

Author: LN Murungi

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ISSUES IN ITS CONCEPTUALISATION AND
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INCLUSIVE BASIC EDUCATION IN SOUTH AFRICA: ISSUES IN ITS CONCEPTUALISATION AND IMPLEMENTATION

LN Murungi*

1 Introduction

The *Constitution* recognises the right of "everyone" to "a basic education".¹ However, the meaning of the term "basic education" is not agreed upon amongst key role players or stakeholders. In recent years, particularly in the period after the adoption of the *UN Convention on the Rights of Persons with Disabilities* (CRPD), there has been a sustained campaign for education to be inclusive. Essentially, there has been a push to adopt "inclusive education" as the best approach to ensure that education is accessible to all. Relying on a general notion of "inclusion", it is arguable that the term "inclusive education" should refer to education that is accessible to all persons in society. However, the term has been applied mainly in the context of persons with disabilities, with the result that efforts towards achieving inclusive education have concentrated on ensuring that persons with disabilities can access education on an equal basis with others in the communities in which they live. However, this view is limiting to the overall goal of universal access to primary education, both under the *Constitution* and internationally.

This article considers how "inclusive education" may be construed in accordance with the *Constitution*. It particularly assesses the existing approaches to inclusive education as compared to the right to "a basic education" provided under section 29 of the *Constitution*. Thereafter, the conceptualisation of inclusive basic education in South Africa is compared to the conceptualisation of inclusive education in international legal instruments. The provisions of the CRPD, which South Africa ratified on 30 November 2007, are particularly instructive in this regard. The article starts by setting out the

* Lucyline Nkatha Murungi. LLB (Moi), LLM (UP), LLD (UWC). Research fellow at the Community Law Centre, University of the Western Cape. E-mail: nkatha.murungi@gmail.com. Parts of this Article are drawn from the author's LLD thesis titled *The Significance of Article 24(2) of the CRPD for Primary Education of Children with Disabilities: A Comparative Study of Kenya and South Africa* which was submitted to the University of the Western Cape in May 2013.

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

background to the right to basic education and inclusive education in international law and South African law and policy.

2 The right to basic education

2.1 *The right to basic education at the international level*

The term "basic education" has its origins in the *World Declaration on Education for All*.² Basic education de-emphasises the completion of specific formal programmes or certification requirements. Basic education is focused on the content of education, as opposed to the form in which it is conducted, such as formal or informal education.³ In terms of the *World Declaration on Education for All* (1990) adopted during the World Conference on Education for All in Jomtien, Thailand,⁴ the focus of basic education should be on actual learning acquisition and outcomes rather than exclusively on enrolment, continued participation in organised programmes, and completion of certification requirements.⁵ Basic education as a core content of the right to education would therefore include "literacy, numeracy, skills relating to one's health, hygiene and personal care, and social skills such as oral expression and problem solving" as well as some elements of Articles 26(2) of the *Universal Declaration of Human Rights* (1948) (hereinafter UDHR), 103(1) of the *International Covenant on Economic, Social and Cultural Rights* (1966) (hereinafter ICESCR) and 29 of the *UN Convention on the Rights of the Child* (1989) (hereinafter CRC).⁶

Basic education is often equated to primary education. However, while primary education is not universally defined, it is often understood to refer to the first layer of formal schooling,⁷ which focuses on imparting basic learning skills, including literacy and numeracy.⁸ Primary education, on the other hand, refers to structured,

² A 1 of the *UNESCO World Declaration on Education for All* (1990).

³ Coomans "In Search of the Core Content of the Right to Education" 226.

⁴ World Conference on Education for All: Meeting our Collective Learning Needs, held in Jomtien, Thailand (1990).

⁵ A 4 of the *UNESCO World Declaration on Education for All* (1990).

⁶ Coomans "In Search of the Core Content of the Right to Education" 226.

⁷ Ssenyonjo *Economic, Social and Cultural Rights* 377.

⁸ Ssenyonjo *Economic, Social and Cultural Rights* 377; Sloth-Nielsen and Mezmur *Free Education*. This interpretation is also adopted in UNESCO *Revision of ISCED*, and UNESCO Institute for Statistics *ISCED 2011* 31.

chronologically graded instruction given in an educational institution.⁹ This means that there may be points of convergence between primary and basic education, but they are not synonymous.

2.2 The right to basic education in South Africa

Section 29 of the *Constitution*, which grants everyone the right to education, is one of the most hotly debated sections of the Bill of Rights for a range of reasons including its significance for the realisation of other rights. The implementation of the right to basic education as set out in section 29 is not subject to resource availability. It is therefore a right that has to be directly and immediately (as opposed to progressively) implemented.¹⁰ It is argued that for this reason the right to basic education under section 29 is of higher priority relative to other rights.¹¹

Two meanings have been ascribed to the term "basic education" as used in South African legislation and education policy.¹² In the first sense, the term indicates a level of education computed on the basis of time, such as a period of five years of primary education; in the second, "basic education" refers to a certain content of education such as elementary reading and arithmetic skill.¹³ Adopting the latter approach, Woolman and Fleisch define "basic education" in South Africa as the "minimum levels of literacy, numeracy and essential life skills necessary to do more than menial work in a complex society".¹⁴ They argue that basic education should be about the adequacy, as opposed to the level, of education.¹⁵ This argument accords to an extent with the definition in the *World Declaration of Education for All* highlighted above.

⁹ Verheyde *Article 28* 12.

¹⁰ Woolman and Bishop "Education" 57-11; Seleoane "Right to Basic Education" 224-225; Viljoen *International Human Rights Law in Africa* 549.

¹¹ Roithmayr 2003 *SAJHR* 421-422; Veriava and Coomans "Right to Education" 62; Boezaart 2012 *SAPL* 456.

¹² Woolman and Bishop "Education" 57-15.

¹³ Seleoane "Right to Basic Education" 228 argues that from the requirement under the *South African Schools Act* 84 of 1996 that education be compulsory for children between 7 and 15 years, it may be inferred that basic education is equivalent to primary education.

¹⁴ Woolman and Fleisch "Constitution in the Classroom" 113.

¹⁵ Woolman and Fleisch "Constitution in the Classroom" 130. Similar arguments are reiterated in McConnachie and McConnachie 2012 *SAJL* 129; and Simbo 2012 *LDD* 16.

However, the *World Declaration* goes further to recognise that primary education is the main delivery channel for basic education.¹⁶

The White Paper on Education and Training (WP 1), adopted at the dawn of democratic governance in South Africa, endorsed the definition of "basic education" in the *World Declaration on Education for All*, arguing that basic education "must be defined in terms of learning needs appropriate to the age and experience of the learner".¹⁷ However, WP 1 subsequently stipulated that the design of education programmes to the level of general education and training (GET) would adequately define basic education for the purpose of the constitutional requirement.¹⁸ The WP 1, therefore, seems to have taken a position that accommodates both perspectives. Subsequently the *South African Schools Act*¹⁹ (SASA) took WP 1's view of basic education further as a level of education that covers a period of 10 years up to grade 9 or the age of 15 years, whichever comes first.²⁰ This period coincides with the GET phase of education.²¹ The GET level is also prioritised in the allocation of state education resources, a trend that at the international level is associated with the primary education phase.²² This suggests that basic education in South Africa, in so far as it applies to children, refers to the primary education phase as understood in international law.

The two perspectives on the meaning of "basic education" in South African law and policy are not mutually exclusive. Rather, they are complementary. Indeed, it is not rational to interpret basic education solely in terms of levels because an organisational structure and the sufficiency of education are complementary aspects of an education system. Learning is also a function of time, and therefore it would not be sufficient to define "basic education" exclusively with respect to its content.

¹⁶ UNESCO *World Declaration on Education for All* (1990).

¹⁷ DoE *Education White Paper 1* ch 12 para 12.

¹⁸ DoE *Education White Paper 1* ch 7 para 15.

¹⁹ *South African Schools Act* 84 of 1996 (SASA).

²⁰ S 3(1) of SASA.

²¹ DoE *Education White Paper 1* ch 7; Malherbe "Education Rights" 404.

²² Woolman and Fleisch "Constitution in the Classroom" 128; Seleane "Right to Basic Education" 228.

The meaning of the right to education, particularly what the full implementation of the right would actually entail, is yet to be fully determined by South African courts. Nevertheless, a body of jurisprudence on some aspects of the right is slowly emerging. Cases such as the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* (the *Western Cape Forum* case),²³ the *Centre for Child Law v Government of the Eastern Cape Province* (the mud schools case), the *Centre for Child Law v Minister of Basic Education* (the post-provisioning case) case,²⁴ and the *Governing Body of the Juma Masjid Primary School v Essay* case (the *Musjid* case)²⁵ have been instrumental in shaping the understanding of the right.

The *Musjid* case was the first time the Constitutional Court considered the content of the right to education in the light of the principle of the best interests of the child.²⁶ In its decision the Court adopted the aims of education in Article 29 of the CRC in the interpretation of section 29 of the *Constitution*.²⁷ This is important as an entry point for the international jurisprudence on the aims of education.²⁸ Article 29 of the CRC recognises the aims of education as the defining components of the content and hence of the quality and acceptability of education. Accordingly, in view of the Court's acceptance of the CRC's approach, the aim of fully developing the personality and talents of children under Article 29(1) of the CRC should be the primary agenda of section 29 of the *Constitution*. The Court in the *Musjid* case also highlighted "access to a school" as a necessity for achieving the right to basic education.²⁹ This is especially significant for the education of children with disabilities in the light of the inadequacy of appropriately equipped schools to facilitate access by these children.

²³ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).

²⁴ *Centre for Child Law v Government of the Eastern Cape Province* (ECB) unreported case number 504/10 of 2011; and *Centre for Child Law v Minister of Basic Education* 2013 3 SA 183 (ECG) respectively.

²⁵ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC).

²⁶ Sloth-Nielsen and Kruuse 2013 *Int'l J Child Rts* 658.

²⁷ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC) para 40.

²⁸ The Court's reference to the CRC is in line with the *Constitution* of South Africa which, at s 39, calls upon the courts, tribunals, and forums to consider international law in the interpretation of the Bill of Rights, including the right to education. In addition, s 233 of the *Constitution* calls upon courts, when interpreting legislation to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

²⁹ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC) para 43.

In the *Western Cape Forum* case, the Western Cape High Court addressed the rights of children with severe and profound intellectual disabilities to basic education. The Court stated that the State has a duty to provide equally for the education of all children, including those with severe and profound disabilities.³⁰ This reasoning is significant in that it accords with the understanding that education is broader than classroom education with academically examinable outcomes. Rather, education includes the development of a child's potential, personality, talents and creativity,³¹ which may not be academically assessable. The Court also determined that the National Strategy on Identification, Assessment and Support (SIAS) that is applied in the implementation of White Paper 6 on Special Needs Education³² (WP 6) had the effect of excluding children with severe and profound disabilities from receiving education, and that such exclusion was discriminatory and unconstitutional.³³

In the light of the earlier socio-economic rights jurisprudence of the Constitutional Court, such as the *Grootboom* and *Treatment Action Campaign* cases,³⁴ certain other interpretations may be anticipated. For instance, the Constitutional Court has maintained a preference for the reasonableness standard in the interpretation of the Bill of Rights, as opposed to the minimum core approach, which requires states to ensure at the very least the minimum essential levels of a particular right.³⁵ In the *Grootboom* case, the Constitutional Court was of the view that whereas there is indeed an obligation to ensure the minimum core of rights, the pertinent question under the South African *Constitution* was if the measures that the state was taking for the implementation of the rights were reasonable.³⁶ In the *Treatment Action Campaign*

³⁰ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) para 52.

³¹ A 24(1)(a) and (b) of the *Convention on the Rights of Persons with Disabilities* (2006).

³² DoE *Education White Paper 6*.

³³ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) para 19-24; Ngwena and Pretorius 2012 *SAJHR* 88-89 argue that the National Strategy on Identification, Assessment and Support (SIAS) has been used as a tool of exclusion as opposed to a tool for the identification of individual specialised support needs.

³⁴ *Minister of Health v Treatment Action Campaign No 2* 2002 5 SA 721 (CC); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

³⁵ CESCR *General Comment No. 3: The Nature of States Parties Obligations* (1990) para 10; *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) para 9; *Minister of Health v Treatment Action Campaign No 2* 2002 5 SA 721 (CC) para 34; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 32; Roithmayr 2003 *SAJHR* 403; McConnachie and McConnachie 2012 *SALJ* 564.

³⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33.

case the Constitutional Court reiterated the difficulty of determining the minimum core of rights, and hence its preference for a reasonableness assessment when determining whether or not the rights under the *Constitution* have been fulfilled.³⁷ The reasonableness approach essentially allows a case by case assessment of whether measures taken to implement a right are reasonable in the circumstances, and that such measures do not exclude those with the greatest need in a particular context. The reasonableness approach has further been interpreted to mean that education ought to be interpreted in accordance with what the state can afford.³⁸ It can therefore be anticipated that though it is generally accepted that children's right to basic education is an unqualified right, it is less likely to be interpreted as imposing an absolute duty to realise it immediately.

3 Inclusive education

3.1 What does "inclusive basic education" mean?

The inclusive education discourse is one of the most acclaimed yet controversial recent developments on the right to education. Inclusive education is widely applied and acclaimed as an appropriate approach to education for all.³⁹ The approach is founded on the recognition that certain groups of learners such as children with disabilities, indigenous children, or girls have historically been directly or indirectly excluded from the existing system of education. Inclusive education therefore requires that the framework within which education is delivered is broad enough to accommodate equally the needs and circumstances of every learner in society equally. This view is captured in the *Dakar Framework's*⁴⁰ statement that as a matter of principle education must neither exclude nor discriminate.⁴¹

However, the question can be asked as to whether the recognition of a right to basic education (including the nature of the obligations that apply to this right), is

³⁷ *Minister of Health v Treatment Action Campaign No 2* 2002 5 SA 721 (CC) para 36-38.

³⁸ Bekink and Bekink 2005 *Stell LR* 134.

³⁹ Wakefield and Murungi "Domesticating International Standards on Education" 142; Beiter *Right to Education* 507.

⁴⁰ *Dakar Framework for Action: Education for All – Meeting Our Collective Commitments* (2000).

⁴¹ UNESCO *Expanded Commentary* para 20.

necessarily equal to a right to inclusive basic education. At first this distinction seems immaterial. However, it is evident that there is greater consensus on the duties relative to the right to basic education than there is with regard to a right to inclusive basic education. Indeed, as in the case of South Africa, while it is generally accepted that there is an immediate duty to implement basic education (as shown above), the duty to ensure inclusive education as stipulated in education policy seems more inclined to a progressive realisation approach.⁴² In addition, the CRPD calls for the progressive realisation of inclusive education, despite an immediate obligation for the realisation of the right to education having been established in preceding international instruments.⁴³

A fundamental challenge with regard to inclusive education is that it is not consistently or universally defined. The distinctions between inclusion and inclusive education, and between inclusion in the broader and narrow senses in the context of education, are also not clear cut.⁴⁴ Inclusion in education has been defined as the:

... process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is the responsibility of the regular system to educate all children.⁴⁵

In the "broad" sense, "inclusive education" has been defined as:

... the understanding that the education of all children including those with disabilities, should be under the responsibility of the education ministries or their equivalent with common rules and procedures. In this model, education may take place in a range of settings such as special schools and centres, special classes, special classes in integrated schools or regular classes in mainstream schools, following the model of the least restrictive environment.⁴⁶

⁴² See the further discussion below on WP6's approach as well as the progressive realisation approach under the CRPD.

⁴³ See for instance para 51 of *CESCR General Comment No 13: The Right to Education* (1999).

⁴⁴ UNESCO *Guidelines for Inclusion*.

⁴⁵ UNESCO *Guidelines for Inclusion* para 13.

⁴⁶ WHO and World Bank *World Report on Disability* 209.

This latter definition presumes that "all children can be educated and regardless of the settings or adaptations necessary, all students should have access to a meaningful curriculum and outcomes".⁴⁷

In the narrower sense, inclusive education is equated with integration. For instance, the aforementioned understanding notwithstanding, the World Disability Report interpreted inclusive education to mean that "all children should be educated in regular classrooms with age-appropriate peers".⁴⁸ This would be facilitated by the removal of barriers to education through measures such as reasonable accommodation. This view is traceable to earlier documents on the rights of persons with disabilities. For instance, the *Salamanca Statement and Framework for Action*⁴⁹ proclaimed that "those with special education needs must have access to regular schools which should accommodate them within child-centred pedagogy capable of meeting these needs".⁵⁰ The *Statement* further noted that "regular schools with inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all".⁵¹ It also stipulated that "the fundamental principle of the inclusive school is that all children should learn together, wherever possible, regardless of any difficulties or differences they may have",⁵² and that "a child with disability should attend the neighbourhood school, that is, the school that would be attended if the child did not have a disability".⁵³

Subsequently, in its *General Comment No 5*, the Committee on Economic, Social and Cultural Rights (CESCR) was of the view that to implement education in integrated settings as contemplated by the *Standard Rules*⁵⁴ it was necessary "that teachers are trained to educate children with disabilities within regular schools".⁵⁵ Later, the CRC

⁴⁷ WHO and World Bank *World Report on Disability* 7.

⁴⁸ WHO and World Bank *World Report on Disability* 209-210.

⁴⁹ *Salamanca Statement and Framework for Action on Special Needs Education* (1994) (hereafter *Salamanca Statement*) para 2.

⁵⁰ *Salamanca Statement* para 2.

⁵¹ *Salamanca Statement* paras 2, 3.

⁵² *Salamanca Statement* para 7.

⁵³ *Salamanca Statement* para 18.

⁵⁴ *Standard Rules on Equalisation of Opportunities for Persons with Disabilities* A/RES/48/96 (1993).

⁵⁵ *CESCR General Comment No 5: Persons with Disabilities* (1994) para 35.

Committee called for the integration of all learners into the mainstream class as a priority, though conceding that there are circumstances where the education of a child with disabilities requires a kind of support that is not available in the regular educational system.⁵⁶

During the CRPD negotiations, it was argued that the low incidence and demographic distribution of some kinds of disabilities, particularly the numbers of deaf, blind, and deaf-blind children, means that at a local level it is difficult to establish appropriate or quality education and peer support between children of similar ages and interests, and therefore that a failure to educate these children in mainstream schools would deny them the opportunity to achieve their potential.⁵⁷ In 2011 the World Disability Report called upon states "not [to] build a new special school if no special school exists. Instead, use the resources to provide additional support for children with disabilities in mainstream schools".⁵⁸ Also, the Committee on the Rights of Persons with Disabilities (CRPD Committee) in its concluding observations on State Party reports has adopted an approach that leans heavily towards the understanding of inclusion as integration.⁵⁹

In its recommendations to Spain, for instance, the CRPD Committee called upon the state to ensure that children with disabilities are included in the mainstream system.⁶⁰ To Argentina the Committee expressed concern over the high number of children with disabilities attending special schools (as opposed to mainstream schools). The Committee therefore called upon that state party to ensure that the children attending special schools were enrolled in mainstream schools, and to offer them reasonable accommodation within the regular education system.⁶¹ However, it is in its comments on China's report that the Committee clearly showed its inclination towards the

⁵⁶ *CRC General Comment No 9: The Rights of Children with Disabilities* (2006) para 66.

⁵⁷ Background documents of the seventh session of the AHC, "Article 24 – education: comments, proposals and amendments submitted electronically" para 24.

⁵⁸ WHO and World Bank *World Report on Disability* 226.

⁵⁹ *CRPD Concluding Observations: Spain CRPD/C/ESP/CO/1* (2011) para 43; *CRPD Concluding Observations: Argentina CRPD/C/ARG/CO/1* (2012) para 38.

⁶⁰ *CRPD Concluding Observations: Spain CRPD/C/ESP/CO/1* (2011) para 43.

⁶¹ *CRPD Concluding Observations: Argentina CRPD/C/ARG/CO/1* (2012) para 38.

understanding of inclusive education as favouring the integration of learners with disabilities into mainstream schools. The Committee stated that it:

... wishes to remind the state party that the concept of inclusion is one of the key notions of the Convention, and should be especially adhered to in the field of education. In this regard, the Committee recommends that the state party reallocate resources from the special education system to promote inclusive education in mainstream schools, so as to ensure that more children with disabilities can attend mainstream education.⁶²

Though the foregoing arguments do not entirely support the idea that inclusive education is synonymous with integrated education, they are clearly indicative of the fact that integration is a core component of inclusive education. A fundamental feature distinguishing between inclusive education and integration is that where and when appropriate, inclusive education seeks to accommodate the needs of all students, and to give all learners a choice on where to undertake their education on a basis of equality, while integration primarily emphasises location. It is therefore rightfully argued that to interpret inclusive education simply as the requirement that all children have a right to be educated in a mainstream school oversimplifies the issue. Rather, the overriding right is for all children to have a good education and to have their needs for education met.⁶³

It is especially clear from the foregoing brief reflection on the journey to inclusive education under Article 24 of the CRPD, that though it is often argued that integration and inclusion are not synonymous, the development of inclusive education at the international level shows that the integration of learners with disabilities into the mainstream classroom has consistently been regarded as a core part of inclusive education. Indeed, even the CRPD contemplates an inclusive education that includes the integration of learners with disabilities into the "general education system" as a priority, and believes education in separate settings to be acceptable only where necessary.⁶⁴ However, the CRPD sets out other defining characteristics of inclusive education beyond the location of learners. Such other components include the need for the adaptation of the content of education in accordance with the expanded aims

⁶² *CRPD Concluding Observations: China CRPD/C/CHN/CO/1* (2012) para 36.

⁶³ Farrel 2000 4 2 *IJIE* 154.

⁶⁴ A 24(2)(a) of the CRPD.

of education, the duty to provide support and reasonable accommodation, and safeguarding equal choice for all learners in education.⁶⁵

3.2 Inclusive basic education in South Africa: White Paper 6

As mentioned above, the shift to inclusive education in South African policy was part of the general move from the segregated education system of the apartheid period towards a diverse, economically and socially empowered society.⁶⁶ SA's approach to inclusive education is set out in WP 6 which seeks to elaborate on a "South African" model of inclusion that takes into account the severe resource constraints within which primary education is provided in the country.⁶⁷ The model envisaged in WP 6 is geared towards the inclusion of children with a range of special needs in education, but is evidently biased towards children with disabilities. It also prioritises the education of children with disabilities in mainstream settings. In the view of WP 6, inclusive education entails accepting that all children have learning needs, respecting diversity in learning capacities and needs, and acknowledging that all children can learn if given support.⁶⁸ WP 6 also acknowledges the long-term economic value of inclusive education; that is, that the education of persons with disabilities has the potential to reduce the government's fiscal burden by reducing the number of dependant citizens relative to productive members of society.⁶⁹

According to WP 6, the components of inclusive education include an acknowledgement that all children and youth can learn, and recognition of the fact that different people have different learning needs that are equally valued for the full human experience. Inclusive education also acknowledges that learners are different, and recognises that learning is not confined to formal schooling. WP 6 considers inclusive education and training as necessary to maximise the participation of all learners, and to develop their individual strengths so as to enable them to participate critically in the process of learning.⁷⁰ Inclusive education according to WP6 further

⁶⁵ A 24(2)(a) of the CRPD.

⁶⁶ OECD *Review: South Africa* 261.

⁶⁷ OECD *Review: South Africa* 261.

⁶⁸ Ngwena and Pretorius 2012 *SAJHR* 90.

⁶⁹ DoE *Education White Paper 6* 25.

⁷⁰ DoE *Education White Paper 6* 16.

embraces the ambition of redressing past inequalities by increasing access to previously marginalised groups and the poor.⁷¹ In accordance with this goal, the financing of education has been redirected specifically towards considerations of equity, redress, accessibility and affordability.⁷²

The model of inclusion advocated in WP 6 seems to advance an approach that seeks the integration of learners into the mainstream education system. For instance, WP 6 argues that the inclusion of learners with intellectual disabilities is much easier to implement because all that is needed is curriculum adaptation, as opposed to intensive medical support or structural adjustments to the built environment.⁷³ This reasoning not only discounts the levels of support that must nevertheless be provided to enable the education of all children in a mainstream class, but also underscores an underlying assumption that inclusion equals the integration of learners into the mainstream classroom.

The integration undertone in WP 6 echoes the provisions of the *South African Schools Act*.⁷⁴ The Act states that education for learners with disabilities ought to be provided in ordinary public schools, and that support is to be provided to the learners within the regular schools.⁷⁵ The SIAS amplifies this approach by primarily pursuing the support of students in regular schools where possible and in special schools in cases where more support is necessary. In terms of the SIAS, once it is determined that a learner falls within a defined range of support needs, he or she is automatically placed in the predetermined school, that is, an ordinary public school, a full service school or a special school.⁷⁶

⁷¹ OECD *Review: South Africa* 19; DoE *Education White Paper 6* 11; McConnachie and McConnachie 2012 SALJ 565.

⁷² OECD *Review: South Africa* 38.

⁷³ DoE *Education White Paper 6* 25.

⁷⁴ *South African Schools Act* 84 of 1996.

⁷⁵ S 12(4) of SASA.

⁷⁶ The SIAS defines ordinary public schools, full service schools and special schools as local ordinary schools, ordinary schools which are specially equipped to address a full range of barriers to learning in an inclusive education setting, and schools equipped to deliver education to learners requiring high-intensive educational and other support either on a full-time or a part-time basis, respectively.

3.3 Issues related to the conceptualisation of inclusive education in South Africa

Arguably, due to the history of exclusion along social lines and the resulting class differences, the discourse on equality in South African education has disproportionately concentrated on race and class inclusion to the further exclusion of other marginalised groups such as persons with disabilities.⁷⁷ On the other hand, the term "inclusive education" as used in the (immediate) post-apartheid education policy had, as part of its central agenda, the inclusion of a range of previously excluded groups into the mainstream education system,⁷⁸ as opposed to the near exclusive disability dimension with which it is often associated in international jurisprudence and literature. In the years following the adoption of WP 6, however, the tide seemingly changed to associating inclusive education in South Africa more with disabilities than with any other ground of exclusion.

WP 6 embraces the theory of system change as opposed to changing the individual, drawing extensively from the reports of the National Commission on Special Needs in Education and Training (NCSNET) and the National Committee on Education Support Services (NCESS).⁷⁹ It is argued that WP 6 "reflects the struggles and settlements ...of a highly contested area of policy development in South Africa between 1996 and 2001".⁸⁰ WP 6 is thus intended to guide the development of an inclusive education system that can accommodate the needs of all learners in the education system.

WP 6 is founded on two key principles: moving away from disability as an organising principle of special needs education (SNE), and favouring the availability of support programmes as opposed to the movement of learners between ordinary and special schools.⁸¹ However, despite this stated commitment, WP 6 failed to fully embrace the shift in approach to the education of children with disabilities as conceptualised by the

⁷⁷ Lomofsky and Lazarus 2001 *CJE* 304.

⁷⁸ Engelbrecht 2006 *EJPE* 253-254, 256.

⁷⁹ The Policy was based on the foundation of the Integrated National Disability Strategy White Paper of 1997 (Office of the Deputy President *Integrated National Disability Strategy White Paper*), which pioneered the shift from a medical to a social perspective on disability. Bekink and Bekink 2005 *Stell LR* 141.

⁸⁰ Howell and Lazarus "Education White Paper 6" 26.

⁸¹ OECD *Review: South Africa* 68.

NCSNET/NCESS.⁸² The NCSNET report sought to usher in a paradigm shift in the conceptualisation of education needs from a "special needs" to a "barriers to learning" paradigm.⁸³ It departed from the pre-existing classification of learners as either needing less support (therefore able to learn in mainstream schools) or as needing "special" support (and hence needing to be educated in special schools).⁸⁴ It was argued that the "special needs" approach failed to take into account the full range of barriers to learning that underlay the exclusion of certain groups of learners, such as their socio-economic circumstances, their social attitudes, their language, their particular physical abilities, and the inflexibility of the curriculum confronting them.⁸⁵

The shift in paradigm was premised on the thought that focusing on these barriers as opposed to the "deficit" of the learners would facilitate an understanding of the causes of exclusion and the appropriate responses to it, in order to open access to all excluded children.⁸⁶ The NCSNET/NCESS, therefore, envisaged a single education and training system with a range of learning contexts, offering a varied curriculum and support interventions to address the diverse needs of all learners. In such a system, special schools would provide a supporting role to the centres of learning.⁸⁷ Evidently, the resulting approach adopted in WP 6 and the SIAS as highlighted above did not achieve this goal.

In addition to disability, WP 6 recognises a range of "learning needs" that have the potential to cause the exclusion of learners from education. These needs are similar to the barriers to learning identified in the NCSNET/NCESS report,⁸⁸ suggesting that "learning needs" as used in WP 6 refer to "barriers to learning" as conceptualised by the NCSNET/NCESS. WP 6 also recognises that the learners who are most vulnerable to barriers to learning and exclusion are those with disabilities and impairments, and on that premise the Policy focuses mainly on children with disabilities.⁸⁹ Arguably the

⁸² Howell and Lazarus "Education White Paper 6" 31.

⁸³ NCSNET and NCESS *Quality Education for All* 11-51.

⁸⁴ NCSNET and NCESS *Quality Education for All* 11.

⁸⁵ NCSNET and NCESS *Quality Education for All* 11.

⁸⁶ NCSNET and NCESS *Quality Education for All* 12.

⁸⁷ NCSNET and NCESS *Quality Education for All* ii & 56.

⁸⁸ DoE *Education White Paper 6* 17; OECD *Review: South Africa* 67; NCSNET and NCESS *Quality Education for All* 23-40.

⁸⁹ DoE *Education White Paper 6* 18.

eventual exclusive focus in WP 6 on the education of learners with disabilities is attributable to the aforementioned substitution of "barriers to leaning" with "learning needs".

There is, indeed, a "subtle but important distinction between ensuring that the [Policy] reaches and benefits the most vulnerable learners (i.e. learners with disabilities) and limiting the focus of inclusive education to only being about learners with disabilities".⁹⁰ Though these distinctions seem merely semantic, in effect they fail to give full meaning to the new paradigm envisaged by the NCSNET/NCESS.⁹¹ This is because the concept of "learning needs" as used in WP 6 does not move far enough from the learner deficit theory so as to contemplate a barrier outside of the learner (such as his or her socioeconomic circumstances or physical environment), because "needs" inevitably invoke ownership - that is, whose needs?

4 The implementation of inclusive education: immediate or progressive?

WP 6 highlights the fact that the contextual (economic) realities of South Africa necessitate a progressive approach to the realization of education for all.⁹² The pathway to inclusive education according to WP 6 is therefore set on a progressive realisation platform typified by a three-phased implementation plan. The three phases entail the taking of short-term steps that were contemplated for 2001-2003, medium-term steps in 2004-2008, and long-term steps in 2009-2021.⁹³ The plan provides for the designation of schools to be converted into full service schools, starting with 30 and progressing to 500. The Policy stipulates that the eventual number of full-service schools will be determined by need and the availability of resources.⁹⁴ The progressive realisation approach is also reflected in the funding strategy, which is predicated upon the need to make more use of the existing resources, and the imminent possibility of inadequate budgetary allocations in the existing fiscal environment.⁹⁵

⁹⁰ Howell and Lazarus "Education White Paper 6" 32.

⁹¹ Howell and Lazarus "Education White Paper 6" 31-32.

⁹² DoE *Education White Paper 6* 12, 38.

⁹³ DoE *Education White Paper 6* 41.

⁹⁴ DoE *Education White Paper 6* 22, 23.

⁹⁵ DoE *Education White Paper 6* 37. The approach of WP6 to inclusive education is largely drawn from the *Salamanca Statement*, especially paras 8-10.

Criticism of the government's commitment to the realisation of the right to basic education in South Africa has concentrated mainly on the issue of "free" basic education, particularly on the constitutionality of the fee-paying approach to financing basic education in South Africa.⁹⁶ The origins of the current school fee framework in South Africa are traceable to the recommendations of the Review Committee on the Organisation, Governance and Funding of Schools as captured in Education White Paper 2.⁹⁷ The Committee recommended a "financial system for public schools based on partnership between the government and communities, on the basis that nothing else is affordable in the present conditions".⁹⁸ It was pointed out that this proposal was likely to compromise the commitment to free and compulsory schooling. In rebuttal, the Review Committee argued that the goal of free and compulsory education was to ensure that no child was denied access to a minimum quality of basic education, and that for as long as children below the fee threshold could be admitted to school, then there was no breach of this provision. In fact, the Review Committee was of the view that the approach would "ensure that free and compulsory education is available to all *who require it*".⁹⁹

Generally, socio-economic rights such as the right to education are subject to progressive realisation.¹⁰⁰ However there is widespread acceptance at the international level that children's right to primary education is not subject to progressive realisation.¹⁰¹ Primary education is also considered to be a minimum core obligation for all states, and therefore there is a duty upon states to implement it immediately.¹⁰² The duties in respect of the right to primary education include granting it priority in resource allocation and implementation, taking immediate (as opposed to progressive) measures towards the realisation thereof, and providing the service free of charge.

⁹⁶ The fee debate is captured in Roithmayr 2003 *SAJHR*; Veriava 2007 *SAJHR* 180; Woolman and Bishop "Education" 57.

⁹⁷ DoE *Education White Paper 1* Part 5.

⁹⁸ DoE *Education White Paper 1* para 5.1.

⁹⁹ DoE *Education White Paper 1* para 5.19 (emphasis mine).

¹⁰⁰ Progressive realisation means that concrete incremental steps are taken towards the fulfilment of the right in question.

¹⁰¹ Coomans "In Search of the Core Content of the Right to Education" 10; Ssenyonjo *Economic, Social and Cultural Rights* 389.

¹⁰² *CESCR General Comment No 13: The Right to Education* (1999) para 51.

Arguably, also, the "unqualified" nature of the right to basic education under section 29 of the *Constitution* applies both to the elimination of fees and to the availability of education infrastructure.¹⁰³ It would also be unreasonable to suggest that some children with disabilities should wait for 20 years (the lifespan of WP 6 and in terms of which inclusive education is to be attained) for a suitable school to be provided in order for them to have access to proper education.¹⁰⁴ Such an approach would be tantamount to condemning the vulnerable to pay the price of the fiscal burden imposed on all, and would be both unreasonable and unjustifiable.¹⁰⁵

Furthermore, children's rights under section 28 of the *Constitution* have been interpreted as containing "no internal limitation subjecting them to availability of resources and legislative measures for their progressive realization".¹⁰⁶ The right to education is not addressed in this provision.¹⁰⁷ There is, however, no reason why an approach similar to the one adopted in respect of other provisions on children such as section 29 cannot be applied.¹⁰⁸ It is not contested that a progressive approach as proposed in WP 6 (that is, to progressively develop inclusive education infrastructure) limits the right to basic education. What remains to be established is whether or not this limitation is legitimate in terms of section 36 of the *Constitution*. One of the requirements for a justified limitation is that such a limitation be by a law of general application.¹⁰⁹ The limitation in the present case is based solely on a policy document, that is, WP 6, which does not satisfy the section 36 criterion because it is a Policy as opposed to a law and cannot therefore provide a justifiable limitation.¹¹⁰

However, the Constitutional Court has argued that children's rights do not have absolute priority over other rights under the *Constitution*. In the *Grootboom* case the

¹⁰³ Woolmal and Bishop "Education" 57-11; Viljoen *International Human Rights Law in Africa* 549.

¹⁰⁴ Sloth-Nielsen and Kruuse 2013 *Int'l J Child Rts* 657.

¹⁰⁵ Sloth-Nielsen and Kruuse 2013 *Int'l J Child Rts* 657.

¹⁰⁶ *Centre for Child Law v MEC for Education* 2008 1 SA 223 (TDP) para 15.

¹⁰⁷ S 28 of the *Constitution*.

¹⁰⁸ It is argued that the guarantee of "basic" entitlements under s 28 of the *Constitution* is partly necessitated by the vulnerability of childhood. Currie and De Waal *Bill of Rights Handbook* 602-603; and Liebenberg *Socio-economic Rights* 233-234. Arguably, the significance of basic education for the full development of the child ought to be accorded similar protection.

¹⁰⁹ S 36(1) of the *Constitution*.

¹¹⁰ See Liebenberg *Socio-economic Rights* 94; Currie and De Waal *Bill of Rights Handbook* 169; Woolman and Bishop "Education" 57-14; Boezaart 2012 *SAPL* 468.

Constitutional Court was of the view that it is unacceptable that the rights of children (particularly via section 28 of the *Constitution*) should trump the progressive realisation approach under the *Constitution*.¹¹¹ The Constitutional Court also seems to have shunned the application of the minimum core approach, in terms of which it is incumbent upon the state to guarantee free and compulsory primary education immediately.¹¹² Essentially, therefore, it is possible to justify a progressive approach to the realisation of inclusive education.

4.1 Does the immediate nature of state responsibilities for basic education apply to inclusive education?

Both the CRC and the ICESCR establish a duty to provide free and compulsory primary education. Article 28(1) of the CRC recognises the right of children to education "with a view to achieving [it] progressively". Article 13(2) (a) of the ICESCR provides for the duty to ensure primary education that is compulsory and freely available to all. When read together with Articles 2(1) and 14, however, the right to primary education under the ICESCR is subject to progressive realisation.¹¹³ Article 14 particularly requires state parties to the ICESCR to provide a plan for the progressive implementation of free and compulsory primary education within a reasonable number of years, which period is to be set in the plan. One can therefore argue that on a strictly textual basis, the right to free and compulsory primary education under these two treaties is subject to progressive realisation.

The prevailing view at the international level that state obligations for primary education are immediate has developed through interpretation by both the CESCR and the CRC Committee through General Comments and concluding observations on state party reports.¹¹⁴ Whether or not the jurisprudence of the CESCR and CRC Committees on the right to education in general can be deemed to form part of international law

¹¹¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 71.

¹¹² *CESCR General Comment No 13: The Right to Education* (1999) para 51.

¹¹³ Beiter *Right to Education* 516. The prospect of the immense responsibility of the state to implement the right to primary education immediately under the CRC triggered reservations to Article 28 from some states. See UN Treaty Collection 2014 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

¹¹⁴ *CESCR General Comment No 13: The Right to Education* (1999) para 51.

is therefore a decisive factor in determining the nature of the obligations of a state under the provision.

General Comments expound on specific provisions of international instruments but are not binding.¹¹⁵ Nevertheless, the General Comments and concluding observations of the respective Committees have substantial jurisprudential and guiding value that must be duly acknowledged.¹¹⁶ The near universal ratification of the CRC and the wide acceptance of the standards established under the ICESCR could also support the view that the jurisprudence of the Committees does amount to international law. Indeed, the understanding of the duty of all states to provide free and compulsory primary education has been widely endorsed and propagated by national and international legal instruments, judicial decisions, and the works of renowned writers on human rights.¹¹⁷ These works are of great persuasive value in terms of Article 38 of the *Statute of the International Court of Justice*, and constitute a source of international law.¹¹⁸

It is also clear from the *travaux preparatoires* of the CRPD that Article 24 was intended to be subject to progressive realisation along with other socio-economic rights under the Convention.¹¹⁹ In terms of Article 4(2) of the CRPD, state parties "undertake to take measures to the maximum of their available resources and where needed, within the framework of international cooperation, with a view to achieving progressively the full realization" of socioeconomic rights including the right to education. however the

¹¹⁵ Steiner and Alston *International Human Rights* 732; Reidel "Economic, Social and Cultural Rights" 144. Reidel also argues that whereas the application of the principles established in General Comments is voluntary, generally there is little opposition to the interpretations of the rights as espoused therein. Verheyde "Convention on the Rights of the Child" 90; and Verheyde *Article 28* 4, further emphasise the "great moral authority" of General Comments.

¹¹⁶ Rehman *International Human Rights Law* 86.

¹¹⁷ Such as Ssenyonjo *Economic, Social and Cultural Rights* 389; and Beiter *Right to Education* 48.

¹¹⁸ A 38 of the *Statute of the International Court of Justice* (1945) lists the sources of international law. According to a 38(d), judicial decisions and writings of publicists in various countries are subsidiary means of determining the rule of law.

¹¹⁹ During the drafting of a 24 of the CRPD, there were frequent references to the inclusion of a clause on the progressive realisation of the right to education. It was finally agreed that the clause on progressive realisation was better addressed in a general clause, which turned out to be the current a 4(2). See AHC 2005 <http://www.un.org/esa/socdev/enable/rights/ahc6reporte.htm> para 31, where the AHC noted that it was generally agreed that rather than qualify the obligations of the state in a 24, the issue of progressive realisation was to be dealt with in an earlier general provision that applied to the whole Convention including the Article on education.

provision does not apply to immediate obligations for socioeconomic rights that are established in international law.¹²⁰

Notably also, throughout the negotiation of Article 24, the progressive nature of the obligations in respect of primary education was constantly highlighted, suggesting that state parties were either oblivious of (which is unlikely) the jurisprudence on the immediacy of their obligations, or consciously endorsing a different standard with respect to the primary education of children with disabilities.¹²¹ In addition, the ultimate removal of the progressive realisation clause from the final wording of the provision was not prompted by the acceptance of an already established immediate responsibility to provide free primary education, but rather by an agreement that the progressive nature of socio-economic rights should be addressed in a general clause, is Article 4(2) of the Convention.¹²² Such a general clause would apply to all rights including those under Article 24. This suggests that there was an almost explicit intention to make the right to primary education under the CRPD subject to progressive realisation.

However, such a conclusion is inconsistent with the expressed intention of Article 24(2)(b), which is to provide education for children with disabilities on an equal basis with others in the communities in which they live. This inherent inconsistency notwithstanding, the dominant theme of the provision is to ensure that children with disabilities have access to free and compulsory education on terms similar to those provided for other children. The clause nullifies the justification for the progressive establishment of inclusive schools where the state is already implementing free and compulsory primary education for other children.¹²³ The equality basis also means that measures taken towards improving the education of children with disabilities cannot

¹²⁰ A 4(2) of the CRPD.

¹²¹ AHC 2004 <http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm> para 38. According to the report, Kenya, Sierra Leone and Thailand proposed the inclusion of progressive realisation in a 17(1) (now 24(1)).

¹²² AHC 2005 <http://www.un.org/esa/socdev/enable/rights/ahc6reporte.htm> para 9.

¹²³ The difficulty with differentiating obligations of an immediate nature from those that are subject to progressive realisation is the fact that many of the rights contain aspects of both. See Quinn "Short Guide to the United Nations Convention" 101.

be prioritised over those of other children in the community. The balancing affects both groups.

If it is therefore accepted that if the implementation of the right to "free and compulsory primary education" yields immediate obligations, then inclusive free and compulsory primary education as envisaged under the CRPD ought to be excluded from progressive realisation. This means that WP 6 and the progressive approach to the realisation of inclusive education as conceptualised therein are out of step with both the *Constitution* and international human rights standards.

5 Inclusive basic education in South Africa versus inclusive education under the CRPD

Article 24(1) of the CRPD is drawn largely from existing international instruments, especially the CRC and the ICESCR.¹²⁴ The Article adds to the pre-existing aims of education, the duty to ensure that education is directed towards the full development of the human sense of dignity and self-worth, and the development of the "creativity" of persons with disabilities. The requirement that education be directed towards the development of respect for human diversity is also new. In view of the connection between the aims of education and the content of education,¹²⁵ these additions could impact upon the existing scope of state obligations in respect of the right to education and hence the conceptualisation of inclusive education.

Article 24(2) sets out guiding principles as to how the right to education is to be implemented in order to achieve the aims envisaged in Article 24(1).¹²⁶ Article 24(3) addresses the right of persons with disabilities to learn life and social development skills in order to facilitate their full and equal participation in education and as members of society, while Article 24(4) sets out state obligations in respect of the

¹²⁴ The Ad Hoc Committee noted that a 24 draws on a 13(1) of the *International Covenant on Economic and Social and Cultural Rights* (1966) (ICESCR) and 29(1) of the CRC by selecting the aspects of both that are relevant to persons with disabilities. See UN date unknown <http://www.un.org/esa/socdev/enable/rights/ahcstata24wgtext.htm> fn 57; Byrne "Minding the Gap?" 432.

¹²⁵ See generally *CRC General Comment No 1: The Aims of Education – Article 29* (2001) in this regard.

¹²⁶ The first sentence of a 24(2) states that "in realizing this right, State Parties shall..." The framing of this sentence is the clearest indication that the principles are a pathway through which the right as established in a 24(1) is to be achieved.

training and employment of teachers, including teachers with disabilities, and other staff and professionals working at all levels of education. Finally, Article 24(5) provides for the right of persons with disabilities to access various forms of tertiary education and lifelong learning.

Inclusive education as envisaged under the CRPD is therefore the combination of all the factors in Article 24 as opposed to any one aspect thereof, and taking into account the other principles of the CRPD. It is also imperative to note that though Article 24 of the CRPD calls for inclusive education, the concept is not limited to children or persons with disabilities. As earlier said, the inclusive education philosophy posits that education ought to be accessible to all in society. It would therefore be inappropriate to regard Article 24 as a universal definition of inclusive education with application to all excluded groups. Rather, the Article sets out the parameters of inclusive education that caters for persons with disabilities.

The essence of Article 24(1) is that states have to legislate for the free and compulsory primary education of children with disabilities, and to ensure that the education of children with disabilities is part and parcel of the national general education management. To ensure non-exclusion from the general education system, the education of children with disabilities ought to be part of the overall management of education, and within the responsibilities of national education management authorities. It is particularly essential to factor in the education of children with disabilities into the planning of free and compulsory primary education.

The duty to ensure that children with disabilities can access inclusive and quality free primary education requires the elimination of barriers to access, and enabling the exercise of a choice of an education system for children with disabilities. The duty to ensure quality is a safeguard for the standards of education given to children with disabilities, particularly in the light of the history of their relegation to the peripheries of quality education through the emphasis on vocational training.

Article 24(2)(b), which calls on state parties to ensure that children with disabilities can access inclusive quality and free education, addresses both the content and location of education. As indicated earlier, however, Article 24(2) prefers the

integration of learners into the mainstream education system, which means that it is essential for teachers to have the requisite training to enable them to respond to the diverse needs of all learners within the general education system. The Article also establishes a duty to provide individual responses to the needs of learners in the education system. In view of the range of needs of every individual, reasonably accommodating such needs demands flexibility and availability of resources.

As far as the provision of support measures in education is concerned, it is acknowledged that they are an integral component of all education systems.¹²⁷ The ambit of support measures ought to be understood to include the measures necessary to facilitate the effective education of children with disabilities, which are highly specialised and technical and mostly located in various professional disciplines. It is therefore difficult to exhaustively catalogue the kind of responses that would satisfy the requirement of the provision of support services under Article 24(2) of the CRPD. The law must provide the framework within which the support can be provided and accessed.

Finally, Article 24(2)(d) and (e) addresses the aspect of alternative locations for the education of children with disabilities, that is, whether in the ordinary school or in a specialised school. Essentially, the Article establishes a basis for choice between systems. Choice is not new in the context of the right to education.¹²⁸ Indeed, the free choice of education without interference by the state or by a third person is one of the four elements of the core content of the right to education recognised by the CESCR.¹²⁹ However, the principle of choice in education is often assumed to be parents' choice of appropriate moral or religious education of their children, and choice between private and public schools.¹³⁰ Arguably, the recognition of the right of individuals and bodies to establish and direct educational institutions under the CRC

¹²⁷ Dekker and Van Schalkwyk *Modern Education Systems* 6, 12; Van Schalkwyk *Education System* 72.

¹²⁸ Nmehielle *African Human Rights System* 130 argues that the right to choice in education is often linked to the parental exercise of freedom of conscience and religion.

¹²⁹ CESCR *Report on the Eighteenth and Nineteenth Sessions* 79.

¹³⁰ Hodgson *Human Right to Education* 189; Beiter *Right to Education* 539. See for instance a 26(3) of the *Universal Declaration of Human Rights* (1948) (UDHR); a 5(1)(b) of the *UNESCO Convention against Discrimination in Education* (1960); a 13(3) of the ICESCR; and a 18(4) of the *International Covenant on Civil and Political Rights* (1966) (ICCPR).

is aimed at guaranteeing such choice.¹³¹ The critical question in the light of the requirements of the CRPD is if this freedom of choice in education can be extended to choice between the regular and special schools for children with disabilities. Only an affirmation of this interpretation would guarantee the full implementation of Article 24. However, the implication of such an affirmation would be that by virtue of the recognition of the need to provide special education sufficient to sustaining equal choice, state parties to the CRPD would have to undertake to provide well equipped special schools to facilitate the exercise of choice for all learners, particularly those with sensory disabilities. The cost implications of this responsibility would be enormous, and they would to a large extent be discordant with the utilitarian and economic arguments put forth in support of inclusive education.

Recalling the preceding discussion on the conceptualisation of inclusive education in South Africa, some parallels can be drawn with the CRPD's conceptualisation. First, both the CRPD and WP 6 seem to confine inclusive education to the education of children or persons with disabilities. Secondly, while there is an apparent recognition of the need to provide free and compulsory primary education to children with disabilities on a basis of equality with other children in the communities in which they live, both the CRPD and WP 6 seem to tacitly allow the progressive realisation of inclusive education. Further, inclusive education as conceptualised in both WP 6 and its supporting SIAS programme, and in Article 24 of the CRPD are in large part concerned with the inclusion of children with disabilities into the mainstream classroom. Nevertheless, it is possible to consider inclusive education under the CRPD as only one facet of inclusion that can be supplemented by other approaches relative to other groups, such as, girls or cultural minorities. If it is so understood, WP 6 falls short of establishing a comprehensive inclusion framework in education as intended by the NCSNET/NCESS.

A further difference, albeit a subtle one, is the manner in which the need for disability-specific support is applied in the CRPD and in WP 6. In the CRPD the level of support necessary to facilitate learning for a child with disabilities seems less important to the

¹³¹ A 29 of the CRC.

choice of an appropriate placement of a learner with disabilities in the education system. In WP 6 the level of support that a learner needs is the axis for the decision on the appropriate placement for the learner. This distinction is significant because it affects the choices for learners. In the case of WP 6, once the level of support necessary has been determined, little choice is left to the learner on where to study. This is different from the CRPD's approach, which accords a lot of significance to equal choice in education for all children, as highlighted above.

6 Conclusion

Inclusive education has been accepted as the appropriate approach to the education of children with disabilities both at the international level and in South Africa. It is apparent, however, that despite a common basis for inclusive education, that is, to ensure the right to education for children with disabilities, there are significant variations in the conceptualisation and implementation thereof between the CRPD and the South African policy framework. For instance, while the goal of equality in the education of children with disabilities is acknowledged in both the CRPD and WP 6, there are apparent differences in the nature of the envisaged state obligations for the realisation of the right to basic education and for inclusive basic education. Hence while it is generally accepted that the duty to provide free and compulsory education is an immediate one, inclusive education as provided for in both the CRPD and WP 6 is susceptible to an interpretation that subjects it to progressive realisation. However, it has been indicated in this article that such an interpretation conflicts with the core purpose of achieving equality for children with disabilities. It is particularly essential that the implementation of WP 6 takes into account the rights approach to inclusive education, especially the need to give effect to the wishes of the child in respect of a choice between education in the mainstream and in the special education systems.

BIBLIOGRAPHY**Literature**

Beiter *Right to Education*

Beiter KD *The Right to Education in International Law* (Martinus Nijhoff Leiden 2006)

Bekink and Bekink 2005 *Stell LR*

Bekink B and Bekink M "Children with Disabilities and the Right to Education: A Call for Action" 2005 *Stell LR* 125-139

Boezaart 2012 *SAPL*

Boezaart T "A Constitutional Perspective on the Rights of Children with Disabilities in an Educational Context" 2012 *SAPL* 455-472

Byrne "Minding the Gap?"

Byrne B "Minding the Gap? Children with Disabilities and the United Nations Convention on the Rights of Persons with Disabilities" in Freeman M *Law and Childhood Studies* (Oxford University Press Oxford 2012) 419-437

CESCR *Report on the Eighteenth and Nineteenth Sessions*

Committee on Economic Social and Cultural Rights *Report on the Eighteenth and Nineteenth Sessions: Economic and Social Council* (UN New York 1999)

Coomans "In Search of the Core Content of the Right to Education"

Coomans F "In Search of the Core Content of the Right to Education" in Chapman A and Russel S (eds) *Core Obligations: Building a Framework For Economic, Social and Cultural* (Intersentia Antwerp 2002) 217-246

Currie and De Waal *Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2005)

Dekker and Van Schalkwyk *Modern Education Systems*

Dekker E and Van Schalkwyk OJ (eds) *Modern Education Systems*
(Butterworths Durban 1995)

DoE *Education White Paper 1*

Department of Education *White Paper on Education and Training* (The
Department Pretoria 1995)

DoE *Education White Paper 6*

Department of Education *Education White Paper 6: Special Needs Education –
Building an Inclusive Education and Training System* (The Department Pretoria
2001)

Engelbrecht 2006 *EJPE*

Engelbrecht P "The Implementation of Inclusive Education in South Africa after
Ten Years of Democracy" 2006 *EJPE* 253-264

Farrel 2000 *IJIE*

Farrel P "The Impact of Research on Developments in Inclusive Education"
2000 *IJIE* 153-162

Hodgson *Human Right to Education*

Hodgson D *The Human Right to Education* (Ashgate Dartmouth 1998)

Howell and Lazarus "Education White Paper 6"

Howell C and Lazarus S "Education White Paper 6: A Framework for Change or
Limiting New Possibilities?" in Muthukrishna N (ed) *Educating for Social Justice
and Inclusion in an African Context: Pathways and Transitions* (Nova Science
Publishers New York 2008) 25-40

Liebenberg *Socio-economic Rights*

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

Lomofsky and Lazarus 2001 *CJE*

Lomofsky L and Lazarus S "South Africa: First Steps in the Development of an Inclusive Education System" 2001 *CJE* 303-317

Malherbe "Education Rights"

Malherbe R "Education Rights" in Boezaart T (ed) *Child Law in South Africa* (Juta Cape Town 2009) 399-419

McConnachie and McConnachie 2012 *SALJ*

McConnachie C and McConnachie C "Concretising the Right to a Basic Education" 2012 *SALJ* 554-590

NCSNET and NCESS *Quality Education for All*

National Commission on Special Needs in Education and Training and National Committee on Education Support Services *Quality Education for All: Overcoming Barriers to Education and Development: Report of the National Commission on Special Needs in Education and Training (NCSNET) and National Committee on Education Support Services (NCESS)* (Department of Education Pretoria 1997)

Ngwena and Pretorius 2012 *SAJHR*

Ngwena C and Pretorius L "Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*" 2012 *SAJHR* 81-116

Nmehielle *African Human Rights System*

Nmehielle VO *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff Leiden 2001)

Office of the Deputy President *Integrated National Disability Strategy White Paper*

Office of the Deputy President *Integrated National Disability Strategy White Paper* (The Office Pretoria 1997)

OECD *Review: South Africa*

Organisation for European Cooperation and Development *Review of National Policies for Education: South Africa* (OECD Paris 2008)

Quinn "Short Guide to the United Nations Convention"

Quinn G "A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities" in Quinn G and Waddington L (eds) *European Yearbook of Disability Law* (Intersentia Antwerp 2009) 89-114

Rehman *International Human Rights Law*

Rehman J *International Human Rights Law: A Practical Approach* (Pearson Longman Harlow 2003)

Reidel "Economic, Social and Cultural Rights"

Reidel E "Economic, Social and Cultural Rights" in C Krause and M Scheinin (eds) *International Protection of Human Rights: A Textbook* (Abo Akademi Institute for Human Rights Turku 2009) 129-149

Roithmayr 2003 *SAJHR*

Roithmayr D "Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education?" 2003 *SAJHR* 382-429

Seleoane "Right to Basic Education"

Seleoane M "The Right to Basic Education" in Coetzee E and Streak J (eds) *Monitoring Socioeconomic Rights in South Africa: Achievements and Challenges* (IDASA Cape Town 2004) 221-272

Simbo 2012 *LDD*

Simbo C "Defining the Term Basic Education in the South African Constitution: An International Law Approach" 2012 *LDD* 162-184

Sloth-Nielsen and Kruuse 2013 *Int'l J Child Rts*

Sloth-Nielsen J and Kruuse H "A Maturing Manifesto: The Constitutionality of Children's Rights in South African Jurisprudence 2007-2012" 2013 *Int'l J Child Rts* 646-678

Sloth-Nielsen and Mezmur *Free Education*

Sloth-Nielsen J and Mezmur BD *Free Education is a Right for Me: A Report on Free and Compulsory Primary Education* (Save the Children Nairobi 2007)

Ssenyonjo *Economic, Social and Cultural Rights*

Ssenyonjo M *Economic, Social and Cultural Rights in International Law* (Hart Oxford 2009)

Steiner and Alston *International Human Rights*

Steiner HJ and Alston P *International Human Rights in Context: Law, Politics and Morals* (Oxford University Press Oxford 2000)

UNESCO *Expanded Commentary*

UNESCO *Expanded Commentary on the Dakar Framework for Action* (UNESCO Paris 2000)

UNESCO *Guidelines for Inclusion*

UNESCO *Guidelines for Inclusion: Ensuring Access to Education for All* (UNESCO Paris 2005)

UNESCO *Revision of ISCED*

UNESCO *Revision of the International Standard Classification of Education (ISCED), General Conference 36th Session* (UNESCO Paris 2011)

UNESCO Institute for Statistics *ISCED 2011*

UNESCO Institute for Statistics *International Standard Classification of Education: ISCED 2011* (The Institute Montreal 2012)

Van Schalkwyk *Education System*

Van Schalkwyk OJ *The Education System: Theory and Practice* (Alkanto Alkantrant 1992)

Verheyde *Article 28*

Verheyde M *Article 28 (The Right to Education): A Commentary to the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Leiden 2006)

Verheyde "Convention on the Rights of the Child"

Verheyde M "The Convention on the Rights of the Child as a Tool for the Promotion of Education Rights" in Van der Auweraert P *et al* (eds) *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments* (Maklu Antwerpen 2002) 77-96

Veriava 2007 *SAJHR*

Veriava F "The Amended Legal Framework for School Fees and School Funding: A Boon or a Barrier" 2007 *SAJHR* 180-194

Veriava and Coomans "Right to Education"

Veriava F and Coomans F "The Right to Education" in Brand D and Heyns C (eds) *Socioeconomics Rights in South Africa* (PULP Pretoria 2005) 57-84

Viljoen *International Human Rights Law in Africa*

Viljoen F *International Human Rights Law in Africa* (Oxford University Press Oxford 2012)

Wakefield and Murungi "Domesticating International Standards on Education"

Wakefield L and Murungi LN "Domesticating International Standards of Education for Children with Intellectual Disabilities: Case Study of Kenya and South Africa" in Groeblaar du Plessis I and Van Reenen T *Aspects of Disability Law in Africa* (PULP Pretoria 2011) 133-158

WHO and World Bank *World Report on Disability*

World Health Organisation and World Bank *World Report on Disability* (WHO Geneva 2011)

Woolman and Bishop "Education"

Woolman S and Bishop M "Education" in Woolman S *et al Constitutional Law of South Africa* (Juta Cape Town 2010) ch 57

Woolman and Fleisch "Constitution in the Classroom"

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

Case law

Centre for Child Law v Government of the Eastern Cape Province (ECB) unreported case number 504/10 of 2011

Centre for Child Law v MEC for Education 2008 1 SA 223 (TDP)

Centre for Child Law v Minister of Basic Education 2013 3 SA 183 (ECG)

Minister of Health v Treatment Action Campaign No. 2 2002 5 SA 721 (CC)

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

Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC)

Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa 2011 5 SA 87 (WCC)

International law instruments

Convention on the Rights of Persons with Disabilities (2006)

Convention on the Rights of the Child (1990)

CESCR General Comment No 3: The Nature of States Parties Obligations (1990)

CESCR General Comment No 5: Persons with Disabilities (1994)

CESCR General Comment No 13: The Right to Education (1999)

CRC General Comment No 1: The Aims of Education – Article 29 (2001)

CRC General Comment No 9: The Rights of Children with Disabilities (2006)

CRPD Concluding Observations: Spain CRPD/C/ESP/CO/1 (2011)

CRPD Concluding Observations: Argentina CRPD/C/ARG/CO/1 (2012)

CRPD Concluding Observations: China CRPD/C/CHN/CO/1 (2012)

Dakar Framework for Action: Education for All – Meeting Our Collective Commitments (2000)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic and Social and Cultural Rights (1966)

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)

Salamanca Statement and Framework for Action on Special Needs Education (1994)

Standard Rules on Equalisation of Opportunities for Persons with Disabilities A/RES/48/96 (1993)

Statute of the International Court of Justice (1945)

UNESCO Convention against Discrimination in Education (1960)

UNESCO World Declaration on Education for All (1990)

Universal Declaration of Human Rights (1948)

Legislation

Constitution of the Republic of South Africa, 1996

South African Schools Act 84 of 1996

Internet sources

AHC 2004 <http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm>

Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities 2004 *Report of the Sixth Session* <http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm> accessed 24 October 2014

AHC 2005 <http://www.un.org/esa/socdev/enable/rights/ahc6reporte.htm>

Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities 2005 *Report of the Sixth Session* <http://www.un.org/esa/socdev/enable/rights/ahc6reporte.htm> accessed 24 October 2014

UN date unknown <http://www.un.org/esa/socdev/enable/rights/ahcstata24wgtext.htm>

UN date unknown *Working Group Draft Text: Article 17 - Education* <http://www.un.org/esa/socdev/enable/rights/ahcstata24wgtext.htm> accessed 3 November 2013

UN Treaty Collection 2014 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

UN Treaty Collection 2014 *Status: Convention on the Rights of the Child* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en accessed 24 October 2014

LIST OF ABBREVIATIONS

AHC	Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities
CESCR	Committee on Economic Social and Cultural Rights
CJE	Cambridge Journal of Education
CRC Committee	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child (1989)
CRPD Committee	Committee on the Rights of Persons with Disabilities
CRPD	Convention on the Rights of Persons with Disabilities (2006)
DoE	Department of Education
EJPE	European Journal of Psychology of Education
GET	General education and training
ICCPR	International Covenant on Civil and Political Rights (1966)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
Int'l J Child Rts	International Journal of Children's Rights
IJIE	International Journal of Inclusive Education
LDD	Law, Democracy and Development
NCESS	National Committee on Education Support Services
NCSNET	National Commission on Special Needs in Education and Training
OECD	Organisation for European Cooperation and Development
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPL	SA Publikereg/SA Public Law
SASA	South African Schools Act 84 of 1996
SIAS	National Strategy on Identification, Assessment and Support (2005)
SNE	Special needs education

Stell LR	Stellenbosch Law Review
UDHR	Universal Declaration of Human Rights (1948)
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WHO	World Health Organisation
WP 1	Education White Paper 1: Education and Training (1995)
WP 6	Education White Paper 6: Special Needs Education (2001)