

How 'basic' is basic education as enshrined in section 29 of the Constitution of South Africa?

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1 Introduction

The preamble to chapter 9 of the National Planning Commission's National Development Plan contains the following quotation:

We are Africans.
We are an African Country ...
We learn together, we love reading.
Each community has:
a school;
teachers who love teaching and learning;
a library filled with the wealth of books;
a librarian.
All our citizens can read, write, converse and value idea and thought.
We are fascinated by scientific invention and its use in the advancement of our live [*sic*].
We live the joy of speaking many languages.¹

This picture was painted with a view to 2030 – not 2012 – that is, 34 years after the right to education was incorporated into our Constitution.² Section 29 of the Constitution establishes a right to basic and further education, but does not articulate a specific education standard.³

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¹National Planning Commission's National Development Plan: *Vision for 2030* (2011-11-11) ch 9, 'Improving education, training and innovation'.

²The Constitution of the Republic of South Africa, 1996.

³S 29(1) provides as follows:

Everyone has the right –

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

But how will you be able to claim your right if you do not know what exactly that right entails? And why does one have to wait 34 years for the right to be realised?

This presentation will attempt to establish what basic education means, what the standard of such basic education should be, and how Government is progressing towards realising the right to basic education.

In order to establish the education standard, I will firstly explore what the international community views as 'basic education', and will then proceed to define the concept based on a South African ideology. Lastly, I will determine whether or not the South African government is fulfilling its constitutional duties.

2 The international context

Relevant in defining the meaning of the right to basic education are international instruments such as the United Nations Charter, the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights (hereafter the ICESCR)⁴ and the General Comments of the ICESCR. According to section 39 of the Constitution of South Africa, courts must consider international law and foreign case law when interpreting the Bill of Rights.⁵

The ICESCR, which reflects the fundamental purposes and principles of the United Nations as well as the provisions set out in article 26 of the Universal Declaration on Human Rights, defines the right to education as follows:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.⁶

The state parties further agreed that primary education shall be 'compulsory and available free to all'.⁷

The Covenant then goes on to distinguish between primary, secondary, higher and fundamental education.⁸

General Comment 13 on the right to education⁹ determines that education, in all its forms and at all levels, must exhibit the following essential features:

⁴Even though the ICESCR remains one of the few international conventions that have not been ratified by South Africa, it is nevertheless relevant for the purpose of interpretation.

⁵The Education Rights Project, available at www.erp.org.za (accessed 2011-11-22).

⁶Article 13(1) of the ICESCR.

⁷Article 13(2)(a) of the ICESCR.

⁸See art 13(2)(a)-(d).

⁹The Committee on Economic, Social and Cultural Rights publishes its interpretation of human rights provisions in the form of general comments on thematic issues.

- (a) Availability – Functional educational institutions have to be available in sufficient quantities. Functionality will depend on the availability of buildings, sanitation facilities, safe drinking water, trained teachers receiving domestically competitive salaries and teaching materials as well as a library and, in some cases, computer facilities.
- (b) Accessibility – Education has to be accessible to everyone, without discrimination, both physically and economically.
- (c) Acceptability – The form and substance of education have to be acceptable. This includes the curricula and teaching methods used.
- (d) Adaptability – Education has to be flexible so that it can adapt to the needs of changing societies and communities, and respond to the needs of students within diverse social and cultural settings.

The comment further states that primary education includes the above four elements, and then derives the definition for primary education from the World Declaration on Education for All. It defines primary education as 'the main delivery system for the basic education of children outside the family ... [p]rimary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community'.¹⁰ For the first time, we are faced with the concept of 'basic education' and 'basic learning needs'.

Article 1 of the World Declaration states that these needs refer to essential learning tools such as literacy, oral expression, numeracy and problem solving, as well as to the basic learning content required by human beings to be able to survive, to develop to their full capacity, to live and work in dignity, to participate in full development, to improve the quality of their lives, to make informed decisions, and to continue learning. The Declaration also states that another fundamental aim of education is the enrichment of moral values.¹¹

The right to secondary education too includes the elements of availability, accessibility, acceptability and adaptability. It also includes the completion of basic education and the consolidation of the foundations for life-long learning and human development. It prepares students for further educational opportunities.¹²

As stated earlier, the ICESCR also refers to 'fundamental education'.¹³ General Comment 13 notes that fundamental education corresponds with basic education as set out in the World Declaration on Education for All referred to above.

The above outline indicates how international conventions and documentation interpret the meaning of 'basic education'. However, as the World

¹⁰Article 9, General Comment 13 on the right to education in terms of the ICESCR.

¹¹World Declaration on Education for All, adopted by the World Conference on Education for All, *Meeting Basic Learning Needs*, Jomtien, Thailand 1990-03-5/9.

¹²Article 11, General Comment 13 on the right to education in terms of the ICESCR.

¹³Article 13(2)(d).

Declaration correctly notes, 'the scope of basic learning needs and how they should be met varies with individual countries and culture, and inevitably, changes with the passage of time'.¹⁴

My next exposition is therefore based on the meaning of basic education as determined by individual countries across the world, after which I will try to establish a benchmark for basic education.

2.1 *The United States*

In the United States, basic education refers to a standard of education that enables a person to enjoy the rights and fulfil the obligations that come with citizenship.¹⁵ De Tocqueville¹⁶ observed that in democratic societies like the United States, 'the instruction of the people powerfully contributes to the support of the democratic republic'.¹⁷ In *Campaign for Fiscall Equity, Inc v State*,¹⁸ the court asserted that students needed a basic education that would allow them to 'function productively as civic participants capable of voting and serving on a jury'.¹⁹ A California court noted that 'education prepares students for active involvement in political affairs',²⁰ while in *Brown v Board of Education*, the court concluded that education is required in the performance of the most public responsibilities of human beings.²¹ The court reiterated this in the *Rodriquez* case by acknowledging that 'a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed'.²²

Regarding education and economic opportunity, Brown noted that education was a vital instrument in 'preparing students for later professional training and that it is doubtful that any child may reasonably be expected to succeed in life if he/she is denied the opportunity of an education'.²³

In his *Notes on the State of Virginia*²⁴ Thomas Jefferson remarked that 'education is less about encouraging the very cleverest to climb the highest intellectual peaks and more about making children competent members of

¹⁴(N 9) art 1 – Meeting basic learning needs.

¹⁵*San Antonio School District v Rodriquez* 411 US 1 (1973), as cited in Malherbe 'The constitutional framework for pursuing equal opportunities in education' (2004) 22/3 *Perspectives in Education* 9-28.

¹⁶A French aristocrat who went to the United States in 1831 when he was only 25 years old, and later wrote *Democracy in America*, a two-volume study of the American people and their political institutions, available at <http://www.tocqueville.org/chap1.htm> (accessed 2011-11-24).

¹⁷De Tocqueville *Democracy in America* 329 cited in Berger 'The right to education under the South African Constitution' (2003) 103 *Columbia LR* 655.

¹⁸655 NE 2d 661, 666 (NY 1995).

¹⁹Berger (n 17).

²⁰*Hartzell v Connell* 679 P 2d 35, 40-41 (Cal 1984).

²¹*Brown v Board of Educators* 347 US 483, 493 (1954).

²²*San Antonio School District v Rodriquez* 411 US 36 (1973).

²³*Brown v Board of Educators* 347 US 483, 493 (1954) as cited in Berger.

²⁴Jefferson *Notes on the State of Virginia* (William Peden ed) (1955) 147, 148 and 166.

society', and that one of education's main functions is to allow people to develop their 'worth and genius' regardless of 'wealth, birth or other accidental condition'.²⁵

With reference to the international notion that primary education must be compulsory and free to all, every state in America requires children to enrol in public or private schools or to be home-schooled from the age of five or six years. Even though the age requirements differ from state to state, all children are required to continue their education into their high-school years.²⁶

2.2 Germany

Another comparative country is Germany, where the primary school's role is to lead pupils from more play-orientated forms of learning at pre-primary school level to the more systematic forms of learning. The aim is to provide pupils with basic linguistic competence and understanding of mathematical and scientific concepts. Primary education should enable pupils to grasp and structure their experience of the world around them, while also further developing their psychomotor skills and patterns of social behaviour.²⁷

It is further stated that primary schools in Germany must develop children's learning abilities as the basis for independent thinking, learning and working, and to provide experience for interaction with other people. Children therefore acquire a solid basis, which helps them find their way and act within their environment, and prepares them for the process of learning in secondary schools.²⁸

In Germany, a further distinction is drawn between lower secondary education, which encompasses education for learners between the ages of 10 and 15/16, and upper secondary education for learners between the ages of 15/16 and 18/19.

In light of the definition contained in the ICESCR, that is, that secondary education includes the completion of basic education, the following goals of lower secondary education, as taught in Germany, qualify as basic education goals:²⁹

- Furthering the overall intellectual, emotional and physical development of pupils, teaching them to be independent, make decisions and bear their share of personal, social and political responsibility;
- Providing instruction based on the state of academic knowledge that

²⁵Berger (n 17) 659-660.

²⁶Available at <http://www.ncsl.org/issues-research/educ/compulsory-education-overview.aspx> (accessed 2012-03-23).

²⁷Secretariat of the Standing Ministers of Education and Cultural Affairs of the Länder, Federal Republic of Germany *The Education System in the Federal Republic of Germany 2010/2011 – A description of the responsibilities, structures and developments in education policy for the exchange of information in Europe* available at http://www.kmk.org/fileadmin/doc/Dokumentation/Bildungswesen_en_pdfs/dossier_en_ebook.pdf (accessed 2012-03-23).

²⁸*Ibid.*

²⁹*Ibid.*

takes the pupil's age-related conceptual faculties into account in its organisation and in the demands made on them; and

- Gradually increasing the degree of specialisation in line with each pupil's abilities and inclinations.

As a rule, general compulsory schooling for all children in Germany starts in the year in which they reach the age of six, and involves nine years of full-time schooling. Compulsory schooling involves regular attendance of lessons and other compulsory school events, and both pupils and parents are responsible for seeing that this obligation is met.³⁰

In Germany, attendance of public-sector primary and secondary education is free of charge, with no fees charged for enrolment or report cards.³¹

2.3 Summary of the international community's view of basic education

The international interpretation of basic education can therefore be summed up as follows: Basic education is education from the age of about five or six up to 15 or 16, which thus refers to primary and lower secondary education, and is supposed to be compulsory and free. The four essential elements of availability, accessibility, acceptability and adaptability must be present.

Basic education must allow a child to:

- develop his/her personality fully and to be independent;
- strengthen his/her respect for human rights and other cultures;
- participate effectively in a society, including adherence to his/her public responsibilities;
- develop intellectually, emotionally and physically;
- read, write and understand mathematical and scientific concepts effectively; and
- live a life of quality, based on sound moral values.

The World Declaration asserts correctly when it states that '[b]asic education is more than an end in itself. It is the foundation for lifelong learning and human development on which countries may build ... further levels ... of education ...'.³²

But how does South Africa measure up against this international standard?

3 The South African context

3.1 The South African ideology

According to the National Planning Commission's Development Plan, '[e]ducation

³⁰(N 27).

³¹*Ibid.*

³²See (n 11).

empowers people to define their identity, take control of their lives, raise healthy families, take part confidently in developing a just society, and play an effective role in the politics and governance of their communities. Foundational skills in areas such as mathematics, science, language, the arts and ethics are essential components of a good education system'.³³

In the South African context, basic education could refer to a standard of education that empowers people to break out of the poverty cycle and compete effectively in the labour market; enables people to understand and enjoy their new-found democratic values, rights and freedoms; encourages people to participate in and protect the fledgling democratic system, and enhances their feeling of self-worth as human beings.³⁴ These descriptions correlate with the international standard of basic education set out above.

The Development Plan goes further to state that education is not the solution to all problems, but that a society's ability to solve problems, develop competitively, eliminate poverty and reduce inequality is severely hampered without it.³⁵ The introduction to the Plan sets forth what education should entail and what is needed to ensure high-quality education. The use of the words 'should' and 'have' clearly indicates that this is not (yet) a reality, but ideology.

3.2 *The South African reality*

The right to basic education is a socio-economic right enshrined in section 29 of the Constitution of South Africa,³⁶ and reads as follows:

- (1) Everyone has the right –
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

The Constitution does not define basic education, but the Ministry of Education associates itself with the definition of the World Declaration on Education for All. Basic education must be defined in terms of learning needs appropriate to the age and experience of the learner, whether child, youth or adult, men or women, workers, work seekers or the self-employed.³⁷

As just mentioned, this right is a socio-economic right. Socio-economic rights compel the state to do everything in its power to secure for all members of society a basic set of social goods, such as health care, food, water, shelter, access to land

³³See (n 1).

³⁴Malherbe (n 15) 9-28.

³⁵See (n 1).

³⁶The Constitution of the Republic of South Africa, 1996.

³⁷Department of Education *White Paper 1 – Education and Training in a Democratic South Africa: First Steps to Develop a New System* (1995-03-15).

and housing, and – most pertinent to this discussion – education.³⁸ The right to basic education imposes a positive duty on the state to provide such education in order for the right to be enjoyed and fulfilled.³⁹ Section 7 of the Constitution provides that ‘the state must respect, protect, promote and fulfil the rights in the Bill of Rights’.

The right requires the state to provide sufficient schools, educators, support and other incidental services in order to ensure reasonable access to basic education for everybody.⁴⁰ Regarding the level of education that the state is duty-bound to provide in order to fulfil the right, the general consensus on the corresponding section 32(a) of the Interim Constitution was that a right to basic education referred to education up to a level of functional literacy, in other words reading, writing, arithmetic and an elementary awareness of economics, culture and politics.⁴¹

In terms of section 3 of the South African Schools Act,⁴² school attendance is compulsory for every learner ‘from the first school day of the year in which such a learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the 9th grade, whichever occurs first’. In 2001, the Department of Basic Education released White Paper 5,⁴³ which explained how grade R⁴⁴ would be expanded across the country. The White Paper explained that Government would gradually introduce grade R across schools, in such a way that by the year 2010, all public primary schools would offer grade R funded by Government. When new schools are included in this system, Government will ensure that the schools in the poorest areas are given preference.⁴⁵ The original deadline for phasing in grade R for every child by 2010 was not met, and has thus been extended to 2014.⁴⁶ The percentage of learners who are enrolled in grade 1 and had previously attended a pre-primary programme increased substantially from 61% in 2006 to 71% in 2009. This trend is a reflection of improved access to pre-primary education, which is deemed essential for improved learning outcomes in higher grades.⁴⁷

The Department of Basic Education has to clarify what it regards as *basic education* because the Department of Basic Education is responsible for

³⁸Currie and De Waal *The Bill of Rights handbook* (2005) 567.

³⁹*In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 537 (CC) para 8-9.

⁴⁰Cheadle, Davis and Haysom *South African constitutional law: The Bill of Rights* (2002) 536.

⁴¹Malherbe (n 15).

⁴²Act 84 of 1996.

⁴³Department of Education *Education White Paper 5 on Early Childhood Education: Meeting the Challenge of Early Childhood Development in South Africa* (2001).

⁴⁴Grade R refers to a learner’s reception year at the age of five. It still forms part of early childhood development, but all reception-year programmes are to be registered with provincial departments of education, be attached to public schools and managed by school governing bodies.

⁴⁵Department of Education *National Norms and Standards for Grade R Funding* (2008) GG vol 28134 GN 1865 of 2005, as amended by GG 30679 GN 26 of 2008-01-18.

⁴⁶Department of Basic Education *Macro Indicator Trends in Schooling: Summary Report 2011* (2011).

⁴⁷*Ibid.*

education from grade R to grade 12 but in terms of the South African Schools Act, schooling is only compulsory from the age of seven years up to 15 years or grade 9. Do grade R and grades 10 to 12 constitute basic education?

So, in terms of international law and policy, South Africa complies with the provision that primary education must be compulsory, and the Education Department has launched a major effort to ensure that all children who will be starting grade 1 in 2015 will have completed grade R in 2014. Education at every level, however, is not free in South Africa. With that being said, though, one must recognise the Department of Education's progress with implementing its no-fee schools policy. At present, there are about 19 933 no-fee schools in the country. This means that 68% of pupils do not pay school fees.⁴⁸

However, when the results of the 2011 Annual National Assessment (ANA) are examined,⁴⁹ one cannot help but wonder what Government understands basic education to be, as the ANA results do not reflect the standard of education envisaged by the Constitution. In fact, it is precisely Government's ineffective and inadequate action in this regard that may constitute a violation of the Constitution.⁵⁰

The report of the 2011 ANA results summarises learners' overall performance as follows:

Competency levels in basic literacy/language skills

- (i) Learners' handwriting was illegible. This could be an indication of insufficient training in this important skill and/or inadequate practice in handwriting/letter formation.
- (ii) Learners displayed a lack of basic literacy skills, such as the correct spelling of frequently used words, and improper use of language forms. This could be a result of insufficient vocabulary, which, in turn, could have arisen from a lack of adequate 'reading' and exposure to new words and how they are used.
- (iii) Comprehension skills were generally low to poor. In most cases, learners attempted to answer only simple questions, ie those that required them either to extract information directly from a given text or to supply short, one-word answers. Many of the learners failed to respond to questions that demanded complex skills of inferential reading (reading between the lines), for example, responses to questions that

⁴⁸ Available at <http://www.sowetanlive.co.za/news/2011/03/11/no-fee-schools-woes> (accessed 2012-03-29).

⁴⁹ The Annual National Assessments are standardised national assessments in language and mathematics in the intermediate phase (grade 4-6) and in literacy and numeracy for the foundational phase (grade 1-3). For grade 3, the mean literacy score is 35% and that for numeracy 28%. The equivalent figures for grade 6 are 28% and 30% respectively.

⁵⁰ Berger (n 17) 614, 616-623.

ask: 'Why?'; 'What do you think?'; 'State in your own words', etc. These skills can only be learnt from numerous interactions with different types of texts – thus, sustained reading is vital.

- (iv) In general, learners showed an inadequate ability to write creatively from given prompts (eg, given a picture and asked to write what they think about it) or to transform a given text into another form that requires basic comprehension.
- (v) Their responses showed that they were unable to interpret instructions.

Competency levels in basic numeracy/mathematical skills

- (i) Learners demonstrated an inability to handle basic numeracy operations of subtraction, multiplication and division that involve whole numbers.
- (ii) Learners' conception of fractions was seriously limited or distorted. For example, learners could not arrange fractions from the smallest to the biggest, or *vice versa*. This could be a manifestation of inappropriate methods of introducing the concept of 'fractions' to learners.
- (iii) Learners' responses showed that they were not able to translate word problems into numbers in order to solve them with relevant mathematical techniques.

Therefore, there seems to be a problem with learners' development, understanding and use of basic concepts and skills in both literacy and numeracy. These results are disturbing, to say the least.

If education is the 'very foundation of good citizenship',⁵¹ what do these results imply for South African society in a few years' time, when these learners leave school and enter the labour market? Clearly, they did not receive a 'basic education' and are therefore not empowered to break out of the poverty cycle and compete effectively in the labour market; they will not be able to understand and enjoy their new-found democratic values, rights and freedoms; they have no encouragement to participate in and protect the fledgling democratic system, and their feeling of self-worth as human beings is therefore not enhanced.

This raises the very important question of why our learners are not receiving a basic education, even though education is for the most part free and compulsory. Education seems to be available and accessible, but is clearly not acceptable or adaptable. In its 7th *Report on Economic and Social Rights*, the Human Rights Commission argues that even though South Africa boasts high primary-school enrolment statistics, increased access to education has come at the expense of quality.⁵²

⁵¹*Brown v Board of Educators* (n 2).

⁵²Statistics reveal that in 2010, there were 9 412 755 learners in ordinary schools. This total includes 32 364 grade R learners. See *Education Statistics in South Africa 2010* published by the Department of Basic Education, February 2012.

According to the National Planning Commission's Development Plan, two factors are responsible for low-quality education. The first is weak capacity throughout the civil service, including teachers, principals and government officials. Secondly, there is a culture of favouritism in almost all areas of the civil service. Nepotism and the appointment of unsuitable personnel weaken Government's capacity even further.⁵³ According to Transparency International, there is general concern among school leadership about embezzlement of funds at provincial level when procuring textbooks, remunerating staff and constructing school buildings.⁵⁴

Both the Eastern Cape and Limpopo education departments have been placed under administration due to inefficiency and maladministration. In Limpopo, the budget has been exceeded each year from 2009 up to 2012. The estimated overrun and misappropriation amount to some R2,6 billion.⁵⁵ Due to budget constraints in the Free State, schools have not received compensation for school fee exemptions granted in 2011,⁵⁶ and by 15 March 2012, many still had not received study material, as the Free State Department owes the suppliers R96 million.⁵⁷

Section 29(1)(a) of the Constitution⁵⁸ enshrines basic education as a strong positive right that contains none of the limitations that apply to other socio-economic rights such as health care and housing.⁵⁹ Both sections 26 and 27 of the Constitution contain the limitation clause: 'The state must take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realisation of this right' (own emphasis). Berger goes on to explain that section 29(1)(a) strongly suggests that Government has an absolute duty to provide basic education: Whereas the state only has to make further education 'progressively available and accessible' 'through reasonable measures',⁶⁰ no such clause limits the obligation to provide basic education, and no reference is made to governmental resources.⁶¹

In view of the above breakdown of the ANA results and further overwhelming proof that the Education Department is failing dismally to deliver basic education,

⁵³Taylor 'Uncovering indicators of effective school management in South Africa using the National School Effectiveness Study' Stellenbosch Economic Working Papers no 10/11, as cited in the National Planning Commission's National Development Plan, *Vision for 2030*, 2011-11-11ch 9, 'Improving education, training and innovation'.

⁵⁴Transparency International *Mapping transparency, accountability and integrity on primary education in South Africa* (2011) available at www.transparency.org (accessed 2011-05-23).

⁵⁵Limpopo Department of Education staff circular 2012-03-26

⁵⁶Available at <http://www.bloemfonteincourant.co.za/Community-News/no-financial-compensation-for-free-state-schools.html> (accessed 2011-05-23); available at <http://www.fedsas.org.za/english/media.aspx?mid=79> (accessed 2011-05-23).

⁵⁷'Geen geld vir boeke vir skole' *Volksblad* (2012-03-15).

⁵⁸The Constitution of the Republic of South Africa, 1996.

⁵⁹Berger (n 17) 638.

⁶⁰Section 29(1)(b).

⁶¹Berger (n 17).

I think it is safe to conclude that Government is violating the constitutional right to basic education. But, now that we have established that, what's the next step?

3.3 Possible next steps

At the 2011 FEDSAS annual general meeting, Professor Jonathan Jansen, Rector of the University of the Free State, lashed out at Government's 'don't care' attitude towards the people of the country. He encouraged parents to occupy the offices of each provincial education department and demand performance. The Ministry of Education, according to Jansen, accepted that state authorities have a continuing obligation under the Constitution to take purposeful and effective action, which would enable all persons to achieve the satisfaction of the right to education. He reckons it is up to civil society to remind them of this obligation. He pointed out that even though the National Planning Commission's report looks good, what is now needed is a step-by-step plan that will point out exactly how policies and recommendations will be implemented.⁶²

Another possibility is to force Government to fulfil its obligations by means of a court order. This has already been done for the other socio-economic rights of health care⁶³ and housing.⁶⁴ Some may however argue that because of the 'separation of powers' principle, courts cannot decide on the essentially political question of how to apportion public resources among competing claims and between individuals, groups and communities in society. The judiciary is an undemocratically elected branch of the state, and therefore lacks the required democratic legitimacy.⁶⁵

In both the *Grootboom* and *TAC* cases, the court considered both 'separation of powers' and 'vulnerable groups' concerns. In the *TAC* case, the court concurred that even though courts are ill suited to make factual inquiries to determine minimum core standards, Government was nonetheless obliged to take necessary steps to 'respect, protect, promote and fulfil positive rights'.⁶⁶ In both cases, the court ruled that Government had to do more to fulfil the socio-economic rights concerned, while at the same time it remained respectful of the other branches' duties.⁶⁷

Berger points out that an education case would fall under *Grootboom* and *TAC*, as the Constitution is clearly implicated – a remedy exists that does not offend the 'separation of powers' principle, and the protected right does particularly affect vulnerable groups. Just as the court could instruct the state to do more to provide

⁶²Beset onderwyskantore oor swak skole – Jansen' *Beeld* (2011-11-20).

⁶³*Soobramoney v Minister of Health* 1998 1 SA 765 (CC); *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

⁶⁴*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

⁶⁵Currie and De Waal (n 38) 569.

⁶⁶*Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 37-39.

⁶⁷Berger (n 17) 635.

housing or HIV treatment to the poor, while still affording the legislature some time and flexibility to determine how, so too could it order Government to improve schools without itself legislating such changes immediately.⁶⁸

On 15 May 2012, the North Gauteng High Court found that the Department of Basic Education and the Limpopo Department of Education's failure to deliver textbooks to learners, infringes their right to basic education. Kollapen J gave them until the 15th of June to deliver the textbooks. The Department must also formulate a 'catch-up' plan wherein gaps in the curriculum are identified. This plan must also indicate to what extent the quality of learning and teaching has been prejudiced because of the shortages in textbooks. The Respondents must furthermore state which remedies will be put in place to address these problems. Monthly reports must be submitted to both the Court and the Applicants regarding compliance with the plan.⁶⁹ Even though about 1.7 million learners and 5000 schools will benefit directly from this judgment, it creates a precedent which can be used by anyone else as authority in matters where the Department of Basic Education fails to provide qualified teachers, adequate infrastructure, funding or anything which can be considered as a barrier to the right to basic education.

Just as in the *Grootboom* and the *TAC* cases where the Court ordered the government to do more to provide housing or HIV treatment while at the same time giving the legislature time and flexibility to determine how to do it, the North Gauteng High Court ordered the Department of Basic Education to realise and promote the right to basic education in accordance with a plan drafted by the Department itself and not prescribed by the Court. Even though the Department failed to respond to this obligation, the judgement is a step in the right direction and an indication that civil society is taking a stance against the violations of its constitutional rights.

4 Conclusion

In a submission made to the Human Rights Commission, the Human Resources Centre stated the following:

The denial of access to education is deemed a denial of the full enjoyment of other rights such as the right to dignity, the right to equality and the inter-related rights to food and health, all which enable an individual to develop his or her full potential to participate meaningfully in society.⁷⁰

Just as informally constructed shanties or no housing at all fail to promote human dignity, so too does a school system in which grade 3 learners achieve a

⁶⁸*Id* 635.

⁶⁹Steyn 'Court victory in the fight for quality education' (2012) available at <http://section27.org.za/dedi47.cpt1.host-h.net/2012/05/17/court-victory-in-the-fight-for-quality-education/> (accessed 2012-05-17)

⁷⁰Pendlebury and Lake (eds) *South African Child Gauge 2008/2009* at 13, as cited in the Human Rights Commission 7th *Report on Economic and Social Rights* (2010).

literacy score of 35% and a numeracy score of 28%, and grade 6 learners achieve 28% and 30% respectively.

After both the *Grootboom* and *TAC* cases, local and federal government have taken steps to comply with the decisions. More education rulings, like the one referred to earlier, could perhaps spark similar government action and push the various branches and levels of government to go further. A judicial ruling could also turn the spotlight on Government's shortcomings that contribute to the problem, such as corruption, bureaucratic inertia, and the mismanagement of funds. Furthermore, decisions that draw attention to education rights may help citizens recognise that it is in their own interest to work towards improved schools.⁷¹

Civil society and, more specifically, parents of learners cannot just sit back and point fingers at Government and its shortcomings. Yes, there is no denying that Government is failing our children, but education remains a partnership, and parents – being crucial partners – must take ownership of their children's education. Parents should become involved in school activities, cast their vote for the best governing body, and stand for election themselves. Robin Cook once said: 'Education is more than a luxury; it is a responsibility that society owes to itself'.

Education plays a crucial role in society: It is not only a right, but lays a social foundation for achieving other goals; it offers a starting point for facilitating a host of necessary social changes. While possibly constricting Government's ability to address other problems in the short-term, the promotion of education may foster the kind of social, political and economic growth that will ultimately enable Government to address many other problems more successfully.⁷²

As an American court asserted: '... [W]ithout the right to education, neither the student nor the state has a future'.⁷³

⁷¹Berger (n 17) 645-646.

⁷²*Id* 614, 616-623.

⁷³*Florida Dep't of Educ v Glasser* 622 So 2d 944, 948 (Fla 1993).