

THE RIGHT TO BASIC EDUCATION AS A PRIMARY DRIVER OF TRANSFORMATION IN SOUTH AFRICA: CONSIDERING COOPERATION

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SUMMARY

The South African Constitution provides expressly for the right to basic education, with a specific provision dedicated to such a right. The right to basic education is enshrined in section 29(1)(a) of the Constitution, which provides everyone with the right to a basic education. The constitutional right to basic education is viewed as a primary driver for effecting and advancing transformation in South Africa; the right to basic education is therefore considered through the lens of South Africa's transformative constitution. In analysing the transformative potential of the right to basic education, the article considers to what extent this transformative potential has been embraced with specific reference to compulsory and free basic education. The manner in which the Constitution and the South African Schools Act provides for compulsory and basic education is considered in relation to transformation. The article examines the effect of South Africa's history on the current education system. The role of the courts in providing content to the right is also analysed with reference to the incremental approach that has been adopted. At issue is also how we measure transformation and the availability of and access to data and information. The argument is made that cooperation and collaboration between different stakeholders and role players should be considered to be a key mechanism in advancing transformation to ensure that the transformative potential of the right to basic education is fully embraced.

1 INTRODUCTION

Considering South Africa's discriminatory past and the fact that the effects of apartheid are still visible today, the need for transformation is evident. When transformation takes place, it must be within this specific context.¹ The need

¹ Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 25; Klare "Legal Culture and Transformative Constitutionalism" 1998 14 *SAJHR*

for transformation is encapsulated in the nature of the Constitution, which is cognisant of the past, while at the same time looking to the future so as to enable transformation of the South African society.² The concept of “transformative constitutionalism” has thus formed part of South African jurisprudence and academic literature, with the South African Constitution clearly acknowledged as being transformative in nature.

Education plays a central role in every community, as it prepares and enables individuals to participate fully in their society.³ The right to basic education is acknowledged as a precondition to the enjoyment of other rights, and is often referred to as a multiplier or empowerment right.⁴ The right to basic education directly affects the majority of individuals and can play a central role in transforming society.⁵

With this in mind, this article focuses specifically on the transformative potential of the right to basic education in South Africa as enshrined in section 29(1)(a) of the Constitution of the Republic of South Africa, 1996 (Constitution), and considers to what extent its transformative potential has indeed been embraced in the South African legal context. Specific emphasis is placed on two components of the right to basic education – that is, the compulsory and free components.

The article provides a brief discussion of the interpretation of transformative constitutionalism in the broader sense, and then turns to examine the right to basic education as a primary driver of effecting transformation in South Africa. The interpretation of the right to basic education is analysed by focusing on the legal framework that recognises and regulates the right, and on how the courts have interpreted and given substantive content to the right to basic education. The article also questions the methods used in measuring transformation, and it reflects on the role of

146–188; Langa “Transformative Constitutionalism” 2006 3 *Stell LR* 351–360; Pieterse “What Do We Mean When We Talk About Transformative Constitutionalism?” 2005 20 *SAPL* 155–166; Moseneke “The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication” 2002 18 *SAJHR* 309–315. See for e.g., *S v Makwanyane* 1995 3 SA 391 (CC); *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC).

² Liebenberg *Socio-Economic Rights* 25; Klare 1998 *SAJHR* 149.

³ Liebenberg *Socio-Economic Rights* 245; Veriava and Coomans “The Right to Education” in Brand and Heyns *Socio-Economic Rights in South Africa* (2005) 57–83.

⁴ Committee on Economic, Social and Cultural Rights *General Comment No 13* (21st session, 1999) “The Right to Education (art 13)” UN Doc E/C.12/1999/10 par 1 (CESCR *General Comment No 13*); Lundy “Mainstreaming Children’s Rights in, to and Through Education in a Society Emerging From Conflict” 2006 14 *International Journal of Children’s Rights* 339–339; Beiter *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (2006) 17; Coomans “Content and Scope of the Right to Education as a Human Right and Obstacles to its Realization” in Donders and Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 185–186; Coomans “In Search of the Core Content of the Right to Education” in Chapman and Russel (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 219; Malherbe “Education Rights” in Boezaart (ed) *Child Law in South Africa* 2ed (2009) 399.

⁵ Skelton *Strategic Litigation Impacts: Equal Access to Quality Education* (2017) 21.

cooperation and collaboration between different stakeholders and role players in advancing transformation.

2 A TRANSFORMATIVE CONSTITUTION

With the end of apartheid came the transition to a new constitutional democracy, which required not only political transformation but also the transformation of socio-economic circumstances. The Constitution was drafted in response to South Africa's discriminatory past and is commonly referred to as a transformative constitution or as being transformative in nature.⁶ The constitutional project for transformation necessitates continuous change with the ultimate goal being to transform society for the better; it requires that the relationship between the past, present and future be acknowledged and that such acknowledgement be applied in order to further transformation.⁷ Flexibility and adaptability should thus be allowed for within the normative framework provided by the Constitution.

In his seminal article on transformative constitutionalism, Klare writes that transformative constitutionalism can be understood as:

“a long-term project of constitutional enactment, interpretation and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.”⁸

This transformative intention can be identified in the Postamble to the Interim Constitution,⁹ which describes the Constitution as a bridge between the past and future. Building on the Interim Constitution, the Preamble to the Constitution identifies the specific historical context against which the Constitution was drafted. Thus, it highlights the importance of context and that the Constitution was adopted in response to South Africa's history of oppression and inequality.¹⁰ The Constitution thereby clearly acknowledges not only the need for transformation but that the Constitution serves as the foundation for transformation to take place in South Africa.¹¹

The Constitution itself however does not provide an exact method for achieving this transformed society.¹² There is also no identified method provided to measure transformation effectively. The Constitution does however provide guidance and instruction in the rights, values, and

⁶ Preamble of the Constitution; Klare 1998 *SAJHR* 149; Langa 2006 *Stell LR* 354; Pieterse 2005 *SAPL* 155; Moseneke 2002 *SAJHR* 309–315.

⁷ Ngang “Human Rights and Socio-Economic Transformation in South Africa” 2021 22 *Human Rights Review* 349 355.

⁸ Klare 1998 *SAJHR* 150.

⁹ Constitution of the Republic of South Africa Act 200 of 1993; Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” 1994 10 *SAJHR* 31 31.

¹⁰ Pieterse 2005 *SAPL* 158; Moseneke 2002 *SAJHR* 313.

¹¹ Pieterse “The Transformative Nature of the Right to Education” 2004 4 *TSAR* 700 701.

¹² Liebenberg *Socio-Economic Rights* 29.

institutions that it enshrines and creates.¹³ The legal system should therefore be aligned with the underlying values of the Constitution, and should embrace and advance substantive equality and human dignity.

The Constitution not only looks to the past but also the future and requires addressing the underlying causes of enduring and systemic inequalities.¹⁴ Integral to achieving transformation is continued discourse and debate that is sensitive and cognisant of societal change and new developments that require legal reform to further the constitutional project.¹⁵

The need for transformation in the South African context is evident. Since the legacy of apartheid is still visible, especially in the education context, the current legal framework regulating the right to basic education must be examined to determine if it is aligned with the transformative potential of the Constitution and the right itself.

3 THE TRANSFORMATIVE POTENTIAL OF THE RIGHT TO BASIC EDUCATION

3.1 The legal framework

In analysing the applicable legal framework, it is clear that section 29(1)(a) of the Constitution explicitly recognises the right to basic education for everyone. The South African Schools Act¹⁶ (Schools Act), building on the Constitution, is the relevant legislation that regulates the education system. The Schools Act acknowledges the transformative potential of the right to education and states in its Preamble that the new education system must redress past injustices in education and advance transformation. The courts have also confirmed that education is a primary driver of transformation and plays a crucial role in developing South African society.¹⁷

The formulation of section 29(1)(a) does not include internal limitations or qualifiers.¹⁸ The provision does not include concepts such as progressive realisation and the availability of resources, and does not make the realisation of the right subject to reasonable legislative measures. This is in

¹³ Liebenberg *Socio-Economic Rights* 29; Ngang 2021 *Human Rights Review* 357.

¹⁴ Liebenberg *Socio-Economic Rights* 28.

¹⁵ Liebenberg *Socio-Economic Rights* 28–29.

¹⁶ 84 of 1996.

¹⁷ *Governing Body of Juma Masjid Primary School v Essay supra* par 42; *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education* Eastern Cape Division of the High Court, Makhanda (unreported) 2022-03-22 Case no 611/2022.

¹⁸ Skelton "How Far Will the Courts Go in Ensuring the Right to Basic Education?" 2012 *SAPL* 392 396; Veriava and Skelton "The Right to Basic Education: a Comparative Study of the United States, India and Brazil" 2019 *SAJHR* 1 2; Kamga "The Right to Basic Education" in Boezaart (ed) *Child Law in South Africa* 2ed (2017) 520; Skelton *Strategic Litigation Impacts* 46; Cameron "A South African Perspective on the Judicial Development of Socio-Economic Rights" in Lazarus, McCrudden and Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (2014) 323; Seleoane "The Right to Education: Lessons from Grootboom" 2003 7 *Law, Democracy & Development* 137 140.

contrast to other socio-economic rights in the Constitution¹⁹ such as the right of access to adequate housing,²⁰ or access to health care services.²¹ The Constitutional Court has fortunately confirmed in the oft-quoted paragraph from *Governing Body of the Juma Masjid Primary School v Essay NO (Juma Masjid)*²² that, unlike some of the other socio-economic rights, which are formulated as an access to a right, the right to basic education is immediately realisable.²³ This means that the right to basic education is unqualified and not subject to the State implementing reasonable legislative and other measures to effect the progressive realisation thereof. The right can therefore only be limited in terms of the limitations clause in section 36 of the Constitution.

While the litigants in the *Juma Masjid* case found the judgment disappointing,²⁴ the clarity and guidance provided by Nkabinde J in the judgment on the interpretation of the right to basic education is significant. The judgment sets a legal precedent by confirming that the right is immediately realisable and unqualified. The judgment was the first time that the Constitutional Court explicitly provided clarity on the nature of the right to basic education. However, it was the strategic decision of the Legal Resources Centre to promote an interpretation of the right to basic education as being immediately realisable.²⁵ What has followed has been jurisprudence in the lower courts, in terms of which the *Juma Masjid* judgment has been relied on to give further content to the right to basic education, when dealing with specific infringements of the right. An incremental approach has subsequently been adopted by the courts, which have systematically given content to the right to basic education.²⁶ The incremental approach by the courts is discussed in more detail below with reference to free and basic education.

A basic reading of section 29(1)(a) of the Constitution reveals that the provision does not specifically refer to compulsory basic education. Nonetheless, it does aim to make basic education universally accessible as required by international standards.²⁷ Free basic education is also not guaranteed by the Constitution, which means that schools may charge fees.²⁸ However, a child's access to basic education may not be denied

¹⁹ Skelton 2012 *SAPL* 395–396; Kamga in Boezaart *Child Law* 520; Proudlock “Children’s Socio-Economic Rights” in Boezaart (ed) *Child Law in South Africa* 2ed (2017) 360–364; Liebenberg *Socio-Economic Rights* 244; Veriava and Skelton 2019 *SAJHR* 2; Cameron in Lazarus *et al Reasoning Rights* 322.

²⁰ S 26 of the Constitution; Liebenberg *Socio-Economic Rights* 232; Cameron “Judicial Development” in Lazarus *et al Reasoning Rights* 322.

²¹ S 27(1)(a) of the Constitution.

²² *Supra*.

²³ *Governing Body of Juma Masjid Primary School v Essay supra* par 37.

²⁴ Skelton *Strategic Litigation Impacts* 66.

²⁵ Skelton *Strategic Litigation Impacts* 66.

²⁶ Skelton *Strategic Litigation Impacts* 66; Arendse “Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-*Juma Masjid*” 2020 20 *AHRLJ* 285–291.

²⁷ Simbo “A Hexagon Right: The Six Dimensions of the Right to Basic Education” 2018 39 *Obiter* 126–127.

²⁸ Devenish *A Commentary on the South African Constitution* (1998) 76.

owing to their financial circumstances.²⁹ These two main components of the right to basic education form the foundation of the analysis, which focuses on how these components effect and affect transformation.

3 2 Compulsory basic education

Section 3(1) of the Schools Act provides guidance on defining basic education in the form of compulsory school attendance. The section provides that all children must attend a school from the first school day in the year in which that learner reaches the age of 7 to the last school day in the year that the learner turns 15 or of the ninth grade – whichever of these two occurs first. Compulsory basic education is understood to be from grade one to grade nine, or from the age of 7 to 15. Basic education should, however, not be equated with compulsory education. In *Moko v Acting Principal of Malusi Secondary School*,³⁰ the Constitutional Court found that, “basic education” is not limited to compulsory education and thus extends to grade 12.³¹

While the availability of schools is central to realising the right to basic education, schools must be accessible. If basic education is compulsory, then it must be economically accessible; otherwise, compulsory education simply cannot stand.³² Non-discrimination is also essential, as basic education must be accessible to all – especially to learners from vulnerable groups and those with disabilities.³³ A clear connection can be established between economic accessibility and non-discrimination. If school fees and indirect costs associated with basic education obstruct learners from education, this amounts to economic inaccessibility, discrimination against the poor and an infringement on the right to basic education. Physical accessibility is also required, and means that schools must, for example, be within a safe physical distance from children’s homes.³⁴ If education is compulsory, children cannot be required to attend schools that are far away from their homes and that entail them having to undertake long and unsafe journeys in order to access their education.

In terms of section 3(3) of the Schools Act, every Member of the Executive (MEC) is compelled to ensure the availability of enough school places for every child in their province to attend school.³⁵ Section 3(4),

²⁹ Devenish *Commentary on the Constitution* 76; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 79; Joubert “The South African Schools Act” in Boezaart (ed) *Child Law in South Africa* 2ed (2017) 579; Skelton *Strategic Litigation Impacts* 47.

³⁰ 2021 (3) SA 323 (CC).

³¹ *Moko v Acting Principal of Malusi Secondary School supra* par 33.

³² Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 70–71; Seleoane 2003 *Law, Democracy & Development* 145.

³³ CESCR *General Comment No 13* par 6(b)(i) and (iii).

³⁴ CESCR *General Comment No 13* par 6(b)(ii).

³⁵ Department of Education *South African Schools Act, 1996 (Act No. 84 of 1996) and National Education Policy Act, 1996 (No. 27 of 1996): National Norms and Standards for School Funding* GN 2362 in GG 19347 of 1998-10-12; Department of Education *South African Schools Act, 1996 (Act No 84 of 1996): Amended National Norms and Standards for School Funding* GN 869 in GG 29179 of 2006-08-31; Abdoll and Barberton *Mud to Bricks: A*

however, elaborates on this obligation and provides for the situation in which an MEC cannot comply with section 3(3). Section 3(4) provides that the MEC must comply with the obligation as soon as possible by remedying the lack of capacity and reporting annually to the Minister of Basic Education. It seems that the legislation recognises the importance of availability of educational institutions, while at the same time acknowledging that this can be a challenge. However, it can be argued that this weakens the obligation on the MEC and lowers the standard of the duty on the State to ensure the availability of schools.

The availability and accessibility of schools is unfortunately not a new challenge and continues to pose a barrier to accessing education. Compulsory basic education requires the State to take positive steps in ensuring that children have access to education that is available, acceptable and adaptable.³⁶

3 3 Free basic education

From a cursory reading of section 29(1)(a) of the Constitution, the constitutional commitment to basic education seems egalitarian, as the right to basic education is afforded to everyone. However, upon a closer reading, it becomes clear that there is no indication that the constitutional right to basic education can be equated to free basic education. The initial egalitarian reading then becomes somewhat questionable.³⁷

The “free” component of the right to basic education brings into question the payment of school fees required in order to attend a school or educational institution. The charging of school fees and how it relates to the availability of free basic education is crucial, as fees have a direct impact on the accessibility of a child’s education. Moreover, other indirect costs pose a further challenge to accessing basic education. Examples here include costs related to school uniforms, teaching and learning materials, and transport.

With free basic education not being constitutionally mandated, legislation must fill the gap to ensure that a child has access to basic education. The Schools Act does not provide for free basic education for everyone. However, free basic education for children is allowed, depending on their circumstances.³⁸ The legislation stipulates that schools are classified as “no-fee” or “fee-free” when no fees are charged at a school, or a learner can be exempted from the payment of school fees.³⁹ The aim of this article is not to

Review of School Infrastructure Spending and Delivery (2014) 5; Liebenberg *Socio-Economic Rights* 243.

³⁶ CESCR *General Comment No 13* par 6.

³⁷ Woolman and Bishop “Education” in Woolman and Bishop (eds) *Constitutional Law of South Africa* 2ed (RS 5 2013) 57–5.

³⁸ See ss 5(3)(a), 39, 40, 41 of the Schools Act; Skelton *Strategic Litigation Impacts* 47.

³⁹ See ss 1, 2, 39 of the Schools Act; Education Laws Amendment Act 24 of 2005; Woolman and Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994–2008* (2009) 192; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68; Skelton *Strategic Litigation Impacts* 47; Woolman and Bishop “Education” in *CLOSA* 57–29.

establish the constitutionality of the current school-fee system,⁴⁰ but rather if and how the current legal framework affects transformative change.

Section 2 of the Schools Act specifies that “school fees” refers to any form of contribution that has a monetary nature, and which is paid by either a person or a body with regard to a learner’s attendance or participation in a public school.⁴¹ From a simple reading and interpretation of the definition, it seems that school fees are mainly concerned with a learner’s ability to attend and participate in school. It is however not only direct school fees that pose a challenge; indirect fees related to education are an additional barrier.

In order to provide for basic education that is economically accessible, there are two ways in which children can attend school without having to pay school fees. The first is by means of no-fee schools as regulated by the National Norms and Standards for School Funding.⁴² Schools in South Africa are categorised into quintiles depending on the funding received from the State. Schools in quintiles 1 to 3 form the lower quintiles and are categorised as no-fee schools. Schools in quintiles 1 to 3 receive a higher level of funding from the State compared to those in quintiles 4 and 5. Schools in quintiles 4 and 5 may accordingly charge school fees as they receive less funding from the State.

The second way in which provision is made for free basic education is by means of an exemption system. If parents cannot afford the school fees of schools in quintiles 4 and 5, they have the option of applying for an exemption in terms of section 39 of the Schools Act. This means that even though schools in quintiles 4 and 5 may charge school fees, they must also take into account the exemption system in their admission policy.⁴³ Section 39 of the Schools Act provides that schools must provide total,⁴⁴ partial⁴⁵ or conditional exemption.⁴⁶ Provision is also made for automatic exemption.⁴⁷

⁴⁰ See for e.g., Veriava “The Amended Legal Framework for School Fees and School Funding: A Boon or a Barrier?” 2007 23 *SAJHR* 180–194; Roithmayr “Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education” 2003 19 *SAJHR* 382–429; Fleisch and Woolman “On the Constitutionality of School Fees: A Reply to Roithmayr” 2004 22(1) *Perspectives in Education* 111–123.

⁴¹ S 2 of the Schools Act.

⁴² Department of Basic Education *South African Schools Act, 1996 (Act No 84 of 1996): National Norms and Standards for School Funding (NNSF)* GN 3964 in GG 49491 of 2023-10-12, comprising a notice of publication relating to schools that may not charge school fees.

⁴³ Liebenberg *Socio-Economic Rights* 247.

⁴⁴ See Department of Education *South African Schools Act, No. 84 of 1996: Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools* GN 1052 in GG 29311 of 2006-10-18 (Exemption Regulations), specifically reg 6(3); Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68.

⁴⁵ See specifically reg 6(4) of the Exemption Regulations; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68.

⁴⁶ S 39(2)(b) of the Schools Act; reg 5 of the Exemption Regulations provides for four categories of exemption: total, partial, conditional and no exemption. Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68.

⁴⁷ Automatic exemption is available to a person who has the responsibility of a parent in respect of a child placed in, for example, a foster home, orphanage or a child who heads a household.

However, even though the Schools Act specifically provides for exemptions, obstacles remain – especially for indigent learners.⁴⁸ The process of applying for an exemption can be very time-consuming, complex and complicated, and can have a negative effect on the dignity and time of learners and families.⁴⁹ Discrimination against those who are granted exemptions is also a concern.⁵⁰ Some parents do not want to apply for an exemption, as they would have to admit to their poverty or make it known to others.⁵¹ This ultimately results in families who qualify for exemptions not applying.⁵²

It is clear that school fees can lead to making basic education inaccessible.⁵³ Not only are schools fees a financial obstacle to enjoyment of the right to basic education, but the secondary costs associated with education such as textbooks, uniforms, transport and stationery also pose an obstacle to education.⁵⁴ When one unpacks the reality that schools are reliant on fees, it is clear that wealthier communities are able to contribute higher fees, leading to better facilities and in most instances a higher standard of basic education. In contrast, poorer communities, where parents cannot afford to pay fees, will not be able to provide the same facilities and infrastructure.⁵⁵ This ultimately results in reinforcement of the racial inequalities that have been left by apartheid in schools.⁵⁶ While the legal framework aims to transform the education system, and provides methods to increase access to education, challenges still remain. The difficult relationship between the right to basic education and questions of compulsory and free basic education is also evident, as is the negative effect such difficulties have on advancing transformation. Compulsory basic education must be accessible economically and physically, and must not be discriminatory in nature; otherwise, the transformative project will be inhibited.

⁴⁸ Liebenberg *Socio-Economic Rights* 246; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68–71; Veriava “The Amended Legal Framework for School Fees and School Funding: A Boon or a Barrier?” 2007 23 *SAJHR* 180 180; Roithmayr “Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education” 2003 19 *SAJHR* 382 382.

⁴⁹ Liebenberg *Socio-Economic Rights* 246; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68–71; Veriava 2007 *SAJHR* 180; Roithmayr 2003 *SAJHR* 382.

⁵⁰ *Ibid.*

⁵¹ Roithmayr 2003 *SAJHR* 382; Woolman and Bishop “Education” in *CLOSA* 57–25; Seleane 2003 *Law, Democracy & Development* 148.

⁵² Liebenberg *Socio-Economic Rights* 246; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68–71; Veriava 2007 *SAJHR* 180; Roithmayr 2003 *SAJHR* 382.

⁵³ Liebenberg *Socio-Economic Rights* 246.

⁵⁴ Woolson and Bishop “Education” in *CLOSA* 57–27.

⁵⁵ Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 70; Liebenberg *Socio-Economic Rights* 246; Roithmayr 2003 *SAJHR* 383.

⁵⁶ Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 70; Roithmayr 2003 *SAJHR* 382.

4 MEASURING TRANSFORMATION

4.1 The importance of context

In considering the right to basic education and transformation, one cannot attempt to separate the current context from its legal and political history. Apartheid policies on basic education were used as a tool of oppression and to enforce a racist system of education.⁵⁷ Several challenges and barriers to a child's right to basic education continue to exist owing to the legacy of apartheid, and this impedes transformation.⁵⁸ The persistent consequences of apartheid in the quality divide between the previously White state schools and the formerly Black schools are still evident today.⁵⁹

In examining the transformative nature of the right to education in South Africa, one must consider the specific contextual history of basic education to ensure a comprehensive understanding of the development of the right to basic education and its relationship to transformation.⁶⁰ The rationale for underscoring the historical context of South African basic education is two-fold. The first reason relates to how historical context can aid in identifying existing issues in basic education;⁶¹ and the second assists in the development of new educational policies and systems.⁶² This two-fold rationale should be understood in light of the transformative potential of the right to basic education, and aids in determining if (or to what extent) transformative change has taken place.

The Constitutional Court has also noted the importance of historical context in adjudicating the right to education in light of transformation, and that, while significant progress and transformation has taken place, this journey is not yet completed.⁶³ Langa CJ in *MEC for Education: KwaZulu Natal v Pillay*⁶⁴ stated that even though circumstances have improved somewhat, the disadvantage that has been engraved into our education system by apartheid is still visible.⁶⁵ In the seminal case of *Governing Body of Juma Masjid Primary School v Essay*, Nkabinde J made it clear that

“[t]he significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy

⁵⁷ Mncube and Madikizela-Madiya “South Africa: Educational Reform: Curriculum, Governance and Teacher Education” in Harber (ed) *Education in Southern Africa* (2013) 166.

⁵⁸ Skelton *Strategic Litigation Impacts* 47.

⁵⁹ Skelton *Strategic Litigation Impacts* 47–48.

⁶⁰ Wolhuter “History of Education as a Field of Scholarship and the Historiography of South African Education” in Booyse, Le Roux, Seroto and Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 1.

⁶¹ Wolhuter in Booyse *et al A History of Schooling in South Africa* 2.

⁶² Wolhuter in Booyse *et al A History of Schooling in South Africa* 2; See also Coetzee “Toekomsstudie as Opgawe vir die Historiese Opvoedkunde: Regverdiging en Motivering” 1989 9(1) *Suid-Afrikaanse Tydskrif vir Opvoedkunde* 36–43; Nkomo *Pedagogy of Domination: Toward a Democratic Education in South Africa* (1990) 291.

⁶³ *Juma Masjid Primary School v Essay supra* par 38.

⁶⁴ 2008 (1) SA 474 (CC).

⁶⁵ *MEC for Education v Pillay supra* par 123.

of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.⁶⁶

It is therefore important that the transformative nature and potential of the right to basic education should be understood against the historical background and legacy of apartheid. It is crucial that the legacy of apartheid is acknowledged to assess how the current constitutional and legislative framework affects transformation but also how it is currently hindering the transformative project. This will aid in the process of identifying which challenges persist and why some methods have been successful in advancing transformation.

4.2 The role of the courts

As noted above, the courts have had to play a key role in interpreting the right to basic education. Civil society organisations such as the Legal Resources Centre, Equal Education, Equal Education Law Centre, Section27 and the Centre for Child Law have played an integral role in instituting litigation dealing specifically with infringements of the right to basic education. These judgments have, case by case, provided scope and content to the right to basic education. The judgments have confirmed that textbooks form part of the right to basic education,⁶⁷ as do furniture,⁶⁸ teaching and non-teaching staff,⁶⁹ and transportation, to name but a few examples.⁷⁰

In relation to the delivery of textbooks, the court has held that textbooks are an essential component of the right to basic education, and that it is difficult to comprehend how the right to basic education can be realised without textbooks.⁷¹ In another judgment, the court stated that, if the State fails to provide all the prescribed textbooks to even one learner, it would be in breach of its constitutional obligation.⁷² The Supreme Court of Appeal⁷³ has ultimately also confirmed that the failure to provide textbooks would result in a violation of the right to basic education.⁷⁴

⁶⁶ *Juma Masjid Primary School v Essay supra* par 42.

⁶⁷ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

⁶⁸ *Madzodzo v Minister of Basic Education* 2014 2 All SA 339 (ECM).

⁶⁹ *Centre for Child Law v Minister of Basic Education* [2012] 4 All SA 35 (ECG).

⁷⁰ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG).

⁷¹ *Section 27 v Minister of Basic Education* 2013 (2) SA 40 (GNP); *Skelton Strategic Litigation Impacts* 53; Veriava (2016) SAJHR 327.

⁷² *Basic Education for All v Minister of Basic Education* 2014 (4) SA 274 (GP) par 82; Veriava (2016) SAJHR 330.

⁷³ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

⁷⁴ *Minister of Basic Education v Basic Education for All supra* par 46; *Skelton Strategic Litigation Impacts* 53.

With regard to transportation, the National Learner Transport Policy⁷⁵ was challenged in the case of *Tripartite Steering Committee v Minister of Basic Education*.⁷⁶ The court found that learners' access to schools is hindered by the inability to pay for transport or if schools are too far away geographically.⁷⁷ The court found that learner transport forms part of the right to basic education because without the aid of transport, learners' right to basic education cannot be realised.⁷⁸

In *Madzodzo v Minister of Basic Education*,⁷⁹ the State's failure to provide essential school furniture was challenged.⁸⁰ The court found that a lack of appropriate furniture undermined the right to basic education and that the continued failure on the part of the State led to an enduring violation of the right to basic education.⁸¹ The judgment makes it clear that furniture such as desks and chairs form part of the right to basic education.⁸² This case was materially successful as the State was ordered to provide and deliver the necessary furniture to the schools, and R300 million was then allocated to address the furniture problem in schools. While problems with the State's compliance with court orders have unfortunately remained, major steps have been taken to improve the availability and acceptability of basic education in this instance.⁸³

From these judgments, it becomes clear that this incremental approach is aligned with the view that the right to basic education is best interpreted substantively to further transformation. This is because a substantive approach allows for adaptability and the development of the right to basic education in a way that is sensitive to context and change. It also strengthens the relationship between education and substantive equality. A substantive interpretation that incorporates rights and values underlying the Constitution also recognises the right to basic education as an empowerment right, and acknowledges the interrelatedness of rights. The incremental approach is an excellent example of how the adjudication process and the law have been used as tools to advance transformation. Such an approach identifies practical needs or gaps in the State's policy or legislation, and relies on the court to provide clarity and legal judgment in this regard.

Recent judgments have also shown that the courts have continued to recognise the transformative potential of the right to education. Application of the transformative nature of the right can be used to further develop the right. As noted above, in *Moko v Acting Principal of Malusi Secondary*

⁷⁵ Department of Basic Education and Department of Transport *National Learner Transport Policy* GN 997 in GG 39314 of 2015-10-23.

⁷⁶ 2015 (5) SA 107 (ECG).

⁷⁷ *Tripartite Steering Committee v Minister of Basic Education supra* par 19.

⁷⁸ *Tripartite Steering Committee v Minister of Basic Education supra* par 66–67.

⁷⁹ *Madzodzo v Minister of Basic Education* 2014 2 All SA 339 (ECM).

⁸⁰ *Madzodzo v Minister of Basic Education supra* par 1–2.

⁸¹ *Madzodzo v Minister of Basic Education supra* par 20, 36; Skelton *Strategic Litigation Impacts* 53.

⁸² Skelton *Strategic Litigation Impacts* 53.

⁸³ Skelton *Strategic Litigation Impacts* 59.

School, the Constitutional Court provided clarity to the meaning and interpretation of basic education. In reaching its judgment, the court refers specifically to the role that education plays in transformation. The court found that the exclusion of students in grades 10, 11 and 12 would be “an unduly narrow interpretation of the term [“basic education”] that would fail to give effect to the transformative purpose and historical context of the right”.⁸⁴

While the delivery of learning and teaching materials has been dealt with by courts on numerous occasions in relation to textbooks, the court in *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education*⁸⁵ once again had to deal with the failure of the Eastern Cape Provincial Government to deliver and provide learning and teaching materials (specifically textbooks and stationery) to several schools in the province. The Department argued that a lack of financial resources was to blame, but the court made it clear that the bald claims of budgetary shortfalls by the State could not excuse the violation of the constitutional duty.⁸⁶ The court also underscored the transformative nature of the right to basic education and stated that it “provides the key mechanism through which society can be transformed”.⁸⁷

The role of the courts in advancing the right to basic education and transformation is crucial, with the court also clearly embracing the transformative potential of the right. Courts should be cognisant of the right’s transformative nature and potential when holding government accountable for failing in its constitutional obligations.

4 3 Considering cooperation in advancing transformation

In order to determine if transformation has indeed taken place, the question of how to measure transformation should be addressed. It is submitted that transformation should be measured in two ways: normatively and practically. Determining transformation normatively requires an examination of the legal framework. However, without implementation of the legal framework, there is of course no true transformation. Transformation should therefore also be measured by assessing how and to what extent the right has been realised in line with its transformative potential. Determining transformation normatively and practically should be done in a complementary manner. It is also important to consider transformation not only within the education system, but also more broadly with reference to the transformation of South African society, as the one will lead to the other. The argument may be made that, normatively, transformation has indeed taken place, at least at

⁸⁴ *Moko v Acting Principal of Malusi Secondary School supra* par 32.

⁸⁵ *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education* Eastern Cape Division of the High Court, Makhanda (unreported) 2022-03-22 Case no 611/2022.

⁸⁶ *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education supra* par 47.

⁸⁷ *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education supra* par 49.

face value. The legal framework provided by the Constitution and legislation shows that great strides have been made to move away from the discriminatory education system under apartheid, and that transformation is incorporated in the legal framework.

One must however acknowledge that while it is clear that the courts have played an indispensable role in advancing the right to basic education, they are of course limited by the separation-of-powers doctrine. It is crucial that other branches of government come to the table in a significant way so as to fulfil their obligations. Unsurprisingly, however, challenges have been faced in this regard. This is illustrated, for example, when the implementation of court orders is delayed or progress is very slow, with follow-up or additional litigation required to ensure compliance. In many instances, therefore, the legal framework for the child's right to basic education is unfortunately not mirrored by reality in South Africa.⁸⁸ A disconnect is identifiable and visible between the normative and the practical. This is also demonstrable and identifiable in education jurisprudence.

To advance transformation and the realisation of the right to basic education requires knowledge of which challenges persist and also why. Access to data and information then becomes relevant in measuring transformation.⁸⁹ Cooperation and collaboration is required between different role players and stakeholders in the sharing of information. In some instances or sectors, transformation and progress is easily quantifiable. The data, numbers or statistics can, for example, indicate how many children have access to schooling, or textbooks. The inverse will also be clear, indicating which learners do not have access to these resources. The data should set out which challenges persist, and which have been successfully addressed. It is crucial, however, to acknowledge that in some instances transformation is not easily measured or quantifiable. It is not only about the physical, quantifiable aspects but also about the dignity of children and their lived realities. Measuring transformation should consequently not only consider what is easily quantifiable.

To ensure that a holistic view is provided, and that transformation is advanced, it is recommended that the various measures that can bring about transformative change be acknowledged – be it legislation, litigation, mobilisation, protest action, or advocacy and lobbying.⁹⁰ These measures make it clear that there are different role players and stakeholders, both in the public and private spheres, that can be significant in effecting change. It is however necessary that these different measures be employed by different stakeholders – both separately and together. Cooperation between different role players and stakeholders is critical in the advancement of

⁸⁸ Berger "The Right to Education Under the South African Constitution" 2003 103 *Columbia Law Review* 614 628; Krüger and McConnachie "The Impact of the Constitution on Learners' Rights" in Boezaart (ed) *Child Law in South Africa* 2ed (2018) 535; McConnachie and McConnachie "Concretising the Right to a Basic Education" 2012 129 *SALJ* 554 555–590; *Juma Masjid Primary School v Essay supra* par 42; Liebenberg *Socio-Economic Rights* 245; *MEC for Education: KwaZulu-Natal v Pillay supra* par 123.

⁸⁹ Skelton *Strategic Litigation Impacts* 62.

⁹⁰ Skelton *Strategic Litigation Impacts* 57.

transformation. By sharing information and data, issues can be more easily identified. The State should not view civil society organisations and other stakeholders as being on the opposite side, but should rather see them as a valuable resource that can aid in the transformative project.

5 CONCLUSION

The transformative potential of the right to basic education has been analysed with specific emphasis on the provision of compulsory and free education in terms of the South African legal framework. It is clear that the right to basic education has the potential to transform South African society and to serve as a primary driver to effect transformative change. While the legal framework embraces and advances the transformative nature of the right, it is unfortunate that this is not reflected in the current education system, as several challenges endure and hinder transformation. It seems that there is disconnect between the normative legal framework and how it plays out in real life. This has led to parties approaching the courts for relief to ensure that the State fulfils its constitutional obligations. The courts have thus played a central role in the interpretation of the right to basic education, thereby providing content to section 29(1)(a) of the Constitution. This is illustrated in the incremental approach, which demonstrates how the law can be used as a tool to effect transformative change, and once more emphasises the crucial role of the courts in embracing the transformative potential of section 29(1)(a).

The article has also considered the methods used to measure transformation in order to determine whether the transformative potential of the right to education has been embraced. It is argued that access to data and cooperation between different role players should be a central consideration. Measuring transformation is of course not an easy task, and it requires looking beyond the numbers and taking into account the lived realities of those who are denied their right to basic education. The State should value the role of civil society organisations that are directly involved with communities, and the information that they gather on enduring challenges. Cooperation between different role players and stakeholders can play a critical role in advancing transformation. It is accordingly recommended that, to advance transformation, access to information and data should be shared between role players and stakeholders in the education sector. This would also enable and advance various measures that result in the adoption of a holistic approach to advance transformation on different fronts.