http://www.ai.org.za/wp-content/uploads/downloads/2012/03/No.-72.The-Failing-Standard-of-Basic-Education-in-South-Africa1.pdf> accessed 24 July 2018.

¹⁴⁶⁹ 'Pupils Speak Out: Unqualified, disinterested teachers debilitate learning' <http://mg.co.za/article/2015-01-29-00-unqualified-disinterested-teachers-debilitate-learning> accessed, 24 July 2018.

¹⁴⁷⁰ *Centre for Child Law and Others v Minister of Basic Education and Others* (1749/2012)

¹⁴⁷¹ Radebe 'The costly choice between public and private schooling' <http://www.moneyweb.co.za/archive/the-costly-choice-between-public-and-private-school/> accessed 24 July 2018. 'Table 1: Public school fees

5.3 The legislative framework regulating basic education in South Africa

5.3.1 Introduction

With the gain of independence so much was needed to tackle the effects of Apartheid and to ensure the equitable provision of education especially primary and secondary. The first step was the enactment of a progressive Constitution followed by the South African Schools Act enacted in 1996.¹⁴⁷² From 1994, the democratic government of South Africa consolidated the fragmented school system into one department called the National Department of Education.¹⁴⁷³ In 2009, The National Department of Education was split into two departments - Department of Basic Education and the Department of Higher Education and Training.¹⁴⁷⁴ The Department of Basic Education now regulates the provision of education discussed in this dissertation and is responsible for primary and secondary schools. The discussion below focuses on the provisions of the Constitution relating to basic education and the provisions of the Schools Act. The position of international law as a source of law in South Africa has already been discussed in chapter 3.

5.3.2 The Constitution

School	Fees	Boarding
King Edward School	R30 500	R36 600
Camps Bay High	R24 250	–
Hoërskool Waterkloof	R19 810	
Bryanston High	R22 615	
Fourways High	R22 450	
Westerford High	R25 020	
Wynberg Girls High	R23 650	R35 000
Pinelands High	R20 223	
Rustenburg High	R27 000*	R34 000/R40 000
Greenside High	R23 800'	

¹⁴⁷² Rusznyak L 'South African Education still fails many 20 years after apartheid' <http://theconversation.com/south-african-education-still-fails-many-20-years-after-apartheid-22069> accessed, 24 July 2018.

¹⁴⁷³ Carter E 'Education in South Africa: Some points for policy coherence' 21-22 in Maile S (e.d) *Education and poverty reduction strategies: issues of policy coherence*. (Colloquium proceedings 2008).

¹⁴⁷⁴ 'The Department of Basic Education' <http://www.education.gov.za/thedbe/tabid/54/Default.aspx> accessed 14 April 2014.

The people of South Africa recognising the injustices of their past, believing that 'South Africa belongs to all who live in it', adopted a Constitution in order to establish a society' based on democratic values, social justice and fundamental human rights'.¹⁴⁷⁵ The Constitution is the supreme law of South Africa and mandates all laws and conduct to comply with its provisions.¹⁴⁷⁶ It binds all organs of the state and places upon them the mandate to fulfill its obligations.¹⁴⁷⁷ The Constitution states the values that underlie the South African Democracy as they were stated in chapter 2. The Constitution also provides the manner of interpreting the bill of rights as stated in chapter 3. In relation to issues concerning children, the Constitution states that, the child's education must not be placed at risk.¹⁴⁷⁸ In matters concerning children, their best interest must be of paramount consideration.¹⁴⁷⁹ Section 29 (1) (a) states that everyone has a right to basic education which includes adult basic education.¹⁴⁸⁰ The provisions of the Constitution are read together with other sources of law such as common law, legislative law and international law as prescribed by the South African interpretation clause discussed in chapter 3.

5.3.3 The South African Schools Act

The purpose of the South African Schools Act is to provide for a unified system for the governance, organization and funding of schools in South Africa.¹⁴⁸¹ It amends and repeals laws which regulate schools and any matters connected to therefore.¹⁴⁸² The Act complements the provisions of the Constitution and regulates the provision of primary and secondary education which fall under the Ministry of Basic Education.¹⁴⁸³ The Schools Act does not mention the term, basic education, save for defining

¹⁴⁷⁵ *Constitution of South Africa, 1996*, Preamble.

¹⁴⁷⁶ *Ibid*, S 2 (2)

¹⁴⁷⁷ *Ibid*.

¹⁴⁷⁸ *Ibid*, S 28 '(1) Every child has the right— (f) not to be required or permitted to perform work or provide services that— (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

¹⁴⁷⁹ *Ibid*, S 28 (2) 'A child's best interests are of paramount importance in every matter concerning the child'.

¹⁴⁸⁰ *Ibid* S 29 (1) (a).

¹⁴⁸¹ *South African Schools Act NO.84 of 1996*, Preamble

¹⁴⁸² *Ibid*.

¹⁴⁸³ *Ibid*.

'Minister' as the Minister for Basic Education.¹⁴⁸⁴ The implication is that by virtue of the Ministry of Basic Education regulating the provision of secondary school and primary school, basic education is presumed by this dissertation to be provided at both primary and secondary school levels in South Africa.

Noting the history of education discussed above, the achievement of democracy in South Africa and the need to move from a past education system characterized by racial inequality and segregation, the Act states the necessity of setting up an education system which addresses past injustices in the provision of education and provides high quality education for every learner.¹⁴⁸⁵ The Act further recognizes the need to uphold the right to education for learners and to advance an education that combats racism and sexism, intolerance, unfair discrimination, develops the talents of learners, exhausts their potential, fights poverty and advances and protects the different cultures and languages of learners.¹⁴⁸⁶ The Act provides that education is compulsory from Grade 1 to Grade 9 and between the ages of 7 and 15, depending on what comes first.¹⁴⁸⁷ Education is not compulsory after Grade 9 although the Minister by a government Gazette can determine the ages of compulsory attendance for learners with special needs and an exemption from compulsory attendance can be made if it is in the best interest of the child.¹⁴⁸⁸

The state through the members of the executive council must make sure that there are enough schools for every learner to attend in every province and failure to do so must be remedied as soon as possible.¹⁴⁸⁹ The Act does not provide that basic education is free in South Africa, however, every learner must be admitted to a public school without unfair discrimination and admission cannot be refused on the grounds that the parent of the learner was unable to pay school fees.¹⁴⁹⁰ As a means of ensuring that learners are treated with dignity, no learner can be subjected to corporal

¹⁴⁸⁴ Ibid, 1. Definitions 'Minister means the Minister of Basic Education'.

¹⁴⁸⁵ Ibid, Preamble

¹⁴⁸⁶ Ibid.

¹⁴⁸⁷ Ibid, S 3 (1).

¹⁴⁸⁸ Ibid, S 3 (2) and S 4(1 and 2).

¹⁴⁸⁹ Ibid, S 3 (3 and 4).

¹⁴⁹⁰ Ibid, S 5 (3) (a).

punishment at school.¹⁴⁹¹ The state is responsible for funding public schools from the public revenue in an equitable basis that allows for the redress of past injustices.¹⁴⁹² In some cases the provision of public schools may include the provision of hostels for the accommodation of learners.¹⁴⁹³

The public school governing body comprising of - parents of learners at the school, educators of the school, support staff and learners of the school who are above the eighth grade¹⁴⁹⁴ - is given the obligation to take reasonable steps at its disposal to supplement the resources provided by the state in order to improve the quality of education provided in schools.¹⁴⁹⁵ As regards school fees, by a majority vote, parents may adopt a resolution to charge school fees at a public school.¹⁴⁹⁶ The resolution must state the amount of school fees to be charged.¹⁴⁹⁷ A parent can be partially or totally exempted from paying school fees and the school governing body has the responsibility to implement such a resolution:¹⁴⁹⁸ Unless exempted, every parent has the obligation to pay school fees and is legally liable for failure to do so.¹⁴⁹⁹ A parent has the right to lodge an appeal with the head of department against the decision of the governing body concerning exemption from paying school fees and the head of department must make a decision after considering the interest of the parent as well as those of the governing body.¹⁵⁰⁰ A parent who fails to apply for exemption to pay school fees after being notified to do so by the school may have legal proceedings commenced against them for the school fees liability.¹⁵⁰¹

The means test which compares the income of the parent(s) of the child relative to the fees that the child has to pay is the bases to exempt a learner from paying

¹⁴⁹¹ Ibid, S(10 (1).

¹⁴⁹² Ibid, S 34 (1).

¹⁴⁹³ Ibid, S 3 (12) (2.)

¹⁴⁹⁴ Ibid, S 23 (2).

¹⁴⁹⁵ Ibid, S 36.

¹⁴⁹⁶ Ibid, S 39 (1).

¹⁴⁹⁷ Ibid, 39 (2) (a).

¹⁴⁹⁸ Ibid, S39(2) (b) and (3).

¹⁴⁹⁹ Ibid, S 40 (1).

¹⁵⁰⁰ Ibid, S 40 (2) and (3).

¹⁵⁰¹ Ibid, S 40 (1) to (6).

school fees.¹⁵⁰² The Regulations Relating to the Exemption of Parents from the Payment of schools fees 2006 provide an application form that parents must fill and apply to the Chairperson of the School Governing Body (SGB).¹⁵⁰³ Children who are automatically exempted from paying school fees include children in foster care, in a youth centre, in a place of safety, in an orphanage, abandoned children, a child who heads a family, a child without support or a child on the child's grant.¹⁵⁰⁴ To get an automatic exemption, a parent or guardian must have a sworn statement or affidavit that is confirmed by the South African Police Service, any social worker or competent authority stating that the child is eligible for exemption or must have a court order confirming the exemption.¹⁵⁰⁵ The documents must be handed to the principal of the school or a member of the School Governing Body.¹⁵⁰⁶

By way of a government notice the Minister may Gazette the 'national quintiles for public schools or part of such quintiles which must be used by the Member of the Executive Council¹⁵⁰⁷ to identify schools that may not charge school fees'.¹⁵⁰⁸ The implication of the above is that whilst some public schools may charge school fees, there are others which may be determined as no-fees schools.¹⁵⁰⁹ The no-fee policy states that the poorest 40% schools should not charge school fees only from Grade R to Grade 9 and its first implementation was in 2007.¹⁵¹⁰ To help in informing its judgement on the names of the 40% that should not charge schools fees, the

¹⁵⁰² Hall K and Monson J 'Free to learn: The School Fee Exemption policy and the National School Nutrition Programme' at 45-46

http://www.ci.org.za/depts/ci/pubs/pdf/general/gauge2006/gauge2006_freetolearn.pdf accessed 12 July 2012 46, The Exemption of Parents from the Payment of School Fees Regulations of 1998 set out a mandatory minimum means test for the granting of exemptions. During the Means to Live research period, the means test read as follows: 'If the combined annual gross income of the parents is less than ten times the annual school fees per learner, the parent qualifies for full exemption'. Partial exemptions were available for those whose income was more than ten times but less than thirty times the annual fees.

¹⁵⁰³ Guide for Parents: School fees in public school' available at <http://www.education.gov.za/linkclick.aspx?Fileticket=pnmqsprt7j4%3D&tabid=333&mid=1943> accessed 2 February 2013.

¹⁵⁰⁴ Ibid.

¹⁵⁰⁵ Ibid.

¹⁵⁰⁶ Ibid.

¹⁵⁰⁷ *South African Schools Act NO.84 of 1996*, definitions 'This is the member of the province who is responsible for education in that province'.

¹⁵⁰⁸ Ibid, S 40 (7), This section must be read together with section 35 of the School Act.

¹⁵⁰⁹ Ibid, S 49 (7).

¹⁵¹⁰ Ibid.

Department of Basic Education 'allocates each school a poverty ranking derived from national data on income levels, dependency ratios and literacy rates in the surrounding community'.¹⁵¹¹ The Minister then states that a school is a no-fees school by publishing it in the Government Gazette – currently all schools ranked in quintiles 1, 2 and 3 should be no fee schools.¹⁵¹² The government then pays to cover the costs of non-fee-paying learners from its national budget.¹⁵¹³

The ranking of no-fees schools is according to the area in which the schools are situated, meaning that children who go to school in areas not depicted as poor have to pay school-fees.¹⁵¹⁴ Although the no-fees policy has not made basic education free in South Africa, it is an unconstitutional notable step forward to ensure that the learners from poor backgrounds have an opportunity to attend primary school for free. In fact, to justify how it has benefited the poor, in May 2010 the MEC for education Mhaule R stated that in 2010 the Mpumalanga provincial government's no-fees policy had been extended to benefit 699,157 children, representing 71.31% of school-going children in the province and a budget of R38.6 million had been set aside for that purpose.¹⁵¹⁵

The Schools Act provides the Minister with a discretion to set the minimum norms and standards relating to basic infrastructure and capacity in public schools.¹⁵¹⁶ The minimum norms and standards must prescribe the infrastructure of a school, the number of learners a school may admit and the provision of teaching and learning

¹⁵¹¹ Hall K and Monson J 'Free to learn: The School Fee Exemption policy and the National School Nutrition Programme' at 45-46
http://www.ci.org.za/depts/ci/pubs/pdf/general/gauge2006/gauge2006_freetolearn.pdf. accessed 12 July 2012.

¹⁵¹² Ibid.

¹⁵¹³ 'Education in South Africa', <http://www.saeduservices.com/pages/educationinformation.aspx> Accessed 21 June 2012.

¹⁵¹⁴ Education Policy <http://www.etu.org.za/toolbox/docs/government/schoolfees.html> accessed 24 July 2018.

¹⁵¹⁵ Mhaule R 'Policy and Budget Speech to be delivered by MEC for Education: Mpumalanga Provincial Legislature' at <http://www.mpumalanga.gov.za/media/speeches/education/14052010.htm> accessed 903/02/2012. 'Western Cape Education Department: Overview' available at <http://capegateway.gov.za/eng/pubs/news/2006/mar/128346> accessed 12 June 2012. 'On the other hand, the Western Cape Education Department stated that it would implement a no fee system that would benefit 146,192 (or 15.9%) learners in 2006'.

¹⁵¹⁶ *The Constitution of South Africa, 1996*, S5 A.

material.¹⁵¹⁷ The Minister is also given discretion to prescribe the norms and standards relating for language policy in public schools and the Governing Body may make a determination on the language of a school subject to the norms and standards by the Minister as well as the provisions of the Constitution.¹⁵¹⁸ The Minister is mandated to also Gazette the national curriculum which determines the minimum outcomes and standards of education as well as the procedures to assess the learners' achievements.¹⁵¹⁹ As regards the funding of public schools, the minister must

¹⁵¹⁷ Ibid, '5A.Norms and standards for basic infrastructure and capacity in public schools.—(1)The Minister may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for—

A)school infrastructure;

B)capacity of a school in respect of the number of learners a school can admit; and

C)the provision of learning and teaching support material.

2)The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following:

A)In respect of school infrastructure, the availability of—

I)classrooms;

Ii)electricity;

Iii)water;

Iv)sanitation;

V)a library;

Vi)laboratories for science, technology, mathematics and life sciences;

Vii)sport and recreational facilities;

Viii)electronic connectivity at a school; and

Ix) perimeter security;

B)in respect of the capacity of a school—

I)the number of teachers and the class size;

Ii)quality of performance of a school;

Iii)(iii) curriculum and extra-curricular choices;

Iv)classroom size; and

V)utilisation of available classrooms of a school;

C)in respect of provision of learning and teaching support material, the availability of—

I)stationery and supplies;

Ii)learning material;

Iii)teaching material and equipment;

Iv)science, technology, mathematics and life sciences apparatus;

V)electronic equipment; and

Vi)school furniture and other school equipment'

¹⁵¹⁸ Ibid, 'Language policy of public schools.—(1)Subject to the *Constitution* and *this Act*, the *Minister* may, by notice in the Government Gazette, after consultation with the *Council of Education Ministers*, determine norms and standards for language policy in public schools.

(2) The *governing body* of a *public school* may determine the language policy of the *school* subject to the *Constitution*, *this Act* and any applicable provincial law.

(3) No form of racial discrimination may be practised in implementing policy determined under this section.

(4) A recognised sign Language has the status of an official language for purposes of learning at a *public school*'.

¹⁵¹⁹ Ibid, S 6A.Curriculum and assessment.—'(1)The *Minister* must, by notice in the Government Gazette, determine—

(a) a national curriculum statement indicating the minimum outcomes or standards; and

(b) a national process and procedures for the assessment of *learner* achievement.

determine the norms and standards relating to school funding which includes the system of placing schools into quintiles and the distribution of funding for public school in an equitable and fair manner.¹⁵²⁰ All the above norms and standards that the Minister of Basic Education is tasked to periodically determine, summarily, relate to the environment for learning, the content of the curriculum, the outcomes of learning, teaching and learning materials as well as the quality of teaching and learning in schools at basic education level.

5.4 Is the right to basic education protected by international law the same as the right to basic education protected by section 29 (1) (a)?

The right to basic education in South Africa is understood to be the same as the right to basic education protected by international law. Unlike the provisions of the Constitution of Zimbabwe, the terminology used by the South African Constitution is exactly the same used by the African Charter as well as the World Declaration. Further to the exact terminology is the fact that South Africa, which views international law as important in providing sizable guidance when interpreting the Constitution, has already made reference to international law regulating either the provision of basic education or its components.

Whilst adjudicating on the right to basic education as protected by section 29 (1) (a) the constitutional court in the *Juma* case made reference to the provisions of various international instruments including the Universal Declaration, CRC and the ICESCR and its General Comment 13 which referred to basic education as the most

(2) The curriculum and the process for the assessment of *learner* achievement contemplated in subsection (1) must be applicable to *public* and *independent schools*'.

¹⁵²⁰ Ibid, S 35 Norms and standards for school funding,—'(1) Subject to the *Constitution* and *this Act*, the *Minister* must determine national quintiles for public schools and national norms and standards for school funding after consultation with the *Council of Education Ministers* and the Minister of Finance.

(2) The *norms and standards for school funding* contemplated in subsection (1) must—

(a) set out criteria for the distribution of state funding to all public schools in a fair and equitable manner;
(b) provide for a system in terms of which learners at all public schools can be placed into quintiles, referred to as national quintiles for learners, according to financial means;

(c) provide for a system in terms of which all *public schools* in the Republic can be placed into quintiles referred to as national quintiles for *public schools*, according to the distribution of *learners* in the national quintiles for learners; and

(d) determine the procedure in terms of which the *Member of the Executive Council* must apply the criteria contemplated in paragraph (a)'.

important aspect of primary education.¹⁵²¹ It is notable that, all court cases brought before the constitutional court related to basic education, inclusive of the *Juma* case, have not explained comprehensively the scope and content of basic education. The specific mention of the provisions of international law which regulate its provision is telling of the fact that the basic education referred to by the Constitution is the same as that provided by international law.

5.5 Justiciability of the right to basic education in South Africa

South Africa among world jurisdictions, is said to be 'alone in many constitutional democracies' to have developed a 'comprehensive socio-economic rights jurisprudence that enforces an array of enumerated social welfare protections including the rights to housing, healthcare and education'.¹⁵²² The South African approach has practically refuted the discussed views in chapter 2 by some scholars that socio-economic rights are not justiciable. Due to 'well established arguments against judicial enforceability of social rights, the South African jurisprudence on social rights has been described as revolutionary' by those who advocate for the justiciability of socio-economic rights.¹⁵²³

The Constitution of South Africa therefore adheres to the ICESCR by providing for constitutionally justiciable Bill of Rights. It states that, the bill of rights which provides for socio-economic rights, 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'¹⁵²⁴ and that rights in the bill of rights are enforceable in a court of law and the courts may grant appropriate relief.¹⁵²⁵ It further states that anyone can approach the court alleging an infringement of any

¹⁵²¹ *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* page 22-23.

¹⁵²² Christiansen EC 'Exporting South Africa's Social Rights Jurisprudence' 5 (2004) 30.

¹⁵²³ Ibid.

¹⁵²⁴ *Constitution of South Africa, 1996*, S 8 (1)

¹⁵²⁵ Ibid, S38 'Enforcement of rights

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members'.

right regardless of its nature.¹⁵²⁶ Further, in the case of *Government of South Africa vs Irene Grootboom*, adjudicating upon the right to housing, the court stated that socio-economic rights are justiciable.¹⁵²⁷ The right to basic education has already been adjudicated upon in the constitutional court of South Africa and the *Juma case* confirmed that it is an unqualified right.

5.6 The applicability of the right to basic education

Section 29 (1) (a) states that everyone has the right to basic education. Unlike the provisions of the Zimbabwean Constitution discussed in chapter 4, the right to basic education in South Africa is for everyone and not only reserved for citizens or permanent residents. The preamble of the South African Constitution is clear that South Africa does not only belong to its citizens or permanent residents but to all those who live in it.¹⁵²⁸ Section 7 (1) of the Constitution further provides that, it enshrines the 'rights of all people in our country'. Whilst there are certain rights, such as the rights to citizenship which are reserved only for South African citizens,¹⁵²⁹ 'the remainder of the rights, subject to the limitation clause in section 36 of the Constitution, [can] be enjoyed by citizens and foreign nationals alike - in particular the socio-economic rights, to which everyone or every child is entitled'.¹⁵³⁰

South Africa must be commended for providing for the right to education for everyone living in South Africa. Education is intertwined with humanity as discussed in chapter 2 and it can only make sense to make it a right for everyone. Despite the need to comply with international law principles of universality, equality and non-discrimination in the provision of the right to education as discussed in chapter 2, the importance of providing basic education in a non-discriminatory manner can also best be viewed in the words of the constitutional court judge, former Justice Mokgoro who referencing to the notion of *Ubuntu* and the need for human beings to treat each other with dignity stated that:

¹⁵²⁶ Ibid.

¹⁵²⁷ *The Government of South Africa v. Irene Grootboom and Others, Case 11 (2000) CCT*, para. 20

¹⁵²⁸ *Constitution of South Africa, 1996*.

¹⁵²⁹ Ibid, Citizenship 20. No citizen may be deprived of citizenship.

¹⁵³⁰ Mokgoro JY 'Ubuntu, the Constitution and the Rights of Non-citizens' (2010) STELL LR 2010.

The notion that a society can respect and entrench in its basic law, and actually enforce particularly the socio-economic rights of foreign nationals, may be viewed as a reflection of a commitment to a spirit of generosity characterizing such society. In the context of the ideals of *ubuntu*, a notion translatable as encompassed by the spirit and purport of our Constitution - it is envisaged that our societal generosity would prevail when interpreting and fulfilling the applicable rights in the bill of rights.¹⁵³¹

In interpreting the bill of rights, particularly the right to human dignity, in the case of *Minister of Home Affairs v Watchenuka*, it was clarified that the Bill of Rights applies to non-citizens and human dignity cannot be bound by the fences of countries. The court stated that:

[Human] dignity has no nationality. It is inherent in all people, citizens and non-citizens alike, simply because they are human beings. And while that person happens to be in this country, for whatever reason, [their human dignity] must be respected, and is protected, by section 10 of the Bill of Rights.¹⁵³²

More relevant in relation to the interpretation of the word 'everyone', is the case of *Khosa v Minister of Social Development*, which stated that the right to social security applied to everyone and depriving a selected few, in this case permanent residents, was discriminatory.¹⁵³³ It is therefore the reasoning of this dissertation that everyone in section 29 (1) (a) includes non-citizens. If the Constitution intended otherwise, it could have been specific like the Constitution of Zimbabwe.

5.7 A hexagon right: the six dimensions of section 29 (1) (a)

5.7 1 The right to basic education is an unqualified and immediately realisable

5.7.1.1 The unqualified and immediate nature of the right to basic education

The right to basic education is an unqualified socio-economic right.¹⁵³⁴ As already stated, an unqualified socio-economic right for the purposes of the South African

¹⁵³¹ Ibid.

¹⁵³² *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326 (SCA) 331B.)

¹⁵³³ *Khosa v Minister of Social Development* (2004) 6 SA 505 (CC).

¹⁵³⁴ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 120.

Constitution is a right formulated in a manner which does not include internal qualifiers in its textual formulation.¹⁵³⁵ As always mentioned in the last chapter, internal qualifiers are words such as 'access' to the right, that the right be 'progressively realized' within 'available resources' subject to 'reasonable legislative measures' which are characteristic in the formulation of socio-economic rights.¹⁵³⁶ The point that the South African right to basic education is an unqualified right is not new, having been accepted among many authors inclusive of Liebenberg¹⁵³⁷ Churr¹⁵³⁸, Pillay¹⁵³⁹. Berger calls section 29(1) (a) a 'strong positive right' due to the absence of qualifiers in its formulation¹⁵⁴⁰. First, interpreting the meaning of the word 'access', the *Grootboom* case stated that 'access' to housing means that the state has no entire responsibility to provide housing but it can only unlock a system which will make it possible for individuals to 'access' housing.¹⁵⁴¹ Eliminating the word 'access' in the formulation of section 29(1) (a) should have been deliberate on the part of the constitutional drafters.¹⁵⁴² It was meant to ensure that, the state does not only unlock a system to ensure that people have access to basic education but that the state provides basic education.¹⁵⁴³

Second, the provision of the right is not dependent on 'reasonable legislative and other measures'. Interpreting the right to housing and health, the constitutional court (court) stated that, for government programmes relating to housing, health and water to stand the test of constitutionality, the legislative of other measures it introduces must be reasonable.¹⁵⁴⁴ On the contrary, to comply with the obligations

¹⁵³⁵ Ibid.

¹⁵³⁶ Ibid.

¹⁵³⁷ Liebenberg 'Socio-economic Rights: Adjudication under a Transformative Constitution' (Juta 2010) 242.

¹⁵³⁸ Churr 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) *PER/PELJ* 7 2416.

¹⁵³⁹ Liebenberg and Pillay *Socio-Economic Rights in South Africa* (publication socio-economic rights project Community Law Centre, University Of Western Cape South Africa 2000) 351.

¹⁵⁴⁰ Berger 'The Right to Education Under the South African Constitution (2003) 103 *Columbia Law Review* 625

¹⁵⁴¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 para 35-37.

¹⁵⁴² Woolman and Bishop *Constitutional Law of South Africa* (Juta Publishers publisher 2008) 10.

¹⁵⁴³ Ibid.

¹⁵⁴⁴ *Lindiwe Mazibuko and Others v City of Johannesburg and Others Case* 2010 (4) SA 1 (CC) para 49-50. 'In the *Mazibuko* case the court stated that section 27 (1) does not entitle anyone to claim sufficient water but to reasonable measures by the government which aim to make water accessible.

imposed by section 29 (1) (a), the measures introduced by the government are not measured against reasonability.¹⁵⁴⁵ The government must provide basic education without fail and cannot defend its failure by professing that the measures were reasonable.¹⁵⁴⁶ The reasonableness approach was regarded in the *Juma* case as irrelevant in deciding whether or not the state had complied with its basic education obligations.¹⁵⁴⁷

Third, section 29 (1) (a) is not dependent on the availability of resources on the part of the government.¹⁵⁴⁸ The court stated in the *Grootboom* case that obligations accruing from human rights, qualified by availability of resources are only measured within the context of availability of resources on the part of the government.¹⁵⁴⁹ In dissimilarity, section 29 (1) (a) obligations are not qualified by resource availability which means that basic education is not a right whose deprivations can be justified by resource constraints.¹⁵⁵⁰ Fourth, the right to basic education is not qualified by 'progressive realisation'. The court in the *Grootboom* case clarified that progressive realisation is a swift, real and overtime undertaking towards the realisation of a right.¹⁵⁵¹ Eliminating the progressive realisation qualifier in section 29 (1) (a) must point to the fact that, basic education is not subjected to overtime provision but rather to immediate provision.¹⁵⁵² The contrast between the textual

See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 39-44. Further, in the *Grootboom* case, the Constitutional Court noted that reasonable measures did not constitute the provision of a house but included the provision of temporary accommodation and constructive engagement, which would ensure humane evictions'.

¹⁵⁴⁵ Woolman and Fleisch *The Constitution In The Classroom: Law and education in South Africa* 1994-2008 (Pretoria University Law Press 2009) 121.

¹⁵⁴⁶ Ibid.

¹⁵⁴⁷ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 par 36 to 38.

¹⁵⁴⁸ Woolman and Fleisch *The Constitution In The Classroom: Law and education in South Africa* 1994-2008 (Pretoria University Law Press 2009) 121.

¹⁵⁴⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* at para 46 See also *Soobramoney v Minister of health* 1998 (1) SA 765 (CC) par 11.

¹⁵⁵⁰ Berger 'The right to education under the South African Constitution' 103 (2003) *Columbia Law Review* 625.

¹⁵⁵¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 par 45 see also *Lindiwe Mazibuko and Others v City of Johannesburg and Others* para 49-50. The court stated that it is insufficient for the government to show that the policy it has selected is reasonable, it must also show that the policy is consistent with the obligation to "progressively realise" socio-economic rights.

¹⁵⁵² Berger 'The right to education under the South African Constitution' 103 (2003) *Columbia Law Review* 625

formulation of section 29 (1) (a) and section (29) (1) (b) which provides for progressive further education became a point of emphasis in the *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (*Juma case*) when the court reasoned that basic education was intended as an unqualified, immediately claimable right.¹⁵⁵³

Taking into account the textual formulation of the right to education and the absence of internal qualifiers in its formulation, in the *Juma case*,¹⁵⁵⁴ the court stated that, dissimilar to some of the other socio-economic rights, section 29 (1) (a) is unqualified, immediately realisable and can only be limited subject to section 36 as discussed in chapter 1 under literature review.¹⁵⁵⁵ Quoting the case of *Juma* the court stated that,

It is important for the purposes of the judgment, to understand the nature of the 'right to basic education' under section 29 (1) (a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation [in the text] requiring the right to be 'progressively realized' within 'available resources' subject to 'reasonable legislative measures'. The right to basic education in section 29 (1) (a) maybe limited only in terms of the law of general application, which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided in section 29 (1) (b). The state is in terms of that right, obliged to take reasonable measures to make further education 'progressively available and accessible'.¹⁵⁵⁶

To reinforce the position of the *Juma case*, the court in the case of *M Madzodzo obo Parents of Learners and Others and the Minister of Education and Others* also stated that the right to basic education is an unqualified right which is not subject to any limitations other than by law of general application.¹⁵⁵⁷

5.7.1.2 Immediate realisability of section 29 (1) (a) and section 36 of the Constitution

¹⁵⁵³ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* par 36 to 38.

¹⁵⁵⁴ *Ibid* para 36 to 38.

¹⁵⁵⁵ *Ibid*.

¹⁵⁵⁶ *Ibid*.

¹⁵⁵⁷ *Madzodzo and Others v Minister of Basic Education and Others* 2014 SA 339 (ECM).
Para 15

Whilst the authors already agree that the right to basic education is unqualified and immediately realisable, McConnache and MacConnache agree with the unqualified nature but dispute its immediate realizability¹⁵⁵⁸. They accept that the right to basic education is an unqualified right but argue that although it is unqualified, the right to basic education 'does not mean that the state will be required to provide adequate facilities immediately, irrespective of budgetary and capacity constraints or other urgent demands on its resources'.¹⁵⁵⁹ They defend their analysis by stating that, the state can justify its failure to deliver the right to basic education using the limitation clause of the Constitution (section 36).¹⁵⁶⁰ Section 36 states that, human rights in the bill of rights can be limited in terms of the law of general application in consideration of the nature of the right and to the extent that the limitation is justifiable in a value-based society. The limitation will therefore always take into account the nature of the right.¹⁵⁶¹ The argument by McConnache and MacConnache that the right to basic education cannot be immediate because of the provisions of section 36 is regarded incorrect by this dissertation. To begin with, section 36 of the Constitution states that all human rights qualified or unqualified may be limited by the law of general application as long as the limitation takes into account the nature of the right.¹⁵⁶² While section 36 limits the enjoyment of rights based on reasonableness and justifiability, it is the proposition of this dissertation that it cannot alter the internally qualified and unqualified nature of a right. Indeed, despite the provisions of section 36, the *Juma case* stated unequivocally that, by virtue of its formulation which does not include qualifiers, basic education is an immediately realizable right¹⁵⁶³. Any

¹⁵⁵⁸ McConachie and McConachie 'Concretizing the right to a basic education' (2012) *SALJ* 557.

¹⁵⁵⁹ Ibid.

¹⁵⁶⁰ *Constitution of South Africa*, 1996, S 36.

¹⁵⁶¹ Ibid, S 36 (1) (a),

¹⁵⁶² Ibid, 'S 36 Limitation of rights'.

'36. (1) 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—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) 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'.

¹⁵⁶³ *Governing Body of the Juma Musjid Primary School & Others v Essay* par 26 to 38.

provision of a right to basic education intentially qualifying it on the basis of resource, reasonable or other constraints cannot be a section 36 limitation and is therefore unconstitutional. The reasoning of this dissertation is that section 36 cannot qualify the unqualified nature of the right to basic education, but can only limit its enjoyment in justifiable circumstances, although, practical concerns will remain.

However, even if we agree that basic education is an immediate obligation, realistically, when demands are made, the question of availability of resources will arise, either within the Ministry of Basic Education, in parliament or in court. The state will likely argue that amid competing claims to provide other socio-economic rights, it is impossible for it to provide the free right to basic education immediately for every child due to resource constrains. Like it has done in the past, in cases such as that of *Centre of Child Law and others v Government of the Eastern Cape Province and Others*¹⁵⁶⁴ and the *School Governing Body of Amasango Career School v MEC for Education Eastern Cape*¹⁵⁶⁵ the state will likely lean towards settlements and five-year plans. Such an approach is viewed by this dissertation as unconstitutional as it makes the right to basic education progressive thereby qualifying it on the basis of resources. Constitutionally, the state has no other constitutional immediate legal constitutional socio-economic obligation which competes with basic education. The state has no duty to deliver the further education, housing, water or food immediately but rather to only provide access to plans or programmes within its available resources in line with the reasoning of the *Grootboom* and *Treatment Action Campaign*.¹⁵⁶⁶ If the state chooses to spend money delivering further education, housing, water or food immediately and for free, then such self-imposed obligations cannot be viewed as obligations which compete with the right to basic education. What is needed is for the state to understand its immediate constitutional obligations and divert energy and resources towards financing and providing basic education. This would mean that the provision

¹⁵⁶⁴ *Centre of Child Law and others v Government of the Eastern Cape Province and Others* ECB (unreported) case number 504/10.

¹⁵⁶⁵ *School Governing Body of Amasango Career School v MEC for Education Eastern Cape* ECG (unreported) case number 3838/2009.

¹⁵⁶⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1075.

of further education, housing, water or food will have to be limited to the provision of access to measures required by the Constitution.

5.7.2 The right to basic education is the minimum core content of the right to education

5.7.2.1 The minimum core concept

Following the above argument that basic education is an unqualified right, is the reasoning that it is also the minimum core obligation of the right to education.¹⁵⁶⁷ The minimum core concept was first described by General Comment 3 to the ICESCR and it points to the fact that each right has an extent of its provision which satisfies its minimum fulfillment as already discussed.¹⁵⁶⁸ Deliberating on the applicability of the minimum core when interpreting socio-economic rights, the Court in the *Grootboom* case, expressed concern, stating that, it would be difficult to determine the minimum core of the right to housing, 'without having the requisite information on the needs and the opportunities for the enjoyment of this right. This court [did] not have comparable information'.¹⁵⁶⁹ The court expressed that determining the extent of the minimum core is difficult because the housing needs of people are different.¹⁵⁷⁰ The court then stated that in light of the progressive obligations on the state, 'the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable'.¹⁵⁷¹ In like manner, in the *Treatment Action Campaign* case the court stated that it would be impossible for it to determine what a minimum core right to health would be.¹⁵⁷² Based on its inability to determine the minimum health needs for different individuals, the court denied that

¹⁵⁶⁷ Simbo C 'The right to basic education, the South African Constitution and the Juma Masjid Case: An Unqualified human right and A minimum Core Standard' (2013) 17 *Law Democracy and Development* 491

¹⁵⁶⁸ Chowdhury 'Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights. A Comparative Perspective' (2009) Cornell Law Library 3.

¹⁵⁶⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* par 32

¹⁵⁷⁰ Ibid.

¹⁵⁷¹ Ibid.

¹⁵⁷² *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1075 par 26-39.

the minimum core applies to the interpretation of socio-economic rights in South Africa.¹⁵⁷³

5.7.2.2 Defending the Constitutional Court's reluctance to adopt the minimum core and arguments for section 29 (1) (a) as granting a minimum core right

In line with international standards the constitutional court acknowledged that international law provides for minimum core obligations as a way to address the needs of the most vulnerable.¹⁵⁷⁴ Basing its arguments on its inability to define the minimum core, the court stated that the minimum core approach cannot be uncritically imported into South African constitutional law and that, at best, it can be used to assist the court to determine whether or not the state had acted reasonably.¹⁵⁷⁵ The court's critical approach towards using the minimum core when interpreting qualified socio-economic rights, although mainly based on its inability to quantify the minimum core, is also convincing in light of the internally qualified nature of the constitutional duties imposed by sections 26 and 27. As discussed above, qualified socio-economic rights obligate the state to fulfil the rights by providing 'access' to the right through taking 'reasonable legislative' and other measures, 'within its available resources, to progressively realise' each of these rights.

Flowing from the qualified nature of the rights discussed above, it defies the whole object of their qualifications to state that the rights have a minimum core content. It is arguable that by specifically qualifying certain socio-economic rights, the Constitution accepted that no aspect of those rights could be provided immediately. The CESCR's view, stated by Young, clarifies that a minimum core is a right that should be provided immediately as a matter of individual right.¹⁵⁷⁶ Given that argument, qualified rights cannot have a content that can be provided immediately. Their

¹⁵⁷³ Ibid.

¹⁵⁷⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 para 30-33.

¹⁵⁷⁵ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1075 par 26-39.

¹⁵⁷⁶ Wesson, 'Grootboom and beyond; Reassessing the socio-economic jurisprudence of the South African Constitutional Court' 20 (2004) *SJHR* 298.

formulation already accepts that the government's resources might not be enough to provide an immediate right to anyone. By qualifying the rights, the drafters of the Constitution accepted that the state could not provide any part or any core of the right immediately but it could only go on making and implementing reasonable measures to provide the right.¹⁵⁷⁷ Such measures would be progressive, that is, on-going, and their implementation would be dependent on the state's resources. Based on the qualified obligations incumbent upon the state, in the *Grootboom case* the court stated that 'the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable' and not whether the state has fulfilled a minimum core obligation.¹⁵⁷⁸

Providing for a qualified right to basic education was explicitly avoided by section 29 (1) (a) which as interpreted by the court in the *Juma* case provides for an unqualified immediate obligation on the government to provide basic education. The specific provision of an unqualified right with immediate enforceability is the foundation of the argument that basic education is a minimum core obligation of the right to education. The argument is supported by Young who reiterates that the minimum core is a concept with 'immediate enforceability', a concept 'with a presumptive legal entitlement, a non-derogable obligation, and an obligation of strict liability'.¹⁵⁷⁹ The argument is further strengthened when one notes that in contrast to section 29 (1) (a), section 29(1) (b) provides for the right to further education which is a qualified right. It becomes clear that the provision of basic education, as an unqualified right was not a mistake or an oversight on the part of the Constitution, rather, it was a deliberate move by the drafters thereof to ensure that the government provides basic education as an immediate minimum core obligation. Judicial precedent on qualified socio-economic rights is therefore not particularly useful in ascertaining whether or not the court should accept that section 29 has a minimum core standard which is basic education. It is not enough reason to deny that section 29 (1) (a) is a

¹⁵⁷⁷ Mbazira C *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press 2009) 58.

¹⁵⁷⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 para 33.

¹⁵⁷⁹ Young 'The minimum core of Economic and Social Rights: A concept in search of content'(2008) 33 *Yale Journal of International Law* 115.

minimum core standard of section 29. Interpreting section 29 as having a minimum core right to basic education ensures that the mistakes made during the apartheid era will never be repeated because everyone will have the same immediate and claimable right to education, as well as other aspects of the right to education which are not immediate.

It is, however, notable that under international law as discussed, General Comment 3 CESCR provides that socio-economic rights are qualified but also have a minimum core content.¹⁵⁸⁰ After considering the provisions of General Comment 3 it is notable that the CESCR recognised the difficulties of defining what a minimum core of a qualified right would be and shied away from giving specifics, leaving each country to fulfil its obligations progressively and to give an explanation where it has failed, for example, due to resource constraints.¹⁵⁸¹ In recognition of the South African volatile and ever-changing economic and political landscape, it will be a mammoth task to ask the judiciary to devise a minimum core of a qualified right as the provision of such rights is contingent upon availability of resources and progressive realisation. Also accepting an argument that a qualified right has a minimum core is potentially unconstitutional in South Africa as it will consequently, indirectly, dictate to the government the amount of resources needed for the provision of such minimum core; an approach that is contrary to a Constitution that provides certain rights with no immediate realisation. Also in the same vein, asking the legislature to define the minimum core of a qualified right through legislation also means that such a law will also indirectly allocate specific amounts of resources needed to fulfil minimum obligations an approach also in direct contrast with the government's obligations to provide certain rights progressively, within its available resources. In South Africa, the provision of a minimum core is therefore justifiable when its provision aligns with the constitutional obligations imposed by such a right. Section 29 imposes an unqualified obligation on the state, and the court has interpreted it that way in the *Juma Masjid case*. It demands the immediate provision of a basic education.

¹⁵⁸⁰ General Comment 3 *The nature of State parties obligations*, 1990 para 10.

¹⁵⁸¹ Ibid.

In the *Grootboom case*, the court stated that it was impossible for the state to give everyone immediate access to housing, because it lacked resources to do so.¹⁵⁸² Such an argument is untenable when interpreting section 29 (1) (a) because it is not qualified by the availability of resources. The state is obligated to provide the right to basic education immediately as a matter of individual right. Such is the nature of the obligation imposed by section 29 (1) (a). Indeed, given the history of education discussed above as well as its benefits, regarding section 29 (1) (a) as a minimum core obligation would be evidence that the drafters of the Constitution were mindful of the impacts of the huge disparities in education left by the discriminatory apartheid educational laws and policies. It would also show that the drafters were aware of the benefits of a basic education and that they sought to redress the ills of the past by ensuring that everyone in South Africa benefits from at least, one certain, immediately claimable type of an education. Also, given the proven benefits of education in alleviating poverty and promoting human and national development, an argument that the immediate provision of basic education is not possible due to resource constraints is no longer sustainable. It must be noted that 'energy and funding directed to basic education [is] perhaps the most profound investment in people and in the future of a country'.¹⁵⁸³ A scope of action going beyond the mere recognition of education as any other human right is required. Resources must be mobilised to ensure that basic education is provided immediately to anyone who does not have it as part of 'a broader scope of action than in the past' this demands the mobilisation of resources from the public and private sectors as well as voluntarily-contributing individuals.¹⁵⁸⁴

In the *Treatment Action Campaign case* the court emphasised its inability to determine the components of a minimum core content of a qualified socio-economic right.¹⁵⁸⁵ The court cannot merely reject the minimum core right to education simply because it cannot define what the minimum core of education entails. In other words,

¹⁵⁸² *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169.

¹⁵⁸³ *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 in Jomtien, Thailand (1990)*, A IX (1).

¹⁵⁸⁴ *Ibid*, A VIII.

¹⁵⁸⁵ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1075 para 26-39

the court cannot deny that section 29 (1) (a) is a minimum core obligation because it cannot define basic education or delineate its scope and content. Accepting that the right to basic education is a minimum core obligation does not give the courts a task to define the minimum core there and then (if at all). Rather, as Lieberberg had already suggested,

acceptance of the minimum core does not require the court to define, in the abstract, the basket of goods and services that must be provided. Instead the court [if it so desires] could define the general principles underlying the concept of minimum core obligations in relation to [the right to education].¹⁵⁸⁶

The different cases that are brought before the courts, relating to basic education will present multiple opportunities for the courts to define the contents of basic education as a minimum core right to education. Also, it must be noted that courts will be exercising their discretion when suggesting what a basic education would entail; they are allowed to choose not to define the term, basic education, or prescribe any scope and content thereof. Courts are not tasked to make law, the role to make law lies with the legislature. With that in mind, it is notable that although at present South African legislation does not define the term basic education, through the Schools Act¹⁵⁸⁷ it provides for a legal framework which allows the Minister of Basic Education to prescribe minimum uniform norms and standards for the provision of basic education. This dissertation therefore suggests that the Schools Act already provides a platform for the Minister of Basic Education to define the term, basic education, and to unpack its scope and content.

According to section 6A of the Schools Act, the Minister must state the national curriculum for basic education stating its minimum outcomes and standards as well as the procedures for assessment of each learner.¹⁵⁸⁸ In addition, section 6 states that

¹⁵⁸⁶ Mbazira C *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press 2009) S68.

¹⁵⁸⁷ *South African Schools Act* 84 of 1996.

¹⁵⁸⁸ *Ibid*, S 6A '(1)The Minister must, by notice in the Government Gazette, determine— (a) a national curriculum statement indicating the minimum outcomes or standards; and (b) a national process and procedures for the assessment of learner achievement. (2)The curriculum and the process for the assessment of learner achievement contemplated in subsection (1) must be applicable to public and independent schools'.

the Minister must determine the norms and standards relating to language policy in public schools.¹⁵⁸⁹ Section 35 states that the Minister must determine the norms and standards relating to school funding¹⁵⁹⁰ as well as norms and standards relating to basic infrastructure and capacity in public schools under section 5A.¹⁵⁹¹ All the above norms and standards that the Minister of Basic Education is tasked to periodically determine, summarily, relate to the content of the teaching syllabus, the outcomes of learning, the teaching and learning environment, teaching and learning materials, as well as the quality of teaching and learning in schools at basic education level.¹⁵⁹² The reasoning that follows in this dissertation is that in the absence of a definition of basic education as well as clarity on its scope and content under the law, the drafting of norms and standards of basic education must be regarded as a legislative framework provided for the minister of basic education to define the term basic education and to

¹⁵⁸⁹ Ibid, S 6 'Language policy of public schools.—(1)Subject to the Constitution and this Act, the Minister may, by notice in the Government Gazette, after consultation with the Council of Education Ministers, determine norms and standards for language policy in public schools. (2) The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law. (3) No form of racial discrimination may be practised in implementing policy determined under this section'.

(4) A recognised sign language has the status of an official language for purposes of learning at a public school.'

¹⁵⁹⁰ Ibid, S 35, 'norms and standards for school funding.—(1)Subject to the Constitution and this Act, the Minister must determine national quintiles for public schools and national norms and standards for school funding after consultation with the Council of Education Ministers and the Minister of Finance. (2)The norms and standards for school funding contemplated in subsection (1) must— (a) set out criteria for the distribution of state funding to all public schools in a fair and equitable manner; (b) provide for a system in terms of which learners at all public schools can be placed into quintiles, referred to as national quintiles for learners, according to financial means; (c) provide for a system in terms of which all public schools in the Republic can be placed into quintiles referred to as national quintiles for public schools, according to the distribution of learners in the national quintiles for learners; and(d) determine the procedure in terms of which the Member of the Executive Council must apply the criteria contemplated in paragraph (a)'.

¹⁵⁹¹ Ibid, S 5A, 'Norms and standards for basic infrastructure and capacity in public schools.—1)The Minister may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for— a)school infrastructure; b)capacity of a school in respect of the number of learners a school can admit; and c)the provision of learning and teaching support material. 2)The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following: a)In respect of school infrastructure, the availability of— i)classrooms; ii)electricity; iii)water; iv)sanitation; v)a library; vi)laboratories for science, technology, mathematics and life sciences; vii)sport and recreational facilities; viii)electronic connectivity at a school; and ix) perimeter security b)in respect of the capacity of a school— i)the number of teachers and the class size; ii)quality of performance of a school; iii) curriculum and extra-curricular choices; iv)classroom size; and v)utilisation of available classrooms of a school; c)in respect of provision of learning and teaching support material, the availability of— i)stationery and supplies; ii)learning material; iii)teaching material and equipment; iv)science, technology, mathematics and life sciences apparatus; v)electronic equipment; and vi)school furniture and other school equipment.'

clarify its scope and content. The Constitution must be understood to provide basic education as a minimum core standard of the right to education and following the Schools Act the Minister of Basic Education is supposed drive the process which to define and unpack the scope and content of basic education.

5.7.2.3 Refuting criticisms levelled against a minimum core right to education

The argument in these discussions that section 29 has a minimum core content is not blind to the criticisms levelled against the minimum core. As Young elaborates, 'critics of the concept have suggested that paring down such rights to an essential core threatens the broader goals of economic and social rights, or pretends a determinacy that does not exist'.¹⁵⁹³ Whilst the above argument may be sustainable when one looks at other rights in the South African Constitution, section 29 does not reduce the 'broad right to education' to an essential core nor threaten the goal of section 29 as a whole, rather, it provides that basic education is an essential core that should be provided for immediately. Then, in addition to and separate from basic education, it provides for other education rights, such as, the right to language and the right to a school of choice. It also provides for the right to further education that the government ought to provide through progressive measures within its available resources. In that regard, the minimum core does not reduce section 29 to the provision of only section 29 (1) (a) which is argued to be the minimum core content of section 29 in this dissertation. It mandates the government to prioritise the rights in the same manner but noting the difference of its obligations - section 29(1)(a) with immediate effect and the others progressively. Further, unlike the critique stated above, the scope and content of basic education is not a 'determinacy that does not exist', rather it is a determinacy that exists. As stated earlier, the provision of basic education has been agreed upon at international level and South Africa vowed its commitment to that goal. The scope and content of a basic education has been determined at the international level. What might vary are constitutional or other legal provisions of countries and their level of compliance with such provisions given the different political and economic landscapes.

¹⁵⁹³ Young 'The minimum core of Economic and Social Rights: A concept in search of content'(2008) 33 *Yale Journal of International Law* Young (2008) 114.

In addition, the 'long-standing' criticism to the effect that the minimum core directs our attention to the performance of developing countries 'leaving the legal discourse of economic and social rights beyond the reach of those facing material deprivation in the middle or high income countries'¹⁵⁹⁴ is too general. It fails to commend developing countries, like South Africa, which aim for restorative justice using legal means, and also fails to rebuke high or middle income countries which fail to legally recognise socio-economic rights or enact laws that promote the use of the legal means to enforce the minimum core or to litigate the minimum deprivation of socio-economic rights. The blame is not on the minimum core concept. To be specific, South Africa, unlike middle or high income countries, recognises a history of deprivation in the provision of education. Informed by such history, it sought justice for everyone through the provision of at least an immediately claimable minimum level of education. Also, given the advantages of education, the provision of a minimum core right to education will ensure that every South African has a basic education that ensures that he/she finds means to access other socio-economic rights, to demand civil and political rights, to take part in their own development, in the development of others and in the governance of their country.

5.7.2.4 What now after the ratification of the ICESCR?

The argument whether or not the Constitution should be amended to include a component of an unqualified right for every socio-economic right in light of the recent ratification of the ICESCR by South Africa is not a question to be answered by this dissertation. This dissertation contends that whether or not South Africa has ratified the ICESCR, Section 29 has already imposed an unqualified obligation on the state section 29 (1) (a), which this dissertation views to be the minimum core content of the right to education defined by international law. In the case of the right to education, the court is not being called upon to determine what the minimum core of the right to education would entail, rather the Constitution itself has clarified that the

¹⁵⁹⁴ Ibid, 115.

right to education has an immediate content and those obligations are similar to those imposed by a minimum core content. The scope and content of basic education is already determinable under international law. The fact that the scope and content of the right to basic education is already determinable under international law refutes any potential argument that the court cannot define basic education. The specific unique provision of an unqualified right with immediate enforceability by section 29 (1) (a) is the foundation of the argument that basic education must be regarded as a minimum core obligation of the right to education. Like an unqualified right, a minimum content is the unqualified part of a human right which is immediately enforceable.

The above argument is further strengthened when one notes that in contrast to section 29 (1) (a), section 29(1) (b) provides for the right to further education which is a qualified right. It becomes clear that the provision of basic education as an unqualified right was not a mistake or an oversight on the part of the Constitution, rather, it was a deliberate move by the drafters to ensure that the government provides basic education as an immediate minimum core obligation. Interpreting section 29 as having a minimum core right to basic education is in line with the transformative agenda of the Constitution. It ensures that the discriminatory provision of basic education done during the apartheid era will never be repeated because everyone will have the same immediate and claimable right to education, in addition to enjoying the other aspects of the right to education which are not immediately realisable. Given the history of education, discussed above, a consideration of the textual formulation of section 29 (1) (a) as well as its spirit and purport must mean that its reading as a minimum core obligation shows that the drafters of the constitution were mindful of the benefits of a basic education. They sought to address the ills of the past by ensuring that everyone in South Africa benefits from at least one certain free and immediately claimable type of an education.

5.7.3 The right to basic education is provided at primary and secondary school levels

The other component of the right to basic education is that it encompasses primary and secondary school attendance. The South African case of *Madzodzo and Others v Minister of Basic Education and Others* has already confirmed the importance of school attendance stating that, 'access to schools is a necessary condition for the achievement of the right to education'.¹⁵⁹⁵ School attendance is not a basic education but is it an input which enables the channeling of a basic education.¹⁵⁹⁶ As discussed in chapter 2, General Comment 13 to the ICESCR states that the close relationship between primary education and basic education is that, outside the family, the primary school is the central conveyancing system for basic education.¹⁵⁹⁷ In accordance with General Comment 13, primary education is the stage where basic education is first introduced.¹⁵⁹⁸ While General Comment 13 states that primary education is the main delivery of basic education, it further states that secondary education 'includes the completion of basic education'.¹⁵⁹⁹ The provisions of the General Comment 13 mean that, basic education is first provided at primary school level and completed at secondary school level.

In addition to General Comment 13 provisions, in the context of South Africa, which is party to the ICESCR, the provisions of General Comment 13 are read together with the provisions of the African Charter on the Rights and Welfare of the Child

¹⁵⁹⁵ *Madzodzo and Others v Minister of Basic Education and Others* 2014 SA 339 (ECM) para 1, 'This matter concerns the impact of an alleged failure to provide essential school furniture, in the form of desks and chairs, to public schools throughout the Province and in particular in impoverished rural areas'.

¹⁵⁹⁶ *General Comment 13: The Right to Education* (1999), par 13(9).

¹⁵⁹⁷ *Ibid.*

¹⁵⁹⁸ *Ibid.*

¹⁵⁹⁹ *General Comment 13: The Right to Education* (1999), par 12, 'While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities.7 Article 13 (2) (b) applies to secondary education 'in its different forms', thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages alternative educational programmes which parallel regular secondary school systems'.

(African Charter)¹⁶⁰⁰ which is also binding on South Africa. The African Charter does not provide for provisions relating to primary and secondary school attendance but it places an obligation on member states to make the acquisition of basic education mandatory.¹⁶⁰¹ The additional non-derogatory obligation imposed on South Africa by the African Charter, of requiring states to make the acquisition of basic education mandatory are interpreted by this dissertation to mean that, as long as there is an international acceptance that basic education is offered at both primary and secondary levels as stated by General Comment 13, both primary and secondary school attendance is compulsory.

The Schools Act does not provide clarity relating on the school levels for which basic education is offered, although the assumption by this dissertation is that, since the Ministry of Basic Education in South Africa regulates the provision of education from Grade 1 to Grade 12, including adult literacy programmes, basic education is provided at primary and secondary school levels.¹⁶⁰² Arendse following the argument by Coomans, however, notes that primary education is the most important level of education which can even translate to being the minimum claim that should be demanded by citizens.¹⁶⁰³ The regard of primary education as a minimum claim reduces the importance of secondary education. As stated above, basic education is the minimum core content of the right to basic education. For children to acquire the full basic education needs, they must attend both primary and secondary school levels in compliance with both the African Charter and General Comment 13 provisions discussed above. Both primary and secondary school attendance are therefore components of the right to basic education.

¹⁶⁰⁰ *African Charter on the Rights and Welfare of the Child*, (1990), A 11 (3) (a) 'State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and (a) shall in particular provide free and compulsory basic education'.

¹⁶⁰¹ Ibid.

¹⁶⁰² Department of Basic Education 'About basic education'

[Http://www.education.gov.za/aboutus/aboutdbe.aspx](http://www.education.gov.za/aboutus/aboutdbe.aspx) accessed 15 July 2017, 'The Department of Basic Education was formed when the former National Department of Education was split into two: Department of Basic Education and the Department of Higher Education and Training. The DBE deals with all schools from Grade R to Grade 12 including adult literacy programmes. The aim of the DBE is to develop, maintain and support a South African school education system for the 21st century'.

¹⁶⁰³ Arendse L 'The Obligation to Provide Free Basic Education In South Africa: An International Law Approach' (2011) 14 *PER/PELJ* 217.

5.7.4 Free and compulsory education as an important component of basic education

5.7.4.1 Compulsory Basic Education

In addition to its provision at primary and secondary school levels as discussed above, basic education must be provided freely and compulsorily. On the aspect of compulsory basic education, the Schools Act, in partial compliance with international law provides for compulsory primary education¹⁶⁰⁴. As discussed in chapter 2, under international law, article 26 (1) (a) of the Universal Declaration states that, 'everyone has the right to education and elementary education shall be compulsory'.¹⁶⁰⁵ The ICESCR provides that, 'primary education shall be compulsory' whilst secondary education must be accessible.¹⁶⁰⁶ State parties to the CRC also agreed that, primary education must be compulsory whilst secondary education is accessible.¹⁶⁰⁷ The Schools Act by making primary education compulsory, mirrors the objectives of international law which intends to ensure that children are able to attend school without interference from anyone, including their parents. It is notable that, as discussed above, the African Charter provides that, basic education, not only primary education, must be compulsory.¹⁶⁰⁸ If South Africa provides clarity in the future, that is in line with international law, basic education will be offered at both primary and secondary school levels in South Africa, then the Schools Act must also provide for both compulsory primary and secondary education.

5.7.4.2 Free basic education and the critique of the South African fee system for children

In terms of the provision of free basic education, the obligation to provide free education at primary school, is viewed as unequivocal at international law. As already

¹⁶⁰⁴ *South African Schools Act, 1996*, S 3 (1)

¹⁶⁰⁵ *Universal Declaration of Human Rights*, (1948), A 26(1) religious groups, and shall further the activities of the United Nations for the maintenance of peace'.

¹⁶⁰⁶ *International Covenant on Economic, Social and Cultural Rights*, (1966), A 13 1 (a) and (b).

¹⁶⁰⁷ *Convention on the Rights of the Child*, (1989), A 28 (1) (a).

¹⁶⁰⁸ *African Charter on the Rights and Welfare of the Child*, (1990), A 11 (3) (a)

stated in chapter 2, the Universal Declaration states that, education 'shall be free at elementary [primary] levels'.¹⁶⁰⁹ The ICESCR states that primary education must be compulsory and free whilst secondary education must be accessible, available and progressively free.¹⁶¹⁰ The CRC states that primary education must be both compulsory and free whilst secondary education must be accessible, available and gradually free.¹⁶¹¹ The African Charter to which South Africa is party, extends the obligation to provide free basic education throughout the basic education years.¹⁶¹²

The Schools Act does not provide for free education at any level including the primary school but provides for a no-fees and fees exemptions. By a majority vote, parents may adopt a resolution to charge school fees at a public school.¹⁶¹³ The resolution must state the amount of school fees to be charged.¹⁶¹⁴ A parent can be partially or totally exempted from paying school fees and the schools' governing body has the responsibility to implement such a resolution.¹⁶¹⁵ Unless exempted, every parent has the obligation to pay school fees and is legally liable for failure to do so.¹⁶¹⁶ A parent has the right to lodge an appeal with the Head of Department against the decision of the governing body concerning exemption from paying school fees and the head of department must make a decision after considering the interest of the parent as well as those of the governing body.¹⁶¹⁷ A parent who fails to apply for exemption to pay school fees after being notified of such failure by the school and fails to pay school fees after three months from such notification may have legal proceedings commenced against them for such liability.¹⁶¹⁸

The means test which compares the income of the parent(s) of the child relative to the fees that the child has to pay is the bases to exempt a learner from paying

¹⁶⁰⁹ *Universal Declaration of Human Rights*, (1948) S 26 (1).

¹⁶¹⁰ *International Covenant on Economic, Social and Cultural Rights*, (1966) A 13 (a) and (b).

¹⁶¹¹ *Convention on the Rights of the Child*, (1989), S 28 (1) (a) (b).

¹⁶¹² *African Charter on the Rights and Welfare of the Child*, (1990), A 11(3) .

¹⁶¹³ *The South African Schools Act*, (1996), S 39 (1) of 84 of 1996.

¹⁶¹⁴ *Ibid*, S 39 (2) (a).

¹⁶¹⁵ *Ibid*, S 39 (2) (b).

¹⁶¹⁶ *Ibid*, S 40 (1).

¹⁶¹⁷ *Ibid*, S 40 (2).

¹⁶¹⁸ *Ibid*, S 40 (1).

school fees.¹⁶¹⁹ The Regulations Relating to the Exemption of Parents from the Payment of schools fees 2006 provide an application form that parents must fill and apply to the Chairperson of the School Governing Body (SGB).¹⁶²⁰ Children who are automatically exempted from paying school fees include children in foster care, in a youth centre, in a place of safety, in an orphanage, abandoned children, a child who heads a family, a child without support or a child on the child's grant.¹⁶²¹ To get an automatic exemption a parent or guardian must have a sworn statement or affidavit that is confirmed by either the South African Police Service, any social worker or competent authority stating that the child is eligible for exemption or must have a court order confirming the exemption.¹⁶²² The documents must be handed to the principal of the school or a member of the School Governing Body.¹⁶²³

By way of a government notice the minister may Gazette the 'national quintiles for public schools or part of such quintiles which must be used by the Member of the Executive Council¹⁶²⁴ to identify schools that may not charge school fees'.¹⁶²⁵ The implication of the above is that, whilst other public schools may charge school fees there are others which may be identified and determined as no-fees schools.¹⁶²⁶ The no-fees policy states that the poorest 40% schools should not charge school fees, but only from Grade R to Grade 9 and its first implementation was in 2007.¹⁶²⁷ To help in informing its judgement on the names of the 40% that should not charge schools

¹⁶¹⁹ Hall and Monson 'Free to learn: The School Fee Exemption policy and the National School Nutrition Programme', available <http://docplayer.net/12058666-Education-is-a-basic-right-section-29-1-a-of-the.html> accessed on 15 August 2017 'The Exemption of Parents from the Payment of School Fees Regulations of 1998 set out a mandatory minimum means test for the granting of exemptions. During the Means to Live research period, the means test read as follows: If the combined annual gross income of the parents is less than ten times the annual school fees per learner, the parent qualifies for full exemption. Partial exemptions were available for those whose income was more than ten times but less than thirty times the annual fees'.

¹⁶²⁰ Department of Basic Education 'Guide for Parents: School fees in public school' <http://www.ecdoe.gov.za/documents/parents/tips/tips-for-parents.pdf> accessed 17 January 2017.

¹⁶²¹ Ibid

¹⁶²² Ibid

¹⁶²³ Ibid

¹⁶²⁴ *The South African Schools Act, 1996*, S 39 (1) Definitions of 84 of 1996 'This is the member of the province who is responsible for education in that province'.

¹⁶²⁵ Ibid, S 40 (7) , This section must be read together with section 35 of the School Act.

¹⁶²⁶ Ibid.

¹⁶²⁷ Hall and Monson 'Free to learn: The School Fee Exemption policy and the National School Nutrition Programme', available <http://docplayer.net/12058666-Education-is-a-basic-right-section-29-1-a-of-the.html> accessed on 15 July 2017.

fees, the Department of Basic Education 'allocates each school a poverty ranking derived from national data on income levels, dependency ratios and literacy rates in the surrounding community'.¹⁶²⁸ The Minister then states that a school is a no-fees school by publishing it in the Government Gazette – currently all schools ranked in quintiles 1, 2 and 3 should be no-fees schools.¹⁶²⁹ The government then pays to cover the costs of non-fees-paying learners from its national budget.¹⁶³⁰ The ranking of no-fees schools is according to the area in which the schools are situated, meaning that children who go to school in areas not depicted as poor have to pay school-fees.¹⁶³¹

Whilst the South African system seems to be noble in its provision of no-fees schools and fee exemptions, it is not in compliance with the international law obligation to provide free basic education. In fee-paying public schools, the Schools Act gives parents the power to determine the amount of school fees to charge.¹⁶³² Such an approach means that the level of income of parents sending their children to a public fee-paying school has the potential to indirectly determine the social class of children who will attend that school. It goes without saying, that a school with parents of learners who are wealthy can afford to attract better teachers, to hire the teachers they want, to buy books for children and to provide the best learning facilities. Such a potential disparities in the funding of education especially at public schools is discrimination in education as it is defined by the Convention Against Discrimination in Education which shuns the provision of education of an inferior standard for anyone.¹⁶³³ It perpetuates the unequal distribution of educational opportunities for children thereby discriminating other children based on the financial status of their parents. Also, consequent to poor education which is almost a direct consequent of the poverty of their parents, children of poor parents may end up being poorly educated and remain marginalized in their adulthood.

¹⁶²⁸ Ibid.

¹⁶²⁹ Department of Basic Education 'About basic education'.
<http://www.education.gov.za/aboutus/aboutdbe.aspx> accessed 15 July 2017.

¹⁶³⁰ Ibid.

¹⁶³¹ Sayed and Motala 'Equity and 'No Fee' Schools in South Africa: Challenges and Prospects' (2012) 46 Social Policy and Administration 675.

¹⁶³² *The South African Schools Act, 1996*, S 39 (1)

¹⁶³³ *Convention against Discrimination in Education*, (1960), A (1) (a) (b).

In the view of this dissertation, the fee exemption policy is also discriminatory in that it directly places the fate of children from poor backgrounds in the hands of more affluent parents who vote to determine whether or not they can be exempted from paying school fees. Such a situation can potentially expose the children and their poor parents and make them vulnerable to discrimination by other parents, teachers or even students. The fee-exemption policy is therefore blind to the exceptionally difficult situation of lack and want that children with poor parents may have grown up in and their need for special attention that does not expose them to further alienation and discrimination. No child deserves to feel that they are getting basic education because other parents, teachers and learners have felt pity for them and condoned their parents for being poor. Further to the above, the fee-exemption policy only applies to public schools and leaves no room for a private school to be compelled to exempt a child from paying school fees. By not extending the fee exemptions to private schools there is a chance that children of domestic workers living with their mothers in wealthy suburbs might not find a no-fee paying public school nearby for their children and yet they still cannot afford to take their child to a private school. The end result might be that the school children will either be separated from their working parent/parents to ensure that they get educated in a no-fee-paying public school elsewhere or the child might be forced to walk long distances to a no-fee-paying school.

In addition to the discrimination perpetrated by the fee exemption policy, the no-fee system as well as fee-exemptions both disadvantage children of well-resourced parents by assuming that because their parents are well resourced, they will consequently provide school fees for them. That assumption is discriminatory by its ability to place the purported rich children at the mercy of irresponsible parents. A child is entitled to free primary education and must never or beg a parent to pay their fees. Also, children from the deemed rich backgrounds are also at risk of dropping out of school as soon as their parents become poor, die or simply refuse to pay school fees. The Committee on Economic Social and Cultural Rights (CESCR) elaborated that the right to free primary education is a right for every child regardless of his/her background. The CESCR reinforce states that:

Free of charge: The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure that availability of primary education without charge to the child, parents or guardians. Fees imposed by the government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category.¹⁶³⁴

The fee-exemption policy is also discriminatory by being based on a rational of cross-subsidization where higher school fees might have to be paid by the more affluent parents to cater for the needs of the less affluent.¹⁶³⁵ This means that in fee-paying public schools as school fees is increased to cater for the underprivileged children partially/fully exempted from paying school fees, the number of children who fall into the exempted category might increase as salaries of parents might not go up. The situation above leads to a vicious circle that might see the affluent parents shouldering the burden of paying school fees for indigent students and consequently opting to take their children to private schools where there are no fee exemptions.¹⁶³⁶ Further, the use of income to determine poverty of parents to determine exemptions often prejudices those who are slightly above or below the poverty line.¹⁶³⁷ The no-fees system like fee-exemptions is also discriminatory in that it is based on the assumption that learners in schools come from the communities in which the school is situated which is not necessarily the case in all circumstances and can lead to wrong assumptions on reaching decisions about the list of schools that qualify for the no-fee policy.¹⁶³⁸ Moreover, using the school and not the child as the unit of analysis to conclude whether the child should pay school fees hides the problems of the individual learner which are supposed to be vital under the principle of the best interest of the child.¹⁶³⁹

¹⁶³⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 11, 1999, para 7 .

¹⁶³⁵ Libisi *The Quest for free education in South Africa. How close is the dream to reality* (2008) 5.

¹⁶³⁶ Ibid 10.

¹⁶³⁷ Ibid 11.

¹⁶³⁸ Ibid 11 .

¹⁶³⁹ Ibid 5.

The importance of education calls for a more serious commitment on the part of South Africa. Given the proven benefits of education in alleviating poverty and promoting human development and the development of nations, an argument that the immediate free and compulsory provision of basic education is not possible due to resource constraints is neither constitutional nor sustainable. As already stated, 'energy and funding directed to basic education [is] perhaps the most profound investment in people and in the future of a country'.¹⁶⁴⁰ The South African Constitution provides for an unqualified right to basic education, it gives importance to the provisions of international law and it is bound by its ICESCR and African Charter obligations which all demand that South Africa provides for free basic education. As long as parents can be guilty for failure to send children to school, basic education must be provided for free. Parents cannot be expected to pay the money they do not have and be punished for not paying money that they do not have.

5.7.5 Basic education points to the quality of education

5.7.5.1 Quality: The heart of the education goal

As stated in chapter 1, it is already accepted among authors such as MacConnache and MacConnachie¹⁶⁴¹ and Murungi¹⁶⁴² that in relation to its definition, the term, basic education, is quality-oriented and defined by the World Declaration.¹⁶⁴³ The difference between the right to basic education and the term 'basic education' is that, the right to basic education is the one whose scope and content this dissertation intends to determine, whilst the term, basic education, is a quality-oriented term which points to the quality of education which children must acquire.¹⁶⁴⁴ The quality component of

¹⁶⁴⁰ *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 in Jomtien, Thailand (1990), A IX (1).*

¹⁶⁴¹ McConachie and McConachie 'Concretizing the right to a basic education' (2012) *SALJ* 557, 565-568.

¹⁶⁴² Murungi LN 'Inclusive basic education in South Africa: Issues in its conceptualisation and implementation' 18 (2015) *PER* 1.

¹⁶⁴³ Berger 2003 *Columbia Law Review* 625 see also McConachie and McConachie 'Concretizing the right to a basic education' (2012) *SALJ* 127.

¹⁶⁴⁴ *Ibid.*

education called basic education is in the view of this dissertation, another component of the right to basic education. The term, basic education, is viewed to have originated from, defined and elaborated upon by the World Declaration on Education for All, 1990 (World Declaration) pointing to the quality of education that learners must receive¹⁶⁴⁵.

Quality is at the heart of the education for all goal. The case of *Fiscal Equity v The state of New York 100 NY 2d 893 and Campaign for Fiscal Equity*¹⁶⁴⁶ illustrated that the term, basic education, is quality-oriented and spoke to some quality aspects such as development of literacy and oral skills.¹⁶⁴⁷ Clarification relating to the type of education which must be provided for children was done by the World Declaration which defined the term- basic education. The World Declaration states that,

Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs. 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.¹⁶⁴⁸

The provision of basic learning needs is what is required at basic education level.¹⁶⁴⁹ The Schools Act aligning with the provisions of the World Declaration must be amended to clarify the foundational components which form a basic education curriculum. The foundational components of a basic education which are beyond the scope of this dissertation must follow the definition and description by the World Declaration although they can be contextualized to meet the needs of South Africa. National examinations can be used to test the competency of a learner in mastering basic learning needs.

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 in Jomtien, Thailand (1990).

¹⁶⁴⁶ Woolman and Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 128 and 129.

¹⁶⁴⁷ Ibid.

¹⁶⁴⁸ *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 in Jomtien, Thailand (1990)*, Article 1 (1).

¹⁶⁴⁹ Ibid.

Whilst they agree that the term basic education points to the quality of education to be provided by children, it is notable that Woolman and Fleish state that, achieving the quality dimension of basic education 'is unequivocally beyond the current reach of the South African educational system' due to the inadequacy of resources.¹⁶⁵⁰ This dissertation advances a point that, there is no constitutional goal which can be beyond the reach of the educational system. Basic education is an unqualified immediate obligation as stated above, hence, the state has an obligation to provide it immediately. To do so, it must reallocate resources and revise its spending priorities in order to meet basic learning needs immediately.

5.7.6 Basic education provided by schools must be available, accessible, adaptable and acceptable

5.7.6.1 A functional School

The Committee through General Comment number 13 elaborates that, if schools are to offer education, it 'shall exhibit the following interrelated and essential features', availability, accessibility, acceptability and adaptability.¹⁶⁵¹ These elements which have been discussed in chapter 2 do not define education or basic education but they are essential features which must be exhibited by a school which offers education. Authors like Churr also agree that the four interrelated elements, availability, accessibility and acceptability and adaptability are important essential features of a basic education.¹⁶⁵² Arendse further states that the interrelated elements 'give concrete content to the right to basic education'¹⁶⁵³, however, unlike Churr¹⁶⁵⁴ who may think of them only as 'contributing to the successful provision of a basic education', this dissertation argues

¹⁶⁵⁰ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 130.

¹⁶⁵¹ *General Comment 13: The Right to Education* (1999), para 6a-6d.

¹⁶⁵² Churr 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) *PER/PELJ* 7 2414.

¹⁶⁵³ Arendse L 'The Obligation to Provide Free Basic Education In South Africa: An International Law Approach' (2011) 100.

¹⁶⁵⁴ Churr 'Realisation of a Child's right to a basic education in the South African Constitution' (2015) *PER/PELJ* 7 2414.

that, these components are not the concrete content of the right to basic education but rather a component of the right to basic education together with its other elements discussed above.

5.7.6.2 The South African Position

The Schools Act prescribes minimum norms and standards relating to infrastructure of a school, capacity of schools, curriculum and the provision of learning materials by the Minister.¹⁶⁵⁵ In relation to minimum standards which make education available, such as infrastructure, capacity, and learning materials, the Minister only has a discretion to prescribe them, the law does not mandate her to prescribe them.¹⁶⁵⁶ The language of the Act states that she 'may' and not she 'must'. The Minister may therefore choose not to prescribe them which will be a decision which compromises the goal of making education available as sanctioned by General Comment 13. If the prescription of norms and standards is to be maintained, the provisions of the Act need to be amended to ensure that the Minister is mandated to prescribe the minimum norms and standards. Further, the Act states that the minister when drafting the norms and standards must exercise her discretion in consultation with the Minister of finance.¹⁶⁵⁷ Such a provision means that the issue of availability of resources may be

¹⁶⁵⁵ *The South African Schools Act, 1996*, S 39 (1) S5A 'Norms and standards for basic infrastructure and capacity in public schools.— (1) The Minister *may*, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for— (a) school infrastructure; (b) capacity of a school in respect of the number of learners a school can admit; and (c) the provision of learning and teaching support material. [Sub-s. (1) amended by s. 5 of Act No. 15 of 2011.] Wording of Sections (2) The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following: (a) In respect of school infrastructure, the availability of— (i) classrooms; (ii) electricity; (iii) water; (iv) sanitation; (v) a library; (vi) laboratories for science, technology, mathematics and life sciences; (vii) sport and recreational facilities; (viii) electronic connectivity at a school; and (ix) perimeter security; (b) in respect of the capacity of a school— (i) the number of teachers and the class size; (ii) quality of performance of a school; (iii) curriculum and extra-curricular choices; (iv) classroom size; and (v) utilisation of available classrooms of a school; (c) in respect of provision of learning and teaching support material, the availability of— (i) stationery and supplies; (ii) learning material; (iii) teaching material and equipment; (iv) science, technology, mathematics and life sciences apparatus; (v) electronic equipment; and (vi) school furniture and other school equipment. (3) When determining policy in terms of sections 5 (5) and 6 (2) a governing body must comply with the norms and standards contemplated in subsection (1). (4) A governing body must, within a period of 12 months after the Minister has prescribed the norms and standards contemplated in subsection (1), review any policy that it has determined in terms of sections 5 (5) and 6 (2) to ensure that such policy complies with the norms and standards'.

¹⁶⁵⁶ Ibid.

¹⁶⁵⁷ Ibid.

taken into account before the norms and standards are prescribed. Norms and standards which tally with available resources may end up being prescribed, which may end up disadvantaging children who are entitled to an unqualified right to basic education.

The Schools Act also provides a mere list which the minister must prescribe standards on, such as stating 'library, furniture or sanitation' without providing details.¹⁶⁵⁸ The Act must provide specifics on each item and not just a list. What is needed is for the Schools Act to expand its provisions and go into detailed foundational specific details. Mere mentioning of the word 'furniture' cannot be enough. Citizens will be advantaged by the provision of specifics in the Act so that the appropriateness of the Minister's norms and standards can be measured against established legal parameters. When providing explanations, the Act must provide a leeway to make them context specific, in some cases. An example of context specific is - that, the Act can state that the classrooms in a certain province must have in-built air conditioning whilst the other province can have fans depending on the weather of each province. Context specific does not allude to discriminatory treatment but a recognition of peculiar contextual needs.

The benefit of more comprehensive legal frameworks is evidenced by the fact that in South Africa, citizens could have benefited from more clarity relating to the educational resources had it been provided by the Schools Act. In the case of *Madzodzo*¹⁶⁵⁹, which related to the availability of school education resources, the court stated that the right to basic education, 'requires the provision of a range of educational resources - schools, classrooms, teachers, teaching materials and appropriate facilities for learners'.¹⁶⁶⁰ It was stated that the lack of age-appropriate

¹⁶⁵⁸ Ibid.

¹⁶⁵⁹ *Madzodzo and Others v Minister of Basic Education and Others* 2014 SA 339 (ECM) par 1 'This matter concerns the impact of an alleged failure to provide essential school furniture, in the form of desks and chairs, to public schools throughout the Province and in particular in impoverished rural areas'.

¹⁶⁶⁰ Ibid para 20.

desks and chairs constituted a violation of the right to basic education.¹⁶⁶¹ Relating to the availability of teaching staff, the case of *Centre for Child Law and Others v Minister of Basic Education and Others (National Association of School Governing Bodies as amicus curiae)* stated that the provision of teaching and non-teaching staff as well as teaching resources is a critical component of the right to basic education.¹⁶⁶² The decisions of the case above clearly shows that, instead of citizens having to hear it from the courts that schools must provide 'age-appropriate furniture', it is more convenient for the government to know the type of furniture, classrooms or libraries it must provide through the provisions in the law of general application.

In relation to acceptability of education, the Minister is obligated to gazette the national curriculum which determines the minimum outcomes and standards of education as well as the procedures to assess the learner's achievements.¹⁶⁶³ The Schools Act does not provide specifics of the type of education the Ministry of Basic Education must provide as well as its intended outcomes. The Schools Act must follow the recommendation of the Basic Education of Finland which provides for the objectives of basic education¹⁶⁶⁴ and the content of its syllabus.¹⁶⁶⁵ In addition, the

¹⁶⁶¹ Ibid para 20 'It is clear from the evidence presented by the applicants that inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right of access to basic education'.

¹⁶⁶² *Centre for Child Law and Others v Minister of Basic Education and Others (National Association of School Governing Bodies as amicus curiae)* (2012) 4 All SA 35 (ECG) para 32.

¹⁶⁶³ *The South African Schools Act, 1996*, S 6A. Curriculum and assessment.—(1) 'The Minister must, by notice in the Government Gazette, determine—

(a) a national curriculum statement indicating the minimum outcomes or standards; and

(b) a national process and procedures for the assessment of *learner* achievement.

(2) The curriculum and the process for the assessment of *learner* achievement contemplated in subsection (1) must be applicable to *public* and *independent schools*'.

¹⁶⁶⁴ Ibid, S2 'Objectives of education 1. The purpose of education referred to in this Act is to support pupils' growth into humanity and into ethically responsible membership of society and to provide them with knowledge and skills needed in life. Furthermore, the aim of pre-primary education, as part of early childhood education, is to improve children's capacity for learning. 2. Education shall promote civilisation and equality in society and pupils' prerequisites for participating in education and otherwise developing themselves during their lives. 3. The aim of education shall further be to secure adequate equity in education throughout the count'.

¹⁶⁶⁵ Ibid, S 11, 'Content of education 1. The basic education syllabus shall contain, as enacted by virtue of Section 14, the following core subjects: mother tongue and literature, the second national language, foreign languages, environmental studies, health education, religious education or ethics, history, social studies, mathematics, physics, chemistry, biology, geography, physical education, music, art, crafts, and home economics. Education may, as enacted by virtue of Section 14, be based on syllabi of different extent. Providers of basic education who have been assigned a special educational mission under Section 7 or 8 may deviate from the provisions of this subsection. (Amendment 453/2001) 2. A pupil may be taught subjects suited for basic education other than those referred to in subsection 1, as

Schools Act must define the term, basic education. It must fully explain the basic learning needs required by the World Declaration including the way in which they (needs) must be taught and assessed. Concepts and phrases including knowledge, skills, values, literacy, oral expression and problem-solving must be defined and explained. Guidance to define them can be sought from international law, national education committees, academic and non-governmental organizations dealing with education for children.

With respect to accessibility of education, it follows that basic education must be free of charge as discussed earlier. However, it is strongly recommended that provisions from the Basic Education of Finland which provide clarity on the need for free education be regarded as persuasive. The Basic Education of Finland provides that, 'teaching, the necessary textbooks and other learning materials, and school equipment and materials' must be free of charge also 'a pupil attending basic education [must] be provided with a balanced and appropriately organized and supervised free meal on every school day'.¹⁶⁶⁶ In relating to access to enrolment, the Constitution is not discriminatory and access to basic education is for everyone as discussed earlier on. It is, however, notable that children of undocumented migrants, asylum seekers or refugees often face difficulties when desiring to access education. It must be noted that the unqualified nature of basic education demands its provision for all children whether or not they are documented and the word 'everyone' provided by section 29 (1) (a) must testify to the universal nature of the right to basic education in South Africa.

5.8 Conclusion

This chapter explained that, the need to determine the scope and content of the right to basic education is rooted in the need to correct the ills of the apartheid past. The discussion exposed that, during apartheid, education was provided along racial lines

determined in the curriculum. These subjects may be partly or totally free-choice or optional. 3. The pupil shall be given guidance counselling. 4. Notwithstanding the provisions of this Section, pre-primary education, additional voluntary education and education preparing for basic education shall be governed by the provisions of Section 14'.

¹⁶⁶⁶ *Basic Education Act 628/1998*.

with the deemed superior education reserved for those of the White race. Since attaining independence, the South African government still struggles to provide equitable education. The state of education is characterized by adding of marks to plump up pass rates, learning in mud schools, unqualified teachers, lack of textbooks, chairs, desks and a Schools Act which does not align with the provisions of the Constitution as well as international law. Taking from the provisions of the South African Constitution, the various decisions by the South African constitutional court relating to the obligations imposed by section 29 (1) (a) and international law this chapter explained the scope and content of the right to basic provided by the Constitution of South Africa. The scope and content of the right to basic education was stated to encompass six components which have equal importance and similar to those of the Zimbabwean Constitution discussed in the previous chapter. First, the right prescribes the provision of a type of education called basic education which is quality-oriented. Second, the provision of basic education is not possible without the attendance of primary and secondary school. Third, the attendance of primary and secondary school is made possible if schools are not only compulsory but free. Fourth, the right to basic education should be regarded as an immediately claimable right which is not qualified by resource or other constraints and fifth the right to basic education must be regarded as the minimum core content of the right to education and sixth, any education including basic education must exhibit characteristic of the interrelated elements sanctioned by General Comment 13 which states that education must be accessible, acceptable, adaptable and available. The next chapter concludes the dissertation with a summation of the discussions of previous chapters. It recommends that Zimbabwe and South Africa share the same constitutional, international and regional obligations relating to the right to basic education. Collaboration and corporation is therefore necessary for the two countries to legally define the scope and content of their basic education obligations and to further devise ideas and funding efforts to ensure the delivery of basic education.

CHAPTER 6
A HEXAGON RIGHT
CONCLUSIONS AND RECCOMENDATIONS

6.1 Introduction

This research was significant and important because educating the public is not only a constitutional and international obligation but an absolute requirement for justice. For citizens to benefit from constitutional provisions and international laws, national laws in both Zimbabwe and South Africa must translate the obligations into enforceable claims. To translate the obligations into legally enforceable claims and to further deliver the entitlements, governments must know the scope and content of the rights which they must provide. The aim of the dissertation was therefore to delineate government obligations in relation to the provision of the right to basic education for Zimbabwe and for South Africa. 6 chapters became necessary to fulfil this aim.

Chapter 1 identified multiple violations of the right to basic education, ranging from the non-provision of schools, provision of inadequate schools, long distance walks to school, paid school fees, zero pass rates for schools, unqualified teachers, lack of text books, chairs and desks. The recognition was that, whilst citizens may suspect violations of the right to basic education, in the absence of legislation unpacking the scope and content of the right to basic education, they are unable to translate discontents into legal claims. The delineation of state obligations and citizen entitlements was however noted to be possible with the assistance of international law. Chapter 1, therefore introduced basic education as the subject of this dissertation, it stated its aim, provided an overview of the views of other authors, stated its objectives and described the problem it seeks to address. It further laid out the research questions, delimited the study and explained the research methodology and approach taken by the study. To address the aims and objectives of this dissertation, a human rights based approach was deemed to be appropriate.

To understand the operation of international law and the basic education obligations incumbent upon states , chapter 2 located the right to basic education within the international human rights framework. It noted that, the need to treat each other with dignity and to attain some level of equality among human beings motivated the universal acceptance of the concept of human rights leading to the enactment of the Universal Declaration. Human rights have now become an integral part of the survival of human beings and an indispensable tool for citizens to demand entitlements from governments. The human rights based approach gives the right holder an entitlement, it provides the motivations to claim from the duty bearer and the confidence to question the manner in which resources are allocated. The Universal Declaration was discussed to have provided for human rights as entitlements and this included the right to education. What became notable however is that since the Universal Declaration, the terms referring to education for children kept on evolving from primary, secondary, elementary and fundamental education to basic education. The World Declaration was the one which introduced the term basic education. General Comment 13 then explained that basic education is offered at primary and secondary schooling levels. The African Charter then took the obligation further and provided that the right to basic education is free and compulsory. Despite the change of education terms, the consistent thread over the years was noted to be that, all international instruments provided that at some point of human life, education had to be compulsory and free. Today the right to basic education is considered free and compulsory for both Zimbabwean and South African citizens. It was however discussed that citizens in both Zimbabwe and South Africa can only benefit from the free and compulsory basic education if the right is justiciable. It was discussed that, the effectiveness of the human rights based approach lies in the ability of citizens to approach the court and demand the state to comply with its obligations. At international law, the right to basic education was discussed to comprise of five components which are explained in the six major findings below.

This dissertation proceeded to chapter 3 which realised that both the Zimbabwean and the South African Constitutions provide a manner in which the rights

they impose must be interpreted and a discussion on constitutional interpretation is necessary. Constitutions are supreme documents so their provisions must be interpreted and understood. The agenda of chapter 3 was to provide a run-down of the subject of constitutional interpretation and the manner in which the Zimbabwean and the South African constitution sanction interpretation of the rights they provide. Chapter 3 discussed that constitutional interpretation is a process which allows the delineation of state obligations. It noted that constitutions are unique documents which embody agreements by the people relating to the principles and values that bind them. The unique nature of Constitutions was seen to call for their purposive interpretation. The consideration of constitutional text when one is interpreting the provisions of the Constitution was noted to be important. It was discussed that, constitutional text derives its meaning within the context of the Constitution as well as its spirit. The spirit of the Constitution was stated to refer to the values it protects, the principles it abides by, the structure of government, history of constitutional provisions and judicial precedence among many considerations. In jurisdictions like Zimbabwe and South Africa, all the above constitutional interpretation considerations would need to be done in light of the consideration of provisions of the interpretation clauses provided by the Constitutions. The discussed similar interpretation clauses were stated to sanction the consideration of the nature of the right, purpose of constitutional provisions, values and the consideration of international law when one interprets human rights. The peremptory consideration of international law sanctioned by the interpretation clauses of both countries was noted as important. It was realised that both the Zimbabwean and South African Constitution mandate the interpreter to prefer an interpretation which aligns with international law more than the one which does not. The textual formulation of the right to basic education in both Zimbabwe and South Africa was also noted and it was determined that the right is unique by not having internal qualifiers in its formulation. The internally unqualified nature of the basic education became the foundation for chapter 4 and 5 to reason that the right to basic education must be regarded as the minimum core content of the right to education in both Zimbabwe and South Africa.

The foundations laid by chapter 1, 2 and 3 became important for chapter 4 to begin to interrogate the scope and content of the right to basic education in Zimbabwe. The evident multiple violations of the right to basic education in Zimbabwe pointed to a government which does not understand its basic education obligations. Besides being party to international instruments and having a Constitution which protects the right to basic education, the history of education in Zimbabwe showed that it evidently violates its constitutional and international obligations. A discussion of the history of education in Zimbabwe was discussed with the view to understand the context in which the right to basic education must be interpreted, an approach discussed in chapter 3. It was discussed that, education began during precolonial times when it was done in an informal uncoordinated manner. The colonial era then introduced formal education but it was provided along racial lines. The curriculum for Black Africans was designed to provide basic skills necessary for them to work as servants of White settlers. Inadequate funding, lack of access, unqualified teachers among many problems characterised the education of the Black child. Education for White people was better funded, delivered by educated teachers and compulsory. When Zimbabwe gained independence more schools were opened and enrolments became free and for all. Literacy and numeracy for all was the goal but as the economy failed the tides changed. Today education in Zimbabwe is characterised by unqualified teachers, inadequate numbers of teachers, lack of school inputs, long travelling distances, fee payments, dropout rates, increased failure rates and a legislative framework which is not supportive of the constitutional and international goals. While the Constitution provides for right to basic education as required by international law, it was noted that the Education Act imposes school fees , imposes punishment for failure to pay school fees, does not even mention the term basic education and does not make secondary education compulsory. Whilst the Constitution provides for the right to basic education, a critique was made that it limits its application and foreigners do not have the right. It was discussed that Zimbabwe should comply with international law and take steps to ensure that the right to basic education is unpacked in the Education Act. Steps must be further taken to ensure that the right to basic education is applicable to all those within the Zimbabwean jurisdiction including foreigners. Chapter 4 therefore added to this discussion by providing a historical and

legislative understanding which provided a foundation to reason that the right to basic education understood in light of international law provisions binding on Zimbabwe, is comprised of six elements which are discussed below on major findings.

In relation to South Africa, building on the discussions of chapter 1, 2 and 3, chapter 5 endeavored to determine the scope and content of the right to basic education. Following the discussions in chapter 3 that, the consideration of context which include the history of education must be done if one endeavors to interpret human rights embodied by the South African Constitution, the history of education was discussed. Like Zimbabwe, the history of education in South Africa begins informally. Formal education was introduced during the apartheid era. The provision of formal education was done through racial lines and different education legislation governed different racial groups. Within that context Black Africans were offered the most inferior education which was meant for them to attain and maintain the position of slaves. Access to education was not equitable, funding was along racial lines, curriculums were different and schools were not enough for black people among many problems. The end of apartheid saw the ushering of a Constitution which now provides for an unqualified right to basic education. The Constitution is read with Schools Act which must further explain and safeguard the provisions of the Constitution. Chapter 5 explained that the Schools Act does not even mention that children have a right to basic education. It does not define the term or even states the scope and content of the right. The Schools Act imposes school fees on children, it discriminates children and their parents on economic basis, it does not state the number of years for attending basic education and does not make secondary education compulsory. Chapter 5 reasoned that the education framework presented by the Schools Act is against the constitutional and international obligations binding on South Africa relating to the right to basic education. Chapter 5 proceeded to determine the scope and content of the right to basic education in South Africa and concluded that it comprises of six elements as will be discussed below under six finding.

This chapter provides a summation of the discussions in the previous chapters as discussed above. It further states the six findings of this dissertation and further

provides 6 recommendations for the Zimbabwean and the South African state to consider.

6.2 Six major findings

6.2.1 Introduction

In relation to the scope and content of the right to basic education, the submission of this dissertation was that an interpretation of section 75 (1) (a) of the Zimbabwean Constitution and section 29 (1) (a) of the South African Constitution provides for similar state obligations. The textual formulation of section 75 (1) (a) of the Zimbabwean Constitution and section 29 (1) (a) of the South African Constitution was however noted to be different in that the Zimbabwean Constitution excludes the word 'everyone' and provides for the words citizen, permanent resident and state-funded. Nevertheless it was argued that they both provide for an unqualified compulsory and free basic education which must be, provided in schools, funded by the state and regarded as a minimum core state obligation. The difference between the textual formulations of the right to basic education provided by the two Constitutions was not viewed to be significant in relation to the scope and content of the right but in relation to its applicability. In relation to the applicability of the right, it was reasoned that the right to basic education in South Africa applies to everyone in South Africa, whilst the right to basic education in Zimbabwe applies only to citizens and permanent residents. In terms of its scope and content, there were six findings and the right to basic education in both Zimbabwe and South Africa was viewed to comprise of six components as follows.

6.2.1.1 The term 'basic education' refers to the quality of education

The dissertation found that, the term basic education refers to the quality of education that must be provided for citizens. To advance this argument, the dissertation explored the international normative and legal framework of the right to education beginning with an understanding of education as a beneficial life process, discussing education

as a human right and locating the term, basic education, as a quality-oriented term defined by international law. The term, basic education which is quality-oriented was viewed to have originated from and defined by the World Declaration. Basic education was defined as the acquisition of basic learning needs which comprise of essential learning tools and a basic learning content. An attempt was made to elaborate the contents of basic learning needs in chapter 2. It is important to note that the explanations of basic learning needs in this study are not conclusive but provide a starting point for both Zimbabwe and South Africa.

6.2.1.2 Right to basic education includes attendance of both primary and secondary education

The dissertation found that, the attendance of both primary and secondary school is a component of the right to basic education. Whilst basic education is quality-oriented, the acquisition of basic education is enabled by school attendance making it an important component of the right to basic education. General Comment 13 to the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that primary education is the main delivery of basic education and further state that secondary education 'includes the completion of basic education'.¹⁶⁶⁷ In the context of Zimbabwe and South Africa which are both parties to the ICESCR¹⁶⁶⁸, the provisions of General Comment 13 are read together with the provisions of the African Charter which is also binding on the two countries.¹⁶⁶⁹ The African Charter places an obligation on member states to make the acquisition of basic education mandatory.¹⁶⁷⁰ The additional non-derogatory obligation imposed on Zimbabwe and South Africa by the African Charter of requiring states to make the acquisition of basic education mandatory must be interpreted to mean that as long as there is an international acceptance that basic education is offered at both primary and secondary levels as

¹⁶⁶⁷ *General Comment 13: The Right to Education, 1990* par 8 and para 12. Para 8,.

¹⁶⁶⁸ Zimbabwe ratified the ICESCR on 13 May 1991 and South Africa ratified on 12 January 2015.

¹⁶⁶⁹ South Africa ratified on 9 July 1996 and Zimbabwe ratified on 30 May 1986.

¹⁶⁷⁰ *African Charter on the Rights and Welfare of the Child 1990*.

'Article 11 (3) (a) State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and (a) shall in particular provide free and compulsory basic education'.

stated by General Comment 13, children must attend both primary and secondary school as a matter of compulsion.

6.2.1.3 Basic education must be free and compulsory

The dissertation found that, the provision of free and compulsory basic education is a component of the right to basic education. The obligation to provide free and compulsory education at primary school is viewed as unequivocal at international law. The Universal Declaration was the first to provide that elementary education must be free and compulsory.¹⁶⁷¹ It was reasoned in chapter 2 that by embodying the two elements, compulsory and free, elementary education referred to by the Universal Declaration should be deemed to be the same as primary education referred to by subsequent international instruments. The ICESCR, its General Comments 11¹⁶⁷² and 13¹⁶⁷³ and international law instruments such as the Convention on the Rights of the Child¹⁶⁷⁴ all confirmed that education at primary school levels must be free and compulsory.¹⁶⁷⁵ The African Charter did not, however, confirm the provision of free and compulsory primary education but provided for free and compulsory basic education¹⁶⁷⁶ leading to a dichotomy relating to the provisions of international law binding on Zimbabwe and South Africa concerning the period when compulsory and

¹⁶⁷¹ Ibid, 'A 26 (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'.

¹⁶⁷² *General Comment 11: Plans of Action for primary education*, (1999).

¹⁶⁷³ General Comment 13: The Right to Education, (1999).

¹⁶⁷⁴ *Convention on the Rights of the Child*, (1990).

¹⁶⁷⁵ *International Covenant on Economic, Social and Cultural Rights*, (1966), A 13 (2), 'The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right,

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education'. *General Comment 11: The right to Education 1999* para 1 'Article 14 of the International Covenant on Economic, Social and Cultural Rights requires each State party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all'. *General Comment 13: The Right to Education, 1990* para 10 'As formulated in article 13 (2) (a), primary education has two distinctive features: it is compulsory and available free to all'.

¹⁶⁷⁶ *African Charter on the Rights and Welfare of the Child* (1990) Article 11 (3) (a)

free education must elapse. It was reasoned that, South Africa and Zimbabwe by ratifying the African Charter, extended their obligations from the provision of free and compulsory primary education to the provision of free and compulsory basic education. Their free and compulsory schooling period is therefore extended throughout the child's basic education years in compliance with the African Charter. As long as basic education is provided at both primary and secondary levels in both Zimbabwe and South Africa, the reasoning is that compliance with the African Charter's basic education obligations means, it is a free and compulsory provision.

6.2.1.4 *The right to basic education is an unqualified right*

The dissertation found that, by virtue of the absence of qualifiers in the internal formulations, of the right to basic education, in Zimbabwe and in South Africa the right must be regarded as unqualified.¹⁶⁷⁷ In South Africa, the position is already noted by various authors¹⁶⁷⁸ and was confirmed in the *Governing body of the Juma Masjid Primary School and Others v Essay NO and Others (Juma Masjid case)*.¹⁶⁷⁹ An unqualified socio-economic right is understood to be a right, textually formulated with no internal qualifiers in its textual formulation.¹⁶⁸⁰ Internal qualifiers are viewed to be words such as, 'access' to the right, that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. These formulations are characteristic of the formulation of socio-economic rights, such as the right to

¹⁶⁷⁷ Woolman S and Fleisch B *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (Pretoria University Press 2009) 120.

¹⁶⁷⁸ Ibid.

¹⁶⁷⁹ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011)* para 37 'It is important, for the purpose of this judgment, to understand the nature of the right to a basic education|| under section 29(1)(a). Unlike some of the other socioeconomic rights,³⁶ this right is immediately realisable. There is no internal limitation requiring that the right be progressively realised|| within available resources|| subject to reasonable legislative measures'.

¹⁶⁸⁰ Lieberberg S 'The value of human dignity in interpreting socio-economic rights,' (2005) *South African Journal on Human Rights*, 81-82.

health¹⁶⁸¹ and water¹⁶⁸² in both the Constitution of Zimbabwe and that of South Africa. The recognition of the fundamental difference between the obligations engendered by both section 29 (1) (a) and section 75 (1) (a) and the obligations engendered by other social and economic rights protected by the Constitutions forms the basis of the argument that they are unqualified rights. It is, however, further understood in this dissertation that besides the qualified or unqualified nature of a right in its internal formulation, in accordance with section 86 of the Zimbabwean Constitution¹⁶⁸³ and section 36 of the and South African Constitution, all human rights (despite their formulations) maybe limited in terms of the law of general application.¹⁶⁸⁴

¹⁶⁸¹ *Constitution of South Africa, 1996* 'S 27 (1) Health care, food, water and social security 27 (1) Everyone has the right to have access to— (a) health care services, including reproductive health care; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. Constitution of Zimbabwe section 76. Right to health care 1. Every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care services, including reproductive health-care services 4. The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section'.

¹⁶⁸² *Ibid*, 'S 77, Right to food and water Every person has the right to-- a. Safe, clean and potable water; and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right. Constitution of South Africa Health care, food, water and social security 27. (1) Everyone has the right to have access to (b) sufficient food and water; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.

¹⁶⁸³ *Ibid*, 'S 86 (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including--a. The nature of the right or freedom concerned; B. The purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest; c. The nature and extent of the limitation; d. The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others; e. The relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and F. Whether there are any less restrictive means of achieving the purpose of the limitation'.

¹⁶⁸⁴ *Ibid*, 'S 36 (1) 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— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

(2) 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 *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011) Para 37 The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is —reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'

6.2.1.5 The right to basic education is a minimum core content of the right to education

The dissertation found that, the right to basic education must be beheld to be the minimum core content of the right to education alluded to by the ICESCR in both Zimbabwe and South Africa. General Comment 3 to the ICESCR states that all human rights have a minimum core content and imposes an obligation on every State to ensure the provision of such core. The minimum core approach proposes that there is a certain minimum extent of providing a human right which amounts to a mandatory minimum fulfilment of providing that right by the State.¹⁶⁸⁵ The minimum core approach is intended to establish an immediate priority need which the State must provide.¹⁶⁸⁶ Although its intricate details may be contextualised, the minimum core must be universal and not country-dependent. The minimum core as part of a right, commanding immediate provision from the government, commands similar obligations to those imposed by an unqualified right. It is not settled whether the minimum core is fulfilled when primary education is offered or whether it extends to secondary education. However, in this dissertation, the argument advanced by other authors that only primary education is the minimum core obligation in relation to the provision of basic education was refuted. It was submitted that, as long as basic education must be offered at both primary and secondary education, the secondary education must be regarded as forming part of the state's immediate obligation to provide basic education as a minimum core right.

The dissertation discussed that, the Zimbabwean constitutional court has not made pronouncements relating to the applicability of the minimum core concept when interpreting socio-economic rights embodied by the Constitution. This dissertation however reasoned that it is applicable to their interpretation because Zimbabwe ratified the ICESCR and is therefore bound by its provisions and General Comments which are 'authoritative statements by the Committee on Economic, Social and Cultural

¹⁶⁸⁵ Chowdhury Judicial 'Adherence to a Minimum Core Approach to Socio-Economic Rights. A Comparative Perspective' (2009) Cornell Law Library 3

¹⁶⁸⁶ Wesson M, 'Grootboom and beyond; Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 SJHR 298.

Rights on the meaning of the provisions in the ICESCR'.¹⁶⁸⁷ In relation to South Africa, it was discussed that the constitutional court previously stated that the international law concept that social and economic rights place a minimum core obligation on the state 'cannot be uncritically imported into South African constitutional law and that, at best, it can be used to assist the constitutional court to determine whether or not the state had acted reasonably'.¹⁶⁸⁸ The reasoning in this dissertation was that the pronouncements by the South African constitutional court were made in relation to qualified socio-economic rights. The acceptance by the constitutional court in the case of *Juma Musjid* case that section 29 (1) (a) has a unique unqualified formulation when compared and contrasted with other qualified socio-economic rights, should motivate the constitutional court to accept that the minimum core concept applies to the interpretation of section 29 (1) (a).¹⁶⁸⁹ It was reasoned that, section 29 (1) (a) which embodies immediate similar obligations to the minimum core should be regarded as an unqualified right and a minimum core content of the right to education in South Africa.¹⁶⁹⁰ It was further noted that the pronouncements relating to the applicability of the minimum core relating to qualified rights were also made before South Africa ratified the ICESCR and the position of the courts may change post ratification.

6.2.1.6 The right to basic education must be accessible, adaptable, acceptable and available

The dissertation found that, the right to basic education must be accessible, adaptable, acceptable and available in line with the international law requirements for any type of an education provided by a school.¹⁶⁹¹ General Comment 13 of the ICESCR states that any education provided by a school must exhibit the above interrelated elements.¹⁶⁹² The individual components of the above elements as clarified by General Comment 13 were discussed by this dissertation. It was noted that, whilst various

¹⁶⁸⁷ 'Section 5: Background information on the ICESCR' see <https://www.escrnet.org/resources/section-5-background-information-icescr> accessed 30 July 2018.

¹⁶⁸⁸ Simbo C 'The right to basic education, the South African constitution and the Juma musjid case: an unqualified human right and a minimum core standard' (2013) 17 Law, Democracy & Development 478.

¹⁶⁸⁹ Ibid.

¹⁶⁹⁰ Ibid.

¹⁶⁹¹ *General Comment 13: Plans of Action for primary education 1999*, Para 6.

¹⁶⁹² Ibid.

authors have agreed with the General Comment 13's interrelated elements, they have not discussed the manner in which they can be imported into either Zimbabwean or South African legislative frameworks.

6.3 Recommendations

6.3.1 Recommendation 1: The governments must ensure that the focus of learning at basic education level must be the provision of quality education

It is recommended that the governments of both Zimbabwe and South Africa must ensure that the provision of basic education is focused on the provision of quality education. The two governments must note that, their failure to provide quality education which transforms the lives of the educated lies in an approach to learning which focuses on pouring curriculum content on pupils without caring about the vital role of education in the empowerment of humanity. The two governments have an obligation to provide basic education which is the type of education which will transform lives and societies. Educational opportunities provided by the two governments will only translate to meaningful personal and community development if citizens are provided basic learning needs. Investment in education, no matter how small, will however remain a waste if the two governments do not make legal commitments which will ensure that when they fail to provide basic learning needs, citizens can hold them accountable.

The starting point for providing quality education is the enactment of an enabling legal framework. Both the Schools Act of South Africa and the Education Act of Zimbabwe do not mention that they provide the basic education sanctioned by their Constitutions, as such the starting point is the amendments of the Acts to include such clarity. The Acts must further provide the curriculum components of basic education, the qualifications of the persons who must teach it, the teaching methods, the assessment methods, and the period for which basic learning must be taught. The yardstick for quality must be determined by the definition of basic education as it is defined by the World Declaration and discussed in chapter 2. Schools must aim to

provide education that is of universal quality and standard.¹⁶⁹³ The provision of quality education should not be the insistence of a level of uniformity in the performance of children rather it must be the promotion of equal opportunities and recognition of those who are disadvantaged, who include girls.¹⁶⁹⁴ Those who go to public and private schools must therefore access the same quality of education.¹⁶⁹⁵

6.3.2 Recommendation 2: Governments must provide access to free and compulsory basic education

It is recommended that, the governments of Zimbabwe and that of South Africa must ensure that basic education is provided free and compulsory. The two governments must note that, the conversation about access to education began as early as 1948 with the Universal Declaration and is probably the oldest conversation in the provision of formal education. The object of promoting compulsory access to basic education is to ensure that it is within the reach of every child, regardless of their color, creed, financial status, religious or national status. Obstacles of any kind including those discussed in this dissertation which are either constitutionalized or legislated and hinder the equitable and free provision of education must be removed. In addition governments must note that, the provision of compulsory education without making it free education is futile because some parents cannot be expected to have money to fund the education of their children. The obligation to provide free and compulsory basic education must therefore be viewed by the two governments as intertwined. Providing free basic and compulsory basic education will be an expensive task for both Zimbabwe and South Africa which are still developing countries, however, the two countries must strengthen regional and international solidarity. Seeing the undeniable need for support from the international community, both Zimbabwe and South Africa must resolve conflicts with other foreign countries, and potential donors in an effort to ensure that all children have a chance to acquire basic education for free.

¹⁶⁹³ Russell B On *Education: Especially in Early Childhood* (George Allen and Unwin Ltd 1937) 16-17.

¹⁶⁹⁴ Ibid.

¹⁶⁹⁵ Ibid.

6.3.3 Recommendation 3: Governments must provide basic education at primary and secondary school levels

The governments of Zimbabwe and that of South Africa must provide basic education at primary and secondary schooling levels. It was discussed by General Comment 13 discussed in chapter 2 that basic education must be provided at primary and secondary school levels. The governments must therefore separately initiate processes to amend the Education Act and the Schools Act for them to reflect the legal obligation. The Schools Act of South Africa and the Education Act of Zimbabwe must also reflect the aspirations of international law by unequivocally stating the number of primary schooling years and those of secondary schooling for which basic education must be provided.

6.3.4 Recommendation 4: Governments must provide basic education which is evidently accessible, acceptable, adaptable and available.

The government of South Africa and that of Zimbabwe must ensure that the education they provide can be regarded as accessible, acceptable, available and adaptable as explained by General Comment 13 discussed in chapter 2. The four components of the obligation which were discussed in chapter 2 must be further legally defined and further explained by the Zimbabwean Education Act and the South African Schools Act. The provision of basic education which complies with the four interrelated elements will require the reallocation of resources from one state department to the other through prioritising education as a means to economic, social and cultural gain. The reallocation of resources towards the benefit of education is not unfair amid competing claims, rather, 'serious attention to improving the efficiency of existing educational resources and programmes will only produce more, [and] it can also be expected to attract new resources'.¹⁶⁹⁶

¹⁶⁹⁶ *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 in Jomtien, Thailand (1990), A XI (2).*

In order for both Zimbabwe and South Africa to develop effective action and funding plans, there is need for long term sustainable goals which are shared at national level which can be broken down to short term/intermittent goals whose progress is measured.¹⁶⁹⁷ Short term goals must have targets and such targets must specify outcomes, timeframes (these convey a sense of urgency), priority groups to be targeted and the manners of measuring accomplishments.¹⁶⁹⁸ Targets are the foundation and not the ceiling for continuous compliance with the right to basic education obligations of both countries. To raise resources for the provision of basic education, partnerships between government and stakeholders' are necessary to achieve the purpose.¹⁶⁹⁹ The two governments should partner with non-governmental organizations, the private sector, communities, families and religious groups.¹⁷⁰⁰ Partnerships are at the heart of 'an expanded vision and renewed commitment' for basic education.¹⁷⁰¹

6.3.5 Recommendation 5: The government of South Africa and that of Zimbabwe must regard basic education as an unqualified right and minimum core content of the right to education in both Zimbabwe and South Africa.

It is recommended that the government of Zimbabwe and that of South Africa ensure that the Education Act and the Schools Act detail that the Acts have a purpose to deliver the right to basic education as an unqualified right and a minimum core content of the right to education. The discussions in previous chapters state that the regard of the right to basic education as an unqualified right is the basis for the argument that it must also be regarded as the provided minimum core content of the right to education in both countries. The General Comment 3 provision of a content of a right which the state cannot derogate from is important if states are to commit to the provision of resource-intensive socio-economic rights. Legislated, the provision of

¹⁶⁹⁷ *Framework For Action: Meeting Basic Learning Needs: Guidelines for implementing the World Declaration on Education for All* see Introduction: Goals and targets.

¹⁶⁹⁸ Ibid.

¹⁶⁹⁹ *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 in Jomtien, Thailand (1990)*, A VII.

¹⁷⁰⁰ Ibid, A VI.

¹⁷⁰¹ Ibid.

basic education as an unqualified right and a minimum core content provides citizens with an immediate claim which the government cannot derogate from.

6.3.6 Recommendation 6: The government of Zimbabwe and that of South Africa must ensure that the Schools Act and the Basic education Act are amended to include a nationally acceptable scope and content of basic education.

The American case of *McLeary v State of Washington* stated it right that the legislature and the executive are the ones endowed with the duty to determine how education duties must be discharged.¹⁷⁰² It is therefore recommended that, the government of Zimbabwe and the government of South Africa amend their education Acts to include the scope and content of the right to basic education. Giving the right to basic education a legal determinable scope and content is an issue that cannot be wished away by both Zimbabwe and South Africa. Given the expertise needed to make the determinations which fit into the framework provided by this dissertation, it would be a mammoth task for the respective constitutional courts of both countries to provide a comprehensive framework for basic education which fits the skeleton provided by this dissertation. Even if it were possible, 'it would be democratically inappropriate for unelected members of the judiciary to give a fixed content of [basic education] thereby usurping the role of the legislature and the executive'.¹⁷⁰³ As stated in the American case of *Campaign for Fiscal Equity I*, the judiciary has a role to 'define and safeguard rights but it does not possess neither the authority, nor the ability nor the will to micromanage education'.¹⁷⁰⁴

Zimbabwe and South Africa 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

¹⁷⁰² *McLeary v State of Washington* 269 P 3d 227 (Wash 2012) para 95-97

¹⁷⁰³ McConachie and McConachie 'Concretising the Right to A basic Education' (2012) 129 The South African Law Journal Page 580.

¹⁷⁰⁴ *Campaign for Fiscal Equity I*, 100 NY 2d 893 (NY2003).

by all the people of the country'.¹⁷⁰⁵ Suggesting that the governments can simply define basic education through policy overlooks the fact that policies do not have the same legal force as the law. 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 and Zimbabwe acquire basic education without any excuses from the government. The approach will also make it easy for citizens to hold the governments accountable for non-compliance with legislative provisions.

6.4 Conclusion

The debate regarding the scope and content of the right to basic education is ongoing in both Zimbabwe and South Africa. For both nations to be able to deliver the right to basic education, their national laws must translate both international and constitutional obligations into enforceable claims. Education has the general aim to make children better human beings.¹⁷⁰⁶ The shaping of children to be better human beings in accordance with international law requires enabling legal frameworks which force governments to comply. This dissertation was a legal analysis of the right to basic education provided by the Constitutions of Zimbabwe and South Africa. For the recommendations of this dissertation to be attainable, it was noted that resources must be provided by the government for the improvement of the legal frameworks of both countries followed by a commitment to implement the legal frameworks. The knowledge of the scope and content of basic education provided by this dissertation is however not important on its own, enabling legal frameworks must be provided. Legal frameworks have an advantage of undoubtable enforceability as opposed to policy which is easily changed and can be manipulated to further the interest of political parties. Important aspects of education such as the obligation to determine curriculum, language, classroom capacity, library, water, electricity, school furniture and equipment should not be left to policy. The intricate components of basic

¹⁷⁰⁵ Olivia O 'Difference between Law and Policy found at <http://www.differencebetween.com/difference-between-law-and-vs-policy/> Accessed 27 July 2012.

¹⁷⁰⁶ Du Plooy JL and Kilian CJG Introduction to Fundamental Pedagogics (HAUM Educational Publishers 1984) 5-6.

education will benefit from the punitive aspect of the law in the event of government's failure to comply.

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