

Accentuating the Right to Access Quality Education in Rural South Africa: Lessons to be learned from other Countries

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Abstract: *This paper emphasize the intervention and interpretation of the right to quality education as contemplated in the 1996 Constitution, Freedom Charter, South African Schools Act and other policies and documents. This paper articulates that jurisprudentially speaking, education as a right was first recognised internationally after the end of World War I, and the delivery of the right to access quality education was first expressed in the international arena under the Universal Declaration of Human Rights (UDHR) in 1948 which was then followed by other instruments from the four walls of the world. As per interpretation of these instruments, the right to quality education must be enjoyed by everyone despite one's age, color or race. However, it is an undisputed fact that the right to access quality education is still under serious fractures in as far as enforcement is concerned and as such it requires special attention. This paper therefore used non-empirical (qualitative) methodology generally acceptable in legal research activities which relies heavily on scholarly legal lexicons. This paper concludes that government must promote the realisation and enforcement of the right to (further) education and further recommends that South Africa must use other countries as its model and it should learn and adopt their educational system.*

Keywords: Enforcement; Freedom Charter; International Arena; Intervention; World War I.

Introduction

Education as a right was first recognised internationally after the end of World War I (UNESCO 2007: 7). This took place through the treaties adopted for the protection of certain minorities in Europe in the aftermath of the war. Thereafter, a Declaration on the Rights of the Child was adopted (The Geneva Declaration of the Rights of the Child 1924). This Declaration stressed social and economic needs over the traditional civil and political rights of the child. Though this Declaration did not expressly refer to a child's educational right, one of its Principles required that the child 'be placed in a situation where he/she will be able to earn a livelihood' (The Geneva Declaration 1924). This means that educating children is implicit in enabling them to earn a livelihood. After this declaration other declarations follow which recognised the right to education.

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Legislative frameworks promoting and supporting the right to education

The Constitution (1996) accentuates the consideration of international law as well as the foreign law by a court, tribunal or forum when interpreting any Right in the Bill of Rights (Constitution 1996, section 93 (1) (b) and (c)). These sections provide government with the opportunity to consult international and foreign law and apply it when there is a need and were applicable. Moreover, Mbazira is of the view that in order for the right to education to be fulfilled it is significant to consider international law (Mbazira 2009).

The Constitution (1996) provides everyone with the right to elementary education which encompasses the right to adult elementary education. The Constitution further provides everyone with the right to further education which the state is obligated to make it progressively and sustainably available and accessible to everyone by the implementation of reasonable measures (Constitution, 1996: s 29). The Constitution further provides everyone with a right to choose language/s to be used as medium of instructions in state educational institutions if that education is reasonable and practicable. The state is further obligated to consider all reasonable educational alternatives which include *inter alia* a single medium language of instruction in ensuring the effective access and in doing so, attention must be paid to equity, practicability and remedying harm caused by the past racially discriminatory laws and practices (Constitution, 1996: s 29).

According to the White Paper on Education and Training “education is the cornerstone of any modern, democratic society that aims to give all citizens a fair start in life and equal opportunities as adults” (White Paper on Education and Training 1995). According to the *Committee on Economic, Social and Cultural Rights* “education must be ensured, accessed and guaranteed without any discriminatory basis” (CESCR 1999).

Nasson and Samuel shares the same sentiments by saying that education is particularly equipped both to maintain the existing social order and also to promote varying kinds of change or mobility” (Nasson and Samuel 1990: 1). On the other hand Nasson asserts that as a question of social change, education must be seen as an important participating force, but not as an arbitrating one (Nasson 1990: 103). According to Robinson education is not necessarily the only instrument that can be used to transform the world; however the world cannot be transformed without equipping people with education (Robinson 1982, Nasson 1990).

Modisaotsile highlight that quality education is also significant for ensuring that there is a progressive human development as well as economic and political systems which are socially responsive (Modisaotsile 2012). Modisaotsile further opined that education is the vehicle which the society can utilize to reproduce and structure themselves (Modisaotsile 2012). This means the society which acquired quality education has a range of ideas on how such society should be structured presently and in the future (Modisaotsile 2012). Tomasevski demonstrates that quality education if acquired is the

starting point for every individual to understand and enjoy other fundamental rights and also to empower such individual to participate meaningfully in the society (Tomasevski 2006). Tomasevski further posits that quality education contribute immensely towards the fulfilment of other socio-economic rights and also increase the individual's chances of securing a better employment which as a result secures access to food, housing as well as health care services (Tomasevski 2006).

However, Nevondwe and Matotoka concurrently opined that the right to education as envisaged in the Constitution (1996) can be regarded as a "hybrid right" for the fact that it a socio-economic right which compels the Government to make education accessible and available to every individual (Nevondwe and Matotoka 2013). Nevondwe and Matotoka asserts further that these right is also a civil and political right because it afford people the opportunity to choose the language of their choice in schools and to establish and maintain independent institutions where applicable (Nevondwe and Matotoka 2013).

Bekker is of the view that the right to education, more in particular the right to basic education which include adult basic education is not inextricably intertwined and attached to the principle of progressive realisation and the availability of the state's resources which distinguishes it from other socio-economic rights (Bekker 2000). This means that the right is immediately realizable. According to Dwane quality education is a bridge which a disadvantaged and marginalised society can utilise to cross over from poverty to a better life and to uplift themselves (Dwane 2012). On the other side Van Leeve is of the view that education which is of low quality and standard and fragmented by under resourced, unsafe and unhealthy environment deprive students from exercising and enjoying their right to quality education (Van Leeve 2014).

The Universal Declaration of Human Rights (UDHR)

The right to education was firstly expressed internationally in 1948 under the UDHR (Arendse 2011). Article 26 provides that everyone has the right to education. It further provides that the elementary and the fundamental stages of education shall be free and compulsory. Vocational, technical and professional education including higher education shall be equally accessible to all based of merit. Education shall further be used as a tool to develop human personality and standard and also to strengthen the promotion development of other fundamental human rights (UDHR 1948). It shall also assist the United Nationsto further its activities by keeping and maintaining peace and stability amongst the signatories. This declaration provides parents with a right to choose the kind of education that should be received by their children (UDHR 1948: Art 26 (1) (2) and (3)).

South Africa is implementing the content of this declaration because the Constitution provides that everyone has the right to education (Constitution, 1996: s 29 (1) (a)). Nine years of schooling (grade 1 to 7) is free and compulsory as provided by South African Schools Act (SASA), and the state is making further education progressively available and accessible through reasonable measures to everyone (SASA, 1996: s 3 (1); Constitution, 1996: s 29 (1) (b)).

International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is an international human rights covenant of the United Nations (UN) which South Africa is a state party to. This covenant is aimed at protecting, promoting and realising socio-economic rights such as the rights to quality education. The ICESCR provides that all the signatories to this covenant shall make education accessible to everyone. The signatories agree that education shall be used as a tool to develop human personality and it shall enable every individual to meaningfully participate in all societal activities (ICESCR 1996).

The ICESCR provides further that every signatory shall strive to full realisation of the right to quality education in that elementary education shall be free and compulsory while secondary education which includes technical and vocational education shall be made available and accessible to everyone through progressive introduction of free education (ICESCR, 1966: Art 13 (1) (2) (a) and (b); Art 14).

On 12 January 2015 the South African government ratified the ICESCR which ratification was set to be in force on 12 April 2015. The ratification provides that signatories are obligated to work towards the effective realisation of every socio-economic rights as set out in the ICESCR. The ratification further provides that the ICESCR must ensure the realisation of every learners' rights to elementary education as enshrined in Section 29(1) (a) of the Constitution (ICESCR ratification 2015).

This covenant provides that the South African government shall give progressive effect to the right to education, as contemplated in Article 13 (2) (a) and Article 14 of the ICESCR. This means that covenants and declarations should not limit the scope of the right to basic education and related obligations, nor limit access to education, particularly in relation to free and compulsory elementary education. Accordingly, South Africa's Constitution does not subject the fundamental right to elementary education to progressive realisation (ICESCR ratification 2015; Durojaye 2015).

The Dakar Framework for Action

South Africa is an active party or signatory to the Dakar Framework for Action, where it commits itself to combating poverty and uplifting its people through the provision of basic education that is compulsory for all children of school-going age that is of good quality and in which financial capacity is not a barrier to access for any child which target must be attained by 2015 (Dakar Framework for Action 2000). The Dakar agreement provides that more emphasis must be placed on ensuring that funding strategies and mechanisms are implemented and developed and fund poor schools so as to improve those schools and to attain sustainable quality education. The objective of this framework is far beyond free education for the indigent in that it seek to achieve an educational system that is of good quality and fee free for the indigent of the country (Dakar Framework for Action 2000).

South Africa is implementing this action as it is making basic education free and compulsory for every child of school-going age and making sure that financial incapacity or predicaments is not a barrier for

any child to access basic education (ICESCR ratification 2015; Durojaye 2015). This is a way of combating poverty and uplifting South African people.

Convention on the Rights of the Child

Convention on the Rights of the Child is one of the International human rights treaties to which South Africa is a party, which also support the right of access to education (Convention on the Rights of the Child 1989). Article 28 provides that signatories shall on the basis of equal opportunities promote and make available and accessible quality elementary education free and compulsory to every child which include elementary technical and vocational education. It further provides that appropriate measures should be taken such as introducing free education and affording financial aid in needy cases, making higher education accessible based on merit and capacity and also encourage regular attendance at schools which will reduce drop-out rates and contribute to the capacity building of individuals (Convention on the Rights of the Child, 1989: Art 28 (1) (a) (b) (c) (d) and (e)).

It further provides that in eliminating ignorance and illiteracy, the signatories shall forthwith promote international cooperation in educational matters by introducing scientific technical knowledge and teaching methods which are consistent with the child's human dignity (Convention on the Rights of the Child, 1989: Art 28 (2) and (3)). South African government is promoting the content of this convention because it provides for free and compulsory basic education and encourages the development of adult basic education and other forms of further education through the Constitution (Constitution, 1996: s 29 (1) (a) and (b)).

Declaration on the Rights of the Child

This Declaration provides that children are entitled to free and compulsory elementary education. It further provides that education should improve and promote the child's culture and help the child to become a useful member of society (Declaration on the Rights of the Child, 1959: pri 7). The Declaration set out the best interests of the child as the guiding principle for those responsible for his or her education, and in this way further entrenched a child-oriented approach on matters affecting the child (Declaration on the Rights of the Child, 1959: pri 2; Alston 2004). It followed the lead of the UDHR in prioritizing elementary education. The Declaration provided that a child who is physically, mentally or socially incapable shall be given the special attention, education, and care necessary required by his respective condition (Declaration on the Rights of the Child, 1959: pri 5; Murungi 2013).

African (Banjul) Charter on Human and Peoples' Rights

South Africa is a member state to the African Charter on Human and Peoples' Rights (ACHPR) which is one of the International human rights treaties that also suggest that states have an obligation to make primary education compulsory and free of charge. Article 17 concisely provides that every individual shall have the right to education (ACHPR 1981: Art 17 (1)). To support the right stipulated in article 17, Article 1 provides that all the signatories shall promote every right including the right to education enshrined in this charter and shall adopt relevant legislative measures to promote and protect such

rights. Article 2 further stipulate that every individual shall enjoy every right provided for in this charter without discrimination of any kind (ACHPR 1981).

South Africa is promoting the contents of this charter because it undertook to adopt legislative frameworks and other measures such as the Constitution and SASA to give effect to the right to basic education. This shows that the state is obligated to make primary or basic education free and compulsory to every person without any kind of discrimination and to make sure that everyone is entitled to the enjoyment of every right including the right to basic education.

UNESCO, Convention against Discrimination in Education

The United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention was the first international treaty to recognize a binding right to education (UNESCO, 1960). Article 1 provides that this convention prohibit discrimination in education on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth. The prohibition is effective if the discrimination had the purpose or effect of nullifying or impairing equality of treatment in education, and particularly if such discrimination had the effect of excluding certain groups of persons from any kind of education, or of establishing separate education systems for groups of persons with the effect that the education offered in those separate schools was of an inferior quality (UNESCO, 1960: Art 1). As the first international binding treaty on education, article 4 of this convention further provides that state parties to the UNESCO Convention undertook to make primary education free and compulsory, to ensure compliance by all with the obligation to attend school as prescribed by law and to establish equal standards of education in all public education institutions (UNESCO, 1960: Art 4 (a) and (b)).

Declarations on the Rights of Mentally Retarded Persons (1971), and on the Rights of Disabled Persons

The 1971 Declaration was adopted in the context of a growing consensus amongst non-governmental organisations that specified conventions defining the rights of disabled persons were necessary to complement the general human rights contained in the universal instruments. The Declaration targeted a specific group of people with disabilities, but it became the basis for the subsequent one which extended the entitlements to all persons with disabilities (Declaration on the Rights of Disabled Persons, 1975: preamble). The declaration provides that “the mentally retarded person has a right to education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential” (Declaration on the Rights of the Mentally Retarded, 1971: par 2).

Subsequently, the 1975 Declaration called for measures to enable persons with disabilities to be as self-reliant as possible, and specifically recognised their right to education, vocational training and rehabilitation that will make it possible for them to develop and as well as to transform their educational skills and capabilities (Declaration on the Rights of Disabled Persons, 1975: para 6). These Declarations did not have binding force. However, they constituted moral and political persuasion to secure national

policy changes in the 70s and 80s. They also greatly enhanced the visibility of persons with disabilities and their exclusion from mainstream human rights protection. Hence, soon after the 1975 Declaration, the year 1981 was designated to be the international year of Disabled Persons by the United Nations General Assembly (Murungi 2013).

The right to free and compulsory education in South Africa is also enjoyed by people with disabilities to develop their abilities and potential, to be self-reliant and to recognise their right to education. This means that people with disability are included to enjoy the rights in the Bill of Rights which also include the right to education, hence the word “everyone” as contemplated in section 29 of the Constitution.

The Jomtien Conference

This Conference was held in Thailand (Jomtien) in 1990 against the backdrop of continuing exclusion of a significant proportion of both child and adult populations from education, the UDHR’s proclamation of a right to education for everyone notwithstanding (World Declaration and Framework for Action, 1990: preamble). The conference adopted a Declaration on Education for All and a Framework for Action to Meet Basic Learning Needs. This Declaration reiterated the right of every person to benefit from educational opportunities designed to meet their basic learning needs (World Declaration and Framework for Action, 1990: Art I (1)). The Declaration identified the need to review the meaning and scope of basic education to embrace an expanded vision that entails, amongst other things, broader resource levels and institutional structures (World Declaration and Framework for Action, 1990: Art ii). The expanded vision would also encompass the universalisation of access and promotion of equity which would entail expansion of measures and equal opportunity for all children to achieve and maintain an acceptable level of learning (World Declaration and Framework for Action, 1990: Art ii (2); Art 3).

Lessons drawn from other Countries

Australia

Legislative Frameworks and the Right to Education in Australia

In Australia the states and territories governments are responsible for a variety of educational aspects and financial assistance thereof. Most of the Australian legislative frameworks make compulsory school attendance from the age of six (6) to 15 or 16. In Australia, there is no Commonwealth statute explicitly containing the right to education as an individual right like in the South African context. However there are laws or legislation dealing with the right to education which is relevant to the responsibilities of the Commonwealth.

Australian Constitution

Australia has a written Constitution which has no Bill of Rights to protect human rights in a single document. The Australian Constitution is largely concerned with pragmatism rather than ideology (Gleeson 2000). This means that it says very little about what it is to be Australian. It says practically nothing about how Australians find themselves there. It says nothing of how they should behave

towards each other as human beings and as Australians (O'Donoghue and Brennan 1994; Williams 1999). The right to education is not incorporated in the Australian Constitution as an individual right, nevertheless, there are five explicit individual rights in the Constitution, namely the right to a trial by jury, the right to vote, freedom of religion, protection against acquisition of property on unjust terms and prohibition of discrimination on the basis of State of residency (Commonwealth of Australia Constitution Act 2010 sec 80, sec 41, sec 116, sec 51 (xxxi) and sec 117).

The Education Act

The right to education in Australia is provided for in Education Act (Education Act 2004; republication 21). Section 7 (1) of the Education Act provides that everyone involved in the administration of this Act, or in the educational institution of any kind in the Australian Capital Territory (ACT), must promote the principle that every child has a right to receive an education of high quality. Section 8 outline the responsibilities of parents and government in relation to education and the obligation which government and non-government school including home education schools has in promoting compulsory education by ensuring progressive participation which include the opportunity to participate in training or employment after schooling (sec 8 (a) and (b) (i) (ii) of the Education Act 2004).

Other Legislation Promoting the Right to Education

Canada

Federal Legislative Frameworks Promoting Education in Canada

The governments of Canada has established a robust legal frameworks that intend to put together laws and policies which stand against discrimination of any kind which include discrimination on the grounds of race, colour, sex, language, religion etc. The right to education is also a significant human right in Canada that is guaranteed in federal, provincial, and territorial legislations.

The Canadian Human Rights Act

The Canadian Human Rights Act (1985) was passed to uphold the principle that all individuals should have equal opportunities. This Act provides that discrimination is prohibited on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for which a pardon has been granted (sec 3 (1) Canadian Human Rights Act, 1985). In defining discriminatory practices, the Act states that it is illegal, for any of the reasons listed above, to deny, or deny access to, any good, service, facility, or accommodation to any individual or to differentiate adversely in relation to any individual. Access to education is included in this prohibition (Canadian Commission for UNESCO, Promoting Equality of Educational Opportunity 2012).

The Canadian Citizenship Act

The Canadian Citizenship Act provides that all Canadians, whether by birth or by choice, are entitled to the same rights, powers, and privileges and are subject to the same obligations, duties, and liabilities (sec 6 of the Canadian Citizenship Act 1985).

The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms (1982) provides every individual with equal protection and equal benefit of the law without any discrimination of some sort and guarantee that every individual must be equally treated before and under the law. It further ensures that this guarantee of rights does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability (sec 15 Canadian Charter of Rights and Freedoms, 1982).

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

In November 2010, Canada joined other countries in supporting the UNDRIP as a reaffirmation of its commitment to promoting and protecting the rights of Indigenous peoples in Canada and around the world. The declaration sets out the individual and collective rights of Indigenous peoples, as well as their rights to culture, identity, language, employment, health, education, and other needs (UNDRIP resolution 61/295). The ratification provides that the Canadian government, with the provincial and territorial support, ratified the Convention on the Rights of Persons with Disabilities in order to protect and promote the educational rights and dignity of persons with disabilities. The core obligations of this ratification relate to non-discrimination and reasonable accommodation, with specific provisions for education (Canada press release 2010).

Territorial and Provincial Legislations Promoting Education

Every province and territory has its own legislative frameworks and procedures and human right commission or equivalent to guard against discrimination and foster human rights. The commissions promote and educate people about human rights and anti-discrimination laws, as well as to do away with any sort of discrimination amongst the community. Education is integrated in each human right legislation and policies as a right subject to the provisions of the law (Canadian Commission for UNESCO, Promoting Equality of Educational Opportunity 2012).

Within the framework of this legislation and policy, the rights of students to be free from discrimination encompass not only access to education, but also the quality of the educational experience itself. Educational jurisdictions in Canada are reaching beyond the idea of anti-discrimination to the concept of truly inclusive education. In inclusive education, educational values and beliefs are centred on the best interests of the students, promoting social cohesion, belonging, equal opportunities for success, and active participation in learning (The Development of Education 2008).

Australia as a Model of South Africa in Promoting the Right to Education

Compulsory education should be implemented and enforced until the child is in a position where it is presumable that he/she is capable of making decisions on his/her own rather than in his early ages. In terms of SASA, compulsory education in South Africa is only the first nine (9) years of schooling or until

the child is fifteen(15) years of age which is presumably too soon for such a child to make sound decisions. Whereas in Australia compulsory education under the Education Act requires a child to participate in education until a child is seventeen (17) years of age or has completed year twelve (12) (whichever happens first). This means that the child is of compulsory age if he/she is six (6) years old and up until he/she is seventeen (17) year and/or the child completes year 12 which is grade 12 in our case (sec 9 Education Act, 2004). South Africa should therefore learn and adopt Australian compulsory educational system and change its own system.

Conclusion

This paper has proved that South Africa as a country has ample legislative and other instruments aimed at supporting, promoting and protecting the fundamental right of access to quality education. Moreover, these frameworks are supported by international instruments on the right to education. Further, the courts have also contributed in interpreting this right by consistently reiterating in their judgements that the right to education is an empowerment right that enables people to realize their potential and improve their living conditions Despite this, there are continuing challenges taking place in the educational sector which bring along poor realization of this right, particularly in rural areas. It is clear in as far as this study is concerned that as a country we have less difficulties or problems with regards to the realization of the right to basic education as compared to that of further education. The realization and enjoyment of the right to further education is still a problem which need serious attention.

Recommendations

This paper therefore recommends that in order for this country to have the quality and the best educational system it must

- Government should no longer separate education as basic and further education but treat it as one in as far as realization is concerned..
- Increase the compulsory school attendance from grade 1 to 7 and make it compulsory from grade 1 to grade 12. This is because a person who is in grade 7 does not have a clear and sound capacity to can face the world and its challenges independently and cannot make rational decisions and choices as to what is it that he/she want, and in most cases he/she is still under the control and auspices of his/her parents. A person who is in grade 12 is in a better position to fully understand the choices he/she make and the repercussions that will follow and therefore can make choices independently.
- Make education completely free from the primary to the tertiary or university level. This will help people who are ambitious and eager to study further, because there are quite a number of people who have passed grade 12 but are unable to study further because of financial predicaments. There are also those who are already within the four walls of institutions of higher learning but cannot finish their respective studies because of high fee rate and they end up sitting at home despite their ambition and eagerness.

- While in the process of making education completely free, increase the budget of National Student Financial Aid Scheme (NSFAS) and other states financial aids and also stringent their rules and selection criteria of selecting who is to be funded to preclude the misuse of the funds.
- Increase the budget of bursaries such as FunzaLushaka and to create others in order to draw the attention of young people to participate in the teaching fraternity and became expert in their fields.
- Provides sufficient funding for postgraduates to meet the NDP's vision of having 75 percent of PhDs among university staff in 2030 in order to improve the research and innovation capacity. This vision must not be made for 2030 only but rather be made perpetual and ongoing.
- Retain highly motivated and ambitious teachers and pay them enough to produce high quality education. Young people have since lost interest in the teaching fraternity and no longer take it serious and as a profession. This is as a result of the low salary that teachers receive while they are doing a great job of creating all these professions. It should be kept in mind that for every profession to come into existence or for one to be a professional, he/she must have went through school or to put it differently, through the hands of a teacher. It is therefore important for government to draw the attention of the youth in this profession and make them not to look the other way.

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