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# THE CHALLENGES OF LITIGATING THE RIGHT TO BASIC EDUCATION IN SOUTH AFRICA: IS THE RIGHT REALISABLE IMMEDIATELY OR SUBJECT TO RESOURCE LIMITATION?

## SUMMARY

The right to education is embodied in sec. 29 of the South African *Constitution*. Sec. 29(1) distinguishes between the right to basic education and the right to further education: the former is unqualified, while the right to further education has an internal qualifier. Like other socio-economic rights in the *Constitution* – such as the rights to housing, healthcare, food, water, and social security – the right to further education imposes a positive obligation on the state to take reasonable measures within available means to realise the right progressively. The courts' approach to this duality has thus far been that the right to basic education, unlike the right to further education, does not depend on the availability of resources or progressive realisation: it is "realisable immediately". The difficulty with this approach is that it assumes that the right to basic education can be enforceable without resource implications as a limitation common to all socio-economic rights. The purpose of this article is to interrogate this assumption. The central hypothesis is that the right to education can be better realised if it is understood as a classical socio-economic right subject to the common limitations applicable to the enforceability of economic rights in South Africa and at the international level.



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## 1. INTRODUCTION

The right to education is one of the fundamental rights in the *Constitution of South Africa*.<sup>1</sup> While the right is universally recognised in many international and domestic instruments,<sup>2</sup> in the case of South Africa, the right is steeped in intrigue because of the country's unique and unpalatable history of education.<sup>3</sup> As early as 1948, when the policy of apartheid was officially instituted in South Africa, education was tagged as the single most important weapon in the arsenal of the apartheid edifice.<sup>4</sup> The lodestars of the segregationist policy of apartheid in education were the infamous *Bantu Education Act*<sup>5</sup> and the *Extension of University Education Act*.<sup>6</sup> The thrust of these pieces of legislation was that Black communities had to receive an education – at both the basic and higher levels – that was tailored to their “needs and culture”. The underlying philosophy of apartheid education is instructively captured by Abdi thus:

[e]ntrenched in the philosophy of Bantu Education was also the discursively benign concept of 'own education' which, from the perspective of the colonisers, advanced the idea that education was to generally emanate from the child's cultural background.<sup>7</sup>

The practical ramifications of this philosophy were segregationist, translating into Black schools being woefully under-resourced. The legacy of the apartheid model of education is enduring and intractable.<sup>8</sup>

Given this unique context of the right to education in the country, it is not surprising that the new *Constitution of South Africa* emphatically embodies the right to education, which imposes an obligation on the state to, among others, take measures “to redress the results of past racially discriminatory laws and

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1 The Bill of Rights is the compendium of recognised rights comprising Ch. 2 of the *Constitution of South Africa*, 1996 (the *Constitution*). For scholarly analysis of the transformational nature of the South African Bill of Rights, see Mureinik 1994:31-48; Malherbe 2000:45-65; *S v Makwanyane and Another* 1995 3 SA 391 (CC).

2 Beiter 2005.

3 Kallaway 2002.

4 Abdi 2003.

5 *Bantu Education Act* 47/1953.

6 *Extension of University Education Act* 45/1959. Du Pisani (2023:26-53) accurately notes: “The adoption by Parliament of the Extension of University Education Act, No. 45 of 1959, was the culmination of a process driven by the National Party government for a period of a decade. Its aim was to design a model of racially segregated universities in South Africa that would bolster the overall objectives of the apartheid system.” See Beale 1992:83.

7 Abdi 2003:92.

8 Van der Berg 2007:849-880; Jonathan 2001:8-14; Gustafsson & Patel 2006:65-77.

practices”.<sup>9</sup> Moseneke DCJ, as he then was, aptly captured the transformative nature of the right to education in the new *Constitution* in *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo* thus:

Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privileges and disadvantages. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception.<sup>10</sup>

Sec. 29 of the *Constitution* provides for the right to education. Sec. 29(1) distinguishes the right to basic education from the right to further education:<sup>11</sup> the right to basic education is unqualified, while the right to further education has an internal qualifier. The superior courts in South Africa endorse this bifurcated approach to the right to basic education and the right to further education. Their attitude is that the right to basic education does not depend on the availability of resources, and it is realisable immediately. It is not subject to progressive realisation like the right to further education.<sup>12</sup> The right to further education is treated as a typical socio-economic right enforceable like all other constitutional socio-economic rights – such as the rights to housing, healthcare, food, water, and social security. These rights impose a positive obligation on the state to take reasonable measures within available means to realise the right progressively.<sup>13</sup> In the *Constitution*, these rights are ordinarily found in secs. 26 and 27. Distinguishing between these two education rights has inherent challenges. The major problem is that it presupposes that the right to basic education can be enforceable without resource implications. As the High Court said in *Mahapa v Honourable Minister of Higher Education and*

9 Sec. 29(2)(c) of the *Constitution*. In the same spirit, sec. 29(3) provides 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;  
(b) are registered with the state; and  
(c) maintain standards that are not inferior to standards at comparable public educational institutions.”

10 *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo* 2010 3 BCLR 177 (CC):par. 45. See also *AB v Pridwin Preparatory School* 2020 5 SA 327 (CC); *Moko v Acting Principal of Malusi Secondary School and Others* 2021 3 SA 323 (CC).

11 Sec. 29(1) provides that “[e]veryone has the right—  
(a) to a basic education, including adult basic education; and  
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”

12 *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 8 BCLR 761 (CC); *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* 2010 3 BCLR 177 (CC); *Minister of Basic Education and Others v Basic Education for All and Others* 2016 1 All SA 369 (SCA); *Section 27 and Others v Minister of Education and Another* 2012 3 All SA 579 (GNP).

13 Heyns & Brand 1998:153-167; Liebenberg & Goldblatt 2007:335-361.

*Another*, “[t]he right to basic education is immediately realisable”.<sup>14</sup> Despite the court in *Mahapa* apparently suggesting that the right to basic education is enforceable “immediately”, the Constitutional Court has labelled the right to basic education a “socio-economic right” but a special one.<sup>15</sup>

The purpose of this article is to critique the prevailing assumption that the right to basic education is realisable immediately without being limited by the common internal modifiers of socio-economic rights. The central hypothesis is that the right to education can be better realised if it is understood as a classical socio-economic right, subject to the common standards applicable to the enforceability of socio-economic rights in South Africa and internationally. The article is divided into five parts. The first part is the introduction, which lays the context for the right to education in South Africa. The second part analyses the right to education in the current *Constitution* of South Africa. The third part analyses the limitation model for the right to education. The fourth part analyses the international framework for the right to education. The fifth part presents the conclusion and recommendations.

## 2. REVISITING THE CONSTITUTIONAL FRAMEWORK FOR THE RIGHT TO EDUCATION

### 2.1 The right to basic education: A classical socio-economic right

The right to basic education is one of the rights in the Bill of Rights.<sup>16</sup> In the South African model, all rights are contained in a single Bill of Rights that is enforceable.<sup>17</sup> This model differs from the model in most of the African countries where these two major human rights generations – civil and political rights and socio-economic rights – are enforced differently, giving more credence to civil and political rights than socio-economic rights.<sup>18</sup> The international framework inspires this division of rights into categories, as the two classes are embodied in two different conventions and entail markedly different typologies of state obligations.<sup>19</sup>

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14 *Mahapa v Honourable Minister of Higher Education and Another* 2017 2 All SA 254 (GJ):par. 26.

15 In *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others*.

16 See sec. 29 of the *Constitution*.

17 For the early debates about the enforceability of socio-economic rights in South Africa, see Wiles 2006:35; Haysom 1992:451-463; Mureinik 1992:464-474; Davis 1992:475-490.

18 Mubangizi 2006:1-19 at 18; Sambo & Abdulkadir 2011:11-22.

19 Civil and political rights are contained and enforceable in terms of the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976), while social and economic rights are enforced in terms of the International Covenant on Economic, Social and Cultural Rights (ICESCR), opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

The South African model – of a single Bill of Rights – champions a radical departure from this model. The vast majority of constitutions that emerged in Africa after the new South African *Constitution* have been inspired by South Africa.<sup>20</sup> The effect of having a single Bill of Rights is that all rights in the Bill of Rights are judicially enforceable, albeit differently. Enforcing socio-economic rights is not straightforward; their enforcement is subject to the three common qualifiers: the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.<sup>21</sup>

Ordinarily, the right to education is understood as a socio-economic right.<sup>22</sup> The *Constitution* of South Africa breaks the right to education down into two rights: the right to basic education and the right to further education.<sup>23</sup> Sec. 29(1)(a) of the *Constitution* provides that “[e]veryone has the right ... to a basic education, including adult basic education”. The *Constitution* does not require that the enforcement of the right to basic education be subject to any of the common qualifiers of socio-economic rights. However, the Constitutional Court stated in *Governing Body of the Juma Masjid Primary School* that “the right to basic education is an important socio-economic right”.<sup>24</sup>

Notwithstanding this categorisation of the right to basic education as a socio-economic right, the court expressed the caveat that “[u]nlike some of the other socio-economic rights, this right is immediately realisable”,<sup>25</sup> thus suggesting that it is a socio-economic right *sui generis* because, ordinarily, socio-economic rights are subject to resource limitation.<sup>26</sup> According to this logic, the nature of the state obligation is not progressive, like other socio-economic rights: it is immediate. This approach is problematic because it overlooks the practical and intractable resource-based problems of providing the right to education.<sup>27</sup> Several cases by the superior courts in South Africa highlight this dilemma.<sup>28</sup> In *Governing Body of the Juma Masjid Primary*

20 See, for instance, Ch. 4 of the Constitution of Kenya 2010. Sec. 19(1) provides that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic, and cultural policies. For an analysis of the Kenyan constitutional provisions on socio-economic rights, see Orago 2013:169-219. See also Part 2 of the Constitution of Zimbabwe 2013.

21 The three common qualifiers are traceable to art. 2(1) of the ICESCR, which provides: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

22 Veriava & Paterson 2020:113-136; Coomans 2009:427; Sital, Getgen & Koh 2017:211-268.

23 Christie 2010:3-11; Berger 2003:614-661.

24 *Governing Body of the Juma Masjid Primary School*:par. 43.

25 *Governing Body of the Juma Masjid Primary School*:par. 37.

26 Iles 2004:448-465; Stewart 2008:472-494.

27 Nakidien, Singh & Sayed 2021:66.

28 For instance, see *Komape and Others v Minister of Basic Education* [2018] ZALMPPHC 18 (23 April 2018) (*Komape*).

*School*, the courts were confronted with a situation where the provision of the right to education involved resources. In this case, a public school was situated on private property owned by the Trust in agreement with the Department of Education.<sup>29</sup> The school was a public school despite it being on private property. In 2002, the Trust informed the Department that it had decided to establish an independent school on the property and would, in due course, give the Department notice to close the existing school. The Department agreed to relocate the school, but it never did. The Trust deemed the appropriate course of action in the circumstances to be an application to the High Court for eviction. The parents, guardians, and caregivers of the learners who were enrolled at the school applied for leave to intervene and opposed the eviction application. The essence of the application was that the MEC had abdicated her constitutional responsibility of ensuring that the children's best interests were accorded their due importance. The High Court rejected the contention based on the constitutional right to basic education and granted the eviction order.<sup>30</sup> The High Court's reasoning was based on the contention that the right to education positively impacts on the state, not a private entity like a trust. Instead, the High Court prioritised the right to property enshrined in sec. 25 of the *Constitution*. In the end, the High Court held that the Trust had no constitutional obligation to the school or learners. Instead, "[i]t has its own constitutional rights to property recognised in terms of section 25 of the Constitution. The obligation to provide compulsory education is an obligation of the Department of Education."<sup>31</sup>

The matter was taken on appeal to the Constitutional Court, which undertook a thorough enquiry into the nature of the obligation of both the MEC as a public entity and the Trust as a private entity. In relation to the MEC, the court found that the MEC had a *positive* obligation to provide basic education.<sup>32</sup> The reasoning of the Constitutional Court was not based on the fact that the right to basic education is a socio-economic right that would ordinarily impose positive obligations.<sup>33</sup> Instead, the court took a generalised approach: that all human rights in the Bill of Rights impose *positive* and *negative* obligations. This is based on sec. 7(2) of the *Constitution*,<sup>34</sup> which provides that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights". The

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29 Sec. 14(1) of the South African *Schools Act* 84/1996 provides that "a public school may be provided on private property only in terms of an agreement between the MEC and the owner of the private property".

30 *Ahmed Asruff Essay NO and Eight Others v The MEC for Education KwaZulu-Natal and Four Others* unreported case number 10230/2008, KwaZulu-Natal High Court, Pietermaritzburg, 16 September 2009 (*Ahmed Asruff Essay*).

31 *Ahmed Asruff Essay*:par. 26.

32 See *Governing Body of the Juma Masjid Primary School*:par. 45, where the court stated: "The MEC has a positive obligation in terms of the Constitution to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. More specifically, for the purpose of this judgment, the MEC must 'respect, protect, promote and fulfil' the learners' right to a basic education. The source of this positive obligation is section 8(1) of the Constitution, which states that '[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'."

33 Mubangizi 2004:93-107.

34 *Governing Body of the Juma Masjid Primary School*:par. 45.

section has been the subject of several judicial pronouncements.<sup>35</sup> In essence, the approach of the courts is that the duty to respect is the one that imposes a positive obligation; the other three – the duties to protect, promote, and fulfil – are all positive. For instance, in *Glenister v President of the Republic of South Africa*,<sup>36</sup> the Constitutional Court held that the *Constitution* imposed an obligation on the state to establish and maintain an independent body to combat corruption and organised crime.<sup>37</sup>

In relation to the Trust, a private entity, the Constitutional Court overturned the reasoning of the High Court that sec. 29(1) of the *Constitution* does not impose an obligation on the Trust. Instead, the apex court relied on *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*<sup>38</sup> to find that “socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion”.<sup>39</sup> The negative obligation in relation to socio-economic rights can be direct or indirect. It is direct when there is a failure to respect the right; it is indirect when there is a failure to prevent the direct infringement of the right by another.<sup>40</sup>

Hence, *Governing Body of the Juma Masjid Primary School* is not only authority for the approach that the right to basic education is realisable immediately, but it is also authority for the proposition that the content of the right to basic education includes the provision of school facilities and ensuring that there are enough school places available in the affected areas.<sup>41</sup> A raft of other positive (economic) obligations are further imposed by the South African

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35 *Women’s Legal Centre Trust v President of the Republic of South Africa (Commission for Gender Equality as Intervening Party, Muslim Assembly Cape as amici curiae)* 2023 1 BCLR 80 (CC).

36 *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC). At par. 107 the court stated: “Under section 7(2), there are a number of ways in which the state can fulfil its obligations to protect the rights in the Bill of Rights. The Constitution leaves the choice of the means to the state. How this obligation is fulfilled and the rate at which it must be fulfilled must necessarily depend upon the nature of the right involved, the availability of government resources and whether there are other provisions of the Constitution that spell out how the right in question must be protected or given effect. Thus, in relation to social and economic rights, in particular those in sections 26 and 27, the obligation of the state is to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights’.”

37 For an analysis of the case, see De la Harpe 2013:395–408; Powell 2017:55–74.

38 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC).

39 *Governing Body of the Juma Masjid Primary School*: par. 58.

40 See also *Jafftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 1 BCLR 78 (CC); *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 4 BCLR 301 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 10 BCLR 1033 (CC), 2002 5 SA 721 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC); *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust as amicus curiae)* 2003 1 SA 389 (SCA); *S v Baloyi (Minister of Justice and Another Intervening)* 2000 1 BCLR 86 (CC).

41 *Governing Body of the Juma Masjid Primary School*: par. 38.

*Schools Act*.<sup>42</sup> The *Act* imposes obligations on the MEC concerned, among others, to provide public schools for the education of learners,<sup>43</sup> to provide for the residential accommodation of learners,<sup>44</sup> where reasonably practicable, to provide education for learners with special education needs at ordinary public schools, to provide relevant educational support services for such learners,<sup>45</sup> ensuring that the physical facilities at public schools are accessible to disabled persons,<sup>46</sup> and to provide gender-specific public schools where possible.<sup>47</sup>

Furthermore, a discernible line of decisions of the superior courts has given the state further sec. 29(1)(a) obligations. For instance, in *Section 27 and Others v Minister of Education and Another*,<sup>48</sup> the North Gauteng High Court found that providing learner support material in the form of textbooks is an essential component of the right to basic education. Hence, “the failure to provide textbooks, somewhat midway through the academic year would *prima facie* constitute a violation of the right to basic education”.<sup>49</sup> A new frontier of the obligation to provide textbooks as part of the right to basic education was created by the Supreme Court of Appeal in *Minister of Basic Education and Others v Basic Education for All*.<sup>50</sup> In this case, textbooks had not been delivered to schools in Limpopo, with half of the academic year already completed. The delivery of textbooks started only after a court order declared that the failure to provide textbooks to the relevant schools violated the learners rights to basic education, equality, and dignity. The Department was ordered to provide textbooks urgently within a specified time and to submit monthly reports with regard to the implementation of the plan. However, the time frames set out in the order were still not adhered to. The court declared that sec. 29(1)(a) of the *Constitution* “entitles every learner at public schools in Limpopo to be provided with every textbook prescribed for his or her grade before [the] commencement of the teaching of the course for which the textbook is prescribed”.<sup>51</sup>

The duty to provision schools as an aspect of the right to basic education was also confirmed by the High Court in *Mpungose Traditional Council v MEC for Education, KZN Province*.<sup>52</sup> In this case, the Department had reneged on its earlier promise to build a secondary school. The community applied to the Department to establish a secondary school in 1996, 2002, and 2007. The community took its case to court because the Department had violated basic

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42 *Schools Act* 84/1996.

43 *Schools Act*:sec. 12(1).

44 *Schools Act*:sec. 12(2).

45 *Schools Act*:sec. 12(3).

46 *Schools Act*:sec. 12(4).

47 *Schools Act*:sec. 12(5).

48 *Section 27 and Others v Minister of Education and Another* 2012 3 All SA 579 (GNP).

49 *Section 27 and Others v Minister of Education and Another*:par. 25.

50 *Minister of Basic Education and Others v Basic Education for All* 2016 1 All SA 369 (SCA) (*Basic Education for All*).

51 *Basic Education for All*:par. 53(3).

52 *Mpungose Traditional Council v MEC for Education, KZN Province* 2019 3 All SA 817 (KZP).



education rights. The court found that the MEC was in breach of sec. 29(1)(a) of the *Constitution* by not ensuring that learners each have access to or use of “(a) a textbook (where the curriculum prescribes one) in every subject taken by such learner; (b) adequate age and grade appropriate furniture; and (c) sufficient classrooms”.<sup>53</sup> In *Equal Education and Others v Minister of Basic Education and Others*,<sup>54</sup> the High Court extended the content of the right to basic education to include the duty to provide a daily meal to all qualifying learners, whether they were attending school or studying away from school as a result of the COVID19 pandemic. The court unequivocally held that the “[t]he Minister and MECs have a constitutional and statutory duty to provide basic nutrition in terms of section 29(1)(a)”.<sup>55</sup>

The analysis of these decided cases on the content of sec. 29(1)(a) reveals that the right to basic education is a socio-economic right: its obligations have far-reaching economic implications for the state. In the majority of cases, where it has been alleged that the state has violated sec. 29(1)(a) of the *Constitution*, the courts have focused on the positive duty of the state. As a result of the long list of decided cases, it is now almost settled that the right to basic education includes providing schools and the provisioning of the National School Nutrition Programme, textbooks, basic furniture and infrastructure, scholar transport, post-provisioning, and proper sanitation facilities. The list is by no means exhaustive. There is no denying that these obligations place an immense strain on the state’s budget.

## 2.2 Right to further education

Unlike the right to basic education, the right to further education is couched in typical socio-economic rights language. Sec. 29(1)(b) provides that everyone has the right “to further education, which the state, through reasonable measures, must make progressively available and accessible”. In contrast to the right to basic education, where there is an abundance of judicial pronouncements on the nature and content of the right, there is a glaring paucity of judicial pronouncements on the right to further education. Instead, the right that has seen significant judicial attention in relation to higher education is sec. 29(2): the right to receive education in the official language or languages of one’s choice.<sup>56</sup>

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53 *Mpungose Traditional Council v MEC for Education, KZN Province*:par. 7.

54 *Equal Education and Others v Minister of Basic Education and Others (Children’s Institute as amicus curiae)* 2020 4 All SA 102 (GP).

55 *Equal Education and Others v Minister of Basic Education*:par. 42.

56 *AfriForum v Chairperson of the Council of the University of Pretoria* 2017 1 All SA 832 (GP); *University of the Free State v AfriForum* 2017 2 All SA 808 (SCA); *AfriForum v University of the Free State* 2018 4 BCLR 387 (CC); *Gelyke Kanse v Chairman of the Senate of Stellenbosch University* 2018 1 BCLR 25 (WCC); *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2019 12 BCLR 1479 (CC); *Chairperson of the Council of the University of South Africa (UNISA) v AfriForum NPC* 2022 3 BCLR 291 (CC).

In a few cases on sec. 29(1)(b), the courts have not demonstrated the same passion and eagerness in realising the right, as has been the case with the right to basic education. For instance, in *Mahapa v Honourable Minister of Higher Education*,<sup>57</sup> the Gauteng Local Division had a rare opportunity to inquire into the content of this right. The case was brought by an inmate who was studying for a law degree. He alleged that he had no money to continue to fund his studies. He applied to the National Student Financial Aid Scheme (NSFAS) for a bursary.<sup>58</sup> His argument was that he could not afford university fees, due to his low-income family background. Therefore, the Minister was obliged to secure funds to further his education. He contended that this obligation emanates from sec. 29(1)(b) of the *Constitution*. The court rejected his argument, reasoning that, unlike sec. 29(1)(a), sec. 29(1)(b) has internal limitations. The state is obliged to take reasonable measures to make further education “progressively available and accessible”. As indicated earlier, the trailblazer for this disjunctive jurisprudence on the right to education is the Constitutional Court’s decision in *Governing Body of the Juma Masjid Primary School*. The centrepiece of this jurisprudence is that this right is distinct from the right to basic education, which is “immediately realisable” and has no internal limitations. The court in *Mahapa* suggested that further education is a luxury compared to the right to basic education, stating as follows:

[S]ection 29(1)(b), to my understanding, is intended to enhance one’s knowledge and equip one with necessary skill for one to become self-dependent and contribute meaningfully to the socio-economic development of the country, whereas section 29(1)(a) is intended to eradicate illiteracy and promote literacy to enable everyone to understand the society in which they live and to fit well in that modern society. Therefore, it should follow that section 29(1)(a) must take preference and be protected.<sup>59</sup>

This *dictum* illustrates the impact of the disjunctive jurisprudence on the right to education. The court’s attitude is that basic education is “more important” than the right to further education. Hence, it comes as no surprise that, ultimately, the court decided that “the applicant’s argument cannot stand. It stands to reason, therefore, that the first respondent has no obligation, arising from section 29(1)(b), to protect the applicant’s right to further his education by providing him with funds.”<sup>60</sup>

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57 *Mahapa v Honourable Minister of Higher Education* 2017 2 All SA 254 (GJ) (*Mahapa*).

58 NSFAS is a statutory body established in terms of the *National Student Financial Aid Scheme Act* 56/1999. In terms of the Preamble of the *Act*, “the purpose of NSFAS is to provide for the granting of loans and bursaries to eligible students at public higher education institutions and for the administration of such loans and bursaries; to provide for the recovery of loans; to provide for the repeal of the Provision of Special Funds for Tertiary Education and Training Act, 1993; and to provide for matters connected therewith”. Hence, the *Act* is a government measure to realise sec. 29(1)(b) of the *Constitution*.

59 *Mahapa*:par. 32.

60 *Mahapa*:par. 32.

It is interesting that, despite the *Constitution* making it abundantly clear that the right to further education is subject to the usual internal limitations – taking reasonable measures within available resources and achieving the progressive realisation of the right – the court did not inquire whether the state met the requirements of these internal limitations. In the context of the scarcity of judicial pronouncements on the right to further education, it is contended that the jurisprudence developed over time on other socio-economic factors can help interpret the right.

### 3. LIMITATION OF THE RIGHT TO EDUCATION

#### 3.1 Limitation of the right to further education as a typical socio-economic right

Sec. 29(1)(b) – the right to further education – has typical internal limitations. It has two internal modifiers: the state has a duty to make higher education accessible through *reasonable measures, progressively available*.<sup>61</sup> This drafting is slightly different from that in secs. 26 and 27 of the *Constitution* and Art. 2 of the ICESCR as it has only two of the common three modifiers – “reasonable measures” and “progressive realisation”. The three common modifiers of socio-economic rights are *progressively taking reasonable measures within the available resources*. The drafting of sec. 29(1)(b) has left out “within the available resources”. However, it is contended that nothing turns on this omission. The right to education, in general, and the right to further education, in particular, are typical socio-economic rights subject to all the three internal limitations common to all socio-economic rights.

The most plausible analytical framework for the three internal limitations for socio-economic rights, which arguably apply to the right to further education, was provided by the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom*.<sup>62</sup> The court laid out practical guidelines for assessing the socio-economic rights limitation framework, which is characterised by three common modifiers. On the first modifier – “taking reasonable legislative and other measures” – the court emphasised that the state’s measures must be coherently directed towards the progressive realisation of the right. The measures must be capable of facilitating the realisation of the right. The state still retains the discretion to choose the exact contours and content of the measure. The threshold, though, is that the measure must be reasonable. The court indicated that the reasonableness of a measure is not whether the state should have adopted a more desirable or favourable measure to the one chosen. Instead, “[t]he question would be whether the measures that have been adopted are reasonable”.<sup>63</sup>

61 The section provides: “Everyone has the right ... (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”

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

63 *Grootboom*:par. 41. For an analysis of reasonableness as a limitation of socio-economic rights, see Mbazira 2008:131-147; Bilchitz 2003:1-26.

On the second modifier – “within the available resources” – the court stated that the most important aspect is that the state is not required to do more than its available resources permit. The availability of resources is the essence of this requirement. It neatly dovetails with the first in that the “availability of resources is an important factor in determining what is reasonable”.<sup>64</sup> The court relied on its analysis of this modifier in *Soobramoney v Minister of Health, KwaZulu-Natal*,<sup>65</sup> where the court emphasised that the realisation of socio-economic rights is “dependent upon the resources available for such purposes and that the corresponding rights themselves are limited by reason of the lack of resources”.<sup>66</sup> Hence, a lack of resources is a justifiable limitation of socio-economic rights, including the right to education.

On the third modifier – “achieving progressive realisation” – the court in *Grootboom* stated that “progressive realisation” presupposes that the right cannot be realised immediately. However, the constitutional goal is that “the basic needs of all in our society be effectively met, and the requirement of progressive realisation means that the state must take steps to achieve this goal”.<sup>67</sup> The state must be seen to be taking concrete steps towards realising the right. Failure to take incremental steps would fall short of the state’s obligation. This approach resonates with the CESCR Committee’s jurisprudence.<sup>68</sup> The Committee warned that realisation over time should not be misinterpreted as depriving someone of the right.<sup>69</sup>

Hence, the court in *Mahapa* should have followed these methodological guidelines laid out in *Grootboom* to analyse the content and the limitation of the right to further education instead of seeking to hierarchise the right to basic education and the right to further education. The hierarchisation approach that the court sought to follow erroneously suggests that only the right to basic education is more important than the right to further education. There is no hierarchy of the rights recognised in the Bill of Rights. If it had followed the guidelines described earlier, the court would have subjected the government measure – the NSFAS – to scrutiny using the *Grootboom* test. In the main, the approach would question whether the NSFAS is a reasonable measure that the state has progressively taken within its available resources to realise the right to further education. It is contended that using such a test could have produced a different outcome.<sup>70</sup>

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64 *Grootboom*:par. 46.

65 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) (*Soobramoney*).

66 *Soobramoney*:par. 11.

67 *Grootboom*:par. 45.

68 The Committee on Economic, Social and Cultural Rights (CESCR) is the body of 18 independent experts that monitors the implementation of the ICESCR by its states parties. <https://www.ohchr.org/en/treaty-bodies/cescr> (accessed on 9 February 2024). See General Comment 3 *The nature of states parties obligations* (Art. 2, par. 1 of the Covenant) (1990).

69 Chenwi 2013:742-769.

70 A methodological inquiry would have scrutinised the state’s claim of inadequacy of resources. It would have been apparent that the student is no different from the thousands that the scheme is funding in many public institutions of higher learning in the country. The inquiry would then have turned to whether the student qualified to be funded based on the pre-determined NSFAS funding guidelines.

### 3.2 The right to basic education: What does “realisable immediately” mean?

The drafting of sec. 29(1)(a) – which has left the right to basic education unqualified – is another source of controversy about how this right is interpreted and limited. Due to its open-endedness, the courts have passionately read into the content of this right almost everything that has to do with basic education, from providing school infrastructure to providing scholar transport.<sup>71</sup> The courts contend that the right is realisable immediately and can only be limited in terms of sec. 36 of the *Constitution*. The flagbearer of this jurisprudence is *Governing Body of the Juma Masjid Primary School*, where the court stated that, “unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’.”<sup>72</sup> This *dictum* was repeated with approval in several subsequent cases and scholarly publications to mean that, unlike the right to further education, which is limited like all other socio-economic rights by the availability of resources, the right to basic education is limited only in terms of the general limitation clause in sec. 36 of the *Constitution*.<sup>73</sup>

For completeness, it is imperative to revisit sec. 36 of the *Constitution*. Sec. 36(1) provides that “[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity”. The section expressly provides for five factors that must be taken into account when imposing a limitation on the right, namely: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose, and (e) less restrictive means to achieve the purpose.<sup>74</sup> The section has been the subject of a slew of court decisions.<sup>75</sup> Its jurisprudence is, for the most part, settled.<sup>76</sup> In early decisions such as *S v Zuma and Others*,<sup>77</sup> the court confirmed that the

71 *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 5 SA 107 (ECG).

72 *Governing Body of the Juma Masjid Primary School*:par. 37.

73 *Madzozo obo Parents of Learners at Mpimbo Junior Secondary School and Others v Minister of Basic Education and Others* 2014 2 All SA 339 (ECM):par. 15: “The right to basic education provided for in section 29(1)(a) of the Constitution is an unqualified right which is immediately realisable and is not subject to the limitation of progressive realisation, as is the case with other socio-economic rights guaranteed by the Constitution.” See also *Simbo* 2013:477-503.

74 *Brümmer v Minister for Social Development* 2009 6 SA 323 (CC).

75 For instance, see *Ferreira v Levin* 1996 1 SA 984 (CC); *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC).

76 Woolman 1994:60; Woolman 1997:102.

77 *S v Zuma* 1995 2 SA 642 (CC). See also *Makwanyane; Ferreira v Levin NO and Others* 1996 1 SA 984 (CC).

analysis of sec. 33 – the general limitation clause of the *Interim Constitution* – calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?<sup>78</sup>

Opinion is divided on whether sec. 36 applies to the socio-economic rights in the *Constitution*, regard being had to the fact that socio-economic rights have internal and special limitations.<sup>79</sup> One strong view is that subjecting socio-economic rights to the general limitation clause leads to what Iles persuasively calls “a methodological difficulty”.<sup>80</sup> The difficulty is mainly caused by the requirement of reasonableness that is found in both sec. 36 and the internal limitations of socio-economic rights.<sup>81</sup> This “difficulty” led Mokgoro J in *Khosa v Minister of Social Development*<sup>82</sup> to doubt whether sec. 36 should apply to socio-economic rights. The judge stated:

The state’s obligation in respect of these rights goes no further than to take “reasonable legislative and other measures within its available resources to achieve the progressive realisation” of the rights. If a legislative measure taken by the state to meet this obligation fails to pass the requirement of reasonableness for the purposes of sections 26 and 27, section 36 can only have relevance if what is “reasonable” for the purposes of that section, is different to what is “reasonable” for the purposes of sections 26 and 27.<sup>83</sup>

This *dictum* indicates the difficulty of applying sec. 36 to socio-economic rights, including the right to education. The idea that the right to basic education is a socio-economic right is at least hardly in dispute.<sup>84</sup> What seems to have caused controversy is the drafting of sec. 29(1)(a): it is couched as an unqualified right without the common internal limitations of other socio-economic rights. Consequently, the Constitutional Court has interpreted the unqualified manner in which the right is drafted to mean that “the right to basic education in section 29(1)(a) may be limited only in terms of the law of general application, which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’”.<sup>85</sup> Indeed, the section is drafted without internal qualifiers or limitations, and the only logical conclusion is that it can be limited in terms of sec. 36. To that extent, the court is correct.

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78 *Zuma*:par. 21. The court confirmed that this jurisprudence is based on the jurisprudence of sec. 1 of the Canadian Charter. See the Canadian Supreme Court decisions *R v Oakes* 1986 26 DLR (4<sup>th</sup>) 200; *R v Whyte* 1988 51 DLR (4<sup>th</sup>) 481, and *R v Downey* 1992 90 DLR (4<sup>th</sup>) 449.

79 Iles 2004:448-465.

80 Iles 2004:448-465.

81 Steinberg 2006:264-284.

82 *Khosa v Minister of Social Development* 2004 6 BCLR 569 (CC) (*Khosa*); Rautenbach 2005:627-654.

83 *Khosa*:par. 83.

84 *Governing Body of the Juma Masjid Primary School*.

85 *Governing Body of the Juma Masjid Primary School*:par. 37.

However, to say the right is immediately realisable is problematic. This argument has several obvious pitfalls. The first one is that the interpretation is too technical, textual, and literal. This is the interpretative approach often bemoaned by courts when they interpret constitutional provisions.<sup>86</sup> The interpretation of constitutional provisions is better undertaken through general and purposive interpretative approaches. In *African Christian Democratic Party (ACDP) v The Electoral Commission*,<sup>87</sup> the Constitutional Court demonstrated an unwavering readiness to proceed beyond the *ipsissima verba* of a legislated text where considerations of constitutional and legislative purpose are required. To that end, the court stated that “[a] narrowly textual and legalistic approach is to be avoided”.<sup>88</sup> The problem with being textual about the interpretation of sec. 29(1)(a) is that this removes the inherent nature of the right to education as a socio-economic right. Like all socio-economic rights, the right to education, regardless of how it is drafted, entails positive economic obligations on the state.<sup>89</sup> The most plausible approach is to accept that this section contains a normal socio-economic right that has been drafted differently from the other socio-economic rights in the *Constitution*. Recourse to sec 36 for limitation should negate this fundamental premise. Methodologically, when the analysis reaches sec. 36, two of the components of sec. 36 will seamlessly lead the analysis to the usual socio-economic qualifiers, which are the “nature of the right” and “reasonableness”. The nature of the right is not in dispute as the right to basic education is economic. The reasonableness test will be the one already set out by the Constitutional Court in *Grootboom*.<sup>90</sup>

The second difficulty, beyond the interpretative one, is that the approach of making the right realisable immediately is unrealistic and complicates the state’s positive obligations under sec. 29(1)(a). The reality is that the obligations involved in the right to basic education are economic and consequently depend on the availability of resources. The most plausible approach to ensure that the government complies with its obligations under sec. 29(1)(a) is to subject the usual claim of non-availability of resources to the reasonableness test developed in *Grootboom* and *Soobramoney*. Insistence on the right being realisable immediately without much regard to sometimes genuine claims of lack of resources is counter-intuitive.<sup>91</sup> The prime example of this difficulty is the oft-cited case of *Komape and Others v Minister of Basic Education*.<sup>92</sup> A

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86 *S v Mhlungu* 1995 3 SA 867 (CC).

87 *African Christian Democratic Party v Electoral Commission and Others* 2006 3 SA 305 (CC) (*African Christian Democratic Party*)

88 *African Christian Democratic Party*:par. 25. An interpretative approach that moves away from legalism and formalism is well entrenched in South Africa. See *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA):659; *Nkisimane and Others v Santam Insurance Co Ltd* 1978 2 SA 430 (A); *Ex parte Mothuloe (Law Society, Transvaal, Intervening)* 1996 4 SA 1131 (T).

89 McConnachie & McConnachie 2012:554.

90 Iles 2004:448-465.

91 Mokgwathi, Graham & De Villiers 2023:1-13.

92 *Komape and Others v Minister of Basic Education* [2018] ZALMPPHC 18 (23 April 2018) (*Komape*). For analysis, see Buthelezi 2023:630-640.

five-year-old Grade R boy had tragically drowned in a pit toilet at Mahlodumela Lower Primary School at Chibeng Village near Seshego in Limpopo. In addition to their claims for damages, the child's parents also sought a declaratory order that the defendants had breached their constitutional obligations in respect of the rights contained in sec. 29 of the *Constitution*.

The court found that “[t]he right to basic education includes provision of adequate and safe toilets at public schools for learners, the failure of which compromised the best interests of the children referred to in section 28(2) of the Constitution”.<sup>93</sup> The most difficult moment came when the court had to provide the remedy for such a finding. It decided that a structural interdict was just and equitable in the circumstances. The state was ordered to take “active steps to provide the lacking basic sanitary requirements to learners in those schools”.<sup>94</sup> Mindful of the problems with the order that it was making, the court stated that “it will no doubt be a mammoth task for the state to undertake. But that cannot deter this Court from ordering the state to comply with its obligations in terms of the Constitution”.<sup>95</sup> The court made a further candid admission that the obligation could not be realised immediately. The court noted that

... this Court is ever mindful that an order that the state replace the pit toilets at rural schools will place an additional burden on the resources of the state. Information as to the time it will take and the program to be developed to achieve that goal in the shortest period of time must be placed before the Court to enable this Court to play a supervisory role in the execution of the order to vindicate the constitutional rights of the children attending schools with pit toilets in rural Limpopo.<sup>96</sup>

Despite the court ordering the Limpopo government to take progressive steps to ensure the eradication of pit toilets in the province, in June 2022, eight years after the tragic death of Michael Komape, *News24* reported that most of the schools in the Mopani District in Limpopo still have unhygienic and dangerous pit toilets.<sup>97</sup> Most dishearteningly, “principals and parents were not hopeful that government will improve the situation”.<sup>98</sup>

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93 *Komape*:par. 63.

94 *Komape*:par. 70.

95 *Komape*:par. 70.

96 *Komape*:par. 72.

97 Ezekiel Kekana 'Eight years after Michael Komape's death we visited Limpopo schools to see if their toilets have improved' *News24* <https://www.news24.com/news24/SouthAfrica/News/eight-years-after-michael-komapes-death-we-visit-limpopo-schools-to-see-if-their-toilets-have-improved-20220622> (accessed on 12 February 2024).

98 Ezekiel Kekana 'Eight years after Michael Komape's death we visited Limpopo schools to see if their toilets have improved' *News24* <https://www.news24.com/news24/SouthAfrica/News/eight-years-after-michael-komapes-death-we-visit-limpopo-schools-to-see-if-their-toilets-have-improved-20220622> (accessed on 12 February 2024).



*Komape* and its aftermath demonstrate that the jurisprudence requiring the “immediate realisation” of the sec. 29(1)(a) right is unrealistic and can only lead to continuing non-compliance with court orders and, ultimately, laxity on the part of the state in relation to its obligations under the section. The correct approach to the limitation of this right is to subject it to the normal socio-economic rights limitation framework.

#### 4. INTERNATIONAL PERSPECTIVES

The jurisprudence of sec. 29(1)(a) can also be enriched by considering how the right is treated internationally. Sec. 39 of the *Constitution* enjoins the courts to consider international law when interpreting the Bill of Rights.<sup>99</sup> Courts in South Africa have relied on international and foreign law to give more content to the South African *Constitution*,<sup>100</sup> but in some cases, the courts have considered international law but declined to be influenced by it.<sup>101</sup> Be that as it may, international law continues to be essential for developing South African constitutional jurisprudence, in general, and human rights, in particular. The most important international convention on the right to education is the ICESCR, a flagship treaty on socio-economic rights.<sup>102</sup> Other treaties, such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention against Discrimination in Education, also embody social and economic rights.<sup>103</sup>

The ICESCR will be prioritised in this article. The ICESCR clarifies the content of the right to education and how it must be realised in countries that are states parties. It assigns arts. 13 and 14 to the right to education.<sup>104</sup> Art. 13 of the Convention creates the right to education. Interestingly, the article disaggregates the obligations of states parties at the various levels of education. While the South African *Constitution* divides education into basic

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99 Sec. 39(1) provides: “(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.”

100 Tladi 2016:310-338; Botha & Olivier 2004:42-77.

101 In *Bernstein v Bester* 1996 (2) SA 751 (CC); par. 133, Kriegler J (Didcott J concurring) stated: “I wish to discourage the frequent and, I suspect, often facile resort to foreign ‘authorities’. Far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition ... The prescriptions of section 35(1) of the interim Constitution are also clear: where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents.” See also *Ferreira v Levin* 1996 1 SA 984 (CC); par. 190.

102 De Schutter 2013.

103 UN Educational, Scientific and Cultural Organisation (UNESCO), Convention Against Discrimination in Education, 14 December 1960 <https://www.refworld.org/legal/agreements/unesco/1960/en/20674> (accessed on 12 February 2024).

104 Perera 2021:268-290.

education and further education, the Convention creates three categories: primary education, secondary education, and higher education.<sup>105</sup> The Convention provides that to realise the right to education, states parties shall make primary education compulsory and available to all for free; secondary education should be generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education, and higher education should be equally accessible to all, based on capacity, "by every appropriate means, and in particular by the progressive introduction of free education".<sup>106</sup> Art. 14 is much more concrete. It enjoins every state party which has not been able to secure compulsory primary education within two years to develop a plan of action for progressive implementation within a reasonable number of years to realise the principle of compulsory primary education and free education.<sup>107</sup> The Committee has released two general comments – No. 11 and No. 13 – that have profoundly enriched the content of both articles.<sup>108</sup> The thrust of the comments is that the right to education is economic and depends on member states' financial capacity.<sup>109</sup> Furthermore, both articles on the right to education are subject to the general limitation of all the rights in the Convention in art. 2. In terms of art. 2, states parties must *undertake measures* to the maximum of their *available resources*, to *progressively achieve* the full realisation of the rights recognised in the ICESCR.<sup>110</sup> In terms of general comment No. 3,<sup>111</sup> the states parties have the minimum core obligations: minimum essential levels of each of the rights recognised in the Convention, including the right to education.<sup>112</sup> The general comment notes that, without these minimum essential levels of each right, the ICESCR would not achieve its *raison d'être*.

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105 Art. 13(2) of the ICESCR.

106 Art. 13(2)(c) of the ICESCR.

107 Art. 13(2)(c) of the ICESCR.

108 CESCR General Comment No. 11: Plans of Action for Primary Education (Art. 14) adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 10 May 1999 (Contained in Document E/1992/23); CESCR General Comment No. 13: The Right to Education (Art. 13) adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights on 8 December 2006; Beiter 2006:459-569.

109 General Comment 13:par. 43 provides: "While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to education, such as the 'guarantee' that the right 'will be exercised without discrimination of any kind' (art. 2(2)) and the obligation 'to take steps' (art. 2(1)) towards the full realization of article 13.20. Such steps must be 'deliberate, concrete and targeted' towards the full realization of the right to education."

110 See also Van Ho 2019:872-889.

111 CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2:par. 1, of the Covenant) adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (contained in Document E/1991/23).

112 CESCR General Comment No. 3:par. 10.

It is regrettable that the Constitutional Court of South Africa has already rejected the minimum core doctrine in favour of the reasonableness test, citing a marked difference in the drafting of the South African *Constitution* and the ICESCR.<sup>113</sup> Scholars in the country have already criticised this approach. Liebenberg, for instance, contends that this behaviour is evasive: courts are escaping the interpretative difficulties “of clarifying the State’s obligation in relation to socio-economic rights by way of a rejection of the concept of a minimum core of rights in favour of a standard of review based upon ‘reasonableness’”.<sup>114</sup> In relation to the right to education, it is argued that basic education would be the perfect minimum core obligation for the right to education.<sup>115</sup> While this jurisprudential approach would be ideal, it is not supported by the decided cases in South Africa. Indeed, if South Africa adopted the minimum essential levels of each socio-economic right without necessarily jettisoning reasonableness, this approach would go a long way in realising these rights. In the case of the right to basic education, the *Schools Act* can be commended for providing that the state has certain basic obligations.

The insight from international law is that the right to education, in general, and the right to basic education, in particular, are socio-economic rights. While they may be available immediately, they are subject to the common internal limitations: taking *reasonable measures* within *available resources* to achieve the right *progressively*. These qualifiers are given more meaning by establishing the minimum essential levels of the right.

## 5. CONCLUSION

The article set out to challenge a now-entrenched jurisprudential trajectory about the right to education, in general, and the right to basic education, in particular.<sup>116</sup> The essence of this jurisprudence, which is receiving increasing scholarly and judicial support, is that the right to basic education entrenched in sec. 29(1)(a), unlike the right to further education, is realisable immediately. This article sought to illustrate that such an approach is unrealistic and may promote laxity on the part of the state, because it may treat court orders directing the immediate discharge of sec. 29(1)(a) obligations as unimplementable. The problem with the “immediately realisable” approach is

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113 In *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC), the court outright declined to adopt the minimum core doctrine, holding that “the socio economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. All that is possible, and all that can be expected from the State, is that it acts reasonably to provide access to the socio economic rights identified in ss 26 and 27 on a progressive basis.” There are divergent views on whether South Africa should adopt the minimum core. See Bilchitz 2003:1-26; Chenwi: 2013:742-769; Steinberg 2006:264-284.

114 “The interpretation of socio economic rights” In S Woolman & M. Bishop 2014:ch. 33.

115 Simbo 2018:126-149.

116 This jurisprudence is trailblazed by the Constitutional Court decision in *Governing Body of the Juma Masjid Primary School*.

that it disregards the reality that the right to basic education requires resources to be implemented. In most cases, court orders are not implemented, like in the provision of books and scholar transport cases, because the court would not have inquired, using the reasonableness test, how the state progressively, within its available resources, realised the right. *Komape* has been flagged as a case in point. Insisting on the right being enforceable immediately without regard to resource constraints treats the right as if it is an exclusively negative right, akin to civil and political rights.<sup>117</sup> Admittedly, sec. 29(1)(a) is not qualified (internally limited), which naturally means that it must be limited by the general limitation in sec. 36. However, the systematic approach is to consider the nature of the right and the reasonableness in sec. 36 as avenues to analyse the right within its proper categorisation as a socio-economic right. This means that the right to education – both basic and further education – will benefit immensely from the growing single jurisprudence of socio-economic rights in the country and at the international level. At the international level, aspects of the right to an education are realisable immediately, such as the prevention of access and the prohibition of discrimination, but in the main, states' obligations are positive: they involve the use of resources.<sup>118</sup> If this approach is taken, errors like the one in the *Mahapa* case, where the court failed to invoke socio-economic rights to analyse NSFAS as a state measure to realise the right to further education, would be avoided. The country could benefit more from a single socio-economic rights jurisprudence rather than a fragmented jurisprudence.

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117 McConnachie & McConnachie 2012.

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