

# **An Analysis of State Compliance With International Laws Regulating the Provision of Basic Education in Botswana, Malawi, Namibia, South Africa and Zambia**

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## **SUMMARY**

Several member states of the Southern African Development Community (SADC) have signed, ratified or acceded to the United Nations instruments that make provision for the promotion and protection of the right to education. In this article, the authors spotlight those international guarantees to remind policymakers and implementers of education across the region about their obligations concerning the provision of basic education. A human-rights-based theoretical framework for development to evaluate the integration of international human-rights standards into the education laws of five selected SADC states: Botswana, Malawi, Namibia, South Africa and Zambia. This framework, which emphasises the indivisibility and interdependence of human rights, is particularly relevant in the context of education as it ensures that the right to education is not only respected but also protected and fulfilled. These countries were chosen because they have all accepted the human-rights-based approach to development and professed their adherence to international instruments that provide for the right to basic education. In addition, some of them have adopted supreme constitutions that expressly provide for the right to education. This study is limited to an analytical assessment of the applicable constitutional, legislative and policy frameworks governing basic education in the selected nation states, a research of utmost significance in the field of human rights and education.

**KEYWORDS:** basic education, international law, state compliance, SADC

## 1 INTRODUCTION

“Education is a human right, a powerful driver of development, and one of the strongest instruments for reducing poverty and improving health, gender equality, peace and stability.”<sup>1</sup> When delivered correctly, education can eradicate a multitude of society’s quandaries. However, the reverse is also true; the benefits are out of reach when education provision is defective. It is not surprising then, that education ranks high on the international agenda. The right to education has been included in several international and regional instruments. State ratification of international law binds States Parties, and authorises varying international bodies and committees to act as overseers of country compliance and to effect sanctions for nonconformity. This article delves into the urgent and critical topic of state compliance with international laws regulating the provision of basic education, a topic of utmost importance to policymakers, implementers of education, and scholars in the field of human rights and education.

The right to education is regarded as both a human and a socio-economic right,<sup>2</sup> thus imposing positive obligations on states to take steps to deliver it. Despite the promulgation of national and international laws, children in the SADC region remain largely marginalised regarding the full realisation of their education rights. Therefore, providing education for every child remains an immediate challenge that needs urgent intervention. Per UNESCO, “half of the world’s out-of-school children and youth are in sub-Saharan Africa, totalling ninety-seven million children and youth and growing, with poverty the main constraint to access”.<sup>3</sup> In addition, while school enrolment has increased, progress concerning the provision of high-quality basic education remains lower than global averages.<sup>4</sup>

A corollary concern is that SADC’s approach to protecting, promoting and fulfilling the right to basic education is restricted to providing access to school. Acquiescence with such a narrow perspective is problematic because the content of the right to basic education in international law is much broader than mere access to school.

In this article, the distinctive constitutional, legislative and policy frameworks in Botswana, Malawi, Namibia, South Africa and Zambia are critically assessed against a comprehensive international education-rights framework. The article is organised as follows. Initially, a rationale for the study is provided. Next, the authors explain why they have embraced the human-rights-based approach to development to evaluate the education-law

<sup>1</sup> World Bank Group “Education” (2024) <https://www.worldbank.org/en/topic/education/overview> (accessed 2024-07-03).

<sup>2</sup> Mbajjorgu and Mafumo “Striving for Quality Education: The Right to Education as a Socio-Economic Right” 2014 5(8) *Mediterranean Journal of Social Sciences* 302 303.

<sup>3</sup> UNESCO “Sub-Saharan Africa Fact Sheet: GEM Report” (2020) <https://gem-report-2020.unesco.org/wp-content/uploads/2020/06/SSA-Fact-Sheet.pdf#:~:text=Half%20of%20the%20world's%20out-of-schoolchildren%20are%20in%20sub-Saharan,will%20not%20have%20completed%20primary%20school%20by%202050> (accessed 2024-07-03).

<sup>4</sup> Southern African Development Community (SADC) “Education and Skills Development” (2022) <https://www.sadc.int/pillars/education-skills-development> (accessed 2024-05-21).

frameworks of the five hand-picked SADC countries. Then, the key international instruments making provision for basic education are outlined. In the subsequent section, the authors engage in an analytic comparative assessment of the education-law strategies of the five selected SADC states to gauge their congruence with the international laws regulating the provision of education. The final section outlines conclusions and recommendations to facilitate action plans to achieve the international commitments associated with the right to basic education.

## 2 JUSTIFICATIONS FOR THE STUDY<sup>5</sup>

The overt benefits of education impel this study. Education is extolled as an empowerment right.<sup>6</sup> The World Bank defines empowerment as a process where the capabilities of people with low incomes are expanded to allow them to “participate in, negotiate with, influence, control and hold accountable institutions” that influence their lives.<sup>7</sup> In the first place, as an empowerment right, education allows citizens to comprehend the structures of politics, allowing them to identify and influence the rules that affect them.<sup>8</sup> Secondly, education provides an individual with the knowledge and skills necessary to live a decent life.<sup>9</sup> Thirdly, education plays a definitive role in lifting people out of social and economic disenfranchisement, empowering them to engage in their communities with equal standing.<sup>10</sup> Fourthly, education equips people with the expertise necessary to secure employment, earn an income, and procure the necessities for survival.<sup>11</sup> Lastly, because rights are symbiotic, education empowers individuals to assert and enforce other human rights.<sup>12</sup>

The right to education affirms the supposition that human rights are universal, indivisible, interrelated and interdependent.<sup>13</sup> Education is thus a dynamic construct protecting human dignity and guaranteeing personal

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<sup>5</sup> The arguments in this part of the article are further advanced in Simbo “Defining the Term Basic Education in the South African Constitution: An International Law Approach” 2013 16 *Law, Democracy and Development* 483–484.

<sup>6</sup> Donders and Vladimir *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 185.

<sup>7</sup> Health Evidence Network (HEN) “What Is the Evidence on Effectiveness of Empowerment to Improve Health” (2006) <https://iris.who.int/bitstream/handle/10665/364209/9789289056861-eng.pdf?sequence=4&isAllowed=y> (accessed 2024-07-17) 17.

<sup>8</sup> Woolman and Bishop “Education” in Woolman and Bishop *Constitutional Law of South Africa* (2009) 7.

<sup>9</sup> Coomans “In Search of the Core Content of the Right to Education” in Chapman and Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 220.

<sup>10</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment 13: The Right to Education (Article 13 of the International Covenant on Economic, Social and Cultural Rights)* (8 December 1999) E/C.12/1999/10 par 1.

<sup>11</sup> Beiter *The Protection of the Right to Education by International Law* (2006) 28–30.

<sup>12</sup> Donders and Vladimir *Human Rights in Education* 185.

<sup>13</sup> World Conference on Human Rights *Vienna Declaration and Programme of Action* (25 June 1993).

development.<sup>14</sup> Education is the key process that encourages the natural development of the human being.<sup>15</sup> The right to education merits discussion because it is a valuable tool that SADC countries can utilise for the enhancement of domestic growth and development, generating a competent and proficient workforce, rooting out undesirable infractions that affect children, including discrimination, and stimulating the realisation of other socio-economic rights, like the rights to work, food and health.<sup>16</sup>

### 3 THEORETICAL FRAMEWORK OF THE STUDY<sup>17</sup>

Demand-driven approaches to education have been unsuccessful in accomplishing the aspirations identified in the World Declaration on Education for All.<sup>18</sup> In this study, the authors have elected to adopt the human-rights-based approach to development (HRBA) for analysing the constitutional, legislative and policy frameworks governing education in Botswana, Malawi, Namibia, South Africa and Zambia, “[b]ecause it is inclusive and provides a common language for partnership”.<sup>19</sup> Though not devoid of constraints and opposition, the HRBA can positively influence the achievement of the education objectives of states.<sup>20</sup> The HRBA investigates the inequalities that give rise to development problems and seeks to restore the balance between discriminatory practices and unjust allocations of power.<sup>21</sup> The HRBA endeavours to eliminate the barriers that hinder people from enforcing their rights, exercising freedom of choice, gaining access to opportunity and enhancing their lives.<sup>22</sup> The HRBA demands that the strategies and programmes implemented to deliver education and the

<sup>14</sup> UNGA *Universal Declaration of Human Rights* (UDHR) A/RES/217(III) (10 December 1948) art 1.

<sup>15</sup> Farrant *Principles and Practices of Education* (2006) 32.

<sup>16</sup> Strohwalde “The Right to Basic Education as a Primary Driver of Transformation in South Africa: Considering Cooperation” 2024 45(3) *Obiter* 595–609.

<sup>17</sup> The views in this part of the article are further expanded on in Simbo “Living the Dream of Fighting Reality: Can the Rights Based Approach Tackle All Forms of Exclusion?” 2013 *De Rebus* 50–51.

<sup>18</sup> Craissati, Banerjee, King, Lansdown and Smith (eds) *A Human Rights-Based Approach to Education for All: A Framework for the Realization of Children’s Right to Education and Rights Within Education* (2007) <http://unesdoc.unesco.org/images/0015/001548/154861e.pdf> (accessed 2024-07-05) 12. See World Conference on Education for All: Meeting Basic Learning Needs *World Declaration on Education For All and Framework for Action to Meet Basic Learning Needs* Jomtien, Thailand (5–9 March 1990) [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNESCO\\_World\\_Declaration\\_For\\_All\\_1990\\_En.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNESCO_World_Declaration_For_All_1990_En.pdf) (accessed 2024-07-05).

<sup>19</sup> Craissati *et al* *A Human Rights-Based Approach to Education for All* 12.

<sup>20</sup> *Ibid.*

<sup>21</sup> UN Sustainable Development Group (UNSDG) “Human Rights-Based Approach” (7 February 2024) <https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach> (accessed 2024-07-08).

<sup>22</sup> Offenheiser and Holcombe “Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective” 2003 32(2) *Nonprofit and Voluntary Sector Quarterly* 268 271.

modes of development are rooted in a scheme of rights and commitments recognised in international law.<sup>23</sup>

The HRBA regards education as a legal entitlement, claimable by any person, regardless of background, place of residence, physical appearance, thought or conscience and religious belief.<sup>24</sup> Conceiving education as a human right protects individuals from exclusionary practices by government.<sup>25</sup> Furthermore, the inclusion of citizens in the design and delivery of their rights is an important facet of the HRBA,<sup>26</sup> which not only encourages the advancement of basic rights<sup>27</sup> but also positions people as agents of change, not just benefactors. There is consensus between the HRBA and international law that human rights have a specific scope and content that states must understand and are obliged to provide.<sup>28</sup> By rendering SADC states duty-bearers with obligations to deliver education as an entitlement,<sup>29</sup> the HRBA creates awareness that a right to education exists, that everyone is entitled to education and that any deprivation thereof constitutes a violation of the entitlement.<sup>30</sup>

## 4 INTERNATIONAL LAW GOVERNING THE PROVISION OF BASIC EDUCATION

### 4.1 Background

The recognition of international law elicited the adoption of numerous declarations, treaties and conventions safeguarding the fundamental rights of humanity, and obliging states to respect, protect and fulfil the human entitlements expressed therein.<sup>31</sup> Since the inception of the UDHR, the right to education has been codified in hard and soft international and regional law. In this part of the article, the international and regional instruments governing the provision of basic or elementary education are reviewed. The principal means for the delivery of basic education to children, external to the

<sup>23</sup> Broberg and Sano "Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences" 2018 2(5) *The International Journal of Human Rights* <https://doi.org/10.1080/13642987.2017.1408591> (accessed 2024-07-05) 664.

<sup>24</sup> Australian Human Rights Commission "What Are Human Rights?" <https://humanrights.gov.au/about/what-are-human-rights> (accessed 2018-07-17).

<sup>25</sup> Boesen and Martin *Applying a Rights-Based Approach: An Inspirational Guide for Civil Society* (2007) 11.

<sup>26</sup> United Nations Development Group (UNDG) *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies* (2003) 3.

<sup>27</sup> *Ibid.*

<sup>28</sup> Craissati *et al* *A Human Rights-Based Approach to Education for All* 50–51.

<sup>29</sup> UNDG *The Human Rights Based Approach to Development Cooperation* 2.

<sup>30</sup> Mander "Rights as a Struggle Towards a More Just and Humane World" in Gready and Ensor *Re-inventing Development? Translating Rights-Based Approaches From Theory Into Practice* (2005) 240.

<sup>31</sup> Henkin "Human Rights and State Sovereignty" 1995 25(1) *Georgia Journal of International & Comparative Law* 31 34.

family unit, is the school.<sup>32</sup> Although neither primary nor secondary education is synonymous with basic education, there is a strong correlation between the concepts, as basic education is provided at both primary and secondary school levels.<sup>33</sup>

## 4 2 International instruments

The foremost international legal instrument encompassing the right to education is the UDHR, which is regarded as binding customary law.<sup>34</sup> The UDHR expresses its ideological base in article 2, which deems all persons “born free” and “equal in dignity and rights”. Per the UDHR, every human being has a right to education and as a minimum requirement, education must be free “in the elementary and fundamental stages”, and elementary education must be mandatory.<sup>35</sup> Article 26(2) of the UDHR further provides:

“Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance, and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.”

The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>36</sup> is the primary treaty to protect and promote economic, social and cultural rights. This category of rights presumes positive action on the part of the State.<sup>37</sup> The ICESCR contains the most widespread narrative on the right to education in international law. Article 13 of the ICESCR acknowledges the universal right to education, free from any form of discrimination, and advances a framework for the attainment of the complete realisation of the right, which includes the provision of free and compulsory primary education as well as progressively free secondary education.<sup>38</sup> The objectives of the right to education as set out in the ICESCR<sup>39</sup> are similar to those in article 26(2) of the UDHR.

General Comment No. 13: The Right to Education (Article 13)<sup>40</sup> adds flesh to article 13 of the ICESCR by describing the normative content of the right to education – that is, what right-holders are entitled to and what States Parties are expected to provide. Paragraphs 6(a)–(d) of General Comment No. 13 provide that “education in all its forms and at all levels shall exhibit the interrelated and essential features of accessibility, adaptability,

<sup>32</sup> World Conference on Education for All *World Declaration on Education for All* 6.

<sup>33</sup> CESCR *General Comment 13* par 9.

<sup>34</sup> Boesen and Martin “*Applying a Rights-Based Approach: An Inspirational Guide for Civil Society*” 38.

<sup>35</sup> Art 26(1) of the UDHR.

<sup>36</sup> UNGA *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976 (ICESCR).

<sup>37</sup> Domaradzki, Khvostova and Pupovac “Karel Vasak’s Generations of Rights and the Contemporary Human Rights Discourse” 2019 20 *Human Rights Review* 423 424.

<sup>38</sup> Art 13(1)(a) and (b) of the ICESCR.

<sup>39</sup> Art 13(1) of the ICESCR.

<sup>40</sup> Craissati *et al A Human Rights-Based Approach to Education for All* 12.

acceptability and availability". "Availability" necessitates that governments establish, expand and administer an education system with schools in all locales and of a sufficient quantity to "ensure that all levels of education are available; immediately and universally".<sup>41</sup> The physical infrastructure required to deliver education is also included under "availability". Within the context of basic education, "accessibility" has three dimensions. First, education must be "accessible to all children, especially the most marginalised groups",<sup>42</sup> and must not discriminate on any of the specified grounds. Secondly, schools must be "within safe physical reach, either by attendance" at an acceptable and suitable physical site or through contemporary technology.<sup>43</sup> Thirdly, education must be inexpensive and compulsory basic education for all children must not be subject to any fees.<sup>44</sup> The interrelated and essential feature of "acceptability" resonates with the notion of high-quality education and pertains to "both the form and substance of education".<sup>45</sup> "Acceptability" denotes that the education syllabus and educational instruction must be acceptable to both parents and learners, and be of an acceptably high standard.<sup>46</sup> Adaptability entails that education must be such that it can be redesigned to accommodate the needs of transforming societies and respond to the needs of learners in their disparate communal and ethnic environments.<sup>47</sup>

States Parties must act promptly when assuring that the right to education will be exercised without any form of discrimination<sup>48</sup> and when duty-bound to design measures for the full realisation of article 13 of the ICESCR.<sup>49</sup> Such steps must be "deliberate, concrete and targeted as clearly as possible towards the full realisation of the right to education".<sup>50</sup> States Parties are obliged to respect, protect and fulfil the right to education.<sup>51</sup> The obligation to respect the right demands that States Parties circumvent actions that thwart fulfilment of the right to education.<sup>52</sup> The duty to protect obliges States Parties to take steps that preclude third parties from impinging on the fulfilment of the right to education. The onus to fulfil induces states to take

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<sup>41</sup> UNESCO *The Right to Education Handbook* (2019) 77.

<sup>42</sup> Par 6(3)(i) of General Comment No. 13. Marginalised groups refers to: "migrants, refugees and internally displaced persons, people living in rural areas, minorities and indigenous peoples, persons in detention, persons with disabilities, and in particular women and girls, especially as there are areas of the world where the economic and social advantages of investing in girls' education are still not widely accepted" (UNESCO *The Right to Education Handbook* 77).

<sup>43</sup> Par 6(b)(ii) of General Comment No. 13.

<sup>44</sup> Par 6(b)(iii) of General Comment No. 13.

<sup>45</sup> UNESCO *The Right to Education Handbook* 77.

<sup>46</sup> Par 6(c) of General Comment No. 13.

<sup>47</sup> Par 6(d) of General Comment No. 13.

<sup>48</sup> Par 34 of General Comment No. 13 provides that the non-discrimination standard "extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status".

<sup>49</sup> Par 43 of General Comment No. 13.

<sup>50</sup> *Ibid.*

<sup>51</sup> Par 46 of General Comment No. 13.

<sup>52</sup> Par 47 of General Comment No. 13.

steps that empower and aid persons and societies in appreciating the right to education.<sup>53</sup>

Every State Party that has not effected free and compulsory primary education must submit a plan of action to the CESCR<sup>54</sup> within two years of the country's ratification of the ICESCR.<sup>55</sup> Such plans of action are imperative because the work of the Committee demonstrates that the shortage of educational prospects for children underpins their susceptibility to other human-rights infringements.<sup>56</sup> States Parties cannot use the excuse of "insufficient resources", financial or otherwise, as a justification for failing to adopt a plan of action.<sup>57</sup> No single person or entity can prevent a child from accessing primary education.<sup>58</sup> Compulsory education also embraces the delivery of education of adequate quality, which must further the attainment of the child's supplementary rights.<sup>59</sup> The requirement that education must be provided free of charge is unequivocal,<sup>60</sup> and the delineation of free education extends beyond the mere prohibition against levying of fees, but also encompasses the incurrence of ancillary costs.<sup>61</sup>

The UN Convention on the Rights of the Child (UNCRC)<sup>62</sup> is the most authoritative and influential international instrument protecting children's rights.<sup>63</sup> The instrument also delineates the rights that must be fulfilled for children to develop their full potential.<sup>64</sup> The UNCRC defines a "child" as any person below the age of 18 years.<sup>65</sup> The rights in the UNCRC must be free of any kind of discrimination based on the listed prohibited grounds of "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".<sup>66</sup> The best-interests-of-the-child principle must be contemplated in all proceedings relating to children.<sup>67</sup> States Parties must realise the right to education by initiating measures "to the maximum extent of their available resources and, where needed, within the framework of international cooperation".<sup>68</sup> Article 28(1)(a) of the UNCRC makes provision for the progressive realisation of a child's right to education based on equal opportunity and provides that primary

<sup>53</sup> *Ibid.*

<sup>54</sup> CESCR *General Comment No. 11: Plans of Action for Primary Education (Article 14)* (10 May 1999) E/1992/23 par 1 and 2.

<sup>55</sup> Par 8 of General Comment No. 11.

<sup>56</sup> Par 4 of General Comment No. 11.

<sup>57</sup> Par 9 of General Comment No. 11.

<sup>58</sup> Par 6 of General Comment No. 11.

<sup>59</sup> *Ibid.*

<sup>60</sup> Par 7 of General Comment No. 11.

<sup>61</sup> *Ibid.*

<sup>62</sup> United Nations *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990.

<sup>63</sup> UNCHR "Guidelines on Determining the Best Interests of the Child" (2008) <https://www.unhcr.org/sites/default/files/legacy-pdf/4566b16b2.pdf> (accessed 2024-07-09) 6.

<sup>64</sup> See art 29 of the UNCRC.

<sup>65</sup> Art 1 of the UNCRC.

<sup>66</sup> Art 2(1) of the UNCRC.

<sup>67</sup> Art 3(1) of the UNCRC.

<sup>68</sup> Art 4 of the UNCRC.

education “must be compulsory and available free to all”. “Progressive” realisation of free secondary education must not be construed as divesting States Parties of their obligations to fully realise the right to education immediately.<sup>69</sup>

States Parties must take steps to bolster regular attendance at schools and abate school attrition rates.<sup>70</sup> International collaboration must be encouraged by States Parties in matters associated with education.<sup>71</sup> Children with disabilities have an unequivocal right to education.<sup>72</sup> Schools must ensure that their infrastructure provides for the distinctive needs of learners with disabilities. Educators must be adequately trained to teach learners with diverse abilities, ensuring that they achieve clear educational outcomes.<sup>73</sup> Children with disabilities are entitled to a school education that is free of charge. Customised educational strategies, suitable and available educational materials, equipment and assistive apparatuses, specifically directed to the learner with disabilities, must be provided by States Parties to the maximum degree of existing resources.<sup>74</sup> Learners with disabilities should be educated with the goal of inclusive education in mind.

Article 10 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>75</sup> commits States Parties to eradicating all forms of discrimination against women, and the equalisation of educational access and opportunities with men. Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>76</sup> obliges States Parties to outlaw and jettison all kinds of racial discrimination, and to guarantee the right of every person, exclusive of distinction, to the right to education. Article 7 of the CERD requires that States Parties take direct and effective measures, especially with respect to teaching and education, to combat bigotry that engenders racial discrimination. Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD)<sup>77</sup> reaffirms the educational rights of all persons with disabilities. Sustainable Development Goal 4<sup>78</sup> expects countries to guarantee “inclusive and equitable quality education and promote lifelong learning opportunities for all”.

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<sup>69</sup> Par 44 of General Comment 13.

<sup>70</sup> Art 28(1)(e) of the UNCRC.

<sup>71</sup> Art 28(3) of the UNCRC. The UNCHR states that the “best interests of the child” principle alludes to the overall well-being of the child, considering the specific situations and risks that children face.

<sup>72</sup> UN Committee on the Rights of the Child (CRC) *General Comment No. 9, 2006: The Rights of Children with Disabilities* (27 February 2007) CRC/C/GC/9 par 62.

<sup>73</sup> *Ibid.*

<sup>74</sup> Par 65 of General Comment No. 9.

<sup>75</sup> UNGA *Convention on the Elimination of All Forms of Discrimination Against Women* 1249 UNTS 13. Adopted: 18/12/1979; EIF: 01/09/1981.

<sup>76</sup> UNGA *Convention on the Elimination of All Forms of Racial Discrimination* 660 UNTS 195. Adopted: 21/12/1965; EIF: 04/01/1969.

<sup>77</sup> UNGA *Convention on the Rights of People With Disabilities A/RES/61/106*. Adopted: 24/01/2007.

<sup>78</sup> UN *Transforming Our World: The 2030 Agenda for Sustainable Development* GA Resolution A/RES/70/1. Adopted: 25/09/2005.

### 4 3 Regional instruments

Article 17 of the African Charter on Human and Peoples' Rights (ACHPR)<sup>79</sup> affords every person the right to education. Article 11 of the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>80</sup> provides all children with the right to an education and imposes the obligation on States Parties to provide compulsory and free basic education.<sup>81</sup> The ACRWC reiterates many of the provisions established in other international instruments, such as fostering regular school attendance and promoting a decline in drop-out rates,<sup>82</sup> ensuring equal educational access, irrespective of gender,<sup>83</sup> and accepting the choices of parents and legal guardians with respect to educating their children in either private or public institutions.<sup>84</sup> Together, paragraphs (1)(a) and (2)(b) of article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>85</sup> oblige States Parties to take steps to remove all discriminatory barriers to women (*including girls*), and to promote equal opportunity and access to education and training for women, at all levels, and in all disciplines. Article 12(2)(c) of the Protocol further provides that States Parties must take positive measures to guarantee the admission and retention of girls in schools and must coordinate programmes for girls who drop out of school unexpectedly.

### 4 4 Interventions by SADC

According to the Protocol on Education and Training in the Southern African Development Community (SADC),<sup>86</sup> member states must endeavour to provide basic education for at least nine years of schooling.<sup>87</sup> Member states have also assented to the delivery of specific support to socially disadvantaged groups in admission to basic education, so as to promote equity in educational access.<sup>88</sup> Basic education aims to provide lifelong learning.<sup>89</sup>

<sup>79</sup> Organisation of African Unity (OAU) *African Charter on Human and Peoples' Rights* 1520 UNTS 217; CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Adopted: 27/06/1981; EIF: 21/10/1986.

<sup>80</sup> OAU *African Charter on the Rights and Welfare of the Child* CAB/LEG/24.9/49 (1990). Adopted: 11/07/1990; EIF: 29/11/1999.

<sup>81</sup> Art 3(1)(a) of the ACRWC.

<sup>82</sup> Art 3(1)(d) of the ACRWC. Also refer to African Union *African Youth Charter* Adopted: 02/07/2006; EIF: 08/08/2009 art 4(c).

<sup>83</sup> Art 3(1)(e) of the ACRWC.

<sup>84</sup> Art 4 of the ACRWC.

<sup>85</sup> African Union *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. Adopted: 11/07/2003.

<sup>86</sup> SADC *Protocol on Education and Training in the Southern African Development Community (SADC)* (8 September 1997).

<sup>87</sup> Art 5(3) of the SADC Protocol.

<sup>88</sup> Art 5(4) of the SADC Protocol.

<sup>89</sup> Art 5(5) of the SADC Protocol.

The next section provides a critical analysis of the education legislation and policies of Botswana, Malawi, Namibia, South Africa and Zambia to interrogate their compliance with binding international, regional and SADC provisions.

## 5 A CRITICAL ANALYSIS OF THE EDUCATION LEGISLATION AND POLICY DIRECTIVES OF BOTSWANA, MALAWI, NAMIBIA, SOUTH AFRICA AND ZAMBIA

The right to education is entrenched through prescriptive international instruments and political guarantees by governments. Article 2(1) of the ICESCR obliges States Parties to institute measures, independently and via international support and collaboration, to fully realise the right to education, “including the adoption of legislative measures”. Here, the extent to which the existing legislative and policy frameworks of Botswana, Malawi, Namibia, South Africa and Zambia conform to the obligatory international and regional education stipulations is assessed.

### 5 1 Botswana

The Constitution of Botswana, 1966, does not contain a right to education. Although the Constitution enshrines several other fundamental rights that are important for exercising the right to education, the fact that there is no express right to education renders the supplementary constitutional rights superfluous. There has also been no constitutional or statutory reform in education for an excessively long period. In 2016, Botswana introduced Vision 2036<sup>90</sup> for the country, which accepts education as a central component. However, despite that intervention, education in Botswana has largely remained stagnant.<sup>91</sup>

The Botswana government has committed itself to the delivery of quality basic education for all.<sup>92</sup> To accomplish that goal, the State promulgated the Right to Education Act (REA)<sup>93</sup> and established the Botswana Education & Training Sector Strategic Plan (ETSSP).<sup>94</sup> The aim of the REA is the *bona fide* advancement of education.<sup>95</sup> The ETSSP provides for “an overall policy and strategic sector framework for the education sector that will play a

<sup>90</sup> Presidential Task Team “Vision 2036: Achieving Prosperity for All” (2016) <https://www.statsbots.org.bw/sites/default/files/documents/Vision%202036.pdf> (accessed 2024-05-23).

<sup>91</sup> Suping “Political Spectacle and the Decline of Public Education in Botswana” 2024 59(2) *Journal of Asian and African Studies* 443–455.

<sup>92</sup> Botswana Ministry of Education and Skills Development “National Education for All (EFA 2015) Review Report: Botswana” (2015) <https://unesdoc.unesco.org/ark:/48223/pf0000231568> (accessed 2024-05-22).

<sup>93</sup> 53 of 2003.

<sup>94</sup> Republic of Botswana *Education & Training Sector Strategic Plan (ETSSP 2015–2020)* (April 2015).

<sup>95</sup> See the long title of the Act.

pivotal role in the development of a modern, sustainable, knowledge-based economy that supports inclusiveness and diversity".<sup>96</sup> Basic education in Botswana is free and compulsory for the first seven years of primary school.

The ETSSP is a suitable mechanism for stimulating educational change since it encourages a diverse curriculum that embraces outcomes-based education and provides numerous conduits for success at all education levels. However, the Botswana government has done very little to facilitate much-anticipated development.<sup>97</sup> The REA has not influenced education in Botswana in any significant or tangible way. The REA merely sets out the administrative duties of various state actors<sup>98</sup> that are responsible for education, and makes provisions for the establishment of boards of governors and school committees.<sup>99</sup> The Act further mandates the compulsory registration of schools and contains several transitory and inconsequential provisions.<sup>100</sup> The name of the REA is also a misnomer because the Constitution does not guarantee a right to education. Botswana is not doing enough to ensure that the right to education is legally provided for and delivered as envisaged by international law.

## 5 2 Malawi

The Constitution of the Republic of Malawi, 1995, not only entrenches a right to education for all persons<sup>101</sup> but also incorporates an objective to provide suitable resources to the education sector and develop plans to make primary education free and mandatory.<sup>102</sup> The codification of the right to education in section 25 of Malawi's Constitution places an overt duty on the State to provide education, and endows citizens with a corresponding right to hold the government accountable for not fulfilling its guarantees and/or for violating human rights.<sup>103</sup> Unfortunately, the manner in which section 25 is articulated is problematic because it does not illuminate the content of the right to education.<sup>104</sup>

It is commendable that, although Malawi is one of the poorest countries in the world and is currently ranked 172 out of 193 countries on the UN's Human Development Index, it was one of the first SADC countries to make primary education free. The Free Primary Education Policy (FPE) was instituted in Malawi in 1994 and constitutes one of the principal ways in

<sup>96</sup> Botswana *ETTSP 2015–2020* 7.

<sup>97</sup> Bulawa, Batsalelwang and Majwabe "Overhauling of Botswana's Education System: What Lessons Can Be Learnt From Other Countries?" 2019 22(1) *Mosenodi Journal* 48 54.

<sup>98</sup> For e.g., the Minister of Education and Skills Development.

<sup>99</sup> See ss 3–12 of the REA.

<sup>100</sup> See ss 14–24 and 26–27 of the REA.

<sup>101</sup> S 25(1) of the Constitution of the Republic of Malawi, 1995.

<sup>102</sup> See s 13(f)(ii) of the Constitution of Malawi.

<sup>103</sup> Heymann, Raub and Cassola "Constitutional Rights to Education and Their Relationship to National Policy and School Enrolment" 2014 39 *International Journal of Educational Development* 131 132.

<sup>104</sup> Mwambene "Implementing the Girl Child's Right to Education in Selected Countries in Africa" in Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2016) 31–32.

which its international education objectives are realised.<sup>105</sup> The foremost intents of the FPE were to expand access, eradicate discrimination,<sup>106</sup> and provoke social awareness of the importance of education.<sup>107</sup> Initially, the government accepted complete responsibility for the provision of education. That undertaking was unsustainable because adopting the FPE generated conditions in terms of which the Malawian government relied largely on foreign donors' capital to launch and/or maintain the scheme, as it did not possess, nor could it generate, the financial resources needed to subsidise the FPE.<sup>108</sup>

To supplement existing policy, the Primary School Improvement Plan (PSIP) was implemented in 2010 to "expand equitable access, increase quality and relevance, and strengthen governance and management".<sup>109</sup> The PSIP was an ambitious plan to overhaul and improve primary education in Malawi, which reaped various benefits – namely, an improvement in enrolment rates, achievement of gender parity in primary-school education access, a reduction in the dropout rate, improved success rates for the primary-school leaving examinations for both males and females and a burgeoning of the total aggregate of qualified educators in primary schools.

The National Strategy on Inclusive Education, implemented in 2016, states that there is a "need to ensure that learners with diverse needs have equitable access to quality education in an inclusive setting at all education levels".<sup>110</sup> In 2020, the Ministry of Education in Malawi introduced a National Education Sector Investment Plan: 2020–2030 (NESIP), which sets out objectives and the outcomes to be realised and directs the execution of crucial undertakings to accomplish national and international obligations from 2020 to 2030.<sup>111</sup> The NESIP indicates that government expenditure in the education sector has expanded hugely because of the establishment of benefactor-merged resources through the Education Sector-Wide Approach Programme (SWAP).<sup>112</sup> The Education SWAP agreement apportions 20 per cent of its discretionary periodic budget to the education sector. In the 2018/2019 fiscal year, the Malawian government earmarked 27 per cent of its periodic budget for the education sector,<sup>113</sup> essentially eradicating the need for a strict dependence on donor funding.

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<sup>105</sup> Inoue and Oketch "Implementing Free Primary Education Policy in Malawi and Ghana: Equity and Efficiency Analysis" 2008 83 *Peabody Journal of Education* 41.

<sup>106</sup> See Munthali "The Education of Girls in Malawi: Access and Retention" 2010 36(1) *Scottish Educational Review* 45–57.

<sup>107</sup> Kadzamira and Rose *Educational Policy Choice and Policy Practice in Malawi: Dilemmas and Disjunctures* (2001) 7.

<sup>108</sup> Kadzamira and Rose *Educational Policy Choice* 6–7.

<sup>109</sup> Ginsburg, Klauss, Nankhuni, Nyirongo, Omowoyela, Richardson, Terwindt and Willimann "Engaging Community Members in Enhancing Education Quality: Studies of the Implementation of the Primary School Improvement Programme in Malawi" 2014 20(1) *Southern African Review of Education* 30.

<sup>110</sup> *Ibid.*

<sup>111</sup> Ministry of Education *National Education Sector Investment Plan: 2020–2030* 2.

<sup>112</sup> Ministry of Education *National Education Sector Investment Plan: 2020–2030* 32.

<sup>113</sup> *Ibid.*

### 5 3 Namibia

Article 20(1) of the Namibian Constitution, 1990, guarantees a right to compulsory, equitable and free access to basic education for every resident within Namibia. Free basic education in Namibia is not restricted to the non-payment of school fees but includes all tuition and concomitant educational materials and supplies, which must be free to learners at state schools.<sup>114</sup>

Section 6(1) of the Basic Education Act<sup>115</sup> (BEA) gives effect to article 20(1) of the Namibian Constitution by requiring that the right to education be respected and fulfilled by all institutions and persons involved in providing basic education and educational services. After more than two decades, the Namibian government recently promulgated several new statutes and regulations to meet its international obligations with respect to basic education. In that regard, Namibia enacted the Basic Education Act (BEA),<sup>116</sup> its accompanying regulations,<sup>117</sup> and the Child Care and Protection Act (CCPA)<sup>118</sup> to effect the commitments enunciated in the UNCRC, the ACRWC and other obligatory international agreements. The BEA aims to “promote and regulate free and compulsory basic education; ensure equitable, inclusive quality education and lifelong learning; and promote and protect learners’ right to education”.<sup>119</sup> A child may not be denied or dispossessed of the right to education based on a disability or other reasons.<sup>120</sup> Where a child or a learner applies for admission or is already attending any school, discrimination in any form is expressly forbidden.<sup>121</sup> Section 7(2) criminalises any breach of section 7(1) and subjects the offender to a fine or imprisonment for a term not longer than two years or both a fine and imprisonment.

The Child Care and Protection Act<sup>122</sup> (CCPA) was promulgated to realise the children’s rights included in the Namibian Constitution and to achieve Namibia’s international obligations with respect to the well-being, development and protection of children that Namibia is duty-bound to enforce.<sup>123</sup> Section 6(1)(e) of the CCPA fortifies a child’s right to receive adequate education. The CCPA is, however, silent on what constitutes “adequate education”. Section 9(2) of the CCPA provides that a child with disabilities is still entitled to inclusive and non-discriminatory education. The Sector Policy on Inclusive Education (SPIE)<sup>124</sup> lays the foundation “for all children in Namibia to learn and participate fully in the education system,

<sup>114</sup> S 38(1) of the Education Act 16 of 2001.

<sup>115</sup> 3 of 2020.

<sup>116</sup> 3 of 2020.

<sup>117</sup> Basic Education Regulations (BER) GN 331 in GG 8229 of 2023-10-05.

<sup>118</sup> 3 of 2015.

<sup>119</sup> Preamble of the BEA.

<sup>120</sup> S 6(2)(c) and (d) of the BEA.

<sup>121</sup> S 7(1) of the BEA.

<sup>122</sup> 3 of 2015.

<sup>123</sup> S 2(b) and (c) of the CCPA.

<sup>124</sup> Ministry of Education: Namibia “Sector Policy on Inclusive Education” (2013) <https://www.npc.gov.na/wp-content/uploads/2022/06/Sector-policy-on-Inclusive-Education-2013.pdf> (accessed 2024-06-12).

and endeavours to create a supporting learning environment for both educators and learners, which is accommodating and learner-centred".<sup>125</sup>

The BEA ascribes a broad definition to basic education, which includes education provided from the pre-primary tier to the final grade of secondary education.<sup>126</sup> The term "basic education" also incorporates special education and all other forms of education that the Minister of Basic Education, Arts and Culture (MBEAC) declares to be public education.<sup>127</sup> The BEA upholds the principles of non-discrimination, inclusivity and learner-centeredness in education. The BEA further provides that the school environment must be safe and conducive to teaching and learning, and that all learners in Namibia must be provided with reasonable access to universal quality education.<sup>128</sup> Section 9 of the BEA makes school attendance compulsory for learners under a clear set of identifiable guidelines. One of those guidelines is that school attendance is mandatory for learners who have attained the age of 6 years and remains mandatory until the last school day of the year when a learner reaches the age of 18.<sup>129</sup>

The BEA states that a national admission policy must be consistent with the principles of inclusivity, accessibility, equity and equality.<sup>130</sup> The MBEAC must develop a national policy on lifelong learning that guarantees high-quality basic education.<sup>131</sup> The norms and standards for infrastructure and capacity at state schools are delineated in section 45 of the BEA, and section 48(1) obliges the MBEAC to develop a policy on quality assurance in education.<sup>132</sup> The Basic Education Regulations (BER) construe quality education as a holistic term encompassing learner participation, learning support, a healthy, safe, protective and gender-sensitive environment, adequate resources and facilities, relevant curricula and materials for acquiring basic skills, learner-centred teaching practices, adroit assessment to enable learning and diminish inequalities, and expertise that incorporates knowledge, skills and attitudes that are connected to national goals for education, and participation in society.<sup>133</sup>

From the above, it can be deduced that Namibia has made notable strides in advancing its education sector by ensuring it is aligned with its international obligations. Despite its intrinsic fallibilities, Namibia's current basic-education scheme has evolved into a system that is not only meritorious but also one that other SADC countries can regard as an example for attaining their international obligations.

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<sup>125</sup> Ministry of Education *Sector Policy* 1.

<sup>126</sup> S 1 of the BEA.

<sup>127</sup> *Ibid.*

<sup>128</sup> SS 3(e), (f), (h), (k) and (l) of the BEA.

<sup>129</sup> S 9(1)(a) of the BEA.

<sup>130</sup> S 19(1) of the BEA.

<sup>131</sup> S 30(1) of the BEA.

<sup>132</sup> S 66 of the BEA.

<sup>133</sup> Reg 2 of the BER.

## 5 4 South Africa

Section 29(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides for a justiciable right to basic education. Although the Constitution does not define “basic education”, it is accepted that basic education refers to education of a suitable standard.<sup>134</sup> The South African Schools Act (SASA)<sup>135</sup> complements the provisions of the South African Constitution and regulates the provision of primary and secondary education. Regarding compulsory basic education, SASA provides for compulsory primary education for Grades 1 to 9 and between the ages of 7 and 15, depending on which comes first.<sup>136</sup> The Minister of Basic Education (MBE) can determine the ages of compulsory attendance for learners with special needs and issue an exemption from compulsory attendance if it is in the child’s best interests.<sup>137</sup>

Although SASA states that every learner must be admitted to a public school and discourages refusals to provide education on the grounds of inability to pay school fees,<sup>138</sup> a large proportion of South African schools require the payment of school fees for receiving basic education. Schools in South Africa are delineated as either fee-paying or non-fee-paying schools. Parents determine the fees to be paid in fee-levying schools.<sup>139</sup> Unless exempted, every parent must abide by their obligation to pay school fees.<sup>140</sup> The means test used to determine the payment of or exemption from school fees compares the income of the parent(s) of the child relative to the fees that the child has to pay.<sup>141</sup> The location of a school has a major influence on the MBE’s power to categorise a school as fee-paying or non-fee-paying.<sup>142</sup> The government funds non-fee-paying schools from its national budget.<sup>143</sup> Allowing for fee-paying schools and fee exemptions is not in harmony with international-law obligations, which unequivocally mandate states to provide free basic education.

SASA confers discretion on the MBE with regard to prescribing minimum uniform norms and standards for school infrastructure.<sup>144</sup> The language

<sup>134</sup> McConnachie, Skelton and McConnachie “The Constitution and the Right to Basic Education” in Veriava, Thom and Hodgson (eds) *Basic Education Rights Handbook: Education Rights in South Africa* (2017) 23.

<sup>135</sup> 84 of 1996.

<sup>136</sup> *Ibid.*

<sup>137</sup> SS 3(2) and 4(1) and (2) of SASA.

<sup>138</sup> S 5(3)(a) of SASA.

<sup>139</sup> S 39(1) of SASA.

<sup>140</sup> S 40(1) of SASA.

<sup>141</sup> Hall and Monson “Free to Learn: The School Fee Exemption Policy and the National School Nutrition Programme” [https://ci.uct.ac.za/sites/default/files/content\\_migration/health\\_uct\\_ac\\_za/533/files/gauge2006\\_freetolearn.pdf](https://ci.uct.ac.za/sites/default/files/content_migration/health_uct_ac_za/533/files/gauge2006_freetolearn.pdf) (accessed 2024-07-27) 45–46. Regulation 6 of the Regulations Relating to the Exemption of Parents From the Payment of School Fees Regulations of 1998 GNR 1052 in GG 29311 of 2006-10-18, set out a mandatory minimum means test for the granting of exemptions.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> S 5A(1)(a) of SASA.

employed in SASA suggests that the MBE only has the discretion to prescribe the minimum norms and standards, but that is erroneous. Several court judgments have highlighted the plight of poorer schools in South Africa, where sub-standard or meagre infrastructural conditions have either caused learner injury or death, and where the MBE was ordered to amend the 2013 Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure.<sup>145</sup> In *Equal Education v Minister of Basic Education*,<sup>146</sup> the court found several sections of the 2013 regulations to be inconsistent with the Constitution, SASA and a 2013 court order authorising the enactment of the Regulations. The court declared several sections of the regulations to be unlawful and invalid and obliged the MBE to remedy the relevant inconsistencies. The court affirmed that the State possesses an immediate and indisputable duty to provide safe and secure schools and adequate school infrastructure, which constitutes an integral element of the right to basic education. In May 2024, the MBE finally enacted the amended regulations.<sup>147</sup>

## 5.5 Zambia

Neither the Constitution of Zambia, 1996, nor the Constitution Amendment Act<sup>148</sup> contains a right to education. The Education Act<sup>149</sup> governs education in Zambia. The critical goals of the Education Act are to regulate the delivery of accessible, equitable and high-quality education, provide for the financing of educational institutions and domesticate the UNCRC in relation to education.<sup>150</sup> The Education Act defines the phrase “basic education” quite narrowly. “Basic education” in the Education Act means “education from early childhood to grade nine”.<sup>151</sup> The Education Act describes a child as “a person who has not attained the age of sixteen years”. That meaning is inconsistent with the demarcation of “child” in international law, which regards a “child” to be a person below the age of 18 years. The Education Act grants a person the right to early-childhood education, basic education,

<sup>145</sup> GNR 920 in GG 37081 of 2013-11-29. See also the amended Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure GNR4895 in GG 50724 of 2024-05-28. In *School Governing Body of Makangwane Secondary School v the MEC of the Executive Council of the Limpopo Department of Education* (case number 3158/2018), the judge ruled that the obstinate failure of the Limpopo Department of Education to fix the derelict and hazardous infrastructure at the school violated the learners’ rights to dignity, equality and basic education. In *Komape v Minister of Basic Education* [2018] ZALMPPHC 18, the court declined to award civil damages against the State for the wrongful and negligent death of Michael Komape, who died after falling into a pit toilet at school.

<sup>146</sup> [2018] ZAECBHC 6.

<sup>147</sup> Department of Basic Education “Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure” GN 4895 in GG 50724 of 2024-05-28.

<sup>148</sup> 2 of 2016.

<sup>149</sup> 23 of 2011.

<sup>150</sup> The long title of the Education Act.

<sup>151</sup> S 1 of the Education Act.

and high-school education and maintains that a child has the right to compulsory<sup>152</sup> and free basic education.<sup>153</sup>

The Free Education Policy in Zambia (FEPZ) was launched on 10 January 2022. The conception of free education is not new to Zambia. In an attempt to affirm its commitment to the aspirations of the World Declaration on Education for All, the Zambian government introduced a Universal Free Education Policy in 2002 (UFEP),<sup>154</sup> which was limited to the provision of free education for all learners at the primary-school level. The rationale for abandoning or drastically altering the UFEP was attributable to scarce financial resources.

The current FEPZ makes provision for free education from early childhood to secondary-school level in all state schools. To meet its subsidy obligations, the Zambian government increased its educational budget to K18.1 billion in 2022 and K23.2 billion in 2023. Such growth renders it Zambia's most sizeable education budget of the preceding five years,<sup>155</sup> and displays a genuine commitment on the part of the government to widen access to education. The FEPZ aims to "eradicate abject poverty and hunger" and "increase equitable access to quality education, and skills training to enhance human capacity for sustainable national development".<sup>156</sup> The FEPZ has effectively removed the economic impediments to accessing education for an enormous number of Zambian people.

The Zambian government has managed to boost its cumulative budget for primary and secondary education; however, whether the FEPZ will be sustainable in the long run remains to be seen. It will take a great deal of effort from the Zambian government and other education stakeholders to ensure that its latest education offering improves access to education and advances the delivery of quality education. That goal can only be accomplished if Zambia's budget allocation for education remains stable and there is significant buy-in from stakeholders who must also play definitive roles in furthering the initiative.

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<sup>152</sup> S 17 of the Education Act.

<sup>153</sup> S 15 of the Education Act.

<sup>154</sup> Mwanza and Darius "Implementation of the Free Education Policy in Primary Schools in Kafue District: Is It a Compromise on Quality of Education in Zambia?" 2020 7(9) *European Journal of Education Studies* 317 318.

<sup>155</sup> Odesomi "Understanding Zambia's Free Education Programme and the Way Forward" (6 March 2023) <https://www.africanleadershipmagazine.co.uk/understanding-zambias-free-education-programme-and-the-way-forward/> (accessed 2024-06-13).

<sup>156</sup> Global Partnership for Education: Transforming Education "Education in Zambia" (2024) <https://www.globalpartnership.org/where-we-work/zambia#transforming-education> (accessed 2024-06-13).

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## **6 RECOMMENDATIONS FOR THE FIVE SELECTED SADC COUNTRIES**

### **6 1 Expanding the definition of basic education**

The meaning of basic education must be extended or stipulated. Botswana, South Africa and Malawi have all elected not to define “basic education”. Namibia and Zambia are the only countries that have attributed extensive definitions to basic education. In short, basic education in Namibia and Zambia incorporates all schooling – that is, education from the pre-primary stage to the final grade of secondary education. That denotation surpasses but is consistent with General Comment 13 and the International Standard Classification of Education (ISCED), in which basic education is expressed as encompassing “primary education (first stage of basic education) and lower secondary education (second stage). It also covers various non-formal and informal public and private activities intended to meet the basic learning needs of people of all ages”.<sup>157</sup>

It is patently illogical to restrict the meaning of basic education to primary schooling. The word “basic” itself connotes a comprehensive meaning.<sup>158</sup> Both primary and secondary education generate the foundation that learners require to gain access to higher education. Without such an essential foundation, learners will remain wedged in poverty. It is recommended that Botswana, Malawi and South Africa adopt the Namibian and Zambian definitions of basic education to enjoy the ensuing benefits of pre-primary, primary and secondary school education.

### **6 2 Making free and compulsory basic education obligatory**

Botswana, Malawi, Namibia and Zambia have all instituted frameworks for the provision of free and compulsory basic education. However, despite this intervention, free and compulsory basic education has only enhanced school admission, but has stunted the delivery of quality education. The rationale for that critique rests on the constrained interpretation of free and compulsory basic education endorsed by the countries mentioned above. Free and compulsory basic education cannot be confined to education “without cost or payment” or the “delivery of mandatory” basic education. Free and compulsory basic education must be perceived universally – that is, as including the corpus of fundamental international prerequisites for education compliance.

Basic education in South Africa must be accessible to all learners within the stipulated age range, as mentioned in section 3(1) of the South African Schools Act. South Africa provides a statutory framework for the exemption

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<sup>157</sup> UNESCO: Institute for Statistics “Glossary: Basic Education” (2024) <https://uis.unesco.org/en/glossary-term/basic-education> (accessed 2024-07-22).

<sup>158</sup> “Basic” generally means the creation of a crucial foundation.

of school fees and for the declaration of certain schools as non-fee paying, but it needs to take deliberate measures to eradicate the levying of school fees at all schools in the country. In Zambia, the levying of user fees and other concealed costs associated with providing school education must be abolished.

### 6.3 The realisation of high-quality education

All the SADC countries considered in this article have experienced challenges in delivering high-quality basic education. Ascribing a single interpretation to quality education is difficult.<sup>159</sup> Tonegawa interprets the quality of education from four frames of reference, namely, “school environment, educational attainment, learning achievement and non-cognitive skills”.<sup>160</sup> To meet Sustainable Development Goal 4, Tonegawa argues that countries must provide public schools with the requisite educational resources, physical infrastructure and teaching and learning materials.<sup>161</sup> Moreover, public schools must use “the proportion of students enrolled in Grade 1, who reach the final year of primary education” as an indicator to measure quality education.<sup>162</sup> Public schools are also encouraged to gauge learning and academic achievement<sup>163</sup> and ensure that non-cognitive or “social and emotional”<sup>164</sup> skills are enhanced.<sup>165</sup> Quality education can be summarised as education

“that focuses on the whole child – the social, emotional, mental, physical, and cognitive development of each student regardless of gender, race, ethnicity, socio-economic status, or geographic location. Based on the pillars of providing excellent teaching; utilizing and providing access to developmentally appropriate and effective learning tools; and establishing supportive learning environments, a quality education provides the outcomes needed for individuals, communities, and societies to prosper.”<sup>166</sup>

Despite making considerable headway concerning educational development, Botswana still struggles with delivering high-quality education. One of the reasons for that undesirable situation is that a large proportion of the education budget has been earmarked for higher education, with pre-primary

<sup>159</sup> Tonegawa “Education in SDGS: What Is Inclusive and Equitable Quality Education” in Urata, Kuroda and Tonegawa (eds) *Sustainable Development Disciplines for Humanity: Breaking Down the 5Ps—People, Planet, Prosperity, Peace and Partnerships* (2022) [https://doi.org/10.1007/978-981-19-4859-6\\_55](https://doi.org/10.1007/978-981-19-4859-6_55) 62.

<sup>160</sup> Tonegawa in Urata *et al* (eds) *Sustainable Development Disciplines* 63.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> Tonegawa in Urata *et al* (eds) *Sustainable Development Disciplines* 64.

<sup>164</sup> OECD *Skills for Social Progress: The Power of Social and Emotional Skills* (2015) <https://doi.org/10.1787/9789264226159-en> (accessed 2024-07-10).

<sup>165</sup> Tonegawa in Urata *et al* (eds) *Sustainable Development Disciplines* 65.

<sup>166</sup> ASCD and Educational International “The 2030 Sustainable Development Goals and the Pursuit of Quality Education for All: A Statement of Support From Education International and ASCD” (12 February 2016) <https://files.ascd.org/staticfiles/ascd/pdf/siteASCD/policy/ASCD-EI-Quality-Education-Statement.pdf> (accessed 2024-07-22) 22–40.

and secondary education receiving very little.<sup>167</sup> Statistics reveal that a meagre 43 per cent of children between the ages of four and five years are gaining access to and participating in early learning opportunities in Botswana; about one-third of children are not acquiring basic literacy skills after completing four to five years of primary education; and around one-third of learners sitting for the exit-level primary-school examination fail.<sup>168</sup> The primary reason for the failure of children in Botswana to accomplish the expected curriculum objectives in primary school is a lack of access to high-quality early-childhood education.<sup>169</sup>

A sizeable learner dropout rate and an abject quality of education subvert education provision for all in Malawi.<sup>170</sup> Despite several notable successes, the Primary School Improvement Plan for Malawi led to an escalation in the number of children who are out of school<sup>171</sup> and created an excessively high learner-to-educator ratio, which points to the reality that there is still a shortage of qualified educators in primary schools, rendering the attainment of quality education unlikely.<sup>172</sup> The implementation of inclusive education in Malawi also presents several challenges, including: a shortfall in educators' knowledge with regard to recognising learners with disparate needs;<sup>173</sup> a scarcity of essential school resources;<sup>174</sup> an absence of suitable training of educators on inclusive education praxis in teacher training colleges and universities;<sup>175</sup> an inability to gain access to school infrastructure, especially by learners with special-education needs;<sup>176</sup> and educator syllabi in Malawi that do not endow educators with the skills necessary to teach learners with disabilities.<sup>177</sup> Another impediment is that undesirable attitudes about

<sup>167</sup> UNICEF "Education: Every Child Has a Right to Accessible Quality Education" (2024) <https://www.unicef.org/botswana/education> (accessed 2024-07-11).

<sup>168</sup> *Ibid.*

<sup>169</sup> Pillar and Haricharan "Early Childhood Care and Education in Botswana: Implications for Access and Quality" 2023 13(1) *South African Journal of Childhood Education 2* <https://doi.org/10.4102/sajce.v13i1.1268> (accessed 2024-07-11).

<sup>170</sup> Chimombo "Quantity Versus Quality in Education: Case Studies in Malawi" 2005 51 *International Review of Education* 155 157.

<sup>171</sup> Mkochi "Education in Malawi: Quality, Quantity and Relevance" 2021 2 *The Malawi Development Digest* 32 33.

<sup>172</sup> Ministry of Education "National Education Sector Investment Plan: 2020-2030" (2020) <https://www.unicef.org/malawi/media/4561/file/National%20education%20sector%20investment%20plan%20.pdf> (accessed 2024-06-07) 6–9.

<sup>173</sup> Alkahtani "Teachers' Knowledge and Attitudes Toward Sustainable Inclusive Education for Students With Emotional and Behavioural Disorders" 2022 9(12) *Children* 1 2–3.

<sup>174</sup> Chataika, Kamchedzera and Semphere "An Exploration of the Challenges Faced by Regular Primary School Teachers in Planning Instructional Strategies for Inclusive Classrooms 2017 2(1) *African Journal of Special and Inclusive Education* 12 13.

<sup>175</sup> Craissati *et al* *A Human Rights-Based Approach to Education for All* 13–14.

<sup>176</sup> Lingolwe *Challenges Facing the Implementation of Inclusive Education in the Primary Schools in Malawi: A Case Study of Four Primary Schools in Zomba District* (unpublished master's thesis, Mzuzu University) 2021 [http://repository.mzuni.ac.mw:8080/bitstream/handle/123456789/321/Lingolwe\\_challenges\\_facing\\_the\\_implementation\\_of\\_inclusive\\_education.pdf?sequence=1&isAllowed=y](http://repository.mzuni.ac.mw:8080/bitstream/handle/123456789/321/Lingolwe_challenges_facing_the_implementation_of_inclusive_education.pdf?sequence=1&isAllowed=y) (accessed 2024-06-06) 2.

<sup>177</sup> Chikasanda "Inclusive Education in Malawi: A Critique of Teacher Education Programmes" 2020 26(2) *Journal of Disability Studies in Education* 59 63–64.

children with disabilities prevail in Malawi, which restricts not only their access to education but also other essential services.<sup>178</sup>

In Namibia, although school enrolment increased following the introduction of free basic education, the MBEAC is still grappling with providing high-quality education to learners, particularly those residing in rural communities.<sup>179</sup> Namibia has also experienced a shortage of schools, especially in rural areas, and a lack of skilled educators.<sup>180</sup> Poor infrastructure, insufficient physical and material resources, and an unusually high learner-educator ratio over the national norm inhibit the teaching and learning process.<sup>181</sup> Many educators in Namibia do not possess the skills and training to support learners with diverse needs. That is one of the reasons that the Basic Education Act stipulates that educators must receive ongoing professional development.<sup>182</sup> Furthermore, educators in Namibia have an affinity for traditional teaching methods and are opposed to technology and digital learning as a means to improve the education landscape.<sup>183</sup> The MBEAC must develop a national policy on lifelong learning and quality assurance in education that guarantees high-quality basic education.<sup>184</sup>

In South Africa, the SACMEQ IV report<sup>185</sup> identified the following factors affecting access to quality education for Grade 6 learners. A sizeable 15,7 per cent of learners have to walk more than five kilometres to the school they attend; 9,9 per cent of learners failed their final examinations; 65,6 per cent of learners own a reading textbook; 66,1 per cent of learners own a mathematics textbook; and only 77 per cent of learners have a notebook or a workbook. More than half of the schools in South Africa did not have a school library, and only 61,3 per cent of all school buildings were in good condition and suitable for teaching and learning. For the first time, South Africa attained an above-average overall performance SACMEQ score of more than 500 in Reading and Mathematics. The median overall performance score for educators in Reading and Mathematics was above 700. Just over 20 per cent of all Grade 6 learners in the Eastern Cape, KwaZulu-Natal, Limpopo, Northern Cape, North West and the Northern

<sup>178</sup> Craissati *et al* *A Human Rights-Based Approach to Education for All* 49–50.

<sup>179</sup> Ipinge and Julius “Quality Education Within the Universal Primary Education: Selected Rural Primary Schools in Namibia 2016 14 *NERA Journal* 48 49.

<sup>180</sup> Julius and Amupanda “The Harambee Prosperity Plan and the Education Sector in Namibia: Challenges of Formal Education Remain” 2017 15 *NERA Journal* 21 31.

<sup>181</sup> Josua *Challenges Facing School Teachers and Principals in Managing and Implementing the Revised Curriculum in Ompundja Circuit in Namibia* (unpublished doctoral thesis, University of Namibia) 2022 53–73.

<sup>182</sup> S 3(l) of the BEA. See also Naholo *Teachers’ Challenges in Supporting Learners With Learning Difficulties in Mainstream Classrooms: A Case Study of One Primary School in Oshana Region, Namibia* (unpublished doctoral dissertation, University of Namibia) 2020 26.

<sup>183</sup> Strauss and Bipath “Evolving Trends of Distance Learning for Basic Education in Namibia: A Parental Perspective During Covid-19 Lockdown” 2021 55(1) *Journal for Language Teaching* 57 58.

<sup>184</sup> S 30(1) of the BEA.

<sup>185</sup> SACMEQ *The SACMEQ IV Project in South Africa: A Study of the Conditions of Schooling and the Quality of Education* (2017) 14–32.

Cape have never attended a pre-primary school. A staggering mere 35,1 per cent of learners acquired the competence of basic numeracy in mathematics, and only 21,1 per cent of learners developed the skill of interpretive reading. Concerning the payment of school fees by Grade 6 learners, the report indicates that 17,6 per cent of rural learners and 25,1 per cent of urban learners still had to pay school fees. Those quotients are excessive and incongruent with the international benchmark that basic education should be free.

Although Zambia complies with certain of its international commitments, the recently approved Free Education Policy in Zambia and the Education Act are subject to several criticisms and challenges. At the outset, the FEPZ was not fully comprehensible to the parents of learners, which allowed schools to exploit parents by charging concealed, unscrupulous fees.<sup>186</sup> The implementation of the FEPZ set in motion a series of challenges for school administrators, including a soaring enrolment rate, which instigated a shortage of educators, amplified workloads for existing educators, a shortage of classrooms for teaching and learning, classroom overcrowding, high rates of ill-discipline, and unsatisfactory teaching and learning materials.<sup>187</sup> The FEPZ led to a significant rise in learner drop-out rates among females and learners from rural areas.<sup>188</sup> Rural Zambia experiences severe barriers to educational access. For example, there are fewer schools close to learners' places of residence, which means that they have to travel lengthy distances to acquire an education. In addition, many rural Zambians do not possess the financial resources to afford the costs of transport to schools owing to high levels of poverty.<sup>189</sup> Learner absenteeism also poses an acute challenge.

#### **6 4 Constitutional and legislative reform is required in some countries**

To meet its international-law obligations, constitutional and legislative reform is needed in Botswana. The Right to Education Act and the Constitution of Botswana are outdated and no longer serve the educational needs or interests of the population. The Botswana Constitution must be amended to include a justiciable right to education. Other human rights, integral to exercising the right to education, must also be guaranteed. A new Constitution must also facilitate the content of the right to education. A

<sup>186</sup> Sinkala *Free Education Policy: Key Challenges Faced by Girls in Accessing Secondary Education In Rural Zambia* (M Ed. thesis, University of Gothenburg) 2024.

<sup>187</sup> Chitondo, Kalasa and Chinyundo "Challenges in the Implementation of Free Education Policy in Zambia: A Case of 4 Primary Schools in Mandevu Compound of Lusaka District 2022 2(2) *International Journal of Literacy and Education* 91 94.

<sup>188</sup> Mulenga-Hagane, Daka and Kanchebele-Sinyangwe "Learning From Change: Benefits and Implications of Distinct Primary and Secondary Schools for Education in Zambia" 2020 1(1) *Malcolm Moffat Multidisciplinary Journal of Research and Education* 121 129.

<sup>189</sup> Machinyise, Kasebula and Chabu "The Impact of Free Education Policy on the Provision of Quality Education and Access to Tertiary Education in Zambia. A Case of Selected Schools and Colleges of Livingstone District" 2023 3(1) *ZAPUC International Conference* 124 125–126.

contemporary REA must be enacted that will provide the framework for the administration of free and compulsory basic education. Ancillary matters, like the payment of school fees in public secondary schools, exemptions from the payment of school fees (to advance economic accessibility), a description of high-quality education that is consonant with the accepted meaning of quality education in international law, the provision of inclusive and equitable education at all levels, and what those concepts entail, and any additional matters connected in addition to that, must also be incorporated in the REA. Namibia has already established a desirable constitutional, legislative and policy scheme to meet its international obligations concerning the right to education. There are, however, certain supplementary undertakings that Namibia must instigate to achieve full compliance with its international commitments. The Child Care and Protection Act must define “adequate education”.

## **6 5 The expansion of education investment**

Unlike other SADC countries, Botswana has not invested in its education system.<sup>190</sup> Botswana has managed to deliver free education for all school learners through the proceeds of diamond mining,<sup>191</sup> and international support. This is not sound in principle when one considers the instability of the mining industry and the depletion of mineral resources. Botswana urgently needs to consider alternative methods for generating education funding that are independent of mining and international subsidies. State funding for realising public basic education in Zambia must be raised and distributed promptly.

## **6 6 The enactment and implementation of prescribed norms and standards for schools**

Botswana, Malawi and Zambia require the prescription of norms and standards relating to school infrastructure, funding, fee structure, capacity, and the provision of teaching and learning support material through the leadership of the relevant Minister. Sufficient and operational educational institutions and curricula must be available or constructed in satisfactory numbers in Botswana, Malawi and Zambia so that all learners can receive a basic education. Botswana, Malawi and Zambia must also make provision to accommodate learners with disabilities in public schools and ensure that school infrastructure is suitable for those learners.

Enduring problems with inferior school infrastructure and overcapacity at state schools necessitate that norms and standards for school infrastructure

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<sup>190</sup> Siphambe “Rates of Return to Education in Botswana” 2000 19 *Economics of Education Review* 291–300. South Africa currently allocates 16,9% of its GDP to education, in comparison to Botswana, which earmarks only 8% of its GDP.

<sup>191</sup> Iredale “How Botswana Guarantees Free Education for All Children” (24 January 2023) <https://www.naturaldiamonds.com/ae/industry-insights-ae/diamond-industry-ae/how-botswana-guarantees-free-education-for-all-children/> (accessed 2024-07-11).

and capacity be effected to ensure that basic education in Botswana, Malawi, Namibia and Zambia complies with both international and national norms. In South Africa, it is expected that the recently promulgated 2024 Regulations Relating to the Minimum Norms and Standards for Public School Infrastructure will remedy the problems concerning poor and deficient infrastructure and overcrowding.

### **6 7 The school-leaving age must be extended to 18, and successful completion of primary and secondary education must be made compulsory**

Most education systems are directed at priming learners for future employment and engendering an efficient, proficient and competent labour force that can work in modern occupations.<sup>192</sup> Despite that goal, learners are permitted to leave school to find employment after completing primary school.<sup>193</sup> A learner with only a primary-school education is neither competent nor skilled for sustainable employment. Countries require proficient workforces to stimulate economic growth, and education acts as a catalyst for human-capital formation. Because of the advantages associated with education, and owing to the low education standards and outputs highlighted in this article, it is suggested that the school-leaving age be extended to 18 and that the completion of full secondary education become compulsory in Botswana, Malawi, South Africa and Zambia.

### **6 8 Qualified educators must be provided; the building of additional schools, the expansion of school retention and a reduction in school dropout rates must be achieved**

Additional schools must be erected in Botswana, Malawi, Namibia, South Africa and Zambia, especially in rural areas, to promote the countries' education needs. It is anticipated that such an intervention will reduce the high learner-educator ratios. More rural schools or schools closer to rural areas are needed to safeguard the delivery of basic education. Such action will guarantee physical accessibility.

The intake by universities and colleges of students pursuing studies in teaching must be increased so that sufficient educators are available to teach all children in the country. Teacher training colleges and universities in Malawi, Namibia and Zambia must equip educators with appropriate training on inclusive education practices, the teaching of learners with disparate

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<sup>192</sup> Bagwasi "The Major Educational Policies, Models and Ideas That Have Influenced the Botswana Education System" 2018 0(0) *Policy Futures in Education* 1 8.

<sup>193</sup> Scholaro Database "Education System in Botswana" (2024) <https://www.scholaro.com/db/Countries/Botswana/Education-System#:~:text=Education%20in%20Botswana%20is%20free.st%204%20years%2C%20thereafter%20English> (accessed 2024-05-22).

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needs and technology-driven education. Innovative measures must be adopted to expand school retention and reduce school dropout rates.

## 7 CONCLUSION

Education must be accessible, acceptable, available and adaptable. The legislative and policy frameworks of the five SADC countries discussed in this article contain standards and directives that are, in some way or another, implicit in the overriding principles of the four A-scheme.<sup>194</sup> However, Botswana, Malawi, Namibia, South Africa and Zambia must still execute auxiliary action plans to comply fully with the overarching international norms and standards directing basic education.

The provision of free, equal, inclusive, mandatory and high-quality basic education in developing or underdeveloped states is not as straightforward as is made out in international treaties. It will take extensive commitment and resources from SADC countries to fulfil the right to basic education, as endorsed in the international and regional treaties. SADC can play an integral role in education. The current SADC framework for the realisation of the right to basic education is meagre, to say the least. SADC must develop, approve, and enforce, without delay, an extensive and sustainable scheme for realising basic education in the region. Pillar 3 of SADC's Vision 2050 already envisages social and human-capital development through "increased access to quality and relevant education and skills development". Article 5 of the SADC Treaty, 1992, aims to "achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged, through regional integration".<sup>195</sup> Basic education is the single apparatus through which those aspirations can be accomplished.

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<sup>194</sup> SADC Vision 2050 is a long-term strategic framework that outlines the aspirations of the Southern African Development Community (SADC) for the region by the year 2050.

<sup>195</sup> SADC: Towards a Common Future "SADC Objectives" (2022) <https://www.sadc.int/pages/sadc-objectives> (accessed 2024-07-24).