

Educational Rights in South Africa

P.J. Visser*

1. Introduction

South Africa did not have a democratic constitution with entrenched human rights as its supreme law until April 1994. This had a profoundly negative impact on education.¹ It is well known that there was institutional inequality and a host of other injustices and problems associated with the promotion of racially based policies. However, these were not the only flaws in the provision of education.

The new democratic government inherited a collection of separate systems of education mainly organized along racial lines – so different in the quality of provision, in ethos, organization, management traditions, learning culture, output and outcomes, that a former Minister of Education even stated that they could well be referring to education systems in different countries.² It was clear what was required: a single, non-discriminatory, high-quality education system with equal opportunities and the recognition of other human rights.³

The new constitutional dispensation provides the ground rules to create specific obligations on the state and to transform the education system by introducing human rights in line with the best traditions found in developed democracies.

2. The legal framework: human rights and key supporting legislation

In order to evaluate the extent of the implementation of the right to education and other rights in education, regard must obviously first be had to the main legal provisions.

Section 29 in the Bill of Rights (in chapter 2 of the Constitution) provides as follows:

- ‘29. (1) Everyone has the right
- (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language 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.

* Professor of Law, University of Pretoria, South Africa.

¹ Pandor, Minister of Education, described the ‘Bantu education’ policy as the most diabolical aspect of apartheid.

² See Bengu (1997) in: De Groof, J. and Malherbe, R., *Human Rights in South African Education*, Acco, Leuven, p. 21.

³ See Bray (1996) in: De Groof, J. and Bray, E., *Education under the new Constitution in South Africa*, Acco, Leuven, p. 37.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.’

Some criticism may be leveled against section 29.⁴ The lack of a sufficiently wide provision of freedom of choice in all relevant areas in public education is one such point.⁵ The vagueness and complexity of the language provision is another. In addition, the meaning of the concepts ‘basic education’ and ‘further education’ is somewhat obscure.

The Bill of Rights contains all the other internationally accepted human rights usually considered relevant in education. These include rights to equality, human dignity, freedom and security of the person, privacy, freedom of religion, belief and opinion, freedom of expression (which includes academic freedom), freedom of assembly and demonstration, freedom of association, freedom to choose one’s trade, occupation and profession, fair labour relations, and an environment not harmful to one’s health. There are also the customary children’s rights (including the principle that a child’s best interests are paramount in every matter concerning the child), the right to language and culture, certain rights of cultural, religious and linguistic communities, the right of access to information and the right to just administrative action.

It is clear from the above provisions that a multiplicity of intersecting constitutional values and interests are involved in education – some overlapping, a few supporting each other and some even competing.⁶

These fundamental rights may only be limited in terms of law of general application in a manner that is reasonable and justifiable in a society based on human dignity, equality and freedom. Limitations can pass constitutional muster only if the court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in the limitation, taking into account the availability of less restrictive means to achieve this purpose.⁷

Other rights (based on common law, customary law or legislation) are recognized to the extent that they are consistent with the Bill of Rights. In interpreting the Bill, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It must consider international law and may consider foreign law.

The Higher Education Act 101 of 1997 provides a framework for the regulation of, for example, university education. This legislation is intended, *inter alia*, to establish a single co-ordinated higher education system, address past discrimination, ensure representivity and equal access and to contribute to the advancement of all forms of knowledge and scholarship in keeping with international standards of academic quality. There are public and independent (private) institutions of higher education.

There are many other statutes of importance concerning education.⁸

As far as school education is concerned, reference must be made to the National Education Policy Act 27 of 1996.⁹ The legislation is intended, *inter alia*, to facilitate the democratic transformation of the national system of education. Provincial legislatures and departments of education in the nine provinces enjoy concurrent authority in school education. Although the Constitutional Court held previously that they are not obliged to follow national policy¹⁰ a legislative amendment now makes it clear that, subject to the Constitution, national education policy prevails over the whole or part of any provincial policy in the case of conflict.¹¹

Of particular relevance to education in public schools and independent (private) schools, is the comprehensive and nationally applicable South African Schools Act 84 of 1996. This legislation is aimed at the provision of a uniform system for the organisation, governance, management and funding of schools. The preamble introduces the wide-ranging nature and purpose of this law:

⁴ See also De Groof (1996) in: De Groof, J. and Bray, E., footnote 3 above, pp. 69-70. See for a historical analysis concerning section 29, Malherbe (1997) in: De Groof, J. and Malherbe, R., footnote 2 above, pp. 53-67.

⁵ See on such freedom, e.g., De Groof (1996) in: De Groof, J. and Bray, E., footnote 3 above, p. 222. Systemic factors also narrow down choices.

⁶ See Sachs J in *Christian Education SA v. Minister of Education* 2000 4 SA 757 (CC), para. 15.

⁷ *Idem* para. 31.

⁸ More recent examples include the South African Qualifications Authority Act 58 of 1995; the Employment of Educators Act 76 of 1998; the National Student Financial Aid Scheme Act 55 of 1999; the Further Education and Training Act 98 of 1998; the Adult Basic Education and Training Act 52 of 2000 and the South African Council for Educators Act 31 of 2000.

⁹ This legislation applies in regard to all educational institutions with the exception of universities and universities of technology.

¹⁰ *In re National Education Policy Bill*, 1995 Case CCT 46/95, para. 38.

¹¹ See s. 3(3) of Act 27 of 1996 introduced by Act 48 of 1999.

‘WHEREAS the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and
 WHEREAS this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people’s talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State; and
 WHEREAS it is necessary to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa (...)’

The Schools Act covers matters such as compulsory school attendance,¹² admission to public schools, language and religious policies, the differences between ordinary public schools and public schools for learners with special education needs, the composition and functions of school governing bodies at public schools, the professional management of schools, a code of conduct for learners,¹³ the provision of public schools and financial matters, the registration of independent schools and of learners for education at home, the merger of schools, civil liability of the state, etcetera. The funding of public schools occurs in terms of norms and standards and on an equitable basis to redress past inequalities. This means that some public schools receive less money from the state than others and implies that parents will have to agree to and pay school fees to supplement state funding.¹⁴

There are provincial education laws in all nine provinces. These laws must be consistent with the Constitution as well as the Schools Act.¹⁵

As far as educators are concerned, there are a number of laws dealing with their appointment and conditions of employment.¹⁶

3. Key human rights issues and current debates

The transformation process in terms of the relevant laws is still continuing in the South African education system. In addition to normal issues concerning education that could be expected in any developing and vibrant society subject to local and international influences, the following are some key human rights and related matters at schools and other educational institutions that are currently relevant:

- The provision of resources of sufficient quantity and quality (especially human and financial) to satisfy the right to ‘basic education’ in public educational institutions and to make ‘further education’ progressively available.
- The final redress of all existing inequalities in the education system (for example, the gap between well-resourced and poorly resourced public schools).
- Inadequate state funding for public schools and unacceptable differences between the nine provinces in this regard.
- The improvement of the quality of the management of education on all levels.
- The fair and reasonable accommodation of the right to freedom of religion and belief in educational institutions.
- Sufficient state action to fulfil the right to have education in the official language or languages of one’s choice as well as the promotion of multi-lingualism in a country with eleven official languages.
- Ensuring that governing bodies of public schools¹⁷ and the parent community play the roles that they are supposed to.

¹² S. 3(1) of the Schools Act provides that the responsible parent of a learner must cause the learner to attend school from the first school day of the year in which the learner reaches the age of 7 years until the last school day of the year in which the learner reaches 15 years or the ninth grade, whichever occurs first. However, a learner who turns 6 years by 30th June of the year of admission may be allowed. In public preschools the admission age is 4 turning 5 by 30th June.

¹³ See generally Visser (1999), *De Jure*, p. 146.

¹⁴ See chapter 4 of the Schools Act.

¹⁵ S. 2(3) of the Schools Act.

¹⁶ See generally Prinsloo (1998) in: De Groof, J., Bray, E., Mothata, S. and Malherbe, R., *Power Sharing in Education*, Acco, Leuven, p. 69.

¹⁷ See generally Visser and Beckmann (1999), *THRHR*, p. 108.

- Properly regulating school dress and the wearing or display of religious clothing or symbols in public schools.
- Ensuring sufficient freedom of choice in public schools in accordance with a human rights culture and a society based on human dignity, equality and freedom.
- Eliminating the problem that some state education authorities do not obey court orders.¹⁸
- Dealing appropriately with the interrelationship between the rights of school governing bodies to make decisions on the employment of educators and the need for transformation to overcome racial and gender imbalances.¹⁹
- Promotion of respect for cultural diversity in the educational system;
- Encouraging and dealing with academic freedom and the autonomy of institutions of higher education.²⁰
- The merger of institutions of higher education.
- Understanding and dealing with the impact of HIV/AIDS, drug abuse and learner pregnancies.
- Responding to sexual harassment in educational institutions.
- Logistical and other problems regarding learners committed to reform schools for the purpose of criminal sentencing.²¹
- Producing enough learners for university studies in natural sciences.
- The full recognition of the professional status of educators.
- Managing labour relations in education to improve and maintain quality and to avoid disruptive strike action.
- Problems with psychological and counseling services in school education.

4. Non-governmental organisations

Reference is made below regarding the position of parents.²²

Learners and students are entitled to organize and belong to non-governmental organizations. In fact, there must be a representative council of learners at public schools that can be described as ‘high schools’.

Educators have a fundamental right to form and belong to trade unions and to fair labour practices.

There are a number of non-governmental organizations that are productively active in regard to aspects of education policy. Some prominent bodies are the Interuniversity Centre for Education Law and Policy (CELP), the South African Association for Education Law and Policy (SAELPA), the Centre for Education and Policy Development (CEPD) and education policy units at different universities.

5. Right of equal access to educational institutions

It is noteworthy that section 29 of the Constitution does not refer to the right of equal access to educational institutions. There is, however, an oblique reference to an aspect of this in section 29(3)(a) regarding independent educational institutions since it is expressly required that no such institution may discriminate on the basis of race.

Section 9 of the Constitution also applies to the field of education:

- ‘9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹⁸ See, e.g., *The Head of Department, Department of Education, Limpopo Province v. Settlers Agricultural High School* Case CCT 36/03, para. 14.

¹⁹ *Idem* para. 12.

²⁰ See generally Malherbe, R. (1993), *TSAR*, p. 363; *idem* (2003), *TSAR*, p. 213.

²¹ See *S v. Zuba and 23 similar cases* Case No. 40/2003 (Eastern Cape).

²² See para. 7.1 below.

- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

It is clear that equal access to educational institutions is governed by this provision. Unfair discrimination on the basis of disability²³ or AIDS will fall under this section. Any measure or conduct unfairly discriminating²⁴ against any learner or student as far as access is concerned and which does not constitute a legitimate limitation of the right to equality, would be unconstitutional. However, section 9 sanctions affirmative action programmes that could in practice provide for preferential admission of persons disadvantaged by past discriminatory laws.

Since section 29 of the Constitution refers to 'every person', even non-citizens and persons without permanent residence may lay claim to these rights and they also have the right to equality in section 9.²⁵

To further strengthen equal and fair access to educational institutions, provisions have been included in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. For example, unfair practices such as unfairly excluding learners, unfairly withholding scholarships or a failure to reasonably and practicably accommodate diversity in education, are specifically prohibited.

Section 5(1) of the South African Schools Act 84 of 1996 restates and amplifies the above:

- '(1) A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.
- (2) The governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test.
- (3) No learner may be refused admission to a public school on the grounds that his or her parent
 - (a) is unable to pay or has not paid the school fees determined by the governing body under section 39;
 - (b) does not subscribe to the mission statement of the school; or
 - (c) has refused to enter into a contract in terms of which the parent waives any claim for damages arising out of the education of the learner.
- (4) (...) [detailed provisions on the age of learners]
- (5) Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.'

The governing body of a public school may determine the admission policy subject to the Schools Act and any provincial law.²⁶ This suggests that some contextual diversity regarding policy is permissible. In an attempt to ensure that parents' lack of financial means would not prejudice the admission of their children, any decision by a school governing body on school fees must provide for the total or partial exemption of school fees.

As far as the age of learners is concerned, the Constitutional Court has declined to examine the constitutionality of a ministerial notice in which an age requirement of six years was imposed for admission and chose to strike down the notice because it was *ultra vires*.²⁷

It has been submitted by an academic commentator²⁸ that insofar as the state fails to provide quality or adequate education to all learners, especially among the very poor in the rural areas and townships, it violates their right to the equal protection and benefit of the law and amounts to unfair discrimination.

²³ The state must take reasonable measures to ensure that the physical facilities at public schools are accessible to disabled persons – s. 12(5) of the Schools Act.

²⁴ Unfair discrimination is generally viewed as unequal treatment that impairs human dignity or affects someone in a comparably serious manner – *Prinsloo v. Van der Linde* 1997 3 SA 1012 (CC), para. 33.

²⁵ This obviously puts even more pressure on state resources available for education.

²⁶ See generally Visser (1999), *THRHR*, p. 295 who outlines some problems.

²⁷ See *Minister of Education v. Harris* 2001 11 BCLR 1157 (CC). See generally s. 5(4) of the Schools Act.

²⁸ See Malherbe, R., 'Equal education opportunities in South Africa: The constitutional framework', (paper at the 'Brown Conference' held in SA in April 2004).

Gender specific public schools are permitted.²⁹

Where reasonably practicable, education for learners with special education needs must be provided at ordinary public schools and include relevant support services.³⁰ In other instances, public schools to accommodate the needs of such learners must be provided.

The issue of the languages to be used in public schools remains a challenge and must be addressed in terms of section 29(2) of the Bill of Rights quoted in paragraph 2 above. The government obviously wants to avoid a situation where language may be used to further covert racial discrimination.

6. The right to provide education³¹

The state has the duty to provide education as contemplated in section 29 of the Constitution read with section 7(2) that obliges it to respect, protect, promote and fulfil all the rights in the Bill of Rights.³²

In addition, 'every person' may at his or her own cost establish and maintain an independent school. There are registration requirements that must be met. Comparable provisions in regard to independent higher educational institutions exist. The state is entitled to provide subsidies to independent educational institutions.³³

Parents may register their children to receive education at home and provide education to them subject to certain conditions.³⁴ Parents are presumably entitled to allow other capable persons to provide such education.

Without derogating from the applicable provisions regarding formal education and the duty to cause children to attend school, parents may obviously provide education to their children without having to obtain consent from the state. It is a principle of common law that a parent with custody of a minor is obliged to take care of educational matters regarding that child. A parent may naturally also use private or independent teachers or tutors.

Educators have the right to provide education at public and independent institutions within the confines of the law. The Constitutional Court has further upheld the right of foreign educators with permanent residence in South Africa to be eligible for appointment and thus to provide education.³⁵

There is some uncertainty as to the effect of the human right to academic freedom on the provision of education.

7. Rights of parents in education³⁶

7.1 General

Common law accords important rights to (custodian) parents in regard to the education of their children. This refers to secular as well as religious education. A custodian parent is vested with decision-making power relating to education, such as selecting the school, choosing the medium of instruction and changing the child's school as circumstances may require.³⁷

²⁹ S. 12(6) of the Schools Act.

³⁰ S. 12(4) of the Schools Act.

³¹ See generally Postma (1997) in: De Groof, J. and Malherbe, R., footnote 2 above, p. 237 on the *droit d'enseigner*.

³² See also s. 12(1) of the Schools Act regarding the provision of public schools.

³³ S. 29(4) of the Constitution.

³⁴ See s. 51 of the Schools Act. The national policy on home education (see notice 1411 of 1999 in *Government Gazette* No. 29659 of 23-11-1999) is probably legally invalid for a number of reasons.

³⁵ See *Larbi-Odam v. Member of the Executive Council for Education* 1998 1 SA 745 (CC).

³⁶ See for a general discussion Visser (1997) in: De Groof, J. and Malherbe, R. note 2 above 133-144; De Groof (1996) in: De Groof, J. and Bray, E. note 3 above, p. 216.

³⁷ *Governing Body, Gene Louw Primary School v. Roodtman* 2004 1 SA 45 (C) 52.

In the preamble of the South African Schools Act the important role of parents is acknowledged. It is stated as one of the aims of the Act to uphold the rights of all parents and to promote their acceptance of responsibility for the organisation, funding and governance of schools in partnership with the state.

A survey of the Schools Act confirms that parents have rights in respect of the functioning of schools, although this generally refers to parents as a collective. This includes the right to be consulted before a code of conduct for learners is adopted, to assist their child being charged with misconduct, to appeal against negative findings or decisions, to have majority representation in the school's governing body and thus to participate in its wide-ranging functions, to decide on school fees, to receive a report from the governing body and to claim information from the school.

Parents are obviously entitled to organize and belong to associations of parents or, more commonly, teacher-parent associations. School governing bodies are entitled by statute to belong to associations of governing bodies.

7.2 Religious instruction

There is currently some uncertainty and thus the potential of dispute and even conflict regarding religion at public schools and the role of parents to make decisions regarding such aspects. Parents naturally have common law rights regarding the religious education of their children.³⁸

Section 15(1) of the Bill of Rights affirms that 'everyone has the right to freedom of conscience, religion, thought, belief and opinion.' Section 9(2) prohibits unfair discrimination on the ground of religion, conscience or belief.

The Constitutional Court has recognized that parents have a general interest in living their lives in a community setting according to their religious beliefs, and a more specific interest in directing the education of their children.³⁹

In regard to schools, a distinction should be made between religious observances and religious instruction.

As far as *religious observances* in public schools are concerned, section 15 of the Constitution is applicable:

- '(2) Religious observances may be conducted at state or state-aided institutions, provided that
 - (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.'

Section 7 of the Schools Act re-enacts aspects of the above and awards powers to a public school's governing body to make rules subject to the Constitution and any relevant provincial law.⁴⁰

In an official policy document emanating from the Minister of Education there has now been an attempt to interfere with religious observances by, for example, prohibiting single faith observances during school hours.⁴¹

After an analysis of this policy, a legal expert has concluded that in seeking to sideline, or even by definition ban, single-faith religious observances from the official school day and in disallowing single-faith religious observances during weekly assembly, the policy is inconsistent with section 15(2) of the Constitution and thus invalid.⁴²

In regard to *religious instruction*, the Schools Act is silent.⁴³ However, the Minister of Education must in terms of section 6A of the Schools Act determine a national curriculum statement and minimum education outcomes. This may obviously include education involving religious matters. In addition, the Minister has issued a policy⁴⁴ concerning 'religion in education' which is supposed to distill from the various religions, and other worldviews,

³⁸ *Dryer v. Lyte-Mason* 1948 2 SA 245 (W) 251.

³⁹ *Christian Education SA v. Minister of Education*, footnote 6 above, para. 15.

⁴⁰ See, e.g., ss. 21 and 22 of the Gauteng Education Act 6 of 1995.

⁴¹ See Malherbe, R (2002), *TSAR*, p. 391. See also Malherbe, R., 'The unconstitutionality of government policy relating to religion in education' (paper at the international conference in SA, on 2nd September 2003).

⁴² *Ibid.*

⁴³ See also De Groof (1996) in: De Groof, J. and Bray, E., footnote 3 above, p. 95.

⁴⁴ Government Notice 916 in *Government Gazette* No. 25127 of 23-06-2003.

those values that would benefit society. In addition, the policy is intended to ‘celebrate diversity’ but also to achieve nation-building.

The policy in question has been subjected to critical scrutiny and a prominent lawyer has declared that the policy is unnecessary as section 15(1) of the Constitution is clear enough on what may happen in schools in respect of religion.⁴⁵ This lawyer added that the policy attempts to impose a humanistic perspective on the study of matters of faith, which ostensibly goes against the views on religion held, for example, by many Christians and Muslims. The policy further appears to be inconsistent with international law. If the policy would be implemented on a voluntary basis by allowing for exemptions on conscientious grounds (which is currently excluded), parents and learners would at least have a choice and their right to freedom of religion would accordingly be respected.

It appears that the purported application of the policy to independent schools which may be established precisely to further a religion chosen by parents of learners, is most probably unconstitutional as well.⁴⁶

Parents may submit in the future that they are deprived by the policy of their general right to bring up their children according to their own religious beliefs⁴⁷ and that our country’s diverse religious traditions are being denied. Moreover, it would be preposterous for the state to attempt indoctrinate learners on religious matters.

7.3 Corporal punishment

Section 10(1) of the South African Schools Act prohibits any person from administering corporal punishment at a school to a learner. A transgression is punishable as assault. This is in line with South Africa’s ratification of the United Nations Convention on the Rights of the Child and its undertaking to take all appropriate measures to protect children from violence, injury or abuse.⁴⁸

In view of these provisions, even a parent is not entitled to personally administer such punishment ‘at a school’.⁴⁹ A parent may not authorise or give consent to anyone to administer such punishment ‘at a school’.

Section 10(1) has been challenged on the basis that it is not permissible to prohibit parents of Christian private schools from authorizing educators to administer corporal punishment in line with certain Biblical tenets. The Constitutional Court remarked that this section does not purport to reach the home or practices in the home⁵⁰ and rejected the application:⁵¹

‘I do not wish to be understood as underestimating in any way the very special meaning that corporal correction in school has for the self-definition and ethos of the religious community in question. Yet their schools of necessity function in the public domain so as to prepare their learners for life in the broader society. Just as it is not unduly burdensome to oblige them to accommodate themselves as schools to secular norms regarding health and safety, payment of rates and taxes, planning permissions and fair labour practices, and just as they are obliged to respect national examination standards, so is it not unreasonable to expect them to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline. The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfill what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children.’⁵²

⁴⁵ Malherbe, R., ‘The unconstitutionality of government policy relating to religion in education’, footnote 41 above, p. 8.

⁴⁶ See generally on religion in independent schools, *Wittmann v. Deutscher Schulverein, Pretoria* 1998 4 SA 423 (T) (right to non-attendance of religious observances may be contractually waived by parent).

⁴⁷ See *Christian Education SA v. Minister of Education*, footnote 6 above, para. 38.

⁴⁸ See *Christian Education SA v. Minister of Education*, footnote 6 above, para. 40. See generally *S v. Williams* 1995 3 SA 632 (CC) for some *obiter* views.

⁴⁹ It is not entirely clear what the expression ‘at a school’ means. Does it merely refer to a physical place or also to an educational situation where learners are away from the seat of the school in the interests of their education? And are school hostels included? It would seem that a wide definition of ‘at a school’ is appropriate. See Visser (1999), *THRHR*, p. 435.

⁵⁰ *Christian Education SA v. Minister of Education*, footnote 6 above, para. 48.

⁵¹ Note 6 above, para. 51 (*per Sachs J*).

⁵² See also Malherbe (2003), *TSAR*, p. 448.

7.4 Sex and health education

The Minister of Education may include compulsory sex and health education in the curriculum statement and minimum educational outcomes to be determined.⁵³ In view of the huge threat that AIDS poses, the importance of such education is self-evident. The curriculum statement does not require parental consent or prior consultation with parents. There is nothing in the Schools Act that expressly allow parents to play any role in regard to sex and health education.⁵⁴

As parents' views concerning the presentation of compulsory sex and health education to their children may be shaped by their religious beliefs and philosophical worldviews, they may have objections to the way such education is presented. Any challenge will have to be based on the common law authority of parents and human rights such as freedom of conscience, religion, thought and belief.

In regard to a different but comparable matter, the Constitutional Court observed as follows:⁵⁵

'The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.'

It is submitted that the purpose and content of sex and health education will have to be balanced against the fundamental rights of freedom of conscience, religion, thought, belief and opinion. If a dispute arises, the state will have to demonstrate that the purpose and content of the education is such that it should reasonably be accepted by parents of whatever religious, conscientious or philosophical perspectives.⁵⁶

8. Critical evaluation of the implementation of the right to education and rights in education

The implementation of the fundamental right to education and rights in education in the South African context, refers to the initial implementation that had to take place from 1994 as well as the continuing and broadening implementation of these rights as may be necessary in any constitutional democracy.

Generally speaking South Africa now has a progressive and well-developed legal and policy framework aimed at promoting human rights and equal opportunities in education. One may describe this legal framework as 'advanced' and in particular respects even as 'excellent' – despite some shortcomings in the South African Schools Act and the provincial education laws.

The implementation of such a framework would pose challenges to any developing country emerging from a history where the denial of human rights was enshrined in law. The implementation process is even more complex and challenging in a diverse and pluralistic nation envisaged by our Constitution⁵⁷ as well as a society where many desire rapid changes in accordance with sometimes exaggerated expectations. And if the natural problems of diversity and minorities were not sufficient, it has been observed by one authority that 'linguistically and culturally speaking there are only minorities in our country.'⁵⁸

⁵³ See s. 6A of the Schools Act.

⁵⁴ See generally Roos (1998) in: De Groof, J., Bray, E., Mothata, S. and Malherbe, R., footnote 16 above, p. 131.

⁵⁵ Sachs J in *Christian Education SA v. Minister of Education*, footnote 6 above, para. 35.

⁵⁶ See for comparative purposes Berka in: De Groof, J. and Malherbe, R., p. 205 (Denmark). See for German law Füssel in: De Groof, J. and Malherbe, R., p. 231 (prior information to parents and education to take place with restraint, tolerance and openness for other opinions).

⁵⁷ *Christian Education SA v. Minister of Education*, footnote 6 above, para. 34.

⁵⁸ Per Sachs J in *The Gauteng Provincial Legislature in re: Dispute concerning the constitutionality of certain provisions in the School Education Bill of 1995* Case 39/95, para. 81.

Scarcity of state financial resources is naturally highly relevant in preventing full implementation.⁵⁹

In view of the above, it is not surprising that section 29(1)(b) of the Constitution only places a duty on the state to make 'further education (...) progressively available and accessible'. The Constitution foresees that resources are not immediately available for 'full implementation'. However, one could probably argue that the qualified right to further education (and the concomitant duty on the state) is in any event implied in the right to education and that its enactment was unnecessary.⁶⁰

Ours is a young constitutional democracy without much experience in the handling of fundamental rights and freedoms. An appropriate human rights culture is not yet as developed as it should and can also not be established overnight.⁶¹ This may cause a host of hopefully temporary challenges regarding implementation. South Africa should thus not yet be measured in terms of standards found in much older constitutional democracies with more experience – and whose mistakes are further back in history. It will take time before a sufficient number of South Africans fully accept that in a diverse society the only hope of eliminating intolerance and even conflict in education lies in the establishment and deepening of a culture of respect based on the values of the Constitution.

A lack of relevant management experience has no doubt caused problems and delays in the full implementation of the new education laws and realization of certain rights in education. The quality of management will no doubt have to be improved.⁶²

Despite the reservations referred to above, it must be recorded that much progress has been made over the past ten years in regard to the initial implementation of important facets of the right to education and other rights in education. The integration of different school education systems and promotion of a new vision of education more in accord with human rights and the realities of the South African situation, represent a notable success. Other issues such as the banning of corporal punishment⁶³ and the outlawing of initiation practices in schools also constitute examples of real progress.

The South African Schools Act generally reflects a meaningful and ambitious attempt to create a sophisticated framework for the management of education. It involves parents in public school governance on a scale not previously known. Much still remains to be done, however, to educate and equip parents to play the role envisaged for them by the new dispensation.⁶⁴

Professional educators are often skeptical about the involvement of parents through democratically elected school governing bodies. The position is even more serious in historically Black schools where there is no or little experience of appropriate parental involvement. A school governing body is generally seen as only a rubber stamp of the school principal. Parents are usually regarded as important merely for the purposes of the financial resources or similar assistance they can provide. In addition, school governing bodies seldom receive appropriate support from education departments in disputes with the professional educators at schools.⁶⁵ There are some well-publicised and credible criticisms of aspects of school management and governance.⁶⁶ The state will have to address these issues.

In school communities who have relatively more experience of parental involvement in school governance, the current powers of governing bodies may possibly provide grounds for some dissatisfaction. It would seem that

⁵⁹ The Minister of Education declared as follows in Parliament on 21-06-04: 'Over the past few years there has been a gradual erosion of the education budget as a percentage of total government expenditure and as a percentage of GDP. There has to be a redistribution of resources in favour of further education if learning is really to be the engine of economic and social growth. This will involve taking some tough decisions affecting the funding for full-time higher education.'

⁶⁰ The accountability of the state regarding progress in this regard (which is not easy to measure qualitatively) is in practice not much more than the political accountability of the governing political parties.

⁶¹ See generally Dlamini in: De Groof, J. and Malherbe, R., footnote 2 above, p. 40 et seq.; Malherbe, R., (2003), *TSAR*, p. 463 who states that time, patience and support are required for a culture of human rights to develop. There is, fortunately, also the Values in Education Initiative that seeks to infuse the notions of human values, such as dignity, integrity and social honour into the school curriculum.

⁶² See generally *Schoonbee v. MEC for Education Mpumalanga* 2002 4 SA 877 (T); *SA Onderwysersunie v. Departementshoof, Vrystaat* 2001 22 ILJ 1790; *Mbanga v. MEC for Welfare, Eastern Cape* 2002 1 SA 359 (SE).

⁶³ However, too many instances of illegal corporal punishment still occur.

⁶⁴ See on capacity building, Beckmann and Visser (1999), *De Jure*, pp. 152-160.

⁶⁵ E.g. *Despatch High School v. Dept of Education, Eastern Cape* 2003 (1) SA 246 (CKH).

⁶⁶ See Samuels in the *Mail and Guardian* (August 27 – Sept 2 2004) referring to, *inter alia*, improper practices and omissions by schools and the department of education in regard to school fees, admission, religious practices, assessment, representative councils of learners and the racial composition of educators at certain schools. See also Beckmann and Prinsloo, 'Matching SA education managers' exercise of real and imagined power with the rule of law' (paper at conference in SA in 2003).

especially in regard to admission requirements and language policy the powers of parents through governing bodies have been unnecessarily limited. The reason for this is obvious: internationally acceptable minority, collective or group rights are currently discredited in the public education system on account of the history of racial segregation in education which has fostered somewhat exaggerated fears about a recurrence of racial discrimination.

A negative aspect in regard to the recognition of human rights in education is the state policy regarding religion that is not fully consistent with the Bill of Rights. The policy appears to articulate the fears of some in government about the exercise of the very rights and freedoms for which they themselves have struggled. It must be clear that any policy calculated to promote political agendas under the guise of state sponsored religious education is not merely doomed to failure but may also be counterproductive in causing resentment translating into harmful polarization.

A further less than positive aspect is the general quality of education in many public schools. The dangerous illusion may now exist that since there is a sufficient number of public schools⁶⁷ that millions of learners may access without being discriminated against unfairly, the state is in fact fulfilling all its constitutional obligations.⁶⁸ However, access to schools with low quality education or which are poorly managed, is obviously not what the fundamental right to basic or further education is about. In education *quality* is as necessary as *equality*.⁶⁹ Moreover, there are reportedly in any event still hundreds of thousands of learners who are not attending school.

Another difficulty is that there appears to be too many educational experiments – especially in school education. Any intelligent person would support continuous review and renewal in education. However, the introduction of certain unrealistic or ill-advised educational programmes or the introduction of new programmes without the necessary preparation of educators will create huge obstacles to quality education.

It is still imperative to continue to improve the quality management systems applicable to public school education. Some good initiatives taken by especially the national Department of Education should be recognised. However, much more should be done to ensure that all educators are properly qualified and act professionally and diligently, and that there is less room for unacceptable educational practices as well as corrupt and quasi-corrupt practices that falsify real educational achievements or cause other problems. The proper enforcement of existing laws would assist in this regard.

There is obviously still too many corrupt practices in the public school sector. This includes practices to give undue benefit to certain learners, misrepresentations to learners, the falsification of learner numbers to benefit school principals, malpractices regarding school funds and the use of such funds to benefit educators, misrepresentations to parents concerning their financial obligations towards the school, the use of tokenism to create the illusion of equality or diversity, the use of school fees to exclude certain learners, as well as other irregular practices amounting to the *de facto* establishment of (secret) private schools within the public school sector.

Finally, it should be observed that the state must respond in a manner appropriate in a constitutional democracy to the challenges and issues listed in paragraph 3 above that relate to the proper implementation of the legal framework applicable to education.

⁶⁷ Approximately 27 000.

⁶⁸ There are reportedly in any event still hundreds of thousands of learners who are not attending school.

⁶⁹ See also generally Charles Willie, 'Brown v. Board of Education: a restoration of equity in public education' (paper read at an international conference in SA in 2004).