

THE RIGHT TO BASIC EDUCATION IN SOUTH AFRICA: EQUALITY DISCRIMINATION BY THE STATE

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Abstract

One of the effects of apartheid is inequality in the South African educational system. The Republic of South Africa's Constitution guarantees everyone the right to a basic education. However, the State did not make provision for free basic education for everyone but rather made provision for a market-related system of fees, wherein those who cannot afford the fees are protected against discrimination by providing free education. This resulted in disparities and inequality in the state school system, wherein ex-model C schools, now called higher quintile 4 and 5 schools, in affluent communities, could afford paying higher school fees as compared to low quintile 1, 2 and 3 schools in poorer rural communities. These lower quintile schools in many rural areas did not benefit from the apartheid regime in terms of infrastructure and resources. Many of these schools are still struggling due to past inequalities in apartheid South Africa and are battling to supplement state funding due to the low socio-economic status of parents in the community. The State is still experiencing challenges with infrastructure and the provision of adequate resources to fulfill this fundamental right to basic education more than thirty years after apartheid was abolished. The inability of parents or legal guardians to pay school fees has, arguably, led to a violation of the right to basic education by the State. Of great concern are the other fundamental rights that are affected by the right to basic education not being realized and consequently keeping the affected learners in their socio-economic state without the possibility of transformation and opportunities out of poverty. It must be emphasized how crucial it is to recognize the importance of the right to basic education in relation to other fundamental rights, considering that it is an empowerment right. The aim of this paper is to illustrate from a legal perspective, against the backdrop of relevant legislation, court cases, academic literature and internet sources that the State's failure to provide free basic education to all learners amounts to unfair discrimination.

Keywords: *Right to basic education, fundamental rights, inequality, discrimination, social transformation.*

1. Introduction

In terms of article 28 of The UN Convention on the Rights of the Child (1989) state parties are obligated to ensure that primary education is mandatory and available free to all. Section 29(1)(a) of the Republic of South Africa's Constitution (1996) (Constitution) states that each person has the right to basic education which includes adult basic education. The South African government (State) is obligated to not impede upon learners' access to the right to basic education and must put measures in place for basic education to be available for all learners (Arendse, 2011). The South African Schools Act 84 of 1996 (Schools Act) builds on the Constitution and is the legislation that is used to regulate the education system (Strohwald, 2024). Section 5(1)(a) of the Schools Act directs that all public schools must admit learners and serve their educational requirements without any unfair discrimination.

This paper addresses the following research questions: Has the State fulfilled its obligation to ensure that the right to basic education in terms of section 29(1)(a) of the Constitution is met for all learners? Has the State fulfilled its duty to provide free basic education for all?

2. Methodology

The researcher conducted a literature review analyzing secondary data such as legislation, policies, and court cases. The material reviewed was to establish what the core content of the right to basic education is, analyze and consider the criticism against the quintile ranking system in the South African school system, consider the reported effects on learners' rights, and ascertain whether the State is unfairly discriminating

against learners on the grounds of race and socio-economic circumstances and to establish if the provision of education is free.

3. Literature review

3.1. The core content of the right to basic education

The minimum core content is described as the substance of a right, without this pivotal element the actual significance of the human right is lost (Arendse, 2011). On the international platform, The Committee on Social, Economic and Cultural Rights (CESCR) in their General Comment No. 13, established the 4-A Scheme that states that education must be available, accessible, acceptable, and adaptable (Arendse, 2011). The concepts of being available and accessible refer mainly to the rights to basic education, whereas being acceptable and adaptable refers to rights in education (Arendse, 2011). Economic and physical obstacles must not affect accessibility to education and there should not be discrimination to access the right (Strohwal, 2024). According to Strohwal (2024), there is a link between economic accessibility and the absence of discrimination in that fees and indirect costs related to basic education, for example, uniforms and transport fees, impede learners from education, it boils down to economic inaccessibility, meaning the impoverished are discriminated against which violates their right to basic education. Physical access to the school is also needed therefore the school should be, for example, a safe distance from where the learners reside (Strohwal, 2024).

According to Ally and Kazim (2024), although the South African Constitutional Court had been hesitant to recognize a minimum core context of socio-economic rights, the courts have not rejected a minimum core approach to basic education. In the South African case of *AB v Pridwin Preparatory School* (2020), the courts expressly recognized that the state is mandated to make provision for education of a certain quality or standard. Basic education should at least include textbooks, furniture for classrooms, ample and adequate educators, basic infrastructure, transport for learners, and nutrition (Ally and Kazim, 2024).

3.2. The constitution and equality

Section 9(1) of the Constitution states that each person is equal before the law and equally entitled to be protected by and benefit from the law. Section 9(3) of the Constitution prohibits unfair discrimination by the State, directly or indirectly, on various grounds listed which includes race. In the case of *Harksen v Lane* (1997), the Constitutional Court set out a two-stage investigation to determine unfair discrimination, firstly, whether the differentiation amounts to discrimination and secondly, does the discrimination amount to unfair discrimination. Unfairness will be presumed if discrimination is based on one or more of the grounds listed in section 9(3) of the Constitution. However, if it is non-listed ground, the onus will be on the complainant to prove the unfairness. The focus of this test will be to determine how the complainant and others who are similarly affected are impacted by the discrimination.

The right to basic education is “immediately realisable”, meaning that the right is unqualified and not subjected to the State having to implement reasonable legislation or further measures to realize the right and the right can only be limited in terms of section 36(1) of the Constitution (*Governing Body of the Juma Musjid Primary School v Essay* 2011).

3.3. The South African school system

Section 34(1) of the Schools Act directs that to repair the historical disparities of the apartheid education system, and to guarantee that the rights of learners are properly exercised, public schools must be funded from public revenue by the state in an impartial manner (Van Dyk & White, 2019). In terms of section 35 of the Schools Act, the goal of the National Norms and Standards for School Funding (NNSF) is to improve fairness when funding the schools and therefore rank schools creating categories consisting of quintiles 1 to 5 (Van Dyk & White, 2019). The School’s Act does not make provision for free basic education for all learners, it is only free depending on the learners’ socio-economic circumstances (Strohwal, 2024). The quintile placement is determined by the unemployment and literacy rate of the community in the area where the school is situated, with a quintile 1 suggesting an impoverished school, and a quintile 5 ranking suggesting an affluent or well-off school (Van Dyk & White, 2019). It would therefore make sense that the schools in the impoverished areas should receive a higher amount of state funds as opposed to the schools in the wealthier areas and the expectation was that this approach should result in equality and fairness when funds are allocated between the different classified schools, however, the quintile system is not as effective as it set out to be (Van Dyk & White, 2019). The Schools Act also stipulates that schools are categorized as either a no-fee-paying school or a fee-paying school, provision is made for exemption applications by parents who are unable to pay the fees in a quintile 4 or 5 school (Strohwal 2024). I will proceed to discuss the criticism against the quintile ranking system.

3.3.1. Criticism against the quintile ranking system. The South African Constitution sets out to transform our society by bestowing the right to basic education but up until this day quintile 1, 2 and 3 learners, mostly made up of black and/ or poor learners, remain disadvantaged by not having access to adequate education (Arendse, 2019). A lack of funding influences the delivery of adequate education (Van Dyk & White 2019). With adequate education I mean the basic core content of the right to basic education.

The first issue with the quintile system is that the higher quintile schools have governing bodies (SGB's), who are permitted to determine the school fees per learner, and those schools have more affluent parents who can afford to pay high amounts in school fees which results in social, material and organizational benefits, compared to the lower quintile schools (Van Dyk & White, 2019). Extra resources can be raised by fee-paying schools through fundraising and obtaining donations and sponsorships; whilst this is not allowed for non-fee-paying schools (Maistry & Africa, 2020). Even though quintile 5 schools' funding from the state is less, quintile 1 schools remain in a worse position concerning school resources and composition (Van Dyk & White, 2019).

The second issue is that the public school system is only seen as either well-resourced and privileged or poorly resourced and underprivileged and with closer inspection one may find that quintile 2, 3 and 4 schools require more resources than quintile 1 schools, which proposes that the ranking system is placing quintile 2 to 4 schools in the wrong quintiles (Van Dyk & White, 2019). Quintile 4 schools are equivalent to or marginally above the national average of the percentage of underprivileged families, even though it is given far less funds than the quintile 1 to 3 schools (Van Dyk & White, 2019). There is a pressing need to reclassify schools in the ranking system to guarantee that those that require more from the funds allocations are placed in the right quintile rank to receive enough funding for their shortcomings (Van Dyk & White, 2019).

The third issue is that even though the state must fund and maintain the facilities, maintaining schools is frequently neglected with overcrowded schools as one of the main issues in a lot of the rural schools (Van Dyk & White, 2019). It is reported that there are no good systems in place to do maintenance inspections and that they are done in an impromptu way when broken down or damaged equipment requires attention and that the funds from the Department of Education for maintaining schools were not enough (Van Dyk and White, 2019). The schools that are funded by school fees can supplement the maintenance expenses from those funds, but the no-fee schools are not able to maintain their schools as needed (Van Dyk and White, 2019). The different financial abilities of quintile 1 and 5 schools are an indication of how the quintile system is ineffective in solving the equity dilemma faced in the schooling system (Van Dyk and White, 2019).

Charging school fees and their relation to free basic education is important because fees directly impact whether a learner can access basic education (Strohwal, 2024).

3.3.2. The aftermath of the quintile ranking system on learners. Arendse (2019) picked up a pattern in her analysis of quality that Black and/or impoverished learners do not have equal access to quality education post-apartheid. Her reasons being first, after analyzing local and international standardized assessments, that Black and/ or impoverished learners do considerably worse than their White and/ or more socio-economically better off Black counterparts and secondly, several of the previously disadvantaged schools (especially the ones in the previous Bantustan territories) are still impacted by inadequate infrastructure by way of poor provision or entirely lacking, of school buildings and furnishings, libraries, laboratories, textbooks and school transport for learners.

Spaull (2015) points out that the constituencies of the different school systems greatly differ with the previously disadvantaged black schools still being racially the same in other words it remains Black post-apartheid and still mainly impoverished; whilst the previously advantaged White and Indian schools are racially more blended with nearly all the learners from middle and upper-class socio-economic backgrounds, regardless of race. He is further of the opinion that due to the connection between race, geographical location, and poverty, poor Black children from rural areas are particularly disadvantaged and have very little possibility if any of improving in terms of social mobility (Spaull, 2015). The effect that the right to basic education has on other fundamental rights and that it is considered a transformative instrument for social transformation (Arendse, 2019). The Governing Body of the Juma Masjid Primary School v Essay (2011) case states that the objective of the right to basic education includes developing someone's personality, talents, and what they are mentally capable of achieving and providing a foundation for a lifetime of learning and employment opportunities. Arendse (2011) notes that the reason for basic education to be free is because if it is guaranteed, it leads to the fulfillment of other human rights which empowers people to play a meaningful part in society.

3.3.3. Infringements experienced by learners. The South African courts had a crucial role thus far in the interpretation of the right to basic education (Strohwal, 2024). Various organizations such as the

Legal Resources Centre, Equal Education, Equal Law Centre, Section27 and the Centre for Child Law have instituted court cases that have played an important part in addressing violations of the right to basic education (Strohwal, 2024). I will proceed to mention a few of these cases.

In the case of *Minister of Basic Education v Basic Education for All* (2016) the Supreme Court of Appeal found that there was a violation of Limpopo learners' constitutional rights namely the right to basic education, equality, and dignity as a result of the National Department of Basic Education and the Limpopo Department of Education not providing all learners with the prescribed textbooks before teaching the courses commenced. In the unreported case of *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education* (2022) the court again had to decide on the Eastern Cape Provincial Government's failure to allocate textbooks and stationery to numerous schools in Eastern Cape (Strohwal, 2024). The reason for the failure advanced by the Department was insufficient financial resources and the court's response to such claims was that the state's budgetary constraints are no excuse for violating their constitutional obligations; the court also highlighted the right to basic education's ability to transform our society (Strohwal, 2024).

The Legal Resource Centre on their website on 19 December 2024 welcomed a ruling handed down by the High Court on 17 December 2024 that directed that the Eastern Cape Department of Transport must provide transport to those learners qualifying for such in the 2025 school year. The judge mentioned that thousands of poor learners, especially in the rural areas of the Eastern Cape, had to travel far distances over often dangerous terrain to attend school. Financially, the families of these learners are not able to solve the transportation problem. The court found that the state's failure to provide all qualifying learners with scholar transport is unconstitutional and invalid. Approximately 40, 000 learners are affected by this judgement.

The Daily Maverick dated December 2024 reported that the Department of Education (DBE) noted in its annual report that the targeted number of new schools that were supposed to be built through the Accelerated Schools Infrastructure Delivery Initiative (ASIDI) was not achieved. This program was started in 2011 to deal with critical infrastructure problems in schools with a focus on the replacement of schools built with improper materials, for example, mud, to provide reliable water and sanitation and to guarantee accessibility to electricity in schools that were identified to lack such basic services. According to Daily Maverick 2024, the DBE also mentioned that the School Infrastructure Backlog Grant (SIBG) is facing a cutback of R179.8- million, which affects completing the planned projects and resulting in them being held over to the next financial year with finalization thereof dependent on available funds. Matshidiso Lencoasa, a budget analyst at the public interest law centre Section27, mentioned that budget cuts played an important role in DBE's inability to build schools, she also indicated that with the current level of funding the 2030 target will most likely not be met. She mentioned that going forward the Treasury will lessen the allotted budget to the provincial equitable share, which will result in a decrease in the availability of resources to effectively realize the 2030 goals, let alone to fulfill the Basic Education Minister's pledge to eradicate pit latrines by 2025.

4. Conclusion

My conclusions are as follows, the minimum standards for the right to basic education, which are set by international and national law, are still not being met in some previously disadvantaged schools, hence the court cases that are still to this day being instituted by civil rights organizations time and again. The learners affected by these infringements are mainly Black and from poor socio-economic circumstances (Maistry & Africa, 2020). The studies of Spaul (2015) show that parents in better socio-economic conditions have been able to send their children to higher quintile schools where a better level of education is provided. Higher quintile schools can provide adequate education that meets at least the minimum standards because of the school fees that they can request from parents compared to certain of the lower quintile schools that do not get the minimum standard of education because of the parents' poor socio-economic conditions (Maistry & Africa, 2020). In my opinion, there is unfair discrimination by the State on the grounds of race and socio-economic conditions concerning adequate basic education for learners that is linked to the implementation of the quintile ranking system by the State, which has caused a divide between rich and poor which can be directly linked with the quality of basic education that could be bought for one's child. I am of the view that the State has not fulfilled its duty to provide free basic education as envisioned by the UN Convention of the Rights of Child (1989) nor the right to basic education in terms of section 29(1)(a) of the Constitution is being realized for all learners in our country, instead adequate basic education comes with a price tag. I agree with Maistry and Africa (2020), that schools are being treated like businesses in South Africa and that the State provisioning and the quintile ranking model need to be critically reviewed, particularly because of the model's consequences.

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