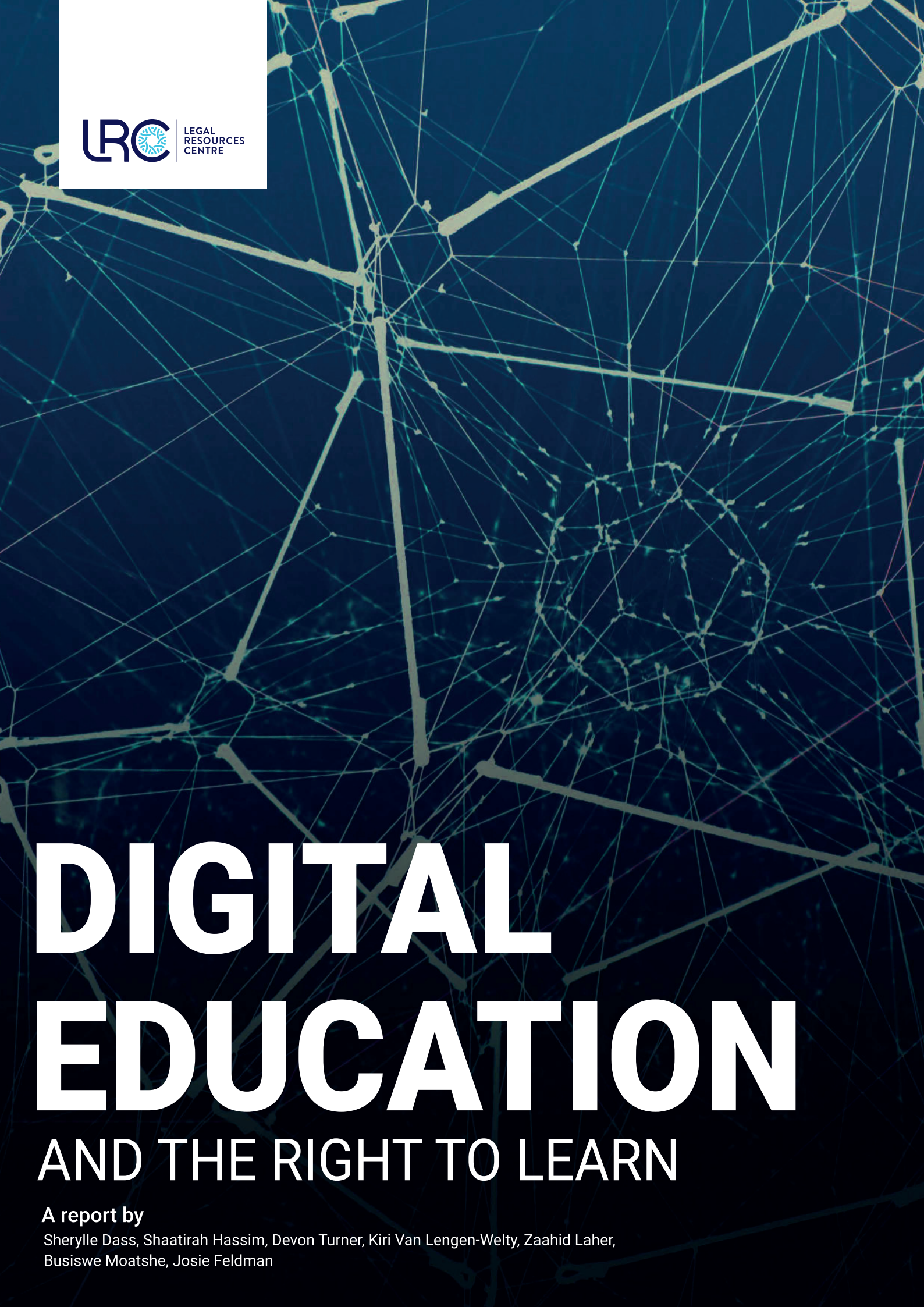

LEGAL RESOURCES CENTRE

DIGITAL EDUCATION

AND THE RIGHT TO LEARN

A report by

Sherylle Dass, Shaatirah Hassim, Devon Turner, Kiri Van Lengen-Welty, Zaahid Laher, Busiswe Moatshe, Josie Feldman

Introduction

Historically, apartheid education law and policy were built on a legacy of segregation and the disproportionate provision of education along racial lines, with the majority black (African, Coloured and Indian) learners receiving lower standards of education and educational resources compared to their white counterparts.

The earliest education policy reform initiative undertaken by the new government was the “White Paper on Education and Training" published in 1995. The White Paper proposed fundamental changes in the governance and funding of public schools. Its purpose was aspirational and intended to “build a just and equitable system which provides good quality education and training to learners young and old throughout the country.”

It acknowledged the critical areas that required interventions by the state to redress historical disadvantage and equalise the impact of two separate public education systems. Significantly it acknowledged that “South Africa has achieved, by a large measure, the most developed and well-resourced system of education and training on the African continent, with the highest participation rates at all levels of the system. In the best-resourced, well-staffed, highly motivated, elite sector of the school system, almost all students succeed in their senior certificate examinations, and an impressive proportion qualify for admission to higher education.” And that “At the same time, millions of adult South Africans are functionally illiterate, and millions of South African children and youth are learning in school conditions which resemble those in the most impoverished states. In the large, poorly-resourced sectors for the majority of the population, a majority of students drop out prematurely or fail senior certificate, and a small minority win entrance to higher education.”

Despite governments aspirations to dismantle the oppressive systems of an apartheid state, inequalities and discrimination on class and racial lines still persist. The disparity between education provision in fee-charging and no-fee schools, with the latter catering for majority poor black learners, is illustrative of the notion that we still operate a ‘two system public education structure.’ These policies have failed to address the underlying systems of oppression and laws and policies adopted by the apartheid state to oppress poor and black people, such as apartheid spatial planning, which continues to exile poor and black learners from educational opportunities and equal access to quality education. Well-resourced schools in previous white residential areas although public schools offer a more privatised education by generating school fees and retaining the status quo of privilege with only a small minority of black middle-class families being invited to the party.

These disparities in accessing equitable and quality education extend also to digital educational resources in no-fee schools (quintile 1, 2 and 3) which means that many previously disadvantaged learners have never had access to the internet and digital forms of schooling unlike most privileged learners in fee-charging schools in previously white suburban areas.

Many of these schools do not have adequate infrastructure such as electricity which increases the difficulties for the learners to exercise their right to education.

The effect of this is that many of these learners eventually face challenges competing on an equal footing with learners that are digitally literate, causing a ripple effect on attaining access to tertiary education and employment opportunities that demands high levels of competence in the digital environment.

Equitable access to free and accessible digital educational resources and by extension, access to the internet and data is an integral component of the right to basic education. The non-provision of internet and inequitable access to digital educational resources in the majority of public schools thus violate a learner's rights to basic education, as well as their rights to equality and non-discrimination, dignity and equal protection of the law.

The South African government has recognised the essential role that internet access plays in improving the ability of South Africans to compete economically on the international stage in an increasingly digitised global economy. Currently, SA Connect is the government's main policy to provide fast and reliable broadband internet access to schools.

This position paper explores the legal and policy framework in South Africa that aims to advance equal access to the internet and data in public schools and why the current interventions by the government falls short of redressing gaps in delivery to historically excluded learners in the majority of public schools.

For ease of reference, this paper is structured in three main sections:

SECTION A: Digital education in South Africa

SECTION B: Domestic Law and Policy on Digital Rights

SECTION C: International Law and Policy on the Digital Rights of Children

SECTION D: Conclusion

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SECTION

A

DIGITAL EDUCATION IN SOUTH AFRICA

For the purposes of this note, digital education is defined as:
"The innovative use of digital tools and technologies during teaching and learning... often referred to as Technology Enhanced Learning (TEL) or e-Learning"[1]

Access to the internet has become essential to achieving the right to basic education. Like many components of the right to basic education that have already been recognised by South African jurisprudence, access to the internet enables a learner to participate fully in their education and to develop skills essential for promoting their lifelong development and success.

Given this reality, unequal access to the internet that disadvantages rural schools and schools that predominately serve poor and black learners, violates not only the right to basic education, guaranteed by the Constitution of the Republic of South Africa, and international law, but also the right to equality and non-discrimination, dignity and equal protection of the law.

The Covid-19 global pandemic has led to the temporary closure of schools across the world, and it is estimated that more than 168 million children were out of the classroom for almost an entire year.[2]

In South Africa, it is estimated that nearly 12 million children have been affected by the shutdown of schools during this unprecedented crisis.[3]

The pandemic has laid bare South Africa's inability to provide internet access to most students nationwide, directly impacting their quality of education.

The importance of accessible internet, both in terms of speed and capacity, has grown during the Covid-19 pandemic to bridge the gap in the remote education of learners, with access to the internet now characterised "not only as an essential public good and basic need — it is a lifeline".[4] Digital literacy is therefore an integral part of any learner's education and plays a key role in their development.

1 Institute for Academic Development 'What is digital education?' The University of Edinburgh 14 September 2018, available at https://www.ed.ac.uk/institute-academic-development/learning-teaching/staff/digital-ed/what-is-digital-education.
2 Covid-19: Schools for more than 168 million children globally have been completely closed for almost a full year, says UNICEF' UNICEF 3 March 2021, available at https://www.unicef.org/press-releases/schools-more-168-million-children-globally-have-been-completely-closed.
3 University of Chicago Law School - Global Human Rights Clinic, "Access Denied: Internet Access and the Right to Education in South Africa" (2020). Global Human Rights Clinic (the "Access Report"), page 4. (source available online at https://chicagounbound.uchicago.edu/ghrc/1
4 Sonia Jorge, Eleanor Sarpong, Maiko Nakagaki, "Covid-19 Policy Brief: Internet Access & Affordability" Washington, DC: Alliance for Affordable Internet and Web Foundation (Available online at: http://webfoundation.org/docs/2020/04/Covid-Policy-Brief-Access_Public.pdf (2020)).

Inequalities in internet access in South Africa

It is widely accepted that many privately run schools and former "Model C" schools (private learners) are sufficiently funded and resourced to equip learners with competent computer training and, in some instances, offer specialised computer-based subjects to learners, thus increasing their skills for further education and in the job market.

Rural and peri-urban schools historically do not have access to sufficient digital resources, which places their teachers and learners at a disadvantage, as compared to their contemporaries attending private and Model C schools.

In 2017, it was estimated by Statistics South Africa's General Household Survey that only about one-tenth of South African households had access to the internet at home[5]. On 15 February 2021, Ms. Shenilla Mohamed, Executive Director of Amnesty International South Africa, commented that due to, and against the backdrop of the apartheid regime, historic underinvestment by the state in existing education inequalities,[6] hazardous and unhygienic conditions at schools, lack of adequate access to water and electricity, overcrowded classrooms, high community Covid-19 infection rates and the lack of safety at schools,

"a child's experience of education in South Africa is still dependent on where they are born, how wealthy they are, and the colour of their skin. The Covid-19 pandemic has made a broken and unequal system even worse, putting students from poorer communities at a huge disadvantage. Remote learning is not an option for the vast majority."

and that,

"South Africa's schooling system is so under-equipped that the pandemic has all but ended education for many students, especially those from already disadvantaged communities. Unless urgent access is taken, the future livelihoods of an entire generation will be at risk."[7]

Most learners in South Africa were not in the same position during this period, which is a factor that "can account for a rise in performance inequality within and across education systems."[8] Specifically, it was noted by Amnesty that:

- Nationally, only 22% of households have a computer and 10% an internet connection.
- In the North West and Limpopo provinces, only 3.6% and 1.6% of households, respectively have access to the internet at home.
- By contrast, students from wealthier communities with computer access have been able to continue their education, particularly through remote learning provided by better resourced schools.

Public institutions lack experience in remote learning methodology and would have had to quickly design, implement, and sustain remote learning techniques. In South Africa, most public learners also do not have adequate levels of access to the internet, or even computers, at their home. The impact of this is two-fold:

- There are stark inequalities in digital education and IT competencies of public learners compared to private learners; and,
- Public Learners were unable to benefit from online education resources to the same extent that private learners were able to during the pandemic.

5 'General Household Survey 2017' Statistics South Africa at 48, available at https://www.statssa.gov.za/publications/P0318/P03182017.pdf.

6 In June 2020 for example, the RSA government announced a decrease of R2 billion from the provincial education infrastructure grant. 'South Africa: Covid-19 pushes inequality in schools to crippling new level, risks a lost generation of learners' Amnesty International 15 February 2021, available at https://www.amnesty.org/en/latest/news/2021/02/south-africa-covid19-pushes-inequality-in-schools-to-crippling-new-level-risks-a-lost-generation-of-learners/.

7 Ibid.

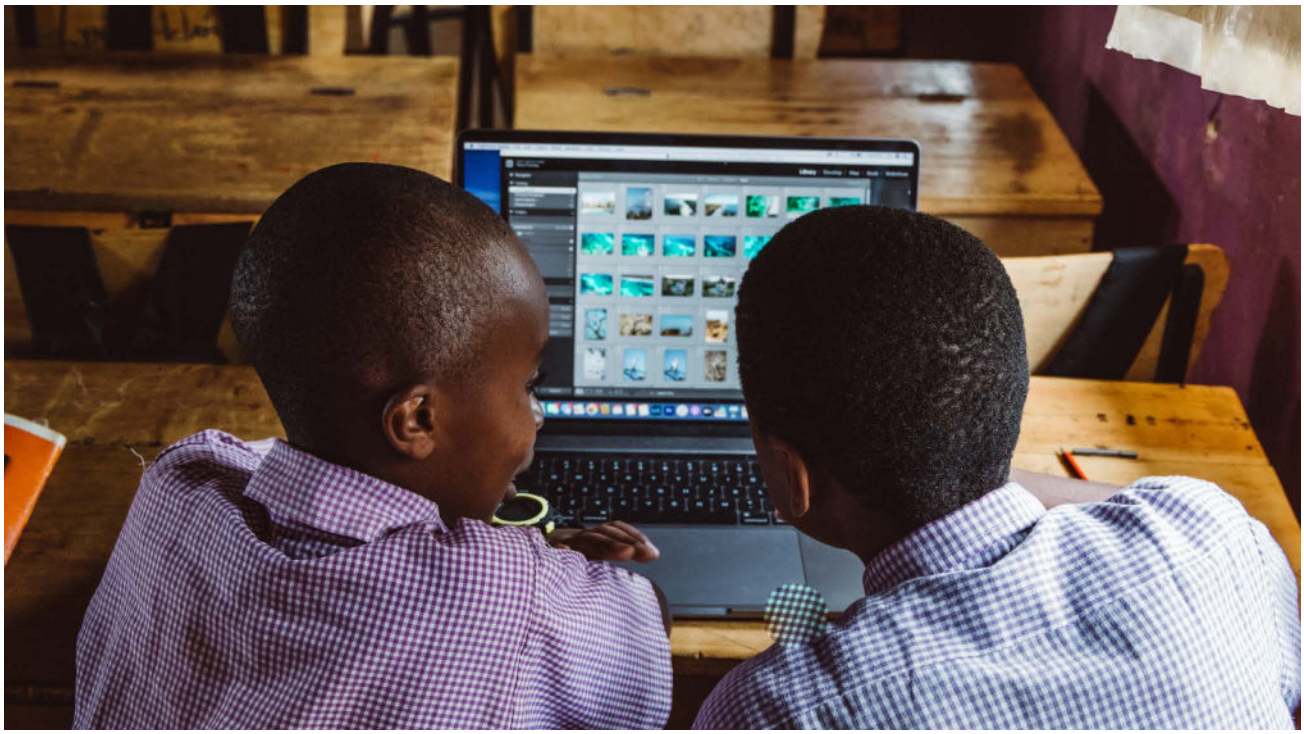
8 Debra Shepherd & Nompumelelo Mohohlwane 'The impact of Covid-19 in education – more than a year of disruption' National Income Dynamics Study (NIDS) - Coronavirus Rapid Mobile Survey (CRAM) 8 July 2021 at 20, available at https://cramsurvey.org/wp-content/uploads/2021/07/11.-Shepherd-D-_-Mohohlwane-N.-2021.-Changes-in-education-A-reflection-on-Covid-19-effects-over-a-year.pdf.

The challenges facing digital education in South Africa

In 2018, the National Education Infrastructure Management System (NEIMS) found that only 4 675 out of 23 471 schools had internet connectivity for teaching and learning.[9]

A recent publication, "Access Denied: Internet access and the right to education in South Africa" (The Access Denied Report), lists a number of reasons for the failure to provide effective internet access in public schools. These included the lack of: capacity, funding, a comprehensive and coordinated strategy for the implementation of the various policies, Infrastructure and adequate facilities (electricity, overcrowding, shortage of teachers, shortage of devices, data charges and theft), IT infrastructure, software and resources and on-going technical support. The report also listed a lack of teacher training in: the use of computers and the internet, teaching digital skills to learners and how to effectively implement online and digital resources into the curriculum. In addition there was no meaningful access to the internet, digital systems and infrastructure were poorly maintained and there were pervasive misconceptions among teachers and parents about internet use.[10]

While the South African government, as well as private telecommunications and digital companies, have invested in initiatives to provide historically disadvantaged and rural schools with access to the internet and IT infrastructure, including devices, there are criticisms that these efforts are dis-jointed, poorly co-ordinated, and unsustainable. Another critique is that there is an over reliance on the corporate and NGO sector.



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9 NIEMS Standard Reports January 2018' at 4, available at https://passmark.org.za/section27sources/2018%20NEIMS%20Report%20%2020172018.pdf.

10 University of Chicago Law School - Global Human Rights Clinic 'Access Denied: Internet Access and the Right to Education in South Africa' Global Human Rights Clinic 2020 at 5, available at https://chicagounbound.uchicago.edu/ghrc/1 Pages 23 and 24

The challenges amplified during the covid-19 lockdown

An April 2021 report by NEIMS (Fig 1) found that most of the South African public schools do not have access to the internet, with only 4 738 out of 23 276, or about 20%, having internet connectivity for teaching and learning purposes.[11]

Figure 1.

Communication Source Facilities (Ordinary Operational Schools)[12]						
Communication Systems Available					Without Communication Systems	
Province	No. of sites	Cell Network	Internet connectivity for teaching & learning	Internet connectivity for administrative purposes	Total	%
Western Cape	1457	1098	1261	1292	1	0.07
Eastern Cape	5291	1561	570	1170	73	1.38
Northern Cape	544	500	215	408	1	0.18
Free state	1084	1027	303	391	5	0.46
KwaZulu-Natal	5803	5609	536	1000	51	0.88
North West	1471	1444	276	650	3	0.20
Gauteng	2074	1762	1327	1441	1	0.05
Mpumalanga	1718	1625	99	241	19	1.11
Limpopo	3834	3782	151	345	24	0.63
Total	**23276**	**22008**	**4738**	**6938**	**178**	**0.55**

Furthermore, 58.16% of South African public schools do not have access to computers. Lack of access is particularly apparent in the Eastern Cape and Limpopo provinces, where 88.81% and 85% of schools, respectively, do not have computer centres (Fig 2).[13]

11 'National Education Infrastructure Management System Report as at 12 April 2021' at 11, available at https://www.education.gov.za/Portals/0/Documents/Reports/NEIMS%20STANDARD%20REPORT%202021.pdf?ver=2021-05-20-094532-570.
12 Ibid.
13 Ibid at 9.

Figure 2.

Communication Source Facilities (Ordinary Operational Schools)[14]					
Province	No. of sites	With Computer Centre	% With Computers	Without Computer Centre	% Without Computer Centre
Western Cape	1457	882	60.54	575	39.46
Eastern Cape	5291	576	10.89	4699	88.81
Northern Cape	544	288	52.94	256	47.06
Free state	1084	431	39.76	653	60.24
KwaZulu-Natal	5803	1938	33.40	3865	66.60
North West	1471	667	45.34	804	54.66
Gauteng	2074	1662	80.14	412	19.86
Mpumalanga	1718	657	38.24	1061	61.76
Limpopo	3834	575	15.00	3259	85.00
Total	**23276**	**22008**	**10686**	**8849**	**380**

UNICEF has reported that learners in South Africa have lost substantial amounts of school days since the pandemic began, with learners between 75% to a full school year behind where they should be.[15] Foundation phase learners have thus lost essential time learning to read and write. Another study found that 10% of adults reported that at least one learner in their household had not yet returned to school in 2021.[16] [17]

Rotational attendance, sporadic school closures and days off for specific grades were cited as the reasons for this loss of learning time not only in South Africa but throughout the world during the pandemic.[18] It was also apparent that most learners were not able to benefit from online learning resources during this period, since access to digital technology as well as online tools and resources were not available.

To compound the difficulties of delivering acceptable levels of education, as of July 2021, 140 schools had been vandalised in Kwazulu-Natal and Gauteng during the July unrest, in addition to the over 2 000 schools, which were looted and vandalised during the national lockdown.[19]

As a result of being out of school, UNICEF anticipates that the loss of learning time will have devastating effects on learners: many learners will suffer from mental distress, exposure to violence and abuse, missing school-based meals, reduced development of social skills and lowered prospects of employability in the future. In addition, when children are out of school, women are "twice as likely to take on childcare responsibilities, affecting their ability to work or search for work."[20]

The above clearly demonstrates that even if a pandemic and national lockdown were foreseen, South Africa would likely have not been sufficiently prepared to accommodate learners in a digital space with online learning.

As things stand, more learners have been left in a situation of staggered learning and other barriers which will not be remedied over a short period of time.

14 Ibid.
15 'Learners in South Africa up to one school year behind where they should be' UNICEF 22 July 2021, available at https://www.unicef.org/southafrica/press-releases/learners-south-africa-one-school-year-behind-where-they-should-be.
16 Shepherd & Mohohlwane op cit note 7 at 2.
17 Shepherd & Mohohlwane op cit note 7 at 2.
18 UNICEF op cit note 10.
19 Ibid.
20 Ibid.

SECTION

B

DOMESTIC LAW AND POLICY

The Constitution

Chapter 2 of the Constitution of the Republic of South Africa, sets out the fundamental rights in the Bill of Rights. The Constitution applies to both public and private actors and imposes both positive and negative obligations on the state to protect, promote and fulfil the rights in the Bill of Rights.

The right to basic education is envisaged in Section 29(1)(a) of the Constitution which provides that "everyone has the right to access basic education …". The state is accordingly required to protect, promote, respect and fulfil this right, and it must do so through the passing of laws, regulations and policies that are developmental and progressive in nature.

Socio-economic rights such as the right to housing or health require that the state must always, through reasonable measures, make the right progressively available and accessible. The right to basic education, however, is distinct in that it is immediately realisable.

This was confirmed by the Constitutional Court in *Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others* (Juma Musjid) where it was noted that:

"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 in Section 29 (1) (a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equity and freedom".[21]

In *Juma Musjid*, the Constitutional Court recognised the right to education as an empowerment right.[22] The right in Section 29 must be understood in the light of the aim of education. Education must be aimed at the full development of the human personality and instil a sense of dignity. It should also be aimed at enabling all persons to participate effectively in a free society.[23]

A functioning, adequate, efficient and quality education system must be one that is available, accessible, acceptable, and adaptable.[24] These elements apply to both basic and further education. Availability means that functioning educational institutions and programmes must be available in sufficient quantity.[25] This threshold has been recognised officially by the UN in respect to UN General Comments 14 and 25, which are elaborated on in section C of this paper.

The United Nations General Comment 13 on the Right to Education further elaborates that "availability" means that all institutions and programmes should have buildings or other protection from elements, sanitation facilities; safe drinking water; trained teachers; teaching materials; libraries; laboratories and computers. This means education institutions and programmes should be accessible to everyone without discrimination. Where there are barriers, the state should work towards removing them. General Comment 13 also provides that education must be adaptable, in that, it should be "flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings".[26]

21 *Governing Body of the Juma Musjid Primary School & Others v Essay* N.O. and Others 2011 (8) BCLR 761 (CC) para 37 [hereinafter Juma Musjid]..
22 Ibid, para 43.
23 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESR) art 13.
24 Katarina Tomaševski 'Human rights obligations: making education available, accessible, acceptable, and adaptable' Right to Education Primers No 3 2001 at 5, available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf.
25 UN General Comment no. 13: The Right to Education (1999). Available at: https://www.ohchr.org/en/resources/educators/human-rights-education-training/d-general-comment-no-13-right-education-article-13-1999#:~:text=Education%20is%20both%20a%20human,of%20realizing%20other%20human%20rights.
26 Ibid

In *Minister of Basic Education v Basic Education for All,* the Supreme Court, in addressing the failure by the Department of Basic Education (DBE) to provide textbooks to learners, noted that the failure to ensure full delivery of textbooks was a violation of the rights to education, equality and dignity guaranteed by the Constitution.[27]

Proper learning and teaching cannot take place where learners do not have access to the necessary resources. The continued denial or frustration of access to much needed teaching and learning resources – be it textbooks or digital access to similar online resources – constitutes a continued violation of the right to a basic education, equality, and dignity.

In *Madzodzo v Minister of Education*, the Eastern Cape High court noted that access to schools is a necessary condition for the achievement of the right to education. So too is the provision of adequate teaching resources. The court also remarked that the state's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources including schools, classrooms, teachers, teaching materials and appropriate facilities for learners.[28]

The obligation on the state to provide digital resources to learners would reasonably be included as an integral part of the notion of educational resources in this regard. Inadequate resources therefore undermine the right to access to education. The constitutional right to education – and the guarantees provided – should thus include the rights to internet and data for all children to ensure equitable access to education.

The Constitutional Court has set out the importance of this right stating that education provides, "a foundation for a child's lifetime learning and work opportunities."[29] It is also important to take note that the right to education is unqualified and immediately realisable. This means the state cannot use budgetary constraints as a viable defence in not providing internet services and infrastructure to schools across South Africa.

Emmanual Ikuegbu via Pexels

27 *Minister of Basic Education v Basic Education* for All 2016 (4) SA 63 (SCA) para 21.
28 *Madzodzo and Others v Minister of Education and Others* 2014 (3) SA 441 (ECM) paras 19-20.
29 Juma Musjid para 43; also see *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng, and Another* 2016 (4) SA 546 (CC) para 3, where Moseneke DCJ noted: ". . . . All forms of human oppression and exclusion are premised, in varying degrees, on a denial of access to education and training. The uneven power relations that marked slavery, colonialism, the industrial age, and the information economy are girded, in great part, by inadequate access to quality teaching and learning. . . ."

Regulations relating to minimum norms and standards for public school infrastructure

The DBE's Norms and Standards for Public School Infrastructure (2013) (the "Regulations" or the "Norms and Standards") in its preamble acknowledges the painful legacy of apartheid and the consequent uneven development with regards to the provisioning of basic school infrastructure to all public schools.[30]

Furthermore, it acknowledges that social investment in education is a responsibility of the government and requires education to be central to government policies as one of its key priorities. Significantly, emphasis is placed on the provision of relevant, effective, responsive, inclusive and sustainable teaching and learning infrastructure within schools to address the systematic inequalities experienced by learners.[31]

To address the legacy of uneven development of public-school infrastructure, the regulations provide minimum norms and standards,[32] compliance obligations[33] and timeframes within which school infrastructure backlogs must be eradicated.[34]

The obligations provided by the regulations contained in the Norms and Standards for Public School Infrastructure therefore constitute a crucial legislative intervention to addressing the inequalities in public education and emphasise the need for progressive measures to advance the development of previously disadvantaged public schools.

In addressing the need for minimum standards in public school infrastructure, the regulations contain essential minimum standards and obligations in providing access to internet infrastructure, which need to be met by the DBE. Furthermore, the Norms and Standards for Public School Infrastructure emphasize, in multiple provisions, the importance of access to the internet in public schools. The regulations also affirm the urgency in meeting these goals within a reasonable timeframe.

The regulations provide that the MEC of Education must prioritise the norms and standards relating to the availability of electronic connectivity.[35] The regulations further state that all schools must have some form of wired or wireless connectivity for purposes of communication, which must be maintained in good working order.[36] Importantly, the communication facilities referred to include internet facilities.[37]

It is therefore indisputable that the regulations mandate the progressive development and implementation of internet access infrastructure in public schools. Given the emphasis placed on decreasing the inequalities caused by apartheid's legacy of uneven facilities in schools in the preamble to these regulations, it should therefore be of highest priority that DBE provide access to internet infrastructure in previously disadvantaged public schools, many of which still do not have access to internet at school.

Significantly, the regulations on Norms and Standards for Public School Infrastructure provide a timeframe for the realisation of the obligations imposed on DBE therein.[38] Regarding the provision of internet facilities in public schools, the regulations provide that this should be phased in over a period of seven years from the date of publication of these regulations.[39]

Given that these regulations were published in 2013, the DBE should have met these legislative obligations by end of 2020. It is therefore concerning that despite government being a full year behind their obligations to provide internet access infrastructure in public schools, they are still falling significantly short of their obligations.

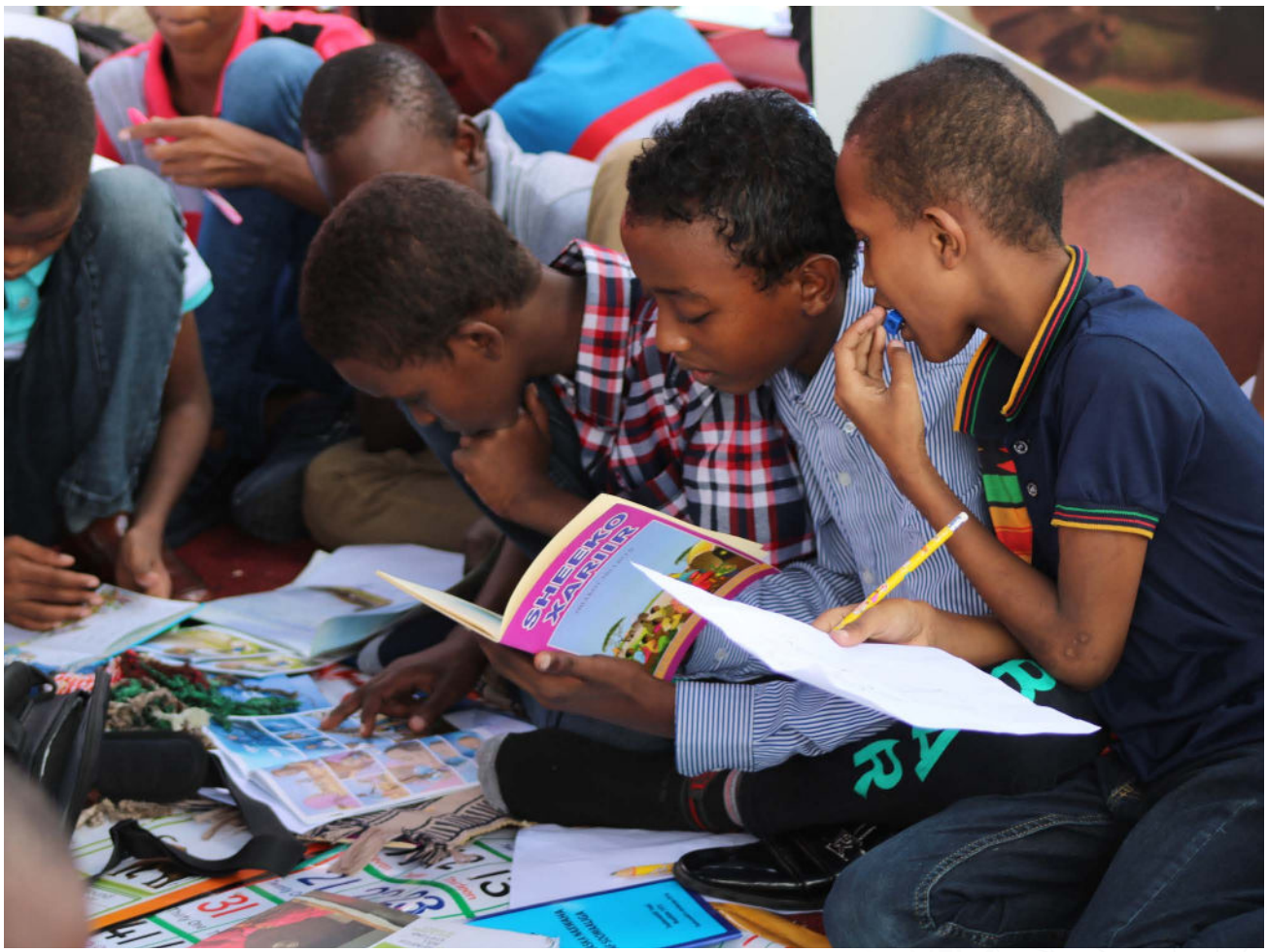
30 Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure in GR 920 GG 37081 of 29 November 2013, available at https://www.gov.za/sites/default/files/gcis_document/201409/37081rg10067gon920.pdf.
31 Ibid.
32 Ibid reg 2(a).
33 Ibid reg 2(b).
34 bid reg 2(c).
35 Ibid reg 4(3)(c).
36 Ibid reg 16(1).
37 Ibid reg 16(2)(c).
38 Ibid reg 4(1)(b).
39 Ibid reg 4(1)(b)(ii).

Finally, the Norms and Standards for Public School Infrastructure also state that in implementing these regulations every reasonable possible avenue must be explored and alternatives considered to give effect to the provisions contained therein.[40] Despite this, the DBE has not done enough to explore reasonable possible avenues and alternatives to ensure effective implementation of their obligation to ensure internet access in public schools.

The South African government has recognised the importance of online learning and has embarked on a series of initiatives detailed below, both in terms of IT Infrastructure, IT Training, and internet access, to grow digital education among young learners in largely remote areas.

The three main domestic policies currently in place are South Africa Connect (SA Connect) and Universal Service and Access Obligations (USAOs) which are obligations imposed by the Independent Communications Authority of South Africa (ICASA) on telecommunications operators, and lastly a recent white paper on e-Education published by the South African government. In addition, MTN, Vodacom, Telkom and Cell C declared specified education websites as "zero-rated" in terms of data to promote access to these resources.

We will deal primarily with these three policies, their relevance, and where they fall short in addressing the barriers to digital education in South Africa.



Ismail Salad Osman Hajji via Unsplash

40 Ibid reg 4(4).

White paper: e-education

Overview

In 2004 the government issued a White Paper on e-Education.[41] The White Paper sets out the South African government's approach to e-Education and how the government wants to effectively reach its objectives and targets. Chapter 1 deals with an overview of South Africa's current situation with regards to Information and Communications Technology (ICT).

Chapter 2 deals with e-Education in South Africa in a broader sense. Paragraph 2.22 of the White Paper sets out the policy goal and reads:

"Every South African learner in the general and further education and training bands will be ICT capable (that is, use ICTs confidently and creatively to help develop the skills and knowledge they need to achieve personal goals and to be full participants in the global community) by 2013" (our emphasis).

Despite this aspirational goal, the majority of South African learners in general are not confident with using ICTs and are not able to be full participants in the global community.

Chapter 7 is important because it lays the groundwork for Phase 1 and Phase 2 of the government's plan to ensure digital education for all students in South Africa. Unfortunately, Phase 1 and Phase 2 are currently behind schedule.[42] This will be discussed more fully in the SA Connect and Universal Services and Access Obligations sections of this report.

The White Paper was a positive step for the government at the time, ensuring the country and various departmental agencies would have a clear map in reaching the goal of providing digital education for all learners in South Africa. The White Paper to this day remains a strong foundational document informing and guiding all subsequent legislation and policies on the matter.

Chapter 5.1 of the White Paper recommends that the Department of Education develop a national policy framework for training policies and programs "to enable teachers to understand and use ICTs for teaching and learning" which would require extensive staff development and support.

Chapter 5.9 further states that provincial education departments should "plan and budget for the appointment of ICT in Education specialists at provincial and district levels... to provide ongoing professional and technical support." It also recommends the adoption of ICT training as part of university degree requirements.

The White Paper lacks clear, context-sensitive definitions of objectives. It also lacks an integrative strategy and does not prioritise the importance of the budget.

The White Paper also fails to provide for a variety of schools or scenarios, meaning the 'one-size-fits-all' approach is adopted within the strategy. It does not realise the diversity of South African schools and the multitude of factors that need to be considered when trying to provide ICT training and resources to schools across the country.

Gustavo Fringe via Pexels

41 Draft White Paper on e-Education: Transforming Learning and Technology through Information and Communication Technologies (ICTs) (GN 1869 in GG 26734 of 26 August 2004), available at https://www.gov.za/sites/default/files/gcis_document/201409/267341.pdf.
42 The Access Denied Report op cit note 2 at 21.

South Africa connect

Overview

SA Connect is the government's primary policy for broadband access in the country.[43] The policy, first published in 2013, set the goal of connecting all schools to the internet by 2020 at speeds of at least 10 megabits per second, with all schools to be connected at 100 megabits per second by 2030.[44]

The policy has four strategies in place to reach its objectives: Digital Readiness, Digital Development, Building the Digital Future and Realising Digital Opportunity. Each strategy addresses aspects, sets out intended outcomes and is measured by indicators.[45]

In SA Connect, the government recognises the essential role that internet access plays in improving the ability of South Africans to compete economically on the international stage in an increasingly digitised global society.[46] The SA Connect Policy targets are:

"To achieve a universal average download speed of 100 mbps by 2030. To reach this target in a progressive manner, reviewable targets have been set starting with an average user experience speed of 5 mbps to be reached by 2016 and available to 50% of the population and to 90% by 2020, with the quality of service monitored by ICASA," and the "rapid evolution of broadband technology means that these targets will be monitored and evaluated on an on-going basis to determine if the targets need to be reviewed" (our emphasis).[47]

The Access Denied Report highlights that the 2020 targets for school connectivity established by the policy were missed and were revised without updating the policy. Significantly, they reference a Department of Telecommunications and Postal Service (DTPS) report that confirms that, as of December 2018 they were at least four or five years behind schedule in implementing Phase 1 of the policy.

The Access Denied Report found that the government has not met its own targets in relation to providing internet access in schools.[48]

It is evident from the Access Denied Report that the SA Connect Policy has fallen short of substantively addressing barriers to digital education for 2 main reasons: a lack of a comprehensive and coordinated strategy for implementation of the various policies; and a lack of funding.

Ron Lach via Pexels

43 Ibid at 11.
44 Ibid.
45 'National Broadband Policy 2013 - South Africa Connect: Creating Opportunities, Ensuring Inclusion' Ellipsis, available at https://www.ellipsis.co.za/national-broadband-policy/, accessed on 10 June 2022.
46 The Access Denied Report op cit note 2 at 11.
47 'South Africa Connect: Creating Opportunities, Ensuring Inclusion' (20 November 2013) available at https://www.dtps.gov.za/dcdt/images/documents/Broadband/gazette_version_1__bb_policy__4_dec_2.pdf.
48 The Access Denied Report op cit note 2 at 43.

Universal services and access obligations (USAO)

Overview

USAOs are licensing obligations imposed by the ICASA telecommunications operators. USAOs are required of South Africa's operators by ICASA and are the second main initiative for connecting schools in South Africa. In respect of schools, these USAOs apply to MTN, Cell-C and Vodacom.[49]

These telecommunications service providers are required to provide internet access to 1,500 schools. Operators are further required to provide each school with three teacher laptops and 24 learner laptops.[50]

The rationale for USAO stems from the general recognition that in their absence there will be a significant number of people who are excluded from specific services, such as telecommunications, broadcasting, or postal services.

Such exclusion may arise for one or more of the following reasons:

- There may be users who cannot afford the services.
- Other users may be living in areas that are uneconomical to serve, given the topography of the area or low population density; and,
- Some users may have special needs, such as the disabled and the elderly.

One of the main concerns raised in the Access Denied Report is that in order for this initiative to work it requires high speed connectivity, and under the current ICASA specifications the minimum speed required is 1 Mbps, meaning that minimal content could be provided.[51]

The Access Denied Report identifies several factors that have contributed to the slow progress in implementation of these policies, which include:

- A comprehensive and coordinated strategy for implementation of the various policies between service providers and the Department of Education.
- Infrastructure and adequate facilities (broadband speeds electricity, overcrowding, shortage of teachers, shortage of devices, data charges on teachers and students and theft).
- Funding and Budget cuts;
- Adequate training and IT support for teachers and administrators (including the integration of digital technology in the curriculum as well as maintaining and upgrading IT networks and hardware); and
- Overreliance on NGOs and corporate social responsibility.[52]

Pexabay via Pexels

49 Ibid at 22.
50 Ibid.
51 Ibid.
52 Ibid at 20.

SECTION

C

INTERNATIONAL LAW AND POLICY ON THE DIGITAL RIGHTS OF CHILDREN

The UN committee on the rights of the child

The United Nations (UN) Committee on the Rights of the Child (Committee) emphasised the importance of children's rights in relation to digital media at its Day of General Discussion in 2014.[53]

Whether the digital environment is seen as a potential threat to or enabler of children's rights, it can no longer be ignored as a factor in children's well-being and development.

An important aspect to consider is the impact of digital technologies on children's rights through the lens of the Convention on the Rights of the Child (CRC).[54] Although written before the present contours and consequences of the digital environment could be foreseen, the CRC was highly prescient in emphasizing the importance of communication contexts as crucial means by which children can exercise their rights.

The right to non-discrimination contained in Article 2 of the CRC embodies one of the four general principles of the CRC and, as such, is of utmost importance for children in the digital environment. Indeed, the underlying idea of this article is that children have a right not to be discriminated against.[55]

The Committee highlights that, to address discrimination, states may have to implement changes in their national legislation, administration, and allocation of resources, but also in their educational system to change attitudes. In relation to digital technologies and the right to non-discrimination, several considerations are relevant. Non-discrimination importantly requires equality of children's access to the digital environment.[56]

As a gateway for many forms of provision and participation, internet access has been taken for granted as a means of ensuring child rights, and in consequence, lack of (sufficient or reliable) access is a pressing problem for large groups of children across the world. These are often those who are already vulnerable or marginalised in society.

According to the Committee, the right to non-discrimination requires states to actively identify those children or groups of children that may need special measures for the recognition and exercise of their rights.[57] Thus, it is important to sustain and extend policies to overcome digital exclusion in its different forms. Such policies should be constructed in such a way that the policy objectives contained therein apply to all children.

53 'Committee on the Rights of the Child, Report of the 2014 Day of General Discussion on "Digital Media and Children's Rights"' Office of the High Commissioner for Human Rights at 2, available at https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/Discussions/2014/DGD_report.pdf [hereinafter 'CRC Report on Digital Media and Children's Rights'].
54 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).
55 Ibid at art 2.
56 CRC Report on Digital Media and Children's Rights op cit note 42 at 13.
57 Ibid at 21.

In other words, inequalities in access may render a "one-size-fits-all" approach ineffective – therefore, policies should be adaptable or flexible to the extent that they address the needs of all children (e.g. children with disabilities,[58] children living in poverty, children from minority groups, child refugees or those displaced by armed conflict, children of imprisoned parents, and other vulnerable groups who may not be reached by schools or supported by parents).[59]

It is also crucial to educate children about their right to non-discrimination in a digital context. As a further consideration, it is important to address gender discrimination and promote equality between girls and boys in relation to digital technologies.[60]

An essential consideration on any discussion on the digital rights of children should include the best interests of the child principle as contained in Article 3(1) of the CRC. According to the Committee, Article 3(1) stipulates that:

"Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions."

In its General Comment No. 14, The Committee (CRC/C/GC/142013A) clarified that the "child's best interests" is a threefold concept:

- A substantive right.
- A fundamental interpretative legal principle; and
- A rule of procedure.

Thus, every decision and action that may have repercussions on a wide array of children's rights in the digital environment should actively consider the child's best interests. As the digital environment is such an inherent part of children's lives, with the potential to – both positively and negatively – impact their rights to, for instance, freedom of expression, privacy, and protection, a balanced assessment of children's interests should be at the centre of policymaking and decision-making practices.

Moreover, states are also required to ensure that the best interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector. In the digital environment, this implies ensuring that technology companies or platform providers consider the best interests of children when their products and services are being used by them.

Article 12 of the CRC (the right to be heard) is another one of the four general principles of the CRC and ascribes to children the right to be heard in all matters affecting them, to participate in all decision-making processes having a bearing on their lives, and to exert influence over such decisions in accordance with their age and maturity. It places an obligation on state Parties to the CRC to truly involve children in all matters affecting them. Article 12 is considered an integral part of the implementation of the other articles of the CRC (e.g., Articles 13 and 17) and applies to all children capable of forming views and not merely those capable of expressing views.

The digital environment now constitutes one such relevant context and therefore children and young people should be meaningfully involved in the decision-making processes leading to the creation of policies in this field.[61]

While children are most often represented in policymaking (by NGOs, Children's Ombudsmen, etc.) they are not generally involved in an active and meaningful way in the actual policymaking process. However, the Committee recommended that states should promote this. The Committee also asked states to ensure that:

"children are consulted in order to take into account their views and experiences in developing laws, policies, and programmes and in the setting up of services, and other measures relating to digital media and ICTs" and that they are "actively engaged in the design and implementation of initiatives aimed at fostering safe use of digital media and ICTs".

Moreover, companies that provide content or services to children should consult them and incorporate their interests into their corporate social responsibility strategies.

58 Meryl Alper & Gerard Goggin 'Digital technology and rights in the lives of children with disabilities' (2017) 19 New Media & Society 5 at 726.

59 Eva Lievens et al. 'Children's Rights and Digital Technologies' in Ursula Kilkelly & Ton Liefaard (eds) International Human Rights of Children (2019)

60 Resolution 70 (Rev. Busan) 'Mainstreaming a gender perspective in ITU and promotion of gender equality and the empowerment of women through information and communication technologies' International Telecommunications Union (2014) at 5, available at https://www.itu.int/en/ITU-D/Digital-Inclusion/Documents/Resolutions/Resolution70_PP_BUSAN_14.pdf.

61 Lievens E et al, Children's Rights, 493.

There are various rights that are particularly relevant in the digital environment regarding children. The right to freedom of expression and information contained in Article 13 of the CRC ascribes to the child the right to "seek, receive and impart information and ideas of all kinds" through any medium. It has a broad scope of application, which extends to traditional but also new and even future media. It has been acknowledged that this right is important for the development of the child and that the right itself is not affected by the fact that children may not have the same capacities as adults.[62]

The child's right to impart information to others is also of particular importance in the context of the digital environment as children are no longer mere receptacles of content but are also creators and distributors of such content. It is important to acknowledge children's dual role of user/consumer and creator. The Right to Freedom of Association in Article 15 is also important in the digital context. Daly (2016) refers to Article 15 CRC as "potentially remarkably broad, spanning children's family relationships, to rights concerning school attendance, to rights in public spaces".[63]

Children exercise their civic and political rights to expression and association in digital environments, notably in countries where such opportunities are sorely needed. The right to information embodied in Article 17 is indeed particularly important in the context of the digital environment. The internet is an information gateway, offering users access to a wealth of information on an infinite number of topics. As such, access to information is a prerequisite for the realisation of many of the other rights contained in the CRC.

Finally, but still of paramount importance, the right to education and literacy contained in Articles 28 and 29 of the CRC should be emphasised.[64] There is a broad consensus that the digital environment, in general, and the internet provides enormous benefits in terms of education, on the one hand, and that education and literacy initiatives function as crucial means to empower children in the digital environment, on the other hand. This dual perspective is reflected in many international policy documents, such as the OECD Recommendation on The Protection of Children Online (2021).[65]

The right to education in Article 28 concerns, most importantly, the provision of educational curricular, library, and informational resources, which in the digital environment can be provided readily accessible and searchable to all with internet access. Second, this right encompasses the competence and literacies required to make the optimal use of such educational and information resources, building on the long history of teaching print and other literacies.

Media literacy has both a protective and a participatory function by providing children and young people with the skills and abilities to take steps to manage their online lives.

Media literacy policies and initiatives should be framed against the backdrop of human rights, with "media and information literacy" interwoven with the right to freedom of expression and information.[66]

Further, Article 29 of the CRC stipulates that one of the goals of education is

"(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations" (CRC/GC/2001/1).[67]

The COE Guide to Human Rights for Internet Users also stresses the role of education and literacy in relation to the exercise of rights and freedoms on the internet, for it is only through access to digital education and knowledge that internet users – including, indeed especially, children – are empowered to understand and exercise their rights and freedoms online.[68]

Children cannot exercise or realise rights about which they are unaware; therefore, they must first be made aware of the human rights to which they are entitled, and of the fact that these rights apply online as well as offline, as was adopted by the UN Human Rights Council in 2016.[69]

62 Lucy Smith 'Convention on the rights of the child: Freedom of expression for children' in Tarlach McGonagle & Yvonne Donders (eds) The United Nations and Freedom of Expression and Information: Critical Perspectives (2015) 146.
63 Aoife Daly A commentary on the United Nations Convention on the Rights of the Child, Article 15: The right to freedom of association and to freedom of peaceful assembly (2016).
64 Lievens et al op cit note 48 at 500.
65 Organisation for Economic Cooperation and Development (OECD) 'Recommendation of the Council on Children in the Digital Environment' (adopted 16 February 2012), available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0389%20.
66 Divina Frau-Meigs & Lee Hibbard 'Education 3.0 and internet governance: a new global alliance for children and young people's sustainable digital development' 2016 Global Commission on Internet Governance at 1, available at https://www.cigionline.org/sites/default/files/gcig_no27web_0.pdf.
67 Lievens et al op cit note 48 at 500.
68 Council of Europe 'Recommendation of the Committee of Ministers to Member states on a Guide to Human Rights for Internet Users' (16 April 2014) CM/Rec (2014) 6.
69 United Nations Human Rights Council Res 32/13 on the Promotion, Protection and Enjoyment of Human Rights on the Internet (1 July 2016) A/HRC/RES/32/13, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/156/90/PDF/G1615690.pdf?OpenElement.

The United Nations' position

Access to the digital space not only allows children opportunities within their right to equal education but also provides them with accessing vital information including services to ensure that their human rights are protected.

South Africa ratified the United Nations Convention on The Rights of a Child affirming human rights for children.

The United Nations has recognized children's rights to the digital environment and during February 2021 the committee adopted General Comment 25 on children's rights to the digital environment.[70]

General Comment 25 emphasizes that states should take cognizance of the following:

(i) NON-DISCRIMINATION

Ensure that children have the right to non-discrimination and that all children have equal and effective access to the digital environment. states should take all measures necessary to overcome digital exclusion.

(ii) BEST INTERESTS OF THE CHILD

By providing access states must ensure that the best interests of children are always of paramount consideration.

In considering the best interests of the child, states should have regard for all children's rights, including their rights to seek, receive and impart information, to be protected from harm and to have their views given due weight, and ensure transparency in the assessment of the best interests of the child.[71]

(iii) RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT

With access to the digital space, states must provide appropriate measures to protect the child's right to life, survival, and development.

The use of digital services should not be harmful to the child. Attention must be given to the effects of technology especially in the early years of childhood development.

General Comment 25 proposes that training must be provided to parents, caregivers and other role players considering the research on the effects of digital technology on a child's development.

(iv) RESPECT OF THE VIEW OF THE CHILD

states should promote awareness of and access to digital means for children to express their views and offer training and support for children to participate on an equal basis with adults anonymously where necessary so they can advocate for their rights individually and as a group.

Children have a right to digital literacy

In developing education policy, states must listen to the views of children.

In essence the General Comment calls on states to ensure that national policies dealing with children's rights include the digital environment, ensuring that all children can engage digitally in a safe environment.

South Africa must ensure safe spaces are provided for learners in school, online as well as offline, bearing in mind various factors which are influenced by inequalities within the schooling system.

70 United Nations Committee on the Rights of the Child 'General Comment 25 on children's rights in relation to the digital environment' (2 March 2021) CRC/C/GC/25, available at https://www.ohchr.org/EN/HRBodies/CRC/Pages/GCChildrensRightsRelationDigitalEnvironment.aspx.

71 Ibid para 13.

SECTION

D

CONCLUSION

Notwithstanding the strides government has made to improve internet connectivity for learners in public schools, the legislative and policy reforms have not done enough to address structural inequalities that continue to disadvantage historically excluded learners in public schools, leaving those learners receiving a poorer quality education. The lack of access to internet and data in public schools will have knock-on effects for children and will hamper their potential to compete for economic and social opportunities in the digitized environment.

Access to the internet and digital educational resources is an integral component of the Right to Basic Education as set out in Section 29 of the Constitution. The inequity in accessing digital educational resources discriminates against learners from poorer and historically marginalised communities and violates their rights to Equality and Non-Discrimination, Dignity and Equal Protection of the law. Furthermore, South Africa is a signatory to most International Conventions relating to children where these rights are entrenched and their failure to provide internet connectivity is thus a violation of international law and norms.

The DBE's current policy framework does not meet the minimum core standards necessary to ensure effective, efficient and reliable implementation of internet connectivity in public schools. These policies have not been supported by a realistic budget, seem disjointed with regard to the various stakeholders needed to implement the policy and have not considered factors pertinent to public schools in rural and peri-urban areas such as poor infrastructure.

Significantly, the policy framework appears to have been developed in isolation and without reference to the Regulations relating to the Minimum Uniform Norms and Standards for Public School Infrastructure. The Regulations create a statutory obligation on the MECs for Education to prioritise internet connectivity within a seven-year time period. This deadline has not been met and the DBE has not made concrete strides to develop a plan to ensure that all public schools have internet connectivity. The reliance on a policy that has itself not met its own deadline does not absolve the DBE from compliance with the regulations.

The DBE has legislative and treaty obligations to ensure that all children have access to the internet and digital educational resources. It must adopt a transparent and effective plan and policy to implement internet connectivity in all public schools that is aligned with the regulations relating to the Minimum Norms and Standards for Infrastructure.