

Review

The right to education: are we facing the challenges?

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The Constitution provides the ground rules to create obligations on the state and to transform the education system by introducing human rights in line with the best developed democracies. This article is not about state-compelled school attendance, but rather the observe: the right to attend school. So while the right to attend school is part of the answer, it is far from the whole answer to the question of the right to education. Is it in the best interest of the child if there are still many corrupt practices in the public school sector? Whose rights are we talking about- those of the child or his or her parents? The mere fact that enforcement mechanisms is not an effective tool of measuring the exercise of the right in education. The article first sets out the constitutional framework in South Africa so far as it bears on the right to education, including whether a constitutional right to education can be implied by the Bill of Rights. It will then probes the extent to which provincial school acts and regulations, and provincial human rights, provide a general right to education.

Key words: Human rights, basic education, equity, redress

INTRODUCTION

Although the purposes of education have shifted and been re-calibrated over the years, the idea that schooling is an important private and social good, critical, to individual and societal well-being, has increasingly helped define democracy. Education matters because it is a fundamental right and because it is intrinsically in its own right. It opens new horizons and raises quality of life of the individual as well as the nation.

In Campbell and Cosans judgment, the European Court of Human Rights defined "education" and "teaching" as: Education of children is the whole process whereby, in any society adults endeavour to transmit their beliefs, culture and other values to the young: According to the Court, discipline in schools form part of these concepts as it is an integral part of the process whereby a school seeks to achieve the object for which it was established.

Universal Declarations of Human Rights are unequivocal on the right of education and proclaims "Education shall be free, at least in the elementary and fundamental stages." This is the legal foundation of the right to education. In principle, almost all the governments through out the world acknowledge this right. Under the terms for the Convention on the Rights of the child, now signed by

all but two of the world's governments, states are required to 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 will make primary education compulsory and available free for all (Sloth-Nielsen, 2001). This article however is not about state compelled school attendance, but rather the obverse - the right to attend school. So while the right to attend school is part of the answer, is far from the whole answer to the question of the right to education. The right to education is entrenched at the international and regional level as a fundamental human right. The right to education has also been included in the constitutions of at least 59 countries. Furthermore, the right has even in countries such as India or the United States of America, where it has not been constitutionally entrenched, nevertheless been recognised as a legal right of fundamental importance.

The importance of entrenching the right to education is based on certain premises. Firstly, it is a precondition for the exercise and understanding of other rights. That is, the enjoyment of a number of civil and political rights, such as freedom of information and the right to vote depend on a minimum level of education, including literacy. Economic, social and cultural rights, such as the right to choose work or to take part in cultural life, can also only be exercised meaningfully once a minimum

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level of education has been achieved. Secondly, through education individuals can be taught values such as tolerance and respect for human rights. Education therefore can strengthen a culture of human rights within and amongst nations.

The right to education: constitutional mandate

South African law

In order to evaluate the extent of the implementation of the right to education and other rights regarding education, attention must be given to the main legal provisions. Section 29 in the South African Bill of Rights provides as follows:

- (1) Everyone has the right
 - (a) To a basic education, including adult basic education.
 - (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.
 - (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.
 - (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 is consequently made up of a bundle of education rights that are divided into subsections. Each of the subsections confers specific and separate entitlements on right-holders and the different subsections place concomitant obligations on the state that vary in nature and degree. That is, section 29 is a socio-economic right that obliges the state to make education accessible and available for all, 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 and hence the freedom of individuals to choose between state organised and private education. The socio-economic entitlements under section 29 are also distinguishable from each other. That is, section 29(1)(a) has been described as a 'strong positive right' and section 29(1)(b) has been described as 'a weak positive right'.

Section 29 therefore resists neat categorisation. This seems inevitable: The hybrid nature of section 29 is a demonstration of the interdependence and indivisibility of all human rights (Brand and de Vos, 2005).

Rights must be interpreted in their context. In Government of the Republic of South Africa, Grootboom, Yacoob J stated:

“Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context”. One implication of this excerpt is that all rights in the Bill of Rights should be seen as interrelated and mutually supporting. As stated, education is a precondition for the exercise of other rights. Therefore, the denial of access to education is also the denial of the full enjoyment of other rights that enable an individual to develop to his or her full potential and participate meaningfully in society (Brand and de Vos, 2005). A second implication is that a right must also be interpreted in its social and historical context. In addition, rights must be interpreted with a historically conscious transformative vision in mind (Sloth-Nielsen, 2001).

The apartheid state legislated for a racially separate and unequal system of education. One of the things that characterised apartheid education was gross inequality in the financing of education, with the African population receiving the least. This, in particular for Africans, manifested in high teacher-pupil ratios; unqualified and underqualified teachers; lack of books, libraries and laboratories; and a curriculum that perpetuated the myth of white superiority and black inferiority.

Today, despite the existence of an innovative and rights-based curriculum and a policy framework for the transformation of education, the legacy of this inherited system continues to exist. Any interpretation of section 29 must therefore be geared towards redressing this historical disparity.

The Bill of Rights contains all internationally accepted human rights usually considered relevant in education. Included are the customary children's rights (including the principle that a child's best interests are paramount in every matter concerning the child), the right to language and culture, certain rights of cultural, religious and linguistic communities, the right of access to information and the right to just administrative action. It is clear that a multiplicity of intersecting constitutional values and interests

are involved in education (Dugard, 2000). Other rights (based on legislation, customary law or common law) are recognized to the extent that they are consistent with the *Bill of Rights*. In interpreting the Bill, a court must promote the values that underlie an open and democratic society on human dignity, equality and freedom. It may consider international law and may consider foreign law. The Bill of Rights has various categories of rights but there are areas of conflict of rights that have not been resolved and we are leaving them to a Constitutional Court, a body of six or seven people, to resolve it for us. Leaving it to the Constitutional Court judges is not really taking the moral nettle by the hand. We are abdicating, to some extent, what is our own moral problem (Andrews and Ellman, 2001). As far as school education is concerned reference must be made to the National Education Policy Act 27 of 1996. The legislation is intended to facilitate the democratic transformation of the national system of education. Provincial legislatures and departments of education in the nine provinces enjoy concurrent authority in school education (Visser, 2004). Of particular relevance to education in public schools, is the comprehensive and nationally applicable is the "South African Schools Act 84 of 1996". This legislation is aimed at the provision of a uniform system for the governance, organization, management and funding of schools.

The Schools Act covers matters such as compulsory school attendance, admission to public schools, language and religious policies, the composition and functions of school governing bodies, code of conduct for learners, civil liability of the state, etcetera.

International obligations and the right to education

As a member of the United Nations; South Africa is subject to the moral suasion of the Universal Declaration of Human Rights. Though strictly speaking not legally enforceable against member states, the Declaration clearly has considerable moral force among many nations and the inclusion of education among its enumerated social, cultural and economical rights only supports arguments in favour of implying guarantees to education within the South African constitution (Dugard, 1995).

The right to education is recognised in article 26 of the Universal Declaration of Human Rights (1948) (Universal Declaration) and articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (1966) (CESCR). The Committee on Economic, Social and Cultural Rights (Committee on ESCR), created in terms of CESCR, has prime responsibility for monitoring socio-economic rights, including the right to education.

The Committee has, to this end, issued a number of General Comments in which the rights enumerated in CESCR are given content (Craven, 1998).

The right to education is widely recognised in regional instruments. The right is included in the European Convention for the Protection of Human Rights and Funda-

mental 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 entrenched in article 17 of the African Charter on Human and Peoples' Rights (African Charter) (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 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 document ratified by South Africa is the UNESCO Convention Against Discrimination in Education (1960).

The most comprehensive international agreement safeguarding children's rights is the Convention on the Rights of the Children (1990). Educational provisions include: the right of disabled children to live full, decent and dignified lives with active participation in the community, and to have effective access to education, aimed at their fullest possible social integration and cultural social and individual development; and the right of all children to financially accessible primary, secondary and higher education. Education should be aimed at developing the children's personalities, talents and mental and physical abilities; respect for human rights; respect for their parents, cultures, languages and values, together with the values of their own and other countries and civilizations; preparation for living a responsible life in a free, peaceful, tolerant and egalitarian society; and respect for the natural environment. The Convention also protects the liberty to establish and run educational institutions separate from the state as long as they conform to the above stated aims and to minimum standards laid down by the state.

The right to education is enshrined in the International Bill of Human Rights which provides the foundation for the United Nations' expanding human rights work. The moral foundations of the right to education are laid in the Universal Declaration on Human Rights. Article 26 of the Universal Declaration of Human Rights stipulates:

(1) 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 mainte-

nance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 13 of the International Covenant on Economic, Social and Cultural rights covers the right to education. It contains provisions similar to those of Article 4 of the Convention. "Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education" (Article 13/2d).

The right to education like all human rights imposes three levels of obligations on state parties: the obligations to respect; protect and fulfill. The obligation to fulfill incorporates both an obligation to facilitate and the obligation to provide. The obligation to respect requires the State to avoid measures that hinder or prevent the enjoyment of the right to education.

With such a broad obligation, article 13 of the International Covenant provides for the right to receive free and compulsory primary education, which should be made available to every one - full and equal educational opportunities for all.

Key human rights issues and current debates

South Africa is still busy with the transformation process in terms of the relevant laws. The following issues are currently relevant in schools as well as other educational institutions (Visser, 2004):

- The final redress of all existing inequalities in the education system (for example, the gap between well resourced and poorly resourced public schools).
- The provision of resources of sufficient quantity and quality to satisfy the right to a basic education in public educational institutions and to make further education, progressively available.
- Inadequate state-funding (although R90 billion was made available in the 2006/07 budget) for public schools and the unacceptable differences between the nine provinces in this regard.
- Sufficient state action to fulfill the right to have education in the official language or languages of one's choice as well as the promotion of multilingualism in a country with eleven official languages.
- Ensuring that governing bodies of public schools and the parent community play the roles that they are supposed to. Many provinces do have many dysfunctional governing bodies (especially in the rural areas).
- Ensuring sufficient freedom of choice in public schools in accordance with a human rights culture and a society based on human dignity, equality and freedom.

- Eliminating the problem that some state education authorities do not obey court orders.
- Promotion of respect for cultural diversity in the educational system.
- Responding to sexual harassment in educational institutions. The recently report from the Human Rights Commission sadly tells the story of how learners are harassed and abused to the advantage of teachers. Learners must "pay" the teachers with sex if they haven't done their homework, must "pay" for higher marks or even the exam paper, must "pay" if they come late, etcetera.
- The full recognition of the professional status of educators.
- Managing labour relations in education to improve and maintain quality and to avoid disruptive strike action.

CONVENTION ON THE RIGHT OF THE CHILD

South-Africa acceded to the Convention on the Rights of the Child (CRG). Although the CRC itself cannot be invoked before the courts in South Africa, it is implemented in South Africa through a number of statutes and their subsidiary legislation.

The convention on the right of the child and the schools

Russo and Stewart (2001) observed that in many common law countries, there has been an increase in the legal processes to guide policies, practices and decision-making in all educational institutions, in particular, schools.

There are many articles in the CRC that impact on education. We will consider some of the significant ones.

•Article 3 of the CRC states that: "In all actions concerning children the best interests of the child shall be a primary consideration, institutions, responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the area of safety as well as competent supervision".

•To promote the best interest of the child, Article 12 states that "a child who is capable of forming his or her own views to express these views freely in all matters affecting them."

•Article 19 reinforces the importance of protecting the physical welfare of children by requiring parties to the CRC to "take all appropriate measures to protect children from violence, injury or abuse, maltreatment or exploita-

tion and to undertake prevention and support programs."

- Article 23 recognizes the needs of children with physical and/or intellectual disabilities and Article 28 provides that "primary education" must be made "compulsory and available free to all". How then has South-Africa responded to the principles of the CRC when compared with other countries?

The right to basic education

Section 29(1) (a) states: 'Everyone has the right to a basic education, including adult basic education.'

In the case of *Expert Gauteng Provincial Legislature: In the Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, which dealt with the equivalent provision under the interim Constitution, the Court held:

[This provision] creates a positive right 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.

Thus, the state is not only required not to interfere with an individual's enjoyment of the right, but the state is also obliged to provide basic education. Save for acknowledging this positive obligation in the provision of basic education, our courts have to date not had the opportunity to comment on the scope and content of the right to basic education and the extent and nature of the state's obligations in respect thereof (Brand and De Vos, 2005).

The obligations engendered by section 29(1) (a) are distinguishable from other socio-economic rights in the Constitution. These rights - such as the rights of access to housing and health care services and the rights to food, water and social security - are qualified to the extent that they are made subject to the adoption of 'reasonable legislative and other measures' and 'progressive realisation' ... 'within: [the state's] available resources'. The right to basic education, including adult basic education, is by contrast unqualified and is therefore an absolute right.

This was confirmed in the recent case of *Minister of Health and Others v Treatment Action Campaign and Others* (the TAC case).

From a textual reading of section 29(1) (a), when compared to these other socio-economic rights in the Constitution, the unqualified and absolute nature of the right to basic education requires a standard of review higher than that used in respect of the qualified rights to determine the extent of the state's obligations in respect of the right to basic education. It is submitted that this higher standard requires that the state implement measures to give effect to the right as a matter of absolute priority. This would require that the state prioritise those

programmes, in its policies and budgetary allocations that seek to give effect to the right over its other spending requirements. An inquiry as to whether or not the state has with absolute priority sought to give effect to the right for all entitled to enjoyment of the right requires an understanding of the scope and content of the right to basic education and an evaluation of the extent to which state policies and practice actually seek to give effect to the right (Sloth-Nielsen, 2001).

The meaning of the term 'basic education' has yet to be decided by South African courts. When the opportunity does finally present itself, the courts should be guided by the objectives to be achieved from the guarantee of the right when defining the scope of the right. The World Declaration on Education for All states that:

[T]he focus of basic education must, therefore, be on actual learning acquisition and outcome rather than exclusively upon enrolment, continued participation in organised programmes and completion of certification requirements.

'Basic education' is accordingly viewed in the Declaration in terms of meeting basic learning needs (these needs include both essential learning tools such as literacy, oral expression, numeracy, problem-solving skills and basic learning content such as knowledge, skills, values, and attitudes) which essentially empower individuals to participate in and interact in the societies in which they live with dignity and with equal opportunities for employment in pursuing their life's vocations. Similarly, what constitutes basic education in the South African context cannot be arbitrarily defined in terms of age or the completion of a particular level of schooling but should be determined in accordance with the educational interest to be achieved by the guarantee of the right. The meaning should therefore be wider than that of only primary education, or compulsory education in terms of the South African Schools Act (Schools Act) and should include secondary education, without which an individual's access to the full enjoyment of other rights, such as the freedom to choose a trade, occupation or profession (section 22) would be severely limited. Such a purposive understanding of the term is also strengthened by the inclusion in the right of the guarantee to provide adult basic education (ABE) so as to ensure the development of all individuals in society (Brand and De Vos, 2005).

General Comment No 13 of the Committee on ESCR defines article 13(2) of CESCR as the right to receive an education. It states that, while the exact standard secured by the right to basic education may vary according to conditions within a particular state, education must exhibit the following features: availability, accessibility, acceptability and adaptability. This four 'A' scheme is a useful device to analyse the content of the right to basic education in terms of section 29(1) (a), and the reciprocal obligations deriving from this unqualified right.

Availability relates broadly to the availability of function-

ing education institutions and programmes. An alarmingly high percentage of schools remain dysfunctional because of a lack of basic infrastructure such as classrooms, clean water and electricity (Brand, 2005).

Accessibility relates to education being available to all on the basis of the principle of non-discrimination, economic accessibility as well as physical accessibility. In terms of the latter, where learners continue to walk distances of up to eight kilometers a day to get to school, whether the state is providing schools that are physically accessible is questionable.

Acceptability in basic education relates to whether or not curricula and teaching methods are sufficient to meet basic learning needs such as literacy, oral expression or numeracy. The scope of the acceptability of basic education has been broadened in international human rights jurisprudence to include a system of education that seeks to protect the individual rights of learners on issues such as language rights, parental choice and discipline of learners (Brand, 2005).

Adaptability in basic education relates to the flexibility of the system of education to adapt to the changing needs in society, and to respond to the diverse needs of learners within their diverse social and cultural settings, most particularly the needs of the more vulnerable segments of society.

The state's attempt to address this is reflected in its policy framework. The Admission Policy for Ordinary Schools Act makes provision for non-citizens to be treated in the same way as other learners, and for learners with special needs to be accommodated in ordinary schools where 'reasonably practical'. The National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions makes provision for the increasing need to manage this pandemic in schools and to guarantee the rights of learners and educators living with HIV/AIDS.

The right to further and higher education

Section 29(1)(b) states: 'Everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.'

This right, unlike the right to basic education, does not place an absolute obligation on the state to provide further education since it is subject to certain of the qualifiers employed in respect of the other socio-economic rights in the Constitution. The term 'progressively' suggests that it is a right that may be realised over time. In *Grootboom* the Court stated:

The term 'progressive realisation' shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic

needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.

The text of section 29(1)(b) also suggests that the standard of review in respect of this section (as in *Grootboom*) is likely to be whether the measures taken to make further education available and accessible are 'reasonable'. A feature of section 29(1)(b) that distinguishes it from the other qualified socio-economic rights is that the phrase 'within available resources' is omitted from the text of the clause. Thus, this could be interpreted to mean that where a state policy or programme is challenged in terms of this right, the criteria for assessing the reasonableness of the programme, could, in addition to those set out in *Grootboom*, also entail an evaluation of the sufficiency of funding available for the policy or programme's implementation (Roux, 2002).

The term 'further education' is not used in international legal instruments. In South Africa, further education and training is defined in the Further Education and Training Act as levels above 'general education' but below 'higher education', while higher education is defined in terms of the Higher Education Act as 'all learning programmes leading to qualifications higher than grade 12 or its equivalent in terms of the National Qualifications Framework'. This includes universities, technikons and colleges. Despite this legislative categorisation, further education in terms of the constitutional right should be read as referring to all education of a higher level than basic education, including higher education. Such an approach would be consistent with the international interpretation given to the meaning of the right, and would be the only way to make sense of the constitutional distinction between basic and further education.

A comparison with article 13(2)(c) of CESCR reveals a significant textual difference with section 29(1)(b). According to article 13(2)(c) of CESCR, higher education shall be made equally accessible to all on the basis of 'capacity'.

This CESCR provision suggests that demonstrated individual ability should determine an individual's eligibility for further education. A determination of a student's ability is complex in a South African context in the light of the legacy of apartheid education since students from disadvantaged schools, which generally produce poor results, are less likely to meet the eligibility criteria for further education than their counterparts from better resourced schools (Brand, 2005).

This should not mean, however, that 'capacity' does not have a role to play in determining eligibility for further education, only that 'capacity' cannot be narrowly defined or assessed, for example by relying solely on a student's matriculation results as an indicator of that student's eligibility for further education. Instead, 'capacity' should

be measured in a manner that acknowledges the history of apartheid education and its continuing legacy of socio-economic disadvantage along racial lines. Thus, a commitment to transformation of further education has to acknowledge that black South Africans were denied opportunities for education and in doing this develop and implement policies and programmes that redress this legacy. An example of such programmes includes selection tests that have been developed at certain universities to assess the potential of students whose schooling results do not necessarily qualify them for university entrance but who nevertheless through these tests demonstrate an ability to succeed at university (Wilson, 2004).

In the case of *Motola Et Another v University of Natal*, the university's admission policy was the subject of an equality challenge. In this case, the parents of an Indian student brought an application against the university after her application to medical school had been rejected, despite good academic results. The parents claimed that the university admission policy discriminated against their daughter and favoured African applicants. The Court found that the discrimination was not unfair and that the policy was within the meaning of section 8(3)(a) of the interim Constitution. The Court accepted that, although the Indian community had been decidedly disadvantaged under apartheid, the disadvantage suffered by African pupils under apartheid was significantly greater, and accordingly an admission policy that acknowledged this was not unfair.

Access to higher education is regulated in terms of the Higher Education Act, which establishes the 'legal basis of a single, national higher education system on the basis of the rights and freedoms in our Constitution'. Thus, there may be institutions reluctant to adopt a programme of institutional transformation, which facilitates access. The Act accordingly gives the Minister of Education a wide discretion to withhold state funds under such circumstances (Wilson, 2004).

Accessibility to further education, as with basic education, requires that education be economically accessible. However, unlike with basic education, there appears to be less support that further education should be free. A more likely interpretation is that further education must be affordable to all who meet the criteria for admission to an institution providing such education. A student aid scheme has been established in terms of the National Student Aid Scheme Act 56 of 1999. The Act provides for the establishment of a board *inter alia* to allocate funds for loans and bursaries to eligible students and to develop the criteria and conditions for the granting and withdrawing of such loans and bursaries.

A scrutiny of the reasonableness of the Act would require an inquiry into whether or not the Act facilitates access to all students, particularly those from disadvantaged backgrounds, who meet the criteria for admission to institutions falling within the Act.

The right to establish private educational institutions

Section 29 (3) of the Constitution states that:

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.

Section 29(4) states that 'subsection (3) does not preclude state subsidies for independent educational institutions'.

In the *School Education Bill of 1995 (Gauteng)*, the Court, interpreting the meaning of the equivalent provision under the interim Constitution, defined the extent of the state's obligations in respect of private education institutions based on a common language and culture:

The submission that every person can demand from the state the right to have established schools based on a common culture, language or religion is not supported by the language of section 32(c). The section does not say that every person has the right to have established by the state educational institutions based on such a common culture, language or religion. What it provides is that every person shall have the right to establish such educational institutions. Linguistically and grammatically it provides a defensive right to a person who seeks to establish such educational institutions and it protects that right from invasion by the state, without conferring on the state an obligation to establish such educational institutions.

The Court thus emphasised that the state's obligations in respect of minority rights in this context were limited to the protection of the rights of minorities to exist as a group, and not to be discriminated against, but that it did not extend to funding the establishment of institutions for particular minority groups. In other words, the Court identified obligations to respect and to protect, but no obligations to fulfill (Brand, 2005).

The right of educational institutions to exist independently is, in terms of this section, conditional on meeting established criteria. That is, independent institutions may not discriminate against learners on the basis of race. Independent schools are also subject to the norms and standards set by the Department of Education and may only qualify for registration once certain basic criteria have been met.

The protection available in terms of equivalent provisions under the interim Constitution was available only to schools that were established in terms of a specific cultural or religious identity. The right in terms of the final Constitution applies to all private schools. Thus, even private schools that do not exist because of a specific cultural or religious affiliation, such as Waldorf schools,

may demand the protection afforded by the right, provided of course that the schools meet the established criteria (Watson, 2000).

While the state is not obliged to fund independent institutions, in terms of section 29(4) nothing precludes the state from granting such schools a subsidy. Such allocations should, however, be guided by the values in the Constitution, in particular the principle of non-discrimination. Eligibility for subsidies at such schools is currently governed by the Schools Act in terms of which schools are eligible depending on the socio-economic circumstances of the schools' clientele.

The right to instruction in an official language

Section 29(2) states that:

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
- (c) The need to redress the results of past racially discriminatory laws and practices.

This protection of language rights in the education clause, as in certain other jurisdictions, arises out of a political compromise with particular minority lobbies for the protection of minority rights. Protecting the right of an individual to learn in the language of his or her choice is nonetheless paramount in facilitating that individual's ability to learn and develop. The approach taken to this right through various processes such as the Constitution drafting process, interpretation by the courts and policy development, has been to balance the need to give effect to this right against the need to ensure broader access to education for all. These processes have accordingly framed the conditions for when the right may be asserted.

In the School Education Bill of 1995 (Gauteng), the Court, in interpreting the meaning of the right under the equivalent provision under the interim Constitution, confirmed that the right creates a positive right for every person to instruction in the language of his or her choice, but stated that this right was qualified to the extent that it was 'reasonably practicable'. The Court did not define the meaning of this term. Under the final Constitution this right has been qualified further by stating explicitly that the entitlement to language choice applies to an official language of one's choice only, as opposed to mother tongue education.

An individual's entitlement under the final Constitution is also further qualified by the inclusion of an internal balancing test when adjudicating on the possible alterna-

tives that may give effect to the right. That is, while the state is obliged to consider all possible options that seek to give effect to the right, such as 'single medium institutions', these must be weighed against certain enumerated grounds, that is, 'equity', 'practicability' and 'the need to redress the results of past racially discriminatory laws and practices'. Therefore, to the extent that a claim is made for an Afrikaans single medium institution, which may have the effect of denying other learners in that area, in particular black learners who are not Afrikaans speaking, access to a school, the establishment of such a single medium institution may be justifiably denied (Brand 2005).

A school could also potentially look at the option of having a dual medium of instruction. Again, this will have to be balanced against the enumerated grounds. In this instance 'practicability' may require an investigation into the availability of resources and teachers. The effect of such an internal balancing test is that where a right in terms of this section is asserted and denied, the state will have to show that all possible alternatives were considered and that the failure to accommodate a learner was justifiable on the basis of one or more of these enumerated grounds (Brand, 2005).

The document entitled Norms and Standards Regarding Language Policy in Public Schools sets out how schools and education departments are to give effect to their obligations in terms of section 29(2) of the Constitution. It sets out the process whereby a learner's language of education may be chosen at a school, and furthermore sets out a process for the Department of Education to assist in the accommodation of a learner at another school in that area, if the school of choice is unable to accommodate the learner.

Right to special education

Where issues of access to, or equal treatment within, schools exist, human rights codes can be invoked to assert equality rights on the child's behalf (Corbett: 1999). Equality rights jurisprudence has developed quickly in recent years in South Africa and with a complexity that defies responsible treatment here. Suffice it to say that a child is entitled to equal treatment, protection and benefit of the law without discrimination because of disability.

Discrimination arises when differential treatment based on disability results from unjustified stereotypical assumptions about the person's ability or worth and does not afford the human dignity and the equal concern and respect every member of South Africa society deserves. The Education White Paper 6: Special Needs Education-Building an Inclusive Education and Training System (2001) aims to:

- Correct discriminatory practices and imbalances of the past and promote the principles of human rights, social justice, access, equity and redress.

- Promote quality education for all-all learners to be developed to their full potential.
- Infuse "special needs and support services" throughout the system.
- Align special schooling with mainstream schooling.
- Foster the development of inclusive and supportive centers for learning.

The White Paper outlines the move away from obvious attendant questions are begged, including, how appropriateness is defined, how centrally, that is done, whether inclusiveness (placement in a regular class) is mandatory, whether learners and / or their parents have effective input into programming and placement decisions, and, finally, whether resources allocated to special education in general, or individual learners, in particular, are adequate.

The landmark case in special education equality rights in Canada is indisputably the Supreme Court's 1997 ruling in *Eaton v. Brant County Board of Education*. Emily Eaton was a profoundly disabled girl with cerebral palsy whose parents wished her returned to a regular-class placement contrary to the board's decision and ultimately to the ruling of a Special Education Tribunal. The parents sought judicial intervention by claiming a violation of Emily's Charter equality rights. The Ontario Court of Appeal ruled that there should be a constitutional presumption of inclusion of exceptional pupils in a regular-class setting. As the Education Act had no such requirement, though it was a policy of the Ministry, the court proprio moto read such a provision into the Act, subject in individual cases to the parents' wishes. The Supreme Court overruled the Appeal Court, holding that such a presumption contravened the need to consider the best interests of the child in each case.

The parents had no right to trump the best interests of the child, which were ultimately to be decided by the court under its *parens patriae* jurisdiction. While a complex ruling, its nub was simple enough: the recognition that true equality of opportunity, especially in the case of a disabled child, often requires unequal treatment (Corbett, 1999). But some have questioned whether the decision to permit segregation in the child's best interests paid sufficient attention to Emily's dignitary interests as required in Law.

The practical upshot of *Eaton* is to place the onus on the parents of a segregated child to show discrimination rather than on the board to show that the limitation on the child's right to equal treatment was reasonable and justified.

In South Africa initial teacher training does include reference to disabilities; the emphasis is on ensuring that trainee teachers master basic skills in teaching and learning. They are not trained with sufficient skills, knowledge or confidence to integrate learners with disabilities in their classes. This lack (a limitation) of training further

translates into regular teachers being unable to identify special needs pupils other than those with physical or sensory disabilities (Valley, 2001).

Another limitation is where education is increasingly becoming "market based" and where competition and standards are vital to a school's survival. In such an environment, schools are compelled to compete with one another, and one way is to recruit the best cohort of learners so that the school's performance can be boosted. Naturally students with disabilities, especially those that have learning difficulties are deemed to be less desirable (Lim and Tan, 2001).

A third limitation, although efforts have been made to enhance opportunities for inclusive education, is that there is still a lack of resources in terms of school staff, flexible curriculum and suitable physical setting in the classroom.

From available literature and reports, there appears to be little evidence to show that in practice "the best interest" principle is applied to learner with disabilities. Do parents with special need children; know where to place their children at school entry age?

Despite the moves to integrate children with special needs into mainstream schools and the steps taken to enhance the support for these children, there has been no attempt to give clearer guidelines on placement and special educational provision. Perhaps lessons can be learnt from the experience of the developed countries in this regard, and measures adopted and implemented to give disabled learners in South Africa what they rightly deserve - the best opportunity to learn- categories of disabilities and the establishment of full service schools which cater for disabilities depending on need and support" (Corbett, 1999).

The obvious difficulty posed in the case of the disabled is that they may be unable to exercise the rights they are claiming by the very fact of their disability and may indeed need to be treated differently to achieve true equality of opportunity (especially in the case of children on whose behalf decisions need to be made) (Valley, 2001).

Under Education Acts most children enjoy the right to access to schooling. But, the disabled child's right to pass through the door of a school and what happens once the door closes behind them, are very different things. For one thing, certain rules and practices designed for the general learner population can work to impair the access right of special education learners (Liebenberg, 2001).

Access issues can also take more subtle forms. Learners with special education needs can also pose a threat to school safety. Schools', code of conduct should be aligned with new needs of the school where "inclusive education" is in practice. Not surprising, that special education learners, especially those with behavioral problems, often run afoul of such codes of conduct (Watson, 2000). The qualitative dimension of the right to education for a disabled learner is typically defined legis-

lately by the phrase "appropriate programme or appropriate services" or like wording.

Sex and health education

The Minister of Education may include compulsory sex and health education in the curriculum statement and minimum educational outcomes to be determined. In view of the AIDS threat, the importance of such education is self-evident. The curriculum statement does not require parental consent or consultation with parents. There is nothing in the South African Schools Act that allows parents to play any role in regard to sex and health education.

Sex education in Finland is compulsory. It is a subject on its own to develop young persons' knowledge of their sexuality as part of the promotion of sexual health and welfare. In Romania sex education is included in Education for health. In Russia proper sex education and health services are largely lacking. Sex education in Turkey is far from being adequate but this fails to worry many in the country. As a result, sex education seldom becomes the topic of public debate in Turkey and it has not been challenged through the legal system for violations of rights. Very interesting is the fact that in many countries sex and health education includes HIV/AIDS as a topic.

Parents in South Africa's views concerning the presentation of compulsory sex and health education to their children may be shaped by their religious beliefs and philosophical world views, they may have objections to the way such education is presented (Visser, 2004). Any challenge whether or not sex education must be presented will have to be based on the common law authority of parents and human rights such as freedom of conscience, religion, thought and belief.

In regard to this, the Constitutional Court observed as follows (Christian Education SA vs Minister of Education):

"The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding, accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the law of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or respectful of the law."

Sex and health education and especially the content thereof will have to be balanced against the fundamental rights of freedom of conscience, religion, thought and

belief. The state should give an indication that the content of such education should be reasonably accepted by parents in the best interest of the child.

Conclusion

In countries worldwide, there is a growing concern about corporal punishment, negligence in schools, sexual assaults by teachers and bullying by learners. The "rights culture" is indeed growing and people, including learners and teachers, are demanding to be heard and be treated fairly. Teachers need to realize, that "the significance of school law presents a unique intellectual challenge" to prepare them to be more proactive in meeting the needs of staff, parents, learners and the community (Russo and Stewart, 2001).

Although there is no single piece of legislation that addresses all the rights of a child as set out in the CRC, a child's rights in South Africa are reflected in various statutes and legislation. In recognizing the rights of the child all these legislation "in the best interest of the child" is always of paramount importance (Watson, 2000).

Like it or not, we are caught up in the globalization of rights, and as the "rights culture" continues to manifest itself, teachers will find themselves inexorably drawn into education law so that they can act in the best interest of the child.

It is imperative to continue to improve the quality management systems to public education. There are still too many corrupt practices in public schools as well as other irregular practices that make the right to education problematic. The State must respond in a way appropriate in a constitutional democracy to the challenges posed by the right to education and in the best interest of the child.

Education is, as has been stated in this article, necessary for the enjoyment of the rights and freedoms of the Constitution. Therefore, the full realisation of the right to education also enhances opportunities for the enjoyment of the right and freedoms. Where policies do not facilitate full enjoyment it must be revised. International Law and treaties can provide guidance in this regard.

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