

**THE ROLE OF EDUCATION AS A GUARANTEE OF NON-
REPETITION IN A TRANSITIONAL PROCESS: A CASE
STUDY OF THE SOUTH AFRICAN FARM-SCHOOLING
SYSTEM**

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INTRODUCTION

Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor . . . that a child of a farm worker can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another.

Long Walk To Freedom:
The Autobiography of Nelson Mandela (1994, p. 144)

Education, unlike any other public sector is, especially in need of transformation given the fact that, it formed an integral part of the apartheid government's racist propaganda. The educational sphere was monopolized to the extent that it suppressed the needs of black students whilst overcompensating for the interests of their white counterparts. This thesis is particularly concerned with the injustices suffered by black children attending farm schools, i.e. schools erected on commercial farms.

Since its inauguration, the democratic government has adopted a multiplicity of educational reforms.¹ However, available data suggests that the needs of farm-school children are still not adequately catered for.² These schools are still poorly constructed, understaffed, ill-resourced, and children lack access to bare

¹ A detailed list of legislation, policies, reports and publications, are available at <http://www.education.gov.za/index.aspx>.

² See generally, Chrystal Prince, *Conditions on Farms: A Draft Paper (Desktop Study)*, (hereinafter referred to as Chrystal Prince, *Conditions on Farms: A Draft Paper*), Department of Social Services and Poverty Alleviation, Sept. 2004. Available at http://www.capegateway.gov.za/Text/2005/4/reviewed_farmworkers.pdf, accessed on 04/05/2010, at 12:00 p.m.

necessities, such as safe water and proper sanitation.³ It is my submission that this exemplifies the fact that South Africa is still plagued by a disintegrated education system that necessitates expedient governmental intervention.⁴ I further contend that a failure to urgently address the socio-economic needs of these children, not only perpetuates the extant systemic disparity, but constitutes indirect discrimination based upon their racial, social and economic disposition. Societal transformation, I concede, does not materialize in the blink of an eye. However, in 2005, after a considerable amount of empirical evidence had been collected, the Ministerial Committee on Rural Education acknowledged the fact that rural and farm schools are still no better off than they were under the apartheid era.⁵ This implies that transition in this area has been stagnant, and, in my opinion, unreasonably so, especially after more than a decade of democratic governance and stability within the country.

The fact that farm-school children are still enslaved in the evil remnants of apartheid is highly unacceptable. This unfortunate state of affairs therefore, begs three pertinent questions as far as transitional justice within the realm of educational reform is concerned: (a) what has the post-apartheid government done to enhance equitable access to education on farms; (b) have these initiatives been

³ *Id.*, at 7-12.

⁴ See generally, Jane Battersby, *Cape Town's Model C Schools: Desegregated and Desegregating Spaces?*, Urban Forum, Vol. 15, No. 3, Jul. – Sept. 2004. See also C Soudien, *Constituting the class: An analysis of the process of "integration" in South African Schools*, at 89-114, as cited in L. Chisholm, *Changing Class: Education and Social Change in Post-Apartheid South Africa*, (eds.), Cape Town, HSRC Press, 2004.

⁵ See the Report of the Ministerial Committee on Rural Education: *A New Vision for Rural Schooling*, at 48-56, May 2005. Available at <http://www.education.gov.za/index.aspx>, accessed on 05/04/2010, at 14:00 p.m.

effective?; and (c) if not, why are they inefficient and how could they be improved? These questions are answered in this thesis in three chapters. Chapter One presents a brief synopsis of the transitional mechanisms that South Africa adopted to remedy the injustices of its apartheid legacy generally. Thereafter, I reflect on these measures as they pertain to the general educational landscape. This Chapter acknowledges the improvements that have been made, but still questions the efficacy of educational reform in farm schools. This follows with an historic overview of the farm-school system, the legislative development pertaining to the farm-school system and a critical evaluation through which I highlight its strengths and weakness. After an assessment of these remedial measures, I conclude that they are ineffective and instead of transforming education, they reinforce the systemic deficiencies of the education sector. The Chapter concludes with a highlight of the status quo of farm schools.

Chapter Two reflects on the constitutional right to education within the South African context. This exposition is further supplemented with international law, because the South African Constitutional Court is yet to give content to the right to education under the Constitution. This Chapter concentrates on the state's core obligations with respect to the availability of, and non-discrimination within education. The principle of non-discrimination is assessed from a domestic as well as an international law perspective. With reference to these developments, I argue and conclude that the government of South Africa is failing to implement the right to education in these remote areas, and, moreover, discriminating

indirectly against farm-school children, based upon their race and socio-economic status.

Chapter Three examines the role of the South African Constitutional Court, as a pivotal institution facilitating transitional justice through its rich socio-economic jurisprudence on the rights of access to adequate housing, health care and social security.⁶ A common thread of rules and principles permeate these cases, which substantiates my contention that the state's failure to provide farm-school children with equitable access to education renders it in violation of its constitutional and international law obligations. In light of this finding, I urge the Court to use its current jurisprudence in conjunction with American case law to embrace the indispensable value of education, not only for farm-school children, but for the nation at large. Further, to compel the government to provide these children with that which they are entitled to, namely a better education. In conclusion, I make a few recommendations as to how the government could more effectively implement the right to education.

⁶ See sections 26 and 27 of the Constitution of the Republic of South Africa, (hereinafter referred to as the Constitution), Act 108 of 1996. The Act was promulgated on 18 December 1996 and commenced on Feb. 3, 1997. Available at <http://www.info.gov.za/documents/constitution/index/htm>. Other constitutionally entrenched socio-economic rights include the right to education (section 29); water and food (section 27), the equal enjoyment and exercise of which, were severely restricted under the apartheid regime. Albie Sachs notes that—

[i]t is not just individuals who will be looking to the Bill of Rights as a means of enlarging their freedom and improving the quality of their lives, but whole communities, especially those whose rights have been systematically and relentlessly denied by the apartheid system.

See Albie Sachs, *Protecting Human Rights in a New South Africa* 19, New York, Oxford University Press (1990). In his opinion the Bill of Rights is a “truly creative document that requires and facilitates the achievement of the rights so long denied to the great majority of people.” (*Id.*)

The research methodology for this thesis was largely through secondary sources: books, official documents, journal and newspaper articles, as well as international, regional and national case law. Throughout the course of my research, my attempts to obtain information from the National and Provincial Departments of Education were unfortunately, unfruitful. I did get some information from the Department of Agriculture in South Africa.

CHAPTER ONE: TRANSITION IN SOUTH AFRICA FROM REPRESSION TO DEMOCRATIZATION AND THE EDUCATION SECTOR

1.1 Transitional Justice Within South Africa

In 1994 the African National Congress (ANC) won the first democratically held elections in South Africa. Its victory ousted the apartheid government and marked the transitional watershed for the country. South Africa's emancipation from the bondages of oppression was facilitated through the adoption of an Interim Constitution⁷ that was subsequently replaced with a Final Constitution.⁸ On the one hand, these instruments essentially reflect the political compromises and concessions agreed upon between the apartheid government and the liberation movement.⁹ On the other, they symbolize the political will to redress past injustices and, moreover, prevent future repetition thereof.

The South African Constitution is often likened to a "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and, a future founded on the recognition of human rights,

⁷ See the Preamble to South Africa's Interim Constitution, (hereinafter referred to as the Interim Constitution), Act 200 of 1993, that states that—

[w]hereas it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution.

Available at <http://www.info.gov.za/documents/constitution/index.htm>.

⁸In terms of Article 2, it is the supreme law of the country, and any law or conduct that does not conform to it is, invalid to the extent of its inconsistency.

⁹ Ruti G. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, (hereinafter referred to as *Transitional Jurisprudence*), YALE L. J., Vol. 106, No. 7, (May 1997), 2009, at 2059.

democracy and peaceful coexistence . . . for all South Africans”.¹⁰ The Constitution’s primary objective therefore, is “to facilitate a fundamental change in unjust political, economic and social relations in South Africa”.¹¹ This aspiration compliments Teitel’s understanding of the functional dimension of transitional constitutions which, in her opinion, “are not merely revolution-stoppers, but they also play a role in constructing the transition.”¹² Thus, the evidence of the fortuitous effects of the callous, heinous acts perpetrated by the apartheid regime, not merely enriches South Africa’s understanding of injustice, but more importantly, informs its sense of justice.¹³

The origins of transitional justice can be traced to the Nuremburg Trials.¹⁴ As stated by the United Nations (U.N.) Secretary-General in his Report on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies,¹⁵ the concept has since evolved into a dynamic theory exceeding its initial focus of individual criminal responsibility to one that “comprises the full range of processes and mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional

¹⁰ See section 251, in Chap. 15 of the Interim Constitution, *supra* note 7.

¹¹ See the Preamble to and section 9(2) of the Constitution, *supra* note 6. For an analysis of South Africa’s transformative ambitions see also, Karl E Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998). See generally André van der Walt, *A South African Reading of Frank Michelman’s Theory of Social Justice*, in RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 163, 167-96, 2003.

¹² Ruti G. Teitel, *Transitional Jurisprudence*, *supra* note 9, at 2059.

¹³ *Id.*, at 2014, where she notes that the understanding of justice within a transitional society is relative to the injustice which it has suffered. Justice, is therefore subjectively contextualized, which renders it “extraordinary and constructivist”.

¹⁴ Louise Arbour, *Economic and Social Justice For Societies in Transition*, 40 N.Y.U. J. INT’L L. & POL. 1, Fall 2007, at 1.

¹⁵ United Nations Secretary-General, *Report on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, S/2004/616, Aug. 23, 2004. Available at <http://www.un.org/en/ruleoflaw/index.shtml>, accessed on 05/4/2010, at 6:30 p.m.

reform, vetting and dismissals, or a combination thereof.”¹⁶ The quest for truth, though not expressed as a right in any international instrument,¹⁷ has apparently converged into one, as evidenced by UN Resolution 2005/66, in which the U. N. Commission on Human Rights “recognize[d] the importance of respecting and ensuring the right to truth so as to contribute to ending impunity and to promote and protect human rights.”¹⁸ The International Committee of the Red Cross regards the right to truth as part of customary international law, whilst regional human rights institutions perceive it as a derivative of other rights.¹⁹

The European Court of Human Rights has given a wide interpretation of the right to life as encompassing a right to truth.²⁰ The African Commission has inferred the right to truth from the right to an effective remedy as provided for in the African Charter.²¹ In the Inter-American system the right exists as a “direct remedy in itself”.²² Within the context of transitional justice, the political climate usually leads to the formation of truth commissions as the means through which truth is sought.²³ The importance of ascertaining the truth is often justified with

¹⁶ *Id.*, at ¶ 8, at 4.

¹⁷ Yasmin Naqvi, *The Right to Truth in International Law: Fact or Fiction*, (hereinafter referred to as *The Right to Truth in International Law: Fact or Fiction*), INT’L REV. OF THE RED CROSS, Vol. 88, No. 862, June 2006, at 254. Available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/review-862-p245>, accessed on 05/04/2010 at 9:45 p.m.

¹⁸ United Nations Commission on Human Rights, *Human Rights Resolution 2005/66: Right to the Truth*, Apr. 20, 2005, E/CN.4/RES/2005/66. Available at <http://www.unhcr.org/refworld/docid/45377c7d0.html>, accessed on 05/05/2010, at 15:00 p.m.

¹⁹ See Rule 117 in *Customary International Humanitarian Law*, Vol.1, Rules , International Committee for the Red Cross, Cambridge University Press, 2005, at 421.

²⁰ Yasmin Navqi, *The Right to Truth in International Law: Fact or Fiction*, *supra* note 17, at 257.

²¹ *Id.*, at 257.

²² *Id.*, at 257-8.

²³ *Id.*, at 249.

reference to closure, healing and bringing an end to impunity.²⁴ Therefore, whether as a matter of right or legal fiction, the need and desire to establish the truth is unequivocally accepted as an integral component of justice.²⁵

Justice, can be defined with reference to four models: retributive justice, which concerns the imposition of punishment through the adversarial court process; restorative justice, that fosters dialogue between the perpetrator and victim as regards the underlying causes for the perpetration of the offence; historical justice through the work of truth commissions; and compensatory justice, ensuring a victim's right to adequate redress in respect of the violation suffered.²⁶ The latter forms of justice provide an alternative to retributive justice, which many post-conflict societies perceive as a threat to political stability and transition.²⁷ Consequently, individual satisfaction succumbs to the overarching safety and preservation of collective interests. Be that as it may, transitional justice cannot vitiate an individual's right to remedial measures, albeit quasi or non-judicial.

An individual's right to reparation stems from the right to an effective remedy entrenched in Article (Art.) 2(3) of the International Covenant on Civil and Political Rights (ICCPR). The right to an effective remedy, in particular, the right to reparations, has featured within the legal fraternity since time immemorial. This right is derived from the growing consensus, grounded on the general principle that, all violations

²⁴ *Id.*, at 246-7.

²⁵ *Id.*

²⁶ Luc Huyse, *Justice*, in *Reconciliation After Violent Conflict: A Handbook*, (hereinafter referred to as *Reconciliation After Violent Conflict*), in David Bloomfield, Teresa Barnes, and Luc Huyse, Chap. 7, at 97, International Institute for Democracy and Electoral Assistance, 2003.

²⁷ *Id.*, at 102-14.

of international law entail reciprocal responsibilities to remedy the violation. Its express articulation manifests itself in the *Factory at Chorzów* case, in which the Permanent Court of International Justice stated that:

The essential principle contained in the notion of an illegal act—a principle which seems to be established by international practice and in particular the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation, which would, in all probability, have existed if that act had not been committed.²⁸

The right has further been incorporated into an assortment of international instruments.²⁹ The right to reparations has furthermore been given content to by the Inter-American Court of Human Rights and the African Commission.³⁰ Art.

²⁸ Permanent Court of International Justice Ser. A, No. 9 (Judgment of July 26, 1927).

According to Poland the Geneva Conventions only conferred upon the Court the jurisdiction to determine the breach of a substantive obligation, not the consequence of the breach. The Court rejected its argument.

²⁹ See for example, the Universal Declaration on Human Rights at Art. 8; International Convention on the Elimination of Racial Discrimination at Art. 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at Art. 14; Convention on the Rights of the Child at Art. 39; the Hague Convention of 18 October 1907 concerning the Laws and Customs of War and Land (Convention No. IV of 1907) at Art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) at Art. 91; and the Rome Statute of the International Criminal Court at Arts. 68 and 75. Regional Conventions additionally provide for the right to an effective remedy. See also, the African Charter on Human and Peoples' Rights at Art. 7; the American Convention on Human Rights at Art. 25; and the European Convention for the Protection of Human Rights and Fundamental Freedoms at Art. 13. See further, General Comment 31 [80] Nature of the General Legal Obligation Imposed on States parties to the ICCPR, CCPR/C21/Rev. 1/Add.13. (General Comments), 26 July 2004.

³⁰ See for example, *Valasquez Rodriguez v Honduras*, Inter-American Court, Judgment of July 29, 1988, in which the Inter-American Commission argued that the Honduran government violated essential provisions of the American Convention on Human Rights when it unlawfully detained, interrogated and tortured the deceased to death. The Court held that the government was responsible for the involuntary disappearance of the deceased and therefore in violation of Articles 4, 5 and 7 of the Convention. The government was ordered to pay fair compensation to the injured parties. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria*, (Comm. 155/96), 15th Annual Activity Report of the Afr. Comm. H.P.R. 2001-2002, Annex V, at 31-44, decision Oct. 27, 2001, which was decided by the African Commission. The plaintiffs argued that the state was condoning oil pollution, which threatened the livelihood of the indigenous Ogoni People and caused environmental degradation. The Commission held that the government did not comply with the minimum standards and therefore it violated Art. 21 of the African Charter. Consequently, it appealed to the government to “ensur[e] adequate compensation to the victims of the human rights violations, including relief and

50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, recognizes an individual's right to seek "just satisfaction" in the event that national law provides "partial reparation" due to injury sustained as a result of a violation of the Convention.

The recently adopted *Basic Principles and Guidelines on the Right to a Remedy and Reparations*³¹ provide more insight into the nature of the state's obligation to provide reparations. These *Basic Principles* are victim-oriented and aimed at addressing gross violations of human rights and serious violations of international humanitarian law.³² They lack a definition of "gross" and "serious" violations and, therefore, such determinations are subject to a case-by-case analysis. They do not create new law, but merely provide the means of implementation and fulfillment of the extant international obligations upon states.³³ States are accordingly obliged to provide reparations in respect of acts attributable to them.³⁴

resettlement assistance to victims of government sponsored raids, and [to] undertak[e] a comprehensive cleanup of the lands and rivers damaged by oil operations."

³¹ See U.N. General Assembly Resolution 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Annex, adopted 16 December 2005, UN Doc. A/Res/60/147, March 21, 2006 (hereinafter referred to as the *Basic Principles*).

³² *Id.* at 3.

³³ *Id.*

³⁴ *Id.* at ¶15. Arguably, the democratic government is not responsible for the inhumane acts of repression committed by the apartheid regime. However, international law, in general observes the principle of state continuity, in terms of which a change in government does not absolve the state from its obligations in respect of its citizenry or the "international society". Furthermore, the democratic government was once the liberation movement, and as indicated by the Truth and Reconciliation Commission, in particular, the Reparations and Rehabilitation Commission's Final Report, were also complicit in the perpetration of human rights violations, during the apartheid era. For a detailed analysis of state succession, see generally, Malcolm N. Shaw, *States Succession*, Chap. 17, at 956-1009, in Malcolm N. Shaw, *International Law*, 6th.ed., Cambridge University Press, 2008. See generally, Truth and Reconciliation Commission, Reparations and Rehabilitation Committee, *Final Report*, Vol. 5, Oct. 1998.

This obligation, however, is not unlimited, given the fact that the *Basic Principles* require a measure of proportionality between the gravity of the harm suffered and the reparations in respect thereof.³⁵ A victim's³⁶ right to reparations constitutes but one of the remedies provided for by the *Basic Principles*.³⁷ The right to reparations takes five different forms: restitution,³⁸ compensation,³⁹ rehabilitation,⁴⁰ satisfaction,⁴¹ and guarantees of non-repetition.⁴² States are

³⁵ *Basic Principles*, *supra* note 31, at ¶ 15.

³⁶ The *Basic Principles*, defines "victim(s)" as—

8. . . . persons who individually or collectively suffered harm, including physical and mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

³⁷ The right to access to justice and factual information concerning the events are the additional remedies provided for. See the Final Report of the Special Rapporteur, M. Cherif Bassiouni, *The Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc E/CN.4/2000/62, 18 Jan 2000, Annex, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and International Humanitarian Law* (hereinafter referred to as the *Basic Principles*), at ¶ 11.

³⁸ Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. (*Basic Principles*, *supra* note 31, at ¶19).

³⁹ Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damage and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services. (*Basic Principles*, *supra* note 31, at ¶ 20).

⁴⁰ Rehabilitation should include medical and psychological care as well as legal and social services. (*Basic Principles*, *supra* note 31, at ¶ 21).

⁴¹ Satisfaction should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;

granted discretion to determine which forms are to be incorporated into a national reparatory framework.⁴³ This framework is to ensure that victims receive full and effective reparations.⁴⁴

In light of the foregoing, it is evident that any form of transition is inherently context-specific, thus, heavily dependent on an accurate and full disclosure the

-
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim's relatives, witnesses or persons who have intervened to assist the victim or prevent the occurrences of further violations;
 - (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
 - (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and the persons closely connected with the victim;
 - (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
 - (f) Judicial and administrative sanctions against the persons liable for the violations;
 - (g) Commemorations and tributes to the victims;
 - (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels. (Basic Principles, *supra* note 31, at ¶ 22).

⁴²Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions and human rights defenders;
- (e) Providing on a priority and continued basis human rights and international humanitarian law education to all sectors of society and training for law enforcement officers as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing or allowing gross violations of international human rights law and serious violations of international humanitarian law. (Basic Principles, *supra* note 31, at ¶ 21).

⁴³ Basic Principles, *supra* note 31 at ¶ 15.

⁴⁴ *Id.* See also ¶ 19-23.

strife suffered by a particular society.⁴⁵ The events of the past, therefore, not only inform the means of redress, but also to an extent prescribe future state conduct.⁴⁶ This is indicative of the fact that transitional justice mechanisms are overwhelmingly responsive, as opposed to prescriptive.

In light of these international law principles and with the view to fostering the “reconciliation and reconstruction of society”,⁴⁷ the democratic government of South Africa has undertaken several institutional and programmatic reformative initiatives in an attempt to remedy the injustices of the past.⁴⁸ From an institutional perspective, the most well-known is the creation of the Constitutional Court and the Truth and Reconciliation Commission (TRC).⁴⁹ These institutions by their nature epitomize the dilemma with which a society in search of transitional justice is faced. The Constitutional Court, arguably, constitutes the primary guarantee of non-repetition in the new dispensation and its role can chiefly be characterized as forward-looking. Chapter Four expands on the role of the Court through its socio-economic rights jurisprudence.

⁴⁵David Bloomfield, *The Context of Reconciliation*, in *Reconciliation After Armed Conflict: A Handbook*, *supra* note 26, Chap. 3, at 40.

⁴⁶*Id.*, at 43.

⁴⁷See the Epilogue to the Interim Constitution, *supra* note 7.

⁴⁸For an overview of the poverty reduction mechanisms adopted by the government, see generally, Leibbrandt, Murray, Servaas van der Berg and Haroon Borhat, *Introduction to Fighting Poverty*, ed. Haroon Borhat et al, Cape Town, UCT Press, 2001.

⁴⁹The Constitution additionally provides for the creation of a Human Rights Committee and a Commission for Gender Equality. See sections 184 and 187, of the Constitution, *supra* note 6, respectively.

The TRC, in contrast, was an enquiry commission, mandated to verify the truth about the egregious human rights violations perpetrated during the apartheid era.⁵⁰ The Promotion of National Unity and Reconciliation Act,⁵¹ colloquially referred to as the Truth and Reconciliation Act, established the Truth and Reconciliation Commission that was comprised of three sub-committees. The Human Rights Violations Committee was responsible for interviewing and documenting the evidence of victims and perpetrators;⁵² the Reparations and Rehabilitation Committee, recommended appropriate redress in respect of the violations suffered;⁵³ and the controversial Amnesty Committee was authorized to grant conditional amnesty.⁵⁴ A request for amnesty was granted in exchange for a full disclosure of the facts of a particular incident, the perpetration of which constituted a gross violation of human rights and was politically motivated. An amnesty recipient was effectively immunized against criminal and civil liability. If these requirements were not met, the request for amnesty was denied and civil and criminal liability could be imputed.⁵⁵

⁵⁰ Ruti G. Teitel, *Transitional Jurisprudence*, *supra* note 9, where she notes that the law is therefore situated between two legal and political orders, at 4. For an elaboration on the TRC's mandate, see the Promotion of National Unity and Reconciliation Act ("hereinafter referred to as the Truth and Reconciliation Act"), Act 34 of 1995. As regards the need to establish the truth, the TRC noted that—

[w]hile seeking to establish responsibility for many of the devastating wrongs suffered, the TRC sought the whole truth and, in so doing, to reconcile victims of and perpetrators, and to help establish a just society. It was the firm belief of the TRC that unless a society exposed itself to truth, it could harbor no possibility of reconciliation, reunification, and trust.

(S Crawford, *Truth and Reconciliation Commission Report*, Vols. 1-5, 1998, at 2.)

⁵¹ Truth and Reconciliation Act, *Id.*

⁵² *Id.*, at section 3(3)(a).

⁵³ *Id.*, at section 3(3)(c).

⁵⁴ *Id.*, at section 3(3)(b).

⁵⁵ *Id.*, at sections 2; 3(b); 4; 18; 19; 20; and 21, for a detailed overview of the amnesty procedures.

The creation of the TRC was however not without objection, as evidenced by the case of *Azanian Peoples Organization (AZAPO) and Others v The President of the Republic of South Africa and Others*.⁵⁶ The petitioners challenged the constitutional validity of section 20(7) of the Truth and Reconciliation Act, which insulated an amnesty recipient from civil and criminal liability.⁵⁷ The petitioners argued that such impunity violated international law and that it effectively ousted the jurisdiction of the courts, thus, denying them access to justice. The Court unanimously upheld the constitutionality of the impugned section⁵⁸ emphasizing the fact that lawmakers enjoy the discretion to decide the best political solution, and, that the Court is neither authorized to substitute its decision for that of the legislature, nor entitled to render such an election unconstitutional, merely based on a difference of opinion.⁵⁹ The political decision to grant amnesty, according to the Court, was not only discretionary, but was in fact mandated by the Epilogue to the Interim Constitution, which provided that “[i]n order to advance such reconciliation and reconstruction, amnesty shall be granted ...”.⁶⁰ The Court held that there is no reason in principle, why the Epilogue should enjoy an inferior status in comparison to other constitutional provisions.⁶¹ Hence, it was equally binding.⁶²

⁵⁶ *Azanian Peoples Organization (AZAPO) and Others v The President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672.

⁵⁷ *Id.*, at ¶ 8.

⁵⁸ *Id.*, at ¶ 51.

⁵⁹ *Id.*, at ¶ 21.

⁶⁰ *Id.*, at ¶ 48.

⁶¹ *Id.*, at ¶ 14.

⁶² *Id.*

On the claim that the amnesty clause was in violation of international law, the Court reiterated the fact that South Africa follows a dualist approach to international law, meaning that international law is not directly applicable in domestic courts, unless it has been incorporated into national legislation.⁶³ The Court further opined that its obligation to have regard to international law was confined to the interpretation of the Constitution, which was not necessary because the amnesty provision was unambiguously and constitutionally entrenched.⁶⁴ The Court then examined various international instruments and state practice, and concluded that the provision of amnesty was widely entrenched in these instruments and there was a trend suggesting its increased acceptance, especially in Latin America.⁶⁵ In light of the aforementioned reasoning, the Court held that:

[B]ut for a mechanism providing for amnesty, the “historic bridge” itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a “democratic society based on freedom and equality”. If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation. (Footnotes omitted).

The efficacy of the TRC’s remedial measures are debatable, and many critiques have argued that those measures have not adequately addressed the depths of

⁶³ *Id.*, at ¶27.

⁶⁴ *Id.*, at ¶ 27-8.

⁶⁵ *Id.*, at ¶ 22.

deprivation, suffered by tens of thousands of black South Africans, who were effectively reduced to worthless, second-class citizens by the apartheid regime.⁶⁶ In order to reassert their value and entitlement, the disenfranchised majority should be provided with the full range of socio-economic services, opportunities, and benefits which they were previously denied.⁶⁷ Thus far, the democratic government has not been able to equitably distribute wealth and income within the country.⁶⁸ The government has failed to prioritize the socio-economic rights of those groups most marginalized, vulnerable, and subject to the greatest level of material disadvantage. This deficiency has been noted with regard to equitable access to quality education.⁶⁹

⁶⁶ See generally, Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, Cambridge, 2001, Cambridge University Press, 2001. See also, Wilmot James & Linda van de Vijer, *After the TRC: Reflections on Truth and Reconciliations on Truth and Reconciliation in South Africa*, Athens, Ohio University Press, 2001, as cited in Lyn Graybill, *Assessing South Africa's Truth and Reconciliation Commission*, Canadian Journal of African Studies/ Revue Canadienne des Études Africaines, Vol. 32, No. 2 ,(2002), at 356-61. See further, Patrick Bond, *Reconciliation and Economic Reaction: Flaws in South Africa's Elite Transition*, J. INT'L AFFAIRS, 60(1): 141-56, (2006); Alan Hirsh, *Season of Hope*, (Pietermaritzburg, South Africa: University of Kwazulu-Natal Press, at 6-7, 2006; and Jay A. Vora and Erica Vora, *The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner and English South Africans*, J. Black Studies, Vol. 34, No. 3, at 301-22, (Jan. 2004).

⁶⁷ See Pierre de Vos, *Substantive Equality after Grootboom : The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence*, (2001) ACTA JURIDICA 52, at 64, where he notes "that people who are denied access to the basic social and economic rights are denied the opportunity to live their lives with a semblance of human dignity". See also Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-economic Rights*, 21 S. AFR. J. HUM. RTS. 1, 18 (2005), at 23, as she agrees "that a social failure to value human dignity is at stake when individuals and groups experience deprivations of subsistence needs."

⁶⁸ See generally, Berk Özler, *Not Separate, Not Equal: Poverty and Inequality in Post-Apartheid South Africa*, World Bank, University of Chicago, 2007.

⁶⁹ Nina Hunter, Julian May, Vishnu Padayachee, *Lessons for PRSP from Poverty Reduction Strategies in South Africa*, paper presented to the Economic Commission for Africa, Third Meeting of the African Learning Group on the Poverty Reduction Strategy Papers, Addis Ababa: 3-5 December 2003, at 25.

1.1 Educational Reform

The Reparations and Rehabilitation Committee, in its Final Report, acknowledged that the democratic government inherited an appalling education system that was “ripe for reform”.⁷⁰ It further recommended that the government undertake measures aimed at promoting continued studies through the erection of youth and community centres; measures for enhancing adult basic education and building and improving schools, prioritising those in rural and disadvantaged locations.⁷¹ The Committee, moreover, highlighted the need to breach the social and economic gap by “giving more urgent attention to the transformation of education”,⁷² and the government was accordingly urged to introduce a human rights curriculum into formal education.⁷³ These recommendations, in my opinion, were weakened when the Committee stated in the report that it was primarily seized with the “moral, political and legal consequences of apartheid, whilst the socio-economic implications, and other reforms pertaining to health and education, for example, were left to other Commissions to decide.”⁷⁴

Admittedly, the state’s conduct cannot be described as one of utter inaction. After more than four decades of state abuse and the perpetration of diabolic human rights violations,⁷⁵ the apartheid regime eventually collapsed in 1994, when South

⁷⁰ Truth and Reconciliation Commission: Reparations and Rehabilitations Committee, *Final Report*, Vol. 5, Oct. 1998, at 193-4.

⁷¹ *Id.*

⁷² *Id.*, at 308.

⁷³ *Id.*, at 311.

⁷⁴ *Id.*, at 258.

⁷⁵ A concise, yet eloquent description of pre-1994 South Africa, was captured by Mohamed DP in *AZAPO v President of the Republic of South Africa*, *supra* note 49, at ¶ 1:

Africa celebrated the birth of its democracy. Since then, the democratic government has adopted a most impressive compendium of education laws and policies, attempting to give effect to the constitutionally entrenched right to education.⁷⁶ The democratic educational system is premised on the principle of co-operative governance.⁷⁷ According to Schedule 4 of the Constitution,

For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance. The conflict deepened with the increased sophistication of the economy, the rapid acceleration of knowledge and education and the ever increasing hostility of an international community steadily outraged by the inconsistency of which had become manifest between its articulation ideals after the Second World War and the official practices of which had become institutionalized in South Africa through laws enacted to give them sanction and teeth by a Parliament elected only by a privileged minority. The result was debilitating war of internal political dissension and confrontation, massive expressions of labour militancy, perennial student unrest, punishing economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among the expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country hemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation. (Footnotes omitted.)

⁷⁶ Section 29 of the Constitution provides that:

- (1) Everyone has the right to—
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has a right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonable practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
 - (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that
 - (a) Do not discriminate on the basis of race;
 - (b) Are registered with the state; and
 - (c) Maintain standards that are not inferior to standards at comparable public educational institutions
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

⁷⁷ In the event of a conflict, national legislation shall prevail only if it is aimed at prohibiting unreasonable provincial action, which threatens the maintenance of national or economic unity;

education is a functional area of concurrent national and provincial legislative competence.⁷⁸ Therefore, the national and provincial divisions of government are empowered to regulate “all levels of education, excluding tertiary education, which is exclusively reserved for the national government.”⁷⁹

The South African Schools Act⁸⁰ (SASA) together with the National Educational Policy Act⁸¹ constitutes the cornerstone of educational reform after apartheid. The provision of education is currently rooted in the policy of Outcomes-Based Education⁸² whose objectives are skill-oriented, directed at equipping learners with the necessary skills to seek employment and function as productive and responsible citizens within society.⁸³ These legislative reforms are geared toward depolarizing the public education system; and effectively redressing its injustices which still linger on.⁸⁴

South Africa’s educational reform has been widely welcomed and internationally praised. The United Nations Children’s Fund (U.N.I.C.E.F.) has noted that the

the protection of a common market place; the promotion of economic activities across provincial boundaries; the promotion of equal opportunity or equal access to government services or the protection of the environment.

⁷⁸ See Schedule 4 of the Constitution, *supra* note 6.

⁷⁹ *Id.*

⁸⁰ Act 84 of 1996. The Mandela Administration affirmed its commitment to educational reformation, by unleashing a series of White Papers. See Education White Paper 1: *Education and Training in Democratic South Africa*, (March 1995); White Paper 2: *Organization, Governance and Funding of Schools*, (1996); White Paper 3: *A Programme For the Transformation of Higher Education*, (1997); and White Paper 4: *Further Education and Training*, (1999-2001).

⁸¹ Act 26 of 1996.

⁸² See Maskew Miller Longman, *The Revised Curriculum Statement (RNCS)*. Available at http://www.mml.co.za/revised_natrional_curriculum_statement.htm, accessed on 02/09/2010, at 16:49 p.m.

⁸³ *Id.*

⁸⁴ The SASA primarily strives to create a uniform system of school organization, governance and funding. It further guarantees indiscriminate access to quality education and makes school compulsory for children between the ages of 7 and 15 or grade 9, whichever comes first. (See the Preamble to the Act for a more detailed overview).

state is making tremendous progress in facilitating access to education and given this level of acceleration, predicts that South Africa will undoubtedly attain universal compulsory education per its pledge to the United Nations Millennium Goals, adopted in 2000.⁸⁵ However, U.N.I.C.E.F. contrastingly noted that “the increase in enrolment of children in school has not been matched by an improvement in the quality of education”, and furthermore, “that a growing proportion of children is failing to meet the standards necessary for completing primary school.”⁸⁶ I submit therefore, that the educational system inherited from the post-apartheid government is still “riddled with inequalities”,⁸⁷ one of which manifests itself in the quality of education provided in urban versus rural areas.⁸⁸

⁸⁵See U.N.I.C.E.F., *Women and Children in South Africa*. Available at <http://www.unicef.org/southafrica/children.html>, accessed on 05/05/2010, at 3:04 a.m.

⁸⁶ *Id.*

⁸⁷South African Human Rights Commission: *Socio-Economic Rights Report*, (2001), 88. See also Sayed Y & Motala S, “*Finance, Fee-free Schools and Education in South Africa (forth coming)*”, Consortium for Educational Research on Educational Access, Transitions and Equity, Policy Brief No.: Aug. 7, 2009. Available at: <http://www.create.rpc.org>, accessed on 02/05/2010, at 13:00 p.m. The evidence compiled by this Institute suggests that the education system is still plagued with a *de facto* disparity between two systems: “one privileged and well resourced and the other poor and disadvantaged.”

⁸⁸The Apartheid government’s segregation policies culminated in the establishment of “Bantustans”, to which tens of thousands of black people were forcibly removed. These were artificial “states” within the republic. In doing so, black South Africans were effectively stripped from their citizenship and therefore, the ancillary benefits thereof. These areas remained in a static state of underdevelopment, whereas the “whites” only areas, flourished into urbanization. After democratization, these areas have since been reintegrated into the Republic. However, reintegration has resulted in desegregation because the inhabitants of those areas are predominantly, if not exclusively black Africans. Whilst confined to the former Homelands blacks were severely disenfranchised from economic and social developments which were taking place in the areas reserved for “whites” only. The manifestation is aptly illustrated with reference to the economic wealth generated in provinces, which were not designated as “Bantustans”. The Gauteng province is an appropriate example because the person living there receives an income which is six times greater than that received in the Limpopo province. Today, sixty percent of South Africa’s population is perceived to be urbanized.

The segment of the population domiciled in rural areas therefore, constitute a forty percent minority, of which the majority is still black. The South African government is yet to define the meaning of “urban” and rural “areas”, which has become blurred in light of the re-demarcation of the intra-state boundary lines. Statistics South Africa in the 2001 Census, defined as “[a]n area that is not classified as urban. Rural areas are subdivided into tribal areas and commercial farms.” (See Statistics South Africa, *Census 2001: Concepts and Definitions*, Report no. 03-02-26, first

This *de facto* disparity, which, I submit, in fact, constitutes indirect discrimination, is manifest within the farm-schooling system. Farm schools are located on large commercial farms, which are primarily scattered throughout the rural parts of the country.⁸⁹ While children inherently represent an especially delicate segment of a nation's population, the rights of these farm-school children are particularly in peril both because of their geographical isolation, and because they maintain a minority status within the broader educational framework. At this

published in 2003, and then again in 2004, with minimal additions. Available at <http://www.google.com/search?q=Stats+SA+census+2001+published+2003%22rural%22+definiton+&btnG=Search&hl=en&sa=2>, accessed on 03/27/ 2010, at 16:19 pm.

For more than four decades black people were subjected to an existence of abject poverty, which most unfortunately still lingers on, given the fact that two-thirds of the population live in rural areas. More than two thirds of these inhabitants are poor, which stands stark contrast to the meager 28% in urban areas. Fifty percent of the population lives below the poverty line, which to the exclusion subsidized state services, amounted to R1100, per household per month, in 2003. It goes without saying that rural areas are most adversely affected by poverty. The CESCR has clearly established the relationship between poverty and education. The South African context exemplifies this. The Eastern Province has the largest amount number of poor children and more than 70% of them live in poverty. Limpopo though less on number, bears an increased percentage of 74% of children living in poverty. This socio-economic reality undoubtedly limits the access they have to educational opportunities, especially early childhood development.

⁸⁹ The Department of Education has interpreted "rural areas" as:

[A] spatial definition identifying Traditional Authority (TA) primarily community owned areas and formal rural areas which are primarily commercial farms in erstwhile white areas of South Africa. It should be noted that South Africa has diverse rural areas and therefore certain social, economic, educational and cultural factors need to be considered in enhancing the definition of rural education. The following features are examples of the rural profile:

- Distance to towns
- Topography (conditions of roads, bridges to schools etc)
- Access to communications and information technology
- Transport infrastructure (roads, buses, taxis)
- Access to services and facilities (electricity, water, sanitation)
- The health, educational and economic status of the community
- Access to life[-]long learning opportunities
- Social conditions in the community
- Activities of political and civil society organi[z]ation.

See Ministerial Seminar on *Education for Rural People in Africa: Policy Lessons, Options and Priorities*, Addis Ababa, Ethiopia, 7-9 Sep. 2005. Available at: http://www.fao.org/SD/ERP/addisababa/Papers/SA%20Education%for%20Rural%20People_24%2008%2005.doc, accessed on 03/27/ 2010 at 16:32 p.m.

juncture it is apposite to first provide an overview of the historical context in which these schools were created.

1.1 *Farm Schools: An Historical Overview*

At the outset it should be noted that very little comprehensive information has been collected on the farm school sector. As a result, I am primarily relying on analyses that have been conducted prior to 1994. Three Articles, written by four authors, namely, Bill Nasson, Pam Christie, Margaret Gaganakis and Johann de Graaf constitute the premise upon which this historical evaluation is based. Their work provides illuminating insight into the creation and maintenance of these schools during the apartheid era, and moreover, identifies the unique and cumbersome realities which they represent within South Africa's new democratic dispensation. The impact of their discrimination which they suffered cannot be understood in the abstract and therefore, it is of cardinal importance to reflect upon the broader economic power-struggles which were, and today, still are at play between the farmer and his laborers.⁹⁰

⁹⁰ A 2007 report, issued by the United States Department of State, stated that white farmers have been perpetuating human rights violations, particularly against female farm workers who are overwhelmingly black. Despite the prevalence of rapes and assaults, calls for detailed investigations have done nothing to slow or combat the inhumane and degrading treatment to which these helpless people are being subjected. Available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100505.htm>, accessed on 05/05/2010, at 12:40 p.m.

According to Christie and Gaganakis, the agricultural market was an integral part of the Afrikaner National Coalition, which assumed power in 1948.⁹¹ Graaf quoted in Unterhalter (1991: 230) continues to explain that:

This privileged position allowed the (Afrikaner National Coalition) to create a legislative environment which ensured an extremely cheap and immobile labour force. This produced an almost feudal set of social relations in which workers were tied to an extremely oppressive and exploitative situation.

It was the beacon from which financial resources were drawn, and, the ideal matrix for the implementation of race and class differentiation.⁹² Farm workers were severely discriminated against⁹³ and forced to work long hours for very little remuneration.⁹⁴ They were perceived as a *sui generis* sector and thus, excluded from labor regulations on minimum working hours and wages, health care, safety and other basic conditions of employment.⁹⁵ In the absence of this legislative protection, they were often victimized and exploited, without any legal recourse.⁹⁶

Christie notes that they were “arguably among the most oppressed workers in South Africa.”⁹⁷ Access to justice was further curtailed by the fact that they were entirely dependent upon the farmer not only in relation to employment, but with

⁹¹ Pam Christie and Margeret Gaganakis, *The Face of Rural Apartheid*, (hereinafter referred to as Pam Christie and Margaret Gaganakis, *The Face of Rural Apartheid*), Vol. 33, No.1, Feb. 1989, at 81.

⁹² *Id.*

⁹³ *Id.*, at 78.

⁹⁴ *Id.*, at 79.

⁹⁵ *Id.*, at 79. See also N. Haysom and C Thompson, *Farm Labour and the Law*, (Second Carnegie Inquiry into Poverty and Development in Southern Africa, Cape Town, 1984).

⁹⁶ *Id.*

⁹⁷ *Id.*, at 78.

respect to residence as well.⁹⁸ During the apartheid era, non-whites were not allowed to own property and many of these farm workers had no alternative accommodation.⁹⁹ Farm workers were enslaved within the agricultural sector and could only escape with the consent of the farmer.¹⁰⁰ The relationship between the farmer and the laborers can be described as one of involuntary servitude, whereby the farmer dictated and steered the course of his laborers' lives, rendering them completely helpless and trapped within this vicious cycle of economic and social abuse. Haysom and Thompson accordingly argue that:

The extent of the relationship is expressed in the servant's dependence or the need of such diverse benefits as access to farm schooling for his [sic] children, provision of food, access to land for private cultivation or grazing, and their continued presence on the farm once they are old. Simultaneously the farmer may have extra contractual expectations of his servant such as the employee's family members make themselves available for work, expectations which he may enforce by virtue of his power to dismiss. Despite the contractual form of the work, the employer can demand and obtain servile demeanor and due deference.¹⁰¹

Farm workers were confined to the farm and consequentially deprived from pursuing other employment alternatives.¹⁰² As a result, they were ignorant of the

⁹⁸ *Id.*, at 81.

⁹⁹ Africans rights to property were severely restricted in terms of the 1913 Land Act. They were only permitted to own or lease property within specially demarcated areas, thus, limiting their exercise of their property rights to 13 percent of South Africa's land. These areas were later designated as "homelands", remote areas to which as many as 1.25 million people were brought, after they had forcefully been removed from their property during the 1960's and 1970's. (Pam Christie and Margaret Gaganakis, *The Face of Rural Apartheid*, *supra* note 91, at 82) These mass removals, also known as "black spot" removals, formed part of the government's overarching denationalization policy, whereby as Africans were stripped of their South African citizenship thus forfeiting all their ancillary benefits. Their property rights were further limited through the adoption anti-squatting and labor tenancy laws, which were promulgated in 1968 and 1978, respectively.

¹⁰⁰ Pam Christie and Margaret Gaganakis, *The Face of Rural Apartheid*, *supra* note 91, 79-80.

¹⁰¹ N. Haysom and C Thompson, *Farm Labour and the Law*, *supra* note 95, at 9.

¹⁰² *Id.*, at 79.

degree of pain and suffering which they were enduring. Their children were no exception.

In light of the foregoing, I now turn to an evaluation of farm schools themselves. The farm school system essentially consisted of public schools on privately owned rural land situated outside urban areas. The establishment of these schools was entirely based on the farmer's consent, and an election in favor of its establishment had to conform to the high common law protection afforded to a farmer's right to property.¹⁰³ They were initially controlled by missionaries and were brought to prominence by the Afrikaner Nationalist Government whose coalition's constituency included "an alliance of white farmers, workers and petty bourgeoisie, bound together by Afrikaner nationalist ideology".¹⁰⁴ In furtherance of its racist political agenda, the apartheid government adopted the Bantu Education Act,¹⁰⁵ pursuant to the recommendations submitted by the Eiselen Commission, tasked with assessing issues pertaining to education between 1949 and 1951.¹⁰⁶ The Act effectively usurped control over the farm schools from the missionaries and placed it in a joint, subsidized venture between the state and a farmer.¹⁰⁷ According to the Department of Education and Training,¹⁰⁸ (DET) this partnership represented a "joint attempt to raise the quality of life of black people

¹⁰³ Pam Christie and Margaret Gaganakis, *The Face of Rural Apartheid*, *supra* note 91, at 83.

¹⁰⁴ *Id.*, at 81. Available at <http://www.jstor.org/stable/1188726>, accessed on 03/ 22/ 2010 at 18:40 p.m. This Commission conducted its investigations between 1949 and 1951.

¹⁰⁵ Act No. 47 of 1953.

¹⁰⁶ *Id.*, at 77.

¹⁰⁷ Pam Christie and Margaret Gaganakis, *The Face of Rural Apartheid*, *supra* note 91, at 83.

¹⁰⁸ The Department of Education and Training was the central government department responsible for the education of Africans in those areas of South Africa that were not the "African homelands".

in the countryside, and to uplift the black community on farms.”¹⁰⁹ This mutually-beneficial relationship distorted the nature of education by portraying it as a privilege bestowed upon black children, as opposed to their fundamental human right.

In terms of this arrangement, the state provided half of the financial resources with respect to the costs of buildings, the provision of utilities and remunerated teachers.¹¹⁰ The farmer was responsible for supplying the other half of the building capital (this was reduced to 25 percent in 1989), and had the election whether to manage the school himself, or appoint another to assume the managerial position on his behalf.¹¹¹ The farmer further incurred ancillary, administrative duties such as registering the school with the DET, ensuring that it remained operative for at least five years, failing which, he would be liable for the repayment of the state’s construction subsidy.¹¹²

These schools provided the ideal opportunity for the government to extend its apartheid ideology by entrenching and spreading the inferior Bantu education amongst the black masses from the bottom up. The government’s intention to spread lower levels of education among black children is evidenced by the fact

¹⁰⁹ Pam Christie and Margaret Gaganakis, *The Face of Rural Apartheid*, *supra* note 91, at 84. See also the Department of Education and Training, *Plaasskole* (Farm Schools), Christie’s translation from Afrikaans (Pretoria: Government Printer, 1982).

¹¹⁰ Pam Christie and Margaret Gaganakis, *The Face of Rural Apartheid*, *supra* note 91, at 84.

¹¹¹ *Id.*

¹¹² *Id.*

that these schools only provided primary education, and, the provision of secondary education was contingent upon the consent of the DET.¹¹³

This system was further aimed at discouraging laborers from migrating to cities thus, simultaneously, retaining low-cost labor and obstructing the black population from pursuing more economically viable alternatives. The apartheid government was intent on denying black people a dignified existence and confining their intellectual development to crop harvesting, as noted by HF Verwoerd, in his speech on Bantu education to the 1954 state Senate:

The establishment of farm schools has in the past been somewhat neglected, resulting in the sending of children to town schools and the moving of parents into the town. If fundamental education can also be obtained on the farms the trek from the farms will be combated, more especially if the training contributes towards more remunerative employment in farm work owing to the greater skill and usefulness of the workers.¹¹⁴

The farm school system reinforced the cycle of cheap labor by providing education only in so far it facilitated the transition from farm child into farm laborer. As a result, these children suffered dualistic discrimination: first, by virtue of the fact that they were black, a factor which deprived them from adequate resource allocations, and; secondly, their status as farm children, further exacerbated their hardship.

¹¹³ Pam Christie and Margaret Gaganakis, *The Face of Rural Apartheid*, *supra* note 91, at 86.

¹¹⁴ Quoted in Karodia et al *The Rural Landscape and Farm schools in South Africa*, a paper presented to the National Conference on Farm Schools, 14 May 2000.

These schools were scarcely resourced and functioned in the absence of clean water, electricity and proper sanitation. The quality of education was also pathetic given the fact that the state employed the least qualified teachers to instruct farm learners. These schools were not only an academic misfortune, but a geographical one, as well. Their rural locations rendered them inaccessible to learners, which in turn contributed to the dwindling numbers of learners attending school, and when they finally reached school, they were too exhausted from the 10km to 30km journey, which they embarked upon simply to get there.¹¹⁵

Farmers were often obstructed and denied access to schools and during the harvest season, the schools were simply closed down forcing the children to assist in harvesting crops. This obstreperous behavior as noted by Human Rights Watch (HRW), is still very much a part of our recent history, for example:

At Cambridge School, in the Free State Province, the Principal, who is also the only teacher at the school, informed Human Rights Watch researchers that the new owner of the property has repeatedly locked the gate to the school, and that the provincial department of education had not effectively intervened to prevent [this] interference with access.¹¹⁶

Forced child labor was outlawed in 1989, but the apartheid government failed to strictly enforce this prohibition, thereby fostering a culture of impunity for these kinds of human rights violations that were taking place on farms. Hence, one can responsibly conclude that the farm schooling was nothing more than an extension of the power and control which, the state through the instrumentality of white

¹¹⁵ Human Rights Watch, *Forgotten Schools: Right to Basic Education For Children on Farms in South Africa*, Vol. 16, No. 7 (AS), May 2004, at 13.

¹¹⁶ *Id.*, at 10.

farmers exerted over black South Africans.¹¹⁷ Further development occurred through the adoption of the Education and Training Act,¹¹⁸ and the 1989 report by the Department of Education, for the provision of education for black pupils in rural areas. Unfortunately, this legislative development did not result in reformation. The state of farm schools was not improved and these documents merely reiterated the fact that ownership of these schools belonged to the farmer thus denying parents a meaningful opportunity to “. . . make any decisions that will impose financial burden or contractual liability on the farmer”¹¹⁹

1.4 Post Apartheid Reformation of Farm Schools

This section expands on the reformations which I have alluded to in the Introduction. Specific reference is made to sections of the SASA that are relevant to determine the legal status of farm schools. This section also gives an overview of the policy initiatives that have been adopted in order to give effect to the SASA’s remedial objectives. I furthermore draw attention to the options which the government could take if unable to reach an amicable resolution with the farmer on whose property a farm-school is erected. After I critically evaluate these, I conclude that they are ineffective and do not address the actual needs of farm-school children.

1.4.1 Enactment of Statutory Remedial Measures

¹¹⁷ Pam Christie and Margaret Gaganakis, *The Face of Rural Apartheid*, *supra* note 91, at 85.

¹¹⁸ Act No. 90 of 1979.

¹¹⁹ Ministry of Education of the Eastern Cape, *A Draft Report on Farm Schools*, (1995), at 3.

The SASA undoubtedly encapsulates and manifests the government's political will and commitment as far as reforming education within the South Africa is concerned. It expressly acknowledges the issues pertaining to farm schools and attempts to address these concerns in terms of Articles 14 and 58. Article 14 speaks to the legal status of schools thus, providing that their legitimacy is contingent upon a contractual agreement entered into between the MEC and the private owner (more often than not, the farmer) of the property. Such agreements are binding upon the current owner of the property as well as his successors in title.¹²⁰ Art. 14(2)(a) prescribes the contents of these agreements as follows:

- (a) The provision of education and the performance of the normal functions of a public school;
- (b) Governance of the school, including the relationship between the governing body of the school and the owner;
- (c) Access by all interested parties to the property on which the school stands;
- (d) Security of occupation and use of the property by the school;
- (e) Maintenance and improvement of the school building and the property on which the school stands and the supply of necessary services;
- (f) Protection of the owner's rights in respect of the property occupied, affected or used by the school.

The Minister of Education, after consultation with the Council of Education Ministers, is mandated to adopt regulations detailing the substantive obligations to

¹²⁰ See section 14(4) of the SASA.

which the parties are to ascribe.¹²¹ These regulations were adopted in 1997. Like all other public schools, these schools are semi-regulated by governing bodies comprised of the principal, learners, teachers and parents.¹²² The governing body holds a position of trusteeship¹²³ and is responsible *inter alia* for developmental initiatives, administration and fostering departmental relations.¹²⁴

Although the regulations require consultation with the governing body, this is purely a formality because their opinion is in no way dispositive of the matter; unless, the MEC decides to close down or merge such a school, in which event they are entitled to consultation. Sections 12A,¹²⁵ 37¹²⁶ and 58¹²⁷ provides for the procedures to follow regarding the management of all assets, liabilities, rights and obligations of the schools that are merged. The SASA envisioned the conclusion of these agreements within a period of six months after its enactment, but unfortunately, studies have indicated that the respective parties have been disinclined as far this is concerned.

As an alternative, section 58 of the SASA permits the expropriation of land or a real right on or over land for any purpose relating to school education in a province. Section 58(1) further vests this power in the provincial MEC, who may

¹²¹ See section 14(6) of the SASA.

¹²² See sections 16(1); 23(1) and (2) of the SASA.

¹²³ See section 16(2) of the SASA.

¹²⁴ See section 20(1) of the SASA.

¹²⁵ Section 12A(5) provides for all assets, liabilities, rights and obligations of the schools that are merged, must, subject to the conditions of any donation, bequest or trust contemplated in section 37(4), vest in the single school.

¹²⁶ In terms of section 37(4), money or other goods donated or bequeathed to or received in trust by a public school must be applied in accordance with the conditions of such donation, bequest or trust.

¹²⁷ No person, as per section 58(A)(2), may dispose of any assets owned by a public school to another person or body without the written approval of the Member of the Executive Council.

only exercise it if it is in the public interests to do so. The process requires the MEC to do the following:

Step 1

Given notice in the Provincial Gazette of his or her intention to expropriate in terms of Section 58(1) of the SASA. The notice in the Provincial Gazette must:

- (a) Identify the land or any real right over the land;
- (b) Give interested parties an opportunity to make written submissions regarding the expropriation within the period of not less than 30 days; and
- (c) Invite any person claiming compensation as a result of the expropriation to enter into negotiations with the Member of the Executive Council in that regard, and draw attention to the provisions of Section 58(5) of the SASA which states that:

58(5) Any expropriation contemplated takes effect immediately even though compensation payable in respect of the land or real right in or over such land has not been finally determined or paid.

Step 2

The Member of the Executive Council may, after considering all the written submissions, expropriate the land or any real right in or over the land by notice in the Provincial Gazette.

Step 3

If the Member of the Executive Council and an owner of the land or the real rights fail to reach agreement regarding the payment of compensation, either party may refer the

matter to a court for determination, or they may agree to refer the dispute to an arbitrator for arbitration. Section 58 (7-9) of the SASA describes the role of the arbitrator:

- (a) The arbitrator determines the time, venue and procedures which apply to the arbitration;
- (b) The arbitrator determines the dispute and makes a written award giving reasons for such awards as soon as possible after the arbitration, and his or her determination is binding.
- (c) The arbitrator may not make an award of costs.

Step 4

The arbitrator is paid, out of moneys appropriated for this purpose by the provincial legislature, such fees and allowances as the Member of the Executive Council may determine, with the concurrence of the Member of the Executive Council responsible for finance.

Step 5

Any transfer duty, or stamp duty, other fees or costs payable as a result of any transfer of land or real right may be paid in full or in part from the funds appropriated by the provincial legislature for that purpose.

Step 6

Any claim to compensation arising from the expropriation must be determined as contemplated in the Constitution and Section 58 of the SASA.¹²⁸

These mergers would certainly affect the no-fee school policy. In this regard, the Directorate has recommended that children formally attending farm schools, if

¹²⁸ See section 58 of the SASA.

merged with a fee-charging one, are automatically entitled to the fee exemption in terms of section 39 of the SASA.¹²⁹ Subsequent to the merger, the provincial department is required to reevaluate the poverty score of the school so as to determine which quintile it falls in henceforth.¹³⁰

1.4.2 Implementation of Statutory Remedial Measures

In an attempt to accelerate development in rural areas, the Mbeki administration initiated the Social Development Indicators Survey, in 2001. The survey was designed to assess the status quo. This information was supposed to incrementally inform methodology adopted by the government in addressing the plight of children resident and attending schools in rural areas.

In 2005, the Human Sciences Research Council issued an additional report, which documented the daily lives of people living in rural areas within South Africa.¹³¹ The report portrays their existence as one confronted with abject poverty. It further illustrates that education does not emerge in the abstract. Rather that it is an integral and indivisible component of the broader societal values, therefore, susceptible to their influence. As a result, it captures the direct relation between poverty and the lack of access to basic education experienced by rural children.

¹²⁹ See Directorate Rural Education, *Guidelines for the merger and closure of Rural and Farm Schools*. Available at http://www.google.com/search?hl=en&q=South+africa+guidelines+for+the+mergers+and+closure+of+rural+schools&aq=f&aql=&oq=&gs_rfai=, accessed on 05/05/2010, at 2:22 p.m.

¹³⁰ *Id.*

¹³¹ See Parliamentary Monitoring Group, *Education in South African Rural Communities Report*. Available at <http://www.pmg.org.za/minutes/20050530-education-south-african-rural-communities-report-briefing-human-sciences-research-c>, accessed on 05/05/2010, at 2:26 p.m.

Therefore, according to the Council, the enhancement of the right to access basic education necessitates an effective response to the overarching social dynamics that deter education at farm schools.

These catalytic findings were duly noted by the government which then appointed the Ministerial Committee on Rural Education.¹³² Its report focuses on the following five areas: “quality of teaching and learning; attracting and retaining learners in rural and farm schools; planning, restructuring and improving infrastructure in rural and farm schools; effective school governance and management in rural and farm schools; and advocacy and sustainable partnership to implement programmes directed at the broader rural development and community participation in rural and farm schools.”¹³³

The Committees recommendations have since been taken up by the Directorate for Rural Education at its establishment in May 2007.¹³⁴ The Directorate has been mandated to devise a National Framework for Quality Education in Rural Areas.¹³⁵ In 2009, the Directorate issued the *Guidelines for the Rationalization of Small or Non-viable Schools*.¹³⁶ These guidelines prescribe the national

¹³² South African Government Information, *Rural Education*, Available at: <http://www.info.gov.za/aboutsa/education.htm#rural>. Accessed on 03/ 27/ 2010, at 12:27 p.m. See also the *DOE Annual Report 2008-2009*. Available at: <http://www.education.gov.za/dynamic/dynamic.aspx?pageid=329&catid=10&category=Reports&egtype=null>, accessed on 03/27/ 2010, at 12:37 p.m.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* As per the DEO’s Annual 2008/9 report, *supra* note 137, this provisional framework, is currently scrutinized *inter alia* by the Nelson Mandela Foundation and U.N.I.C.E.F.

¹³⁶ Directorate of Rural Education, *Guidelines for the Rationalization of Small or Non-viable Schools*, July 2009. Available at www.government.za, accessed on 03/ 27/ 2010, at 2:00 a.m.

framework within which the merger and closure of public schools are to be executed. They are to be read in conjunction with section 12A of the SASA, which provides the process for the merger of two or more public schools. The Directorate, holds the view that “[t]he merger and closure of farm schools aim to improve the quality of education, to expedite the resourcing of schools, to promote access to schools and ensure the retention of learners and educators in rural and farm schools.”

The Directorate has acknowledged the persisting concern posed by farm and rural schools with respect to two concessions. It accordingly states that “[a]fter more than 12 years of democracy the situation at many farm and rural schools remains desperate.”¹³⁷ Furthermore that “[m]any rural and farm schools do not function properly due to the lack of adequate facilities such as, no water in the school yard, no proper functional toilets and dilapidated buildings. According to the National Education Infrastructure Management System (NEMIS), the infrastructure conditions of 11% of 28786 ‘operational schools sites are very poor and 15% of 28786 ‘operational’ schools sites assessed are poor.”¹³⁸

The government has sought to justify its course of action with reference to the dwindling number of learner registration as these schools; curriculum constrains; undue strain suffered by teachers whom are forced to teach across different grades; geographical impediments limiting access to these schools; inadequate facilities; high drop-out rates; high percentage of teacher resignations and

¹³⁷ *Id.*, at 8.

¹³⁸ *Id.*

contractual complexities.¹³⁹ The report highlights two points of interest. First, the fact that the state, in terms of national legislation, is barred from spending public funds on private property.¹⁴⁰ Secondly, that the merger and closure of these schools are in some cases warranted by failed attempts between the state and the owner to conclude a section 14 Agreement.¹⁴¹

These mergers or closures are to take place at the provincial level in accordance with a set time frame.¹⁴² Unfortunately, the report fails to provide such estimation. Schools are to be identified in terms of an impact assessment having regard to the demographics; the initiatives adopted by the local government; consultation with property owners; the retention of learners and logistics in moving learners and educators to merged schools.¹⁴³ The *Guidelines* further require the establishment of, and sets out the functions of a provincial coordinating as well as a district coordinating team.¹⁴⁴ It emphasises the importance of consultation and access to information between the government, the affected communities and other interested parties.¹⁴⁵ The collaborative role of governing bodies is noted and it expressly calls for tolerance and respect when language policy is determined.¹⁴⁶

¹³⁹ *Id.*, at 8-9.

¹⁴⁰ *Id.*, at 9.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*, at 9-10.

¹⁴⁴ *Id.*, at 13-4.

¹⁴⁵ *Id.*, at 15.

¹⁴⁶ *Id.*

The Directorate has in addition, issued *Guidelines for the Implementation of section 14 Agreements*.¹⁴⁷ The owner in terms of the *Guidelines* and the Deeds Registries Act¹⁴⁸ is responsible for all the maintenance, security and insurance of the school building and immovable assets, unless the owner, to the contrary concluded an agreement with the state.¹⁴⁹ The owner is barred from any form of obstruction and may have access to only the portion of the property on which the school is situated, only insofar as it does not violate the best interests of the learner.¹⁵⁰

The *Guidelines* urge for a collaborative approach between governmental departments for the purpose of erecting the much needed roads and infrastructure.¹⁵¹ If concluded and then breached, legal recourse must be had to.¹⁵² Expropriation by the state is only to be considered as a last resort, conditional upon the unwillingness of the owner conclude a section 14 Agreement and if there is a dire communal need to preserve the school within a specific area.¹⁵³ Until recently, educational laws and policies were silent on the issue of teachers despite the fact that at least 3 million children obtain their education in

¹⁴⁷ These guidelines are concerned with:

- (a) The criteria for entering into a Section 14 Agreement;
- (b) The role of the provincial rural education coordinator;
- (c) The role of the district director/manager;
- (d) The role of the district team dealing with Section 14 Agreements;
- (e) Governance of public schools on private property;
- (f) Access to schools on private property;
- (g) Security of occupation and use of private property by the school.

¹⁴⁸ Act No. 47 of 1937. This Act regulates the agreements between landlord/landowner and tenant.

¹⁴⁹ *Id.*, at 23.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*, at 24.

¹⁵³ *Id.*, at 20-1.

this fashion.¹⁵⁴ These teachers are usually unqualified, lack resources and in desperate need of governmental support.¹⁵⁵ In an attempt to ameliorate these struggles, the government has drafted *Guidelines to Formulating a Training Manual for Multigrade Teachers*.¹⁵⁶

¹⁵⁴ See *South African Multigrade Conference Tackles Global Educational Policy Issues*, Apr. 20, 2010. Available at <http://www.cmge.co.za/category/projects/>, accessed on 05/04/2010, at 21:00 p.m.

¹⁵⁵ *Id.*

¹⁵⁶ See the *DOE Annual Report 2008-2009*, *supra* note 137.

1.5 *Farm Schools: The Current State of Affairs*

The vulnerability of farm-school children has transcended national borders and captured international attention. In 2004, Human Rights Watch (HRW) published a report entitled *Forgotten Schools*. The report asserts that:

The South African government is failing to protect the right to a primary education for children living on commercial farms by neither ensuring their access to farm schools nor maintaining the adequacy of learning conditions at these schools . . . The historical, social and economic conditions on commercial farms, inherited from the years of an undemocratic minority government, mean that farm schools . . . are among the poorest in financial resources, physical structure and resources in South Africa. Farm children attend schools without electricity, drinking water, sanitation, suitable buildings or adequate materials. Also children may face harassment from farm owners . . .¹⁵⁷

The report compiles months of on-sight research that was conducted in the Limpopo province and provides an account of the daily challenges faced by farm workers generally and the adverse impact that those struggles have on the educational opportunities of their children. Specifically, it notes that farmers are still engaging in discriminatory practices by forcefully and unlawfully evicting farm workers, thereby depriving their children of access to education. Even in the absence of such arbitrary evictions, farmers intentionally obstruct access to the schools by locking the facilities.

In the event that children are allowed access, they are subjected to harsh conditions, finding themselves confined to a fragile building, lack of access to

¹⁵⁷ Human Rights Watch, *Forgotten Schools*, *supra* note 115, at 1.

clean water, improper sanitation, and the absence of electricity. Human Rights Watch perceives this deplorable state of affairs as hazardous and “putting [children] at unnecessary risk of disease”. Furthermore, the absence of these basic services constitutes a violation of the SASA, which obligates the government to ensure that they are provided for.

The report further highlights the fact that the SASA, since 1996, has required Members of the Executive Council (MEC’s)¹⁵⁸ to conclude section 14 Agreements with the farmers, within a period of six months subsequent to its adoption. In 2000, 88% of these agreements were still outstanding.¹⁵⁹ The absence of these agreements perpetuates the uncertainty regarding the legal status of these schools, and according to HRW, the state’s “failure to negotiate contracts with farmers impedes children’s right to basic education”. The report seems to imply a degree of state tolerance, noting the fact that the police have been called upon and have intervened, such intervention proving to be futile because it has not yielded the much desired deterrence.

In 2005, the Centre for Applied Legal Studies at the University of Witwatersrand, in South Africa, issued a draft research report,¹⁶⁰ concentrating on the farm school system within the broader socio-economic pretext. The dynamics at play are undoubtedly complex and predominantly racially-based given the fact that most

¹⁵⁸ In terms of section 1(xi) of the SASA, an MEC is defined as “the Member of the Executive Council of a province who is responsible for education in that province.

¹⁵⁹ Centre For Applied Legal Studies, University of the Witwatersrand, *ALMOST A BOSS-BOY: FARM SCHOOLS, FARM LIFE AND SOCIAL OPPORTUNITY IN SOUTH AFRICA*, October 2005, at 13.

¹⁶⁰ *Id.*, at 11.

of South Africa's farmers are still primarily white, and their work force, almost exclusively black. The authors of this report corroborate HRW's findings as far pertaining to "the quality of teaching and learning in farm schools and the adequacy of the resources afforded to them".¹⁶¹

However, the report begs to differ with the general tone of HRW's report, which seems to imply that the government has not been proactive in responding to the need of these schools. The CALS highlights three developmental initiatives that have emerged since democratization, namely "education law and policy reform; the worsening of relationship between white agricultural capital and the state; and the so-called 'new wave' of land dispossession in South Africa." These children represent a class of persons that were historically and socially excluded, disadvantaged and deserted for decades. Moreover, they constitute a special class of persons, legally entitled to a higher standard of care and protection by virtue of their status as children. Section 28(3) of the South African Constitution stipulates that "[a] child's best interests are of paramount importance in every matter concerning the child". This section not only recognizes a child's legal right to special protection, but implicitly, and constitutionally mandates the South African government to provide accordingly. In terms of section 28(3) of the South African Constitution, a child is defined as "a person under the age of 18 years".

In light of the foregoing, there is a dire need for governmental intervention in order to empower these individuals against such intolerable and unconstitutional

¹⁶¹ *Id.*

exploitation. If adult farm workers are being treated so harshly, there is no telling the amount of harm that may be inflicted upon their children, who are even more vulnerable. Therefore, the government needs to inform these children about their human rights.

An effective means of achieving such widespread awareness and respect is through the medium of education, which the government through its National Statement, Educational Manifestos, and educational laws and policies, has admitted and further purport to foster. With this said, South Africa is evidently still in the process of transition,¹⁶² and therefore, its education system is in need of further refinement in order to fully address these inherent institutional and structural deficiencies.

¹⁶² Qualifications and Curriculum Agency, “*South Africa: Context and principles of education*”, at 7. Available at <http://www.inca.org.uk/2350.html>, accessed on 02/05/2010, at 17:44 p.m.

CHAPTER TWO: THE RIGHT TO EDUCATION UNDER DOMESTIC AND INTERNATIONAL LAW

Measuring the degree to which the state has discharged its obligations under domestic and international law on the right to education is slightly complicated by the fact that the Constitutional Court is yet to be confronted with a case purely invoking the right to education. As a result, the content of the right and the state's reciprocal obligations with respect to its implementation remains uncertain. This Chapter provides a brief synopsis of the right to education as explicitly guaranteed in section 29 of the South African Constitution. Under section 39(1)(b) of the Constitution, the Constitutional Court is obliged to take account of international law when interpreting the Bill of the Rights. Therefore, I will turn to international law because it has been more progressive and thus, provides an enriched understating of the right to education. On the international plane the International Covenant on Economic, Social and Cultural Rights (ICESCR) is most relevant, and so too, are the interpretations provided for by the Committee on Economic, Social and Cultural Rights (CESR). South Africa is, however, a mere signatory to the Covenant because to date it has failed to ratify it. Be that as it may, it is still an important interpretive tool.¹⁶³ South Africa has, however, ratified the

¹⁶³ In *S v Makwanyane and Another* [1995] ZACC3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] CHRLD 164; 1995 SACLR 1, the Constitutional Court held that binding and non-binding international law are applicable in interpreting the rights in the Bill of Rights. The failure of South Africa to ratify the ICESCR is unfortunate (and ironic) in view of the fact that it had been the most influential human rights instrument in shaping the socio-economic rights provisions in the South African Constitution. The Covenant is therefore an essential source of interpretation in developing the socio-economic jurisprudence in South African law. Recently, the South African Human

Convention on the Rights of the Child and its provisions relating to the right to education reinforce that of the ICESCR. The Committee on the Rights of the Child has developed guiding principles by which to judge the level of state compliance, and these guidelines shall be highlighted in the course of the analysis. I will further substantiate my claim of unconstitutionality, with reference to the principle of non-discrimination.

2.1 *The Right to Education under the South African Constitution*

The South African Constitution expressly provides for the right to education. Section 29 thereof states that “[e]veryone has the right (a) to a basic education¹⁶⁴ . . . and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”¹⁶⁵ Unlike other constitutions such as some American state constitutions,¹⁶⁶ Section 29 of the South African Constitution does not prescribe the standard or quality of education that the state should provide, and it is even vaguer by stating that private institutions should

Rights Commission, in its report on the right to basic education, made use of General Comment No 13 in describing the content and concomitant legal obligations in terms of section 29(1)a) of the Constitution.

¹⁶⁴ The Department of Education has defined “basic education” as “appropriately designed programmes to the level of the proposed General Education Certificate (GEC), whether offered in school to children, or through other forms of delivery to young people and adults.” See Department of Education, *White Paper on Education and Training, General Notice 196* of Mar. 15, 1995, Parliament of the Republic of South Africa, at ¶ 15. See also Art. 1 of the World Declaration on Education for All.

¹⁶⁵ The right to education, *supra* note 76.

¹⁶⁶ Many state constitutions require the establishment of “an adequate public education” or an “ample” education. See Michael A. Rebell, *Education Adequacy, Democracy and the Courts, in Achieving High Educational Standards for All* 218, 232, Christopher Edley et al. eds., 2002. See generally, William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 Educ. L. Rep. 19 (1993) for a summary of state constitutions’ education clauses. The New Jersey Constitution is even more prescriptive in obliging the legislature to “provide for the maintenance and support of a thorough and efficient system of free public schools.” See N. J. Const. Art. VIII, 4, at 1.

not, when compared to state owned public schools, provide an inferior education.¹⁶⁷

A purely textual analysis of the right yields a “hybrid” result, as far as the state’s obligations are concerned.¹⁶⁸ On one hand, the ambiguous formulation of the right imposes positive obligations upon the state to adopt proactive measures in order to grant everyone equal access to education.¹⁶⁹ The state’s positive obligation was duly noted in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of the Gauteng Education School Bill of 1995*, in which the Constitutional Court held that “[this provision] creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.”¹⁷⁰ Section 29(1)(a) which provides for basic and adult education and (b) which regulates access to further education, has additionally been dissected as a “strong positive” and a “weak positive” right, respectively.¹⁷¹ On the other hand, sections 29(3) and (4), clearly illustrate the negative dimension of the right to education, in so far as it protects an autonomous educational quest¹⁷² thereby insulating an individual from state interference as regards the language choice in schools, and the establishment and maintenance of independent educational

¹⁶⁷ See section 29(3)(c).

¹⁶⁸ See R Kriel, Education, in M Chaskalson et al (eds.) *Constitutional Law of South Africa* 1st ed. RS 5, 1999, at 38-1-38-3, as quoted in Veriava F and Coomans, “*The right to education*”, in Brand and Heyns C et al (eds) *Socio-Economic Rights in South Africa* (2005), at 60.

¹⁶⁹ *Id.*, at 59.

¹⁷⁰ 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC), at ¶ 9. The Constitutional Court has identified a similar negative dimension in section 26(1)’s right to access to adequate housing. See also *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC, at ¶ 34.

¹⁷¹ *Id.*

¹⁷² *Id.*

institutions.¹⁷³ This in turn, grants an individual an unfettered preference for either public or private education.

Noticeably, unlike the other constitutionally entrenched socio-economic rights, the right to basic education is not subject to limitations such as “reasonable legislative measures”; “progressive realization”; and resource constraints.¹⁷⁴ It appears to be an unqualified right.¹⁷⁵ Arguably, therefore, the right to basic education is immediately enforceable against the state¹⁷⁶ and an objection based on insufficient resources shall only withstand constitutional muster under extremely circumscribed circumstances.¹⁷⁷ Note further that section 29 only prohibits discrimination based on race.¹⁷⁸

2.2 *The Right to Education under International Law*

I. *The Nature of the Right*

¹⁷³ *Id.*

¹⁷⁴ F Veriava and F Coomans “The right to education” in D Brand and C Heyns *et al* (eds) *Socio-Economic Rights in South Africa*, (hereinafter referred to as Veriava and Coomans, *The right to education*), (2005) 60.

at 62. See also M Seleoane, *The Rights to Education: Lessons from Grootboom*, (2003) 7(1) *Law, Democracy and Development*, 137, 140-1, where she argues that the lack of resources does not absolve the state from its obligations under section 29.

¹⁷⁵ Veriava and Coomans, *supra* note 174. Additional, unqualified, socio-economic rights entrenched in the Constitution, include: children’s socio-economic rights (section 28(1)(c)); the right to a legal practitioner (s 35(2)(c)); and detainees’ rights to adequate accommodation, nutrition, reading material and medical treatment (section 35(20)(e)).

¹⁷⁶ *Id.*

¹⁷⁷ Any interference with the legitimate exercise of the right can only be justified in terms that meet the test set out in section 36 of the Constitution. See further Stu Woolman & H Botha, ‘*Limitations*’, in Stu Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds.) *Constitutional Law Review of South Africa*, 2nd ed., OS, Jul. 2006, at section 34.8.

¹⁷⁸ See section 29(3)(a) of the Constitution.

The right to education was first recognized as a fundamental human right in the Universal Declaration on Human Rights (UDHR).¹⁷⁹ It has further been entrenched in an array of other international legal instruments¹⁸⁰ including the International Covenant on Civil and Political Rights (ICCPR)¹⁸¹; and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁸²

¹⁷⁹ See Art. 26 of the United Nations Declaration on Human Rights, 1948.

¹⁸⁰ The right to education has further been entrenched in the Convention on the Rights of the Child (CRC); the Convention on the Elimination of All Forms of Racial Discrimination (1966); as well as the United Nations Education, Scientific and Cultural Organization (UNESCO) Convention Against Discrimination in Education (1960), are most relevant for the purpose of this study. It has also been incorporated into treaties that afford special protection to marginalized and minority groups such as the Convention Relating to the Status of Refugees, Convention on the Elimination of All Forms of Discrimination Against Women. Non-binding instruments which make reference to the right to education include the United Nations World Declaration on Education For All (1990) and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief (1981).

¹⁸¹ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by G.A. res. 2200A (XXI), of 16 December 1966, entered into force Mar. 23, 1976, in accordance with Article 49. Art. 18(4) of the ICCPR states that: The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

¹⁸² International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by G.A. res. 2200A (XXI), of 16 December 1966, entered into force Jan. 3, 1976, in accordance with Article 27. Art. 13 of the ICESCR states that:

- “1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) 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; and
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

See also Art. 14 of the ICESCR.

The dual incorporation of the right to education¹⁸³ has prickled many a scholarly mind, given the traditional categorization of rights as either civil and political or socio-economic and cultural.¹⁸⁴ However, the Vienna Declaration states that human rights are “indivisible”, “interdependent” and “interrelated”.¹⁸⁵ These terms have been echoed by the Inter-American Court of Human Rights, which holds the view that all rights “should be fully understood as human rights, without any rank and enforceable in all the cases before competent authorities.”¹⁸⁶

The European Court of Human Rights has similarly held “that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.”¹⁸⁷ However, albeit significant, this proclamation does not remedy the distinct normative characterization, which rights have acquired, given

¹⁸³ “Dual” in the sense that it features in both the ICESCR and the ICCPR.

¹⁸⁴ Craig Scott highlights two additional reasons for this dichotomy between civil-political and socio-economic and cultural rights: (a) “implementation-based” and “pragmatic” reasons for the division of separate codification of the rights in Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a partial Fusion of the International Covenants on Human Rights*, 27 Osgoode HALL L. J., 769, 791-98 (1989). See also office of the High Commissioner for Human Rights in the Administration of Justice: *A Manuel on Human Rights for Judges, Prosecutors and Lawyers* at 681-748. U.N. Sales No. 02.XIV.3 (2005). The position of the Western states is reflected upon in Daniel J. Whelan & Jack Donnelly. *The West, Economic, Social and Cultural Rights, and the Global Human Rights Regime: Setting the Record Straight* (Human Rights & Human Rights Welfare Working Papers, Paper No. 40, 2007), available at http://www.du.edu/gsis/hrhw/working/2006/40-whelan_donnelly-2006-rev.pdf.

¹⁸⁵ See World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, U.N. Doc A/CONF.157/23 (July 12, 1993); U.N. Millennium Declaration, G.A. Res. 55/2, U.N. Doc A/RES/55/2 (Sept. 13, 2000); and G.A. Res 60/1, at 9, U.N. Doc.A/RES/60/1 (Oct. 24, 2005) [“We recognize that development, peace and security and human rights are interlinked and mutually reinforcing.”].

¹⁸⁶ *Acevedo Buendia et al. (“Discharged and Retired Employees of the Comptroller”) v. Perú*, Inter-American Court of Human Rights, Judgment of July 1, 2009, at ¶ 101.

¹⁸⁷ *Airey v. Ireland*, European Court of Human Rights, Judgment of 9 October 1979, Serie A, No. 32, at ¶ 26.

the textual variations with respect to their content and the reciprocal obligations vis-à-vis the state.¹⁸⁸

Historically, the human rights discourse was devised, first, as a mechanism to redress to the most diabolic atrocities committed during World War I and II, and, secondly, as a guarantee of non-repetition.¹⁸⁹ During that state of anarchy, tens of thousands of innocent human beings were brutally massacred and exploited at the instance of the state.¹⁹⁰ The arbitrary exercise of state power is, therefore, the primary evil, which the discourse was designed to monitor and even limit, if need be.¹⁹¹ Conversely, the preservation and protection of an individual's rights and needs is the lynchpin around which the system has been framed and evolved.¹⁹²

This desire to protect the individual against arbitrary state intervention has manifested itself in the form of the ICCPR, which concentrates on rights such as life, liberty and property, which are individually-oriented.¹⁹³ The nature of these rights, at a minimum, require the state to adopt legislative and administrative measures,¹⁹⁴ which restrict the state's interference with an individual's exercise

¹⁸⁸ See Chapter 5, *The Typologies of State Duties Imposed by the Covenant*, in MAGDELENA SEPÚLVEDA *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, (hereinafter referred to as Magdalena, *The Nature Of The Obligations Under The International Covenant on Economic, Social and Cultural Rights*), at 119-20, 2003.

¹⁸⁹ See generally Chap. 1, *Human Rights Concepts and Discourse*, at 3-148, in Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights In Context: Law, Politics and Morals*, (hereinafter referred to as Alston, Ryan Goodman, *International Human Rights In Context: Law, Politics and Morals*) 3rd ed. Oxford University Press, 2007.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See section 2(2) of the ICCPR.

and enjoyment of those rights.¹⁹⁵ Thus, the state's inaction, for the most part, would suffice for purposes of their implementation.¹⁹⁶ Therefore, Art. 2(1) of the ICCPR imposes the obligation upon states parties to "respect" and "ensure".¹⁹⁷ Art. 2(1) does not accommodate any limitations, and as a result, the rights contained in the ICCPR have been interpreted as immediately enforceable against the state.¹⁹⁸

To the contrary, socio-economic and cultural rights such as education, housing, health and social security, though capable of being framed as an individual entitlement, they, at their core, incorporate elements of that which individuals in their collective capacity have an interest in. The preparatory material suggests that the legal status of these rights has been contested since the very beginning.¹⁹⁹ They were perceived as too burdensome in that they demanded a greater devotion of resource allocations. In an attempt to limit their perceived budgetary inroads, they were codified with due regard to their communal and proactive incentives, which cannot be realized overnight.²⁰⁰ Therefore, states are obligated to "undertake steps [. . .] to the maximum extent of [their] available resources, with a

¹⁹⁵Magdalena Sepúlveda *The Nature Of The Obligations Under The International Covenant on Economic, Social and Cultural Rights*, *supra* note 188.

¹⁹⁶ *Id.*

¹⁹⁷ Section 2(1) of the ICCPR states that

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.

¹⁹⁸Magdalena, *The Nature Of The Obligations Under The International Covenant on Economic, Social and Cultural Rights* *supra* note 188.

¹⁹⁹ Alston, Ryan Goodman, *International Human Rights In Context: Law, Politics and Morals*, *supra* note 176, where the authors draw attention to the fact that Western governments worked actively to demote the importance of economic and social rights. For a description of this tension as far back as the UDHR, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt And The Universal Declaration of Human Rights* 115-17, 2001.

²⁰⁰ See for example, Commission on Human Rights, Report of thirty-fourth Session, ECOSOC official Records, 1978, E/1978 38.

view to achieving progressively the full realization of the rights” enunciated in the Covenant.²⁰¹

The dual incorporation of the right to education seems to challenge this strict separatist understanding of the relationship between the content of human rights and the reciprocal state obligations, which they invoke. In addition, contemporary human rights advocates vehemently oppose this illusive dichotomy between rights and perceive it as an archaic approach to human rights, which taints one’s understanding of human dignity. Melish, in particular, contends that the correct assessment should focus on the jurisdictional component of judicial competence, as opposed to such an inconsequential misperception that civil-political, as opposed to economic-social-cultural rights, are enforceable.²⁰² The CESCR has contributed to this debate by stating that:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labor and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized 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, are one of the joys and rewards of human existence.²⁰³

²⁰¹ For an illuminating discussion on the drafting history of this standard of obligation, see Phillip Alston & Gerard Quinn, *The Nature and Scope of States parties Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156 (1987).

²⁰² Tara Melish, *Rethinking the “Less As More” Thesis: Supranational Litigation of Economic, Social, And Cultural Rights In The Americas*, 39 N.Y.U. J INT’L L. & POL. 171, Winter (2006), at 171.

²⁰³ See General Comment No. 13, at ¶ 1.

The United Nations Special Rapporteur on the Right to Education has also recognized the special relationship between education and other aspects of human life.²⁰⁴ He further notes that “[t]he interconnectedness of human rights is nowhere more obvious than in educational processes, so the right to education is, moreover, an individual guarantee and a social right which is fully expressed by the individual in the exercise of his or her citizenship.”²⁰⁵ In light of the foregoing, Beiter, has correctly concluded that the right to education is neither purely civil-political nor purely socio-economic-cultural, but rather a “solidified” right.²⁰⁶

II. *Content of the Right*

Articles 13 and 14 of the ICESCR collectively provide the most expansive elaboration of the right to education. They further mandate states parties not only to devise a coherent system of educational institutions, but moreover, to respect and ensure equal access to education at all levels. At the primary level, education is compulsory and should be provided free of charge. Equitable access to secondary and tertiary education may evolve progressively. However, states parties are immediately obliged to take all the necessary steps, including legislative and administrative, to guarantee equal enjoyment of the right to

²⁰⁴ Commission On Human Rights, *Economic, Social and Cultural Rights*, The right to education, Report submitted by the Special Rapporteur on the right to education, Mr Vernor Munoz Villalobos, at the Sixty-first session on 17 December 2004, at 5 ¶ 6.

²⁰⁵ *Id.*

²⁰⁶ See Klaus Dieter Beiter, *History and Nature of the Right to Education*, in Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: Including a Systemic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*, International Studies in Human Rights, (hereinafter referred to as Klaus Dieter Beiter, *History and Nature of the Right to Education*), Chap. 2, Vol. 82, Martinus Nijhoff Publishers, Leiden/Boston, (2006), at 17.

education. Arts. 28 and 29 of the Convention on the Rights of the Child (CRC) further expounds on the content of the right to education.

States parties are further required to develop their educational framework in a manner which conforms to the mandate of the United Nations to maintain international peace and security. Noticeably, Articles 13 and 14 do not expressly prohibit discrimination. This omission is, however, sufficiently remedied by Article 2 of the ICESCR, which prohibits discrimination as an overarching obligation with respect to all the rights enshrined in the ICESCR. Article 2(2), in particular, provides that “[s]tates parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Discrimination is also prohibited in terms of Art. 2 of the CRC.

The CESCR has provided more guidance with respect to the content of the right to education and the contours of a state party’s obligation in its General Comment No. 13.²⁰⁷ The Committee affirms the fact that the right to education is a fundamental human right and that the denial thereof, severely impairs one’s right to pursue and a dignified life.²⁰⁸ The CESCR regards education as the most effective and sustainable means to alleviate poverty and therefore, states parties

²⁰⁷ United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No. 13: *The Right to Education* (Art. 13), U.N. Doc. E/C.12/1999/10 (hereinafter General Comment No. 13), Dec. 8, 1999.

²⁰⁸ CESCR General Comment No. 3, at ¶ 1.

are urged to considerably invest in education.²⁰⁹ The 4-A scheme: (a) “availability”; (b) “accessibility”; (c) “adaptability and (d) “acceptability”,²¹⁰ provides the framework within in which the advancement of the right to education is to be measured.

Some argue that “availability” and “accessibility” refer to the right *to* education, whilst “adaptability” and “acceptability” relate to the right *in* education. “Adaptability” refers to the rights of children with special needs, such as the disabled and children who are normally out of school, such as child soldiers.²¹¹ The CESCR defines “acceptability” with reference to an adequate standard of education provided through an appropriate and culturally-sensitive curriculum, employed through an effective teaching methodology.²¹²

²⁰⁹ *Id.*

²¹⁰ CESCR General Comment No. 13, at ¶ 6(a) - (d).

²¹¹ Judith Sloth-Nielsen and Benjamin Mezmur “*Free Education is a Right for Me: A Report on Free and Compulsory Education*” (2007), 14.

²¹² CESCR General Comment No. 13 at ¶ 6(c). The need for “adequate” education is also reiterated in General Comment No. 11, at para 4. See also the case of *Campaign for Fiscal Equity v The State of New York* 86 N.Y. 2d at 317) in which the court held that “[c]hildren are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils and reasonably current textbooks. Children are entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subjects areas.” (86 N.Y. 2d at 317). These key features of “teaching”; “facilities”, and “instrumentalities of learning”, were reiterated in *Campaign for Fiscal Equity v City of New York* 100 NY 2d 893, in which the New York Court of Appeals was confronted had to decide whether children attending New York City schools were receiving a “meaningful” education, given the state’s alleged failure to distribute its resource allocations in an equitable manner. Thus, arbitrarily depriving these educational institutions of the much needed economic capacity in order to enhance the quality of education. As far as the teaching component was concerned, the court held that the quality of teaching has a direct bearing on the learner performance, which was further weakened by the overcrowded class sizes. Furthermore, that the state’s inability to “attract and retain qualified teachers”, significantly contributed to the high drop-out and poor graduation statistics. Overall the schools were under resourced, lacking library facilities, books, technological and scientific equipment. All these deficiencies could be remedied if more funding was made available to these schools, therefore, the plaintiffs were successful in asserting that the inadequacy was derivative of the lack of state’s funding scheme. The state was accordingly ordered to re-evaluate the scheme in order to provide each child with a sound education. It

The latter two elements fall beyond the scope of this study and will not be addressed. Despite this seemingly determinate criterion, the CESCR, pertinently notes that “the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party”.²¹³

I thus proceed to an evaluation of the meaning which the CESCR has ascribed to “availability” and “accessibility”. “Availability”, this element incorporates the basic necessities to sustain educational institutions, the foremost of which are, the provision of safe school buildings and qualified teachers to impart the necessary skills and knowledge. Schools are to be of such quality as to ensure an appropriate; well-equipped environment which fosters meaningful teaching and learning.²¹⁴ “Accessibility” is based on a tripartite structure, which requires economic, physical and indiscriminate accessibility to education.²¹⁵ Therefore, children should ideally, be able to attend school free of charge, but if they have to pay school fees, it should not constitute such a grave impediment which deprives them of obtaining an education.²¹⁶ Furthermore, schools should be geographically dispersed, with due regard to the commuting needs of the children whether they travel to school on foot or by public transport.²¹⁷ Moreover, children should not be denied attendance based on arbitrary grounds of differentiation.²¹⁸

should be noted that the standard of adequacy overlaps to some extent with that of “availability” described above.

²¹³ CESCR General Comment 13, at ¶ 6.

²¹⁴ Beiter, *supra* note 206, at 479.

²¹⁵ CESCR General Comment No. 3, at ¶6(b).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

III. Scope of the state's obligation

In general states are obligated to respect, protect and fulfill all human rights, including the right to education.²¹⁹ The obligation to *respect* requires the state to refrain from impairing access to an existing right.²²⁰ Where this is unavoidable, the state must take steps to mitigate the impact of such impairment.²²¹ This “negative” duty also prohibits the state from placing obstacles in the way of a person to gain or enhance access to a right.²²²

To guarantee the *protection* of a right, states parties are obliged to prevent third parties from either arbitrarily depriving people from their existing access to a right or impeding their ability to enhance or gain access to a right.²²³ This includes the provision of effective remedies in the event of such interference.²²⁴ In order to *fulfill* a right, state parties are required to proactively adopt all the necessary measures needed to ensure that those currently denied the right, acquire access to the equal enjoyment and exercise thereof.²²⁵ Insufficient access to a right should further be remedied in a manner which makes it widely accessible.²²⁶

²¹⁹ CESCR, General Comment No. 13, at 9. See generally, Asbjørn Eide, *Economic, Social and Cultural Rights As Human Rights*, in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.) *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* (1995), at p 21-40.

²²⁰ Krzysztof Drzewicki, *Internationalization of Human Rights and Their Juridization*, (hereinafter referred to as *Internationalization of Human Rights and Their Juridization*), in Raija Hanski and Markku Suksi (eds.), Second Edition, *AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK*, (1999), at 31.

²²¹ D Brand, *The right to food*, in D Brand and C Heyns *et al* (eds), *Socio-Economic Rights In South Africa* (2005) 159.

²²² *Id.*

²²³ Krzysztof Drzewicki, *Internationalization of Human Rights and Their Juridization*, supra note 208.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* These three obligations were not only confirmed, but moreover evaluated by the African Commission on Human and Peoples' Rights in the case of *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, supra note 30. As mentioned above,

This generic, obligatory framework likewise applies to the right to education.²²⁷ Article 2 of the ICESCR sets out the overarching duty imposed upon states in respect of the right to education. This prescribed formulae, requires states to immediately adopt all necessary steps to ensure that they devote the maximum available resources at their disposal, to the progressive realization of all socio-economic rights. Article 4 of the CRC contains a similar provision.²²⁸ The CESCR further states that the right imposes both negative and positive obligations upon states. Therefore, the progressive achievement of the right should neither be used as a façade to detract from the immediate obligations, nor as a justification for the states retrogressive behaviour.

It is clear from the above that the standard of progressive realization constitutes the yardstick by which a state's compliance with these international law

the Nigerian government, stood accused of violating a wide range of socio-economic rights, including the rights to health and a clean environment, as result of its decision to grant concessions to multinational corporations for the exploration of oil, in the Ogoniland. The petitioners highlighted the government's failure to comply with its obligation to *respect* the rights to health, with reference to its participation in the contamination of air, water and soil. The state's failure to protect the Ogoni population was evidenced by the damage inflicted upon them by the Nigerian National Petroleum Company, Shell Petroleum Company and the government security forces which were utilized to facilitate the harm. Lastly, the state failed undertake or permit the necessary social and economic impact assessments to determined whether any potential or actual health and environmental hazards, caused by the by the oil operations. Hence, in breach of its duty to fulfill and respect the human rights of the vulnerable Ogoni Community. In summation, the African Commission upheld the petitioners' clam that the state had violated all three elements of its obligations

²²⁷ CESCR General Comment 13, at ¶ 46.

²²⁸ In terms of Article 4 of the CRC:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to the economic, social and cultural rights, States parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

obligations, is to be measured. This approach is less prescriptive, and thus, less intrusive, in that it grants states a measure of deference, in determining which mechanisms to adopt in order to effectively discharge their obligations. Although, the Committee embraces the progressive realization approach, it in fact, offers a more nuanced interpretation thereof, in respect of the right to education. This is illustrated by its interpretation of progressivity, with reference to a “minimum core” element. The Committee has expressed the view that—

[A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.²²⁹

The Committee on the Rights of the Child has in addition, devised at least three principles that are to inform the state's obligations, namely non-discrimination; the best interests of the child and the child's inherent right to life, development and survival. The Committee similarly regards the principle of non-discrimination as a core obligation and that the state ought to take all necessary measures to eliminate any such laws and practices. The best interests of the child should further be a primary consideration in all matters affecting the child. This

²²⁹ CESCR, General Comment No. 3, at ¶ 10.

approach has been endorsed by the Constitutional Court of South Africa in the case of *Laerskool Middelburg v Departement v Onderwys*,²³⁰ in which the issue of language rights surfaced. English medium learners challenged the schools adoption of Afrikaans as the exclusive language of instruction. In interpreting section 28(2) of the Constitution which entrenches the best interests of the child principle, the Court stated that even though the school enjoys discretion in this regard, it would be in the best interests of the English medium children, to be admitted and to be instructed in the language of their choice.

According to the Committee, the inherent right to life, development and survival, incorporates a wide range of aspects that are vital for the child's physical, mental, spiritual, moral, psychological and social development. Therefore, it goes beyond language and curriculum considerations, but extends to broader responsibilities such as nutrition, sports and the child's participation in extramural activities. Thus, the manner in which a state elects to implement this right should not fall short of achieving the bare necessities, which the right contemplates. Within the context of education, this minimum core obligation, transcends into the adoption of a non-discriminatory national education policy that ensures the implementation of primary, secondary and tertiary education; whilst providing for and protecting the autonomy of private educational institutions.²³¹ States are further urged to react as expeditiously and effectively as possible in adopting the necessary

²³⁰ 2003 (4) SA 160 (T).

²³¹ CESCR, General Comment No. 13.

measures, which should be deliberately targeted at achieving the full realization of the right to education.²³²

IV. Minimum Core Obligations With Respect to the Right to Education

In terms of the right to education, states parties have in addition, acquired specific, core and non-core, international law obligations. According to the CESCR states parties are obliged to ensure the “availability” of education, by providing a safe building, fully functioning amenities such as safe drinking water, sanitation, teaching material, libraries, computer facilities and information technology.²³³ This aspect implicitly entails the duty not to arbitrarily close down schools and conversely limit state intervention in respect of the establishment of private schools.

One of the minimum “core” obligations upon a state is “to provide primary education for all”. Arguably, therefore, the state is in violation of this obligation if it does not make education available to the degree contemplated by the CESCR. This may not include the provision of computer facilities and information technology but rather the basic necessities for children to attend school and receive instruction in safe and hygienic conditions. Admittedly however, computer and information technology facilities and components are gaining increasing popularity to the extent that they have transformed from a mere luxury into a desired skill in order to adequately compete in the global arena. Be that as

²³² CESCR, General Comment No. 2.

²³³ CESCR, General Comment No. 13, at ¶ 6.

it may, one can still acquire a good education in their absence, and they are the type of skills that one can learn relatively easy when confronted with a computer.

Another core obligation upon the state in the context of the right to education is “to ensure the right of access to public institutions and programs on a non-discriminatory basis”. The principle of non-discrimination is well-documented and has frequently been litigated before the South African Constitutional Court. I will therefore assess its meaning within the South African context and this will accordingly be supplemented by international law.

2.3 *The Principle of Non-discrimination*

It is my submission that the government of South Africa, albeit unintentionally is, in fact, indirectly discriminating against learners attending farm schools based upon their race and socio-economic status. Race is closely related to geographical areas.²³⁴ Empirical evidence corroborates the fact that the most impoverished schools are located in predominantly black communities residing in rural areas²³⁵ while the most prestigious, financially resourced, well-equipped and effectively functioning schools are those located in the more affluent, former “whites-only” urban zones.²³⁶

²³⁴ See generally *Pretoria City Council v Walker* [1998] ZACC 1; 1998 (2) 363; 1998 (3) BCLR 257.

²³⁵ See generally Stephan Taylor and Derek Yu, *The Importance of Socio-Economic Status in determining Educational Achievement in South Africa*, A Working Paper of the Department of Economics and the Bureau for Economic Research at the University of Stellenbosch, (hereinafter referred to as Stephan Taylor and Derek Yu, *The Importance of Socio-Economic Status in determining Educational Achievement in South Africa*), Jan., 2009.

²³⁶ *Id.*

Liebenberg is of the opinion that the “transformative goals” enumerated in the Constitution can only be achieved if social rights are “substantively interpreted”.²³⁷ She contends, therefore, that the central consideration should be the position of the claimant in society, the history and nature of the deprivation experienced and its impact on her and others in a similar situation.”²³⁸ Her approach mirrors the Constitutional Court’s test for unfair discrimination, as crafted in *Harksen v Lane NO*,²³⁹ particularly that portion employed to establish unfair discrimination based on a non-listed ground.²⁴⁰ Hence, social justice is the underlying objective that the Constitution’s drafters were intent on achieving, through the paradigm of non-discrimination, which together with freedom and human dignity, constitute the founding values of the Constitution.²⁴¹ I would go so far as to submit that the principle of non-discrimination is the lynchpin, without which, the Constitutional framework would crumble. The matter at hand concerns a case of indirect discrimination, and therefore, the analysis will be limited specifically to this.

²³⁷ Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, 17 Stellenbosch Law Reviews 5, (2006), 5, at 21.

²³⁸ *Id.*, at 32.

²³⁹ [1997] ZACC 12; 1997 (11) BCLR 1489 (1) ;1998 1 SA 300 (CC), at ¶53. The test provides as follows:

(a) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to discrimination? If it is on a specified ground [in section 9(3)], then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focus primarily on the impact of the discrimination on the complainant and others in his or her situation. See I Curie and J De Waal *The New Constitutional and Administrative Law, Vol. 1* (2001), at 349-350.

²⁴⁰ *Id.*

²⁴¹ See section 1 of the Constitution, *supra* note 6.

Section 29 of the Constitution only prohibits discrimination based on racial grounds.²⁴² However, section 5(1) of the SASA compensates for the omitted grounds in providing that “[a] public school must admit learners and serve their educational requirements without unfairly discriminating in anyway.²⁴³ Arguably, this is to be read in conjunction with section 9 of the Constitution, which is more expansive.²⁴⁴ International law further corroborates the importance of non-discrimination in education. General Comment 13 affirms that states parties have an immediate obligation to ensure that the right to education “will be exercised without discrimination of any kind.”²⁴⁵

The United Nations has adopted special anti-discriminatory instruments, the foremost of which is the UNESCO Convention against Discrimination in Education²⁴⁶ (CED). Article 1 defines discrimination as “any distinction, exclusion, limitation, or preference [on prohibited grounds, including race, colour and economic condition] that has the purpose of or effect of nullifying or impairing equality of treatment in education.” Discrimination with respect to all levels of, access to; the standard and quality of education; and the conditions under which it is given, is further prohibited in terms of Art. 2(2) of the ICESCR.

²⁴² Section 29(3) states that [e]veryone has the right to establish and maintain, at their own expense, independent educational institutions that (a) do not discriminate on the basis of race”.

²⁴³ See also section 5(3) of the SASA, which prohibits schools from denying access to them because parents cannot afford the school fees.

²⁴⁴ These grounds additional include “gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” The list is merely illustrative and not exhaustive by the word “including” which precedes the enumerated list.

²⁴⁵ CESCR, General Comment 13 at ¶ 31.

²⁴⁶ Convention Against Discrimination in Education, of the United Nations Educational, Scientific, and Cultural Organization, adopted on 14 December 1960, entry into force 22 May 1962, in accordance with Article 14. Available at <http://www2.ohchr.org/english/law/education.htm>, accessed on 05/05/2010, at 3:34 a.m.

Art. 2(2) provides a wide range of prohibited grounds which include race and colour, but omit economic status. However, it does prohibit discrimination on any “other status”, which undefined, could arguably include economic status. The CESCR has interpreted this as an immediate obligation, thus, neither subject to progressive realization nor resource constraints.²⁴⁷

The CESCR further endorses the adoption of special temporary measures in instances where the discrimination is so deeply embedded in the societal order.²⁴⁸

These measures are to be directed at bolstering the position of previously disadvantaged individuals, so that they may equally compete with other members of society for political, cultural and economic flourishing. In exceptional instances and if need be these measures may assume some permanency. Hence, one can responsibly conclude that international law expressly permits affirmative action measures to facilitate substantive equality between persons. States are further obligated to identify and address discriminatory practices in schools.

These positive obligations are further underscored by Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination²⁴⁹ (CERD). It obligates state parties “to undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without

²⁴⁷ CESCR, General Comment No.3, at ¶ 31.

²⁴⁸ CESCR, General Comment No. 20, *Non-discrimination in Economic, Social and Cultural Rights*, Forty-second session Geneva, 4-22 May, 2009, at ¶ 9 and 39.¶

²⁴⁹ Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19. Available at <http://www2.ohchr.org/english/law/cerd.htm>, accessed on 05/05/2010, at 3:24 a.m.

distinction as to race, colour, or national or ethnic origin to equality before the law, notably in the enjoyment of the following rights: . . . (e)(v) the right to education and training. Art. 10 of the Convention on the Elimination of All Forms of Discrimination Against Women²⁵⁰ further prohibit discrimination with respect to education.

Therefore, as a matter of law and fact everybody, including the most vulnerable, are entitled to education on an equitable and indiscriminate basis.²⁵¹ States are thus immediately obligated to remove any impediment which may cause discrimination, whether it is direct or indirect in nature.²⁵² The concept of “indirect discrimination” requires further elaboration.

2.4 Indirect Discrimination within Education

According to the CESCR, a state perpetrates indirect discrimination, when formally, its laws and policies appear neutral, but nevertheless adversely impair the fundamental dignity of the person(s) to whom it applies.²⁵³ This was aptly illustrated in the case of *Griggs v Duke Power Co.*,²⁵⁴ which was decided by the United States Supreme Court. In that case, a number of black employees challenged a company’s employment policy under which recruitment was contingent upon a high school diploma. This precondition was not *per se*

²⁵⁰ Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1979. Available at <http://www2.ohchr.org/english/law/cedaw.htm>, accessed on 05/05/2010, at 3:28a.m.

²⁵¹ See CESCR, General Comment 3, at ¶ 6(b).

²⁵² See the Preamble to the Convention Against Discrimination in Education, *supra* note 232.

²⁵³ *Id.*, at ¶ 10 (b).

²⁵⁴ *Griggs v Duke Power Co.*, 401 UA 424 (1971).

discriminatory, however, due to various political and social factors, the majority of the black population were unable to acquire that level of education. Hence, it effectively denied black people the opportunity to equally compete for such employment, and was thus, found to be unconstitutional. Similar reasoning was employed by the Constitutional Court of South Africa in *Pretoria City Council v Walker*,²⁵⁵ where it held that indirect discrimination occurs where “conduct may appear to be neutral” but the consequences thereof results in discrimination.²⁵⁶ Indirect discrimination may also result from instances where the law is unfairly administered.²⁵⁷

Similar to direct discrimination, the prohibited grounds listed in section 9(3) of the Constitution may serve as a basis for indirect discrimination and it may further rest upon an analogous ground.²⁵⁸ If the indirect discrimination invokes a listed ground, which among others include “race”, it triggers the presumption of unfairness.²⁵⁹ If not, the complainant would have to prove that the unlisted ground similarly has the effect of impairing her dignity or affecting her in a seriously comparable manner. However, such a successful assertion is not

²⁵⁵ *Pretoria City Council v Walker*, *supra* note 234.

²⁵⁶ *Id.*, at ¶ 31.

²⁵⁷ *Id.*, at ¶ 32.

²⁵⁸ See for example, *Hoffman v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (II) BCLR 1235 (CC), in which the Constitutional Court refused to treat HIV status as an analogous ground, rather than a disability. The case concerned a cabinet attendant that was denied employment by the Airline company due to his HIV positive status. The rejected this blanket approach on stated that it was based on an ill-informed prejudice that all people who are HIV positive pose a health risk within the context of this type of employment. Furthermore that this treatment constituted a “fresh instance of stigmatization”, which fundamentally impaired their human dignity. “Prejudice”, according to the court, “can never justify unfair discrimination”.

(see ¶ 28; 37 and 40).

²⁵⁹ Section 9(5) of the Constitution states that “Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”.

dispositive of the matter because South Africa's Constitution only prohibits unfair discrimination and not mere discrimination.²⁶⁰ Unfair discrimination, "principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."²⁶¹ Dignity is therefore of fundamental importance in understanding unfair discrimination.²⁶² Unfair discrimination amounts to differential treatment that is hurtful and demeaning.²⁶³ It takes place when "law or conduct, for no good reason treats some people as inferior or incapable or less deserving of respect than others."²⁶⁴ It also takes place "when law or conduct perpetuates or does nothing to remedy existing patterns of disadvantage."²⁶⁵ In *President of the Republic of South Africa and Another v Hugo*²⁶⁶ Goldstone J stated that:

At the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.

As a precursor to the discrimination analysis, the *Harksen* test requires an evaluation of the rationality of the governments legal and policy objectives. If these are found to be irrational in that they fail to meet a legitimate government

²⁶⁰ See section 9(3) of the South African Constitution.

²⁶¹ *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at ¶ 31.

²⁶² Judith Sloth-Nielsen and Benjamin Mezmur "*Free Education is a Right for Me*, supra note 211, at 15.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) ¶ 41-3.

objective, then they would violate section 9(1) by not ensuring equal protection of and before the law. Chapter 1 discusses the remedial measures, namely the SASA and additional Guidelines which the state has adopted in order to reform the farm-schooling system. The Department of Education has noted that merging and closing down some of these schools would enable it to effectively monitor them, phase out multigrade classrooms, prevent duplication of resources and make them more accessible to officials for regular inspection. In my opinion, these objectives constitute legitimate governmental purposes, and therefore, do not violate section 9(1). Even so, the *Harksen* test still allows for further analysis to determine whether the measures, though rational, may still amount to discrimination.

I am of the view that the indirect discrimination is two-fold: (a) based upon race, and therefore, according to section 9(5), unfair discrimination is presumed, unless the government is able to justify the limitation imposed on the complainant's right to equality; and (b) based on socio-economic status, which is an unlisted ground. Thus, the complainant would be required to establish the unfairness of the alleged discrimination with reference to three factors: (1) her position in society as it relates to her status of a previously disadvantaged group; (2) the discriminatory conduct cannot legitimately be justified; and (3) that such conduct fundamentally impairs her fundamental dignity. In light of these factors, I will now proceed to determine whether there is a violation of section 9(3), firstly on account of race and secondly based upon economic status.

2.4.1 Indirect Discrimination based on Race

In 2002, Fiske and Ladd found that race is still the predominant factor in selecting the choice of school which a child attends.²⁶⁷ The study suggests that many learners are still attending schools which the apartheid government designated for them.²⁶⁸ Further that apartheid laws²⁶⁹ were geographically designed to strategically separate blacks from white. Therefore, black schools are almost exclusively located within impoverished, black, rural communities, whereas former white schools are still going strong because of their urban location within more affluent communities.²⁷⁰

This was duly noted by the Constitutional Court in the case of *Pretoria City Council v Walker*,²⁷¹ The case concerned municipality levies which were disproportionately targeting former white areas people because they were subject to a metered tariff, whilst people living in black areas, were charged a flat rate. In recognizing the correlation between race and geography, Langa CJ stated that

²⁶⁷ EB Fiske & HF Ladd 'Financing Schools in Post-Apartheid South Africa: Initial Steps Toward Fiscal Equity' (prepared for International Conference on Education and Decentralisation: African Experiences and Comparative Analysis, Johannesburg, 10-14 June 2002) in D Roithmayr "Access, adequacy and equality: The constitutionality of school fee financing in public education". Available at http://search.sabinet.co.za/WebZ/images/ejour/ju_sajhr_v19_n3_az.pdf?sessionid=01-62891-8457662798format=F, accessed on 05/05/2010, at 07:00a.m.

²⁶⁸ *Id.* Fiske and Ladd found that 79% of black learners remained in the former DET schools, 94% of former colored learners remain in the former HOR schools and primarily 100% of white learners remain in the former HOA schools.

²⁶⁹ In *Pretoria City Council v Walker*, *supra* note 234, at ¶ 32, where Langa CJ remarked that "The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory."

²⁷⁰ Fiske and Ladd, *supra* note 268.

²⁷¹ *Pretoria City Council v Walker*, *supra* note 234.

[T]his conduct which differentiated between treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit, indirect, on grounds of race.

Until recently,²⁷² farm schools were funded in terms of the national quintile system ranging from one to five, the former representing the poorest, whilst the latter represents the least poor schools. This provincial system was replaced with a national one through the 2006 enactment of the Education Law Amendment Act (ELAA). The ELAA not only codifies and nationalizes the NNS, but further designates quintile one and two schools as “no fee schools”.²⁷³ In 2007, these schools accounted for 40% of the public schools.²⁷⁴ Even though disadvantaged schools would generally fall into the lowest quintile, there was still no guarantee

²⁷² The national quintile system is currently under review.

²⁷³ In the absence of such a declaration, Under this system, schools could to apply to the provincial department of education if they want to be considered no fee schools. Upon such request, the department shall determine their eligibility in terms of a national criterion, which is essentially a poverty-oriented analysis. The department then conducts a contextual analysis of the community with in which the school is situated, with particular, reference to: income; unemployment and the level of education. This accumulative assessment produces a poverty score, upon which the quintile allocation is based.

²⁷⁴ The ANC’s 2009 manifesto, and its Universal Periodic Report (2008) which it submitted to the Human Rights Counsel the government clearly pronounced its intention to increase no fee schools to 60% . Many have welcomed the no-fee system, but others vehemently object and harshly critique its deficiencies. On the one hand, it allows access for the poor, yet simultaneously it negatively affects the quality of education because it leads to over-crowding and also exacerbates the teacher to student ratio, which at the national level is 1:35. The Congress of South African Students has publically declared its desire to have 95% of public schools declared no fee schools, and, threatened to incite their constituency to attend schools without paying school fees, even in the absence of a formal declaration by the provincial department to that effect. (See the Mail & Guardian, “Students want 95% no fee schools by 2010”, 14 July 2009. Available at: <http://www.mg.co.za/article/2009-07-14-students-want-95-no-fee-schools-by-2010>, accessed on 5 February 2010, at 21:23pm.

that they would be adequately resourced. Unless, the school was declared a “no-fee” school, learners would only receive the maximum 60% subsidy. The amount of children that attend these schools are considerably less than those attending other public schools, therefore, this amount of money is still relatively low in comparison to that received by schools located in urban areas, notwithstanding the fact that they might fall within a higher quintile. This system was initially to be supplemented by permitting schools to charge school fees.

Many commentators have highlighted the adverse impact that the imposition of school fees has on learners to the extent that it completely impedes their access to basic education, and deters the pursuance of further education.²⁷⁵ Realistically these rural schools are not able to raise additional funds through this system because parents are confined to mediocre jobs and receive very low financial remuneration if any at all.²⁷⁶ Hence, this system reinforced their hardship because it places so much responsibility on the community’s socio-economic status. After the state has allocated the school an amount of money, any shortfall is to be covered by the schools fees generated by the school. Parents, through the school governing body, determine the amount of school fees. People in rural areas tend to earn less than those in the urban areas; therefore they are not able to set high school fees. As a result black schools remain under-resourced in comparison to

²⁷⁵ See generally, D Roithmayr “*Access, adequacy and equality: The constitutionality of school fee financing in public education*”. Available from http://search.sabinet.co.za/WebZ/images/ejour/ju_sajhr_v19_n3_az.pdf?sessionid=01-62891-8457662798format=F, accessed on 05/02/2010, at 15:00 p.m.

²⁷⁶ South African farmers more often than not withhold remuneration and pay their laborers in kind, which usually takes the form of alcohol. Hence, these communities birth the highest rate of children with alcohol syndrome throughout the country. See generally Chrystal Prince, *Conditions on Farms: A Draft Paper*, *supra* note 2.

former white schools, which are able to receive funds from the state and still generate income through schools fees.

The geographical location further factors into the equation as far as qualified teachers are concerned. In 2008, the *Rapport* newspaper noted the fact that at least 7000 unqualified teachers were operating within the education system.²⁷⁷ At that time, these teachers were almost exclusively teaching at disadvantaged schools which, as I have stated before, are primarily located in rural areas.²⁷⁸ The government has been unsuccessful in facilitating the redeployment of qualified teachers to rural and farm schools.²⁷⁹ Qualified teachers are therefore concentrated within urban areas and have opposed redeployment initiatives.²⁸⁰

This evidence undoubtedly illustrates the position of black learners within the education system. Even though the current laws and policies appear neutral, they disproportionately affect these learners, even if the government is not intentional in orchestrating it. The position of black learners resembles that of the Roma in Europe, and the Constitutional Court of South Africa could look at the jurisprudence of the European Court of Human Rights, as interpretive authority for justifying a more robust approach to hold the South African government

²⁷⁷ Rapport, “SA werf wiskunde-, wetenskap-onnies in Egipte, Uganda” (31 May 2008).

²⁷⁸ *National survey on barriers of access to education in South Africa: Baseline review and conceptual framework document (Barriers survey)* (September 2006), prepared jointly by Social Surveys and the Centre for Applied Legal Studies, University of the Witwatersrand, 23.

²⁷⁹ F Veriava “Free to Learn: A discussion paper on the School Fee Exemption policy” in A Leatt and S Rosa (eds) *Towards a Means to Live: Targeting poverty alleviation to make children’s rights real* (2005), at 4.

²⁸⁰ *Id.* The South African Teachers Union SADTU) suggests that the policy governing the selection of schools to benefit from re-deployment does not benefit poor schools.

accountable for its failure to ensure that rural and farm children are no longer deprived of the same quality of education enjoyed by black children in urban areas as well as children attending former white schools.

In 2007, the case of *DH and Others v Czech Republic*,²⁸¹ (on appeal)²⁸² presented the European Court of Human Rights, with a challenge based on indirect discrimination, in violation of Art. 14 of the European Convention read in conjunction with Art. 2 of the Protocol No. 1 to the Convention. The applicants contended that Roma children were disproportionately targeted for placement in special schools for the mentally disabled. Even though the selection procedure was lawfully entrenched in terms of a law of general application, and objectively administered in terms of psychological tests, it effectively targeted Roma children consequently removing them from the mainstream educational sector and confining them to schools that provided an inferior quality of education and stagnated their academic and social development. In deciding the matter, the Court first demarcated the framework for its analysis with reference to previous decisions in which it was called upon to decide whether governmental policy constituted indirect discrimination. Attention was drawn to the case of *Nachova v*

²⁸¹ *D.H. and Others v. Czech Republic*, 57325/00, Council of Europe: European Court of Human Rights, 7 February 2006. Available at: <http://www.unhcr.org/refworld/docid/469e020e2.html>, accessed on 05/03/2010, at 16:56 p.m.

²⁸² The Constitutional Court of the Czech Republic denied the applicants' petition on the basis that they failed to exhaust the internal remedial procedures provided for within the school system and further, that it lacked jurisdiction because the law in question has not unconstitutionally been enacted or administered. Thereafter, they petitioned the European Court of Human Rights. It ruled in favor of the government, finding that there was no violation and similarly dismissed the claim.

Bulgaria,²⁸³ which concerned the death of a Roma male at the instance of a police official. Before firing the automatic rifle at the deceased, the offender called him a “damn Gypsy”. The principle to be extracted from this decision is that proof of intent is not a prerequisite for establishing discriminatory conduct. The government was found to have failed in its duty to investigate the matter from a racially motivated vantage point. Secondly, the Court referred to the case of *Hoogendijk v Netherlands*,²⁸⁴ in which the applicant challenged the amended social insurance law, which no longer provided females with a disability grant, but such a limitation was not adopted with respect to men. This case was significant in deciding the probative value of statistical evidence when an assertion of indiscriminate had been made. According to the Court, statistical evidence, though important, was not determinative for a claim based on indirect discrimination. Its weight was limited to potentially shifting the burden onto the state, thus, requiring it to prove the legitimacy of the questionable law or conduct. Thirdly, the Court cited the case of *Adami v Malta*, in which a male citizen raised a claim of unfair discrimination based on the fact that he was selected four times to fulfil his civic juror duty. On three occasions he heeded the call, but declined to do so the fourth time. As a result, he was fined, but failed to pay, which resulted in him being summonsed. He argued that the regulations favoured women in only targeting men. The Court confirmed its role as the upper guardian

²⁸³ *Nachova and Others v. Bulgaria*, 43577/98 and 43579/98, Council of Europe: European Court of Human Rights, 26 February 2004. Available at: <http://www.unhcr.org/refworld/docid/414d89254.html>, accessed on 04/06/2010, at 17:25 p.m.

²⁸⁴ *Hoogendijk v Netherlands*, 57325/100, European Court of Human Rights. Available at http://www.google.com/search?hl=en&q=Hoogendijk+v+Netherlands+citation&aq=f&aql=&aql=&oq=&gs_rfai=, accessed on 04/15/2010, at 5:00 a.m.

of human rights protection and reasserted its authority in determining a member state's margin of appreciation, with reference to "the changing conditions in Contracting States" and in response to "any emerging consensus as to the standards to be achieved." The Court without explanation shifted the burden of proof to the state. In summation, the Court rejected the government's contention that it amounted to an "explanation of the mechanisms which had led to the difference in treatment complained of", and, therefore, upheld it as a violation of Art. 14 of the Convention.

Applying these principles, the Court found that within the framework of discrimination, this state of affairs constituted indirect discrimination. Unfortunately, and in my opinion, the Court erred in not requiring the abolition of the law in question, by upholding it as sound. Therefore, even though the applicants' claim was monetarily vindicated, albeit at a much lesser amount than advocated for, the Court disappointingly failed to actually assert its authority, despite previously alluding to its power to vigilantly guard human rights. Critiques have indicated that the Court, despite a request by the Committee of Ministers, failed to adequately define the manner of oversight desired with respect to the implementation of its judgment.

The Inter-American system, provides additional guidance for interpreting the principle of non-discrimination as it pertains to access to education. It has been confronted with a number of cases, but has not directly ruled on the right to

education. Instead, it has expressed itself in this regard, as an ancillary inquiry, stemming from claims based on the right to life, personal integrity and the rights of the child. These rights have acquired an expansive interpretation in order to illustrate their relation to the right to education. Albeit an indirect assessment, the Inter-American Court still projects the impression that it is willing to acknowledge and hold the state accountable to its positive obligations as far as providing education to its citizenry is concerned. The Court has further been able to give effect to the right to education through its remedial creativity. In the case of *Girls Yean and Bosico v Dominican Republic*,²⁸⁵ the applicants were resident in the Dominican Republic, but were of Haitian decent. They sought a late declaration of birth in respect of their children, but were denied, due to their failure to produce certain documentation, which the Central Electoral Board, claimed to be indispensable. For more than four years, the children's birth certificates were withheld, despite the fact that the applicants complied with the registry requirements, established for children below the age of 13. The Applicants were required to produce a considerable number of formal documentation, among others, certification from the hospital in which the child was born; the parents' marriage certificate if they were married or death certificate if they are deceased; letter from the parish certifying that the child was baptized, identification documents of both parents; and a sworn statement from three witnesses that were above the age of 50 at the relevant time. The applicants were still denied the requested birth certificates despite complying with these requirements.

²⁸⁵ Inter-American Court, judgment Sep.8, 2005.

The Court found the cumbersome requirements to be unconstitutional in light of national law because they imposed not only an additional, but severely onerous burden upon the parents of these children, even though the Constitution of the Dominican Republic entrenched the *ius soli* doctrine for purposes of acquiring the state's nationality. In light of the constitutional requirement, these children were in full compliance because they were born on Dominican territory. This inconsistency suggests that the additional and highly formalized legal impediments were introduced purely to alienate, marginalize and disenfranchise this vulnerable group of persons whom were confined to a life of abject poverty and social and economic exclusion.

The Court further held that the State without just cause applied a different criterion to these children than that prescribed under its constitution. Consequently, the state violated the best interests of the child principle by subjecting them to discriminatory treatment, which not only rendered them stateless, but “placed them in a situation of extreme vulnerability, as regards the exercise and enjoyment of their rights.” The conduct of the state was sufficient to constitute discrimination based on the origin of the girls in question, and that their vulnerability was exacerbated. The denial of late registration stagnated their development and integration within the broader society. The State was ordered to comply with its obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage, which arises from the special

protection that must be provided to children. The Court further ordered the state to pay compensation in addition to other forms of reparations (satisfaction and guarantees of non-repetition) to the victims, whilst the judgment was held to constitute sufficient reparation for the suffering inflicted upon their next of kin.

The Court did not really undertake an in-depth analysis of the indirect discrimination, other than stating that it is prohibited by international law and when evaluating the effect that the law had on these children, the Court did not focus on the discriminatory effect as much as it did on the adverse consequences of statelessness. Even though, I would have preferred a more in-depth analysis of the right to education, the case is still of great jurisprudential value because it enhances our understanding of indirect discrimination, indicating yet again, that the law on its face, appeared fair because the same registration formalities applied to Dominicans and Haitians, alike. However, the evidence before the Inter-American Court, to the contrary, suggested that bureaucratic institutions, in fact, administered the law unfairly. Thus, it was not the law *per se*, but rather the application thereof that violated the right to education. The judgment further reiterates the state's positive obligation in providing equal access to education, and moreover, acknowledges the linkage between education and all other human rights.

2.4.2 Indirect Discrimination based on Socio-Economic Status

The UNESCO Convention against Discrimination expressly prohibits discrimination on the basis of one's socio-economic status. At the domestic level, socio-economic status does not feature among the list of grounds upon which the South African Constitution prohibits discrimination. However, the Equality Act,²⁸⁶ which was promulgated in order to give effect to the equality provision of the Constitution, does. Under the Act, socio-economic status is defined as “[including] a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or low-level education qualifications. According to the Vienna Declaration²⁸⁷, the exclusion of people with a low socio-economic status from social services is an infringement of their inherent dignity.²⁸⁸ Thus, a person's dignity is impaired where there is an inability to access social services.

The relationship between socio-economic status and discrimination can be traced back to James Coleman's 1966 report.²⁸⁹ He was then mandated to investigate the reasons why the American system was so consumed with disparity. The much anticipated race factor and unequal spending was surprisingly not the prime cause thereof. Instead, his findings revealed that there was an even more endemic factor at play, namely, the socio-economic status of parents, which in turn, determined

²⁸⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁸⁷ Vienna Declaration and Programme of Action, Adopted 25 June 1993 by the World Conference on Human Rights (“the Vienna Declaration”).

²⁸⁸ Section 25 of the Vienna Declaration.

²⁸⁹ See generally R.D. Khahlenberg, “*Learning from James Coleman*”, Public Interest, Summer, 2001.

that type of school to which they would send their children. According to a study by Taylor and Yu, this too is the case in South Africa.²⁹⁰ The authors were intent on finding the reason why South African learners constantly perform “among the worst in the world” in numeracy and literacy assessments,²⁹¹ as well as reading competency.²⁹² The study further revealed that inequality in income is directly linked with unequal educational opportunities. The report furthermore, indicated that children at the former white schools performed much better than children at previously disadvantaged, black schools.

The impact of these factors cannot be assessed in the absence of an understanding of the farm-school children’s degree of vulnerability, which in turn determines the extent of the harm which they suffer. In the case of *Khosa v the Minister of Social Services*,²⁹³ the Constitutional Court was faced with a similar situation where the deprivation of social services infringed the right to dignity, whilst contemporaneously constituting a violation of the right to equality. The applicants were exiled from Mozambique and had acquired permanent residency in South Africa. They challenged the constitutionality of the Social Services Act which excluded them from the government’s welfare system, despite the fact that they, like citizens, contributed to its sustenance. Their claim was rooted in section 27(1)(c) that guarantees everyone’s “right to have access to social security,

²⁹⁰ , Stephan Taylor and Derek Yu, *The Importance of Socio-Economic Status in determining Educational Achievement in South Africa*, *supra* note 235.

See also Trends in International Math and Science Survey, 2003, http://www.news24.com/News24/South Africa/News/0,,2-7-1442_2357890.00.html, accessed on 10/07/2009.

²⁹² See the Progress in International Reading Literacy Study, 2006.

²⁹³ *Khosa v the Minister of Safety and Security* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

including, if they are unable to support themselves and their dependents, appropriate social assistance.” The government argued that this was financially burdensome and that it encouraged immigration to the country. The Court accepted these considerations as legitimate governmental purposes and therefore its policy was rational. However, the test was one of reasonableness, and not merely rationality. In evaluating whether their exclusion was reasonable, Mokgoro J reflected on the impact of this policy on these people. She noted that they were a vulnerable group within society and that their vulnerability was exacerbated, because in the absence of the social security, they were dependent on friends, family and the community for survival. This dependency gravely impaired their dignity and denied them the opportunity to equally enjoy their constitutional rights; therefore, it resulted in unfair discrimination. Further, it created the impression that they were inferior to citizens and not entitled to the same benefits. Even though she acknowledged that the Constitution endorsed the notion of substantive equality which by necessity implies differentiation. The differential treatment in this instance was not merited, in terms of the section 36 limitation analysis, because their exclusion, but for lack of citizenship, was unreasonable. Consequently, she held that the severity of the harm they suffered far outweighed the government’s concerns.

These findings support our thesis that the current education laws and policies in South Africa, designed for the provision of rural education, despite their neutral appearance, still have a disproportionate impact on farm-school children. It

places them in an excessive state of vulnerability, thereby exploiting their minority status, whilst simultaneously perpetuating their historic deprivation, and, social exclusion from the broader society. It further highlights the unfair manner in which these laws are being administered, thereby reinforcing and perpetuating their exploitation and marginalization. The South African government, by allowing the status quo to continue, is also in violation of its international law obligations because it is failing to provide quality education to eighty percent of its children who “find themselves trapped” in township and rural schools which have been described as “sinkholes, where children are warehoused rather than educated.”²⁹⁴ Without acquiring the necessary numeracy and literacy skills, these learners are confined to a life of unemployment or securing “only the most menial jobs.”²⁹⁵ Hence, the South African government is failing to ensure that education is available and accessible, in fact, education seems nothing more than lip-service, as opposed to a concrete right as far as these farm school children are concerned. The best interests of these children do not seem to be of paramount importance, neither are their rights to life, development and survival being given the attention that it deserves. Instead, the current system is stagnating their development and confining them to the state of poverty which they were born into. Beiter suggests that such disadvantaged groups though not directly discriminated against in terms of the law, in fact, lack the same socio-economic platform enjoyed by the rest of society. This backlog is in need of legislative and administrative reform;

²⁹⁴ Available at <http://64.233.183.104/search?q=cache:JLU89HY8pncJ:www.dbsa.org/Research/Documents/Building%2520Education%2520Beyond%2520Crisis.doc+building+education+beyond+crisis&hl=en&ct=clnk&cd=1&gl=za9>, accessed 01/05/2010, at 19:40 p.m.

²⁹⁵ *Id.*

therefore, the law must innovatively address these underlying deficiencies in order to ensure that all citizens have an equal opportunity to enjoy their rights. These children are not merely in need of being treated similar to children at other schools. Instead, they are entitled to special attention if they are ever to stand a reasonable chance of catching up. In my opinion, the democratic government's aims to "redress past injustices in educational provision"²⁹⁶ are ironically perpetuating the inequality in the current education system. As the system stands, it reproduces, rather than transforms and uproots the deeply entrenched patterns of inequality within society.

The fundamental human dignity of farm children are severely being impaired because the current state of affairs suggests a lack of political will to address their needs, thus, implying that they, in comparison to other children are less entitled to government concern. Furthermore, that they are not intellectual component to take up leadership positions within the country, therefore, they deserve the inferior standard of education that they are currently receiving. They have already entered the new democratic era as an oppressed populace. The current state of affairs diminishes the hope and value of education as a vehicle for transformation. Unless the government truly digs into the rural dusty earth, it will not be able to discover and extract its invaluable worth.

²⁹⁶ See Preamble to the SASA.

CHAPTER THREE: IMPLEMENTING THE RIGHT TO EDUCATION IN ACCORDANCE WITH SOUTH AFRICA'S SOCIO-ECONOMIC JURISPRUDENCE

This Chapter analyses how the South African Constitutional Court, through its socio-economic jurisprudence, has mobilized reformation within the country. It provides an overview of the evolution of the South African jurisprudence with respect to the nature of socio-economic rights and the scope of the state's corresponding obligations. The analysis will be conducted with reference to the three most important cases in which the Constitutional Court has teased out some of the adjudicative complexities inherent in socio-economic rights litigation. These cases are *Grootboom*,²⁹⁷ *Soobramoney*²⁹⁸ and *TAC*²⁹⁹. The contours of socio-economic rights have further been explored in other cases, but the above-mentioned, have been pivotal in structuring the interpretative framework for the adjudication of these rights. I will then evaluate the right to education in terms of the principles enunciated within those cases. I further allude to US case law on the right to education to shed more light on the right.

²⁹⁷ *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

²⁹⁸ *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

²⁹⁹ *Minister of Health and Others v Treatment Action Campaign* [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (CC).

3.1 *The Role of the Constitutional Court in Promoting Transition*

Constitutional courts, in general, assume a heightened responsibility within a transitional society. They constitute an objective and independent arbiter between the tyrants, on the one hand, and the revolutionist, on the other.³⁰⁰ In order to redress the past injustices, and to prevent their repetition, these courts assume a two-fold duty: (1) to hold the previous regime accountable for past abuses and (2) to re-establish the supremacy of the rule of law above the power wielded by the revolutionists. Hence, it has a unique role to play in facilitating a genuine break from the past and asserting a true commitment to a just future. These transitional demands cannot be addressed in terms of judicial passivism, but rather require a more robust approach.³⁰¹ I am in favour of this degree of constitutional oversight because democratic order essentially requires the co-operation of all branches of the state. These branches are expected to be responsible to the people and therefore accountable, if they fail to maintain transparent relations. I find it hard to conceive how these elements of democratic order could be established in the absence of judicial intervention.

The South African Constitutional Court is a creature of the Constitution and therefore it is subject to the Constitution's transformative mandate.³⁰² The socio-economic jurisprudence of the Court suggests that it is alive to its crucial role in providing transformative momentum. Perception and actualization are

³⁰⁰ Ruti G. Teitel, *Transitional Justice: The Role of Law in Political Transformation*, *supra* note 9, at 13.

³⁰¹ *Id.*, at 11.

³⁰² *Id.*

conceptually entirely different. Therefore, an overview of South Africa's jurisprudence with respect to socio-economic rights and non-discrimination is apposite at this juncture. These principles shall be accentuated with international jurisprudence to the extent that they present lacunas.

3.2 *The Vindication of Socio-Economic Rights as a Means to a Transitional End*

As previously indicated, the right to education is a fusion of civil, socio-economic and cultural rights.³⁰³ Be this as it may, the international and national legal spheres, respectively, treat equitable access to education as a socio-economic right, and it is within this framework that I conduct my analysis thereof. The universal, and no doubt, principal fear with socio-economic rights lies in their justiciability, which concerns a court's legitimacy and capacity to enforce these rights against the state.³⁰⁴ The primary concern relates to a court's ability to influence the manner in which a state allocates its resources, thus, potentially undermining the separation of powers doctrine.³⁰⁵ This objection rests on the long-articulated concern that the judiciary is an undemocratic institution and, therefore, not accountable to the people, who remedy their grievances through the electoral process.³⁰⁶ Furthermore, the judiciary lacks the requisite institutional competence and expertise to dictate and craft governmental policy.³⁰⁷

³⁰³ Klaus Dieter Beiter, *History and Nature of the Right to Education*, *supra* note 206.

³⁰⁴ *Id.*, at 79.

³⁰⁵ *Id.*, at 81. See also Sandra Liebenberg, "Needs, Rights and Transformation: Adjudicating Social Rights, 17 Stellenbosch Law Review 5, (2006), at 13-4, where she refers to the discussion by Davis 1992 *SAJHR* 475-79 of the views of Nozick developed in *Anarchy, State & Utopia* (1974). See generally Frank B Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857 (2001).

³⁰⁶ *Supra* note 11, at 14. Liebenberg referring to Davis 489. Lenta 2004 *SAJHR* 29, who contends that

These arguments were raised during South Africa's negotiated peace process, and challenged before the Constitutional Court in the *First Certification* judgment.³⁰⁸ The Court conceded that the implementation of socio-economic rights invariably affect the distribution of state resources. However, this probability, according to the Court, does not automatically render these rights null and void because the implementation of civil and political rights, not only conceivably, but, in fact, poses the same risks.³⁰⁹ The Court further held that socio-economic rights, do not only contain a positive element, but at the very minimum, impose a negative burden upon the state to prevent unjust interference in the exercise thereof. On this basis, their justiciability was upheld.³¹⁰ This progressive finding did not

The fact that constitutional courts are regarded as the forum for deciding fundamental questions facing the political community in the areas of employment, education, housing, freedom of association among others, decreases the number of decisions left for the political arena and contributes to the erosion of politics.

³⁰⁷ *Id.* See also Frank I Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13 (2003), and further Thomas C Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 900, (1976).

³⁰⁸ *Ex parte Certification of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification judgment) 1996 (4) SA 744 (CC).*

³⁰⁹ For example if the Court were to order the state to provide legal representation to an accused person.

³¹⁰ *Supra* note 308, at ¶ 77-8, in which the Court stated that:

It is true that the inclusion of socio-economic rights may result in courts making order which have direct implications for the budgetary matters. However, even of when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provisions of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers. Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the New Constitution will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion. In the light of these considerations, it is our view that the

miraculously vitiates the political discontent and the Court was yet to strike an equitable balance between its power to review on the one hand, and the problem of separation of powers and polycentricism, on the other.

The Constitutional Court's first challenge in securing a jurisprudential foundation for the implementation of socio-economic rights arose in the case of *Grootboom*, in which the right to have access to adequate housing had been implicated.³¹¹ The Court was called upon to determine the legality of an eviction order against thousands of homeless persons, half of whom were children, from vacant, privately-owned land that had been earmarked for low-cost housing development. Before the Court was seized with the matter, the municipality had already given effect to a favorable eviction order, granted by a lower court. Thus, bulldozing the applicants' homes and intentionally destroying their possessions. During the course of adjudication, the Court made two significant preliminary points. First,

inclusion of socio-economic rights in the New Constitution does not result in a breach of the . . . [Constitutional Principals].

Subsequently, in *Grootboom*, the Court was even more assertive, noting that the justiciability of socio-economic rights, had been "*put beyond question by the text of the Constitution*" (*Grootboom*, at ¶ 20.) The Court's view accords with view expressed in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. Article 8 thereof states that "[a]lthough the full realization of the rights recognized in the [ICESCR] is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time". See also ¶ 5 of CESCR, General Comment No. 3 which states that some rights of the ICESCR "would seem to be capable of immediate application by judicial and other organs in many national systems". These rights include: the enjoyment of the Covenant rights without discrimination, the equal right of men and women to the enjoyment of ESCR (Art. 3); equal remuneration for work of equal value (Art. 7(a)(i)); the right to form and join trade unions and the right to strike (Art. 8), special measures of protection on behalf of children (Art. 10(3)); compulsory and free primary education (Art. 13(1)(a)), the liberty of parents to choose for their children non-public schools and to ensure the religious and moral education of their children in conformity with their own convictions (Art. 13(3)); the liberty of individuals and bodies to establish and direct educational institutions (Art. 13(4)); and the freedom indispensable for scientific research and creative activity (Art. 15(3)).

³¹¹ *Grootboom*, *supra* note 297.

it carved the general constitutional framework for the interpretation of socio-economic rights. Yacoob J, adopted the term “contextual” approach, which as he notes: (a) involves a textual analysis in the light of a holistic consideration of the Bill of Rights; and (b) requires a social and historical evaluation, of the denial of the right in question.³¹² Secondly, the Court rejected the elevated status attributed to civil and political rights in comparison to socio-economic rights. In denouncing this illusive dichotomy and, upholding the interdependence of the Bill of Rights, the Court opined as follows:

[The 1996] Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realization of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.³¹³

At this juncture, an overview of the right to have access to adequate housing is apposite.³¹⁴ Section 26(1) of the Constitution guarantees everyone access to adequate housing. The state, under section 26(2) is, obligated to progressively realize this right through reasonable legislative and other measures, subject to its financial capacity. Furthermore, section 26(3) outlaws arbitrary eviction. As far

³¹² *Id.*, at ¶ 22.

³¹³ *Id.*, at ¶ 23.

³¹⁴ Section 26 of the Constitution provides that:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may arbitrarily be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

as the state's obligation in terms of section 26(1) is concerned, the Court had no real difficulty finding a violation. According to the Court, the state, more particularly, the municipality's destructive behavior, constituted an improper invasion of the applicants' existing right to have access to adequate housing. Therefore, the state effectively violated its negative obligation to respect the right in question.³¹⁵ Section 26(2) is composed of three elements, namely (a) the adoption of "reasonable legislative and other measures"; (b) "to achieve the progressive realization" of the right; and (c) "within [the state's] available resources". The Court considered each of these qualifications in turn.³¹⁶

3.2.1 "Reasonable legislative and other measures"

In considering the extent to which the state complied with its positive obligations contained in section 26(2), the Court opted for a "reasonableness" standard of review, based upon an evaluation of the state's housing policy.³¹⁷ According to the Court, this inquest involves an assessment of the extent to which the denial of the right in question impairs the inherent dignity of the affected persons, therefore

Reasonableness must be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavor to realize".³¹⁸

³¹⁵ Section 7(2) of the Constitution, in part, provides that "[t]he state must respect, protect, promote and fulfill the rights in the Bill of Rights."

³¹⁶ *Grootboom*, *supra* note 297, at ¶38.

³¹⁷ *Grootboom*, *supra* note 297, at ¶41.

³¹⁸ *Id.*, at ¶ 44.

Furthermore, the Court highlighted that a myriad of options are at the state's disposal and it, as an adjudicative body, is not at liberty to pass judgment on whether the state adopted the correct measures. Instead, its inquisition is limited to whether that which the state implements is, reasonably capable of achieving the overall objective of the right to have access to adequate housing.³¹⁹ Moreover, the measures are to be reasonable on both a conceptual and implemental echelon.³²⁰ In this regard the Court observed the need for an inclusive housing policy, capable of addressing short, medium and long-term needs. Moreover, stating that the interests and rights of the most vulnerable are of primary concern, and should not be ignored.³²¹ Such an omission would render the policy unreasonable and unconstitutional because even "*though statistically successful, [it] fail[s] to respond to the needs of the most desperate*". Hence, well-designed

³¹⁹ *Id.* In support of this approach, Etienne Mureinik asserts that

A court would never be entitled to interfere with a government's honest and rational programme. . . simply because it disapproved of the underlying political or economic theory. A court would be bound to respect all the government's choices, whether inspired by marxism or monetarism; whether social democratic or liberal. But the court would be entitled to ask the government how it envisaged [to achieve the aim]. That in itself would improve the quality of the government, because any decision[-]maker who is aware in advance of risk of being required to justify a decision will always consider it more closely than if there were no risk. A decision[-]maker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully to discard all the alternatives, to the decision contemplated. And if in court the government could not offer a plausible justification for the programme that it had chosen—if it could not show a sincere and rational effort . . . —then the programme would have to be struck down." (*supra* note 206, at 82, where Beiter quotes Etienne Mureinik, 1992, at 471-72.

³²⁰ *Id.*, at ¶ 42.

³²¹ *Grootboom and TAC*, *supra* notes 297 and 299, at ¶ 36 and 70, respectively, stating that: "There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of those differences."

measures incapable of reasonable implementation, renders the state in non-compliance with its constitutional imperatives.³²²

3.2.2 “To achieve progressive realization”

This condition further diminishes the scope of socio-economic rights, with respect to the positive obligations which they impose upon the state.³²³ In *Grootboom*,

Yacoob J described progressive realization in the following terms

It means that accessibility should be progressively facilitated: legal, administrative operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be more accessible not only to a larger number of people but to a wider range of people as time progresses.³²⁴

However, as noted in *Grootboom*, this limitation does not absolve the state from the obligation to take immediate steps aimed at the full realization of the right over a period of time.³²⁵ Retrogressive measures are further prohibited, and, any

³²² *Id.*, at ¶ 44. In order to be reasonable, a government program must display the following characteristics:

- The program must be comprehensive and coordinated with a clear delineation of responsibility amongst the various spheres of government, with national government having overarching responsibility;
- The program must be reasonable both in conception and implementation;
- The program must be balanced and flexible and make appropriate provision for crises and for short, medium and long-term needs;
- The program cannot exclude a significant segment of society;
- The program must include a component which responds to the urgent needs of those in most desperate situations and the state must plan, budget and monitor measures to address immediate needs and the management of crises.

³²³ *Soobramoney*, *supra* note 298, in which the meaning of this qualification was interpreted as follows:

What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would presently be capable of being fulfilled. (at ¶ 11.)

³²⁴ *Grootboom*, *supra* note 297, at ¶ 45.

³²⁵ *Id.*

lackadaisical conduct would have to be fully justified by the state, because it bears the burden of proving progressivity.³²⁶ The Court thus adopted the CESCR's interpretation, as per General Comment No. 3, stating that:

Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties for any country in ensuring the full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for State's parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberate retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.³²⁷

3.2.3 “Within [the state's] available resources”

This requirement further constrains the enforceability of socio-economic rights and, illustrates an attempt to horizontally and vertically balance the interests of an individual(s) vis-à-vis persons similarly situated with that of the state. A case in point is that of *Soobramoney*,³²⁸ in which the Constitutional Court stated that

What is apparent from these provisions is that the obligations imposed on the state by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent on the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.

³²⁶ CESCR, General Comment No. 3, cited in *Grootboom*, *supra* note 297, at ¶ 45. See also the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) at ¶ 8.

³²⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 3 (1990): “*Nature of the States Parties obligations*” UN Doc HRI/Gen1/Rev 1 at 45 (1994) at ¶ 9.

³²⁸ *Soobramoney*, *supra* note 298.

Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.³²⁹

In *casu*, the applicant was a chronically-ill patient suffering from renal failure, and therefore, in need of sustained dialysis treatment. He approached a hospital in the province of Kwazulu-Natal, but his request was refused. Noticeably, this refusal was by no means arbitrary. To the contrary, it was in sync with the provincial health department's decision to restrict such treatment to non-chronic renal patients, due to its budgetary, personnel and infrastructure constraints. In response, and based on an alleged violation of his right to access to adequate health care, provided for in terms of section 27 of the Constitution, he petitioned the Court.

In deciding the matter, the Court considered all the relevant factors, including: the exorbitant amount of R60 000 per annum that the state would have spent on the applicant, let alone thousands of other individuals that would be eligible for the same treatment; the need to employ additional staff would have increased the costs of labor; and not to mention the ancillary maintenance costs that the state would have incurred, in order to guarantee the operational status of the dialysis machinery.

In weighing these factors, the Court rejected the applicant's argument, accepting the fact that such costs would severely drain the health budget to the detriment of other social demands, which the state was equally obligated to discharge. In the

³²⁹ *Id.*, at ¶ 74.

absence of evidence to the contrary, the health department's policy was thus, found to be reasonable. The Court reiterated its position in support of deference by stating that:

The provincial administration which is responsible for health services in Kwazulu-Natal has to make the decision about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A Court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters. (Footnotes omitted).

Although a scarcity of resources might justify the state's long-term programmatic approach, its scope has narrowly been construed. Hence, it does not permit inaction on the part of the state; instead, it requires the state to dedicate the greatest portion of its resources, with a view to systematically enhance the full realization of socio-economic rights. Therefore, as a general rule, resource constraints do not absolve the state from fulfilling the "minimum core" content of a given right. As Liebenberg notes, "[a] failure to ensure . . . basic social provisioning should only be justifiable when resources are demonstrably inadequate, or other compelling justifications exist. The latter, may include, for example, competing urgent priorities which are justifiable in an open and democratic society based on human dignity, equality and freedom."³³⁰ This approach has been adopted by the CESC³³¹ as well as the Constitutional Court,

³³⁰ Sandra Liebenberg "Socio-economic rights: revisiting the reasonableness review/minimum core debate" in S Woolman and M Bishop (eds.) *Constitutional Conversations* (2008), 326.

³³¹ CESC, General Comment No. 13.

despite the latter's failure to delimit such a core, with respect to all socio-economic rights.³³²

In applying the above principles, the Court acknowledged that the housing policy in *Grootboom* was designed in a manner which would alleviate the housing crisis in due time. Notwithstanding, the Court declared the policy unreasonable and in conflict with the Constitution to the extent that the state “*failed to make reasonable provision within its available resources for people . . . with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.*” After determining the nature of the state's obligation, the Court in the form of a declaratory order, deferred it to the state to decide how best in practice it would remedy its failure.

The Court subsequently invoked its reasonableness standard of review in the *Treatment Action Campaign (TAC)* case, in which the government's policy to limit the administration of an antiretroviral drug (nevirapine), which significantly reduces HIV transmission from mother-to-child, to only nine pilots sites throughout the country, was challenged. The claim was framed as a section 27 violation of the right to have access to adequate health care.³³³ The government

³³² See *Grootboom* and *TAC*, *supra* notes 297, 299, in general.

³³³ Section 27 of the Constitution provides that:

- “(1) Everyone has the right to have access to—
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

disputed the drug's efficacy, safety and its institutional capacity, as far as country-wide distribution was concerned. The Court rejected each of these arguments in the light of scientific evidence, corroborating the safety of the drug. Lastly, the government's alleged institutional incapacity was declared irrelevant in deciding whether the antiretroviral drugs were to be administered at public hospitals not specifically designated within the state's policy. In confirming the unreasonableness of the state's failure to provide a "simple, cheap and potentially lifesaving medical intervention",³³⁴ the Court held that:

The fact that the research and training sites will provide crucial data on which a comprehensive program for mother-to-child transmission can be developed and, if financially feasible, implemented is clearly of importance to government and to the country. So too is ongoing research into safety, efficacy and resistance. This does not mean, however, that until the best program has been formulated and the necessary funds and infrastructure provided for the implementation of that program, nevirapine must be withheld from mothers and children who do not have access to the research and training sites. Nor can it reasonably be withheld until medical research has been completed. A program for the realization of socio-economic rights must:

[b]e balanced and flexible and make appropriate provision for attention to . . . crises and to short, medium and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable.³³⁵

Unlike the *Grootboom* decision, the Court granted a more robust remedy obligating the state to extend the administration of the antiretroviral drugs and counseling to clinics and hospitals throughout the public health sector.³³⁶

(3) No one may be refused emergency medical treatment.

³³⁴ *TAC*, *supra* note 277, at ¶ 125, in which the Court states that:

"We have held that its policy fails to meet constitutional standards because it excludes those who could reasonably be included where such treatment is medically indicated to combat mother-to-child transmission of HIV."

³³⁵ See *TAC*, *supra* note 299, at ¶ 68, quoting *Grootboom*, at ¶ 43.

³³⁶ *TAC*, at ¶ 135. The effect of this judgment in comparison to *Grootboom*, has yielded positive results because the government, despite initial reluctance, eventually complied by facilitating nationwide access to antiretroviral drugs. See Mia Stewart, *Left Out in the Cold*, 21 S. AFR. J.

Attention should further be drawn to the Court's emphasis that, notwithstanding its finding, socio-economic rights do not *per se* entitle an individual to actionably demand his portion of resources and services.³³⁷

In *Khosa*,³³⁸ the Constitutional Court provided more insight with respect to the standard of reasonableness which it employs. It not only reiterated the indivisibility of the rights contained in the Bill of Rights, but signified that the interconnectedness of rights was a fundamental factor weighed into its reasonableness review.³³⁹ In terms of the social security policy, only citizens, as opposed to permanent residents were entitled to benefit, despite the latter's contribution to the welfare system.³⁴⁰ The Court declared the policy unreasonable, discriminatory and in violation of section 27 of the Constitution, because it effectively excluded and fostered the perpetual stigmatization of this

HUM. RTS. 224 (xxxx); Heinz Klug, *Five Years On: How Relevant Is The Constitution To The New South Africa?*, 26 VERMONT L. REV. 803, 808 (2002); Mark Heywood, *Preventing Mother to Child HIV Transmission in South Africa*, 19 S. AFR. J. HUM. RTS. 278, 308, (2003) and David Bilchitz, *Poverty and Fundamental Rights* 163 (2007).

³³⁷ *Grootboom*, *supra* note 275, at ¶ 95, where the Court notes that:

Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand.

See also *TAC* case, at ¶ 34, which emphasizes that—

[T]he socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them.

³³⁸ *Khosa v Minister of Social Development*, *supra* note 293.

³³⁹ *Id.*, at ¶ 44:

When the right to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social-security scheme put in place by the state to meet its obligations under section 27 of the Constitution raise the question of the prohibition of unfair discrimination.

³⁴⁰ The relevant legislation was the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997.

vulnerable group of persons. The case precisely illustrates Liebenberg's theory regarding the intersection between social and equality rights.

Despite the Court's meticulous evaluation and pedagogical reasoning, its reasonableness review of socio-economic rights, paradoxical as it may seem, in fact, incorporates an element of unreasonableness, because the Court does not define, in precise terms what it means. Instead, it rejects a blanket approach in favor of a context-sensitive approach premised on a case-by-case analysis.³⁴¹ The Court has, however, stated that its reasonableness review constitutes a higher threshold in comparison to its rationality review under section 9(1) of the Constitution. One can therefore, reasonably infer that the Court has adopted a cautious approach in determining governmental compliance with respect to the implementation of socio-economic rights.³⁴² This is evidenced by its "reasonableness" standard of review and the substantial margin of appreciation, which the Constitution affords the state as regards the manner of implementation.³⁴³

4.3 Minimum Core versus Reasonableness Review for Positive Duties

The Court has clearly pronounced its stance in favour a "reasonableness review", but for the sake of academic debate, it is worth reflecting on the alternative

³⁴¹ *Id.*, at ¶ 92.

³⁴² Pieterse M, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" 20 *SAHRJ* 383 (2004).

³⁴³ *Id.*

“minimum core” approach. The *amici* in both the *Grootboom* and *TAC* cases, called upon the Court to prescribe the minimum content for the rights to access to housing and health care, respectively, with the view to ascertaining the minimum obligations the state had to meet in order to discharge its corresponding positive duties. The Court, however, refused to interpret socio-economic rights in a manner that would “give rise to self-standing and independent positive rights enforceable irrespective of the considerations in the second subsections of sections 26 and 27”.³⁴⁴

The Court proffered three grounds as justification for its rejection: First, it emphasized the relation between class distinction and its implications with respect to the diverse spectrum of societal exigencies.³⁴⁵ Secondly, it opined that such an obligation would be onerous and virtually untenable because it is “impossible to give everyone access even to a core service immediately”.³⁴⁶ Finally, it held that the minimum core results in *ultra vires* adjudication, thus, exceeding its mandate and institutional competency.³⁴⁷ Even against this background, the Court still acknowledged the possibility that evidence in a particular case might overwhelmingly substantiate a divergence in favor of a minimum core evaluation of the state’s conduct. Hence, one could safely conclude that the minimum core

³⁴⁴ *TAC*, *supra* note 299, at ¶ 39.

³⁴⁵ *Grootboom*, *supra* note 297, at ¶ 32-3. With respect to the right to have access to adequate housing the, the stated that—

there are those that need land; others need both land and houses; yet others need financial assistance.

³⁴⁶ *TAC*, *supra* note 299, at ¶ 35.

³⁴⁷ *TAC*, *supra* note 299, at ¶ 37, where it held that—

courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards should be.

approach was not absolutely rejected, and, that to some degree the Court is acutely cognizant of the fact that certain aspects of a right possess an urgent dimension, in need of immediate state response.³⁴⁸

3.4. The State's Obligation to Provide an Adequate Education

As noted in *Grootboom*, the right to education should be understood within its historic, social and textual dimensions. The textual dimension of the right to education has been discussed in a previous section but there is a need to highlight its historic and social setting. In 1948 the Afrikaner Nationalist Government assumed power and continued to wield it for more than four decades. In *Brink v Kitshoff NO*,³⁴⁹ the Constitutional Court of South Africa, aptly captured the crux of apartheid, which

Systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as “white”, which constituted nearly 90% of the land mass of South Africa; senior jobs[;] access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society today.³⁵⁰

In affirming its commitment to white supremacy, the apartheid government left no stone unturned. As a result, the regime's diabolism venomously penetrated the legislative, administrative and judicial arms of the state. “Every structure of South Africa, the army, police services and the whole of the civil service were

³⁴⁸ See *Grootboom* and *TAC*, *supra* notes 297, 299, at ¶ 33 and ¶ 34, respectively.

³⁴⁹ *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).

³⁵⁰ *Id.*, at ¶ 40 (O'Regan J).

committed to the maintenance and defense of an evil system of abhorrent means”,³⁵¹ which included education. The government’s separatist *modus operandi* echoed in the corridors of bureaucratic institutions, and permeated through every letter of the “law”.

The educational sector was strategically utilized to invoke, spread and systematically sustain apartheid, as evidenced through the adoption of the *Christian National Education Policy*. Article 15 is particularly illustrative of the manner in which education was politically and religiously manipulated by the regime

We believe that the calling and task of White South Africa with regard to the native is to Christianize him and help on culturally, and that this calling and task has already found its nearer focusing in the principles of trusteeship, no equality and segregation. We believe besides that any system of teaching and education of natives must be based on the same principle. In accordance with these principles we believe that the teaching and education of the native must be grounded in the life and worldview of the Whites most especially those of the Boer nation as senior White trustee of the native “. (Footnotes omitted).

The educational sphere was clearly instrumental in perpetuating wide spread discrimination and marginalization, disenfranchising the majority, non-white population, for the sake of racial purity. This policy produced a segregated educational system, separately catering for whites and non-whites. Further the policy eventually became the foundation on which the “Bantu Education” was

³⁵¹ Boraine A., Levy J., and Scheffer R., *Dealing with the past: Truth and Reconciliation in South Africa*, Cape Town, South Africa, IDASA, (eds.) 1994, p vii.

established, which was premised on the *Verwoerdian* concept that “education must train and teach people in accordance with their opportunities in life.”³⁵²

One of the key features of apartheid education was the gross inequality in the funding of public schools.³⁵³ State resources were racially allocated, resulting in less money being spent on black, in comparison to white schools.³⁵⁴ Black schools, therefore, were plagued by a lack of basic infrastructure, overcrowded classrooms, unqualified teachers and insufficient learning material.³⁵⁵ In contrast, white schools constituted the primary recipient of state finances, which enabled them to provide a more superior standard of education. These elite schools, operated under a policy of indoctrination where especially boys were subjected to

³⁵² See Rights Project: The Law and Transformation Programme, Centre for Applied Legal Studies and the Education Policy Unit, Framework Document, 9 available from <http://www.erp.org.za> [accessed 19 July 2007]. During his term as Minister of Bantu Education, Hendrik Verwoerd (notoriously known as the architect of Apartheid) made the following statement

If the Native in South Africa today in any kind of school in existence is being taught to expect that he will live his adult life under the policy of equal rights, he is making a big mistake... There is no place for him in the European community above the level of certain forms of labour... [r]acial relations cannot improve if the wrong type of education is given to Natives. They cannot improve if the result of the Native education is the creation of frustrated people, who as the result of education they received, have expectations of life which circumstances in South Africa do not allow to be fulfilled immediately, when it creates people who are trained for professions not open to them, when there are people who have received a form of cultural training which strengthen their desire for white collar occupations to such an extent that there are more such people than openings available. Therefore, good racial relations cannot exist when the correct education is not given. Above all, good racial relations cannot exist when the education is given under the control of people who create wrong expectations on the part of the Native himself.

See, for example Veriava and Coomans, *supra* note 174, at 60. The Black Education Act 47 of 1953 is available from <http://www.sahistory.org.za/pages/chronology/special-chrono/governance/apartheid-legislation.html> [accessed 18 September 2008].

³⁵³ F Veriava and F Coomans, *The right to education*, *supra* note 174.

³⁵⁴ *Id.*

³⁵⁵ South African Human Rights Commission: *Report of the Public Hearing on the Right to Basic Education* (2006) at 2.

patriotic ideologies that emphasize their duty to protect their land from blacks and communists.³⁵⁶

The Court's jurisprudence as developed in the *Makwanyane*³⁵⁷ and *Khosa*³⁵⁸ judgments further elaborate both the contextual as well as the textual approach to the right to education. In *Makwanyane*³⁵⁹ the Court illustrated the fact that all the rights in the Bill of Rights are interdependent and many of them can be violated at the same time, therefore, any limitation, placed on one right would not only have to be justifiable in its singular capacity, but should also be justifiable in terms of the other rights which are implicated. The case concerned the constitutionality of the death penalty, which obviously implicates the right to life, but even though one may be able to conjure a justifiable limitation in respect of this right, this Court pointed out that that justification further has to satisfy the right to dignity. Human dignity lies at the heart of the Bill of Rights and the Court was not convinced that crime prevention outweighed its indispensable democratic value. The *Khosa*³⁶⁰ judgment similarly illustrates the relationship between the constitutionally entrenched rights. Even though the case primarily concerned access to social security, the Court noted the fact that such a denial was inextricably intertwined with one's right to dignity and equality, and therefore, a violation of the former resulted in a violation of the latter.

³⁵⁶ Kallaway P, *From Bantu Education to People's Education*, Cape Town: UCT, (1998). These schools were coined "veld schools", literally translated as "bush schools", and this indoctrination was guised under the banner of nature studies.

³⁵⁷ *Makwanyane*, *supra* note 163.

³⁵⁸ *Khosa*, *supra* note 293.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

The interdependence between rights is even more apparent in respect of the right to education as was noted by the United States Supreme Court (U.S) decision in *Brown v Board of Education of Topeka*,³⁶¹ which eloquently captures the inextricable relation between the right to education and other human rights. This decision is universally noted as a hallmark in firm denunciation of racial segregation within educational institutions, and further one which, reiterates the fact that everybody has an equal right to be educated. Moreover, the decision illustrates the fact that education can broadly and narrowly be construed.³⁶²

Education is understood as the vehicle for sustainable social development, thus, imposing upon the current generation a fiduciary duty to pass on the essential skills and knowledge, upon which human burgeoning wholly depends. Education further determines the contours within which people not only engage with one another, but also relate to the environment. Hence, the case suggests that education fosters an embracive consciousness, instilling fundamental values such as tolerance and respect for all living creatures. Education is further perceived as an indispensable tool through which an individual acquires professional and vocational training in pursuance of economic, political and cultural endeavors. The U.S. Supreme Court goes so far as to define education as a precondition for

³⁶¹ 347 U.S. 483 (1954).

³⁶² Another relevant source of interpretation is, Art. 1(a) of UNESCO's Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms, in terms whereof, education is defined as "the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge".

good citizenship, thus, making two significant points. First, it highlights the fact that the right to education symbolizes the unity and interdependence of all human rights.³⁶³ The principal of interdependence proposes a holistic approach to human rights, thereby connoting the fact that rights are mutually-reinforcing and not to be compartmentalized because they accrue to a single human entity. The well-being of that entity necessitates an aggregated and synchronized legal construction, recognizing that civil and political rights are meaningless in the absence of the bare necessities of life, such as: food, shelter, education, access to adequate health services and employment. Within this integrated rubric, the Court's decision effectively preserves the right to equality, as a civil right, by eliminating discriminatory practices, which contemporaneously promote the exercise of its correlative, socio-economic right, namely equal access to education.

Secondly, this linkage not only implies that the right to vote, but more importantly the concept of democracy, in its entirety, thrives upon a well-educated society. This view coincides with that adopted in *Pyle v Doe*,³⁶⁴ where the US Supreme Court held that although public education was not claimable as a matter of right “[w]e have recognized the public schools as a most vital civil institution for the

³⁶³ This position has since been endorsed by the CESCR, in General Comment No. 3, at para 1. General Comment 11 at ¶ 2, provides a more elaborative expression of the Committee's position as regards the interdependence of human rights

The right to education . . . has been variously described as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.

³⁶⁴ 457 U.S. 202 (1982).

preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests". Thus a sound level of education, whether provided in a wide or narrow sense, adequately moulds an individual into a responsible being, capable of critically analyzing the societal order, whilst simultaneously making a rich, well-informed and reasoned contribution to its proliferation. In a nutshell therefore, it empowers an individual with a sense of self-determination to harmoniously pursue a dignified existence in conjunction with other human beings.

3.5 Analysis and Recommendations

In light of the aforementioned, it is clear that South Africa has current jurisprudence of the Constitutional Court that may be used to evaluate the government's progress in providing education for children in farm and rural schools. This coupled with the importance of education in ensuring that children develop to the best of their ability, live a dignified existence and eventually lead their respective countries, is more than ample justification for the Court to adopt a more robust approach.

One may even go so far as to advocate for a higher standard of reasonableness to be applied in respect of the right to basic education, because this is an unqualified right. However, it is highly unlikely that the Court would adopt this approach. A similar argument was raised in *Grootboom*. As an alternative, the applicants argued that the state was under an immediate obligation to provide them with

housing by invoking their children's rights to shelter as provided for in section 28(2) of the Constitution. The Constitution does not subject a child's right to shelter to any limitations such as progressivity or available resources. But the Court reasoned that parents are primarily responsible for ensuring shelter for their children and the state's custodial obligation is only triggered in the event that a child is removed from parental care. Furthermore, that such an interpretation would create anomalous results, thus, granting parents that have children a directly enforceable right to housing, whilst depriving adults that do not have children of the same.³⁶⁵ This coupled with the fact that the Court is disinclined to adopt a "minimum core" approach to rights, suggests that it is likely to preserve the integrity of its current socio-economic jurisprudence. I submit that even within its restrictive approach, the Court is still able to find that the current state of education does not pass constitutional muster.

The *Grootboom*, *TAC* and *Soobramoney* cases indicate that the interests of the most needy are of primary concern and that the government's policies and law, cannot be regarded as sound, if they fail to pay due regard to the plight of the most vulnerable strands of our societal fabric. We have argued above that farm school children are a vulnerable group of persons that are not adequately provided for in the current policies and, even those that do purport to cater for their needs, are aspirational and lack short-term, realistic objectives. As far as progressivity is concerned, I would like to note the fact that the Department of Education has not made enough information publically available, therefore, it is difficult to judge.

³⁶⁵ *Grootboom*, *supra* note 297, at ¶ 79.

However, available evidence does suggest that the provision of education in rural areas is still in need of greater commitment and hard work. Progress has undoubtedly been stagnant. Despite the pool of information and the development of the National Framework for Developing Education in Rural Areas, the Department of Education's Annual Report for 2008/9, acknowledges that there are still challenges in providing basic services to rural schools.

All is not lost and the government's initiatives have yielded a few positive results. Rural communities and schools have been the subject of a number of projects for example the *Dreams Project*, which distributed 36 footballs across the nine provinces to promote sports in farm and rural schools. The report further indicates that 450 farm, rural and nodal schools have already been exempted in terms of the "no-fee" policy and their evaluation is to take place between 2009/10 thus, amounting to an eighty-percent implementation rate. Furthermore, 15 503 schools have been recipients of infrastructural development.³⁶⁶ The report also draws attention to the fact that the government is actively engaging in data compilation with a view to accurately identifying the specific needs of these children.³⁶⁷ The Ministry of Education has overwhelmingly welcomed the ever-increasing amount of finances that has been ploughed into education over the past

³⁶⁶ Infrastructure is provided for through the Quality Improvement Development Supply and Upliftment Programme (QIDS-UP).

³⁶⁷ The National Education Informative Management Information System (NEMIS) is responsible for collecting and compiling the information.

decade.³⁶⁸ I fail to understand the fact that farm schools still find themselves akin to a position which they occupied under the apartheid regime.

One would think that a combination of information, policies, laws and money, is a recipe for success. What then is the problem? The only reasonable inference one can draw is that it must be the lack of implementation of the current measures that have been adopted, on the one hand; and the inefficacy of those measures on the other. An evaluation of all the legislative and administrative measures illustrates the fact that they are primarily long-term oriented. The measures which the government has thus far adopted constitute a combination of options either to merge, close down or upgrade farm schools. Given the cumbersome degree of legal formalities involved, these measures are undoubtedly time consuming. But farm-school children cannot wait. These children already face a gigantic backlog which has far-reaching consequences. Procrastination not only unjustly deprives them of their right to access basic education, but effectively denies them their right to pursue further education. It restricts their development and potential thus, indirectly sealing their fate as second class citizens.

In *Grootboom*, the Constitutional Court very explicitly required the government's policy to be reasonable in its conception as well as its implementation. The court further ordered that the policy has to respond to the needs of the most vulnerable segments of society, which are undoubtedly children. The housing policy was

³⁶⁸ See Parliamentary Monitoring Group, *Basic Education: Minister's Budget Speech*, Jun. 30, 2009. Available at <http://www.pmg.org.za/briefing/20090630-basic-education-ministers-budget-speech>, accessed on 05/05/2020, at 12:06p.m.

sound with respect to statistical capacity and long-term implementation. Notwithstanding, its prospective success, that policy was still rendered unreasonable because of its failure to accommodate for the short-term needs of those whose rights were most in peril. The Constitutional Court further held that neither the judiciary, nor any other actor, is in a position to criticize the manner in which the state has opted to discharge its obligations in favour of one which is deemed more appropriate. Instead, judgment can only be passed insofar as it informs the determination of reasonableness. Therefore, I am not suggesting that the state ought to have opted for a different approach other than mergers and closures. Rather, I am suggesting that its methodology nonetheless has to be capable of ensuring dignified liberation of a physically and mentally oppressed class of persons.

The policies neither adequately provide for nor mention how the government proposes to remedy their plight with respect to infrastructure, water supply, proper sanitation, educational materials, and secure, effective financial management. As noted above, the government has relied on the national bar placed upon it with respect to public expenditure on private land. This is not only a disturbing, but archaic understanding of South Africa's constitutional and international law obligations to respect, protect, promote and fulfill human rights. The argument that a state may invoke its national law as a defense mechanism for the non-fulfillment its international law obligations, no longer holds merit.

The policies dismally fail to indicate how the government intends to assist in capacity building and mobilizing the school governing bodies of these farm and rural schools. In terms of the SASA, these bodies play an integral role as far as managing and building the school is concerned. Within the context of farm schools, this is a recipe for disaster because it reflects a situation in which the blind are leading the blind. Many parents have not acquired the necessary educational skills to perform the tasks prescribed and due to their tiresome working hours and conditions, frankly are incapable of devoting as much time to discharging their obligations. Consequently, I am of the view that the government should bear the greater portion of managerial responsibility, and whilst upgrading the actual schools, it should simultaneously develop a structural approach, whereby adult education could be fostered.

The need to provide these children with access to education therefore requires a holistic synthesis, and it cannot be severed from the collateral need to educate their parents. Such an approach would constitute a mechanism for sustainable educational development, at the local level. It would further cultivate a culture of learning among the poor with a view to inspiring and encouraging them to pursue a better life and break free from the hardship and strife that they have grown accustomed to. The farm school context, in my opinion, calls for an academic as well as a social approach to education. These children should not merely be taught the wonders of the sciences, but they have a right to be emancipated from their

unjust incarceration. Therefore, a mutually exclusive approach would be hopelessly inadequate.

As earlier mentioned, in 2000, 88% of the MEC agreements were outstanding and current information was not available to verify whether this is still the figure. Going by this figure, this is a major impediment to effective regulation of these schools because until these agreements are concluded, the legal status of these schools remains unclear. In my opinion, this ought to be the state's point of departure and it should indicate that it is willing to make use of expropriation if need be. I am aware of the competing interests that are at play, namely the farmer's common law right to property on the one hand, and the rights of the child, on the other. Therefore, the state should do its utmost to strike an equitable balance.

Resource-constraints is yet another factor to be considered. The state might argue that leasing the property from the farmer might be more economically feasible than having to expropriate and pay adequate compensation. Be that as it may, the state is under an international law obligation not to invoke resource constraints, unless it is impossible for it to generate the funds and also to acquire international assistance. According to my knowledge, the state has not formally documented an allegation that it is too expensive to expropriate certain properties. In the absence of resource constraints the state's conduct is questionable. Moreover, as evidenced in *Grootboom* and *TAC*, the Court is more than willing to accept that

the nature of right at stake and the vulnerability of the rights-holders, in fact, trump resources constraints. Hence, even if the state were to argue that it did not have sufficient resources to cater for the needs of rural schools, that argument is likely to fail.

In general, these schools are covered by the same legislative and administrative means governing the ordinary public schools. In my opinion, these initiatives are fatally flawed to the extent that they regulate farm and rural schools. These schools experienced a unique form of injustice and therefore, require specifically crafted remedial measures. By lumping all public schools under that same rubric, these essential nuances are blurred. As a result, legislative reformation has no productive and transformative impact. I would go as far as challenging these laws and policies as unreasonable for their lack of sensitivity. Although, I have not expressly argued that the state has failed to devote sufficient resources to these schools, I do contend that even if the state does make an adequate financial contribution, it is not enough because economic analysts have discovered that providing more money is not necessarily the solution. The condition of these schools, however, seem to suggest the contrary, but I am willing to give the government the benefit of the doubt, and, only wish to add that prevention the of financial mismanagement and corruption, should compliment additional resource allocations.

The Court's current jurisprudence asserts its commitment to the socially vulnerable, without encroaching upon the principle separation of powers. The case of *Brown v Board of Education* suggests that the Court would not merely be limited to its jurisprudence, but that it is entitled and even expected to have regard to the importance of democratic stability, the rule of law and the economical development of South Africa, which are to a large degree dependent on a well-educated populace. These factors are becoming increasingly more important because the fathers of the liberation are growing old and fading away from the political front line. The country is experiencing isolated instances of unrest and citizens have resorted to violence because of a lack of service delivery in the country. Values such as reconciliation, forgiveness and tolerance are waning thin, as more South Africans have expressed their dissatisfaction with the manner in which transition was facilitated. I believe that it is only through education that these values have any prospect of survival within a citizenry whose wounds might no longer be infested, but who live with the scars that daily remind them thereof. Education in my opinion is not merely the vehicle of transformation, but it is in fact the achievement and sustenance thereof.

CONCLUSION

After sixteen years of democratic order, South Africa, still finds herself faced with many intricate challenges as she attempts to sever herself from the grave, systemic consequences of her apartheid legacy. The attainment of true freedom therefore, depends on a profound understanding of the institutional framework that sustained the apartheid regime, because a sound comprehension of our past shall equip and prepare us for our future. This thesis has focused on one institution, namely that of education. It provided the broad metamorphosis of education from a weapon of repression to one of reformation. Despite the proliferation of reformative and institutional initiatives, I alleged that the education system is still plagued not only by *de facto* disparity, but moreover, discriminatory practices, which manifest itself within the farm-schooling system.

In proving my assertion, I explored the scope of the state's obligation with regard to the right to education, in pursuance of transitional justice within the South African context. After analyzing both national and international law, I have demonstrated how discrimination and the lack of political will, albeit unintentionally, operates to effectively deny farm-school children access to adequate education, based on their racial and socio-economic status. With reference to international law, I have illustrated the importance of education for fundamental human development and the process of social burgeoning. Within

this context, due to their childhood status, and as a result of the broader socio-economic dynamics of farm life, I have argued that the state has a heightened duty of care towards farm-school children. I have further contended that the Constitutional Court, based on its decisions in *Grootboom* and *TAC*, should reiterate this duty and hold the government accountable for its failure to heed the desperate cries of children that are trapped in a miserable state of racism, abject poverty and ignorance. The Court should furthermore, order all levels of government to cooperate and construct a coordinated educational program that effectively addresses the needs of these children. I have further argued that the South African government lacks in social service delivery and that the country is ranked as one of the most unequal societies with only a meager percent enjoy wealth in abundance, whilst the majority is poverty-stricken. The CESCR has noted that education is the key to unlocking these social deficiencies by providing children with an opportunity to break the cycle of poverty. Therefore, it has encouraged states to invest in the education of its citizenry.

South Africa is still in a state of development and, in my opinion; education is the only means of ensuring that it evolves into a developed country. Through education the government would be able to reduce the tens of thousands of people whose survival depends on state aid, because it is a means of providing them with the skills to be self-sufficient. The government therefore has vested interests in educating its populace. South Africa's future frankly depends on a well-educated society. With these considerations in mind, the Constitutional Court has, as I

stated before, a cardinal role to play and as a guardian of peace and reconciliation, it should not turn a blind eye to the reality faced by these children. Instead, it should ensure that children's right to education is not merely denigrated to paper, but proactively vindicated before it. In the absence of such a robust approach, the words of former President Nelson Mandela that [w]e saw our country tear itself apart in terrible conflict ... The time for healing of wounds has come ... Never, never again will this beautiful land experience the oppression of one by another," have sadly, fallen on deaf ears.