

1 INTRODUCTION

The Constitution of South Africa¹ makes provision for the following social and economic rights: labour relations, environmental rights, housing, health care, food, water, social security, and education. It also provides for the protection of cultural, religious and linguistic rights. The focus of this paper is on the right to education, provided for in section 29 of the Constitution in the following terms:

- (1) Everyone has the right –
 - (a) to basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
 - (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
 - (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Subsections (3) and (4) will not receive any consideration in this paper since they do not impose positive obligations on the state, subsection (4) merely communicating the notion that independent educational institutions may receive state subsidies.

This paper seeks to enquire into the policy implications of the *Grootboom*² judgment for the right to education, as it is formulated above. This is the leading case in which the Constitutional Court has developed its jurisprudence on socio-economic rights. Therefore it is necessary to describe the judgment briefly and then enquire into its policy implications for the right to education. The paper will then also enquire into the extent to which existing policy on education meets the implications we extract from *Grootboom*.

¹ The Constitution of the Republic of South Africa Act 108 of 1996.

² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

2 INTRODUCING *GROOTBOOM*

The case was determined on the basis of sections 26 and 28 of the Constitution. The relevant provisions of section 26 read:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

Section 28(1)(c) stipulates that every child has the right “to basic nutrition, shelter, basic health care services and social services”.

The Court found that:

- Section 26(1) imposes a negative duty on the state not to prevent or impair the right of access to adequate housing.³
- There is a difference between ‘the right of access to adequate housing’ and ‘the right to adequate housing’. Whereas the right to adequate housing is direct and includes land, services and the building of houses, the right of access conveys that the state must (through legislation and other measures) enable others in society, including individuals, to provide housing.⁴
- In creating an enabling environment, the state must take into account people’s different socio-economic stations. The poor, being particularly vulnerable, require special attention.⁵
- Section 26(2) imposes a positive obligation on the state to devise a comprehensive and workable plan to bring about the progressive realisation of the right of access to adequate housing. The obligation is, however, not absolute: it is qualified by reasonableness, the progressive nature of the obligation, and the resources available to the state.⁶
- Given the three tier government constitutionally sanctioned in South Africa, the element of reasonableness requires that the state’s plan must allocate clear responsibilities to the different spheres of government and ensure that appropriate financial and human resources are made available to them.⁷ National government bears overall responsibility to ensure that the state delivers on its section 26 obligation.⁸
- The state is under obligation to establish a coherent public housing programme aimed at progressively realising the right of access to adequate housing. The programme must be capable of facilitating the realisation of the right. In a section 26(2) challenge where it is alleged that the state has failed to deliver on its obligation, the question is whether the legislative and other measures taken by the state are reasonable, not whether other more favourable ones could have been adopted.⁹

³ Ibid. para. 34.

⁴ Ibid. para. 35.

⁵ Ibid. para. 36.

⁶ Ibid. para. 38.

⁷ Ibid. para. 39.

⁸ Ibid. para. 40.

⁹ Ibid. para. 41.

- Legislative measures are not enough to answer the command of section 26(2). The state is required to act in order to achieve the intended result. The legislative measures must be supported by appropriate and well-directed policies and programmes implemented by the executive. An otherwise reasonable programme that is implemented unreasonably does not constitute compliance with the section 26(2) obligation of the state.¹⁰ Effective implementation of the right of access to adequate housing requires adequate budgetary support by the national government.¹¹
- In determining the reasonableness of the state's programme, regard must be had of the social, economic and historical context of the problem of housing. Further, the Bill of Rights must be kept in mind, especially the value it places on human beings and the need to afford them the basic necessities of life.¹²
- There is no obligation on the state to do more than is achievable within its resources.¹³
- Such housing programmes as exist cannot leave out of consideration the immediate amelioration of the circumstances of people in a crisis situation.¹⁴ Those in desperate need cannot be ignored in the interests of an overall programme focussed on medium- and long-term objectives.¹⁵

With regard to section 28, the Court basically decided that the responsibility to provide shelter to children lies with their parents in the first instance, and that the state only incurs a duty to provide shelter directly to children when they no longer enjoy family care.¹⁶

3 FROM HOUSING TO EDUCATIONAL RIGHTS

It is obvious that one cannot extrapolate uncritically the state's obligations in respect of education from the housing rights provision in section 26. Indeed, such an extrapolation would be undesirable since, in some respects, the constitutional promise in respect of education is stronger than it is with respect to housing. It accordingly follows that one cannot derive policy implications from *Grootboom* to the right to education without further ado. This section attempts to identify similarities and dissimilarities in the ways in which the two rights are articulated in the Constitution. From that exercise an attempt is made to derive policy implications from the judgment in respect of the right to education.

3.1 Basic and adult basic education

The right to basic and adult basic education is stronger than the right of access to housing in three respects. It is not subject to available resources, it

¹⁰ *Ibid.* para. 42.

¹¹ *Ibid.*

¹² *Ibid.* paras. 43–44.

¹³ *Ibid.* para. 46.

¹⁴ *Ibid.*

¹⁵ *Ibid.* para. 44.

¹⁶ *Ibid.* para. 77.

is immediate and it is direct.

3.1.1 The right is not contingent upon resources availability

Unlike the right of access to housing, which is explicitly made contingent upon the resources of the state, the right to basic and adult basic education is not articulated in any conditional terms.

Bekker therefore argues that resource constraints “would not be applicable in determining the content of the right to education”.¹⁷ Therefore we should assert that the state’s obligation to provide basic and adult basic education *as such* is unconditional and should not, in principle, be qualified by the resources available to the state. It is suggested that the question of whether the state *as a matter of fact* has the resources to give effect to the right belongs to a different debate and would be extraneous to the construction of the right as it is formulated in the Constitution. Therefore, the right must be interpreted as it is found in the Constitution and not with reference to any physical state of affairs that may or may not exist.

It may be suggested that the availability of resources might be a factor to take into account in limiting the right to basic and adult basic education in terms of section 36 of the Constitution. It would appear that some responses ought to be made in respect of this suggestion. First, the possibility of such limitation is not integral to the construction of the right to basic and adult basic education as it is formulated in section 29(1)(a). The *limitation* of any right in terms of section 36 is a separate question from the *meaning* of the right. Establishing its meaning is a necessary precondition to limiting a right, otherwise it is not known what is being limited.

Second, if we already introduce considerations about the possible limitation of a right under section 36 at the stage of interpreting it, we make it possible that the right might be read down *ab initio*. Considerations of resource constraints might then quite easily sway those who interpret the right in assigning meaning to it. It is suggested that such an approach would be incompatible with *B and Others v Minister of Correctional Services and Others*,¹⁸ which is discussed briefly below.

Third, the desirability of limiting the right to basic and adult basic education on the basis of the availability of resources must be problematised. One must proceed on the basis that, where subjecting a social and economic right to the availability of resources was desired, the Constitution specifically provided for that. Therefore it would seem that the omission to subject the right to basic and adult basic education to available resources conveys that such subjection is undesirable. To limit the right on account of resource constraints would therefore, it seems, amount to defeating the objective of section 29(1)(a), namely, to free the right from such considerations.

It can be noted in this regard that section 35(2)(e) of the Constitution articulates the right of detainees and prisoners to medical treatment, at the expense of the state, in similarly unconditional terms. The Cape High Court stated that, once it is established that any other medicine than AZT would be inadequate for the purpose of treating an HIV positive prisoner or detainee, it is no defence for the state to argue that it does not have the money to provide

¹⁷ Bekker 2000: 7.

¹⁸ *B and Others v Minister of Correctional Services and Others* 1997(6) BCLR 789 (C).

AZT.¹⁹

Although B's case related to the right to medical treatment and not education, it provides guidance on how the state's obligation should be approached in respect of a right that is formulated in unconditional terms. Regard may also be had to *Grootboom v Oostenberg Municipality and Others*²⁰ where the Cape High Court suggested that budgetary limitations are not relevant to the construction to be placed on the right of a child to have shelter in terms of section 28(1)(c) of the Constitution. The right is thus also unconditional.²¹

While the Constitutional Court overruled Davis J in the *Grootboom* case, the reversal was not based on an incorrect apprehension of the nature of the duty imposed by the right. The Constitutional Court thought that Davis misapprehended, not the *nature* of the obligation, but its *locus* in the first place. Therefore it is suggested that the view expressed by Davis, referred to above, has not been rendered irrelevant by the Constitutional Court's later judgment.

3.1.2 The right is immediate

The right to basic and adult basic education, unlike the right of access to adequate housing, is immediate. It is not subject to progressive realisation. Therefore the state has to act immediately in order to give full effect to the right.

3.1.3 The right is direct and imposes positive duties

The right to basic and adult basic education is direct. The beneficiary of the right is offered, not the right of *access* to basic or adult basic education, but the right to the relevant education as such. In addition, the positive duty of the state is not described in terms of taking 'reasonable legislative and other measures'. Interpreting section 32(a) of the interim Constitution, Mahomed, the then-Deputy President of the Constitutional Court stated that the section:

...creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.²²

Therefore we deal here with a positive duty imposed on the state, rather than the negative duty to refrain from impeding people from access to the right.²³

The state must act positively to ensure that everyone can acquire basic and adult basic education. As the Constitutional Court said in *Grootboom*,²⁴ the right of access means only that the state must enable others to provide for themselves, whereas if the right is direct, the state has to act in order to make the content of the right physically available. Bekker formulates the obligation on the state in respect of the right to basic and adult basic education in the

¹⁹ Ibid.

²⁰ *Grootboom v Oostenberg Municipality and Others* 2000(3) BCLR 277 (C).

²¹ Ibid 290 G–J–291 A–C.

²² *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC). Although this judgment related to the right to basic education in s 32 of the interim Constitution (Act 200 of 1993), it is equally apposite to s 29(1)(a) of the 1996 Constitution owing to the similar drafting.

²³ Bekker 2000:7.

²⁴ *Grootboom*, *supra* note 2, para. 35. Heyns & Brand 1999: 6.

following terms:

The implication of this is that not only should a person not be prevented from attaining an education, but furthermore, that the state should provide basic education. This means that the state has to make provision for functional educational institutions. This would require the state to build schools, provide teaching materials and employ teachers. However, it goes further than merely making education physically available. The state has to ensure that educational institutions are open to everyone on the basis of non-discrimination. It has to see to it that the education being provided is affordable and of a high quality. Finally, it also has to see to it that the curriculum is flexible. In following the typification of General Comment No 13,²⁵ it would mean that basic education would have to be available, accessible, acceptable and adaptable.²⁶

She analyses the South African Schools Act,²⁷ and the Department of Education's Admission Policy for Ordinary Public Schools (hereafter the admission policy),²⁸ and then infers that "it is clear [from this] that the state is not under a duty to provide free education".²⁹ Schools are merely precluded from turning away children whose parents are indigent or from discriminating against such children.³⁰ This view was already foregrounded in Bekker's reading of the right to basic and adult basic education, cited above, where she suggests that the education provided by the state must be affordable.

3.1.4 The meaning of 'basic education'

The terms 'basic education' and 'adult basic education' are not defined in either the Constitution or the interim Constitution. In recognition of this fact, the *White Paper on Education and Training* (hereafter the *White Paper on Education*) argues that the meaning must therefore be "settled by policy in such a way that the intention of the Constitution is affirmed".³¹ The *White Paper on Education* then cites article 1 of the World Declaration on Education

²⁵ This General Comment deals with the right to education in article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). General Comment No. 13 (Twenty-first session, 1999) *The right to education (art 13 of the Covenant)* UN doc. E/2000/22. The Committee on Economic, Social and Cultural Rights (CESCR) was established under a resolution of the UN Economic and Social Council, with the mandate to supervise states parties' obligations under the ICESCR. It studies the provisions of the ICESCR and from time to time makes General Comments aimed at assisting parties to the ICESCR to fulfil their reporting obligations. Since the states parties' reports will be assessed on the basis of the General Comments, they are a useful interpretation tool in trying to settle the meaning of rights that are enshrined in the ICESCR. See Bekker 1999: 62.

²⁶ Bekker 2000: 7–8.

²⁷ South African Schools Act No 84 of 1996. The Act provides in s 5(3)(a) that no child may be denied access to a public school on the basis that its parents are unable to pay prescribed school fees.

²⁸ The admission policy provides that no learner should be suspended from class, denied access to cultural, sporting or social activities of the school, denied a school report or transfer certificate or victimised any other wise, on the basis that its parents are unable to pay school fees. Republic of South Africa 1998 *Government gazette 19377* Pretoria: Government printer 19 October.

²⁹ Bekker 2000: 8.

³⁰ *Ibid.*

³¹ Department of Education 1995 "White Paper on Education and Training" <www.gov.za/whitepaper/1995/education.htm> chapter 7, para. 12.

(the Declaration), to the effect that:

- Every child, youth and adult shall be able to benefit from educational opportunities designed to meet their needs;
- The said needs comprise tools such as literacy, oral expression, numeracy, problem solving, knowledge, skills, values and attitudes, which human beings require in order to survive, develop their full capacities, live and work with dignity, participate fully in development, improve the quality of their lives, make informed decisions, and continue learning.³²

The Education Ministry associates itself with the sentiments in the Declaration and states that “basic education must be defined in terms of learning needs appropriate to the age and experience of the learner”.³³ There is no further attempt in the document to define ‘basic education’ and ‘adult basic education’. It is suggested that, useful as the Declaration might be, it remains rather vague in defining these terms. Different people might apprehend the needs and tools required by human beings in order to get along in the journey of life differently.

Kriel argues that such vagueness allows the courts “a wide latitude to determine what standard of education is prescribed by the Constitution” in relation to basic education.³⁴ Implicit in the argument is therefore the suggestion that the Constitution envisaged a *standard* of education in laying down the right to basic education. If that is so, it is suggested that it would have been better not to leave the question open, even if it is supposed that the courts thereby acquire a wide latitude to determine the matter. The judicialisation of human rights is not necessarily an uncontested matter. As Roux argues, nothing stops a politically conservative judge from reading down rights while deploying the progressive language of the Constitution.³⁵

Relevant international instruments³⁶ suggest that ‘basic education’ might be the same thing as ‘primary’ or ‘fundamental’ education. The South African Schools Act³⁷ makes school attendance compulsory between the ages of seven and 15 years or up to the ninth grade, whichever happens first. The Department of Education states that it “defined general education and training...to span Grades 1–9”.³⁸ Therefore it could be inferred that ‘basic’ education is from grade one to grade nine. The same inference can be drawn from the Further Education and Training Act’s³⁹ definitions and those of the South African Qualifications Authority Act.⁴⁰ A reading of paragraph 15 of chapter seven of the *White Paper on Education* supports this view. It states:

Appropriately designed education programmes to the level of the proposed General Education Certificate (GEC) (one-year reception class plus 9 years of schooling), whether offered in school to

³² Ibid. para. 13.

³³ Ibid. para. 14.

³⁴ Kriel 1996: 38–3.

³⁵ Roux 2000. See also Meyerson’s discussion of the problem of subjectivity in the context of rights limitation (1997: 1–3).

³⁶ The said international instruments are discussed *infra*.

³⁷ *Supra* note 27.

³⁸ Department of Education 2001a: 17.

³⁹ Further Education and Training Act 98 of 1998.

⁴⁰ South African Qualifications Authority Act 58 of 1995. The definitions are discussed *infra*. See also Liebenberg & Pillay 2000: 351.

children, or through other forms of delivery to young people and adults, would adequately define basic education for purposes of the constitutional requirement.⁴¹

3.1.5 Should basic and adult basic education be free?

As Bekker suggests, basic education is not free in South Africa, even though learners whose parents are indigent cannot be turned away. The fact that the said learners cannot be turned away must not, however, be construed to be a concession to the notion that basic education should be free since, as Vally points out, their parents can still be sued for non-payment.⁴²

It would appear that there is ample evidence to suggest that the notion of free basic education has been actively resisted in South Africa. Malherbe shows, for instance, that during the negotiation process preceding the interim Constitution, one of the constitutional drafts placed before the negotiators by the South African Law Commission, after its own resistance to socio-economic rights had brought it under severe criticism, contained a clause on “free education at primary level”.⁴³ Neither the interim Constitution nor the current Constitution, however, provided for free education at any level.

The 1989 Convention on the Rights of the Child provides that member states must “make primary education compulsory and available free to all”.⁴⁴ The 1960 Convention Against Discrimination in Education contains a similar provision.⁴⁵ The 1948 Universal Declaration of Human Rights (UDHR) says that “elementary” or “fundamental” education should be free and compulsory.⁴⁶ The rights enshrined in the UDHR are given effect, *inter alia*, by the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁷ The ICESCR states that, in order to achieve “the full realization” of the right to education, states parties must make primary education compulsory and free.⁴⁸ It recognises that a state might, at the time of becoming a party to the Covenant, not yet have secured free and compulsory primary education for those under its jurisdiction. It requires that such a state party must, within two years of becoming a party, produce a detailed plan of action for the progressive implementation of the principle of compulsory education free of charge for all.⁴⁹ The 2000 African Charter on the Rights and Welfare of the Child provides that basic education must be free and compulsory.⁵⁰ However, the 1981 African Charter on Human and Peoples’ Rights simply provides that every individual shall have the right to education, without specifying that it must be free.⁵¹

One sees in these instruments a strong trend in international human

⁴¹ *White Paper on Education*, *supra* note 31, chapter 7, para. 15.

⁴² Vally 2001: 6.

⁴³ Malherbe 1997: 85–86.

⁴⁴ Article 28(1)(a).

⁴⁵ Article 4(a).

⁴⁶ Article 26(1).

⁴⁷ Alston 1998: 2. See also Bekker 1999 :130.

⁴⁸ Article 13(2)(a).

⁴⁹ Article 14. For the interpretation of this provision by the CESCR, see General Comment No. 11 (Twentieth session, 1999) *Plans of action for primary education (art. 14 of the Covenant)* UN doc. E/2000/22.

⁵⁰ Article 11(3)(a).

⁵¹ Article 17.

rights law that basic education must be *free*. Given the role of international law in interpreting our constitutional rights, there is an argument to be made that the right to basic education should be interpreted as a right to *free* basic education.⁵² South Africa, as has been indicated, makes basic education compulsory. It is suggested that, for basic education to be effectively compulsory, it has to be free.

South Africa signed the ICESCR on 3 October 1994⁵³ but has to date not ratified it. Therefore, South Africa is not bound to give effect to the injunctions of the ICESCR. Nevertheless, South Africa drew up the National Action Plan for the Promotion and Protection of Human Rights (NAP) in December 1998.⁵⁴ In the NAP, South Africa produced a plan for civil and political rights as well as for social-economic rights. The NAP is, however, silent on the subject of free basic education.⁵⁵ South Africa therefore falls short, not only of article 13 of the ICESCR (requiring free primary education), but also of article 14, which allows that even if education is not provided for free, a country can produce a plan for doing so on a progressive basis. The effect is that South Africa seems unwilling even to consider the free provision of basic education, but may have to reconsider its position when it eventually gets round to ratifying the ICESCR.

It is suggested that the reluctance to endorse a right to free basic education is untenable. First, the provisions of the Bill of Rights on the right to education were clearly substantially influenced by the ICESCR. One is therefore entitled to reason that the intention in formulating the country's basic law on the right to education was to give effect to that right as it is articulated in the ICESCR. If that is so, it is hard to see why the country is shy to ratify a covenant that formed the basis of the drafting of the socio-economic rights provisions in the Constitution.

Second, the ICESCR allows a measure of leeway to countries that are not up to speed in implementing the right to free and compulsory primary education. Whereas it formulates the right to basic education in direct and immediate terms, it also allows states parties to implement the right progressively through a detailed plan of action. This plan must fix a reasonable number of years for the realisation of the right. South Africa is not strictly bound to draw up a detailed plan of action on education in terms of article 14 of the ICESCR. However, it has drawn up a national plan of action on human rights that is substantially based on international human rights law instruments. It would not have been unreasonable to expect that the question of free basic education would have been included in that plan. On the other hand, South Africa *has* ratified the Convention on the Rights of the Child. This Convention, as pointed out earlier, also enjoins states parties to provide free basic education. Therefore the non-ratification of the ICESCR does not absolve the country of the obligation to provide free basic education.

The urgency of the requirement is underlined by the fact that approximately 18.4% of the South African population (more than four million people) have no education at all.⁵⁶

⁵² See s 39(1)(b) of the Constitution.

⁵³ Department of Foreign Affairs, n.d. p 1.

⁵⁴ NAP Steering Committee 1998.

⁵⁵ *Ibid.* 122–127.

⁵⁶ SAIRR 1999/2000: 110.

3.1.6 Are user fees unconstitutional?

The Wits University Education Rights Project (ERP) canvasses this question⁵⁷ and the following emerges from a discussion document it commissioned:

- The practice of charging user fees impedes to some degree the exercise of the right to basic education. The international community has come to recognise that “fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right [to education] and may jeopardise its realisation”.⁵⁸

- The right to basic education is very fundamental. The only way to guarantee its full exercise is to make basic education freely available to all learners. On this approach, user fees in respect of basic education are unconstitutional on their face because they impose a significant unconstitutional burden on the right to basic education for all learners.

- In practice, the effect of user fees in respect of education is to restrict access to basic education for those who cannot afford to pay. The statutory exemptions provided for in respect of parents who cannot afford to pay are ineffective and therefore do not serve the purpose for which they were meant.

The document then considers the question of whether free basic education should be provided for all learners or only for those who cannot pay. Because it is crafted with litigation in view, the document concludes that the prospects of success in court are better if the constitutionality of user fees is attacked on behalf of the poor, rather than on behalf of everyone, including middle classes.⁵⁹

If user fees cannot be struck down for unconstitutionality, the document further suggests that the state could be directed to assist learners from indigent families by paying the set fees in order to enable them to exercise their right to basic education.⁶⁰

The question remains, however, whether there is evidence to support the claim that user fees have the effect of impeding people in the enjoyment of the right to basic education. The document cites studies by UNICEF and the World Bank, which show that:

- In Malawi enrolment at primary schools shot up by 50% after school fees and uniform requirements were eliminated in 1994.
- In Ghana, enrolment at primary schools dropped by 4% in 1992 when school fees were introduced, and parents cited inability to pay as the reason.
- In Kenya, Tanzania and Indonesia, enrolment at primary school increased appreciably after the scrapping of school fees.
- In Uganda, enrolment at primary school doubled to 5.3 million after school fees were eliminated in 1997.⁶¹

If these statistics are accepted, they suggest a definite correlation between the practice of taking user fees for education and the fact that some learners do not go to school. It would therefore appear that a case might indeed be made to the effect that user fees are unconstitutional.

⁵⁷ Roithmayr 2002: 4.

⁵⁸ Ibid.

⁵⁹ Ibid. 5.

⁶⁰ Ibid. 6.

⁶¹ Ibid.

However, as the ERP document suggests, one of the major obstacles to such a challenge would be the statutory provisions for the partial or complete exemption from such fees of children whose parents cannot afford them, coupled with the prohibition on turning such learners away on account of their parents being unable to pay. The document then falls back on the argument that these provisions are not effective, that they do not cover secondary costs such as uniforms and transport, and that their cost in dignity might well be too high.⁶²

While these arguments are supportable, it must be pointed out that the document's proposal that free basic education be extended only to those who cannot pay amounts to the same very high cost in dignity that it cautions against, as previously argued. In other words, beneficiaries of the dispensation it advocates have to show that they are poor before they can derive the benefits it envisages. We have argued where people are required to show their lack of means, the tendency seems to be that they stay away from the benefits envisaged, rather than parade their poverty. Further support for this view can be found in the experiences of the Department of Social Development with a fund it established for the assistance of children orphaned by AIDS. Guardians of these children are not registering them in order to derive the benefits envisaged. The result has been that a substantial portion of the funds set aside for this purpose is simply not being used.

We say again that if people are required to prove their poverty in order to access any benefits, it is more than likely that they will save their dignity by simply foregoing those benefits. It would therefore be better if basic education were made free for all. Moreover, the law does not take account of the reality that poverty is not uniform and that some people are poorer than others. Affordability is thus a relative concept. The significance of this proposition becomes clearer when we consider, for instance, that the regulations promulgated under the South African Schools Act indicate that full exemption must be granted to parents whose income is less than ten times the annual school fee. Let us say that one family's income is R1 000 per month. If that family has only four members, it is still better off than one with eight members that has same income, even though both families might in fact be poor. It would therefore make a lot more sense to work towards free basic education for all.

Yet it may be that the courts are much likelier to buy into free basic education for the poor, rather than for all, precisely because, as the ERP document suggests, they are unwilling to push the government too far on socio-economic rights. It would then appear that those who argue against litigation as the principal method of campaigning for free basic education have a point. The campaign must be waged outside of the courts in the first instance, with the courts being used as a last resort. In other words, the practice of charging user fees for primary education at public schools must be contested first and foremost in the political arena, rather than in the courts.

3.2 Further education

The formulation of the right to further education is somewhat different. The right is direct in that it is not *access* to further education that is promised, but

⁶² Ibid. 9.

further education *itself*. The right is not expressly made contingent upon resources available to the state and so suggests that it is also not subject to this qualification. However, it is not immediate: the state must make it available and accessible *progressively* through reasonable measures.⁶³ It is suggested that, in answering the question of whether the measures introduced by the state to give effect to the right are reasonable, the resources available to the state might be a factor to consider even though the right is not subject to resource constraints.

As to the meaning of the term 'further education', Bekker suggests that in the context of South Africa it would include "further education and training as well as higher education".⁶⁴ She relies on the Further Education and Training Act and the Higher Education Act⁶⁵ read together. The former defines further education and training as:

...all learning and training programmes leading to qualifications from levels 2 to 4 of the National Qualifications Authority Act ... which levels are above general education but below higher education.⁶⁶

The second Act defines higher education as:

any learning programmes leading to qualification higher than grade 12 or its equivalent in terms of the National Qualifications Framework as contemplated in the South African Qualifications Authority Act...and includes tertiary education as contemplated in Schedule 4 of the Constitution.⁶⁷

Further education therefore includes standard 10 or grade 12.⁶⁸

As pointed out above, there is, on the face of it, no reference in the Constitution to the right to further education being subject to resource constraints. Bekker writes:

With regard to the relationship between resources and the progressive realisation of the rights, the *Limburg Principles*⁶⁹ provide as follows: 'The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available. Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realisation by everyone of the rights recognised in the Covenant.'⁷⁰

It is not clear that the relevant parts of the Limburg Principles cited by Bekker in the passage above were necessarily intended as an aid to interpret

⁶³ Bekker 2000: 9.

⁶⁴ Ibid.

⁶⁵ Higher Education Act Act 101 of 1997.

⁶⁶ *Supra* note 39. Level four is standard 10 or grade 12 or similar qualification. See Department of Education 2001: 15.

⁶⁷ *Supra* note 65.

⁶⁸ See also Liebenberg & Pillay 2000: 354.

⁶⁹ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights were formulated by independent experts in international law, meeting at Limburg University (Netherlands) in June 1986. The meeting was convened to consider the nature of obligations created by the ICESCR on states parties. The Limburg Principles are widely acknowledged as constituting an influential guide to interpreting states parties' obligations under the ICESCR.

⁷⁰ Principles 23 and 24 in Bekker 2000: 9.

the obligation of states in respect of rights that are not legally encumbered by resource constraints. The subheading under which they appear is “to achieve progressively the full realisation of the rights”. It would appear, therefore, that they were intended as an aid to interpret the term ‘progressive realisation.’

They convey, it seems, that even where rights are subject to progressive realisation, resource constraints are not an adequate answer to non-compliance. The resources that *are* available must be harnessed effectively in order to make the full realisation of the rights possible. They convey that one must not only think of *increasing* money in grappling with the question of what resources are required in order to bring about the full realisation of rights, but that a re-organisation of the already available social resources is also necessary.

The paragraphs are pertinent to the extent that section 29(1)(b) of the Constitution requires that the state make further education *progressively* available and accessible. However, it is suggested that Bekker should not be read to imply that the right to further education is subject to the availability of resources. It is noteworthy that the Maastricht Guidelines⁷¹ read:

In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25–28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.⁷²

In other words, even where the right *is* subject to the availability of resources, that would not absolve the state from implementing the right minimally and progressively improving the level of enjoyment of the right.⁷³ ‘Progressive realisation’ also implies no retrogression unless it is unavoidable or necessary in order to advance other socio-economic rights.⁷⁴ Where, then, the right is not constitutionally encumbered by the limitation of available resources, it is suggested that we should be slow in implying the encumbrance.

A point that is well worth making is that even if the right is not encumbered by resource constraints, it would still be subject to what Kriel calls “internal limitations”. That is, the right has to compete for resources with other socio-economic rights “which may have an equal or greater constitutional weight”.⁷⁵

⁷¹ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights were formulated by experts in international law in January 1997 under the auspices of the International Commission of Jurists, the Urban Morgan Institute on Human Rights and the Centre for Human Rights at Maastricht University. Their purpose was to elaborate on the Limburg Principles after they had been in existence for ten years. Therefore the guidelines, like the Limburg Principles, are a useful guide to interpreting states parties’ obligations under the ICESCR.

⁷² *Ibid.* para. 10.

⁷³ See Craven 1995: 138.

⁷⁴ *Ibid.* 131–132.

⁷⁵ Kriel 1998: 38–13, 14.

There are, to sum up, similarities and dissimilarities between the constitutional formulation of the right to further education and the right of access to adequate housing. Both are subject to reasonable measures to be introduced by the state for their realisation. Both are subject to progressive implementation. However, the right to further education is not constitutionally encumbered by resources that may or may not be available to the state. Nor is it a right of access.

3.3 The official language of one's choice

The Constitution guarantees the right to receive education in public educational institutions in the official language of one's choice, where this is reasonably practicable. The Department of Education's language policy states that, in order for the request to provide education in a particular language to be reasonable, at least 40 learners in grades one to six and 35 learners in grades seven to 12 in a particular grade and in a particular school must make the request.⁷⁶ Bekker suggests that this is in line with international practice:

The larger the number of speakers of a language in a particular area, the greater the obligation to provide mother-tongue education in that area. The higher the level of education, the less pressing is the obligation to provide mother-tongue education in all the languages of a region.⁷⁷

Although Bekker is probably concerned only with the fact that the policy compares favourably with international standards, it bears pointing out that, in South Africa, the right is to education in an *official language* of choice, rather than to *mother tongue* education. Therefore a learner is not entitled to mother tongue education if that mother tongue is not an official language. So seen, it may be necessary to qualify the extent to which South Africa compares favourably with international standards on the matter.

It is suggested that the right to education in an official language of choice is by necessary implication subject to available resources, and that the consideration would be part of the inquiry in any given set of circumstances as to whether the request is reasonable. A Canadian judge observed in similar circumstances:

Cost is not usually explicitly taken into account in determining whether or not an individual is to be accorded a right under the Charter. In the case of [section] 23, however, such a consideration is mandated. Section 23 does not, like some other provisions, create an absolute right. Rather, it grants a right which must be subject to financial constraints, for it is financially impractical to accord every group of minority language students, no matter how small, the same services which a large group of [section] 23 students are accorded.⁷⁸

Nevertheless, the drafters of the Constitution considered education in an official language of choice as sufficiently important to mandate the government to consider all reasonable educational alternatives, including single-medium institutions in order to give effect to this right.

⁷⁶Bekker 2000.

⁷⁷Ibid. 11.

⁷⁸*Mahe v Queen in Right of Alberta* (1990) 68 DLR (4th) 69, cited by Kriel 1998: 38–

4 GOVERNMENT'S LEGISLATIVE AND POLICY FRAMEWORKS ON EDUCATION VIEWED THROUGH THE PRISM OF GROOTBOOM

The *Grootboom* judgment has been summarised in a previous section of this paper. It remains now to extrapolate principles from the judgment on the basis of which one might evaluate government performance in respect of the right to education.

4.1 The duty to act

One of the principles that can be derived from *Grootboom* is that where the law communicates a direct right, rather than a right of access, the state bears an explicit obligation to *act* in order to bring about the realisation of the right. The Constitution conveys a direct right with reference to basic, adult basic and further education and there is therefore an explicit obligation on the part of the state to act. State action can take different forms and in this paper consideration will be given to the concepts of minimum core obligations, policy and legislative formulation, and implementation.

4.2 Minimum core obligations

The Committee on Economic, Social and Cultural Rights' (CESCR's) General Comment No 3 reads, *inter alia*, that a state party fails to discharge its obligations under the ICESCR if a significant number of people under its jurisdiction are deprived of the most basic forms of education.⁷⁹

Of relevance for current purposes is not the question of whether any number of people in South Africa are deprived of basic forms of education, but rather that a minimum core responsibility rests on the state parties to the ICESCR to provide basic education. Similarly, the question is not now what level or form of education the state is obliged to provide in order to discharge its minimum core responsibility, but rather what lessons about this we can draw from *Grootboom*.

In *Grootboom* it was decided that, while there might be a core responsibility resting on the state to provide a particular service, that did not entitle people to demand the direct delivery of such services. All it meant was that such core responsibility must be taken into account in assessing the reasonableness or otherwise of government policies and programmes.⁸⁰ This position was reiterated in *Minister of Health and Others v Treatment Action Campaign and Others*.⁸¹ The Constitutional Court went a little further in the latter case and opined that it would in any event be "impossible to give everyone access even to 'core' service immediately".⁸²

One must be careful in drawing lessons for the right to education from either judgment, bearing in mind that the right to education is formulated differently in the Constitution. Let us return to this point in a little while.

⁷⁹ General Comment No. 3 (Fifth session, 1990) *The nature of States parties obligations (art 2(1) of the Covenant)* UN doc. E/1991/23, para. 10.

⁸⁰ *Grootboom*, *supra* note 2, para. 33.

⁸¹ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), paras. 26–39.

⁸² *Ibid.* para. 35.

The opinion of the Court on what the concept ‘minimum core obligation’ of a right conveys is problematic apropos General Comment No 3. The General Comment seems to be clear: it says that there is a minimum core responsibility on the state to provide “minimum essential levels” of the rights protected in the Covenant.⁸³ The state fails in its duty if a significant number of individuals under its jurisdiction are denied that benefit. If it were to be agreed, for instance, that the minimum the state can do is to provide clean water to a given number of residents in order to fulfil its core responsibility, it would be absurd to say that the agreement does not entitle the beneficiaries of this right to demand that the state should do so. The empirical question of whether it is possible to provide the minimum benefit envisaged by the right immediately to everyone affected can never be an obstacle to a correct interpretation of the General Comment or the Constitution. First, the General Comment does not require that everyone must receive the minimum benefit of the rights discussed. Rather, it says that a “significant number” of individuals should not be denied the minimum benefit of the rights mentioned.⁸⁴ It is therefore possible to agree that the General Comment indeed entitles rights beneficiaries to demand that the state will do what the right contemplates, but disagree about what constitutes a ‘significant number’.

Second, the General Comment says that, in assessing whether a state party has discharged this minimum core responsibility, regard must be had of “resource constraints applying within the country concerned”.⁸⁵ Therefore, in adjudicating whether the state has discharged its minimum core responsibility, the Court might allow the state to raise resource constraints as a defence. However, the state must demonstrate that it has used all resources at its disposal “in an effort to satisfy, as a matter of priority, those minimum obligations”.⁸⁶ It is therefore not necessary to take the view that the minimum core obligation of the state to deliver on the rights concerned does not entitle people to demand that the minimum core be provided.

Let us return to the applicability of these to the right to education. It would seem that the opinion of the Court on the meaning of minimum core responsibility cannot be applied without further ado to the right to education. As was indicated in part two above, the Court distinguishes ‘access rights’ from ‘direct rights’.

The right to education is a ‘direct right’ and therefore there should be no obstacle in demanding that the state provide a minimum core service. It is conceivable that there might be a divergence of opinion on what that core service is, and up to what levels it should be delivered. But if the obligation to act is recognised, as it is, then it makes sense to agree that there must be a minimum content of provision, below which the state is not allowed to sink. It is suggested that the provision of basic education is the point at which the state’s minimum core responsibility must be fixed.

4.3 Policy and legislation formulation

The NAP indicates what the government has done to realise the right to education. It has framed various policies and enacted various laws. The

⁸³ General Comment No 3, *supra* note 79, para. 10.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

policies include measures to:

- redress the legacy of race-based education;
- build a unified education system based on equity;
- ensure the elimination of unfair discrimination;
- provide educational institutions and services that are necessary to ensure reasonable access to education;
- ensure that learners are not excluded from school on account of non-payment of fees; and
- ensure sufficient funds for basic education.⁸⁷

The laws introduced include:

- the South African Qualifications Authority Act⁸⁸ which seeks, *inter alia*, to:
 - create an integrated framework for learning achievements;
 - facilitate access to, and mobility/progression within, education, training and career paths;
 - enhance the quality of education and training;
 - accelerate the redress of past unfair discrimination in education, training and employment opportunities; and
 - contribute to the full development of the individual learner, the society, economy and the nation;
- the National Education Policy Act,⁸⁹ which aims to lay down a policy framework for the provinces in respect of admissions policy in public schools and so promote a level of uniformity across the provinces;
- the South African Schools Act,⁹⁰ which provides for a uniform system for the organisation, governance and funding of public schools and for compulsory education up to the age of 15 years or grade nine; and
- the Further Education and Training Act,⁹¹ which regulates education and training beyond age 15 or grade nine.

The government also lists various challenges it faces in the area of education, one of which is the need to reduce “the high rates of illiteracy”.⁹² One must suppose, therefore, that the policy and legislative frameworks are geared, *inter alia*, to reducing the high illiteracy rate.

An analysis of the policy and legislative frameworks suggests that the government did not distinguish between the different obligations created by the Constitution in respect of the right to education. This is clear from government's explanation that, with respect to the right to basic and adult basic education, it adopted an incremental approach to the implementation of the right (see next subsection). If by taking an incremental approach to the right government means implementing the right progressively, then it is necessary to point out that the right is not subject to progressive implementation and therefore government policy is inappropriate to the nature of the right.

Similarly, government's plea of fiscal limitations in the face of the right

⁸⁷ NAP Steering Committee 1998: 122–124.

⁸⁸ *Supra* note 40.

⁸⁹ National Education Policy Act 27 of 1996.

⁹⁰ *Supra* note 27.

⁹¹ *Supra* note 39.

⁹² NAP Steering Committee 1998: 124.

is inappropriate to the nature of the right. As it was indicated earlier, where a right is constitutionally formulated in unconditional terms, lack of funds is not a defence to the complaint that the right has not been effected. It has again been suggested that lack of funds might well be relevant at the limitation stage. We must point out yet again that the inquiry is not at that stage yet and therefore this argument is not particularly relevant.

It is interesting to note how the government formulates the right to further education in the NAP: "Where it is practical and reasonable, everyone has the right to further education".⁹³ It is suggested that this formulation detracts from the right as it is formulated in the Constitution.

By formulating the right to further education in the way it does, government makes it subject to considerations of practicalities whereas, constitutionally, it is only subject to progressive realisation and the reasonableness of the measures government has introduced in order to give effect to the right. Therefore government is burdening the right with a consideration that is extra-constitutional. This suggests that government is attempting to create space for itself to avoid giving full effect to the right on the basis that it is not practical to do so. Indeed, as it will be indicated later, government does justify some of its failure in this respect on fiscal grounds.

There is a need, at policy level, for the government to draw the distinction between basic education, on one hand, and further education, on the other, as required by the constitutional articulation of the right to education. Whereas the policy and legislative frameworks produced thus far would probably be adequate in the context of further education, there appears to be a crying need for policy formulation at the level of what government calls 'general education'. Such policy formulation would need to be cast in a language that takes into account that there are different levels of obligation at play in attempting to give effect to the right to education. Thus policy formulation on education needs to be more attentive to the constitutional text.

It would also appear that policy is required at national level in order to ensure that fiscal arrangements are compatible with the duties imposed on the state by the right to education. Not only must such policy be sensitive to the linguistic formulation of the right, it must also take into consideration the General Comments of the CESCR as explanatory tools regarding the nature of the obligations imposed by the right. Although South Africa has not ratified the ICESCR, this is necessary, as it was suggested earlier, because of the similarity in the language of the Constitution (Section 39(1)(b)) and that of the ICESCR. Further, the Constitutional Court decided in the *Makwanyane* case that international law is binding on South Africa.⁹⁴

4.4 Implementation of laws, policies and programmes

We have extracted the principle from *Grootboom* that laws and policies do not sufficiently answer a command of the Constitution to give effect to a right. The principle of reasonableness requires that the state must have well-directed programmes and plans, and that they must be implemented in a reasonable manner by the Executive. There is thus a need to examine the *implementation*

⁹³ Ibid.122.

⁹⁴ *S v Makwanyane and Mchunu* 1995 6 BCLR (CC), 1995 3 SA 391 (CC) at para.

of policies as well.

After providing a narrative of all the policy and legislative frameworks the Department has called into existence, the Department's report on achievements in education since 1994 deals with the implementation phase. It states that:

- the Ministry of Education has adopted an incremental approach to implementation;
- there is a delay in fully implementing the regulatory mechanisms the government has established. The delay has "created something of a 'policy vacuum'";
- the delay is caused by various factors, including a general decline in student enrolments and ongoing fiscal constraints. It is also attributable to competition in the higher and further learning sector. Many institutions have emerged in this sector and have "strategically positioned themselves to ensure greater market share and diversity of income sources"; and
- there has been no planning framework.⁹⁵

Reference was made to government's statement of its commitment to reduce the high levels of illiteracy in South Africa. One would expect, therefore, that budgetary allocations would speak to this need. However, even at the stage of drawing up the NAP (1998), it was evident that the government had made peace with retrogressive budgetary measures.⁹⁶ In fact, Fair Share concluded that state expenditure per illiterate person amounted to a mere R0.31 in the 1997/98 budget.⁹⁷ Further, Vally points out that a mere 0.8% of the education budget is dedicated to adult basic education and that adult basic education is often the first to have its funding cut when there is a budget squeeze. He points out that in 1998, 432 adult basic education centres were shut down in the Eastern Cape alone.⁹⁸

General Comment No 3 requires that, while taking into account the peculiarities of different countries in bringing about the progressive fulfilment of a right, the state must "move as expeditiously and effectively as possible".⁹⁹ It should also be kept in mind that the right under consideration here is not subject to progressive fulfilment and that, therefore, the obligation outlined in the General Comment would probably be stronger. The General Comment also conveys that backward movement in the implementation of a right (retrogressive measures) should generally be avoided.¹⁰⁰ As indicated previously, this portion of the General Comment has been interpreted to mean that the introduction of retrogressive measures in the fulfilment of a right should not be lightly condoned. In *Grootboom* the Constitutional Court expressly endorsed the portion of General Comment No 3 dealing with the issue of retrogressive measures.¹⁰¹

Following the *Grootboom* judgment, one has to enquire into the actual

⁹⁵ Department of Education 2001a: 23.

⁹⁶ See NAP Steering Committee 1998: 127 where the education Medium-Term Expenditure Framework was reflected as 21.87 (1995/6), 22.07 (1996/7), 21.19 (1997/8), 22.81 (1998/9) and 21.80 (2000/01).

⁹⁷ Fair Share 1998: A-3.

⁹⁸ Vally 2001: 8. See also Aitchinson 2001: 15–19.

⁹⁹ General Comment No 3, *supra* note 79, para. 9.

¹⁰⁰ *Ibid.* Craven 1995: 131.

¹⁰¹ *Grootboom*, *supra* note 2, para. 45.

implementation of the policy on education, insofar as the government is constitutionally mandated to take positive action towards realising the right. It was noted that the government attributes some of the implementation difficulties it had to a lack of planning frameworks. This should not have been the case. *Grootboom* requires that, side by side with the policies, there should be well-directed plans or programmes for implementing policies and legislative agendas. It requires, moreover, that the plans or programmes *be implemented*.

A few practical indicators are in order to assess how adequately the right to education is being implemented.

Table 1: Distribution of learners by province: 1996 and 2000

Province	Learners				
	1996		2000		Net change
	Number	%	Number	%	
Eastern Cape	2 226 408	18.7	2 113 387	18.2	-0.5
Free State	785 217	6.6	744 627	6.4	-0.2
Gauteng	1 424 360	12.0	1 527 698	13.0	1.2
KwaZulu-Natal	2 612 235	22.0	2 646 126	22.8	0.8
Mpumalanga	898 210	7.6	857 241	7.4	-0.2
Northern Cape	199 603	1.7	174 497	1.5	-0.2
Northern Province	1 902 732	16.0	1 722 869	14.9	-1.1
North West	954 907	8.0	896 141	7.7	-0.3
Western Cape	871 708	7.3	916 115	7.9	0.6
National	11 875 380	100.0	11 598 701	100.0	0.1

Source: Department of Education 2000: 21.

The table suggests that, with the exception of three provinces, learner numbers declined in South Africa between 1996 and 2000. In the three provinces that do not show a decline – Gauteng, KwaZulu-Natal and Western Cape – the increase is not significant, with the result that the national increase is a mere 0.1%. This must have serious implications for the right to education and raises the question, once again, of whether government should not revisit its reluctance to introduce free basic education. As was pointed out previously, financial constraints are part of the explanation for the declining number of learners, as is evident from the Department's own data.

Table 2: Learner-teacher ratio by province: 1996 and 2000¹⁰²

Province	1996			2000			Net change in ratio
	Learners	Educators	Ratio	Learners	Educators	Ratio	
Eastern Cape	2 226 408	62 773	35	2 113 387	66 702	32	-3
Free State	785 217	24 869	32	744 627	24 305	31	-1
Gauteng	1 424 360	51 031	28	1 527 698	52 568	29	1

¹⁰²The data refer both to state paid educators, and those paid by school governing bodies.

KwaZulu-Natal	2 612 235	75 723	34	2 646 126	77 039	34	0
Mpumalanga	898 210	25 175	36	857 241	22 179	39	3
Northern Cape	199 603	7 487	27	174 497	6 798	26	-1
Northern Province	1 902 732	57 145	33	1 722 869	55 912	31	-2
North West	954 907	32 682	29	896 141	30 589	29	0
Western Cape	871 708	33 714	26	916 115	29 873	31	5
National	11 875 380	370 599	32	11 598 701	365 965	32	0

Source: Department of Education 2000: 21.

The table suggests that on average, the national learner/educator ratio of 1:32 has remained constant.¹⁰³ The figure compares favourably with the South African Human Rights Commission's (SAHRC's) figure of 1:33, although it is not clear whether the SAHRC distinguished between state paid educators and those paid by school governing bodies.¹⁰⁴

One should, however, be cautious in assigning too much significance to the apparently acceptable ratio since, in part, it is attributable to a decline in learner enrolment figures. The Department points out, for instance, that part of the explanation for the lack of increase in the ratio is that there were approximately 300 000 less students in 2000 than was the case in 1996.¹⁰⁵

On the positive side, however, one can note that even in 1996, when the learner figures were appreciably higher, the average national ratio was an acceptable 1:32. However, with an appreciably lower number of students in 2000, the ratio moved up to 1:35 in respect of state paid educators. This is perhaps something to worry about even if the ratio in itself is not unacceptable. If the ratio can only be kept constant with declining learner enrolment figures by parents having to pay higher fees, it seems to be a clear case for concern.

A further serious consideration is the extent to which averages might conceal rather ugly individual situations. It would be interesting, for instance, to see what differences one might observe if the data were not de-racialised. In other words, how does the fact that we do not know whether we are speaking about schools in Soweto or in Sandton affect our analysis? Do we know what percentage of the universe of learners is made up of white students, so that we can be confident that the averages are not perhaps racially skewed? If we draw up policy and plan educational programmes on the basis of acceptable national averages, how do we control for the risk that they might be a distortion as a result of various factors? These could include poorer school attendance in the black communities, a better ability of white parents to pay for educators that the state is not paying for, and so on.

It is interesting to note that while the learner/educator ratio remains constant (1:32) at public schools over the period studied, it nevertheless drops from 1:25 in 1996 to 1:15 in 2000 at independent schools.¹⁰⁶ There was, of

¹⁰³ The ratio was 1:33 in 1996 and 1:35 in 2000 if only state paid educators are considered. See Department of Education 2001b: 23.

¹⁰⁴ See SAHRC 1998–1999: 41.

¹⁰⁵ Department of Education 2001b: 21.

¹⁰⁶ Ibid. 27.

course, no information regarding the state of enrolment at independent schools in the period considered and it is therefore not clear whether the figures increased, remained constant, or decreased. Therefore it is not possible, strictly speaking, to draw definitive comparisons. The worst case scenario would be that the enrolment figures declined at independent schools, which is what occurred at public schools. In terms of this scenario, it is interesting to note that the learner/educator ratio improved at independent schools whereas it did not at public schools.

When one considers that the provision of education is primarily the responsibility of the state, this is disturbing. There were 370 599 educators in South Africa in 1996 but this number declined by 4 634 to 365 965 in 2000.¹⁰⁷ The decline was probably more as a result of state policy than to do with the non-existence of educators. It is significant, for instance, that various provinces reported large-scale reductions in state paid educators, and appreciable increases in the number of educators paid by school governing bodies in the same period.¹⁰⁸

Consequently, as government more and more shifts the burden of funding education to parents, one sees a corresponding decline, not only in the number of learners, but also in the number of educators for the simple reason that parents cannot afford to carry the burden. The few who are well resourced are able to intervene and save the situation, but that leaves out of account the vast majority of South Africans who must rely entirely on the state for realising their right to education.

The availability of classrooms is another factor that has a bearing on implementing the right to education.

Table 3: Number of learners to a classroom by province: 1996 and 2000

Province	1996			2000			Change
	Learners (number)	Classrooms (number)	Learners per classroom	Learners (number)	Classrooms (number)	Learners per classroom	
Eastern Cape	2 226 408	40 489	55	2 113 387	52 222	40	15
Free State	785 217	20 583	38	744 627	22 841	33	5
Gauteng	1 424 360	41 721	34	1 527 698	46 324	33	1
KwaZulu-Natal	2 612 235	58 423	45	2 646 126	68 031	39	5
Mpumalanga	898 210	19 996	45	857 241	17 766	48	-3
Northern Cape	199 603	6 265	32	174 497	6 772	26	6
Northern Province	1 902 732	38 958	49	1 722 869	45 649	38	9
North West	954 907	23 928	40	896 141	26 680	34	6
Western Cape	871 708	26 461	33	916 115	29 545	31	2
National	11 875 380	276 824	43	11 598 701	315 830	37	6

Source: Department of Education 2000: 21, 29.

At face value the number of learners per available classroom seems satisfactory. Except for Mpumalanga, all provinces indicate an improvement.

¹⁰⁷ Ibid. 17.

¹⁰⁸ Ibid.

One has to consider, however, that shelters¹⁰⁹ account for 8 213 (2.6%) of the classrooms counted in 2000.¹¹⁰ One must also then factor in that learner enrolment figures dropped by a substantial 300 000 in the year 2000.

Had they remained constant, there would have been 315 830 classrooms to 11 989 701 learners and thus 38 learners per classroom. If the shelters are discounted, there would have been 307 617 classrooms to 11 989 701 learners and thus 39 learners per classroom.

The opinion among demographers is that, however, learner enrolment should have increased by approximately 3% per annum during the period under consideration. Following this view, there should therefore have been approximately 1 438 764 more enrolments in the year 2000 than there were before that date, bringing the total to about 13 428 465 learners. If we assume that government did not know that enrolment figures would pan out the way they did, we have to infer that it did not plan with the figures we ended with in mind. Therefore, the state of classrooms would probably have remained the same even if enrolment figures had panned out more naturally. In that case there would have been 43 learners to a classroom and thus no improvement on the national scale. The fact, therefore, that there is an improvement in the learner/classroom ratio appears to be due to a lucky combination of contradictory factors rather than to rational planning based on constitutional requirements. These factors include the failure by parents to avail their children of the education opportunities that are available, on one hand,¹¹¹ and the sheer will to receive education against all odds, on the other.¹¹²

It would appear, therefore, that much still needs to be done in regard to the state's obligation to *act* in order to give effect to the right to education. To point this out is not to deny positive measures that have been introduced.

4.5 Special provision for vulnerable groups

As indicated previously, the Court stated in *Grootboom* that vulnerable groups need special attention in policy formulation and implementation. It also said that state measures that leave people in desperate and crisis situations could not pass the test of reasonableness.

There are probably many social groups that could be considered to be vulnerable and therefore in need of special attention in terms of the *Grootboom* judgment. What follows is an examination of the Department's admission policy,¹¹³ formulated under the National Education Policy Act¹¹⁴ in order to regulate admission to South African schools.

4.5.1 Non-citizens

The admission policy stipulates that it applies equally to learners who are not citizens of South Africa, but whose parents are in possession of a permit for temporary or permanent residence.¹¹⁵ Persons who are classified as illegal

¹⁰⁹ The Department defines a shelter as a "structure that is used as a classroom and has a roof but does not necessarily have walls". Department of Education 2000: 29.

¹¹⁰ *Ibid.* 29.

¹¹¹ As reflected in the declining enrolment figures.

¹¹² As reflected in the number of shelters serving as classrooms.

¹¹³ *Supra* note 28.

¹¹⁴ *Supra* note 89.

¹¹⁵ *Supra* note 113, para. 19.

aliens and who apply for admission of their children into South African schools must produce evidence that they have applied to the Department of Home Affairs to regularise their stay in the country.¹¹⁶

It is suggested that this policy satisfies the principle extracted from *Grootboom* insofar as foreigners are a vulnerable group. It also satisfies all the instruments of international law that prohibit educational discrimination, and in particular UNESCO's policy statement that at the basic education level non-citizen learners must be treated no differently from nationals.

4.5.2 Learners with special needs

To appreciate the extent of the challenge with regard to learners with special needs, one needs a sense of the prevalence of 'disabilities' in South Africa.

Table 4. Distribution of disabled persons per category per province

Province	Sight	Hearing	Physical	Mental	Multiple	Not specified	Total	% per province	% of population
Eastern Cape	161 898	68 531	115 717	41 432	35 997	38 604	462179	17,39	1,14
Free State	133 614	33 045	41 960	13 947	16 461	18 127	257154	9,68	0,63
Gauteng	211 769	59 868	69 936	24 033	26 030	63 906	455542	17,14	1,12
KwaZulu-Natal	183 758	76 034	129 894	42 646	24 895	44 863	502090	18,89	1,24
Mpumalanga	98 322	31 895	41 381	12 211	9 019	19 085	211913	7,97	0,52
Northern Cape	18 529	6 083	9 052	3 791	2 403	7 137	46995	1,77	0,12
Northern Province	113 088	51 416	60 078	22 578	16 019	33 690	296869	11,17	0,73
North West	129 442	37 571	54 706	17 768	16 913	23 134	279534	10,52	0,69
Western Cape	40 603	18 965	35 051	14 146	6 499	30 174	145438	5,47	0,36
Total	1 091 023	383 408	557 775	192 552	154 236	278 720	2657714	100,0	6,55
% per disability	41.05	14.43	20.99	7.25	5.80	10.49	100,0		
% per population	2.69	0.94	1.37	0.47	0.38	0.69	6,55		

Source: Department of Education 2001 *Education White Paper 6: Special needs education* Pretoria: Department of Education (hereafter *White Paper 6*).

Thus, close to three million people in South Africa have some physical 'disability'. It would have been absurd not to deal with this challenge at the level of policy and legislation.

The South African Schools Act¹¹⁷ directs ordinary public schools to admit learners with special education needs wherever this is practicable. The admission policy states that the rights and wishes of learners with special needs must be taken into account upon admission.¹¹⁸ Schools must, as far as possible, make their facilities accessible to such learners. It would therefore not be enough merely to admit the learners. The physical surroundings at the school must reflect the necessary accommodation for learners with special needs.

The admission policy implies that an effort should be made to integrate

¹¹⁶ Ibid. para. 21.

¹¹⁷ *Supra* note 27.

¹¹⁸ *Supra* note 28, para. 22.

learners with special educational needs in the educational context prevailing at the school.¹¹⁹ Where the necessary support for integration cannot be provided, the principal of the school must apply to the Head of Department to have the learner admitted to a suitable public school in the same province or, if necessary, a different province. Before the contemplated transfer can take effect, the Head of Department must consult with the parents of the learner and such other support personnel as may be necessary.¹²⁰

This is an area where there appears to be a well-developed policy and legislative framework, as well as a plan of action in place.

According to the *White Paper 6* there are 380 special schools in South Africa, catering for some 64 603 learners. The average expenditure per learner per annum is approximately R17 836.00.¹²¹

The Department of Education's 2001 publication entitled *Report on the school register of needs 2000 survey*¹²² points out the following deficiencies with regard to the provision of schools for learners with special needs:

- Only 14.8% of disabled children of school-going age attended school according to the 1996 census. Although there might be other explanations for the high number of such children not being in school, the possibility cannot be discounted that many are out of school because of learning facilities not being readily available. There are, for instance, only three schools for visually disabled learners throughout the country, one for the deaf and blind, two for the hard of hearing and three for those who suffer from epilepsy.¹²³

- Of the schools for learners with special needs, 36.4% cater for those who have mental disabilities, although these children comprise only 6.7% of children with all disabilities in South Africa. Children who are visually impaired, on the other hand, make up 37.9% of the total of children with disabilities and yet only 2.3% of the schools registered for learners with special needs are dedicated to them.¹²⁴ Clearly, this can not pass the directive of the Court in *Grootboom* to the effect that policies and programmes designed to give effect to socio-economic rights must be *well directed*.

4.5.3 Learners living with HIV/AIDS

In July 1999, Minister Kadar Asmal made the following statement:

We must deal urgently and purposefully with the HIV/AIDS emergency in and through the education and training system. This is the priority that underlies all priorities, for unless we succeed, we face a future full of suffering and loss, with untold consequences for our communities and the education institutions that serve them.

¹¹⁹ Ibid. para. 23.

¹²⁰ Ibid. para. 24.

¹²¹ Department of Education *Education White Paper 6: Special needs education 2001: 13*. There appears to be a discrepancy between the *White Paper 6* and the *Report on the school register of needs 2000 survey*. According to the latter, there were 390 schools for learners with special needs in South Africa in the year 2000 and 78 123 learners (2001b: 85). It is tempting to put the discrepancy down to the data having been gathered at different times, but when it is taken into account that the *White Paper 6* is dated July 2001, it seems it should be citing higher figures than the *Report*.

¹²² Department of Education 2001b.

¹²³ Ibid. 89.

¹²⁴ Ibid.

The Ministry of Education will work alongside the Ministry of Health to ensure the national education system plays its part to stem the epidemic, and to ensure that the rights of all persons infected with the HIV/AIDS virus are fully protected.¹²⁵

Two years down the line the Department of Education asserted:

A recent UNAIDS (2000) report suggests that South Africa has the fastest growing HIV/AIDS epidemic in the world, with prevalence rates highest among the youth.¹²⁶

The projections that are made, based on the UNAIDS study, must be approached with some caution, but “they paint a devastating picture”.¹²⁷ Recent studies by the Department of Health suggest that between 1998 and 1999 the epidemic reached a plateau and had slowed down.

Accurate statistics to estimate the direct or indirect consequences of HIV/AIDS on schooling are not available. The Department “[knows] however that drop-out rates due to poverty, illness, lack of motivation and trauma are likely to increase”.¹²⁸

HIV/AIDS is more prevalent among teachers than learners since “they are educated, mobile and relatively affluent”.¹²⁹

The impact of HIV/AIDS on educators is profound.¹³⁰

The Department then makes reference to Tirisano,¹³¹ which it says operationalises its HIV/AIDS policy. Tirisano is articulated in two documents, namely, *Implementation plan for Tirisano January 2000–December 2004* (hereafter *Tirisano 2000–04*)¹³² and *Implementation plan for Tirisano 2001–2002* (hereafter *Tirisano 2001–02*).¹³³

Before discussing these documents, it is perhaps pertinent to point out at this stage that the Department’s approach, as outlined above, is contradictory. The view that HIV/AIDS reached a plateau between 1998 and 1999, and that it is no longer spreading as rapidly as before, is not compatible with Minister Asmal’s statement in July 1999. The Department’s views as reflected in the report,¹³⁴ which is supposed to detail achievements since 1994, are an anticlimax, judged from the standpoint of Asmal’s apprehension of the challenges posed by HIV/AIDS. In any event, the views expressed in the report are in some respects undermined by the Medical Research Council’s (MRC’s) recent report on the subject.¹³⁵

In *Tirisano 2000–04*, the Departments lists three projects under the HIV/AIDS programme. The strategic objective of project 1 is to raise awareness of and the level of knowledge about HIV/AIDS and to promote

¹²⁵ Department of Education 2001a. 29.

¹²⁶ Ibid. 29–30.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Tirisano is the Department of Education’s implementation plan to, as Minister Asmal put it, “achieve the...priorities set out in our Call to Action”. It was devised in 2000. The term means, literally, ‘working together’ or cooperation.

¹³² Department of Education n.d. *Implementation plan for Tirisano January 2000–December 2004* Pretoria: Department of Education.

¹³³ Department of Education n.d. *Implementation plan for Tirisano (2001–2002)* Pretoria: Department of Education.

¹³⁴ Department of Education 2001a.

¹³⁵ Dorrington et al 2001.

values that encourage respect for girls and women and recognise their right to choice in sexual relations. The outcomes include the development of HIV/AIDS policy for the education and training system and the eradication of discrimination against learners affected by the virus.

The strategic objective of project 2 is to ensure that life skills and HIV/AIDS education are integrated into the curriculum at all levels of education and training. The outcome intended is that every learner understands the causes and the consequences of HIV/AIDS and that they all lead healthy lifestyles.

The strategic objective of project 3 is the development of planning models for analysing and understanding the impact of HIV/AIDS on the education system. The outcomes envisaged include plans and strategies to respond to the impact of HIV/AIDS on the sustainability of the education system and the establishment of care and support systems for learners who are affected by the virus.¹³⁶

The document does not deal with the subject of HIV/AIDS again except in the sense of summarising what has already been said in a logical framework.¹³⁷ *The Department's Corporate Plan 2000–2004*¹³⁸ was presumably produced as a tool for guiding the Department's day-to-day activities in the light of *Tirisano 2000–04*. However, the plan really only reiterates the contents of *Tirisano*.¹³⁹

Tirisano 2001–02 is presumably a plan of action for a single year, although it must obviously be located in the context of the longer-term plan as spelled out in *Tirisano 2000–04*. Presumably, therefore, it should indicate the immediate steps to be taken by the Department in implementing the grand design in the principal document. The plan is indeed elaborate in terms of detail regarding objectives, specific activities, and outcomes envisaged.¹⁴⁰

The plans and activities envisaged by the Department on HIV/AIDS are commendable. It is not clear, however, that they address the entire spectrum of the tasks that Asmal identified in the July statement referred to earlier. By and large the plans and activities focus on awareness raising and cooperation, which are noble and necessary pursuits in themselves.

However, Asmal also focused our minds on the need “to ensure that the rights of all [learners] infected with the HIV/AIDS virus are fully protected”.¹⁴¹ It is not at all clear that the awareness raising and cooperation building activities the Department has embarked upon, laudable as they are, will necessarily translate into the protection Asmal envisaged. In any event, awareness raising and cooperation building are exercises that involve people's attitudes and these take quite a while to change. It would have been necessary, therefore, to provide a safety net in conjunction with the other activities the Department has embarked upon. What is lacking is a clearly articulated policy statement on the protection of the rights of the affected learners.

¹³⁶ Department of Education n.d: 12–13.

¹³⁷ Ibid. 26–27.

¹³⁸ Department of Education 2001a.

¹³⁹ Ibid. 10–11.

¹⁴⁰ Ibid. 2–12.

¹⁴¹ SAIIR 1999/2000.

4.5.4 People living in extreme poverty

In 1999 the South African Catholics Bishops' Conference issued a pastoral statement under the title, *Economic justice in South Africa*.¹⁴² It indicated that some 53% of the population of South Africa live in conditions of poverty. A study undertaken by the South African Institute of Race Relations suggested that 36.6% of South African households have a monthly income of below R900 per month, while another 14.7% have a monthly income of less than R1 400.¹⁴³ It also suggested that some 49.5% of South Africans of working age are unemployed.¹⁴⁴ A SANGOCO study arrived at a similar figure.¹⁴⁵

It is hard to determine how extreme poverty should be defined. It is doubtful whether the exercise would be useful in the context of the task at hand. What seems to be clear, however, is that a substantial number of South Africans live under conditions of poverty, and that it would be hard for them, almost impossible, to finance the education of their children. The number of students who are unable to pay the money they owe universities for fees is living testimony to this.

The conditions of poverty under which so many live brings the question of free education up to a certain level into sharp relief. All the major international human rights instruments on education require this in respect of primary education which, in South Africa is called basic or general education and extends to grade nine. As the previous discussion has shown, however, South Africa has elected not to follow this course.

As will be recalled, the South African Schools Act¹⁴⁶ makes no provision for free basic education. Nevertheless, it prohibits the turning away of learners whose parents are indigent, withholding the reports of such learners, excluding them from social and cultural activities of the school or discriminating against them in any other way.

There are some problems with this approach. First, it requires a lot of courage to parade one's poverty and it borders on the insensitive to expect people to do so. Part of the argument for enforcing socio-economic rights is precisely that poverty erodes the victim's dignity and sense of worth. To say that people may only access free education if they can show that they are poor is out of synch with the rationale for having a justiciable system of socio-economic rights. The present approach requires people to parade their poverty, the very thing that socio-economic rights are meant to protect them against.

If one accepts that poverty is not something people parade too happily, the likelihood is that learners and their parents will not try to access the right to education if they have to demonstrate their poverty as a condition. Learners and their parents might choose to save their dignity and forego education instead. That this might indeed be so appears evident from the Department's report referred to earlier attributing a high dropout rate to poverty.

True, the report does not indicate the grades at which the dropout rate is most prevalent. It is therefore not possible to assert positively that, but for the lack of free education, the situation might be different. The Department's

¹⁴² South African Catholic Bishops' Conference 1999.

¹⁴³ SAIRR 1999/2000: 296.

¹⁴⁴ Ibid.

¹⁴⁵ SANGOCO 1997.

¹⁴⁶ *Supra* note 27.

failure to disclose the grades at which the dropout rate is prevalent, should not, however, shield it from the critique. If anything, the failure should invite a dual critique.

It may be argued, one should anticipate, that learners are *not* required to show their poverty in order to access basic education for free. The question that must then be asked is to how the decision is made that a particular learner's parents are indigent and that he/she therefore qualifies for the treatment provided for in the Act? If the learner is not expected to establish his/her *bona fides*, the system simply becomes unworkable and anyone can claim the benefits of the Act. If that is so, what was the point of having the poverty criterion in the first place?

It is suggested that, in the end, the policy of compulsory attendance of school from age seven to age 15 would be enhanced if education were provided for free. In order to work well, compulsory school attendance requires a sanction. If a person is told that he/she is under an obligation to do something or to refrain from something, and there is no sanction for non-compliance, only the good-willed will comply. But at the same time, if society wishes to exact a sanction for non-compliance, then it has to ensure that what its laws command is possible. If not, it is morally reprehensible to impose a sanction.

As things stand, the policy of compulsory schooling is fairly meaningless and really not capable of enforcement. But if schooling were free at the relevant grades, the Department might be able to deal creatively with the dropout rates. If all else fails, the normal sanctions accompanying compulsory education in countries where it is supplied for free should be applied.

5 CONCLUSION

While there have been several positive developments insofar as the right to education in South Africa is concerned, there is still ample scope for improvement. As argued above, there is a need to pay more attention to the different obligations created by the right to education, insofar as the Constitution differentiates between basic education and further education. The policy and legislative frameworks have to show that the policy-makers have applied their minds to the difference in the articulation of these rights.

Grootboom requires that the policies that do exist must be accompanied by well-directed and comprehensive plans in order to give effect to the right. The Department of Education has indicated that, at a certain stage, the implementation of its policies was frustrated by the lack of planning. This should not have been. However, detailed plans have now been drafted in various areas. But the plans do not show an appreciation of the different obligations falling on the Department as a result of the Constitution drawing a distinction between basic education and further education.

There are some 2 657 714 people in South Africa who, according to the Department, would have special learning needs. The Department has not disaggregated them by age or by educational needs, and so it is not clear what proportion of them would be part of its brief as learners, since some of them might be adults who are not pursuing education formally any longer. Since, however, the Department mentions them in the context of challenges it

faces in the area of special learning needs, it would not be unreasonable to hypothesise that a substantial proportion might still be in need of education. The gaps in the Department's collection and analysis of data makes it difficult to assess the adequacy of the provision made in respect of learners with special educational needs. How, for instance, does one assess the adequacy of catering for 64 603 learners out of a universe of 2 657 714 if one does not know about the educational needs and ages of those in the universe? Policy needs to be developed regarding the handling of data so that it makes sense and can meaningfully guide the implementation of policy. The Department cannot be held to account if the information coming through to the public is of such a nature that one cannot engage with it meaningfully.

Regarding learners living with HIV/AIDS, the Department falls short of articulating clear policy in protection of their rights as promised by Minister Asmal.

Finally, there is an urgent need for the provision of free education between the ages of seven and 15 or up to grade nine.

List of sources

- Alston P 1998 “*Economic and social rights in the international arena*” 1 *ESR Review* 2.
- Aitchinson J 2001 “ABET on trial” *Quarterly Review* January–March University of the Witwatersrand: Education Policy Unit.
- Bekker G 2000 “The right to education in the South African Constitution” in Mashava L V (ed) *A compilation of essential documents on the right to education* Volume 2 Pretoria: Centre for Human Rights.
- Craven M C R 1995 *The International Covenant on Economic, Social, and Cultural Rights* Oxford: Clarendon Press.
- Department of Education n.d. *Corporate plan: January 2000–December 2004* Pretoria: Department of Education.
- Department of Education 2000 *Quality education for all* Pretoria: Department of Education.
- Department of Education 2001a *Education in South Africa: Achievements since 1994* Pretoria: Department of Education.
- Department of Education 2001b *Report on the school register of needs 2000 survey* Pretoria: Department of Education.
- Department of Foreign Affairs n.d. “Position with regard to human rights treaties” unpublished document distributed on the occasion of the 50th anniversary of the UDHR on 10 December 1998.
- Dorrington R E et al 2001 *The impact of HIV/AIDS on adult mortality in South Africa* Pretoria: Medical Research Council.
- Fair Share 1997 *Key concerns about the 1997/98 budget and macro-economic plan (GEAR)* Bellville: School of Government University of the Western Cape
- Heyns C & Brand D 1999 “Introduction to socio-economic rights in the South African Constitution” in Bekker G (ed) *A compilation of essential documents on the right to education* Volume 1 Pretoria: Centre for Human Rights.
- Kriel R R “Right to education” 1996 in Chaskalson M et al *Constitutional law of South Africa* Cape Town: Juta & Co.
- Liebenberg S & Pillay K (eds) 2000 *Socio-economic rights in South Africa: A resource book* Bellville: Community Law Centre University of the Western Cape.
- Malherbe E F M 1997 “Reflections on the background and contents of the education clause in the South African Bill of Rights” 1 *TSAR* 1997.
- Meyerson D 1997 *Reading the Constitution through the lens of philosophy* Cape Town: University of Cape Town.
- NAP Steering Committee 1998 *The National Action Plan for the promotion and protection of human rights* Pretoria: NAP.
- Roithmayr R 2002 *The constitutionality of user fees in public education*: Johannesburg: Education Rights Project University of the Witwatersrand.
- Roux T n.d. *Understanding Grootboom – A response to Cass R Sunstein* unpublished paper.
- South African Catholic Bishops’ Conference (SACBC) 1999 *Economic justice in South Africa: A pastoral statement* Pretoria: SACBC .

South African Human Rights Committee (SAHRC) 2001 *Second economic and cultural rights report, 1998* Johannesburg: SAHRC.

South African Institute for International Relations (SAIIR) 2000 *South African survey 1999/00: Millennium edition* Braamfontein: SAIIR.

SANGOCO 1997 2 *NGO matters* 9.

Vally S 2001 "Fundamentals of education and the right to basic education" *Quarterly Review* December University of the Witwatersrand: Education Policy Unit.