

LLM DISSERTATION

“The school funding system in post-apartheid South Africa: Is the right to adequate basic education accessible to the rich only?”

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KEYWORDS

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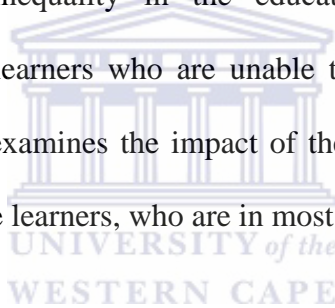
ABSTRACT

“The school funding system in post-apartheid South Africa: Is the right to adequate basic education accessible to the rich only?”

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The financing of public schools in South Africa is dependent on school fees to a great extent. However, the legislative process governing the charging of school fees perpetuates the entrenched inequality in the education system and violates the constitutional rights of those learners who are unable to afford school fees and other educational costs. This study examines the impact of the school funding system on the right to basic education of these learners, who are in most instances black and/or poor.



DECLARATION

I declare that “The school funding system in post-apartheid South Africa: Is the right to adequate basic education accessible to the rich only?” is my own work, that it has not been submitted for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Lorette Elizabeth Arendse Date: 15 May 2009.

Signed:.....



ACKNOWLEDGMENTS

All glory to my Saviour, the Lord Jesus Christ who gave me the strength to persevere.

Thank you to my supervisor and mentor, Prof Pierre De Vos for his endless patience and guidance.

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Last, and most importantly, this thesis is dedicated to all those children in our country, who are entitled to receive a decent standard of education, but often do not.

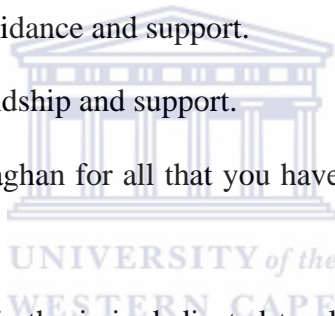



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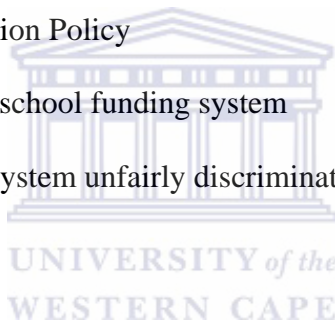
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CHAPTER 1: INTRODUCTION

1.1 Background to study

One of the key features of Apartheid education was the gross inequality in the funding of public schools.¹ The financing of public education under the previous regime occurred primarily on the basis of race, with black learners receiving the least.² In contrast, the bulk of state funding was spent on former white schools. The effect of this unequal funding system manifested in a lack of basic infrastructure, insufficient learning material, unqualified teachers and overcrowded classes at the former black schools.³ The converse was of course true for the former white schools. Fifteen years after apartheid has been abolished, the current education system is still characterized by its legacy: former white schools continue to be adequately resourced whilst former black schools are entrenched in abject poverty.⁴ Since 1994, the democratic government has implemented a whole range of laws and policies to ensure that public funding is aimed at redressing this disparity and ultimately aimed at realizing the right to basic education of learners in terms of section 29(1)(a) of the South African Constitution.⁵ The financing of public schools is reliant on school fees to a great extent.⁶ Because the exact amount of fees charged is determined by the parent community of a school, there is great concern that the public funding system is reinforcing the existing inequality between former black and white schools.⁷ This argument is informed by the fact that wealthy (mostly former white) schools can sustain their position of

¹ F Veriava and F Coomans “The right to education” in D Brand and C Heyns *et al* (eds) *Socio- Economic Rights in South Africa* (2005) 60.

² As above. For purposes of this study, “black learner” includes Africans, Coloureds and Indians.

³ As above.

⁴ South African Human Rights Commission: *Report of the Public Hearing on the Right to Basic Education* (2006) 2.

⁵ The Constitution of the Republic of South Africa, 1996.

⁶ D Roithmayr “ *Access, adequacy and equality: The constitutionality of school fee financing in public education*” available from http://search.sabinet.co.za/WebZ/images/ejour/ju_sajhr_v19_n3_az.pdf?sessionid=01-62891-8457662798format=F [accessed 22 June 2007].

⁷ As above.

privilege by charging high school fees which enable them to operate on budgets far exceeding those of poor (mostly former black) schools which cannot charge similar amounts.⁸ A further concern is that learners are regularly refused access to schools and suffer discriminatory practices as a result of the inability to pay school fees.⁹

1.2 Focus of study

This study examines the extent to which the public funding system has impacted on the right to basic education of learners, in particular those who cannot afford the payment of school fees and other educational costs.

1.3 Limitations of study

Section 29(1)(a) entrenches the right to basic education, including adult basic education. This study excludes adult basic education. This study is limited to the basic, compulsory education guaranteed to learners from Grade R to nine or upon reaching the age of fifteen years, whichever occurs first in terms of section 3(1) of the South African Schools Act 84 of 1996.

1.4 Overview of chapters

Chapter two explores the normative content of the right to a basic education. Since the Constitutional Court has not clarified the content and concomitant obligations engendered by section 29(1) (a), I rely extensively on international law to provide relevant guidance as to the interpretation of the right.

⁸ As above.

⁹ As above.

Chapter three examines the interpretation of the right to basic education in the specific South African context.

Chapter four provides a detailed analysis of the regulatory framework governing the current school funding system. In this chapter, I primarily investigate whether government is complying with its constitutional obligations by assessing the impact of the school funding system on the right to basic education of black and/or poor learners.

Chapter five concludes the study by summarizing the most important findings of the research. This chapter also provides legal and policy recommendations.



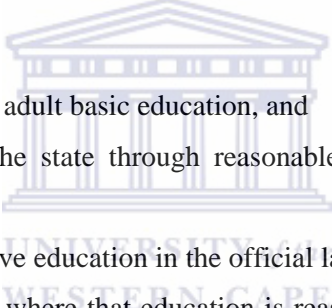
CHAPTER 2: INTERNATIONAL LAW

2. Introduction

This chapter seeks to explore the content of the right to basic education and the concomitant legal obligations imposed on South Africa in terms of international law. Section 2.1 introduces the right to basic education as it is entrenched in the South African Constitution. Section 2.2 represents the greater part of this chapter by providing an examination of the interpretation of the right in terms of international law.

2.1 The right to education as a socio-economic right

Section 29 of the South African Constitution (the Constitution) provides:

- 
- (1) Everyone has the right-
 - (a) to a basic education, including adult basic education, and
 - (b) to further education, which the state through reasonable measures, must make progressively available and accessible.
 - (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-
 - (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.
 - (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-
 - (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
 - (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Section 29 of the South African Constitution consists of a cluster of education rights and has consequently been called a “hybrid” right.¹⁰ This is because section 29(1) characterizes the socio-economic nature of the right whereas section 29 (2) and (3) are civil and political rights. As a socio- economic right, section 29(1) obliges government to make education available and accessible to everyone. Socio-economic rights create legal entitlements to material conditions that are required to satisfy basic human welfare, such as housing, health and food as opposed to civil and political rights which are concerned with the rights to speak, associate and make individual choices.¹¹ As a civil and political right, the right to education provides freedom of choice guarantees seeing that section 29(2) confers the right to choose the language of instruction in a public educational institution whereas section 29(3) grants the freedom of choice between private and public education by recognizing the right to establish and maintain independent educational institutions.¹² During the drafting process of the South African Constitution, various

¹⁰ Veriava and Coomans (note 1 above) 60.

¹¹ D Brand “Introduction to socio-economic rights in the South African Constitution” in D Brand and C Heyns *et al* (eds) *Socio- Economic Rights in South Africa* (2005) 1.

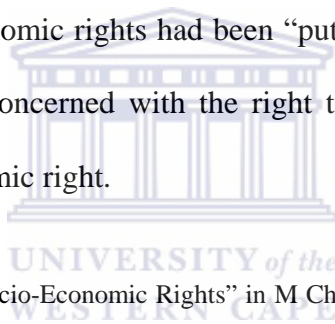
The South African Constitution entrenches a number of socio- economic rights. These include section 26 which guarantees the right to have access to housing whereas section 27 provides for the right to have access to health care, food, water and social security. The remaining socio-economic rights in the Constitution are:

- The right to a healthy environment: section 24.
- The right of access to land, to tenure security, and to land restitution: section 25(5)-(9).
- The right not to be refused emergency medical treatment: section 27(3).
- The right of the child to basic nutrition, shelter, basic health care services and social services: section 28(1)(c).
- The right of the child to be protected from maltreatment, neglect, abuse or degradation: section 28(1)(d).
- The right of every detained person , including every sentenced prisoner to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment: section 35(2)(e).

¹² Other civil and political rights in the South African Constitution include the right to freedom of expression (section 16), freedom of association (section 18) and the right to vote (section 19).

The socio-economic rights and the civil and political rights above are included in the Bill of Rights (Chapter 2) of the South African Constitution. The primary instrument on socio-economic rights in international law, the *International Covenant on Economic, Social and Cultural Rights* together with the principal instrument on civil and political rights, the *International Covenant on Civil and Political Rights* (including the *Optional Protocol*) serve to elaborate the *Universal Declaration of Human Rights*. These instruments constitute the *International Bill of Human Rights*. The international community has repeatedly confirmed that socio-economic rights are of equal status as civil and political rights and deserve equal protection. See for example, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, reprinted in 9 *Human Rights Quarterly* (1987) 122- 135.

objections were raised against the inclusion of socio-economic rights in the Constitution.¹³ These included that they were inconsistent with the doctrine of the separation of powers and were not justiciable.¹⁴ The South African Constitutional Court rejected these arguments. Firstly, it held that the fact that socio-economic rights have budgetary implications does not necessarily mean that it results in a breach of the doctrine of the separation of powers.¹⁵ The court noted that the implementation of civil and political rights such as freedom of speech and equality also often has budgetary implications.¹⁶ Secondly, the court stated that the “fact that socio-economic rights will almost inevitably give rise to budgetary implications is not a bar to their justiciability.”¹⁷ In a subsequent judgment the court adopted a stronger stance on this particular issue by pointing out that the justiciability of socio-economic rights had been “put beyond question by the text of the Constitution....”¹⁸ This study is concerned with the right to a basic education, entrenched in section 29(1) (a) as a socio- economic right.



¹³ S Liebenberg “The Interpretation of Socio-Economic Rights” in M Chaskalson et al *Constitutional Law of South Africa* (1999) 33-34.

¹⁴ The original separation of powers doctrine is built on the notion that each arm of the State (the legislature, executive and the judiciary) is assigned a separate and independent function. Thus, the task of the legislature is to formulate laws and policies; the role of the executive is to execute those laws and policies and the judiciary is responsible for the interpretation of laws. The doctrine in its “pure” form was originally developed to protect society against an overconcentration of state power in one body. One of the objections raised during the drafting process was that the inclusion of socio-economic rights in the South African Constitution would result in the judiciary intruding into the domain of the other spheres of government by taking decisions that have budgetary implications. See Liebenberg (note above) 33-34 and M Pieterse “Coming to terms with judicial enforcement of socio-economic rights” (2004) 20 *SAJHR* 383.

¹⁵ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1999 (10) BCLR 1253 (CC) paras 76- 78 (*First Certification* judgment).

The original separation of powers doctrine (see note above) has changed over time with the introduction of “check and balances” in terms of which accountability is promoted by the different branches of government monitoring the exercise of state power by one another. An example of these “checks and balances” is judicial review of executive and legislative action. Thus, an absolute separation of powers is impossible. Authors, such as Marius Pieterse argues that the boundaries between the different forms of government have become gradually more flexible. According to Pieterse, the inclusion of socio-economic rights in the South African Constitution has resulted in the judiciary increasingly deviating from its traditional role since these rights inevitably involve the judiciary in making decisions which have budgetary implications. For a thorough discussion of the development of the doctrine of separation of powers in South African constitutional jurisprudence, see Pieterse (note above).

¹⁶ *First Certification* judgment (note above) paras 76-78.

¹⁷ As above.

¹⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (*Grootboom*) para 20.

2.2 Interpreting the right to basic education in terms of international law

The South African Constitutional Court has to date not considered the scope and content of the right to a basic education.¹⁹ In interpreting the rights in the Bill of Rights, section 39(1)(b) of the Constitution requires of courts to consider international law.²⁰ Moreover, the international law regarding socio-economic rights is more developed and nuanced than domestic law on the same topic.²¹ International law is therefore of significant importance in the interpretation of socio-economic rights in the Bill of Rights.²²

The international instruments which will be referred to include the Universal Declaration of Human Rights, the Convention against Discrimination in Education, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the World Declaration on Education For All and the Dakar Framework for Action. At regional level, the African Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the Child will receive attention.

Through the ratification of international conventions or treaties, South Africa has incurred obligations which it is required to enforce at domestic level.²³ However, other legal instruments such as declarations, frameworks and recommendations do not have binding legal effect but they do impose moral commitments upon states.²⁴

¹⁹ Veriava and Coomans (note 1 above) 61-62.

²⁰ Section 39(1) (b) states: "When interpreting the Bill of Rights, a court, tribunal or forum... (b) must consider international law..."

²¹ P De Vos "The right to housing" in D Brand and C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 89.

²² As above.

²³ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [accessed 17 July 2008].

Sections 231(1)-(3) of the South African Constitution describe the relevant processes in terms of which international agreements become binding on the country. In terms of section 231(4) an international agreement becomes legally enforceable in South Africa once it is enacted into law by national legislation. The South African Constitutional

South Africa has ratified the principal instrument on children's rights, the Convention on the Rights of the Child.²⁵ It has signed but not ratified the Convention against Discrimination in Education and the International Covenant on Economic, Social and Cultural Rights.²⁶ However, the non-ratification status of these treaties does not prevent us from looking towards them as a guide in interpreting the right to basic education.²⁷ Furthermore, through its signature of the International Covenant on Economic, Social and Cultural Rights and the Convention against Discrimination in Education, South Africa has incurred an international obligation to "refrain from acts which would defeat the object and purpose of the [relevant] treaty."²⁸ At regional level, South Africa has ratified the African Charter on People's and Human Rights and the African Charter on the Rights and Welfare of the Child.²⁹



Court, in *Grootboom* (note 18 above) at para 26 affirms that "where a relevant principle of international law binds South Africa, it may be directly applicable."

²⁴ <http://www2.ohchr.org/english/law/index.htm#core> [accessed 17 July 2008].

²⁵ <http://daccessdds.un.org/doc/UNDOC/GEN/G08/124/21/PDF/G0812421.pdf?OpenElement> [accessed 17 July 2008].

²⁶ As above.

In a compilation prepared by the Office of the High Commissioner for Human Rights on South Africa's progress made in the ratification of international treaties, the South African government indicated, in 2007 that it was in the process of ratifying the International Covenant on Economic, Social and Cultural Rights. This compilation is prepared in accordance with paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1.

²⁷ In *S v Makwanyane and Another* (1995) 3 SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 35 the South African Constitutional Court held that binding and non-binding international law are applicable in interpreting the rights in the Bill of Rights.

²⁸ Article 18 of the Vienna Convention on the Law of Treaties of 1969.

²⁹ <http://www2.ohchr.org/english/bodies/docs/status.pdf> [accessed 18 July 2008].

The full texts of the international law treaties are available from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.asp> [accessed 1 March 2007].

The full texts of the regional law treaties are available from http://www.africa-union.org/official_documents/Treaties [accessed 1 March 2007].

2.2.1 Sources

This section indicates the protection afforded to the right to basic education in international law. The Universal Declaration of Human Rights (UDHR)³⁰ was the first international instrument to give expression to the right to education.³¹ Article 26 provides that “everyone has the right to education” and that “education shall be free, at least in the elementary and fundamental stages.” It further states that “[e]lementary education shall be compulsory.”³² Since the adoption of the UDHR in 1948, the elements of “free” and “compulsory” have been attributed to the right to a primary education in the subsequent international instruments.

Article 4 (a) of the UNESCO³³ Convention against Discrimination in Education (CDE)³⁴ requires of state parties “to promote equality of opportunity and treatment in the matter of education and in particular [t]o make primary education compulsory and free.” State parties are only required to make secondary education generally available and accessible.³⁵ Similar to the UDHR, the CDE distinguishes two core elements of a primary education, namely making it compulsory and free. Whereas the right to primary education was included in the UDHR as a mere aspiration, the CDE was the first international treaty to include an obligation on State parties to provide free and compulsory primary education.³⁶

³⁰ Adopted and proclaimed by General Assembly Resolution 217 A (III) on 10 December 1948.

³¹ K Beiter *The Protection of the Right to Education by International Law* (2006) 90.

³² As above.

According to Beiter (note above) elementary and fundamental education are synonyms of primary education. It only differs as to the method of instruction.

³³ United Nations Educational, Scientific and Cultural Organization.

³⁴ Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960.

³⁵ Article 4(a) of the CDE.

³⁶ Beiter (note 31 above) 90.

The International Covenant on Social, Economic and Cultural Rights (ICESCR)³⁷, in article 13(2) (a) and (b) obliges State parties to make primary education compulsory and free whereas secondary education “shall be made generally available and accessible.”³⁸ Article 14 of the ICESCR requires of state parties to work out a detailed plan to realize primary education within a reasonable time.³⁹

The Committee on Social, Economic and Cultural Rights (CESCR) has published various General Comments which are relevant to the right to education.⁴⁰ General Comment No 3⁴¹ clarifies the nature of the obligations of state parties. General Comment No 11⁴² sheds light on the interpretation of article 14 and explains the meaning of the terms “free” and “compulsory” in primary education. General Comment No 13⁴³ gives substance to article 13 by describing its content and the engendered obligations. This General Comment entrenches the so-called 4-A scheme developed by Katarina Tomasevski, the former United Nations Special Rapporteur on

³⁷ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976.

³⁸ Article 13(2) of the ICESCR provides:

“The State Parties to the present Covenant recognize that, with a view to achieving the full realization of [the right to education]:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.”

³⁹ Article 14 of the ICESCR provides:

“Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in a plan, of the principle of compulsory education free of charge for all.”

⁴⁰ The Committee on Economic, Social and Cultural Rights is the body that monitors compliance by state parties of the rights in the ICESCR. The Committee publishes General Comments which guide the interpretation of the rights in the ICESCR. For a detailed explanation of the role of the Committee in international law, see <http://www.ohchr.org> [accessed 1 March 2007].

⁴¹ Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 3: The nature of states parties’ obligations: article 2(1) (1990).

⁴² Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 11: Plans of Action for Primary Education: article 14 (1999).

⁴³ Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 13: The right to education: article 13 (1999).

the right to education.⁴⁴ Lastly, General Comment No 16⁴⁵ provides clarification on the equality provision⁴⁶ and the principle of non-discrimination under the ICESCR.

The Convention on the Rights of the Child (CRC)⁴⁷ protects the right to education of the child in article 28. Article 28(1)(a) obliges state parties to make primary education compulsory and free whereas article 28(1)(b) requires states to make secondary education available and accessible to the child.⁴⁸ General Comment No 5⁴⁹ published by the Committee on the Rights of the Child (CRC Committee) provides clarity on the four guiding principles governing the interpretation of the rights in the CRC which will be referred to later.⁵⁰ The General Comments published by the CESCR and the CRC Committee are not legally binding.⁵¹ However, they do carry considerable legal weight as authoritative interpretations of a relevant treaty.⁵² Moreover, in the absence of an “individual complaints procedure generating international case law” on the interpretation of socio-economic rights, General Comments provide an important tool to the respective

⁴⁴J Sloth-Nielsen and B Mezmur “*Free Education is a Right for Me: A Report on Free and Compulsory Education*” (2007) 13.

⁴⁵ Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights :article 3 (2005).

⁴⁶ Article 3 of the ICESCR.

⁴⁷Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 December 1990.

⁴⁸ Article 28(1)(a) to (c) of the CRC provides as follows:

“State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.”

⁴⁹ Committee on the Rights of the Child: General Comment No 5: General Measures of implementation of the Convention on the Rights of the Child: articles 4, 42 and 44 (2003).

⁵⁰ The CRC Committee consists of a team of independent experts that monitors the implementation of the rights in the CRC by the various State parties. These parties are under an obligation to submit regular reports to the Committee on their efforts made in implementing the rights in the CRC. Upon examining each report, the Committee makes its concerns and recommendations known to the State parties in what is termed “Concluding observations.” Similar to the CESCR, the CRC Committee publishes General Comments which provide guidance on the interpretation of the rights under the CRC. See [http:// www.right-to-education.org](http://www.right-to-education.org) [accessed 1 March 2007].

⁵¹ Beiter (note 31 above) 365.

⁵² As above.

committees to develop jurisprudence on socio-economic rights.⁵³ According to Verheyde, concluding observations are merely country-specific and should therefore in principle be given less weight than General Comments.⁵⁴

At regional level, article 17(1) of the African Charter on Human and People's Rights (African Charter)⁵⁵ provides that "[e]very child shall have the right to an education." The African Charter does not expand on this brief formulation of the right to education.

In contrast, the African Charter on the Rights and Welfare of the Child (African Children's Charter)⁵⁶ provides comprehensively for the educational rights of the child.⁵⁷ Article 11(1) states that "[e]very child shall have the right to an education." Article 11(3) distinguishes between the various levels of education. State Parties are required "to provide free and compulsory basic education" but only encouraged to develop secondary education and make it available and accessible."⁵⁸

⁵³ As above.

The supervision of the obligations of States parties' obligations in respect of socio-economic rights has generally been restricted to a periodic reporting system. In contrast, treaties entrenching civil and political rights provide for an optional individual complaints procedure (despite claims by the international community that these two sets of rights are equal in status). The absence of such a procedure in respect of socio-economic rights has resulted in the inability of treaty monitoring bodies to develop the normative content of treaty provisions through their application in concrete cases. See Liebenberg (note 13 above) 33-13, 14.

⁵⁴ M Verheyde *A Commentary on the United Nations Convention on the Rights of the Child: Article 28 The Right to Education* (2006) 5.

⁵⁵ Opened for signature on 27 June 1981, 1520 U.N.T.S. 217, entered into force on 28 December 1988.

⁵⁶ Opened for signature on 11 July 1990, entered into force on 29 November 1999 AOU DOC CAB/LEG/24.9/49 (1990).

⁵⁷ <http://portal.unesco.org/education/en/filedownload.php/2cd8c40932f7ffc0600732a4dddiscussion.right-to+edu...pdf> [accessed 1 August 2007].

⁵⁸ Article 11(3) provides:

"State Parties to the present Charter shall take appropriate measures with a view to achieving the full realization of this right and shall in particular:

- (a) provide free and compulsory basic education;
- (b) encourage the development of secondary education in its different forms and progressively make it free and accessible to all."

2.2.2 Preliminary Issues

(a) Basic or Primary education?

The terms “basic education” and “primary education” are sometimes used as synonyms in international law discourse. However, it is important to clarify these two concepts. According to the World Declaration on Education for All, “[t]he main delivery system for the basic education of children outside the family is primary schooling.”⁵⁹ A “basic education” has been defined as “education that includes all age groups, and goes beyond conventional curricula and delivery systems, for example pre-school, adult literacy, non-formal skills training for the youth and compensatory post-primary programmes for school leavers.”⁶⁰ A primary education thus refers to the formal process of schooling for children of primary school age whereas a basic education includes informal approaches to primary education.⁶¹ According to Sloth-Nielsen, primary education could be defined as the formal basic education given to children in primary schools by primary teachers.⁶² The South African Education Department defines a “basic education” as “...appropriately designed education programmes to the level of the proposed General Education Certificate(GEC)...”⁶³ A General Education Certificate is achieved at the end of the compulsory schooling phase: one year reception (Grade R) plus nine years to grade nine.⁶⁴ In *Phillips v Manser and Another*⁶⁵, the court confirmed that “in terms of the South African Constitution basic education is schooling up to the age of 15 years or Grade 9.”⁶⁶ I will use the terms ‘basic education’ and ‘primary education’ interchangeably in this study.

⁵⁹ Article 5.

⁶⁰ Swedish International Development Cooperation Agency (Sida) “Education For All: A Human Right and Basic Need. Policy for Sida’s Development Cooperation in the Education Sector (April 2001), 17.

⁶¹ Beiter (note 31 above) 324.

⁶² Sloth- Nielsen and Mezmur (note 44 above) 10.

⁶³ White Paper on Education and Training (March 1995) 37.

⁶⁴ As above.

⁶⁵ (1999) 1 All SA 198 (SE), 217.

⁶⁶ The applicant was 17 years old and in grade 11. Following his suspension, he argued that the conduct of the principal and school governing body in suspending him was an infringement of his constitutional right to basic

(b) Prioritizing basic education: Jomtien to Dakar

The discussion above points out that the major international law instruments prioritize basic education above other levels of education by requiring of state parties to make it compulsory and free. The significance attached to realizing basic education for all children has led to the so-called *Education for All* process which commenced in Jomtien, Thailand eighteen years ago.⁶⁷ At the start of 1990, it was estimated that 100 million children worldwide had no access to primary schooling.⁶⁸ This indictment against humanity led to the World Conference on Education for All, held at Jomtien in March 1990.⁶⁹ The *World Declaration on Education for All* and the *Framework for Action to Meet Basic Learning Needs* were adopted at this Conference.⁷⁰ The *Framework for Action* appealed to participating countries to set targets at national level for the achievement of various goals, including “universal access to and completion of primary education by the year 2000.”⁷¹ Ten years later, at the World Education Forum held at Dakar, Senegal in April 2000 it had to be conceded that the target of universal basic education had not been met.⁷² At the time of the Forum, 113 million children worldwide had no access to basic education.⁷³ A revised plan of action was adopted called *Education for All: Meeting our Collective Commitments: The Dakar Framework for Action*.⁷⁴ The *Dakar Framework* called upon participating countries to realize six goals by developing or strengthening national plans of action by 2002.⁷⁵ These goals included “universal access to and completion of free and

education. The court held that since basic education means schooling up to the age of 15 years or grade nine, the right to basic education was not applicable to the applicant.

⁶⁷ Beiter (note 31 above) 323.

⁶⁸ As above.

⁶⁹ As above.

⁷⁰ As above.

⁷¹ As above.

⁷² As above, 326.

⁷³ As above.

⁷⁴ As above.

⁷⁵ As above.

compulsory primary education of good quality by 2015” and “improving all aspects of the quality of education.”⁷⁶ South Africa, a signatory to the *Dakar Framework* committed itself to achieving these targets through the publication of the *Plan of Action: Improving access to free and quality basic education for all* in 2003 (*National Plan of Action*).⁷⁷ In this plan of action, the government declares that it is “well on the way to attainingthe provision of basic education that is compulsory for all children of school-going age, that is of good quality and in which financial capacity is not a barrier for any child...before 2015.”⁷⁸

(c) Rationale for making basic education compulsory and free

In 1921, the International Labour Organization (ILO) through ILO Convention No 10 linked free and compulsory basic education to the elimination of child labour by prohibiting employment which prejudices the school attendance of children.⁷⁹ The minimum age of employment was set at the age of fourteen.⁸⁰ ILO Convention 138 subsequently raised the minimum age of employment to fifteen.⁸¹ The rationale at that time and at present is that education, if guaranteed

⁷⁶ As above.

The remaining goals are as follows:

- expanding early childhood care and education, especially for vulnerable children;
- ensuring that the learning needs of young people and adults are met through access to learning and life skills programmes;
- achieving a 50 percent improvement in levels of adult literacy by 2015, especially for women; and
- eliminating gender disparities in primary and secondary education by 2005 and achieving gender equality in education by 2015.

The *World Declaration on Education for All*, the *Framework for Action to meet basic learning needs* and the *Dakar Framework* are available at <http://www.right-to-education.org>. [accessed 1 March 2007].

The *EFA process* is co-sponsored by UNESCO, UNICEF (United Nations Children’s Fund), UNDP (United Nations Development Programme), UNFPA (United Nations Population Fund) and the World Bank. For a discussion on the role of these organizations in the *EFA process*, see <http://www.unesco.org> [accessed 1 March 2007].

⁷⁷ Department of Education (2003) *Plan of Education: Improving access to free and quality education for all* available at http://education.pwv.gov.za/DOE_sites [accessed 30 June 2007].

⁷⁸ As above, 5.

⁷⁹ K Thomasevski *Human Rights Obligations in Education: The 4-A Scheme* (2006) 47.

⁸⁰ As above.

⁸¹ As above.

unlocks the enjoyment of other human rights.⁸² Certain civil and political rights only obtain some meaning and substance when a person has had some form of education.⁸³ For example, an educated person has the ability to make informed political choices, such as choosing a suitable political representative or political party or standing for public office. Education also plays a crucial role in the fulfillment of other socio-economic rights, such as the rights to housing and health as well as the right to food and work: education enhances a person's prospects of securing employment which in turn secures access to food supply, housing and health care services.⁸⁴ The denial of education often prevents the enjoyment of these human rights and perpetuates poverty.⁸⁵ In *Brown v Board of Education of Topeka*⁸⁶, the United States Supreme Court held that "...it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." According to UNESCO, the provision of free, compulsory primary education ensures that all children, irrespective of financial constraints can go to school which provides them with the necessary tools to participate actively in the economy and in society in general.⁸⁷ Furthermore, education helps in the fight against HIV/AIDS and lays the foundation for using new technologies.⁸⁸ The CESCR regards education as one of the best

⁸² As above.

⁸³ F Coomans "Clarifying the core elements of the right to education" in F Coomans *et al* (eds) *The Right to complain about Economic, Social and Cultural Rights* (1995) 2.

⁸⁴ As above.

⁸⁵ Tomasevski (note 79 above) 47. The CESCR, in General Comment No 11, at para 4, notes the following: "... [T]he work of the [CESCR] has shown that the lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance these children, who may live in abject poverty and not lead healthy lives, are particularly vulnerable to forced labour and other forms of exploitation. Moreover, there is a direct correlation between, for example, primary school enrolment for girls and major reductions in child marriages."

⁸⁶ 347 U.S. 483, 1954.

⁸⁷ http://portal.unesco.org/education/en/ev/php-URL_ID=47065&URL_DO=DO_TOPIC&URL_SECTION=201.html [accessed 19 March 2008].

⁸⁸ As above.

The role of education in the battle against HIV/AIDS is crucial to South Africa. The most recent statistics released by the Treatment Action Campaign reveal that one out of every ten people in South Africa is HIV-positive. According to the Department of Economics at the University of Free State the impact of HIV/AIDS on the South African economy is devastating. The impact of the disease is felt in almost all sectors of society, including the

financial investments states can make.⁸⁹ This view was confirmed in the *Dakar Framework* which states that “[education]...is the key to sustainable development and peace and stability within and among countries, and thus an indispensable means for effective participation in the societies and economies of the twenty-first century...”⁹⁰ The South African government reiterates the importance of basic education as “...the cornerstone of any modern, democratic society that aims to give all citizens a fair start in life and equal opportunities as adults.”⁹¹

(d) Basic education and the interdependence of human rights

Through its connection to other rights, the right to education symbolizes the unity and interdependence of all human rights.⁹² The principle of interdependency is built on the notion that “human rights should be treated holistically in order to protect human welfare.”⁹³ Thus, rights cannot be seen in isolation but as co-dependent in securing that the welfare of human beings are best fulfilled. The fulfillment of civil and political rights is crucial to the enjoyment of socio-economic rights. For instance, the achievement of the right to equality through the eradication of discriminatory practices in schools is vital to ensuring the realization of the right

labour force, private sector, government and households. HIV/AIDS-related mortality amongst the economically active population leads to a decline in total labour supply; private firms will experience higher expenditure due to increased health care costs, burial fees and training costs and payment of other employee benefits, as well as absenteeism and a higher labour turnover; HIV/AIDS will impact primarily on government due to a higher demand for health services and the high costs of HIV/AIDS treatment; household expenditure is impacted by the care of and loss of HIV infected family members. This translates into losses of household income as well as higher medical and funeral expenses, which results in changes in expenditure patterns and in turn in private savings and in investment. See F le R Booyen, JP Geldenhuys, M Marinkov “The Impact of HIV/AIDS on the South African Economy: A Review of Current Evidence”: Paper prepared for TIPS/DPRU conference on ‘The Challenge of Growth and Poverty: The South African economy since democracy’ (2003). See also <http://www.tac.org.za/community/aidsstats> [accessed 7 August 2008].

⁸⁹ CESCR General Comment No 13 (note 43 above) para 1.

⁹⁰ Note 76 above, para 6.

⁹¹ Note 77 above, 4.

⁹² Coomans (note 83 above) 2.

The principle of interdependence is expressed in various international law documents, for example the Limburg Principles (note 12 above) at para 3; the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, reprinted in 20 *Human Rights Quarterly* 691 (1998) at para 4 and CRC Committee General Comment No 5 (note 49 above) at para 6.

⁹³ Liebenberg (note 13 above) 33-31.

to basic education. The CESCR has confirmed that the elimination of discrimination is fundamental to the enjoyment of all socio-economic rights, including the right to education.⁹⁴

The CESCR sums it up aptly:

[The right to basic education] has been variously described as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil and political right, since it is central to the full and effective realization of those rights as well. In this respect, the right....epitomizes the indivisibility and interdependence of all human rights.⁹⁵

2.2.3 The right to basic education: clarifying its content and legal obligations

Through its ratification of the principle treaties on the right to basic education and as a signatory to the *Dakar Framework*, South Africa has committed itself to achieving basic education for its children. However, the realization of its commitment depends on meeting the obligations engendered by the right to basic education. This is only possible if the content of the right is understood first. The CESCR General Comment No 13 provides the most comprehensive description of the content of the right to basic education in international law.⁹⁶ To reiterate, this General Comment entrenches the so-called 4-A Scheme, developed by the former United Nations Special Rapporteur on the Right to Education. This scheme gives concrete content to the right to basic education. Furthermore, CESCR General Comment No 11 provides further content to the right by clarifying the two core elements of “free” and “compulsory”.⁹⁷ Although South Africa has not ratified the ICESCR, the CRC Committee is of the view that where provisions of the ICESCR are similar in wording to that of the provisions under the CRC, the General Comments published by the CESCR should be seen as complimentary to those issued by the

⁹⁴ CESR General Comment No 16 (note 45 above) para 3.

⁹⁵ CESCR General Comment No 11 (note 42 above) para 4.

⁹⁶ Note 43 above.

⁹⁷ Note 42 above.

CRC Committee.⁹⁸ Since the provisions on primary education under the ICESCR and the CRC are almost identical⁹⁹, General Comment No 13 and General Comment No 11 should thus be viewed by all states which have ratified the CRC (including South Africa) as the principle guides in defining the content of the right to basic education.¹⁰⁰

2.2.3.1 Content

All forms and levels of education, including basic education displays four interrelated features of availability, accessibility, acceptability and adaptability.¹⁰¹ According to Wilson who developed a complimentary legal framework in which to consider the 4-A scheme, available and accessible refers largely to the rights *to* basic education, whereas acceptable and adaptable refer to rights *in* education.¹⁰² Because the rights *in* education are primarily civil and political rights and this study is concerned with the right to basic education as a socio-economic right, the principal focus will be placed on the availability and accessibility features. The relevant aspect of the acceptability feature is that the quality of basic education must be guaranteed.¹⁰³ The issue of quality will receive further consideration when I assess what is meant by a “basic” education. Adaptability refers to the rights of children with special needs, such as the disabled and children who are

⁹⁸ CRC Committee General Comment No 5 (note 49 above) para 5.

In *Makwanyane* (note 27 above) at para 35 the Constitutional Court held that binding and non-binding international law are applicable in interpreting the rights in the Bill of Rights. The failure of South Africa to ratify the ICESCR is unfortunate (and ironic) in view of the fact that it had been the most influential human rights instrument in shaping the socio-economic rights provisions in the South African Constitution. The Covenant is therefore an essential source of interpretation in developing the socio-economic jurisprudence in South African law. Recently, the South African Human Rights Commission, in its report on the right to basic education, made use of General Comment No 13 in describing the content and concomitant legal obligations in terms of section 29(1)a) of the Constitution. See Brand (note 11 above) 7.

⁹⁹ See section 2.2.1 above.

¹⁰⁰ Verheyde points out that because “article 28(1) of the CRC has largely been drawn up among the lines of article 13(2) of the ICESCR, one may suggest that [the findings of the CESCR] may be read into the text of article 28(1) of the CRC.” See Verheyde (note 54 above) 28.

¹⁰¹ CESCR General Comment No 13 (note 43 above) para 6.

¹⁰² Note 4 above, 9.

¹⁰³ Beiter (note 31 above) 627.

normally out of school, such as child soldiers.¹⁰⁴ This particular aspect falls beyond the scope of this study and will not be addressed.

2.2.3.1.1 Availability¹⁰⁵

This particular criterion broadly covers two aspects, namely the availability of schools and the availability of teachers.¹⁰⁶ The availability of schools encompasses more than mere physical structures in which teaching can take place.¹⁰⁷ Schools must be in such a condition which makes meaningful teaching and learning possible.¹⁰⁸ This means that the school building must be in a good condition, learners must have access to safe drinking water and sanitation facilities as well as teaching materials, libraries, computer facilities and information technology.¹⁰⁹ The exact facilities that the state is obliged to provide depend on the developmental context within that particular state.¹¹⁰ In section 2.2.3.2.2, I will distinguish between those facilities which states are required to provide immediately irrespective of their developmental context and those facilities which states may provide over a period of time as more funds become available to them.

The second aspect of the feature of availability is that qualified teachers must be available. The *Dakar Framework* affirms that “professionally competent teachers” are required to ensure...[a] basic education.¹¹¹

¹⁰⁴ Sloth- Nielsen and Mezmur (note 44 above) 14.

¹⁰⁵ CESCR General Comment No 13 (note 43 above) para 6.

¹⁰⁶ Beiter (note 31 above) 479.

¹⁰⁷ As above.

¹⁰⁸ As above.

¹⁰⁹ CESCR General Comment No 13 (note 43 above) para 6.

¹¹⁰ As above.

¹¹¹ Note 76 above, para 65.

2.2.3.1.2 Accessibility¹¹²

The availability of schools and teachers alone do not ensure that education takes place. In addition, children require access to school to guarantee their right to basic education. Having access to education does not simply mean that a learner is able to enroll at school. A child may enroll at school without *completing* the primary school phase.¹¹³ Hence, commentators such as Wilson argue for a distinction between enrollment and attendance.¹¹⁴ He suggests that learners may be prohibited from attending school on account of the inability to pay school fees despite being enrolled at the school.¹¹⁵ Moreover, the *Education For All (EFA) Assessment* of 2002 indicates that the costs related to school fees, uniforms and transport prove too burdensome for some parents and are among the key reasons for non-attendance at school.¹¹⁶ Thus, in assessing the element of accessibility as one of the indicators in measuring whether the state is meeting its obligation in respect of basic education, the focus should not be on the enrollment rate only but also on the success of the attendance and completion rate. I will now refer to the accessibility feature as described in General Comment No 13. According to this General Comment, accessibility has three overlapping dimensions.

(a) Education must be accessible to all without discrimination.

(i) Discrimination

The primary purpose of the Convention against Discrimination in Education (CDE) is the prohibition of all forms of discrimination and the promotion of equal opportunities and treatment

¹¹² CESCR General Comment No 13 (note 43 above) para 6(b).

¹¹³ Italics my emphasis.

¹¹⁴ F Veriava “Free to Learn: A discussion paper on the School Fee Exemption policy” in A Leatt and S Rosa (eds) *Towards a Means to Live: Targeting poverty alleviation to make children’s rights real* (2005) 9.

¹¹⁵ As above.

¹¹⁶ As above.

in education.¹¹⁷ Article 1(1) of the CDE defines discrimination as “any distinction, exclusion, limitation, or preference [on prohibited grounds, including race, colour and economic condition] that has the purpose or effect of nullifying or impairing equality of treatment in education.” The CDE¹¹⁸ as the most specific convention on discrimination in education prohibits discrimination in the following spheres: all educational levels, access to education, the standard and quality of education and the conditions under which it is given.¹¹⁹ Subjecting learners to conditions which are incompatible with human dignity constitutes discrimination under the CDE.¹²⁰ The CESCR echoes the definition of discrimination under the CDE by stating that the principle of non-discrimination entrenched in article 2(2) of the ICESCR prohibits differential treatment on a wide range of grounds, including race, colour and “other status”.¹²¹ Similarly, the CRC contains “other status” as prohibitive ground in its non-discrimination provision.¹²² The term “other status” suggests that the grounds listed in the above mentioned treaties are not exhaustive. According to the CESCR, “other status” includes “...a group of motives for discrimination, which have in common that certain groups in society have a particular social vulnerability or disadvantage.”¹²³ According to Beiter, disadvantaged groups usually enjoy equal treatment in terms of the law.¹²⁴ However, he argues that in comparison to other groups their “socio-

¹¹⁷ See preamble to the CDE.

¹¹⁸ According to para 31 of CESCR General Comment No 13, the prohibition against discrimination as enshrined in article 2(2) of the ICESCR is interpreted in light of other treaties, including the Convention against Discrimination in Education and the CRC.

¹¹⁹ Article 1(2) of the CDE.

¹²⁰ As above.

¹²¹ CESCR General Comment No 16 (note 45 above) para 10.

¹²² Article 2(1) of the CRC provides:

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

¹²³ Beiter (note 31 above) 427.

¹²⁴ As above.

economic starting point” in life is not favourable.¹²⁵ Hence, they do not have equal opportunities in exercising their rights.¹²⁶ The CESCR has identified various groups as disadvantaged, including children of low-income groups, children from rural areas and children from racial minorities.”¹²⁷ In Chapter 4, I will argue that the South African school funding system discriminates against learners on the basis of race and economic status.¹²⁸

(ii) Fair discrimination

The concept of fair discrimination is recognized by the CESCR in that it supports affirmative action measures to bring about substantive equality for disadvantaged groups.¹²⁹ Whereas formal equality assumes that equality is achieved if a law or policy treats everyone, irrespective of their circumstances the same, substantive equality takes account of the inherent disadvantage that certain groups of people may experience and is concerned that laws or policies do not maintain, but rather alleviate this disadvantage.¹³⁰ Thus, laws or policies which prescribe affirmative action measures to bring the position of a certain group to the same level as that of another group are regarded as legitimate even though it means discriminating against certain people. This view is supported by the CRC Committee which emphasizes that the principle of non-discrimination under the CRC does not mean that everyone is treated exactly the same.¹³¹ In this regard, the CRC Committee endorses the implementation of special measures to eliminate conditions which

¹²⁵ As above.

¹²⁶ As above.

¹²⁷ As above.

¹²⁸ Not all forms of discrimination are unlawful under the South African Constitution. Only unfair discrimination is prohibited. The South African Constitutional Court has developed a specific enquiry to determine unfair discrimination which I will discuss in the subsequent chapters.

¹²⁹ CESCR General Comment No 13 (note 43 above) para 32.

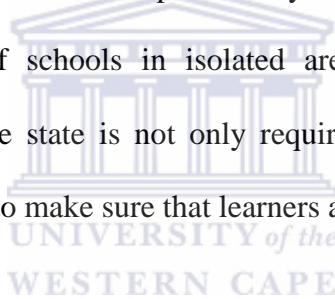
¹³⁰ CESCR General Comment No 16 (note 45 above) para 7.

¹³¹ CRC Committee General Comment No 5 (note 49 above) para 12.

cause discrimination.¹³² It has been suggested that the taking of special measures broadly means that greater financial and human resources should be allocated to disadvantaged schools than to schools occupied by children from affluent families.¹³³ This includes the provision of additional qualified teachers.¹³⁴ Of course, this is crucial to effectively address the inequalities in disadvantaged schools. Also, as an immediately available measure, it can accelerate the rate at which inequalities in schools are being diminished.

(b) Education must be physically accessible.

This means it has to be within safe physical reach or accessible via modern technology.¹³⁵ The CRC Committee has recommended that states particularly ensure the availability of transport to rural children or the building of schools in isolated areas to make education physically accessible.¹³⁶ This implies that the state is not only required to provide transport but has to employ any other suitable remedy to make sure that learners are able to reach school.



(c) Education must be economically accessible.

The CRC, in article 28(1)(a) guarantees that primary education shall be made compulsory and “free to all.” This requirement is formulated unconditionally. Primary education is not only free to those who are financially constrained but also to those who are better off.¹³⁷ The CRC, in article 28(1)(b) provides that secondary education should be made available and accessible and that state parties should “take appropriate steps such as the introduction of free education and

¹³² As above, para 30.

¹³³ Beiter (note 31 above) 409.

¹³⁴ As above.

¹³⁵ CESCR General Comment No 13 (note 43 above) para 6(b).

¹³⁶ See for example CRC Committee, *Concluding Observations: Jordan* (UN Doc. CRC/C/29, 1994) para 131 and CRC Committee, *Concluding Observations: the Democratic Republic of the Congo* (UN Doc.CRC/C/108, 2001) para 210.

¹³⁷ Beiter (note 31 above) 512.

offering financial assistance in the case of need.” This suggests that states should only provide exemptions to school fees in respect of secondary education as exemptions are usually only granted in the case of need.¹³⁸ Primary education, on the other hand should be completely free. The exact content of “free” primary education will be analyzed in section 2.2.3.2.2 when I assess the core obligations imposed upon states by the right to basic education. In this section, I will also explore whether free education should be made available to all primary school learners, irrespective of their economic status.

2.2.3.1.3 Acceptability: What is a “basic” education?

According to the *Dakar Framework* all children have the “...right to *quality* education...at whatever level is considered “basic.”¹³⁹ The Framework emphasizes further that “[q]uality is at the heart of education”¹⁴⁰ and that “[a] quality education is one that satisfies basic learning needs...”¹⁴¹ This Framework, to which South Africa is a signatory, therefore implies that the term ‘basic education’ should not be confused with “low” quality education or an “inadequate” standard of education. Rather, it is my submission that ‘basic’ merely refers to the entry level of education. However, the question remains: What is the appropriate standard of a ‘basic’ education? In interpreting “primary education”, the CESCR obtains guidance from the World Declaration on Education for All which states that primary education must ensure that the basic learning needs of children are met.¹⁴² Article 1(1) defines “basic learning needs” as:

¹³⁸ As above.

¹³⁹ Note 76 above, para 32. Italics my emphasis.

¹⁴⁰ As above, para 42.

¹⁴¹ As above.

¹⁴² CESCR General Comment No 13 (note 43 above) at para 9: “ The Committee obtains guidance on the proper interpretation of the term “primary education” from the World Declaration on Education for All which states: “The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal [and] ensure that the basic learning needs of all children are satisfied...”

Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.

According to the Declaration, the focus of basic education must be on actual learning acquisition and outcome rather than on mere enrolment and completion of education.¹⁴³ Thus, achieving a certificate at the end of the compulsory school phase is meaningless unless the purpose of “basic learning needs” has been realized. Based on the definition above, basic education should empower an individual with the necessary training needed to ensure survival. This means that, at the least, a basic education should equip a person with the required skills to find employment in order to meet basic physical needs, such as food supply, housing, et cetera. In addition, it should also cater for the mental development of a person so as to ensure an individual is capable of interacting meaningfully in society. Furthermore, it should provide access to further education in order to have an improvement in the quality of life.

However, Article 1(1) does not clarify the standard of basic education. The CESCR sheds some light by requiring the standard of primary education to be one of *adequacy*.¹⁴⁴ In *Campaign for*

¹⁴³ Article 4.

¹⁴⁴ Italics my emphasis. In describing the term “compulsory”, the CESCR, in General Comment No 11 (note 42 above), at para 4, states the following :

“The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. ...It should be emphasized, however, that the education offered must be *adequate* in quality, relevant to the child and must promote the realization of the child’s other rights.”

*Fiscal Equity v City of New York*¹⁴⁵ the New York State Court of Appeals identified three categories which are necessary to realize an adequate basic education: (1) teaching; (2) school facilities and (3) classrooms and instrumentalities of learning.¹⁴⁶ Teaching includes ‘the quality of teaching staff...’. This element accords with the Dakar Framework which requires that teachers are competently trained.¹⁴⁷ ‘School facilities and classrooms’ encompass ‘structures that protect learners from the elements.’¹⁴⁸ This category includes water, electricity, sanitation facilities, desks and chairs.¹⁴⁹ Finally, the ‘instrumentalities of learning’ refers to ‘textbooks, blackboards, stationary and possibly computers.’¹⁵⁰ Critics, taking into account the difference in developmental status between South Africa and the United States of America, may argue that a South African court will likely not have regard to a standard of adequacy laid down by a New York court. However, the latter standard confirms the international standard referred to in General Comment No 11.¹⁵¹ Furthermore, General Comment No 13 emphasizes that the developmental context of a particular state will determine the exact facilities that the state is required to provide in delivering basic education. States are therefore, not required to slavishly follow the standard laid down by the CESCR and the New York State Court of Appeals, but may adapt it according to the specific context prevailing in the country. The South African government has, to some degree, borrowed from this standard of adequacy. The Education Department declares that “[the right to basic education] would be satisfied by the availability of

¹⁴⁵ 100 NY 2d 893.

¹⁴⁶ As above, 908.

¹⁴⁷ As above. See also note 76 above, para 65.

¹⁴⁸ As above.

¹⁴⁹ As above.

¹⁵⁰ As above.

¹⁵¹ It must be noted that the standard of adequacy laid down by the CESCR overlaps, to some extent with the element of availability described above. CESCR General Comment No 11 (note 42 above) at para 7, describes the right to free primary education, in part as “[ensuring]... the *availability* of primary education without charge to the child...” See also section 2.2.3.1.1 above.

schooling facilities sufficient to enable every child to begin and complete a basic education programme of acceptable quality.”¹⁵²

2.2.3.2 The right to basic education: What are the obligations upon states?

In the previous section, I have analyzed the content of the right to basic education. This part of the study examines the concomitant obligations engendered by this right. Although the content has, to some extent, revealed the obligations incurred by states, section 2.2.3.2.2 distinguishes between core obligations, i.e. obligations which must be fulfilled without delay by states (unless the delay is justifiable) and non-core obligations, i.e. obligations which states are required to fulfill gradually. In international law discourse, the former obligations are derived, in part from the concept of the ‘minimum core’ content of socio-economic rights and the latter obligations are derived from the concept of the ‘progressive realization’ of socio-economic rights. Thus, before I investigate the specific obligations imposed upon states, these and other concepts of law have to be clarified.

2.2.3.2.1 General Obligations

The right to basic education, like all human rights, imposes three types or levels of obligations on states: the obligations to respect, protect and fulfil.¹⁵³ The obligation to respect requires the state to refrain from impairing access to an existing right.¹⁵⁴ Where this is unavoidable, the state must take steps to mitigate the impact of such impairment.¹⁵⁵ This “negative” duty also prohibits the

¹⁵² Note 63 above, 37. The Oxford English dictionary describes the term “adequate” as follows: “satisfactory or acceptable in quality or quantity.”

¹⁵³ CESCR General Comment No 13 (note 43 above) 9.

¹⁵⁴ D Brand “The right to food” in D Brand and C Heyns *et al* (eds) *Socio-Economic Rights In South Africa* (2005) 159.

¹⁵⁵ As above.

state from placing obstacles in the way of a person to gain or enhance access to the right.¹⁵⁶ The obligation to protect requires of states to take steps to protect people's existing access to a right and their ability to enhance and gain access to a right against the interference by third parties.¹⁵⁷ The obligation to fulfil means that the state must take positive steps to ensure that those lacking access to the enjoyment of a right gains access and that where access is insufficient, it is enhanced (positive obligation).¹⁵⁸

Article 4 of the CRC sets out the overarching duty imposed upon states by the right to primary education:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 2 of the ICESCR contains a similar provision:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights

¹⁵⁶ As above.

¹⁵⁷ As above.

¹⁵⁸ As above.

The case of *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria* (Communication 155/96) provides an excellent rendition of the violation of all three elements of state obligations. In this case, the complainants alleged that the government of Nigeria violated a wide range of socio-economic rights under the African Charter including the right to health and the right to a clean environment. According to the complainants the Nigerian government violated these rights through its involvement in oil production in Ogoniland, in particular by -

- participating in the contamination of air, water and soil and hence harming the health of the Ogoni population (failure of the obligation to respect the right to health);
- failing to protect the Ogoni population from the damage inflicted on them by the Nigerian National Petroleum Company (NNPC) and the Shell Petroleum Company but instead using government security forces to facilitate the harm (failure of the obligation to protect against interference by third parties) and
- failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations (failure of the obligations to fulfil and respect).

The African Commission on Human and Peoples' Rights (African Commission) agreed with the complainants and found an infringement of the alleged rights.

recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

(a) “Progressive realization” and “to the maximum extent of its available resources”

The provisions above introduce the concept of “progressive realization.” This concept takes account of the reality that a lack of financial and other resources may hinder the full implementation of socio-economic rights in some states.¹⁵⁹ Hence, it accepts that the full realization of socio-economic rights will not be achieved immediately or within a short period of time.¹⁶⁰ However, the CESCR is of the view that the progressive realization of rights does not mean that the fulfillment of the right will never be achieved.¹⁶¹ States have a specific and continuing obligation “...to move as expeditiously and effectively as possible” to ensure the full realization of the right.¹⁶² The CRC Committee emphasizes that states, irrespective of their economic circumstances are required to undertake all possible measures towards realizing the rights of the child, paying special attention to the most disadvantaged groups.¹⁶³ The CESCR regards retrogressive measures taken in relation to education as impermissible.¹⁶⁴ It has been suggested that the CRC Committee considers retrogressive measures such as a decrease in the education budget as incompatible with the word “progressively”.¹⁶⁵ Thus, the whole notion of progressive realization does not mean that states can sit back and do nothing. States are under an obligation to take steps immediately and continuingly to work towards the realization of the right to basic education of all children. However, their chief priority should be to implement measures to make basic education a reality to those children who cannot afford the cost of schooling. The

¹⁵⁹ CRC Committee General Comment No 5 (note 49 above) para 7.

¹⁶⁰ CESCR General Comment No 3 (note 41) para 9.

¹⁶¹ As above.

¹⁶² As above.

¹⁶³ CRC Committee General Comment No 5 (note 49 above) para 8.

¹⁶⁴ CESCR General Comment No 3 (note 41 above) para 9.

¹⁶⁵ Verheyde (note 54 above) 53.

South African Constitutional Court has endorsed the meaning of the term “progressive realization” as described above.¹⁶⁶

Article 4 of the CRC requires of States Parties to take steps “to the maximum extent of their available resources.” The “maximum available resources” include the resources available within a particular state as well as those available from the international community.¹⁶⁷ The CESCR as well as the CRC Committee are of the view that international co-operation in this regard is an obligation upon all states, in particular those states who are in a position to assist.¹⁶⁸ One of the focal points of the CRC Committee is the budgetary allocation for education.¹⁶⁹ In its reporting guidelines, the Committee requests states to furnish information on the proportion of the overall budget devoted to children and allocated to the various levels of education.¹⁷⁰ The CRC Committee, in its concluding observations is often concerned about an insufficient allocation of resources to education and thus welcomes an increase in the educational budget and frequently encourages states to increase budgetary allocations to education.¹⁷¹ The Committee is however silent about the exact proportion of the national budget that should be allocated to education, in particular basic education. It is my submission that its silence on this issue is due to the fact that budgetary allocation traditionally falls outside the sphere of the judiciary.¹⁷² The CESCR states

¹⁶⁶ In *Grootboom* (note 18 above), the Court held at para 45 F-G:

“Although the [CESCR]’s analysis is intended to explain the scope of states parties’ obligations under the [ICESCR], it is also helpful in plumbing the meaning of ‘progressive realization’ in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.”

¹⁶⁷ CESCR General Comment No 3 (note 41 above) para 13.

¹⁶⁸ As above, para 14 ; CRC Committee General Comment No 5 (note 49 above) para 1.

¹⁶⁹ Verheyde (note 54 above) 53.

¹⁷⁰ CRC Committee, *General Guidelines regarding the form and contents of the periodic reports* (UN Doc. CRC/C/58, 1996), para 26.

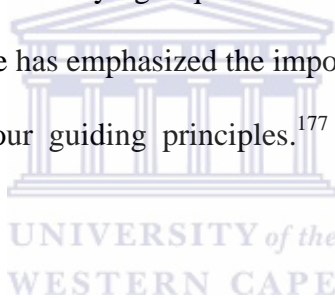
¹⁷¹ See for example CRC Committee, *Concluding Observations :Yemen* (UN Doc. CRC/C/50,1996) para 51; CRC Committee, *Concluding Observations: Lebanon* (UN Doc. CRC/C/54, 1996) para 36 and CRC Committee, *Concluding Observations: Uruguay* (UN Doc. UN Doc. CRC/C/50,1996) para 117.

¹⁷² See note 14 above.

that any deliberate retrogressive measures taken by a state needs to be fully justified by reference to the totality of the rights provided and in the context of the full use of the maximum available resources.¹⁷³ Thus, a retrogressive measure such as a decrease in the education budget would be very difficult to justify because states have the burden of proving that they have exhausted their own as well as international resources.¹⁷⁴

(b) Guiding principles in assessing the obligations imposed by the CRC

In implementing the obligations imposed by the CRC, states are required to be guided by four articles identified as guiding principles by the CRC Committee.¹⁷⁵ Articles 2, 3, 6 and 12 enshrine these principles which embody the underlying requirements for any of the rights in the CRC to be realized.¹⁷⁶ The CRC Committee has emphasized the importance of ensuring that the domestic law of state parties reflect the four guiding principles.¹⁷⁷ Three of these principles will be considered here.



(i) Article 2: the obligation of States to respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind.

The principle of non-discrimination prohibits discrimination against any child in the sphere of education.¹⁷⁸ States are required to actively identify individual children or groups of children who are experiencing discrimination.¹⁷⁹ Marginalized and disadvantaged groups in particular are required to be identified and prioritized.¹⁸⁰ Thus, states are under an obligation to take positive

¹⁷³ CESCR General Comment No 3 (note 41 above) para 9.

¹⁷⁴ CESCR General Comment No 13 (note 43 above) para 45.

¹⁷⁵ CRC Committee General Comment No 5 (note 49 above) para 12.

¹⁷⁶ http://www.unicef.org/crc/files/Guiding_Principles.pdf [accessed 19 March 2008].

¹⁷⁷ As above.

¹⁷⁸ CRC Committee General Comment No 5 (note 49 above) para 12.

¹⁷⁹ As above.

¹⁸⁰ As above, para 30.

steps to identify whether discriminatory practices are occurring in schools. There seems to be a stronger obligation to identify discrimination against those children who are vulnerable because of their specific status. This will undeniably include children who are barred access to school because of an inability to pay school fees or other educational costs, such as those related to transport or the wearing of uniforms. The CRC Committee stresses that addressing this discrimination may require changes in legislation, administration, resource allocation, as well as education measures to change attitudes.¹⁸¹ In addressing discrimination, states are thus urged to take action that goes beyond the adoption of legislation.

As stated before, the Committee is of the view that the principle of non-discrimination does not mean identical treatment.¹⁸² Hence, special measures may be taken to diminish or eliminate the conditions that cause discrimination.¹⁸³ Thus, even if the implementation of special measures discriminate against certain people, this does not constitute a violation of the principle of non-discrimination if the object of such discrimination is to give priority to marginalized and disadvantaged children. For instance, if the state compels affluent schools to share their resources with disadvantaged schools this may amount to discrimination against wealthy parents on account of their economic status.¹⁸⁴ However, this will not be a violation of the non-discrimination principle since the purpose of the affirmative action measure is to eradicate conditions of inequality.

¹⁸¹ As above, para 12.

¹⁸² As above.

See section 2.2.3.1.2 above for an explanation of the difference between formal and substantive equality. The notion of substantive equality is the underlying rationale for allowing fair discrimination against certain people in order to alleviate the plight of the marginalized and disadvantaged in society.

¹⁸³ CRC Committee General Comment No 5 (note 49 above) para 12.

¹⁸⁴ These parents may argue that forcing them to indirectly finance the education of disadvantaged children amounts to discrimination on the basis of their economic status in society.

(ii) Article 3(1): the best interests of the child as primary consideration in all actions concerning children.

This principle compels all courts of law, legislative bodies, administrative bodies and private or public social welfare institutions to always act in the best interests of the child when they are taking decisions which affect the child.¹⁸⁵ According to Natasha Conception, this principle will apply to those circumstances where the rights of the child are in conflict with the prerogatives of parents and/or with those of the state.¹⁸⁶ In those instances, this principle calls for the best interests of the child to prevail.¹⁸⁷ The operation of this principle was illustrated in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*¹⁸⁸ in which the court interpreted section 28 (2) of the South African Constitution which entrenches the best interests of the child principle.¹⁸⁹ This case concerned the plight of English speaking learners who were denied permanent accommodation at the Middelburg primary school by the school's governing body.¹⁹⁰ Although the school were legally entitled to adopt an Afrikaans medium language policy at the school, the court held that "section 28 establishes a fundamental right of every child

¹⁸⁵ <http://www.wcl.american.edu/hrbrief/v7i2/child10years.htm> [accessed 19 March 2008].

¹⁸⁶ As above.

¹⁸⁷ As above.

¹⁸⁸ 2003 (4) SA 160 (T).

¹⁸⁹ Section 28 (2) provides: "A child's best interests are of paramount importance in every matter concerning the child."

¹⁹⁰ The single-medium policy at the school was validly established in terms of section 6(2) of the South African Schools Act. The latter section gives effect to section 29(2) of the Constitution which provides: "Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions..."

Initially, the school governing body, relying on the school language policy, refused the English speaking learners access to school. However, the Mpumalanga Education Department intervened and ordered the school to accommodate these learners.

to come first where there are competing rights” and ordered that “the interests of the relevant learners would best be served by allowing an English course to be created at the ... school.”¹⁹¹

(iii) Article 6: the child’s inherent right to life and States parties’ obligation to ensure to the maximum extent possible the survival and development of the child.

The third principle outlines the child’s right to life, survival and development. The child’s right to life is broadened by including the right to survival and development.¹⁹² According to the CRC Committee “development” includes the child’s physical, mental, spiritual, moral, psychological and social development.¹⁹³ Children are thus entitled to opportunities, programs and conditions that will foster the “qualitative aspect of their survival.”¹⁹⁴ It is submitted that all aspects of the school life, including cultural and sporting activities contribute to ensuring that children develop to their full potential.¹⁹⁵ In this regard, article 31 of the CRC requires that “States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.” In implementing the right to basic education, state parties should therefore aim to ensure the child’s right to life and survival as well as the “optimal development”¹⁹⁶ of children as required by the CRC Committee. Thus, it is submitted that this particular principle does not only call for states

¹⁹¹ The court reached this decision after considering the report of a *curatrix ad litem* who found that the “the new learners could easily have been accommodated in other schools, that the learners had adapted reasonably well at the ... school, that the ... school was probably the best primary school in the area, that it was the nearest school to their homes, that the learners’ parents wanted them to attend the ... school, that a forced turning away of the learners would have a negative influence on them, that the learners might feel rejected, and that it would thus be in the learners “best interest” to stay at the ... school...” For an in-depth discussion of this case, see PJ Visser “Some ideas on the “best interests of a child” principle in the context of public schooling” 2007 (7) *SAJHR* 459.

¹⁹² Note 185 above.

¹⁹³ CRC Committee General Comment No 5 (note 49 above) para 12.

¹⁹⁴ Note 185 above.

¹⁹⁵ Section 29 (1) (a) of the CRC states that ‘the education of the child shall be directed to the development of the child’s personality, talents and mental and physical abilities to their fullest potential.’ This objective is repeated in section 11(2) of the African Children’s Charter. Article 13(1) of the ICESCR and article 5 (1) (a) of the CDE require that education shall be directed at the “full development of the human personality.”

¹⁹⁶ CRC Committee General Comment No 5 (note 49 above) para 12.

to ensure that children receive instruction in a particular curriculum at school. However, it encompasses a broad array of aspects, including the provision of nutrition and the participation of children in extra-curricular and sporting activities. These aspects are vital for the child's physical, mental, spiritual, moral, psychological and social development.

2.2.3.2.2 Specific obligations

In the following section, I will distinguish between the minimum core obligations engendered by the right to basic education and those obligations which only require progressive realization (non-core obligations).

(a) The right to basic education and the notion of the “minimum core” in international law

The concept of the “minimum core content” of a right to which “minimum core obligations” correspond is often referred to in determining the violation of socio-economic rights.¹⁹⁷ The CESCR developed the notion of a minimum core to explain the core substance of a right and the corresponding minimum obligations which states must comply with.¹⁹⁸ Coomans regards the minimum core content as the “essence” of a right: “that essential element without which a right loses its substantive significance as a human right.”¹⁹⁹ It is the floor beneath which the conduct

¹⁹⁷ CESCR General Comment No 3 (note 41 above) at para 10 provides: “[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State party in which any significant number of individuals is deprived of essentials foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’etre*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.”

¹⁹⁸ M Wesson “Grootboom and Beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court” 20 (2004) *SAJHR* 284.

¹⁹⁹ Coomans (note 83 above) 7.

of the State must not drop if there is to be compliance with the obligation.²⁰⁰ A failure to provide the minimum core obligations of a right thus results in a breach of the particular right. According to Coomans the right to free, compulsory primary education under the ICESCR is the minimum core of the right to education. He argues that primary education is so essential for the development of a person's abilities that it can be "rightfully defined as a minimum claim."²⁰¹ Coomans' argument is strengthened further by the fact that the ICESCR regards basic education as so important that it imposes an immediate obligation on states to realize the right.²⁰² The CESCR General Comment No 3 states that some rights in the ICESCR "would seem to be capable of immediate application by judicial and other organs in many national legal systems." Article 13(2)(a) is listed as one of these rights. According to the Maastricht Guidelines the corresponding core obligations to the right to basic education apply irrespective of the availability of resources and should thus be fulfilled by all countries, including developing countries.²⁰³ However, the CESCR does "take account of resource constraints applying within the country concerned" in assessing whether a state has discharged its minimum core obligations.²⁰⁴ Eide notes that if a State claims that a lack of resources is hindering the implementation of the core levels of the right, it must prove that this is because of reasons beyond its control and that it could not secure the assistance of the international community.²⁰⁵ Thus, although the minimum core obligations of the right to basic education may not be subject to "progressive realization", it

²⁰⁰ This particular view was emphasized by the CESCR during its ninth session in December 1993. See UN Doc. E/C.12/1993/11, para 5.

²⁰¹ Coomans (note 83 above) 7.

²⁰² CESCR General Comment No 13 (note 43 above) para 51.

²⁰³ The Maastricht Guidelines (note 92 above) paras 9-10.

²⁰⁴ Note 197 above.

²⁰⁵ A Eide "Economic, Social and Cultural Rights as Human Rights" in A Eide, C Krause, A Rosas (eds) *Economic, Social and Cultural Rights* (2001) 27.

does not mean that states will have to enforce them immediately in all circumstances.²⁰⁶ Even if states are able to justify their non-compliance with the minimum core obligations, it is submitted that they are still under stringent scrutiny to ensure that the right to basic education is at least prioritized above other rights which are subject to progressive realization. Finally, although the minimum core is a right vested in everyone²⁰⁷ a minimum core approach to the realization of socio-economic rights prioritizes certain needs over others.²⁰⁸ This approach is justified by the argument that these “core” needs are most urgent.²⁰⁹ Thus, in the sphere of education, such an approach would require that the state “devotes all the resources at its disposal first to satisfy” its minimum core obligations in respect of disadvantaged learners before “expending resources on relatively privileged groups.”²¹⁰ Roux terms this temporal prioritization.²¹¹

(b) Core obligations

Section 28(1a) of the CRC provides that “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular, make primary education compulsory and available free to all”. Sloth-Nielsen argues that “article 28(1)(a) states the core minimum:...“free” and “compulsory” education at the primary stage...”²¹² According to Verheyde, article 28 has to be read with article 41 of the CRC which provides that, if any standard set in national law, or other applicable international instruments are higher than those of the CRC, it is the higher standard

²⁰⁶ Although CESCR General Comment No 3 lists the right to primary education as a right “capable of immediate application”, the CESCR, in General Comment No 11, at para 10 provides that “The plan of action [which states are required to adopt in terms of article 14 of the ICESCR] must be aimed at securing the progressive implementation of the right to compulsory primary education...”

²⁰⁷ Committee on Economic, Social and Cultural Rights (CESCR) No 15: The right to water :articles 11 and 12 (2002) para 44(c).

²⁰⁸ Wesson (note 198 above) 284.

²⁰⁹ As above.

²¹⁰ T Roux “Understanding *Grootboom*- A Response to Cass R Sunstein” (2002) 12 *Constitutional Forum* 41, 47.

²¹¹ As above.

²¹² Sloth-Nielsen and Mezmur (note 44 above) 14.

that prevails.²¹³ She claims that article 41 together with the significance the CRC Committee attaches to the notion of the minimum core and the strong advocacy for this concept in legal doctrine justifies her submission that the obligation to make primary education free and compulsory constitutes a minimum core obligation.²¹⁴ Thus, the minimum core obligations engendered by the right to basic education can be derived from the concepts of “free” and “compulsory” assigned to primary education.²¹⁵

The CESCR, in General Comment No 11 defines the meaning of “free of charge” as follows:

The nature of this requirement is unequivocal. The right [to primary education] is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs²¹⁶, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis.²¹⁷

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(i) Availability

The first overarching obligation to be extracted from this definition is the state's obligation to ensure the *availability* of free primary education. The element of availability requires that the state provide the necessary resources to ensure that the basic infrastructure of schools is maintained. Furthermore, the state is obliged to provide safe drinking water, sanitation facilities,

²¹³ Verheyde (note 54 above) 55.

²¹⁴ As above.

²¹⁵ As above.

²¹⁶ Direct costs are directly produced by the educational service, including teacher salaries, provision of schools and their maintenance, and the management of the education system. Other direct costs include costs without which education could not be delivered, namely text and other books, learning materials, basic school equipment (stationary such as pens, pencils, rulers, etc.), and fees for examination. Indirect costs are indirectly caused by the educational service. These include transport costs (costs incurred to get to school) and costs related to school meals, school uniforms, sporting equipment, and further educational equipment. See Sloth-Nielsen and Mezmur (note 44 above) 10.

²¹⁷ CESCR General Comment No 11 (note 42 above) para 7.

electricity, classrooms, desks and chairs to its learners. The provision of textbooks, blackboards and stationary constitutes a further core obligation as well as the provision of qualified teachers. Although many South African schools are in a deplorable physical condition²¹⁸ and a good percentage of teachers are unqualified²¹⁹, it is my submission that the abovementioned obligations are core obligations: without these, the right to basic education loses its significance as a human right. Furthermore, as will be seen below, the non-discrimination provision under the ICESCR and the CRC imposes an immediate obligation on states. This includes undertaking affirmative action measures in line with the concept of fair discrimination. In this regard, I agree with Beiter that the provision of qualified teachers to disadvantaged schools constitutes such an affirmative action measure.²²⁰



(ii) Accessibility

General Comment 11 proceeds by distinguishing between the various costs incurred by education. The CESCR emphasizes that the scope of free primary education extends beyond the prohibition on charging school fees. Parents are exempted from other direct costs as well, such as fees for examinations, textbooks, learning materials and all basic school equipment. The CRC Committee is in agreement that direct costs, such as maintenance of school buildings and the supply of books and learning materials are free of charge and thus the responsibility of the state.²²¹ Thus, the position seems to be that parents are not legally obliged to make any contribution that will supplement the direct costs related to education.

²¹⁸ See note 288 below.

²¹⁹ See note 474 below. Generally speaking, states may argue that they do not have enough qualified teachers to deploy at schools. I concede that the process of training more teachers require time and financial resources. However, nothing prevents states from adopting policies which would result in qualified teachers sharing their skills among schools, thus accelerating the rate at which children are able to benefit from qualified teaching.

²²⁰ See note 31 above, 409.

²²¹ Sloth – Nielsen and Mezmur (note 44 above) 16.

Indirect costs such as those related to school uniforms seem to fall under the scope of free primary education. In this regard, the CRC Committee notes that where the wearing of uniforms is mandated by school regulations, the state should provide for them, at least for poor children.²²² The overriding principle is that the requirement to wear uniforms should not lead to the exclusion of any child.²²³ Hence, the CRC Committee is of the view that the wearing of school uniforms should not be compulsory and that a disadvantaged child, in particular should not be excluded in any way for not wearing them. The CRC Committee holds the same view in respect of the transport costs of disadvantaged learners. The Committee has stated that the obligation to provide free primary education includes state subsidizing of transport costs for learners who cannot afford such costs.²²⁴ This view corresponds with that of the CESCR which provides that the right to equality and its corollary of non-discrimination is not subject to progressive realization.²²⁵ According to General Comment No 16, the right to enjoy socio-economic rights on an equal basis creates an immediate obligation on states parties.²²⁶ General Comment No 13 confirms that states parties have an immediate obligation that the right to education “will be exercised without discrimination of any kind.”²²⁷ The non-discrimination provision under the CRC is also regarded as imposing an immediate obligation.²²⁸ Coomans identifies the obligations to respect as part of the core content of the right to education.²²⁹ This means that states should realize these obligations immediately and irrespective of their economic development.²³⁰ States are thus under an immediate obligation to remove any impediment which may cause

²²² As above.

²²³ As above.

²²⁴ As above.

²²⁵ CESCR General Comment No 3 (note 41 above) para 5.

²²⁶ CESCR General Comment No 16 (note 45 above) para 16.

²²⁷ CESCR General Comment No 13 (note 13 above) para 43.

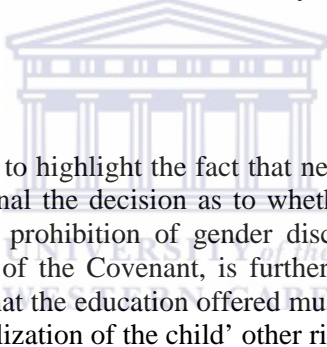
²²⁸ Sloth- Nielsen and Mezmur (note 44 above) 15.

²²⁹ Note 83 above.

²³⁰ Verheyde (note 54 above) 57.

discrimination against children in schools, including the charging of school fees and the compulsory wearing of school uniforms where parents are unable to afford it. States also incur a positive core obligation to identify discriminatory practices in schools and to address them.²³¹ In the South African context, the eradication of systemic discrimination in the education system may take time.²³² However, this does not prevent the government from immediately employing strategies to identify discrimination in schools and actively tackling it.²³³ This particular issue will receive further attention in the subsequent chapters.

The element of “compulsory” provides further insight into the core entitlements engendered by the right to basic education. This element is described by the CESCR, in General Comment No 11, at para 6 as follows:



The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasized, however, that the education offered must be adequate in quality, relevant to the child and must promote the realization of the child's other rights.

The South African government legally obliges all children in the compulsory school phase to attend school.²³⁴ In South Africa, parents are liable to pay a fine or may even be imprisoned if they fail to ensure the attendance of their children at school during the compulsory school phase.²³⁵ This obligation upon parents is necessary if considered that parental choice may be exercised to the detriment of the child.²³⁶ A parent may decide that a child should look after the household or contribute financially to the family by working instead of going to school. In this

²³¹ See section 2.2.3.2.1 (b) (i) above.

²³² See section 3.2.1 below.

²³³ As previously stated, the CRC Committee urges states to employ a wide range of strategies to address discrimination in education. These transcend the mere adoption of legislation. See section 2.2.3.2.1 (b) (i) above.

²³⁴ Section 3(6) of the South African Schools Act.

²³⁵ As above.

²³⁶ Sloth-Nielsen and Mezmur (note 44 above) 18.

context and for various other reasons, compulsory education becomes critical. However, nobody can do the impossible and hence parents cannot be under an obligation to ensure that their children attend school if they cannot afford the costs related to schooling.²³⁷ Thus, making primary education compulsory is contingent on making it free.²³⁸ Read with the first element of “free” primary education, the prohibition of non-discrimination and temporal prioritization in terms of the minimum core concept, it is submitted that states are under a core obligation to ensure that those costs related to ensuring the attendance of disadvantaged children at school, are free. This will include the costs mentioned above, including transport costs which have been documented to be bar to poor parents to ensure their children’s attendance at school.²³⁹

The CESCR, in describing the element of “compulsory”, also holds that the standard of primary education should be adequate. As I have already discussed this concept in section 2.2.3.1.3 above, it will not be repeated here, except for stating that states are under a core obligation to provide adequate basic education.

In conclusion, states are under stringent scrutiny to fulfill core obligations urgently. Non-compliance with these obligations should only be condoned where states have proved that they do not have the required resources and have failed to acquire the assistance of the international community. It is submitted that states should look beyond procuring financial resources, but explore all possible measures to realize the right to basic education, including utilizing existing resources of the more privileged schools. For example, governments should consider to legally compel more affluent schools to share their facilities with disadvantaged schools which may lack

²³⁷ Tomasevski (note 79 above) 21.

²³⁸ As above.

²³⁹ See note 114 above.

the means to enable the realization of the minimum core obligations engendered by the right to basic education.

(c) Non-core obligations

(iii) Availability

In my previous discussion on the content of the right to basic education, it was noted that the exact facilities provided by states depends on the developmental context of the state. According to Verheyde, some facilities are indispensable irrespective of the specific developmental status of the state.²⁴⁰ These include basic infrastructure, such as adequate buildings, safe drinking water and sanitation facilities. In my discussion above, the provision of the latter facilities are core obligations. Verheyde also notes that the provision of facilities, such as computers and libraries, however, are only feasible in developed countries.²⁴¹ The implication is therefore that developing countries do not have sufficient financial resources to provide the latter facilities. This may be true. However, this does not mean that these countries are exempted from making libraries and computers available to learners. Instead, they should aim to provide the basic facilities first²⁴² before extending more advanced resources to learners. The realization of libraries and computers are, therefore, subject to progressive realization.

²⁴⁰ Verheyde (note 54 above) 16.

²⁴¹ As above.

²⁴² See discussion on core obligations above.

(iv) Accessibility

The CRC Committee has emphasized that the principal reason for making primary education free is to avoid exclusion.²⁴³ It is submitted that schools will always consider it justifiable to exclude learners from school as long as they are permitted to charge school fees. Providing exemptions to disadvantaged learners however is not a lasting solution to the problem. Firstly, the obligation under the CRC is to provide free, compulsory primary education to all learners, not only learners from low-income groups. This means that the primary responsibility to provide free primary education is that of the state, not of the parents. Secondly, exempting certain learners and not others will not necessarily eliminate discrimination. Those learners who have been exempted may be classified at school as “poor and needy” and may be subjected to further discriminatory practices. However, in line with the minimum core approach, it could be argued that an exemption system is initially necessary to provide free basic education to disadvantaged learners first. The system should then be gradually phased out so as to provide free basic education to all learners as required by article 28(1). In this regard, and in line with my previous arguments, states are under a core obligation to make costs, which could potentially bar poor children from school, free. The CRC Committee has stated that the obligation to provide free primary education includes state subsidizing of transport costs for learners who cannot afford such costs.²⁴⁴ It is submitted that this obligation entails more than the mere provision of school buses. Subjecting learners to unreasonable lengthy hours on the road is detrimental to their optimal development. Hence, in the best interests of the child, other viable options should be considered such as hostels, boarding allowances, et cetera. However, in this regard, the CRC Committee has expressly provided that only transport costs are included under the core obligation to provide free

²⁴³ Sloth- Nielsen and Mezmur (note 44 above) 15.

²⁴⁴ As above.

primary education.²⁴⁵ The implication is therefore that the provision of hostels, boarding allowances, et cetera is subject to progressive realization. Lastly, the state obligation to provide sport and cultural facilities cost-free to learners, is also subject to progressive realization. Again, the CRC Committee has not expressly included the obligation to provide the latter facilities under the umbrella of free, primary education.²⁴⁶ Furthermore, although the provision of these is necessary for the optimal development of the child and is in the best interests of the child, it is not an obligation without which the right to basic education would lose its core character.

2.3 Concluding remarks

South Africa has a key obligation under the Convention on the Rights of the Child to realize basic education for all its children in the primary school phase. Although this obligation requires progressive realization, it does not mean that this goal can be indefinitely delayed. Other international instruments such as the African Charter and the African Children's Charter impose an immediate obligation on the country to provide basic education. A sense of urgency has also been created by South Africa's commitment to the Dakar Framework in which it commits itself to realizing free, compulsory basic education before 2015. In line with the notion of the minimum core, South Africa is obliged to provide the following to disadvantaged learners first: free, compulsory basic education, equal access to education and the right to an adequate basic education. Once these minimum core obligations have been achieved, the right to basic education has to be fully realized to all children in accordance with article 28(1)(a) of the CRC.

²⁴⁵ As above, 15.

²⁴⁶ As above, 16.

CHAPTER 3: SOUTH AFRICAN LAW

3. Introduction

This chapter explores the right to basic education in its South African context. In particular, I will examine the social and historical context and thereafter the textual context of the right. I will also determine whether the unqualified nature of the right means that the right is not subject to the standard of reasonableness established by the Constitutional Court in assessing whether the state has discharged its constitutional obligations in respect of socio-economic rights.

3.1. The transformative South African Constitution

The South African Constitution, through its entrenchment of socio-economic rights, embodies a transformative model of constitutionalism.²⁴⁷ This differs from traditional liberal constitutions which only place restraints on the exercise of state power.²⁴⁸ Besides providing measures to curb an abuse of state power, the transformative Constitution also requires of government to take steps “to advance the ideals of freedom, equality, dignity and social justice.”²⁴⁹ The

²⁴⁷ Brand (note 11 above) 1.

The term “transformative constitutionalism” was created by Karl Klare. He explains the term as follows: “By transformative constitutionalism, I mean a long term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of including large-scale social change through non-violent political progress grounded in law.”

Transformation is defined by Albertyn and Goldblatt as:

“a complete reconstruction of the state and society, including a distribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realize their full human potential within positive social relationships.”

For a thorough discussion of the nature of the transformative South African Constitution, see K Klare “Legal culture and transformative constitutionalism” (1998) *SAJHR* 146; C Albertyn and B Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” (1998) *SAJHR* 248. The transformative nature of the Constitution is also confirmed in the preamble which states:

“The Constitution is the supreme law of the land, adopted to heal the divisions of the past, to establish a society based on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizens and free the potential of all people.”

²⁴⁸ Brand (note 11 above) 1.

²⁴⁹ As above.

transformation of the South African society into one characterized by these constitutional values are made attainable by the inclusion of socio-economic rights in the Constitution.²⁵⁰ The justiciability of these rights imposes a constitutional obligation upon the state to “realize housing, educational and social security objectives, which cannot be left merely to the mechanisms of the free market for fulfillment.”²⁵¹ Therefore, “[t]he purpose of the transformative Constitution is not merely to protect [existing] rights, but also to empower disadvantaged persons and to contribute to the amelioration of social evils such as poverty, illiteracy and homelessness.”²⁵² The underlying political philosophy of socio-economic rights involves implementing policies to alleviate the plight of the disadvantaged in our society.²⁵³ This philosophy is entrenched in the South African Constitution which lists the establishment of a society built on social justice as one of its fundamental objectives.²⁵⁴ Beiter is of the view that the underlying concept for making socio-economic rights justiciable is that certain social services such as basic health care and education should be accessible to all, irrespective of the ability to pay for these services.²⁵⁵ According to Liebenberg the inclusion of socio-economic rights as justiciable rights in the South

²⁵⁰ As above, 3.

²⁵¹ GE Devenish “The nature, evolution and operation of socio-economic rights in the South African Constitution” (2007) *THRHR* 85. Economic experts agree that education is a public good because the market is unable to provide adequate public education to learners based on their ability to pay. They argue that poor families cannot obtain sufficient credit to pay school fees, they are also mostly in a position where they are unable to gain access to information that will enable them to make an accurate assessment of the benefits of education and they are less likely to invest in education because of the long-term risks attached to it. Based on these reasons, the majority of experts agree that the state should be the primary funder of education. See for example T Roux “*Comment on Department of Education’s Report to the Minister: Review of the Cost, Resourcing and Funding of Education in Public Schools*” (30 April 2003) 8. Roux refers here to C Colclough ‘*Education and the Market: Which Parts of the Neoliberal Solution are Correct?*’ (1996) 24 *World Development*; R Venugopal ‘Oxford University Development Seminar’ Queen Elizabeth House (2002), World Bank World Development Report (1995).

²⁵² Devenish (note above) 85.

²⁵³ As above. Devenish defines socio-economic rights policies as “policies of human compassion, sharing and caring.”

²⁵⁴ Preamble to the South African Constitution.

²⁵⁵ Beiter (note 31 above) 490.

African Bill of Rights confirms the fundamental importance that the Constitution attaches to the redress of poverty.²⁵⁶

3.2 Interpreting socio-economic rights in context

In *Grootboom*, the Constitutional Court held that a right in the Bill of Rights cannot be interpreted in isolation but must be construed in its proper context.²⁵⁷ This requires the interpretation of two types of context.²⁵⁸ Firstly, a right must be understood in its social and historical context.²⁵⁹ This entails an understanding of the right against our specific “history and background to the adoption of the Constitution.”²⁶⁰ This specific context was aptly described by Chaskalson P in *Soobramoney*:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, in social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”²⁶¹

²⁵⁶ Liebenberg (note 13 above) 33-32.

²⁵⁷ *Grootboom* (note 18 above) para 21.

This contextual approach by the Constitutional Court is also known as the “purposive” or “generous” approach. See, for example *Makwanyane* (note 27 above) at para 9; *S v Zuma* 1995 (2) SA 642 (CC); 1995 (4) BCLR 104 (CC) at para 15 (the Court refers here with approval to the Canadian case of *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 where it was held that a right must be understood in light of its purpose or “the interests it was meant to protect.”); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (*Hugo*) at para 41; *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (*Khosa*) at paras 40-49.

²⁵⁸ *Grootboom* (note 18 above) para 22.

²⁵⁹ As above, para 25.

²⁶⁰ *Soobramoney v Minister of Health, Kwazulu – Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) (*Soobramoney*) para 16.

²⁶¹ As above, para 8. This passage also confirms the transformative nature of the South African Constitution.

This passage suggests that an understanding of the scope and content of the rights in the Bill of Rights is firstly dependent on the history that preceded our constitutional democracy.²⁶² This history has been interpreted by the Constitutional Court as the specific apartheid history in which the majority of the South African population were denied their political freedom and deprived of opportunities to advance their economic and social position in life.²⁶³ Consequently, many of these South Africans are still living in conditions of poverty which contribute to a denial of their basic human rights.²⁶⁴ At the core of the transformative constitution lies a commitment to address these conditions in order to ensure a future country in which the constitutional values of human dignity, equality and freedom will be enjoyed by all. The role of the Constitution in facilitating this future has been equated to a “historic bridge between the past ...characterized by injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans...”²⁶⁵ A mere understanding of the specific historical context of a right is thus not enough. In order to realize the goals of the transformative constitution, an interpretation of the right must be aimed at rectifying the injustices of the past.

²⁶² P De Vos “*Grootboom*, the right of access to housing and substantive equality as contextual fairness” (2001) 17 *SAJHR* 262-263.

²⁶³ As above, 263.

²⁶⁴ The South African government recently published “Towards a 15 year review”, a report which tracks its progress in improving the quality of life of all South Africans since 1993. In assessing poverty levels in South Africa, two poverty lines were used: a lower poverty line of R174 per person per month and a higher poverty line of R322 per person per month. In 1995, 63.04 % of Africans, 39 % of Coloureds, 4.7% of Asians and 0.53% of whites lived on a monthly income of R322. In 2005, 24.44 % of Africans, 12.98 % of Coloureds, 2.17% of Indians and 0.11% of Whites received a monthly income of R322. In 1995, 38.18% of Africans, 14.62% of Coloureds, 0.82% of Asians and 0.23% of Whites received a monthly income of R174. In 2005, 8.55% of Blacks, 3.88% of Coloureds, 1.07% of Asians and 0% of Whites lived on a monthly income of R174. The decline in poverty among all groups is primarily due to government’s social security assistance program. In 2005, social assistance grants contributed to 90% of the income of Africans and Coloureds. This indicates that the past patterns of racial inequality are still persisting. The South African government concedes that there is still persistent inequality in “...income, resources, skills, and other determinants of people’s capacity to take advantage of opportunities.” “Towards a 15 year review” is accessible from http://www.info.gov.za/otherdocs/2008/toward_15year_review.pdf [accessed 8 October 2008].

²⁶⁵ These words are contained in the first paragraph of the provision on National Unity and Reconciliation which concludes the Interim Constitution Act 200 of 1993. Section 232(4) of the Interim Constitution provides that the provision on National Unity and Reconciliation forms part of the substance of the Constitution and has no lesser status than any other provision in interpreting the Constitution.

The second leg of the contextual approach requires that rights must be interpreted in their textual setting.²⁶⁶ This requires an interpretation of the other rights in the Bill of Rights and the Constitution as a whole.²⁶⁷ The Constitutional Court, in *Makwanyane* describes the contextual approach as construing rights in the Bill of Rights in such a way so as to provide individuals the “full measure of the protection” of the Constitution²⁶⁸: In determining the constitutionality of the death penalty²⁶⁹, the Court interpreted the meaning of the prohibition of “cruel, inhuman or degrading treatment or punishment” under section 11(2) of the Interim Constitution.²⁷⁰ Firstly, the Court looked at all the rights associated with section 11(2), namely the rights to life, dignity and equality.²⁷¹ The court then held that punishment in terms of section 11(2) must “meet the requirements” of the associated rights.²⁷² Since *Makwanyane*, the Court has followed the same approach to the interpretation of socio-economic rights. In *Grootboom* the court emphasized the interrelated and mutual link between socio-economic rights and the other rights enshrined in the Constitution by pointing out that:

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.²⁷³

²⁶⁶ *Grootboom* (note 18 above) para 22.

²⁶⁷ As above.

²⁶⁸ *Makwanyane* (note 27 above) para 10.

²⁶⁹ Under the previous section 277(1) (a) of the Criminal Procedure Act the death penalty was a competent sentence for murder. This section was declared unconstitutional in *Makwanyane* (note 27 above) at para 344.

²⁷⁰ As above. Section 11 (2) of the Interim Constitution Act 200 of 1993 provides: “No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.”

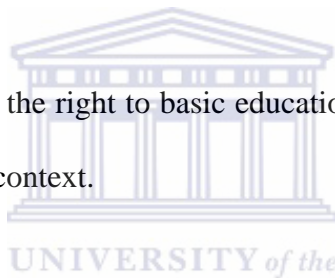
²⁷¹ As above.

²⁷² As above.

²⁷³ *Grootboom* (note 18 above) para 23.

In *Khosa*, the court held that the rights to life, equality and dignity must be considered where it is implicated in cases dealing with socio-economic rights²⁷⁴: In interpreting the right to social security under section 27(1)(c)²⁷⁵ of the Constitution, the court found that the denial of social security to permanent residents is a not only a violation of section 27, but also of their rights to equality and dignity which were described as founding values lying “at the heart of the Bill of Rights.”²⁷⁶ This judgment coupled with the abovementioned passage from *Grootboom* seem to suggest that where the values of dignity, equality, life and freedom are implicated in socio-economic rights claims, it will be very difficult to justify an infringement of the socio-economic right and *vice versa*.

I shall now proceed to interpreting the right to basic education, firstly in its social and historical context and secondly in its textual context.



3.2.1 Social and historical context of section 29(1)(a): The legacy of apartheid

Formal schooling in South Africa is rooted in missionary and colonial forms of education.²⁷⁷

During the 1950's, education was removed from missionary control and brought under the control of the ruling National Party government.²⁷⁸ Three “own affairs” systems were instituted which catered for Whites, Coloureds and Indians respectively.²⁷⁹ The administration of black education was divided between six self-governing territory departments, a central department for

²⁷⁴ *Khosa and Others v Minister of Social Development; Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC); 2004(6) BCLR 569 (CC) (*Khosa*) paras 40-44.

²⁷⁵ Section 27(1)(c) of the Constitution provides: “Everyone has the right to have access to social security, including if they are unable to support themselves and their dependants, appropriate social assistance.”

²⁷⁶ *Khosa* (note 274 above) para 85.

²⁷⁷ South African Human Rights Commission: “*A report on racism, racial integration and desegregation in South African public secondary schools*” (February 1999) 19.

²⁷⁸ As above.

²⁷⁹ Note 63 above, 13. Former White schools were administered by the House of Assembly (HOA), former Coloured schools were managed by the House of Representatives (HOR) and the former Indian schools were governed by the House of Delegates (HOD). (See note 277 above, 17).

Africans living in “white South Africa”²⁸⁰ and four nominally independent state departments.²⁸¹

The allocation of policy and budgetary initiatives was administered by the then Department of National Education.²⁸² The allocation of funding by this Department reflected the gross inequality in the education system with black schools receiving the least from a government committed to white supremacy.²⁸³ Former white schools did not only receive more resources than other racial groups but were also entitled to a higher standard of education.²⁸⁴ Blacks were taught a limited curriculum in line with the concept of “Bantu education” which was premised on the *Verwoerdian* concept that “education must train and teach people in accordance with their opportunities in life.”²⁸⁵ Not surprisingly, the education system inherited by the post-apartheid

²⁸⁰ This term refers to the territory of the Republic of South Africa, excluding the so-called Bantustan homelands which were created by the Apartheid regime. In terms of the Bantustan policy, black South Africans were classified according to their tribal heritage and forced to accept citizenship of the appropriately designated homelands. See, for example the Representation between Republic of South Africa and Self-Governing Territories Act (Promotion of Bantu Self-Government Act) 46 of 1959 available from <http://www.sahistory.org.za/pages/chronology/special-chrono/governance/apartheid-legislation.html> [accessed 18 September 2008].

²⁸¹ Note 63 above, 13. The former Department of Education and Training (DET) supervised former black schools (Note 277 above, 27).

²⁸² Note 63 above, 13.

²⁸³ In 1986, the apartheid government spent R2 635 per year on every white child in comparison to R572 per every black child. In 1994, the annual expenditure on education was as follows: R5043 per White child; R4787 for each Indian child; R3691 for each Coloured child and between R2184 and R1053 per African child. See F Veriava “Education Rights” in S Khoza *et al* (ed) *Socio-Economic Rights in South Africa: A Resource Book* (2007) (2nd ed) 413. See also note 277 above.

²⁸⁴ Education Rights Project: The Law and Transformation Programme, Centre for Applied Legal Studies and the Education Policy Unit, Framework Document, 9 available from <http://www.erp.org.za> [accessed 19 July 2007].

²⁸⁵ As above.

During his term as Minister of Bantu Education, Hendrik Verwoerd (notoriously known as the architect of Apartheid) made the following statement: “If the Native in South Africa today in any kind of school in existence is being taught to expect that he will live his adult life under the policy of equal rights, he is making a big mistake...There is no place for him in the European community above the level of certain forms of labour...[r]acial relations cannot improve if the wrong type of education is given to Natives. They cannot improve if the result of the Native education is the creation of frustrated people, who as the result of education they received, have expectations of life which circumstances in South Africa do not allow to be fulfilled immediately, when it creates people who are trained for professions not open to them, when there are people who have received a form of cultural training which strengthen their desire for white collar occupations to such an extent that there are more such people than openings available. Therefore, good racial relations cannot exist when the correct education is not given. Above all, good racial relations cannot exist when the education is given under the control of people who create wrong expectations on the part of the Native himself.” See, for example Veriava and Coomans (note 1 above) 60. The Black Education Act 47 of 1953 is available from <http://www.sahistory.org.za/pages/chronology/special-chrono/governance/apartheid-legislation.html> [accessed 18 September 2008].

government is “riddled with inequalities.”²⁸⁶ South Africa, in reality still harbors separate education systems in its public school domain: the one consists of the former Model C schools²⁸⁷, which is adequately resourced and the other constitutes the township and rural schools entrenched in abject poverty.²⁸⁸ The legacy of Apartheid education manifested in a minimum level of resources, a lack of qualified teachers, high teacher-pupil ratios, a lack of libraries and laboratories and a shortage of classrooms at the latter schools.²⁸⁹ On the other hand, most of the former Model C schools are equipped with modernized computers, well-resourced libraries and laboratories and well qualified teachers.²⁹⁰ In 2008, it was estimated that the former Model C schools are charging school fees ranging anywhere between R5400 and R20 000 a year.²⁹¹ On the other hand school fees in previously disadvantaged schools can be as minimal as R50 per year.²⁹² Because funding under the Apartheid government occurred primarily along racial lines, there continues to be a strong correlation between a former department in which a school was located and the race of the learners it served.²⁹³ However, the former Model C schools are generally open to learners who can afford the school fees. Thus, an increasing

²⁸⁶ South African Human Rights Commission: *Socio-Economic Rights Report* (2001), 88.

²⁸⁷ “Model C” is generally used to describe the former white schools as they existed under the previous regime. However, this term requires explanation. In April 1992, the then Minister of Education announced that all white schools would become Model C status schools. This meant that these schools would be converted into state-aided schools managed by the principal and a management committee. The state paid the salaries of a set number of teachers whilst the rests of the costs at these schools became the responsibility of the parents. The management committee had the power to appoint teachers, determine admission policy and impose fees. Although, in theory, white schools could admit black pupils as from October 1990, many black learners were barred access to these schools due to the charging of high school fees and the failure to meet certain selection criteria which, in fact disguised racism. See note 277 above.

²⁸⁸ In its third Socio-Economic Rights Report, the South African Human Rights Commission disclosed the following data on the state of South African schools: 2 280 schools have buildings in a very poor condition; 10 723 schools have a shortage of classrooms; 13 204 schools have inadequate textbooks; 8 142 195 learners live beyond a 5-kilometre radius from school; 10 859 schools are without electricity; 9 638 schools are without telephones; 2 496 schools are without adequate toilets; 19 085 schools do not have access to computer facilities; 21 773 schools lack access to library facilities and 17 762 lack access to recreational and sporting facilities.

See note 4 above.

²⁸⁹ Veriava and Coomans (note 1 above) 60; Note 277 above, 20.

²⁹⁰ Note 6 above.

²⁹¹ <http://www.thetimes.co.za/PrintEdition/News/Article.aspx?id=875626> [accessed 7 November 2008].

²⁹² Veriava (note 114 above), 11.

²⁹³ As above, 15.

amount of black learners are gaining access to these schools. The socio-economic status of a learner has thus become a determining factor in respect of the choice of school a learner attends.²⁹⁴ As I will show below the funding system excludes learners from access to schools on account of race and socio-economic status. In some cases, there may be an overlap. The right to basic education must therefore be interpreted against this background of an education system segregated along racial and/or class lines.

3.2.2 Textual context: Section 29(1)(a) and the related provisions in the Bill of Rights

The significance of section 29(1)(a) in the realization of other rights has been discussed in great detail in the previous chapter.²⁹⁵ To reiterate, the right to basic education plays a central role in the fulfillment of both socio-economic and civil and political rights.²⁹⁶ Education is vital to gaining access to the labour market. A person with no formal schooling has a thirty percent chance of unemployment whereas a person with a tertiary education has less than five percent.²⁹⁷ Furthermore, education is the greatest determining factor in South Africa regarding salaries: A person with no formal schooling earns 21 times less income in a lifetime than a person with a tertiary education.²⁹⁸ Obtaining at least matric guarantees the income of a salary double of a person with a grade 11 qualification.²⁹⁹ These figures indicate that the level of education determines a person's quality of living. The lower the level of education, the slimmer an individual's chance is of generating a decent income and securing a decent standard of living.

²⁹⁴ As above.

²⁹⁵ See section 2.2.2 (c) above.

²⁹⁶ As above.

²⁹⁷ M Schussler "What are you worth?" 7th United Association of South Africa (UASA) Employment Report (2008), 13 accessible from http://www.skillsportal.co.za/human_resource_management/910744.htm [accessed 30 May 2008].

²⁹⁸ As above, 13. According to Schussler (note above), the average salary of an uneducated person is R2500 per month, provided he/she works for a period of fifty years. Taking into account that most people do not work for such a long period of time, in reality the average salary is much lower.

²⁹⁹ As above, 10.

Because income is crucial to the affordability of socio-economic services, it is safe to argue that most uneducated people are left dependent on the state for the fulfillment of socio-economic rights, such as housing and health rights.³⁰⁰ As will be shown below, these rights cannot be fulfilled immediately by the state. Therefore, a denial of the right to education inevitably results in a denial of other socio-economic rights in the Constitution.

Education implicates the right to equality³⁰¹: a denial of education prohibits a person from competing on equal footing with those who are educated in the pursuit of opportunities to ensure an improved quality of life. However, once a poor child receives an education equal to that of one more fortunate, both have an equal chance of fulfilling their full potential.

Education is essential to the inherent dignity of a person.³⁰² In *Makwanyane*, the Constitutional Court held that “[r]ecognising a right to dignity is an acknowledgement of the intrinsic worth of human beings [which are] entitled to be treated as worthy of respect and concern.”³⁰³ I have shown above that education is essential to finding employment. Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society.³⁰⁴ A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.³⁰⁵ Without the attainment of basic educational skills, a person is rendered powerless to assume control of his/her life. This manifests in a severe infringement of the inherent dignity of a person.

³⁰⁰ See note 264 above.

³⁰¹ Section 9 (1) of the Constitution provides: “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

³⁰² Section 10 of the Constitution provides: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

³⁰³ *Makwanyane* (note 27 above) para 328.

³⁰⁴ *Hospersa obo Venter v SA Nursing Council* (2006) 6 BLLR 558 (LC) para 27.

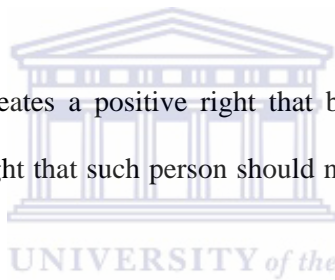
³⁰⁵ As above.

In sum, the realization of the right to basic education is crucial to the fulfillment of the ideals of the transformative Constitution: it facilitates the enjoyment of all other rights in the Constitution, is key to the achievement of an individual's full potential and enables the realization of a society built on the constitutional values of dignity, equality and freedom.

3.3 State obligations

The South African Constitution obliges the state to “respect, protect, promote and fulfill the rights in the Bill of Rights.”³⁰⁶ In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*³⁰⁷, the court held:

[The right to basic education]³⁰⁸ creates a positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education.³⁰⁹



Therefore, the state is not only prohibited from impairing access to the enjoyment of the right, but is obliged to take positive steps to ensure that basic education is provided. An understanding of the specific obligations engendered by the right to basic education requires an understanding of the scope and content of the right. However, to date, South African courts have not clarified the content and the concomitant legal obligations of section 29(1)(a).

In its textual formulation, section 29(1)(a) differs from other socio-economic rights in the Constitution. The rights to have access to housing and health care services and the rights of

³⁰⁶ Section 7(2). See section 2.2.3.2.1 above for an explanation of the different types of obligations.

³⁰⁷ 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) (*School Education Bill case*). (This case was decided under the Interim Constitution).

³⁰⁸ Section 32(a) of the Interim Constitution.

³⁰⁹ *School Education Bill case* (note 307 above) para 9.

access to food, water and social security³¹⁰ are qualified to the extent that the second subsection of these rights states that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of each of these rights. The right to basic education is neither formulated as a right of access nor subject to the same internal qualifiers as sections 26 and 27.

So far, claims have been made against the state for the enforcement of socio-economic rights in various cases before the Constitutional Court. In *Grootboom*³¹¹, the claimants sought access to housing, in *Minister of Health and Others v Treatment Action Campaign and Others*³¹², access to health care services was claimed and in *Khosa*³¹³, permanent residents sought to enforce access to social security. In determining whether government has fulfilled its obligations in respect of each of these rights, the Constitutional Court scrutinized the reasonableness of the government programme put in place to provide for the housing, health and social security needs of the claimants.³¹⁴ The notion of reasonableness has become the standard against which the Constitutional Court assesses government’s compliance to meet its constitutional obligations in respect of qualified socio-economic rights. In *Grootboom*, the court held that “[i]n any challenge

³¹⁰ Section 26 provides:

“(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

Section 27 provides:

“(1) Everyone has the right to have access to-

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

³¹¹ Note 18 above.

³¹² 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC)(TAC).

³¹³ Note 274 above.

³¹⁴ *Grootboom* (note 18 above) para 41; *TAC* (note 312 above) paras 67-68; *Khosa* (note 274 above) paras 44-67.

based on section 26 [or section 27] in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2)[or section 27(2)], the question will be whether the legislative and other measures taken by the state are reasonable.”³¹⁵ In order to be reasonable, a government programme must display the following characteristics:

- The programme must be comprehensive and co-ordinated with a clear delineation of responsibility amongst the various spheres of government, with national government having overarching responsibility;
- The programme must be reasonable both in conception and implementation;
- The programme must be balanced and flexible and make appropriate provision for crises and for short, medium and long-term needs;
- The programme cannot exclude a significant segment of society;
- The programme must include a component which responds to the urgent needs of those in most desperate situations and the state must plan, budget and monitor measures to address immediate needs and the management of crises.³¹⁶

Whether the same standard of reasonableness applies to unqualified socio-economic rights, such as the right to basic education, still needs to be resolved by the court. As I will argue below, it seems as if the court is inclined to subject unqualified socio-economic rights to the same standard. Because of the unqualified nature of section 29(1)(a), it has been described as a “strong, positive right [which] means that in principal [this right] can be asserted regardless of the state’s other budgetary imperatives...”³¹⁷ Moreover, it has been suggested that the unqualified nature of the right imposes a duty on the state to provide basic education without

³¹⁵ *Grootboom* (note 18 above) para 41.

³¹⁶ Liebenberg (note 13 above) 33-34.

³¹⁷ Note 284 above.

immediate delay.³¹⁸ The argument seems to be that because section 29(1)(a) is not subject to “progressive realization” nor formulated to be reliant on the availability of state resources, the right should be realized immediately.³¹⁹ However, it is my submission that the Constitutional Court will not agree. In *Grootboom*, the Court considered the right of children to shelter in terms of section 28(1)(c) of the Constitution.³²⁰ Similar to section 29(1)(a), this provision is unqualified. The respondents argued that the absence of internal qualifiers meant that children had a right to shelter on demand.³²¹ The court’s response to this argument indicates a clear loyalty to “t]he carefully constructed constitutional scheme for progressive realization of socio-economic rights [which] would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand.”³²² The court confirmed its contextual approach to interpretation by interpreting section 28(1)(c) in the context of the rights and obligations created by sections 25(5), 26 and 27 which are connected to the right to shelter.³²³ Because the former rights are subject to internal qualifiers, the court’s point of view seems to be that a contextual interpretation of section 28(1)(c) results in this right being subject to the same.³²⁴ In *TAC*, the Court was once again presented with an opportunity to provide clarity on the unqualified nature of section 28(1)(c).³²⁵ This case dealt with the state’s policy to provide nevirapene, a drug thought to reduce HIV/AIDS transmission from mother to child during

³¹⁸ S Liebenberg “Taking Stock: The jurisprudence on children’s socio-economic rights and its implication for government policy (2004) 5 *ESR Review* (5), 2.

³¹⁹ See section 2.2.3.2.1 (a) above.

³²⁰ Note 18 above, para 70.

Section 28(1) (c) provides: “Every child has the right to basic nutrition, shelter, basic health care services and social services.”

³²¹ *Grootboom* (note 18 above) para 72.

³²² As above, para 71.

³²³ As above, para 74.

Section 25(5) provides: “The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

³²⁴ *Grootboom* (note 18 above), para 74.

³²⁵ Note 312 above, para 74.

childbirth.³²⁶ The respondents challenged the reasonableness of this policy because it was restricted to selected public hospitals.³²⁷ As a result those mothers without access to these hospitals would be denied an opportunity to be given nevirapene.³²⁸ In interpreting the child's right to basic health care services under section 28(1)(c), the court conceded that "[t]he state is obliged to ensure that children are accorded the protection contemplated by section 28..."³²⁹ However, it did not expressly state that this provision imposes a general direct duty on the state to provide basic health services to children.³³⁰ Sloth-Nielsen asserts that the Court's "judgment was carefully worded and contextualized to avoid imposing general obligations on the state arising from entitlements on demand."³³¹ Thus, it was not clear whether the state's obligation could be extended to other health conditions other than HIV/AIDS.³³² Instead, the court evaluated section 28(1)(c) in terms of the established reasonableness standard. For instance, the needs of the children were described as "most urgent" and their rights as "most in peril" as a result of a "rigid and inflexible policy that excludes them from having access to nevirapene."³³³ In making these observations, the court was clearly considering two factors in determining whether the government policy was reasonable: firstly, it must be balanced and flexible and secondly, it must include a component which responds to the urgent needs of those in most desperate situations.³³⁴ In *TAC*, the Court thus failed to adequately address the unqualified nature of section 28(1)(c). By subjecting this right to the reasonableness review, the Constitutional

³²⁶ As above.

³²⁷ As above, para 76.

³²⁸ As above.

³²⁹ As above, para 79.

³³⁰ J Sloth-Nielsen and C Mbazira "Incy wincy spider went climbing up again-prospects for constitutional (re) interpretation of section 28(1) (c) of the South African Constitution in the next decade of democracy" (2007) 2 *Speculum Juris* 47.

³³¹ As above.

³³² As above.

³³³ Note 312 above, para 78.

³³⁴ Note 13 above, 33-34.

Court gave the impression that there is no difference between the qualified and unqualified socio-economic rights. Therefore, based on the approach to interpretation in *Grootboom* and *TAC*, it seems logical that the Constitutional Court will interpret the right to basic education in “the context of the cluster of socio-economic rights in the Constitution.”³³⁵ The discussion above indicates that the right to basic education overlaps with most rights in the Constitution. Since the qualified rights are subject to internal qualifiers, the court will be inclined to use the reasonableness review to determine whether the state has fulfilled its obligations created by section 29(1)(a).

3.3.1 A revised standard of reasonableness: higher degree of judicial scrutiny in respect of the right to basic education

Although I have indicated above that it seems that the Court does not differentiate between the qualified and unqualified socio-economic rights, the difference in textual formulation between the two sets of rights needs to be further scrutinized. The absence of internal qualifiers in respect of section 29(1)(a) suggests that the intention of the Constitutional Assembly, when adopting this right, was to confer on it a higher normative status than the qualified rights.³³⁶ As a result, it has been argued that the right to basic education has to be subject to a higher standard of review than the established standard of reasonableness.³³⁷ Sachs J asserts that “a higher degree of judicial scrutiny is required for [unqualified] rights, including the right to basic education.”³³⁸ Veriava argues that a higher degree of judicial review requires that the state implement programmes that

³³⁵ *Grootboom* (note 18 above) para 19.

³³⁶ Comment on the Department of Education’s Report to the Minister: *A review of the financing, resourcing and costs of education in public schools*, Law and Transformation Programme, Centre for Applied Legal Studies, University of the Witwatersrand (30 April 2003).

³³⁷ Veriava and Coomans (note 1 above) 62.

³³⁸ A Sachs “Reflections on Emerging Themes” (1999) 1 *ESR Review* 14.

will give effect to section 29(1)(a) “as a matter of absolute priority.”³³⁹ This would require the prioritization of these programmes in budgetary allocations over the state’s other programmes.³⁴⁰ Her views are endorsed by other leading commentators on children’s rights, such as Liebenberg.³⁴¹ However, there are conflicting views on the content of this higher standard of review in respect of the unqualified socio-economic rights. Creamer suggests that the current reasonableness review standard should be supplemented by additional factors, including “accelerated and comprehensive service delivery to children in need.”³⁴² Sloth- Nielsen rejects Creamer’s proposed higher standard of review.³⁴³ Her main point of contention is that there is no clear benchmark against which to measure the accelerated delivery of children’s rights.³⁴⁴ I have stated above that it is unlikely that the Constitutional Court will abandon the reasonableness review standard in respect of the right to basic education. However, I will argue below that there are two factors that require the Court to heighten the current reasonableness standard in respect of the right to basic education: (a) the state’s obligations should be derived from the content of the right and (b) the Court should ascertain the extent of the impact of the denial of the right on the complainant group.

(a) Minimum core obligations

Although some commentators are of the opinion that the minimum core argument has been dealt a “final blow” by the Constitutional Court³⁴⁵, I will argue below that this is not the case. Despite rejecting the notion of the minimum core in *Grootboom*, the Court did not rule out the possibility

³³⁹ Veriava and Coomans (note 1 above) 62.

³⁴⁰ As above.

³⁴¹ Sloth – Nielsen and Mbazira (note 330 above).

³⁴² As above.

³⁴³ As above.

³⁴⁴ As above.

³⁴⁵ As above.

that “[t]here may be cases where it may be...appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.”³⁴⁶ This indicates that in some instances, the Court will consider the minimum core obligations of a right as an additional factor in determining the reasonableness of the state’s conduct. These factors are not a closed list.³⁴⁷ In *Khosa*, the court confirmed that “all relevant factors” have to be considered in “determining whether the state has complied with its constitutional standard of reasonableness.”³⁴⁸ The relevance of these factors “may vary from case to case depending on the particular facts and circumstances.”³⁴⁹ As I will argue below, the minimum core content of the right to education can be regarded as a relevant factor in assessing the reasonableness of the state’s action in realizing this right.

The purpose of this study is to examine the impact of the school funding system on the right to basic education. The factors listed above in respect of the reasonableness review are desirable characteristics of a state policy.³⁵⁰ However, by examining only these factors in determining the reasonableness of the relevant state policies, the full impact of the funding system on the right will not be understood. I have shown in the previous chapter that South Africa has a key international obligation to provide free basic education to its learners.³⁵¹ “Free” and “compulsory” are the two core elements of basic education.³⁵² A reasonableness review devoid of the content of the right to basic education will not be sufficient to determine what is exactly meant by these concepts. Furthermore, the impact of the funding policy on the standard of

³⁴⁶ Note 18 above, para 33.

³⁴⁷ Note 274 above, para 44.

³⁴⁸ As above.

³⁴⁹ As above.

³⁵⁰ D Bilchitz “Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic jurisprudence” (2003) 19 *SAJHR* 9.

³⁵¹ See section 2.2.3.2.2 above.

³⁵² As above.

education cannot be determined without understanding the content of the right first. In terms of the international standard, a basic education has to comply with the standard of adequacy.³⁵³ The standard of basic education can therefore not be measured without giving content to the right. In *Grootboom*, the court rejected a minimum core approach in terms of the right of access to housing due to the varied needs in the context of housing: “there are those who need land; others need both land and houses; yet others need financial assistance.”³⁵⁴ As a result, the Court argued that the needs and opportunities for the enjoyment of the right will be hard to define and it will be very difficult to decide “whether the minimum core obligation should be defined generally or with regard to specific groups of people.”³⁵⁵ The Court’s reasoning also established that defining the minimum core content is only possible “in so far as a country-specific core is capable of being ascertained.”³⁵⁶ The court further pointed out that in cases where it is appropriate to define the minimum core content, “sufficient information” needed to be placed before the court to make such a determination.³⁵⁷ It is submitted that the needs and opportunities for the enjoyment of the right to basic education are the same for all learners entitled to it.³⁵⁸ Learners in South Africa may come from different socio-economic backgrounds but as learners in the same public school domain and as equal bearers of their constitutional right to basic education they are all entitled to the same type and quality of education. Defining the content of basic education is thus possible in a South African context since the objectives in meeting the basic learning needs are the same for all South African learners and the necessary information are available to provide guidance as to the content of the right. The 4-A scheme had been accepted in terms of international law as

³⁵³ See section 2.2.3.1.3 above.

³⁵⁴ Note 18 above, para 32.

³⁵⁵ As above.

³⁵⁶ As above, paras 32-33. See also Veriava and Coomans (note 1 above) 65.

³⁵⁷ Note 18 above, para 32.

³⁵⁸ Note 284 above, 18.

the most comprehensive framework in which to define the content of the right to basic education. At local level, this scheme had been endorsed by the South African Human Rights Commission and is cited with approval by the leading commentators on the right to education.³⁵⁹ The Department of Education, through the adoption of its *National Plan of Action* and other policies have borrowed from the 4A Scheme to give content to section 29(1)(a).³⁶⁰ For the reasons indicated above, I submit that the Constitutional Court, in assessing the impact of the school funding system on section 29(1)(a), will be compelled to determine the content of this right.

(b) The impact of the denial of the right to basic education on the complainant group: the case of *Khosa*³⁶¹

In *Khosa*, the applicants challenged the constitutionality of certain provisions of the Social Assistance Act.³⁶² The applicants who enjoyed permanent residence status of South Africa, argued that their exclusion from the country's social security scheme was in violation of the state's obligations under section 27(1)(c) of the Constitution.³⁶³ They also contended that the exclusion constituted unfair discrimination against them in terms of section 9(3) of the Constitution and was unjustifiable in terms of section 36 of the Constitution.³⁶⁴

Section 9 of the Constitution provides:

- "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more

³⁵⁹ See notes 1, 4 above.

³⁶⁰ See note 63 above, 37.

³⁶¹ Note 274 above.

³⁶² 59 of 1992. As above, para 1.

³⁶³ As above, para 38.

³⁶⁴ As above, para 39.

grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

In determining the constitutionality of the stated provisions, Mokgoro J examined the reasonableness of the exclusion of the applicants from the state's social assistance scheme.³⁶⁵ In assessing the reasonableness of the scheme, she, *inter alia*, examined "the impact of the exclusion on permanent residents...[including the effect it has] on other intersecting rights."³⁶⁶ She held that "...where the right to social assistance is conferred by the Constitution on "everyone" and permanent residents are denied access to this right, the equality rights entrenched in section 9 are directly implicated."³⁶⁷ Mokgoro J argued that it is necessary that the state differentiates between certain categories of people in order "to allocate rights, duties, immunities, privileges, benefits or even disadvantages and to provide efficient and effective delivery of social services."³⁶⁸ However, she held further that these "classifications must meet the constitutional standard of reasonableness."³⁶⁹ At para 53, she states:

In this case, the state has chosen to differentiate between citizens and non-citizens. That differentiation, if it is to pass constitutional muster, must not be arbitrary or irrational nor must it manifest a naked preference. There must be a rational connection between that differentiating law and the legitimate government purpose it is designed to achieve. A differentiating law or action which does not meet these standards will be in violation of section 9(1) and section 27(2) of the Constitution.

³⁶⁵ As above, paras 48-49.

³⁶⁶ As above, para 49.

³⁶⁷ As above.

³⁶⁸ As above, para 53.

³⁶⁹ As above.

Mokgoro J conceded that there was indeed a rational connection between the differentiating law and a legitimate government purpose.³⁷⁰ This proved that the differentiating law met the standard of rationality as provided for in section 9(1). However, the test for determining constitutionality under the Constitution is not rationality, but reasonableness.³⁷¹ In determining the reasonableness of the state's measures to provide social assistance to the applicants, Mokgoro J proceeded to determine whether the exclusion of the applicants constituted unfair discrimination under section 9(3) of the Constitution.³⁷² The Constitutional Court has adopted a test to determine unfair discrimination which supports the notion of substantive equality endorsed by the Constitution.³⁷³ This enquiry, established in the case of *Harksen v Lane*³⁷⁴ provides as follows:

(a) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to discrimination? If it is on a specified ground [in section 9(3)], then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focus primarily on the impact of the discrimination on the complainant and others in his

³⁷⁰ As above, para 67.

³⁷¹ As above.

³⁷² As above, para 68.

³⁷³ The South African Constitution endorses a substantive approach to equality which transcends mere formal equality which requires that the law treats people the same irrespective of their starting point in life. By supporting a substantive notion of equality, the Constitutional Court acknowledges that “besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under – privilege, which still persist.” See *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) and *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) para 26.

³⁷⁴ 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) (*Harksen*).

or her situation.³⁷⁵

The Court has distinguished the following factors in determining unfair discrimination:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. . . .

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.”³⁷⁶

The Constitution only prohibits unfair discrimination.³⁷⁷ Unfair discrimination “principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.”³⁷⁸ Dignity is therefore of fundamental importance in understanding unfair discrimination.³⁷⁹ Unfair discrimination amounts to differential treatment that is hurtful and demeaning.³⁸⁰ It takes place when “law or conduct, for no good reason treats some people as inferior or incapable or less deserving of respect than others.”³⁸¹ It also takes place “when law or conduct perpetuates or does nothing to

³⁷⁵ I Curie and J De Waal *The New Constitutional and Administrative Law, Volume 1* (2001) 349-350.

³⁷⁶ *Harksen* (note 374 above) para 53.

³⁷⁷ Section 9(3).

³⁷⁸ *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) para 31.

³⁷⁹ Note 375 above, 244.

³⁸⁰ As above.

³⁸¹ As above.

remedy existing patterns of disadvantage.”³⁸²

In *President of the Republic of South Africa and Another v Hugo*³⁸³ Goldstone J stated that:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.

In *Khosa*, Mokgoro J found that the applicants form part of a vulnerable group that are worthy of constitutional protection.³⁸⁴ She held that because permanent residents also contribute to the welfare system through the payment of taxes but were nevertheless excluded from claiming social assistance, the impression was created that they "are in some way inferior to citizens and less worthy of social assistance."³⁸⁵ She found that "decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society."³⁸⁶ This suggests that if vulnerable groups are excluded from public benefits to which they are entitled to, they are not treated as equal members of society. In assessing the impact of the denial of social assistance on the applicants, Mokgoro J held that their exclusion from social welfare benefits casts them in the role of supplicants to the extent that they have to depend on friends, family and their community [for survival]. As a result, their dignity is gravely infringed.³⁸⁷ Their exclusion from social assistance was also found to deprive them of their ability to enjoy the other constitutional rights vested in them.³⁸⁸ In sum, it was held that the denial of the right to social

³⁸² As above.

³⁸³ 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) paras 41-43.

³⁸⁴ Note 274 above, para 74.

³⁸⁵ As above.

³⁸⁶ As above.

³⁸⁷ As above, para 76.

³⁸⁸ As above, para 77.

security affected the applicants "in a most fundamental way".³⁸⁹ Hence, this denial was found to constitute unfair discrimination against the applicants.³⁹⁰ Thus, where a vulnerable group is excluded from benefits derived from a socio-economic right and that exclusion has a grave impact on their dignity and leads to a denial of their other constitutional rights, unfair discrimination is established. A further consideration is Mokgoro J's view that "the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies."³⁹¹ This implies that the importance attached to a socio-economic right and the effect of its exclusion on the dignity and life of a group will determine the extent to which a state can rely on financial and other considerations as justification for not complying with the realization of the right. It is submitted that the more important the right and the more grave the infringement on dignity and life of the group seeking realization of the right, the more difficult it will be for the state to claim that it cannot realize the right because of a lack of resources. This is particularly true in the context of vulnerable groups who are much more prone to have their dignity infringed and other constitutional rights denied if they are excluded from the enjoyment of benefits derived from the realization of socio-economic rights. In line with the notion of the minimum core, states will thus have to prove that they could not realize the right because of circumstances beyond their control or that they could not secure the assistance of the international community.³⁹² The state's burden in proving that they could not meet the minimum core obligations of a right is thus very arduous.³⁹³ Lastly, Mokgoro J held that "the denial of access to social grants to permanent residents who, but for their citizenship,

³⁸⁹ As above.

³⁹⁰ As above.

³⁹¹ As above, para 82.

³⁹² See note 205 above.

³⁹³ The exact nature of this evidentiary burden will be discussed in Chapter 4.

would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution."³⁹⁴ This suggests that where there is a lack of equal access to benefits derived from a socio-economic right, it is more likely that there will be an infringement of the right.



³⁹⁴ Note 274 above, para 82.

CHAPTER 4: CONSTITUTIONALITY OF THE SCHOOL FUNDING SYSTEM

4. Introduction

This chapter is the crux of the study. Here, I assess the constitutional validity of the school funding system by examining the impact thereof on the right to basic education of black and/or poor learners. However, before embarking on this enquiry, it is imperative that I clarify the present legislative framework governing the funding of basic education.

4.1 The legislative framework governing the funding of public schools

In terms of Schedule 4 of the Constitution, education is a matter of concurrent national and provincial legislative competence. Thus, both the national parliament and the various provincial legislatures have the power to pass laws on education.³⁹⁵ The Ministry of Education determines national policy that governs all schools in South Africa.³⁹⁶ However, provincial education authorities bear the primary responsibility for public schools.³⁹⁷ The funding of public schools is determined by provincial budgets in compliance with national standards.³⁹⁸ Since 1994, significant legislative and policy reform has taken place to address the historical disparity in the education system. Various laws, regulations and policies have been implemented to this effect. The **South African Schools Act (Schools Act)**³⁹⁹ as amended by the **Education Laws Amendment Act**⁴⁰⁰, the **National Norms and Standards for School Funding (Norms and**

³⁹⁵ A conflict of laws between national parliament and a provincial legislature is resolved in terms of section 146 of the Constitution.

³⁹⁶ *National survey on barriers of access to education in South Africa: Baseline review and conceptual framework document (Barriers survey)* (September 2006), prepared jointly by Social Surveys and the Centre for Applied Legal Studies, University of the Witwatersrand, 22.

³⁹⁷ B Barry *Schools and the Law: A Participant's Guide* (2006) 23.

³⁹⁸ As above, 23.

³⁹⁹ 84 of 1996.

⁴⁰⁰ 24 of 2005.

Standards)⁴⁰¹ and the **Employment of Educators Act**⁴⁰² together with the **Regulations for the Creation of Educator Posts in a Provincial Department of Education and the Distribution of Such Posts to the Educational Institutions of such a Department**⁴⁰³ govern the funding of public schools in South Africa. The Schools Act instructs government to fund public schools from public revenue to ensure the redress of the inequalities in the education system.⁴⁰⁴ The Norms and Standards clarify the procedures to ensure the redress contemplated by the Schools Act.⁴⁰⁵ Lastly, the **Employment of Educators Act** read with its relevant regulations outlines a post-provisioning model which aims to re-deploy well qualified teachers to the previously disadvantaged schools.⁴⁰⁶

4.1.1 Categories of funding

State funding is divided into three categories.⁴⁰⁷ Firstly, the bulk of funding (approximately 90 percent) is spent on teachers' salaries, the exact amount of which is connected to the qualifications and experience of the teachers.⁴⁰⁸ Since most suitably qualified teachers are at historically advantaged schools, the lion's share of the state's budget is allocated to these schools.⁴⁰⁹ The Department has attempted to re-deploy well qualified teachers to the disadvantaged schools by instructing provincial departments to allocate between two and five

⁴⁰¹ Government Gazette 19347: General Notice 2362 as amended by South African Schools Act: Amended National Norms and Standards for School Funding (Government Gazette 29179, General Notice 869).

⁴⁰² 76 of 1998.

⁴⁰³ Government Gazette 19627: Government Notice R1676 as amended by Government Gazette 24077: Government Notice R1451.

⁴⁰⁴ Section 34-36 as amended by the Education Laws Amendment Act. See also Preamble to the Schools Act.

⁴⁰⁵ Note 401 above, paras 1-3.

⁴⁰⁶ Veriava (note 114 above) 4.

⁴⁰⁷ Note 401 above, 24.

⁴⁰⁸ As above.

⁴⁰⁹ As above.

percent of these posts to poor schools.⁴¹⁰ However, it is doubtful whether this decision has had any significant effect on the difference in personnel funding between the public schools. Most provinces have only set aside two percent of their posts for the redistribution.⁴¹¹ Moreover, the South African Democratic Teachers' Union (SADTU) suggests that the formula governing the selection of schools to benefit from this re-deployment is not favouring the poor schools.⁴¹² In addition, it is submitted that the transformation of the disadvantaged schools into learning centres which are equal to their former Model C counterparts will require a far more robust policy from government than the current redistribution model. The second category of state funding is directed at the infrastructure of schools.⁴¹³ Since most disadvantaged schools are in a deplorable physical condition⁴¹⁴, government allocates money for infrastructure almost exclusively to poor schools.⁴¹⁵ The last category is the non-personnel, non-capital expenditure (NPNC) or more commonly known as "school allocation" money.⁴¹⁶ This expenditure is directed at the purchasing of capital equipment and consumables necessary for teaching and assessment in schools, including textbooks, stationary, furniture, computers, photocopiers, teaching aids, electricity, water, and so forth.⁴¹⁷ Schools pay for these from their NPNC expenditure and from money produced by charging school fees⁴¹⁸ and organizing fund raising activities.⁴¹⁹

⁴¹⁰ As above.

⁴¹¹ As above.

⁴¹² As above. In terms of this formula, learners are "weighted" according to factors such as "class size, the range of subjects offered, whether the school caters for disabled children, the number of different language streams in a school and the level of poverty in the community served by the school." The higher the total weighting of the learners in a school, the more likely it is that the school will benefit from the re-deployment of teachers' posts. According to SADTU, the more advantaged schools are benefited by this formula since the level of poverty can be outweighed by the other factors from the formula.

⁴¹³ Note 396 above, 24.

⁴¹⁴ See note 288 above.

⁴¹⁵ Note 396 above, 25.

⁴¹⁶ As above.

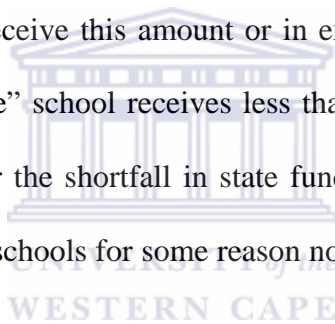
⁴¹⁷ As above, 25-26.

⁴¹⁸ Section 39 (1) of SASA provides:

"School fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending" the annual budget meeting of the school.

4.1.2 National quintiles and “no fee” schools

The state funding allocated to schools is governed by the Norms and Standards in terms of which schools are divided into national quintiles ranging from the poorest school to the least poor school.⁴²⁰ The provincial departments are instructed by national government to allocate a specified amount per learner according to the quintile in which the learner is based.⁴²¹ For example, in 2008, schools in quintile one (poorest schools) received an allocation of R775 per learner and in quintile 5 (least poor schools) an amount of R129 per learner.⁴²² An adequacy benchmark is also determined nationally, which is considered as “the minimally adequate amount for a learner’s right to basic education to be realized.”⁴²³ The adequacy benchmark for 2008 was R581.⁴²⁴ Schools that receive this amount or in excess thereof are declared “no fee” schools.⁴²⁵ However, if a “no fee” school receives less than the adequacy benchmark, it may charge school fees to make up for the shortfall in state funding.⁴²⁶ The Department points out that “should the funding of no fee schools for some reason not reach the no fee threshold level, it



⁴¹⁹ Note 396 above, 25.

⁴²⁰ Note 401 above, para 109.

⁴²¹ Note 396 above, 30.

⁴²² Note 401 above, para 109.

According to the Norms and Standards, schools in quintile 2 receive R711 per learner, schools in quintile 3, R581 per learner and schools in quintile 4, R388 per learner for the year 2008.

According to para 101 of the Norms and Standards, the provincial education departments must assign to each school a poverty score that will enable them to sort schools from poorest to least poor. The determination of this score is based on the relative poverty of the community around the school, which in turn depends on the individual or household advantage or disadvantage with regard to income, wealth and/or level of education. The poverty score should be based on data collected from the national Census conducted by Statistics South Africa. Provincial departments are prohibited from relying on data provided by schools themselves.

⁴²³ Note 396 above, 30.

⁴²⁴ Note 401 above, para 109.

In terms of para 91 of the Norms and Standards, in assessing the level of allocation to schools, government considers the following key factors, namely the “rights of learners with regards to schooling”, “the minimum basic package of school inputs” required to satisfy “quality education”, the costs of services and goods needed by schools, the “distribution of income and poverty in the country”, the “greater ability of certain communities to make private contributions to the schooling process” and the overall budget of government.

⁴²⁵ As above, para 156. Thus, schools in quintile 1, 2 and 3 are no-fee schools.

⁴²⁶ Section 37 (11) of the Schools Act as amended by the Education Laws Amendment Act.

would be important for parents to have a way of dealing with this contingency.”⁴²⁷ It is submitted that this provision defeats the whole purpose of exempting parents from payment of school fees in the poorest quintiles, especially in light of government’s declaration that it “believes that in schools serving the poorest communities, there should be no school fees.”⁴²⁸ A further concern is that schools may receive the adequacy benchmark or in excess thereof, but this may not be enough to cater for all of their expenditure needs. The Education Department receives regular complaints from no-fee schools claiming that they have less income since their declaration as no-fee schools.⁴²⁹ This may explain the practice of the latter schools to continue charging school fees, despite their status as “no-fee” schools.⁴³⁰

4.1.3 Schools charging school fees

Schools receiving less than the adequacy benchmark may charge school fees.⁴³¹ Section 39 of the Schools Act provides:

- (1) School fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending” the annual budget meeting of the school.
- (2) [This resolution] must provide for :
 - (a) the amount of fees to be charged; and
 - (b) equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees.

Firstly, it is noted that parents have the discretion to determine whether school fees will be charged and the amount to be charged. Government explains the reasoning behind the levying of school fees and making it subject to the discretion of parents as follows:

⁴²⁷ Note 401 above, para 163.

⁴²⁸ As above , para 153.

⁴²⁹ <http://www.mg.co.za/article/2007-06-01-free-education-in-sharp-focus> [accessed 1 July 2008].

⁴³⁰ <http://www.kzneducation.gov.za/news/2007/21-01-2007b.pdf> [accessed 1 July 2008].

⁴³¹ Note 401 above, para 156.

The [Schools Act] imposes a responsibility on all public school governing bodies⁴³² to do their utmost to improve the quality of education in their schools by raising additional resources to supplement those which the state provides from public funds (section 36). All parents, but particularly those who are less poor or who have good incomes, are thereby encouraged to increase their own direct financial and other contributions to the quality of their children's education in public schools. The Act does not interfere unreasonably with parents' discretion under the law as to how to spend their own resources on their children's education.⁴³³

This statement acknowledges that the state is aware that its own funding towards schools may not be enough to provide for a quality education. Therefore, parents' contributions through school fees or fund raising activities should make up for a shortfall in state funding. It is submitted that this declaration illustrates the state's shortsightedness into the existing inequality in the education system. Given the discretion of parents, the amount of school fees to be charged depends on the economic status of the parent community the school serves. Thus, the more affluent the parent community, the higher the school fees that will be charged and *vice versa*. Although poor schools may receive a larger amount in school allocations than the more advantaged schools, the parent communities serving the former schools are not financially able to increase the amount of fees charged if there is a shortfall in the state funding. However, schools serving affluent communities are in a position to increase their budgets despite receiving a lesser allocation from government.⁴³⁴ The link between inequality and school fees is best revealed by the fact that more money enters the education system through school fees than through the allocations by provincial education departments.⁴³⁵ Thus, for example in 2001, the national school allocation from government flowing into the education system amounted to R1,5

⁴³² The school governing bodies exercise various functions at a school, including administering and allocating school fees. See sections 16-21 of the Schools Act.

⁴³³ Note 401 above, para 41.

⁴³⁴ Note 396 above, 26.

⁴³⁵ As above, 26-27.

billion.⁴³⁶ In 2002, school fees constituted at least R3,5 billion.⁴³⁷ Approximately 90 percent of school fees are charged by the richest 20 percent of schools.⁴³⁸ Only 0.9 percent of school fees reaches the poorest 20 percent of schools.⁴³⁹ The following table compiled by Idasa⁴⁴⁰ shows that despite government’s policies of redress in education, the existing inequality in the education system is perpetuated by the present school fee system:

BUDGETS IN RICH AND POOR SCHOOLS		
Funding Source	‘Poor School’	‘Rich School’
School allocation	R196 000	R28 000
Teacher salaries (30 teachers @ R60 000)	R180 000	R180 000
School fees	R50 000	R2 500 000
TOTAL BUDGET	R 426 000	R2 708 000

Idasa based the study above on a hypothetical “poor and rich school” having the same amount of learners and teachers (1000 learners and 30 teachers).⁴⁴¹ It assumes that the poor school is charging its learners R50 annually in school fees whereas the rich school is charging R2500 annually per learner.⁴⁴² The results of the study shows that despite the lesser contribution of government to school allocation, the rich school has a budget more than twice the size of the poor school because of the vast difference in the amount of school fees charged.

⁴³⁶ As above, 27.

⁴³⁷ As above.

⁴³⁸ As above.

⁴³⁹ As above.

⁴⁴⁰ Institute for a Democratic South Africa.

⁴⁴¹ The study performed by Idasa is accessible from Idasa Budget Information Service *The Intergovernment Fiscal Review – Education* (November 1999).

⁴⁴² As above.

4.1.3.1 The School Fee Exemption Policy

The legislature acknowledges that some parents may not be able to afford school fees. Therefore, provision is made for the automatic, full, partial or conditional exemption of school fees.⁴⁴³ Until 2005, before amendments to the Schools Act, parents qualified for a full exemption if they earned less than ten times the annual school fees.⁴⁴⁴ Parents qualified for partial exemptions if they earned between ten and thirty times the annual school fees.⁴⁴⁵ Currently, the different forms of exemptions are calculated according to an extremely intricate formula which looks like this:

$$\frac{[(E=F + T + f) / (Y + y_o)]}{[I]} > [10\%]$$

⁴⁴³ South African Schools Act: Regulations Related to the Exemptions of Parents from Payment of School Fees in Public Schools (Government Gazette 29311:Government Notice 1052) (Exemption Regulations), para 5.

⁴⁴⁴ Note 396 above, 28.

⁴⁴⁵ As above.

⁴⁴⁶ Note 443 above, para 6(2).

E = per learner expenditure by parent in a school; F = annual school fees charged to any parent in the school; T = additional monetary contributions explicitly demanded by the school; f = the lowest of the three values; (1) the adequacy benchmark for the current yr (2) the average fee charged to the parent in the school (3) the average nondiscounted annual fees charges in other schools; yo = the number of learners in other schools; Y = the number of learners for which a parent is charged annual school fees in the current school; I = combined gross income of parents; 10% is of the gross income used towards education expenditure.

Phillip Tucker from the Centre of Applied Legal Studies at [http://64.233.183.104/search?q=cache:nEsBs2QRXwkJ:web.wits.ac.za/NR/rdonlyres/E0357D9D-1DDA-4DDC-87BA-](http://64.233.183.104/search?q=cache:nEsBs2QRXwkJ:web.wits.ac.za/NR/rdonlyres/E0357D9D-1DDA-4DDC-87BA-5BBEBAD4809A/0/SchoolfeesarticleinDeRebusPhillipaTucker.pdf+amended+exemption+regulations&hl=en&ct=c&lnk&cd=7&gl=za)

[5BBEBAD4809A/0/SchoolfeesarticleinDeRebusPhillipaTucker.pdf+amended+exemption+regulations&hl=en&ct=c&lnk&cd=7&gl=za](http://64.233.183.104/search?q=cache:nEsBs2QRXwkJ:web.wits.ac.za/NR/rdonlyres/E0357D9D-1DDA-4DDC-87BA-5BBEBAD4809A/0/SchoolfeesarticleinDeRebusPhillipaTucker.pdf+amended+exemption+regulations&hl=en&ct=c&lnk&cd=7&gl=za) [accessed 7 November 2008] explains the formula as it pertains to full and partial exemptions as follows:

“If the annual school fees (including any extra expenses such as a school trip or any extra uniforms, for example, sports uniforms) are 10% or more of the total gross annual income (including salaries, investments and any business profits for both parents, if a two-parent household) a parent is entitled to a **full exemption** and will not have to pay school fees. If the school fees are between 3,5% and 10% of his total income a parent will qualify for a **partial exemption**. If the school fees are 2,5% of a parent’s total income, the parent does not qualify for any **exemption**, unless he has three or more children at the same public school or at another public school that has not been declared a ‘no-fee’ school. If the school fees are 3% of a parent’s total income, the parent does not qualify for any **exemption**, unless he has two or more children at the same public school or at another public school that has not been declared a ‘no-fee’ school. Note that, when a parent has children in different schools or more than one child at the same school, the amount of school fees that the parent has to pay in respect of each child must be calculated individually. This must be done by applying the same formula and using the highest amount of school fees at each particular school. “

According to para 1 of the Exemption Regulations, a conditional exemption may be “granted to a parent who qualifies for a partial exemption, but owing to personal circumstances beyond his or her control, cannot even pay the reduced amount.” A conditional exemption may also be granted to a parent who does not qualify for an exemption

The principal is obliged to inform parents of the procedures for applying for an exemption from school fees.⁴⁴⁷ Parents are also entitled to a copy of the regulations governing the exemption of school fees which must be displayed at a conspicuous place at the school.⁴⁴⁸ The status of parents who apply for exemptions must be kept confidential by the school.⁴⁴⁹ An educator or similar person at a school is obliged to assist parents who require assistance in applying for an exemption.⁴⁵⁰ Where such assistance is not available, the principal must assist the parents.⁴⁵¹ In light of this complex formula which has been described as “ridiculously convoluted”, it is likely that most parents will rely on the schools to assist them in applying for exemptions. In *Centre for Applied Legal Studies and Others v Hunt Road Secondary School and Others*, the court “ordered that the Hunt Road Secondary School was interdicted against proceeding with any debt-recovery actions instituted against parents for unpaid fees since January the previous year (2006), unless it could prove that the parents did not qualify for school-fee exemptions in terms of the Schools Act.”⁴⁵² Despite this landmark decision, the “general trend” in many schools is not to enforce the exemptions policy.⁴⁵³ The main reason for non-enforcement seems to be that the state does not grant compensation to schools that do grant exemptions.⁴⁵⁴ As indicated by the *National Plan of Action* “[t]he school allocations flowing to quintile 5 (richest schools) are intended to make it possible and fair for these schools to enrol poor learners to a level where 25% of learners would

“but supplies information [to the school governing body] indicating his or her inability to pay school fees owing to personal circumstances beyond his or her control.” The Automatic exemptions are available to a person who has the responsibility of a parent in respect of a child placed in a foster home, a youth care centre, a place of safety or an orphanage; a person who is a kinship caregiver of an orphan or of a child who has been abandoned by his or her parents and is without any visible means of support; a person who receives a social grant on behalf of a child or a child who heads a household.

⁴⁴⁷ Note 443 above, para 3(1)(a).

⁴⁴⁸ As above, paras 3(2) and (3).

⁴⁴⁹ As above, para 3(4).

⁴⁵⁰ As above, para 9(1).

⁴⁵¹ As above, para 9(2).

⁴⁵² Unreported Case 10091/2006, Kwazulu-Natal High Court. See also note 446 above and Veriava (note 114 above) 16.

⁴⁵³ Veriava (note 114 above) 8.

⁴⁵⁴ As above, 7.

be granted full exemption from school fees.”⁴⁵⁵ This implies that the purpose of the allocation is to reimburse the school for exempting 25% of its learners from school fees. However, the relevant legislation does not give effect to this by expressly ordering the state to subsidize schools which exempt learners from school fees.⁴⁵⁶ Moreover, if one considers the current allocations to quintile 5, it is probable that the allocation from the state will be far less than what the school would have collected in terms of school fees. A second reason for non-enforcement is that in many cases, schools do not even have exemption policies in place.⁴⁵⁷ Many parents are not even aware of such a right to apply for an exemption from school fees.⁴⁵⁸ This implies that many schools are disregarding the law by not taking the necessary steps to provide the required information to parents to enable them to enforce their rights under the Exemption policy. Fiske and Ladd studied fee exemption patterns in South Africa and established that only 2.5% of parents with children in primary schools are granted exemptions.⁴⁵⁹ At secondary school, 3.7 of parents receive exemptions.⁴⁶⁰ A final reason for the poor enforcement of the exemption policy is that the law does not impose any sanctions on schools which fail to adopt exemption policies.⁴⁶¹

4.2 The constitutionality of the school funding system

I will argue below that the school funding system is unconstitutional because the exclusion of black and/or poor learners from equally benefitting under the latter system is unreasonable. In line with *Khosa*, I will contend that the funding system unfairly discriminates against these learners on the basis of race and/or socio-economic status. As a result, it is unreasonable and thus

⁴⁵⁵ Note 77 above, para 41.

⁴⁵⁶ Note 114 above, 7.

⁴⁵⁷ As above, 8.

⁴⁵⁸ As above.

⁴⁵⁹ EB Fiske and HF Ladd “Balancing public and private resources for basic education: school fees in post-apartheid South Africa” in L Chisholm (ed) *Changing Class Education in Post-Apartheid South Africa* (2004) 72-74.

⁴⁶⁰ As above.

⁴⁶¹ Veriava (note 114 above) 8.

infringes section 29(1)(a) and section 9 of the Constitution. In order to determine which benefits learners are entitled to, it is imperative to clarify the obligations engendered by the right to basic education, which I have sufficiently dealt with in the previous chapters. This is in accordance with my proposed heightened standard of reasonableness review which requires courts to examine the content of the right as well as the impact of the denial of the right on black and/or poor learners.

4.2.1 Does the school funding system unfairly discriminate against black and/or poor learners?

Section 9 (3) of the Constitution provides:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Section 5(1) of the Schools Act provides:

A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.

Section 5(3) of the Schools Act provides:

No learner may be refused admission to a public school on the grounds that his or her parent is unable to pay or has not paid the school fees determined by the governing body under section 39.

In terms of the *Harksen* enquiry⁴⁶², there is no violation of section 9(1) of the Constitution because the school fee system is rationally connected to legitimate government purposes. The Education Department has noted that school fees serve the following objectives:

⁴⁶² See 68 above.

- (a) It provides a mechanism to government to raise revenue from parents who are economically able to make such a contribution, “which in turn provides fiscal space for the state to implement preferential funding for poor schools.
- (b) It encourages parents to participate in the governance of schools; and
- (c) It promotes accountability of schools to the parent communities.”⁴⁶³

These purposes in my view constitute legitimate government purposes. I will now proceed to determine whether there is a violation of section 9(3), firstly on account of race and secondly on account of economic status.

(i) Race

According to a study by Fiske and Ladd, with some exceptions, race is still one of the determining factors of the choice of school a learner attends.⁴⁶⁴ The study reveals that most learners attend the schools that they were compelled to attend in the past on account of their race.⁴⁶⁵ Because of former Apartheid laws⁴⁶⁶, the geographical location of the school is closely linked to the wealth of the community.⁴⁶⁷ Thus, former black schools are located in predominantly impoverished communities whereas former white schools are located in overwhelmingly rich communities.⁴⁶⁸ Because the state allocations to a school is determined by

⁴⁶³ Note 401 above, para 152.

⁴⁶⁴ EB Fiske & HF Ladd ‘Financing Schools in Post-Apartheid South Africa: Initial Steps Toward Fiscal Equity’ (prepared for International Conference on Education and Decentralisation: African Experiences and Comparative Analysis, Johannesburg, 10-14 June 2002) in Roithmayr (note 6 above).

⁴⁶⁵ As above. Fiske and Ladd found that 79% of black learners remained in the former DET schools, 94% of former coloured learners remain in the former HOR schools and primarily 100% of white learners remain in the former HOA schools.

⁴⁶⁶ In *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) Langa J remarked at para 32:

“The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory.”

⁴⁶⁷ Note 464 above.

⁴⁶⁸ As above.

the poverty of the community around the school⁴⁶⁹, it is evident that the former black schools will be located in the poorest quintiles whereas the former white schools will be located in the least poor quintiles. Because of the close correlation between race and geographical location, it is submitted that section 39 of the Schools Act indirectly differentiates between learners on the basis of race. Because race is a listed ground in section 9(3), indirect discrimination is established. In *Pretoria City Council v Walker*, the Constitutional Court held that indirect discrimination occurs where “conduct may appear to be neutral” but the consequences thereof results in discrimination.⁴⁷⁰ Although section 39 of the Schools Act facially differentiates on the basis of geographical location (a seemingly neutral ground), the effect of the discretion given to parents is that black learners receive a far lesser contribution from their community in respect of school fees than their white counterparts on account of the poverty of the geographical location of the school.⁴⁷¹ Whether the discrimination is unfair, depends on the following factors. Firstly, the position of black learners in our society has been well documented in this study.⁴⁷² To reiterate, most of these learners are still attending schools lacking the most basic resources and qualified teachers because of the inequality in the funding regime of the Apartheid government.⁴⁷³ According to statistics provided by the Department of Education, 7 000 teachers in the public education system are under qualified or unqualified to teach.⁴⁷⁴ These teachers are almost exclusively in the previously disadvantaged schools.⁴⁷⁵ However, this figure could be much larger since the human resources system of the Department does not indicate the

⁴⁶⁹ Note 401 above, paras 87 -91.

⁴⁷⁰ Note 466 above, para 32.

⁴⁷¹ I do take into account that there may be white learners in poor quintiles and black learners in the least poor quintiles. However, I am concerned here with establishing unfair discrimination against the overwhelming majority of black learners.

⁴⁷² See section 3.2.1 above.

⁴⁷³ As above.

⁴⁷⁴ Rapport, “SA werf wiskunde-, wetenskap-onnies in Egipte, Uganda” (31 May 2008).

⁴⁷⁵ Note 396 above, 23.

qualifications of teachers.⁴⁷⁶ As indicated above, government's attempt to re-deploy well qualified teachers to the poor schools has not been successful.⁴⁷⁷ As a result, these schools are left to cope without suitably qualified teachers because unlike rich schools they are not able to recruit additional teachers on governing body contracts, paying them from school fees.⁴⁷⁸ In contrast, most white learners are benefiting from the same system which guaranteed highly qualified teachers and manifested in former Model C schools which can boast with "state of the art computers, cutting edge laboratories and first rate textbooks."⁴⁷⁹ Ironically, the democratic regime which aims to "redress past injustices in educational provision"⁴⁸⁰ is perpetuating the inequality in the current education system. Because of the discretion given to parents to determine school fees, former white schools can charge an amount of fees which enable them to maintain their position of privilege if government funding is not enough. On the face of it, the current state funding regime favours these schools with a higher allocation in NPNC expenditure. From these allocations, the poor schools have to pay their water and electricity costs as well as purchase textbooks, teaching aids and other capital equipment and consumables. In the event of a shortfall, these schools have to rely on school fees. However, considering the poor financial status of the parent community, poor schools "must just make do" if school fees are not enough to provide for all of their expenditures.⁴⁸¹ The second factor to consider is the nature and purpose

⁴⁷⁶ Note 474 above.

⁴⁷⁷ See section 4.1.1 above.

⁴⁷⁸ Note 401 above, para 46.

⁴⁷⁹ Note 6 above, 30.

⁴⁸⁰ See Preamble to the Schools Act.

⁴⁸¹ In 2007, the National Council of Provinces (NCOP) visited various schools in the Northern Cape as part of its *Taking Parliament to the People Programme*. The purpose of their visit was to identify barriers which hamper service delivery to schools. For purposes of this study, I will reveal their findings in respect of one no-fee school and one fee charging school. The no-fee school reported that the funding from government was not enough to purchase enough textbooks and other learner support material. Poor student performance at the school was attributed to a lack of study material. The fee charging school experienced similar problems. Learners were forced to share textbooks because of a lack of study material. Because of the poverty of the parent community, school fees were charged at only R120 a year. However, this was not enough to provide for the shortfall in state funding. For a detailed account

of section 39 of the Schools Act. The objectives of section 39 are listed above. All these purposes serve important goals in society. However, they are not important enough to negate my finding that section 39 nevertheless amounts to unfair discrimination against black learners. This leads me to the third factor which investigates the impact of section 39 on black learners. I have highlighted the vast difference in resources between former black and white schools above. The discretion imposed on parents in terms of section 39 perpetuates this state of affairs. Where public funding is inadequate, the state expects black learners to “get by” on the limited resources available to them. Moreover, because of the state’s failed policy to re-deploy well-qualified teachers to the former disadvantaged schools, black learners are deprived of the same quality of teaching as is found in former white schools. Black schools do not have the financial capacity to employ additional teachers from a healthy school budget as is the case with former white schools. The impact of section 39 results in a situation which conveys a message to black learners that they are inferior and not entitled to be educated under the same conditions and entitled to the same resources as their white counterparts. They are in effect being told that they are not entitled to the same respect and concern from government as white learners. There is no doubt that the fundamental dignity of black learners is severely impaired.

(ii) Socio - economic status

Socio- economic status is not a ground listed in section 9 (3). Differentiation based on socio-economic status will result in discrimination if the ground has the potential to impair a person’s dignity or other comparable interests.⁴⁸² The Equality Act⁴⁸³ defines “socio –economic status” as

of the NCOP’s findings, see <http://www.pmg.org.za/docs/2008/comreports/080515ncopreport2.htm> [accessed 7 November 2008].

⁴⁸² *Harksen* (note 374 above), para 53.

“[including] a social or economic condition or perceived condition of a person who is disadvantageded by poverty, low employment status or low-level education qualifications.”⁴⁸⁴

Thus, socio-economic status is inextricably linked to a level of poverty, in other words what is affordable to a person or not. According to the Vienna Declaration⁴⁸⁵, the exclusion of people with a low socio-economic status from social services is an infringement of their inherent dignity.⁴⁸⁶ Thus, a person’s dignity is impaired where there is an inability to access social services. The Human Rights Commission reveals that many learners are denied access to basic education because of an inability to pay school fees.⁴⁸⁷ Differentiation on the ground of socio-economic status is therefore obviously a ground which can potentially impair a person’s dignity. Discrimination is therefore established. In assessing unfair discrimination: Firstly, the position of the poor in our society is appalling. A recent report by the Presidency reveals that nearly half of all South Africans live on an income of less than R3000 per month.⁴⁸⁸ Considering that almost 90% of poor South Africans are dependent on social grants for their monthly income⁴⁸⁹, it is safe to argue that a significant amount of South Africans are dependent on the state for the delivery of basic education. The payment of school fees is thus a barrier for many parents.⁴⁹⁰ Although South Africa has a high enrolment rate, the drop-out rate of learners is alarming.⁴⁹¹ A recent survey by the Centre for Applied Legal Studies at Wits University reveals that one of the main

⁴⁸³ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁴⁸⁴ See definition section of the Equality Act.

⁴⁸⁵ Vienna Declaration and Programme of Action, Adopted 25 June 1993 by the World Conference on Human Rights (“the Vienna Declaration”).

⁴⁸⁶ Section 25 of the Vienna Declaration.

⁴⁸⁷ Note 4 above, 20.

⁴⁸⁸ “Development Indicators Mid- term Review” (2007) issued by the Presidency’s Policy and Advisory Service Unit available from http://www.info.gov.za/otherdocs/2007/development_indicators.pdf [accessed 7 November 2008].

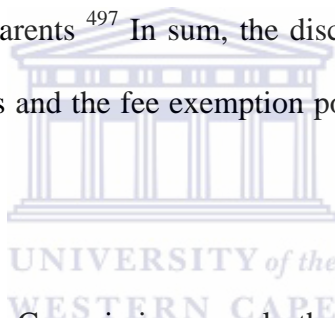
⁴⁸⁹ See note 264 above.

⁴⁹⁰ Note 4 above, 23.

⁴⁹¹ As above, 25.

The South African Human Rights Commission reports that South Africa has an average enrolment rate of 98% in grade 1. However, the drop-out rate between grade 1 and 3 is 26% and between grade 9 and 10, 19, 6%.

reasons for non- attendance at schools is the inability to pay school fees.⁴⁹² Thus, it is probable that the inability of parents to pay schools fees is one of the root causes for the disturbing drop-out rate among learners. However, school fees are not the only barrier to basic education. Other access costs such as transport costs and costs related to school uniforms and textbooks also act as barriers to education.⁴⁹³ Although the Education Department attempts to alleviate this burden by providing transport to learners who live more than five kilometers from school,⁴⁹⁴ the CALS survey found that in poor communities a significant amount of the average income was spent on educational costs, including school fees, school transport costs, textbooks, uniforms and stationery.⁴⁹⁵ Although uniforms are not obligatory for the poor⁴⁹⁶, the Department is ineffective in conveying this information to parents⁴⁹⁷ In sum, the discussion above indicates that despite the establishment of no fee schools and the fee exemption policy, poor parents are struggling to keep their children in school.⁴⁹⁸



The South African Human Rights Commission reveals that the following incidents regularly occur in schools where parents are unable to afford school fees: sending learners home and withholding their school records until their fees are paid.⁴⁹⁹ Similar incidents include withholding books from learners and publicizing the names of learners whose fees are unpaid.⁵⁰⁰

⁴⁹² Note 396 above, 33.

⁴⁹³ Note 114 above, 10.

⁴⁹⁴ Note 4 above, 24.

⁴⁹⁵ Note 396 above, 33. CALS found that in communities where the average income was R877 per month, 32% of the household income was spent on educational costs.

⁴⁹⁶ According to *National Plan of Action* schools are prohibited from marginalizing learners in any way who cannot afford uniforms. See note 77 above, 33.

⁴⁹⁷ Note 4 above, 24.

⁴⁹⁸ Note 114 above, 10.

⁴⁹⁹ Note 4 above, 24.

⁵⁰⁰ <http://etd.rau.ac.za/theses/available/etd-10122005-122303/restricted/AEIsmailDoctoralThesis2005.pdf> [accessed 7 November 2008].

These practices persist despite recent amendments to the Schools Act, which explicitly outlaws the more malicious forms of discrimination against learners. In terms of the section 41(5) of the Education Laws Amendment Act, “ a

Even where learners have been granted exemptions, evidence suggests that these learners are stigmatized as poor and are being treated differently at schools.⁵⁰¹ This includes learners being forced to sit on chairs as opposed to desks.⁵⁰² In sum, the treatment of learners whose parents are unable to pay school fees is hurtful and demeaning. Despite anti-discriminatory laws, these learners are treated as inferior and unworthy of the same respect and concern shown to learners whose parents are able to pay their school fees. Thus, section 39 fundamentally impairs the dignity of poor learners.

4.2.1.1 Impact of school funding system on black and/or poor learners

South African learners constantly perform ‘among the worst in the world’ in numeracy and literacy assessments.⁵⁰³ The majority of the present grade 9 class did not have the required standard of literacy or numeracy in 2005.⁵⁰⁴ Recent assessments performed by the Department of Education indicate that the competence of grade 6 learners in literacy and numeracy is far below standard.⁵⁰⁵ The disturbing reality reflects that the majority of learners who performed poorly are located at the previously disadvantaged schools.⁵⁰⁶ The performance of learners in

learner has the right to participate in the total school programme despite non-payment of compulsory school fees by his or her parent and may not be victimised in any manner, including but not limited to (a) suspension from classes; (b) verbal or non verbal abuse; (c) denial of access to cultural, sporting or social activities of the school; or (d) denial of a school report or transfer certificates”.

⁵⁰¹ Note 114 above, 10.

⁵⁰² As above.

⁵⁰³ http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2357890,00.html [accessed 7 November 2008].

⁵⁰⁴ <http://www.smartxchange.co.za/images/Scarce%20and%20Critical%20Skills%20-%20Dan%20Ellappa%20May%202008.ppt>. [accessed 7 November 2008]. In 2005, 72% of present grade nine learners (then in grade 6) did not have the required standard of numeracy. Of these learners, 62% did not have the required standard of literacy.

⁵⁰⁵ http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2402117,00.html [accessed 6 November 2008].

⁵⁰⁶ In 2007, the Western Cape Education Department tested the literacy and numeracy levels of 71 874 learners across 1 034 schools across the Western Cape. The study shows that an average of 44, 8 % of learners have the required literacy level of a grade 6 learner. However, only 22, 7% of learners at the poorest schools could meet this standard, whilst 71, 7% of learners at the former advantaged schools were able to pass the required literacy level. The competency levels in numeracy show that 34,8% of learners at former advantaged schools possess the required numeracy level of a grade 6 learner, whilst only 1,7% of learners at the poorest schools could meet this standard. Although the numeracy performance of learners at the former advantaged schools is not good, the vast difference in

matric is also a clear indicator that there is a clear difference in quality between the former Model C schools and the previously disadvantaged schools.⁵⁰⁷ Uncertainty exists about the “the extent to which equality of educational resources is a necessary precondition of equality of educational outcome.”⁵⁰⁸ However, recently support has grown for analyses which indicate that there is a strong causal link between good learners’ performance and a well-funded school.⁵⁰⁹ The Department of Education endorses this view by acknowledging that an improvement in resources is thought to improve the output in education or the performance of learners.⁵¹⁰ Because of the legacy of Apartheid, the majority of the previously disadvantaged schools experience conditions of a lack of basic infrastructure, basic inputs and a lack of well-qualified teachers. The current school funding system exacerbates this situation. The post provisioning model to re deploy well qualified teachers to poor schools has failed. Unlike the wealthy schools, poor schools are not able to appoint additional teachers from their budgets to make up for a lack of qualified teachers. In addition, these latter schools are forced to cope without the necessary resources if their school allocation money is inadequate.⁵¹¹ According to education analysts, South Africa is failing to provide quality education to eighty percent of its children who “find themselves trapped” in township and rural schools which have been described as “sinkholes, where children are warehoused rather than educated.”⁵¹² Without acquiring the necessary

performance between learners from the different schools is alarming. See Die Burger “*Syfers tel steeds teen leerders: Geletterdheid in gr. 6 het verbeter, maar arm skole kry swaar*” (23 April 2008).

⁵⁰⁷ One in every 10 white learners received an “A” aggregate in the 2007 matric examinations. One in every 1000 black learners achieved the same. See note 504 above.

⁵⁰⁸ Note 396 above, 23.

⁵⁰⁹ As above.

⁵¹⁰ Note 77 above, 7.

⁵¹¹ I am of course not suggesting that a lack of resources and available teachers are the only factors which impact negatively on the quality of education. Researchers have identified various other factors which may influence the quality of education in South Africa, such as ineffective leadership at schools and the unsuccessful implementation of outcomes based education. However, these issues fall outside the scope of this study and will not be addressed.

⁵¹² <http://64.233.183.104/search?q=cache:JLU89HY8pncJ:www.dbsa.org/Research/Documents/Building%2520Education%2520Beyond%2520Crisis.doc+building+education+beyond+crisis&hl=en&ct=clnk&cd=1&gl=za9> (accessed 7 November 2008.)

numeracy and literacy skills, these learners are confined to a life of unemployment or securing “only the most menial jobs.”⁵¹³ In sum, the exclusion of black and /or poor learners from sufficiently benefiting under the school funding system affects them fundamentally. This exclusion has a grave impact on their dignity and prevents them from enjoying the other constitutional rights vested in them. I thus conclude that the school funding system unfairly discriminates against learners on the basis of race and/or economic condition.⁵¹⁴

4.2.1.2 The limitation enquiry

If a finding of unfair discrimination is established, a further enquiry has to be made under the limitation clause to determine whether the discrimination is justifiable.⁵¹⁵

Section 36 (1) of the Constitution provides:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose;
- (e) less restrictive means to achieve the same purpose.

The limitation enquiry involves a balancing exercise.⁵¹⁶ The court weighs the purpose, effect and importance of the infringing law against the nature and extent of the right that is being

⁵¹³ As above.

⁵¹⁴ Although I investigated unfair discrimination on the basis of race and socio-economic status in two separate enquiries, it is possible that in some instances, the two grounds overlap. Thus, certain learners may experience unfair discrimination on both grounds. In *Harksen* (note 374 above), the Court confirmed this possibility at para 62: “There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.”

⁵¹⁵ Curie and De Waal (note 375 above) 350.

infringed.⁵¹⁷ The various interests are balanced against each other on the basis of what is acceptable in an open and democratic society based on human dignity, equality and freedom.⁵¹⁸ Although the factors listed in section 36 are not exhaustive, they have become the focus of the limitation enquiry.⁵¹⁹ I will now consider each factor. The first factor is the nature of the right. Here the court considers the importance of the right.⁵²⁰ Some rights are considered to be more significant than others.⁵²¹ For instance, the Constitutional Court has held that the “rights to life and dignity are the most important of all rights.”⁵²² Thus, the more important the right, the more compelling the reasons must be for the limitation.⁵²³ The second factor is the importance of the purpose of the limitation. The limitation must serve a purpose that is considered important by all reasonable citizens.⁵²⁴ Thirdly, the nature and extent of the limitation is considered. The issue is whether the limitation is a serious or minor infringement of the right.⁵²⁵ The “infringement of the right should not be more extensive than is warranted by the purpose that the limitation seeks to achieve.”⁵²⁶ Thus, if the infringement of the right is severe, it would be very difficult to justify the limitation of the right. The fourth factor is the relation between the limitation and the purpose. Where the law does not achieve the purpose it was designed to achieve, it is not reasonable to limit the right.⁵²⁷ If the law only has a minor impact on its purpose, the limitation will not be considered to be justifiable.⁵²⁸ The final factor is whether there are less restrictive means to achieve the same purpose. If there are less restrictive means that will achieve the same

⁵¹⁶ As above, 341.

⁵¹⁷ As above.

⁵¹⁸ As above.

⁵¹⁹ As above.

⁵²⁰ As above.

⁵²¹ As above.

⁵²² *Makwanyane* (note 27 above) para 144.

⁵²³ Curie and De Waal (note 375 above) 341.

⁵²⁴ As above.

⁵²⁵ As above.

⁵²⁶ As above.

⁵²⁷ As above.

⁵²⁸ As above, 342.

purpose, but which will not restrict the right at all or restrict the right to a lesser extent, those means must be preferred.⁵²⁹ Thus, if such means do exist, the limitation will not be justifiable.

(i) Is the unfair discrimination against learners justifiable?

The importance of the right not to be unfairly discriminated against and the right to dignity are implicated by section 39 of the Schools Act. These two rights are inextricably linked to each other. The Constitutional Court has held that “at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity.”⁵³⁰ In *Makwanyane*, the Constitutional Court held that the rights to dignity and life are the most important rights in the Constitution and must be valued above all other rights.⁵³¹ In view of the importance of these rights, the justification for the limitation thereof must be very compelling. Secondly, the importance of the purpose of section 39 must be considered. The charging of school fees serve three purposes: it secures an additional source of funding to the state which allows it to spend more of its own resources on disadvantaged schools, it encourages parent participation in schools and promotes the accountability of the schools to the communities they serve. In my view, these objectives will be considered as important by all reasonable South Africans. The third factor to consider is the extent to which the implicated rights have been infringed. Although the objectives of section 39 are important, it does not outweigh the harm done to learners through the denial of their rights. The marginalization of learners in former black schools is exacerbated by the effect of the discretion given to parents. Learners’ sense of self-worth is significantly harmed by the impact of section 39 as discussed above. Therefore, section 39 imposes a severe limitation on the

⁵²⁹ As above.

⁵³⁰ *Hugo* (note 257 above) para 41.

⁵³¹ Note 27 above, para 144.

implicated rights. The fourth factor considers whether section 39 achieves the purpose it was designed to achieve. It is reasonable to conclude that a law which requires parents to determine the amount of school fees at a school encourages parents to participate in the management of the school and promotes accountability of schools to the broader community. In respect of these two objectives, section 39 achieves the purposes it was designed for. The remaining objective of section 39 is that it provides an additional source of funding to the state which allows it to “implement preferential funding for poor schools.”⁵³² According to the Department, poor schools are preferred in state funding to “ensure the redress of past inequalities in educational provision.”⁵³³ I have shown above that the discretion given to parents under section 39 results in the perpetuation of the existing inequality in the education system. Thus, section 39 is achieving the exact opposite of this specific purpose which it was designed for. The last question is the consideration of less restrictive means. The objectives contemplated by section 39 can be achieved without bestowing upon parents the discretion to determine the amount of school fees. The state can secure additional funding through various other means, including general taxation⁵³⁴ and if that is not enough, international assistance.⁵³⁵ Parent participation in the governance of schools is already being achieved through the establishment of school governing bodies.⁵³⁶ Likewise, parents’ participation in school governing bodies does provide an effective tool to ensure accountability by schools to their communities.⁵³⁷ In light of all the above, I

⁵³² Note 401 above, para 152.

⁵³³ As above, paras 16 and 40; section 34(1) of Schools Act.

⁵³⁴ Verheyde (note 54 above) 21-22.

⁵³⁵ See section 2.2.3.2.1 (a) above.

⁵³⁶ In terms of section 16(1) of the Schools Act, the governance of every public school is vested in its governing body.

Section 23 of the Schools Act mandates the election of parents, educators, non-educator staff and learners to the governing body of a school.

⁵³⁷ Section 23 of Schools Act.

conclude that the nature and extent of the rights to equality and dignity outweigh the purpose, effect and importance of section 39. The limitation of these rights is therefore not justifiable.

4.2.2 Remedy

The Constitution grants the courts wide remedial powers.⁵³⁸ The courts “may make any order that is just and equitable” where there has been a violation of a constitutional right.⁵³⁹ In *Fose v Minister of Safety and Security*⁵⁴⁰, the Court held that “[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution.”⁵⁴¹ In *Soobramoney*, the Court held that the realization of [socio-economic rights] is dependent upon the resources available to the state.⁵⁴² In *Grootboom*, the Court confirmed that “[the Constitution] does not expect more of the State than is achievable within its available resources.”⁵⁴³ Thus, in determining an appropriate remedy, the Court will take into account the financial constraints of the state.

The South African government should be commended for the steps they have taken to make basic education accessible to poor learners. In particular, the abolishment of school fees in the poorest quintiles needs mentioning. Furthermore, the state has taken steps to make transport accessible to poor learners and deploying qualified teachers at disadvantaged schools. However, despite these efforts, this study indicates that learners in disadvantaged schools are not receiving an adequate standard of basic education. The question is therefore not “what needs to be done?”, but “what *more* needs to be done?” Firstly, it is submitted that the state should acknowledge that

⁵³⁸ In terms of section 38, a court “may grant appropriate relief” where a right in the Bill of Rights has been infringed.

⁵³⁹ Section 172(1)(b).

⁵⁴⁰ 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) (*Fose*).

⁵⁴¹ *Fose* (note above) para 19.

⁵⁴² Note 260 above, para 11.

⁵⁴³ Note 18 above, para 46.

there are certain core obligations engendered by the right to basic education that requires immediate realization. The state's approach towards these core obligations has been one of progressive realization. However, as I have argued in this study, the state's obligation to provide basic infrastructure, basic school inputs, qualified teachers, free primary education and non-discrimination in disadvantaged schools are not subject to progressive realization. Secondly, in light of the importance of basic education and its central role in the realization of other constitutional rights, it is submitted that the state should prioritize the realization of the core obligations above other competing interests. In this regard, I agree with Liebenberg that

“[a] failure to ensure...basic social provisioning should only be justifiable when resources are demonstrably inadequate, or other compelling justifications exist. The latter may include, for example, competing urgent priorities which are justifiable in an open and democratic society based on human dignity, equality and freedom.”⁵⁴⁴(footnotes omitted)

Liebenberg proposes that the state is required to discharge the abovementioned evidentiary burden in assessing whether they are complying with minimum core obligations engendered by socio-economic rights.⁵⁴⁵ This approach is in part derived from international law discourse which also requires that the state's failure to realize minimum core obligations is only justifiable if the state is able to show that it could not provide the appropriate resources because of circumstances beyond its control and that it could not secure the assistance of the international community. In line with this approach, it is submitted that the government's failure to realize the minimum core obligations will only be justifiable if they are able to place evidence before court, demonstrating that they do not have the required resources to spend on basic education or that other interests are more compelling. However, prioritizing basic education in budgetary allocations is not enough.

⁵⁴⁴ S Liebenberg “Socio-economic rights: revisiting the reasonableness review/minimum core debate” in S Woolman and M Bishop (eds) *Constitutional Conversations* (2008) 326.

⁵⁴⁵ As above.

The state has already done so.⁵⁴⁶ Throwing money at the problem is clearly not the only solution. In addition, government should become far more vigorous in their approach to realizing the minimum core obligations. This entails utilizing existing resources to eradicate the existing inequality in our schools and to ensure that the minimum core obligations in respect of basic education are achieved. Section 9(2) of the Constitution provides:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

In *Minister of Finance v Van Heerden*⁵⁴⁷, Moseneke J shed light on section 9(2) by stating that “[r]estitutionary measures, sometimes referred to as “affirmative action”, may be taken to promote the achievement of equality. The measures must be “designed” to protect or advance persons disadvantaged by unfair discrimination in order to advance the achievement of equality.” The Constitution therefore authorizes the undertaking of affirmative action measures to advance those learners who have experienced unfair discrimination because of their lack of equal access to the benefits of the school funding system. In this regard, it is submitted that the state should consider affirmative action policies in education, such as the amalgamation of former Model C schools with disadvantaged schools and compelling qualified teachers to teach at disadvantaged schools. In light of the vast difference in resources between the former Model C schools and the disadvantaged schools as well as the difference in quality of education presented at these schools, it is submitted that directing money alone at the realization of the core obligations is not enough. Utilizing existing physical and human resources at former Model C schools is an

⁵⁴⁶ In the 2008 national budget, R121, 1 billion was allocated to education, the largest expenditure allocation by function in the budget. See note 446 above.

⁵⁴⁷ 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) para 28.

immediately available measure. In my view, this is key in the realization of the right to basic education of black and /or poor learners.



CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5. Introduction

This study has sought to address the impact of the school funding system on the right to basic education of poor learners. This study has established that the funding system has failed to ensure the realization of the right to basic education for learners who cannot afford the costs related to schooling. Moreover, it has shown that the method of funding perpetuates the entrenched inequality in the education system. This chapter highlights legislative and policy weaknesses in the school funding system and provides appropriate recommendations.

5.2 Legislative weaknesses

This study has revealed a very complex set of laws governing the school funding system. Notably, the legislation in place governing school fees warrants further discussion. Firstly, although it is lawful to charge school fees, it is unlawful to turn children away from schools that are unable to afford school fees. However, this study has shown that, at times schools are compelled to levy fees to make up for a shortfall in state funding. Hence, they resort to discriminatory practices to force parents to pay school fees. It has been submitted in this study that as long as schools are allowed to charge school fees, discriminatory practices against learners will persist. Secondly, legislation prohibits and allows no-fee schools to charge school fees at the same time. It is unlawful for no-fee schools to charge school fees. However, as soon as their public funding is inadequate, it becomes lawful to impose school fees on parents. Thirdly, the legislature vests the discretion of charging school fees and the amount charged in the parent community of a school. This study has shown that this results in unfair discrimination against learners on the basis of race and socio-economic status. Furthermore, it perpetuates the entrenched inequality in the education system. Based on all the reasons cited above, it is

recommended that the legislature resolve the complexity around these laws.

5.3 Weaknesses in Policy

A complete review of the Norms and Standards is required. This study has shown that poor schools are simply not receiving enough in public funding to meet all their needs. Presently, in determining the amount of funding to schools, the state is guided by the poverty ranking of the school. The calculation of the poverty levels of schools is miscalculated because it does not take into account data from schools itself, but is based on the relative poverty of the community around the school. It is suggested that in order to determine a more accurate amount that will satisfy the needs of learners at poor schools, the state should take into account data from the schools itself. Furthermore, it is suggested that in determining these allocations, the state should take into account all costs related to schooling, including those costs related to school uniforms and transport. Secondly, the current School Fee Exemption policy requires dire review. It is recommended that the state abolish the current formula to determine exemptions and implement a more coherent method. The culture of non-enforcement of exemptions also requires attention by the state. It seems as if parents' ignorance of the exemption policy contributes greatly to this problem. The state should therefore embark on a campaign to inform parents of their right to be exempted from school fees. It is also suggested that the state should consider compensating those schools that do grant exemptions. Furthermore, it is recommended that the state impose some form of sanction against those schools which refuse to implement the exemption policy.

5.4 Concluding remarks

Our transformative Constitution has ushered in a new era in which all South Africans are entitled

to equal opportunities, including the attainment of free, adequate basic education. However, this study has revealed that the current school funding system has perpetuated the entrenched inequality in our schools and barred access to many black and/or poor learners to exercise their constitutional right to a basic education.



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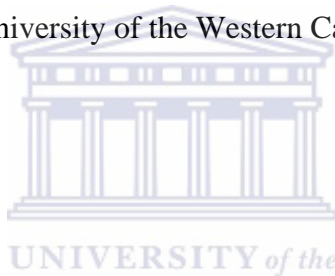
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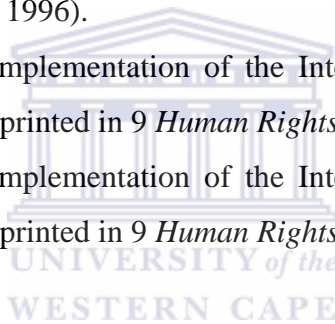
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