

The Domestication of the United Nations Convention on the Rights of the Child in South Africa

RAYMOND CHIROWAMHANGU 

Department of Sociology
University of Pretoria, South Africa 
raychirowa@gmail.com

RUTH T NYAMADZAWO 

International Centre of Non-Violence
Durban University of Technology, South Africa 
RuthN@dut.ac.za

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Abstract

The domestication of the United Nations Convention on the Rights of the Child (CRC) in South Africa presents a critical constitutional commitment towards protecting the rights of children. The paper reflects on the right to basic education as provided in Section 28 of the Constitution of South Africa and related key policy frameworks. This research examines the extent to which the CRC has been effectively translated into practice, focusing specifically on access to basic education for orphans and vulnerable children in South Africa. Based on primary findings obtained through qualitative research, the study shows that while judicial and policy frameworks reference the CRC, systemic inequalities persist, and the efficacy of the process is undermined by systematic inequalities, poor infrastructure and resource allocation, and socio-economic barriers faced by vulnerable children. The situation is further impeded by a lack of monitoring mechanisms, effective enforcement, accountability and political governance from policymakers.

Keywords: Domestication, children's rights, basic education, Convention on the Rights of the Child, South Africa

Introduction

The right to basic education is universal and inclusive for all children (Tran & Mwanri, 2013; UNESCO, 2002). Researchers affirm that the right to basic education is one of the most complex rights in the context of international human rights law because it is an empowerment right that “*enhances all rights and freedoms*” while its violation “*jeopardises them all*” (Meskele, 2015; Kalantry et al., 2009; Tomasevki, 2001). Access to basic education is enshrined in various regional and international treaties, including the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).

This paper examines the extent to which the CRC has been domesticated to support basic education for OVC in South Africa. This is critically important because the success or failure of any international human rights treaty should be evaluated in accordance with its impact on human rights practices at the domestic level (Odhiambo, 2005). Thus, the following objectives will be achieved in this study: firstly, identifying key provisions on the domestication of the CRC in

South Africa; secondly, analysing South Africa's constitutional and legislative framework on the right to basic education; lastly, documenting the challenges and progress made to domesticate the CRC, using the Eastern Cape province as a case study.

The study was conducted using a qualitative research design, in which 46 participants from 34 non-governmental organisations (NGOs), 9 primary schools and 3 government departments in the Eastern Cape province participated. The qualitative research design has been supported by various scholars as a naturalistic, holistic and inductive method, which allows participants to freely express their views (Lim, 2024; Bazen et al., 2021). The study employed the non-probability snowball sampling technique to select knowledgeable and experienced participants. Data analysis was conducted using the Atlas.Ti 9, a computer-aided software program.

Context of Basic Education in South Africa

Since the new political dispensation in South Africa in 1994, much emphasis has been placed on changing the society to provide equal education opportunities for all children (Muthukrishna, 2006; Ndonga, 2012). This suggests a commitment to the broad view of social inclusion and a strong commitment to the rights of a child, through two major pillars in particular, namely, the Constitution of the Republic of South Africa (1996) and the South African Schools Act 84 of 1996.

Section 28(1)(c) of the Constitution of South Africa stipulates that every child has basic rights to education, nutrition, health care services and social services (Republic of South Africa, 1996). The implementation of the right to basic education under Section 28 has higher priority relative to other rights (Abrahams & Matthews, 2011; Boezaart, 2012). Section 28(2) of the Constitution of South Africa establishes that "A child's interests are of paramount importance in every matter concerning the children" (Republic of South Africa, 1996).

In explicit terms, Section 29(1)(a)¹ of the Constitution states that everyone has the right to basic education. Roithmayr (2003) adds that this is an inclusive right for all, which is not subject to resource availability. In addition, Section 29(1)(b) states that everyone has the right to further education and that the state must make such education progressively available and accessible (Republic of South Africa, 1996; Robinson, 2003).

In response to the definitive challenges of basic education, the South African Schools Act of 1996 provided practical guidelines on basic education; specifically, basic education is and should be compulsory for all children from the age of 7 to 15 years or Grade 9, whichever comes first (Republic of South Africa, 1996; Murungi, 2015). Such statutory stipulations emphasise the right to basic education. However, in most instances, judicial action has had to be taken for the practical implementation of this right. In such cases, the court would have to define the parameters of the right, enforce adherence, and attempt to remove existing structural obstacles. The following case highlights how the right to basic education has been understood and operationalised by South African courts, especially with regard to its definition, access, and governmental responsibility.

Legislation

Domestication of the CRC treaty

Mendes and Lalonde-Roussy (2003) state that International law does not regulate the implementation of international treaties, and as a result, states have had to rely on their

¹ Section 29(1)(a) states that 1. Everyone has the right to a basic education

domestic and constitutional law for this, and this is where domestication comes into the picture. Domestication is described as a way of maximising the effects of an international instrument at the national level, which has to be made part of domestic law either by way of incorporation or transformation (Lusanjo, 2013; Deitrick, 1999; Setear, 1996). In application, the process will be based on translating international conventions into domestic legislation, thereby implementing projects which will advance the realisation of the aims of the conventions. The success of the domestication process helps to establish that provisions of the convention are more visible with tangible results in the country.

Doek (2006) entails the activities of the government to ensure that national laws and related administrative regulations are in full compliance with the CRC. As noted above, this is a continuous, ongoing process to assess whether the state is operating in compliance and is fully compatible with the proposed legislation. Furthermore, the state can implement additional measures, which include monitoring institutions and policy reforms. Domestication in the context of the CRC is advantageous because the obligation to legislate the convention rests on all levels of the government. In relation to this study, the right to education for all children has been mentioned very frequently in African constitutions. The main provisions for free and basic education are constitutionally entrenched in Article 28 of the CRC and can be found in several government Constitutions (Section 29(1)(a) in the case of South Africa), thus demonstrating more commitment towards protecting children's rights at the domestic level.

The evolving nature of domestication is the dominant political process contributing to an effective response to the education-related challenges of vulnerable children (Munzhedzi, 2016; Murungu & Biegon, 2011). Therefore, the domestication of international and regional treaties principally requires that constitutional and other legal provisions be enacted at the national level to give effect to the ratified treaties (Vilijoen & Precious, 2007; OHCHR, 2010). Following the ratification of an international Convention, state parties are obliged to align national laws to reflect the commitment in the treaties (Achilihu, 2010; Van Sant, 2000). In addition, the state is encouraged to establish measures to ensure that the terms of the treaty can be applied locally. This is when domestication is fully implemented and is achieved through the country's constitutional provision. Himes (1995) states that attention must be paid to a broad array of legislative, administrative, judicial, regulatory, and other measures at all levels of government to achieve the goals or attain the agreed standards (Olowu, 2009; Hanf, 2015).

The interpretation of Section 231(1) of the Constitution of South Africa provides critical discourse on the preferred system of domestication whereby the negotiating and signing of all international agreements is the responsibility of the national executive (Republic of South Africa, 1996). This subscribes South Africa to the dualists system, which regards international and domestic law as completely separate with different legal systems and characteristics; conversely, an exemption is given to the Head of State, who is the only state organ to represent the state both in domestic and international law (Wangari, 2013). This means international treaties do not automatically become law upon ratification. Researchers, Hovell (2022) and Park et al. (2020), assert that the main proponents of dualism are the positivists whose consensual views around international law naturally led to their conceiving of domestic law as a distinct system. Buergethal et al. (2002) purport that the dualist approach provides the opportunity for states to establish a legal regime that suits the state's unique circumstances. The practical disadvantages of dualism are diverse because there is always the danger that the national and the international legal situation drift apart due to national-centric interpretation, unincorporated treaties and the latitude of the national legislator in the sense of their willingness to incorporate the treaties (Lusanjo, 2013).

In the specific context of South Africa, the state follows a dualistic approach (Phooko, 2018 & Schlemmer, 2004). As elaborated earlier in the case of dualism, treaties are not automatically adopted but rather follow a dual process involving the role of the legislation. As such, treaties are not directly implemented within the state without parliamentary approval, as stated in the national law under Section 231(4) of the Constitution of the Republic of South Africa states:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament (Republic of South Africa, 1996)

As reflected above, the domestication of international treaties is finalised by the approval of the parliament. The statutory enactment of international law in domestic law is the final step in the procedure triggering the applicability of international law in national law (Phooko, 2018; Mutubwa, 2019). In addition, Section 233 further mandates that courts should prioritise reasonable interpretations of laws that align with international law (Khangala, 2024), as it offers an unambiguous framework for interpretation. Section 39 of the Constitution also specifies that in interpreting the Bill of Rights, a court, tribunal, or forum is required to consider international law and may also consider foreign law. This suggests that the consideration of international law is obligatory.

From the above discussion, one can allude to the fact that domestication ensures that international human rights standards that protect children's rights are not just symbolic but legally binding and actionable within the country. This then allows for a wider definition of what domestication should look like. It can be concluded on that basis that domestication ought to extend beyond policy, case law and legislation. It must go a step further and be seen in active implementation through inclusive programmes, community-based interventions, among others (Kilkell & Liefwaard, 2019).

Research findings and discussion

To determine the extent of domestication of the CRC in the local communities in the Eastern Cape province, the study focused on key themes, including programs to promote the implementation of the CRC, the scope and nature of engagement on children's rights issues, challenges and solutions for the basic education sector.

Programmes to promote the implementation of the CRC

The participant responses certified that there were four main programmes implemented to support the CRC in the Eastern Cape province. These include children's rights awareness, family visit programmes, expert assistance and training workshops.

As indicated in Figure 1, 15 participating organisations indicated that children's rights awareness was their pivotal programme. This was reflected below:

So that we see the child as a holistic person, and not only looking at natural development versus just ticking boxes and then making things move. One of the things that critical programs have done is called "Bridges of Peace". The outcome of it was that we're trying to get children from an early age to understand, like, the concepts of empathy, Ubuntu and diversity (Participant 7, Educator, Alice).

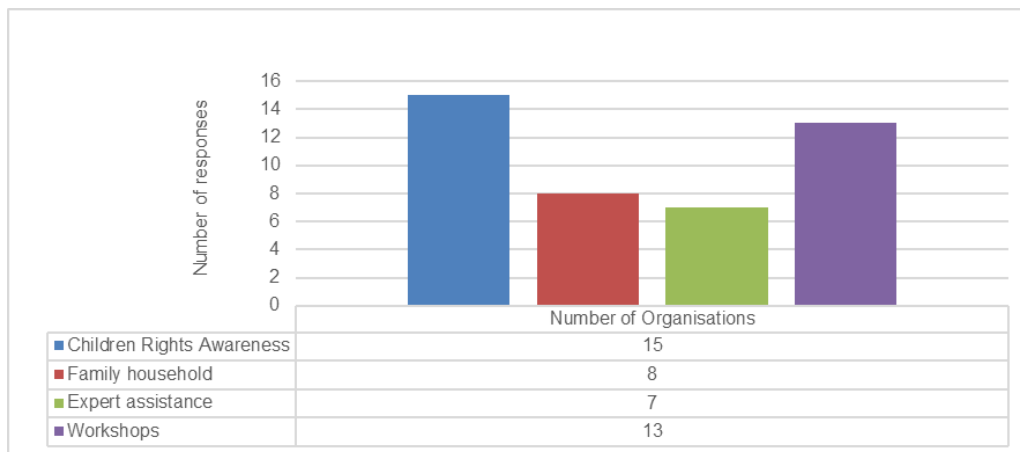


Figure 1: Programmes promoting children’s rights. Source: Compiled by the researcher

The response presents one of the key programmes on basic education, which helps to deal with the issues of discrimination in the Eastern Cape province. Mahaye (2018) asserts that “Education must create a consciousness among children to encourage and enable them to think positively”. The concepts of empathy, ubuntu and diversity are taught at a young age through the use of play-based programmes.

That is approximately 94,000 children. We have already trained 800 ECD Heads. There are 2350 classrooms in the Eastern Cape. We have already trained 1000 this year. In the next month or so, the other 400 will be trained, and they will start to implement it in their classrooms. Next year. We’re going to treat the other 1350 because we have created a pretty program that is replicable (Participant 10, NGO, Queens Town).

As regards children’s rights, some schools and NGOs conducted training on children’s rights, covering areas such as violence against children, discrimination, and cultural traditional practices forced on children, such as Ukuthwala² and illegal initiation practices. The Eastern Cape province is prone to several cultural practices which violate the rights of the child (Kugara et al., 2017; Mwambene & Sloth-Nielsen, 2011).

Scope of community and NGO engagement

Helliker (2006) contends that the role of NGOs includes empowering and capacitating grassroots communities. The presentation below reflects on the responses from the schools and NGOs.

Figure 2 indicates that 75% of the participants indicated that they engage with the community and NGOs on basic education initiatives for OVC. As stated by Roodt (2001), participation denotes an active connection between NGOs and the community on outcomes that affect their lives. The dynamics of community in this research included the involvement of family members, guardians, community leaders, traditional leaders, and community members at large.

In contrast, only 25% responded that they do not have direct contact with either the community or NGOs. These were, in most cases, communities in the most rural communities of the Eastern Cape province; for example, Matatiele, Nqanqarhu, and Nkwenkwezi, which had limited access to any NGOs working to support OVCs in their area.

² Cultural practise involves abducting young girls (below the age of consent) into forced marriages

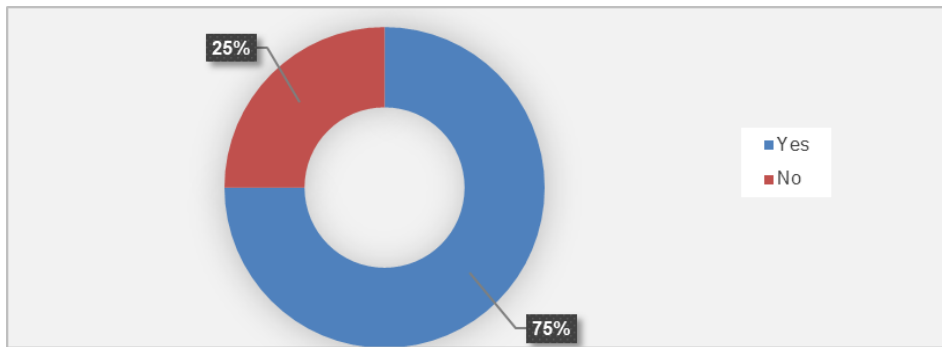


Figure 2: Engagement with community and NGO. Source: Compiled by the researcher

Nature of community and NGO engagement

McGee (2009) establishes that engagement refers more to public participation, which includes different ways that individuals engage in social activities with the capacity to take part in the decision-making process. This critical process promotes the active participation of community members.

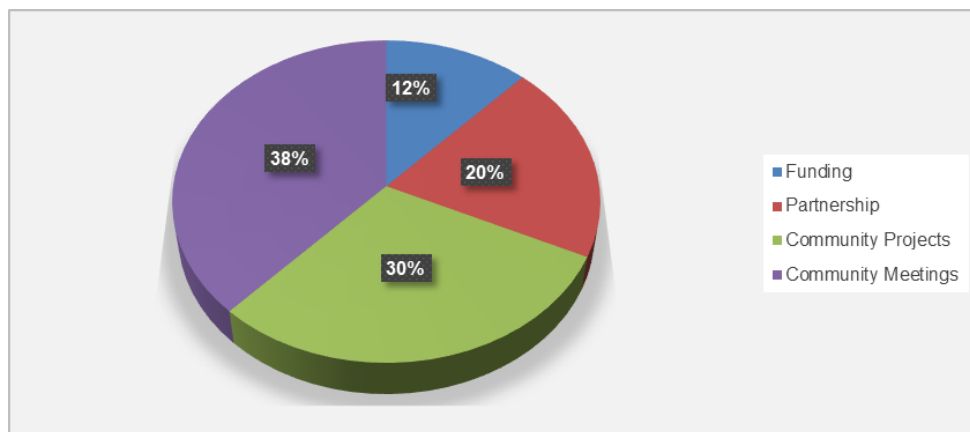


Figure 3: Nature of engagement. Source: Compiled by the researcher

The findings showed four main methods of engagement between NGOs and the community; namely, funding, partnership, community projects and meetings. The most prominent form of engagement was in the form of community meetings, constituting 38% of responses. This was referenced by a participant:

Sometimes we have, even through churches, parents hosting some workshops and information sessions about inclusive education for disabilities. So, we have different avenues of trying to reach our target audience (Participant 4, Community Leader, Alice).

These meetings were used to promote and educate participants on the rights of the child, and included traditional chiefs, community leaders, and teachers who also form part of the community. Researchers have suggested that there is a rising demand for community leaders in decision-making and government accountability (Barbaro, 2006; Herriman, 2011).

In addition, the participants reflected that 30% of their engagement was in the form of community projects. According to Baciu et al. (2017), the engagement process should create a shared vision

between the community and partners to benefit the community equitably. In support of this view, a participant indicated that:

Then, in January 2020, we facilitated the donation and installation of 160 streetlights in the township. So, the first time they had light, that was a very significant project for people living in the township, because they now see and night and feel safer. We collaborate with our local collaborators; they guide me on the projects to implement (Participant 12, Community leader, Mdantsane).

The participant highlighted the role of the community through the installation of streetlights to help create a safe learning environment when travelling to and from school. Another participant responded:

And then we work with the community to support the children with a healthy snack or first bread. And then every child gets a hot lunch. So, there's like a stew with soy. And there are always veggies in it. There's always protein in it. So yeah, they all get a hot lunch. And then in the hostel, kids get food (Participant 3, NGO, King Williams Town).

The example above demonstrates engagement with the community. The response showed how the organisation is continuously working with the community to support the OVC at their organisation to provide a meal for each child. These efforts are significant as Hall and Sambu (2017) indicate that 60% of children below 6 years' experience poverty, and half of them are exposed to food poverty.

Engagement with government

The aspect of engagement with the state, through provincial government institutions, is critical to this research, as the nature of engagement helps to express the extent of domestication of a treaty. Significantly, 98% of the participants stated that they have had engagement with the government, but as reflected in this research, the efforts have not translated to access to basic education.

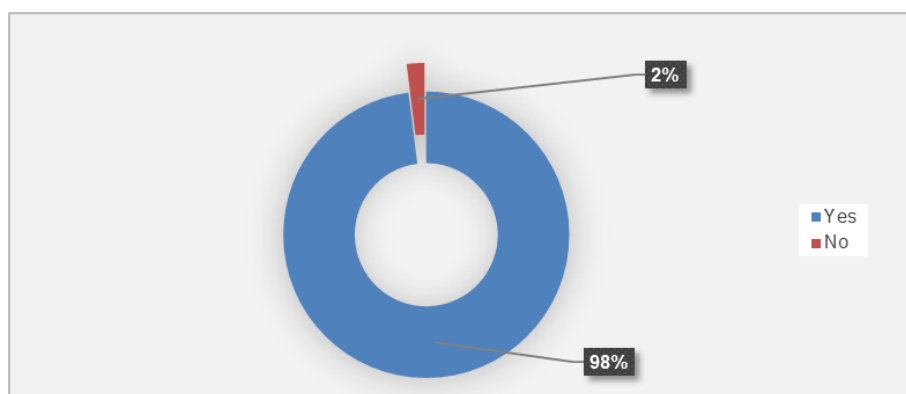


Figure 4: Engagement with Government Departments. Source: Compiled by the researcher

Significantly, the guidelines on periodic reports encourage governments to work closely with NGOs and the community in implementing the CRC, as articulated in Article 44(1)³ of the CRC

³ Article 44(1) of the CRC states: States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and, on the progress, made on the enjoyment of those rights

and the guidelines from the CRC Committee.⁴ This is in the form of various forms such as policy feedback, administration, government agents and financial assistance. Only 2% of responses reflected no engagement with the government; these were either organisations that claimed they did not require government assistance or had given up working with the government, as there was no progress.

Nature of government engagement with the community and NGO

This engagement denotes the main roles of the government working with either the community or NGO to support OVC. In this section, the challenges and progress are detailed. The diagram below reflects these roles: namely, administration, policy feedback, periodic visits and expert assistance.

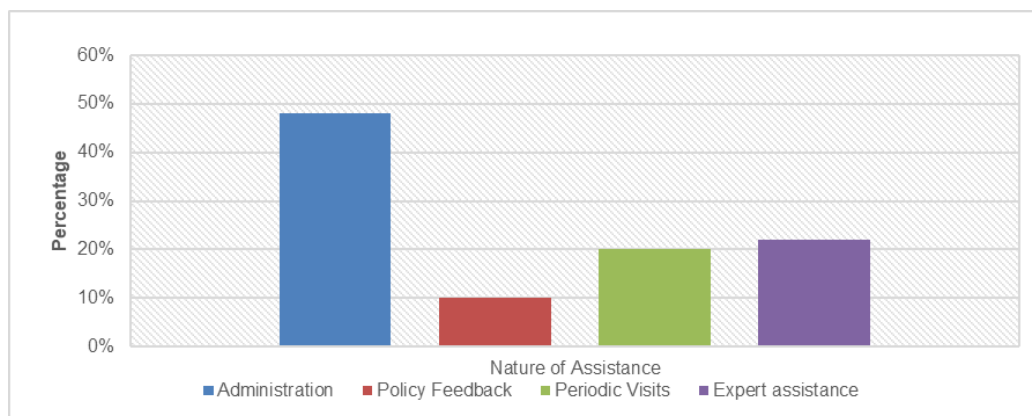


Figure 5: Nature of Government Engagement. Source: Compiled by the researcher

The responses from the participants indicated that 48% of primary engagement with the government was for administrative purposes. This involves either the registration of organisations or the registration of schools with the Department of Education. This also includes constant communication on plans, programmes and activities. In some instances, approval should be requested from the established government institutions' implementation:

Also, we engage with city parks in some programs when we need to use public space. In summary, we do try to engage them at different stages and levels as well (Participant 18, Community leader, Seymour).

In addition, other participants stated that:

Where we identify issues with a child that need to be addressed by the Department. I can say we are successful because when we started, we were working with ECD centres that were not registered with the Department of Social Development. We had identified 42 of them when we started, and currently have 18 ECD centres successfully registered (Participant 15, Government representative, Bisho).

However, only 10% of the participants mentioned the role of policy engagement and feedback with the government. In terms of the domestication of the CRC, this should be the principal form of engagement, scrutinising basic education policies and providing feasible legislative solutions. An example of policy feedback stated that:

⁴ OHCHR (2005) states that "[t]he States Parties should provide information on cooperation with CSOs, including non-governmental organizations and children's and youth groups, with regard to implementation of all aspects of the Convention".

We received the draft of the transport policy, I believe, last year, and we commented on it. Now, we are trying to campaign to ensure that the final draft is published (Participant 21, NGO, Fort Beaufort).

In the case above, dialogue was established on the school scholar transport policy to create a safe network of transport for all children and overcome barriers to education. Corruption Watch (2013) documents the transport challenges in the Eastern Cape province, which include backlogs in transport provision, and unroadworthy vehicles and roads. In addition, Machard (2014) and Mahlaba (2014) reflect on severe scholar transport issues which require immediate attention.

Furthermore, poor policy feedback and engagement with schools and communities have significant repercussions for the domestication of the CRC. Constitutionally, provincial departments are responsible for implementing the policy by translating it into such action as they, as implementers, consider best within their unique contexts (Sookal, 2005). It is for this reason that sufficient time must be invested in planning the implementation stages which follow policy initiation.

The intergovernmental nature of the South African education system, as reflected in Section 231 of the Constitution of South Africa, shows that implementation occurs at the provincial and institutional level while policy is at the national level (Republic of South Africa). Policies are therefore always mediated through minor or major adjustments within the context in which they are implemented, and are changed in the process (Fowler, 2000). Having recognised the power of implementers, it would be appropriate for policymakers to anticipate implementation problems to strategise, so as to minimise or influence the agents of the implementation process (Hogwood & Gun, 1984; Sabatier & Mazmanian, 1979).

Outcome of government engagement on the CRC

The aspect of government engagement postulates that there is continuous interaction between the government and NGOs or the community. Unfortunately, 62% of the issues raised during engagement with the government were not addressed from 2019 to 2021. These ranged from the transport scholar transport, nutrition programme and school infrastructure projects.

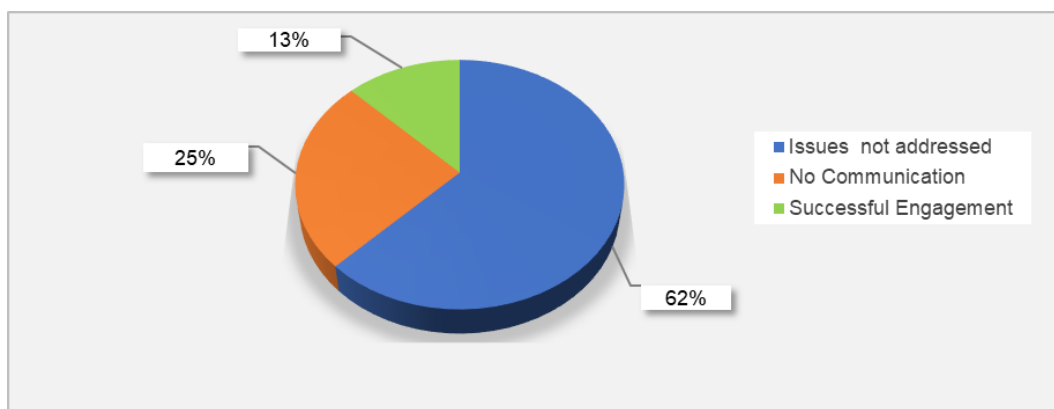


Figure 6: Status of Government Engagement. Source: Compiled by the researcher

Notably, the participants indicated that grant backlogs in 2019 were not a result of the COVID-19 pandemic in South Africa, as the first case of COVID-19 in South Africa was only recorded on the 5th of March in 2020 (Giandhari et al., 2021). However, COVID-19 was often used as a pretext for the poor state of basic education in the Eastern Cape province. The following were some of the key responses from the participants:

We talked to them about but it did not come to fruition because we have been given so many promises, but those promises are not putting anything on the table. Because even the students who come to school can be hungry, and we have to find something for them to eat in the morning. But imagine if the student has to be with us till 3 pm or 4 pm, they will still need something to eat (Participant 26, Educator, Middledrift).

In addition, the issue of poor communication was expressed by 25% of the participants. This mainly included instances of submitted reports with no feedback, no follow-up visits, and continuously rescheduled meetings with no attendance.

But in terms of our agreement with the Department, we are supposed to meet Quarterly, where we can raise issues that some of the schools are having. And this year (2021), we haven't had those Quarterly meetings. They have always been postponed. Concerning the Norms and Standards law, we are supposed to produce a yearly report of progress on infrastructure. So, we analyse reports. And if there are discrepancies, for example, in 2019, the Department did a copy-and-paste of the report. It is the same as the one they sent last year. And also, there is a lot of analysis of the reports, and there are a lot of discrepancies between what is sent to Parliament and what is in the Department reports (Participant 30, NGO, East London).

The remarks above provide a bleak picture of the lack of policy engagement and implementation. The participants indicated that dialogue meetings were continuously postponed and parliamentary portfolio responses contained copy-and-paste responses, which fail to reflect the issues on the ground. The “*copy-and-paste*”⁵ culture of reporting from Government departments has been noted in several United Nations CRC reports, which continuously indicate in their recommendations that these issues have to be attended to.

So, if you dig deep into your reports, even something as simple as sanitation, you will get different numbers across the different reports. One of the biggest or saddest things, I guess, for me is how, you know, if you look at social media, you know, all the schools that are highlighted are the ones that are in good form and everything looks all nice in 10 years, you'd never say that we have schools that have pit latrine toilets. So, for me, it's just a little sad that we were fixated on optics and not producing tangible results in education in the province (Participant 8, Educator, Mthatha).

The outcome of the successful engagement was expressed by only 13% of the participants. These highlighted that, to some extent, the issues raised have been or are being addressed.

Challenges to access to basic education

Cristobal-Fransi et al. (2020) state that primary schools in the Eastern Cape province are isolated and typically underdeveloped, and are characterised by widespread poverty, poor infrastructure for sanitation and lack of electricity. In their report titled “*Energy Racism*”, Maggott et al. (2022) refer to a systematic lack of electricity in the rural areas in the Eastern Cape province. The responses from the research reflected some of the challenges in the Eastern Cape province.

5 A form of reporting where no due diligence is given to details

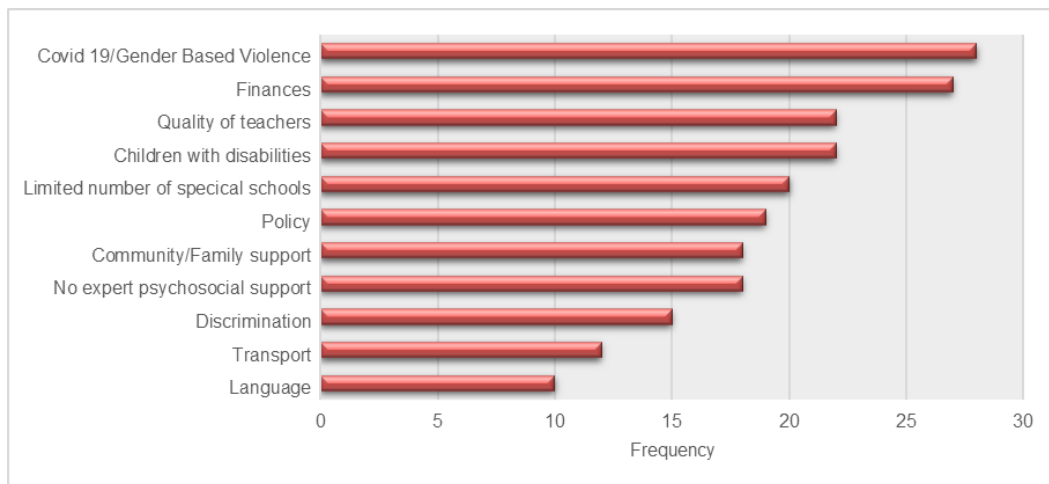


Figure 7: Challenges in Basic Education. Source: Compiled by the researcher

The study was conducted at the peak of the COVID-19 pandemic; accordingly, 28 participants mentioned that the pandemic was the major challenge, as most of the schools in the rural areas did not have access to online learning. Dube (2020) remarks that to this end, rural learners and teachers are seemingly helpless on how to approach online learning during the COVID-19 lockdown measures; therefore, the chasm between the “*haves and the have-nots*” gets ever deeper, especially when considering the socio-economic inequalities in South Africa.

It is worth taking note of the link between Covid 19 and the influx of gender-based violence (GBV) related cases, the psychological impact of GBV increased child vulnerability. In the case of South Africa, Uzobo and Ayinmoro (2021) state that Covid 19 and GBV are a “*double pandemic*”. Research shows that South Africa has one of the highest rates of GBV in the world; for example, every three hours on average, every three hours a woman is murdered, either through assault or rape (Sibanda-Moyo et al., 2017). On a global scale, WHO (2020) estimates that annually, 12.1 in every 100,000 women are victims of GBV in South Africa, which is five times the global average. Concerning OVC, this shows that many children are suffering, unnoticed, from exposure to such an extent of trauma and abuse.

The participants reflected on various challenges, and of worth taking note were the challenges faced by children with special needs. As reflected, 22 participants stated that the major issue is that there are few special needs schools, and in most cases, the children have to travel long distances to the nearest school.

We don't have enough schools, very minimal, especially for children with disabilities. Since we are here in Port Alfred, you will find that the nearest centre is far away (Participant 35, Community leader, Port Alfred).

For special schooling here, we only have 2 Government special schools in Gqeberha. Therefore, you can understand there's a massive waiting list, or sometimes, you know a child is on a waiting list. And obviously, there are specific criteria which you need to meet to be placed in a special school. Most children, or you know, are on waiting lists in stages. Not enough special schools to accommodate all our learners' needs. The waiting list of up to 550 learners per annum. Over 2500 children are still at home because they are intellectually challenged (Participant 11, Government representative, Bisho).

According to Miles (2000), inclusive education is concerned with removing all barriers to learning and with the participation of all students vulnerable to exclusion and marginalisation.

The Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System is the key framework for supporting an inclusive education system in South Africa. Despite the efforts to domesticate the CRC through the White Paper 6, the implementation of inclusive education in South Africa is slow and only partial (Donohue & Bornman, 2014; Dalton et al., 2012).

Conclusion and recommendations

The provisions in Section 231(4) of the Constitution of South Africa provide a comprehensive framework for the domestication of the CRC and other ratified treaties. However, despite these legal reforms, access to basic education, especially for OVC in rural areas in South Africa, is a form of “*silent exclusion*” whereby their rights are highly publicised but continuously violated. Whilst progress has been made to promote engagement and awareness on issues related to children’s rights, communities are still plagued with systematic inequalities, which manifest through a lack of educational resources, poor infrastructure, a limited number of available special needs schools, and experts trained to assist children with disabilities. Despite these challenges, the role of community leaders, NGOs working together with educators, has been critical to policymakers being accountable and to translating the policies emanating from the CRC into pragmatic projects to promote the right to basic education.

Recommendations for further research can explore other critical areas in relation to OVC and basic education, such as inclusive education for children with disabilities. Therefore, an analysis of the implementation of other relevant treaties, such as the CRPD, will provide a clearer analysis of the relationship between the treaty and domestic policies on children with special needs in South Africa. Furthermore, in line with decolonising knowledge production on children’s rights, specific research on African treaties, such as the ACRWC on children’s rights, will be highly beneficial, as it will reflect on the challenges and progress made towards promoting children’s rights. African perspectives will be crucial to reflect on the progress made towards the realisation of the children’s rights, including prevalent issues including child marriages and harmful practices in Africa.

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