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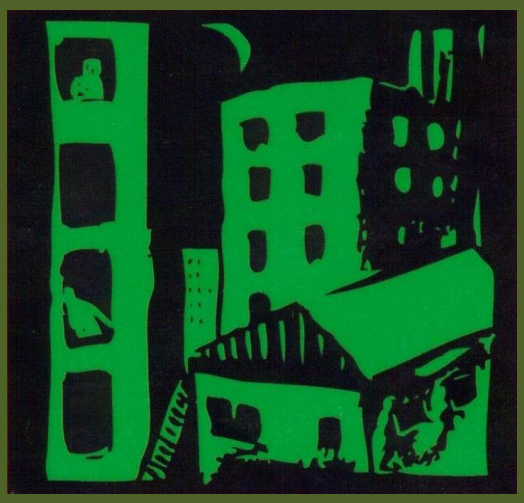

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The right to basic education, the South African constitution and the *Juma Musjid* case: An unqualified human right and a minimum core standard

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1 INTRODUCTION

The 2011 decision by the Constitutional Court (CC) in *Governing Body of the Juma Musjid Primary School and others v Essay NO and others,*[1] which dealt with the right to basic education in the context of an application for the authorisation of the effective eviction of a public school conducted on private property, provides us with telling insight about the possible scope and content of the right to basic education guaranteed in section 29(1)

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[1] *Juma Musjid Primary School and others v Essay NO and others* 2011 (8) BCLR 761 (CC).

of the South African Constitution (Constitution).[2] More than 16 years after the enactment of the CC has not had an opportunity to provide clarity on the scope and content of the right to basic education. Although the CC did not (and was not required to) provide full clarity on this issue in the *Juma Musjid* case, Justice Nkabinde provided pointers to assist with understanding the scope and content of the right to basic education guaranteed in section 29(1) (a) of the Bill of Rights, affirming that the right - unlike some of the other socio-economic rights - is immediately realisable. The CC confirmed that because there is no internal limitation in section 29 (1) (a) requiring "access" to the right, that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures", the right to a basic education in section 29 (1) (a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[3] Indeed, while all socio-economic rights in the Constitution provide for negative and positive obligations, the right to education is unique in that it includes the right to basic education, which unlike the right to housing[4] and the right to water[5] has no internal qualifiers.[6] That recognition of the fundamental difference between the obligations engendered by section 29 (1) (a) and the obligation engendered by other social and economic rights protected in the Constitution forms the basis of the analysis in this article. In this article the author advances the argument that basic education is not only an unqualified human right but that section 29 imposes an obligation on the state to provide a minimum core of that right to everyone. It must be conceded that the CC has indeed previously[7] stated that the international law concept that social and economic rights place a minimum core obligation on the state cannot be uncritically imported into South African constitutional law and that, at best, it can be used to assist the CC to determine whether or not the state had acted reasonably.[8] However, the contention in this paper is that the recognition by the court judgment in the *Juma Musjid* case of the unique formulation of section 29 (1) (a) when compared and contrasted with other socio-economic rights already interpreted by the CC, should consequently lead the CC to accept that the minimum core concept applies to the interpretation of section 29 and section 29 (1) (a) which is that the right to basic education should be regarded as the minimum core standard of the right to education in South Africa.

2 EDUCATION IN SOUTH AFRICA: A HISTORICAL CONTEXT

Understanding the historical context within which the right to education in South Africa must be interpreted, assists us in understanding why the drafters of the Constitution

[2] The Constitution of South Africa 1996.

[3] *Juma Musjid* at paras 36 – 38.

[4] Constitution s 26.

[5] Constitution s 27.

[6] *Juma Musjid* paras 36 – 38.

[7] *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) at paras 30-33.

[8] Minister of Health and others v Treatment Action Campaign and others 2002 (10) BCLR 1033 (CC) at para 26-39.

saw it fit to include section 29 (1) (a) in the Bill of Rights as an unqualified human right. Section 29 must be understood to establish a minimum core standard of the right to education that should be provided immediately by the state as a constitutional measure to redress, more specifically, the ills of the apartheid past.

The history of education in South Africa dates back from the time when communalism formed the basis of life among Africans and education was conducted informally in a manner that benefited the extended family,[9] to the colonial times when missionaries had a leading role in providing education for Africans.[10] It proceeds to the apartheid era when education was provided along racial lines, to the constitutional era when education is now a human right protected by section 29 of the Constitution. For the purposes of the discussion in this article, the most important period that advances the argument for a minimum core content of the right to education is the apartheid era. The discriminatory provision of education during the apartheid period in South Africa clarifies the need for a specific content of the right to education that can be claimed from the state by everyone immediately.

After the National Party won the national elections in 1948, there was the introduction of the policy of apartheid in South Africa.[11] Apartheid "epitomised a harsh scheme of enforced segregation, racial discrimination, inequality and political oppression."[12] During apartheid, discrimination in the provision of education was legalised. "Separate development"[13] was the rationale behind the system of apartheid and it ensured the unequal distribution of education opportunities in South Africa.[14] The education system was racist and unequal both at social and economic levels.[15] For the purposes of education, there was a division of races into four classes, that is, Blacks, Indians, Coloureds and Whites, coupled with different legislation and curricula that governed each class.[16] Discriminatory legislation included the Coloured Persons Act 1963, the Indian Education Act 1965 and the Bantu Education Act 1953 which regulated education for the South Africans of African origin who were often referred to as Natives.[17]

Natives, whose history of education is the main focus of this article were Africans originating from South Africa, who were the majority, the most in crisis, the most oppressed and those whose education was regulated by the Bantu Education Act. The Bantu Education Act had two aims: first, it brought "an end to missionary control of the

[9] Farrant J S *Principles and practices of education* (2006) at 30.

[10] Christie P *The rights to learn* (1991) at 10.

[11] Nekhuwevha F "Transformation education: The education crisis and suggested solutions", a paper delivered to the Association for Sociology in Southern Africa in June- July 1987 at the Conference held in the Western Cape (1987) at 15.

[12] Smit M H *Fundamentals of human rights and democracy in education-A South African perspective* (2011) at 47.

[13] Robertson N & Robertson B *Education in South Africa* (1977) at 6.

[14]Christie (1991) at 56-57.

[15] Nekhuwevha (1987) at 11.

[16] Molteno F "The historical foundations of the schooling of Black South Africans" in Kallway P *Apartheid and education: Education of Black South Africans* (1984) at 88-89.

[17] Molteno at 88-89.

education of black people and institute[d] a system of mass education"[18] and secondly, it legalised a special, inferior, form of education for Blacks in South Africa that differentiated it more specifically from the education provided for the White minority.[19] To support the objectives of Bantu education, in 1953, Hendrik Verwoerd, the then Minister of Native or Bantu Education, addressed parliament concerning a special form of education for natives.[20] He stated that Natives had limited opportunities in South Africa and as such they needed minimal education as they would never be absorbed in certain professions.[21]

At the peak of apartheid in the 1970s, per pupil spending in schools for White learners was ten times that in schools for Black learners.[22] Most Black schools did not have trained teachers or enough classrooms, were underfunded and overcrowded and black teachers were underpaid.[23] On the other hand, White learners had their own schools with mostly well trained teachers.[24] They also had their own special curricula whilst Blacks in schools for Black learners had curricula that made it almost impossible for African students to go beyond matric or to qualify for admission to any higher education institution.[25]

As resistance to apartheid grew more fierce, there was an uprising by Black students which was termed the 1976 Soweto uprising. [26] One of the main reasons behind the uprising was the decision by the government to force Black students to learn in Afrikaans. African students contended that they could not learn in Afrikaans and they also wanted an education that could empower them.[27] The government reacted harshly to the confrontation and more than 500 students died.[28] However, because of the Soweto uprising, the South African Institute of Race Relations appointed a commission, which compiled a report that stated that there was a need for equal opportunities and non-discrimination in education.[29] It proposed changes in the allocation of resources in the South African budget, which would see a higher percentage of the budget spent on education and a more equitable distribution of resources. The report emphasised that it would be important to change the management of schools to foster community

[18] "A history turning points: The beginning of formal education." Available at *http://www.sahistory.org.za/classroom/feature/hiseduc.htm* (accessed June 2010).

[19] "A history turning points".

[20] Nekhuwevha (1987) at 10-11.

[21] Nekhuwevha (1987) at 10 -11.

[22] "Education." Available at *http://countrystudies.us/south-africa/56.htm* (accessed 21 June 2010).

[23] Mncwabe M P *Post-Apartheid education: Towards non-racial, unitary and democratic socialisation in the new South Africa* (1993) at 27.

[24] Robertson & Robertson (1977) at 19-23.

[25] Taylor R "The narrow ground: Critical intellectual work on South Africa under Apartheid" (1991) 5(4) *Critical Arts* at 31. Available at *http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/Critical%20Arts/cajv5n4/caj005004004.pdf* (accessed 21 June 2010).

[26] Mncwabe (1993) at 3-23.

[27] Mncwabe (1993) at 3 - 23.

[28] Ka Choeu C "The right to education: An elusive quest for the youth in South Africa" (1991) 38(3) *Africa Today* at 75.

[29] Mncwabe (1993) at 9-13.

involvement.[30] It stated that there was a need to change the school curricula and textbooks so that they would not offend Black South Africans.[31] It also stated the need for schools and education with an open enrolment for all.[32] In recognition of the existence of unqualified Black adults, it emphasised the need to institute adult education as a high priority.[33] In June 1980, the government of South Africa commissioned the Research Council Review Commission (RCRC) to review South African education.[34] The RCRC appointed the De Lange Committee on Education, which issued a report stating that what education required was not only desegregation but also a further recognition that education is a human right.[35]

The report recognised that education in South Africa was in a crisis and attempted to make recommendations to confront the problems.[36] It emphasised that every South African had an entitlement to a "rightful share" of education.[37] It is important to note that the government selectively accepted the recommendations, opting to commit to the principles of the Christian National Education which informed the worldview of the day.[38] The De Lange report was criticised for failing to address the real symptoms and problems in Bantu education, which were rooted in the politics of the day.[39] The education system in South Africa today is a result of a revolution mainly by Black South African students. The task of the government is to redress the evils of the apartheid government and to interpret its constitutional obligations in a manner that speedily promotes the transformative agenda of the Constitution. A serious commitment to the transformative agenda of the Constitution must lead to the advancement of the argument that section 29 (1) (a) is not only an unqualified right but also a minimum core obligation of the right to education.

3 THE IMPORTANCE OF EDUCATION AS A HUMAN RIGHT

3.1 What is education

In this part of the article, "education" is defined in order to understand what section 29 protects. Education is a process and as such it cannot have an exact definition.[40] Nonetheless, the definition of "education" in the Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education

[30] Mncwabe (1993) at 9-13.

[31]Mncwabe (1993) at 9-13.

[32] Mncwabe (1993) at 9-13.

[33] Mncwabe (1993) at 9-13.

[34] Chisholm L "Redefining skills: Black education in South Africa in the 1980s" in Kallway P, *Apartheid and education: Education of Black South Africans* (1984) at 388.

[35] Mncwabe (1993) at 3-23.

[36]Kallway (1984) at 32.

[37] Mncwabe (1993) at 3-23.

[38] Christie (1991) at 189.

[39] Kallaway (1984) at 32.

[40] Gurrey P *Education and the training of teachers* (1963) at 14.

relating to Human Rights and Fundamental Freedom (Recommendation),[41] adopted by and binding upon UNESCO member states provides us with a starting point in understanding the term. In defining "education", the Recommendation states:

> The word education implies the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge. This process is not limited to anti specific activities.[42]

The Recommendation's definition acknowledges that education is a process of learning and development through social interaction and includes both formal and informal activities. Education as a process develops human beings and benefits both individuals and communities. The Recommendation's definition is strikingly similar to the provisions of the General Comment on the Convention on the Rights of the Child[43] (CCRC) on education for children. The CCRC states that education

> [G]oes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.[44]

It has been illustrated that education in traditional African societies in South Africa benefited social groups.[45] On the other hand, due to colonial Western influence, education in South Africa is now a mixture of formal and informal education. Formal education refers to "the process of training and developing people in knowledge, skills, mind, and character in a structured and certified program".[46] It is commonly referred to as "schooling" as described by the CCRC's definition above.[47] The school is the medium for children to learn through equal access to learning programmes.[48] Formal education places greater emphasis on the need for the individual to grow irrespective of society.[49] This means that unlike informal education, the design of the school curriculum ought to take into account the peculiar needs and interests of each learner.[50] Nonetheless, formal education does not ignore the needs of the society in which the individual exists.[51] Like

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[41]Recommendation concerning education for international understanding, co-operation and peace and education relating to human rights and fundamental freedom adopted by the General Conference at its eighteenth session Paris (1974). Available *at http://portal.unesco.org/en/ev.phpurl_id=13088&url_do=do_topic&url_section=201.html* (accessed 31 August 2010) .

[42] Recommendation, Art 1 (1) (a).

[43] General Comment no. 1 (2001) Article 29 (1): The aims of education CRC/GC/2001/1.

[44] General Comment No.1 (2001) Art 29 (1) (2).

[45] Mialaret G *The child's right to education* (1979) at 11.

[46] "What is formal education?" (2011) Available at *http://www.sil.org/lingualinks/literacy/referencematerials/glossaryofliteracyterms/whatisformaleducation.htm* (accessed 13 October 2010).

[47] "What is formal education?" (2011) at 11.

[48] The Dakar Framework for Action, Education for All : Meeting our Collective Commitments Adopted by the World Education Forum Dakar, Senegal (2000) Including six regional frameworks for action para 2 (3).

[49] Farrant (2006) at 32.

[50] Annand JB *Education for self-discovery* (1977) at 3-4.

[51]Annand (1977) at 3-4.

informal education, it gives an individual the ability to grow and integrate within society.[52]

Whilst section 29 protects the right to "education" which has been defined above, section 29 (1) (a) which is the subject of discussion in this article, makes specific reference to "basic education". Basic education is a specific type of formal education that is usually provided to children at primary school level although it can also be provided to adults as adult basic education.[53] Whilst the general term "education" refers to all forms of education, formal or informal,[54] the term "basic education" has a specific definition and is defined by the World Declaration on Education for All (World Declaration) as the acquisition of basic learning needs.[55] The basic learning needs have two components, namely, essential learning tools as well as the basic learning content.[56] The critical aspects of the essential learning tools and the basic learning content are beyond the scope of this discussion.

3.2 The benefits of education

Understanding the benefits of education is important as it enlightens us of the reasons why education is so important that the drafters of the Constitution consciously ensured that it has a content that can be demanded immediately. The benefits of education will also clarify why the apartheid system of education was problematic.

Education is an ingredient for socio-economic development, since "only educated individuals possess the ability to secure both the basic necessities for survival and the other material goods required for flourishing".[57] An educated person has more prospects of finding a job, which improves personal income and the ability to escape poverty.[58] *An educated person* has increased basic knowledge about healthy living which increases individual life expectancy.[59] Education enables a person to participate diligently in the community by adding and conserving cultural and religious values, thereby enabling the community to choose the way it wants to live.[60] Education has the

[52] Farrant (2006) at 32.

[53] Constitution, s 29 (1) (a)

[54] Simbo C "Defining the term basic education in the South African Constitution: An international law approach" (2012) 16 *Law, Democracy & Development* 163.

[55] World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs. Adopted by the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand (1990). Art 1 (1).

[56] These needs comprise both essential learning tools (such as, literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as, knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.

[57] Beiter K *The protection of the right to education by international law* (2006) at 28-30.

[58] Coomans F "In search of the core content of the right to education" in Chapman A R *Core obligations: building a framework for economic, social and cultural rights*, (2002) at 220.

[59]Coomans (2002) at 220.

[60] Beiter (2006) at 28-30.

ability to make individuals equal since it gives them the ability to be free to develop talent, individual callings and skills that enable a person to manoeuvre through all the difficulties that weaken the human condition.[61] All the above facts point us to the fact that education is an active tool to protect human dignity and ensure personal development.[62]

Education advances individual freedom since an educated person has increased social mobility and can escape any kind of discrimination based on social standing, thereby safeguarding his/her freedom.[63] By having individual freedom, an educated person is likely to know the difference between oppression and liberation.[64] Education also promotes self-discovery,[65] thereby promoting creativity and the use of skills that enable the individual to discover all-important aspects of life that lead to happiness.[66] As self-discovery continues, there will be an increase in competencies giving an individual the freedom to explore new potentials and to make a meaningful contribution to society.[67] Education is therefore a "discipline for improving body, mind and spirit and a process for encouraging natural development".[68] Therefore, schools should not only aim at making pupils learned but should teach them to desire to learn, to reason, to attain excellence, to persevere and to be skilful in things that are valuable and beneficial.[69] Education also allows a person to exercise individual judgements and to develop abilities and responsibility.[70] All the above facts show us that education "provide[s] the individual with motivation, so that he may be in continual search for new ways to absorb the impact of change before he is swept off his feet".[71]

In addition to the role of education in developing the individual, there is evidence that a proper education coupled with a supportive environment can lead to economic development,[72] the aptitude of companies and national growth.[73] With such benefits of education, it is no wonder that it was used to "perpetuate and legitimize social and wealth divisions in society"[74] during the apartheid era in South Africa. Understanding the fundamental benefits of education for individuals and societies is therefore important as it reminds us of the need to have a content of education that can be demanded immediately from the state. However, there is still need to distinguish the significance of education as a human right and the peculiar benefits that accrue to the

[61] Mialaret (1979) at 20.

[62] Universal Declaration of Human Rights (1948). Art 1 states "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience."

[63] Coomans (2002) at 219.

[64] Beiter (2006) at 28-30.

[65] Annand (1977) at 3-4.

[66] Gurrey P, *Education and the training of teachers* (1963) at 26.

[67] Annand (1977) at 3-4.

[68] Farrant (2006) at 32.

[69] Mialaret (1979) at 20.

[70] Gurrey (1963) at 26.

[71] Annand (1977) at 3-4.

[72] Adams D *Education and national development: Priorities, policies, and planning* (2002) at 1.

[73] Adams (2002) at 1.

[74] Adams (2002) at 1.

individual therefrom. Such an approach is important because section 29 (1) (a) does not only guarantee the individual an education but a right to education.

3.3 The benefits of education within the human rights framework

Although the above sections have defined education and its benefits, it is important to note that describing education as a human right provided by section 29 is distinct and significant. Human rights are unique in that by legal recognition they give the holder an entitlement to claim from the duty bearer,[75] to gain control of the behaviour of the duty bearer and to question the allocation of resources.[76] Education as a human right is described as an "empowerment right".[77] "Empowerment" is a contested word but the World Bank defines it as "the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control and hold accountable institutions that affect their lives".[78]

Empowerment rights differ from other human rights in three respects. First, they guarantee that "citizens are able to set the rules of the game and not merely be assured that the rules are applied or written".[79] By knowing the rules of the game educated people are able to participate in the politics of their country.[80] Meaningful participation in politics requires an understanding of the political structures and the ability to know and conceptualise the voting process in order to bring change to a country.[81] As a result, the right to education enables individuals to resist any autocratic rule, to demand the right to speak and to understand the obligations of public figures.[82] Secondly, empowerment rights "allow the individual to determine the shape and direction of his or her life".[83] They give an individual skills and knowledge to make independent value judgements for his/her benefit and to the benefit the society.[84] As a result, although formal education has been blamed for "drawing children and youth away from their cultural origins and traditional familial customs",[85] education as an empowerment right helps cultural minorities to preserve and defend their culture.[86]

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[75] Wolfson S A "Children's rights: The theoretical underpinning of the best interest" in Freeman M & Veerman P *The ideologies of children's rights* (1992) at 10.

[76] Wolfson (1992) at 10.

[77] Donders Y & V Vladimir *Human rights in education, science and culture: Legal developments and challenges* (2007) at 185.

[78] "What is the evidence on effectiveness of empowerment to improve health?" (2011) at 17. Available at *www.euro.who.int/_data/assets/pdf_file/0010174656/E88086.pdf* (accessed 10 June 2010).

[79] Woolman S & Bishop M "Education" in Woolman S *et al Constitutional law of South Africa* (2009) at 7.

[80] Beiter (2006) at 28-30.

[81] Beiter (2006) at 28 - 30.

[82] Donders & Vladimir (2007) at 185.

[83] Woolman & Bishop (2009) at 7.

[84] Coomans (2002) at 220.

[85] Adams (2002) at 1.

[86] Donders & Vladimir (2007) at 185.

Thirdly, empowerment rights are also "means" for individuals to benefit from other human rights.[87] The right to education enables citizens to enjoy other socio-economic rights.[88] The link between the right to education and other socio-economic rights accrues from the fact that human rights are universal, indivisible, interrelated and interdependent.[89] Human rights are universal in the sense that there is an international recognition that there are minimum core rights that accrue to every human being by virtue of them being human, and these core rights are recognised by everyone regardless of where they are and states should ensure their enjoyment.[90] Human rights are interdependent in that, although they are different, a person can only enjoy one category of right(s) if they have enjoyed other categories of human rights.[91] Human rights are interrelated in the sense that they share the same foundation and common characteristics and they are part of a family that is the body of human rights.[92] Human rights are indivisible in that they "have equal status, and cannot be positioned in a hierarchical order. Denial of one right invariably impedes enjoyment of other rights".[93] The above descriptions mean that without enjoying the right to education a person cannot enjoy other human rights. The right to education is therefore an important tool to enhance the realisation of socio-economic rights, such as, the right to food, the right to work and the right to health.[94]

4 THE TEXTUAL FORMULATION OF SECTION 29(1) (a)

4.1 An unqualified right

The unqualified nature[95] of section 29 (1) (a) ought to be understood in the context that section 36 of the Constitution already provides for the limitation of all human rights in the Constitution. Section 36 provides that human rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is

[87] Donders & Vladimir (2007) at 185.

[88] Coomans (2002) at 219: "The key to social action in defense of rights…is an educated citizenry, able to spread its ideas and to organize in defense of its right. Civil and political rights such as freedom of expression, freedom of association, or the right to political participation, obtain substance and meaning only when a person is educated. The same holds true for the right to take part in a cultural life. For ethnic and linguistic minorities the right to education is an essential means to preserve and strengthen their cultural identity and heritage."

[89] Vienna Declaration and Programme of Action: United Nations General Assembly: World Conference on Human Rights, Vienna (1993). Available at *http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en* (accessed 12 April 2010).

[90] Sarrmiento R V "Human Rights Universal? Indivisible? Interdependent?" Available at *http://www.hrsolidarity.net/mainfile.php/1995vol05no02/92/* (accessed 12 June 2010).

[91] Whelan D J "Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights" Working paper 7, *The Human Rights Institute, University of Connecticut* (2008) at 2

[92] Whelan (2008) at 3-4.

[93] "Human Rights principles." Available at *http://www.unfpa.org/rights/principles.htm* (accessed12 May 2010).

[94] Coomans (2002) at 220.

[95] Unqualified in the sense that unlike ss 26 and 27, it does not provide for access, progressive realisation within available resources. But the right is qualified in another sense as it only relates to basic education. This must be made clear.

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.[96]

The above provisions mean that despite the qualified or unqualified textual nature of any human right in its textual formulation, human rights in the Bill of Rights may be limited in terms of law of general application.[97] "Law of general application" refers to limitations that are authorised by statutory or common law provisions.[98] Despite the inherent limitation of rights by section 36, in this article, the difference in the textual formulation of human rights in the Constitution clarifies the distinction between qualified and unqualified socio-economic rights.[99] Section 29 (1) (a) is an unqualified socio-economic right which is clarified by the fact that it is distinct in four ways in its formulation from the formulation of sections 26 and 27 which are qualified and have been interpreted as such by South African courts. First, its formulation eliminates the word "access" which makes it different from other socio-economic rights guaranteed in section 26 and section 27. Clarifying the meaning of the word "access" in the *Grootboom* case the CC stated that "access" to adequate housing suggests that the state is not entirely responsible for the provision of housing: other agents in our society, including individuals, must create conditions to "access" adequate housing.[100] The CC elaborated that the government's duty is not to provide the housing itself but to unlock the housing system by providing "access" to housing stock and a legislation framework that facilitates self-built houses through planning laws.[101] The elimination of the word "access" in section 29(1) (a) ought to be regarded as a deliberate move by the Constitution to ensure that the government does not only ensure that basic education is accessible but is also provided.[102]

Secondly, the provision of basic education is not subject to a restriction like "reasonable legislative and other measures", which is at the core of the reasonableness standard adopted by the CC in social and economic rights cases dealing with the right to housing, health care and water.[103] Adjudicating on sections 26 and 27, the CC stated that

[96] Constitution s 36.

[97] Woolman & Bishop (2009) at page 15.

[98] Robinson JA "The children's rights in the South African Constitution" (2011). Available at http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/03jarobi.pdf (accessed 22 August 2012).

[99] Woolman S & Fleisch B *The Constitution in the classroom: Law and education in South Africa 1994-2008* (2009) at 120.

[100] *Government of the Republic of South Africa and others v Grootboom and others* paras 35-37.

[101] *Grootboom* para 35-37.

[102] Woolman & Bishop (2009) at 10.

[103] Woolman & Fleisch (2009) at 121.

if the measures taken by the government are reasonable, the government has fulfilled its obligation to make the rights accessible.[104] On the other hand, the state's reasonable legislative and other measures are not part of fulfilling the government's provision of a basic education and cannot be a defence for the state's failure to fulfil its obligations.[105] Therefore, the reasonableness approach should be regarded - and was indeed so regarded in the *Juma Musjid* case – as irrelevant in determining the state's compliance with providing. Clearly, there is nothing in section 29 (1) (a) that could have justified its inference.[106]

Thirdly, "section 29 (1) (a) is not contingent on the availability of resources".[107] The CC has repeatedly stated that when interpreting socio-economic rights that are contingent on the availability of resources the government's obligation depends on the availability of resources and such obligation cannot be more than what the government's resources permit.[108] In contrast, section 29 (1) (a) is "a 'strong positive right', a right that can be asserted regardless of the state's other budgetary imperatives".[109] This means that the state cannot invoke the defence that it does not have adequate resources to provide a basic education[110] since the textual formulation of section 29 (1) (a) should not lead the court to such a conclusion. Indeed, in the *Juma Musjid* case the CC held that the government had failed to fulfil its constitutional obligation to provide basic education by failing to pay the Juma Musjid Trust its outstanding arrears for the maintenance of the buildings it was using as the Juma Musjid Primary School.[111] The CC made no determination regarding the availability of resources on the part of the government.[112] Certainly, regarding the provision of basic education, the government should work towards finding means to provide basic education or to mobilise resources for its provision since the lack of resources does not relieve it from its obligations imposed by section 29 (1) (a).

Finally, the right to basic education "is not subject to progressive realisation". The CC stated that progressive realisation is an expeditious and effective movement towards the realisation of a goal.[113] The elimination of a progressive realisation qualifier

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[104] *Lindiwe Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) paras 49-50.In the *Mazibuko* case the CC stated that s 27 (1) does not entitle anyone to claim sufficient water, but reasonable measures by the government which aim to make water accessible. See also *Grootboom* paras 39-44. Furthermore, in the *Grootboom* case, the CC noted that reasonable measures did not constitute the provision of a house but included the provision of temporary accommodation and constructive engagement, which would ensure humane evictions.

[105] Woolman & Fleisch (2009) at 121.

[106] *Juma Musjid* at paras 36 – 38.

[107] *Juma Musjid* at 121.

[108]*Grootboom* para 46. See also *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) para 11.

[109] Berger E "The right to education under the South African Constitution" (2003) 103(3) *Columbia Law Review* 625.

[110] Woolman & Bishop (2009) at 10.

[111] *Juma Musjid* paras 45-46. The CC stated that: "[t]he MEC has an obligation in terms of the Constitution to "respect, protect, promote and fulfil the rights in the Bill of Rights".

[112] *Juma Musjid* paras 45 – 46.

[113] *Grootboom* para 45. See also *Lindiwe Mazibuko and others v City of Johannesburg and others* paras 49-50. The CC stated that it is insufficient for the government to show that the policy it has selected is

in section 29 (1) (a) ought to mean that basic education is not subject to provision over time but to immediate provision when needed, and the government cannot exonerate itself from its obligations because it is simply moving towards attaining the goal.[114] The contrast between section 29 (1) (a) and section (29) (1) (b) which states that further education should be progressively available was emphasised in the *Juma Musjid* case to further clarify the Constitution's intention regarding the provision of basic education.[115] Indeed, the distinction ought to justify the argument that basic education is an unqualified human right that should be provided immediately. It is quite recognisable that, based on its formulation the CC in the *Juma Musjid* case vehemently and without hesitation acknowledged that section 29 (1) (a) as an unqualified right. In this article, the internally unqualified nature of section 29 (1) (a) discussed here provides us with a foundation to argue that the right to basic education is a minimum core standard of the right to education. This is so because as discussed below, just like the obligations imposed by an unqualified right, a minimum core obligation is a non-excusable obligation that imposes a duty on the government to provide a certain content of a right without being able to allege resource or any other constraints.

4.2 What is a minimum core approach?

The minimum core approach proposes that there is a certain extent of provision of a right by the state which amounts to a minimum fulfilment of that right.[116] This means that there is a certain minimum extent of providing a human right which amounts to a minimum compliance with the state's obligations to provide such right. The minimum core approach intends to establish that the provision of certain needs enjoys priority over others, and that the state is obliged to provide those classes of needs immediately as a matter of individual right.[117] The minimum core approach is a way of interpreting and understanding the obligations engendered by socio-economic rights and it provides us with a normative basis for and a starting point towards their realisation.[118] It is a starting point or a level at which governments should first provide the core and then aim to go up and realise a human right at higher levels.[119] The "elements of a right which cannot be regarded as part of its core content (the peripheral part) are no less important but constitute as it were a derivative or consequent of the core content".[120]

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reasonable, it must also show that the policy is consistent with the obligation to "progressively realise" socio-economic rights.

[114] Berger (2003) at 625.

[115] *Juma Musjid* paras 36 – 38.

[116] Chowdhury J "Judicial adherence to a minimum core approach to socio-economic rights: A comparative perspective" (2009) at 3. Available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=lps_clacp (accessed 12 September 2010).

[117] Wesson M "Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court" (2004) 20 *SJHR* 298.

[118] Bilchitz D *Poverty and fundamental rights, The justification and enforcement of socio-economic rights* (2007) at 186.

[119] Coomans F "In search of the core content of the right to education" in Brand D & Russell S *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) at 166-167.

[120] Coomans in Brand D & Russell S *Exploring the core content of socio-economic rights* (2002) at 167.

The minimum core is an analytical tool to assess compliance with socio-economic rights by the state and to identify their violations.[121] The point that a human right should have a minimum core content is derived from General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights (CESCR).[122] General Comment 3 states that the human rights protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) have a minimum core content and impose an obligation on every state party to ensure the provision of such minimum core.[123] Adding to the provisions of the CESCR and emphasising the argument in this article that the minimum core is that part of a right that commands immediate provision by the government, Young states:

> The United Nations Committee on Economic and Social Rights the first international body to articulate the concept, has, since 1990, variously equated the minimum core with a presumptive legal entitlement, a non-derogable obligation, and an obligation of strict liability. At the constitutional level, advocates of the concept (whose positions are most developed in relation to the economic and social rights provisions of the South African Constitution) have argued for the concept's immediate enforceability, justiciability, and value as a benchmark against which government programs can be temporally oriented and assessed.[124]

Although South Africa has not ratified the ICESCR, the Constitution makes it mandatory to consider international law in interpreting the Bill of Rights.[125] International law both binding and non-binding, is useful to clarify our understanding of section 29 (1) (a).[126]

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[121] Coomans (2002) at 166.

[122]"On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations." General Comment 3 *The nature of States parties obligations* (Art. 2, para. 1 of the Covenant) (1990) para 10.

[123] General Comment No. 3 (1990) para 10.

[124] Young C "The minimum core of economic and social rights: A concept in search of content" (2008) 33 *Yale Journal of International Law* 115.

[125]Constitution s 39.

[126] However, covenants bind states and become part of national law by ratification, and one might question the use of the ICESR provisions to assist in the interpretation of the Bill of Rights. The CC responded to and addressed the issue, and stated that the international law that must be considered in interpreting the Bill of Rights refers to both binding and non-binding international laws. See *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

4.3 Defending the Constitutional Court's reluctance to adopt the minimum core and arguments for section 29 (1) (a) as granting a minimum core right

In line with international standards the CC acknowledged that international law provides for minimum core obligations as a way to address the needs of the most vulnerable.[127] Basing its arguments on its inability to define the minimum core, the CC stated that the minimum core approach cannot be uncritically imported into South African constitutional law and that, at best, it can be used to assist the CC to determine whether or not the state had acted reasonably.[128] The CC's critical approach towards using the minimum core when interpreting qualified socio-economic rights, although mainly based on its inability to quantify the minimum core is also convincing in light of the internally qualified nature of the constitutional duties imposed by sections 26 and 27. As discussed above, qualified socio-economic rights obligate the state to fulfil the rights by providing "access" to the right through taking "reasonable legislative" and other measures, "within its available resources, to progressively realise" each of these rights.

Flowing from the qualified nature of the rights discussed above, it defies the whole object of their qualifications to state that the rights have a minimum core content. It is arguable that by specifically qualifying certain socio-economic rights the Constitution accepted that no aspect of those rights could be provided immediately. The CESCR's view, stated by Young above, clarifies that a minimum core is a right that should be provided immediately as a matter of individual right.[129] Given that argument, qualified rights cannot have a content that can be provided immediately. Their formulation already accepts that the government's resources might not be enough to provide an immediate right to anyone. By qualifying the rights, the drafters of the Constitution accepted that the state could not provide any part or any core of the right immediately but it could only go on making and implementing reasonable measures to provide the right.[130] Such measures would be progressive, that is, on-going, and their implementation would be dependent on the state's resources. Based on the qualified obligations incumbent upon the state, in the *Grootboom* case the CC stated that "the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable" and not whether the state has fulfilled a minimum core obligation. [131]

Providing for a qualified right to basic education was explicitly avoided by section 29 (1) (a) which as interpreted by the CC in the *Juma Musjid* case provides for an unqualified immediate obligation on the government to provide basic education. The specific provision of an unqualified right with immediate enforceability is the foundation of the argument that basic education is a minimum core obligation of the

[127] *Grootboom* para 30-33.

[128] Minister of Health and others v Treatment Action Campaign and others paras 26-39.

[129] Wesson (2004) at 298.

[130] Mbazira C *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) at 58.

[131] At para 33.

right to education. The argument is supported by Young who reiterates that the minimum core is a concept with "immediate enforceability", a concept "with a presumptive legal entitlement, a non-derogable obligation, and an obligation of strict liability". [132]The argument is further strengthened when one notes that in contrast to section 29 (1) (a), section 29(1) (b) provides for the right to further education which is a qualified right. It becomes clear that the provision of basic education as an unqualified right was not a mistake or an oversight on the part of the Constitution. Rather, it was a deliberate move by the drafters thereof to ensure that the government provides basic education as an immediate minimum core obligation. Judicial precedent on qualified socio-economic rights is therefore not particularly useful in ascertaining whether or not the CC should accept that section 29 has a minimum core standard which is basic education. It is not enough reason to deny that section 29 (1) (a) is a minimum core standard of section 29. Interpreting section 29 as having a minimum core right to basic education ensures that the mistakes made during the apartheid era will never be repeated because everyone will have the same immediate and claimable right to education, as well as other aspects of the right to education which are not immediate.

It is, however, notable that under international law, General Comment 3 CESCR provides that socio-economic rights are qualified but also have a minimum core content.[133] Whilst the provisions of General Comment 3 are not binding, the Constitution says they must be considered when interpreting constitutional provisions.[134] After considering the provisions of General Comment 3 it is notable that the CESCR recognised the difficulties of defining what a minimum core of a qualified right would be and shied away from giving specifics, leaving each country to fulfil its obligations progressively and to give an explanation where it has failed due to resource constraints.[135] In recognition of the South African volatile and ever changing economic and political landscape, it will be a mammoth task to ask the judiciary to devise a minimum core of a qualified right as the provision of such rights is contingent upon availability of resources and progressive realisation. Also accepting an argument that a qualified right has a minimum core is potentially unconstitutional in South Africa as it will consequently indirectly dictate to the government the amount of resources needed for the provision of such minimum core; an approach that is contrary to a Constitution that provides certain rights with no immediate realisation. Also in the same, vein asking the legislature to define the minimum core of a qualified right through legislation also means that such a law will also indirectly allocate specific amounts of resources needed to fulfil minimum obligations an approach also in direct contrast with the government's obligations to provide certain rights progressively, within its available resources. In South Africa, the provision of a minimum core is therefore justifiable when its provision aligns with the constitutional obligations imposed by such a right. Section 29 imposes an unqualified obligation on the state, and the CC has interpreted it that way in the *Juma Musjid* case. It demands the immediate provision of a basic education.

[132] Young (2008) at 115.

[133] General Comment 3 (1990) para 10.

[134] Constitution s 39.

[135] General Comment 3 (1990) para 10.

In the *Grootboom* case the CC stated that it was impossible for the state to give everyone immediate access to housing, because it lacked resources to do so.[136] Such an argument is untenable when interpreting section 29 (1) (a) because it is not qualified by the availability of resources. The state is obligated to provide the right to basic education immediately as a matter of individual right. Such is the nature of the obligation imposed by section 29 (1) (a). Indeed, given the history of education discussed above as well as its benefits, regarding section 29 (1) (a) as a minimum core obligation would be evidence that the drafters of the Constitution were mindful of the impacts of the huge disparities in education left by the discriminatory apartheid educational laws and policies. It would also show that the drafters were aware of the benefits of a basic education and that they sought to redress the ills of the past by ensuring that everyone in South Africa benefits from at least one certain immediately claimable type of an education. Also, given the proven benefits of education in alleviating poverty and promoting human development and the development of nations, an argument that the immediate provision of basic education is not possible due to resource constraints is no longer sustainable. It must be noted that "energy and funding directed to basic education [is] perhaps the most profound investment in people and in the future of a country"[137]. A scope of action going beyond the mere recognition of education as any other human right is required. Resources must be mobilised to ensure that basic education is provided immediately to anyone who does not have it as part of "a broader scope of action than in the past", which demands the mobilisation of resources from the public and private sectors as well as voluntarily contributing individuals.[138]

In the *Treatment Action Campaign* case the CC emphasised its inability to define what a minimum core right to a qualified socio-economic right would entail.[139] The CC cannot merely reject the minimum core right to education simply because it cannot define what the minimum core of education entails. In other words, the CC cannot deny that section 29 (1) (a) is a minimum core obligation because it cannot define basic education or delineate its scope and content. Accepting that the right to basic education is a minimum core obligation does not give the courts a task to define the minimum core there and then (if at all). Rather, as Liebernberg has already suggested, "acceptance of the minimum core does not require the court to define, in the abstract, the basket of goods and services that must be provided. Instead the court [if it so desires] could define the general principles underlying the concept of minimum core obligations in relation to [the right to education]".[140] The different cases that are brought before the courts relating to basic education will present multiple opportunities for the courts to define the contents of "basic education" as a minimum core right to education. Also, it must be noted that courts will be exercising their discretion when suggesting what a basic education would entail; they are allowed to choose not to define the term basic

[136] *Grootboom* para 46. See also *Soobramoney* para 11.
[137] World Declaration on Education (1990) Art IX (1).
[138] World Declaration on Education (1990) Art VIII.
[139] *Treatment Action Campaign* paras 26-39.
[140] Mbazira (2009) at 68.

education or prescribe any scope and content thereof. Courts are not tasked to make law, the role to make law lies with the legislature. With that in mind, it is notable that although at present South African legislation does not define the term "basic education", through the South African Schools Act (the Schools Act)[141] it provides for a legal framework which allows the Minister of Basic Education to prescribe minimum uniform norms and standards for the provision of basic education. This article therefore suggests that the Schools Act already provides a platform for the Minister of Basic Education to define the term basic education and to unpack its scope and content.

According to section 6A of the Schools Act the Minister must state the national curriculum for basic education stating its minimum outcomes and standards as well as the procedures for assessment of each learner.[142] In addition, section 6 states that the Minister must determine the norms and standards relating to language policy in public schools.[143] Section 35 states that the Minister must determine the norms and standards relating to school funding[144] as well as norms and standards relating to basic infrastructure and capacity in public schools under section 5A.[145] All the above norms

[141] Act 84 of 1996.

[142] S 6A of the Schools Act: "(1)The Minister must, by notice in the Government Gazette, determine— (a) a national curriculum statement indicating the minimum outcomes or standards; and (b) a national process and procedures for the assessment of learner achievement. (2)The curriculum and the process for the assessment of learner achievement contemplated in subsection (1) must be applicable to public and independent schools."

[143] S 6 of the Schools Act: "Language policy of public schools.—(1)Subject to the Constitution and this Act, the Minister may, by notice in the Government Gazette, after consultation with the Council of Education Ministers, determine norms and standards for language policy in public schools. (2) The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law. (3) No form of racial discrimination may be practised in implementing policy determined under this section.

(4) A recognised sign language has the status of an official language for purposes of learning at a public school."

[144] S 35 of the Schools Act: "Norms and standards for school funding.—(1)Subject to the Constitution and this Act, the Minister must determine national quintiles for public schools and national norms and standards for school funding after consultation with the Council of Education Ministers and the Minister of Finance. (2)The norms and standards for school funding contemplated in subsection (1) must— (a) set out criteria for the distribution of state funding to all public schools in a fair and equitable manner; (b) provide for a system in terms of which learners at all public schools can be placed into quintiles, referred to as national quintiles for learners, according to financial means; (c) provide for a system in terms of which all public schools in the Republic can be placed into quintiles referred to as national quintiles for public schools, according to the distribution of learners in the national quintiles for learners; and(d) determine the procedure in terms of which the Member of the Executive Council must apply the criteria contemplated in paragraph (a).

[145] S 5A of the Schools Act: "Norms and standards for basic infrastructure and capacity in public schools.—1)The Minister may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for— a)school infrastructure; b)capacity of a school in respect of the number of learners a school can admit; and c)the provision of learning and teaching support material. 2)The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following: a)In respect of school infrastructure, the availability of— i)classrooms; ii)electricity; iii)water; iv)sanitation; v)a library; vi)laboratories for science, technology, mathematics and life sciences; vii)sport and recreational facilities; viii)electronic connectivity at a school; and ix) perimeter security b)in respect of the capacity of a school— i)the number of teachers and the class size; ii)quality of performance of a school; iii) curriculum and extra-curricular choices; iv)classroom size; and v)utilisation of available classrooms of a school; c)in respect of provision of learning and teaching support material, the availability of—

and standards that the Minister of Basic Education is tasked to periodically determine summarily relate to the content of the teaching syllabus, the outcomes of learning, the teaching and learning environment, teaching and learning materials, as well as the quality of teaching and learning in schools at basic education level.[146] The argument that follows in this article is that in the absence of a definition of "basic education" as well as clarity on its scope and content under the law, the drafting of norms and standards of basic education must be regarded as an opportunity given to the Minister of Basic Education to define the term "basic education" and to clarify its scope and content. Under the Constitution it must be understood that basic education is a minimum core standard of the right to education and under the Schools Act it must be understood that the Minister of Basic Education is supposed to define and unpack the scope and content of basic education

4.4 The Minister's norms and standards for basic education: An avenue to define the minimum core

The main argument in this article is that basic education must be regarded as an unqualified right and minimum core standard of the right to basic education. What is suggested is that the judiciary must accept that section 29 has a minimum core content which is section 29 (1) (a). After such acceptance, the provisions of the World Declaration are perhaps the most important in any discussion that pertains to basic education. In accordance with the World Declaration, for any country to achieve the expanded vision to achieve basic education, supportive laws and policies are required.[147] In light of that, it is important to note, that as stated above, the Schools Act is a supportive law which provides an avenue by which the government can define "basic education" and unpack its scope and content. In various sections of the Schools Act mentioned above the Minister is tasked with the duty to state the norms and standards regarding the provision of basic education.[148]

Whilst drafting the norms and standards relating to basic education, the Constitution must always be the starting point as the norms and standards delineate the scope and content of a human right. The Minister of Basic Education must take into account the prescribed manner in which the scope and content of human rights are determined under the Constitution. Section 39 of the Constitution states that when interpreting the Bill of Rights the values of the Constitution, namely, human dignity, equality and freedom, must be considered, international law must be considered and

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i)stationery and supplies; ii)learning material; iii)teaching material and equipment; iv)science, technology, mathematics and life sciences apparatus; v)electronic equipment; and vi)school furniture and other school equipment."

[147] World Declaration on Education for All (1990) Art VIII.

[148] *Federation of Governing Bodies of South African Schools & others v MEC for the Department of Basic Education and another* ECB 2 March 2011 (case no. 60/11) unreported para 21: "The structure of the Schools Act accordingly provides for the Minister to lay down norms and standards in respect of various issues relating to public schools, including the number of teachers and class sizes (section 5A (2) (b)(i), the appointment of teachers by the governing bodies of public schools (section 20(4) and the funding of public schools (section 35)."

foreign law may be considered. Consequent to section 39, the prescribed norms and standards of basic education must not only be tested against the provisions of the Schools Act but also the values of the Constitution, international law and, in some instances, foreign law. Against that background it is argued that although the South African legislature has not defined the term "basic education" and its scope and content has not been determined, international law defines "basic education" and its scope and content have been determined by the World Declaration, which South Africa endorsed.[149] The World Declaration states that "basic education" refers to "the acquisition of basic learning needs". It defines basic learning needs as follows:

> These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.[150]

Without doubt the definition of "basic education" above advocates for a kind of education with a certain quality, as contrasted with the Bantu education historically provided for the Black majority in South Africa. The definition is quality oriented and focuses on learning and its outcomes for the individual. Within the South African context it relates to the national curriculum and its outcomes and processes or standards, as well as the national processes and procedures for the assessment of the learner set by the Minister of Basic Education in accordance with the requirements of the Schools Act stated above. Viewing basic education as quality oriented and focusing on learning is the core aspiration of the World Declaration which states that "the focus of basic education must, therefore be on actual learning acquisition and outcome".[151] However, an approach that defines basic education only as content oriented, focused only on the curriculum, assessment and outcomes, ignores the factors that affect the child's environment and enable him/her to learn. Factors that affect the child's environment include, among others, language of instruction, funding of schools, infrastructure, as well as capacity of schools. Such factors "create for all, a learning environment of vibrancy and warmth"[152] and must be given equal importance as the learning content itself and treated as components of a basic education. As the World Declaration of Education points out, for every child to acquire basic learning needs, what is now needed is an expanded vision that focuses on learning but also "broadens the means and scope of basic education" whilst "enhancing the environment for learning, universalizing access and promoting equity."[153]

The expanded vision described above focuses on the curriculum, learning and outcomes and goes beyond the environment, a level that "surpasses present resources

[149] Simbo (2012) at 163-182.

[150] World Declaration on Education for All (1990) Art 1 (1).

[151] World Declaration on Education for All (1990) Art IV.

[152] World Declaration on Education for All (1990) Art VI.

[153] World Declaration on Education for All (1990) Art V.

levels [money, human or otherwise], institutional structures, curricula and conventional delivery systems while building on the best in current practices".[154] The fact that the government might argue that it does not have the resources to attain the expanded vision does not arise, as legally speaking the *Juma Musjid* case already confirmed that section 29 (1) (a) in an unqualified right. What is needed as stated by De Vos, is for the government to share the sense of urgency to rectify the lingering injustices of the apartheid past in education.[155] The sense of urgency, as the World Declaration states, "is a broader scope of action than in the past"[156] and might require the re-allocation of resources between sectors "as, for example, a transfer from military to educational expenditure"[157]. Whilst it needs emphasis that the focus of basic education must be on learning, the vision must be reshaped and new commitments made to enhance the environment of learning. With that in mind it is notable that although it is not an indication of the quality of basic education offered, as regards the learning aspect of basic education in South Africa, the pass rate for matriculants has been steadily rising. However, the government has not managed to completely address the effects of the inequitable distribution of education resources during the apartheid era, leading to children being educated in environments that do not foster or support their learning. The complaint, as De Vos puts, it is that given the fact that the judiciary has already confirmed that the right to basic education is an unqualified right, "it is perhaps entirely [within our rights] to expect our government to do everything in its power to ensure an equitable distribution of resources to public schools in an attempt to address the fundamentally unfair and unequal provision of basic education resources for learners across South Africa".[158]

Recent case law has shown that public schools lack teachers, textbooks, laboratories, libraries, etc., and the Department of Basic Education has also unashamedly concluded that the problems with the provision of basic education resources in South Africa are "extremely serious" and "the consequences of these problems are such that many learners are already being denied their full rights to quality basic education"[159]. In *Centre of Child Law and others v Minister of Basic Education and others*[160] the Court noted that some public schools have more teachers than they need whilst others have fewer teachers than needed, which affects teaching and learning.[161] In *Section 27 and others v Minister of Education and another*[162]the

[154] World Declaration on Education for All (1990) Art II.

[155] De Vos P "When our governments obstructs transformation, the courts must intervene" (6 August 2013)Available http://constitutionallyspeaking.co.za/when-our-government-obstructs-transformation-the-courts-must-intervene/ (accessed 20 March 2013).

[156] World Declaration on Education for All (1990) Art IX (1).

[157] World Declaration on Education for All (1990) Art IX (2).

[158] De Vos P "When our governments obstructs transformation, the courts must intervene"(6 August 2013). Available http://constitutionallyspeaking.co.za/when-our-government-obstructs-

[159] *Centre for Child Law and others v Minister of Basic Education and others*; (2012) 4 All SA 35 (ECG) para 14.

[160] *Centre for Child Law* para 14.

[161] *Centre for Child Law* para 17. See also *Federation of Governing Bodies of South African Schools & others v MEC for the Department of Basic Education & another* at para 21.

[162] *Section 27 and others v Minister of Education and another* [2012] 3 All SA 579 (GNP).

Minister of Basic Education was taken to court for failure to provide textbooks for learners. The above situations must be taken as glaring evidence that the government is failing to provide basic education. It is arguable that children are already not enjoying their minimum core right to education in South Africa.

To attain the basic education defined by the World Declaration, this article suggests that the norms and standards set by the Minister must address certain fundamental aspects with which the state must comply. First, the Minister's "national curriculum statement indicating the minimum outcomes or standards as well as the national process and procedures for the assessment of learner achievement" must set the objectives and purpose of a basic education. It must define the term "basic" and state that it is the acquisition of basic learning needs, explaining how the content of the curriculum and assessments ought to meet the basic learning needs of each learner, including learners with special needs. Secondly, the "norms and standards for language policy in public schools" must state the important role of the language of instruction in basic education. The language of instruction is the medium used to educate the learner. Given the fact that South Africa is a multilingual country, and in consideration of the role of English and other global languages vis-a-vis the importance of the mother tongue, the Minister of Education must regulate the use of languages in a manner that ensures that every learner communicates effectively with the educator and at the end acquires basic learning needs. Learners need linguistic skills to function in the global community, a fact that must inform the Minister's norms and standards. The important link between language and culture must be recognised with the view to promoting the use of the mother tongue (which includes sign language) as well as the child's culture. Third, regarding access to basic education, the "national norms and standards for school funding" must address the funding of public schools with a view to making basic education free for all as required by the Convention on the Rights (CRC) of the Child which South Africa ratified.[163] Free education is not the quintile system currently practised in South Africa. Rather, like section 31 (1) of the Basic Education Act of Finland,[164] "teaching, the necessary textbooks and other learning materials, and school equipment and materials shall be free of charge" and "a pupil attending basic education shall be provided with a balanced and appropriately organised and supervised meal on every school day". [165] Free basic education can also mean that learners who live far from school must be provided with free transport and the waiting time for such transport minimised.[166] If free transport cannot be arranged, free accommodation must be provided at a place where children can be transported to school and back to ensure that they acquire a

[163] The CRC which was adopted on 20 November 1989 and entered into force on 2 September 1990. The CRC was signed on 29 January 1993 and ratified by South Africa on 16 June 1995. Art 28(1) (a) provides: "State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: Make primary education compulsory and available free to all."

[164] Act 628/1998.

[165] Finland Basic Education Act 628/1998.

[166] Finland Basic Education Act s 32.

basic education.[167] No learner must be denied a basic education because the school is too far. The "[n]orms and standards for Basic Infrastructure and Capacity in Public Schools" must state the child's right to a safe, clean environment and the need for infrastructure which promotes unhindered learning in accordance with safety and health concerns. Children must not be educated in overcrowded classrooms and must have the requisite learning materials like books and laboratories for them to attain their basic learning needs as stated and detail in the curriculum. The Ministry of Basic Education must have "a sufficient number of teaching posts or teachers under employment"; if that cannot be attained immediately schools can have "hourly-paid teachers, classroom assistants and other personnel".[168] All the above suggestions are intended to show that defining the term "basic education" and delineating its scope and content are attainable goals. Whilst the task of the Minister is to determine the scope and content of "basic education" through norms and standards, the task of the judiciary is to measure whether the state has immediately complied with its minimum core obligations as they are spelt out by the Minister. A judicial review of the Minister's norms and standards might also be necessary to see if they comply with the Constitution and international law, and also are in accord with best practice recommendations of foreign laws.

4.4 Refuting criticisms levelled against a minimum core right to education

The argument in this article that section 29 has a minimum core content is not blind to the criticisms levelled against the minimum core. As Young elaborates, "critics of the concept have suggested that paring down such rights to an essential core threatens the broader goals of economic and social rights, or pretends a determinacy that does not exist."[169] Whilst the above argument may be sustainable when one looks at other rights in the South African Constitution, section 29 does not reduce the "broad right to education" to an essential core nor threaten the goal of section 29 as a whole. Rather, it provides that basic education is an essential core that should be provided for immediately. Then, in addition to and separate from basic education, it provides for other education rights, such as, the right to language and the right to a school of choice. It also provides for the right to further education that the government ought to provide though progressive measures within its available resources. In that regard, the minimum core does not reduce section 29 to the provision of only section 29 (1) (a) which is argued to be the minimum core content of section 29 in this paper. It mandates the government to prioritise the rights in the same manner but noting the difference of its obligations, section 29(1)(a) with immediate effect and the others progressively. Further, unlike the critique stated above, basic education is not a "determinacy that does not exist". Rather it is a determinacy that exists. As stated earlier, the provision of basic education has been agreed upon at international level and South Africa vowed its commitment to that goal. The scope and content of a basic education has been determined at the international level, meaning that the criticism that the minimum core

[167] Finland Basic Education Act s 33.

[168] Finland Basic Education Act s 37.

[169] Young (2008) at 114.

varies from country to country is not sustainable. What might vary are constitutional or other legal provisions of countries and their level of compliance with such provisions given the different political and economic landscapes.

In addition, a "long-standing" criticism to the effect that the minimum core directs our attention to the performance of developing countries "leaving the legal discourse of economic and social rights beyond the reach of those facing material deprivation in the middle or high income countries"[170] is too general. It fails to commend developing countries, like South Africa, which aim for restorative justice using legal means, and also fails to rebuke high or middle income countries which fail to legally recognise socio-economic rights or enact laws that promote the use of the legal means to enforce the minimum core or to litigate the minimum deprivation of socio-economic rights. The blame is not on the minimum core concept. To be specific, South Africa, unlike middle or high income countries, recognised a history of deprivation in the provision of education. Informed by such history, it sought justice for everyone through the provision of at least an immediately claimable minimum level of education. Also, given the advantages of education, the provision of a minimum core right to education will ensure that every South African has the basic education that ensures that he/she finds means to access other socio-economic rights, and to demand civil and political rights, to take part in their own development, in the development of others and in the governance of their country.

5 CONCLUSION

In conclusion, it is important to remember that the argument for the minimum core right to education in this article is not concerned with defining the term "basic education" or advocating that it entails a certain quality or standard of education. In this article, the minimum core argument is concerned with the provision of a right to basic education by the state as a minimum fulfilment of the right to education. The argument in this article is that the CC's acceptance that section 29(1) (a) is an unqualified socio-economic right must mean that it will not determine the obligations imposed by section 29 (1) (a) in the same fashion as it interpreted qualified socio-economic rights. Since the Court accepted that section 29(1) (a) imposes immediate obligations on the government, it ought to regard basic education as a minimum core standard of the right to education as justified in this article. Such a reading recognises the ills of apartheid, reinforces the transformative agenda of the South African Constitution, and arguably aligns with international law. The recommendation is that the Minister of Basic Education should view the norms and standards he/she must enact as an opportunity to define "basic education" and to unpack its scope and content. The public must also take the norms and standards set by the Minister with the seriousness the Equal Education is already showing. It must be noted that courts never denied that section 29 has a minimum core obligation. It is expected that given the opportunity to determine the scope and content of section 29, the courts will state that it has a minimum core obligation, which is basic education.

[170] Young (2008) at 115.

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