

Incorporating international standards into national education law in South Africa: The accountability of the state

Rika Joubert

1 Introduction

The aim of this article is to assess the extent to which the international norms and standards related to the right to education are incorporated into the national education laws in South Africa.

The theoretical framework that I have chosen to assess the incorporation of international human rights standards into education law in South Africa is the Tomaševski framework¹ which focuses on the minimum essentials of what states should do to deliver core obligations related to the right to education. According to the Tomaševski framework, education must be available, accessible, acceptable and adaptable. These four principles are not mutually exclusive. Each of the four principles will be discussed with reference to applicable education law and case law to assess whether the international norms and standards related to the right to education are incorporated into education law.

2 Background

Most sovereign states have enshrined the right to education in their constitutions. They have also ratified the International Covenant on Economic, Social and

¹BSc, BEd, MEd, PhD, THED, FDE. Associate Professor in Education, University of Pretoria and Director of the Interuniversity Centre for Education Law and Policy (CELP).

¹Katarina Tomaševski was the United Nations (UN) Special Rapporteur on the Right to Education from 1998 to 2004. She developed the 4 A-scheme which the UN Committee on Social, Economic and Cultural Rights (CESCR) adopted in their *General Comment on the Right to Education* issued in 1999. Tomaševski subsequently developed the scheme in her publications: See Tomaševski *Human rights obligations: Making education available, accessible, acceptable and adaptable* (2001); *Human rights obligations: The 4-A scheme* (2006). Tomaševski 'Human Rights obligations: making education available, accessible, acceptable and adaptable' Primer 3 available at <http://www.huridocs.org/resource/human-rights-obligations-making-education-available> (accessed 2013-04-22).

Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC), both of which include the right to education.² At domestic level, there are political and legal remedies for many educational violations. However, support for the implementation of the right to education and freedom in education must be converted into a political reality and into a programme for the transformation of the education system that is understandable to a significant part of society.³

Almost eighteen years after the South African government signed the ICESCR, Cabinet has finally approved that South Africa will ratify the ICESCR. This important decision to ratify, which means that the ICESCR will be legally binding, was included in a statement issued in Pretoria on 10 October 2012.⁴ The Cabinet statement describes how the ICESCR is a 'key international treaty which seeks to encourage State Parties to address challenges of inequality, unemployment and poverty, which are critical to the strategic goals of governments'. Civil society organisations have been calling for many years for the South African government to ratify the ICESCR.⁵

The ICESCR, together with the International Covenant on Civil and Political Rights (ICCPR), optional protocols to these covenants, the UN Charter and the Universal Declaration on Human Rights constitute the International Bill of Rights.⁶ The ICESCR has been ratified by over 160 states since it was adopted in 1966, forty-eight of which are African states and 11 of which are member states of the Southern African Development Community (SADC). South Africa ratified the ICCPR in 1998, and its current ratification of the ICESCR will unambiguously signal its commitment to be legally bound by the full range of human rights recognised under international law.⁷

²De Groof, Lauwers and Kishore *The right to education and rights in education* (2006) 3. The right to education and educational freedom are specified quite explicitly in the constitutions of most countries except in the United States. This book deals with the constitutional provisions from 28 sovereign countries that have included the right to education in their constitutions.

³Glenn and De Groof *Balancing freedom, autonomy and accountability in education* (2012) 25.

⁴The UN ratification status chart 2012 reflects that it had not yet been ratified at the time of writing.

⁵The Community Law Centre (CLC), Socio-Economic Rights Institute of SA (SERI), Black Sash, People's Health Movement South Africa, National Welfare Forum, Global Call to Action against Poverty South Africa (GCAP-SA) and the Studies in Poverty and Inequality Institute (SPII) see this as a great opportunity to ensure that South Africa's jurisprudence on socio-economic rights develops in harmony with the normative standards set by the leading international treaty on these rights.

⁶Beurgenthal, Shelton and Steward *International human rights* (2002) 34.

⁷South Africa has not yet ratified the ICESCR, although a decision was taken on 10 October 2012 to ratify. See the list of countries that have signed and ratified the UN Treaties available at <http://tbinternet.ohchr.org> (accessed 2014-01-20).

3 The international right to education

In most countries, there are numerous examples of international and domestic laws to protect the right to education. The main responsibility for the providers of education is to respect, protect and promote educational rights for the benefit of all human beings.⁸ The main obstacle to realising the right to education remains a lack of political will and commitment on the part of states, international institutions and education providers.⁹ The various political and legal remedies for many educational violations demonstrate that educational rights are fundamentally justiciable.¹⁰ A core part of every international convention, for example, is a prohibition on discrimination against the right to education. Worldwide, the right to education – as a basic human right – is one of the most prominent dimensions where societies are challenged to guarantee and refine fundamental choices for every citizen.¹¹

The legal framework for schooling, and especially how the right to education is ensured, generally provides an accurate reflection of national cultural traditions and social context. This is why education laws tend to differ from country to country and even more from continent to continent. The institutional arrangements for education vary according to each country's constitution. Internationally, the traditional features of the right to education include the freedom to enjoy the education of one's own choice and in this respect the rights of parents take precedence.¹²

Legislation is an indispensable instrument in accomplishing economic, social and political transformation. The international provision for the respect, protection and promotion of the right to education should form part of the national education policy. The same could be said of the primary concern for quality in education. Comparative law ought to be a vital part of the preparation of new legislation in the field of education law. Comparability is a means of discovering where one's own education laws are situated and possibly a source of inspiration for new law-making.

⁸De Groof 'Legal framework for freedom of education' in Glenn and De Groof (eds) *Balancing freedom, autonomy and accountability in education* (2012) 25.

⁹Glenn and De Groof (n 3) 60.

¹⁰Glenn and De Groof (n 3) 25 refer to the following education rights that have already been tried in courts around the world: discrimination and access to education; banning teachers' unions; failing to provide primary level education; educational institutions in such poor condition that there are safety risks and unfair treatment of religious and linguistic rights.

¹¹Universal Declaration of Human Rights (art 26); the European Convention on Human Rights (art 2 of the First Protocol), the UNESCO Convention against Discrimination in Education, and the ICESCR (arts 13 and 14)

¹²Glenn and De Groof (n 3) 32.

From the standards of international law concerning the right to education, a miscellany of guarantees of freedom and cultural rights on the part of parents on the one hand, and general aims for and obligations of the state on the other can be deduced.¹³ In several countries the direct effect of international standards concerning education is accepted, although the international standards cannot be ascribed to all conditions without exception.¹⁴ Countries have transformed the right to education into a constitutional right and the courts are responsible for arbitrating disputes concerning this right. Basic education, for example, is a right under the Constitution of the Republic of South Africa of 1996 (hereafter Constitution) – unqualified by the availability of resources or progressive realisation – to be provided without discrimination and on the basis of equality.¹⁵

4 International norms and standards relating to the right to education

The right to education may be interpreted as an objective that has to be attained in order to achieve positive freedom.¹⁶ At the international level, there is no uniform rule on how educational rights should be protected and enjoyed; there are too many differences among nations and their social and legal arrangements. Legal comparisons demonstrate that the right to education is closely related to the notion of freedom.¹⁷ Education is thus intended to enable a human being to freely develop his or her personality and human dignity. This implies freedom of choice between different kinds of schools, on the basis of religious, philosophical, or pedagogical convictions or for reasons of language or ethical affiliations.¹⁸ It implies freedom from indoctrination in educational institutions and demands respect for the human rights of learners.

¹³Glenn and De Groof (n 3) 39 report on the education law provisions in 65 countries all over the world. In these country reports the authors had to report on the legal aspects pertaining to the freedom of parents to make fundamental decisions about the education of their children and the responsibilities of each country's government to ensure that every child has the effective opportunity to receive an adequate education.

¹⁴Glenn and De Groof reported (n 3) on 65 countries in four volumes.

¹⁵Section 29 of the Constitution of the Republic of South Africa, 1996 guarantees that: 'Everyone has the right - to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible'.

¹⁶Glenn and De Groof (n 3) 50.

¹⁷Glenn and De Groof (n 3) compared the implementation of the right to education in 65 countries and found a direct link between the right to education and the right to freedom. These freedoms include the freedom of parents to make decisions about the education of their children and the freedom of the authorities in these countries to shape and implement their education missions.

¹⁸Glenn and De Groof (n 3) 52.

Internationally, the right to education refers not merely to the right to receive education and equal access to educational institutions funded by the state. It is also a freedom to be protected against any infringement of human personality which might occur in the process of education.¹⁹

Beiter examined the core obligations of States to fulfil the right to education as it is spelt out in the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁰ A failure to comply with the core obligations of the right to education should be considered a violation of this right.

The minimum core obligations of state parties to ICESCR with regard to education include:

- Ensuring free choice of education without interference from the state or third parties;
- providing primary education for all;
- ensuring the right of access to public educational institutions; and
- adopting and implementing a national education strategy which includes the provision of fundamental, secondary and higher education.

The Tomaševski framework signals the elements necessary for implementing the right to education. The following is a succinct description of what is required in applying a rights-based approach to education.

- *Availability of education* This principle relates to the existence of functioning education institutions and programmes close to a child's area of residence, appropriate and contextually relevant modes of education delivery, as well as provision of facilities and infrastructure, educators and educational materials required to provide education for everyone.
- *Accessibility of education* Accessibility of education relates to education being available to all on the basis of the principle of equality and non-discrimination, economic accessibility as well as physical accessibility.
- *Adaptability of education* Adaptability of education requires schools to respond to the needs of each individual child, instead of expecting the child to adapt to whatever form of education the school provides. The core

¹⁹Infringement of human freedoms through education could result from abuse of power by private organisations, by indoctrination by state authorities, prescribing the mission statements of schools, prescribing religious policies to be used by schools, unfair discrimination on grounds such as race, ethnic origin, sexual orientation and language.

²⁰Beiter *The protection of the right to education by international law* (2006) 476-478.

element of this principle is the flexibility of curricula and instructional techniques for the benefit of the children.²¹

- *Acceptability of education* This principle requires minimum guarantees regarding the quality of education, including the content of educational curricula and textbooks, and the creation of violence-free schools.²²

The international standard of reasonable provision of education refers to administrative practices pertaining to government regulations, quality control mechanisms, curricula and funding of education. The democratic principle that forms the basis for protecting the right to education is founded on the confidence that most persons will claim their right to education responsibly, while at the same time respecting other persons' rights and freedoms.²³

5 International norms and standards incorporated into South African education law

*'History tells us how we got here. The law tell us where we are.'*²⁴

Post-apartheid South Africa has been characterised by the formulation of laws and policies that came out in rapid succession, some of which are progressive by international standards. Three major pieces of national legislation govern primary and secondary education in South Africa – the National Education Policy Act 27 of 1996, the South African Schools Act 84 of 1996 and the Employment of Educators Act 76 of 1998. However, there are some concerns, notably that political zeal might lead to law-making by trial and error with the potential to adversely affect structural continuity.

Four distinct phases can be identified in the education law and policy-making landscape in South Africa. The post-1994 phase focused on the establishment of a new national educational system. The second phase – 1997-1999 – attempted to lay out a vision for the new education system. The main focus was on transforming the apartheid education system into a non-discriminatory, democratic education system. During the third phase – 1999-2004 – education laws and policies aimed at improving school practice, funding and inclusion. Since

²¹Tomaševski *Manual on rights-based education: Global human rights requirements made simple* (2004) vi.

²²Tomaševski (n 21) 7.

²³*Id* 12.

²⁴Woolman and Fleisch *The Constitution and the classroom: Law and education in South Africa 1994-2008* (2009) 120-126.

2004 the focus is mainly on reviewing and revising existing legal and policy frameworks.²⁵

Applying a rights-based approach to education will require the reform of a school system to provide for constitutional guarantees, new policies, a new funding system, a new curriculum, teacher training programmes, availability of physical resources, discipline strategies and, above all, accountability.

A thematic content analysis was carried out using the Tomaševski framework to determine to what extent international norms and standards related to the right to education are incorporated into education law in South Africa. In this regard, the following sections deal with the aspects of the framework that were used to analyse relevant legal texts.

5.1 Availability of education in South Africa

In this section two aspects pertaining to existing education laws are discussed, namely, the availability of facilities to provide education and the availability of teachers. Availability of education deals with availability of enough school places for all learners. Teacher availability deals with teacher supply, teacher quality and teacher preparation. The legacy of apartheid education is manifested in a minimum level of resources, a lack of qualified teachers, high teacher-learner ratios, too few libraries and laboratories and a shortage of classrooms at the schools. The right to education is crucial to the transformation of South African society.²⁶ In order to reach this objective, schools must be in a condition that makes meaningful teaching and learning possible. The National Department of Basic Education has a policy that requires schools to be maintained in a condition that makes teaching and learning possible.²⁷ The building blocks of school infrastructure, teaching and learning support materials, and sufficient qualified teachers constitute the core of the right to a basic education.

The Constitutional Court in the recent case of the *Governing Body of the Juma Masjid Primary School v Essay NO* recognised the state's duty to ensure the availability of schools.²⁸ This encompasses more than mere physical structures in which teaching can take place.²⁹ This obligation must be understood in the light of the objectives of the right to basic education identified by the Court. Nkabinde J remarked as follows:

²⁵Sayed *et al* *Education and inclusion: Policy and implementation in South Africa and India* (2007) 33.

²⁶ *Governing Body of Juma Masjid Primary School v Essa* 2011 8 BCLR 761 (CC) para 43.

²⁷ Department of Basic Education *The national policy for an equitable provision of an enabling school physical teaching and learning environment* (2010) 9.

²⁸ *Juma Masjid Primary School* (n 26) para 45.

²⁹ Beiter (n 20) 479.

Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents, mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities.³⁰

Section 5A of the Schools Act provides that the Minister of Basic Education may prescribe minimum norms and standards for school infrastructure, the capacity of a school in respect of the number of learners it can admit and the provision of learning and teaching support material. It defines school infrastructure as 'the availability of classrooms, electricity, water, sanitation, a library, laboratories for science, technology, mathematics and life sciences, sport and recreational facilities, electronic connectivity at a school, and perimeter security'.³¹ Capacity is defined as 'the number of teachers and the class size, quality of performance of a school, curriculum and extra-curricular choices, classroom size, and utilisation of available classrooms of a school'.³² Learning and teaching support material encompasses 'the availability of stationery and supplies, learning material, teaching material and equipment, science, technology, mathematics and life sciences apparatus, electronic equipment and school furniture and other school equipment'.³³ Regulations on Minimum Norms and Standards for Public School Infrastructure have been drafted pursuant to section 5A (1) of the South African Schools Act, 84 of 1996.³⁴ This section was added to the Schools Act in 2011 and a court order was necessary before the regulations were drafted and published for comment. There is no indication that the Minister of Finance and the Council of Education Ministers have been consulted in the drafting process as contemplated by section 5A(1) of the Schools Act which determines that the regulations can only be prescribed after consultation with the said two agencies. The regulations could lead to an improvement in regard to the matters they are intended to regulate but many provisos apply that may make it almost impossible to enforce the regulations. There are many provisions with wording like 'as far as reasonably practicable' and 'any reasonable possible avenue must be explored and alternatives considered to give effect to the norms and standards' and 'subject to the resources and co-operation of other government agencies and entities for infrastructure in general and the making available of such infrastructure'. Such provisions will make the regulations difficult to interpret and enforce and contain many loopholes which

³⁰ *Juma Masjid Primary School* (n 26) para 43.

³¹ Section 5A(2)(a).

³² Section 5A(2)(b).

³³ Section 5A(2)(c).

³⁴ Regulations on Minimum Norms and Standards for Public School Infrastructure GN 932 in GG 36837 of 2013-09-12.

may be used to explain non-performance in terms of the norms and standards. The Regulations do not address any aspects of the provision of teaching and learning support materials as provided for in section 5(1) of the Schools Act.

The Norms and Standards for School Funding explicitly provide for the allocation of capital expenditure for the construction of new schools or additional classrooms to the neediest populations. In this expenditure category, 'need' is defined in terms of lack of schools or overcrowding of existing schools.³⁵

The National Policy Framework for Teacher Education and Development in South Africa makes provision for continuous professional training and development of teachers, with the aim of improving the knowledge and skills of many teachers who entered the teaching profession before 1994.³⁶ According to the National Qualifications Act,³⁷ all teacher programmes are required to incorporate competencies – both situational and contextual – that enable teachers to deal with diversity and transformation and address the critical challenges facing education in South Africa.

On the issue of teacher quality and professionalism, South African educators are required to be registered with the South African Council for Educators (SACE) as a condition for them to practice teaching.³⁸

5.2 Accessibility of education in South Africa

The principle of accessibility dictates that education must be provided on the basis of equality and non-discrimination. Education should be economically and physically accessible to all. Economic accessibility includes the provision of fee-free access to education services and the equitable funding of education.³⁹

Since 1994 the democratic government has implemented a whole range of laws and policies to ensure that public funding is aimed at redressing this disparity and that, ultimately, learners' right to basic education is realised.⁴⁰ The financing of 40 per cent of South African public schools is reliant on school fees to a great extent.⁴¹ As the exact amount of fees charged in the more affluent quintiles is determined by the parent community of a school, there is a growing

³⁵Department of Education, GN 890 of 2006. The National Norms and Standards for School Funding is published in terms of the South African Schools Act 84 of 1996. The NNSSF is amended annually and also includes National Poverty Distribution Tables.

³⁶Department of Education, 2006.

³⁷Act 67 of 2008.

³⁸Act 3 of 2000.

³⁹Beiter (n 20) 476.

⁴⁰Section 29(1)(a) of the Constitution.

⁴¹National Norms and Standards for School Funding in GG 35458 of 2012-06-20.

concern that the public funding system is reinforcing the existing inequality between schools in more affluent areas and schools in poorer areas.⁴²

The Schools Act provides that the State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in educational provision.⁴³ The National Norms and Standards for School Funding (NNSSF) state that educational needs are always greater than the budgetary provision for education, and to affect redress and improve equity, public spending on schools is specifically targeted on the needs of the poorest.⁴⁴ The Minister of Basic Education annually determines the national quintiles for public schools which must be used by the Member of the Executive Council in each province to identify schools that may not charge school fees.⁴⁵ These no-fee schools are those in poorer quintiles and hence receive larger allocations per learner, while those in more affluent quintiles receive smaller state allocations.

6 Physical accessibility

The Department of Education reported that in 2001, only seven per cent of all learners could afford to use public transport to go to school, and the majority of learners had to get to school on foot.⁴⁶ Cost is often cited as the reason for the lack of a barrier-free environment, yet the White Paper 6,⁴⁷ as well as the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment,⁴⁸ both provide for the establishment of school buildings, grounds and infrastructure that ensure accessibility to all learners. The 2008 draft Norms and Standards for School Infrastructure document specifically addressed the maximum distance of a school from learners that are eligible to attend that school.⁴⁹ There is a growing concern about the safety of learners who use public transport to go to school. In provinces such as the North-West, the transport of learners to and from schools is managed by the Department of Public Works and

⁴²Arendse *The school funding system and its discriminatory impact on marginalised learners* (2011) 15 339.

⁴³Section 35 of the Schools Act.

⁴⁴National Norms and Standards for School Funding, Department of Education, 1998, para 44.

⁴⁵Para 4 of National Norms and Standards for School Funding.

⁴⁶Department of Education. Review of the financing, resourcing and cost of education in public schools GN 374 in GG 543 of 2003-03-14.

⁴⁷Department of Education (2001) White Paper 6 on Special Needs Education: Building an Inclusive Education and Training System.

⁴⁸Department of Education, GN 515 GG 33283 of 2010-06-11.

⁴⁹Department of Education (2008) para 1.26.

Transport, in conjunction with the Department of Education.⁵⁰ In practice this means that the Department of Public Works and Transport appoints the service providers responsible for learner transport and the Department of Basic Education is accountable for the safety of learners. This arrangement puts the safety of the learners at risk.

7 Acceptability and adaptability of education

Acceptability of education dictates that minimum guarantees be put in place to ensure good quality education, in terms of both the content of the curriculum and the availability of educational materials. Acceptability also requires the creation of violence-free schools, which can be extended to include the issue of learner discipline.⁵¹

The lack of a concrete and precise definition of basic education in section 29(1) (a) of the Schools Act affects the meaning of and compliance with the concept 'basic education'. There is no clarity on whether the term refers to learners' right to merely attend school for a specified schooling period or learners' right to receive a particular quality of education during a certain schooling period.⁵² The Bill of Rights should be read together with other legislative documents that further its mandate to equitably provide the right to education. One such legislative document is the National Qualifications Framework (NQF) which is 'a set of principles and guidelines, which provide a vision, a philosophical base and an organizational structure for the construction [of the equitable provision of education]'.⁵³ The Schools Act makes education compulsory from Grade 1 to Grade 9 and between the ages of seven and 15 depending on what comes first.⁵⁴

South Africa undertook a serious curricular reform with the implementation of outcomes-based education through Curriculum 2005 (C2005).⁵⁵ In 2000, the Review Committee on C2005 recommended that the principles of outcomes-based education be retained, and that the principles of social justice, human

⁵⁰Interview with the Director of School Safety in the North West province conducted in February 2013.

⁵¹Tomaševski (n 21) 7.

⁵²Woolman and Bishop 'Education' in Woolman and Bishop (eds) *Constitutional law of South Africa* (2009) 15-16.

⁵³Education in South Africa home page available at: <http://www.saeduservices.com/pages/EducationInformation.aspx> (accessed 2013-08-21).

⁵⁴Section 5 of Act 84 of 1996.

⁵⁵C2005 was criticised because it was too elaborate and littered with complex terminology with the result that the teachers could hardly understand it. *Reviews of national policies for education: South Africa* (2008) 80. This curriculum also placed a heavy burden on hard-to-buy resources for its implementation, which made it almost impossible to implement in poorly resourced schools.

rights, a healthy environment and inclusiveness be strengthened.⁵⁶ The subsequent revision of C2005 resulted in the publication of the Revised National Curriculum Statement for Grades R-9 (RNCS) and the National Curriculum Statement for Grades 10-12 (NCS).⁵⁷

Another Task Team was appointed in 2010 to review the implementation of the RNCS and NCS in 2010. This report resulted in the publication of the Curriculum Assessment Policy Statement (CAPS) for implementation in 2012. The new policy published by the Department of Basic Education sets out to simplify the terminology contained in the previous curriculum statements and to focus on active, critical learning by individual learners.⁵⁸

The problem is that 'policies are objectives that an organisation or a government sets for itself to achieve in a given period of time', whilst laws 'are the standard rules and regulations that are compulsory and to be followed by all the people of the country'.⁵⁹ The concern is that the Department of Basic Education cannot simply enact policy that unpacks the scope and content of basic education. Every time the Department of Basic Education changes the national curriculum, thus affecting the quality and standards of education for every child in South Africa, it overlooks the fact that policies do not have the same legal force as legislation. There is a need to regulate the provision of basic education by having concrete legal provisions as to its scope and content. Simbo posits that:

The literacy and numeracy problems in South Africa make one doubt if education institutions that provide basic education appreciate what learners are looking for when they come to school. Learners come to school for an opportunity to receive a certain quality of education that prepares them to proceed successfully through higher education and consequently through life.⁶⁰

The Schools Act gave formal effect to the establishment of democratic structures of school governance which provide the basis for co-operative governance between education authorities and the school community. In principle these provisions were intended to establish a democratic power-sharing and co-operative partnership between the state, parents, and educators. In terms of section 20 of the Schools Act, the authority of school governing bodies *inter alia*

⁵⁶Olivia 'Difference between law and policy' available at:

<http://www.differencebetween.com/difference-between-law-and-vs-policy/> (accessed 2013-07-27).

⁵⁷Revised National Curriculum Statement for Grades R-9 and in another publication the National Curriculum Statement for Grades 10-12. Teachers' Guides and Assessment Guides were also published by the Department of Education in 2003 and 2004 respectively.

⁵⁸Department of Basic Education (2011) *Curriculum and assessment policy statement*.

⁵⁹Olivia (n56) at 80.

⁶⁰Simbo 'Defining the term basic education in the South African Constitution: An international law approach' (2012) 16 *Law, Democracy and Development* 162-184 at 162.

include the functions to: recommend the appointment of staff; determine the language policy of a school; take measures to ensure learner discipline at schools; and the responsibility for control of the school's property and financial resources. Education must be 'flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of the learners within their diverse social and cultural settings'.⁶¹

School governing bodies of public schools must promote the best interests of the school and strive to provide a safe school environment by adopting a code of conduct for learners and supporting the school with disciplinary actions by recommending learner suspension and recommending learner expulsion after conducting a fair disciplinary hearing.⁶²

The South African Government, in recognition of the serious threat posed by substance abuse in schools, amended the Schools Act to include provision for random search and seizure exercises and drug testing in schools.⁶³ The Guidelines for the Management and Prevention of Drug Use/Abuse by Learners in all Public Schools and Further Education and Training Institutions provided by the Department of Education spells out that searches must be conducted in a manner that is reasonable and proportional to the suspected illegal activity.⁶⁴ In 2006, the Regulations for Safety Measures at Public Schools were amended to provide for the safety of learners.⁶⁵

8 The accountability of the state

Education is a pre-condition for the full enjoyment of a variety of human rights. In this regard, De Groof⁶⁶ explains the state's three obligations are firstly, to respect the rights and freedoms of everyone. The second obligation is to prevent and prohibit the violation of individual rights and freedoms by third parties. The third level concerns the obligation to fulfil the right to education.

8.1 With regard to the right to basic education

Most socio-economic rights provide the rights-bearer with 'access' to the required goods or services.⁶⁷ Section 29(1) of the Constitution guarantees 'the right to a

⁶¹United Nations General Comment No 13: The Right to Education (1999) para 6(d).

⁶²Sections 8 and 9 of Act 84 of 1996.

⁶³Section 8A of Act 84 of 1996.

⁶⁴Section 8A (n 63).

⁶⁵GN 1128 in GG 29376 of 2006-11-10.

⁶⁶Glenn and De Groof (n 3) 38.

⁶⁷Section 26(1) provides everyone 'the right to have access to adequate housing' and section 27(1) provides the 'right to have access to (a) health services, including reproductive health care services; (b) sufficient food and water; and social security including, if they are unable to support themselves and their dependents, appropriate social assistance'.

basic education', and not merely 'access to' the right. The state must provide education, and not merely take 'reasonable legislative and other measures, within available resources, to achieve the progressive realisation of this right'.⁶⁸

In the case of *The Governing Body of the Juma Masjid Primary School v Essay NO* the court stated the following:

It is important, for the purposes of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'.⁶⁹

By issuing this type of order, courts become central to a normative debate, based on detailed information about the actual problems in the education system. The courts can be part of the solution, but one has to ask who has to monitor the outcomes of court decisions against the Department of Basic Education? Woolman and Fleisch concluded that the right to basic education is not subject to a reasonable standard nor dependent on availability of resources and is therefore a direct, immediately enforceable rights entitlement.⁷⁰

The right to a basic education promised by section 29(1)(a) 'can only be achieved through the provision of classrooms, teachers and textbooks'.⁷¹ The problem of non-delivery of textbooks to schools in the Limpopo Province in 2013 resulted in the organisation *Section 27* bringing an urgent application before the North Gauteng High Court⁷² to compel the Minister of Basic Education⁷³ to ensure that the textbooks were delivered by a specified deadline to schools in Limpopo. The court declared that the failure to deliver textbooks was an infringement of the

⁶⁸See ss 26(2) and 27(2).

⁶⁹Section 29 of Act 84 of 1996.

⁷⁰Woolman and Fleisch (n24) 120–126.

⁷¹*Id* 10.

⁷²*Section 27 v Minister of Education* (2013) 2 BCLR 237 CGNP) hereafter *Section 27 and Others*.

⁷³Although the Department of Basic Education is a provincial competency, Limpopo was placed under the authority of the National Minister of Basic Education in terms of s 100 of the Constitution. The textbooks were not delivered by the end of the extended deadline. Various investigations into the debacle have been initiated by the Government.

right to a basic education,⁷⁴ and made an order to compel effective delivery and directed the Department of Basic Education to make a 'catch up' plan to ameliorate the effects of the failure on learners.

The right to a basic education includes the right to an adequate education. Woolman and Fleisch have argued that international law can be invoked to support an interpretation of 'a basic education' that relates to content, not duration.⁷⁵ The basic learning needs of children include basic learning tools such as literacy, oral expression, numeracy and problem solving as well as basic learning content, such as knowledge, skills, values and attitudes. Research has shown that by the age of eight years there are already very large gaps in the performance of school children in the top 20% of schools, compared with the bottom 80%.⁷⁶ Skelton⁷⁷ is of the opinion that:

Even if we have not established what a basic education consists of, the fact that some children enjoy a dramatically better standard of education would certainly be simple to demonstrate, based on infrastructure, conditions, class sizes, and indicators such as test scores. The Department of Basic Education would no doubt point to its policy Norms and Standards on School Funding, which provides that the non-personnel costs at quintile one schools (the poorest) are funded by government at approximately six times more than those in quintile 5 (the least poor schools). However, it is apparent that whilst this mechanism has improved access to education for the poorest children, it has done little to bring about actual equality in education.

8.2 With regard to the education laws in South Africa

The National Education Policy Act⁷⁸ was designed to inscribe in law the policies, as well as the legislative and monitoring responsibilities of the Minister of Basic Education, and to formalise the relations between national and provincial

⁷⁴*Section 27 and Others*. See court order and para 23 where Kollapen J states that textbooks are an essential and vital component in the delivery of quality learning and teaching.

⁷⁵See (n 27) 127. See also Roithmayr ('Access, adequacy and equality: The constitutionality of school fee financing in public education' (2003) 19(3) *SAJHR* 382 at 393) who argues that the fact that s 29(1)(a) also includes the right to 'adult' basic education, which implies that the right to a basic education is for the education system that does not fall under 'adult education', namely, schooling that goes up to Grade 12. The division of the former Department of Education into the Department of Basic Education and the Department of Higher Education, with the former delivering services up to Grade 12 level, is a further indication.

⁷⁶Van der Berg *et al* 'Low quality education as a poverty trap' (March 2010) University of Stellenbosch available at <http://www.andover.edu/gpgconference/documents/low-quality-education-poverty-trap.pdf> (accessed 2012-08-31).

⁷⁷Skelton 'How far will the courts go in ensuring the right to a basic education?' (2012) 27 *SAPL* 392.

⁷⁸Act 27 of 1996.

authorities. As such, it provides for the formulation of national policies in general and further education and training for, *inter alia*, curriculum, assessment and language policy, as well as quality assurance.

The South African Schools Act⁷⁹ promotes access, quality and democratic governance in the schooling system. It ensures that all learners have the right of access to quality education without discrimination, and makes schooling compulsory for children aged 7 to 14 (s 3). It provides for two types of schools – independent schools and public schools (s 45). The provision in the Act for democratic school governance, via school governing bodies, is in place in public schools countrywide (s 16). The school funding norms, outlined in this Act, prioritise redress and target poverty with regard to the allocation of funds for the public schooling system.⁸⁰ The Schools Act has been amended by the Education Laws Amendment Act 24 of 2005, so as to authorise the declaration of schools in poverty-stricken areas as ‘no-fee schools’. No-fee schools are fully subsidised and parents are not required to pay school fees. In 40 per cent of the more affluent public schools, parents are still legally obliged to pay school fees. In brief, as noted in the preamble, the general purpose of the Schools Act is to establish a new legislative system which sets ‘uniform norms and standards for the education of *learners* at *schools* and the organisation, governance and funding of *schools* throughout the Republic of South Africa’.⁸¹

The state is not unaware of the problems it faces in delivering an acceptable and adaptable basic education for all. A process of redress began in 2007 with the Education Laws Amendment Act⁸² to address infrastructure backlogs, hold principals accountable for learner performance, increase school funding for no-fee schools and demonstrate increased concern about teacher development and remuneration. The most significant amendment can be found in section 5A of the Schools Act that gives the Minister of Basic Education the opportunity to prescribe minimum norms and standards for school infrastructure, the capacity of a school in respect of the number of learners it can admit and the provision of learning and teaching support material. It seems as if the state is taking up its responsibility for providing acceptable education for all.

Acceptability of education also requires that learners are not treated in a manner that violates their dignity and fundamental freedoms. The Schools Act provides for participatory democracy by giving extensive powers to school governing bodies to determine public school admissions policies and language policies.⁸³ However, during the past 11 years the state has used its power,

⁷⁹Act 84 of 1996.

⁸⁰National Norms and Standards for Public School Funding (n 39).

⁸¹Preamble to Act 84 of 1996.

⁸²Act 21 of 2007.

⁸³Sections 6 and 7 of Act 84 of 1996.

'through law-making, litigation or more subtle forms of persuasion, to challenge the more privileged schools to open their gates to historically disadvantaged learners'.⁸⁴ It seems that the perspective on cultural diversity and language rights was sometimes overlooked in the heated atmosphere generated by the dispute over single-medium institutions. There is still an obligation on the state to provide education in the official language or language of choice where reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must consider 'all reasonable educational alternatives, including single-medium institutions, taking into account equity, practicability and the need to redress the results of past racially discriminatory law and practice'.⁸⁵

By making primary education compulsory, the Schools Act aligns undoubtedly with international law provisions that intend to ensure that basic education is available to all through compulsory attendance of primary school. However, mere school attendance for a specified period of time could not suffice as the acquisition of basic education. The literacy and numeracy problems in South Africa make one doubt if education institutions that provide basic education appreciate what learners are looking for when they come to school. Simbo⁸⁶ argues that: 'The fact that many South African children are illiterate and innumerate means that the government is failing to make sure that everyone receives basic education as such focus should be placed on defining the term basic education.' Without teaching South African children literacy, oral expression, numeracy and problem solving, an education cannot qualify as a basic education.

9 Conclusion

The international norms and standards relating to the right to education deal with practically all aspects of the school, with social rights, with governance and management and the budget, with property issues, dispute management and above all with teachers and learners. In modern education, few major decisions are made without considering the legal consequences. Societal development pushes the education system to radically evolve and adapt to new ways in which knowledge is created, transferred and implemented. Nowadays, in many countries, state control is limited to the assessment of standards of academic achievement in core subjects such as reading, writing, mathematics and science and the evaluation of schools aiming to improve learners' performance.

The level of education plays a significant role in determining a person's quality of life. It is safe to say that most uneducated people are trapped in a cycle

⁸⁴Woolman and Fleisch (n 24) 196.

⁸⁵Section 29(2) of Act 84 of 1996.

⁸⁶Simbo (n 60) 178.

of poverty and are left dependent on the state for the fulfilment of their socio-economic rights such as housing and health rights. As these rights cannot be fulfilled immediately by the state, it is arguable that a denial of the right to education inevitably results in a denial of other socio-economic rights.⁸⁷

The right to education is a cross-sectoral right, simultaneously a civil, political, economic, social and cultural right. These rights are interlinked with the freedom of thought, religion, association and equality. The South African government's aim has been to restructure the entire education system and overcome its racially discriminatory and unequal past. While constitutional imperatives directed the trajectory of change, consistent and persistent efforts are being made to make education structurally accessible to all who were previously denied, or had limited access to education. Marginalised or vulnerable groups have received particular attention in education legislation and policies. National education law has been directed specifically towards considerations of equity, redress, accessibility and affordability in South Africa.

It is significant that the South African Constitutional Court has acknowledged how crucial the right to education is to the transformation of South African society.⁸⁸ In order to reach this objective, the right to education is not just a matter of providing access, it also extends to the effective functioning of schools and the influence they exert to enable every learner to freely develop his or her personality and to protect their human dignity.

The Tomaševski framework is silent on the role of discourse to inform the law-making process and this article proposes that the role of social structures, social justice, power and ideology be examined in order to address the accountability of the state to protect the right to education of everyone.

⁸⁷ Arendse (n 42) 345.

⁸⁸ *Juma Masjid Primary School* (n 26).