Constitutional protection of the right to education

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1 Introduction

Education is important: education takes place in the family environment; education through exposure to the public domain; education by the mass media; education within the enclave of public entertainment and theatrical performances, and much more. Most important, though, in the context of the present survey is education in schools and other educational institutions.

Education provides knowledge, prepares one for meaningful and lucrative employment, promotes a healthy life style, cultivates an understanding of the complexities of historical eventualities and current affairs, instils in a learner a certain moral consciousness, and stimulates conduct that is conducive to a better future.

According to the Committee on Economic, Social and Cultural Rights, the right to education 'is of vital importance', and 'epitomizes the individuality and interdependence of all human rights'.[1] 'Education is both a human right in itself and an indispensable means of realizing other human rights'.[2] It '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'.[3]

2 International law directives

No wonder, therefore, that education has come to be recognised in international law as a fundamental human right. The Universal Declaration of Human Rights (UDHR) deals with the rights of a child exclusively in the context of education and indeed

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[1]Committee on Economic, Social and Cultural Rights, General Comment no 11 para 2.

[2]Committee on Economic, Social and Cultural Rights, General Comment no 13 para 1; and see *Governing Body, Rivonia Primary School v MRC for Education, Gauteng Province* [2012] 1 All SA 576 (GSJ) para 28.

[3]Committee on Economic, Social and Cultural Rights, General Comment no 13 para 1.

proclaims the right of everyone to education.[4] It provides that elementary education shall be compulsory and that education in the elementary and fundamental stages shall be free.[5] Higher education must be equally available to all on the basis of merit, while technical and professional education must be made generally available.[6]

The Universal Declaration also has something to say about the substance of education. It must be directed to the full development of the human personality; it must strive toward respect for human rights and fundamental freedoms; it must promote the understanding, tolerance and friendship among all nations, and among racial or religious groups; it must further the activities of the United Nations for the maintenance of peace.[7]

The above principles were endorsed by the International Covenant on Economic, Social and Cultural Rights (ICESCR).[8] The Covenant distinguishes between primary education (which is to be compulsory and free to all),[9] secondary education (that includes technical and vocational secondary education, which is to be 'generally available and accessible to all', and should progressively become 'free education'),[10] higher education (which must 'be made equally accessible to all' and should also progressively become 'free education'),[11] and fundamental education (which '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').[12]

In its General Comment no 13 of 8 December 1999, the Committee on Economic, Social and Cultural Rights elaborated in some detail the principles outlined in the Covenant. The right to receive an education requires (a) **availability** of functioning educational institutions and programmes; (b) **accessibility** to everyone of such institutions and programmes; (c) **acceptability** of the form and substance of education, including curricula and teaching methods; and (d) **adaptability** to the needs of changing societies and communities and to the needs of students within diverse social and cultural settings.[13]

The Convention on the Rights of the Child (CRC) confirmed the right to education of the child,[14] and called on States Parties to '[m]ake primary education compulsory and free to all';[15] to '[e]ncourage the development of different forms of secondary education', to make such education 'available and accessible to every

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[4]UDHR art 26(1).
[5]*Ibid*.
[6]*Ibid*.
[7]*Id* art 16(2).
[8]ICESCR arts 13(1), 13(2)(a) and (c) and 13(3).
[9]*Id* art 13(2)(a).
[10]*Id* art 13(2)(b).
[11]*Id* art 13(2)(c).
[12]*Id* art 13(2)(d).
[13]Committee on Economic, Social and Cultural Rights, General Comment no 13 para 6.
[14]CRC art 28(1).
[15]*Id* art 28(1)(a).

child', and to this end to 'take appropriate measures such as the introduction of free education and offering financial assistance in case of need';[16] States Parties are further instructed to '[m]ake higher education accessible to all on the basis of capacity';[17] to '[m]ake educational and vocational information and guidance available and accessible to all children';[18] and to take the necessary measures 'to encourage regular attendance at schools and the reduction of drop-out rates'.[19] States Parties must 'promote and encourage international cooperation in matters relating to education'.[20] Such cooperation must be designed 'to contributing to the elimination of ignorance and illiteracy' and 'facilitating access to scientific and technical knowledge and modern teaching methods'.[21] Special efforts must be made to accommodate the needs of developing countries.[22]

Education must be directed towards 'development of the child's personality, talents and mental and physical abilities to their fullest potential';[23] 'development of respect for human rights and fundamental freedoms';[24] 'development of respect for the child's parents, his or her cultural identity, language and values, for the national values' of his or her home country or country of origin, and for 'civilizations different from his or her own'.[25] Education must prepare the child 'for responsible life in a free society, in the spirit of understanding peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin'.[26] It must also develop 'respect for the natural environment'.[27]

The African Charter on the Rights and Welfare of the Child endorsed the principle of free and compulsory education;[28] included in the objectives of education 'the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential';[29] '[f]ostering respect for human rights and fundamental freedoms';[30] and 'the development of respect for the environment and natural resources'.[31] The educational principles listed in the Child Welfare Charter have been endorsed by the South African Constitutional Court.[32]

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[16] *Id* art 28(1)(b).
[17] *Id* art 28(1)(c).
[18] *Id* art 28(1)(d).
[19] *Id* art 28(3).
[20] *Ibid*.
[21] *Ibid*.
[22] *Id* art 28(1)(a).
[23] *Id* art 29(1)(a).
[24] *Id* art 29(1)(b).
[25] *Id* art 29(1)(c).
[26] *Id* art 29(1)(d).
[27] *Id* art 29(1)(e).
[28] African Charter on the Rights and Welfare of the Child para 11(3)(a), OAU Doc CAB/LEG/24.9/49 (1990) (entered into force 1999-11-29) (hereafter Child Welfare Charter).
[29] *Id* par 11(2)(a).
[30] *Id* par 11(2)(b).
[31] *Id* par 11(2)(g).
[32] *Governing Body of the Juma Musjid Primary Schools v Essay* 2011 8 BCLR 761, note 38 (CC).

3 Constitutional Provisions

South African law is – as they would say in Germany – *Völkerrechtsfreundlich*. Customary international law is,[33] and self-executing international agreements are,[34] part of the law of the land unless it or they are inconsistent with the Constitution of the country or an Act of Parliament. The South African Constitution furthermore instructs courts of law to prefer an interpretation of legislation that is consistent with international law.[35] When interpreting the constitutional Bill of Rights, courts of law *are permitted* to consider comparable foreign law,[36] but *are compelled* to take international law into account.[37] They are evidently precluded from following international-law directives that are at odds with constitutionally protected rights.[38]

South Africa furthermore ratified the Convention on the Rights of the Child on 16 June 1995, the Covenant on Civil and Political Rights (ICCPR) on 10 December 1998, the African Charter on the Rights and Welfare of the Child on 7 January 2000, and the UNESCO Convention against Discrimination in Education of 9 March 2000. It did so in all instances without reservation. It signed (on 3 October 1994), but did not ratify, the Covenant on Economic, Social and Cultural Rights. Given the overlap of provisions of the Covenant relating to education with those contained in the instruments which South Africa did ratify, it is fair to conclude that South Africa is duty-bound to uphold the principles proclaimed in all the international instruments outlined above. And, although the provisions of the Covenant on Economic, Social and Cultural Rights were made subject to progressive implementation dependent on the available resources at the disposal of the State,[39] it has been established that deprivation of any significant number of individuals of, among other things, 'the most basic forms of education' will *prima facie* be regarded as a violation of the Covenant.[40] The same applies – it is submitted – to provisions in the Convention on the Rights of the Child which does not *per se* grant children the rights proclaimed therein, but invites a commitment of States Parties 'to ensure such protection and care as is necessary for his or her well-being',[41] or to 'ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities'.[42]

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[33]Constitution of the Republic of South Africa, 1996 (hereafter SA Constitution) sec 232.
[34]*Id* s 23(4).
[35]*Id* s 233.
[36]*Id* s 39(1)(c).
[37]*Id* s 39(1)(b).
[38]*Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 para 104 (CC).
[39]ICCPR art 3(2).
[40]Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 9, reprinted in (1998) 20 *Human Rights Quarterly* 691-704.
[41]CRC art 3(2).
[42]*Id* art 3(3).

Article 29 of the Constitution of the Republic of South Africa, 1996 proclaimed four principles relating to the right to education:

> (a) Everyone has the right to a basic education, including adult basic education;
> (b) Everyone has the right to further education, which right must be made progressively available and accessible;
> (c) Everyone has the right to receive education in one or more of the country's eleven official languages of their choice, subject, however, to providing education in a particular language being reasonably practicable, taking into account considerations of equity, practicability, and the need to redress the results of racially discriminatory laws and practices of the past; and
> (d) Everyone has the right to establish and to maintain independent educational institutions that must be registered with the State and may be subsidised by the State, but which may not discriminate on basis of race and must maintain standards that are not inferior to the standards at comparable public educational institutions.

The National Education Policy Act 27 of 1996 was enacted to pave the way for bringing the country's education policy in line with these constitutional decrees. Its constitutionality was contested in the Constitutional Court because it allegedly authorised the national authorities to usurp powers reserved for the provinces, but the attack on its legality was rejected by the Constitutional Court.[43] Further legislation, the South African Schools Act 84 of 1996,[44] was enacted to more concretely implement the constitutional principles pertaining to education. The constitutionality of certain sections of this Act – those implicating the future of Afrikaans schools and Christian education – were also contested, but here, too, the Constitutional Court upheld their constitutionality.[45] In a concurring judgment, Sachs J noted that:

> immense inequality continues to exist in relation to access to education in our country. At present, the imperatives of equalising access to education are strong, and even although these should not go to the extent of overriding constitutionally protected rights in relation to language and culture, they do represent an important element in the equation. The theme of reducing the discrepancies in the life chances of all South Africans runs right through the Constitution, from the forceful opening words of the preamble to the reminder of the past contained in the powerful postscript.[46]

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[43] *In re: The National Education Policy Bill no 83 of 1995* 1996 4 BCLR 518 (CC).
[44] The Act was initially introduced as a Bill of the Gauteng legislature but was subsequently enacted as an Act of Parliament.
[45] *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 3 SA 165; 1996 4 BCLR 536 (CC). For a critical analysis of the judgment, see Venter 'Afrikaanse en christelike onderwys in die nuwe grondwetlike bedeling' (1996) 36 *Tydskrif vir Geesteswetenskappe* 232.
[46] *Ex parte Gauteng Provincial Legislature* (n 45) para 52.

3.1 The right to education

The right to basic education has been acknowledged as 'a positive right' requiring 'that basic education be provided for every person', and not merely as a 'negative right' denoting 'that such person should not be obstructed in pursuing his or her basic education'.[47]

Unlike other socio-economic rights, the right to basic education,[48] including basic adult education,[49] is not subject to progressive implementation and therefore dependent on the availability of resources but is instead immediately enforceable.[50] The right to further education, on the contrary, is couched in the language of progressive implementation.[51] In both instances – in the case of basic education and further education – there is a primary duty on the State to provide the support, facilities and services for the realisation of these rights. This appears from the second clause of article 29(1)(b) of the Constitution which places an obligation on the State to take reasonable measures that would make further education progressively available and accessible, and from distinguishing the right to basic and further education from the right of persons other than the State to establish and maintain independent educational institutions.[52]

The right to basic education is furthermore a fundamental right that must prevail over other conflicting constitutional rights and freedoms. This becomes even more evident if one considers the right to education in conjunction with the very basic directive of article 28(2) of the Constitution, which provides: 'A child's best interests are of paramount importance in every matter concerning the child'.[53]

In a recent judgment of the Constitutional Court it was accordingly decided that, in view of the right to basic education, a landowner's right to obtain an eviction order that would culminate in the closing of a public school cannot be executed before the education department has found suitable alternative accommodation for that educational institution.[54]

In another matter, though, the High Court of Eastern Cape was not prepared to condone the award of a tender to provide scholastic stationery to schools where the 'tender process was not only procedurally flawed, but also substantially unfair',[55] and in spite of the fact that a large number of schools in the Eastern Cape would be

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[47] *Id* para 9, with reference to s 32(a) of the 1993 interim Constitution.
[48] SA Constitution s 29(1)(a).
[49] *Id* s 29(1)(b).
[50] *Juma Musjid Primary School* (n 32) para 37; *Rivonia Primary School* (n 2) para 26.
[51] SA Constitution s 29(1)(b).
[52] *Id* s 29(3).
[53] *Id* s 28(2); and see *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*, 2003 4 SA 160, 176 (T); Visser 'Some ideas on the best interests of a child principle in the context of public schooling' (2007) 70 *THRHR* 459-69.
[54] *Juma Musjid Primary School* (n 32).
[55] *Freedom Stationary (Pty) Ltd v MED for Education, Eastern Cape* 2011 JOL 26927 para 28(E) (2011-03-16); and see also *Logbro Properties CC v Bedderson NO* 2003 2 SA 480 (SCA), holding that the tender process constitutes 'administrative action under the Constitution'.

without scholastic materials that constitute 'a critical part to the right to basic education'.[56] The Court noted that '[t]he absence of stationery, transport, and in some cases food, at so many schools, is directly attributable to the action (or inaction) of the Department [of Education]'[57] and expressed the hope that charities could assist in providing stationery to the schools in the interim period until the administrative process for awarding a tender could be completed within the confines of the law.[58] Here, it would seem, the best interests of the child did not trump the constitutional requirements of a tender process having to be lawful and procedurally fair.[59]

A vexing question is whether a constitutional right to education means free education:[60] Does the duty of the State to provide education entail the further obligation of the State to bear all the costs of providing education? The progressive implementation provision attending the duty of the State to provide 'further education' in addition to (the immediately enforceable) basic education, is indicative of state responsibility to finance both basic and further education within the meaning of section 29(1). The Constitutional Court assumed that the equal access provision in the Interim Constitution implied that basic education was to be provided at public expense.[61] Equal access to educational institutions that was included in the right to education under the 1993 Interim Constitution[62] was excluded from its counterpart in the 1996 Constitution.

It is rather surprising that the right to *free* basic education was not expressly included in the 1996 constitutional guarantees. Under the African Charter on the Rights and Welfare of the Child, States Parties undertook to 'take all appropriate measures' to ensure that 'free and compulsory basic education be provided.[63] South Africa is furthermore a signatory to the Dakar Framework for Action of 2000 and is as such under 'an obligation to ensure that EFA (Education for All) goals and targets are reached and sustained',[64] and those goals include one 'ensuring that by 2015 all children ... have access to and complete free and compulsory primary education of good quality'.[65] The South African Schools Act of 1996 does make school attendance compulsory for all learners aged 7 to 15,[66] but also makes

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[56] *Freedom Stationary* (n 55) para 31.
[57] *Id* para 34.
[58] *Ibid*.
[59] See in general Couzens 'Procurement adjudication and the right of children: *Freedom Stationery (Pty) Ltd v MRC for Education, Eastern Cape* 2011 JOL 26927 (E)' (2012) 15(1) *PER* 391.
[60] See in general Arendse 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) 14/6 *PERJ* 97.
[61] The National Education Policy Bill no 83 of 1995 (n 43) para 7.
[62] Constitution of the Republic of South Africa Act 200 of 1993 s 32(a).
[63] Child Welfare Charter (n 28) para 11(3)(a).
[64] World Education Forum, The Dakar Framework for Action, Education for All: Meeting our Collective Commitments, para 2 (Dakar, Senegal 2000-04-26-28) (hereafter Dakar Framework for Action).
[65] *Id* para 7(ii).
[66] South African Schools Act 84 of 1996 s 3(1); and see *Juma Musjid Primary School* (n 32) para 38.

provision for the levying of school fees,[67] which evidently implicates the principle of free education. In its *Plan of Action* of 2003 for *Improving Access to Free and Quality Basic Education for All*, the Department of Education maintained that its 'current fee-setting policies are adequate'.[68] The *Plan of Action* also expressed the opinion 'that school uniforms can play a positive role in the schooling system'.[69] School fees and the cost of particular school uniforms, combined with household poverty, have been identified as a financial barrier that prevents the indigent from attending the better schools. 'There is strong reason to believe', said Anderson, Case and Lam, 'that school fees are correlated with school quality in South Africa'.[70]

As far as mandatory school uniforms are concerned, the 2003 Plan of Action does prohibit schools 'from taking any action against or marginalising in any way, a learner who does not comply with the school uniform, where there are grounds to suspect that the reason for non-compliance is economic hardship of the learner concerned'.[71] It is respectfully submitted that this is not a feasible solution. School uniforms serve several useful purposes, among others because a uniform dress code conceals outer appearances of the divide between the rich and the poor. Permitting learners that suffer economic hardship not to comply with the school uniform will obviously counter this important benefit of the dress code. School authorities should rather provide the indigent learners with the school uniform free of charge.

3.2 Language rights in education

Section 29(2) of the Constitution 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, taking into account
> (a) equity;
> (b) practicability; and
> (c) the need to redress the results of past racially discriminatory law and practice.

The Constitutional Court explained:

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[67]South African Schools Act s 39; and see also s 37(2).
[68]Plan of Action for Improving Access to Free and Quality Basic Education for All para 61 (2003). As to the person(s) liable for the payment of school fees, see Carnelley 'Liability for the payment of public school fees' (2011) 14/6 *PER/PEJL* 34-60.
[69]Plan of Action (n 68) para 67; and see also Department of Education and Training, School Uniform Policy Doc PD/2004/0025/V001 (2004-08-16).
[70]Anderson, Case and Lam 'Causes and consequences of schooling outcomes in South Africa: Evidence from survey data' (2001) 27/1 *Social Dynamics* 37, 44.
[71]Plan of Action (n 68) para 70.

> The right to receive education in the official language of one's choice in a public educational institution where it is reasonably practical is located in section 29(2) of the Constitution. In order to give effect to this right, the same provision imposes a duty on the state to consider all reasonable educational alternatives, including single medium institutions, taking into account what is equitable, practicable and addresses the results of past racially discriminatory laws and practices. The Schools Act is legislation that seeks to give effect to this constitutional safeguard.[72]

Mother tongue instruction – an invention of the Soviet Constitution of 1924 – has been commended as 'the foremost and the most effective medium of imparting education',[73] and as 'the most powerful instrument of extending educational opportunities to all South Africans'.[74] However, the Constitution does not compel a person to undergo education in his or her mother tongue – as was the policy of the apartheid regime – but permits education in the official language or languages of the scholar's own choice, and it so happens that a vast majority of African learners prefer education through the medium of a language other than their own – notably in South Africa, through the medium of English. This is in a sense commendable, because English has become a 'world language'. However, it has also placed exclusively Afrikaans medium schools in South Africa at risk,[75] and, as noted by Justice Johan Kriegler, 'Language – and more precisely the maintenance of Afrikaans – provoke deep-rooted emotion'.[76]

If education in the official languages of South Africa had been freely and adequately accessible throughout the country, implementation of language rights in education would not have been a problem. But that is not the case. Consequently, the right to education in any particular official language – say, Afrikaans – can only be insisted upon where provision of education through the medium of Afrikaans is 'reasonably practicable'. Public educational authorities have been given a wide discretion to consider their options in the allocation of (linguistically) scarce resources: it must consider all educational alternatives,

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[72] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415; 2010 3 BCLR 177 para 42 (CC); and see Malherbe 'Reflections on the educational background and contents of the education clause in the South African Bill of Rights' (2007) 70 *THRHR* 85; Malan 'Die grondwet, onderwysowerhede en die pad vorentoe vir Afrikaanse skole' (2010) 50/2 *Tydskrif vir Geesteswetenskappe/Journal of Humanities* 261-283.

[73] *Hoërskool Ermelo* (n 72) para 50.

[74] Malherbe (n 72) 97.

[75] See, eg, *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T); *High School Carnarvon v MEC for Education Training Arts and Culture of the Northern Cape Provincial Government* [1999] JOL 5726 (NC); *Laerskool Middelburg*; *Minister of Education* (*Western Cape*) *v Mikro Primary School Governing Body* 3 All SA 436 (SCA); *Hoërskool Ermelo* (n 72); and see in general Swart 'The constitutionalisation of diversity: An examination of language rights in South Africa after the *Mikro* Case' Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht (2008).

[76] *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 3 SA 165; 1996 4 BCLR 536, para 39 (CC): 'Taal – en by name die behoud van Afrikaans – ontlok diepgewortelde emosie'.

including single medium institutions, taking into account equity, practicality and considerations of remedial actions.

In *Hoërskool Ermelo*, the Constitutional Court had the final say in interpreting the constitutional principles relating to single medium education in 'the new' South Africa. The Ermelo High School has been an Afrikaans medium school of high standing for many years. In recent times, though, there was a dramatic decline in its student enrolment. At the same time, the demand of basic education through the medium of English increased dramatically and to an extent not fully accommodated by the English language schools in the area. A fairly large number of black learners applied to be admitted to the High School of Ermelo and to receive tuition through the medium of English. They were refused admission on the basis that Afrikaans was the only medium of instruction of the school.

In terms of section 6(2) of the South African School's Act 'the governing body of a public school may determine the language policy of the school subject to the Constitution'. Section 22(1) of the Act authorises the head of the education department to withdraw a function of the governing body, and may do so, in terms of section 22(3), in cases of emergency without prior communication to the governing body. In cases where the department of education has determined on reasonable grounds that a governing body ceased to perform functions allocated to it by the Act or has failed to perform one or more of those functions, the head of the education department, acting pursuant to section 25(1) of the Act, 'must appoint sufficient persons to perform all such functions or one or more of such functions, as the case may be, for a period not exceeding three months'. Acting pursuant to these provisions, the head of department terminated the existing governing body of the Ermelo High School and replaced it with an interim committee, which then amended the language policy of the school to make provision for instruction through the medium of Afrikaans and English. The action of the head of department was upheld in the North Gauteng High Court, Pretoria,[77] overruled by the Supreme Court of Appeal,[78] and finally came before the Constitutional Court, which upheld the decision of the Supreme Court of Appeal but on partially different grounds.[79]

The Constitutional Court decided that section 29(2), read with section 22, of the South African Schools Act does give the head of the education department the power to withdraw on reasonable grounds the function of the governing body to determine the language policy of the school. Once the power has been properly withdrawn, such power vested in the head of department and could be exercised by him or her for a specific remedial purpose. The appointment of an interim committee in terms of section 25 of the South African Schools Act to

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[77] *High School Ermelo v Head of Department of Education, Mpumalanga* Case no 3062/07 2007-10-17 (unreported).
[78] *Hoërskool Ermelo v Head, Department of Education, Mpumalanga* 2009 3 SA 422 (SCA).
[79] *Hoërskool Ermelo* (n 72).

determine the school's language policy was therefore *ultra vires* the head of department. The withdrawal of the function from the governing body of the school, the appointment of the interim committee, and the subsequent amendment of the school's language policy by the interim committee, were therefore unlawful and were consequently set aside.

The Constitutional Court, acting pursuant to section 172(1)(b) of the Constitution,[80] further decided that the governing body revisit its language policy for at least two reasons. First, the governing body assumed that its decision regarding the school's language policy was to be determined by the interests of the school and its learners only, whereas the interests of the community in which the school is located and the needs of other learners in the region have to be taken into account also. Secondly, even though the decision of the interim committee was unlawful, the scarcity of classroom spaces for learners preferring education through the medium of English remains a reasonable certainty in the future. The Department of Education furthermore bears a constitutional and statutory duty to provide basic education in the official language of the learners' choice in cases where this is reasonably practical and just.

The Constitutional Court therefore made an order requiring the school's governing body and the school to report to the Court within a specified period of time on the reasonable steps it has taken in reviewing the school's language policy and on the outcome of their review process. The end result was that the Ermelo High School is now a double medium school offering education through the medium of Afrikaans and English. The High School of Nelspruit is the only remaining Afrikaans medium high school in Mpumalanga,

3.3 Independent educational institutions

In the Gauteng School Education Bill case, Justice Johan Kriegler suggested that those wishing to retain single medium education should take recourse to private educational institutions.[81] The Constitution expressly sanctioned the right of '"[e]veryone" to establish and maintain independent educational institutions'.[82] Justice Kriegler proceeded on the assumption that those aspiring towards single medium schools do so for racist reasons,[83] which is of course not necessarily the case.[84] The International Covenant on Economic, Social and Cultural Rights sanctioned the establishment of independent schools, subject only to the condition that such schools comply with general educational policies stipulated in the Covenant and uphold

[80]Under s 172(1)(b) the Court may suspend a decision of unconstitutionality for a fixed period of time to allow the competent authority to correct the default.
[81]School Education Bill, Gauteng (n 76) para 42.
[82]SA Constitution s 29(1).
[83]School Education Bill Gauteng (n 76) paras 39-42.
[84]See Swart (n 75) 1096.

minimum standards laid down by the State.[85] The Convention on the Rights of the Child likewise endorses the '"liberty of individuals and bodies" to establish private educational institutions', provided only that such institutions 'conform to the minimum [educational] standards as may be laid down by the State'.[86] The establishment of private educational institutions also finds support in the UNESCO Convention against Discrimination in Education of 14 December 1960.[87]

The South African interim Constitution expressly provided that independent educational institutions could be based on a common culture, language or religion.[88] These criteria were not repeated in the 1996 Constitution, probably because they were too restrictive. For example, the interim Constitution did not permit single sex schools. Omission in the 1996 Constitution of the Equal Access Clause of section 32(a) of the interim Constitution is of special significance in this regard. It is perhaps important to note that the UNESCO Convention against Discrimination in Education did not include the establishment of single sex schools, or of separate educational systems or institutions for religious or linguistic reasons, as instances of discrimination in education.[89] It is, therefore, submitted that independent educational institutions based on a common culture, language or religion, as well as (private) single sex schools, are constitutionally tenable. The Constitution does not compel the State to provide independent educational institutions with a specific cultural, ethnic, linguistic, or religious bias, but in terms of section 29(3), '[e]veryone has the right to establish and maintain' such institutions.[90]

Independent (private) educational institutions must comply with certain constitutionally defined standards: Race may not be the reason for the establishment of, or a criterion for admission to, an independent educational institution;[91] and the institution must be registered with the State and maintain standards that are not inferior to those of comparable public educational institutions.[92]

Application of the Non-Discrimination Clause could be complicated. Putative egalitarianism may develop under the guise of all kinds of ostensibly race-neutral admission tests and cunning entry requirements. There are, in a word, more ways than one to kill the cat. The principle of 'purposive discrimination', developed in the United States to dispose of discriminatory neutral legislation that in its application amounts to *de facto* discrimination,[93] may serve as a useful guide for

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[85] ICESCR art 13(4).
[86] CRC art 29(2).
[87] Convention against Discrimination in Education, arts 2(a) and (b). United Nations Educational, Scientific and Cultural Organization, Records of the General Conference, 11th Sess at 119 (Paris 1960).
[88] Act 110 of 1993 s 32(c).
[89] Convention against Discrimination in Education (n 87) art 2(b).
[90] See *School Education Bill, Gauteng* (n 76) para 7.
[91] SA Constitution s 29(3)(a).
[92] *Id* s 29(3)(b) and (c).
[93] *Washington v Davis* 426 US 229 (1976); *Mobile v Bolden* 446 US 55 (1980); and see Van der Vyver 'Comparative law in constitutional litigation' (1994) 111 *SALJ* 19, 30-31.

dealing with such matters: If it can be demonstrated that the purpose of an admission test or entry requirement was precisely devised to conceal a racial preference, then the institution should be judged to have been created in violation of the non-discrimination imperative.

This, perhaps, was of special concern to the South Gauteng High Court in a case concerning the Rivonia Primary School. The school authorities in that case had restricted the number of learners in each class to a certain maximum and declined to admit a learner who applied for admission after the school had reached its capacity for the relevant grade. Although there are clearly good pedagogical reasons for restricting the number of learners in class, the right to education is a more vital constitutional right. The Court noted that 'whilst the applicants' desire to offer the best possible education for its learners is laudable, the Constitution does not permit the interests of a few learners to overrule the right of all other learners in the area to receive a basic education'.[94] Racial discriminatory practices of the past also had a decisive influence on the Court's decision to set aside the governing body's decision as to the school's maximum capacity.[95] The Rivonia Primary School is located in a predominantly white suburb of Sandton and shared in the historically advantaged disposition of white education: 'Although all schools are now open to children of all races, the consequences of apartheid forced removals and racially exclusive zoning mean that a majority of formerly white schools remain disproportionately white, while the majority of black schools continue to serve almost solely black children'.[96] A school admission policy that seeks to uphold first class education but which would be conducive to perpetuating this state of racial inequality can no longer be upheld in this day and age. It should be noted, though, that leave to appeal the judgment of the High Court to the Supreme Court of Appeal has been granted and that the High Court's ruling was consequently 'suspended' pending the outcome of the appeal.

In the interim Constitution, nothing was said about the financing of independent educational institutions. A strong argument could be made that state subsidies of such institutions were called for: if one has a constitutional right to a particular facility, amenity or service, the State is under a complementary duty to provide that facility, amenity or service. *In re: The School Education Bill of 1995 (Gauteng)* was decided differently.[97] The matter has now in any event been clarified: independent educational institutions may be created and maintained at the founder's own expense.[98] Nothing, however, would preclude the State from subsidising an independent educational institution.[99] The constitutional endorsement of independent schools includes the establishment of parochial schools.

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[94] *Rivonia Primary School* (n 2) para 72.
[95] See in particular *id* paras 70 and further.
[96] *Id* para 71.
[97] *School Education Bill, Gauteng* (n 76) para 42 (per Kriegler J) and para 83 (per Sachs J).
[98] SA Constitution s 29(3).
[99] *Id* s 29(4).

3.4 Religion in public education

South Africa remained favourably disposed toward promoting spiritual values in the minds of young people, and to do so through the good offices of state institutions. Family values and parental control has been afforded a special place in the cultivation of moral values and religious principles in the minds of children and young people.

According to the Universal Declaration of Human Rights, parents must be afforded a prior right to choose the kind of education to be given to their children.[100] In its education clauses, the International Covenant on Economic, Social and Cultural Rights upholds the liberty of parents or guardians to choose the schools for their children other than those within the public education system, and expressly includes in that liberty a competence of the parents to ensure the religious and moral education of their children in conformity with their own convictions.[101] The International Covenant on Civil and Political Rights likewise calls on States Parties 'to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.[102] The African Charter on the Rights and Welfare of the Child endorsed the right of parents or guardians to ensure the religious and moral education of the child but taking into account the evolving capacities of the child.[103]

South African law expressly authorises religious observances at state or state-aided institutions, provided that the religious observances follow rules made by the appropriate public authorities, are conducted on an equitable basis, and render attendance at such observances to be free and voluntary.[104] The question of free and voluntary attendance of religious classes and ceremonies in state and state-aided educational institutions was in issue in a case involving the German School in Pretoria.[105] Religious education in the school was initially offered on a parochial basis (mainly Lutheran, but also Catholic), but since 1987 religious instruction was offered in an historical context and no longer from the perspective of any particular denominational confession. Since then, and for that reason, attendance of religion classes became mandatory – and free only to the extent that no one was obliged to go to that school. The plaintiff in the matter, a student in the German School, took issue with the School Association for being compelled to attend the religion classes. The Court found that the constitutional right not to attend religious observances is one that can validly be waived by its beneficiaries and that the plaintiff had done exactly that by subjecting herself to the school's rules and regulations when she enrolled as a student.[106]

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[100]UDHR art 16(3).
[101]ICESCR art 13(3).
[102]ICCPR art 18(4).
[103]Child Welfare Charter (n 28) para 11(3)(a).
[104]SA Constitution s 15(2).
[105]*Wittmann v Deutscher Schulverein, Pretoria* 1998 4 SA 423 (T); 1999 1 BCLR 92 (T).
[106]*Id* SA at 445; BCLR at 121.

A religious or cultural dress code came under scrutiny in a case involving a young learner of Hindu extraction, Sunali Pillay.[107] Ms Pillay gained entry into the Durban Girls' High School – one of the most prestigious state schools in South Africa – where she received excellent education. When she reached a certain stage of maturity, a golden stud was inserted in her nose, which is a custom in the Hindu community indicating that a girl has become eligible for marriage. This brought her into conflict with the school authorities. The school's code of conduct, signed by her parents as a condition for Sunali's admission to Girls' High, prohibited the wearing of any jewellery, except ear-rings and then only under meticulous conditions specified in the code of conduct. Sunali's mother explained to the school authorities that her daughter did not wear the nose stud as a token of fashion but in deference to an age-old tradition of the Hindu community. The school management refused to grant Sunali an exemption from its dress code. A complaint was thereupon filed by Mrs Pillay in the equality court, based on discrimination. The equality court ruled in favour of the school,[108] and the matter eventually came before the Constitutional Court of South Africa. The Constitutional Court decided that refusal by the school authorities to grant Sunali an exemption from the jewellery provision in the school's code of conduct amounted to unreasonable discrimination and was therefore unlawful.[109]

In *Christian Education SA v Minister of Education of the Government of the RSA*, the constitutionality of a provision in the South African Schools Act, which prohibits corporal punishment in independent schools,[110] was in issue.[111] The Applicant, on Biblical grounds, claimed the right to apply corporal punishment in its parochial (independent) schools, and argued that the legislation being contested violated the right to self-determination afforded to religious communities by section 31(2) of the Constitution. The Court would have nothing of it: The Biblical texts cited by the Applicant (*Proverbs* 22:6; *Proverbs* 22:15; *Proverbs* 19:18; *Proverbs* 23:13-14) refer to corporal punishment inflicted by parents on their own children and do not sanction an entitlement of persons *in loco parentis* to do the same. Flogging of children has been designated in South Africa,[112] and elsewhere,[113] as a cruel and inhuman (or degrading) punishment;

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[107] See in general De Waal, Mestry and Russo 'Religious and cultural dress at school: A comparative perspective' (2011) 14/6 *PER* 61.
[108] *Pillay v MEC for Education: KwaZulu-Natal* 2006 6 SA 363 (EqC).
[109] *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).
[110] South African Schools Act s 10.
[111] *Christian Education South Africa v Minister of Education* 2000 4 SA 757; 2000 10 BCLR 1051 (CC); and see Van der Vyver 'Freedom of religion or belief and other human rights' in Lindholm, Durham and Tahzib-Lie (eds) *Facilitating freedom of religion or belief: A deskbook* (2004) 85, 85-86.
[112] *S v Williams* 1995 3 SA 632; 1995 7 BCLR 861 (CC).
[113] *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 3 SA 76 (NmSC) in regard to Namibia; *S v F* 1989 1 SA 460 (Z) and *S v Juvenile* 1990 4 SA 151 (ZSC) in regard to Zimbabwe; *Tyrer v United Kingdom* (1979-80) 2 EHRR 19 in regard to the European

and, in terms of the Constitution, the right to self-determination may not be exercised 'in a manner inconsistent with any provision of the Bill of Rights'.[114] Speaking for a unanimous court, Sachs, J observed:

> 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 laws of the land. At the same time, the State should, whenever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful to the law.[115]

The right of parents to chastise their children was not in issue in the case. It might be noted in passing that there is a reasonable foundation for confining the right to apply 'corporeal correction' to a parent, since one could expect the parent to apply moderate chastisement with compassion, and compassion might be wanting in a third person who lacks the ties of kinship upon which compassion is founded.

It further might be noted that the decision of the Court fully complied with international law standards. In terms of the Covenant on Civil and Political Rights, States Parties must see to it 'that school discipline is administered in a manner consistent with the child's human dignity'.[116] The African Charter on the Rights and Welfare of the Child similarly sought assurances that school and parental discipline be executed with respect for the inherent dignity of the child.[117]

4 Concluding observations

In the 'new' South Africa, one may not discriminate in any way against learners and all learners are entitled, as of right, to attend a public school.[118] Unfairly denying a child admission to a school on the grounds of race is strictly impermissible and indeed unconstitutional.[119]

In spite of these lofty and highly commendable principles of the law, equal educational opportunities for all have remained in a state of disarray in South

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Convention of Human Rights and Fundamental Freedoms.

[114] SA Constitution s 31(2).

[115] *Christian Education v Minister of Education* (n 111) para 35.

[116] *Id* para 28(2).

[117] Child Welfare Charter (n 28) para 11(5).

[118] *Ferdinand Postma Hoërskool v Stadsraad van Potchefstroom* [1999] 3 All SA 623, 630 (T).

[119] *Matukane v Laerskool Potgietersrus* 1996 3 SA 223, 231; [1996] 1 All SA 468, 474 (T); and see also *School Education Bill Gauteng* (n 76) para 40.

Africa. The problem that persists in this regard is to a large extent attributable to the country's heritage of institutionalised racial discrimination. The Constitutional Court accordingly lamented the 'continuing deep inequality in our educational system' as 'a painful legacy of our apartheid system'.[120] The Court explained:

> It is so that white public schools were better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and deliberating legacy of our past is an unequal distribution of skills and competencies acquired through education.[121]

The Court on another occasion noted that racially defined inequality in education was entrenched by the formal institutionalisation of apartheid after 1948 and is today still discernible 'in the systematic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners'.[122] Needless to say, 'an unequal access to education entrenches historical inequity as it perpetuates socio-economic disadvantage'.[123]

Equality under the South African Constitution includes 'remedial or restitutional equality' and accordingly charges courts of law with 'a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised underprivilege'.[124] However, the problems confronting the powers that be in complying with the constitutional demands in the area of education are not confined to inequality of educational facilities alone; rather, those problems penetrate the very existence of basic educational facilities within lesser privileged communities. The State bears the absolute obligation to provide basic education to 'everyone', and one must again be reminded that compliance with this obligation is not conditioned by a norm of progressive implementation and therefore subject to the available resources at the disposal of the State. The State must provide basic education to everyone; it must ensure that the facilities provided are, and the quality maintained is, of an equal educational standard within every region of the country and available to every community within the nation; and it must see to it *now*! In this respect, public education in South Africa has failed quite dismally thus far.

One can attribute this failure to comply to all sorts of reasons: incompetence of persons charged with the administration of public education, corruption within

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[120] *Hoërskool Ermelo* (n 72) para 2.
[121] *Ibid*; and see also *Rivonia Primary School* (n 2) paras 31, 70-72.
[122] *Juma Musjid Primary School* (n 32) para 42; and see also *Rivonia Primary School* (n 2) para 27.
[123] *Hoërskool Ermelo* (n 72) para 2; and see also *Rivonia Primary School* (n 2) para 26.1.
[124] *Minister of Finance v Van Heerden* 2004 6 SA 121, para 31 (CC).

their ranks, the tremendous backlog in providing properly qualified teachers, adequate buildings, school books and other educational materials, and the like. There is, however, one overriding problem which is seldom addressed: the absence of family planning and the concomitant population explosion within particularly less privileged communities. Educational authorities simply cannot keep up with the ever increasing demand for basic education.

The Constitutional Court consequently emphasised 'the importance of the right to basic education for the transformation of our society';[125] and as noted in the introductory paragraph of this essay, the Committee on Economic, Social and Cultural Rights has in similar vein singled out the empowerment of women and the control of population growth as a vital role of education.[126]

On 15 May 2012 Judge Navi Pillay, United Nations High Commissioner for Human Rights, touched upon the same problem from a slightly different angle when she delivered the annual Helen Kanzira Lecture at the Centre for Human Rights of the University of Pretoria.[127] The focus of her lecture was on the work of her Office to combat the frequency of maternal mortality in developing communities. She emphasised that the disabling or death of women during childbirth was found to be 'a direct product of discrimination against women', and pleaded for the empowerment of women in relation to sexual and reproductive rights, including family planning. She was constrained to admit that efforts of her Office to bring this about are quite often obstructed by deep-seated stereotypes.

The same, I would suggest, applies to the problem of education in developing communities. Economic and social advancement through education, the promotion of gender equality within the social construct, and the empowerment of women with regard to sexual and reproductive rights, are the most effective means of contraception and a *sine qua non* for upholding the right to basic education of everyone.

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[125] *Juma Musjid Primary School* (n 32) para 38.
[126] Committee on Economic, Social and Cultural Rights, General Comment no 13 para 1.
[127] Pillay 'Valuing women as autonomous beings: Women's sexual and reproductive health rights' (University of Pretoria 2012-05-15).