

REALISING THE RIGHT TO EDUCATION IN LESOTHO

by

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Abstract

The enjoyment of life depends on a minimum level of education including literacy. As one of the socio-economic rights, the right to education must be fully realised in order to empower great majority of people out there who are still facing social injustice. This study focuses on the right to education in Lesotho. The extent to which this country has incorporated socio-economic rights, specifically the right to education, is explored. The mechanisms through which the said right is turned into reality; the challenges such right entails and the approach taken by the government are also looked at. As a signatory to many human rights instruments, Lesotho is charged with an obligation of realising socio-economic rights. One of the many international law obligations facing Lesotho emanates from the provisions of International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 13 provides that state parties must recognise the right to education. Member states, as further provided, also 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. The above provisions are read with article 2(1) of the same Covenant with respect to the domestic implementation of the socio-economic rights in the ICESCR. Having analysed what is expected of Lesotho internationally to realise the right to education by looking at the provisions of the ICESCR and the General Comments of the Committee on ESCR, assessment is made as to whether the current measures adopted by the Lesotho government on working towards realising the right in question comply with the international requirements. The survey then concludes that there is a lot that needs to be done in Lesotho in the area of socio-economic rights. It has been recommended that India and South African jurisprudence can be of great importance to Lesotho for purposes of making laws which will give socio-economic rights teeth.

1.1 Background

The realisation of the right to education is based on a precondition for the exercise and understanding of other rights that the enjoyment of a number of civil and political rights, such as freedom of information and the right to vote, depend on a minimum level of education.¹ Through education, people can be taught values such as tolerance and respect for human rights and other socio economic rights such as the right to choose work or to take part in cultural life can only be exercised meaningfully once a minimum level of education has been achieved.² Positive developments in Lesotho's education system over the past several years have brought about the provisions of free primary education as well as improved access to and quality of vocational and technical education.³ Literacy rates in Lesotho are among the highest in the continent, with adult literacy rate standing at 79.4 percent compares to 59 percent in the rest of Sub-Saharan Africa and 82 percent in South Africa, according to the United Nations' Educational Scientific and Cultural Organization (UNESCO).⁴

Over the years, Lesotho's development partners have funded various programmes to procure teaching aids, construct new schools, provide scholarship and bursaries and develop school feeding programmes. The said partners are usually the World Bank, and other international organisations and agencies such as the United States Agency for International Development (USAID), UNESCO, United Nations Population Fund (UNFPA), United Nations Development Programme (UNDP), United Nations Children's Fund (UNICEF), World Food Programme (WFP), Irish Aid, the British Council and Save the Children in UK.⁵

Despite the above efforts and many others which have not been mentioned, Lesotho is one of the poorest countries in the world. This has been the case from as far back as independence in 1966 from British colonialism.⁶ Hunger and starvation, as experienced by other African states, have also been part of life in Lesotho. The sad reality is that Lesotho is still one of the world's poorest and least developed

¹F Veriava 'The right to education' in D Brand et al (eds) *Socio-Economic Rights in South Africa* (2005) 57.

²As above.

³ Free Primary Education in Lesotho was introduced in 2000 see www.lesothoreview.com/education (accessed 10 November 2010).

⁴www.lesothoreview.com/education and training. html (accessed 10 November 2010).

⁵As above.

⁶L Mat *From Crisis to Growth in Africa* (2001) 248.

countries. This situation has led to a very high economic dependence on the neighbouring state South Africa. There have been propositions by the governments over and over again to lessen the dependence on South Africa by stimulating the country's economic growth and creating domestic employment. It is assumed that this will reduce the country's foreign dependency and assist with poverty alleviation.⁷

Lesotho is a signatory to many international instruments. Unlike other countries which belong to the monist tradition, Lesotho practices dualism and as such, takes international and domestic law as separate legal systems.⁸ This means that for the international law to apply it has to be introduced into domestic law by an Act of parliament. In 1992, Lesotho became a member state to the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹ Article 2 of the said covenant gives rise to the legal obligations undertaken by state parties to promote and realize economic, social and cultural rights.

This paper will be focusing on the right to education as one of the socio-economic rights in Lesotho. The proposed research aims to give an understanding and explain the legal obligations emanating from Article 2 of the ICESCR that Lesotho is faced with as a member state. Due to the fact that there is very little which can be said about the obligations faced by the government in realising the right to education in Lesotho at the domestic level, much attention will be shifted to International law on the right to education. I start off by giving a brief view on the legal framework of the right to education at the international level in order to illustrate how and why Lesotho must adhere to international norms on the right to education as a global village. To narrow down the area of study, the researcher will be focusing only on the legal responses of Lesotho as a member state to the ICESCR. This will be done by critically looking at Lesotho's legal system as a primary tool in realising and promoting economical and social rights particularly the right to education. Thus, the legal framework of the right to education in Lesotho and its functions in the realisation of the said right will be critically analysed.

⁷ As above.

⁸ [http://www.Nyulawglobal.org/global ex/Lesotho.htm](http://www.Nyulawglobal.org/global%20ex/Lesotho.htm). (accessed on 19 March 2010).

⁹ <http://treaties.un.org/> (accessed on 11 March 2010).

1.2 Problem statement

The problem can be stated in the following manner: What legal measures has Lesotho adopted to realise and promote the right to education in line with the ICESCR? This can be elaborated through its sub-problems as follows:

- How far does the constitution of Lesotho go in realising the right to education?
- Is there legislation that has been passed in favour of the right to education?
- If there is that legislation, does it adequately address the issues involved in order to realise the right to education?

1.3 Importance of study

The concept of socio-economic rights seems to be treated differently from civil and political rights. This is true also to the right to education. In most African countries, socio-economic rights have remained as mere policies. This research is important because many people are still not aware that realising and promoting these socio-economic rights is actually helping the country to develop. Further, it is hoped that the research will contribute to the existing literature on the subject.

1.4 Definitions

There are quite a number of terms and concepts in the research that must be understood as used here. “Realisation of socio-economic rights” for purposes of this study means to give effect to the provisions of socio-economic rights as enshrined in the ICESCR in order to make them real and effective by way of formulating legislation in favour of socio-economic rights at the national level.

“Promotion of socio-economic rights” means implementing measures which make ordinary citizens aware of their rights. Much emphasis is put on the vulnerable and marginalised members of the public and this group includes the illiterate and poor people with little economic means to access justice and claim their rights without

assistance from a third party, thus needing special protection of their socio-economic rights.

“Legal response” is understood as steps taken by the government in realising socio-economic rights since the ratification of ICESCR in 1992. This may also extend to legislative measures the government has taken in preserving the said rights.

1.5 Literature survey

A limited literature review was undertaken for the purposes of developing this research proposal. This confirmed that there was room for further research in the desired field of study, realisation of socio-economic rights in Lesotho.

Henry J. Steiner and Philip Alston¹⁰ have edited a book entitled *International Human rights in Context*. This book covers quite a number of interesting topics in the sphere of international human rights. One of the topics it covers is economic and social rights. From the historical background and challenges of socio-economic rights, to the bearer and nature of duties under the ICESCR and the justiciability and the role of courts in developing economical and social rights, indeed, this book has provoked discussion of these socio-economic rights in the researcher’s home country, Lesotho.

Danie Brand and Christof Heyns¹¹ have provided an overview and analysis of the available international local materials on the various socio-economic rights recognised in the South African constitution in the book *Socio-economic Rights in South Africa*. They also introduce readers to current legal issues regarding socio-economic rights as seen in the international context.

Frans Viljoen¹², professor of law at the University of Pretoria, gives three cross-cutting themes namely, national implementation and enforcement of international human rights law, legal and other forms of integration and the role of human rights in the eradication of poverty in his book. He also provides an introduction to relevant human rights concepts.

¹⁰ J. Steiner, *International Human Rights in Context*, (2000).

¹¹ D. Brand and C Heynes, *Socio economic Rights in South Africa*, (2005)

¹² F Viljoen, *International Human Rights Law in Africa*, (2007).

Paul Tiyambe Zeleza and Philip J. McConnaughay¹³ have edited a book on human rights, the rule of law, and development in Africa. Among other contentions, they insist on the holistic view that human rights are as much about economic and social rights as they are about civil and political rights and offer novel analyses of African conceptions, experiences and aspirations of human rights which manifest themselves in complex global, regional and local idioms. They also explore the varied construction of human rights in Africa and Western discourses and the roles played by state and NGOs in promoting or subverting human rights.

Professor Shadrack Gutto¹⁴ from the University of South Africa has also addressed the issue of human rights and democracy in Southern Africa. The professor sheds some light on the role of government and civil society in making human rights a living reality. This draws attention specifically to socio-economic rights.

Lastly, Asbjorn Eide, Catarina Krause and Allan Rosas¹⁵ have also edited a book on economic, social and cultural rights. They focus upon this category of rights, socio-economic and cultural rights and also bring out their relations to other human rights, civil and political rights in particular.

1.6 Methodology

The research will mainly be library based. Documented materials and facts on the socio-economic rights will be explored and judicial decisions as well as legal regimes in the field will also be explored. And lastly, internet resources, as it has already been used, shall be used to get the relevant information.

1.7 Overview of chapters

Chapter one is a general introduction to the research. In chapter two I discuss the legal framework of socio-economic rights as well as legal obligations flowing there-

¹³ T. Zeleza, *Human Rights, the Rule of Law and Development in Africa*, (2004).

¹⁴ Shadrack Gutto, 'Making Human Rights a Living Reality for Urban and Rural Communities' in *Human Rights and Democracy in Southern Africa: Papers presented at the Conference: Cultivation Co-operation among Human Rights institution in the Southern African States*, (1998).

¹⁵ Asbjorn E, *Economic, Social and Cultural Rights*, (1995).

from. This is done by referring to the ICESCR and the constitution of Lesotho. In chapter three I consider measures that are in place in Lesotho to realize the said right. In chapter four I give a critical analysis of these measures and provide answers to the research questions by looking into the country's state of affairs. In chapter five I suggest obtainable solutions by way of comparison with South Africa as a neighbouring country.

1.8 Limitation of study

I concentrate on the realisation of socio-economic rights specifically the right to education and not cultural rights. I do not intend to go further to discuss the historical background of socio-economic rights or their stance at the international level. The main focus of the study is to explore and not exhaust the legal responses by Lesotho to the ICESCR upon its ratification in 1992.

1.9 Hypothesis

This research conceives that Lesotho as a member state to the ICESCR has not adopted enough measures to realise and promote socio-economic rights particularly regarding the right to education for its citizens.

Chapter 2

The Legal Framework of the right to education from International to regional level:

2.1 Introduction

The concept of human rights has been dominated by commonly known civil and political rights. In many instances, human rights are understood as entailing only these civil and political rights. By contrast, economic and social rights are much less well known, and only rarely do they form the subject of concerted political action, media campaign or critical reportage.¹⁶ The mindset has continued to show itself even today, despite several international human rights instruments which have been ratified by the western countries. The global trend has been that almost all those international human rights instruments entailing only civil and political rights have been ratified by the majority of world's countries without any hesitation whereas those which included economic and social rights have been left for states to choose whether they ratify or not. Some western countries have summarily ratified these treaties in order to escape international pressure, aware that there will be no external interference when it comes to domestic implementation of these rights.

The aim of this chapter is to give a minimum legal framework of socio-economic rights and showcase that inasmuch as civil and political rights are taking the lead in the human rights discourse, socio-economic rights have, to some extent, also been long established. Special emphasis will be put on the right to education. Several international human rights instruments containing socio-economic rights shall be discussed, from the international level or UN system, to the regional level-African, European and American level as well as the national or domestic level. More attention shall be given to the International Covenant on Economic Social and Cultural Rights (ICESCR) as it is the basis of this dissertation and also because it has been one of the UN conventions devoted entirely to economic and social rights. In this chapter, having discussed the legal framework of socio-economic rights generally, I also give an analysis of the legal obligations for state parties flowing from the ICESCR.

¹⁶ Oloka J, 'Beyond the rhetoric: Reinvigorating the struggle for Economic and Social Rights in Africa' (1995) 1 California Western International Law Journal, p1 (available at www1.umn.edu/humanrts/).

2.2 International Law on the right to education

The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organisation, and came into force on 24 October 1945.¹⁷ One of its objectives is to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.¹⁸ Various proposals were made during the drafting of the UN Charter for the inclusion of provisions enshrining the maintenance of full employment as a commitment to be undertaken by member state.¹⁹ Despite significant support, the United States opposed the proposal on the grounds that any such undertaking would involve interference in the domestic economic and political affairs of the state.²⁰ The conclusion was reached on Article 55 of the UN Charter, which states that the United Nations shall promote higher standards of living, full employment and conditions of economic and social progress and development. It follows therefore that the United States' opposition in this context did not fully reject the concept economic and social rights.²¹ Indeed, in 1941 President Roosevelt had nominated freedom from want as one of the freedoms that should characterize the future world order.²²

Although the entire UN Charter does not expressly state the right to education, Article 55 gives a broad view on the realisation of socio-economic rights, the right to education being one of them.

During the drafting of Universal Declaration on Human Rights (UDHR), which was adopted in 1948, there was strong support for the inclusion of economic and social rights from the United States (a delegation led by Eleanor Roosevelt), Egypt, several Latin American countries (particularly Chile) and from (Communist) Eastern Europe.²³ Australia and the United Kingdom were against their inclusion, as did

¹⁷ Steiner (n 10 above) 242.

¹⁸ Article 1 of the UN Charter.

¹⁹ (n 10 above) 243.

²⁰ (n 19 above).

²¹ As above.

²² As above.

²³ Steiner (n 10 above) 244.

South Africa which objected that a condition of existence does not constitute a fundamental human right merely because it is eminently desirable for the fullest realisation of all human potentialities.²⁴ The Declaration has served as the foundation for two binding UN human rights covenants, the ICCPR and the ICESCR. It requires governments from member countries to commit themselves to undertake measures in securing the universal and effective recognition and observance of the human rights set out in the declaration.²⁵ While it may be seen as a mere declaration without this declaration forms part of customary international law and is a powerful tool in applying diplomatic and moral pressure to governments that violate any of its articles. The right to education as one of the socio-economic rights has been specifically provided for in the UDHR.²⁶

The ICESCR entered into force on 3 January 1976, following the deposit of the 35th instrument of ratification.²⁷ As previously stated, it is the first UN treaty to be entirely devoted to socio-economic rights and has been one of the unfortunate conventions in terms of receiving universal recognition. It is said that despite the ambition of the UN to secure the foundation of the new world order upon respect for human rights, it took nearly twenty years to finalise the text of the covenant.²⁸ A further decade lapsed before the covenant entered into force and yet another before the covenant was provided with a supervisory body that was worthy of the name.²⁹ It is the above reasoning which tends to imply that perhaps the covenant should rightly be regarded as a relatively new human rights system despite its age, because, until 1986, it existed only as a textual reference point subject to speculative claims.³⁰ In its many provisions in the area of socio-economic rights, the ICESCR further stipulates that state parties recognize the right of everyone to education and agree that education shall be directed to the full development of human personality and the sense of its

²⁴As above.

²⁵In its preamble the UDHR inter alia provides that member states themselves and peoples of their territories under their jurisdiction keeping this Declaration in mind shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures.

²⁶Article 26 of the UDHR.

²⁷Craven M, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, (5th ed 1998) 1.

²⁸As above.

²⁹As above.

³⁰As above.

dignity and shall strengthen the respect for human rights and fundamental freedoms.³¹

There are a number of UN treaties which also contain socio-economic rights. For example, both the Convention on Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of a Child contain extensive obligation and status of an economic and social character on the right to education.³² My intention, however, is not to delve into international human rights instruments entailing the said right but to give a brief view on their international legal frame work. With this I shall now move to regional system.

2.3 The Inter-American System

Having taken the view that both sets of rights, namely, civil and political rights as well as economic social and cultural rights should not be separated during the drafting of the UDHR,³³ the American Convention on Human Rights came into place in 1969. This convention throughout its many articles provides for socio-economic rights under only one article.³⁴ In 1988 however, the Additional Protocol to the American Convention on the Area of Economic, Social and Cultural Rights came into being. As the name suggests, this Additional Protocol has been entirely dedicated to economic, social and cultural rights.

2.4 The European System

The European Convention was the first document in giving specific legal content to human rights in an international agreement.³⁵ The convention does not provide for any economic, social and cultural rights. There has been some development

³¹Article 13 of the ICESCR.

³²See Articles 10 of the CEDAW and 28 of the UN Convention on the Rights of the Child.

³³Steiner (n 10 above) 243.

³⁴Chapter III, Article 26 of the American Convention on Human Rights, 1969 only urges state parties to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view of achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social educational, scientific and cultural standards set forth.

³⁵The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on 4 November 1950 and entered into force on 3 September 1953.

however, in the area of economic, social and cultural rights. There is Protocol no. 6 which guarantees the right to education. There is also a 1988 European Social Charter the primary objective of which is to ensure rights of workers, for example, equal pay³⁶ and satisfactory working conditions.³⁷ It does not however, guarantee the right to work. It can therefore be said that the European system does recognise socio-economic rights to some extent.

2.5 The African System

The African Charter on Human and Peoples' Rights (ACHPR) was adopted on 27 1981 and entered into force on 21 October 1986. In its preamble it states, amongst other things, that it is essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

The Charter in its many articles recognises, among other socio-economic rights, the right of to education. It maintains that every individual may freely, take part in the cultural life of his community and that the promotion and protection of morals and traditional values recognised by the community shall be the duty of the state.³⁸ It also urges the member states to eliminate all sorts of discrimination against women and children and avers that the aged and disabled must be included in special measures of protection in keeping with their physical or moral needs.

The African Charter has provided for special protocols where it is necessary to supplement the provisions of the African Charter on Human and Peoples' Rights.³⁹ One of them is the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. This instrument is to a large extent dedicated to African women and covers several aspects of women in terms of human rights. Socio-economic rights of women is one of the subjects addressed in this protocol. To

³⁶Article 4 of the Protocol.

³⁷Article 3 of the same Protocol.

³⁸Article 17 of the African Charter.

³⁹Article 66.

mention but a few, there is a provision for right to education and training in guaranteeing equal opportunity and access in the sphere of education and training.⁴⁰ The economic and social welfare rights of women followed by health and reproductive rights as well as the right to food and security, and adequate housing, have also been provided.⁴¹

The African Charter on the Rights and Welfare of the Child came into effect in 1990. As the name suggests, it is dedicated to children in Africa. In its Preamble, it among other things, acknowledges that the situation of most African children remains critical due to the factors of their socio-economic, cultural, traditional and natural disasters. That due to the needs of children's physical and mental development, as it goes further, they require particular care with regard to health, physical, mental, moral and social development. It would, therefore, seem that the Charter recognises the necessity of socio-economic rights with regard to children. It also takes into account that every child has a right to education,⁴² the right to enjoy the best attainable state of physical, mental and spiritual health and requires member states to pursue the full implementation of this right.⁴³

2.6 The right to education under the South African Constitution⁴⁴

The South African constitution entrenches both civil and political rights and socio-economic rights. As a country, it has moved from being one of the most oppressive undemocratic regimes, with deliberate and systematic denial of socio-economic rights to the majority of the population, to a country which now includes justiciable socio-economic rights in its national constitution, accompanied by a genuine commitment by the government to give effect to them. It was only in 1996 when these rights were formally given recognition by the coming into effect of the Constitution. Some of the socio-economic rights which have been provided for in the South African constitution are the right to housing,⁴⁵ the right to health care, food,

⁴⁰ Article 12 of the Protocol to the African Charter on Human Peoples' Rights on the Rights of Women in Africa.

⁴¹ See Article 13, 14, 15 and 16 of the above stated Protocol.

⁴² Article 11 of the African Charter on the Rights and Welfare of the Child.

⁴³ Article 14.

⁴⁴ The South African Constitution came into force in 1996.

⁴⁵ Section 26.

water and social security⁴⁶ and the right to education.⁴⁷ The South African Constitution is often referred to as one of the first Commonwealth Constitutions to entrench both civil and political rights and social and economic rights and to render both justiciable before the courts.⁴⁸ The task of interpreting and applying the social and economic rights has also been identified as the most challenging exercise facing judges in the South African courts.⁴⁹

Although there have been several cases in the area of socio-economic rights which have contributed quite a lot in the newly born socio-economic rights jurisprudence of the South African Constitutional Court, Veriava⁵⁰ points out that the obligations imposed by the right to education provision under section 29 are distinguishable from other socio economic rights in the Constitution. From a textual reading of the said section, when compared to other socio-economic rights in the constitution, the unqualified and absolute nature of the right to education requires a standard of review higher than that used in respect of the qualified rights to determine the extent of the state's obligations in respect of the right to education as further argued.⁵¹

In the case of *Grootboom*,⁵² a group of adults and children had been rendered homeless as a result of eviction from their informal dwellings situated on private land which was marked for low cost housing project. They applied for an order directing the local government to provide them with temporary shelter, adequate basic nutrition, health care and other social services. The Constitutional Court, in determining whether or not state measures were reasonable in progressively facilitating access to the right in housing, ruled that the state had actually failed to meet the obligations places on it by section 26 of the constitution and declared that the state's housing programme was inconsistent with section 26(1) which provides for the right of everyone having access to adequate housing.

The same standard of review established in respect of the qualified rights to determine whether the state's measures were reasonable in realising the right in

⁴⁶Section 27.

⁴⁷Section 29.

⁴⁸McLean K, *Constitutional Deference, Courts and Socio Economic Right in South Africa*, (2009) 1.

⁴⁹As above.

⁵⁰Veriava (n 1 above) 3.

⁵¹As above.

⁵²*Government of the Republic of South Africa v Grootboom* 1998 1 SA 765 (CC).

question was adopted in the case of *Minister of Health and Others v Treatment Action Campaign and others*.⁵³ Here, a non-governmental organisation, TAC, specifically demanded that nevirapine, a drug which can reduce by half the rate of HIV transmission from mothers to babies, be freely distributed to women who were infected with the virus. The court held that the government's policy and measures to prevent mother to child transmission of HIV at birth fell short of compliance with section 27(1) and (2) on the constitution. The court further ordered the state to provide the required medication and remedy its programme.

With the right to education on the other hand, it would seem that the higher standard requires that the state implement measures to give effect to the right as matter of absolute priority. Thus, where the state fails to allocate resources for the building of a primary school in a particular area, an individual learner from that area may have a direct claim against the state to provide adequate primary school facilities.⁵⁴

Perhaps much of this conception comes from the idea that education is an empowerment right. Coomans⁵⁵ sees the exercising of an empowerment right which is the right to right to education as enabling a person to experience the benefit of other rights. Education's status therefore, as an empowerment right might well explain why it receives, on its face, greater protection than other socio-economic rights: housing health-care, food, water and social security.⁵⁶

Woolman and Bishop⁵⁷ assert that the Constitutional Assembly apparently believed that an adequate education provides the quickest route to a polity of creative, productive and self-sufficient population of citizens and not a country in which the majority of decisions relied on some form of state largesse. The Two authors are of the same view that the right to education under the South African Constitution stands out from other socio-economic rights. By ensuring that people are not prevented from accessing existing educational resources, section 29 of the Constitution operates like an ordinary civil and political right. And by expressly noting that

⁵³2002 5 SA 721 (CC).

⁵⁴Veriava (n 1 above) 3.

⁵⁵F Coomans 'In Search of Core Content of the Right to Education' in D Brand and S Russel (eds) *Exploring the Core Contents of Socio-economic Rights: South African and International Perspectives* (2002) 160

⁵⁶Coomans (n 56 above)

⁵⁷ Woolman S and Bishop M 'Education' in Woolman S et al (eds) *Constitutional Law of South Africa* (second edition 2010) 57-8

everyone has a right to basic education, the Constitution operates like socio-economic rights but only this time it requires much higher standard and it is not subject to standard socio-economic rights limitations such as reasonable legislative measures.⁵⁸ Thus, the state's obligation under the right to education as enshrined in the South African Constitution does not look for reasonable measures, availability of resources and progressive realisation.⁵⁹ The state's obligation as dictated by the Constitution on the right to education can only be fulfilled by the provision of classrooms, teachers and textbooks.⁶⁰

One can therefore safely conclude that indeed there has been quite a progress in terms of realising socio economic rights in South Africa. This does not however, mean that there are no challenges. Indeed there is still a lot that needs to be done concerning these rights and one of such challenges is interpretation and application of these rights by the courts as it has been previously stated.

2.7 The right to education under the Lesotho constitution⁶¹

The constitution of Lesotho provides for protection of fundamental human rights and freedoms. Chapter 2 of the constitution is devoted to the protection of fundamental human rights and freedoms and addresses their enforcement and the curtailment in exceptional circumstances of such rights.⁶² As with the case of South Africa, the rights and freedoms in the Lesotho constitution are largely, but not exclusively, derived from the 1948 Universal Declaration on Human Rights and other relevant international human rights instruments. In that regard, civil and political rights as well as socio-economic rights are contained in the Lesotho constitution. However, the form and extent to which socio-economic rights have been provided for in the constitution is drastically different from that of South Africa. With regard to socio-economic rights, the right to education being one of them, chapter 2 of the Lesotho constitution, which provides for fundamental human rights and freedoms, does not pay any kind of attention to such rights.

⁵⁸Woolman and Bishop (n 58 above).

⁵⁹As above.

⁶⁰As above.

⁶¹The constitution of Lesotho came into force in 1993.

⁶²See section 4 up to section 20 of the constitution of Lesotho.

These socio-economic rights which should ordinarily be included in the Bill of Rights are laid down in another chapter of the constitution under a section entitled principles of state policy.⁶³ This section refers to socio-economic rights as principles and maintains that the said principles contained in the chapter shall form part of the public policy of Lesotho. The section further avers that the said principles shall not be enforceable by any court, but subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities in the performance of their functions with a view to achieving progressively by legislation or otherwise, the full realisation of these principles. The said principles include, among others, protection of health policies,⁶⁴ education policies,⁶⁵ an opportunity to work,⁶⁶ economic opportunities⁶⁷ and protection of the environment.⁶⁸

In a nutshell therefore, the socio-economic rights under the Lesotho constitution are not justiciable.

It is obvious from the above assertions that socio-economic rights are not given enough recognition in the constitution of Lesotho in contrast with civil and political rights. This, however, does not mean the dead end to this discussion on realising socio-economic rights in Lesotho. As it was stated in the previous chapter, Lesotho, like many of the African states, is member state to the ICESCR. This means, despite its constitutional deficiencies regarding socio-economic rights, it is still faced with international obligation emanating from the Covenant to realise socio-economic rights. Analysing its national constitution to assess the progress on realising socio-economic rights has not really contributed much to the discussion. I therefore, propose to look outside the constitution of Lesotho in determining what Lesotho has done so far in terms of realising the rights in question. Before going any further, it would be best first to discuss the legal obligation arising from the ICESCR. As it has already been outlined in the previous chapter, Article 2 of the said convention is of great significance in understanding the nature of the state's obligations in ratifying

⁶³Chapter 3 of the Lesotho Constitution provides for principles of state policies.

⁶⁴Section 27.

⁶⁵Section 28.

⁶⁶Section 29.

⁶⁷Section 34.

⁶⁸Section 36.

the treaty. The covenant seeks to shed light for member states upon what needs to be done in their efforts and attempts towards the realisation of the said rights. There have been quite a number of authors who have argued that the provisions of article 2 have been rather vague in terms of application by member states.⁶⁹

The main international UN body responsible for promotion and protection of socio-economic rights is the Committee on Economic, Social and Cultural Rights (CESCR).⁷⁰ This Committee is very important in that it represents the first international effort to transform the socio-economic rights in the UDHR into legally binding provisions and gives a much broader detailed process by which member states must realise these rights. Its duties include receiving state parties' reports⁷¹ and developing interpretations on how member states should work towards realising socio-economic rights domestically and it is to this jurisprudence that I now turn.

2.8 The nature of the states obligation

The CESCR has over time developed general comments on how state parties should work towards realising the said rights. Perhaps being aware that the member states had already drafted their constitutions by the time they ratified the ICESCR, they saw the need to help formulate guiding principles on how they can still work towards realising the rights in question.⁷²

In its General Comments regarding Article 2 and 3 of the Covenant, the Committee has noted that the means which should be used in order to satisfy the obligations to take steps are stated in Article 2(1) to be "all appropriate means, including particularly the adoption of legislative measures".⁷³ As it elaborates more on the same matter, the Committee has recommended that legislation in most cases is highly desirable. It gives an example where discrimination has to be combatted

⁶⁹Most Western Scholars do not advocate for socio economic rights by arguing that even their application is not very clear from their covenant on economic and social perspective.

⁷⁰The CESCR was established under the Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985.

⁷¹Article 16 of the ICESCR requires member state to submit reports periodically on measures they have taken and plan on taking towards realising the rights contained in the covenant.

⁷²See General Comments on the nature of the states obligations available on <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed on 3 September 2010).

⁷³Para 3 of General Comments No.3 (1990) CESCR 'The Nature of the States obligation.

effectively and emphasizes the importance of a sound legislative foundation in such a scenario. It goes on to stipulate that legislative measures may be of great significance in fields such as protection of children and mothers, education, health as well as in respect of the matters dealt with in Article 6 to 9.⁷⁴

Having put more emphasis on the importance of legislative measures as a way of working towards realising the rights in question by the member states, the committee further submits that this adoption of legislative measures is not exhaustive of the obligation of state parties.⁷⁵ The phrase “by all appropriate means” must be given its full and natural meaning as it further suggests.⁷⁶

The Committee has provided other measures which may also be considered “appropriate” for the purpose of article 2(1) and they include but are not limited to, administrative, financial, educational and social measures.⁷⁷ Much room has been left for member states to find a way on how to go about in working towards realising socio-economic rights. The committee has noted that the undertaking by the member states “to take steps by all appropriate means particularly of legislative measures” neither requires nor precludes any particular form of government or economic system being used as a vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. In this regard, the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for or the desirability of a socialist or a capitalist system or a mixed centrally planned or laissez-faire economy, or upon any other particular approach submitted by the committee.⁷⁸ And to take steps, as it further goes, with a view to achieving progressively the realisation of the rights recognised is a flexibility device which reflects the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. Thus, the phrase in article 2(1) must be read in the light of the overall

⁷⁴Article 6 of the ICESCR provides for the right to work, 7 provides for the working conditions, 8 for trade unions and 9 for social security including social insurance.

⁷⁵General Comments (n 56 above) par 4.

⁷⁶As above.

⁷⁷(n 70 above) par 7.

⁷⁸Para 8 (above).

objective of the Covenant, which is to establish clear obligations for state parties in respect of the realisation in question.⁷⁹

According to the committee, an obligation is imposed on the member state to move as expeditiously and effectively as possible towards realising the said rights and that any deliberately retrogressive measures would require careful consideration and need to be fully justified with reference to the totality of the rights provided for in the covenant in the context of the maximum available resources.⁸⁰

The minimum core obligation is another concept the committee has introduced in its jurisprudence. Here, a member state has an obligation to ensure the satisfaction of, at the very least, the minimum essential level of each of the rights enshrined in the covenant. A state party as an example, in which a significant number of individuals is deprived of the essential food stuffs, of essential primary health care, of basic shelter or housing, or of the most basic forms of education will indeed be failing to live up to its legal obligation as per the covenant which it has ratified according to the Committee.⁸¹ Thus, for every member state, there needs to be that minimum level of provision regarding the realisation of socio-economic rights, regardless of how the economic challenges of a country are.⁸² And where such minimum core obligations cannot be met, it must be demonstrated that every effort was made as a matter of priority, to satisfy those minimum obligations. In most cases, this will be highlighted in the state party report submitted to the committee.

Being aware that some of the member states may be economically disabled even to develop programmes that will help to achieve the said rights, the Committee has emphasised that it is a state's obligation to strive to ensure the widest possible enjoyment of the relevant rights under any circumstances. More so, obligations to monitor the non-realization of economic, social and cultural rights and to come up with measures for their promotion are by no chance eliminated as a result of resource constraints.⁸³

⁷⁹Par 9 (above).

⁸⁰As above.

⁸¹Par 10 (above).

⁸²Par 10 (n 56 above).

⁸³Par 11 (above.)

2.9 Conclusion

The way forward to achieving goals of socio-economic rights depends greatly on the level of commitment by the government to the protection of human rights. What the government does to improve the conditions of its peoples' lives domestically is the beginning of it all. I now look at the measures which have been put in place with an aim of working towards the realisation of the right to education in the area of socio-economic rights in Lesotho.

Chapter 3

The realisation of the right to education in Lesotho

3.1 Introduction

*“Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments states can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence”.*⁸⁴

This chapter outlines the legislative framework of the right to education by looking at the measures currently in place towards realisation of the said right in Lesotho.

3.2 Current context

Lesotho, like most African states, subscribes to the African Charter on the Rights and Welfare of the Child⁸⁵ as previously outlined. It thus views education as a right of every child. In 2000, the government of Lesotho introduced free primary education. To address poverty crisis that hinders effective and efficient schooling, other packages, which included government sponsored schools and feeding programmes which cater for pupils’ nutritional needs were also introduced.

To ensure that the free primary education programme remains a success, the government is engaged in several projects of construction to provide more schools at

⁸⁴General Comments 13 (21st Session, 1999) ‘The Right to Education (art 13)’ UN Doc E/C.12/1999/10 Para 1.

⁸⁵The African Charter on the Rights and welfare of the Child came into force in 1990.

both primary and secondary level throughout the country.⁸⁶ The main teaching training institution, the Lesotho College of Education,⁸⁷ has also expanded its intake capacity to respond to the increasing enrolment in schools.

The government has further put in place bursary schemes for orphaned children, especially those who have lost two parents as well as those who are destitute at secondary level.⁸⁸ A system of text book, rental which makes access to instructional material less costly, has also been introduced.⁸⁹ There is also a bursary scheme for tertiary level which is administered by the National Manpower Development Secretariat for graduates of Cambridge Overseas School Certificate (COSC) in varying and diverse areas of study both locally and regionally in SADC countries.⁹⁰

One of its outstanding features of Lesotho's Education programme records is the allocation of 13% of the country's Gross Domestic Production to education in terms of budgeting.⁹¹ This makes Lesotho one of the countries which rank high among countries in Africa that prioritize education in their budgets. Furthermore, it intends to invest in ensuring proper financing for quality education so that the good news goes beyond enrolment to a real opportunity to learn.⁹²

Being one of the highest proportions of orphans in the world at twelve percent of the population and the third highest prevalence of HIV, with young generations being the most affected and at risk, Lesotho saw the need to ensure that children are fully equipped with the means to make healthy and informed decisions that will improve the quality of their lives. Schools, as stated above, play a major role to achieve just that.⁹³

As one of its aspirations, the Ministry of Education has introduced special education in its curriculum for the needs of all learners irrespective of their physical abilities and

⁸⁶Human Rights Report of the Kingdom of Lesotho, Universal Periodic Review 8th Session 2010, 23.

⁸⁷Lesotho College of Education Act 2 of 1998 establishes the Lesotho College of Education and to provide for incidental matter.

⁸⁸Human Rights Report (note 81 above) 24.

⁸⁹As above.

⁹⁰I am myself one of the people who got financial assistance from the government to further my studies at tertiary level.

⁹¹The Book of The Decade, Guinness World Records, (2010) 23.

⁹²Says Ahmed Magan, the Lesotho representative of the UN's children agency UNICEF, Maseru on the 14 May 2010, available at www.lexadin.nl/wlg/legis/nofr/lxweles.htm (accessed 10 November 2010).

⁹³As above.

disabilities, gender and race. The Maseru Education Ministry and its partners are now working to ensure that education remains a key development priority and to support national policies that provide access to school for all children in a safe and gender-sensitive environment.⁹⁴ The development partners are also supporting the development of school management regulations that are to translate the new act into implementable systems and structures.⁹⁵ There are however, challenges and they include adequate infrastructure whose root cause is the low capacity of the economy in the country.

3.3 Legislative measures

The government of Lesotho has enacted the Education Act⁹⁶ which legalises the right to free and compulsory education. This Act has been hailed as “a historic landmark for the children of Lesotho” and will boost school enrolment.⁹⁷ It is the outcome of a widely consultative process, which aimed at reviewing the Education Act of 1995.⁹⁸ The 1995 Education Act had aimed at promoting the education of the people of Lesotho and to ensure that as soon as circumstances permit, every child is provided with opportunities and facilities to enable him to develop physically, mentally, morally, spiritually and socially in a healthy, normal manner and in conditions of freedom and dignity.⁹⁹

By introducing free primary education in the year 2000 as a major strategy towards achieving the “Education for All” goals, there has been a rapid increase in the net enrolment rate, which currently stands at an impressive 82 percent of primary school children.¹⁰⁰ It is hoped that this new Education Act law will give a major boost to education as it is a critical step forward in reaching the remaining eighteen percent of the most vulnerable children who are still out of school.¹⁰¹

⁹⁴Human Rights Report (n 81 above) 25.

⁹⁵As above.

⁹⁶Education Act 3 of 2010.

⁹⁷Magan (n 87 above) 2.

⁹⁸As above.

⁹⁹See Preamble of the Education Act of 1995.

¹⁰⁰Human Rights Report (n 81 above) 26.

¹⁰¹As above.

The Education Act makes free primary education compulsory and also makes it an offence for any parent to keep a school going child at home.¹⁰² The Act is designed to put compulsory education at primary level into law in Lesotho. It clarifies the roles and responsibilities of persons and institutions tasked with the administration of education system.¹⁰³ Most importantly, it foresees the welfare of children in schools and abolishes corporal punishment.¹⁰⁴

In terms of the administration of the Act, the minister responsible is charged with the responsibility of taking measures which are desirable to make provisions for free primary education to all learners from the age of six.¹⁰⁵ Making provisions for free primary education at all levels of learning and decentralising educational services as well as making that education service available within the reasonable distance from every habitation are also some of the desirable measures which the minister is expected to take.¹⁰⁶

The minister, principal secretary, teaching service commission, proprietors of schools, teachers and school boards are urged to promote the education of people of Lesotho and in particular, ensure that a learner is provided with opportunities and facilities to enable him or her to develop physically, mentally, morally, spiritually and socially in a healthy, normal manner and in conditions of freedom and dignity.¹⁰⁷

The minister is also urged to take desirable measures to ensure that a learner who is physically, mentally or otherwise handicapped is given the special treatment, education and care required by his or her condition. And, the learner is free from any form of discrimination in accessing education.

Education Advisory Council is established under the Act. Some of its functions entail funding of schools, establishment and development of schools, quality assessment and advice the minister on such matters relating to the provision for education as the

¹⁰²Section 6 of the Education Act of 2010.

¹⁰³ Section 26 to 52 of the Act.

¹⁰⁴ Section 4(4).

¹⁰⁵ Section 4 of the 2010 education Act.

¹⁰⁶ Lesotho College of Education Act (n 4 above).

¹⁰⁷ Section 4(2).

council may determine.¹⁰⁸ The council is also charged with the responsibility of establishing temporary committees.¹⁰⁹

The teaching council is responsible for registration and deregistration of teachers.¹¹⁰ It also regulates the teaching profession, develop and manage a professional code of conduct for teachers and advise the minister in matters related to the teaching profession.

Several statutory bodies are provided for throughout the Act but now effort is made to outline and give an understanding of a right to education. Despite the fact that the Act's objective is to be consistent with the letter and spirit of the UN Convention on the Rights and Welfare of a Child, the Act does not give any guidance to interpreting and translating the right to education in Lesotho.¹¹¹ I shall dwell more into these issues in the preceding chapter.

3. 4 Non legislative measures

There are however, non legislative measures which have been put in place with the same purpose of realising of socio-economic rights. In what follows, I give a brief view of some those measures which are currently running in Lesotho to realise the right to education.

3.4.1 The Millennium Development Goals (MDGs)

The Millennium Development Goals (MDGs) are eight goals to be achieved by the year 2015 which respond to the world's main development challenges. The said goals are, eradication of extreme poverty and hunger, achieving universal primary education, promotion of gender equality, child mortality reduction, improvement of mental health, combating of HIV and AIDS, Malaria and other diseases, ensuring environmental sustainability and formulation of global partnership for

¹⁰⁸ Section 29 of the 2010 Education Act.

¹⁰⁹ As above (2).

¹¹⁰ Section 36 of the 2010 Education Act.

¹¹¹ Paragraph 2 of the Statement of objects and Reasons of the Education Act 18 of 2010 provides that the Act itself is consistent with the letter and spirit of the UN Convention on the Rights of Children which Lesotho has ratified, as well as the education for All (EFA) Declaration.

development.¹¹² During the UN Millennium Summit in 2000, these actions and targets were contained in the Millennium Declaration and adopted by several nations.¹¹³ Lesotho as a global village was among those many nations who at the end of the summit adopted the Declaration.

Despite the economic down turn of the global economic which, in the worst case scenario, make a very hard progress towards MDGs in some areas, there is a substantive progress which is still to be seen in some areas concerning the MDGs. The making of free primary education into the law which has already been stated is one of the visible examples of progress.

3.4.2 Lesotho Vision 2020

At the turn of the Millennium in 2000, the government of Lesotho recognised the need for the development of a long term Vision for Lesotho that would guide the national policies of the country for development.¹¹⁴ This, as it is maintained, was triggered by the observation that since independence, development planning in Lesotho had been based on short to medium term strategies.¹¹⁵ No effort had been made to develop a shared long term National vision that could guide the activities of all sectors of society in a common direction toward achieving a preferred development scenario as further stated.¹¹⁶

Following the National Dialogue which was held in the same year to further develop the vision and build a national consensus on the requisite processes for its realization the vision statement was agreed upon. The Vision document was officially accepted as the developmental aspirations of Basotho in 2004.¹¹⁷ A well formulated Vision statement which gives hope to Basotho whenever it's sung reads as follow,

“By 2020, Lesotho shall be stable democracy, a united and prosperous nation at peace with itself and its neighbours. It shall have a healthy and well

¹¹² www.ls.one.un.org/mdgs/mdgs.php. (accessed on 6 October 2010).

¹¹³ As above.

¹¹⁴ National Dialogue for the Development of Long term vision For Lesotho, Extract from a Broadcast, (2000) p3. Also Available at www.lesotho.gov.ls/articles/vision2020executivesummary.htm. (accessed on 6 October 2010).

¹¹⁵ As above.

¹¹⁶ As above.

¹¹⁷ National Dialogue (n 30 above) p4.

*developed human resource base. Its economy will be strong, its environment well managed and its technology well established”.*¹¹⁸

With the little that has been done so far. It is hoped that Lesotho will indeed have emerged from the troubles of social and economic injustices by the year 2020.

3.4.3 Poverty Reduction Strategy (PRS)

The government consults with civil society throughout the country to prepare Poverty Reduction Strategy Paper.¹¹⁹ The PRS builds on a number of government documents and initiatives including the National Vision 2020 and the MDGs.¹²⁰ While Vision 2020 articulates the level of development that Basotho aspire to attain by 2020, and the MDGs reflect long term goals and targets to be achieved by 2015, the PRS provides a framework for making progress toward the attainment of those goals and targets within three years.

The main strengths of Lesotho PRS are, (a) its extensive involvement of communities in identifying priorities for reducing poverty and improving welfare, (b) its attention to cross-cutting issues, notably those related to HIV/AIDS, gender and children and youth, (c) its comprehensive assessments of the situation in each of the identified priority areas followed by specific approaches for addressing them and (d) its identification of detailed indicators to monitor progress.¹²¹

One of the PRS's interconnected goals is to create jobs through the establishment of an environment that facilitates private sector-led economic growth and empower the poor and the vulnerable by providing them with access to health care and education.¹²²

3. 5 Conclusion

Through this chapter, I have outlined the legal response Lesotho has adapted to working towards realisation of the right to education. Other measures which are non

¹¹⁸Envisaged in Lesotho Vision 2020.

¹¹⁹Poverty Reduction Strategy Paper Joint Staff Advisory Note, (2005) 11.

¹²⁰As above.

¹²¹As above.

¹²²As above.

legislative have also been highlighted. In what follows, I take a critical evaluation of the legislative frame work of the right to education in Lesotho. This, I do by analysing whether the legislative measures in Lesotho meet government's International Law obligation to realise the right to education.

Chapter 4

A critical analysis on the right to education in Lesotho

4.1 Introduction

The governments' functions are no longer confined to defence, foreign affairs and maintenance of law and order. It should now be the duty of the state also to promote economic democracy and social justice. It is no longer acceptable, in the light of the grave socio-economic conditions of the vast majority of people, for the government to ignore the path of proactive approach to these rights in meeting some of the most profound challenges for human beings in Lesotho. The UN World Food Programme (WFP) has been feeding people since 1965, yet the tiny beautiful mountain kingdom is still not much closer to achieving adequate food supply.¹²³ Will the idea of stable, united, democratic, peaceful and prosperous nation with a healthy and well developed human resources base and a well managed environment, be turned into reality or forever remain a myth?

In this chapter I give a brief critical analysis of the already stated measures under chapter 3 which have been put in place to realise the right to education in Lesotho. The chapter is only confined to analysing the given measures only on their first level review and not to determine whether they are effective or non-effective. To assess whether the said measures meet the Lesotho's government international law obligation on the right to education, I take a look at the General Comments adopted by the CESCR.

4.2 International Law obligation

The ICESCR provides that state parties must recognise the right to education.¹²⁴ Member states also 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.¹²⁵ All persons through education, according to the Covenant, shall be able to participate effectively in a free society,

¹²³ www.rinnews.org/report.aspx?ReportId=86921. (accessed 29 November 2010).

¹²⁴ Article 13 of the ICESCR.

¹²⁵ As above.

promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and further the activities on the United Nations for the Maintenance of peace. With a view to achieving the full realisation of the right to education, the Covenant further provides that Primary education shall be made compulsory, free and available to all. Secondary education in its many forms and higher education shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education. Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.

With regard to school system, member states are urged to actively persuade development and establish adequate fellowship system. Material conditions of teaching staff are also required to be continuously improved according to the Covenant.

Several international conventions establish a committee to monitor and advice on the implementation of its provisions. To this end, ESCR frequently makes General Comments on particular provisions as guidance as to how provision in question should be implemented. These General Comments are usually seen as authoritative interpretation of binding obligations and they serve to elucidate the obligation of the state. Focusing on the right to education, the Committee on ESCR stipulates that the right to receive an education must exhibit the four features which are availability, accessibility, acceptability and adaptability. These four features are analysed briefly below.

Availability

The Committee has noted that there must be functioning educational institutions and programmes which are available in sufficient quantity within the jurisdiction of the state party.¹²⁶ The proper functioning of these depends on many factors, including the developmental context within which they operate.¹²⁷ Examples are buildings or other protection from elements, sanitation facilities for both sexes, safe drinking water, trained teachers on competitive salaries, teaching materials and facilities such

¹²⁶General Comments No.13 (2) Par 6 (a).

¹²⁷As above.

as library, computer laboratory and information technology in some institutions and programmes.¹²⁸ Tomasevki¹²⁹ points out that availability embodies two different governmental obligations: the right to education as a civil and political right requires the government to permit the establishment of educational institutions by non-state actors, while the right to education as a social and economic right requires the government to establish them or fund them or use a combination of these and other means so as to ensure that education is available.

Accessibility

Accessibility should include the principle of non-discrimination, being accessible to all, especially vulnerable groups like children living with or affected by HIV/AIDs.¹³⁰ The element of physical accessibility which requires that education must be within safe physical reach must also be present.¹³¹ An example given is having neighbourhood schools. That same education has to be affordable to all in terms of economic accessibility. It is again, the duty of government to secure access to education for all children in the compulsory education.

Acceptability

This relates to whether or not curricular and teaching methods are sufficient to meet basic learning needs such as literacy, oral expression or numeracy.¹³² The international human rights jurisprudence has stretched acceptability to cover regulations and supervision in terms of minimum standards, respect of diversity, and language of instruction, orientation and contents school discipline rights of learners.¹³³

Adaptability

Adaptability requires that education be flexible to evolve with the changing needs of society and contribute to challenging inequalities, such as gender discrimination, and

¹²⁸ As above.

¹²⁹ K Tomasevki 'Human rights obligation : 'Making education available, accessible and adoptable' *Right to education Primers*, Primer No 3 p13: <http://www.right-to-education.org> (accessed 1 December 2010).

¹³⁰ S Khoza Socio –Economic Rights in South Africa (2nd ed 2007) 418.

¹³¹ General Comments (n 120 above) Para 6(b).

¹³² Veriava (n 1 above) 71.

¹³³ Tomasevki (n 123 above) 13-14.

that it can be adapted locally to suit specific contexts.¹³⁴ The government would have to take into account, children with disabilities, working children, refugee children and children deprived of their liberty when making education available and ensure that even to those vulnerable groups, the kind of education they receive suits their needs.

There is no doubt that much work is needed to address the right to education. Very little can be done at the international sphere where the right to education is one out of hundred issues on the table, thus, the necessity of providing and working towards realisation of the said right at national level by member state. In what follows I look at the achievements and challenges on the right to education in Lesotho. This, I do by comparing and contrasting provisions of the education Act and the interpretations of state party obligations by the Committee on ESCR in realising the right to education.

4.2.1 The right to primary education

Primary education according to the General Comments must include the above four features which have been outlined namely availability, accessibility, acceptability and adaptability. The Committee notes that primary education should have two distinctive features: “compulsory and “available free to all”.¹³⁵ Thus, while the state is not the only investor, international human rights law obliges it to be the main investor within its jurisdiction so as to ensure that primary schools are there for all children.

In the context of Lesotho, although the implementation of free primary education started at the beginning of the year 2000, almost ten years before the education Act got implemented, it is now the law that primary education in Lesotho be free and compulsory.¹³⁶ With a view of making primary education available free to all, the government has been engaged in several projects of construction to provide more schools as mentioned earlier. One of the objectives of the Education Act is to align the education laws with decentralisation of services. Provision of free food has also made schooling more accessible to vulnerable children and orphans.

In expanding free primary education the government is implementing targeted equity-based programmes to cater for the disadvantaged who do not benefit directly

¹³⁴(n 120 above).

¹³⁵General Comments (n 120 above) Para 10.

¹³⁶See Purpose and Objectives of the Act, section 3.

from free education.¹³⁷ The community campaigns are being conducted to encourage the uptake of free primary education and these campaigns are considered extremely important in encouraging parents to recognise that education is a fundamental right of children.¹³⁸ It is hoped that grant provision will be intensified for needy schools while bursary schemes have already been provided to needy children. Since 2000 when free primary education was introduced, there have been several buildings of new classrooms and schools. It is a fact that more primary schools are now in areas which previously had no access to education and this has assisted in the decongesting of previously crowded schools and considerable shortening of travelling distances for young learners.¹³⁹ As of 2006, Lesotho had 1 455 primary schools, compared to 1283 in the year 2000.¹⁴⁰ This is a twelve percent increase over a period of ten years when the free primary education was increased.

In this regard, the two features of primary education according to the Committee on ESCR namely, 'compulsory' and 'available free to all' seem to be at least instilled in the Lesotho primary education.

4.2.2 The right to secondary education

Secondary education should also include the four features already mentioned according to the Committee on ESCR. Here state parties are instructed to adopt varied and innovative approaches to the delivery of secondary education in different social and cultural context. The Committee is of the view that, progressive introduction of free education means that while states must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education.¹⁴¹

While education is free for all children at primary education in Lesotho, the government only sponsors secondary education for orphans with no surviving parents, as well as some vulnerable children. The ministry of education and training is currently under negotiations with the Ministry of Finance and Development

¹³⁷ Education and Training Wade Publications presenting on Lesotho Report 3. Available at http://lesothoreview.com/education_and_training.html (accessed on 20 November 2010).

¹³⁸ As above.

¹³⁹ As above.

¹⁴⁰ As above.

¹⁴¹ General Comments (n 120 above) Para 14.

Planning about the possibility of increasing such sponsorships to accommodate large numbers of needy children.¹⁴²

There have been successful attempts of diversification in general education. Reports show that in 2006, about 60 secondary schools throughout the country offered technical subjects.¹⁴³

4.2.3 Higher education

Although Higher education also covers the four already mentioned features, it is different from secondary education in that, while secondary education shall be made generally available and accessible to all, higher education on the other hand shall be made equally accessible to all, on the basis of capacity.¹⁴⁴ Thus, the capacity of individuals should be assessed by reference to all their relevant expertise and experience.¹⁴⁵

There is Higher Education Act¹⁴⁶ which provides the legal framework for the regulation of higher education in the country. This Act makes provisions for the establishment, governance and funding of a council for higher education.¹⁴⁷ It is expected that higher education in Lesotho will contribute effectively to the world of work through the supply of high-level human resources which will be responsive and relevant to the needs of the country, the region and the rest of the world.¹⁴⁸

The main institution for learning in Lesotho is the National University of Lesotho (NUL). Other tertiary institutions comprise Limkokwing University of Creative Technology (LUCT), the Lesotho College of education (LEC), which is an autonomous teach training institution, the institute for Distance and Continuing studies, which affiliates with NUL, the National Health Training College (NHTC) and the hospital-linked colleges of nursing, Lesotho Agricultural College (LAC) and the Lerotholi Polytechnic (LP).

¹⁴²Education and Training (n 131 above) 3.

¹⁴³As above.

¹⁴⁴General Comments (n 120 above) Para 19.

¹⁴⁵As above.

¹⁴⁶The Higher Education Act of 2004.

¹⁴⁷Education and Training (n 131 above) 4.

¹⁴⁸As above.

The main priorities for the higher education comprise, increasing access to higher education on an equitable basis, improving the relevance of higher education to make it more responsive to the demands of labour market, enhancing efficiency in institutions of higher learning and mainstreaming gender, HIV and AIDs in higher education curriculum and activities.¹⁴⁹

To make higher education equally accessible to all, on the basis of capacity, students who attain admission at the university are provided with financial assistance by the government.

4.2.4 Fundamental or basic education

This form of education is meant for those individuals who have not received or completed the whole period of their primary education.¹⁵⁰ However, it has also been observed that since everyone has the right to the satisfaction of their basic learning needs as understood by the world Declaration, the right to fundamental education is not confined to those who have not received or completed the whole period of their primary education.¹⁵¹ The right to fundamental education extends to all those who have not yet satisfied their basic learning needs. The Committee also notes that the enjoyment of the right to fundamental education is not limited by age or gender and that it extends to children, youth and adults, including older persons.¹⁵² To this end, fundamental education is an integral component of adult education and life-long learning. And because fundamental education is a right for all age groups, curricula and delivery systems must be devised to suit students of all ages.¹⁵³

Lesotho, from as far back in 1974, established the LDTC which offers basic education courses as well as post primary courses through the basic education unit and continuing education unit.¹⁵⁴ This has been known as non-formal education and its primary purpose is to complement formal education programmes and cater for the poorest sector of society, such as school dropouts and adults who missed out on earlier chances of acquiring education.¹⁵⁵ The main providers of this non-formal

¹⁴⁹ As above.

¹⁵⁰ General Comments (n 120 above) Para 23.

¹⁵¹ As above.

¹⁵² General Comments (n 120 above) Para 24.

¹⁵³ As above.

¹⁵⁴ Education and Training (n 131 above) 4.

¹⁵⁵ As above.

education are NGOs, the community, private individuals and some church organisation.¹⁵⁶ The Ministry of education and training also offers non-formal education through the LDTC and the Institute of Extra-Mural Studies (IEMS), which is part of NUL.¹⁵⁷

Strategies being undertaken by the Lesotho government to strengthen this sub sector include, completing the non formal education policy, developing a comprehensive non-formal education training curriculum covering various issues such as agriculture, community development, entrepreneurship, environment and health, where necessary, provide teaching facilities and recruit additional teachers and lastly develop courses to provide the out-of-school population with functional skills, which focus on alternative learning opportunities, basic English and variety of practical skills.¹⁵⁸

The Committee on ESCR further breaks down some of the governmental or member state's duties in terms of school system, adequate fellowship system and material conditions of teaching staff.¹⁵⁹ With regard to development of a system of schools, the Committee points out that a state party is obliged to have an overall developmental strategy for its school system. The strategy must encompass schooling at all levels and such overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigour.¹⁶⁰

The Committee further notes that "an adequate fellowship system shall" should be read with the covenant's non-discrimination and equality provisions.¹⁶¹ Fellowship system should enhance equality of educational access for individuals from disadvantaged groups.¹⁶²

With regard to the material conditions of teaching staff, the Committee draws attention the attention of state parties to the joint UNESCO-ILO Recommendation

¹⁵⁶ As above.

¹⁵⁷ As above.

¹⁵⁸ As above.

¹⁵⁹ General Comments (n 120 above) Para 25.

¹⁶⁰ As above.

¹⁶¹ As above.

¹⁶² As above.

Concerning the status of Teachers¹⁶³ and the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel¹⁶⁴, and urges state parties to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role.¹⁶⁵

In response to the above, the 2010 Education Act establishes the school board which is a governing body of schools. Some of the responsibilities faced by the board comprise of liaising with the relevant local authorities on matters relating to the development of schools. In a public school, the school board may recommend to the appointing authority the appointment, promotion, demotion or transfer of teacher and also appoint, promote or transfer a teacher in an independent school. The terms and conditions of service including leave, salary entitlement, allowances and terminal benefits are determined by the school board where a teacher has been appointed by that school board.¹⁶⁶

Teaching Council, whose function is to register and remove teachers from the register, regulate the teaching profession and develop and manage a professional code of conduct for teachers, is also established under the Act.¹⁶⁷

The minister responsible is urged to prepare and publish codes of practice for the purpose of providing practical guidance in respect of acts including the following codes:

- (1) code of conduct which shall primarily be a guide to teachers in the conduct of their relationships and dealings with their employers and the general public;
- (2) grievance code which shall prescribe the procedure to be followed in handling teachers' grievances
- (3) disciplinary code which shall be followed in instituting disciplinary action against a teacher who has committed a misconduct and a,

¹⁶³Adopted by the Special intergovernmental Conference on the Status of teachers, Paris 5 October 1966. Its sets forth the rights and responsibilities of teachers, and international standards for their initial preparation and further education, recruitment, employment, teaching and learning conditions.

¹⁶⁴Adopted by the General Conference of UNESCO in 1997, following years of preparatory work between UNESCO and the ILO. This standard is a set of recommended practises covering all higher education personnel.

¹⁶⁵General Comments (n 120 above) Para 27.

¹⁶⁶Section 53 (2) of the 2010 education Act.

¹⁶⁷Section 36 of the Act.

(4) code on dispute resolution which shall prescribe the procedure to be followed to resolve any dispute emanating from the workplace.¹⁶⁸

In expanding rights and responsibilities of teachers, settlement of disputes,¹⁶⁹ arbitration,¹⁷⁰ retirement¹⁷¹ and teachers' formation¹⁷² have also been provided for under the current Act as a way of meeting international standards for dozens of issues which relate to the most important professional, social, ethical and material concerns of teachers.

4.3 Challenges

Although the right to education is universal, the way national constitutions and legislations interpret this right will vary and maybe limited. The measures which I have already outlined in the previous chapter are indicative of how seriously education is viewed in Lesotho. While the Lesotho constitution merely declares education for all as principles of state policy, the present Act provides for a shift from free primary education to ten years of free and compulsory education for all. Through this Act, education is now being decentralised to local and regional level, to ensure better implementation and management, and hence greater accountability. Establishment of committees, councils and other bodies responsible for school supervision, school management, teaching service and conduct of teachers, have all been set up to make education in Lesotho available, accessible, acceptable and adaptable

The current Act however, seems to be running short of certain necessary elements. In the context of rights based approach, this law says very little concerning rights holders and duty bearers. It can hardly be inferred that there is awareness that people have the right to education which is currently being denied throughout the entire reading of the Act.

¹⁶⁸Section 57 of the Act.

¹⁶⁹Section 58.

¹⁷⁰Section 60.

¹⁷¹Section 62.

¹⁷²Section 64.

The entire concept of free and compulsory primary education seems to be almost defeated simply because issues such as age, area and standards are left to the discretion of the minister responsible. Most importantly, primary education which should have at least been given a minimum entitlement in order to avoid ambiguity has been immensely ignored.

Against this background is the attempt to make the right to education in Lesotho meaningful. It is submitted that the current provisions of the Act do not make enough room to explore and try to give an understanding on what is offered in the legislation itself and what would need to be provided in order for the right to be effectively realised. An ordinary citizen going through this law may gather little or no confidence and knowledge in order to hold his or her government accountable to deliver on its obligation and to fulfil the right to education. To this end, the right to education may be viewed as an abstract concept although it is enshrined in national law. The right is meaningless when people do not know that it exists for them. Grounding the right to education locally means transforming the abstract concept into a concrete reality and looking at current provisions for the right to education and explores what local people need to make their right to education a reality.¹⁷³

4.4 Conclusion

One purpose of law is to ensure security and predictability; it defines who is entitled to what, who is obliged to do what and what happens if the anticipated behaviour does not ensue as to correct departures from the required conduct.¹⁷⁴ Laws enforcing the right to education which lack such factors may end up creating a perception that education is a gift by a country's political leader.¹⁷⁵ Such mentality may in turn defeat the whole purpose of educational rights. This is not the way it should be.

¹⁷³<http://www.right-to-education.org> (accessed 1 December 2010).

¹⁷⁴Tomasevki (n 123 above) p15.

¹⁷⁵As above.

Chapter 5

Conclusion and Recommendations

5.1 Conclusion

The right to education is a basic human right, the satisfaction of which serves as a basis for the enjoyment of all other rights. It is therefore necessary to take adequate measures for its realisation. My task in this paper was to find out what legal measures Lesotho has adopted to realise and promote the right to education. Almost two decades now after ratifying the ICESCR, there seems to be a progress in concretising some of the socio-economic rights in Lesotho. The government is being more responsible by passing national laws to give socio-economic rights teeth. Serious challenge however, lies in the formulation of these laws as previously shown. It is still not clear whether these laws establish right holders and duty bearers; whether one can actually claim to have a right under the current law. Although there are other measures which have been put in place towards realisation of the right to education in Lesotho, it is submitted that such measures seem complex because the way they are operating does not benefit ordinary people and vulnerable people to claim their educational rights where government does not perform. Many of these people see education as a favour from the government.

Against this background is the role of courts in Lesotho. There is a judiciary system with the Court of Appeal being the highest court of the land.¹⁷⁶ The High Court, which has unlimited original jurisdiction, has the power to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate courts.¹⁷⁷ It is the main watchdog of human rights abuses in Lesotho. The judiciary is supposed to be the most independent arm of government. However, the independence of the judiciary in Lesotho is potentially questionable regard being had to the fact that the appointment of the Chief Justice of the High Court is done by the Prime Minister. The appointment of the other judges is done by the Judicial Service Commission, whose members are composed of members that are mostly appointed by the Prime Minister. Of great importance is the fact that important

¹⁷⁶Section 118 of the Lesotho Constitution.

¹⁷⁷(n 170 above) section 119.

stakeholders like the Law Society of Lesotho are not represented in the Judicial Service Commission. This compromises the independence of the court's integrity and courage to adjudicate matters against the government or members of the government regarding realisation of socio economic rights.

One of the major strengths of the judiciary is the court's intervention which can influence on how resources are used for realising socio economic rights since the government can be prosecuted where it fails to fulfil its obligations regarding socio economic rights. The court's decision as well can influence and contribute to the legislative function on socio economic matters. However, because of the current situation in Lesotho in terms of independence of the judiciary, these productive measures had not been put in use by the court system.

The role of national courts in protecting socio economic rights so far has been non-existent. Part of this misfortune lies in the already addressed situation that the constitution distinguishes human rights and only upholds civil and political rights as justiciable while socio economic rights are stated as merely principles of state policy in a different provision. It can also be argued that judges are still not very conscious of principles and content of human rights.

One thing that raises great concern is the lack of national human rights institution currently to address human rights violations.¹⁷⁸ There is however, the Department of Human Rights under the ministry of Justice, Human Rights and Rehabilitation of Law and Constitutional Affairs. This department performs coordinating functions for human rights activities of the ministry of justice. It does not accept complaints directly from the public but only coordinates human rights activities and programmes within the country. At this juncture, one is led to ask a question, where does this leave socio economic rights?

The office of the ombudsman by law is supposed to address the complaints on human rights abuses lay mainly against the civil servants.¹⁷⁹ Now, the challenge is that it does not address grievances that relate to human rights violations which take place in private sectors. Furthermore, the office does not have enforcement powers and as a result, some of the recommendations that it makes regarding reparation are

¹⁷⁸Human Rights Report (n 81 above) 32.

¹⁷⁹(n 170 above) section 135.

easily ignored. The status of socio economic rights in this whole scenario does not even come close when very little is being done to address other grievances. Socio economic rights have no place of recognition even in this office. It follows that, protection and realisation of the right to education provided in legislation is going to remain weak and worthless for a long time if the power of human rights institutions to effectively enforce their implementation is not set out clearly.

5.2 Recommendations

It is necessary to build capacity of the relevant institutions for human rights and train its human resource. It is also important for all these key institutions to have research offices specifically for human rights issues.

5.2.1 Drawing inspiration from India

The Indian Constitution like that of Lesotho holds the fundamental rights and directive principles as distinct entities. The judicial interpretation of these directive principles however has been rather instrumental in strengthening issues of socio-economic rights in the Constitution of India. In 1947, India became independent and faced the enormous challenge of introducing a new social and economical order, restoring human dignity and justice and uniting its population in the face of widespread diversity after 40 years of British rule.¹⁸⁰ In its preamble, the Constitution of India provides for justice, social economic and political, liberty of thought, expression, belief and worship, equality of status, of opportunity and to promote among them all, fraternity assuring the dignity of the individual and the unity and the integrity of the nation of India.¹⁸¹

The colonial legal heritage which was ill equipped to meet the challenges of distributive justice for the underprivileged millions in India did not instantly disappear when India gained its independence.¹⁸² It took thirty years after the independence to actually get it right and it was only in the late 1970's when the situation changed

¹⁸⁰S Meer 'Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa' (1993) vol 9 no 3 *South African journal on human rights* 358
Meer (n 4 above) 358

¹⁸¹Indian Constitution, adopted 26 November 1949

¹⁸² Meer (n 180 above) 359

drastically.¹⁸³ The Indian jurisprudence aimed at making law and justice accessible to the poor and underprivileged was born. Judicial activism and creativity with a Constitution enshrining fundamental rights and a socially active society armed with a great sense of rights awareness and culture of resistance to oppression despite the harsh socio-economic realities, deserves attention of many legal systems, Lesotho included.¹⁸⁴

The Indian judiciary has been innovative, creative and activist in human rights protection and has given expansive and purposive interpretation to fundamental rights to address socio-economic rights which are merely declared as Directive Principles of State Policy (DPSP) in the Indian Constitution. In the case of *Olga Tellis*¹⁸⁵ where many people of India lived on pavements and slums in the city of Bombay, journalists and social action groups filed a case on behalf of the certain pavement dwellers in Bombay who were facing forced eviction. They claimed that their eviction would mean the deprivation of their means of livelihood as hawkers, casual labourers, domestic servants, construction workers and luggage carriers in the City of Bombay. They argued that they had a fundamental right to live, a right which could not be exercised without the means of livelihood. In giving out the ruling in their favour, the court gave a wide interpretation to the right to life as guaranteed under the Indian Constitution and held that the right to life encompasses the right to livelihood.

On the right to education in India, the appropriate case would be *Unnikrishnan J. P v State of Andhara Pradesh*¹⁸⁶. One of the issues which was dealt with in the above case was whether the right to education which falls within the directive principles of state policy under Article 45 of the Indian Constitution can be interpreted as a fundamental right. The private educational institutions wanted to challenge the provincial laws regulating the charging of capitation fees from the students seeking admission. They wanted to enforce their right to do business alleging that they do not receive aid from the government. In rejecting their argument, the court said that the state is under an obligation to establish educational institutions to enable citizens to enjoy the said right. The state may discharge this obligation through state-owned

¹⁸³ Meer (n 182 above)

¹⁸⁴ Meer (n 183 above) 371-2

¹⁸⁵ *Olga Tellis v Bombay Municipal Council* (1985) SRC 51

¹⁸⁶ (1993) 1 SCC 645

educational institution. If the state grants recognition to the private educational institution, it creates an agency to fulfil its obligation under the Constitution. Charging of capitation fees by such institutions is a patent denial of a citizen's right to education under the Constitution. Thus, the state's action in permitting capitation fees to be charged by private educational institutions is wholly arbitrary and violates Constitution.

It was further held that the right to education is not stated expressly as a fundamental right in Part 3 of the Constitution. However, having regard to the fundamental significance of education to the life of an individual and the nation, the right to education is implicit and flows from the right to life as guaranteed under Article 21 of the Constitution. Without education being provided to the citizens of this country, as further stipulated, the objectives set forth in the Preamble of the Constitution cannot be achieved.

While the above decision has been applied by the courts subsequently in formulating government's compliance with the Constitution regarding the right to education, Judge Muralidhar¹⁸⁷ points out that the decision has prompted a constitutional amendment that formally acknowledged the transformation of the right to education from a directive principles of state policy to an enforceable fundamental right.

5.2.2 South Africa

South Africa has not only made the most advanced constitutional provision for socio-economic rights, it has also taken the lead in the judicial enforcement of such rights, an experience from which countries like Lesotho can opt for. Experience has shown that the South African courts protect socio-economic rights, one such way being through their law-making powers of interpreting legislations dealing with socio-economic rights.

In terms of the right to education in South Africa, section 29 of the constitution discusses all the relevant educational rights and confers specific and separate entitlements on right-holders. This section explicitly obliges the state to make education as a right accessible and available to all and not only as a positive

¹⁸⁷S Muralidhar 'The expectations and challenges of judicial enforcement of social rights' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 116

obligation from the government but also as a civil and political right as it contains freedom of choice guarantees such as language choice in schools.¹⁸⁸

There are certain minimum entitlements outlined in the above section, duty bearers as well as rights holders are also acknowledged and as such, the right to education under the South African law, to some extent, may seem not far from reality. Ordinary citizens can be able to approach courts of law and claim that their educational rights have been violated.

I sincerely believe this can be very good starting point for a country like Lesotho to take note when making laws which address socio economic rights.

¹⁸⁸ Veriava (n 1 above) 59.

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