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## Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
ADRY	African Disability Rights Yearbook
AU	African Union
CESR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRSA	The Constitution of the Republic of South Africa
DBE	Department of Basic Education
DHET	Department of Higher Education and Training
DPSA	Disabled People South Africa
GHS	General Household Survey
ICESCR	International Covenant on Economic, Social and Cultural Rights
IQ	Intelligence Quotient
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination
RSA	Republic of South Africa
SIAS	Screening, Identification, Assessment and Support
STATS SA	Statistics South Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World Health Organization

# **Access to inclusive, quality basic education for children with disabilities in South Africa**

## *Abstract*

The history of South Africa is plagued by centuries of oppression, isolation, racism and ableism which exist as a result of our colonial and Apartheid past. Colonialism and Apartheid, in their various forms and manifestations, created and legalized oppression and discrimination against vulnerable population groups, such as black people, women, children and persons with disabilities. These vulnerable groups were, and continue to be denied equal access to their fundamental rights and freedoms.

Persons with disabilities continue to be one of the most vulnerable population groups in the world. They are often denied access to socio-economic rights such as education, employment, healthcare, food, sanitation and water. The charity, welfare and medical models of disability resulted in persons with disabilities being treated as either charity cases or medical patients requiring rehabilitation. The shift from the medical model to the social model to the human rights model occurred as the result of the rise of the disability rights movement. There is no longer a focus on impairment, but rather the focus is on external barriers and negative societal attitudes and stigmas.

In 1994, South Africa transitioned from Apartheid to democracy. The Constitution of the Republic, which guarantees multiple socio-economic rights for all in its Bill of Rights, is the supreme law of the land. The Constitution is based on the foundational values of human dignity, freedom and equality. In order to give meaning to these foundational values, it became necessary to enact legislation and policies to remedy the injustices of the past and improve access to socio-economic rights for persons with disabilities. The right to basic education, which is viewed as somewhat of a gateway to access other socio-economic rights, is guaranteed in the Constitution. Unlike other socio-economic rights which are progressively realisable, the right to basic education is immediately realisable.

The purpose of this research is to interrogate whether South Africa is adequately disposing of its obligations to provide access to inclusive, quality basic education for children with disabilities in light of its domestic, regional and international obligations. This research will also focus on the challenges with implementation of the relevant instruments and the various barriers which exist. Furthermore, this research seeks to provide practical recommendations and solutions to improve access to inclusive, quality basic education for children with disabilities in South Africa. Despite the fact that socio-economic rights are justiciable in South Africa, the reality is that the courts are not the most accessible avenue. As a result, there is a need for us to explore creative mechanisms to ensure better access to socio-economic rights for vulnerable population groups in South Africa.

## Chapter 1

### Introduction

'There are few things as important for the flourishing of a society and its people as education. Through education, doors are opened to opportunities that were only before ever dreamt of. I am not exaggerating when I say that education changes lives. It enriches and develops our children so that they may reach the height of their potential. And, as our citizens are empowered through education to improve their future and achieve their dreams, our nation will undoubtedly prosper too'<sup>1</sup>

*Justice Khampepe for the Constitutional Court*

### 1.1 Background of the study

According to the World Health Organization (WHO) Disability report, approximately 15% of the global population has some form of a disability.<sup>2</sup> It is estimated that approximately 80 million people in Africa have some form of a disability.<sup>3</sup> The prevalence of disability in the Global South is much greater than that of the Global North; and this is due to multiple factors, such as inadequate healthcare access, malnutrition, a lack of resources, poverty, conflict and war, amongst others. Throughout the African continent, as in other regions in the world, persons with disabilities are marginalised, stigmatised and oppressed within their communities and societies at large.<sup>4</sup> In Africa, persons with disabilities are likely to be disproportionately impacted by poverty.<sup>5</sup> As a result, persons with disabilities are routinely denied access to quality healthcare, employment, education, justice, water and housing. Persons with disabilities are thus denied access to and full enjoyment of their socio-economic and cultural rights, as well as their civil and political rights and freedoms. Much of the exclusion that occurs boils down to negative stereotypes and misconceptions which have translated into exclusionary attitudes as well as exclusionary social and institutional practices.

In South Africa, we lack reliable and efficient disability statistics. According to the 2011 population census conducted by Statistics South Africa (Stats SA), the national disability prevalence rate is 7.5%.<sup>6</sup> The census also revealed that disability prevalence was higher amongst women, Black Africans and the elderly.<sup>7</sup> The reality is that persons with disabilities who also belong to other minority groups and marginalised groups, often face compounding and intersecting forms of oppression and

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<sup>1</sup> *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC).

<sup>2</sup> United Nations Division for Social Policy Development *Toolkit on Disability in Africa: Introducing the United Nations Convention on the Rights of Persons with Disabilities*

<sup>3</sup> 'Disability in Africa' available at [www.ascleiden.nl/Library/Webdossiers/DisabilityInAfrica.aspx](http://www.ascleiden.nl/Library/Webdossiers/DisabilityInAfrica.aspx) (accessed 20 March 2022).

<sup>4</sup> n 2 above, 3 – 4.

<sup>5</sup> n 2 above, 3 – 4.

<sup>6</sup> [www.statssa.gov.za](http://www.statssa.gov.za) (accessed 31 March 2022).

<sup>7</sup> As above.

discrimination.<sup>8</sup> According to the 2018 General Household Survey (GHS), the national disability prevalence rate in South Africa is 9.5%.<sup>9</sup> According to the 2021 GHS, 4.5% of South Africans over the age of five, were classified as disabled.<sup>10</sup> The results of the 2021 GHS are further distorted by the fact that during the COVID-19 pandemic, data was collected telephonically rather than through the conventional face-to-face method.<sup>11</sup> This indicates the possibility that the data available by Stats SA is outdated and does not reflect the correct and accurate numbers. Since the 2011 population census was conducted, the number of disabled persons in the country has increased and this data has not yet been captured by Stats SA. In 2022, Stats SA embarked upon a Population Census using digital methods, such as computer-assisted web and telephonic interviews.<sup>12</sup> The results of the 2022 census are expected to be released sometime during this year, 2023.<sup>13</sup>

In April 1652, South Africa was colonised by the Dutch who arrived in the Cape Colony with the intention of not just economic exploitation and domination, but also social, cultural and psychological exploitation and domination.<sup>14</sup> In the early 1800's, South Africa was colonised by the British who arrived with the same intentions as the Dutch had back in 1652.<sup>15</sup> The psychological element of colonial exploitation has been described by many as epistemic violence. Colonialism resulted in the dearth of African knowledge systems and ways of living.<sup>16</sup> Colonialism in South Africa was the creation of a Eurocentric state of white supremacy in which economic, social, political and cultural power was vested in the white minority.<sup>17</sup> In the 1800's, Charles Darwin, who was a social scientist, introduced his theory of the 'survival of the fittest' which soon spread throughout Europe and was used as a justification for many social, economic and political injustices that Europe carried out; such as acts of conquest, war and genocide.<sup>18</sup> Through colonialism and imperialism, theories of Darwinism and Eugenics were imposed on Africa. Darwinism and Eugenics recognises persons with disabilities as weaker beings. The history of colonialism in South Africa resulted in the emergence of an ableist mind-set in which persons with disabilities are viewed as inferior to those persons who do not have disabilities.

In 1948, the National Party government introduced the system of Apartheid which legislated racial segregation into all facets of life.<sup>19</sup> Apartheid was, in many ways, simply an extension of colonial-era practices. Apartheid legislation consisted of grand

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<sup>8</sup> n 2 above, 3 – 4.

<sup>9</sup> [www.disabilitydataportal.com](http://www.disabilitydataportal.com) (accessed 21 December 2022).

<sup>10</sup> Stats SA, 'General Household Survey' (2021) 4.

<sup>11</sup> As above.

<sup>12</sup> <http://census.statssa.gov.za/> (accessed 2 August 2023).

<sup>13</sup> <http://census.statssa.gov.za/> (accessed 2 August 2023).

<sup>14</sup> A Piotrowski 'Colonialism, Apartheid and Democracy: South Africa's Historical Implications on the Land Reform Debate' (2019) 11 *Journal of Interdisciplinary Undergraduate Research* 57.

<sup>15</sup> Piotrowski (n 14 above) 57.

<sup>16</sup> T Lephakga 'Colonial institutionalisation of poverty among Blacks in South Africa' (2016) 3 – 4.

<sup>17</sup> As above.

<sup>18</sup> [www.nationalgeographic.org](http://www.nationalgeographic.org) (accessed 6 August 2022).

<sup>19</sup> <https://www.sahistory.org.za/article/history-apartheid-south-africa> (accessed 10 August 2023).

Apartheid as well as petty Apartheid.<sup>20</sup> Grand Apartheid referred to legislation such as the Group Areas Act which ensured that people of the same race were to live together in the same designated areas decided upon by the government; whilst petty Apartheid referred to legislation such as the Separate Amenities Act which ensured there were separate public amenities and facilities for those of European descent and those of non-European descent.<sup>21</sup> It is also worth noting that in 1948, the Universal Declaration of Human Rights (hereafter, 'UDHR') was adopted.<sup>22</sup> At the same time the United Nations was adopting the UDHR proclaiming universal human rights for all persons and nations, the National Party government had embarked upon a crime against humanity.

Under Apartheid, the education system, like everything else, was racially segregated and black children were offered poor quality basic education in the townships or homelands.<sup>23</sup> The Bantu Education Act was one of the most oppressive and damaging pieces of Apartheid legislation as it sought to ensure that black children would only be educated to the extent that they would be menial laborers to the advantage of white people.<sup>24</sup> HF Verwoerd, who is known widely as the architect of Apartheid, stated that; 'Education must train people in accordance with their opportunities in life, according to the sphere in which they live'.<sup>25</sup> The Bantu Education Act vested all powers relating to the education of black children in the government and the minister that was appointed by the National Party government.<sup>26</sup> This ensured that the government maintained total arbitrary power over all aspects of Bantu education, in this manner, the government even controlled what was taught in Bantu schools as well as the medium of instruction at these schools.

It is estimated that during the Apartheid era, only one fifth of children with disabilities accessed basic education.<sup>27</sup> Basic education for children with disabilities was also segregated along racial lines, with special schools being created to accommodate only white disabled children at first.<sup>28</sup> Eventually, when special schools were created to accommodate black, Indian and colored disabled children, these schools lacked adequate resources.<sup>29</sup> Apartheid created a system of intersectional discrimination,

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<sup>20</sup> E Blakemore 'The Harsh Reality of Life Under Apartheid in South Africa' 26 April 2019 <https://www.history.com/news/apartheid-policies-photos-nelson-mandela> (accessed 10 August 2023).

<sup>21</sup> As above.

<sup>22</sup> United Nations 'History of the Declaration' <https://www.un.org/en/about-us/udhr/history-of-the-declaration> (accessed 1 August 2023).

<sup>23</sup> T Hodgson & R Beere 'The Right to Basic Education for Children with Disabilities' in *Basic Education Rights Handbook* Second Edition 148 – 149.

<sup>24</sup> NL Moore 'In a class of their own: The Bantu Education Act (1953) revisited' unpublished Masters thesis, University of Pretoria, 2015 1 – 2.

<sup>25</sup> HF Verwoerd speech as Minister of Native Affairs on 7 June 1954 <https://www.sahistory.org.za/archive/hendrik-verwoerd-10-quotes-hendrik-verwoerd-politics-web-20-september-2016> (accessed 10 August 2023).

<sup>26</sup> NL Moore (n 24 above) 1 – 2.

<sup>27</sup> Hodgson & Beere (n 23 above).

<sup>28</sup> Section 27 'Too many children left behind: Exclusion in the South African Inclusive Education System' 14 August 2016 <https://section27.org.za/2016/08/too-many-children-left-behind-exclusion-in-the-south-african-inclusive-education-system/> (accessed 7 July 2023).

<sup>29</sup> Hodgson & Beere (n 23 above) 145.

within which children were discriminated against for being black and for being disabled.

The Constitutional Court of South Africa has taken an intersectionality approach in various judgements under our constitutional democracy. This is an acknowledgement from the apex court that multiple grounds of discrimination may simultaneously converge, therefore resulting in heightened levels of harm and oppression for an individual or group within society.<sup>30</sup> Furthermore, an intersectional approach to assessing discrimination is especially crucial in a South African context as it serves as an acknowledgement of the fact that certain groups were placed at the bottom of the social hierarchy during Apartheid.<sup>31</sup> These groups which were historically disadvantaged under the brutal Apartheid system, continue to be marginalised even under our constitutional democracy. Persons with disabilities are one such group which continue to be oppressed and discriminated against on various intersecting grounds; such as disability, race, gender, class stratification and socio-economic status.

## **1.2 Problem statement**

In South Africa, 1994 marked the end of the Apartheid era and the beginning of our constitutional democracy. Non-discrimination, freedom, equality, and human dignity for all are the key foundational principles of our constitutional democracy. According to section 2 of the Constitution of the Republic of South Africa (hereafter referred to as 'the Constitution'); it is the supreme law of the land, and all laws and behavior inconsistent with it, are regarded as unconstitutional.<sup>32</sup> Section 28 of the Constitution protects and promotes the rights of children to a name, nationality, basic nutrition, basic healthcare, social services; as well as the rights to be protected from neglect, abuse, and child labor practices.<sup>33</sup> Furthermore, it emphasises that the best interest of the child are of paramount importance in all matters concerning the child.<sup>34</sup> Section 29 of the Constitution deals specifically with the right of everyone to an education.<sup>35</sup> Section 29 (1) states that everyone has the right to a basic education.<sup>36</sup> The right to basic education, unlike many of the socio-economic rights found in the Bill of Rights, is immediately realisable. Many of the socio-economic rights contained in the Bill of Rights, are progressively realisable subject to the availability of state resources and reasonable measures being taken by the state. In South Africa, socio-economic rights are justiciable, which means that any violation of socio-economic rights may be brought before a court of law.

Many laws and policies have been enacted to give effect to the Constitutional right to basic education in terms of section 29 (1). The Schools Act of 1997, which repealed

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<sup>30</sup> *Mahlangu and Others v Minister of Labour and Others* 2021 (1) BCLR 1 (CC).

<sup>31</sup> n 30 above, para 96.

<sup>32</sup> The Constitution of the Republic of South Africa, 1996.

<sup>33</sup> As above.

<sup>34</sup> n 32 above.

<sup>35</sup> n 32 above.

<sup>36</sup> n 32 above.

the Education and Training Act of 1979, is the primary piece of legislation governing the organisation, governance and funding of South African schools.<sup>37</sup> Education White Paper 6: Special needs education: Building an inclusive education and training system (hereafter referred to as 'White Paper 6') is the policy document that has been enacted to create an inclusive education system in South Africa.<sup>38</sup> To assist with the incremental implementation of White Paper 6, the Department of Basic Education (hereafter referred to 'Department of Basic Education') enacted further policies focusing on various different aspects of inclusive education, such as the policy on Screening, Identification, Assessment and Support (hereafter referred to as 'the SIAS policy').<sup>39</sup> The Children's Act of 2005 places an obligation on the state to recognise the special needs that children with disabilities may have.<sup>40</sup>

In addition to the South African domestic legal framework protecting and promoting the right to basic education, South Africa is also party to multiple international and regional instruments which protect and promote the rights of children to basic education. The United Nations Convention on the Rights of Persons with Disabilities (hereafter referred to as the 'CRPD'), which South Africa ratified in 2007, obliges state parties to ensure an inclusive and accessible education system in which persons with disabilities would be able to develop to their full potential without being discriminated against on the basis of their disability.<sup>41</sup> The Convention on the Rights of the Child (hereafter referred to as the 'CRC'), which South Africa ratified in 1995, obliges state parties to provide free and compulsory basic education; albeit progressively.<sup>42</sup> The African Charter on the Rights and Welfare of the Child (hereafter referred to as the ACRWC), which South Africa ratified in 2000, obliges state parties to ensure that every child would have access to free basic education and that the education system would allow each child to develop according to their potential and abilities.<sup>43</sup>

Despite a domestic, regional and international legal framework which, on the surface appears to be enabling and open to an inclusive education system, children with disabilities in South Africa are still being denied access to quality basic education on an equal basis with non-disabled children.

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<sup>37</sup> South African Schools Act 84 of 1996.

<sup>38</sup> Department of Education *Education White Paper 6: Special needs education: Building an inclusive education and training system* (2001).

<sup>39</sup> Department of Education *National Strategy on Screening, Identification, Assessment and Support* (2014).

<sup>40</sup> Children's Act 38 of 2005.

<sup>41</sup> Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008, Article 24.

<sup>42</sup> United Nations Convention on the Rights of the Child, GA Res 44/25, entered into force 2 September 1990, Article 28.

<sup>43</sup> The African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, adopted July 1990, entered into force 19 November 1999.

### **1.3 Research questions**

This study will assess whether or not the South African government has succeeded in ensuring that children with disabilities have access to inclusive, quality basic education by answering the following questions;

- What is the current domestic, regional and international framework and does it create an 'enabling' environment for the creation of an education system which is inclusive and accessible for children with disabilities?
- Is the South African government adequately disposing of its domestic, regional and international obligations as it relates to the right of children with disabilities to quality basic education?
- What are some of the barriers which hinder children with disabilities from accessing quality basic education on an equal basis with others?
- What could/should be done to ensure that quality basic education becomes more inclusive and accessible for children with disabilities?

### **1.4 Methodology**

For purposes of this research dissertation, I will undertake a desktop research of the relevant South African legislation, case law, policy documents, journal articles and reports; as well as the relevant and applicable international and regional instruments. I will critically analyse the materials to determine the gaps and disparities which exist between the law on paper and the law in reality. Legislation and policy documents provide us with a thorough understanding of the law on paper, whilst case law, reports and journal articles might provide insight as to the disparities between the law on paper and the law as it exists in the lives of those most vulnerable, such as children with disabilities. Through researching the applicable international and regional instruments, I will also be able to determine whether the South African legal framework is on par with international and regional standards.

### **1.5 Significance of the study and objectives of the research**

Equality, human dignity, and freedom are the foundational values of our constitutional democracy.<sup>44</sup> These values will never be realised for as long as there are vulnerable population groups which continue to exist on the periphery of society. Women, children, and persons with disabilities are amongst the most vulnerable persons in society. For as long as these vulnerable groups are excluded and denied access to their human rights, the constitutional promise of equality, human dignity, and freedom will have a hollow ring. Children with disabilities continue to be denied access to quality basic education; in fact, since the dawn of democracy in South Africa, the number of disabled children who are without schooling, has significantly increased.<sup>45</sup> South Africa is one of the most unequal societies in the world, and the provision of access to quality

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<sup>44</sup> n 32 above, section (1) (a).

<sup>45</sup> Hodgson & Beere (n 23 above) 144 – 145.

education would go a long way in breaking our country's inequality cycle.<sup>46</sup> Education often holds the key to unlocking and realising other rights.<sup>47</sup> If children with disabilities are provided with inclusive access to quality basic education, it would break the cycle of poverty which persons with disabilities experience in South Africa.

The central objective of this research is to argue that access to inclusive, quality basic education for children with disabilities is an obligation, not a choice, upon the South African government. This research seeks to determine whether the South African government has succeeded or failed in disposing of its obligations in light of its domestic, regional and international obligations.

According to the findings of the population census report on disability, many disparities exist in terms of disability type as well as population group/race when it comes to accessing early childhood education, primary education, as well as secondary education.<sup>48</sup> Those with severe intellectual and psychosocial disabilities are the most marginalised in terms of disability type.<sup>49</sup> In terms of population groups, black and colored children are the most marginalised.<sup>50</sup> This research will seek to determine whether the legal framework is sufficient to tackle the intersectional discrimination which exists.

Furthermore, this research seeks to find meaningful and practical solutions to ensure that children with disabilities are able to access inclusive, quality basic education on an equal basis with others. Access to quality basic education for children with disabilities, as well as access to other socio-economic rights and services, is not merely the responsibility of government. Government bears the greatest responsibility to ensure quality access to socio-economic rights and services for its citizens, however, a collaborative effort between government and its various branches, civil society, and the South African public, is required. The various barriers which hinder the equal participation of persons with disabilities within society are multi-dimensional and requires multi-dimensional solutions.

## **1.6 Limitations of the research**

As mentioned above, throughout the African continent, reliable statistics on disability are difficult to come by. Unfortunately, South Africa is no different in this regard. The latest population census was conducted over a decade ago, in 2011, from which a disability specific report was drafted.<sup>51</sup> The results from the 2022 population census has not yet been published. The census does not contain information for children below the age of five years and even for the data for those aged between five and nine years old, Stats SA recommends that we interpret the data with caution as there were

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<sup>46</sup> M Du Plessis 'The social model of disability, rights discourse and the impact of South Africa's Education White Paper 6 on access to the basic education system for persons with severe or profound intellectual impairments' (2013) *Law democracy and development* 203.

<sup>47</sup> Du Plessis (n 30 above) 203 – 204.

<sup>48</sup> Stats SA *Census 2011: Profile of Persons with Disabilities* (2011).

<sup>49</sup> As above.

<sup>50</sup> n 48 above.

<sup>51</sup> n 48 above.

several instances of parents incorrectly reporting on their children due to a lack of understanding of the various types of disabilities.<sup>52</sup>

The justice system is largely inaccessible to persons with disabilities, many of whom live in poverty; and as a result, it is highly likely that many violations of the rights of children with disabilities to quality basic education, do not make it to the courts or even to civil society organisations that litigate on behalf of persons with disabilities. In addition to not having access to the justice system, many persons with disabilities are unaware of their rights and hence, are unaware when their rights are being violated by the state or private party.

Hence, the greatest limitation to this research is the fact that we do not have the full picture. Regardless of how much research we might do, a desktop research will never fully capture the lived experiences on the ground. Furthermore, the lack of accurate and updated statistics, distorts the picture to an even greater extent.

### **1.7 Literature review**

Considering the history of access to education and other socio-economic rights in South Africa, it is appropriate that we consider literature that seeks to expose the impact of Apartheid education policies on inclusive education rights discourse in a democratic South Africa. Gallo examines the impact of the Bantu Education system on the education system in post-Apartheid South Africa by discussing the various religious and economic influences on the creation and implementation of the Bantu Education Act and its policies.<sup>53</sup> Furthermore, Gallo examines the practicalities of the Bantu Education system, such as the funding model for black children in comparison to the funding model for white children, the curriculum which was developed to be used in Bantu schools, as well as a lack of resource allocation in Bantu schools.<sup>54</sup> Gallo thereafter proceeds to discuss the impact of the Bantu education system on the education system in post-Apartheid South Africa and the extent to which access to education impacts upon access to other socio-economic rights.<sup>55</sup>

Murungi examines the terms basic education, inclusive education and inclusive basic education from an international perspective as well as a South African perspective. Murungi explains that two meanings have been attributed to the term 'basic education' in South Africa. The first meaning attaches a timeline or timeframe to the attainment of basic education; whilst the second meaning is more substantive than the first as it is concerned with the attainment of basic skills in the areas of literacy, arithmetic's and life skills.<sup>56</sup> Whilst there is still debate on what the right to basic education entails in South Africa, significant strides have been made through the jurisprudence of the

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<sup>52</sup> n 48 above.

<sup>53</sup> MA Gallo 'Bantu Education, and its Living Educational and Socioeconomic Legacy in Apartheid and Post-Apartheid South Africa' unpublished PhD dissertation, Fordham University, 2020.

<sup>54</sup> n 53 above, 16.

<sup>55</sup> n 53 above, 4.

<sup>56</sup> LN Murungi 'Inclusive Basic Education in South Africa: Issues in its Conceptualization and Implementation' (2015) 18 *Potchefstroom Electronic Law Journal* 3162.

courts, particularly the Constitutional Court.<sup>57</sup> Thereafter, Murungi discusses White Paper 6 as the guiding instrument for the development and implementation of an inclusive education system in South Africa.

Hansungule reviews the South African legal framework on the rights of children with disabilities to socio-economic rights, with a specific focus on the right to education and the right to social services in terms of the Constitution.<sup>58</sup> The review of the South African legal framework consists of a review of the international instruments which South Africa has ratified, followed by the regional instruments which South Africa has ratified, and the national/domestic laws which South Africa has enacted to give effect to various socio-economic rights.<sup>59</sup> Hansungule recognises that the mere creation of legal instruments cannot improve the lives of those most vulnerable, such as children with disabilities.<sup>60</sup> The lives of children with disabilities can only be improved through effective and efficient implementation of policies by the relevant organs of the state.<sup>61</sup>

Ngwena argues that South Africa boasts a legal framework which, on the surface, appears to be enabling to an education system which is inclusive but inwardly, is disabling and inherently discriminatory towards learners with disabilities; particularly, learners with intellectual and psychosocial disabilities.<sup>62</sup> Ngwena uses the case of the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* as the basis for his argument.<sup>63</sup> In this case, the High Court ruled that the state has an obligation to provide education equally to all children, including those with severe and profound intellectual disabilities.

Donohue and Bornman identify two key challenges which are hindering the realisation of inclusive education in South Africa.<sup>64</sup> Firstly, the lack of clarity within the policies, such as the Education White Paper 6; and secondly, poor implementation and a lack of resource allocation from the National Department of Education.<sup>65</sup> Donohue and Bornman argue in favor of a top-down approach, wherein national government, particularly the National Department of Education, should lead the implementation of White Paper 6 and other policies through allocating resources, developing clear strategies, and developing processes of accountability.<sup>66</sup> An argument is made that

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<sup>57</sup> n 56 above, 3164.

<sup>58</sup> Z Hansungule 'A case for the Socio-economic Rights of Children in South Africa: Protection of the Right to Basic Education and the Right to Social Services' unpublished LLM dissertation, University of Pretoria, 2016.

<sup>59</sup> n 42 above, 59 – 71.

<sup>60</sup> n 42 above, 137 – 138.

<sup>61</sup> n 42 above, 138.

<sup>62</sup> C Ngwena 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in Inclusive Education' (2013) 1 *African Disability Rights Yearbook* 152.

<sup>63</sup> n 62 above, 140.

<sup>64</sup> D Donohue and J Bornman 'The challenges of realizing inclusive education in South Africa' (2014) 34 *South African Journal of Education*, 6 – 7.

<sup>65</sup> As above.

<sup>66</sup> n 64 above, 10 – 11.

the policies adopted and steps taken by the government are often simply symbolic, without the will to actually implement the policies.

In contrast to Donohue and Bornman, Du Plessis argues that inclusive education in South Africa can only be achieved through a community-based approach.<sup>67</sup> Du Plessis is of the firm opinion that a community-based approach is a key and central feature of inclusive schools.<sup>68</sup> Du Plessis argues that the adoption of policies and implementation by national government is alone, insufficient for the realisation of inclusive education in South Africa. Parents, teachers, the government, and all relevant stakeholders must be involved in the process. Du Plessis places emphasis on the importance of adopting White Paper 6 as legislation; as it currently does not have any binding force.

### **1.8 Structure of the dissertation**

Chapter one of the dissertation sets out the brief background to the research, the problem statement, research questions, limitations to the research, methodology used for the research, as well as the significance and objectives of the research. It concludes by setting out the structure of the research dissertation.

Chapter two of the dissertation provides a conceptualisation of disability as an evolving concept, the models of disability, and an overview of children with disabilities in South Africa insofar as their socio-economic rights are concerned.

Chapter three of the dissertation delves into the relevant domestic, regional and international instruments which South Africa is bound by. This chapter will determine whether the legal framework is indeed 'enabling' for the creation of an inclusive and accessible education system. This chapter will interrogate whether South Africa has succeeded or failed in its obligation to provide access to quality basic education on an equal basis with others for children with disabilities. In so doing, the definition of basic education in a South African context will also be highlighted, as well as the definition of inclusive education.

Chapter four of the dissertation investigates multiple barriers which children with disabilities face in their pursuit for inclusive access to quality basic education. This chapter will also explore possible recommendations to improve access to quality basic education for children with disabilities.

Chapter five will be the concluding chapter in which the findings which were made throughout the research will be summarised.

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<sup>67</sup> P Du Plessis 'Legislation and policies: Progress towards the right to inclusive education' (2013) *De Jure*, 89 – 90.

<sup>68</sup> As above.

## Chapter 2

### Understanding disability

#### 2.1 Introduction

'Everybody on the planet moves differently. It's part of the complex fabric of human existence. What, then, makes a body "dis-abled"? Understanding of disability is rooted in colonialism, in which bodies and land were transformed into commodities assigned value on a global market according to their ability to produce profit. While "impairment" is as old as humanity itself, colonialism established a global ableist hierarchy that values bodies as instruments of labour.'<sup>69</sup>

In order to understand why persons with disabilities and particularly, children with disabilities are marginalised within society, we have to understand the history of disability and the manner in which it has evolved and developed throughout the different phases of human history.

This chapter seeks to delve into the history of disability as a social construct through a discussion of the medical, social and human rights models of disability. The medical or individualised model of disability conceptualises disability as an inherent flaw within an individual which needs to be 'fixed' whilst the social model of disability shifts the focus from an individual onto the barriers which exist within society.<sup>70</sup> The human rights model of society, which is the model that is used to monitor implementation of the CRPD by state parties, recognises persons with disabilities as persons with fundamental rights and freedoms. This chapter also describes disability as an evolving, non-stagnant concept; which is in line with the definition found in the CRPD.

Furthermore, this chapter seeks to provide a brief overview of children with disabilities in South Africa and their access, or lack thereof, to socio-economic rights as guaranteed by the Constitution and other domestic, regional and international instruments.

#### 2.2 The history of disability

There are various models of disability which have been used to contextualise and understand disability throughout the past century. These models of disability have had significant influence on the shaping of policies, laws and practices which impact upon persons with disabilities. In this section, we will focus on the three models that have had the most significant impact on the shaping of laws and policies which impact upon persons with disabilities; namely, the medical model, social model and human rights model. Other models include the religious model, which viewed disability as a sin; and the charity or welfare approaches, which treated persons with disabilities as subhuman

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<sup>69</sup> <https://study.soas.ac.uk/against-accessibility-decolonise-ableism/> (accessed 10 January 2023).

<sup>70</sup> <https://www.disabilitynottinghamshire.org.uk/index.php/about/social-model-vs-medical-model-of-disability/> (accessed 10 December 2022).

and in need of charitable assistance or social welfare programmes designed by the state.<sup>71</sup>

### **2.2.1 The medical model of disability**

The medical model of disability focuses on the impairment of a person and states that the inherent impairment is the reason why persons with disabilities are unable to participate within society on an equal basis with others.<sup>72</sup> For example, according to the medical model of disability, persons with visual impairments are unable to read because of their impairment; in other words, because they cannot see. The focus is on the impairment rather than on the fact that the materials could be made accessible through the publication of braille or easy-to-read formats. The medical model of disability, once having identified the inherent impairment, proceeds to then determine how the impairment may be fixed, cured or rehabilitated.<sup>73</sup> Within this model, persons with disabilities are required to assume the role of a patient who should be willing and prepared to be rehabilitated.<sup>74</sup>

Before medical sciences made significant advancements, the predominant model of disability was the religious model of disability; which we will not discuss at great length. The religious model of disability viewed disability as a punishment from God for one's sins or the sins of one's parents or as a test of faith from God.<sup>75</sup> Following significant advancements in the field of medical science during the late 1700's and early 1800's, society gradually made the shift from the religious model to the charity or welfare model, to the medical model of disability. The medical model of disability conceptualises disability in a negative way and this has resulted in various laws and policies referring to persons with disabilities in derogatory terms such as 'retard', 'insane', 'mentally handicapped', 'spastic', 'cripple', and 'imbecile'; amongst others. The medical model of disability has had a significant impact on the shaping of law and policy throughout the African continent; and this impact continues to live on in legislation, policy and most devastatingly, in the mindsets of society.

Section 246 of the Criminal Procedure and Evidence Act of Zimbabwe uses the terms 'idiocy' and 'imbecility' to refer to persons with intellectual and psychosocial disabilities and essentially states that persons with intellectual and psychosocial disabilities are not competent to participate in criminal proceedings in court.<sup>76</sup> This provision is currently still in force and has not been repealed.<sup>77</sup> Section 216 of the Criminal Procedure and Evidence Act of Botswana is almost identical to the section found in

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<sup>71</sup> M Retief and R Letsosa 'Models of Disability: An overview' (2018) 74 *HTS Theological Studies*.

<sup>72</sup> MC Sadiki, B Watermeyer & NT Abrahams 'Transitioning to life with disability in rural South Africa: A qualitative study' (2021) 10 *African Journal of Disability*.

<sup>73</sup> As above.

<sup>74</sup> MC Du Plessis 'Access to work for disabled persons in South Africa: The intersections of social understanding of disability, substantive equality and access to social security' unpublished doctoral thesis, University of Cape Town, 2015 233.

<sup>75</sup> n 71 above.

<sup>76</sup> Criminal Procedure and Evidence Act (Zimbabwe), Chapter 9:07, 1 June 1927.

<sup>77</sup> There have been widespread calls by civil society throughout Southern African to repeal this provision but to this day, the section has not been repealed. The terms 'lunacy' and 'idiocy' continue to be used.

Zimbabwean law as mentioned above.<sup>78</sup> Many such examples of persons with disabilities being referred to in derogatory terms exist on the African continent. Angola, Eswatini and Malawi, amongst other African countries, refer to persons with intellectual and psychosocial disabilities using derogatory terms. The use of derogatory terms which occurs up until today, can largely be attributed to the influence of the medical model of disability which portrays disability in a negative light and portrays persons with disabilities as patients in need of rescuing and rehabilitation.<sup>79</sup>

In a communication which was brought before the African Commission on Human and Peoples' Rights, namely *Purohit and Moore v the Gambia*, the derogatory terms used to refer to persons with disabilities as well as the degrading treatment of persons with disabilities; particularly persons with intellectual and psychosocial disabilities; was brought into the spotlight.<sup>80</sup> The Lunatics Act permitted the detention of persons regarded to be 'lunatics' at psychiatric units in the Gambia which were often overcrowded and poorly resourced.<sup>81</sup> Furthermore, the Act did not provide any redress or appeal measures for those who were often detained under destitute conditions.<sup>82</sup> The Commission found, amongst other things, that the use of derogatory terms amounted to dehumanization and degradation.<sup>83</sup> The fact that this matter was brought to the Commission is indicative of the fact that civil society and human rights activists are becoming aware of the measures available at regional level. However, the fact that the Gambia has still not addressed the issues which were raised in the communication before the Commission, is indicative of the fact that many African countries are still not willing and committed to creating inclusive communities in which persons with disabilities are able to participate fully on an equal basis with others. The Lunatics Detention Act is currently still in force and has not been repealed.<sup>84</sup> It can be said that *Purohit and Moore v the Gambia* is a classic example of the influence of the medical model of disability on legislation as well as the attitude of a government towards persons with disabilities.

In the context of education for children with disabilities, the medical model of disability views children with disabilities as children that need to be 'fixed' and 'cured' in order to adapt to fit into an existing environment.<sup>85</sup> Hence, according to the medical model of disability, education should not be made inclusive and accessible for children with disabilities but rather, children with disabilities should adapt and fit into the existing

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<sup>78</sup> Criminal Procedure and Evidence Act (Botswana), Chapter 08:02, 1 January 1939.

<sup>79</sup> n 71 above.

<sup>80</sup> Communication 241/01, *Purohit and Moore v the Gambia*.

<sup>81</sup> As above.

<sup>82</sup> n 80 above.

<sup>83</sup> <https://dullahomarinate.org.za/socio-economic-rights/Cases/foreign-cases/purohit-and-moore-v-the-gambia-communication-241-2001-2003-ahrlr-96-achpr-2003> (accessed 9 September 2022).

<sup>84</sup> Law Hub Gambia 'The Status of the findings of the African Commission on *Purohit and Moore v the Gambia*: Seventeen Years of nothingness' 27 November 2020 <https://www.lawhubgambia.com/lawhug-net/tag/Lunatics+Detention+Act> (accessed 20 October 2022).

<sup>85</sup> Z Massoumeh and L Jamshidi 'An investigation of medical model and special education needs' (2012) 46 *Procedia: Social and Behavioral Sciences*.

education system.<sup>86</sup> Medical science plays an important role in understanding various types of disabilities and the needs associated with each; however, the focus should never solely be on the impairment. In South Africa, Apartheid policies and legislation were based on the medical model of disability. The education system under Apartheid was segregated in terms of both race and disability; hence creating a structure of intersectional discrimination within the education system.<sup>87</sup> The Apartheid government ensured that students of different races would be kept apart and that children with disabilities would be kept isolated.<sup>88</sup> Government made little to zero effort to create an inclusive and accessible basic education system because the intention was to isolate children with disabilities.

### **2.2.2 The social model of disability**

A publication by the Union of the Physically Impaired Against Segregation, which is a United Kingdom based organisation, in 1976, stated the following; 'Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society.'<sup>89</sup> Whilst the medical model of disability focuses on the impairment and describes a person as 'deficient', the social model, which has gained traction since the 1970's, shifts the focus onto the negative attitudes of society and the barriers which exist within society.<sup>90</sup> According to the social model of disability, disability is a social construct and it is society which disables and it is society which oppresses and isolates persons with disabilities.<sup>91</sup> Persons with disabilities are an oppressed and vulnerable group within a society which views a non-disabled white male as the ideal being. Power relations within society dictate that persons with disabilities are inferior because they do not fit the profile of the ideal being. Furthermore, within capitalist societies, persons with disabilities are regarded as inferior because they are not as 'productive' and 'profitable' as persons without disabilities.<sup>92</sup>

Persons with disabilities are not disabled because of their impairments, but rather, they are disabled by societal barriers, negative perceptions, and a lack of accommodations. For example, persons who are visually impaired are not disabled because of their visual impairment, but rather, they are disabled by the lack of braille materials and other assistive devices and technologies. A further example is that persons who are wheelchair users are not disabled because of their physical impairment, but rather, they are disabled by factors such as a lack of ramps and narrow pathways to access buildings and rooms. Disability, then, essentially exists as a result

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<sup>86</sup> As above.

<sup>87</sup> n 23 above, 144.

<sup>88</sup> n 23 above, 145.

<sup>89</sup> M Oliver 'The social model in action: If I had a hammer' in C Barnes & G Mercer (eds) 'Implementing the Social Model of Disability: Theory and Research' (2004) 19.

<sup>90</sup> As above.

<sup>91</sup> n 89 above, 19.

<sup>92</sup> AC Carey 'Review of Russell, Marta. *Capitalism and Disability: Selected Writings by Marta Russell*, edited by Keith Rosenthal. Chicago: Haymarket Books, 2019' (2021) 41 *Disability Studies Quarterly*

of societal and environmental factors or barriers which are external to the person themselves.<sup>93</sup>

The social model of disability makes a distinct differentiation between impairment and disability.<sup>94</sup> An impairment is an inherent and corporeal fact which renders one weaker and less functional than someone who does not have any impairment.<sup>95</sup> Disability is a social construct caused by oppression, isolation and exclusion through factors which are external to the person themselves. The social model recognises impairment only for the purpose of understanding the state of a person's body and the varying needs that persons with disabilities may have but it does not recognise impairment as the cause of disability.<sup>96</sup> In contrast to the medical model in which persons with disabilities are assumed the role of the patient, the social model places persons with disabilities at the forefront of the disability rights movement.<sup>97</sup> The social model is a much more holistic approach to conceptualising disability as compared to the medical model. The medical model focuses solely on the impairment, whilst the social model takes into consideration a wide range of societal, cultural and environmental factors to conceptualise and understand disability. Using a person who is deaf as an example; in terms of the medical model, the inherent impairment is the sole cause of the person's disability. However, the social model would focus on a broad range of factors; such as, the fact that the person who is deaf may be someone who is from a poor and impoverished background without access to adequate healthcare services, and the fact that persons who are deaf are unable to participate in society because of communication barriers. As it can be seen from the example, the medical model focuses solely on the impairment and the social model focuses on context.

A crucial element of the social model is the removal of barriers which exclude persons with disabilities from participating in society on an equal basis with others.<sup>98</sup> Attitudinal barriers are one form of barrier which exists; and one of the first steps in tackling this form of barrier is the removal of derogatory terms from our vocabulary.<sup>99</sup> The derogatory terms should be replaced with the appropriate terminology. Persons with intellectual and psychosocial disabilities should not be referred to as 'crazy' or 'lunatic', persons with physical disabilities should not be referred to as "crippled" or 'handicapped', and persons who use synthetic and alternative methods of

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<sup>93</sup> n 89 above, 21 – 22.

<sup>94</sup> S Buder & R Perry 'The social model of disability explained' 12 April 2021 <https://www.thesocialcreatures.org/thecreaturetimes/the-social-model-of-disability> (accessed 10 August 2023).

<sup>95</sup> As above.

<sup>96</sup> R Olkin 'Conceptualizing disability: Three models of disability' 29 March 2022 <https://www.apa.org/ed/precollege/psychology-teacher-network/introductory-psychology/disability-models> (accessed 9 November 2022).

<sup>97</sup> n 74 above, 34 – 35.

<sup>98</sup> M Ramaahlo, KM Tonsing & J Bornman 'Inclusive education policy provision in South African research universities' (2018) *Disability and Society* 5.

<sup>99</sup> n 2 above, 8.

communication as opposed to speaking, should not be referred to as 'dumb' or 'mute'.<sup>100</sup>

Notwithstanding the above which has been discussed regarding the social model of disability, it is important to note that because there has been extensive literature on this model from various parts of the world, there are some inconsistencies and differences of agreement in the usage and articulation of the model.<sup>101</sup> However, there is no difference of opinion on the fact that the social model shifts the focus from the impairment to the barriers which exist in society.

In South Africa, during the 1980's, the disability rights movement grounded itself within the anti-apartheid movement because different forms of oppressions rarely exist in isolation and often overlap.<sup>102</sup> The disability rights movement gained momentum during the early 1960's, and in 1964, Disabled People South Africa (hereafter referred to as 'DPSA') was founded. DPSA, and the disability rights movement in South Africa at large, were influenced by international resistance to the medical and welfare approaches to disability, as well as domestic efforts against Apartheid.<sup>103</sup> The Black Consciousness Movement, which came into existence as a form of resistance to Apartheid, sought to create a sense of self-pride amongst black people. This positively influenced the disability rights movement as persons with disabilities came to the realisation that they need to be the prime advocates in matters concerning them and that they need to develop a sense of self-pride and self-dependence.<sup>104</sup>

South Africa's approach to inclusive education, which will be discussed at great length in the following chapters, is based on the social model of disability.<sup>105</sup> On paper, South Africa's approach to inclusive education removes the focus from impairment to the inaccessible society and the inaccessible general education system which is still reeling from the impacts of Bantu education, its policies, and the Apartheid system at large.

### **2.2.3 The human rights approach/model to disability**

The social model and human rights models of disability are sometimes viewed as two different, contrasting models of disability. However, some authors are of the opinion that the two models complement one another and should be used in tandem because each model carries out a distinct yet crucial role.<sup>106</sup>

The human rights model, like the social model, is based on the premise that disability exists as a result of barriers within society.<sup>107</sup> The human rights model then goes a

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<sup>100</sup> As above.

<sup>101</sup> A Lawson & AE Beckett 'The social and human rights models of disability: towards a complementarity thesis' (2021) 25 *The International Journal of Human Rights*, 348 – 350.

<sup>102</sup> W Rowland 'Building a movement' in *Nothing about us, without us: Inside the Disability Rights Movement in South Africa* 162.

<sup>103</sup> n 74 above, 35.

<sup>104</sup> n 74 above, 34 – 36.

<sup>105</sup> n 46 above, 215.

<sup>106</sup> n 101 above, 349 – 350.

<sup>107</sup> n 101 above, 349.

step further in that it calls for persons with disabilities to demand that their human dignity be respected and promoted and that they be treated equally and granted equal access to their fundamental rights and freedoms.<sup>108</sup> According to the human rights model, the fundamental rights and freedoms of persons with disabilities should be expressly protected and promoted in law, policy, legislation and institutional practices.<sup>109</sup> The human rights model obliges states to take active steps to eliminate all forms of barriers which hinder persons with disabilities from fully exercising and enjoying their fundamental rights and freedoms.<sup>110</sup> Furthermore, it places an obligation on states to take measures to ensure that persons with disabilities are not excluded, isolated and discriminated against with regards to access to housing, education, healthcare, employment; amongst others.

The human rights model envisions an inclusive and just society in which persons with disabilities are able to realise their full potential without being discriminated against by fellow human beings, the government, laws and policies, and structural and institutional barriers and practices. Hence, the human rights model complements the social model as it adds another dimension to it. Both models shift the focus from impairments onto barriers which exist within society as well as negative attitudes and stigma. The human rights models' additional dimension is that the law and the state play a huge role in the elimination of barriers which persons with disabilities face on a daily basis. The human rights model reaffirms that persons with disabilities have fundamental rights and freedoms on an equal basis with others.

### **2.3 Disability as an evolving concept**

What has become clear from the developments over time and the various models of disability which have shaped policy and practice in different ways during different periods in history, is that disability is an evolving and non-stagnant concept. Just as society is constantly evolving, how we view and conceptualise disability is constantly evolving as well. Disability as an evolving concept has been reaffirmed in the preamble to the CRPD.<sup>111</sup> Article 1 of the CRPD defines disability as follows:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>112</sup>

The Preamble to the CRPD further acknowledges that disability is a multi-dimensional and complex concept as there are various different types of disabilities and it often overlaps with various socio-economic issues.<sup>113</sup> Furthermore, persons with disabilities often face multiple layers of exclusion, ostracisation, stigma and intersectional

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<sup>108</sup> SD Kamga 'Disability rights in South Africa: prospects for their realisation under the White Paper on the Rights of Persons with Disabilities' (2016) *South African Journal on Human Rights* 571.

<sup>109</sup> As above.

<sup>110</sup> n 58 above, 29 – 30.

<sup>111</sup> Preamble to the CRPD.

<sup>112</sup> Article 1 of the CRPD.

<sup>113</sup> Preamble to the CRPD.

discrimination depending on their race, gender, class, social standing, and sexual orientation.<sup>114</sup>

As evident from the definition given above, the different types of disabilities include, but are not limited to, physical, mental, intellectual and sensory impairments. The barriers which persons with disabilities face, are often categorised under the following headings; physical, attitudinal, cultural, environmental, institutional and communication barriers. Disabilities differ as do the accommodations required by persons with disabilities. The CRPD places an obligation upon state parties to provide individualised reasonable accommodations for persons with disabilities as there is no 'one size fits all' approach. For example, two persons with visual impairment might require different types of accommodations; the one might require a printed braille format of a document, whilst the other might require a PDF document with a screen-reader to be used on an electronic device.

#### **2.4 Children with disabilities in South Africa**

As we now understand the definition of disability as well as the history of its conceptualisation, it is necessary that we place disability within a South African context for purposes of this research.

As discussed above under chapter one of this research, one of the limitations of this research is the fact that we lack updated, efficient and reliable statistics and data on disability in South Africa. There are many reasons why this is so; such as the fact that there is a lack of education and awareness on disability, violence against persons with disabilities, and the fact that persons with disabilities who reside in rural areas, which is often the case, are unaccounted for when population census' and household surveys are conducted by Statistics South Africa.<sup>115</sup> The 2011 Population Census as well as the subsequent GHS surveys made use of the Washington group of questions to determine disability related statistics in the country. The Washington group of question has its limitations in that it is inappropriate for children below the age of five and those with psychosocial disabilities.<sup>116</sup> The latest disability statistics can be found in the 2011 Population Census as well as the 2013, 2018 and 2021 GHS surveys. The results of the 2022 Census have not been published/reported as yet. Despite the limitations, the available data is useful for purposes of this research, albeit to a limited extent. According to the available data from the 2011 Census, the disability prevalence for children aged between 5 and 9 years old is 10.8%, 4.1% for children aged between 10 and 14 years old, and 2.6% for children aged between 15 and 19 years old.<sup>117</sup> Unfortunately, there is no data available on children below the age of five years old.

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<sup>114</sup> Preamble to the CRPD.

<sup>115</sup> n 58 above, 9 – 10.

<sup>116</sup> Advantages and Limitations of Washington Group Short Set <https://e-inclusion.unescwa.org/node/1358> (accessed 2 August 2023).

<sup>117</sup> n 48 above.

## 2.5 Socio-economic rights of children with disabilities in South Africa

Socio-economic rights, which are justiciable in South Africa, refers to access to life's basic necessities.<sup>118</sup> When South Africa transitioned from Apartheid to a constitutional democracy, the society envisioned by the Constitution was one in which human dignity and equality would prevail over pre-existing systems of oppression, exclusion and inequality.<sup>119</sup> The transformative ideals of the Constitution seek to serve as a bridge between a past of oppression and inequality, and a future in which human dignity, equality and freedom for all is respected, protected and promoted.<sup>120</sup> Children are a vulnerable population group within society whose fundamental rights, freedoms and human dignity are often violated and infringed upon. The constitutional promise of equality and human dignity would be an empty one if vulnerable groups continue to operate on the periphery of society despite a supreme Constitution which guarantees fundamental rights and freedoms for all. To this end, a section focusing on the rights of children was included in the Bill of Rights.<sup>121</sup> Section 28 protects and promotes a wide range of socio-economic rights of children.<sup>122</sup> Section 28 also crucially states that the best interests of the child is of paramount importance in all matters concerning the child.<sup>123</sup>

Given the nature and importance of the right to education, it is also entrenched in the Constitution. Section 29 (1) of the Constitution protects the right of everyone to basic education, including adult basic education.<sup>124</sup> The fact that the right to basic education is immediately, not progressively realisable, highlights the importance of the right to education and its potential to unlock other socio-economic, political, civil and cultural rights. The right to basic education in the Constitution does not contain any internal limitations and is not subject to the availability of resources, as is the case with most socio-economic rights. However, the substantive content of our socio-economic rights is unclear as South Africa has been reluctant to adopt the 'minimum core' approach, which is the approach adopted within the International Covenant on Economic, Social and Cultural Rights (hereafter referred to as the 'ICESCR') which South Africa ratified in 2015.<sup>125</sup> The substantive content of our socio-economics is constantly being developed by the courts.

The above socio-economic rights contained in the Constitution applies equally to children with and without disabilities. Despite constitutional protection of the socio-economic rights of all children including children with disabilities, children with

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<sup>118</sup> Z Hansungule & T Boezaart 'The socio-economic rights of children with disabilities in South Africa: A comparison between the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons with Disabilities' (2017) 5 *African Disability Rights Yearbook* 42.

<sup>119</sup> P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 352 – 353.

<sup>120</sup> As above.

<sup>121</sup> Section 28 of the Constitution protects the rights to a name, nationality, basic nutrition, shelter and healthcare; as well as the right to be protected from neglect, degradation and abuse.

<sup>122</sup> Section 28 (1) of the Constitution.

<sup>123</sup> Section 28 (2) of the Constitution.

<sup>124</sup> Section 29 (1) of the Constitution.

<sup>125</sup> International Covenant on Economic, Social and Cultural Rights GA Res 2200A, adopted on 16 December 1966, entered into force 3 January 1976.

disabilities continue to be marginalised and excluded; especially in the context of education. Statistics reveal that the numbers of children with disabilities without access to schooling has doubled since the dawn of democracy.<sup>126</sup>

## **2.6 Conclusion**

Former Chief Justice, Pius Langa, when speaking about the transformative nature and potential of the Constitution, alluded to the fact that the perfect society does not exist.<sup>127</sup> Society will always be evolving and the law will have to evolve in order to continue to serve the society which it exists within. Disability can be understood as a multi-dimensional, complex and evolving concept with multiple layers. The progression from the medical model of disability, to the social model, and now the human rights model, is an indication that the needs of society are constantly evolving. Hence it can be said that South Africa's legal framework, which is based upon the principles of transformative constitutionalism, supports the conceptualisation of disability as an evolving concept because transformative constitutionalism recognises the evolving nature of society and its needs.

Under the medical model, persons with disabilities were defined by their impairment. The social model shifted the focus from the impairment to the inaccessible society and negative stereotypes which exist. The human rights model, while keeping the focus on barriers created by society, adds a further dimension to our understanding of disability. The human rights model highlights the inherent human dignity of persons with disabilities, and further reinforces the role of the state and the law in eliminating barriers, discrimination, as well as other forms of oppression.

The medical model was the dominant approach under Apartheid South Africa, and this influenced all facets of life, especially education. Democratic South Africa's inclusive education approach, which aims to eliminate the discriminatory and exclusionary practices which were created by Apartheid, follows the social model.<sup>128</sup> Despite the change in policy on paper, education remains exclusive, inaccessible and unequal. In the chapters to follow we will interrogate why this is the case through a discussion of the relevant legal instruments.

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<sup>126</sup> n 23 above.

<sup>127</sup> n 119 above, 360.

<sup>128</sup> n 104 above.

## Chapter 3

### A disabling or enabling legal framework: Approach to inclusive basic education in post-Apartheid South Africa

#### 3.1 Introduction

The purpose of this chapter is to understand the history of basic education in South Africa. The Bantu Education Act will be briefly discussed together with the impact of its policies on the education system in post-Apartheid South Africa. Thereafter, the terms basic education and inclusive education will be discussed in a South African context. Once we have conceptualised the terms basic education and inclusive education, the discussion will focus on the various domestic, regional and international instruments which protect and promote the right to access inclusive, quality basic education for children with disabilities.

#### 3.2 The impact of Bantu education and its policies on education in South Africa

When Nelson Mandela was on trial before he was sentenced to life imprisonment, he stated the following from the dock:

only 5,660 African children in the whole of South Africa passed their Junior Certificate in 1962, and in that year only 362 passed matric.... Children wander about the streets of townships because they have no schools to go to, or no money to enable them to go to school.... This leads to a breakdown of moral standards<sup>129</sup>

In 1953, the Apartheid government, which at the time was led by DF Malan, with HF Verwoerd leading the Ministry of Native Affairs, enacted the Bantu Education Act.<sup>130</sup> The Bantu Education Act governed the education of African children under Apartheid and created a racially segregated education system.<sup>131</sup> It granted national government, through the newly appointed Minister of the Bantu Education Sector, the power to govern all aspects of Bantu education, such as the curriculum which would be taught as well as the languages they should be taught in.<sup>132</sup> It also granted national government the power to determine the funding that Bantu schools would receive. This resulted in underfunded and poorly resourced schools for black children and well-resourced schools for white children.<sup>133</sup> The purpose of the Bantu Education Act was not only to ensure racial segregation in schools, but also to ensure that black people would be trained to be unskilled laborers, hence trapping black people in a cycle of poverty and dependence on white people for income and sustenance.<sup>134</sup> It was a

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<sup>129</sup> Court Transcript of statement from the Dock of Nelson Mandela, Pretoria Supreme Court, 20 April 1964 <https://www.sahistory.org.za/archive/court-transcript-statement-dock-nelson-mandela-pretoria-supreme-court-20-april-1964> (accessed 7 June 2023).

<sup>130</sup> Bantu Education Act 47 of 1953.

<sup>131</sup> A Phillips 'Bantu Education' (1999) 2 *The Review: A Journal of Undergraduate Student Research* 24.

<sup>132</sup> As above.

<sup>133</sup> n 53 above, 21 – 22.

<sup>134</sup> n 131 above, 25.

method of economic exploitation by the government. Furthermore, it was also a method of social and cultural exploitation which resulted in the dearth of African cultural practices, languages and knowledge systems.<sup>135</sup>

On 16 June 1976, South African students took to the streets in protest against an educational decree requiring all Sowetan schools to be taught in Afrikaans.<sup>136</sup> This event, which is known as the Soweto Uprising, sparked worldwide outrage when photographs of the police brutality against the students were shared in the newspaper. The photographs brought the injustices of Apartheid to the attention of the international community and resulted in boycotts, disinvestments and sanctions against South Africa. In 1979 the Bantu Education Act was repealed and replaced by the Education and Training Act; of which racial segregation remained the key feature.<sup>137</sup> Education in South Africa remained segregated until the end of Apartheid.

Steve Biko, who was an anti-Apartheid activist and the leader of the Black Consciousness Movement in South Africa, stressed upon the fact that African people were being mentally enslaved.<sup>138</sup> The Bantu Education system was one of many tools which the Apartheid government employed to mentally enslave the oppressed. Hence, the aims of Bantu education were as follows; racial segregation, mental enslavement, as well as economic, social and cultural exploitation, amongst others. Statistics reveal that during Apartheid, black students were allocated only 14% of what was allocated towards white students.<sup>139</sup> Access to education opens access to other socio-economic rights, such as employment, adequate housing, healthcare, food, water and sanitation. Without access to quality education, access to other socio-economic rights are compromised to a great extent.

Some practical examples of the legacies of the Bantu education system are as follows; in January 2014, a five-year-old boy in the Limpopo Province of South Africa, named Michael Komape drowned in a pit toilet/latrine at his school.<sup>140</sup> Little Michael fell into a pit latrine with urine and fecal matter.<sup>141</sup> This case highlighted the plight of thousands of South African children who attend public schools that are under-resourced, unsafe and unsanitary.<sup>142</sup> *Komape* is an illustration of Apartheid legacy compounded by the failures of the democratic government, National Department of Education, and Limpopo Provincial Department of Education. In *Komape*, the court placed emphasis on the importance of education and the fact that it is a beacon of hope for both children

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<sup>135</sup> This is known as epistemic violence. Colonialism, and by extension, Apartheid, resulted in African languages, practices and knowledge systems being treated as inferior to cultural practices and knowledge systems of the Western world.

<sup>136</sup> M Alexander 'The 16 June 1976 Soweto students' uprising – as it happened' 2 November 2022 <https://southafrica-info.com/history/16-june-1976-soweto-students-uprising-as-it-happened/> (accessed 10 April 2023)

<sup>137</sup> National Education and Training Act 90 of 1979.

<sup>138</sup> S Biko 'We Blacks' in *I Write What I Like* (2017) 30 – 32.

<sup>139</sup> n 131 above, 21 – 22.

<sup>140</sup> *Komape and Others v Minister of Basic Education* 2020 (2) SA 347 (SCA) para 1.

<sup>141</sup> *Equal Education and Another v Minister of Basic Education and Others* 2019 (1) SA 421 (ECB) (19 July 2018) para 55.

<sup>142</sup> *Komape and Others v Minister of Basic Education* 2018 (ZALMPPHC) para 65.

as well as their families who have been trapped in cycles of poverty for many decades or even centuries.<sup>143</sup> The court accentuated the fact that for many families, education represents hope for a better and brighter future.<sup>144</sup> Certain schools have reported having only one pit latrine, to be used by teachers and female learners.<sup>145</sup> Male learners are exposed to additional dangers as they have to walk long distance to relieve themselves in bushes.<sup>146</sup> For the 2023/2024 financial year, an amount of R2.1 billion has been allocated by national treasury to build more schools and eradicate pit latrines in schools.<sup>147</sup> However, whether or not this allocated budget will bring about substantial change, remains to be seen.

In January 2022, at the beginning of the school year, it was reported by News24 that only 748 out of 5451 government schools in the Eastern Cape province had received their textbooks and other learner support material.<sup>148</sup> Once again, this illustrates the legacy of Apartheid's segregated education system compounded with the failure of the democratic government to realise the socio-economic rights of children in South Africa. In January 2019, SABC News reported that schools in the Eastern Cape province were running out of textbooks; students in grade 10 and 11 did not have sufficient stationery, whilst matriculants had insufficient textbooks for Business Studies and English Literature.<sup>149</sup> In July 2023, it was reported by multiple news outlets that a R37 billion project to build additional classrooms to alleviate overcrowding, was stalled as the contractor was allegedly threatened by business forum.<sup>150</sup> All of these examples illustrate two points to us; first and foremost, that schools which were under-funded and under-resourced under the Bantu education system, continue to suffer the repercussions of the previously discriminatory and segregated education system. And secondly, that the democratic government continues to fail its children by failing to improve funding, infrastructure and access within the public education sector.

Under Apartheid and the Bantu Education system, children with disabilities faced an intersectional form of discrimination and approximately only one fifth of them attended school, which were segregated special schools.<sup>151</sup> In keeping with the medical model of disability, which was the dominant model under Apartheid, children with disabilities were often treated as 'ineducable', and even those that attended school, did not receive the same level of education as those in mainstream or model C schools.<sup>152</sup>

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<sup>143</sup> As above.

<sup>144</sup> n 142 above.

<sup>145</sup> n 141 above, para 55.

<sup>146</sup> n 141 above, para 55.

<sup>147</sup> Resolving schools' overcrowding requires innovative solutions <https://www.iol.co.za/saturday-star/opinion/resolving-schools-overcrowding-require-innovative-solutions-8ac9f755-0ecc-421e-8287-43787a973917> (accessed 1 August 2023).

<sup>148</sup> <https://www.news24.com/news24/southafrica/news/in-the-eastern-cape-4-703-schools-have-not-yet-received-textbooks-20220118> (accessed 1 December 2022).

<sup>149</sup> <https://www.sabcnews.com/sabcnews/some-limpopo-schools-still-without-textbooks/> (accessed 15 June 2022).

<sup>150</sup> <https://www.businesslive.co.za/bd/national/2023-07-04-umlazi-school-building-project-stalls-over-threats/> (accessed 6 July 2023).

<sup>151</sup> n 23 above.

<sup>152</sup> n 23 above.

Model C schools were established towards the end of Apartheid in South Africa to ensure that certain white schools would maintain their culture and ethos, essentially upholding white privilege. Black children with disabilities were discriminated against on the grounds of both their race and disability.

Since 1994, the democratic government has enacted multiple pieces of legislation and policies in an attempt to remedy the impacts of the Apartheid system of education, and to realise the constitutional promise of freedom, human dignity and equality for all. Although a substantial amount of progress has been made, especially in terms of policy and law, the reality is that on the ground, education remains unequal, exclusive and inaccessible; especially for children with disabilities. In the following sections of this chapter, we will delve into the legal instruments that protect and promote the right of children with disabilities to access inclusive, quality basic education on an equal basis with others in a democratic South Africa.

### **3.3 Conceptualizing basic education and inclusive education in post-Apartheid South Africa**

Before exploring the applicable domestic, regional and international legal instruments, it is necessary that we conceptualise the terms basic education and inclusive education within the South African post-Apartheid context. It is essential that we understand the terms before we are able to determine whether or not South Africa has adequately disposed of its obligations to provide inclusive, quality basic education.

#### **3.3.1 Basic education: History and overview**

According to Article 26 of the UDHR, everyone has the right to education, and it is specifically stated that elementary education shall be free and compulsory.<sup>153</sup> In 1990, approximately 1500 delegates from 155 countries, representing various types of institutions and organizations, congregated in Thailand for the World Conference on Education for All.<sup>154</sup> At this conference, the World Declaration on Education for All, together with a Framework for Action: Meeting Basic Learning Needs, were adopted.<sup>155</sup> The purpose of the conference and the declaration was to take steps towards ensuring that adequate, quality basic education becomes universalised.<sup>156</sup> The declaration recognises that there are diverse learning needs across diverse groups of people and that education systems need to respect this diversity and allow for persons to learn according to their needs.<sup>157</sup> Furthermore, it recognises that the focus should not be on access alone, but rather, outcomes and quality should be prioritised.<sup>158</sup> The declaration further recognises diversity of disability, culture and religion which must be considered when developing education systems and

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<sup>153</sup> Article 26 of the UDHR.

<sup>154</sup> <https://www.un.org/en/development/devagenda/education.shtml> (accessed 10 July 2023).

<sup>155</sup> As above.

<sup>156</sup> S Ostveit 'The Jomtien Conference in 1990 was a gamechanger for education' 22 August 2014 <https://world-education-blog.org/2014/08/22/the-jomtien-conference-in-1990-was-a-game-changer-for-education/> (accessed 10 May 2023).

<sup>157</sup> As above.

<sup>158</sup> n 154 above.

policies.<sup>159</sup> The Salamanca statement of 1994 reaffirmed the objectives and ideals of the World Declaration on Education for All.<sup>160</sup> Basic education includes the acquisition of skills such as literacy, numeracy, people skills, problem-solving skills and personal-hygiene skills, amongst others.<sup>161</sup> The purpose of basic education is to ensure each person is equipped with the skills to be able to fulfil their individual potential and talents.

In addition to the World Declaration on Education for All, the ICESCR, which South Africa ratified in 2015, is the most significant international treaty/instrument which provides guidance as to the content of socio-economic rights, including the right to basic education.<sup>162</sup> General comment 13 and 11 of the Committee on Economic, Social and Cultural Rights (hereafter referred to as 'CESCR') state that systems of education must adhere to the 4-A approach; namely, availability, acceptability, accessibility and adaptability.<sup>163</sup> Availability refers to the quantity of schools available. Accessibility comprises three elements, namely; non-discrimination, physical accessibility and economic accessibility. Acceptability refers to the quality of the content being taught. Adaptability refers to the ability of an education system to be flexible. The ICESCR does not explicitly provide for the right to education for persons with disabilities. However, General Comment 5 makes provision for inclusive education for children with disabilities.<sup>164</sup>

Furthermore, as South Africa has been reluctant to follow the minimum core approach to determine the content of socio-economic rights, the content of socio-economic rights in South Africa remains unclear and subject to implementation and interpretation by the executive, legislature and judiciary. In South Africa, the courts have taken a contextual and reasonableness approach in determining the content of socio-economic rights in any given situation/circumstance.<sup>165</sup> The reasonableness approach entails a case-by-case analysis in which the measures taken by the state are adjudged as reasonable or not.<sup>166</sup> The reasonableness approach considers the reasonableness of the measures adopted by the state, as well as the reasonableness of the implementation of the measures in question. Availability of state resources also plays a huge role in the determination of whether or not reasonable measures have been taken in a reasonable manner.

### **3.3.1.1 Basic education in South Africa**

Unfortunately, there continues to be a lot of uncertainty regarding the definition of basic education in the South African context as the Schools Act does not provide a definition,

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<sup>159</sup> <https://www.humanium.org/en/world-declaration-on-education-for-all/> (accessed 5 May 2023).

<sup>160</sup> n 67 above, 79 – 80.

<sup>161</sup> n 56, 3161 – 3162.

<sup>162</sup> L Arendse 'The Obligation to provide free basic education in South Africa: An International law perspective' (2011) 14 *Potchefstroom Electronic Law Journal* 100.

<sup>163</sup> General Comment 13 of the CESR.

<sup>164</sup> General Comment 5 of the CESR.

<sup>165</sup> n 162 above, 116 – 117.

<sup>166</sup> This approach was first taken in the case of *Grootboom and Others v Government of Republic of South Africa and Others* 2000 11 BCLR 1169 (CC), which concerned the right to adequate housing in terms of section 26 of the Constitution.

nor is there consensus amongst key stakeholders.<sup>167</sup> The Schools Act does not provide a definition but takes a 'period of schooling' approach. The Constitution does not provide a definition either despite the fact that it guarantees an unqualified and immediately realisable right to basic education for all in section 29, including adult basic education.<sup>168</sup> The Constitution is not self-executing; it is up to the legislature to design policy, the executive to implement, and the judiciary to interpret the rights entrenched in the Bill of Rights and the Constitution as a whole.

Until 2020, the Constitutional Court did not take a definitive stance on the definition of basic education. In the *Moko* case, the Constitutional Court delved into a discussion on the definition of basic education in South Africa.<sup>169</sup> In this case, a student in grade 12 (a matriculant) was unable to write the Business Studies Paper 2 final examination because he was not allowed onto the school premises due to the fact that he had not attended the extra lessons offered by the school.<sup>170</sup> The pupil had missed the exam and as a result, could not complete all the exams required for the completion of his matric. The court began by pointing out that the Constitution, in section 29, makes a distinction between basic education and further education. The court stated that whilst basic education is an unqualified right which is immediately realisable, further education is progressively realisable subject to reasonable measures being taken by the state as well as available resources at the state's disposal.<sup>171</sup> Therefore, it is crucial to understand what constitutes basic education and what constitutes further education. It is also important to note that the right to basic education in the Constitution is inclusive of children that attend public schools as well as independent private schools.

The Court in the *Moko* case refers to the *Juma Masjid* case, in which it was stated that primary education includes grades 1-9, at the very least.<sup>172</sup> The court also considered the judgement in the *Pridwin* case, in which the majority was of the opinion that basic education is a flexible term which should not be limited by the parameters of age or school-grade.<sup>173</sup> The stance taken by the majority in the *Pridwin* case aligns with international standards and definitions of basic education which do not view education within certain boxes and parameters such as 'until grade 9' or 'until the age of 15 years'. The court in *Moko* took a firm stance on the matter and stated that basic education in South Africa refers to all the years of one's schooling career which falls

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<sup>167</sup> n 56 above, 3162 – 3163.

<sup>168</sup> The right to basic education does not contain any internal limitations within the Constitutional text.

<sup>169</sup> n 1 above, para 26.

<sup>170</sup> T Gray and N Stipinovich 'The Constitutional Court's intervention vindicates the right to a basic education at the 11th hour' 16 February 2021 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-16-february-the-Constitutional-Courts-intervention-vindicates-the-right-to-a-basic-education-at-the-11th-hour.html#:~:text=The%20Moko%20v%20Acting%20Principal,in%20pursuing%20his%20future%20aspirations>. (accessed 3 April 2023).

<sup>171</sup> n 1 above, para 27.

<sup>172</sup> As above.

<sup>173</sup> n 1 above, para 30.

within the control of the Department of Basic Education and of which the end result is the obtainment of the National Senior Certificate.<sup>174</sup>

Hence, the *Moko* case has to a great extent, clarified the uncertainty which existed surrounding the definition and approach to basic education in South Africa. In practical terms within a South African context, basic education includes and ends upon successful obtainment of the National Senior Certificate. The National Senior Certificate serves as a gateway between basic education and further education. However, it is arguable that the approach taken by the court in *Moko* does not align with the international standard of basic education being regarded as a flexible term with a focus on quality, content and outcomes because the court in *Moko* defines basic education within the parameters of grades 1 until 12, and the culmination of the National Senior Certificate. The World Declaration on Education for All's approach to basic education de-emphasised the importance of certificates and other formal educational programmes.<sup>175</sup> Hence, the view of the court in *Moko* might be seen as regressive rather than flexible and progressive even though it does take a definitive stance on the matter. It has been argued that since there is a lot of uncertainty regarding the definition of basic education, the concept must be viewed and interpreted in a holistic manner, considering our history and constitutional context, jurisprudence from the courts, as well as international and foreign law.<sup>176</sup> Throughout the years, the courts have developed a 'basket of entitlements', which is essentially a variety of elements which constitute the right to basic education.<sup>177</sup> These elements include, but are not limited to, adequate infrastructure, textbooks, food and nutrition, sanitation, water and transport.

### 3.3.2 Inclusive basic education in South Africa

Vulnerable population groups, such as women, children, and persons with disabilities have often been excluded and marginalised within the education sector and society at large.<sup>178</sup> As a result of this exclusion, discrimination and marginalisation, emerged the need for inclusive education.<sup>179</sup> Since the adoption of the CRPD, the concept 'inclusive education' has gained traction worldwide. It has mainly been used within the context of persons with disabilities despite the fact that the term 'inclusion' implies that it should be accessible to all persons within society.<sup>180</sup> As is the challenge with basic education, there is no acceptance amongst key stakeholders on the definition and conceptualisation of inclusive education.<sup>181</sup> Murungi discusses inclusive education in

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<sup>174</sup> n 1 above, para 31.

<sup>175</sup> n 56 above, 3161.

<sup>176</sup> Equal Education Law Centre 'Let in or Left out: A 20-year review of the Regulatory framework for inclusive education and its implementation in South Africa' (2021) 7.

<sup>177</sup> S Mateus and K Shange 'Broken and Unequal: The South African education system and the attainment of the right to Basic education through litigation' (2021) 15 *Pretoria Student Law Review* 366.

<sup>178</sup> n 176 above, 2.

<sup>179</sup> n 176 above, 2 – 4.

<sup>180</sup> n 56 above, 3160.

<sup>181</sup> SY Stofile 'Factors affecting the implementation of Inclusive Education policy: A case study in one province in South Africa' unpublished doctoral thesis, University of the Western Cape, 2008 7.

both a narrow and broad sense.<sup>182</sup> In a narrow sense, inclusive education focuses heavily on integration and providing education for persons with disabilities within mainstream schools through the removal of barriers.<sup>183</sup> For example, training teachers on sign language could aid in the removal of communication barriers between teachers and learners with hearing impairments. In the broad sense, inclusive education is education which takes place in various different formats and settings, there is no emphasis on integration as is the case with the narrow sense. Furthermore, the broad sense does not require that children with disabilities be integrated into mainstream schools, but rather, that inclusive education is a flexible concept which can occur in various settings, such as special schools, special care centers, the home environment, and any other environment which is conducive and necessary to the learning process.

As established above, basic education in South Africa is immediately realisable and not subject to any internal limitations. However, what has become evident through the education policies in South Africa, is that inclusive basic education is in fact not immediately realisable, but rather, progressively realisable.<sup>184</sup> Due to the fact that children with disabilities were almost entirely alienated and excluded from the education system under Apartheid, it is not reasonable to expect that the right to inclusive basic education be immediately realised. This aligns with the approach to inclusive education taken in the CRPD.<sup>185</sup> There is recognition for historical and other circumstances which have designed and upheld exclusive, discriminatory and inaccessible education systems throughout the world, which make it difficult for inclusive education to be immediately realisable. In General Comment 13 by the CESR, the right to education is progressively realisable whilst the right to non-discrimination when accessing education, is immediately realisable. However, it is crucial to note that rights being progressively realisable still requires states to work as quickly as possible towards the achievement of the right making maximum use of the resources available.<sup>186</sup>

### **3.4 The post-Apartheid legal framework: The supremacy of the Constitution**

The Constitution is the supreme law of the Republic and all law or conduct inconsistent with it is invalid.<sup>187</sup> Against this backdrop, it is essential that we begin the discussion on South Africa's post-Apartheid legal framework by consulting the relevant constitutional provisions. Section 9 of the Constitution is the equality clause which guarantees equal protection and benefit from the law.<sup>188</sup> Furthermore, section 9 prohibits direct or indirect discrimination on the grounds of race, age, gender, sexual orientation, religion, culture, language and disability, amongst others.<sup>189</sup> At this stage,

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<sup>182</sup> n 56 above, 3167.

<sup>183</sup> n 56 above, 3167 – 3168.

<sup>184</sup> n 38 above.

<sup>185</sup> JA Venter 'The realisation of the right to Inclusive Education of children with mild and moderate intellectual disabilities in South Africa' unpublished LLM thesis, North West University, 2021 35 – 36.

<sup>186</sup> General Comment 3 of the CESR, para 9.

<sup>187</sup> Section 2 of the Constitution.

<sup>188</sup> The Constitution.

<sup>189</sup> The Constitution.

it is also crucial that we mention that the approach to equality in South Africa is substantive and not formal, this means that consideration is given to factors such as historical context and past injustice. Section 10 of the Constitution respects and protects the right to human dignity.<sup>190</sup> Human dignity is an indispensable right in a South African context, more so in relation to persons with disabilities because they were, and continue to be dehumanised. This provision also protects the right to human dignity of children with disabilities within the education system; wherein they have often been isolated, excluded and dehumanised. Section 29 (1) (a) of the Constitution guarantees the right to basic education for all, including adult basic education.<sup>191</sup> This provision places both a negative as well as a positive duty on the state. The negative duty is that the state is prohibited from denying access to basic education; whilst the positive duty is that the state must take active measures to ensure the realisation of the right to quality basic education. According to section 39 (1) (b), international law must be considered when interpreting the rights in the Bill of Rights.<sup>192</sup> Section 39 (1) (b) highlights the crucial role which international law ought to play within a South African context.

#### **3.4.1 The post-Apartheid legal framework: International and continental/regional law instruments**

Section 39 (1) (b) of the Constitution highlights the importance of international law as a source when enacting and implementing domestic law. In terms of section 231 (2) of the Constitution, international treaties become binding on South Africa once approved in both the National Assembly and National Council of Provinces.<sup>193</sup> In December 2006, the United Nations General Assembly adopted the CRPD and its Optional Protocol.<sup>194</sup> The CRPD and its Optional Protocol, which South Africa ratified on 30 November 2007, is the leading international law instrument on the rights of persons with disabilities. Persons with disabilities have operated on the periphery of society and have been dehumanised by society and law for centuries; to this end, the preamble to the CRPD reaffirms the inherent human dignity, freedom and equality of persons with disabilities.<sup>195</sup> It recognises that disability exists as a result of attitudinal and environmental barriers which prohibit persons with disabilities from participating in society on an equal basis with others.<sup>196</sup> Furthermore, it recognises difference and diversity and obliges state parties to cater for this diversity.<sup>197</sup> The development of the CRPD was guided by the following general principles; respect for inherent dignity, non-discrimination, full and effective participation and inclusion in society, accessibility,

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<sup>190</sup> The Constitution.

<sup>191</sup> The Constitution.

<sup>192</sup> The Constitution.

<sup>193</sup> G Ferreira and A Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 *Potchefstroom Electronic Law Journal* 1473.

<sup>194</sup><https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (accessed 10 January 2023).

<sup>195</sup> Preamble to the CRPD.

<sup>196</sup> Preamble to the CRPD.

<sup>197</sup> Preamble to the CRPD.

equality of opportunity, equality between men and women, accessibility, and respect for difference and diversity.<sup>198</sup>

Article 7 of the CRPD deals with children with disabilities and notably states that the best interests of the child should be the primary consideration in all matters concerning the child.<sup>199</sup> The best interests' principle has been used in multiple legal instruments dealing with the rights of children which requires the principle to be regarded as the 'primary' or 'paramount' consideration in all matters concerning children. However, it has been argued that the use of the term 'primary' waters down the importance of the principle as it implies that other principles might trump the best interests' principle.<sup>200</sup> The use of the words 'primary' and 'paramount' highlights the importance of the principle. The principle is a recognition of the vulnerability of children,<sup>201</sup> whose rights require the additional layer of protection which the best interests' principle provides. The CRPD's inclusion of the best interests' principle in article 7 is a recognition of the fact that children with disabilities are vulnerable and often times, face multiple layers of discrimination within society. However, the challenge which exists is that the best interests' principle has not been defined by the CRPD and hence, is open to interpretation on a case-by-case basis.

Article 24 of the CRPD deals with the right to education of persons with disabilities.<sup>202</sup> In terms of article 24, education is a lifelong process and must be made inclusive at all levels; namely, pre-school, primary, secondary, tertiary, vocational training, extracurricular and social activities. The aim of making education inclusive at all levels is the creation of an enabling environment for all persons with disabilities to develop to their individual potential and talents.<sup>203</sup> Article 24 contains strong anti-discrimination and equality rhetoric necessary for tackling the discriminatory practices which have excluded persons with disabilities from the education system for centuries.<sup>204</sup> The anti-discrimination and equality rhetoric are of particular importance for countries such as South Africa due to the fact that we had a legal system which legalised discrimination on the basis of race, and also disability. As mentioned above, in the narrow sense, inclusive education focuses on integration of children with disabilities within the general education system. This is the approach taken by article 24 which requires state parties to ensure that inclusive, free, quality primary education is made available to persons with disabilities within their communities and within the general education system.<sup>205</sup> Essentially, the CRPD's stance on inclusive education is that children with disabilities should be educated within the general education system. Furthermore,

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<sup>198</sup> Article 3 of the CRPD.

<sup>199</sup> Article 7 of the CRPD.

<sup>200</sup> n 58 above, 48.

<sup>201</sup> <https://www.humanium.org/en/the-principle-of-the-best-interest-of-the-child/> (accessed 17 May 2022).

<sup>202</sup> Article 24 of the CRPD.

<sup>203</sup> General Comment 4 of the CRPD Committee.

<sup>204</sup> In addition to the equality rhetoric in article 24, article 5 of the CRPD deals with equality and non-discrimination specifically.

<sup>205</sup> Article 24 of the CRPD.

article 24 places a lot of emphasis on diversity through its obligation on state parties to provide individualised reasonable accommodation measures for persons and children with disabilities.<sup>206</sup> The obligation on state parties to provide individualised reasonable accommodation measures is a recognition of the fact there is no 'one size fits all' approach when it comes to accommodations. However, it must be stated here that 'reasonable' implies that there must be an inquiry into the availability of resources; financial or other.<sup>207</sup> This reinforces our understanding that inclusive basic education follows a progressive realisation approach rather than an immediate realisation approach which is applied to basic education.

Furthermore, article 24 highlights the importance of awareness-raising and training as both of these have a huge role to play in eliminating the barriers and exclusionary practices which exist within the general education system and society at large.<sup>208</sup> It is essential that state parties take measures to raise awareness regarding disability because a lack of knowledge and understanding on disability result in negative stereotypes and misconceptions being perpetuated from one generation to the next. Article 24 places emphasis on the training of professionals and teachers within the education sector, however, there is unfortunately no provision made for the inclusion of disability awareness and education within the curriculum of general education systems. The inclusion of disability awareness and disability rights education within the curriculum of general education systems would educate the youth on disability and would ensure the gradual elimination of negative stereotypes and misconceptions.

General Comment No. 4 provides us with the normative content of Article 24. General Comment No. 4 sets out the core features of inclusive education, namely; a whole systems approach, whole educational environment, whole person approach, supported teachers, respect for diversity, learning-friendly environment, effective transitions, recognition of partnerships, and monitoring.<sup>209</sup> There is recognition of the fact that in order to create an inclusive education system and inclusive society at large, there needs to be a society/community-wide collaboration. General Comment No. 4 highlights the 4-A approach which the CESCR outlines as the foundation for an inclusive education system; availability, accessibility, acceptability and adaptability.<sup>210</sup> Furthermore, all relevant stakeholders, such as parent and teacher associations, school boards, and other schooling support systems, are encouraged to increase their knowledge and understanding of disability.<sup>211</sup> However, the obligation to provide more understanding and knowledge on disability for the key stakeholders should have been placed upon the state so that state parties could allocate resources towards it.

On 28 January 2018, the African Union Heads of States adopted the The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with

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<sup>206</sup> Article 24 (2) (c) of the CRPD.

<sup>207</sup> General Comment 4 of the CRPD Committee.

<sup>208</sup> Article 24 of the CRPD.

<sup>209</sup> General Comment 4 of the CRPD Committee.

<sup>210</sup> General Comment 4 of the CRPD Committee.

<sup>211</sup> General Comment 4 of the CRPD Committee.

Disabilities in Africa (hereafter the 'African Disability Rights Protocol') at the African Union Summit in Addis Adaba, Ethiopia.<sup>212</sup> Civil society organisations, organisations representing persons with disabilities, and members of government departments were consulted in the drafting process of the instrument.<sup>213</sup> The purpose of the African Disability Rights Protocol was to create a document similar to the CRPD which tackled issues pertinent and unique to the African context.<sup>214</sup> Hence, it reaffirms the provisions of the CRPD but takes into consideration the lived experiences of persons with disabilities on the African continent.<sup>215</sup> Some of the issues that are unique to the African continent includes, but are not limited to, the HIV/Aids pandemic, harmful practices and ritual killing, civil and political unrest, and the right to communal living which is not relevant to Western societies and communities.<sup>216</sup> Furthermore, the African Disability Rights Protocol aims to provide African Union member states with guidance on the formulation, adoption, implementation, monitoring and evaluation of laws impacting upon the rights of persons with disabilities on the continent.<sup>217</sup> Unfortunately, the African Disability Rights Protocol is not in force as it requires ratification from at least fifteen African Union member states.<sup>218</sup> South Africa ratified the African Disability Rights Protocol in 2023. The African states which have ratified the instrument are Mali, Rwanda, Kenya, Angola, Burundi, Mozambique, Niger and South Africa.<sup>219</sup>

Article 16 deals with the right to education of persons with disabilities. Echoing the provisions of the CRPD, the African Disability Rights Protocol obliges state parties to take effective measures to ensure persons with disabilities have access to inclusive, quality, free basic education.<sup>220</sup> It also obliges state parties to ensure the provision of individualised reasonable accommodation measures for persons with disabilities.<sup>221</sup> Unlike the CRPD, African Disability Rights Protocol does not place an emphasis on integration of persons with disabilities into the general education system, but rather, recognises that persons with disabilities may prefer to learn in environments other than the general education system.<sup>222</sup> The CRPD, through General Comment No. 4, alludes to the fact that it is not sustainable to maintain mainstream schooling systems as well as special schooling systems.<sup>223</sup> Notably, article 16 states that a crucial aim of education should be the strengthening, preservation and promotion of positive African

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<sup>212</sup> <https://www.ohchr.org/en/press-releases/2018/02/african-states-affirm-rights-persons-disabilities-new-landmark-protocol> (accessed 19 September 2022).

<sup>213</sup> Centre for Human Rights 'A roadmap to ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2022) 4.

<sup>214</sup> As above.

<sup>215</sup> n 213 above, 5 – 6.

<sup>216</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa adopted by the African Union in 2018.

<sup>217</sup> As above.

<sup>218</sup> n 213 above, 4.

<sup>219</sup> <https://au.int/en/treaties> (accessed 11 August 2023).

<sup>220</sup> Article 16 of the African Disability Rights Protocol.

<sup>221</sup> Article 16 (3) (d) of the African Disability Rights Protocol.

<sup>222</sup> Article 16 (3) (e) of the African Disability Rights Protocol.

<sup>223</sup> General Comment 4 of the CRPD Committee.

values.<sup>224</sup> This is an element which addresses an extremely pertinent issue on the African continent. Due to the history of colonialism and oppression in Africa, African values, knowledge systems, cultural norms and social practices were erased and treated as inferior to Western norms, practices and knowledge systems. In order to create a sense of pride and independence amongst African nations, it is essential that education systems place emphasis upon positive African values, such as Ubuntu, communal and family living, extended family systems and respect for elder members of society.

Article 23 of the Convention on the Rights of the Child (CRC) protects and promotes the rights of children with disabilities, including the right of access to education.<sup>225</sup> Article 28 of the CRC deals specifically with the right to education and states that primary education must be made compulsory, available, free and accessible for all children; albeit progressively.<sup>226</sup>

### **3.4.2 The post-Apartheid legal order: South Africa's legal framework on inclusive basic education**

Due to the fact that children are a vulnerable population group, it is necessary that their rights are protected through the adoption and implementation of specific legislation; to this end, the Children's Act was adopted to give effect to section 28 of the Constitution.<sup>227</sup> Children are entitled to special care, assistance and protection of their rights. The Children's Act reinforces the principle that the best interests of the child are of paramount importance in all matters concerning the child;<sup>228</sup> and that the child has the right to participate in decisions concerning themselves.<sup>229</sup> According to section 11 of the Act, the state is obliged to take into consideration the special needs that children with disabilities may have, and to ensure that children with disabilities are able to participate equally in social, cultural, educational and religious activities.<sup>230</sup> The Act further sets out the norms and standards for early childhood development programmes of which the primary and most crucial purpose is the creation of an environment which enables children to develop to their full potential. The development of each child to their individual potential as the purpose of basic education is emphasised in international, regional and domestic instruments.

The provision of basic education is governed by the School's Act. The purpose of the School's Act is to create a uniform system of governance of all schools in the country.<sup>231</sup> The Preamble to the School's Act highlights that our schooling system under the previous regime was characterised by discrimination, segregation and injustice, and that the democratic government aims to remedy these injustices.<sup>232</sup> It is

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<sup>224</sup> Article 16 (4) (d) of the African Disability Rights Protocol.

<sup>225</sup> The CRC.

<sup>226</sup> The CRC.

<sup>227</sup> n 40 above.

<sup>228</sup> Section 9 of the Children's Act.

<sup>229</sup> Section 10 of the Children's Act.

<sup>230</sup> Section 11 of the Children's Act.

<sup>231</sup> n 37 above.

<sup>232</sup> Preamble to the School's Act.

important to note that the Preamble states that high quality education will be provided to all progressively.<sup>233</sup> Despite the fact the right to basic education is immediately realisable, there is recognition in the School's Act that quality, inclusive, basic education will require a concerted effort from all involved stakeholders over possibly a lengthy period of time. The Preamble further states that the education system in a democratic South Africa is one that must protect and promote diversity, and allow for the development of each child to their full potential.<sup>234</sup> Thus, the School's Act aligns with international standards as it relates to the purpose of basic education, which is to provide an enabling environment which allows every child to development to their full potential.

The School's Act refers to learner's with 'special education needs' and prohibits schools from practicing discriminatory and exclusionary practices against learners with special education needs. In fact, the Act states that where reasonably practicable, learners with disabilities must be catered for within ordinary schools and should this not be practiced upon, the matter may be referred to the Head of Provincial Department of Education or MEC of the relevant province.<sup>235</sup> The sections of the School's Act which deal with disability and special needs education are the following; article 23 and 24 which call for representativity for children with disabilities on the board and other executive structures within schools, article 6 which recognises sign language as a language of teaching and learning, and article 5 which deals with admissions and prohibits discriminatory practices as far as admissions into schools are concerned.

As mentioned above in chapter one, Education White Paper 6 is the policy document which was enacted to create an inclusive education and training system in post-Apartheid South Africa. White Paper 6 was adopted by the Department of Basic Education as an attempt to tackle the injustices which occurred during the Apartheid era within the education sector.<sup>236</sup> White Paper 6 is a comprehensive policy document outlining the roles and responsibilities of government and other stakeholders in South Africa's quest for an inclusive education system which caters for children with disabilities on an equal basis with others. Section 29 (1) of the Constitution read with section 9, serve as the constitutional foundation for the creation of an inclusive education system. As we have established above, inclusive basic education follows a progressive realisation approach in South Africa; this is further reaffirmed in White Paper 6 which speaks about the phasing in of strategies towards the achievement of an education system which is inclusive.<sup>237</sup> Furthermore, White Paper 6 recognises the fact that the exclusion of persons with disabilities from the education system and society at large, is a multi-dimensional issue which requires transformative

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<sup>233</sup> As above.

<sup>234</sup> Preamble to the School's Act.

<sup>235</sup> Section 12 (4) of the Schools Act.

<sup>236</sup> White Paper 6.

<sup>237</sup> As above.

interventions at multiple levels such as institutional, instructional and departmental levels.<sup>238</sup>

White Paper 6 sets out various long, medium and short-term goals for the obtainment of quality inclusive education in South Africa. The National Department of Education developed various policies, guidelines and strategies to aid and assist in the achievement of the long, medium and short-term goals as set out in White Paper 6. One such policy is the SIAS policy, which was designed to create a standardised system for assessing the levels of support required by learners to ensure their equal participation within the education system.<sup>239</sup> Furthermore, the SIAS policy recognises that various types of barriers to learning exist within the education system; such as disability, socio-economic conditions, physical, emotional and sexual abuse, amongst others.<sup>240</sup>

Also worthy of mentioning, is the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) which gives effect to the Constitution's equality clause,<sup>241</sup> and the White Paper on the Rights of Persons with Disabilities.<sup>242</sup> The National Education Policy Act (NEPA) which provides for the determination of national education policy, protects the right to be protected from unfair discrimination within the education system.<sup>243</sup>

### **3.5 Conclusion**

From the above, it is apparent that South Africa has ratified various international and regional instruments necessary for the achievement of an inclusive education system in South Africa. In addition to the international and regional framework, South Africa has also made massive strides towards the achievement of an inclusive education system through the development of legislation, policies, guidelines and strategies. However, what is unclear is why, despite a legal framework which seems to be enabling to the achievement of an inclusive education system; the number of children with disabilities who are out of school has increased since the dawn of democracy. In the chapter to follow, we will explore the various challenges and barriers which have hindered, and continue to hinder the achievement of a quality inclusive basic education system.

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<sup>238</sup> White Paper 6.

<sup>239</sup> n 39 above.

<sup>240</sup> n 39 above.

<sup>241</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>242</sup> White Paper on the Rights of Persons with Disabilities (approved December 2015).

<sup>243</sup> Section 4 (a) (i) of the National Education Policy Act 27 of 1996.

## Chapter 4

### 'Disablers': Challenges hindering the achievement of inclusive education

#### 4.1 Introduction

The purpose of this chapter is to explore the various challenges and hindrances to an inclusive education system in South Africa. The challenges we will explore in this chapter are by no means exhaustive; and range from issues of formulation and implementation of legislation and policy, to attitudinal, cultural and institutional barriers faced by persons with disabilities.

#### 4.2.1 Rejection of the minimum core approach

The ICESCR which South Africa ratified in 2015 follows a minimum core approach in interpreting and adjudicating socio-economic rights. This is the approach which gives substance to the rights which are protected by the covenant. The minimum core approach consists of two components; the first being the minimum core content which defines the essential elements or nature of a socio-economic right.<sup>244</sup> The second component is the minimum core obligation, which sets out the measures which a state must immediately put into place to progressively realise socio-economic rights.<sup>245</sup> Essentially, it creates the 'minimum threshold' for the rights protected by the covenant.<sup>246</sup> Furthermore, the approach requires the prioritisation of the poor and most vulnerable in society.<sup>247</sup>

The minimum threshold for each socio-economic right will differ by country, dependent on the resources available in each country.<sup>248</sup> However, general comments 14 and 15 of the Committee on Economic, Social and Cultural Rights (CESR) state that resource constraints can no longer be used as a justification for a state's failure to provide the minimum obligation of a right, save for in exceptional circumstances.<sup>249</sup>

Despite the ratification of the ICESCR, South Africa rejects the minimum core approach and has instead opted to use reasonableness and a context-based approach as the criterion. The reasonableness review approach was established by the Constitutional Court in the landmark *Grootboom* case.<sup>250</sup> This approach has created significant challenges as it becomes difficult to determine the substantive content of socio-economic rights. It has been argued that the manner in which the Constitutional Court has interpreted and enforced constitutional socio-economic

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<sup>244</sup> NW Orago 'The place of the "minimum core approach" in the realization of the entrenched socio-economic rights in the 2010 Kenyan Constitution' (2015) 59 *Journal of African Law* 245 – 247.

<sup>245</sup> As above.

<sup>246</sup> O Fuo and A Du Plessis 'In the face of judicial deference: Taking the "minimum core" of socio-economic rights to the local government sphere' (2015) 19 *Law, Democracy and Development* 6 – 8.

<sup>247</sup> As above.

<sup>248</sup> RD Nanim and E Durojaye 'Four years following South Africa's declaration upon the ratification of the ICESCR and jurisprudence on the right to basic education: A step in the right direction?' (2019) 23 *Law, Democracy and Development* 273.

<sup>249</sup> n 244 above, 247.

<sup>250</sup> C Mbazira 'Grootboom: a paradigm of individual remedies versus reasonable programmes' (2011) 26 *Southern African Public Law* 60.

rights, is partly responsible for the slow progress made in the realisation of these rights.<sup>251</sup> The apex court has been heavily criticised for deferring the responsibility of establishing what socio-economic rights entail onto the legislative and executive branches of government.

In the Constitutional Court case of *Grootboom*, the justiciability of socio-economic rights in our constitutional democracy was confirmed.<sup>252</sup> It is also the case in which the reasonableness review approach was established. In *Grootboom*, the court ruled that measures to be taken by the state to progressively realise socio-economic rights must be determined by the legislative and executive branches of government.<sup>253</sup> The court stated that it is not institutionally equipped to determine what the minimum core standard of any given socio-economic right should be.<sup>254</sup> It was further noted by the court that the CESR had developed the minimum core approach after many years of research and experience and that the court does not possess the same luxury.<sup>255</sup> It is crucial to note that the court placed emphasis on the needs of society's most vulnerable as an essential element of the reasonableness test.

In the Constitutional Court case of *Mazibuko*, which occurred about a decade after *Grootboom*, the right to sufficient water as guaranteed in section 27 (1)(b) of the Constitution was adjudicated before the court.<sup>256</sup> In *Mazibuko*, the court stated that the other two branches of government, namely the legislature and executive, are best placed to determine the substantive content of rights. Information such as the needs of society, budgetary constraints and achievable targets is more easily obtainable for the legislative and executive branches of government.<sup>257</sup> Furthermore, the court also ruled that the state does not have to 'immediately' provide sufficient access to water to all those who require it. This judgement has been criticised for being potentially regressive as it failed to consider the needs of the most vulnerable.<sup>258</sup> However, it is worthy to note that the High Court in *Mazibuko* stated that it is possible that the courts might possibly, in the future, make use of the minimum core approach should there be sufficient information available to the court in question.<sup>259</sup> The fact that the two cases, *Mazibuko* and *Grootboom*, occurred ten years apart and the court maintained the same stance in terms of determining the substantive content of socio-economic rights, is indicative of the fact that the judiciary is exercising extreme caution and restraint due to the separation of powers doctrine.

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<sup>251</sup> n 246 above, 3.

<sup>252</sup> n 250 above, 60.

<sup>253</sup> *Grootboom* (n 166 above).

<sup>254</sup> Sisay Yeshanew 'Combining the "minimum core" and "reasonableness" models of reviewing socio-economic rights' (2008) 9 *ESR Review* 9.

<sup>255</sup> As above.

<sup>256</sup> *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

<sup>257</sup> As above, para 61.

<sup>258</sup> ED Couzens 'Avoiding Mazibuko: Water security and constitutional rights in Southern African case law' (2015) 18 *Potchefstroom Electronic Law Journal*.

<sup>259</sup> n 254 above, 10.

The rejection of the minimum core approach has resulted in difficulties in understanding what socio-economic rights, such as the rights to sufficient water, adequate housing, and the right to basic education, actually entails in a practical sense. The context-based approach which places reasonableness at the centre of its inquiry, does not create certainty on the content of socio-economic rights as each matter is judged on a case-by-case basis. The reasonableness approach requires that the state act reasonably to progressively provide access to socio-economic rights. In the Constitutional Court case of *Treatment Action Campaign*, the court emphasised the importance of considering the relevant social and historical context in interpreting socio-economic rights.<sup>260</sup>

The right to basic education in South Africa is inclusive of various different components and has been described as a basket of entitlements.<sup>261</sup> This basket of entitlements has been developed throughout the years by the courts and presents the right to basic education as a holistic right. For example, infrastructure has been recognised as a crucial facet of the right to basic education.<sup>262</sup> The courts have also recognised that access to food and nutrition are necessary components of the right to basic education.<sup>263</sup>

However, the right to basic education for children with disabilities, or rather, inclusive basic education, has rarely been adjudicated before our courts. The substantive content of inclusive education, in a South African context, remains largely unknown. The legal framework regarding inclusive education in South Africa is insufficient.<sup>264</sup> Hence, the adoption of the minimum core approach could, to a great extent, eliminate the uncertainties that exist.

#### **4.2.2. Failure to adequately implement existing legislation, policies and guidelines**

White Paper 6, which is South Africa's policy on inclusive education, was adopted in 2001.<sup>265</sup> More than two decades since its adoption, it has still not been adopted as law and remains a white paper. In South African law, a white paper is a broad statement of government policy and does not have binding force.<sup>266</sup> It is also worthy to note that White Paper 6 was originally adopted as a 20-year plan; it has now been twenty-two years since its adoption back in 2001, and no plans have been made by the Department of Basic Education to revise and update the policy despite the urgency of the matter.<sup>267</sup> The failure of the government and in particular, the Department of Basic

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<sup>260</sup> *Minister of Health and Others v Treatment Action Campaign and Others* 2002 10 BCLR 1033 (CC).

<sup>261</sup> n 177 above, 366.

<sup>262</sup> n 141 above.

<sup>263</sup> P Knipe 'The significance of *Equal Education and others v Minister of Basic Education and Others*' (2022) 23 *ESR review* 29.

<sup>264</sup> n 185 above, 2 – 3.

<sup>265</sup> White Paper 6.

<sup>266</sup> <https://www.parliament.gov.za/how-law-made> (accessed 6 July 2023).

<sup>267</sup> The Right to Education for Children with Disabilities Alliance 'Alternative Report to the UN Committee on the Rights of Persons with Disabilities in response to South Africa's Baseline Country Report of

Education, to update and revise White Paper 6 indicates a lack of commitment to create a truly inclusive system of basic education in South Africa. The failure to update and revise White Paper 6 goes against the values of transformative constitutionalism which requires the development of the law to meet ever-changing societal needs. Furthermore, as White Paper 6 was adopted prior to the CRPD, it is also crucial that, where applicable and possible, the principles of the CRPD should be used to strengthen White Paper 6.<sup>268</sup>

As far as implementation of White Paper 6 goes, it is regarded as inadequate and insufficient.<sup>269</sup> The Department of Basic Education, in November 2021, acknowledged that despite the progress that has been made, there is still much work that needs to be done to ensure that children with disabilities are able to access basic education on an equal basis with others.<sup>270</sup> The fact that the number of children with disabilities out of school has more than doubled since the dawn of democracy, illustrates the failure of the state to improve access to quality, inclusive basic education.

The DBE acknowledges that one of the most crucial and significant barriers to inclusive education is the curriculum that is currently being taught in the mainstream schooling system.<sup>271</sup> Majority of our teachers in South Africa do not possess the adequate qualifications and training required within an inclusive classroom,<sup>272</sup> hence teachers are not adequately equipped to transform curricula. The DBE acknowledges the role of teachers in curriculum differentiation,<sup>273</sup> however, the state fails to make inclusive education a core element in teacher training programme and degrees.<sup>274</sup>

#### **4.2.3 Maintaining the status quo: Continued discrimination against learners with severe and profound intellectual disabilities**

In terms of its constitutional obligations, the state is required to provide basic education for all learners, including those with severe or profound intellectual disabilities.<sup>275</sup> Despite this obligation on the state, the transformative ideals of the constitution have failed to translate into reality for children with severe and profound intellectual disabilities.<sup>276</sup> Children with severe and profound intellectual disabilities, under the democratic dispensation, have been subjected to systems and practices which are

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March 2013 on the UN Convention on the Rights of Persons with Disabilities, with particular reference to the provisions of Article 24' (2017).

<sup>268</sup> N Murungi 'The duty to provide basic education for children with severe and profound intellectual disabilities' (2011) 12 *ESR Review* 12.

<sup>269</sup> As above.

<sup>270</sup> <https://www.sanews.gov.za/south-africa/basic-education-sector-makes-progress-implementing-inclusive-education> (accessed 11 July 2023).

<sup>271</sup> DBE 'Guidelines for full-service/inclusive schools page' (2010) 29.

<sup>272</sup> K Nseibo 'The dynamics of training teachers for disability inclusion in South Africa' (2022) *Frontiers in Education*, 2 – 3.

<sup>273</sup> n 271 above, 29.

<sup>274</sup> n 272 above, 2 – 3.

<sup>275</sup> SD Kamga 'Inclusion of learners with severe intellectual disabilities in basic education under a transformative constitution: a critical analysis' (2016) 49 *The Comparative and International Law Journal of Southern Africa* 37.

<sup>276</sup> n 275 above, 50.

rooted in Eugenics and other Western systems of oppression.<sup>277</sup> Basic Education Minister, Angie Motshekga, has stated that children with severe to profound intellectual disabilities are at risk of 'compound marginalisation'.<sup>278</sup>

The SIAS policy of 2005 is the state education policy which was designed for the state to determine the level of support required by learners with intellectual disabilities. In order to determine the level of support required by learners with intellectual disabilities, the state made use of IQ (intelligence quotient) testing.<sup>279</sup> In the early 1900's, Alfred Binet developed an intelligence scale, from which the IQ test was born.<sup>280</sup> Historically, IQ testing was used to identify, segregate and sterilise 'mentally retarded' persons.<sup>281</sup> In Nazi Germany, IQ testing was used as a tool to identify and murder children with disabilities; as children with disabilities were viewed as inferior in comparison to the supreme race which Adolf Hitler envisioned for Germany and all of Europe.<sup>282</sup>

The use of IQ testing in a democratic South Africa is reflective of our colonial past as our policies still embrace, and fail to dismantle Eugenics and the concept that persons with disabilities are required to fit a certain profile in order to be worthy of their human rights and inherent human dignity.<sup>283</sup> In the *Western Cape Forum* case, state education policy, namely the 2005 SIAS policy, was challenged for infringing upon the rights of education, equality, and human dignity of children with severe and profound intellectual disabilities.<sup>284</sup> As per state policy, children with an IQ of between 20 – 25 were classified as having a severe intellectual disability, whilst children with an IQ below 20 were classified as having a profound intellectual disability.<sup>285</sup> The Department of Education held the view that children with severe and profound intellectual disabilities are ineducable and as such, did not make provision for these learners to receive education in any public school; whether full-service/mainstream or special.<sup>286</sup> These children received education provided for by NGO's in the form of special care centres. Furthermore, the state funding which was provided to these learners, through the Department of Health, was disproportionate in relation to their needs.

The High Court ruled that the state had violated various constitutional rights in this matter, namely; the rights to basic education, equality, human dignity, and protection from neglect and degradation.<sup>287</sup> Furthermore, the court ordered that the state take

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<sup>277</sup> n 62 above, 161.

<sup>278</sup> SD Kamga 'COVID-19 and the inclusion of learners with disabilities in basic education in South Africa: A critical analysis' (2020) 20 *African Human Rights Law Journal* 580.

<sup>279</sup> n 62 above, 147.

<sup>280</sup> A Reddy 'The Eugenic origins of IQ testing: Implications for Post-Atkins litigation' (2008) 57 *DePaul Law Review* 668.

<sup>281</sup> As above.

<sup>282</sup> n 280 above, 674.

<sup>283</sup> n 62 above, 161.

<sup>284</sup> *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC).

<sup>285</sup> n 62 above, 167.

<sup>286</sup> n 62 above 147.

<sup>287</sup> n 284 above, para 52.

reasonable measures, including interim steps, to ensure access to quality basic education for children with severe or profound intellectual disabilities.<sup>288</sup> Amongst others, the court ordered that funding cover transport costs, training and remuneration for staff, and adequate facilities at special care centres.<sup>289</sup>

Following the order made by the court, the state developed the conditional grant for learners/children with severe or profound intellectual disabilities.<sup>290</sup> The purpose of this conditional grant is to ensure children with severe or profound intellectual disabilities access publicly funded education that is of an adequate quality.<sup>291</sup> There is great concern that the conditional grant is being poorly implemented and that there has been an underspend on the allocated budget over the past few years.<sup>292</sup> According to the Department of Basic Education, the underspend may be attributed to, amongst others, the COVID-19 pandemic/lockdown, delays in obtaining teaching and learning support material, and delays in appointing staff that are appropriately trained and skilled.<sup>293</sup> Furthermore, in 2014, the state adopted a revised version of the SIAS policy which replaced the 2005 policy.<sup>294</sup> The revised policy makes provision for learners with high-level support needs, namely children with severe to profound intellectual disabilities, to be educated within the education system, mainly through special schools.<sup>295</sup> Furthermore, the assessment to develop the level of learner support required, needs to be a multi-layered assessment.<sup>296</sup>

From a socio-economic rights perspective, the actions of the state which gave rise to the *Western Cape Forum* case, highlights a departure or rather, a digression from socio-economic rights jurisprudence which has been developed by the Constitutional Court since the dawn of democracy. In the *Grootboom* case, the court placed emphasis on the responsibility of the state to fulfill the socio-economic needs of the most vulnerable.<sup>297</sup> However, the actions of the state which gave rise to *Western Cape Forum*, exposes state behavior and state policy which exploits the vulnerabilities of those most vulnerable in society.

From the above, it is clear that children with severe and profound intellectual disabilities continue to operate on the periphery on society as the state has continued to exclude and isolate them. For children with severe and profound intellectual disabilities, the constitutional promise of equality remains an empty one.<sup>298</sup> In 2020, the Western Cape Forum for Intellectual Disability Forum reported to parliament that

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<sup>288</sup> n 284 above, para 52.

<sup>289</sup> Mail and Guardian, 6 March 2020 <https://mg.co.za/article/2020-03-06-we-fail-children-living-with-disabilities/> (accessed 20 July 2023).

<sup>290</sup> Parliament of RSA 'Policy brief on performance on basic education grants' May 2022.

<sup>291</sup> Western Cape Forum for Intellectual Disability 'Submission to portfolio committee on basic education' 8 October 2019.

<sup>292</sup> As above.

<sup>293</sup> n 290 above.

<sup>294</sup> n 23 above.

<sup>295</sup> n 39 above.

<sup>296</sup> n 271 above, 27.

<sup>297</sup> n 166 above.

<sup>298</sup> n 275 above.

not enough has been done to provide access to quality education for children with severe to profound intellectual disabilities.<sup>299</sup>

#### **4.2.4 Existing contradictions within the education system**

##### **4.2.4.1 Immediately realisable basic education v progressively realisable inclusive basic education**

In the *Juma Masjid* case, it was held that the section 29 (1) (a) right to basic education is immediately realisable, and may be limited only in terms of laws of general application as per section 36.<sup>300</sup> As the *Juma Masjid* case was a Constitutional Court case, the stance that basic education is immediately realisable has been maintained by the apex court, and the lower courts have subscribed to this view as well.<sup>301</sup> Despite this stance which has been established by the courts, when South Africa ratified the ICESCR in 2015, a declaration was made by the government that they would progressively realise the right to education.<sup>302</sup> The declaration which was made represents a stark contrast and lack of coherence and cooperation between the executive and judicial branches of government.<sup>303</sup> It further highlights the executive's disregard for the Constitution and the rights enshrined within it.<sup>304</sup>

Whilst basic education, as confirmed by the courts in South Africa, is immediately realisable,<sup>305</sup> the approach to inclusive basic education is a progressive one. The fact that White Paper 6 set out a 20-year implementation plan (2001 – 2021) indicates that inclusive basic education will be incrementally and progressively realised by the government.<sup>306</sup>

##### **4.2.4.2 Provision of different school types**

As envisioned by White Paper 6, an inclusive education and training system is one wherein all learners are provided the necessary support to learn, diversity and difference is embraced and respected, and education is understood as a holistic concept which takes place in multiple settings.<sup>307</sup> White Paper 6 further acknowledges that children may experience barriers to learning due to various different factors, such as disability, socio-economic status, HIV status and ethnicity, amongst others.<sup>308</sup> Despite the inclusive rhetoric contained in White Paper 6, it together with the SIAS policy continues to segregate children with disabilities through the provision of different

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<sup>299</sup> n 23 above.

<sup>300</sup> n 177 above, 359.

<sup>301</sup> See *Minister of Basic Education v Basic Education for All* (2015) 198 ZASCA.

<sup>302</sup> n 248 above, 276.

<sup>303</sup> n 248 above, 276.

<sup>304</sup> n 248 above, 277.

<sup>305</sup> *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC).

<sup>306</sup> n 185 above, 69.

<sup>307</sup> Inclusive Education South Africa 'Fact sheet 3 on Education White Paper 6'.

<sup>308</sup> EG Mphanda 'From mainstream to full-service schools: An exploration of teachers' attitudes towards the inclusion of learners living with physical disabilities in South African schools' Unpublished Masters dissertation, University of Pretoria, 2018.

types of schools. It is worthy to note that arguments exist in favor of the ‘separate but equal’ principle due to the belief that at times, educating children with disabilities within the mainstream education system does more harm than good.<sup>309</sup> However, the provision of separate schools does not align with the principles of inclusive education.

The types of schools are full-service/inclusive schools, special schools and ordinary/mainstream schools.<sup>310</sup> The level of support required by a learner determines which type of school they will be able to attend.<sup>311</sup> Children requiring the highest levels of support, will be educated in special schools, whilst children requiring moderate to low levels of support, will be educated in full-service and ordinary schools.<sup>312</sup> Ideally, the plan is that ordinary schools are to be transformed into full-service schools, allowing for children with disabilities to be accommodated within the general public education system.<sup>313</sup> Full-service schools are schools equipped to cater for diverse learning needs.<sup>314</sup> Furthermore, ideally, special schools are to function as support mechanisms for full-service and ordinary schools.<sup>315</sup>

According to the DBE, the development and success of full-service schools will depend on the extent and efficiency of collaboration between various stakeholders, namely; learners, parents/caregivers, teachers, communities, principals, and school governing bodies.<sup>316</sup> There also needs to be continuous conversation and collaboration between the various levels of government, namely; national, provincial and local.<sup>317</sup> However, the reality of co-operative governance in South Africa is that more often than not, the three levels of government tend to become locked in disputes and as a result, rights are often violated and service delivery is halted.<sup>318</sup> Studies have found that many schools have been unable to assume their role as full-service schools due to a lack of resources, infrastructure and support.<sup>319</sup> Environmental, cultural and communication barriers, amongst others, hinder access to inclusive, quality basis education for children with disabilities.

At first glance, the transforming of ordinary schools into full-service schools and special schools into special school resource centres, seems to be in accordance with the ideals of inclusive education. However, at a closer glance, it is apparent that the state is perpetuating the segregation and isolation of children with disabilities. The use of special schools to educate children with disabilities stands firmly in contrast to the ideals of inclusive education.<sup>320</sup> For as long as special schools are used, the normal-

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<sup>309</sup> n 248 above.

<sup>310</sup> White Paper 6 8, 15.

<sup>311</sup> n 185 above, 64.

<sup>312</sup> n 185 above, 65.

<sup>313</sup> n 308 above, 13 – 14.

<sup>314</sup> n 271 above, 7.

<sup>315</sup> Inclusive Education South Africa ‘Fact Sheet: Special School Resource Centres’.

<sup>316</sup> n 271 above, 16 – 18.

<sup>317</sup> n 271 above, 45 – 46.

<sup>318</sup> MZ Makoti and OK Odeku ‘Co-operative governance in South Africa: Impetus for Fostering Effective Inter-Governmental Relationships’ (2021) 12 *African Journal of Public Affairs* 49.

<sup>319</sup> n 308 above.

<sup>320</sup> n 185 above, 81.

abnormal binary will continue to exist. The Equal Education Law Centre recommends the abandonment of the full-service schools' concept.<sup>321</sup>

#### **4.2.4.3 Compulsory school-going age**

In terms of the School's Act, the compulsory school-going age is between the ages of seven and fifteen years old.<sup>322</sup> This compulsory school-going age does not take cognisance of the fact that children with disabilities require flexibility with regards to the provision of their education. The Minister of Basic Education should set a compulsory school-going age for children with disabilities, as this has not been done.<sup>323</sup>

#### **4.2.4.4 Ratification of the CRPD and African Disability Rights Protocol**

South Africa ratified the CRPD and its Optional Protocol in 2007,<sup>324</sup> which is the year in which it was opened for signature. In contrast, South Africa ratified the African Disability Rights Protocol in 2023,<sup>325</sup> five years after it was adopted by the African Union.<sup>326</sup> This eagerness to sign a global instrument on one hand, to the reluctance to sign a continental instrument on the other hand, highlights that the government's commitment to improving the lives of persons with disabilities might exist purely on a superficial level. It has been argued that at times, states ratify international legal instruments merely for their political gain.<sup>327</sup>

#### **4.2.5 The use of derogatory and inappropriate language**

The language and terminology used to refer to persons with disabilities are more often than not, quite derogatory and demeaning. In a study conducted in a rural town in the Limpopo province of South Africa, someone with a physical disability stated that he is referred to as an animal by others within his community.<sup>328</sup> The use of such derogatory language exists as a result of deeply rooted cultural and attitudinal barriers stemming from traditional belief, culture and religion, amongst others. Cultural and traditional beliefs, norms, practices, stereotypes and misconceptions continue to perpetuate the mistreatment of persons with disabilities and continues to view persons with disabilities as 'abnormal'. Even within the academic space, derogatory and undesirable terms are used to refer to persons with disabilities. 'Persons living with disabilities' is a term still widely used within the academic space and is an undesirable term as it defines a person by their disability.

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<sup>321</sup> n 176 above, 12.

<sup>322</sup> <https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolAdmissions.aspx> (accessed 7 August 2023); <https://www.right-to-education.org/es/node/412#:~:text=In%20keeping%20with%20its%20constitutional,for%20all%20children%20with%20disabilities>. (accessed 7 August 2023).

<sup>323</sup> n 56 above.

<sup>324</sup> n 41 above.

<sup>325</sup> n 216 above.

<sup>326</sup> n 216 above.

<sup>327</sup> n 62 above, 140.

<sup>328</sup> n 72 above.

### 4.3 Recommendations and conclusion

What is evident from the above is that the challenges hindering the achievement of an inclusive education system in South Africa are multi-layered, multidisciplinary and complex. Given the nature of the challenges which exist, multidisciplinary solutions are required.

The following recommendations are made to improve access to quality, inclusive basic education for children with disabilities in South Africa:

- In keeping with the slogan, 'Nothing without us',<sup>329</sup> persons with disabilities should be granted the opportunity to be at the forefront of all disability rights matters. Children with disabilities should have a voice in the development of legislation, policy and practices on inclusive education. This is also in line with the best interests of the child principle which is constitutionally protected.<sup>330</sup>
- As White Paper 6 was published in 2001, and has crossed its original 20-year implementation plan mark, there is an urgent need for it to be revised.<sup>331</sup> It should be revised in light of both the CRPD and the African Disability Rights Protocol. This revision of White Paper 6 should not occur on a superficial level and should be done in consultation with persons with disabilities, teachers, parents, the civil society sector, as well as the various branches and levels of government.
- In instances of dispute, meaningful engagement should be employed as a remedy as much as reasonably possible. Meaningful engagement was first introduced as a remedy by the Constitutional Court in *Olivia Road*.<sup>332</sup> This case concerned mass evictions and the right to housing,<sup>333</sup> however, meaningful engagement could, and has been used within the context of the right to education.<sup>334</sup> Meaningful engagement allows for all stakeholders in a matter to have a voice, and most importantly, it allows for the most vulnerable in society to engage with organs of the state on service delivery and socio-economic rights issues.
- Teaching degrees, courses and programmes offered at higher education institutions should adequately train teachers on inclusive education practices, such as curriculum differentiation and adaptation. National treasury and the Department of Higher Education and Training (DHET) would need to allocate sufficient financial capital and human resources towards this.
- The DBE should collaborate with the civil society sector to embark on mass awareness-raising programmes within communities, including rural communities, to create awareness around the correct terminology to be used

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<sup>329</sup> <https://www.ndi.org/our-stories/nothing-about-us-without-us-nothing-without-us> (accessed 7 August 2023).

<sup>330</sup> Section 28 (2) of the Constitution.

<sup>331</sup> White Paper 6.

<sup>332</sup> *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (5) BCLR 475 (CC).

<sup>333</sup> As above.

<sup>334</sup> During the 2015 and 2016 #FeesMustFall protests, there was engagement between student leaders and university management.

when referring to persons with disabilities. Furthermore, such information should be widely disseminated within the public education system. Tackling negative stereotypes and perceptions will go a long way in eliminating the cultural and attitudinal barriers which children with disabilities face within the education system.

- Given South Africa's recognition of sign language as the country's 12<sup>th</sup> official language,<sup>335</sup> sign language should be phased in as one of the compulsory languages to be taught in schools. This would assist in fostering greater inclusion for the deaf community within the education system and in society at large.
- The government should ratify the Marrakesh treaty which allows for the reproduction of protected works and materials in accessible formats. This ratification would foster greater inclusion of visually impaired persons within the education system and in society at large.<sup>336</sup>
- The phasing in of sign language in schools and the ratification of the Marrakesh treaty would, to a great extent, eliminate the communication barriers which children with disabilities experience within the education system and society at large.
- An entirely new data collection system needs to be developed as the current systems in place produces data which is skewed and inaccurate.
- When providing reasonable accommodations, teachers, principals and other relevant persons and entities should be aware of the fact that there is no 'one size fits all' approach and learners must be provided with the type of support that they are comfortable with. Given resource constraints, the provision of individualised reasonable accommodation measures would be no easy feat. The DBE should collaborate with private institutions, such as iSchool Africa, for example, to provide learners with braille iPads.
- Recently, a student at Stanford University developed glasses which can transcribe real-time speech.<sup>337</sup> This is a brilliant example of how technology may be used to improve access to education. This is an example of why the author recommends collaborations between DBE and organisations such as iSchool Africa.
- When schools are being built, renovated or transformed from mud to brick, the principles of universal design should be complied with; to the extent that it does not place an undue burden on the DBE and National Treasury.
- The Constitutional Court has, on multiple occasions, confirmed that the right to basic education is immediately realisable.<sup>338</sup> However, the court has not stated

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<sup>335</sup> <https://www.news24.com/news24/southafrica/news/sign-language-officially-becomes-sas-12th-official-language-20230719> (accessed 7 August 2023).

<sup>336</sup> YT Zewale 'The need to go beyond ratifying the Marrakesh VIP Treaty: The case of Ethiopia' (2022) 10 *African Disability Rights Yearbook* 9.

<sup>337</sup> <https://headtopics.com/uk/stanford-university-students-develop-transcribeglass-for-real-time-speech-transcription-41722556> (accessed 10 August 2023).

<sup>338</sup> n 305 above.

whether this extends to the right to inclusive education as well. Without guidance from the courts, the government has taken a progressive realisation approach to inclusive education. It is recommended that when the opportunity arises, the court should make a ruling on whether inclusive education is immediately or progressively realisable.

- The government should consider employing the ICESCR's minimum core approach in relation to the right to inclusive education. Given that the content of the right is underdeveloped within a South African context, the application of the minimum core approach would assist in developing the substantive content of the right. It is also recommended that the minimum core approach be used in tandem with the reasonableness approach.
- The government has often cited resource constraints as the justification for the failure to provide inclusive, quality basic education for children with disabilities.<sup>339</sup> In terms of the CESR's general comments 14 and 15, the state can no longer use resource constraints as a justification for the failure to provide for the minimum obligation of the right in question.<sup>340</sup> Hence, with the employment of the minimum core approach, the government would be in breach of their international law obligations if they failed to provide the minimum obligation of the right to inclusive education.
- With regards to the provision of inclusive, quality basic education for children with intellectual and psychosocial disabilities, the government has largely absolved its duties upon the civil society sector. Rather than doing so, the government, through the DBE, should collaborate with the civil society sector as they could provide valuable assistance.
- Resources allocated should be in proportion to the needs of learners. The DBE should be required to report regularly to National Treasury on the allocation of resources.

Throughout this research, it has become increasingly evident that the government is failing to discharge its domestic, regional and international obligations to provide access to quality, inclusive basic education for children with disabilities in South Africa.

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<sup>339</sup> n 284 above.

<sup>340</sup> General Comment 14 and 15 by the CESR.

## Chapter 5

### Conclusion

The aim of this dissertation, as set out in chapter 1, was to determine whether or not South Africa is adequately disposing of its obligations to provide access to inclusive, quality basic education for children with disabilities. The obligation upon the government was assessed in light of the international, regional and domestic legal framework. Furthermore, the aim of the dissertation was to explore creative suggestions and recommendations to develop the inclusive education system in South Africa. The lack of accurate statistics on disability was cited as the greatest limitation to the study as we are unaware of the accurate number of children with disabilities without schooling. Chapter 1 also makes it abundantly clear that for as long as children with disabilities are denied access to inclusive, quality basic education; the constitutional promise of equality, human dignity and freedom will remain hollow.

Chapter 2 begins with a discussion of the development of disability as a social construct. As the field of medical sciences progressed, the medical model became the dominant lens through which disability was viewed.<sup>341</sup> In terms of the medical model, the focus is on the individual's impairment as the barrier to equal participation in society.<sup>342</sup> Resistance against the medical model by the disability community resulted in the development of the social model.<sup>343</sup> The social model of disability shifts the focus from the individual's impairment onto the barriers which are created by society itself.<sup>344</sup> White Paper 6, South Africa's inclusive education policy document, is based on the social model of disability. The human rights model, which builds upon the social model, recognises that disability rights are human rights which should be protected in legal instruments at international, regional and domestic levels.<sup>345</sup>

Thereafter, chapter 2 proceeds to define disability as it is defined in the CRPD. As per the CRPD, disability includes but is not limited to the following categories; mental, physical, visual and sensory impairments.<sup>346</sup> What was also crucially pointed out, is that disability must be understood as an evolving concept which is constantly developing. After conceptualising the definition of disability as well as the history of the development of the three main models, namely, the medical, social and human rights models, it became necessary to place disability within a South African context. According to the 2011 population census, the disability prevalence rate is 10.8% for

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<sup>341</sup> n 72 above.

<sup>342</sup> n 72 above.

<sup>343</sup> n 94 above.

<sup>344</sup> n 89 above.

<sup>345</sup> n 108 above.

<sup>346</sup> Article 1 of the CRPD.

those aged between 5 – 9, 4.1% for those aged 10 – 14, and 2.6% for those aged 15 – 19.<sup>347</sup> The chapter concludes with a brief discussion on the socio-economic rights of children in South Africa with a particular focus on section 28 and section 29 (1)(a) of the Constitution. Section 28 protects a wide range of children's rights, whilst section 29 (1)(a) protects the unqualified right to basic education.<sup>348</sup>

Chapter 3 begins with a discussion on the Bantu education system and its legacy on the public education system in post-Apartheid South Africa. The Bantu education system was adopted by the Apartheid government to racially segregate the education system and to ensure that black children would only be educated as menial laborers.<sup>349</sup> The Bantu Education Act allowed for the government to determine the curriculum, language of instruction and funding model, amongst others, of Bantu schools. Under Apartheid, schools for white children were well-resourced whilst schools for black children were severely under-resourced.<sup>350</sup> The legacies of Apartheid compounded by the failures of the democratic government are manifested regularly in the drowning of children in pit latrines, children being taught in mud schools, and children going through an entire schooling year without textbooks. Under Apartheid, children with disabilities were discriminated against on an intersectional basis; on grounds of both race and disability. Studies suggest that only one fifth of children with disabilities attended school during Apartheid.<sup>351</sup>

Thereafter, chapter 3 proceeds to discuss the history and overview of basic education, as well as the conceptualisation of basic education and inclusive education in post-Apartheid South Africa. The UDHR protects the right to education of everyone,<sup>352</sup> whilst the World Declaration on Education for All and the Salamanca statement provide the basis for the development of inclusive education systems by recognising that diverse learning needs must be supported and accommodated. In the South African context, basic education can be described as a 'basket of entitlements' which has been developed by the courts throughout the years.<sup>353</sup> Basic education has also been described as the education received of which the end result is the obtainment of the National Senior Certificate.<sup>354</sup> Furthermore, the courts have confirmed that basic education is an unqualified, immediately realisable right containing both negative and positive obligations for the state. By contrast, the approach to inclusive basic education has been a progressive one.

The discussion on the legal framework begins with pointing out that in terms of section 39 (1) (b) of the Constitution, international law must be considered when interpreting the Bill of Rights.<sup>355</sup> The international law instruments which South Africa has ratified

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<sup>347</sup> Stats SA.

<sup>348</sup> The Constitution.

<sup>349</sup> n 133 above.

<sup>350</sup> n 23 above.

<sup>351</sup> n 23 above.

<sup>352</sup> Article 26 of the UDHR.

<sup>353</sup> n 177 above.

<sup>354</sup> n 1 above.

<sup>355</sup> The Constitution.

and are most relevant to the right to inclusive, quality basic education for children with disabilities are the following; the CRPD, the ICESCR, the African Disability Rights Protocol, and the CRC. Most, if not all of these instruments recognise the right to education for all as progressively realisable. All these instruments contain strong anti-discrimination rhetoric and provide valuable guidance to the state in developing policies on inclusive education. At domestic level, the Constitution is the supreme law of the land and provides for the rights to equality, human dignity, the best interests of the child and the right to education. The School's Act was adopted to give effect to the right to education, whilst White Paper 6 is the policy document governing inclusive education. White Paper 6 set out various long, medium and short-term goals over the original 20-year period, 2001 – 2021.

In Chapter 4, we explored the various challenges hindering the achievement of an inclusive education system in South Africa. The challenges range from cultural and attitudinal barriers, to communication barriers and environmental barriers. The failure by the government to adopt White Paper 6 as legislation, as well as the failure to adequately conceptualise inclusive basic education have proved to be significant challenges. Other challenges include teacher incapacity, lack of funding and resources, and a lack of cooperation between the various branches and levels of government. It is strongly recommended that White Paper 6 is urgently revised and adopted as legislation so that children with disabilities can enjoy a stronger protection of their right to inclusive, quality basic education.<sup>356</sup>

The systems put in place by the Apartheid government have ensured that the education system would remain segregated and unequal even after the transition to democracy and the adoption of a supreme Constitution. Since attaining power in 1994, the democratic government has made massive strides in addressing the injustices of the past, however, persons with disabilities and more particularly, children with disabilities have remained at the bottom of the agenda. Children with disabilities continue to be marginalised, oppressed and deprived of their basic human rights. The government has failed dismally in providing access to inclusive, quality basic education for children with disabilities in South Africa. This will only be remedied by multi-disciplinary approaches and collaboration between all relevant stakeholders.

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<sup>356</sup> n 268 above.

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