

## An Analysis of the Constitutionally Guaranteed Right to Basic Education in South Africa

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**ABSTRACT** The paper looks at the context and interpretation of the right to basic education as entrenched in the South African Constitution and determines whether this right is being realised. In determining the latter, the paper looks at the effect of the history and legacy of apartheid on education in South Africa. It is argued that the right to basic education in South Africa remains one of the fundamental rights in the Constitution which if realised adequately will contribute towards empowerment of the people, capacity building, economic growth and prospect. The attainment of South Africa democratic government in 1994 should have brought about good educational service delivery to the people, but this is not the case as basic education in South Africa still faces major challenges which are evident in the recent Limpopo textbook saga and lack of sanitation (infrastructure) in schools in the Limpopo Province. This saga clearly shows that the realisation of the right to standard basic education in South Africa is still far from being achieved. The lack of teaching materials, accountability by the accounting officers in the Department of Education, dedicated teachers and also the dysfunctional School Governing Bodies, poverty and illiteracy of parents are some of the factors that are hampering the delivery and realisation of basic education post 1994. It is further argued that when compared to other African countries, South Africa has good legislative framework and policies on basic education but, there are great challenges of the enforcement and implementation of this right. This paper concludes that an governments effective communication between the national and provincial governments has to be strengthened to ensure that basic education in South Africa is fully realised.

### INTRODUCTION

According to Mtswesi (2013) *“it is widely accepted that education plays a vital role in lifting people out of poverty, empowering women and children, and promoting human rights and democracy.”* Educational rights are contained in section 29 of the South African Constitution, 1996 (Spreen and Vally 2006). In terms of the section, everyone has the right to a basic education, including adult basic education and further education (Naicker 2005). The State must, through reasonable measures, make the right to basic education progressively available and accessible (Malherbe 2000). These rights obligate the State to promote, improve and provide education by putting in place and maintaining an education system that is responsive to the needs of the country (Mtswesi 2013).

The White Paper on Education and Training (1995) provides that *“education and training*

*are basic human rights. The state has an obligation to protect and advance these rights, so that all citizens irrespective of race, class, gender, creed or age, have the opportunity to develop their capacities and potentials, and make their full contribution to the society.”* One of the fundamental components of the right to access quality basic education is to ensure that parents or guardians have the primary responsibility for the education of their children (Maddaus 1990), the right to be consulted by the state authorities with respect to the form that education should take and to take part in its governance (UNICEF 2009). Parents have an inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling (Viteritti 1999), whether provided by the state or not, subject to reasonable safeguards which may be required by law (Woolman and Fleisch 2006). The study conducted by Woolman and Fleisch (2006) reveal that *“school choice is often identified with right-learning, voucher-happy, market-oriented public school systems like those found in the United States. Thus, the proposition that a social democratic state such as South Africa will offer many primary and secondary school learners*

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*with far greater choice strikes many as counter-intuitive and implausible...that the three major pieces of education framework legislation—National Education Policy Act (NEPA), South Africa Schools Act (SASA) and Employment of Educators Act (EEA)—conspire with recent historical events, deep political and constitutional commitments to create South Africa's unintended experiment in school choice."*

According to The White Paper on Education and Training (1995), the parents' right to choose includes choice of the language, cultural or religious basis of the child's education, with due regard for the rights of others and the rights of choice of the growing child. The implication of this is that while numerous laws allow for the right of the child, with regard to education, at the developmental stage, the parents and guardians have the responsibility to provide parental guardian that will help the child to receive good and high standard education without constraints of any sorts (Phillips 2008). Therefore, education is significant because *"it is a fundamental human right which is intrinsically important in its own right. It opens new horizons and raises the quality of life"* (Watkins 2000). More importantly, *"education is also a means to achieving wider human-development ends, including higher living standards, improved public health and democratisation"* (Watkins 2000).

According to Friedman (1955), *"a stable and democratic society is impossible without widespread acceptance of some common set of values and without a minimum degree of literacy and knowledge on the part of most citizens. Education contributes to both. In consequence, the gain from the education of a child accrues not only to the child or to his parents but to other members of the society and to other people's welfare by promoting a stable and democratic society."*

Education downsizes and downgrades poverty and as such, *"it is one of the most powerful catalysts for poverty reduction"* (Watkins 2000). Denial or deprivation of access to education will ultimately produce poverty, ignorance, hopelessness and illiteracy (Robinson 2011). Klasen (1997) points out that *"poverty is closely related to poor education and lack of employment. The poor suffer from lack of access to education, quality health care, basic infrastructure, transport, are heavily indebted, have little access to productive resources, and are heavily*

*dependent on remittances and social transfers, particularly social pensions and disability grants."*

In South Africa, majority of the poor have no access to education thereby increasing the numbers of the illiterates at an astronomical rate (Evoh 2007). Similarly, lack of ample access to basic education is now one of the sources of poverty in the country (Klasen 1997). Klasen (1997) points out that *"South Africa is one of the countries with the highest levels of income inequality in the world and compares poorly in most social indicators to countries with similar income levels. Poverty in the country occur majorly as a direct result of apartheid policies that deny equal access to education, employment, services, and resources to the black population of the country. Because of this, poverty has a very strong racial dimension; In addition, poverty is much higher in rural areas, and particularly in the former homelands."*

It is pertinent to point out that to a reasonable extent, in South Africa, there is still *"education apartheid under which opportunity is distributed on the basis of have and have-not"* (Rotberg 2014). Children, who are supposed to be in schools, are out of schools and there is no likelihood that they will ever see or be in the four walls of a classroom (Lemon 2004). Majority of the children that are not in schools are black children, prevalent not only in the rural remote poor areas but also in the townships, locations, and informal settlements in the cities and so on (DiGiulio 2001). While the affluent live in the suburb where all the social economics goods and services are being provided (Bond 1999), the poor who live adjacent to the suburb lack all these basic infrastructure and services including education (Fakir 2007). Against this backdrop, these children, like their poor parents are being denied the opportunities that education can provide thereby creating a continuous circle of illiteracy and poverty within the family and across generations and now, becoming a culture (Olufemi 2000).

## Objective

The objective of this paper is to examine the extent the right to basic education is being provided and promoted in South Africa. The paper discovers and discusses the gaps in the realisation of the right to basic education and offers

insightful solutions and recommendations to these gaps. In achieving its objective, the paper determines whether the right to basic education remains a fundamental right in South Africa, and also determines whether the State is optimally fulfilling its constitutional obligation to observe and protect the right to basic education.

### METHODOLOGY

The research methodology used in this study is qualitative, relying on literature relevant to the study. Pursuant to this, the study relied on library materials such as textbooks, reports, legislations, regulations, case laws and articles.

### Historical Background

The right of access to basic education for all has been recognised in the past in the Freedom Charter (1955). The Freedom Charter stipulates that the doors of learning shall be opened to all (Christie 2008). The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace. Education shall be free, compulsory, universal and equal for all children (Freedom Charter 1955).

The right of access to basic education was also provided for in the South African Interim Constitution (1993) which provides that every person shall have the right- (a) to basic education and equal access to educational institutions; (b) to instruction in the language of his or her choice where this is reasonably practicable; and (c) to establish, where practicable, educational institutions based on a common culture, language or religion provided that there shall be no discrimination on the ground of race.

Lemon (2004) writes that “*education is a critical element in post-apartheid restructuring. In 1994, the ANC-led government inherited a racially divided and discriminatory education system to which the National Party had, in its early 1990s reform, added elements of a market-driven system. National policies since 1994 have been rich in the political symbolism of equity and redress, but in practice were characterised by acceptance of commodification, and choice and very limited implementation of change on the ground.*”

According to the South African Human Rights Commission 3<sup>rd</sup> Economic and Social Rights Report (1998-1999), “*the post-1994 government inherited an education system riddled*

*with inequalities. The system was racially fragmented and characterised by a disproportionate distribution of resources with former white schools receiving more resources than schools of other racial groups. Multiple education authorities caused duplication and inefficiency. The system was also marked by lack of properly qualified educators for the vast majority of learners.*”

In 1995, the White Paper on Education and Training as a policy of the Department of Education provided a blueprint policy which gives direction on how South African educational system must be provided to the people of South Africa. The former Minister of Education, Professor Sibusiso Bengu commented on the preamble of the policy that “*it is essential for us to build a system of education and training with which all our people can identify because it serves their needs and interests. Such a system must be founded on equity and non-discrimination, it must respect diversity, it must honour learning and strive for excellence, it must be owned and cared for by the communities and stakeholders it serves, and it must use all the resources available to it in the most effective manner possible.*” The 1996 South African Constitution explicitly guarantees the right to education and mandates the State to provide essential services to realise the right (Mubangizi 2006). Despite this, the government is still finding it very difficult to rebuild the corrupt education system (Teferra and Altbachl 2004). While years of apartheid had left consequential inequalities in schooling and the entire educational sector, in recent years (Alexander 2006), the new democratic government has exacerbated the problem by not providing essential services that will make the right to education realisable not to talk of it being fulfilled (Ndimande 2006). Evidence of maladministration, corruption, misconducts by the people and institutions responsible for providing quality educational services are common and there is lack of financial accountability which has now strengthened culture of impunity (Camerer 2009).

### OBSERVATIONS AND DISCUSSION

#### Perceptions from Contemporary Scholarly Literature

Although numerous promises are enshrined in the South African Constitution, for purposes of realising and fulfilling these promises (Vally

2007), other legislation and policies have also been put in place to ensure implementation and delivery of the right to education as enshrined in the constitution (Rembe 2006). To some extent, milestones have been achieved; however, the agenda for the right to access education is still far from complete (Fiske and Ladd 2004). A lot of children who are supposed to be in school are still left vulnerable and deprived due mainly to lack of performance by those with responsibility to provide ample access to basic education (UNICEF 2009). Against this backdrop, “*the key transformation goals that underpinned the policy development and policy implementation on educational processes are but not limited to (i) increased access to education, (ii) democracy in education structures and procedures (iii) greater equity to redress the numerous inequalities of the past; and (iv) improved efficiency (for example, financial, management, learner flow and so on) within the system*” (Nicker 2005).

Pursuant to the above mandate to perform, by this, South African Constitution provided unambiguous leadership and expects officials implement (Burnell 2008). This is supported by the Department of Education (DOE 2001:4) where it indicates that “*the South African Constitution required that education be transformed and democratised in accordance with the values of human dignity, equality, human rights and freedom, non-racism and non-sexism. It guarantees access to basic education for all through the provision that everyone has the right to basic education.*”

While the right to education is imperative, “*evidence has shown that investing in education is both a responsibility and opportunity. It is a responsibility because lack of education undermines children’s ability to develop their full potentials. It is an opportunity because gains achieved through quality education are likely to be far greater and long-lasting than in almost any other area of development*” (UNESCO 2009). In the same vein, the DoE (2001) has also asserted that “*education and educational system are viewed as part of the important transformation mechanism that will be used to eradicate poverty, hunger, illiteracy and also to be used to strengthen democracy, economy, good governance and so on.*” It is pertinent to point out that “*a founding principle of the South African Constitution is common citizenship and*

*equal enjoyment of an array of rights including freedom of belief, religion, expression, assembly and association. A range of socio-economic rights including the right to basic and adult education and the rights of children are also emphasised in the Bill of Rights. The lyricism of the phrases in the Constitution and the promise of these words of justice, after decades of apartheid, has become a symbol of hope for advocates of social justice*” (Spren and Vally 2006).

Watkins (2000) argues that “*more media attention is lavished on the fluctuations of financial markets, civil conflicts, and natural disasters than on the human costs of deprivation in education. Yet the destructive impact of the education crisis is more powerful than any earthquake or civil war. It is concerning millions of the world’s most vulnerable citizens—its children—to a future of poverty and insecurity. It is widening already scandalous income gaps between rich and poor countries, and rich and poor people. And it is undermining efforts to improve child health and nutrition.*”

In their work, Spren and Vally (2006) argued for collective human rights “*as opposed to the liberal conception of rights which is based on the notion that those who succeed in society do so because of their own individual attributes and those who fail do so because of their deficits and weaknesses—better illuminates the structural and contextual conditions of poverty and inequality that remain in South Africa.*” However, scholarly literature has confirmed that some people have better opportunities and succeeded just because of the advantages that they have which made them have those individual attributes which others lack or are deprived and denied of (Young 2011). This observation applies to South Africa and reflects on how social economic goods and services are being distributed among the geographical boundaries and it is against the backdrop of this that Lemon (2004) points out that in “*townships, informal settlements and rural areas, desegregation and redistribution are explored in relation to parental incomes, fees and school feeder areas; parental choice of schools and involvement in governing bodies; learner: teacher ratios and teacher redeployment; resource constraints, buildings and facilities, books and materials; relationships between schools and provincial authorities; examination results; and relations*

*between resource-rich and resource-poor schools. Provincial funding levels cover little beyond the salaries of approved numbers of teachers, leaving most other expenditure dependent on fee income and funds raised by other means. Class rather than race is now the main determinant of educational opportunity. For the poor majority, the system offers neither equality of opportunity nor significant redress to compensate for the injustices of apartheid education.”*

### **Promises in International Legal Frameworks**

The South African Constitution provides that when interpreting the Bill of rights, the court or tribunal may consider foreign law and must consider international law pursuant to Section 39 of the South African Constitution (De Wet 2004). Interestingly, the right to education enjoys extensive protection and provision in international law (Buergethal et al. 2009). The right of access to basic education is recognised in Article 26 of the Universal Declaration of Human Rights 1948 (UDHR) which is a customary international instrument and provides that “*everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.* (2) *Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.* (3) *Parents have a prior right to choose the kind of education that shall be given to their children.”* The UDHR is an international customary instrument and South Africa has ratified it and its policies and legislations on education are inspired by it since 1994 (Hannum 1998).

Article 13 and 14 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) also make provision on the right of access to basic education. Article 13(1) state that the States’ Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to

the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms (Baxi 1994). They also indicate that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace (Lenhart and Savolainen 2002). More importantly, article 14 provides that “*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 the plan, of the principle of compulsory education free of charge for all.*”

South Africa signed the ICESCR on October 3, 1994 and by doing so, indicated its intention to become a party to, and thus be bound by the ICESCR and implement the provisions as set out in the articles (Zimmermann 2008). However, the major setback is that as at today, South Africa has not yet ratified the ICESCR and as a result, this instrument is not yet legally binding on South Africa (Alvarez and Widener 2001). According to section 231(2) of the South African Constitution, an international agreement must be approved by both Houses of Parliament, namely the National Assembly and the National Council of Provinces, by way of a resolution of ratification before it becomes legally binding upon the Republic (Scholtz 2004). According to Petherbridge (2012), “*the announcement by Cabinet that the ratification of the ICESCR is to be tabled before Parliament is a significant step towards obtaining Parliamentary approval. Once an agreement is tabled in Parliament, the relevant portfolio committees of both the National Assembly and the National Council of Provinces will consider the agreement. These committees will document their decision in a report which will be placed separately before both Houses. Both the National Assembly and Council of Provinces must approve and adopt the reports before the process of preparing the draft Instrument of Ratification can ensue.*”

On ratifying the ICESCR, South Africa will bind itself to its obligations, goals and standards and will be bound in international law to act in such a way that it does not infringe upon the spirit of the ICESCR (Hardowar 2009). Therefore, ratification of the ICESCR would necessitate aligning domestic legislation and policies with the obligations contained the ICESCR (Pieterse 2004). These actions would signal the Republic's dedication to advancing socio-economic rights in South Africa and may assist in increasing its international credibility regarding its approach towards the protection of socio-economic rights especially the right to access basic education (Petherbridge 2012).

The Committee on Economic, Social and Cultural Rights (Committee on ECSR) has prime responsibility for monitoring socio-economic rights, including the right to education (Kalantry et al. 2010). The Committee has, to this end, issued a number of General Comments in which the rights enumerated in CESCR are given content (Griffey 2011). Article 13 of the Covenant provides that education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can come out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth (Craissati et al. 2007). Increasingly, education is recognized as one of the best financial investments the States can make (Friedman 1955). According to Nevondwe and Matotoka (2013) "*the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.*"

At the regional level, the right to education is widely recognised in regional instruments (Kitagawa 2004). The right is included in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) (1953). It is also included in the American Declaration of the Rights and Duties of Man (1948) and the Protocol of San Salvador to the American Convention on Human Rights (1988).

In the African region, the right to education is enshrined in Article 17 of the African Charter on Human and Peoples' Rights, 1981. Article 11 of the African Charter on the Rights and Welfare of the Child (1990) also provides for the right to education.

The right to education is also recognised in a number of international instruments dealing with the rights of specific vulnerable groups, in particular, Articles 23(3) and (4), 28 and 29 of the Convention on the Rights of the Child (1989) (CRC) contain extensive provisions with regard to the progressive realisation of the right of the child to education and the aims of education. A final relevant instrument ratified by South Africa is the UNESCO Convention Against Discrimination in Education (1960). In the words of Watkins (2000), "*more than half a century has now passed since the Universal Declaration of Human Rights made education a fundamental right. It decreed that all governments have a responsibility to provide free and compulsory basic education.*" However, as at today, "*that promise has been comprehensively broken. No human right is more systematically or extensively violated by the governments than the right of their citizens to a basic education*" (Watkins 2000). This is applicable to South Africa and existing literature has generally show that there is a major crisis in the educational sector.

### Constitutional Obligations

South Africa is a constitutional democracy (Worden 2011) and as such, section 29 (1) of the South African Constitution provides for the right of everyone to a basic education, including adult basic education, and to further education, which the State, through reasonable measures, must make progressively available and accessible (Malherbe 2004). According to Seleoane (2002) "*unlike the right of access to housing, health care services and the other socio-economic rights in section 27 of the Constitution, this right is unqualified by terms such as reasonable legislative and other measures, available resources and progressive realisation.*" In the case of *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC), the court held that the right to basic education is an unqualified right, distinct from the other socio-economic rights. The court emphasised that "*unlike some of the*

*other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring the right to be progressively realisable within available resources subject to reasonable legislative measures. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This right is therefore distinct from the right to further education provided for in section 29(1)(b). The State is, in terms of that right, obliged, through reasonable measures, to make further education progressively available and accessible.”*

It is pertinent to point out that with regard to right to education, the State is under constitutional obligation to provide for this right unconditionally regardless of challenges (Dugger 2007). The provisions of section 29 of the South African Constitution are supported by international instruments (Dugard 1998). In many of these international instruments, basic education is associated with reaching a specific standard or set of outcomes (Seleoane 2002).

Section 29 of the Constitution can be described as a hybrid right (Ray 2009). This is because section 29 is a socio-economic right that says the Government must make education accessible and available to everyone (Wilson 2004). But, it is also a civil and political right, as it contains freedom of choice guarantees, such as language choice in schools and the freedom to establish and maintain independent educational institutions (Coomans 2007). Individuals thus have the freedom to choose between State-organised schools and private education (Bornman 2010). In the case of *In re: The Schools Education Bill of 1995 (Gauteng) (Schools Education Bill case) 1996 4 BCLR 537*, the Constitutional Court commented on the constitutional right to basic education as follows “*this provision creates a positive duty that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education*” (Paragraph 9 of the judgment).”

Section 7(2) of the Constitution enjoins the State to “*respect, protect, promote and fulfill the rights in the Bill of Rights*” (Mubangizi 2006). This duty implies that the State must protect people against invasion by the private sector or failure to deliver necessary study materials for

learners to facilitate teaching and learning in the classrooms (Higgs et al. 2001). The State’s duty also extends to protect individuals from discrimination in private educational institutions (Fredman 2011). This means that the State would have to protect individuals from interference by other individuals or private companies in the exercise of their right to education (Donnelly 2013). For example, the State has obligation to protect children from engaging in any sorts of work which would interfere with their right to education (UNICEF 1989).

## CONCLUSION

The right to education remains amongst the centre pieces of transformative constitutionalism. It is therefore highly imperative for the national government and provincial governments to always take cognizance of the fact that a nation which runs without education is the same as a forest without trees. The Constitution is a tool which carries within itself an agenda of stabilising the society, burying all wounds of the past and building one unified nation based on human dignity, equality and freedom in general. Hence, it remains fundamental that rights such as the right to basic education be protected at all cost. This is necessary because the late regime of apartheid split education systems along racial divides and the consequence of this is that the majority of the people would not receive appropriate education whereas the minority did.

## RECOMMENDATIONS

For there to be equal access to quality and high standard education, education should be considered as a unique socio-economic right and the state should make it free at all levels.

## LIMITATIONS AND AREAS FOR FURTHER STUDY

This paper only looks at the issues surrounding the right to access basic education but did not dwell on consequences for failure to provide. Against this backdrop, there is therefore an ample opportunity for other studies to examine the consequences for failure to provide and fulfil the constitutionally guaranteed right to access to basic education in South Africa.

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