

# The constitutional framework for pursuing equal opportunities in education<sup>\*</sup>

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## Abstract

*The promotion of equal learning opportunities is crucially important for the improvement of the quality of life of millions of people. The virtues of education in preparing learners for life, for meaningful interaction with other human beings, for constructive civic and political involvement, and for successful economic participation stand beyond reason. As stated in *Brown v Board of Education*, education "is the very foundation of good citizenship". This contribution focuses on the constitutional framework within which equal educational opportunities are pursued in South Africa. Section 29 of the Constitution, which provides for the education rights, and section 9, the equality principle, as well as the interaction between them, are discussed in some depth. It is concluded that, despite the constitutional framework being in place, there is still a long way to go before education opportunities will have been created that enable learners with different backgrounds, needs, abilities and preferences to achieve their potential within the complexities of modern society. A superhuman effort is required to make meaningful progress towards adequate access to educational opportunities for millions of people still hamstrung by the vicious cycle of poverty, disease and hopelessness.*

*A balance must also be struck between the constitutional values of dignity, equality and freedom. Aspects of current education policies fail to appreciate this, especially when it comes to reflecting language and religious diversity in education. Policies that deny this diversity, and impose uniformity in the name of equality, will fail in the long run, because a unified nation cannot be built by rejecting the bricks one has to use. As such policies marginalise people, and deny their self-respect and self-worth; they affect their human dignity. A clearer understanding is needed of what nation-building is about, and in pursuing everyone's equal worth, it must be appreciated that equality will remain an elusive dream if people's uniqueness is ignored, and if we fail to pursue equality within the context of their diversity. In the final*

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*analysis it is a quest for human dignity rather than equality. That is what Brown v Board of Education is about. And that is what democracy in South Africa should be about.*

## Introduction

### General

In law issues of equality often concern multiple causes of discrimination such as race, gender and disability.<sup>1</sup> In South Africa in particular, questions of equality, in education as in other spheres, are naturally intertwined with the redress of the racial discrimination and inequalities of apartheid. This is not dissimilar to the American experience, where much that has happened in education after *Brown v Board of Education* is a chronicle of legislative, judicial and other attempts to overturn the effects of former segregation policies. Of course equality is more than redress and is also about creating opportunities for people to realise their potential, irrespective of race, gender, age or disability. It is about treating people with respect for their inherent dignity, freedom and uniqueness. In the final analysis, equality is about human relations and the responsibility of the state as well as the individual to promote what is fair and just to everybody.

The effects of apartheid are particularly evident in the provision of state services such as housing, health care, welfare and education. After a decade of democracy, vast differences persist in the day-to-day living conditions of the various race groups. In education the constitutional and legal framework to redress the situation, to achieve greater equity, and to move pro-actively towards the realisation of equal opportunities is more or less in place, but so far its execution leaves much to be desired.<sup>2</sup> This situation is also not unfamiliar to the United States, where, for example, much is still required to bridge the gap in education provision created or perpetuated by inadequate funding systems.<sup>3</sup>

The promotion of equal learning opportunities is crucially important, not because the inherited inequalities are more serious than in other fields, but because quality education is so vital to the improvement of the general quality of life of millions of people. The virtues of education in preparing learners for life, for meaningful interaction with other human beings, for constructive civic and political involvement, and for successful economic participation stand beyond reason. In *Brown v Board of Education* it was bluntly asserted that education "is the very foundation of good citizenship".<sup>4</sup> This contribution focuses on the constitutional framework

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<sup>1</sup> See e.g. Collins *The Equal Opportunities Handbook: A Guide to Law and Best Practice in Europe* (1992).

<sup>2</sup> See e.g. the comments by Berger "The right to education under the South African Constitution" 2003 *Columbia Law Review* 614, 616-623.

<sup>3</sup> For a summary of the mixed results of legal challenges to various funding systems based on local property taxes employed by states in the USA, see Imber and Van Geel *Education Law* (2000) 281-283. See in particular the conflicting judgments, first by the US supreme court in *San Antonio Independent School District v Rodriguez* 411 US 1 (1973) and, second, by the California supreme court in *Serrano v Priest* 487 P.2d 1241 (1971). The effects of these funding systems are sometimes referred to as "savage inequalities" – see e.g. Kozol *Savage Inequalities: Children in America's Schools* (1991). See also Thro "Constitutional paradigms of educational equality: the American experience" paper read at the Oxford Round Table, University of Oxford, 14-21 August 2002, who points out that inequality has multiple causes which will not necessarily be solved by the mere spending of more money.

<sup>4</sup> *Brown v Board of Education* 347 US 483 (1954) 493. See also *Hartzell v Connell* 679 P.2d 35 (Cal. 1984) 40-41; *Sheff v O'Neill* 678 A.2d 1267 (Conn. 1996) 1294; *Smith v Regents of Univ. of Cal.* 844 P.2d 500 (Cal. 1993) 526; *Campaign for Fiscal Equity v State* 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001) 487.

within which equal educational opportunities are pursued in South Africa. The actual progress made so far within this framework is best left to other commentators.

## The underlying values of the Constitution

Two provisions of the Constitution are of particular relevance in a discussion of equal educational opportunities, the equality principle in section 9 and the education rights in section 29. Of course, these provisions have to be interpreted within the context of the Constitution as a whole, and with reference to all the underlying values of the Constitution. Specifically in respect of equality, section 39(1) provides that when interpreting the Bill of Rights, the values underlying an open and democratic society based on human dignity, equality and freedom must be promoted, international law must be considered and foreign law may be considered. Section 1 contains the underlying values of the Republic and again refers to human dignity, the achievement of equality and the advancement of human rights and freedoms, whereas the Preamble to the Constitution contains a reference to the equal protection of citizens by the law. The achievement of equality is therefore central to the democratic South African society, and sections 9 and 29 can be discussed properly only within this context.

The Constitution's emphasis on equality should be considered in context. The Constitution recognises in equally strong terms the human dignity and freedom of each individual and the diversity of the South African society.<sup>5</sup> The Constitutional Court related equality to the equal worth of all human beings and in *S v Makwanyane* elevated human dignity above all other rights and values.<sup>6</sup> In *President of the RSA v Hugo* the Court quoted with approval the following from a Canadian case

Equality ... means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.<sup>7</sup>

In *Prinsloo v Van der Linde* the court held that the meaning of "unfair discrimination" as prohibited by section 9(3) should be determined against the background of the past unequal treatment of people in which their inherent dignity had been denied. The court then stated

In our view unfair discrimination ... principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.<sup>8</sup>

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<sup>5</sup> Apart from the general recognition of diversity in the Preamble and s 1, eleven official languages are recognised in s 6, religious freedom and language and cultural rights are protected in ss 15, 30 and 31, traditional leadership and communities are recognised in ss 211 and 212, a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities has been established in terms of ss 185 and 186, and provision has been made in s 235 for the self-determination of communities within the Republic.

<sup>6</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC), 1995 3 SA 391 (CC) par 144: "The rights to life and dignity are the most important of all human rights and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."

<sup>7</sup> 1997 6 BCLR 708 (CC), 1997 4 SA 1 (CC) par 41, quoting from *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-105. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) par 42; *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC), 2001 1 SA 46 (CC) par 83.

<sup>8</sup> 1997 6 BCLR 708 (CC), 1997 3 SA 1012 (CC) par 31-32. This view was confirmed in *Harksen v Lane NO* 1997 11 BCLR 1489 (CC), 1998 1 SA 300 (CC) par 50-53; see Van der Walt and

Clearly, equality cannot be pursued in isolation from human dignity and freedom. That is why equality can never mean "uniformity", and should be interpreted to mean "of equal worth",<sup>9</sup> and why people have to enjoy the freedom to be themselves in order for everybody's dignity and equal worth to be respected and upheld. The quest for equal educational opportunities is therefore as much a challenge to balance and harmonise the values of dignity, equality and freedom,<sup>10</sup> to respect and accommodate people's "otherness", and to build the South African nation *on* and not separately from its diversity.<sup>11</sup> In education, dealing with the cultural, linguistic and religious diversity of the South African society is a particular challenge.<sup>12</sup>

## Section 29 of the Constitution

### General: Comparative content

Section 29 of the 1996 Constitution, which provides for several education rights, is one of the so-called social and economic rights guaranteed in the South African Constitution. The others include the right of access to adequate housing, to health care services, to sufficient food and water, and to social security.<sup>13</sup> Section 29 is also a manifestation of the quest for equality within a diverse society referred to above. That is why within its broader thrust of creating equal educational opportunities for all, the provision includes a right to education in one's preferred language, as well as a right to establish independent educational institutions. Section 29 is the result of a hard fought battle.<sup>14</sup> It was one of the last seemingly insurmountable hurdles to the

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Botha "Coming to grips with the new constitutional order: critical comments on *Harksen v Lane NO*" 1998 *SA Public Law* 17-41. See also the comments by Rautenbach "Die Konstitusionele Hof se riglyne vir die toepassing van die reg op gelykheid II" 2001 *TSAR* 329 334; and Cowen "Can dignity guide our equality jurisprudence?" 2001 *SAJHR* 34.

<sup>9</sup> Tribe *American Constitutional Law* (1988) 1515-1516 states: "The core value of this principle is that all people have equal worth. When the legal order that shapes and mirrors our society treats some people as outsiders, or as though they were worth less than others, those people have been denied the equal protection of the laws ... The goal of the equal protection clause is ... to guarantee a full measure of dignity for all." In *Law v Canada (Minister of Employment and Immigration)* 1 SCR 497 (1999) par 53 the Canadian Supreme Court stated: "Human dignity means that an individual or group feels self-respect and self-worth."

<sup>10</sup> Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 14-15 also argue that the values of dignity, equality and freedom should not be considered separately, and should be taken together as the conceptual framework within which the Bill of Rights should be applied. With reference to the Constitutional Court's judgment in *Ferreira v Levin NO; Vryenhoek v Powel NO* 1996 1 BCLR 1 (CC), 1996 1 SA 984 (CC) they declare: "This compartmentalised approach to dignity and freedom represents bad law and worse philosophy" (15).

<sup>11</sup> This was at least conceded by Sachs J in *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 561 (CC), 1996 3 SA 165 (CC) par 52: "The objective should not be to set the principle of equality against that of cultural diversity, but rather to harmonise the two in the interests of both. Democracy in a pluralist society should accordingly not mean the end of cultural diversity, but rather its guarantee, accomplished on the secure bases of justice and equity."

<sup>12</sup> See the remarks by Venter "The protection of cultural, linguistic and religious rights: the framework provided by the Constitution of the Republic of South Africa, 1996" Konrad Adenauer Stiftung *Seminar Report: The Constitutional Protection of Multiculturalism* (1998) 19-20.

<sup>13</sup> Ss 26 and 27.

<sup>14</sup> See the account of the negotiations on the education clause by Malherbe "Reflections on the background and contents of the education clause in the South African bill of rights" 1997 *TSAR* 85 91-95. See also Ebrahim H *The Soul of a Nation: Constitution-making in South Africa* (1998) 215-216.

adoption of the Constitution and its content was finalised right at the very end. Being a compromise, section 29 has some flaws and does not enjoy the unqualified support of all stakeholders. However, it is a better and more comprehensive provision than section 32 of the interim Constitution.<sup>15</sup> Section 29 reads as follows:

- (1) Everyone 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.
- (2) Everyone has the right to receive education in the official language of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
  - (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.

The provision does not refer to all universally accepted education rights.<sup>16</sup> Compulsory education is still not part of the right, although the South African Schools Act provides that learners are compelled to attend school from the age of seven years until the age of 15 years, or the ninth grade, whichever comes first.<sup>17</sup> Unlike the international norm,<sup>18</sup> section 29 also does not guarantee a right to free education.<sup>19</sup>

No general freedom of choice is recognised, but the right to choose between public and private education is provided for, as well as the right to be educated in a preferred language. No explicit provision is made, however, for the right to freedom of choice regarding home education,

<sup>15</sup> See Malherbe (n 14) 87-91.

<sup>16</sup> Several international law instruments provide for educational rights – see e.g. the International Convention on Economic, Social and Cultural Rights (art 13(1)), African Charter on Human and Peoples' Rights (art 17), European Convention on the Protection of Human Rights and Fundamental Freedoms (Protocol 1 Art 2) and especially the Convention against Discrimination in Education. See further Nowak "The right to education" in Eide *et al* *Economic, Social and Cultural Rights: a Textbook* (1995) 189-211; Delbrück "The right to education as an international human right" 1992 *German Yearbook of International Law* 92; De Groof "Some comments and questions on rights dealing with education in South Africa" in De Groof and Bray (eds) *Education under the New Constitution in South Africa* (1996) 55.

<sup>17</sup> S 3(1) of Act 84 of 1996.

<sup>18</sup> Cf Art 26(1) of the Universal Declaration of Human Rights, Art 13(2)(a) of the International Covenant on Economic, Social and Cultural Rights, Art 28(1)(a) of the Convention on the Rights of the Child (iro primary education), Art 3(a) of the African Charter on the Rights and Welfare of the Child, and Art 4(1)(a) of the Convention against Discrimination in Education.

<sup>19</sup> See further below.

and the right of parents to have their children educated according to their own religious and philosophical convictions. The South African Schools Act creates the possibility of home schooling by providing for the registration of such learners, but, of course, this possibility does not enjoy constitutional protection.<sup>20</sup> Parents' freedom of choice regarding religious matters has been covered partly by providing for voluntary religious observances in public institutions.<sup>21</sup>

Section 29 indicates how South Africa differs from the United States where there is no express recognition of a right to education.<sup>22</sup> This in itself lays a very different foundation for creating equal educational opportunities. For a start the right creates a direct constitutional obligation on the state to provide education which can be judicially enforced,<sup>23</sup> whereas in the United States the courts are formally confined to furthering equality wherever the state indeed provides education. The absence of an express right has to an extent proved to be a handicap in the United States's quest for equal educational opportunities.<sup>24</sup>

Unlike section 32(a) of the interim Constitution, section 29 of the present South African Constitution does not contain an express right to equal access to educational institutions, but it is assumed that the right is implicitly covered by the equality rights guaranteed in section 9.<sup>25</sup> Of course, the provision in section 32(a) referred not only to basic education, but to all education provided by state or state-aided institutions, including universities supported by the state.<sup>26</sup> The equality principle in section 9 furthermore sanctions affirmative action, and programmes instituted by educational authorities that give preference to the admission of pupils disadvantaged by past discriminatory laws and practices enjoying constitutional protection.<sup>27</sup> As mentioned, the express provision of a right to equal access is in any case probably unnecessary as the equality rights in section 9 could be regarded as providing adequate protection. In view of the apartheid history, it was probably deemed necessary and appropriate to include the right in the interim Constitution. This kind of provision, and section 9 in its absence, guarantees equality of access and of opportunity. It does not imply total equality, but equal opportunities to education according to every person's abilities and potential. Reasonable and justifiable admission requirements based on performance, language proficiency and age may in other words be imposed.<sup>28</sup>

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<sup>20</sup> S 51. Cheadle *et al.* (n 10) 543 aver that the reference in s 29(3) to "independent educational institutions" does impose a duty on the state to allow parents to educate their children at home.

<sup>21</sup> S 15(2). This matter has become contentious due to the government publishing a rather sweeping policy on education and religion during 2002, and a final version in 2003, which violates s 15 in key respects. Much has been said about the policy over the last couple of years – see for an early comment Malherbe "The constitutionality of government policy relating to the conduct of religious observances in public schools" 2002 *TSAR* 391.

<sup>22</sup> As confirmed in *San Antonio Independent School District v Rodriguez* 411 US 1, 33 (1973).

<sup>23</sup> See the discussion below.

<sup>24</sup> Imber and Van Geel (n 3) 283 point out that challenges to the inequalities created by state funding systems based on taxes often fail in the absence of an express right to education, as the strict scrutiny standard does then not apply.

<sup>25</sup> This view is shared by Cheadle *et al.* (n 10) 537. See further below.

<sup>26</sup> See Malherbe "Die onderwysbepalings van die 1993 Grondwet" 1995 *TSAR* 1 2-3.

<sup>27</sup> S 9(2). See e.g. the reference to *Motala v University of Natal* 1995 3 BCLR 374 (D) in par 3.3 below.

<sup>28</sup> According to e.g. the School Education Act of Gauteng (Act 6 of 1995), admission requirements may not discriminate unfairly on the basis of race, sex, belief, language, etc. This should not be interpreted to mean that boy and girl schools are inadmissible, or even that a learner may not be refused because he or she does not understand the medium of instruction at a particular school. See also item 2 of the Schedule to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.



Evidently the educational rights are closely linked to the equality principle and whereas some educational rights can be regarded as manifestations of the equality principle, the latter in return impacts on almost every aspect of the education rights discussed here. The interaction between the right to education and the equality principle are discussed further below.

## Section 29(1): Basic education

### *Content*

The right to basic education imposes a positive duty on the state to provide such education in order for the right to be enjoyed and fulfilled.<sup>29</sup> It is an unqualified right requiring the priority attention of the state, also in respect of budgetary allocations. The right requires the state to provide sufficient schools, educators and support and other incidental services in order to ensure reasonable access to basic education for everybody.<sup>30</sup> The right to adult basic education has now been added to this provision. This is superfluous, as *everyone* has the right to a basic education, which obviously does not only refer to children, and should be interpreted to mean everybody, irrespective of age, in need of a basic education. However, as adult illiteracy remains a tremendous problem in many parts of the country, the emphasis on adult basic education can be appreciated. Accordingly the Adult Basic Education and Training Act provides in detail for the provision of education to illiterate adults, fleshing out this constitutional right in innovative ways.<sup>31</sup>

Regarding the level of education that the state is duty bound to provide in order to fulfil the right to basic education, the general consensus on the corresponding section 32(a) of the interim Constitution was that a right to basic education referred to education up to a level of functional literacy, in other words, reading, writing, arithmetic, and an elementary knowledge or awareness of economics, culture and politics. That would be an education probably equivalent to primary education, which in South Africa equals education to the end of the seventh grade.<sup>32</sup>

A more serious question is to what quality or standard of education the right refers.<sup>33</sup> In the United States, basic education refers to a standard of education that enables a person to enjoy his or her constitutional rights to freedom of expression and full participation in the political process.<sup>34</sup> Simply put, it refers to a standard of education that enables a person to enjoy the rights and fulfil the obligations identified with citizenship. The standard of education has a close bearing on the question of equal opportunities.<sup>35</sup> Of course, this aspect is not only significant for the fulfilment of the right, but also to eradicate the inequalities inherited from apartheid. One may accept that the right requires the state to provide education of an "adequate" standard (according to American parlance), in order to fulfil this duty. According to one

<sup>29</sup> *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 537 (CC), 1996 3 SA 165 (CC) par 8-9. See s 7(2) of the Constitution which provides that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights".

<sup>30</sup> Cheadle *et al.* (n 10) 536.

<sup>31</sup> See Act 52 of 2000.

<sup>32</sup> In the White Paper on Education and Training it was suggested that basic education refers to education to the ninth grade. See also the comments in Cheadle *et al.* (n 10) 535.

<sup>33</sup> Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* (1990) 467 refer to "the existence and maintenance of a minimum of education provided by the State, since otherwise the right would be illusory, in particular for those who have insufficient means".

<sup>34</sup> See e.g. *San Antonio School District v Rodriguez* 411 US 1 (1973).

<sup>35</sup> This actually relates to all education that the state is obliged to provide under s 29, such as further education – see below.

commentator this refers to education that provides "a base or foundation for ongoing personal development, civic activity and employment".<sup>36</sup> The International Covenant on Economic, Social and Cultural Rights<sup>37</sup> also refers to a right to education that is "directed to the full development of the human personality".<sup>38</sup> In the South African context "adequate" education could refer to a standard of education that empowers people to rise above the poverty cycle and compete effectively in the labour market, enables people to understand and enjoy their new-found democratic values, rights and freedoms, encourages people to participate in and protect the fledgling democratic system, and enhances their feeling of self-worth as human beings.

### *Limitations*

Limitations on the right to basic education must comply with the general limitation clause in section 36,<sup>39</sup> but any limitation should be closely scrutinised and the state should not be allowed, for example, to justify a limitation merely on the ground of a lack of resources. Significantly the specific limitation provision allowing the state in the case of the right to further education to move progressively towards full compliance does not apply here and the state is expected to fulfil this right fully and immediately.<sup>40</sup> Admission requirements are examples of limitations that have to comply with section 36.<sup>41</sup> In this regard, the South African Schools Act prohibits admission tests and, furthermore, a learner may not be refused because the parent is unable to pay the school fees, or does not subscribe to the mission statement of the school.<sup>42</sup> These grounds are in other words not regarded by the Act as reasonable and justifiable grounds to limit a child's right to basic education. This does not condone non-payment of school fees, or non-subscription to a school's mission statement, but these duties must be enforced through means other than to refuse the child admission which would limit the child's right to education.

The school fee system, which enables individual schools to augment their allocated state funds for the improvement of their facilities and capabilities, is in any case contentious, as it tends to exacerbate the differences between schools in the traditionally white, more affluent, areas and those in the poorer black townships. It has even been argued that the school fee system impedes access to education for those learners who refrain from enrolling or attending because their parents cannot or can ill afford to pay the prescribed fees, and is thus an unconstitutional infringement on their right to basic education.<sup>43</sup> Another contention worthy of consideration is that the school fee system creates differentiation on the basis of the wealth or poverty of a community, which is still inextricably linked to race, and thus amounts to indirect (unintentional) unfair discrimination in terms of section 9(3).<sup>44</sup> This sounds rather similar to the

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<sup>36</sup> Chaskalson *et al.* *Constitutional Law of South Africa* (Revised Service 5, 1999) 38-3.

<sup>37</sup> Which must be considered in determining the content of the right – s 39(1)(b) of the Constitution.

<sup>38</sup> Article 13. See also Article 29 of the Convention on the Rights of the Child, and Article 11 of the African Charter on the Rights and Welfare of the Child.

<sup>39</sup> The US Constitution does not contain a general limitation clause, and over the years the courts have developed criteria or standards for the lawful limitation of each right. Of course, the application of s 36 to every individual limitation that may occur does not exclude the development of different standards for the limitation of different rights, and in different circumstances.

<sup>40</sup> See below.

<sup>41</sup> Chaskalson *et al.* (n 36) 38-10.

<sup>42</sup> S 5 of Act 84 of 1996.

<sup>43</sup> Roithmayr "Access, adequacy and equality: the constitutionality of school fee financing in public education" 2003 *SAJHR* 382 397. It is also contended that school fees are furthermore unconstitutional as they require the poor to spend an inordinate portion of their income on the education of their children (397).

<sup>44</sup> Roithmayr (n 43) 410.

<sup>45</sup> See the references in n 3.



property tax-funding debate in the United States,<sup>45</sup> with the difference that in South Africa the school fee system does not form the basis of school funding and is designed merely to augment allocated state funds. The supplementary nature of school fees possibly weakens its discriminatory nature.

Other limitations of the right to education are disciplinary measures such as suspensions and expulsions, or simply dismissing a learner from class for misbehaviour.<sup>46</sup> The limitation on the right to education implied by such measures must be justified in terms of section 36. Normally such cases require the weighing of, on the one hand, the individual's right to education and, on the other hand, the rights of others to their education, or, put differently, the duty of the relevant institution to maintain order for the sake of protecting the education process.<sup>47</sup>

## Further education

### *Content*

The exact meaning of the right to further education in section 29(1)(b) is rather contentious. "Further education" has been defined by the Department of Education and subsequently included in the Further Education and Training Act to mean education from grades 10 to 12 (the highest school grade), including general and career-specific education provided by technical, vocational and other colleges and institutions.<sup>48</sup> This has been done arbitrarily and there is no clear-cut legal, much less constitutional, basis for this restriction of the general inclusiveness of the ordinary dictionary meaning of the word "further". The point is that in terms of the Department's definition, the right to further education does not include a right to higher education.<sup>49</sup>

On the basis of the wording of section 29(1)(b), there are convincing arguments why further education should be interpreted to include higher education.

First, as mentioned, the term "further" is open-ended and there is no compelling or obvious grammatical or legal reason to restrict its meaning. International law in this regard supports this

<sup>46</sup> Chaskalson *et al.* (n 36) 38-10. On the proper procedures to be followed in such cases, see s 33 of the Constitution, and the Promotion of Administrative Justice Act 3 of 2000, as discussed by Malherbe "Administrative justice and access to information: implications for schools" 2001 *Perspectives in Education* 65.

<sup>47</sup> This test, namely to protect the educational process or prevent its disruption, is widely used in the USA (see e.g. Imber & Van Geel (n 3) 138) and seems to be appropriate for South Africa as well – see e.g. *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N).

<sup>48</sup> See the White Paper on Education and Training GG 16312 of 15 March 1995 26. S 1(viii) of the Further Education and Training Act 98 of 1998 defines further education as all learning programmes leading to qualifications from levels 2 to 4 of the National Qualifications Framework, or their equivalent of grades 10 to 12 in the school system.

<sup>49</sup> S 1(xiii) of the Higher Education Act 101 of 1997 defines higher education as all those learning programmes leading to qualifications higher than grade 12 or its equivalent in terms of the National Qualifications Framework. The White Paper (26) referred to higher education as education provided by professional colleges, technikons and universities, which is not very helpful.

<sup>50</sup> Art 26(1) of the Universal Declaration of Human Rights provides that "higher education shall be equally accessible to all on the basis of merit" (see the comments by Arajärvi "Article 26" in Eide *et al. The Universal Declaration of Human Rights: A Commentary* (1992) 405ff; Nowak (n 16) 189ff; Sieghart *The International Law of Human Rights* (1983) 247). (Art 4(a) of the Convention against Discrimination in Education contains a similar provision.) Art 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights provides that "higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular

view. Most international human rights instruments accept either expressly or tacitly that there is at least a right of equal access to higher education.<sup>50</sup> The European Convention on Human Rights and Fundamental Freedoms is interpreted to mean that one has a right to any education provided at a given time, which naturally includes higher education if provided.<sup>51</sup> A similar position prevails in German law and, accordingly, it has been held that an applicant who qualifies cannot be refused admission to a university on arbitrary grounds.<sup>52</sup> No international instrument or constitution uses the term "further education"<sup>53</sup> and in view of the international approach to the scope of the right, the narrow view taken by the South African education authorities seems unfounded in law and out of step with international norms. A better view would be to regard "further education" as an open-ended concept that includes all forms of education above basic education.<sup>54</sup>

Secondly, the fear that a right to higher education would impose an unbearable burden on the state and that the state would be unable to fulfil its duty to provide higher education if it was included in section 29(1)(b) is unfounded for the following reasons

- (a) Most if not all rights, including the other education rights, require positive action by the state involving costs for their protection, promotion and fulfilment, and one cannot on this basis begin to deny the existence or enforceability of rights expressly guaranteed by the Constitution.
- (b) Section 29(1)(b) contains a specific limitation provision in the sense that the state, through reasonable measures, must make further education progressively available

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by the progressive introduction of free education". In terms of Art II.10(1) of the European Social Charter, states undertake "to grant facilities for access to higher technical and university education, based solely on individual aptitude".

<sup>51</sup> Art 2 of Protocol 1 provides that "no person shall be denied the right to education". In the famous *Belgian Linguistic Case* the court held that a state is not obliged to provide a particular type of education, but that one has the right to avail oneself of the means of instruction existing at a given time (Judgement A.6 of 23 July 1968). According to Van Dijk and Van Hoof (n 32) 467 this does not imply that the state is not obliged to provide a certain minimum of education, otherwise the right would be illusory. It does imply that the scope of the right may vary from state to state. See also the comments by Berka "Human rights: a challenge to educational law: a survey within the system of the European Convention on Human Rights" in De Groof and Malherbe *Human Rights in South African Education* (1997) 199 203-204. Jacobs and White *The European Convention on Human Rights* (1996) 262 simply state: "Article 2, in principle, allows access to any educational facility offered by the State provided that the normal qualifications for admission to it are met." See also Kempees *A Systematic Guide to the Case-law of the European Court of Human Rights* Vol. II (1996) 1311-1312.

<sup>52</sup> Lack of physical capacity has been accepted, for example, as a legitimate ground for refusal. Accordingly, the refusal of a medical student who was able to show that the facilities of the medical faculty were under-utilised, was set aside (BVerfGE 39, 258). Preference to applicants that have completed their military training met with the same fate (BVerfGE 33, 303). See also BVerfGE 39, 276; 43, 47.

<sup>53</sup> The term indeed used in international law is "secondary education", which obviously refers to a particular category of education, viz education in between primary and tertiary education. See also the Convention on Technical and Vocational Training, which does not refer to "further" education and training, whereas in South Africa the latter term includes technical and vocational training.

<sup>54</sup> See e.g. Van Raemdonck and Verheyde "The right to education in South Africa and Belgium: a comparative perspective" in De Groof and Malherbe (n 51) 247 266.

<sup>55</sup> See the *Grootboom* and *Treatment Action Campaign* cases referred to below on the meaning of this phrase. The significance of the fact that the qualification in s 29(1)(b) does not contain the phrase "within its available resources" which appears both in s 26(2) (housing) and s 27(2)

and accessible.<sup>55</sup> This recognises the fact that the enjoyment of the right to any further education depends on the state's ability, financially and otherwise, to provide such education. All education above basic education is therefore in any case subject to this condition. This matter is argued further below.<sup>56</sup>

It may accordingly be asserted that in so far as higher education is indeed available and an applicant complies with reasonable admission requirements, he or she has a right to higher education at the institution and in the course of their choice, implying *inter alia* that a university, being bound by the Bill of Rights, cannot arbitrarily refuse admission to anyone.<sup>57</sup> Equal access and freedom of choice are particular, albeit in South Africa implicit, aspects of the right to education,<sup>58</sup> and further reinforce the right to higher education.

### *Limitations*

Unlike the right to basic education, the right to further education in section 29(1)(b) is qualified by the phrase "which the state, through reasonable measures, must make progressively available and accessible". This is a specific limitation clause which recognises the shortfall in current education provision and allows the state to move progressively towards full compliance. One should bear in mind that all the education rights are in any case socio-economic rights, and that the fulfilment of these rights very often depends on the availability of the financial and other resources of the state. The general approach of the Constitutional Court to these rights is of great significance. Without going into detail, the Court had to grapple with the content and enforceability of social and economic rights in the *Soobramoney*, *Grootboom* and *Treatment Action Campaign* cases.<sup>59</sup> In all these cases the Court confirmed the enforceability of social and economic rights, but at the same time took care not to intrude on the responsibilities of the other branches of government. In both the latter cases, the Court nevertheless expected from the

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(health care), may be considered further. It may e.g. mean that in the case of further education, a lack of resources is not, as in the case of housing and health care, a ground on which the state may plead inability to comply. However, even if it does not signify that difference, it would not affect the argument advanced here.

<sup>56</sup> See the comments below.

<sup>57</sup> Cheadle *et al.* (n 10) 538 simply state: "In line with international standards, further education should be interpreted to include primary education (to the extent that it is not covered by the right to a basic education), secondary and higher education, as well as technical and vocational education."

<sup>58</sup> Malherbe "'n Handves van regte en onderwys" 1993 *TSAR* 686 691.

<sup>59</sup> *Soobramoney v Minister of Health Care, KwaZulu-Natal* 1997 12 BCLR 1696 (CC), 1998 1 SA 765 (CC); *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC), 2001 1 SA 46 (CC); *Minister of Health v Treatment Action Campaign (1)* 2002 10 BCLR 1033 (CC). These cases have been discussed at length – see e.g. Moellendorf "Reasoning about resources: *Soobramoney* and the future of socio-economic rights claims" 1998 *SAJHR* 327; Scott and Alston "Adjudicating constitutional priorities in a transnational context: a comment on *Soobramoney's* legacy and *Grootboom's* promise" 2000 *SAJHR* 206ff; Blackbeard "Renal failure – right to haemodialysis denied" 1999 *THRHR* 304; Mubangizi "Public health, the South African Bill of Rights and the socio-economic polemic" 2002 *TSAR* 343; Liebenberg "The right to social assistance: the implications of *Grootboom* for policy reform in South Africa" 2001 *SAJHR* 232; Sloth-Nielsen "The child's right to social services, the right to social security, and primary prevention of child abuse: some conclusions in the aftermath of *Grootboom*" 2001 *SAJHR* 210; De Vos "*Grootboom*, the right of access to housing and substantive equality as contextual fairness" 2001 *SAJHR* 258; Klug "Access to health care judging implementation in the context of Aids" 2002 *SAJHR* 114.

state *reasonable* policies to fulfil these rights. On this basis the Court found government policies giving effect to the rights to adequate housing and to health care services, respectively, to be inadequate in certain respects and therefore not fulfilling the state's reasonable obligations under those rights.<sup>60</sup> What is significant for education is that if based on the same standard of reasonableness, it might be possible to scrutinise the constitutionality of education provision, especially to the very poor in the townships and rural areas, in similar fashion and to come to a similar conclusion, namely that government policy relating to the provision of education to those South Africans is found wanting.<sup>61</sup>

## Section 29(2): Education in one's preferred language

### *Background*

This was the clause that nearly derailed the constitutional negotiations of the mid-nineties and on which an uncomfortable compromise was reached eventually. The essence of the crisis was that some parties tried to protect the existing separate schools for the different language groups by means of a constitutional right to single-medium schools, as opposed to the ANC's ideal of equal, non-racial education that would eradicate the injustices and disparities of the past. On the one hand, in other words, there was the fear that existing white schools would be overcrowded by pupils from other language and cultural groups. On the other hand there was the suspicion that this fear was inspired by racism, and that a right to single-medium institutions would perpetuate existing inequalities and would frustrate the redress of inequalities and the transformation of the education system.

Largely overlooked in this debate were the educational advantages of mother-tongue instruction, which means that the right to education in one's preferred language is also particularly relevant for the achievement of equal educational opportunities. It may, in other words, be argued that the right is yet another instrument through which equal educational opportunities should be pursued.

### *Content*

Section 29(2) guarantees the right of everyone to education in the official language or languages of their choice in public educational institutions where it is reasonably practicable,<sup>62</sup> in other words, whenever it is reasonable to expect the state to provide such education. In the heated atmosphere generated by the ongoing disputes over single-medium institutions, the recognition of this basic right in the South African multilingual situation is being overlooked sometimes. Note that the right goes further than Article 2 of Protocol I of the European Convention on Human Rights and Fundamental Freedoms as it was interpreted and applied in the *Belgian Linguistic Cases*,<sup>63</sup> and that it indeed imposes a duty on the state to provide such education wherever reasonably practicable. The right is not confined to existing facilities either.

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<sup>60</sup> Note that the qualification that the state must take measures "within its available resources" which appears in s 26 (housing) and 27 (health care), does not appear in s 29(1)(b) – see the comments in n 55.

<sup>61</sup> See the comments by Berger (n 2) 635-640. Berger is of course incorrect when he alleges (637) that since the Constitutional Court did not refer to s 36 in the *Grootboom* case, "limitations are not at the center of constitutional interpretation of socioeconomic rights". The fact that the Court did not apply s 36 expressly does not mean that it did not in fact conduct a "limitations analysis", albeit by implication.

<sup>62</sup> S 29(2).

<sup>63</sup> 1 EHHR 241. See the comments by Van Dijk and Van Hooft (n 32) 467.

The right applies to all education and is not restricted to basic education. Even institutions of higher education are therefore required to provide instruction in the languages preferred by students. However, the right extends only to the official languages and not to all languages used in South Africa. Although it would accommodate most South Africans, it therefore does not strictly speaking provide for a right to mother-tongue education. Of course the right includes mother-tongue education, which is significant not only for the protection of language rights, but also, as mentioned, because it has been proven over and over that the mother-tongue is the preferred medium of education, especially in the early phases,<sup>64</sup> and is therefore a legitimate mechanism for creating equal educational opportunities.

### *Limitations*

Section 29(2) contains an important specific limitation provision in that the right is subject to the condition that provision of education in the preferred language must be reasonably practicable. The state must fulfil this right, unless it is not reasonably practicable or the state can establish on other grounds that its refusal or inability to provide such education complies with the general limitation provision.<sup>65</sup> In respect of the practicability requirement, learner numbers, costs, availability of facilities and educators, the distance to the nearest similar institution that is able to provide education in the chosen language, and the chosen medium of instruction in the case of universities,<sup>66</sup> can be relevant factors that may determine whether, in a particular case, it is reasonably practicable to provide such education. It seems as if this specific limitation provision calls for a similar approach as the one followed in the Canadian case of *Mahe v Alberta*. In that case, the reference in section 23(3)(a) of the Canadian Constitution to student numbers was held to establish a sliding scale of steps to be taken by the state to fulfil the right.<sup>67</sup>

Section 29(2) further provides, and this was the actual compromise during the constitution-making process, that in order to ensure effective access to and implementation of this right, the state must consider all reasonable alternatives, including single medium institutions, taking into account equity, practicability and the need to redress the results of past discrimination. Although this provision does not provide for a right to single-medium institutions, it imposes a particular duty on the state<sup>68</sup> and on any applicable organ of state.<sup>69</sup> In choosing the appropriate institution in general or in a particular case, the state must consider all reasonable alternatives in a *bona fide* way, taking into account what is educationally appropriate, as well as the listed factors of equity, practicability and the need for redress.<sup>70</sup> The factors carry equal weight and must be balanced. What may be equitable to everybody concerned may not be practicable or educationally reasonable or appropriate, and what may be practicable may not serve to redress historical inequalities. This duty applies in the case of existing institutions as well. It thus means that when an education department or school authority takes decisions regarding the medium of instruction, it must comply with the provisions of section 29(2).

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<sup>64</sup> See the references in n 74.

<sup>65</sup> S 36.

<sup>66</sup> See s 27(2) of the Higher Education Act 101 of 1997.

<sup>67</sup> *Mahe v Alberta* 1 SCR 342 (1990). See the comments by Hogg PW *Constitutional Law of Canada* (1992) 1224-1225.

<sup>68</sup> See the comments by Malherbe (n 14) 96 ff.

<sup>69</sup> All organs of state as defined in section 239 of the Constitution are bound by the Bill of Rights – s 8(1).

<sup>70</sup> Cheadle *et al.* (n 10) 540-541.

<sup>71</sup> See Malherbe (n 14) 97-98.

A few implications of section 29(2) should be emphasised.<sup>71</sup>

- ❑ The phrase "in order to provide effective access to and implementation of the right" requires the state to take the right seriously and to be able to demonstrate that it in fact provides the right to education in one's preferred language effectively. The indiscriminate targeting of Afrikaans-medium schools and educational institutions to become dual or parallel medium institutions presently undertaken by the state, as well as the neglect of indigenous languages in education, deny the multilingual reality of South Africa and violate the language rights guaranteed by the Constitution. This is an example of the values of human dignity and freedom being sacrificed for the sake of a view which equals equality to uniformity, instead of the three values being applied in harmony to enhance the equal worth of people.
- ❑ The right to education in one's preferred language is primarily subject to the practicability test, and not to the factors mentioned later in subsection 29(2) relating to the best alternative to provide the right effectively. The latter factors apply only to the determination of the best alternative to give effect to the right, and should not be used to deny the right as such.
- ❑ The fact that subsection 29(2) expressly refers to single-medium institutions means that within a range of possibilities that may also include dual and parallel medium instruction, at least this alternative must always be considered.<sup>72</sup> Whenever they are found to provide the most effective way to fulfil the right to education in one's preferred language, single-medium institutions should be the first option.
- ❑ Any perception that single-medium institutions obstruct the redress of past discrimination is unfounded. As suggested above, mother-tongue education is, as a matter of fact, a powerful tool to extend educational opportunities to all South Africans.<sup>73</sup> Research has established the correlation between mother-tongue instruction and optimal educational progress.<sup>74</sup> Furthermore equal access to educational facilities is in any case guaranteed by the equality principle and any abuse of single-medium institutions to deny anyone equal access to education would be inconsistent with section 9.
- ❑ Although, in principle, dual and parallel medium institutions or instruction may under suitable circumstances be the appropriate option to fulfil the right to education in one's preferred language, it has the shortcoming that diminishing numbers of a particular language group put tremendous pressure on that language and may in practice lead to an institution eventually becoming single-medium. Should that happen, the right of those learners to education in their preferred language is threatened.

Summarising this issue, it should be emphasised that the right to education in one's preferred language is guaranteed unequivocally in the South African Bill of Rights. Single-medium educational institutions are not a guaranteed right, but must be considered whenever the best alternative to provide the right to education in one's preferred language must be chosen. Even when a single-medium institution proves not to be the best alternative, the duty remains on the state to provide education in one's preferred language effectively. This seems to

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<sup>72</sup> Cheadle *et al.* (n 10) 540.

<sup>73</sup> See the discussion by the SA Law Commission, *Project 58: Group and Human Rights: Interim Report* (1991) 189 ff.

<sup>74</sup> See the recent contribution by Heugh "Bilingual and multilingual education in South Africa", paper read at a parliamentary conference on multilingualism, Cape Town 23 February 2004. See also the paper read at the same occasion by Finlayson "Challenges of multilingualism in higher education".



be the most feasible and just way in which this delicate matter could have been handled in the Constitution, but the present concern is that instead of fulfilling the right, the state is actually advancing policies that undermine the right and that may yet prove to be an unconstitutional violation of the right to education in one's preferred language.

## Sections 29(3) and (4): Independent educational institutions

Read with section 29(2), section 29(3) has further clarified the uncertainty about section 32(c) of the interim Constitution. It provides for a right to establish at one's own expense independent educational institutions that do not discriminate on the basis of race, are registered with the state, and maintain standards not inferior to those at similar public institutions. The right protects people's freedom to establish such institutions and does not impose on the state an obligation to provide them.<sup>75</sup> It is significant that, unlike in the interim Constitution, the grounds on which such institutions may be established are left unspecified. The interim Constitution referred only to the grounds of a common culture, language or religion, which led to the question why other grounds like educational grounds, gender or disability, or simple purposes like commercial profit were excluded.<sup>76</sup> There is now no doubt that there is a constitutional right to establish independent educational institutions on any reasonable ground or for any reasonable purpose. Also omitted is the reference to practicability, which did not make sense if the provision in the interim Constitution referred only to private institutions.

The conditions on which the establishment of independent institutions is allowed are in accordance with international law.<sup>77</sup> As the main provider of education, the state has a responsibility to monitor private institutions in order to ensure that standards are maintained. The South African Schools Act and the Higher Education Act accordingly provide for the registration and monitoring of so-called independent educational institutions.<sup>78</sup>

Section 29(3) does not refer to a particular level of education and should be interpreted to include all levels, including higher education. Independent higher education institutions have in any case become a reality, even if they cannot always rely on some state support in terms of section 29(4).<sup>79</sup>

Although probably covered by the equality principle, the prohibition of race discrimination can also be appreciated, especially in the South African context. As there is always the fear that some people may attempt to "buy apartheid", it is also important in the South African context that independent educational institutions, although they are not state institutions, remain bound by the Bill of Rights in terms of its horizontal application. Section 8(2) of the Constitution expressly provides that the Bill of Rights binds natural and juristic persons.<sup>80</sup> Private educational institutions cannot, therefore, be used inconsistently with the Bill of Rights as enclaves of apartheid and for the perpetuation of past privilege.

Section 29(4) simply confirms that the fact that in terms of subsection (3) these private or independent institutions must be established and maintained at one's own expense does not

<sup>75</sup> With reference to s 32(c) of the interim Constitution, Mahomed J in *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 537 (CC), 1996 3 SA 165 (CC) called this a "defensive right" (par 7, 9).

<sup>76</sup> See Malherbe (n 26) 4.

<sup>77</sup> See Currie "Minority rights: education, culture and language" in Chaskalson *et al.* (n 36) 35-27.

<sup>78</sup> See ss 45-50 of the SA Schools Act 84 of 1995 and ss 50-64 of the Higher Education Act 101 of 1997.

<sup>79</sup> As mentioned, s 51 of the Higher Education Act 101 of 1997 provides for the registration of private higher education institutions.

<sup>80</sup> See e.g. Cheadle *et al.* (n 10) 45ff.

<sup>81</sup> Cheadle *et al.* (n 10) 542-543.

preclude the state from subsidising such institutions. All over the world, the state is often involved in the financial support of private educational institutions. There is no duty on the state in this regard,<sup>81</sup> but should the state choose to subsidise independent institutions, it will not be allowed to discriminate unfairly between such institutions.

## The equality principle

### Content

Equality means that people in the same position should be treated the same. Logically it also means that people in different situations should be treated differently in order to achieve equality.<sup>82</sup> Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) emphasises that the state may not discriminate unfairly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth. The right to equality, also known as the equality principle, protects the equal worth of people and any law or conduct that violates the equal worth of people is prohibited by section 9.<sup>83</sup> The provision recognises that people may be treated differently for valid reasons and therefore does not prohibit all discrimination, only unfair discrimination. Unfair discrimination has been defined by the Constitutional Court as unequal treatment that impairs human dignity, or affects somebody in a comparably serious manner.<sup>84</sup> Achieving equality in post-apartheid South Africa poses a daunting challenge and various pieces of legislation, among others the Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>85</sup> have been enacted to further this objective. The latter Act reiterates the state's duty to promote and achieve equality, and provides *inter alia* that the state<sup>86</sup> must take measures, develop action plans and codes of conduct, and enact legislation to address unfair discrimination and promote equality.<sup>87</sup> The Act identifies in its schedule so-called unfair practices that may amount to unfair discrimination and which the state is supposed to address through legislative and other means.<sup>88</sup> Specifically in respect of education, the following are listed as such unfair practices:<sup>89</sup>

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<sup>82</sup> De Waal *et al.* *Bill of Rights Handbook* (2001) 198. In *Jenness v Fortson* 403 US 431 (1971) 442 it was stated that "the grossest discrimination can lie in treating things that are different as though they were exactly the same".

<sup>83</sup> Rautenbach and Malherbe *Constitutional Law* (2004) 333.

<sup>84</sup> *Prinsloo v Van der Linde* 1997 6 BCLR 708 (CC), 1997 3 SA 1012 (CC) par 33.

<sup>85</sup> Act 4 of 2000, made in pursuance of s 9(4). See the brief explanation of the provisions of the Act by De Waal *et al.* (n 82) 225-229 and Cheadle *et al.* (n 10) 118-121. See e.g. also the Employment Equity Act 55 of 1998 and the Restitution of Land Rights Act 22 of 1994 and related legislation dealing with the issue of land.

<sup>86</sup> Which includes all organs of state – see the definitions in s 1 of the Act.

<sup>87</sup> Ss 24 and 25(1).

<sup>88</sup> S 29(1) and (2), read with the schedule to the Act.

<sup>89</sup> Item 2 of the schedule to the Act.

<sup>90</sup> The prohibited grounds are those mentioned in s 9(3) of the Constitution – see above, and see s 1(xxii) of the Act, which in fact extends those grounds mentioned in s 9(3).

- (a) Unfair exclusion of learners from educational institutions, including learners with special needs;
- (b) unfair withholding of scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds;<sup>90</sup> and
- (c) the failure to reasonably and practicably accommodate diversity in education.

## The right to equality applied to education

The equality principle underpins other rights in that it guarantees the full and equal enjoyment of all other rights; its protective ambit therefore overlaps with those of other rights.<sup>91</sup> The infringement of a specific right very often also amounts to a violation of the equality principle and may even be challenged on the latter ground alone.<sup>92</sup> The equality principle is thus closely linked to and supportive of other rights and, accordingly, impacts on education in different ways. As mentioned above, the principle relates directly to equality of access to education and educational facilities. In states such as Belgium and India equal access is guaranteed by express provisions relating to education, whereas in Germany and the United States of America, equal access is enforced through the general equality principle.<sup>93</sup> In America the principle is instrumental in the elimination of racial segregation,<sup>94</sup> gender discrimination<sup>95</sup> and unjustified differences in funding,<sup>96</sup> and in the creation of equal opportunities for the disabled.<sup>97</sup> Separate schools for boys and girls are generally held not to be unconstitutional;<sup>98</sup> under the South African equality principle it could probably be argued that although such schools differentiate on the basis of a ground listed in section 9(3), this does not amount to unfair discrimination.

The equality principle can indeed be called into action to challenge discriminatory measures and practices in South African education, and promote equal educational opportunities. The Constitutional Court has held in the *Larbi-Odam* case that the equality principle protects foreigners and has accordingly held unconstitutional provisions in education regulations that restricted the permanent appointment of teachers of South African citizens to the exclusion of foreigners permanently resident in South Africa.<sup>99</sup> The Court argued that to permit foreigners to

<sup>91</sup> See e.g. *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC), 1999 1 SA 6 (CC) par 32, 112. See generally the discussions by De Waal *et al.* (n 82) 197 ff; Cheadle *et al.* (n 10) 51 ff, Chaskalson *et al.* (n 36) 14-1 ff.

<sup>92</sup> Cheadle *et al.* (n 10) 77.

<sup>93</sup> See the discussion by Malherbe (n 58) 693-694.

<sup>94</sup> See *Brown v Board of Education* (1954) 347 US 483.

<sup>95</sup> *Berkelman v San Francisco Un School District* (1974) 501 F 2d 1264. See also the range of cases cited by Thro (n 3) relating to gender discrimination in school sports.

<sup>96</sup> See e.g. *San Antonio Independent School District v Rodriguez* (1973) 411 US 1. See also the numerous cases referred to by Imber and Van Geel (n 3) 282.

<sup>97</sup> *Board of Education of Hendrick Hudson Central School District v Rowley* 458 US 176 (1982); *Daniel RR v State Board of Education* 874 F.2d 1036 (US Ct of App Fifth Ct 1989); *Pennsylvania Association for Retarded Children v Commonwealth* 343 F Supp 279 (Pa 1972).

<sup>98</sup> *Vorheimer v School District of Philadelphia* 430 US 703 (1977). That is also accepted in Art 2(1)(a) of the International Convention against Discrimination in Education. But see *Garrett v Board of Education of School District of City of Detroit* 775 F. Supp 1004 (US District Ct, 1991), which cast doubts on the grounds on which new such schools could be established.

<sup>99</sup> *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1997 12 BCLR 1655 (CC), 1998 1 SA 745 (CC).

<sup>100</sup> *Larbi-Odam* (n 99) paras 25-26.

<sup>101</sup> *Larbi-Odam* (n 99) paras 35-38.

<sup>102</sup> Imber and Van Geel (n 3) 217 ff. See in the case of racial discrimination in South Africa, *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T).

enter the country permanently, but then to exclude them from permanent employment, constitutes unfair discrimination which cannot be justified in terms of section 36.<sup>100</sup> It is noteworthy, however, that the Court expressly excluded from the same protection foreigners who only enjoy temporary residence.<sup>101</sup>

Apart from racial, gender, disability and other forms of discrimination, sexual harassment and age limitations are other contentious issues in education relating to the equality principle.<sup>102</sup> In *Mfolo v Minister of Education, Bophuthatswana* regulations providing for the obligatory suspension of female students at education colleges who fall pregnant were held to discriminate unfairly on the basis of sex and to be in violation of the equality principle.<sup>103</sup> In view of the prohibition in section 29(3) of racial discrimination in independent educational institutions, the equality principle may also prove to be relevant in private education. In *Harris v Minister of Education* the Constitutional Court declined a constitutional challenge on the grounds of age discrimination to a ministerial notice in which an age requirement of six years was imposed for admission to school, and chose to strike down the notice because it was *ultra vires*.<sup>104</sup>

Lastly, it could be argued that in so far as the state fails to provide quality or adequate education to all learners, especially among the very poor in the townships and rural areas, it violates their right to the equal protection and benefit of the law and amounts to unfair discrimination on the basis of race. As a matter of fact, it might be possible to convince a court of law that their equality rights, as much as their education rights, are being violated. Pointing out the mere inequalities that can still be related to racial divides, even if only indirectly, would probably weigh as much as making out a case on the basis of the differences in the standard of education provided to different communities.<sup>105</sup>

## Affirmative action

Section 9(2) provides that to promote the achievement of equality, legislative and other measures may be taken that are designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. This is the so-called affirmative action provision which allows preferential treatment of persons disadvantaged by apartheid in order to reduce or eliminate the inequalities created by past discriminatory laws and practices.<sup>106</sup> Although the provision has elicited surprisingly little litigation so far, the corresponding provision in the Interim Constitution was the subject of a dispute in *Motala v University of Natal*.<sup>107</sup> In this case an exemplary Indian student was refused admission to medical school in favour of a less meritorious African student in terms of an admission policy which limited the number of Indian students in order to make room for more African students. The court upheld the exclusion of the Indian student simply because it came to the conclusion that Africans were disadvantaged more than Indians under apartheid. Although this contention might be true, it still left the Indian student, whose ethnic group was also the victim of unfair discrimination under apartheid, out in

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<sup>103</sup> 1994 1 BCLR 136 (B).

<sup>104</sup> *Minister of Education v Harris* 2001 11 BCLR 1157 (CC). See the discussion of the case by Bertelsmann in 2001 *Perspectives in Education* 29-34.

<sup>105</sup> Berger (n 2) 640-641 avers that it should be easier to establish the former than the latter, in other words that the equality principle is being violated, rather than one's education rights.

<sup>106</sup> See the discussions of this provision by Cheadle *et al.* (n 10) 76 ff; De Waal *et al.* (n 82) 223 ff. S 9(2) has been reiterated without further explanation in s 14(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>107</sup> 1995 3 BCLR 374 (D).

<sup>108</sup> See De Waal *et al.* (n 82) 224-225. Cheadle *et al.* (n 10) 83 are less critical of the judgment.

<sup>109</sup> Act 76 of 1998. As mentioned, s 14(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 refers to affirmative action but does not explain the matter further.

the cold. A better approach by the court would have been to review the whole admission policy of the University in order to determine whether it was designed to achieve equality for *all* victims of past discrimination.<sup>108</sup> Affirmative action is also relevant for the appointment of educators, a matter which is extensively addressed by the Employment of Educators Act.<sup>109</sup>

## Conclusion

I once told an American friend that according to my understanding the United States has the means, but its legal framework to achieve equal educational opportunities is sometimes not in place, whereas in a third world country such as South Africa, its legal framework is sometimes in place, but it does not have the means. Although an oversimplification the statement draws attention to how difficult it often is to achieve optimum fairness and justice for all. The circumstances of the two states differ vastly, but none can afford to be complacent or smug about their progress so far. Both still have a long way to go before educational opportunities will have been created that enable learners with different backgrounds, needs, abilities and preferences to achieve their potential within the complexities of modern society. South Africa, no doubt, has not even come close to appreciate the superhuman effort required to make meaningful progress towards adequate access to educational opportunities for millions of people still hamstrung by the vicious cycle of poverty, disease and hopelessness.

This contribution highlights the education rights and the equality principle as guaranteed in the Constitution, as well as the interaction between them. The true impact of these rights on realising equal educational opportunities will no doubt only become evident in the years to come. The need for a balance between the constitutional values of dignity, equality and freedom when pursuing equal educational opportunities is also being alluded to. In too many instances South Africans have seen policies that fail to appreciate this, especially when it comes to reflecting language and religious diversity in education, for example the unrelenting pressure on Afrikaans-medium schools to become parallel or dual medium institutions, the neglect of education in the indigenous languages, and the policy seeking to impose on learners a one-sided humanistic view of religion. Such policies that deny diversity and impose uniformity may now seem attractive for the sake of so-called equality, but will fail in the long run, because one cannot build a unified nation by rejecting the bricks one has to use. This is the trap the French seem to be falling into by banning Muslim head scarfs in public schools. They do not seem to understand that their emphasis on equality and the ideal of one French nation denies people their religious and cultural identity, and thus their dignity and their freedom to be themselves. Their misunderstanding of the values of the French Revolution is pitting state and religion against each other and will eventually bring painful conflict upon that nation. The following wisdom of a Canadian judge should be heeded:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do

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<sup>110</sup> *Law v Canada (Minister of Employment and Immigration)* 1 SCR 497 (1999) par 53. Significantly, Chaskalson CJ quoted this passage in "The third Bram Fischer lecture: human dignity as a foundational value of our constitutional order" 2000 *SAJHR* 193 203 n 44. See also in another context Pieterse's plea that "through sensitive, informed and context-based accommodation of cultural principles and values in legislative and judicial decision-making, the South African legal system could reflect the multicultural nature of the society it is meant to serve while simultaneously remaining true to the founding values of the Constitution" ("Its a 'black thing': Upholding culture and customary law in a society founded on non-racialism" 2001 *SAJHR* 364 403).

not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context of their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society.<sup>110</sup>

One can only pray that South Africans will come to a clearer understanding of what nation-building is all about, and that as they pursue, in education as elsewhere, everyone's equal worth and self-worth, they will appreciate that equality will remain an elusive dream if they turn a blind eye to people's uniqueness, and if they fail to pursue equality within the context of their diversity. In the final analysis, their quest is not for equality, but for human dignity. That is what *Brown v Board of Education* is really about. And that is what democracy in South Africa is all about – for the past phenomenal decade as well as the exciting one to come.