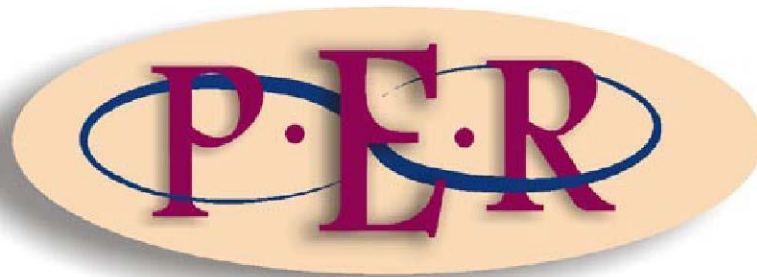


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REALISATION OF A CHILD'S RIGHT TO A BASIC EDUCATION IN THE SOUTH AFRICAN SCHOOL SYSTEM: SOME LESSONS FROM GERMANY

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It is a greater work to educate a child, in the true and larger sense of the word, than to rule a state.¹

1 Introduction

Education has, since the beginning of time, been regarded as the formal process by which society conveys its accumulated knowledge, skills, customs and values from one generation to another. Today, education is a human right, and the right to education and specifically the right to (a) basic education is acknowledged and emphasised worldwide.² In South Africa the right to a basic education is entrenched in the *Constitution of the Republic of South Africa, 1996* (hereafter "the *Constitution*") and is regarded as one of the most crucial constitutional rights, particularly because it promotes economic and social well-being.

Section 29 of the Bill of Rights in the *Constitution* guarantees the right to a basic education. The state is required to "protect, respect, promote and fulfil" the right to education.³ This can be done only if laws and regulations are passed by government, policies are developed, and relevant programmes are established. The right to

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¹ Channing *Works* 379.

² It is important to note that most of the resources used in this article refer to "a right to education". However, the *Constitution* refers to "a right to a basic education". For the purposes of this article (and to be consistent and in line with the *Constitution*), the author will refer to "a right to a basic education".

³ It is important to differentiate between "the right to education" and the "right to a basic education". The right to education is "broader" than the right to a basic education, since the right to a basic education refers only to a person's basic learning needs (such as literacy, expression, numeracy and problem solving) and the basic learning content (such as knowledge, skills, values and attitudes). The right to education is a universal entitlement to education and also includes the responsibility to provide basic education for all individuals. In other words, the right to education is not restricted to basic education: it is something more – it is a tool that improves the quality of life. (See, in general, UNESCO 2000 <http://www.unesco.org/education/wef/en-conf/Jomtien%20Declaration%20eng.shtm>).

education is justiciable and the state can therefore be confronted and challenged in court if it does not succeed with its constitutional obligations regarding education.⁴

Education is also regarded as one of the most valuable requirements pertaining to global progress and advancement. Not only does it equip the learner with the necessary abilities and skills for a meaningful occupation, but it is also a suitable instrument to convey the fundamental tone of a human rights culture to a young and upcoming generation. Moreover, education is a way to set people free from their lack of knowledge, false notions and fear. Education furnishes people with dignity, self-respect and self-assurance, and is an important basic human right on which the realisation and fulfilment of other rights depend.⁵

Education and the right to a basic education are not only of cardinal importance on a national level, but also on an international level. Many national constitutions worldwide make provision for the right to (a basic) education. One can thus say that meaningful and significant existence is dependent worldwide on education.

The South African school system is crippled by a myriad of unfavourable challenges, situations and circumstances. These include inequalities in the school environment, the lack of quality education in a safe environment, insufficient funds for the provision of basic education, inadequate buildings, a shortage of qualified and skilled educators, and the inability of the school system to cater for learning differences, to mention only a few. Many of these challenges, situations and circumstances are frustrating and solutions have been sought diligently – many with success and many without success.

Thus, the South African school system is suffering a great ordeal. This was confirmed by the South African Minister of Basic Education, Mrs Angie Motshekga, when she stated the following: "Let's face it: Education is in a severe crisis. We have

⁴ Pendlebury 2008/2009 *SACG* 25.

⁵ Oosthuizen and Rossouw 2001 *Koers* 656; also see Devenish *Constitution* 153.

a big problem".⁶ Moreover, there seems to be a strong increase in the percentage of school dropout rates⁷ as well:⁸

Table 1: Percentage school dropout rates for various grades

Year	Grade 2 enrolment (2000; 2001; 2002; 2003)	Grade 10 enrolment (2008; 2009; 2010; 2011)	Grade 11 enrolment (2009; 2010; 2011; 2012)	Grade 12 enrolment (2010; 2011; 2012; 2013)	% dropout rate(s) Grades 10-12
2010	1 090 765	1 076 527	881 661	579 384	-46%
2011	944 977	1 017 341	841 815	534 498	-47%
2012	1 012 892	1 039 762	847 738	551 837	-47%
2013	1 111 858	1 094 189	874 331	576 490	-49%

It is clear from Table 1 that the school dropout rates increase almost every year. It is also expected that the dropout rate for 2014 will be higher than in 2013 (the statistics for 2014 have not yet been finalised).

One can therefore argue that it is obvious that drastic action should be taken in order to save the school system from further downfall and destruction. It appears that the mainstream school system in South Africa does not function satisfactorily and that other alternatives (and possibly another school system) should be considered.

The focus in this article falls on the questions of whether the current South African school system sufficiently realises the constitutional rights of learners and whether an alternative school system could lead to the increased fulfilment and realisation of South African children's rights (with a specific focus on the rights to a basic

⁶ Nel 2014 <http://www.netwerk24.com/nuus/2014-12-06-onderwys-in-groot-krisis-s-angie>.

⁷ "Dropout rates" refers to the percentage of children who do not complete school. Also see the discussion in para 4.2.3 and para 5 below.

⁸ Louw 2015 <http://www.equaleducation.org.za/article/2015-01-02-on-the-upcoming-2014-matric-results>.

education, equality and dignity). The article therefore deals with the "acceptability" (see paragraph 2.2 below) of the South African school system.

The following issues are discussed in this article: The right to a basic education, related constitutional rights, the German tripartite school system with its focus on the individual and learning differences, the South African school system with its focus on mainstream education, and relevant international instruments.

The German school system was selected for the purposes of this article in order to illustrate that a tripartite school system (as in Germany) can be to the benefit of all learners if such a system is applied properly and with due care. A tripartite school system provides for learners' diverse individual learning backgrounds, as well as their different learning aptitudes, skills, talents and interests. Such a school system would certainly be beneficial for a diverse country such as South Africa.

It should be kept in mind that Germany has one of the world's best education systems and is one of today's most important industrial nations – thanks to its education system that is flexible and that properly provides for diversity (also see paragraph 4.1.7 below). Therefore, South Africa can learn some valuable lessons from Germany with regard to Germany's tripartite school system and education rights.⁹

2 The right to a basic education in South Africa

The right to a basic education is enshrined in section 29(1)(a) of the *Constitution* – for both adults and children. Section 29 consists of a group of education rights and is also known as a "hybrid" right because section 29(1) typifies the socio-economic nature of the right, while sections 29(2) and (3) are categorised as civil and political rights. There is an obligation on the state in terms of section 29(1) to make education available and accessible to everyone; the *Constitution* explicitly guarantees the right to a basic education.¹⁰ However, it is important to note that section 29 does not specify the content and quality of the education that the state

⁹ It must be kept in mind that Germany has 16 different states (Länder) and a full discussion of the educational situations in all of these states does not fall within the scope of this article.

¹⁰ Arendse 2011 *PELJ* 97.

must provide,¹¹ nor has the South African Constitutional Court considered the scope and content of the right to a basic education.¹² One should also note that section 29 does not refer to all universally accepted education rights.¹³ Free and compulsory education does not form part of the right to a basic education, although provision is made for compulsory education in section 3(1) of the *South African Schools Act*.¹⁴ There is also no explicit right of equal access to educational institutions, but it can be assumed that this right is absolutely and completely enclosed and protected by section 9 of the *Constitution*, which specifically deals with equality.¹⁵

An important question pertaining to section 29 is:

[D]oes section 29 promise merely a place to go to school, or does it provide for an 'adequate' education?¹⁶

It is submitted that the right to a basic education compels the state to provide adequate education in order for the right to be enjoyed and fulfilled.¹⁷ The right to a basic education can therefore be described as:

... an unqualified right requiring the priority attention of the State, also in respect of budgetary allocations. This requires the State to provide sufficient schools, educators and support, and other incidental services in order to ensure reasonable access to basic education for everybody. The right refers to education up to a level of functional literacy, in other words, reading, writing, arithmetic, and an elementary knowledge or awareness of economics, culture and politics.¹⁸

With regard to the meaning of "adequate" education, Malherbe submits as follows:¹⁹

In the South African context 'adequate' education could refer to a standard of education that empowers people to rise above the poverty cycle and compete effectively in the labour market, enables people to understand and enjoy their

¹¹ Taiwo *Implementation of the Right to Education* 116.

¹² Arendse 2011 *PELJ* 98.

¹³ Universally accepted rights are the following: the right to education, equal access to educational facilities, freedom of choice, education in the language of one's choice, the right to establish private educational institutions, availability, accessibility, acceptability and adaptability. Also see Malherbe "Education Rights" 400-402.

¹⁴ *South African Schools Act* 84 of 1996.

¹⁵ Malherbe 2000 *EJELP* 51. With regard to the right to education for the "girl child", see Mwambene "Girl Child's Right to Education" 219-235.

¹⁶ Taiwo *Implementation of the Right to Education* 116.

¹⁷ See, in general, *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) paras 8-9.

¹⁸ Taiwo *Implementation of the Right to Education* 117.

¹⁹ Malherbe 2008 *TSAR* 274-275.

newly acquired democratic values, rights and freedoms, encourages people to participate in and protect the fledgling democratic system, and enhances their dignity and feeling of self-worth as human beings.

The right to a basic education is also a second-generation right and gives "manifest expression to essentially first generation rights".²⁰ The enforcement of second-generation rights is problematic, however, and specific questions must be asked. Firstly, what precisely is meant by "basic education", and, secondly, can the state be held liable by a court of law to provide adequate basic education for individuals?²¹

2.1 What precisely is meant by "basic education"?

It is difficult to determine the exact or precise meaning of the term "basic education". However, before the concept of basic education can be explained, it is necessary to define "education". Education can be defined as follows:²²

Education in its broadest, general sense is the means through which the aims and habits of a group of people [live] on from one generation to the next. Generally it occurs through any experience that has a formative effect on the way one thinks, feels, or acts. In its narrow, technical sense, education is the formal process by which society deliberately transmits its accumulated knowledge, skills, customs and values from one generation to another.

The concept of "basic education" can be explained as follows:²³

Basic education is that whole range of educational activities in different settings that aim to meet basic learning needs. It comprises both formal schooling (primary and sometimes lower secondary) and a variety of non-formal, informal, public and private educational activities offered to meet the defined basic learning needs of people of all ages.

It can therefore be submitted that the difference between basic education and education is that basic education focuses on the "stage" when children first start learning (their basic learning needs), and education focuses on the overall transmission of aims, values and habits from one generation to another.

The concept of basic education can also be defined as follows:

²⁰ Devenish *Bill of Rights* 398.

²¹ Devenish *Bill of Rights* 398.

²² Dewey *Democracy and Education* 1-4.

²³ HSRC and EPC *Report on Education* 141.

[D]aardie tipe opvoedende onderwys wat 'n leerder ontvang en wat hom [en haar] toerus met die basiese vaardighede van funksionele geletterdheid (wat die basiese vaardighede van lees, skryf en rekenkunde insluit) sowel as 'n basiese kennis en bewustheid van ekonomie, kultuur en politiek.²⁴

With regard to the interpretation of the concept of basic education, the Department of Education noted the following in its White Paper on Education and Training:²⁵

Basic education is a flexible concept which must be defined so as to meet the 'learning needs appropriate to the age and experience of the learner, whether child, youth or adult ...', and should also provide access to nationally recognised qualifications.

The term "basic education" in section 29(1) of the *Constitution* must therefore be construed in the light of what the state can afford. In other words, basic education should fulfil the "learning needs appropriate to the age and experience of the learner, whether child, youth or adult".²⁶ As already mentioned, section 29(1)(a) of the *Constitution* does not stipulate that all education is free and compulsory. It does, however, make provision for the educational rights of impoverished children and does not "preclude a sliding scale of fees" in relation to parents' children who are enrolled at public schools.²⁷

There are several academics and scholars who argue that the South African definition of basic education is too narrow. The reason for this argument is simple: Learners who barely completed Grade 9 are not properly equipped with the necessary knowledge, skills and experience to "tackle" the outside world.²⁸ The consequence of this is that they will be unable to develop to their full potential, to live and work with dignity, pride and self-respect, and to improve the quality and virtues of their lives.²⁹ It is submitted that basic education should include the whole schooling career of a learner. That is, basic education should not be defined in terms

²⁴ Oosthuizen and Rossouw 2001 *Koers* 662.

²⁵ The *White Paper on Education and Training* was published on 15 March 1995 (Gen N 196 in GG 16312 of 15 March 1995) in terms of the obligations under s 32(a) of the Interim *Constitution of the Republic of South Africa* 200 of 1993.

²⁶ Bray "South African Schools Act" 279.

²⁷ Devenish *Bill of Rights* 400.

²⁸ See para 4 below for a discussion on compulsory school attendance.

²⁹ Khoza *Socio-economic Rights* 420.

of age or the completion of a specific level of schooling; it should rather include primary as well as secondary education.³⁰

Thus, basic education:

...should evolve with increasing educational standards and capacities in South Africa, in order to meet the changing requirements of a dynamic society in the process of political and social transformation.³¹

Basic education must also provide learners with the foundation to be successful and flourish in society, including the minimal necessary learning equipment and tools of literacy and numeracy.³²

2.2 Can the state be compelled by a court of law to provide basic education for individuals?

Section 7(2) of the *Constitution* imposes an obligation on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". Every obligation imposes a related set of duties on the state, namely:³³

- (a) respect: the state is required to avoid measures that prevent children's enjoyment of the right to basic education;
- (b) protect: the state is required to prevent other parties such as parents and caregivers from interfering with and hindering children's enjoyment of the right to basic education;
- (c) promote: the state has the duty to encourage and promote educational participation and to make citizens aware of their educational rights; and
- (d) Fulfil: the state must take positive measures that enable all children to enjoy the right to basic education.

The following case makes it clear that there are positive and negative obligations on the state to give effect to the right to a basic education: In *Ex parte Gauteng*

³⁰ Taiwo *Implementation of the Right to Education* 122.

³¹ Devenish *Bill of Rights* 398.

³² Devenish *Bill of Rights* 398.

³³ Pendlebury 2008/2009 *SACG* 22.

Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995,³⁴ the court stated as follows:³⁵

[The right to [a] basic education] creates a positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education.

It is therefore submitted that the right to a basic education imposes both positive and negative obligations on the state to provide for education. With regard to the positive obligation, the state is required to take effective steps in order to guarantee that every child has access to educational facilities and that every child benefits from the right to education. The negative obligation, on the other hand, poses a duty on the state and its agencies not to impede or hinder children's access to education.³⁶

To summarise, the state has the following obligations in terms of section 29 of the *Constitution*:³⁷

- (a) to provide for adequate basic education;
- (b) to ensure effective access to public educational institutions;
- (c) to ensure, where reasonably possible, that a course of education is conducted in the official language or languages of the learners' choice in public educational institutions; and
- (d) to monitor the introduction of standards and the observance of equivalent standards in the so-called "independent" educational institutions³⁸, as well as the registration of these institutions.

³⁴ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC).

³⁵ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 9. Although this case was decided under the *Interim Constitution (Constitution of the Republic of South Africa 200 of 1993)*, it is still of great value because it emphasises the state's duty to promote and to give effect to the right to a basic education.

³⁶ Pendlebury 2008/2009 *SACG* 19.

³⁷ De Groof "Some Comments and Questions" 63.

³⁸ The *South African Schools Act* 84 of 1996 makes provision for two types of schools, namely, public schools and independent schools. Public schools are controlled by the state, whereas independent schools are privately governed and administered. Independent schools/institutions are required to register with the state and standards not lower than those of similar public schools/institutions must be upheld by these independent schools/institutions.

In addition, the state also has the obligation in terms of article 13(2) of the *International Covenant on Economic, Social and Cultural Rights* (hereafter "the ICESCR") to make education available, accessible, acceptable and adaptable. This is also known as the "4-A Scheme".³⁹

The "4-A's" are interrelated and essential features of education and contribute to the successful provision of the right to a basic education:⁴⁰

Table 2: The 4-A Scheme

Availability	Accessibility	Acceptability	Adaptability
<p>The state has the duty to provide education and to make it available to all children. In other words, the state has the duty to make educational institutions and programmes available in sufficient quantity in order to meet the needs of children. The availability obligation can be fulfilled through a public education system and by allowing non-state actors to establish non-public schools. The state will then have a combination of both public schools and non-public (private) schools.</p>	<p>The state has the duty to make educational institutions and programmes accessible to everyone, without discrimination – as stipulated in section 9 of the <i>Constitution</i>. In order to meet the accessibility criteria, schools must be physically and economically accessible and affordable.</p>	<p>The state has the duty to ensure that the form and substance of education, as well as the curricula and teaching methods, are acceptable, relevant, culturally appropriate and of high quality to children. In order to meet the acceptability obligation, the state must ensure that the education provided is stable, reliable and consistent with the rights of children set out in human rights instruments such as the <i>ICESCR</i> and the <i>Convention on the Rights of the Child</i> (hereafter "the <i>CRC</i>").</p>	<p>The education system has to be flexible and expandable in order to adapt to the needs of changing societies and communities, and to respond to the needs and requirements of learners and students within their social and cultural circumstances. Thus, there is a necessity for curriculum flexibility, liveness, and adaptation to meet the needs of children.</p>

In order to fulfil its constitutional obligations, the state has established a mainstream and inclusive school system. This school system aims at being inclusive, efficient,

³⁹ See the discussion on the *ICESCR* in para 6.2 below.

⁴⁰ Pendlebury 2008/2009 *SACG* 20; see also Coomans 2007 *SIM Special* 20 137-138.

and attentive to the quality of learning conditions and outcomes.⁴¹ However, many questions remain: Does the South African school system realise a child's rights to a basic education? How inclusive is the school system? Can an inclusive school system sometimes lead to the exclusion of certain learners? Does an inclusive system infringe upon a child's rights to equality and dignity? Is an inclusive mainstream school system in the best interest of the child? These questions will be addressed in paragraph 4.2.3 below. However, before addressing these questions, one needs to understand the way in which the courts adjudicate the right to a basic education and how the right to a basic education relates to other constitutional rights.

2.3 Adjudication of the right to a basic education

There is a compendium of socio-economic rights, which compendium includes rights of access to adequate housing, health-care services, sufficient food and water, and social security. The right to a basic education is part of this compendium of rights. It is important to bear in mind that a child's right to a basic education is distinguishable from other socio-economic rights in the *Constitution* in the sense that it is not dependent on the progressive realisation thereof.

The way in which the courts adjudicate the right to a basic education differs from the way in which other socio-economic rights are adjudicated. An explanation of how the adjudication of the right to a basic education differs from the adjudication of the right to housing can be summarised as follows: On the one hand, section 26(1) of the *Constitution* provides that everyone has the right to have access to adequate housing. In terms of this right, the state has the duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to have access to adequate housing.⁴² In other words, the state is obliged to take progressive steps to realise this right over a period of time. This means that the state needs to consider its available resources, but it does not mean that any person is entitled to insist on, or to demand, a house immediately.⁴³ On the other hand, section 29(1)(a) of the *Constitution* provides that everyone has

⁴¹ Pendlebury 2008/2009 *SACG* 20; also see Coomans 2007 *SIM Special* 20 137-138.

⁴² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

⁴³ See, in general, Liebenberg *Socio-economic Rights* 233-242.

the right to a basic education, including adult basic education. In terms of this right, the state is not required to realise the right to a basic education over a period of time – the right to a basic education is immediately realisable and does not carry the same limitations as other socio-economic rights contained in the *Constitution* (such as the right to access to adequate housing). The case of *Governing Body of the Juma Masjid Primary School v Essay*⁴⁴ serves as a good example of how courts adjudicate the right to a basic education. The facts of this case are that the High Court authorised the eviction of a public school conducted on private property and the eviction order had a major impact on the learners' right to a basic education in terms of section 29(1) of the *Constitution* and on the best interests of the children in terms of section 28(2) of the *Constitution*. This case therefore ended up in the Constitutional Court, which confirmed that the right to a basic education is not subject to progressive realisation. The court held that:⁴⁵

[i]t is important ... to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

It is clear from the above that the right to a basic education is a cardinal socio-economic right which aims to promote, improve and develop a child's personality, talents, and mental and physical abilities to their fullest extent. The importance of education, especially basic education, can be emphasised again – it is nearly impossible to "survive" without education in an educated world. Education gives human beings the power to claim and realise their other rights, and the right to a basic education is seen as a "central facilitative right in South Africa's constitutional democracy". One can thus argue that through (a) basic education people are better able to recognise the value of their human rights and are in a better position to exercise the full range of these rights.⁴⁶

⁴⁴ *Governing Body of the Juma Masjid Primary School v Essay* 2011 7 BCLR 651 (CC).

⁴⁵ *Governing Body of the Juma Masjid Primary School v Essay* 2011 7 BCLR 651 (CC) para 37. See also Arendse 2011 *PELJ* 116.

⁴⁶ Pendlebury 2008/2009 *SACG* 21.

2.4 The relationship between section 29 of the Constitution and other fundamental rights

The right to (a basic) education cannot be seen as a separate right. This right and many other rights are interdependent. One of the rights that may be relevant is the right to mother tongue education (and language rights). Section 29(2) of the *Constitution* states that everyone has the right to receive education in the official language or languages of his/her choice in public educational institutions where such education is reasonably practicable. Section 30 of the *Constitution* stipulates that everyone has the right "to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights". Section 31 of the *Constitution* makes provision for persons to belong to a cultural, religious or linguistic community. This section stipulates that these persons "may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society".⁴⁷

Moreover, in order to indicate how the right to (a basic) education may affect other rights, the table below will illustrate the rights to education, rights in education and rights through education protected in the *Constitution*:⁴⁸

Rights to education	Rights in education	Rights through education
<ul style="list-style-type: none"> • Everyone has the right to a basic education (s 29(1)(a)). • Everyone has the right to further education (s 29(1)(b)) • Everyone has the right to learn in their official language of choice (s 29(2)) 	<ul style="list-style-type: none"> • Everyone has the right to dignity (s 10) • Everyone has the right to equality (s 9) • Everyone has the right to an environment that is not harmful to health (s 24) • Children have the right to protection from abuse 	<p>Basic education facilities: access to a wide range of political, social and economic rights.</p> <p>These include, amongst others:</p> <ul style="list-style-type: none"> • the rights to equality and dignity (ss 9 & 10); • the right to further education (s 29);

⁴⁷ A full discussion of all these rights does not fall within the scope of this article. For a detailed discussion, see the book of Liebenberg *Socio-economic Rights*.

⁴⁸ Pendlebury 2008/2009 *SACG* 21.

<ul style="list-style-type: none"> • Children have the right to be protected from work that places their education at risk (s 28(1)(f)) 	<p>and neglect (s 28(1)(d))</p> <ul style="list-style-type: none"> • Children have the right to basic nutrition (s 28(1)(c)) 	<ul style="list-style-type: none"> • the right to information (s 32); • the right to health care and social security (s 27); • the right to just administrative action (s 33); • the right to freedom and security of the person (s 12); • the right to freedom of religion, belief and opinion (s 15); and • the right to freedom of expression and association (s 16).
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As already noted, these rights are mutually dependent, and when the right to education is under consideration it is important to interpret it in the context of the Bill of Rights. The ethical standards for a democratic system of education are set through the right to equality (section 9 of the *Constitution*) and the right to human dignity (section 10 of the *Constitution*). It is stipulated that:⁴⁹

...every child – regardless of race, gender, culture, language, religion, ability or disability – is equally entitled to learn, under conditions that respect, protect and promote the inherent human dignity of each child.

Moreover, the South African *Constitution* is mainly and unequivocally "an egalitarian constitution".⁵⁰ In other words, the focal point of this *Constitution* is equality. It can therefore be said that the organising principle of the South African *Constitution* is to prevent or proscribe unfair discrimination between individuals.⁵¹

Because equality and human dignity are seen as the cornerstone of a democratic system of education, it is necessary to discuss these two concepts briefly.

⁴⁹ Pendlebury 2008/2009 *SACG* 20.

⁵⁰ Krüger 2011 *Equal Rights Review* 27.

⁵¹ Krüger 2011 *Equal Rights Review* 27.

2.4.1 *The right to equality*

Sections 9(1) and (2) of the *Constitution* stipulate that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. ...

Sections 9(3) and (4) stipulate further that unfair discrimination against any person (directly or indirectly) is prohibited. The right to equality is concerned with the protection and safeguarding of the equal worth of the bearers of this right. Equivalently, the right to equality is not a right to equal treatment, but rather a right "to have one's equal worth with others respected, protected, promoted and fulfilled".⁵²

Moreover, the *Promotion of Equality and Prevention of Unfair Discrimination Act*⁵³ deals with the promotion and advancement of equality on the one hand and clearly stipulates which reactive measures are available where the right to equality is violated on the other hand. The reactive provisions include *inter alia* the prohibition of unfair discrimination and related encroachments on the right to equality.⁵⁴

However, the equality provision in the South African *Constitution* does not preclude or prevent the state from making classifications. The explanation for this is that there are various reasons why classifications between people are permissible and why these people may also be treated differently. One should not forget that the classification of people into different groups and the provision of different treatment for different groups can be done only if "the criteria upon which the classifications are based are permissible".⁵⁵ The purpose of the classification will determine

⁵² Rautenbach "Bill of Rights" para 1A57.1.

⁵³ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

⁵⁴ Krüger 2011 *Equal Rights Review* 27.

⁵⁵ Albertyn "Equality" para 4.1.

whether such classification is permitted.⁵⁶ This approach was confirmed by the South African Constitutional Court in the case of *Prinsloo v Van Der Linde*.⁵⁷

Thus, in order to climb the "equality ladder" successfully, it will almost always be required to prove "unfair discrimination" and not just a mere claim to equality. It seems as if the South African courts view the right to equality in section 9 of the *Constitution* as "little more than a guarantee of non-discrimination".⁵⁸

It is thus clear from the above that there is no prohibition on classifying or distinguishing between persons with differences – provided that such classification or distinguishing is permissible and does not constitute unfair discrimination.

Consequently, the right to equality also includes equal education and/or equal educational opportunity. This means that learners are protected against discrimination in education based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Lastly, the distribution of resources and supplies in education must be equitable and unbiased across all communities in proportion to what is needed.⁵⁹

2.4.2 *The right to dignity*

Section 10 of the *Constitution* stipulates that "everyone has inherent dignity and the right to have their dignity respected and protected". Moreover, dignity is not only a constitutional right, but it also has foundational value. This means that the right to dignity enlightens, enlivens and leads all other constitutional rights. Moreover, the right to dignity is seen as a promise and pledge to human dignity which is inseparably connected to the humanity and mortality of the bearer of rights.⁶⁰

⁵⁶ Albertyn "Equality" para 4.1.

⁵⁷ *Prinsloo v Van Der Linde* 1997 6 BCLR 759 (CC).

⁵⁸ See, in general, Van de Lanotte, Sarkin and Haeck *Equality* 141.

⁵⁹ NESRI 2014/2015 <https://www.nesri.org/programs/what-is-the-human-right-to-education>.

⁶⁰ Haysom "Dignity" para 5.2.1.

The importance of the right to dignity was also explicitly emphasised in the case of *S v Makwanyane*:⁶¹

Recognising a right to dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched.⁶²

It can also be unequivocally stated that the right to dignity is pivotal to democracy.⁶³ One can also argue that, without the recognition and enforcement of the right to dignity, the progress and advancement of a country will be severely hampered.

In short: Dignity promotes and respects the level of autonomy of the individual, protects and safeguards an individual's worth in society, and recognises and emphasises that all human beings have equal worth and value.⁶⁴ In other words: The right to human dignity protects and safeguards the inherent worth of every person.⁶⁵ Every person qualifies automatically as a bearer of the right to dignity, since every person is human and the inherent worth that attaches to the reality and certainty of being human is therefore protected by this right. One can say that the right to dignity is an extraordinary right, as it is not earned and cannot be abandoned.⁶⁶

Furthermore, it is also clear that dignity and equality go hand in hand, since dignity is pertinent when one needs to establish whether discrimination on an unstipulated ground exists, whether such discrimination is unfair, and whether unfair discrimination (if found) is justifiable and admissible as stipulated in section 36 of the *Constitution*.⁶⁷

Learners' rights to dignity in education are also protected in the sense that schools must respect the inherent dignity of every learner, which means that a favourable environment of respect and tolerance in the classroom must be created in order to

⁶¹ See *S v Makwanyane* 1995 6 BCLR 665 (CC) para 328.

⁶² Haysom "Dignity" para 5.2.1.

⁶³ Haysom "Dignity" para 5.2.1.

⁶⁴ Haysom "Dignity" para 5.2.2.

⁶⁵ Rautenbach "Bill of Rights" para 1A57.1.

⁶⁶ Rautenbach "Bill of Rights" para 1A58.1.

⁶⁷ Haysom "Dignity" para 5.2.2.

avoid practices and disciplinary policies that cause harm, mistreatment or humiliation to learners. Self-confidence and self-expression must be promoted and encouraged.⁶⁸

Moreover, the *Constitution* of Germany expressly provides for the right to equality and the right to dignity and will be discussed below. It is wise to first discuss the German school system, as the discussion will provide the necessary background information on how a tripartite school system functions. A school system similar to the German school system will be proposed for South Africa, and the German school system can therefore be used as a framework.

3 The right to (basic) education in Germany – a brief overview

Es gibt nur eine Sache auf der Welt, die teurer ist als Bildung: keine Bildung!⁶⁹

Germany has a *Constitution* that is similar to the South African *Constitution*. Chapter 1 of the German *Constitution* (*Grundgesetz für die Bundesrepublik Deutschland*),⁷⁰ also known as the *Basic Law*, consists of basic rights (*die Grundrechte*) and promotes and encourages the values of human dignity, equality and liberty.⁷¹

Article 1 (human dignity) of the German *Constitution* emphasises the importance of human dignity:

- (1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.
- (2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.

In other words, article 1 makes it clear that:

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

⁶⁸ NESRI 2014/2015 <https://www.nesri.org/programs/what-is-the-human-right-to-education>.

⁶⁸ Haysom "Dignity" para 5.2.1.

⁶⁹ Said by JF Kennedy, the 35th President of the United States of America. It can be translated as there is only one thing in the world which is more expensive than education: no education!

⁷⁰ The *German Constitution* is also known as the *Basic Law of the Federal Republic of Germany* (*Grundgesetz für die Bundesrepublik Deutschland R1*).

⁷¹ Robbers *German Law* 44.

- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.⁷²

Article 3 (Equality) of the German *Constitution* provides that:

- (1) Alle Menschen sind vor dem Gesetz gleich.
- (2) Männer und Frauen sind gleichberechtigt. Der Staat fördert die tatsächliche Durchsetzung der Gleichberechtigung von Frauen und Männern und wirkt auf die Beseitigung bestehender Nachteile hin.
- (3) Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. Niemand darf wegen seiner Behinderung benachteiligt werden.

Thus, article 3 emphasises the importance of the right to equality by providing that:

- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
- (3) No person shall be favoured or disfavoured because of gender, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.⁷³

Moreover, Germany has a written *Constitution*, codified in a single document. Germany has sixteen different states and each state also has its own state *Constitution*, which is partly modelled on the *Basic Law*, but each state *Constitution* also has an identity of its own. However, in terms of article 28 (the principle of homogeneity), all state *Constitutions* are obliged to comply with the fundamental principles of the *Basic Law*.⁷⁴

The development of the German school system varied from that of other European countries, *inter alia* because of the unification of East and West Germany. The

⁷² See, in general, Battis and Gusy *Staatsrecht* 234-241; also see Bundesrepublik Deutschland 2015 <http://www.dejure.org/gesetze/GG>.

⁷³ See, in general, Battis and Gusy *Staatsrecht* 234-241; also see Bundesrepublik Deutschland 2015 <http://www.dejure.org/gesetze/GG>.

⁷⁴ Robbers *German Law* 44.

Unification Treaty (Einigungsvertrag) was concluded between the Federal Republic of Germany and the German Democratic Republic in 1990 and brought unity in the areas of culture, education and science. Fundamental provisions are included in this treaty in order to establish a common, comparable basic structure in education – specifically in the German school system. It is important to remember that each state has its own *Constitution*, which means that each state has its own educational legislation and educational administration. In other words, a federal principle with regard to educational policy is followed. This means that the educational legislation and educational administration are primarily the responsibility of each state. The federal government therefore plays only a subordinate role. However, under the *Basic Law* and the *Constitutions* of each state, the entire German school system is under the supervision of the state as stipulated in article 7 of the German *Constitution*.⁷⁵

However, the right to education, and more specifically the right to basic education, are not explicitly provided for in the German *Constitution*, although it is regarded as an important basic right. There are several ongoing debates and demands with regard to human rights and one of the demands is to explicitly enshrine the right to education in the *Basic Law*.⁷⁶ Nevertheless, article 5(3) of the *Constitution* stipulates that:

...arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

Article 7 of the *Constitution* states that the entire German school system shall be under the supervision of the state. It also provides for the right of parents and guardians to decide whether or not their children shall receive religious instruction. The right to establish private schools is also guaranteed in this section.

*Title Eight of the Social Code*⁷⁷ is also important with regard to the right to education, since this code:

⁷⁵ Hörner *et al Education Systems* 302.

⁷⁶ Kunze *Recht auf Bildung* 93.

⁷⁷ Sozialgesetzbuch VIII [SGB VIII], Dec 8, 1998, BGBl I 3456. Also see Palmer 2007 <http://www.loc.gov/law/help/child-rights/pdfs/ChildrensRights-Germany.pdf> 90; Ohnesorge *Kinder- und Jugendhilfe* 6-7.

...grants every young person the right to obtain assistance for his or her development and the right to an education that makes the young person a responsible member of the community.

In general, the school-going age in Germany is six years and attending school is compulsory. Compulsory education can be divided into two parts, namely:⁷⁸

- (a) Full-time compulsory education. This education lasts for a period of ten years.⁷⁹ Children attend four years⁸⁰ of primary school and thereafter education in comprehensive schools which are also known as "secondary-school stage I". These schools are divided into secondary general schools, intermediate schools and grammar schools.⁸¹ Therefore, within this selection of schools, learners can complete their compulsory full-time education.
- (b) Continued compulsory schooling in secondary school, which is also known as "secondary-school stage II". These schools mainly consist of vocational schools.

Moreover, since 2012 career orientation has become compulsory for all learners and begins at the age of 14 years. This orientation forms part of all school subjects, with an emphasis on individualised approaches. Thus, the process of career and academic orientation in the German education system can be illustrated as in Table 3:⁸²

Table 3: Process of career/academic orientation in the German education system

Identification of learners' potentials and exploration of occupational areas:	Practical training / internships:	Decision making and the arrangement of the transition:	Exploration of academic paths:	Decision making and the arrangement of the transition:
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⁷⁸ Rose and Beutner 2014 http://evive.eduproject.eu/wp-content/uploads/EVive_Educational-VET-System-in-Germany.pdf 2-3.

⁷⁹ This may vary from state to state. For example, the state of Bavaria is different.

⁸⁰ This varies from state to state. For example, primary school lasts for 6 years in the states of Berlin and Brandenburg.

⁸¹ This may vary from state to state, since some states also have an alternative to the traditional three-tier school system, namely "die Gesamtschule".

⁸² Rose and Beutner 2014 http://evive.eduproject.eu/wp-content/uploads/EVive_Educational-VET-System-in-Germany.pdf 2-3.

"FORM 8"	"FORM 9"	"FORM 9/10"	SECONDARY SCHOOL II	SECONDARY SCHOOL II
Analysis of a student's capabilities and the exploration of vocational areas	Practical phases Extension or consolidation of practical experiences	(Job) Application, attendance of the transition Define core areas for vocational / secondary school	Reviewing of the learner's abilities to study at a university and gather practical experiences	The process of enrolment, job application and the arrangement of the transition is started

Table 3 thus emphasises the importance of the core elements of career orientation. These elements are of importance for the design and aim of the German school-specific process of career and academic orientation. In a nutshell – the three most important steps pertaining to career orientation are as follows:

- (a) Firstly, individual potentials, aptitudes and career possibilities are identified.
- (b) Secondly, specific employment opportunities are explored and considered.
- (c) Thirdly, a decision is made in respect of the individual's career path.

It is clear from the above that the German education system equips each learner with the necessary knowledge and information in respect of his/her career opportunities. Moreover, career orientation at school level has become more and more important, since it provides the learner with concise and accurate information pertaining to career opportunities; it encourages confidence when career decisions need to be made; and such career orientation contributes to a more effective and productive workforce, as the learner is already aware of what the career entails.

4 South Africa and Germany: A brief comparison

In South Africa, section 3(1) of the *South African Schools Act*⁸³ stipulates that schooling is compulsory for children aged seven to 15 years or attendance in Grades

⁸³ *South African Schools Act* 84 of 1996.

1 to 9, whichever comes first. In Germany, the minimum age for the end of compulsory schooling can be summarised as follows:⁸⁴

At the age of six: (i) Children are required to attend school (the cut-off date is always the first day of June). The obligation to attend school full-time continues for nine or ten years (in terms of the education acts or the compulsory education acts of the *Länder*, respectively⁸⁵).

At the age of 15: (i) The period of compulsory schooling ends in most of the *Länder* (in terms of the education acts or the compulsory education acts of the *Länder*, respectively).

Compulsory education in Germany is structured into three phases, as in Table 4.⁸⁶

Table 4: Three phases of compulsory education in Germany

Phases	Age range	Year of compulsory education
Primary education	6 to 10 years (6 to 12 years in the <i>Länder</i> of Berlin and Brandenburg)	Years 1 to 4 (or years 1 to 6) of compulsory education
Lower-secondary education (Secondary 1)	10 to 15/16 years (or 12 to 15/16 years)	Years 5 to 9 (or 7 to 9/10) of compulsory education
Upper-secondary education (Secondary 2)	15/16+ to 18/19 years	Years 10/11 to 13 of compulsory education

The different phases of education in South Africa can be categorised as follows:

- (a) Foundation phase (Grades R-3)
- (b) Intermediate phase (Grades 4-6)
- (c) Senior phase (Grades 7-9)
- (d) Further education and training phase (Grades 10-12)

⁸⁴ Melchiorre *At What Age?* 64-65.

⁸⁵ "*Länder*" may be translated as "states".

⁸⁶ Nuffield Foundation 2013 [http://www.nuffieldfoundation.org/sites/default/files/files/GERMANY%20\(R-P\)%20country%20profilev_FINAL.pdf](http://www.nuffieldfoundation.org/sites/default/files/files/GERMANY%20(R-P)%20country%20profilev_FINAL.pdf).

(e) Higher education

In short, children in South Africa may begin their school career with Grade 0 from the age of four. This is also known as "reception" or Grade R. Grades 1 to 9 are compulsory for all children and are categorised as General Education and Training (GET). Grades 11 and 12 are known as Further Education and Training (FET) and are not compulsory. However, on completion of Grade 12, learners receive a matriculation certificate which is required to enter tertiary/higher education (university).

In Germany, the *Basic Law (Grundgesetz – RI)* and the *Constitutions of the Federal States (Länder) (R12-27)* have several fundamental provisions pertaining to schools that also have a bearing and impact on primary schools. The legal basis for the *Grundschule*, also known as the first compulsory schooling for all children, can be found in the *Education Acts (R85, R87, R89, R91, R93, R96, R98, R100, R102-103, R105, R107, R113, R115-117)*, the *Compulsory Schooling Acts (R108)* and the *Schulordnungen* (school regulations). These Acts are enacted by the German Ministries of Education and Cultural Affairs in the *Länder*.⁸⁷

4.1 The education/school system in Germany

Jeder Mensch hat das Recht auf Bildung.⁸⁸

4.1.1 A short history

The Second World War had an enormous impact on the German education system. Not only were universities and schools destroyed, but the education system was plagued by a shortage of teachers and resources. Moreover, the Cold War divided Germany between the two opposing blocs and a multitude of valuable educational talents were lost, since many Jewish scholars had been driven from their positions by the Nazis. At this time the education systems of East Germany and the Soviet sector of Berlin were reformed. The reforms were often referred to as the

⁸⁷ Lohmar and Eckhardt *Education in Germany* 103.

⁸⁸ Article 26 of the *Allgemeine Erklärung der Menschenrechte (Universal Declaration of Human Rights)* (1948) which states that everyone has a right to education. Also see the discussion in para 6.1 below.

"Sovietisation of education". In 1945 the Soviet military authority established the German Central Administration for National Education and administered the elimination of private schools in East Germany and the Soviet sector of Berlin.⁸⁹ The current German school system will be discussed below.

4.1.2 *Grundschule (primary school)*

From Grades 1 to 4, all children attend *Grundschule*, where the basic skills and knowledge are taught to them.⁹⁰ The main purpose of the *Grundschule* is to promote, advance and foster children with diverse individual learning backgrounds and learning aptitudes and capabilities. In this context children are provided with a solid basis for independent thinking, reasoning, learning and working. Moreover, the *Grundschule* aims to provide its children with the necessary basis for the next level of education as well as for lifelong learning.⁹¹ From Grade 5 and onwards children are evaluated for the next level of schooling. In other words, children are separated into "different" schools according to their academic performance and the wishes of their families.⁹² These schools can be divided into three different types of schools, namely: *Hauptschule*, *Realschule* and *Gymnasium*. There is also an alternative to these schools, namely the *Gesamtschule*, which will be discussed in paragraph 4.1.4 below.

4.1.3 *The tripartite system of secondary schools in Germany*

4.1.3.1 The *Hauptschule* (basic general education)

The *Hauptschule* is for learners who want to do an apprenticeship after leaving school. Learners are prepared for "working life", and practical knowledge and skills are emphasised and encouraged. Learning also takes place at a slower pace. Most learners also attend vocation-oriented courses/modules once or twice a week by doing an internship at a company. Vocational education in Germany is recognised

⁸⁹ Andell 2008 *MJ* 16.

⁹⁰ *Grundschule* lasts for six years in Berlin and Brandenburg.

⁹¹ Lohmar and Eckhardt *Education in Germany* 103.

⁹² Plötzgen *Bildungssysteme* 37-44.

internationally and is also to the benefit of the particular learners, because learning and education occur at more than one place.⁹³

The *Hauptschule* lasts for five years⁹⁴ and after completion of the *Hauptschule*, learners receive a "*Hauptschulabschluss*". This is also known as a school-leaving certificate, which is awarded to learners who graduate from a *Hauptschule*.⁹⁵

In this way, practical and theoretical training are optimally linked and learners are adequately prepared to successfully enter the world of work. Examples of apprenticeships are those for electricians, mechanics, salespeople and office clerks.

4.1.3.2 The *Realschule* (more extensive general education)

The *Realschule* makes provision for extended general education. Learners are trained to flourish in mid-level jobs/careers. Learners are also allowed to learn a second foreign language and they learn more independently than in the *Hauptschule*. The *Mittlere Reife* is the school-leaving certificate which is awarded to learners who have completed the *Realschule*. It is usually awarded after ten years of schooling.⁹⁶

4.1.3.3 *Das Gymnasium* (intensified general education)

The *Gymnasium* makes provision for advanced general education. This type of school prepares learners for university or for dual academic and vocational credentials. Subjects such as German, foreign languages, mathematics, science and history are learnt through the *Gymnasium*. Two foreign languages are also learnt. Learners attend this school for eight or nine years before they can write the final examination, the *Abitur* in their Grade 12 or 13. The *Abitur* is an examination of vital importance in order to gain university admission/entrance.⁹⁷ Once a learner has

⁹³ Plötzgen *Bildungssysteme* 37-44; also see Andell 2008 *MJ* 16-17.

⁹⁴ This may also vary from state to state.

⁹⁵ Andell 2008 *MJ* 16-17.

⁹⁶ Brenner *Schule in Deutschland* 44-46.

⁹⁷ Rösner *Schulsystem in Deutschland* 74-75.

completed *Realschule* or *Hauptschule*, there are several ways he/she can continue his/her secondary education in order to eventually pass the *Abitur*.⁹⁸

4.1.4 *Die Gesamtschule: An alternative to the traditional three-tier school system*

This type of school is also known as a comprehensive school. Despite children's different performances, these children are not divided into the tripartite system of secondary schools. Instruction/education is given collectively to these children.

A distinction is also made between two types of *Gesamtschulen* (comprehensive schools), namely cooperative comprehensive schools and integrated comprehensive schools. The cooperative comprehensive *Gesamtschulen's* main goal is to make the transition between the *Hauptschule*, *Realschule* and *Gymnasium* easier and uncomplicated by merging/uniting the three tracks in the same school. The integrated comprehensive *Gesamtschulen* can be described as integrated, since the merging/uniting of the *Hauptschule*, *Realschule* and *Gymnasium* is educationally and organisationally cohesive.⁹⁹

The *Hauptschule*, *Realschule* and *Gymnasium* offer a single course of education, which means that this course of education is related to a certain school-leaving certificate.¹⁰⁰

4.1.5 *Compulsory curricula in Germany*

In Germany (in all *Länder*), compulsory curricula exist for all subjects in all types of compulsory schools (see Table 5).¹⁰¹

⁹⁸ Rösner *Schulsystem in Deutschland* 74-75.

⁹⁹ Andell 2008 *MJ* 16 17.

¹⁰⁰ There are also additional/alternative school types in different *Länder* (states), which offer several courses of education. They are: *Werkrealschule* (Baden-Württemberg); *Mittelschule*, *Wirtschaftsschule* (Bayern); *Integrierte Sekundarschule* (Berlin); *Oberschule* (Brandenburg); *Sekundarschule*, *Oberschule* (Bremen); *Haupt- und Realschule*, *Stadtteilschule* (Hamburg); *Verbundene Haupt- und Realschule*, *Mittelstufenschule*, *Förderstufe* (Hessen); *Regionale Schule* (Mecklenburg-Vorpomern); *Oberschule* (Niedersachsen); *Realschule plus* (Rheinland-Pfalz); *Erweiterte Realschule*, *Gemeinschaftsschule* (Saarland); *Mittelschule* (Sachsen); *Sekundarschule* (Sachsen-Anhalt); *Gemeinschaftsschule*, *Regionalschule* (Schleswig-Holstein); *Regelschule*, *Gemeinschaftsschule* (Thüringen).

¹⁰¹ Lohmar and Eckhardt *Education in Germany* 117-118.

Table 5: Compulsory curricula for all compulsory schools

Phase	Age range	Subjects studied
Primary education	6-10 (6-12 in the <i>Länder</i> of Berlin and Bradenburg)	Includes, in most <i>Länder</i> : German, mathematics, <i>Sachunterricht</i> (interdisciplinary subject providing an introduction to economics, social studies, history, geography, science and technology), art, sport, music and, increasingly, a modern foreign language from around Year 3 (at the age of 8-9 years)
Lower-secondary education	10-15/16 (or 12-15/16, depending on the <i>Land</i>)	Subjects may vary between <i>Land</i> and school type, but usually include the following: German, mathematics, social studies, history, geography, biology, chemistry, physics, art, music, sport, and one or more modern foreign languages
Upper-secondary education	15/16+ to 18/19	The curriculum followed by these learners depends on the type of institution a student attends and the course he or she is studying

Thus, the basic education system in Germany aims to achieve the following: to carry children forward from learning-by-playing at preschool level to more systematic forms of school learning, and to seek to adapt the subject matter taught and methods employed to the learners' requirements and capabilities. The *Grundschule* lays the foundations for secondary education. It endeavours to provide learners with a structured understanding of the impressions they gain from the world around them and to develop their psychomotor abilities and patterns of social behaviour.

Furthermore, the most important goals with regard to basic education are:

...to make learning as effective as possible for every child and, in this way, to ensure equality of opportunity from the very beginning of organized instruction.¹⁰²

There is thus a strong emphasis on child-centred methods of learning, which emphasis attempts to provide a favourable learning environment with wide-ranging

¹⁰² Woodill, Bernhard and Prochner *Early Childhood Education* 224.

experiences and practices that will support and promote the development of the whole child.¹⁰³

To summarise: The *Grundschule*, *Hauptschule*, *Gymnasium* and *Gesamtschule* strive to achieve the following objectives:¹⁰⁴

- (a) to promote the full intellectual, emotional and physical development of children (Children are taught how to be independent, how to make informed decisions and how to deal with personal, social and political responsibility.);
- (b) to provide the necessary education in accordance with the child's academic knowledge and also taking into consideration age-related conceptual faculties;
- (c) to increase the degree of specialisation by considering every child's abilities and inclinations; and
- (d) to maintain an open education system that permits transfers from one type of school to another type of school after an orientation phase.

4.1.6 Vocational Education and Training (VET) at upper-secondary level

The VET system is described as a dual system, since training is done in two places of learning, namely at companies and at vocational schools. The duration of training is normally three years but it may vary from state to state.¹⁰⁵

The aim of "dual training" is to provide basic vocational training, qualifications and competences which are required to "practise an occupation as a skilled worker in a changing world of work". The successful completion of this kind of training enables the trainee to practise an occupation as a qualified, skilled worker. There are currently 346 recognised training occupations. The only requirement for VET is the completion of compulsory full-time education.¹⁰⁶

¹⁰³ Woodill, Bernhard and Prochner *Early Childhood Education* 224.

¹⁰⁴ Lohmar and Eckhardt *Education in Germany* 113.

¹⁰⁵ Hippach-Schneider, Krause and Woll *Vocational Education* 24-26.

¹⁰⁶ Hippach-Schneider, Krause and Woll *Vocational Education* 24-26.

4.1.7 Criticism of the German tripartite education system

There is of course (as with any other education system in the world) also criticism of the tripartite education system of Germany. The most important criticism levelled at this system is the existence of possible social inequality on the basis of social background, language and immigrant status.¹⁰⁷ Another point of criticism levelled at the tripartite education system was that children were separated too early and should have been separated at a later age. In response to this, Chancellor Angela Merkel argued that the results of the Programme for International Student Assessment (PISA) were not proof that the tripartite education system was at fault. In other words, the criticism could not be ascribed to a tripartite system error, but had to be attributed to human mistake(s), and these can certainly be remedied and resolved.¹⁰⁸ Since the criticism, Germany has focused on reforming its education system.

Despite the criticism, Germany still has one of the world's top education systems. Germany is currently eighth in The World Top 20 Education Poll 2014 Final Rankings.¹⁰⁹ Moreover, Germany is (owing to its school system) one of today's leading industrial nations. One should remember the following:¹¹⁰

It was Germany that first developed the modern research university. In Germany, they found in the *Gymnasium* a model for secondary schools designed to prepare students for the modern research university. And it was Germany that provided in the *Realschule* and – later in the dual system – two of the world's most compelling models for supplying a nation with highly trained workers in every field of endeavour.

¹⁰⁷ This was according to the PISA (Program for International Student Assessment) undertaken by the OECD (Organisation for Economic Co-operation and Development) at schools in participating countries. See a summary of the 2006 findings at OECD 2006 <http://www.oecd.org/pisa/pisaproducts/39725224.pdf> 31-37. Also see OECD 2010 <http://www.oecd.org/pisa/pisaproducts/46581323.pdf>.

¹⁰⁸ Andell 2008 *MJ* 17-19. Also see Freitag and Schlicht 2009 *GIJPAI* 47-72; Diefenbach *Migrantenfamilien* 15-25; Schubert *Bildungssystem* 12-17; Theobald *Bildungsungleichheiten* 4-10.

¹⁰⁹ The World Top 20 Education Poll is an international project which examines, monitors and ranks more than 200 countries' education systems in order to improve learner development between the ages of 3 and 25. The main purpose of this project is "to assure that every child on the planet has an opportunity to reach their full potential, with access to quality education in a safe and nurturing environment". See World Top 20 2014 <http://www.worldtop20.org>.

¹¹⁰ OECD 2010 <http://www.oecd.org/pisa/pisaproducts/46581323.pdf> 202.

Moreover, Germany's flexible and adaptable combination of formal schooling together with the VET system signifies a very powerful and influential approach to provide learners with "skills, knowledge and motivation that could prove decisive on a national scale in international competition".¹¹¹

Germany is also often referred to as Europe's economic engine and its success in this sphere is based mainly on the quality, excellence, creativity, skill and dexterity of its labour force.¹¹² It is submitted that this can be directly attributed to the country's education system, which caters for learning differences.

4.2 The education/school system in South Africa

The school system in South Africa can be described as a "mainstream" school system. This means that, from Grades 1 to 7, all children attend primary school and, from Grade 8 and onwards, children attend high school (secondary school). Children are not separated into "different" schools according to their academic performance,¹¹³ since the main focus is on inclusive, Outcomes-based Education (OBE).¹¹⁴ However, this system is in the process of being revised, improved and renamed as "Schooling 2025". Schooling 2025 is a new action plan to improve the education system in South African schools. It aims to improve and promote all aspects pertaining to education, such as teacher recruitment, learner enrolment, school funding, mass literacy and numeracy, and the overall quality of education. This new action plan (this new curriculum) will enable learners to be educated in their mother tongues for the first three years of their schooling. English will still be a compulsory subject, but will not replace the mother tongue or home language in the early grades. Each grade will have its own study programme.¹¹⁵ The plan seems to favour a strong bilingual education and mother tongue-based multilingual education model where instruction or academic content is taught in a home language (mother

¹¹¹ OECD 2010 <http://www.oecd.org/pisa/pisaproducts/46581323.pdf> 202, 214.

¹¹² OECD 2010 <http://www.oecd.org/pisa/pisaproducts/46581323.pdf> 202, 215.

¹¹³ It is important to note that provision is made for special schools where disabled children are able to receive education.

¹¹⁴ OBE can be described as "an approach to learning that seeks to link education more closely to the real world, giving students skills to access, criticize, analyse and practically apply knowledge, rather than simply absorb and repeat it parrot-fashion". (See, in general, Fitzgerald 2005 http://www.sitemaker.umich.edu/356.fitzgerald/outcomes_based_curriculum).

¹¹⁵ DoBE *Realisation of Schooling 2025* 12-14.

tongue or first language) and a second language; or where a child begins his or her educational career in his or her mother tongue, with later transitions to additional languages.¹¹⁶

There is also the Curriculum and Assessment Policy Statement (CAPS). CAPS provides clear guidelines and directives on what educators (teachers) should teach and assess on a grade-by-grade and subject basis.¹¹⁷ CAPS is defined as follows:¹¹⁸

A National Curriculum and Assessment Policy Statement is a single, comprehensive, and concise policy document, which will replace the current Subject and Learning Area Statements, Learning Programme Guidelines and Subject Assessment Guidelines for all the subjects listed in the National Curriculum Statement Grades R–12.

The Department of Basic Education is responsible for the implementation of CAPS. The implementation has already taken place. CAPS was implemented as follows:¹¹⁹

- (a) In 2012 in the foundation phase (Grades 1-3) and Grade 10.
- (b) In 2013 in the intermediate phase (Grades 4-6) and Grade 11.
- (c) In 2014 in the final school year (Grade 12).

For the sake of completeness, it is necessary to give a brief overview of the school system in South-Africa.

4.2.1 Pre-primary/preschool

Preschools make provision for children between the ages of four and seven. These schools are normally divided into two grades, namely Grade R for children of four years who turn five before 30 June, and Grade 1 for children of five years who turn six before 30 June. Compulsory education begins in Grade 1, as already said. It is

¹¹⁶ DoBE *Realisation of Schooling 2025* 12-14; also see Brown 2014 <http://sites.miis.edu/katiebrown/files/2014/06/K-Brown-Best-Practices-Report.pdf> 3-6; Malone 2007 www.sil.org/sites/default/files/files/mtbml_e_implications_for_policy.pdf.

¹¹⁷ CAPS provides guidance for teachers with regard to week-by-week planning; it gives direction and guidance in terms of pacing and progression and it provides clear guidelines in terms of assessment requirements.

¹¹⁸ DoBE 2011 <http://www.education.gov.za/Curriculum/CurriculumAssessmentPolicyStatements/tabid/419/Default.aspx>.

¹¹⁹ DoBE 2011 <http://www.education.gov.za/Curriculum/CurriculumAssessmentPolicyStatements/tabid/419/Default.aspx>.

permissible to enrol children in Grade R or Grade 1 a year later if the parents or guardian of the child believe that the child is not "school-ready". Some schools insist that a child begin with Grade 1 only at the age of seven. The main focus areas of children's learning in preschools are literacy, numeracy and life skills.

4.2.2 Primary school

Primary schools make provision for children from their reception year to Grade 6. The reception year is non-compulsory and formal schooling starts in Grade 1. Primary schools are divided into junior primary and senior primary. Junior-primary schooling continues for three years and children are taught basic subjects such as reading and writing, mathematics and, in most instances, are introduced to a second language. Children between the ages of ten and twelve years attend senior-primary school. Besides mathematics and language skills, these children learn subjects such as history, geography, life skills and science. Moreover, their writing and speaking skills in respect of a second language are also developed and expanded.

Assessment in primary schools is conducted through Annual National Assessments (ANAs) and is unvarying across South Africa. Assessment takes place in literacy and numeracy in the foundation stage (Grades 1-3) and in numeracy and languages in the intermediate phase (Grades 4-6).

4.2.3 Secondary school

Secondary education is also divided into two phases, namely the junior and senior phases. Learners are allowed to study two or three languages, and secondary school also enables learners to extend and intensify their knowledge of numerous academic subjects. One can thus say that secondary education prepares and equips learners for further study, which then enables them to follow a career of their choice. Learners study at least four subjects from the following areas: general studies, commercial studies, the natural sciences, technical studies, the arts, agriculture, and domestic science. Grades 10 to 12 are optional.

Furthermore, certificates are awarded to learners who complete Grades 10 and 11, but the National Senior Certificate (NSC) is awarded only when a learner completes

Grade 12. The NSC is the equivalent of a high-school diploma and is better known as a matriculation or matric certificate.

In order to obtain an NSC, learners are obliged to take a minimum of six subjects. Learners are also permitted to add three additional subjects, but these three additional subjects are non-compulsory. The compulsory subjects are two languages (the mother tongue plus an additional language), mathematics and life orientation. Learners have a choice of two (or more) other subjects.

However, despite new plans and efforts to improve the school system, it seems that the South African school system is still not functioning satisfactorily. It appears that mainstream education in South Africa does not work either, since the school system does not make provision for the needs of learners who cannot cope in mainstream education nor does it make provision for children with specific skills, talents and aptitudes. In other words, it seems that the current inclusive mainstream school system of South Africa does not cater satisfactorily for learning differences, which means that the system excludes some learners (with different aptitudes, skills, talents and interests) from realising their right to a basic education to its fullest extent. The ripple effect of this is that there might be an infringement/violation of these children's constitutional rights to equality and dignity. Furthermore, one needs to ask whether mainstream schooling is really in the best interests of the child as provided for in section 28(2) of the *Constitution*, and whether it makes provision for children with "mainly practical talents" or children "whose predisposition lies between theoretical and practical extremes of the psychological range" to "compete" with children "who are theoretically inclined"? The answer to these questions is that it does not.¹²⁰ The reason for this is that children's aptitudes, skills and talents vary and equal educational opportunities (and the prevention of unfair discrimination) can be promoted only when children follow different curricula in accordance with their aptitudes, skills and talents and *not* on the basis of social background and/or race. Furthermore, high-school dropout rates in South Africa are evidence that the

¹²⁰ The answer(s) to the questions that were asked in para 2.2. Also see a discussion on the right to equality and the right to dignity in paras 2.4.1 and 2.4.2.

mainstream school system is not working and that drastic action needs to be taken in order to accommodate learner differences.¹²¹

The current mainstream school system of South Africa reminds one of the well-known folk tale about the tree-climbing competition in Animal Land. The participants are Leopard, Elephant, Turtle and Monkey. It is obvious that it is impossible for all of the participants (especially the Elephant and Turtle) to climb a tree, since all the participants have different aptitudes, skills and talents. In other words, the competition is not in the best interests of all participants (all children), and nor does it make provision for all participants' rights to equality and dignity.

The question now is: What should or could be done in order to enhance learner differences? It is submitted that all children (learners), regardless of their social background and/or race, should be entitled to an education appropriate to their learning needs, aptitudes, skills and talents. Children with different learning needs, aptitudes, skills and talents need different curricula.

5 A proposed school system for South Africa?

The success of any country, whether it is social, financial or economic success, depends on how its citizens are educated. To put this differently: the performance and well-being of education (and school) systems worldwide have become an important indicator of a country's success or failure and have both economic and social importance when countries are seeking greater ecological sustainability and inclusive economic growth. It is, therefore, hard to imagine that any government would not support and encourage a quality system of education for all.

On the basis of the above discussion, it appears that a system similar to Germany's school system would be favourable for South Africa, since such a system gives better effect to the realisation and fulfilment of a child's right to a basic education, with specific emphasis on the right to equality and the right to dignity. With regard to the right to equality, the German system does not focus solely on the equal treatment of every child, but rather on promoting, protecting and respecting every child's equal

¹²¹ See Table 1 above for dropout rates.

worth. In other words, children have equal opportunities within the school and education context, *but* in different ways (different curricula) according to their aptitudes, skills and talents.¹²² With regard to dignity, it seems that the South African school system does not sufficiently acknowledge the fact that each child is unique, with different learning needs (with specific reference to mainstream education). It seems, therefore, that the German school system makes better provision for children's different learning needs and the uniqueness of the individual to such an extent that every individual's (child's) potential and intrinsic worth are promoted, protected and respected to the best of the system's capacity.¹²³

A proposed school system for South Africa would not need to be exactly like the German one, but the German tripartite school system could be used as a framework. It is proposed that the following school system be considered in South Africa in order to realise a child's right to a basic education to its fullest extent:¹²⁴

- (1) School W (equivalent to the *Grundschule*) where all learners (children) attend Grades 1 to 4. During this stage, all the basic skills and knowledge are taught to them.
- (2) School X (equivalent to the *Gymnasium*) where provision is made for the theoretically inclined learner (high academic performance) whose work-related objective is a "leading intellectual position".
- (3) School Y (equivalent to the *Hauptschule*) where provision is made for basic general education for learners who mainly have practical skills and talents (technical, mechanical, entrepreneurial, etc.) and whose occupational objective is an "instruction-following" position. Learners should also have the opportunity of acquiring an additional certificate in order to gain access to university education.
- (4) School Z (equivalent to the *Realschule*) where provision is made for adequate education for those learners whose "predisposition lies between the

¹²² See the discussion on equality in para 2.4.1 above.

¹²³ See the discussion on dignity in para 2.4.2 above.

¹²⁴ Ertl and Phillips 2000 *Brit J Educ Stud* 394.

theoretical and practical extremes of the psychological range" and who aim for careers/occupations with "increased responsibilities". Learners should also have the opportunity of acquiring an additional certificate in order to gain access to university education.

However, there can still be comprehensive secondary schools (such as the *Gesamtschule*) that any child can attend and which offer all the necessary subjects with regard to the whole range of qualifications.

Of course, the development of such a system is not without challenges and would be bound to attract criticism, but at least it would be an improvement. It is submitted that the proposed South African school system would be better able to surmount barriers such as discrimination on the basis of social background, language and immigrant status (the biggest criticism levelled against the German tripartite system),¹²⁵ since the South African *Constitution* explicitly prohibits such discrimination in terms of section 9, and South Africa is well advanced with the application thereof, not only in schools, but also in the workforce.

The school system proposed for South Africa would strive to put the child first, and it would have to be kept in mind that the different types of schools are to be designed to suit different children with different aptitudes, talents, skills (learning needs) and interests, and not different social groups or different races or different languages. No child should be forced into an academic education that bores the child to rebellion, or which causes huge amounts of stress or frustration, merely because that type of school education is considered more socially desirable by society.

In conclusion, adopting a VET system similar to the German VET system¹²⁶ would be highly beneficial to South Africa, since it would reduce school dropout rates and unemployment rates. School leavers would have the opportunity to undertake VET training after the completion of compulsory schooling in order to start off with successful occupations as highly skilled workers. A VET system would build skills such as:

¹²⁵ See the criticism levelled at the German tripartite education system in para 4.1.7 above.

¹²⁶ See para 4.1.6 for a discussion on the German VET system.

...the ability to set work goals, create plans to achieve them and working in a disciplined way to implement and execute that plan, being an effective member or leader of a team and the ability to think analytically and creatively.¹²⁷

The adoption of VET would without a doubt strengthen the nation's economic activity.

6 Conclusion

The South African education system is undoubtedly a high-cost, low-performance system where the full realisation of a child's right to a basic education is not satisfactorily adhered to in terms of section 29 of the *Constitution*. Moreover, the best interests of children in terms of section 28 of the *Constitution* are also not promoted adequately, and children's rights to equality and human dignity¹²⁸ seem to be infringed as well. The time is therefore ripe for a change in the system. Of course, such a change would not take place without problems and/or challenges, but when such change occurs step by step and systematically, it would be likely to succeed.

It is obvious that the proposed school system would not work if there were inequalities of any nature.¹²⁹ It is therefore also crucial that children be assessed and evaluated objectively and that the importance of objective and unbiased assessment and evaluation be promoted and encouraged.¹³⁰ Moreover, the assessment and evaluation should not be based on a child's performance in tests and examinations only, but also on the child's aptitude, skills, talents and interests. In addition, the success of the proposed school system would depend on teachers being well trained for teaching in such a system. It would accordingly be advantageous in future to employ only newly qualified teachers who have been trained for teaching in a new school system.

Furthermore, the main purpose of the proposed school system in South Africa should be the promotion, advancement and fostering of children with diverse individual

¹²⁷ OECD 2010 <http://www.oecd.org/pisa/pisaproducts/46581323.pdf> 214.

¹²⁸ See paras 2.4.1 and 2.4.2 above.

¹²⁹ See para 4.1.7 above.

¹³⁰ In other words, South Africa needs to create a welfare society with an emphasis on supporting every individual regardless of economic or social background.

learning backgrounds and learning aptitudes, skills, talents and interests. A culture of diligence should, in other words, be fostered: children have different abilities, but every child can reach his/her educational goal – it might just require a different route or a longer journey. When such a purpose is accomplished, children will be provided with a solid basis of independent thinking, reasoning, learning and working.¹³¹ Also, this would lead to a fuller realisation of the child's right to a basic education, as well as his/her right to equality and human dignity, and it would also be in the best interest of the child.

The proposed school system should strive to achieve the following goals:¹³²

- (a) to promote the full intellectual, emotional and physical development of children;
- (b) to provide satisfactory education in accordance with children's academic knowledge and prowess;
- (c) to increase the degree of specialisation with regard to children's aptitudes, skills, talents and learning differences;
- (d) to maintain an open education system that permits the transfer from one school type to another school type after proper orientation;
- (e) to drastically improve teacher quality; and
- (f) to provide reports based on a continuous, data-based, problem-centred examination of the South African education system.

Moreover, such a school system in South Africa, like that of Germany, may serve as a good instrument in:

- (a) empowering people to escape the poverty cycle and compete effectively in the labour market;

¹³¹ See para 4.1.2 above.

¹³² See also para 4.1.5 above.

- (b) enabling people to understand and enjoy their democratic values, rights and freedoms;
- (c) encouraging people to participate in and protect the fledgling democratic system; and
- (d) most importantly, enhancing their dignity and feeling of self-worth as human beings.¹³³

Lastly, it is submitted that the proposed school system would, to a much greater extent than the current South African school system, progressively realise the constitutional rights specified in sections 7(2) and 29 of the South African *Constitution*.

When children are educated, the following must always be remembered:

Everybody is a genius. But if you judge a fish by its ability to climb a tree, it will live its whole life believing that it is stupid.¹³⁴

¹³³ Malherbe 2008 *TSAR* 274-275. Also see para 2 above.

¹³⁴ Albert Einstein as quoted in Kelly *Rhythm of Life* 80.

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LIST OF ABBREVIATIONS

ANAs	Annual National Assessments
BGBI	Bundesgesetzblatt
CAPS	Curriculum and Assessment Policy Statement
Brit J Educ Stud	British Journal of Educational Studies
CRC	Convention on the Rights of the Child
DoBE	Department of Basic Education
EJELP	European Journal for Education Law and Policy
EPC	Educational Programs Committee
FET	Further Education and Training
GET	General Education and Training
GIJPAI	Governance: An International Journal of Policy, Administration, and Institutions
HSRC	Human Sciences Research Council (South Africa)
ICESCR	International Covenant on Economic, Social and Cultural Rights

MJ	The Monitor Journal
NESRI	National Economic and Social Rights Initiative
NSC	National Senior Certificate
OBE	Outcomes-based Education
OECD	Organisation for Economic Co-operation and Development
PELJ	Potchefstroom Electronic Law Journal
PISA	Program for International Student Assessment
SACG	South African Child Gauge
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UNESCO	United Nations Educational, Scientific and Cultural Organization
VET	Vocational Education and Training